

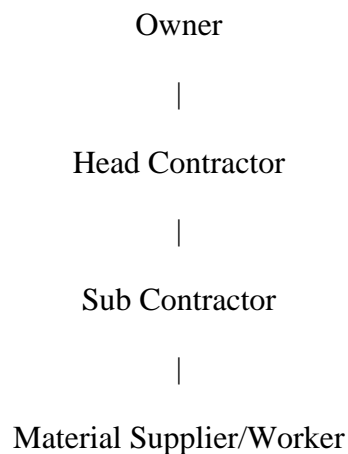
Discharge of Liens under the *Builders Lien Act*

Overview

A lien under the British Columbia *Builders Lien Act* (the “*Act*”), as intended, can have serious consequences for a construction project and property owners. Project financing, construction payment and the sale of a property can be held up by the lien.

Section 23 and section 24 of the *Act* provide mechanisms by which liens can be removed from title. By way of a court application, the applicant can either pay the amount of any undisputed lien claims into court or provide security for disputed claims.

Section 23 - Paying Out Undisputed Claims



Section 23 specifically addresses the scenario where a party in the above construction contract hierarchy becomes insolvent. Where the head contractor or the sub contractor under whom the lien is claimed is insolvent and cannot clear the lien, the next solvent party above it in the hierarchy can clear title by paying into court any undisputed amount still owing on a contract or subcontract. The lien becomes a lien against the money in court and is removed from the owner's title. The *Act* specifically excludes resolution of head contractors' own liens as section 23 does not apply to “a class of lien claimants engaged by an owner” (s. 23(1)).

An applicant can clear title by paying into court the lesser of:

- (a) the total amount of the lien claims, or
- (b) the amount owing from the applicant to the person engaged by the applicant, provided that amount is at least equal to the statutory builders lien holdback applicable to the contract or subcontract between them.

At a minimum, an applicant will pay the amount of the statutory holdback. Section 23 may operate as follows where the sub contractor is insolvent, keeping in mind the hierarchy set out above:

Scenario 1 - The material supplier under the sub contractor has filed a lien for \$100,000. The head contractor still owes the sub contractor \$200,000. The head contractor could clear title by paying the total lien claim of \$100,000 into court.

Scenario 2 - The material supplier's lien equals \$200,000. The amount remaining to be owed on the contract from the head contractor to the subcontractor is \$100,000. The statutory holdback retained by the head contractor on account of the contract is \$50,000. Where the amount owed by the head contractor to the subcontractor is equal to or greater than the holdback, then the head contractor must pay \$100,000, the amount actually owed.

With respect to this scenario, section 23(5) provides that if the amount to be paid into court is in excess of the actual holdback, then the head contractor can apply as necessary some or all of that excess (but not any of the statutory holdback) to remedy construction deficiencies or other non-performance or default under the applicable contract or subcontract. This will reduce the amount payable into court on the section 23 application.

Scenario 3 – If in scenario 2 the amounts are reversed and the holdback at \$100,000 is greater than the amount owed by the head contractor to the subcontractor at \$50,000, then the amount of the required holdback must be paid into court.

Payment into court pursuant to a section 23 order discharges the owner's lien liability on the basis that the money paid into court "stands in the place of the improvement" (s. 23(2)). The lien claimant must still establish its right to the lien but the owner is then entirely removed from the lien dispute. The owner has no further claim over the monies held in court.

Separate section 23 applications and payments into court would be necessary to deal with liens arising under separate insolvent parties in the construction contract hierarchy. If further liens are filed by the same class of lien claimants following a section 23 application, then further applications would have to be made for the discharge of those liens (s. 23(3)). Additional funds may have to be paid into court if, for example, the original payment was for the total of the previous lien amounts and less than the applicable holdback amount.

Section 24: Disputed Liens

Section 24 is the more commonly used mechanism to clear title. It allows the applicant to remove a lien from title by providing security for payment of the claim into court. The security posted, either money or money-equivalent, is a substitution for the security afforded by the lien on title to the property. The substitution does not affect the owner or lien claimant's rights. The claimant must still establish its right to the lien and the quantum of it and the owner retains all of its defences.

There are advantages to the lien claimant in having security posted rather than a lien on title to the property. When a lien is on title, the money might ultimately have to be realized by sale of the lien property. If security is posted in place of the land, then the lien claimant eliminates the risk that there may be insufficient equity in the property to satisfy the claim.

An application under section 24 can be made by the owner, contractor or subcontractor. Security can be posted in one of the following ways:

1. funds paid in cash or by cheque;
2. irrevocable letter of credit issued by a financial institution; or
3. a lien bond issued by a surety company.

Generally, security must be posted in the face amount of the lien. Until recently, a reasonable allowance (usually 15%) was also paid for security for costs for the lien enforcement action. In a recent case, *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253, the court found against this well established practice. In this case the court held there was no basis for this practice pursuant to the *Act*. The court found that the *Act* must be strictly construed and in the absence of a provision providing for security for costs, the court has no jurisdiction to require such payment.

The *Act* allows the court discretion when considering the appropriate value of a lien claim on a section 24 application. The *Act* specifically recognizes that the amount of the security to be posted may be less than the face value of the lien claim (s. 24(3)). The courts have often reduced the amount of security required to be posted, relative to the original lien claim. Some examples where the courts have exercised their discretion to reduce the amount of security include:

1. the lien claimant failed to respond to the owner's request for information concerning the amount of the lien;
2. the lien claimant included uninvoiced work, overheard and other non-liable damages in the lien claim; and
3. the defendant made a counterclaim for damages.

A 2008 decision of our Court of Appeal, *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.* 2008 BCCA 366, addressed the proper test for reducing security under a section 24 application. In that case, the lien claimants' liens totaled \$1,950,512.90. The owner counterclaimed for damages arising from delay, which far outweighed the amount of the claimants' liens. The owner also alleged that the claimants' liens included amounts which could not properly form part of the lien claim. The trial judge ordered security of \$1,250,000.00. The Court of Appeal upheld the trial judge's reduction and said that there are two inquiries to be made on a s.24 application:

1. Are the lien claims advanced by the parties sustainable? The test at this first stage of the inquiry is whether it is plain and obvious that the claim will fail. If the court determines that a portion of the claim will fail, then the quantum of that part of the claim will not play any part in the assessment of the amount of the security.
2. What are all of the relevant circumstances in setting the amount of the security? This question must be answered in the context of the objective of the *Act*, which is to protect those who supply work and materials to the project so long as the owner is not prejudiced.

A common and useful procedure many counsel use is the “informal” securing of liens equivalent to section 24. Security is posted in the trust account of one of the parties’ lawyers and the lien claimant agrees to discharge the lien. If the parties can reach a settlement then the security is distributed by counsel in accordance with the settlement agreement. This procedure avoids the time and expense involved in a formal section 24 application and monies collect interest pending resolution of the claim.

Conclusion

The *Act* provides two mechanisms to clear title and enable the construction project to move forward or to allow the owner to deal with the property. The lien claimant can also benefit from the alternatives to a lien on title. Money or money-equivalent posted in place of a lien on title can afford equal or greater security.

These materials are not intended as legal advice. Please contact the author should you have any specific questions related to discharge of liens or other provisions of the *Builders Lien Act*.

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