

May 2006

## TECHNICAL

The Construction Lien Act is a technical, complicated statute. The jurisprudence is often contradictory – at least until it is straightened out over time. For this newsletter, we thought that we would pose questions about everyday situations and answer those questions, referring to recent cases dealing with the Act.

### Setoff

Question: Who can set off claims for debt and damages and against what can the claims be set off?

Answer: Any payer can claim setoff against the person with whom it contracted (the "payee"). However, if there are lien claimants in the construction ladder below the payee, then the setoff cannot reduce the amount owed to an amount that is less than the 10% minimum holdback. Conversely, if there are no lien claimants below the payee, the payer can claim full setoff.

Case: Landry Mechanical Services Ltd. v. J.C. Sulpher Construction Ltd. (Ont. Master's Court).

The owner properly held back 10% of the value of the work that the general performed. The general did not pay certain subs, who had registered liens, because the general claimed setoff against them. The general claimed that the subs had caused delays to the project. After setoff for its damages, the general claimed that it owed the subs nothing. The subs brought a mo-

tion to force the owner to pay to the subs the money that the owner had held back from the general. The owner did not care to whom it was to pay the money.

Section 17(3) of the Act states that in determining an amount owing under a lien, the court is to account for the monies owed to the payer "*of all outstanding debts, claims or damages, whether or not related to the improvement.*"

Had it wanted to do so, the owner could not have claimed setoff to reduce its 10% holdback because the subs, whose rights the holdback protected, had registered claims for lien. Conversely, the general, who was also a "payer", could claim full setoff against the subs because no subsubs, whom the general's holdback was to protect, had registered claims for lien. Accordingly, the Master held that the owner should pay the holdback money into an interest bearing account taken out in the name of the solicitors of either the general or the subs, to be held in trust pending the outcome of the action between the general and the subs.

### Second Crack

Question: Can a possible lien claimant, who ultimately does not register a lien, commence a trust fund action and then tie up the land by way of the registration of a certificate of pending litigation?

Answer: No way. A certificate of pending litigation is the

means by which someone who has a claim in land can register notice of an existing action to enforce its rights in or to that land. Once the certificate is registered, the owner cannot deal with the land. However, a trust fund action is not an action in which the claimant has a right in or to the land; it is merely an action in which the claimant makes a claim against trust funds.

Case: Rafat General Contractor Inc. v. 1015734 Ontario Ltd. (Ont. Superior Court of Justice)

The general did not register a claim for lien. It commenced an action for payment, claiming a breach of the trust fund provisions, and then moved for an order for the issuance of a certificate of pending litigation. The judge dismissed the motion. Either you register a claim for lien, and therefore bind the land under the provisions of the Act, or you do not. If you do not, any rights to the land are gone. We cannot imagine that the general really believed it had any chance of success on that motion.

### Overpayment

Question: What happens if a payer does not retain the full 10% for holdback? Is the payer liable for the holdback plus the amount that it overpays or is it liable for just the holdback?

Answer: It depends. If the payer pays in the face of a lien of which it had notice, then the payer could be liable for both. If the payer had no notice of a lien, then the payer is liable only for the holdback that it should have retained.

Case: Aiken Bros. Hardware Ltd. v. Sergeant (Ont. Court of Appeal)

We will use fictitious numbers for ease of example. The general performed \$1,000 worth of work on the project. The owner paid the general \$940, leaving itself \$40 less than its prescribed 10% holdback under the Act, but without knowledge that a sub was unpaid. The sub then registered a claim for lien. The general first paid the actual holdback of \$60 into court and then paid an additional \$40 into court. Accordingly, the general ultimately paid the money that it initially ought to have held back.

The sub claimed that the owner was liable for \$140 (i.e. the money that it ought to have held back plus the \$40 overpayment to the general).

The motion judge held that the owner was only liable to pay \$100. The Divisional Court, by a 2-1 majority, overturned that decision. However, the Ontario Court of Appeal reversed the Divisional Court and reinstated the motion judge's decision.

The Court of Appeal held that the owner, who had no contract with the sub, owed the sub an obligation only under the provisions of the Act. The Court relied on section 23(2) of the Act, which states: "*Where the defaulting payer is the contractor, the owner's personal liability to a lien claimant ... does not exceed the holdbacks the owner is required to retain.*" Since the owner is liable only to retain 10%, assuming no notice of lien, the owner in this case was only liable for \$100. Of course, the owner's exuberance, in paying

the general \$40 more than it ought to have paid, cost the owner an extra \$40. However, it cost only an extra \$40, not an extra \$80.

## Improper Lien

Question: What happens when a lien claimant registers a claim for lien that is entirely improper?

Answer: Who knows? It depends on the circumstances. We have reported on a number of scenarios and they all have different outcomes.

Case: JDM Developments Inc. v. J. Stollar Construction Ltd. (Ontario Superior Court of Justice).

Upon motion, a judge vacated the claim for lien of a lien claimant, but allowed the action to continue as an ordi-

nary action. The lien was held invalid under convoluted facts with which we shall not bore you. The judge refused to allow damages under section 35 of the Act (i.e. thou shall not register an improper or excessive lien) because the defendant did not demonstrate that it suffered any damages. However, the judge allowed the defendant substantial indemnity costs regarding the motion to discharge the lien. The judge held that the defendants had acted reasonably throughout and that the lien claimant had not. Further, the lien claimant's offer to settle made it clear that the amount it was claiming had no relevance to the amount of work that it had performed on the project.

The judge fixed the costs at \$40,000 for preparation and attendance on two motions. It was less than the \$47,000 that the defendant had claimed, but it was still a significant amount.

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