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Supreme Court of Texas.
SOLAR APPLICATIONS ENGINEERING, INC., Petitioner,
v.
T.A. OPERATING CORPORATION, Respondent.
No. 06-0243.

October 16, 2006

Appearances:
Douglas W. Alexander, Austin, Texas.
Sharon E. Callaway, San Antonio, Texas.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 06-0243 Solar Applications Engineering Inc. v. T.A. Operating Corporation.

SPEAKER 1: May it please the Court. Mr. Alexander will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE PETITIONER

MR. ALEXANDER: May it please the Court. The Court to reverse the judgment of the Court of Appeals and render the same judgment that the trial court did for two independent reasons. First, because a general contractor and its subcontractors should not be required to give up their security for payment in order to pursue a claim for nonpayment. And thus, the Court of Appeals reversibly erred when it held that as a condition precedent for bringing a suit for substantial performance against an owner who is refusing to pay any portion of the retainage that the general contractor was not only required to give up its statutorily guaranteed lien rights, he was also required to prevail on its subcontractors to give up their lien rights.

The second reason for a reversal is that under a proper reading of the contract, it is evident that the condition precedent that was relied upon by the Court of Appeals that is the lien release provisional in contract was never triggered because the contract was

terminated before the time for that performance ever arose. The net result in this case was a manifest injustice. We have a situation in which the general contractors and its subcontractors completed 99.8 percent of the work under the contract. But the general contractor was held to have forfeited $392,000 almost 10 percent of the contract price. What should have instead happened in this case was for the Court of Appeals to leave undisturbed what the trial court did, that is to first have a trial about who owed who what and then at the end of the day have a second proceeding in which the lien claims were resolved so that in the end of the day the proper party can go away with their money and the owner could go away with a lien-free building.

JUSTICE BRISTER: So would there been -- how would this case have been different if you turned over the liens that they wanted, you still would have the jury trial, you still would have won and you wouldn't have had to be here because they can just -- you just would be out collecting your judgment there.

MR. ALEXANDER: Well, collecting judgment on what? That's the problem and now there's the purpose -- the very purpose of the lien is a guarantee to collect the money at the end of the day. And it's a guarantee not only to the general contractor but also to the subcontractors. So, that would be the problem. We would have given up --

SPEAKER 2: [inaudible]

JUSTICE BRISTER: [inaudible] are they bankrupt or something?

MR. ALEXANDER: Well, who knows?

JUSTICE BRISTER: Well, but I mean, for instance on letters of credit, a letter credit is an agreement of who gets to hold the money while we fight. And isn't this just an agreement as to whether there's a lien on the property or not while we fight?

MR. ALEXANDER: Well --

JUSTICE BRISTER: You could certainly -- as soon as you win, you can slap a lien back on the property.

MR. ALEXANDER: Well, so one would say but -- but what we are being asked to tender was a release of liens so, no, I don't agree with that last sub position --

JUSTICE BRISTER: No, no --

MR. ALEXANDER: -- but at the end of the day we could apply for a lien.

JUSTICE BRISTER: No, no. That's not the mechanic's or material's lien. Once you win the judgment, you got a judgment lien. You file the judgment lien. You got a new lien. You didn't release a judgment lien.

MR. ALEXANDER: Yes.

JUSTICE BRISTER: Isn't this just an agreement as to whether we are having a lien on the property while we have the lawsuit? And your clients agreed that there wouldn't be a lien on property while we have the lawsuit.

MR. ALEXANDER: Well, we did not agree that there would not be a lien on the property while we pursue the lawsuit and that's point one. Point two is that you really need to look at what a statutory lien is. It's -- it's one if you actually look at the provisions of the lien statutes, particularly the one about preference over other creditors. All subcontractors, laborers, and material men whoever mechanic's lien have preference over other creditors of the original contractor. It's a super lien. It's one that has been in existence not only constitutionally guaranteed but also provided. So, the business of saying we have a judgment lien or some other types of lien doesn't cut it because what you've given up is the most highest regarded lien that

exists in -- in the construction context and that --

JUSTICE BRISTER: But you would have turned them over if they had paid you the check and willing to give you the check?

MR. ALEXANDER: Absolutely. Absolutely. In fact, that's what -- that's what contemplated under the lien statutes. I did one of my little cheat sheets here that kind of lays out how it works. The way that the contract contemplates the things you can work if things work at a feasible fashion is -- is that you -- you -- you complete the work. Well actually, the first thing you do is that you substantially complete the work. And that's the first grade here. That's Paragraph 14.04. What happens there is once you substantially completed, the building is ready for its intended use. I mean this case Popeyes is up and running and you've got Country Fried and you can take the family out to dinner down there. Everything is -- is ready to go. The next thing that happens though is that the -- as part of that the -- the owner provides a punch list saying, okay it's substantially complete but it's not entirely complete here is the lists of items. And that's what happened here. And then the parties work along towards completing those punch lists items. But at the point in which the project was 99.8 percent complete, T.A. terminated the contract for cause, they say. That was before the entire work was complete. And the way it works is this, in peaceable circumstances where you don't boot somebody off the job, you complete the entire work at which point there is a final inspection. And at the final inspection everybody gets together and go okay are we all comfortable? Everything is done. It's all through. All good. Well then let's get together. It's kind of like settling up in a lawsuit. Let's all get together around the big table. And I'll tell you what ah, well you just pass items here. Subcontractors, well, first general contractor here is your check. You're cutting your checks to the subcontractors. And here is all the releases of liens. Everyone of them lets to walk away from the table. Owner, you've got a lien-free building. General contractor, you've got your money. Subs, you've got your money. That's the way it suppose to play out. Now what happened here was the party has gotten into a dispute.

CHIEF JUSTICE JEFFERSON: But the way the -- the language reads, I mean before everyone walks away, your final application for payment is supposed to be accompanied by these release of liens, right? So, is it -- I mean, are you saying that you made a mistake in signing it, you shouldn't have signed it or the language is ineffective or you are not in condition to say it --

MR. ALEXANDER: And -- well first off, look let's talk about that. Once again that language 14.07 about we tender the liens occurs after the final inspection has occurred, occurs after the work is entirely complete which never occurred here. Now, the way it's written and the way it works in real practice, I mean I don't want to get too hung up on that. Generally speaking --

JUSTICE BRISTER: What was this? What was the dispute?

MR. ALEXANDER: The dispute was this. We said, we -- we've done most of the work here. And we're entitled to be paid I mean 99.8 percent complete. The other side says, Oh no, no, no, no, no, no. Your subcontractors screwed up. Defective work. What you need to look at is defendant's Exhibit 11 and 12. Those are the key Exhibits. Those are what lays out the position of the owner. And what the owner's saying was is this work was so bad that we're entitled to recover three quarters of a million dollars. And that's what the lawsuit was about. I mean they want to come up here and say that, oh, really the reason we weren't paying over this money was because of these, you know, these

outstanding liens but look at this defendant's Exhibit 11 and 12. And what you will see there is the lien business at least in the opening letter of the -- giving notice of default it's item number four. Item number one is look at all these defective work and we'll tell you how much that cost later. That was -- that was on October 18th. On November 13th, when the notice of termination went out it says, attached is a full schedule of everything's defective and look if you added it up, it's $736,000. So, that's what the lawsuit was about. That's what they went tooth and tongue and at the end of the day the jury said, well no. No to the owner. Yes, to the general contractor. The general contractor you did 99.8 percent of your work. You're about $8,000 short. So, at the end of the day the Court properly entered judgment for $392,000, which was the $400,000 retainage less the $8,000 of work that needed to be done.

CHIEF JUSTICE JEFFERSON: Just to go back for a second.

MR. ALEXANDER: Yes.

CHIEF JUSTICE JEFFERSON: Back to the language. I am trying to understand it. And it seem like the amicus doesn't answer this question for me either. This language says when you make and let's assume the timing is okay here --

MR. ALEXANDER: Okay.

CHIEF JUSTICE JEFFERSON: When you make your final application for payment, you must accompany it with all these legally effective releases or waivers of all lien rights.

MR. ALEXANDER: Okay.

CHIEF JUSTICE JEFFERSON: So you're doing -- you're making this waiver before everything, before you get the final payment either is that --

MR. ALEXANDER: Right. And that's the way it is set up. And I don't have a problem with that.

CHIEF JUSTICE JEFFERSON: Okay, if you don't have a problem, why --

MR. ALEXANDER: I don't have a problem and I'll explain why. Because this comes up again. Once again, you're doing this after everybody has gotten together. They've done their final inspection. Evereybody goes, everybody cool? Is it all good? It's all done? Yup. Good. I'm trusting you, I general contractor am going to my field and say, they're ready to pay. So here's -- give me your liens. Okay, here's our liens. We bundle them up. Give them to you in an envelope with our final application for payment, which here again was never reached. But you turn that over. And then what happens is is that the owner is to -- you know, this is also in the 14.07, looks it all over and says you know this all looks good to me. We'll go ahead and pay. Or the owner goes still not quite right. Still quite not right.

JUSTICE HECHT: Why can't the subcontractors and the general tender all this stuff conditioned on payment being made as follows. Yes, here is our release of lien but it's not any good unless you -- unless we get our last $50,000.

MR. ALEXANDER: And you're talking about?

JUSTICE HECHT: Sort of escrow or conditional tender. I mean rather than go through all these machinations, look like this is gonna arise a lot. That's what you say is, sure I'll give you release of lien but it's no good. I want you -- we'll have an agreement but it's no good unless I get my last $50,000.

MR. ALEXANDER: Well this is beforethe tooth and tongue lawsuit?

JUSTICE HECHT: Yeah.

MR. ALEXANDER: Conceptually, and I haven't thought about it. So, you know I may be making a concession here that I'll regret later. And

we'll write you a letter but -- conceptually I don't have a problem with that. I don't. I mean, in other words, it's a matter of saying -- and the problem here though is unconditional release. But what you're talking about, that that doesn't bother me. Look if at the end of the day, you know, you're right, we're wrong. You don't pay us any money. You get your lien releases. We'll have some third party hold that as an escrow. Conceptually, I don't have a problem with that because it gets us to the same place. We have not unqualifiedly given up our lien rights at the time when they are required most so I don't have a problem with that.

JUSTICE JOHNSON: Under paragraph 7 and let me go into that, doesn't it also the contract appears to say that you could simply bond around that and provide a bond to the owner in lieu of that so that to fix that failure of a sub to give you a release of lien.

MR. ALEXANDER: Yeah, and I'll confess to you Justice Johnson. I'm not as familiar with the bonding requirement.

JUSTICE JOHNSON: Right.

MR. ALEXANDER: I'm not, but I think that -- that is perhaps to deal with the situation where you have a recalcitrant sub.

JUSTICE JOHNSON: Right.

MR. ALEXANDER: Now, there -- everyone else says, you know, I'm tendering up. The one sub says, the general contractor, look we'll just bond around that. So I mean, I think it's -- it's intended to deal with that situation but it doesn't cure the concern of the Court of Appeal's decision.

JUSTICE JOHNSON: Right.

MR. ALEXANDER: Okay. But I --

JUSTICE JOHNSON: -- I agree with that -- I mean there are lot of different ways you could have done it. The problem is none of them happened in this case.

MR. ALEXANDER: None of them happened in this case. And what happened was, I mean, we went through a whole lawsuit. And we got a judgment we went up to the Court of Appeals. The Court of Appeals initially said affirmed then on rehearing suddenly it's like, well, geez because you didn't three years ago unqualifiedly give up your lien rights when you needed most, you failed to satisfy a condition precedent and therefore you don't collect. And what we say is that that was erroneous. And it establishes harmful precedent not only for general contractors but also for subcontractors. I think I've got a couple of minutes. I'm gonna anticipate an argument that's gonna be made on the other side. And that is that I think yesterday you got a fax of -- of -- of a recent statute. The one in effect September 1. I've -- I've got this under Tab 2 of my cheat sheet here and -- and that's dealing with contingent payment provisions. In our briefing we talked about how some contracts or most actually contracts between general contractors and their subs have so-called contingent payment provisions, which means if I don't get paid you don't pay, period. What this statute does is it ameliorates that -- that -- that provision and certain situations but it doesn't cure the Court of Appeal's problem here because of the italicized language.

And I have here a general contractor to ensure he may not enforce a contingent payment clause to the extent that the owner's nonpayment to the general contractor is the result of the contractual obligations of the general contractor not being met. So in order words, if there is a default by the general contractor, so far so good. You can't enforce the contingent payment provision against the subcontractor but here's the -- the key language. Unless the nonpayment is the result of the

subcontractor's failure to meet the general contractor's contractual requirements. And so what we have here is if you look again at the defendant's Exhibit 11 and 12, that's what that is. That is the obligor under the statute. The owner saying the sub's performance is subpar. And in that -- in that situation the subs don't get the benefit of this statute. They're still stuck. They don't get payment until the general contractor get paid. And therefore they're very concerned about a decision that says, well geez, you know -- if we're going to sue this owner who was saying, you know -- is improperly claiming that you work is defective, first off, you have to bundlee up these liens, don't do it in escrow, give it over unqualifiedly, and -- and wait, you know, release your liens. We say that that's -- that's improper.

JUSTICE WAINWRIGHT: Mr. Alexander?

MR. ALEXANDER: Yes?

JUSTICE WAINWRIGHT: As I understand that both of your argument first several pages of your brief you say that even assuming that this -- the obligation to provide release is as a condition precedent. You believe you went for two reasons; one the -- the requirement was never triggered you never reached that stage --

MR. ALEXANDER: -- Right.

JUSTICE WAINWRIGHT: -- of the transaction and two as I understand it, that a condition precedent like this -- your argument is only goes to the -- the payment it doesn't preclude the filing of suit --

MR. ALEXANDER: Right.

JUSTICE WAINWRIGHT: -- to enforce your -- your obligation --

MR. ALEXANDER: -- that's correct.

JUSTICE WAINWRIGHT: -- your right to get paid as you understand. Does the contingent payment clause -- does that have -- is that affected at all about release of liens, that is the clause that says the general contractor only has to pay the subs if and when the owner pays the general. Is that affected by the releases?

MR. ALEXANDER: And let me make sure I understand it. In other words, if we have released would that have been affected or --

JUSTICE WAINWRIGHT: Under the structure of this --

MR. ALEXANDER: Well I'd say, I mean, the way -- the way it works, I think that the answer is no for this reason. It's -- it's -- it's still the contingent payment clause as one that says that to tell the general contractor to get its money. It has no obligation to pay money to the subcontractor. And -- and if you have a situation in which the general contractor is never paid by -- by the owner for whatever reason under a pure contingent payment provision, the subs don't get paid. The statute that I've been talking about helps to -- to -- to deal with this situation. The harshness --

JUSTICE WAINWRIGHT: Let me ask --

MR. ALEXANDER: Yeah.

JUSTICE WAINWRIGHT: -- let me ask a question.

MR. ALEXANDER: Okay.

JUSTICE WAINWRIGHT: Probably more succinctly this way.

MR. ALEXANDER: Okay.

JUSTICE WAINWRIGHT: If -- if the general contractor had provided the release of liens and --

MR. ALEXANDER: -- before bringing suit?

JUSTICE WAINWRIGHT: -- then, would these -- how would the subs get paid? What right would they be able to follow? What recourse to get paid?

MR. ALEXANDER: -- they --

JUSTICE WAINWRIGHT: Would they be able to go against the owner?

MR. ALEXANDER: No, they'd be out of luck. I mean, I mean that's -- that's the problem. That's the concern is that the only privity of contract is between -- is between the -- is between the owner and the general contractor. There is no contractual relationship between the owner and the subs. And so in -- in a very real way, the subs rely upon the general contractor to pursue a suit against the general -- against the owner. And if they give up their lien rights, I mean this -- well let's go back. If they don't give up their lien rights then they do have a claim against the property ultimately if the owner doesn't pay.

JUSTICE WAINWRIGHT: Right.

MR. ALEXANDER: That's -- that's the value to them of the liens. And that's why the concern about having to give up lien rights. That's what gives them a recovery. If they give up their liens then they're -- they are completely out of luck because they don't have a claim against the general contractor because there's been no payment. And they don't have a claim against the owner because well or -- or the building because the lien right has been X'd out. I see I'm out of time.

CHIEF JUSTICE JEFFERSON: Any other questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER 1: May it please the Court. Ms. Callaway will present argument for the respondent.

ORAL ARGUMENT OF SHARON E. CALLAWAY ON BEHALF OF THE RESPONDENT

MS. CALLAWAY: Mr. Chief Justice, may it please the Court. If I can start with Justice Wainwright's question. I believe the answer to your question was what happens in this -- I assume you were referring to the 35.521 contingency pay statute that I have provided the Court with yesterday. And the only reason I did that was to -- to demonstrate yet again that the legislature has -- has a very comprehensive scheme worked out for this whole situation. And it's called 'mechanic's lien.' And as I understood so large response to your question was if they don't get to enforce that contingency or to not enforce that contingency pay then they're out of luck. They're never out of luck because the sub has the mechanic's lien. The general can't waive the subs with lien for him. And the owner can't make the sub waive his lien. He's got that lien.

JUSTICE WAINWRIGHT: But your client was requiring the release of liens as a condition to being paid. And as I understand your argument here is that Solar -- Solar doesn't have the right to pursue the lawsuit without releasing the liens either.

MS. CALLAWAY: No, your Honor, that's not our position.

JUSTICE WAINWRIGHT: It's not?

MS. CALLAWAY: That's not our position at all.

JUSTICE WAINWRIGHT: That's the way it's characterized.

MS. CALLAWAY: That's the way it was characterized but it's not our position. Our position is that the doctrine of substantial performance does give the contractor a right to pursue the contract. But it is a suit on the contract. And on the contract there are very important words. It's not substantial performance. It's not an independent cause of action. It doesn't mean that you get to ignore the contract. It's not -- it's -- all it is, really, is to say you have a right to sue on the contract. It avoids the harsh rule of prior material breach, allows you to sue on the contract. But suing on the contract means just that.

You come to Court. You sue on the contract. And the Court has to apply the contract to the argument you're making and the recovery you're asking for.

JUSTICE O'NEILL: And how did the Court not do that here by -- by severing out the subcontractor's claims and saying out of any recovery we're gonna pay them, why don't they take care of what the contract was designed to do?

MS. CALLAWAY: Well, procedurally, your Honor, it doesn't work. That order -- the Court is making an order before the case is tried on the sub's arguments. Procedurally, the subs should never have been severed out. And T.A. operated -- T.A. operating argued against them being severed out for this very reason. All of this should -- should have been determined in the dispute. And we wouldn't be standing here today because the condition precedent wouldn't have worked because they wouldn't have reached judgment without deciding the subs. And so that order that talks about --

JUSTICE BRISTER: So, this --

MS. CALLAWAY: -- what has to happen --

JUSTICE BRISTER: -- this trial didn't decide whether the sub's work was defective?

MS. CALLAWAY: No. It did not, your Honor, because Solar expressly moved to sever them out.

JUSTICE BRISTER: Well, I understand --

MS. CALLAWAY: -- and --

JUSTICE BRISTER: -- it didn't grant recovery to the subs but surely you defended the case saying the stuff we got was no good.

MS. CALLAWAY: Yes, we did and --

JUSTICE BRISTER: -- so --

MS. CALLAWAY: -- and --

JUSTICE BRISTER: -- this case just did decide whether the work was defective or not.

MS. CALLAWAY: It did in terms of the, of the -- yes. And it decided that we were wrong. We -- we were -- or the jury found $88,000 in delay damages but those were held to be waived. And so we recovered nothing on that.

JUSTICE O'NEILL: So, there's no longer a barrier then to the subs coming in and -- and satisfying their liens. I mean that gets back to my original question is why -- why is the way that the Court handled this not -- why doesn't that further for the purpose of contract?

MS. CALLAWAY: Because the Court couldn't -- if that issue wasn't before the court, it's really an advisory sort of opinion that here's what is going to happen when we get over to this case.

JUSTICE O'NEILL: What's wrong with that? I mean --

MS. CALLAWAY: I don't think a Court can do that. I think procedurally you've got to have the issues before you. And what they did is that they decided to sue on the contract. And keep in mind this is a contract only between the owner and the general. It doesn't concern the subs' rights at all. It's whether the owner has to pay or not. And there was a condition precedent saying, we don't have to pay the final payment, which here constituted really the retainage which we were statutorily required to retain.

SPEAKER 3: [inaudible]

JUSTICE O'NEILL: Well, I still don't understand because after the trial, you know you have to pay and you know what you have to pay. So, what do you care about what happens with the subs? I mean, what's gonna happen in the severed suit, they'll -- they'll pay whatever they think is due on the lien. So, where's the beef for you in the severed suit?

MS. CALLAWAY: I don't care that it was -- I don't care that it was severed. It would have been better to have all the liens, everything decided in one judgment. And by the way, Solar had its own lien but it abandoned that lien. It sued for foreclosure on the lien. And remember it won at the trial court, it was entitled to judgment and was entitled to judgment both on the recovery for substantial performance and on its lien. It did not ask for any judgment. There's a Mother Hubbard clause. And therefore its lien is gone. So --

JUSTICE O'NEILL: -- but --

MS. CALLAWAY: -- specifically in this case, its lien is gone. And -- and it's asking this Court in -- in effect to make some sort of advisory opinion on that issue.

JUSTICE WAINWRIGHT: But --

JUSTICE O'NEILL: I guess your only problem then with the way the Court handled it is it's now advisory although that doesn't affect you anymore?

MS. CALLAWAY: Right. Exactly. And -- and I don't have -- I mean I don't have a problem with that. Our position is our condition precedent required releases of liens that there couldn't be liens on our property and if there were liens on our property, we were not contractually obligated

JUSTICE WAINWRIGHT: But Counsel, your client sent a letter terminating the contract before that point was reached. They were still working on the punch list. Punch list has to be completed at least to the satisfaction of the parties before you get a final application for payment. Before the punch list was completed, you sent a letter saying the contract is terminated. So, how are they supposed to then proceed, in performance to the contract. And this is a question I am kind of wrestling with, if your client declared it terminated before that point.

MS. CALLAWAY: Well, first of all, your Honor, the termination does not terminate the contract. The contract is still in place. What it does is terminate all those --

JUSTICE WAINWRIGHT: They are still in place to the extent that you are going to fight over it and see who gets damages.

MS. CALLAWAY: Exactly --

JUSTICE WAINWRIGHT: -- but --

MS. CALLAWAY: -- it doesn't, it doesn't --

JUSTICE WAINWRIGHT: -- but when you terminate it, surely you didn't expect that you both would proceed following the terms of the contract --

MS. CALLAWAY: -- terminated --

JUSTICE WAINWRIGHT: -- as the termination letter had been sent.

MS. CALLAWAY: We terminated their right to proceed with the work. And we -- when we terminated, we specifically said, we are terminating this contract because you are in violation of the contract. There was, in addition to this all bills paid condition precedent, there was a separate and independent provision in the contract 6.20(c) that required Solar to keep the project lien free. And we said at that point, we had three liens on the project. And we said there're liens on our project. You have -- you have breached the contract. And we are gonna terminate your right to proceed.

JUSTICE BRISTER: But if they --

MS. CALLAWAY: -- and that's --

JUSTICE BRISTER: -- if they have tendered releases of leins, you wouldn't have paid them anything?

MS. CALLAWAY: We would have still, but those are two different --

JUSTICE BRISTER: -- no, no, no, just wait.
MS. CALLAWAY: -- well because we had a --
JUSTICE BRISTER: If -- you're saying this is a condition but if you have gotten it, you weren't going to pay them. And everybody knew that.
MS. CALLAWAY: That's true. That's true but why are we not entitled to stand on our contract? Because we -- there are two separate issues here. There's the condition precedent to final payment --
JUSTICE BRISTER: -- well because there is anticipatory --
MS. CALLAWAY: -- and there is the dispute about the defective work.
JUSTICE BRISTER: -- there's --
JUSTICE BRISTER: Because there is anticipatory repudiation. You can't stand there and say, uh, I'll act but you got to do this first. If we all know that I'm not going to do it regardless of whether you act. That's no longer a condition of my payment because compelling in it, ain't gonna make anything happen. How is that still a condition?
MS. CALLAWAY: Well, it is a condition because that was a risk. A risk was that we would have liens put on our property. And that's still a very real risk to us. And we shifted that risk just as the statute does. The statute always and consistently places the duty. And that's what gets lost in this whole argument. The duty is always on the general contractor to pay the subs, not on the owner. It's always on the general. And that's what that new legislation reemphasizes. The general has to pay the subs --
JUSTICE WAINWRIGHT: So Counsel, it is your position that you're entitled to a release of liens but you shouldn't have to pay the $392,000?
MS. CALLAWAY: No. My position is had they provided releases of liens and Justice Johnson's right they could have bonded around it and Justice Hecht is right --
JUSTICE WAINWRIGHT: -- but none of that --
MS. CALLAWAY: -- that 58.05 --
JUSTICE WAINWRIGHT: -- is in the facts of this case. None of that is in the facts of this case. Binding around it or other things, you're right they are in the contract. But, I mean, --
MS. CALLAWAY: Well --
JUSTICE WAINWRIGHT: -- let's deal with what's on our plate. You seem to be saying you're entitled to the release of liens without -- but not have -- but have no obligation to pay the $392,000. See, what's -- both sides, they kinda seem to have a kinda old western standoff. The six shooter pointed at each other. Give me the release of liens. You give me the payment. Give me one at the same time. You get the other. And you seemed to be claiming your entitled -- well, you do argue you are entitled to the release of liens but do you also have the obligation to pay the contract price or do you think you can get one without paying the contract price?
MS. CALLAWAY: Let me answer it this way. What this condition precedent did was bar their recovery in a suit on the contract. And whether we got -- the -- the fact of the matter is we didn't get the releases. And that's why we are relying on that condition precedent. And that's the point we're at. And --
JUSTICE O'NEILL: [inaudible].
MS. CALLAWAY: -- it is in the case whether they could have bonded and 53.85(c)(1) specifically addresses what Justice Hecht brought up is that they could have conditioned their waiver of the lien.
JUSTICE WAINWRIGHT: In the final outcome, if you get a $392,000

judgment, should the final result incorporates that you also get release of liens or you actually pay the $392,000 --

MS CALLAWAY: -- it's --

JUSTICE WAINWRIGHT: -- you should get release of liens that's --

MS. CALLAWAY: -- outside the records, your Honor, but I understand the liens have been paid. And so that's -- that's -- that's no longer an issue. But the point is when they sued on the contract, a verdict was reached on that suit on the contract. And a judgment was entered. Those liens were outstanding. And therefore under the contract, we had no duty to pay. And that's what the question is about. It's not whether we got the releases but the question here is did we have a duty to pay. And under the contract, we don't have a duty to pay.

JUSTICE WAINWRIGHT: In part of the issue here, a timing problem. Certainly if both parties went all the way through final application and payment then all the steps that are required to be taken after the punch list is done, would be required by both sides. But the question here seems to back that time table up a little bit and ask what happens if a breach of the contract is declared and then there's litigation before the punch list they just finished and you get the final application for payment. Isn't that what we are talking about?

MS. CALLAWAY: I don't think it's what we are talking about. I think the end question is do we have a duty to pay under the contract. And the answer is no. But in answer -- in part of the answer to your question would be, the contract at 15.02(c) specifically provides that termination of the agreement, i.e. terminating before we get to final inspection, does not affect the owner's rights. And this whole peaceable argument is a remarkable one to me because it contemplates that if it goes along peaceably then, in fact the brief says, if goes along peaceably then that condition precedent makes sense but if it doesn't then you shouldn't enforce that condition precedent. And where on earth is there any authority for you construe a contract differently, depending on whether it is peaceable or not. In fact, if it had gone peaceably, you never get to a Court so there is no reason for such a rule.

SPEAKER 4: If --

MS. CALLAWAY: And the fact -- I mean that's the whole point of contracting, you're shifting risks and one of the risk you shift is the very risk that came to pass. And you shift it. And you say if things go wrong. And so you can't ignore this risk shifting when things do go wrong. And they've gone wrong. The contract didn't get completely finished but does that mean because it didn't proceed exactly as it should that they should never be finally paid?

JUSTICE O'NEILL: Well, if we --

MS. CALLAWAY: I don't think that's what it means.

JUSTICE O'NEILL: If we accepted your position, tell me what the result is. The result is, you don't have to pay the $390,000 judgment?

MS. CALLAWAY: Correct.

JUSTICE O'NEILL: The contractor had to pay the liens off?

MS. CALLAWAY: Correct.

JUSTICE O'NEILL: Even though, everybody acknowledges $380-something thousand worth of work was done, so the owner gets the windfall? Just as a practical manner. It may be --

MS. CALLAWAY: It's a practical manner but that's precisely what the statute contemplates.

JUSTICE O'NEILL: A windfall.

MS. CALLAWAY: I don't -- I don't -- is it a windfall? They didn't proceed to really fault, they didn't prove up their --

JUSTICE O'NEILL: -- well then I can see --

MS. CALLAWAY: -- they are still on the contract. They didn't keep their lien in place.

JUSTICE O'NEILL: If the liens were still in place, if they had not paid off the liens, then and we were to hold that it was condition precedent then -- then the materialmen can pay off the lien. I mean then they could pursue for closure of those liens. And you will be responsible.

MS. CALLAWAY: But what -- but what this all is saying is that this Court can come in and rewrite this contract. As the Court of Appeals noted, parties are free to contract even if it's a stupid contract. The Court doesn't get to rewrite it. This Court can void a contract as against public policy. That doesn't mean we don't like it. There is a windfall involved to hear it the way you contract it and that you know, as Justice Hecht noted in the Criswell opinion --

JUSTICE BRISTER: But Justice --

MS. CALLAWAY: -- you don't construe an unambiguous contract. And there's nothing ambiguous about 1407.

JUSTICE BRISTER: But, this is why -- we try to do our -- bend over backwards in fact to avoid finding something to be a condition. And say it's a covenant. Say, okay, if they breached it by putting on all the liens that's fine, pay -- and they will have to pay you all the damages you've incurred from having lien on your property, which is nothing. But then, you've got to do your side of the contract. What's wrong with that tradition?

MS. CALLAWAY: But, I disagree with you, your Honor, that this Court gets to bend over backwards to construe conditions precedent as covenants. If the intent is doubtful then the Court starts to construe. As I was saying -- as Justice Hecht pointed out, you don't construe unambiguous contracts. Here, there was never an argument. And I believe that this 1407, the condition precedent, was ambiguous. It wasn't submitted. It wasn't argued. And it wasn't submitted to the jury. And Solar has therefore waived that argument. If --

JUSTICE BRISTER: -- if Criswell in cases before it, say you gotta have some kind of conditional language in there.

MS. CALLAWAY: Well --

JUSTICE BRISTER: You can't just be party A agrees to do one, two, and three. And party B agrees to do one, two, and three. And you didn't do one. So, that is a condition. That's -- that's not the law. That's -- those are bargain promises. They are covenant. A condition is something that if you don't do two, we get to get everything, you owe nothing, and everything goes away. And there's nothing of a language like that in this contract.

MS. CALLAWAY: And that's what 1407(b) says. If you don't submit your final payment in accordance with the contract, we're not gonna pay it. That's the if. And -- and 53.085 specifically recognizes this very condition and says, owner you can do that. And the reason they do is if they've allowed a lien to be placed on the owner's property by someone who is not in privity with them. And so they give the owner. It's a delicate balance between owners, general contractors, and subs. And what they do is they give the owner this protection against double liability --

JUSTICE BRISTER: Yeah, but --

MS. CALLAWAY: -- paying the general and the general not paying the subs.

JUSTICE BRISTER: And if that's the rule, then really owners have a strong incentive to go find a friendly subcontractor to file a lein. It

seems like I've got a serious problem with collusion. If I can go and get the drywall guy to file a little lien on this, I can get out of the $3 million contract and have me a free gas station. That's -- can't be what the party has intended, is it?

MS. CALLAWAY: Well, it is not the party's intent. It's the legislature's intent. And they've set up this scheme. And I'm sure there are people who do abuse it but that's not the situation here. It's not an abuse situation. It's a straight up condition precedent. We bargained for that risk. Solar promised that it would keep it. It promised separately that it would keep it lien-free. And it didn't live up to that promise. And that's what we're saying. We therefore don't have a duty to pay under the contract. And if --

JUSTICE HECHT: And if it weren't a condition precedent and the general sued the owner for payment and won something, would the owner be entitled in that judgment to have any existing liens set aside before having to pay? Would you -- would you think you'd have that argument with the Court? I guess you couldn't make that argument if the subcontractors weren't there --

MS. CALLAWAY: Right. Yeah. And I can't --

JUSTICE HECHT: And other claims might be more than what the general recovered in the lawsuit.

MS. CALLAWAY: Yeah. As I have said, the statutory scheme lies it out. It keeps placing the burden on the -- on the general to pay. And that's what this case is about. The general hasn't explained why it didn't pay the subs. As a matter of fact, at the third volume of the record pages 141- 42, Bob Romer, who is the Solar officer in charge of overseeing this project is asked, well did you not pay the subs because we hadn't given you the final payment? And he says, no that's not the case. In other words, they have the money to pay the subs. They just decided we are not gonna pay the subs until you finally pay us. And nowhere in this statutory scheme is it provided that the owner has to finally pay before. In fact to the contrary, it recognizes the right to this all bills paid. And it is a part of the balance. And I guess my -- my main point is, this Court can't rewrite the contract. And when I, coming back to Justice Brister's question and that is you don't -- you don't get to ignore condition precedent unless the language is doubtful and unless there is another reasonable interpretation under the contract. And the 14.04 substantial completion and the 14.06 final inspection have nothing to do with final payment. Yes, there's steps on the contracting process and the building process but they have nothing to do with final payment. 14.07 is the only one. My time is up. I'm sorry. Thank you.

CHIEF JUSTICE JEFFERSON: [inaudible] counsel?

REBUTTAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE RESPONDENT

MR. ALEXANDER: May it please the Court. I have five minutes. And in that time, I intend to address the question raised by Justice Wainwright, one raised by Justice Brister, another by Justice O'Neill and do housekeeping task subject of course to be interrupted at any time by your questions.

MR. ALEXANDER: First, Justice Wainwright, it is a timing issue in terms of interpreting the contract. We are not asking this Court to ignore the contract or to rewrite the contract. What we have laid out

on that tab, under number 1 is if this contract was terminated before the time performance arrived. Justice Brister, you are correct. What they were asking us to do by tendering releases would have been a pointless act. We would have tendered all these releases, given up all the lien rights, and they still would not have paid. Because their -- their claim was quite clearly. And in fact, if you look at defendant's Exhibit 11, you'll see the word offset. Their whole claim was we have a claim for three quarters of a million dollars, you have got a claim for $400,000 retainage. It's gonna be an offset. So, it would have been a pointless act. Justice O'Neill, you had asked why wouldn't the severance taken care of the concern, it would have. The severance would have taken care of the concern. And I think it would have taken care of the concern, that is the concern being the double liability problem. I don't want to stand up here and say that -- that -- that -- that -- there aren't legitimate interests at stake here including interest of the owner to walk away at the end of the day, having paid off all the money with the lien-free building. That's what the severance was intended to do. And back to -- I think you have asked a later question on that Justice Hecht and I --

JUSTICE HECHT: I mean [inaudible]--

MR. ALEXANDER: -- have now lost it but I think --

JUSTICE HECHT: -- but only recovered $10,000.

MR. ALEXANDER: Say what?

JUSTICE HECHT: Solar had only recovered $10,000 instead of $392,000 or whatever it was. And the lien claim -- the subcontractors all still had their lien claims, the result would be that the owner would have to pay Solar the $10,000 or whatever and then still have to litigate the lien claims. [inaudible]

MR. ALEXANDER: No, actually -- I mean, good point but -- but no for this reason. The $10,000 would be -- it is -- is saying that general contractor, you and your subs only performed what would that be 2-1/2 percent of -- of the final work. And so at that point, no, the -- the -- the subs would not have any claims over --

JUSTICE BRISTER: [inaudible]

MR. ALEXANDER: -- and above that --

JUSTICE BRISTER: Why would that be binding on the subs, they weren't there? They wouldn't be res judicata. They could still make their claim [inaudible]

MR. ALEXANDER: Well, as a matter of fact in this case, I mean they intervened, I mean that was -- you raise an interesting question there as well. But I think that the -- I think that in terms of the lien claims, yes they would be out of luck in that situation because the general contractor again is the only one that's actually in privity with the owner. And so it's the general contractor who is pursuing the claim not only on it's own behalf but also in behalf of the subs. Because it's really the subs who did the work. I mean this is a case in which 99 percent of the work of whatever it was -- was actually performed by the subs.

JUSTICE HECHT: If there are 20 subcontractors --

MR. ALEXANDER: Yes.

JUSTICE HECHT: -- one of them says, well I -- whatever the other 19 did, I did mine.

MR. ALEXANDER: Right.

JUSTICE HECHT: And the general contractor only recovered a fraction of what he thought was due on the project but I'm doing what I put on the property, which say, we will make it easy, was all equipment so it is just sitting there. So he still has a claim against the owner.

MR. ALEXANDER: Well, actually at that point -- and maybe this -- now. Now, I have finally figured it out. Sorry it took me so long. But really the claim would be against the general contractor.

JUSTICE HECHT: Well, but he still has a lien.

MR. ALEXANDER: He still has a lien but -- but -- but in that situation and this is why you'd have the separate action, I mean this gets back to your point. You may have a situation where the sub, he says, look, I did all the work and really the only reason you got $10,000 is either you screwed up prosecuting the lawsuit or really it was because of you're delay general contractor in the critical path method. That's what caused everything so I want my money. I want my money. And in that situation, what would happen in the second lawsuit would be -- they would -- that would be decided. And maybe decided, okay general, you pay off this person but at the end of the day, general you are not getting a dime until everybody has paid off and at the end of the day, we're gonna get this thing resolved in a way, so if the owner walks away with a lien-free building. So that's how that would be resolved.

JUSTICE HECHT: So you're saying in that situation, that the general contractor shouldn't get the judgment whatever it was, $10,000 -- some lesser amount, if there was still all these lien claims or something because that would deprive the owner of this contract altogether. He would be making payment to the general. And he'd still be facing all these lien claims.

MR. ALEXANDER: Well, what I am saying is, in that situation, this is why we have this separate action. I agree that at the end of the day, he should be able to -- to walk away. And that's -- and that's -- that's what would be litigated in that claim. Again, it could be a situation where it could come out different ways. It could be adjudicated there that well sub you say you did all the work but you didn't. So you're not gonna get it, you know, all of your lien claim. I'm sorry. Or it could be it really did fall on the general contractor but that's where you sort that all out. And at the end of the day, the idea is as in any situation, everybody walks away, some happier than others but in the -- the long run, the subs are addressed, the general contractor addressed, and the owner addressed because they are all involved in that suit.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. And that concludes the argument for this morning.

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