Daoust Vukovich LLP
BARRISTERS & SOLICITORS

PDF 6-11

"CONSTRUCTION LIEN FOR DUMMIES"

Prepared By: Wolfgang Kaufman (with David Holmes)
2011 ICSC Canadian Shopping Centre Law Conference
Breakfast Roundtable, Hilton Hotel, Toronto
February 24, 2011

CONSTRUCTION LIEN FOR DUMMIES

2011 ICSC CANADIAN SHOPPING CENTRE LAW CONFERENCE
BREAKFAST ROUNDTABLE
THURSDAY, FEBRUARY 24, 2011
HILTON HOTEL, TORONTO

PRESENTERS

WOLFGANG KAUFMANN
Daoust Vukovich LLP
3000 – 20 Queen Street West
Toronto, Ontario
M5H 3R3
wolfgang@dv-law.com
direct line: 416-597-3952

DAVID HOLMES
Miller Thomson LLP
5800 – 40 King Street West
Toronto, Ontario
M5H 3S1
Dholmes@millerthomson.com
direct line: 416-595-8536

ICSC ROUNDTABLE DISCUSSION – CONSTRUCTION LIENS
February 24, 2011

SAMPLE LEASE PROVISIONS DEALING WITH CONSTRUCTION LIENS:

Sample #1

Neither the Tenant nor the Landlord shall permit any construction, mechanic's or materialman's or other lien against the Demised Premises or the Project in connection with any labour, materials or services furnished or claimed to have been furnished. If any such lien shall be filed against the Demised Premises or Project, the party charged with causing the lien will cause the same to be vacated by payment into court or otherwise within fifteen (15) days of notice from the other party, or within such shorter time as may be necessary if funding of a financing is delayed pending such vacating, failing which the said other party may cause said lien to be vacated at the cost of the party charged with causing the lien.

Sample #2

Whether prior to the Commencement Date or during the Term of this Lease or any renewal or extension hereof, the Tenant shall not make any repairs, replacements, Leasehold Improvements or install trade fixtures in any part of the Leased Premises without first obtaining the Landlord's written approval, such approval not to be unreasonably withheld, and in connection therewith the Tenant shall, prior to commencing any such work, submit to the Landlord: (i) for its prior approval details of the proposed work, including drawings and specifications prepared by qualified architects or engineers and conforming to good engineering practice; (ii) ***such indemnification against liens****, costs, damages and expenses (including its costs and expenses incurred, or which may be incurred, in reviewing the proposed work and supervising its completion) and such insurance coverage as the Landlord requires; and (iii) evidence satisfactory to the Landlord that the Tenant has obtained at its expense all necessary consents, permits, licences and inspections from all governmental and regulatory authorities having jurisdiction.*

The Tenant shall at all times during the period that the Tenant is engaged in the construction or installation of its improvements or has been given possession of the Leased Premises and throughout the Term promptly pay all its architects, engineers, contractors, materialmen, suppliers and workmen and all charges incurred by or on behalf of the Tenant for any work, materials or services which may be done, supplied or performed at any time in respect of the Leased Premises and the Tenant shall do any and all things necessary so as to ensure that no lien is registered against the Complex or any part thereof or against the Landlord's interest in the Leased Premises (including, without limitation, obtaining a waiver of lien from its contractors and subcontractors) and if any lien is made, filed or registered, the Tenant shall discharge it or cause it to be discharged forthwith at the Tenant's expense. If the Tenant fails to discharge or cause any such lien to be discharged as aforesaid, then in addition to any other right or remedy of the Landlord, the Landlord may but it shall not be obligated to discharge the same by paying the amount claimed to be due into Court or directly to any such lien claimant and the amount so paid by the Landlord and all costs and expenses, including reasonable legal fees (on a solicitor and his client basis) incurred as a result of the registration of any such lien shall be immediately due and payable by the Tenant to the Landlord as Additional Rent on demand.

SOME RELEVANT CASE LAW

The following is a list of some relevant case law relating to the issue of a landlord's potential liability under the *Construction Lien Act*, R.S.O. 1990, c. C.30:

1276761 Ontario Ltd. v. *2748355 Canada Inc.* (2005), 44 C.L.R. (3d) 284, 140 A.C.W.S. (3d) 790 (Ont. S.C.J.) aff'd 55 C.L.R. (3d) 54, 48 R.P.R.; (4th) 201 (Ont. S.C.J. (Div. Ct.)).

D.B.M. Heating & Air Conditioning Ltd. v. *Lark Manufacturing Inc.* (1990), 37 C.L.R. 113, 19 A.C.W.S. (3d) 1138 (Ont. S.C.).

Hamilton (City) v. *Cipriani* [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1 (S.C.C.).

John A. Marshall Brick Co. v. *York Farmers Colonization Co.* (1917), 54 S.C.R. 569, 36 D.L.R. 420 (S.C.C.).

K. & Fung Canada Ltd. v. *N.V. Reykdal & Associates Ltd.* [1998] 8 W.W.R. 45, 175 W.A.C. 184 (Alta. C.A.), leave to appeal to S.C.C. refused 188 W.A.C. 162*n*, 228 A.R. 162*n*.

Markborough Properties Inc. v. *841202 Ontario Inc.* (1996), 28. C.L.R. (2d) 77, 62 A.C.W.S. (3d) 830 (Ont. Ct. (Gen. Div.)).

Pinehurst Woodworking Co. v. *Rocco* (1988), 13 O.A.C. 121, 38 R.P.R. 116 (Ont. Div. Ct.).

Sandon Construction Ltd. v. *Cafik* (1973), 34 D.L.R. (3d) 809, [1973] 2 O.R. 553 (C.A.).

Southern Plumbing Ltd. v. *Quality Craft Interiors Ltd.* (1994), 17 C.L.R. (2d) 195 (Ont. Ct. (Gen. Div.).

Venneri Engineering Ltd. v. *Zonenward Leasex Management Inc.* (1994), 16 C.L.R. (2d) 141, 49 A.C.W.S. (3d) 18 (Ont. Ct. Gen. Div.).

There's a Construction Lien on My Property!!

Tenant's contractors and their subcontractors are entitled to register a construction lien against a tenant's leasehold interest, if they are not paid. Unfortunately, the leasehold interest of a tenant who is not paying its bills has little value. For this reason tenants' contractors frequently register construction liens against the landlord's interest in the property. Do tenants' contractors have the right to register a construction lien against the landlord's interest?

As a general rule they do not, unless either:

a) the contractor gave the landlord notice, pursuant to section 19(1) of the *Construction Lien Act* ("*CLA*"), of its intention to claim a lien against the landlord's interest before the work. Upon receiving the required notice, the landlord's property will be subject to a claim for a construction lien unless, within 15 days of receiving the notice the landlord gives the contractor written notice that it assumes no responsibility for the improvements to be made; or

b) there is a direct relationship between the landlord and the contractor such that the landlord is an "Owner" with respect to the work done by the contractor. While the landlord may be the owner of the lands in the everyday sense, in order to prove the landlord is the "Owner" under the *CLA,* whose interest may be liened by the contractor, the contractor must show that the work was **done at the landlords request and,** one of the following:

   i) upon the landlord's credit, or

   ii) on behalf of the landlord, or

   iii) with the landlord's privity or consent, or

   iv) for the landlord's direct benefit.

The tenant's contractor generally does the work at the tenant's request, upon the tenant's credit, on the tenant's behalf, etc. In order to get around this and justify a claim for a construction lien against the landlord's interest, the tenant's contractor will point to the lease between the landlord and the tenant. The usual provisions of a commercial lease respecting tenant's work or improvements, at first blush, lend support to a tenant's contractor's claim for a lien.

A commercial lease will generally require that a landlord approve any plans for construction before the work begins. Contractors argue that by reviewing and approving plans before construction begins, the landlord had notice of the contractor's claim under section 19(1). Unless the landlord disavows such a claim, in writing, within 15 days of receiving the plans, which of course the landlord never does, then the contractor claims to be entitled to claim a lien against the landlord. Although this argument is frequently made, it does not hold up in court.

Sending plans to a landlord for approval before construction commences is not sufficient to trigger section 19(1) of the *CLA*. There is no prescribed form for a *CLA* section 19(1), however the notice must be in writing and be: sufficiently "sufficiently distinct and memorable" to allow the landlord to know that its land will be looked to be financially responsible for any money owing by its tenant to the contractor in question. (*1276761 Ontario Ltd. V. 2748355 Canada Inc. (Ont. Div. Ct. 2006)*. Sending plans to a landlord for approval does not meet this test.

Similarly when it comes to the issue of the whether or not the landlord is an "Owner" under the *CLA* contractors will point to the lease and argue as follows:

a) the lease contemplates the tenant constructing its building or other leasehold improvements – accordingly the work was done at the landlord's request:
b) the landlord agreed to pay a tenant allowance to cover all or part of the construction costs – accordingly the work was done on the landlord's credit;
c) the landlord must approve the plans before the construction can commence – this establishes privity and consent between the landlord and the contractor;
d) the landlord has the right to monitor the construction and landlord's do in fact carefully monitor the work being done – contractors argue this shows the work was done on behalf of the landlord; and
e) at the end of the day the improvements belong to the landlord – which, it is argued, demonstrates that the landlord received a direct benefit from the work.

The leading legal decisions in the area make it clear that a landlord, is not an "Owner" under the *CLA*, solely because the work is contemplated by the lease, the tenant allowance is used to pay for the improvements, the landlord must approve any plans and will monitor the work - "a

landlord is entitled to protect the integrity of its building without fear of being held liable as an "Owner" (*Southern Plumbing v. Quality Craft Interiors*)) or because the landlord will ultimately own the improvements (*Pinehurst Woodworking v. Rocco* (*Ont.Div.Ct.)*).

There are cases where landlords have been found to be "Owners" under the *CLA* and had their lands successfully liened by tenants' contractors. In those cases, the courts found a direct relationship between the landlord and contractor, or that the tenant is so closely related to the landlord, that the tenant is in reality the landlord's agent or surrogate. In determining whether or not the landlord is an "Owner" the courts will go beyond the form of the transaction and look at the substance of the transaction, to determine the true relationship between the parties. For example, where the landlord leases to a related company, but ultimately it is upon the landlord's credit that the construction is proceeding, then the landlord's lands will be subject to claim for lien. Another example is where the landlord itself could not contract for the work to be done. In order to get around this it caused a related entity to lease its premises and contract to have the work done. The court found the related entity was acting as trustee for the landlord who was ultimately liable to the contractor.

While the law is well established in this area it is still fertile ground for construction lien claims against landlords. Tenant's contractors will point to the line of cases which state that the courts will look beyond the form of the transaction to determine if the landlord is an "Owner" under the *CLA*. They will argue that the transaction in question is not a typical commercial lease and will try find something to justify a claim for lien against the landlord's interest. However without some special circumstances, the landlord is not an "Owner" under the *CLA* and tenant's contractors are not entitled to claim a construction lien against the landlord's interest.

Discharging a Construction Lien by Payment into Court (Bonding Off the Lien):

Vacating lien by payment into court

Without notice

44. (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien, where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $50,000 or 25 per cent of the amount described in clause (c), as security for costs. R.S.O. 1990, c. C.30, s. 44 (1).

45 days to register a construction Lien

Expiry of liens

31. (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1).

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and

(ii) the date the contract is completed or abandoned; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date the contract is completed, and

(ii) the date the contract is abandoned. R.S.O. 1990, c. C.30, s. 31 (2).

Liens of other persons

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which the person last supplies services or materials to the improvement, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which the person last supplied services or materials to the improvement, and

(ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. R.S.O. 1990, c. C.30, s. 31 (3).