When can a lien be secured for less than face value?

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The B.C. Court of Appeal last week released reasons for judgment addressing the factors to be considered where an owner seeks to secure a claim of builders lien for less than the claim's full value. This decision confirms that a judge should exercise caution in favour of the lien claimant in determining the appropriate amount of security.

Decision Criteria and Evaluation

When an owner (or general contractor) seeks, under section 24 of the *Builders Lien Act*, to remove a claim of lien from title by posting security for less than the lien's full value (or to reduce the value of already-posted security), the Court asks two questions:

1. Which of the lien claimant's claims should be taken into account for the purposes of security?
2. For those claims, what amount of security is "appropriate"?

The parties disputed whether the burden was on the lien claimant to establish, through evidence, that the lien claim had a reasonable chance of success, or whether the burden was on the owner to establish that the lien had no reasonable chance of success.

The Court of Appeal concluded:

1. In addressing the first question of which claims to take into account, a judge must order security be posted for a claim or component of a claim of lien unless the owner can demonstrate that it is plain and obvious that the claim is bound to fail.
2. In addressing the second question of the appropriate amount of security, a judge must consider the evidence as a whole and exercise caution in favour of the lien claimant.

This decision puts an end to confusion that had arisen in the lower courts with respect to who bears the burden of proof on such an application: the burden is squarely on the party who is applying to reduce the security – not the lien claimant – and it is a heavy one.

In this particular case, the judge of first instance had reduced the security to approximately half the face value of the lien claim, by discounting entirely the contractor's claim for extra costs caused by the owner's interference and delays. The basis for this appeared to be a conclusion that this claim was barred for failure to comply with the contract's notice requirements – despite uncontradicted evidence that the contractor had made early written complaints of interference or delay affecting the completion of the project.

The contractor argued that it was an error to apply a strict, rather than a contextual, approach to the interpretation of the contract's notice provisions and whether notice was given or its purpose satisfied. The Court of Appeal found that the judge erred by engaging in "a difficult analysis of the claim on the merits, including contractual interpretation without considering the context, rather than applying the cautious approach".

Takeaways

Going forward, lien claimants should be reluctant to agree to orders for reduced security. This decision favours keeping lien security fully in place until a full trial can be heard on the merits. However, if a lien claimant claims costs that are not properly the subject of a lien, or makes an obviously meritless claim, the Courts can and will reduce or cancel security, impose adverse costs awards, or even award damages to the owner.

BLG's Rob Deane and Krista Johanson represented the successful appellant.

By

Krista M. Johanson

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749