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Court of Appeal Clarifies Factors to be Considered When Fixing Security Under B.C. Builders Lien Act

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On September 22, 2008, the British Columbia Court of Appeal released its decision in *Q West Van Homes Inc. v. Fran-Car Aluminum Inc.* This decision sets out five general factors to guide courts when fixing security under section 24 of the British Columbia *Builders Lien Act* (the BLA).

Section 24 of the BLA allows a person against whose land a lien has been filed, as well as a contractor, subcontractor or any other person liable on a contract or subcontract in connection with an improvement on the land to apply to a court for cancellation of the claim of lien upon the posting of an amount "sufficient to stand in place of the lien". The court has discretion to order that the value of the security be less than the amount of the claim of lien. Further, the legislation only provides that the court consider "all relevant circumstances". Given this latitude, the Court of Appeal's guidance is significant to owners, lenders, contractors and other construction industry participants.

BACKGROUND

The appellants were hired to manufacture, deliver and install windows and doors for a condominium construction project undertaken by Q West Van Homes Inc. (Q West). The price specified in the contract between the parties was C$2,585,000, plus taxes. The appellants alleged that although their work was completed, C$1,390,652.70 had not yet been paid. They filed an initial lien against the condominium property for the amount owing to them under the contract, and a second lien for the cost of additional work and materials.

Q West responded by bringing its own action claiming damages for breach of contract and delay, and sought an order discharging the liens pursuant to section 24 of the BLA. Mr. Justice Tysoe of the Supreme Court of British Columbia held that the appellants were responsible for some of the delay alleged by Q West and that the amount of security required should take into account a counterclaim for delay. However, he also expressed concern about ordering a significantly reduced amount of security given that section 24 applications are typically decided on untested affidavits and without discovery. Mr. Justice Tysoe ultimately ordered security in the amount of C$1,250,000, inclusive of an amount for security for costs.

The appellants were granted leave to appeal, seeking security for the full amount of their lien claims, and an additional amount as security for costs.

THE COURT OF APPEAL JUDGMENT

The Court of Appeal held that there are two questions that must be answered on an application to substitute security for a claim of lien: (1) are the claims advanced by the parties sustainable; and (2) what is the appropriate quantum of the security. While the Court of Appeal recognized that it would not be appropriate to articulate criteria to be taken into account on a section 24 application with specificity, it did articulate five general factors that inform the consideration of these two questions:

1. The court must look at the claims of the parties to determine if it is plain and obvious that they will not succeed. It is sufficient to establish a *prima facie* case to support the claim.

2. If the court determines that it is plain and obvious that the claim would fail, such a claim must not be considered in the court's assessment of the appropriate quantum as it is not relevant.

3. Considering the evidence as a whole, the court has discretion in fixing the amount that is appropriate security.

4. The court's discretion must be exercised judicially based on the relevant evidence before the court and taking into account the objectives of the legislation. Primarily, those objectives include protecting those who supply work and materials to a construction project, and not unduly prejudicing the owner.

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5. As the wording of the section contemplates, the amount of security may be less than the amount claimed under the lien.

In the result, the Court of Appeal held that the approach taken by Mr. Justice Tysoe was not inconsistent with these considerations and that he committed no error in principle. Tysoe J. properly exercised his discretion after considering the affidavit materials and other relevant materials. He held that there was some evidence that the appellants caused delay and stated he could not determine properly the full extent of the delay or assess the damages caused by it. In other words, it was not "plain and obvious" that the delay claim would fail. The Court of Appeal also approved of his comments regarding an inability to determine the merits of claims based on material provided on a section 24 application, and that the court must be cautious in ordering a reduced amount of security.

Finally, the Court of Appeal considered whether overtime charges claimed by the appellant properly form part of a claim of lien. Tysoe J. had analogized them to overhead and financing charges and did not include them in his assessment of the appropriate quantum of security. The Court of Appeal held that whether or not overtime charges could be equated to overhead or financing charges is a matter that should have been left for trial and that Mr. Justice Tysoe erred in deducting them on a section 24 application.

In the result, the appeal was allowed, only to the extent of increasing the required security to C$1,500,000.

CONCLUSION

Having a builders lien registered on title typically interferes with the flow of financing from lenders and prevents the transfer of title. Section 24 of the BLA is a useful means of preventing this interference so that projects are adequately funded and complete on time and on budget. This in turn reduces the risk of all parties involved. The *Q West* decision provides guidance for construction industry participants as to the factors that the court will consider when determining the quantum of security to be posted under section 24 and demonstrates the impact that a counterclaim for delay can have on reducing the amount of that security. While the BLA provides courts with broad discretion in fixing the amount of security, that discretion must now be exercised within the *Q West* guidelines.

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