

## ● Construction Law Advisory

Date November 30, 2010

Subject **BC Supreme Court Reaffirms Strict Interpretation of Lien Claims in the Province**  
*W Redevelopment Group Inc v Allan Window Technologies Inc. (2010 BCSC 1601)*

In this recent BC Supreme Court decision involving multiple lien claims on the new Woodward's development in downtown Vancouver, the court again reaffirmed the strict nature and requirements when filing liens in British Columbia under the *Builders Lien Act* and what amount of security is required to cancel liens from title pursuant to s.24 of the Act.

### Facts

The respondent, Allan, was a subcontractor on the project claiming a total of 8 builders liens for work and material supplied on the project for a total value of \$2,050,257.12; what Allan claimed was the amount they had not been paid under their various subcontracts. The general contractor and applicant, W Redevelopment, sought to have the liens discharged from title on grounds that they were extinguished by the passage of time, that they did not relate to work done against the strata lots to which they were filed or alternatively that the Liens were vexatious, frivolous or an abuse of process due to Allan's continued refusal to remove them from title after acknowledging they were attached to incorrect parcels of land and that one of the liens, an omnibus lien for the entire amount owed, was a clear duplication.

The matter was further complicated by the fact that two sets of completion certificates existed, one issued between July 9, 2009 and January 20, 2010 while the other set was issued on February 11 and March 12, 2010. This occurred because the contract stipulated that the normal payment certifier who acted as the project director could be replaced temporarily by another representative of W Redevelopment if not available and was so replaced by the parties requiring certificates of completion.

### Time Requirements under the Act

The trial judge reaffirmed the strict application of timelines to lien claims pursuant to ss.20, 22, 24 and 25 of the Act. Under the Act, such a timeframe would extend for 45 days after the earliest of:

- 1) Actual substantial completion of the head contract (determined by the 3%2%1% formula based on the cost of work remaining to be done);
- 2) Termination of the head contract;
- 3) Abandonment of the head contract;
- 4) Issuance of a (proper) certificate of completion for any subcontract under which the lien claimant is claiming; and
- 5) For strata lots only: the date the strata lot is sold by the developer or is occupied.

Because the first set of certificates of completion were deemed defective for failing to include a legal description of the land affected by the improvement, failing to identify the specific Allan subcontract or any subcontracts to which they related and for the failure to post notices of such certificates of completion at a prominent place on the improvement in the prescribed form, the respondent was permitted to rely on the second set of certificates. Nevertheless, the payment certifier's evidence indicated that at least 2 of the subcontracts had been completed prior to 45 days before the filing of the liens evidenced by the occupancy permits granted by the City of Vancouver and pronounced that those claims were therefore extinguished by the effluxion of time.

#### **Duplication of the Lien Amount**

The omnibus lien filed on March 26, 2010, three days before the 7 distinct liens were filed, represented the entire amount of the lien claims (\$2,050,257.12) and duplicated the claim consisting of the other 7 filed liens. Consequently, the total amount of lien claims was double the amount claimed by Allan for work done and material supplied however because the duplicate filing was not done to compel payment or extorting a settlement of claim, the applicant suffered no prejudice and the trial judge ordered the omnibus lien to be discharged after payment of a nominal amount of security in the sum of \$1 to the court pursuant to s.24 of the Act.

#### **Incorrect Filing**

The respondent admitted that some of the liens had been filed against incorrect parcels of land (strata lots) on which no work had been completed and the trial judge summarily discharged such liens from title of those parcels.

#### **Security for Cancellation**

In determining the amount of security required to discharge the liens, the trial judge commented that the test only requires Allan to establish a prima facie case to support the claims. For the 5 remaining liens amounting to \$1,746,239.50, sufficient evidence was brought to show a prima facie case of the work being completed and the amount being outstanding to Allan causing the trial judge to order the full amount of the liens to be paid into court pursuant to s.24 of the Act. The judge did not allow the applicant to pay the far lesser amount as security determined pursuant to the *Strata Property Act* proposed by the applicant since that Act was intended to protect subsequent owner of properties from lien claims rather than owner-developers such as W Redevelopment was determined to be.

#### **Industry Effects**

The BC Supreme Court has continually applied strict interpretation to lien legislation in the Province, requiring contractors to file liens within the allotted 45 days after 'completion' of the work. Claimants must consequently be proactive in making sure they are familiar with the system of claims under the BLA, checking for recent posts on the site of the improvement and acting quickly in the event they think

- they may have a lien claim. The court has inferred that liens filed without a vexatious or collateral purpose other than to get paid for work done or materials supplied will be dealt with judicially and no penalty costs will be ordered even if liens filed are done so incorrectly. **The bottom line for contractors in BC is to file liens as soon as payment seems in jeopardy and without undue concern for over-inclusiveness.**

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