Fleury, Comery LLP
Barristers & Solicitors

CONSTRUCTION LIENS: SOME ISSUES

The construction lien remedy was introduced over 100 years ago to make it simpler and cheaper for tradespeople to get paid for their work. From a review of the issues below, one may legitimately ask if the legislation now fulfills its original purpose.

New Home Buyer Exception

A good proportion of construction work is the building of new housing. In our society, we want to encourage the building of new homes, so it has been decided that new home buyers receive their home free and clear of any lien claims. This means that if the new home sale is closed before the lien period has expired, then the trades people and suppliers cannot thereafter lien the premises.

General Liens

It often happens that a claimant supplies small amounts of service or materials, but for several premises, such as in a new housing development. The *Construction Lien Act* allows for a "general lien", whereby the entire amount owing can be claimed against any one of those premises--unless the contract with the general contractor provided that lien rights expire on a lot-by-lot basis. Further complexities arise if some claimants have a general lien against certain premises, and some claimants have only their own lien against that particular building.

Sheltering

Some potential claimants believe that their claim is protected when another person issues a lien claim. They believe they can "shelter" under that other person's lien. The best general advice in regard to sheltering is not to rely on it. For example, sheltering does not protect a lien for which a claim for lien has not been registered.

Trust Remedies

In 1983 a new remedy was created by which money received in the construction process is impressed with a trust for the persons below on the payment pyramid. For example, the owner receives mortgage funds which are impressed with the trust for the benefit of the contractor. Similarly, the contractor or subcontractor, when they receive money from the person above them, must hold that money in trust for their own suppliers and subcontractors. To be protected for this remedy, one does not need to register a construction lien. A breach of trust action is in fact becoming a popular alternative to a construction lien claim.

Holdbacks

Every payer in a construction situation is required to hold back 10% of the "price" of services or materials as they are supplied, until 45 days after the last supply. This seems fairly straightforward but in practice, becomes quite complex. In nonpayment situations, there is almost always a counterclaim by the payer against the payee, so that rules had to be made that there could be no setoff against the holdback, even if the counterclaim exceeded the amount of that holdback.

Tenancies

If a commercial tenant does renovations on leased premises, the landlord is not usually considered an "owner" whose interest is subject to a construction lien. The lien claimant's only lien is on the "leasehold interest" of the tenant. If the work is done at the request of the landlord, however, the landlord might be found to be an "owner". This issue is frequently the source of controversy and litigation.

Timing Issues

The date of last supply is frequently a disputed issue. The trades person quite often claims that his minor cleanup work, performed long after he has really left the job, preserves his lien. The owner usually puts the supplier or trades person to the strict proof of these dates. We strongly recommend to our clients that a contemporary diary of their work be maintained for all construction work.

Legal Costs

The maximum amount that can be recovered for legal costs in a construction lien claim is 25% of the amount recovered. This can be quite discouraging for minor lien claims.

The discussion above touches on only some of the issues that arise under the *Construction Lien Act*. When you consult our law firm regarding a potential lien claim, we will review the claim to determine whether it is indeed simple enough to make a lien claim worthwhile, or whether some of the alternative remedies, such as Small Claims Court or a breach of trust claim, would be more suitable in the circumstances.

©FLEURY, COMERY
gem\office\#25constructionliensomeissues.memo rev Nov/10

Edward R. Fleury, Q.C. ◆ William F. Comery, Q.C. (1930 - 2008)
Gregory E. McConnell, M.A., LL.B. ◆ Stephen P. Fleury, B.Sc., LL.B ◆ Peter J. Sialtsis, B.B.A., B.A., LL.B..

215 Morrish Road, Suite 104, Scarborough, Ontario, M1C 1E9
Telephone (416) 282-5754 Telecopier (416) 282-9906 E-mail *thefirm@fleurcom.on.ca*