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WARNING TO CONDO PURCHASERS - DON'T GET CAUGHT WITH BUILDER'S LIENS

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Richards Buell Sutton Construction Law Newsletter

In an interesting decision in 2012, the BC Supreme Court discussed in *Gulf Excavating Ltd. v. Otter Bay Developments* a significant problem confronting purchasers of newly acquired strata properties with respect to builder's liens filed by construction trades.

The *Strata Property Act* sets out a mechanism intended to protect purchasers of newly constructed strata properties from liability to builder's liens by requiring that 7% of the purchase price be held back in trust for 55 days after the conveyance of the strata unit before being paid to the developer who sold the strata property to them.

If a claim of lien is filed on title to the purchaser's strata unit within 45 days of the conveyance to the purchaser by a construction trade for amounts it has not been paid on the construction project, then the new owner of the strata unit is intended under the *Strata Property Act* to be able to discharge the validly filed lien from title to its strata unit by simply making a court application to pay the 7% holdback into court. The new owner has no further liability to the lien claimant and the purchaser is not out-of-pocket for anything beyond his purchase price.

If no builder's lien claim is filed on title to the strata unit or proceeding commenced to enforce a lien against the holdback, then the 7% holdback must be paid to the developer of the project 55 days from conveyance.

However, a problem has been identified with this scheme which the courts appear to recognize will prevent the use of this simple mechanism to clear builder's liens from title to strata units.

The problem lies in the wording of the *Strata Property Act* which states that only a "purchaser" rather than an "owner" may avail themselves of the procedure of paying the 7% holdback into court to discharge a validly filed lien on title to the strata unit. Of course, once a purchaser completes its conveyance of title to the strata unit it is no longer a "purchaser" but an "owner".





Importantly, a purchaser who completes its purchase of a strata unit may know nothing about payment disputes among construction trades and the developer of the construction project that comprises the purchaser's strata unit. However, this purchaser loses the right to use the 7% holdback from his purchase price to discharge the liens after conveyance because the "purchaser" is now an "owner".

In simple terms, the *Strata Property Act*, by mistakenly identifying that only "purchasers" can use the mechanism, creates a situation that purchasers who complete their purchase of a strata unit lose the ability to discharge builder's liens validly registered on title within 45 days of conveyance without further liability to the lien claimant. However, this is precisely when it is clear the *Strata Property Act* intended that they be protected.

If a purchaser has completed its sale and is now an owner of a strata unit and needs to discharge a validly registered lien on title from a construction trade, it appears that the strata unit owner has two alternatives:

1. The strata unit owner can make an application under Section 24 of the *Builder's Lien Act* to have the builder's lien discharged upon the posting of the full amount of the lien. However, the difficulty with this mechanism is that the total amount of the lien registered on title can be very large. In the case of *Gulf Excavating Ltd. v. Otter Bay Developments* the strata unit owners were faced with liens of approximately \$500,000.00. Further, these amounts paid into court will remain there until the developer and building trades settle their dispute or judgment is rendered by the court. It is important to understand that such funds held in court are security for payment of any such judgment despite the fact that the strata unit owner is merely an innocent bystander.
2. An alternative to Section 24 under the *Builder's Lien Act* is another provision under the *Strata Property Act* whereby the owner to the strata unit may have the builder's lien removed from title upon payment into court of the strata lot's share of the amount secured by the lien. The strata unit owner is released from further liability upon such payment. The method for calculating these sums for each strata lot are set-out in the *Strata Property Act*. However, once again these amounts can be large depending on the amount of the lien claim. Further, this is payment over and above the purchase price originally agreed to.

Unfortunately, both of the foregoing options are not financially palatable.

It is recommended that to protect purchasers of strata units from finding themselves in these circumstances that the purchaser's lawyer ensures that there are undertakings placed on the developer's lawyer to the effect that, if any builder's liens are filed against title to the purchaser's strata lot before expiration of the holdback period, the developer's lawyer will take such action on behalf of the developer as is necessary to





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effect cancellation of all such builder's liens in accordance with Section 24 of the *Builder's Lien Act*. In short, purchasers in negotiating their purchase of the strata unit should ensure it is the developer who must deal with any builder's lien and not them.



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