

CANADA / JUDGMENT

W Redevelopment Group, Inc. v. Allan Window Technologies Inc.

2010 BCSC 1601

COURT

Supreme Court of British Columbia

DECIDED

15 November 2010

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2010 BCSC 1601 W Redevelopment Group, Inc. v. Allan Window Technologies Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

W Redevelopment Group, Inc. v. Allan Window Technologies Inc.,

2010 BCSC 1601

Date: 20101115

Docket: S103259

Registry: Vancouver

Between:

W Redevelopment Group, Inc.

Petitioner

And

Allan Window Technologies Inc.

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioner:

Daniel S. Parlow

Counsel for the Respondent:

George A. Jones

Place and Date of Hearing:

Vancouver, B.C.

August 11 and 13, 2010

Place and Date of Judgment:

Vancouver, B.C.

November 15, 2010

INTRODUCTION

- [1] The petitioner W Redevelopment Group, Inc. applies pursuant to ss. 24 and 25 of the Builders Lien Act, S.B.C. 1997, c.45 ("BLA") and s. 90 of the Strata Property Act, S.B.C. 1998, c.43 ("SPA") for the cancellation of eight liens filed by the respondent Allan Window Technologies Inc. ("Allan") against title to properties comprising the Woodward's redevelopment project in Vancouver, British Columbia.
- [2] The petitioner is the head contractor for the Woodward's redevelopment project, which consists of lands and four buildings known respectively as the Abbott Tower, the Heritage Building, the W Tower, and the Hastings Building, and includes commercial, residential, office and educational uses.
- [3] Allan is a subcontractor engaged by the petitioner under seven stipulated price subcontracts each dated March 19, 2007 (referred to collectively as the Allan Subcontracts), each of which covered a defined portion of the Woodward's redevelopment. The Allan Subcontracts were for the supply and installation of windows, doors, and related materials.
- [4] Allan has filed a total of eight builders liens relating to its claims for work done and materials supplied to the Woodward's redevelopment. On March 26, 2010, the respondent filed a lien for \$2,050,257.12 representing the full amount of its claims in respect of all phases of the Woodward's redevelopment project (the "omnibus lien"). On March 29, 2010, Allan filed seven builders liens for work performed and materials supplied under each of its seven subcontracts. The total amount claimed under those liens is again \$2,050,257.12.
- [5] An unusual feature of this application is that it involves two sets of certificates of completion relating the work performed and materials supplied by the respondent under the Allan Subcontracts. The first set was issued by the petitioner's primary payment certifier, Mr. David Leung, at the owner's request. The second group of certificates was issued by the petitioner's site representative, Mr. Houtan Raffii, an alternate payment certifier, at Allan's request. The petitioner relies on the earlier certificates of completion in support of its submission that four of seven of Allan's individual liens are extinguished by effluxion of time. The petitioner also asserts that the filing of the omnibus lien and the seven individual

liens is duplicative, vexatious, and an abuse of process, and that some claims of lien were incorrectly filed against components of the Woodward's redevelopment project to which they do not relate.

RELIEF SOUGHT

[6] The petitioner applies for the following relief:

- (a) a declaration pursuant to s. 25 of the BLA, that Allan's claims for lien filed in the New Westminster land titles office ("Lien Claims") against lands and premises comprising the Woodward's redevelopment, together with substituted security therefor, be cancelled on one or more of the following grounds:
 - i. the liens were extinguished before the Lien Claims were filed;
 - ii. the Lien Claims relate to work allegedly done and materials allegedly supplied against lands other than parcels against which they were filed;
 - iii. the Lien Claims are vexatious, frivolous or an abuse of process;
 - (b) alternatively, an order that the Lien Claims, together with substituted security therefor be cancelled pursuant to s. 24 of the BLA upon the petitioner providing sufficient security for the payment of the claims in an amount considered satisfactory by the court;
 - (c) with respect to the Lien Claims charging market housing strata lots located in the W Tower and the Abbott Tower, a declaration that the Lien Claims, together with substituted security therefor, be cancelled from title to each strata lot set out in Appendix B to the petition, pursuant to s. 90 of the SPA, upon the petitioner paying into court that amount of money that is a particular strata lot's proportionate share of an amount considered to be sufficient security in respect of each Lien Claim amount, as determined under s. 99(2) of the SPA.
 - (d) an order that the monies currently held in trust by Kornfeld Mackoff Silber LLP, pursuant to agreements between counsel for the petitioner and counsel for Allan (the Security Agreements) be released from trust or alternatively, be paid into court in reduction of the lien amounts, pursuant to para. 3(a) of the Security Agreements.
- [7] Counsel advise that with the respondent's consent, the owner of the strata lots, 101 West Hastings Holdings Ltd., joins with the petitioner in bringing the application for relief under s. 90 of the SPA. However, 101 West Hastings Holdings Ltd. has not been added as a party to this petition. The petitioner, rather than the owner of the strata lots, proposes to pay any security ordered for the removal of the liens from the strata lots.

ISSUES

[8] This proceeding raises the following issues:

- (a) With respect to the petitioner's application under s. 25 of the BLA:

- (i) Were any of Allan's liens extinguished by effluxion of time?
- (ii) Are any of Allan's claims of lien vexatious, frivolous or an abuse of process?
- (iii) Should any of Allan's claims of lien be cancelled because they do not relate to the lands against which they are filed?
- (b) Alternatively, if any of Allan's claims of lien are cancelled pursuant to s. 24 of the BLA, what is sufficient security for the cancellation of those liens?
- (c) With respect to the Woodward's Tower and Abbott Tower market housing strata lots, should the court exercise its discretion under s. 90(2) of the SPA to order Allan's claims of lien with respect to those properties removed from title on payment of security determined under s. 99(2) of the SPA?
- (d) What order should be made respecting the funds held in trust by the petitioner's solicitors pursuant to the Security Agreements?

FACTS

- [9] It is necessary to set out the background to this application in some detail. In doing so, I have incorporated in these reasons a number of the tables prepared by the petitioner which show how the Allan Subcontracts correspond to the head contracts; identify the first set of certificates issued by the petitioner and their relationship to the Allan Subcontracts; and show the properties charged by the various liens.
- [10] The Woodward's redevelopment involved the creation and registration of 11 air space parcels through Air Space Plans BCP33982 and BCP41793 filed in the Vancouver Land Title Office.
- [11] Air Space Parcels 6 and 10 were strata titled and marketed for sale as market priced condominium units within the Abbott and W Buildings respectively. These strata units constitute the "market housing" component of the Woodward's redevelopment. The various Air Space Parcels are referred to as ASP's throughout these reasons.

Head Contracts

- [12] Prior to registration of Air Space Plans BCP33982 and BCP41793, or the strata plans created from ASPs 6 and 10, the petitioner as head contractor entered into six head contracts (collectively, the Head Contracts) with the original owner, 101 West Hastings Holdings Ltd.
- [13] The petitioner and 101 West Hastings Holdings Ltd. are related companies, with common officers and directors.
- [14] Five of those Head Contracts relate to work done and materials supplied by the petitioner in respect of the following portions of the redevelopment:

- (a) Contract for construction of non-market housing for singles located in the Hastings Building which was registered as ASP 2. Title to ASP 2 was subsequently transferred to the City of Vancouver. All of the work done and materials supplied under this contract relate to ASP 2 (the Singles Non-Market Head Contract).
 - (b) Contract for construction of non-market housing for families located in the Abbott Building, which was registered as ASP 3. Again, title to ASP 3 was subsequently transferred to the City of Vancouver. All work done and materials supplied under this contract relate to ASP 3 (the Family Non-Market Head Contract).
 - (c) Contract for construction of the child care facility located within the Heritage Building, which was registered as ASP 9 pursuant to a Heritage Revitalization Agreement entered into with the City of Vancouver. Title to ASP 9 has remained with 101 West Hastings Holdings Ltd. All of the work done and materials supplied under this contract relate to ASP 9 (the Child Care Head Contract).
 - (d) Two contracts for construction of a fine arts campus at Simon Fraser University located in the Hastings Building, which was registered as ASP 1. Title to ASP 1 was transferred to Simon Fraser University. All work done and materials supplied under these two contracts relate to ASP 1 (respectively, the SFU Shell Head Contract and the SFU Improvements Head Contract).
- [15] The sixth Head Contract (the Market Head Contract) related to the balance of the construction for the Woodward's redevelopment. This included market housing located throughout the W Building, registered as ASP 10 and strata titled as previously described; market housing located in the upper portion of the Abbott Building, registered as ASP 6 and strata titled as previously described; retail and office space in the Abbott Building registered as ASPs 11, 4 and 5, and retail and office space in the Heritage Building registered as ASPs 11, 7 and 8.

[16] The Allan Subcontracts correspond to the Head Contracts as follows:

Allan Subcontract

Within Scope of

CS484-005 "W Tower"

Market Head Contract

CS485-009 "Abbott Tower Market Housing, Office & Commercial Retail Units ("CRU") - 100 West Cordova Street"

Market Head Contract

CS485-800 "Abbott Tower Non-Market"

Family Non-Market Head Contract

CS486-007 "Hastings Building SFU and CRU"

SFU Shell Head Contract (SFU)

Market Head Contract (CRU)

CS486-006 "Hastings Building Non-Market Housing"

Singles Non-Market Head Contract

SC487-007 "Heritage Building Basement, 1st to 5th Flrs"

Market Head Contract

SC487-006 "Heritage Building - 6th fl daycare"

Daycare Head Contract

Issuance of Certificates of Completion relied upon by Petitioner

- [17] Each of the Allan Subcontracts provides that a representative of the petitioner is the payment certifier as defined in the BLA, and that if subcontract work is determined by the payment certifier to be substantially performed, the payment certifier will issue a certificate of completion.
- [18] The petitioner's representative who normally served as the payment certifier was project director David Leung. When Mr. Leung was not available, another petitioner's representative would act as payment certifier.
- [19] As major components of the Woodward's redevelopment were completed, the petitioner requested that the owner issue certificates of completion in relation to all subcontracts entered into by the petitioner for the completed component. The owner then requested that the payment certifier issue a certificate of completion relating to those subcontracts.
- [20] Mr. Leung has deposed that upon receiving such requests, he, or any substitute payment certifier would determine whether the subcontracts for a particular component of the Woodward's redevelopment had been "completed" within the meaning of the BLA. If so, he would issue a certificate of completion.
- [21] Upon the issuance of certificates of completion for the Woodward's redevelopment, the petitioner's construction manager, Intertech Construction Managers 2005 Ltd. ("ITC") posted the certificates of completion on site and delivered copies to any subcontractors who had requested them.
- [22] Although ITC posted these certificates on site, neither the petitioner nor ITC delivered copies of these certificates to Allan, or took any other steps to notify Allan of the issuance of the certificates of completion signed by Mr. Leung.

[23] Mr. Leung, or in one case a substitute other than Mr. Raffi , issued and ITC posted, certificates of completion relating to the following components of the Woodward redevelopment:

Certificate Issued for

Completion Date

Certificates of Completion Issuance/ Posting Dates

Within Allan Subcontract(s)

Corresponding Head Contract(s)

Phase (W Building and P1 and P2 Parking)

July 2, 2009

July 2, 2009

CS484-005 "W Tower"

Market

W Building - units 1010, 1403, 2306, 2910, 3503) - Sky Suites

Oct. 16, 2009

Oct. 16, 2009

CS484-005 "W Tower"

Market

Abbott Building - Levels 4 to 29

Nov. 3, 2009

Nov. 3, 2009

CS484-009 "Abbott Tower (Market housing, office & CRU)"

CS485-008 "Abbott Tower Non-Market"

Market

Family Non-Market

Abbott Building - PH's 4-8, Level 4 Amenity

Dec. 16, 2009

Jan. 20, 2010

CS484-009 "Abbott Tower (Market Housing, office & CRU)"

Market

W Building - Amenity and CRU's (Shell)

Dec. 16, 2009

Jan. 20, 2010

CS4894-005 "W Tower"

Market

London Drugs

Dec. 16, 2009

Jan. 20, 2010

CS486-007 "Hastings Building SFU & CRU"

Market

Abbott Building - Level 2 - Public Link & Pedestrian Bridge; Levels 2, 3 and CRU's (Shell)

Dec. 16, 2009

Jan. 20, 2010

CS485-009 "Abbott Tower (Market housing, office & CRU)"

Market

Nesters - CRU (Shell)

Dec. 16, 2009

Jan. 20, 2010

CS485-009 "Abbott Tower (Market) housing, office & CRU)"

Market

Abbott Building PH's 1, 2, 3

Jan. 8, 2010

Jan. 20, 2010

CS485-009 "Abbott Tower (Market housing, office & CRU)"

Market

Hastings Building Singles Non-Market

Jan. 15, 2010

Jan. 20, 2010

CS486-006 "Hastings Building Non-Market Housing"

Singles Non-Market

[24] Although each of the certificates described in the preceding table related to work falling within in the corresponding Allan subcontract shown in the table, the certificates did not identify the particular subcontracts to which they related, or name the parties to the subcontracts.

Allan's Applications for Payment upon Completion of Subcontracts

[25] Allan submitted progress applications to the petitioner or to its construction manager, ITC as follows:

- (a) invoice dated October 25, 2009 relating to Allan Subcontract CS484-005 "W Tower" showing the subcontract, with change orders, to be 100% complete;
- (b) invoice dated October 25, 2009 relating to Allan Subcontract CS485-008 "Abbott Tower Non-Market" showing the subcontract to be 100% complete;
- (c) invoice dated November 23, 2009 relating to Allan Subcontract CS486-006 "Hastings Non-Market" showing the subcontract, with change orders to be 100% complete;
- (d) invoice dated December 22, 2009 relating to Allan Subcontract CS485-009 "Abbott Tower (Market Housing & CRU)" showing the subcontract with change orders, to be 100% complete.

[26] Allan billed a total of \$11,769,906.89, inclusive of GST on its seven subcontracts and has received payments totalling \$9,719,649.77, inclusive of GST. Allan claims an unpaid balance owing of \$2,050,257.12.

Issuance of Second set of Certificates of Completion relating to Allan Subcontracts

[27] The respondent maintains that since June 2009 it attempted to obtain from both ITC and the petitioner confirmation of completion of the project and the time from which the lien holdback period would begin to run. The respondent wrote to the petitioner on July 7, 2009, January 2, 2010 and January 21, 2010 asserting that it had substantially completed its subcontracts with respect to the W Tower, the Abbott Tower, and the Hastings SFU and Non-Market Housing components, and requesting that the petitioner establish dates for substantial performance of each project.

[28] By its letter of July 7, 2009, Allan requested the establishment of July 6, 2009 as the date of substantial performance for the W Tower. At this stage, Allan had only completed the first of three phases of the work for which it was responsible under its subcontract CS484-005. On July 2, 2009, Mr. Leung had issued a certificate of completion for Phase 1 of the W Tower and P1 and P2 parking. Allan's subcontract required the respondent to supply and install doors,

windows, and related materials for two more phases of the W Tower. Phase 2 consisted of the Sky Suites (Units 1010, 1403, 2306, 2910 and 3503). Phase 3 included the amenity levels (top two floors), and the shell for the ground floor commercial retail units located in the W Tower. Mr. Leung issued certificates of completion for these phases on October 16, 2009 and January 20, 2010, respectively.

- [29] As of July 7, 2009, with two phases of the work yet to be completed, Allan had not completed its subcontract for the W Tower.
- [30] On October 22, 2009, representatives of the respondent, the petitioner, and ITC's construction manager, Mr. Deanu Constantinescu, met at ITC's site office to discuss deficiencies, billings, payments and certificates of completion. Mr. Houtan Raffii, rather than Mr. Leung, was the petitioner's representative at that meeting. One of the topics at the October 22 meeting was the release of the W Tower certificate of completion. No one told Allan's representative that two certificates of completion had previously been issued relating to particular phases of the W Tower project.
- [31] On November 7, 2009, Mr. Constantinescu wrote to the respondent summarizing the meeting of October 22, 2009. In that correspondence, Mr. Constantinescu noted that the petitioner was "to formally apply for W Tower's certificate of completion release". Again, Mr. Constantinescu made no reference to the certificates of completion previously issued respecting the first two phases of the W Tower. However, on October 25, 2009, Allan had submitted an invoice to the petitioner showing its subcontract for the W Tower to be 100% complete. By November 7, the petitioner, ITC, and the respondent must all have understood that Allan was requesting certification of substantial completion of the whole of its work under the W Tower subcontract.
- [32] By its letter of January 2, 2010, copied to Mr. Leung, Allan requested a "certificate of substantial completion" for "Woodwards Abbott Towers - both Market and Non-Market housings". Allan performed work at the Abbott Tower under its subcontracts CS485-009 Abbott Tower (Market Housing, Office & CRU) which included Market housing and floors 1 to 4 (commercial and office space), and under subcontract CS485-008 (Abbott Tower Non-Market) covering floors 4 to 10. On November 3, 2009, Mr. Leung issued a certificate of completion for floors 4 to 29 of the Abbott Tower. On January 20, 2010, he issued certificates of completion for all of the remaining portions of the Abbott Tower.
- [33] Mr. Leung also received a copy of the respondent's letter of January 21, 2010 by which Allan requested a certification of substantial completion of "Woodwards Hastings - both SFU and Non-Market housings". Again, this request related to two Allan subcontracts, CS486-006 Hastings Building Non-Market housing, and CS486-007 Hastings Building SFU and CRU.

- [34] On January 20, 2010, Mr. Leung had issued a certificate of completion for the Hastings Building Singles Non-Market, and a certificate of completion for London Drugs, which was the CRU portion of Allan's subcontract CS486-007. He did not issue a certificate of completion for the SFU portion of the Hastings Building because it was not complete at that time.
- [35] On February 22, 2010 Allan received four certificates of completion, each issued on behalf of the petitioner on February 11, 2010, relating to four of its subcontracts: CS485-009 Abbott Tower Market Housing, Office & CRU; CS485-008, Abbott Tower Non-Market; CS486-006, Hastings Building Non-Market Housing, and CS486-007, Hastings Building SFU & CRU. On March 12, 2010, the petitioner issued a fifth certificate of completion, in respect of Allan's subcontract CS 484-005, for the W Tower.
- [36] Each of the five certificates of completion issued on February 11 and March 12, 2010 identified Mr. Houtan Raffii, a representative of the petitioner, as the payment certifier. The sixth certificate of completion, issued on April 29, 2010 relates to the Heritage Building basement and floors 1 to 5, and 6, and the Heritage Building daycare.
- [37] During February 2010, the respondent made a number of unsuccessful attempts to speak with Mr. Leung, Mr. Constantinescu and Mr. Raffii about resolving the amounts it claimed to be owed under the Allan Subcontracts. The dispute remained unresolved. Allan instructed its solicitor to file a builders lien for the full amount of its claim.

Allan's Claims of Lien

- [38] On March 26, 2010, Allan registered builders lien number BB1458760, the omnibus lien, against parcels ASP 1 to 5, 7 to 9, and 11. The respondent also registered the omnibus lien against strata plan BCS3528, lots 12, 15, 18, 19, 27 to 29, 46, 49, 56, 66, 114, 168, 211 to 212, 222, 250, 262, 344 and 363, each of which are market housing units located in the W Tower; and against strata plan BCS3625, lots 5, 103, 115, 120, 137 to 138, 146, 148, 150, 155 to 157 and 165, each of which are market housing units located in the Abbott Tower.

- [39] In addition, Allan registered the following liens on March 29, 2010:

Instrument No.

Registered on:

Amount Claimed

Registered Against Parcels

BB1251057

March 29, 2010

\$766,566.27

ASP 3 & 11

Strata Plan BCS3528 Lots 12, 15, 18-19, 27-29, 46, 49, 56, 66, 114, 168, 211-212, 222, 250, 262, 344, 363

Strata Plan BCS3625

Lots 5, 103, 115, 120, 137-138, 146, 148, 150, 155-157, 165

BB1251058

March 29, 2010

\$303,209.64

ASP 7-9, 11

BB1251059

March 29, 2010

\$42,280.14

ASP 7-9, 11

BB047376

March 29, 2010

\$408,091.22

ASP 11

Strata Plan BCS3625

Lots 5, 103, 115, 120, 137-138, 146, 148, 150, 155-157, 165

BB047377

March 29, 2010

\$109,288.68

ASP 11

BB047378

March 29, 2010

\$194,728.90

ASP 11

BB047379

March 29, 2010

\$226,092.28

ASP 1-2, 11

[40] Allan filed its liens more than 45 days after the issuance of all of the certificates issued by Mr. Leung between July 9, 2009 and January 20, 2010, but no later than 45 days after the certificates of completion issued by Mr. Houtan Raffii on February 11 and March 12, 2010.

Duplication of Allan Liens

[41] The omnibus lien filed on March 26, 2010 is for \$2,050,257.13, which is the same as the total amount claimed by Allan for work performed and materials supplied to the petitioner under its seven subcontracts in the seven liens filed on March 29, 2010.

[42] Despite the petitioner's requests, Allan has declined to remove the omnibus lien from title to all of the parcels comprising the Woodward's redevelopment.

Allan Liens Filed Against Properties Not Included in Allan Subcontracts

[43] Mr. Leung has reviewed each Allan Subcontract and the amounts claimed in the Allan liens. He has identified parcels against which particular lien claims were incorrectly registered. The respondent does not take issue with Mr. Leung's analysis as set forth in the following table:

Instrument No.

Allan Subcontract:

Registered Against Parcels

Parcels Not Related to the Subcontract

BB1251057

CS484-005 - "W Tower";

ASP 3 & 11

Strata Plan BCS3528 Lots 12, 15, 18-19, 27-29, 46, 49, 56, 66, 114, 168, 211-212, 222, 250, 262, 344, 363

Strata Plan BCS3625 Lots 5, 103, 115, 120, 137-138, 146, 148, 150, 155-157, 165

ASP 3

Strata Plan BCS3625 Lots 5, 103, 115, 120, 137-138, 146, 148, 150, 155-157, 165

BB1251059

SC487-006 "Heritage Building - 6th fl daycare"

ASP 7-9, 11

ASP 7-8, 11

BB047377

CS486-006 "Hastings Building Non-Market Housing"

ASP 11

ASP 11

BB047379

CS486-007 "Hastings Building SFU & CRU)"

ASP 1-2, 11

ASP 1

[44] From time to time, liens have been released from both unrelated parcels and related parcels when the petitioner has posted security under its Security Agreements with the respondent. However, at the time of hearing, Builders Lien BB1251057 remained registered against the lots in strata plan BCS3625 located in the Abbott Tower, which are not related to Allan's W Tower subcontract, despite the petitioner's demands for the discharge of the liens from all unrelated properties.

Security Agreements

[45] Pursuant to the Security Agreements made between the petitioner and Allan, the petitioner has paid into the trust account of its solicitors, Kornfeld Mackoff Silber LLP a total of \$1,272,214.59 in order to secure the release of Lien Claims from the parcels specified in the Security Agreements, and to allow progress draws or transfers of title to those parcels.

[46] The petitioner paid into trust the total amount claimed under all of Allan's subcontracts other than the two subcontracts relating to the W Tower and the Abbott Tower market housing. The amounts claimed by Allan under the W Tower and Abbott Tower market housing subcontracts are, respectively, \$766,566.30 and \$408,091.22. With respect to those two subcontracts, the petitioner takes the position that the amount of security should comply with s. 90(1) of the SPA.

[47] Under the Security Agreements the petitioner's solicitors undertook to hold the funds paid into trust until any of the following events occur:

...

(ii) an order is obtained in the Supreme Court of British Columbia, granting or directing payment, release or other disposition of the Security, with no appeal having been commenced and the appeal period having expired, or if such order is appealed, such appeal is dismissed or disposed of; or

(iii) an order from the Supreme Court of British Columbia is made ordering alternate or substitute security for the liens in a form and amount acceptable to the court.

LEGISLATIVE FRAMEWORK

[48] Section 1 of the BLA contains the following definitions relevant to this application:

certificate of completion" means a certificate under section 7 stating that work under a contract or subcontract has been completed and includes an order made under section 7 (5);

"completed", if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed;

notice of certification of completion" means a notice in the prescribed form stating that a certificate of completion or a court order to the same effect has been issued;

- (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
- (a) 3% of the first \$500 000 of the contract price,
 - (b) 2% of the next \$500 000 of the contract price, and
 - (c) 1% of the balance of the contract price.
- (3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

[49] Section 7 of the Act provides for the issuance of certificates of completion:

7 (1) In this section, "payment certifier" means

- (a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or

...

- (2) A lien holder in respect of an improvement may, by making a written request, require that the payment certifier for the improvement deliver to the lien holder
 - (a) particulars of any certificate of completion issued under this section before and after the request, or
 - (b) particulars of certificates of completion issued, before and after the request, with respect to stipulated contracts or subcontracts.

- (3) On the request of a contractor or subcontractor, the payment certifier must, within 10 days after the date of the request, determine whether the contract or subcontract has been completed and, if the payment certifier determines that it has been completed, the payment certifier must issue a certificate of completion.
- (4) If a certificate of completion is issued, the payment certifier must, within 7 days,
 - (a) deliver a copy of the certificate to the owner, the head contractor, if any, and the person at whose request the certificate was issued,
 - (b) deliver a notice of certification of completion to all persons who submitted a request under subsection (2) in relation to the contract or subcontract, and
 - (c) post, in a prominent place on the improvement, a notice of certification of completion.
- (5) If the payment certifier fails or refuses to issue a certificate of completion as provided in subsection (3), the court may, on application by the person who requested the certificate and on being satisfied that the contract or subcontract has been completed, make an order declaring that the contract or subcontract has been completed.

...

- (10) A certificate of completion may be in the prescribed form and, if it is in the prescribed form, it is sufficient to comply with this Act.

[50] The following provisions of sections 20, 22, 24 and 25 of the BLA are relevant to this application:

20 (1) If a certificate of completion has been issued with respect to a contract or subcontract, the claims of lien of

- (a) the contractor or subcontractor, and
- (b) any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the certificate of completion was issued.

- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
 - (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
- (3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if
 - (a) that time would otherwise be determined with reference to the time an earlier certificate of completion was issued, or
 - (b) time had started to run under subsection (2).

- (4) On the filing of a claim of lien under this Act, the registrar or gold commissioner has no duty to inquire as to whether or not the lien claimant has complied with the time limit for filing the claim of lien.

...

22 A lien in respect of which a claim of lien is not filed in the manner and within the time provided in this Act is extinguished.

...

24 (1) A person against whose land a claim of lien has been filed, and a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land, may apply to a court to have the claim of lien cancelled on giving sufficient security for the payment of the claim.

- (2) The court hearing the application under subsection (1) may, after considering all relevant circumstances, order the cancellation of the claim of lien on the giving of security satisfactory to the court.
- (3) The value of security required under an order under subsection (2) may be less than the amount of the claim of the lien.

...

25 (1) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court, registrar or gold commissioner and the court, registrar or gold commissioner may cancel a claim of lien if satisfied that

- (a) a lien is extinguished under section 22 or 33

...

(2) An owner, contractor, subcontractor, lien claimant or agent of any of them may at any time apply to the court and the court may cancel a claim of lien if satisfied that

- (a) the claim of lien does not relate to the land against which it is filed, or
- (b) the claim of lien is vexatious, frivolous or an abuse of process.

DISCUSSION AND ANALYSIS

Were Some of Allan's Liens Extinguished by the Effluxion of Time?

[51] Because the builders lien is a statutory remedy, lien claimants must strictly comply with the time limits established under the BLA: *Marabella Pac. Const. Ltd. v. Fast Trac Bobcat & Excavating Service & Coast Aggregates Ltd.*, 2002 BCSC 803 at para. 32.

[52] The petitioner submits that all of the respondent's claims of lien were extinguished by the effluxion of time, except:

- (a) BB1251058 (SC487-007 Heritage Building Basement), in the amount of \$303,209.64;
- (b) BB1251059 (SC487-006 Heritage Building Daycare as it relates to ASP 9), in the amount of \$42,280.14;
- (c) BB047379 (CS486-007 Hastings Building SFU & CRU as it relates to ASP 2 and 11), in the amount of \$226,092.28.

[53] On March 26, 2010, Allan filed its omnibus lien. On March 29, 2010, the respondent filed the seven liens relating to each of its subcontracts with the petitioner. Each of the certificates of completion signed by Mr. Houtan Raffii on February 11 and March 12, 2010 were in the prescribed form, identified the payment certifier, certified the date of completion for the relevant Allan subcontract, provided a street address for the improvement, a brief description of the improvement, and a brief description of the subcontract, including its date and the parties to the subcontract. Each certificate of completion is accompanied by a notice of certification of completion in the prescribed form containing the warning that:

All persons entitled to claim a lien under the BLA in the performed work or supplied material in connection with or under the contract are warned that the time to file a claim of lien may be abridged and Section 20 of this Act should be consulted.

[54] Section 7(10) of the BLA is permissive in so far as it provides that a certificate of completion may be in the prescribed form and that if it is in the prescribed form, it is sufficient to comply with the Act.

[55] The prescribed form of certificate of completion contains the following information:

I..... [name of payment certifier], of [address], British

Columbia, certify that, for the purposes of the Builders Lien Act, the following contract or subcontract was completed on..... [month, day, year]:

Street address or other description of the land affected by the improvement:

Brief description of the improvement:

Brief description of the contract or subcontract, including the date of the contract and the names of the parties to it:

Signed: [signature of payment certifier]

Dated[month, day, year]

[56] In David A. Coulson, Guide to Builders' Liens in British Columbia, (Toronto: Carswell), 2010 loose-leaf ed., at pp. 56.1-57, it is suggested that a certificate, in order to comply with the BLA, should contain the information included in the prescribed form, and ought to:

1. Be in writing, and in a form which is readily understandable and identifiable as a certificate of completion;
2. State the date and place of issue;
3. Identify the payment certifier, who should sign the certificate;
4. Contain an address for service of the payment certifier;
5. Identify the location of the improvement, both by street address and legal description;
6. Include a short description of the improvement;
7. Identify the contract or subcontract to which the certificate relates, including the parties as well as the nature and date of commencement of the work; and
8. Contain the particulars of completion, including the date of completion.

[57] The respondent submits that it is entitled to rely upon the certificates of completion issued on February 11 and March 12, 2010 because they were received in response to its request, they are in the prescribed form, and comply with the BLA as required by s. 7.

[58] The respondent submits that the earlier certificates of completion relied upon by the petitioner are defective because:

- (a) they do not state the date and place of issue;
- (b) they do not identify the payment certifier who signed the certificate;
- (c) they are on the letterhead of Westbank Projects Corp., which is not the payment certifier;
- (d) they do not contain an address for service of the payment certifier;
- (e) they do not identify the location of the improvement by street address and legal description;
- (f) they do not identify the contract or subcontract to which the certificate relates.

[59] The respondent also submits that the petitioner has failed to comply with s. 7(4) of the BLA because it failed to post a notice of certification of completion, as well as the certificate of completion.

[60] In *Alterra Property Group Ltd. v. Doka Canada Ltd.*, 2008 BCSC 1880 at para. 12, Allan J. held that a document entitled "Certificate of Substantial Performance" which was not in the prescribed form, did not identify the payment certifier or his address, was not signed and dated, did not provide the date of the contract or the names of the parties, did not certify that the contract was completed on a specific date, and did not comply with the BLA.

[61] Here, each of the certificates of completion relied upon by the petitioner is in the following format:

westbank

CERTIFICATE OF COMPLETION

PROJECT NAME: __WOODWARDS REDEVELOPMENT__

DATE OF COMPLETION: JULY 2, 2009_____

In accordance with the final design drawings, field reviews and the relevant occupancy documentation from various Registered Professionals, the payment certifier, on behalf of the Client, hereby certifies that Phase 1 (the W Tower and P1 and P2 Parking) has been completed.

The date of this certification shall be the commencement of the builder's lien period. The contractor and his Subcontractors shall continue to work towards total completion of the contract during this period, provided no liens are registered. Holdback monies are due and payable one day after termination of this period.

Date of Holdback Release August 17, 2009 (being the 46th day after the date hereof).

The issuance of this Certificate does not release the Contractor or any Subcontractor from the duty of completing the work pursuant to the terms of the contract.

WESTBANK PROJECTS CORP.

Development Manager on behalf of W Redevelopment Group

Payment Certifier:

Date: July 2, 2009

[62] Each of the certificates relied upon by the petitioner does contain a brief description of the improvement, and shows the dates of completion and of issuance. Although the certificates are on Westbank Projects Corp. letterhead, the payment certifier's signature appears immediately below text which identifies Westbank Projects Corp. as the "Development Manager on behalf of W Redevelopment Group".

[63] However, none of the certificates of completion relied upon by the petitioner, other than the certificate issued November 3, 2009 with respect to the Abbott Tower, levels 4 to 29, contains either a street address or legal description of the land affected by the improvement. More importantly, none of these certificates identifies the particular Allan subcontract, or subcontracts to which it relates. None of these certificates identifies the parties to the contract or subcontract, or the date of commencement of the work. While each certificate contains the handwritten signature of the payment certifier, his name is not printed or otherwise clearly identified anywhere in the certificate. Because these certificates do not identify the subcontracts to which they relate, do not name the parties to the subcontracts, do not state the date of commencement of the work, or the date of the subcontracts, they do not comply with the BLA.

- [64] Section 7(4) of the BLA requires that a notice of certification of completion be posted in a prominent place on the improvement. The petitioner posted each of the certificates of completion upon which it relies at the work site, but did not post a notice of certification of completion in the prescribed form.
- [65] While the prescribed form of certificate of completion is permissive, s. 7(4) of the BLA stipulates that the payment certifier must post a notice of certification of completion in a prominent place on the improvement within seven days of issuance of the certificate: Alterra at para. 13.
- [66] The certificates of completion posted at the work site and relied upon by the petitioner do not comply with the form of notice of certification of completion provided under the BLA. Again, there is no identification of the contract or subcontract in respect of which the certificate is issued and no warning of the potential abridgment of time for filing a claim of lien.
- [67] In Alterra, at para. 14, the court held that the purpose of the notice of certification of completion "is obviously to give notice to potential lien claimants that the time for filing the liens may be abridged and their lien rights potentially lost."
- [68] In obiter dicta at para. 15 of her reasons for judgment in Alterra, Allan J. stated:
- I would note that in my opinion the process of issuance [of a certificate of completion] is not complete unless there is some communication of the document. Presumably that is why s. 7(4) imposes a mandatory requirement to post a Notice of Certification of Completion on the improvement. It is consistent with the scheme of the act that subcontractors must be notified of such certificates.
- [69] Here there was no effective notification to the respondent because the certificates of completion signed by Mr. Leung did not comply with the BLA. Further, there was no notice of certification of completion where the petitioner failed to either issue notices in the prescribed form or to post certificates which clearly identified the contracts or subcontracts to which they related and contained a clear warning that the time to file a claim of lien might be abridged.
- [70] I find that the original certificates of completion issued by Mr. Leung and relating to work performed by Allan under its subcontracts CS484-005 for the W Tower, CS485-009 for Abbott Tower (Market Housing, Office and CRU), CS485-008, Abbott Tower Non-Market, and CS486-006, Hastings Building Non-Market Housing, do not comply with the BLA, and are invalid.

Consequences of Original Certificates Being Non-compliant

- [71] Under s. 20(2)(a) of the BLA, a claim of lien not governed by subsection (1) must be filed by no later than 45 days after the head contract has been completed, abandoned or terminated, if, as here, the owner engaged a head contractor.
- [72] Section 20(3)(b) of the Act provides that subsection (1) does not operate to extend or renew the time for filing of the claim of lien if time had started to run under s. 20(2). Thus if the relevant Head Contracts were completed before Allan filed its claims of lien, the fact that the petitioner had issued another set of certificates of completion respecting the Allan Subcontracts which did comply with the requirements of the BLA would not postpone or restart the time for Allan to file its liens.
- [73] Allan's Abbott Tower Non-Market subcontract fell within the scope of the Family Non-Market Head Contract. Mr. Leung's uncontradicted evidence is that the Abbott Tower Family Non-Market Head Contract was completed on November 3, 2009. On that date, the City of Vancouver issued the occupancy permit for the family non-market housing space. Similarly, Allan's Hastings Building Non-Market Housing subcontract relates to the Singles Non-Market Head Contract which, on Mr. Leung's uncontested evidence, was completed by the time that the City of Vancouver issued the occupancy permit for the Singles Non-Market space on January 15, 2010. Accordingly, Allan's claims of lien in respect of subcontracts CS485-008 "Abbott Tower Non-Market" and CS486-006 "Hastings Building Non-Market Housing" were each filed more than 45 days after completion of the relevant Head Contracts, and are extinguished by effluxion of time.
- [74] In his affidavit #1 sworn May 7, 2010, Mr. Leung deposed that "As of February 1, 2010, the Market Head Contract was nearly completed. At this point I have not verified whether it was "completed" as defined in the Builders Lien Act." Mr. Leung attached to his affidavit copies of occupancy permits issued by the City of Vancouver for various components of the Market Head Contract, and then deposed that the only portions of the Market Head Contract for which no occupancy permit was issued were "other portions in the Heritage Building."
- [75] Under s.1(1) of the BLA, "completed", when used with reference to a contract or subcontract in respect of an improvement, means "substantially completed or performed, not necessarily totally completed or performed".
- [76] Section 1(2) provides:
- (2) For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction at a cost of not more than
 - (a) 3% of the first \$500 000 of the contract price,
 - (b) 2% of the next \$500 000 of the contract price, and

(c) 1% of the balance of the contract price.

- [77] The petitioner has not adduced any evidence of the cost of the remaining work to be performed as of February 1, 2010, when it says that the Market Head Contract was "nearly completed", and has not shown that the Market Head Contract was "substantially performed" within the meaning of s. 1(2) as of that date.
- [78] Mr. Leung's evidence falls short of establishing the date of completion of the Market Head Contract. The various occupancy permits provide evidence of the dates of completion of some, but not all, of the improvements comprising the Market Housing component of the Woodward's redevelopment project. However, the question arising under s. 20(2)(a) of the BLA is whether the respondent's claim of lien was filed no later than 45 days after the Market Head Contract had been completed. The petitioner has failed, on the evidence adduced on this application, to establish the date of completion of the Market Head Contract, and has therefore not shown that Allan's claims of liens in respect of the subcontracts CS484-005 "W Tower" and CS485-009 "Abbott Tower" (Market Housing Office and CRU) are extinguished by effluxion of time.
- [79] The petitioner is entitled to an order pursuant to s. 25(1)(a) of the BLA for the cancellation of Allan's claims of lien in respect of the Abbott Tower Non-Market and Hastings Building Non-Market Housing subcontracts only.

Duplication of Liens

- [80] The omnibus lien duplicates the March 29, 2010 liens. In the result, Allan has filed Lien Claims totalling \$4,100,514.26, or double the amount it claims for work done and material supplied under the Allan subcontracts. The petitioner submits that the duplication of lien claims is an abuse of process and seeks an order for the cancellation of all of Allan's claims of lien pursuant to s. 25(2)(b) of the BLA.
- [81] The respondent, through its counsel, has acknowledged the duplication of liens. As counsel for the respondent explained in his submissions, the respondent filed the omnibus lien on the premise that the whole of the Woodward's redevelopment constituted a single improvement. Allan subsequently filed the seven separate liens because it was concerned that the entire project might not be considered a unified improvement. Allan says that the duplication has caused no prejudice to the petitioner. There is no evidence of lost sales. When requested to do so by the petitioner, Allan has discharged the liens from individual parcels, although in the case of the market housing strata title units, it has insisted upon security in an amount greater than the petitioner has wished to pay. The respondent has taken the position that the entire amount of its claim, in the amount of \$2,050,257.12 should be posted as security for the discharge of the liens from title to all of the parcels against which they are registered.

- [82] The filing of a builders lien for an improper purpose may be an abuse of process: *Smith v. Rusk*, 2009 BCCA 96 at para. 35. In *Guildford Industries Ltd. v. Hankinson Services Ltd.* (1973), 40 D.L.R. (3d) 398 (B.C.S.C.), the court held that the filing of a lien against land on which the claimant had done no work, for the purpose of extorting a settlement of a claim for work allegedly done on other land, was an abuse of process.
- [83] In *Henderson Land Holdings (Canada) Ltd. v. Micron Construction Ltd.* (2000), 49 C.L.R. (2d) 311 (B.C.S.C.), the court held that a lien claimant that filed liens well in excess of the amount previously agreed between the owner and the lien claimant did so in callous disregard of the process established under the BLA, and found that the liens were vexatious, frivolous and an abuse of process. Similarly, in *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253 at para. 27, Burnyeat J. found that the filing of a lien for an amount that was "grossly overstated" amounted to an abuse of process.
- [84] Here, Allan is not attempting to compel payment of twice the amount of its lien claim. The respondent has provided an explanation of why it initially filed the omnibus lien and subsequently filed the seven individual liens. The petitioner has not established that the filing of the Allan claims of lien was for an improper purpose, or was otherwise an abuse of process.
- [85] However, the fact that the respondent seeks to have the entire amount of its lien claim secured does not justify the continued registration of both the omnibus lien and the seven individual liens. In my view, the refusal of Allan to remove the omnibus lien after the filing of the seven individual liens, in circumstances where the respondent acknowledges that the omnibus lien is duplicative, borders on vexatious.
- [86] However, rather than order the cancellation of the omnibus lien pursuant to s. 25(2)(b) of the BLA, I would order its cancellation pursuant to s. 24. In *Pleasantview Homes Ltd. v. Hari Chand et al.*, 2005 BCSC 1235, the lien of the general contractor, Pleasantview, was for \$93,900, which included the amounts claimed by various subcontractors who had also filed their own claims of lien. Madam Justice Arnold-Bailey held at para. 53 that because Pleasantview's claim of lien included those of the subcontractors, it was fair to reflect that in the amount of security to be posted for Pleasantview's lien. Her Ladyship ordered that security be posted for Pleasantview's claim of lien in the nominal amount of \$1. Here, where the omnibus lien duplicates Allan's individual liens, I find that \$1 will provide sufficient security for cancellation of the omnibus lien. There will be an order pursuant to s. 24 of the BLA for cancellation of the omnibus lien from title to all of the properties against which it is registered upon the posting of \$1 as security with the court.

The Filing of Liens against Incorrect Parcels

- [87] The respondent concedes liens have been filed against incorrect parcels but says it has never refused to provide a discharge of a lien when requested to do so.

[88] As shown in the table reproduced at para. 43 of these reasons, the petitioner has established that four of the Allan claims of lien were registered against parcels to which they do not relate. Those claims of lien have since been removed from most of the parcels against which they were incorrectly filed.

[89] Pursuant to s. 25(2)(a) of the BLA, Allan's claim of lien registered under instrument number BB1251057 will be cancelled from title to Strata Plan BCS3625, lots 5, 103, 115, 120, 137 to 138, 146, 148, 150, 155 to 157 and 165.

Security for Cancellation of Claims of Lien

[90] In *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.*, 2008 BCCA 366, 83 B.C.L.R. (4th) 349, Chiasson J.A., for the Court, summarized the test for determining the amount of security required to discharge claims of lien under s. 24 of the BLA, at para. 56:

Under s. 24 there is a two-prong test. The first is consideration of what claims should be taken into account when fixing security. The second is determining what amount of security is appropriate. In summary:

- the judge must look at the claims of the parties to determine whether it is plain and obvious they will not succeed; a *prima facie* case will suffice;
- any claims that are not sustainable will not be considered in fixing the appropriate quantum of security;
- looking at the evidence as a whole, the judge has discretion in fixing the amount that is appropriate security;
- that discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation: to protect those who supply work and materials to a construction project so long as the owner is not prejudiced;
- the amount of security may be less than the amount claimed under the lien.

[91] I have found that Allan's claims of lien respecting subcontracts CS485-008 "Abbott Tower Non-Market" and CS486-006 "Hastings Building Non-Market Housing" were each filed outside the time permitted under s. 20 of the BLA, and are extinguished. These two claims of lien are not "sustainable", and I do not take them into account in fixing the amount of security for the remaining claims of lien.

[92] It is by no means obvious that Allan's remaining claims of lien will not succeed. The test is whether Allan has established a *prima facie* case to support its remaining claims of lien: *Strata Plan LMS 2262 v. Belgrove Construction Ltd.*, 2003 BCSC 535; *Q West Van Homes* at para. 23. Allan's general manager, Mr. Fook, has sworn that Allan has performed the work, that the balances claimed on each of the subcontracts remain due and owing, and that Allan has completed all outstanding deficiencies on the project. In my view, Allan has made out a *prima facie* case in support of its claims of lien BB1251058, BB1251059, BB047379, BB1251057

and BB047376.

[93] The petitioner sought to have these claims of lien cancelled on grounds that either they had been extinguished, or they constitute an abuse of process. On this application, the petitioner has not challenged the amounts claimed by Allan as due and owing for work performed and materials supplied under each of its subcontracts. Although under s. 24(3) of the BLA the court has discretion to order security in a reduced amount, that discretion should be exercised with caution. Otherwise a lien claimant that proves its claim may be left with security in an amount less than its proven claim. The petitioner's application under s. 25 for the cancellation of the five remaining claims of lien has failed. For these claims of lien, there is no evidentiary basis for quantifying security in a reduced amount under s. 24, and I would decline to do so.

[94] For cancellation of Allan's remaining claims of lien under s. 24 of the BLA, I find that "sufficient security" for the payment of those claims would be the posting of security in the full amount of each of the following lien claims:

BB1251058

\$303,209.64

BB1251059

\$ 42,280.14

BB047379

\$226,092.28

BB1251057

\$766,566.27

BB047376

\$408,091.22

TOTAL

\$1,746,239.50

[95] With respect to Builders Lien No. BB1458760, the omnibus lien, I have already determined that it should be cancelled pursuant to s. 24 of the BLA upon the petitioner paying into court security in the amount of \$1.

[96] Before making any order for the posting of security for the five remaining claims of lien pursuant to s. 24 of the BLA, it will be necessary to consider the petitioner's submission that the amount of security to be posted for removal of claims of lien BB1251057 and BB047376 from the Market Housing strata lots in the W Tower and the Abbott Tower respectively should be determined pursuant to s. 90 of the SPA.

Security for Cancellation of Lien - W Tower and Abbott Tower Market Housing

[97] The petitioner submits that the amount required as security for Allan's claims of lien in respect of its W Tower and Abbott Tower subcontracts should be limited to the proportionate share represented by the strata units owned by the original owner, 101 West Hastings Holdings Ltd.

[98] Allan performed work and supplied material to all of the strata units in the W Tower and the Abbott Tower.

[99] However, Allan did not file its claims of lien against title to all of those strata units. Rather, the respondent filed its claims of lien against the strata units still owned by 101 West Hastings Holdings Ltd. at the time of filing. Nonetheless, Allan asserts a claim of lien against those strata lots for the full amount of its claims on each of the W Tower and Abbott Tower subcontracts.

[100] The petitioner and 101 West Hastings Holdings Ltd. urge the court to exercise its discretion under s. 90 of the SPA:

90 (1) An owner may apply to the Supreme Court to remove a claim of lien under the Builders Lien Act or other registered charge that charges more than one strata lot from the title to the owner's strata lot.

(2) The court may order the claim of lien or other charge removed from the title to the owner's strata lot on payment into the court of the strata lot's share of the amount secured by the claim of lien or other charge.

(3) Payment into the court releases the owner from liability to the lien claimant or other charge holder for the amount secured by the claim of lien or other charge.

(4) The strata lot's share of the amount secured by the claim of lien or other charge is calculated as set out in section 166 as if the amount of the claim of lien or other charge were a judgment.

(5) The money paid into the court is security for the lien or other charge in place of the strata lot.

[101] Section 166 of the SPA refers to s. 99(2) for the calculation of each strata lot's share:

166 (1) A judgment against the strata corporation is a judgment against all the owners.

- (2) A strata lot's share of a judgment against the strata corporation is calculated in accordance with section 99 (2) or 100 (1) as if the amount of the judgment were a contribution to the operating fund and contingency reserve fund, and an owner's liability is limited to that proportionate share of the judgment.

[102] Under s. 99(2), the method of calculating each strata lot's share is as follows:

- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

unit entitlement of strata lot

_____ x total contribution

total unit entitlement of all strata lots

- [103] Allan has insisted that the petitioner pay into trust an amount which insures that the total amount of its claims for the W Tower and Abbott Tower will be secured in order for its claims of lien to be discharged from individual units as they are sold. Accordingly, the petitioner has had to pay more to secure the release of each strata lot than the amount payable under s. 90 of the SPA.
- [104] With respect to the Abbott Tower, the unit entitlement of the strata lots owned by 101 West Hastings Ltd. when Allan filed its lien was 868 out of a total unit entitlement of all strata lots of 11,321. The total amount claimed by Allan under its Abbott Tower Market Housing subcontract is \$408,091.22. If the amount of security required to discharge the Allan lien relating to the Abbott Tower Market Housing subcontract were calculated pursuant to s. 90 of the SPA, the result would be $868 / 11,321$ or $7.93\% \times \$408,091.22$, which equals \$32,361.63.
- [105] Similarly, with respect to the W Tower, the original owner unit entitlement is 2,029 and the total unit entitlement of all strata lots is 28,703. The original owner's unit entitlement is 6.75% of the total unit entitlement. The amount Allan claims for work performed and materials supplied to the Woodward's Tower is \$766,566.30. If security were posted in an amount proportionate to the original owner's unit entitlement, the amount required would be \$51,743.23.
- [106] The respondent submits that the court ought not to exercise its discretion under s. 90(2) because an order for security pursuant to that section would enable the petitioner to take advantage of its relationship with the owner developer to the prejudice of the lien claimant, by substantially reducing the security required for discharge of the claims of lien relating to the W Tower and Abbott Tower market housing.
- [107] The petitioner contends that because Allan performed work for all of the strata units, but only filed the lien against the original owner units, payment into court of an amount calculated in accordance with s. 99(2), representing the original owner units' proportionate share of the claims of lien is not unfair to Allan. The amounts of its lien referable to those units will be secured. If Allan had performed work on some, but not all of the strata units,

and had then filed its claim of lien against only a portion of those units, the application of s. 99(2) might well be unfair. In those circumstances, calculation of the amount to be paid by the owner as security based on the owner's unit entitlement as a proportion of the total unit entitlement of all strata lots in each building would result in the owner providing security in an amount less than those units' proportionate share of the work performed. However, that is not the case here.

- [108] The petitioner also argues that because there is no contractual relationship between 101 West Hastings Holdings Ltd. and Allan, s. 90(3) will not restrict in any way Allan's contractual claim against W Redevelopment Group, Inc.
- [109] The submissions of counsel assume that the court has discretion to grant or refuse relief under s.90 in the circumstances of this case. However, before the court grants or refuses relief under that section, it is necessary to interpret the legislation.
- [110] Counsel were unable to find any case law on the application or interpretation of s. 90 of the SPA.
- [111] The authors of the Continuing Legal Education Society of B.C., British Columbia Builders Lien Practice Manual at p. 6-34.2 briefly discuss s. 90:

Section 90 of the Strata Property Act creates an additional lien removal procedure, by which a strata owner can obtain an order of the court discharging a lien on the owner's payment into court of "the strata lot's share of the amount secured by the claim of lien or other charge".

This additional procedure appears to be intended to address the removal of liens in post-purchase circumstances (for example, liens arising from "leaky condo" repairs), and is noteworthy for codifying, along with s. 16(2) of the Builders Lien Act, the concept of proportional divisibility of a lien amount among separate liened properties.

- [112] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J., for the Court, said this respecting the interpretation of legislation, at para. 21:

Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- [113] *Rizzo* concerned an appeal by former employees of a bankrupt employer from an order disallowing their claims for termination pay and severance pay following their termination by the trustee in bankruptcy. The issue of statutory interpretation was whether under the provisions of the Ontario Employment Standards Act, R.S.O. 1980, c. 137 ("ESA") in effect at the time of the bankruptcy, employees were entitled to claim termination and severance pay where their employment was terminated as a result of the employer's bankruptcy. The

plain meaning of those provisions suggested that only employees who were terminated by their employer could claim severance and termination pay.

[114] In *Rizzo*, at paras. 25 and 26, the Court held that the objects of the termination and severance pay provisions of the ESA were to protect employees and to compensate long-serving employees. At para.27, the Court also applied "the well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". The Court held that an interpretation that would arbitrarily deprive some employees of their entitlement to severance pay based on the timing of their dismissal would defeat the intended working of the legislation and produce an unreasonable result. After considering the words of the ESA, severance and termination pay provisions in their entire context, and considering the scheme of the Act and its objects, the Court concluded in *Rizzo* at para. 41 that termination as a result of an employer's bankruptcy gave rise to an unsecured claim by the former employees provable in bankruptcy for termination and severance pay.

[115] In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, the Supreme Court of Canada emphasized the role that context plays in statutory interpretation. As Iacobucci J. explained in his reasons for judgment in *Bell Express Vu* at para. 27:

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[116] Thus, in addition to considering the plain meaning of the language of s. 90 of the SPA, it is necessary to consider the scheme of the legislation, the intention of the Legislature and the entire context of the words in issue.

[117] Further, Section 8 of the Interpretation Act, R.S.B.C. 1996, c. 238 provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[118] Sections 86 through 90 comprise Division 5 of Part 5 of the SPA, which deals with builders' liens and other charges. The words of s. 90 must be construed in the context of the SPA as a whole, including relevant statutory definitions, and the other provisions of Division 5.

[119] Section 1 of the SPA includes the following definitions:

"owner" means a person, including an owner developer, who is

- (a) a person shown in the register of a land title office as the owner of a freehold estate in a strata lot, whether entitled to it in the person's own right or in a representative capacity, or
- (b) if the strata lot is in a leasehold strata plan, as defined in section 199, a leasehold tenant as defined in that section,

unless there is

- (c) a registered agreement for sale, in which case it means the registered holder of the last registered agreement for sale, or
- (d) a registered life estate, in which case it means the tenant for life.

[120] An "owner developer" is defined as follows:

"owner developer" means

- (a) a person
 - (i) who, on the date that application is made to the registrar for deposit of the strata plan, is registered in the land title office as
 - (A) the owner of the freehold estate in the land shown on the strata plan, or
 - (B) in the case of a leasehold strata plan as defined in section 199, the lessee of the ground lease of the land, or
 - (ii) who acquires all the strata lots in a strata plan from the person referred to in subparagraph (i), and
- (b) a person who acquires all of the interest of a person who is an owner developer under paragraph (a) in more than 50% of the strata lots in a strata plan.

"purchaser" means a person, other than an owner developer, who enters into an agreement to purchase a strata lot or to acquire a strata lot lease in a leasehold strata plan as defined in section 199, but to whom the strata lot or strata lot lease has not yet been conveyed or assigned.

[121] 101 West Hastings Ltd. is an "owner developer", within the meaning of s. 1 of the SPA.

[122] Turning to Division 5 of the SPA, s. 86 provides that:

86 Except as provided in sections 87 to 90 of this Act, the Builders Lien Act applies to land in a strata plan.

- [123] Under s. 87, in a phased strata plan a claim of lien under the BLA may be filed against only the strata lots in the phase in which the materials were supplied or the work was done. Section 88 establishes the time limit for filing a claim of lien where an owner developer conveys a strata lot to a purchaser, and the period during which the purchaser must retain a holdback. Neither of these sections is in issue in this case.
- [124] Subsections 89 (1), (2) and (3) provide:
- (1) If one or more claims of lien under the Builders Lien Act are filed against a strata lot purchased from an owner developer, the purchaser may apply to the Supreme Court for an order for permission to pay into the court the lesser of
 - (a) the total amount of the claims of lien filed, and
 - (b) the full amount of the holdback under section 88 (2).
 - (2) Payment into the court discharges the lien and releases the purchaser from liability to the owner developer or the lien claimant for the liens.
 - (3) The order under subsection (1) must provide that the claims of lien be removed from the title to the strata lot.
- [125] Under s. 89(4), the money paid into court is security for the liens in place of the strata lot.
- [126] Section 89 provides a procedure by which a "purchaser" may apply to the court for the removal of a claim of lien. Because a purchaser is "a person ... who enters into an agreement to purchase a strata lot ... but to whom the strata lot ... has not yet been conveyed", s. 89 enables a purchaser who has agreed to purchase a strata lot charged by a builders lien from an owner developer to apply for the removal of the lien before the owner developer has conveyed title to that lot.
- [127] The object or purpose of s. 89 is consumer protection. The Legislature has provided a summary process by which the purchaser of a strata lot may obtain the discharge of a lien or liens filed against a strata lot purchased from an owner developer, and be released from liability to the owner developer or lien claimant for the liens.
- [128] Similarly, s. 90 sets out the procedure by which an "owner" may apply to the Supreme Court to remove a claim of lien charging more than one strata lot from title to the owner's strata lot. Again, s. 90 serves to protect an owner who has completed the purchase of a strata lot by enabling that owner to be relieved from liability to the lien claimant for the full amount secured by the lien claim upon payment into court of the strata lot's share of that amount.
- [129] However, because the definition of "owner" under the SPA includes an owner developer, the plain meaning of s. 90(1) suggests that the Legislature may have intended that either an owner developer, or an owner who had purchased a strata lot from an owner developer, would be entitled to apply under this section for the removal of the claim of lien from title to the owner's strata lot.

[130] An interpretation of s. 90 that restricts its application to individual owners who have completed the purchase of their strata lots is consistent with the statement made the Minister responsible for the introduction of the SPA in 1998, which identified consumer protection in strata ownership as an objective of the legislation.

[131] On July 13, 1998, the Honourable J. Kwan, who introduced the new Strata Property Act, said this respecting the object and purpose of the legislation:

The new Strata Property Act builds upon and improves the current Condominium Act without altering the fundamental scheme of condominium ownership. It is an important step in ensuring consumer protection in strata ownership. It forms part of the government's comprehensive response to the report of the Barrett commission on condominium construction, incorporating many of the commission's recommendations, which are intended to assist purchasers and owners in dealing with leaky-condo problems.

In addition to responding to the recommendations of the Barrett commission, this legislation is intended to accomplish three primary objectives.

First, the current act is extremely complex and can be difficult to understand. The act has been restructured and rewritten using plain language, and ambiguities and gaps in the legislation have been addressed to provide a more complete code for condominium development and governance.

Second, condominium legislation must balance the interests of various parties such as municipalities, developers, strata corporations and individual owners. The new act redefines and clarifies the rights and obligations of these parties.

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Third, the amendments provide strata corporations, which must regulate diverse types of strata complexes in ever-changing circumstances, with greater flexibility so that they can adapt to changes and better meet the needs of their owners.

British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard), Vol. 11, No. 19 (13 July 1998) at 9922 (Hon. J. Kwan). (emphasis added)

[132] The SPA received third reading on July 28, 1998. Sections 70 to 94 inclusive were approved without debate: British Columbia Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard), Vol. 12, No. 8 (28 July 1998) at 10536.

[133] Although the court must bear in mind the limited reliability and weight of Hansard evidence, it is relevant to both the background and purpose of legislation: Rizzo at para. 35, and R. v. Morgentaler, [1993] 3 S.C.R. 463 at p. 484.

- [134] The objects of the SPA as expressed by the Minister in Hansard included, in addition to the enhancement of protection for strata property owners, the provision of a complete code for condominium development and governance, and balancing the interests of municipalities, developers, strata corporations and individual owners. None of those objects would be advanced by an interpretation of s. 90 that would substantially reduce the security for a claim of lien to which a contractor or subcontractor would otherwise be entitled under s. 24 of the BLA.
- [135] Furthermore, the presumption of consistency between statutes dealing with the same subject matter supports a conclusion that the Legislature did not intend that s. 90 might be invoked by a contractor to avoid or reduce its obligation to give sufficient security for the cancellation of a claim of lien under s. 24 of the BLA. I say this bearing in mind that under s. 86 of the SPA, the BLA applies to land in a strata plan, except as provided in ss. 87 to 90. However, in my view if the Legislature had intended to so substantially alter the application of s. 24 of the BLA to strata property, it would have said so in clear and unequivocal language.
- [135] Did the Legislature intend that s. 90 could be invoked where an owner developer and general contractor are related companies, and the effect of the order under s. 90 would be to order payment of security in an amount that is substantially less than the amount that the court might order the general contractor to post as security for the lien under s. 24 of the BLA?
- [136] Under s. 90(3), payment into court releases the owner from liability to the lien claimant for the amount secured by the lien. Section 90(5) provides that the money paid into court "is security for the lien ... in place of the strata lot."
- [137] A court interpreting legislation may consider whether the consequences or effects of a particular interpretation are incompatible with the object of the statute. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, is extremely unreasonable or inequitable, is illogical or incoherent, or is incompatible with other provisions or with the object of the Act. An interpretation which defeats the purpose of the statute will be absurd: *Rizzo* at para. 27.
- [138] Where an owner developer has a contract with the lien claimant, s. 90(3) would operate to release the owner developer from liability to the lien claimant for the amount secured by the lien claim. In those circumstances, the contractor or subcontractor would have little or no recourse on its contractual claim against the owner developer. Here, there is no contractual relationship between the original owner and Allan. However, the consequences of the interpretation of s. 90 urged by the petitioner are so unjust to amount to an absurdity, and cannot have been intended by the Legislature.
- [139] In my view, when the Legislature enacted s. 90, it intended that individual owners of strata lots, who had purchased units subject to a lien charging more than one strata lot should have the ability to apply to the court for discharge of the lien from title to their own strata

lot upon payment of security in an amount proportionate to their unit entitlement. The Legislature cannot have intended that an owner developer closely related to its general contractor would be able to invoke s. 90 and thereby substantially reduce the amount of security that the general contractor would otherwise be obliged to pay in order to secure the discharge of liens pursuant to s. 24 of the BLA.

- [140] Having found that the Legislature did not intend s.90 to be used as a vehicle by which an owner developer could reduce its liability to a lien claimant with whom it had contracted, or, as here, by a general contractor to minimize the security to be posted for removal of liens, I decline to make an order for the removal of claims of lien BB1251057 and BB047376 under s. 90 of the SPA, rather than s. 24 of the BLA.

CONCLUSION

- [141] The petitioner is entitled to a declaration pursuant to s. 25 of the BLA for cancellation of Allan's claims of lien in respect of subcontracts CS485-008 (Abbott Tower Non-Market) and CS486-006 (Hastings Building Non-Market Housing), together with any substituted security therefor, on the ground that each lien was extinguished before the lien claims were filed.
- [142] There will be an order for cancellation of Allan's claim of lien BB1251057 from title to Strata Plan BCS3625, lots 5, 103, 115, 120, 137 to 138, 146, 148, 150, 155 to 157 and 165.
- [143] There will be an order for the cancellation of Allan's omnibus claim of lien BB 1458760, and any substituted security therefor, upon the petitioner paying into court security in the amount of \$1.
- [144] All of Allan's remaining lien claims, together with the substituted security therefor, will be cancelled pursuant to s. 24 of the BLA upon the petitioner paying into court security in the amount of \$1,746,239.50.
- [145] Finally, the petitioner is entitled to an order that the monies currently held in trust by the petitioner's solicitors pursuant to the Securities Agreements be paid into court in reduction of the lien amounts pursuant to para. 3(a) of the Security Agreements.
- [146] With respect to costs, success was divided on this application. Each party will bear their own costs.

"PEARLMAN J."

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