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# AN OWNER'S QUICK ATTACK ON LIENS FILED ON TITLE – CAN IT SUCCEED?

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The recent decision of the BC Court of Appeal in *West Fraser Mills Ltd. v. BKB Construction Inc.* sheds light on the efforts of owners to aggressively attack the registration of liens on their property. In particular, the decision gives guidance on cancelling liens pursuant to section 25 of the *Builders Lien Act* (the "Act") and with respect to section 24 of the Act concerning the appropriate amount of security to post to clear a lien from title.

The facts of the case are somewhat unusual and if the action proceeds to trial there could be further guidance from the court as to the meaning of what constitutes a lienable "improvement" under the Act.

In this case the owner sold a paper mill on its property to a foreign buyer who was to dismantle it and ship abroad and the owner then intended to separately sell the land to another party. Contractors of the buyer of the paper mill engaged to dismantle it and ship it out were unpaid by the buyer of the paper mill. The unpaid contractors filed a lien against title to the land under the Act.

The owner of the land took an aggressive position with respect to the liens filed on title to its property. It sought a quick hearing before the court to have the liens declared invalid pursuant to section 25 of the Act or in the alternative post in court nominal security in the amount of $1.00 in place of the liens to be removed on title. Further, the owner of the land argued that the liens could not be valid as the work done was not an "improvement" to the land as required by the Act, but merely a demolition that added no value to the land. The Chambers Judge granted the order to cancel the liens under section 25 of the Act and the lien claimants appealed.

The BC Court of Appeal held that the only possible basis to cancel the liens under section 25 of the Act was on the basis of whether the liens were:

(a) filed out of time or in the wrong form;

(b) filed against the wrong property; or

(c) frivolous, vexatious or an abuse of process.

The owner of the lands did not allege the first two basis and only alleged that the liens were an abusive process..

The BC Court of Appeal held that to succeed under the test of whether the liens were an abusive process the owner of the lands needed to prove that it was "plain and obvious" that the claims with respect to the liens could not succeed. In reaching this decision, the court relied on analogous case law with respect to striking pleadings in litigation for being scandalous, frivolous or vexatious. Under this case law it is important as to whether there is "a question to be tried" or there are "at least arguable claims". In short, the court found on the evidence before it that it was not plain and obvious that the liens were invalid.

Further, the BC Court of Appeal held that it was premature to determine the issue of the validity of the liens and whether the dismantling and demolition work done on the property constituted an "improvement" and was therefore lienable under the Act.

Ultimately, a trial of the issues is required as more evidence was needed than the affidavits that were before the Chambers Judge making the order invalidating the liens.

With respect to section 24 of the Act, the BC Court Appeal rejected the argument that this provision could be used to post only nominal security in order to remove the liens from title to the property.

Again, the Court relied upon the "plain and obvious" test to determine whether the security could be reduced to below the face value of the claim in the liens. In other words, unless it was plain and obvious that the amounts claimed in the liens could not succeed at a full hearing of the claims at trial, the full amount must be posted in court to clear the liens from title.

Of course, this means that if the liens can be cleared from title to the property for nominal security under section 24 of the Act, they might as well be stuck in their entirety as being invalid pursuant to section 25 of the Act as being frivolous.

It appears that owners of property who try to take a pre-emptory aggressive position against lien claimants have been dealt a set-back. However, it remains to be seen as to whether the case will proceed to trial and whether the court will ultimately provide some guidance as to what work on property is capable of

constituting an “improvement” and is therefore lienable.