IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tylon Steepe Homes Ltd. v. Pont,***
2009 BCSC 253

Date: 20090306
Docket: 80986
Registry: Kelowna

Between:

Tylon Steepe Homes Ltd.

Plaintiff

And

Charles Eli Pont and Jill C. Pont

Defendants

And

**1216393 Ontario Inc., Tylon Steepe Development Corporation
And Dennis Kretschmer**

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice Burnyeat

**Reasons for Judgment
(from Chambers)**

Counsel for Plaintiff and Defendants by way of Counterclaim	D.W. Donohoe
Counsel for Defendants	F.G. Potts and S.W. Urquhart
Date and Place of Hearing:	January 7 & 21 and February 6, 2009 Vancouver, B.C.

[1] Applying pursuant to s. 25(2)(b) of the ***Builders Lien Act***, R.S.B.C. c. 1997, c. 45, ("***Act*** "), the Defendants seek an order cancelling a claim of lien filed under the ***Act*** on October, 21, 2008 under number LB250990 ("Lien") against property in the Municipality of Lake Country known as Parcel Identifier: 026-545-438, Strata Lot 24, Section 24, Township 14 and District Lots 5237 and 5238, Osoyoos Division Yale District, Strata Plan KAS 2946 ("Property") and cancelling any certificates of pending litigation filed in relation to the Lien. In the alternative, the Defendants seek an order pursuant to s. 24(2) of the ***Act***, that the Lien be cancelled upon the Defendants depositing with the Court security in the amount of $1.00 plus $1.00 as security for costs.

BACKGROUND

[2] In March of 2004, the Defendant signed an offer to purchase relating to the Crystal Waters subdivision at

Kalamalka Lake and paid a deposit to the solicitors for Tylon Steepe Development Corporation ("*Development*") and 1216393 Ontario Inc. ("*Ontario*"). In August of 2005, the Defendants received a letter from the solicitor for the developers informing them that their contract was cancelled as it was not possible for the development to proceed due to government authority issues.

[3] On August 25, 2005, Mr. Kretschmer wrote to the Defendants enclosing an amended contract which saw an increase of the purchase price for the Property to $269,700.00. The Defendants signed that amended contract and, on February 3, 2006, Ontario executed a transfer of the Property to the Defendants. That transfer was registered in the Land Title Office on February 17, 2006.

[4] On January 11, 2007, the Defendants received a quotation from the Plaintiff ("Homes") for the construction of a home on the Property. There were negotiations and discussions regarding the proposed construction costs. On October 12, 2007, the Defendants paid a deposit and on October 24, 2007, a building contract was executed by the Defendants and Homes ("Contract").

THE CONTRACT

[5] The cost under the Contract was set out as being $867,097.00 payable as follows:

(a) $86,709.00 By way of a deposit on the execution of the Contract;

(b) $124,862.00 "When the basement of the Work is ready for backfill";

(c) $375,586.00 "When the windows, exterior man doors and roofing have been installed in the Work";

(d) $146,077.00 "When the house is at taping stage";

(e) $43,154.00 "When finish carpentry is complete";

(f) $90.709.00 "Upon the substantial completion of the work".

"The Goods and Services Tax has not been included In the amount of the Contract and will be added to the amount of each of the above draws."

[6] The Contract also contained the following:

> Provided that all advances shall be subject to the provisions of the Builders' Lien Act, the final advance and balance of the purchase price shall be paid upon the issuance of a Certificate of Substantial Completion of the Work and upon the Contractor making the work available to the Owner for possession. Whether made by the Owner or their mortgagee, Builders' Lien holdbacks shall be released to the Contractor FORTY SIX (46) DAYS after the draw date for which the builders' lien holdback had been taken and the Owner has confirmed by a search of the Title to the lands that no Builders' Liens have been registered. In the event that Builders' Liens have been registered, the holdback shall be dealt with in accordance with the existing Builders' Lien legislation.

PROGRESS OF CONSTRUCTION

[7] The Defendants complain of delay and claim damages because it was not until April, 2008 that construction commenced. By the end of April, 2008, the foundation was poured so that the framing could begin. In April, the Defendants paid the $124,862.00 plus G.S.T. contemplated under the Contract.

[8] In May, 2008, the financial institution of the Defendants advised that they would not be advancing any further funds until the construction had achieved the "Closed/Lockup stage". On May 1, 2008, the financial institution of the Defendants sent a representative to check on the progress of construction and a determination was made by that representative that the home was 14% complete. On May 2, 2008, the financial institution of the Defendants approved an advance of $176,000.00 against an approved mortgage of $950,000.00 based on 14% completion.

[9] There were a number of meetings during May and June, 2008 as well as discussions regarding the Contract. In a July 28, 2008 "Statement", Homes referred to "Draw (c)" as set out under the Contract, provided an invoice for $394,365.30, a credit of $19,189.98 and a "Total Due" of $375,175.32.

FILING OF THE CLAIM OF LIEN

[10] The Lien was filed against the Property by Homes on October 21, 2008. In the Lien, Mr. Kretschmer as the President of Homes states that Homes was entitled to a builders' lien against the Property for: "supply labour and material to build a new home on above noted property" and that: "The sum of $255,982.00 is or will become due and owing to Tylon Steepe Homes Ltd. on September 19, 2008."

[11] On October 27, 2008, a Notice to Commence an Action was delivered to the solicitor for Homes by the Defendants. On November 14, 2008, a Writ of Summons and Statement of Claim was filed by Homes and subsequently served on the Defendants. The Defendants filed an Appearance to the Action on November 28, 2008.

POSITION OF THE PARTIES

[12] The first submission of the Defendants is that the Lien is vexatious, frivolous, and an abuse of process so that the Lien should be discharged pursuant to s. 25(2)(b) of the ***Act***. In the alternative, the Defendants submit that the Lien includes amounts which cannot be claimed, amounts actually paid by the Defendants, amounts attributable to profit so that the Lien is far in excess of the unpaid actual labour and materials of Homes. The Defendants submit that the best case scenario for Homes is a lien which takes into account the amounts already paid and the amounts which should be subtracted from what Homes claims under the Lien. The Defendants also submit that there is no documentation, no invoices, no particularization, no affidavit from a tradesperson to substantiate any claims by Homes to justify payment of any security so that Homes has not met the onus of establishing that the amount of the Lien is the amount of security that should be ordered.

[13] In its November 14, 2008 Statement of Claim, Homes states that the Contract required Homes to provide services and materials as a general building contractor to construct a residence for the Defendants on the Property, that the price was $867,097.00, that the Defendants wrongfully terminated the Contract on September 19, 2008, that a July 20, 2008 invoice for "progress draw (c)" was forwarded in the amount of $375,175.32 "after deducting a credit for an order for windows that had been paid by the Defendants in the sum of $19,189.98", that Homes received payments totalling $211,571.00 from the Defendants, that demand had been made for $375,175.32, that Homes filed the Lien for the sum of $255,982.00 "in error", that the sum of $255,982.00 was "an alternative claim based on a non- party assessment of the percentage completion" of the Contract as at July 28, 2008 including the "construction management fee" of Homes as of that date, that Homes reserves the right to apply for leave to amend the amount stated in its claim of lien in order to claim the sum of $375,175.32, that Homes continues to claim for recovery of $375,175.32, and that Homes is seeking a declaration that it is entitled to claim of lien in the amount of $255,982.00 (or alternatively, $375,175.32).

APPLICABLE PROVISIONS UNDER THE ACT

> **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 the security required under an order under subsection (2) may be less than the amount of the claim of lien.

> **25**(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 …
>
> (b) the claim of lien is vexatious, frivolous or an abuse of process.

FEBRUARY 6, 2009 ORDER

[14] On application by the Defendants, an Order was made allowing the Lien to be cancelled pursuant to s. 24(1) of the ***Act*** upon the Defendants paying into Court $255,982.00 on account of the lien claim and $25,598.20 as a security for the costs of the lien claim on the basis that the Order would be "without prejudice" to any application by the Plaintiff to amend the amount claimed under the Lien, to the right of the Defendants to claim that the Lien was improper or defective and that no funds should be paid into Court as security for the Lien or for the costs of the Plaintiff, and to the ability of any party to apply to the Court to revise the form, amount, or type of security ordered once these Reasons for Judgment are provided.

DISCUSSION AND CASE AUTHORITIES

[15] On the question of whether the Lien should be cancelled under s. 25(2)(b) of the ***Act*** because the claim of lien is vexatious, frivolous or an abuse of process, the Defendants rely on the decision in ***Henderson Land Holdings (Canada) Ltd. v. Micron Construction Ltd.*** (2000) 49 C.L.R. (2d) 311 (B.C.S.C.), which dealt with a lien of almost $400,000.00 but an agreement that the amount owing was only $41,860.52. In coming to the conclusion that the lien should be struck on the basis that it was frivolous, vexatious or an abuse or process, J.T. Edwards J. stated:

> The evidence indicates that Micron showed a callous disregard for the process established by the legislation. I am satisfied that the liens of Micron are vexatious, frivolous and an abuse of process. This conclusion is based on the agreement which settled the amounts owing and the subsequent filing of liens in amounts that are clearly an abuse of process where the evidence is that the agreement amounts remaining owing are $41,860.52 and the liens filed are in the face amount in excess of $400,000. (at para. 21)

[16] J.T. Edwards J. then went on to deal with the two sections of the ***Act*** relied upon by these Defendants in their application:

> I am satisfied that the liens at bar may be cancelled under either s. 24(1) or s. 25(2)(b) of the Builders Lien Act. Under the former the security is "... sufficient security" for payment of the claim and under s. 24(3) the value of the security required under an order pursuant to s. 24(2) may be "less than the amount of the claims of lien".
>
> Under s. 25(2)(b), if the court is satisfied that the claim of lien is vexatious, frivolous or an abuse of process it may cancel the claim of lien.
>
> I have not been asked to comment on these sections. Nevertheless some comment is necessary to demonstrate the application of these sections or of the Builders Lien Act in circumstances where the face value of the liens is equal to or substantially greater than the amounts owing on the contract. (a) First, when s. 24(1) is used there must be "sufficient security for payment of the claim". (b) Second, when s. 24(2) is used the courts may, after considering all the relevant circumstances, order the cancellation of the claim of lien. (c) Third, under s. 24(3) the court has discretion, in ordering the posting of security, to order that the amount of security may be less than the amount of the claim of lien. (d) Fourth, the court has discretion under s. 25(2)(b) to cancel the claim of lien if the claim of lien is vexatious, frivolous or an abuse of process.
>
> In my view, in the case at bar, after consideration of all relevant circumstances the court has the authority under s. 24 of the Builders Lien Act to cancel the liens on being satisfied that the proposed security is satisfactory to the court and the order to post security under s. 24(2) may be less than the

> amount of the claim of lien.
>
> The plain meaning of s. 25(2)(b) would require a cancellation of the lien filed in circumstances set out in this section. The court would not have a discretion to accept security in an amount less than the amount of the claim of lien.
>
> (at paras. 22-6)

[17] Regarding this Lien, the Defendants submit that the Lien amount of $255,982.00 is far in excess of the balance owing for labour and material, that it includes amounts actually paid by the Defendants, and that it includes loss of future profits. Accordingly, the Defendants submit that Homes has shown a callous disregard for the purpose of the legislation so that the Lien should be removed from title and no security provided.

[18] In support of their submission that the Lien amount cannot include future profits, the Defendants rely on the following statements in ***Golden Hill Ventures Ltd. v. Kemess Mines Inc.*** [2002] 7 B.C.L.R (4th.) 1:

> In Kettle Valley Contractors Ltd. v. Cariboo Paving Ltd. (1986), 1 B.C.L.R. (2d) 236 (B.C.C.A.), McLachlin, J.A., as she then was, stated on behalf of the majority that the value of work is claimable under a lien if it is "an integral and necessary part of the actual physical construction of the project" (at p. 256). Similarly, in Harmony Co-ordination Services Ltd. v. 542479 B.C. Ltd. (1999), 64 B.C.L.R. (3d) 376 (B.C.S.C.), Smith, J. held that the "price" includes all relevant inputs of labour and materials that make up the delivered product, provided such inputs are not "manifestly unrelated to the improvement" (at p. 385).
>
> Overhead and profit are claimable inputs or components of the price: Lauder Bros. & Tate Builders Ltd. v. Vanmore Holdings Ltd. (1985), 12 C.L.R. 128 (B.C. Co. Ct.) and Astro Contracting Ltd. v. McArthur (1986), 17 C.L.R. 230 (B.C. Co. Ct.).
>
> (at paras. 1146-7)
>
> It should be noted that Stro-Built Wall, [***Stro-Built Wall and Ceiling Inc. v. Kamal & Bros. Enterprises Ltd.*** [1997] B.C.J. (Q.L.) 2725 (B.C.S.C.)], *supra*, dealt with the question of whether claims for profit on work taken away from the claimant were lienable or not. In concluding that "damages are not lienable", the learned Master relied on the decision in Hanwor Construction Ltd. v. Sundial Properties Ltd. (1986), B.C.L.D. Civ. 2588-01 (B.C. Co. Ct.). That case also dealt with a claim for price and profits on work taken away from a claimant. I am satisfied that it is uncontroversial that such amounts are not lienable as the damages there relate to lost profits not to work done.
>
> (at para. 1151)

[19] The Defendants are correct in submitting that Homes is not in a position to include profit within the Lien amount. I am also satisfied that the Lien was filed for an amount in excess of the balance owing for labour and materials, so that a significant amount of the Lien is not supportable. In this regard, s. 2(1) of the Act is clear that the Lien can only be for the "price of the work and material, to the extent that the price remains unpaid …" While the Lien was filed for $255,982.00, $211,571.00 had already been paid. Clearly, $211,571.00 must be subtracted from the amount of the Lien.

[20] After reviewing the accounting materials provided by Homes, the Defendants point out that the Lien amount claimed includes amounts that were actually paid by the Defendants: (a) $6,200.00 (structural architectural and engineering); (b) $4,400.00 (municipal fees); (c) $19,199.00 (windows and doors); and (d) $9,975.00 (plumbing roughed in). In addition to the amount of profit claimed ($33,065.00), the Defendants also state that the following amounts cannot be included within what is lienable: $43,129.00 (office overhead) and $7,800.00 (contingency site work extras).

[21] Even if Homes had filed the Lien in the amount of $375,586.00, the Defendants submit that the Lien amount available to Homes excluding G.S.T. would be $43,548.91, made up as follows:

Claimed	$ 375,586.00

Less:			
(a)	Architectural fees (paid by the Defendants)	$ 6,200.00	
(b)	Municipal fees (paid by the Defendants)	$ 4,400.00	
(c)	Office overhead	$ 43,129.00	
(d)	Windows and doors (paid by the Defendants)	$ 19,199.00	
(e)	Contingency	$ 7,800.00	
(f)	"Plumbing Rough-In" (paid by the Defendants)	$ 7,374.09	
(g)	Already paid	$ 211,571.00	
(h)	Profit	$ 32,364.00	$ 332,037.09
	OWING		$ 43,548.91

[22] As well, the Defendants note that there is no evidence from the subs regarding what work they undertook and no real outside assessment of what is owing. The Defendants submit that the bald assertion of Mr. Kretschmer on behalf of Homes as to what is owing is not enough. In this regard, the Defendants also refer to the January 14, 2008 Affidavit of Mr. Kretschmer where he states:

> I was not requested to provide an accounting of monies that were paid to us by the Ponts. I was requested to provide them with all our invoices and payments. I took the position and informed the Ponts that this was a fixed price contract, and we were not required to provide a breakdown of our costs.

[23] The Defendants submit that the Court ought to draw an adverse inference from the failure of Plaintiff to produce a "non-party" assessment of the percentage of completion and rely on the following statement of Martin C.J.S. on behalf of the Court in ***Murray v. Saskatoon*** [1952] 2 D.L.R. 499 (Sask. C.A.):

> The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in Wigmore on Evidence following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application. (at para. 21)

[24] After hearing the submissions made on behalf of the Defendants at the January 7, 2009 hearing, Homes arranged for George C. Evans, Professional Quantity Surveyor, to provide an opinion "on the valuation of the work in place as September 18, 2008…." In his January 14, 2009 Affidavit, Mr. Evans states that he received from Homes and that he relied upon: (a) a list of "completed work"; (b) a list of "cost to complete"; and (c) the description of "work in place" dated December 29, 2008 prepared by Homes. Mr. Evans confirmed that he did not attend the site and:

> We have relied on the architectural drawings and a description of work in place developed by Tylon Steepe Homes Ltd. For the purposes of this report, we must assume that the contractor's description of work in place is accurate and the breakdown provided is an accurate breakdown of the contract amount.

[25] In conclusion, Mr. Evans states:

> The conclusions stated in my letter of January 14, 2009 are based on my analysis of the documents and data described under such a heading and do not include a personal inspection of the site. It is my opinion that I can prepare a valuation of the work in place making the assumptions that the information contained in the documents provided to me is accurate information.

[26] I am satisfied that the work done by Mr. Evans does not assist Homes in establishing the amounts of the Lien that should have been included in the amount claimed under the Lien. While I am satisfied that a site visit would not have added appreciably to the information available to Mr. Evans because additional work has been undertaken by the Defendant after September 18, 2008, it is clear that Mr. Evans merely relied upon the information provided to him by Homes and that this information was far from accurate.

[27] I find that the Defendants have established that the amount of the Lien is far in excess of what was lienable. Even accepting a lien amount of $375,175.32, the amount of the Lien is grossly overstated as it does not take into account the fact that $211,571.00 of that amount was already paid, and that a further $37,173.09 was actually not owing because it had been paid by the Defendants. The difference between either $375,586.00 or $255,982.00 and $43,548.91 is so substantial as to amount to an abuse of process. However, it may be that some of the $43,129.00 claimed for “office overhead” might ultimately be proven to be an integral and necessary part of the actual work and material. As well, Homes may well be entitled to G.S.T. on those parts of the Lien which are maintainable. While I am satisfied that the filing of the Lien in the amount of $255,982.00 amounts to an abuse of process, I am satisfied that it is more appropriate to deal with the Lien in accordance with the provisions of s. 24 of the ***Act*** so that some security for the Lien will be available to Homes.

[28] The Plaintiff is entitled to a lien which includes all relevant inputs of labour and materials that make up the delivered product, provided such inputs are not manifestly unrelated to the improvement: ***Golden Hill Ventures Ltd.****, supra*, at para. 146; and ***Harmony Coordination Services Ltd. v. 542479 B.C. Ltd.*** (1999) 64 B.C.L.R. (3d) 376 (B.C.S.C.). It may well be that a portion of the office overhead claimed might relate to the work done on the Property. At this point, that amount cannot be calculated on the basis of the materials before me. However, the amounts previously paid to Homes or paid separately by the Defendants but claimed by Homes cannot be included within the amount claimed under the Lien. In the circumstances, I am satisfied that the amount of the security should be considerably less than the amount of the Lien.

[29] On a number of occasions, the court has cancelled a lien upon the posting of security in an amount less than what was claimed under the lien: ***Tran v. DeWeertd*** [2005] B.C.J. (Q.L.) No. 1372 (B.C.S.C.) ($10,000.00 was required as security where the lien was $42,000.00 when it was found that there were “substantial merits” to the claim, prejudice to the homeowner, and a low risk of insolvency); and ***Gryphon Court Inc. v. Barclay Construction Corp.*** [1996] B.C.J. (Q.L.) No. 647 (B.C.S.C.) (where a lien of $817,719.38 was discharged upon $1 being paid into court).

[30] The materials before me indicate that the Property will have a value upon completion of construction of about $1,275,000.00 and that the approved mortgage for the Defendants is $950,000.00. Now that the Lien has been discharged, the Defendants will be able to complete the construction. There will be enough equity in the Property to satisfy a judgment for the face amount of the Lien if Homes is successful in establishing its entitlement to the amount claimed.

[31] The onus is on the Plaintiff to establish that the full amount of the Lien should be posted as security: ***Strata Plan LMS2262 v. Belgrove Construction Ltd.*** [2003] B.C.J. (Q.L.) No. 756 (B.C.S.C.), where Master Barber stated:

> When the question arises at the time of posting security with respect to the amounts claimed, the onus shifts to those who want full security posted to provide at least the barest of details which would be something more than a bald statement that the monies are owing and something less than prima facie proof of the claim. (at para. 10)

[32] I am satisfied that the Plaintiff has not met that onus. Homes only provided the barest of materials as to what is owing, including a “bald statement” of the monies owing. It is also clear that Homes has not taken into account the monies already paid in partial satisfaction of what is owing to it. In this regard, Homes has failed to

distinguish between what might be owing under the Contract and what might be lienable as a result of the labour and materials relating to the improvement on the Property.

[33] In ***Q West Van Homes Inc. v. Fran-Car Aluminum Inc.***, (2008) 83 B.C.L.R. (4th) 349 (B.C.C.A.), Chaisson J.A. on behalf of the Court summarized the appropriate approach to the determination of the quantum of security required to discharge claims of lien as provided under s. 24 of the ***Act***:

> 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.
>
> (at para. 56)

[34] I am satisfied that it is plain and obvious that a claim for $375,175.32 or a claim for $255,982.00 will not succeed. I come to that conclusion after taking into account what has already been paid directly to the Plaintiff or has been paid by the Defendants to others, that part of the Lien is not sustainable, and those parts of the Lien where I can conclude that it is plain and obvious that they will not succeed. I also take into account that there will be more than enough equity to satisfy the full balance of the amount claimed if, in due course, Homes obtains a judgment for the balance that it says is due and owing under the Contract.

[35] In the circumstances, I set the amount that must be retained as security for the Lien at $90,000.00. This sum represents the sum of $43,548.91, as noted above, some or all of the overhead set out in the information that was provided by Homes to Mr. Evans ($43,129.00), some amount for G.S.T., if claimable, as well as a minimum further amount representing what is claimed by Home to be owing for labour and materials. The question which then arises is whether an amount for costs should also be held as security arising as a result of the cancellation of the Lien.

SHOULD AN AMOUNT FOR COSTS BE PART OF THE SECURITY?

[36] There is no specific section in the ***Act*** requiring an owner to pay security for costs as part of an application to cancel a lien. In this regard, Chaisson J.A. on behalf of the Court in ***Q West Van Homes Inc.,*** *supra*, stated:

> I found it curious that the security requested and ordered includes an amount for security for costs of the lien claimant. These costs presumably relate to proceedings to be brought by the lien claimant to recover the amount of the claim. This means that a putative defendant is posting security for the costs of a putative plaintiff. There also does not appear to be consideration of the criteria that apply to an application for an order for security for costs. (at para. 9)
>
> In response to questions from the Court, counsel advised that it is the usual practice to include 10% of the value of the lien claim as an amount for security for costs. There may be a perfectly good explanation for this apparently usual practice, but, while I am prepared to proceed on that basis in this case, it may be that the issue should be addressed in appropriate circumstances. (at para. 11)

[37] The learned authors of *British Columbia Builders Lien Practice Manual* (Vancouver: C.L.E. 2006) set out the "usual practice" and include a "rule of thumb" that security for costs to be pegged at 15% to "adequately secure the lien claimant" for the costs of the lien enforcement action. Of similar effect are the comments in the annotated *British Columbia Builders Lien Practice Manual 2007-2008* (Vancouver: C.L.E. 2007) and *Guide to Builders' Liens of British Columbia* (Toronto: Thomson Carswell, 2006. However, those sources only provide a statement of practice without an analysis of the rationale behind it or decisions which would support the legal basis for it.

[38] A number of decisions have referred to the "common practice" of fixing the amount of security for costs at between 10%-15% of the amount of the Lien. In ***Bristol Construction Co. v. D.K. Investments Ltd.*** [1972] 4 W.W.R. 119 (B.C. Cty. Ct.), the statement was made:

> It has been the practice of the Court to fix security in the sum of the claim of lien, together with a further sum of estimated costs of action before ordering cancellation of the claim of lien. (at para. 13)

[39] In ***Costco Wholesale Corporation v. J.W. Price Construction Ltd.*** (1998), 37 C.L.R. (2d) 254, Master Joyce, as he then was, stated:

> While it may be common practice in applications pursuant to s. 33 of the Act to fix the amount of security at 10% to 15% of the amount of the lien claim there is no statutory rule which provides that the amount of security for costs be fixed on this basis (cf. s. 44(1) of the Ontario Construction Lien Act which provides that the court shall vacate the lien upon posting security in the amount of the lien and the lesser of $50,000 or 25% of the amount of the lien). The amount of security for costs is in the discretion of the court. In my view it is appropriate to consider a pro-forma bill of costs. (at para.12)

[40] However, the percentage calculation has varied: (a) ***Pleasantville Homes Ltd. v. Chand*** (2005) 35 R.P.R. (4^{th}) 46 (B.C.S.C.) at para. 55, where Arnold-Bailey, J. stated that the defendants would pay the "customary" 15% as security for costs; and (b) ***Quigg Homes W.V. 345 Ltd. v. Bosma*** (2004) 42 C.L.R. (3d) 253 (B.C.S.C.), where Groberman J., as he then was, ordered 25% as security for costs.

[41] While adding a percentage or any amount for costs appears to be a well established practice, I am satisfied that the practice is other than in accordance with the purpose of the ***Act*** and the nature of a lien filed against property. A review of the decisions of this Court allows me to conclude that the propriety of adding an amount for costs has not been considered within the contexts of the purpose of the ***Act***, of the specific provisions of what is and is not covered by a lien, and of the extent to which security can add to or subtract from the substantive rights of a claimant.

[42] The rationale for providing security and whether or not the security can change the security afforded by a lien was discussed in ***Nanaimo Contractors Ltd. v. Patterson et al.*** (1964) 46 D.L.R. (2d) 649 (B.C.C.A.), where Davey J.A., on behalf of the Court, dealt with what was then s. 33 of the ***Act*** on an appeal from an order that a lien be cancelled upon payment into Court:

> … security provided under s. 33 is merely a substitution for the security afforded by the lien under the Act. It neither adds to nor subtracts from the substantive rights of the claimant and owner inter se, and it remains for the claimant to establish his right to the lien and the quantum of it; the owner retains all his defences to the claim. Whatever rights other lienholders may have to participate in the security provided under s. 33 is a matter between the rival claimants and cannot per se extend the owner's liability under the ***Act***. (at para. 10)

[43] I am also satisfied that the "customary" practice that security for costs be paid in addition to the amount of a lien adds to the substantive rights of the lien claimant. This is not the purpose of s. 24 of the ***Act***. Such an order should not be made. Section 2(1) of the ***Act*** provides that a lien may be filed for "… the price of the work and material, to the extent that the price remains unpaid …". The nature of a lien and the fact that security is merely in substitution for the security afforded by a lien leads me to the conclusion that, in the absence of a specific legislative provision, it was not intended that security for costs would be included when a lien is discharged pursuant to s. 24 of the ***Act*****.**

[44] The legislation in other provinces is specific in establishing that security for costs must be included in the amount paid when an order is made discharging a lien:

(a) s. 44(1)(d) of the ***Construction Lien Act***, R.S.O. 1990, c. 30 (the lesser of $50,000.00 or 25% of the full amount of the lien);

(b) s. 56(1)(b) of the ***Builder's Lien Act***, R.S.S. 1984-85-86, c. B-7.1 (25% of the full amount of the lien);

(c) s. 56(1)(b) of the ***Builders' Liens Act***, C.C.S.M, c. B91 (granting the lienholder a first charge "if any amount, including costs, found by the judge to be owing" under the lien);

(d) s. 48(1)(a) of the ***Builder's Lien Act***, R.S.A. 2000, c. B-7 (the amount of lien plus "any costs that the court may fix").

[45] No similar provision is present in the ***Act***. As well, the present language of s. 24 of the ***Act*** differs from what was then s. 34 of the ***Act***, R.S.B.C. 1996, c. 41, thus narrowing the scope of the lien and giving further emphasis to the interpretation I give to s. 24 of the ***Act***. The former provision included a provision that the lien could be discharged upon payment into Court "… in an amount satisfactory to the court and on terms, if any, the court sees fit to impose." Now, s. 24(1) provides that the claim of lien can be cancelled "on giving sufficient security for the payment of the claim". Section 24(2) of the ***Act*** refers only to the cancellation of the "claim of lien" without reference to an amount for the costs to prove the amount of the claim. Section 24(3) states that the security may be less than "the amount of the claim of lien". Again, there is no reference to costs". Throughout s. 24, there are only references to the "claim of lien".

[46] When the security is ordered it is only in substitution for the "claim of lien", and nothing else. There is no ability of the Court to include the payment of the anticipated costs to prove the claim of lien. The ***Act*** is a statute which creates extraordinary remedies and, as such, must be strictly construed. I cannot assume that, because of the absence of any provision for the inclusion of costs as part of the amount of the security, the general provisions of the Rules of Court or the equitable jurisdiction of the Court come into consideration. In the absence of a provision in the ***Act***, I am of the view that the Court has no jurisdiction to entertain such an inclusion.

[47] I am satisfied that there are sound reasons why the amount of security should not include security for costs. It is extremely rare for a plaintiff to seek or be provided with security for costs against a defendant prior to obtaining judgment. In the context of a dismissal of an application for leave to appeal an order dismissing the plaintiff's application for security for costs against an impecunious defendant, Donald J.A. in ***Dang v. Nguyen***, [1998] B.C.J. (Q.L.) 416 (B.C.C.A.) described the relief as "extraordinary" and a form of "pre-judgment execution". In ***Wiest v. Middelkamp*** [2004] B.C.J. (Q.L.) No. 1413 (B.C.S.C.), an application for security for costs against an impecunious plaintiff was dismissed:

> Although the court does have the inherent jurisdiction to order an individual to post security for costs, that power is to be exercised "cautiously, sparingly and indeed under very special circumstances": Tordoff v. Canadian Life Assurance Co. (1985), 64 B.C.L.R. 46 (S.C.) at 50. (at para. 21)

[48] I am satisfied that it is inappropriate to provide for security for costs. This is an unwarranted addition to the substantive rights available to Homes. In any event, it will be extremely rare for a situation to justify the extraordinary remedy of providing for security for costs prior to a lien action being reduced to judgment. I am not satisfied that this is a case where any available power to order that costs be included within the security to be held in substitution for a lien creates such special circumstances that this extraordinary remedy should be available to Homes.

[49] The security will be limited to the $90,000.00 ordered. There will be no additional security for the potential costs which may be available to Homes in due course. I also order that the $90,000.00 be held by the solicitor for Homes in an interest-bearing trust account rather than remaining in Court. I also order that any funds paid into Court be paid out of Court. The funds to be held by the solicitor for Homes will be available only by Court Order.

___”G.D. Burnyeat J.”_____
The Honourable Mr. Justice Burnyeat