

BUILDERS LIENS IN BAD ECONOMIC TIMES

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In recent years, British Columbia experienced a very active, if not overheated, construction environment. In that context, it was not unusual for legal counsel to find that some clients who were owed money on construction projects let accounts receivable rise to shockingly high amounts before becoming concerned enough to begin thinking about filing a builders lien in an attempt to secure payment. This happened on both the construction and the design professional sides of the construction contractual pyramid.

Recent events in the banking and other financial sectors of the economy and the spectre of impending recession have quickly and radically altered the construction industry status quo in British Columbia. The news is full of stories of major construction projects which have been abruptly shut down due to the constriction of credit and the decline in the real estate market. This leaves design professionals, contractors, subcontractors and material suppliers scrambling to obtain payment for their work and services.

In this new environment, it is now more than ever essential that construction creditors understand and act quickly to enforce their legal collections remedies, including in particular their builders lien rights.

The traditional reasons for delaying the pursuit of a lien and other possible collection remedies usually involve concerns relating to the ongoing business relationship between the parties and/or the reluctance to risk endangering the viability of the project. Filing a lien may seem to be an aggressive or provocative, or even an unprofessional, act. Similarly, a potential lien claimant might not wish to be the first to take a step which might result in a domino effect leading to the drying up of project funding.

It is true that filing a builders lien can complicate the flow of funds on a construction project, in view of the requirement of mortgage lenders for clear property title to secure their priority for each further advance, the need to provide clear title to purchasers and the contractual and customary responsibilities of contractors and others to remove liens filed by parties under them.

However, that potential has always been the reason that the strategic filing of a lien should be considered, rather than discounted, since it makes up a powerful part of the leverage available to a lien claimant as a means toward forcing or securing payment.

A builders lien is a special statutory remedy, invented to protect persons whose work or services improve real property, but who often suffer from non-payment in the volatile environment of the construction industry. Filing a lien is a construction creditor's legal right and, unless it is filed without justification and is therefore an abuse of process, cannot be a breach of contract or an unethical act by a design professional or other claimant. Rather, in circumstances of non-payment, it is the construction debtor who is in breach of contract.

A lien does not guarantee payment, which will be limited for subtrades to applicable and available holdback and may depend on factors such as the equity available in the property, the number and relative positions of other construction debtors and the priorities of secured creditors and statutory authorities such as Canada Revenue Agency and WorkSafe BC. However, a lien does offer a lien claimant potential security additional to its contractual and trust rights, as applicable, and may make the difference between no recovery and at least partial recovery of the construction debt. It has never been recommended that such a potentially critical payment tool be ignored.

In normal times, most construction projects proceed to completion fully funded and without serious disputes arising between the parties. In contract, non-payment without contractual justification is always a symptom of bigger problems. Forbearance to file a lien without receiving payment or some other form of security or benefit is usually a one way street which favours only the debtor.

The Builders Lien Act and Strata Property Act set out maximum time limits for filing a lien. In view of its nature as a security remedy, it has always been appropriate for construction creditors to start considering the filing of a lien as soon as they begin to feel insecure about being paid in full. A lien can be discharged quickly once satisfactory arrangements for payment or the posting of funds as security for the lien have been made. The nature of the lien remedy makes it a self-defeating business practice to lose it by not using it.

These considerations have never been more urgent than in the present drastically-altered construction market. While a builders lien cannot ensure full, or even any, recovery of payment in the face of project shutdowns, mortgage foreclosures and Companies' Creditors Arrangement Act or bankruptcy proceedings, failure to file a lien simply abandons an important potential security for payment.