

BUILDERS LIENS IN A TIGHTENING ECONOMY

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Everyone involved in British Columbia's construction industry is cautiously, sometimes anxiously, watching the outcome of the current global credit crisis on the local economy. Property owners, consultants and contractors want to make sure that funding obligations on construction projects, whether financing or progress payments, remain secure and timely. But, if invoices for work and material supplied during a project are unpaid, an effective remedy is a builders lien. A claim of lien for an outstanding sum made under the *Builders Lien Act* (BLA) is filed in the appropriate land title office against the title of the property for which a contractor provided labour, materials or both.

Conceptually, a lien is a remedy against land and improvements so that an owner cannot take advantage of the work and materials provided by others—it is intended to give those providing work, services and material an interest in the enhanced property until they are paid. A lien does not guarantee payment but it is an addition to the contractual remedies available to an unpaid contractor.

From a property owner's viewpoint, a filed lien can have an immediate and serious impact on project financing, progress payments, and the purchase and sale of a property. However, those faced with such situations do have recourse to a method to discharge a lien from title without having to pay the full amount owing, which may be in dispute. Section 24 of the BLA allows a lien to be removed from title upon sufficient security being posted in court for the payment of the claim.

This section states, in part: "The court . . . may . . . order the cancellation of the claim of lien on the giving of security satisfactory to the court." The process allows for payments to be made to other contractors and workers as well as for continued financing to be obtained on the project. The amount of the security required to be posted is typically the amount of the lien plus 10 per cent as security for costs. Section 24(3) does, however, allow for the security to be an amount less than the sum being claimed.

In a recent case, *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, the B.C. Court of Appeal set out the factors that the courts must take into account when considering whether to order security for less than the amount claimed. In this case, Fran-Car contracted with the owner, Q West, to supply and install windows and doors on a 44-unit condominium project. Fran-Car ended up filing two

builders liens: one for approximately \$1.4 million for the balance said to be owing under the contract and another for approximately \$560,000 for additional work and material (including \$312,000 of overtime). For its part, Q West brought its own claim for breach of contract (it alleged Fran-Car had \$350,000 of work left to do) and delay (alleged to be in excess of \$5 million). In this application, Q West applied for an order to discharge the liens on the payment into court of reduced security, pursuant to the BLA's Section 24(3).

In a Chambers hearing, after considering affidavit evidence from the parties on Q West's application to discharge the liens, the B.C. Supreme Court determined that \$1,250,000 was satisfactory security to post. The Court did not adjudicate the delay claims of the parties but it did hold that there was some evidence that Fran-Car was responsible for delay. However, it could not properly determine the full extent of the delay or assess the damage caused by it. In other words, the Court found that it was not plain and obvious that Q West's allegations against Fran-Car for delay would fail. The Court did not take the \$312,000 overtime claim into account when determining the reduced amount of security. Instead, it considered that the overtime charges were more akin to increased overhead and financing charges instead of relating to the price of the contract and thus were not properly part of a lien claim.

On appeal, the principal issues were the considerations that a court should take into account when ordering security less than the amount of the lien claim; in addition, there was a question of whether the security that was ordered was sufficient in the circumstances. It is important to note that, on an application to substitute security for a builders lien, a court examines the parties' affidavit evidence that is often untested by cross-examination or examination for discovery. In this case, the Court of Appeal stressed that courts should be cautious before ordering a reduced amount of security. It stated that any application for a reduction should be subject to two areas of inquiry: Are the claims advanced by each party sustainable? What is the appropriate amount of security?

The Court of Appeal set out several considerations that a judge must take into account when answering those questions. Among others, these were:

- to analyze the claims of the parties to determine if it is plain and obvious they will not succeed (a *prima facie* case will suffice)
- to not consider any unsustainable claims for fixing the appropriate amount of security
- to exercise discretion, after looking at the evidence as a whole and taking into account the BLA's objectives, in fixing the amount that is appropriate security.

In the circumstances of this particular case, the Court of Appeal determined that the Supreme Court judge, Mr. Justice Tysoe, had adopted an appropriate analysis in applying his discretion to set a reduced amount of security. The Court did, however, disagree with his decision to not take the overtime charges into account and increased the security to be posted from \$1,250,000 to \$1,500,000.

Section 24 of the Builders Lien Act provides a mechanism for a property owner to post security with a court to discharge a lien from title and thus gain some flexibility for the conduct of its business. The courts also have discretion to order security that is less than the amount being claimed in certain circumstances. While standard practice may require an owner to post the full amount of the lien (plus an amount as security for costs), it is important that potential lien claimants document and present convincing and comprehensive evidence regarding their claims in order to prevent reduced security being ordered under Section 24. From the other perspective, owners and contractors seeking to discharge a lien from title should consider whether they can make counterclaims or detail circumstances that could support such action. In these economically uncertain times, owners can definitely benefit if they have to post security that is less than the full amount of the lien claim.