

Date of Release: September 12, 1995

NO: C930896
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)
ACAN DEVELOPMENT INC.)
PLAINTIFF)
AND:)
TIGHCON CONSTRUCTION LTD.,)
SOFIA VOLPOV and ROMAN VOLPOV)
DEFENDANT)
)

)
REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE
R.T. ERRICO

Place and date of trial:

Vancouver, BC
June 22 & 23, 1995

Counsel for the Plaintiff:

A.E. Thiele

Counsel for the defendants
Sofia and Roman Volpov:

P.W. Watson

1 Acan Development Inc. brings this builders lien claim against Mr. and Mrs. Volpov as owners of the subject property upon which certain commercial improvements were constructed. Default judgment has been taken against the defendant Tighcon Construction Ltd.

2 The first issue to determine is the relationship of the

parties to each other under the terms of the **Builders Lien Act**, R.S.B.C. (1979) Chapter 40.

3 Mr. and Mrs. Volpov had operated a business on the subject property under their limited company Volco Enterprises Ltd. They determined to enlarge their business premises extensively, and on April 25, 1989, Volco Enterprises Ltd. entered into a construction management agreement with the defendant Tighcon Construction Ltd., of whom a Mr. Deans was the principal. The agreement was a fairly lengthy formal agreement whereby Volco retained Tighcon to be its construction manager and authorized limited agent to award contracts, but only after obtaining the owner's approval, covering the furnishing of materials and labour by trade contractors and suppliers and to purchase or rent necessary materials, tools, equipment and supplies. All material and labour contracts and supply purchases were to be made in the name of the owner.

4 Sometime shortly after the entering into of this agreement, Mr. Deans asked Mr. Godler, the principal of Acan, to price out the job for forms and framing. Mr. Deans then subsequently suggested that the job be done on a time and materials basis, and that is what was done.

5 Mr. Godler had never seen Tighcon's management agreement and had assumed that Tighcon was the main contractor on this job site with Acan being a subcontractor to Tighcon. On the other hand,

Mr. and Mrs. Volpov thought that Mr. Godler and his crew were employees of Tighcon. There was no specific agreement between Mr. and Mrs. Volpov and Tighcon for the work being done by Acan. The management agreement contained no provision for Tighcon to do any portion of the construction and any contract with Volco or Mr. and Mrs. Volpov were to be approved of before they were entered into. Tighcon had some authority to purchase materials but no purchase of materials costing more than \$3,000 was to be made without the owner's written approval.

6 I think it must be found that Tighcon was a contractor under the terms of the **Builders Lien Act**. "Contractor" is defined under that Act as follows:

"'Contractor' means a person contracting with or employed directly by an owner or his agent to do work on or to place or furnish materials, or to do both, on an improvement, or for the rental of equipment with an operator for use in making an improvement, but does not include a worker."

Tighcon was a person employed directly by Mr. and Mrs. Volpov to do the work done by Acan. That employment of Tighcon was outside of the terms of the management agreement. Mr. and Mrs. Volpov were aware the work was being done, and they thought that Tighcon was doing it. Payment was made by them to Tighcon who in turn paid Acan from monies received from Mr. and Mrs. Volpov, as well as a number of supplies.

7 Mr. and Mrs. Volpov assert that they did not know of the existence of Acan until after the claim of lien was filed. The earlier invoices presented by Tighcon to Mr. and Mrs. Volpov did not make any reference to what firms various payments were made. In an invoice of October 11, 1991, the breakdown showed a payment of a substantial sum, \$16,754.02 to Acan Development Inc., and that name appears in a list of payments made by Tighcon as prepared by Mr. Deans and delivered on December 2, 1991, to Mr. and Mrs. Volpov. However, Tighcon was receiving payment for the work done. The work was done, and Mr. and Mrs. Volpov accepted and believed that Tighcon was doing the work. As such then, I find that Tighcon was a contractor as defined under the **Builders Lien Act**, not for the entire project, but for the specific work that Mr. and Mrs. Volpov had authorized Tighcon to do.

8 It follows then that Acan was the subcontractor under the definition contained in the **Builders Lien Act** which reads as follows:

 " 'Subcontractor' means a person not contracting with or employed directly by an owner or his agent to do work on or to place or furnish material, or to do both, on or for the making of an improvement, but one who contracts with or is employed by the contractor or under him by another subcontractor or their agents for the purposes mentioned, but does not include a worker."

9 While Tighcon was the contractor for the doing of the specific

work of forms and framing and Acan was a subcontractor to Tighcon, Tighcon, nonetheless, was not the general contractor for the entire project. Most of the sub trades were working under direct contracts for Mr. and Mrs. Volpov through their company Volco Enterprises Ltd.

10 The summary of invoices paid furnished by Mr. Deans to Mr. and Mrs. Volpov on December 2, 1991, came about at the request of Mr. and Mrs. Volpov. Mr. and Mrs. Volpov were becoming dissatisfied with the services being provided by Tighcon, and from that time on Mr. Deans was most entirely absent from the job site. By that time also, the work of forming and framing under which Tighcon was contractor and Acan was subcontractor had been completed.

11 On November 4, 1991, Tighcon and Volco Enterprises Ltd., or Mr. and Mrs. Volpov, agreed in writing to certain further work being added to the improvements. This was the installation of an oil separator that was required by the building inspector of the District of Richmond to prevent oil from the service bays being flushed into the sewer system. While the document refers to the "contract" being increased by the sum of \$9,378, that amount is significant to the original agreement between Volco and Tighcon only in that Tighcon's remuneration as construction manager could vary depending on the total construction costs. The November 4, 1991 agreement provides that Tighcon is authorized to carry out the

additional work with the mechanical work to be provided by a firm referred to as K.L.M. at a price of \$6,628 and civil works at a price of \$2,750. Again, it was Mr. and Mrs. Volpov's understanding that the civil work was the excavation and preparation of a foundation for the oil separator itself and that that work was to be done by Tighcon. It seems clear then that there was then in place a contract between Tighcon and the Volpovs or their company for this additional civil work. Again, the work in fact was done by Acan on a time and materials basis. In addition, Acan was continuing to do other incidental work on a time and materials basis for Tighcon.

12 On January 28, 1992, Acan billed Tighcon for work done in December and January, most of which involved the oil separator tank, the last work being done on January 22, 1992. The evidence also indicates that the final work done by another trade, the cement finishing, was completed on January 31, 1992.

13 On February 12, the building inspector did a final inspection and noted five minor deficiencies including installation of grab bars in the handicapped washrooms and a minor drywall repair in the stairway. The evidence is not clear how it came about but Acan sent two men on February 12, 1992, to the site. They put up a small piece of drywall and left but did not instal the two grab bars. Mr. Godler has no independent recollection of ordering his men to do that work but relies on his invoice of March 6, 1992, and

the cash receipts from the building supply for the purchase of a piece of drywall and for the grab bars. Neither Mr. or Mrs. Volpov requested that Acan do that work. Mr. and Mrs. Volpov had been regularly faxing Tighcon requests for completion of unfinished or incomplete work, long having given up trying to contact Mr. Deans by telephone, but had little expectation of that work being done. Since November 2, 1991, Mr. and Mrs. Volpov had effectively been carrying on the construction management duties themselves and Mr. Deans had dropped out from the picture. That Mr. Deans somehow communicated a request to Acan to do the work done on February 12 seems to be the only inference drawn. In fact, by February 12, Mr. Volpov had installed the grab bars himself, and those left by Acan's employees were not utilized. The work actually done by Acan's employees on February 12 was to install a small piece of drywall approximately four feet by four feet affixed by four screws over an opening. Mr. Godler cannot give any further details of what work was done by his employees on that date although the time charged totals seven hours.

14 On March 11, 1992, the affidavit of lien was filed against the subject property. Paragraph 22 of the **Builders Lien Act** sets out the time within which a claim of lien of a contractor or subcontractor may be filed. It reads as follows:

"22. (1) A claim of lien of a contractor or subcontractor may be filed as provided in this Act at any time after the contract or subcontract has been made, but not later than 31 days after

the contract of the contractor has been completed, abandoned or otherwise determined."

15 "Completed" is defined in Section 1 as follows:

"'Completed', whenever used with reference to a contract for an improvement, means substantial performance, not necessarily total performance."

16 The next issue in this case is what was the contract of the contractor Tighcon and when had it been completed, abandoned or otherwise determined. Tighcon was not a contractor contracting to do the entire project. In addition to being the construction manager for an agreed fee of \$11,000 with a possible bonus, Tighcon was also a contractor to do the forming and framing on a time and materials arrangement and to do the civil work on the oil separator for \$2,750. Both of those contracts had been completed by January 31, 1992. In addition, at the very most, Tighcon could be said to have an agreement or understanding with Mr. and Mrs. Volpov to do some further sundry work, which work, of course, was performed by Acan. Again, at the most, Acan's contracts to do that work could only be contracts to do the work requested from time to time, and each request would constitute a separate contract. Mr. Godler agreed that at least after the completion of the forming and framing, his work on the job site was work that he did on the instructions of Mr. Deans and that Acan had no right to do that work which could have been turned over to any other person at anytime.

17 The entire project had been substantially completed at the

very latest on January 31, 1995, if not earlier. Mr. and Mrs. Volpov had moved into the main building and were carrying on business there prior to Christmas. If there was any contract of the contractor for which Acan can claim as subcontractor it would have to be for a separate contract to do the work that was done on February 12, 1992. However, I am not satisfied that there was even such a contract. Mr. Godler is unable to explain the circumstances under which his workmen went to the site. Prior to this time, Tighcon seems to have been dropped out of the picture completely and Mr. and Mrs. Volpov did not request Tighcon to do what was required by the building inspector on February 10, 1992. A copy of the inspection report was faxed to Tighcon not with any expectation that that work would be done by Tighcon. This is clearly evident by Mr. Volpov having installed the grab bars himself prior to February 12, 1992.

18 In these circumstances then, Acan's claim for lien must be dismissed with costs to the defendants, Sofia Volpov and Roman Volpov.

"ERRICO, J."

September 6, 1995
Prince Rupert, BC