Jenkins Marzban Logan LLP
lawyers

# Lien Rights Return to Pre-1998 Equilibrium for BC Architects

*British Columbia architects have been riding a lien rights roller coaster since the province's introduction of new lien legislation in 1998. Now Chaston adds gravity.*

Unlike all other participants in the construction process, architects often render the majority of their services before the owner has made a firm decision to proceed with work on site. Under the pre-1998 legislation, the fees for these services could not be secured with a lien until, at minimum, the work was validated by actual construction (*Re Erickson/ Massey*, [1971] 2 W.W.R. 767 (B.C.S.C.); *John Perkins/ Peter Wardle Partnership v. Domus Design Co*. (1984), 4 C.L.R. 288 (B.C.C.A.)). Some case law had suggested that, even if construction had taken place, only the supervision portion of an architect's services could support a lien (*Tripp v. Clark* (1913), 4 W.W.R. 912 (B.C.Co.Ct.); *Scott v. Lindstrom* (1964), 50 W.W.R. 573 ).

When B.C.'s new *Builders Lien Act* came into force on February 1, 1998 (S.B.C. 1997, c.45), it was hailed by architects as a distinct improvement to the old regime. Not only are architects (and engineers) now rated a mention in the legislation, but their specific services are eligible to be secured by liens "whether provided before or after the construction of an improvement has begun".

*Harmony Co-Ordination Services Ltd. v. 542479 B.C. Ltd.* (1999), 45 C.L.R. (2d) 15 (B.C.S.C.), was first off the mark to interpret this new language. *Harmony* swept away the problem of no security for abandoned projects. The judge stated flatly that:

> "Now, if the services of a contractor or sub-contractor fall within the expanded definition of services 'as an architect or engineer' they are lienable for intended construction, even if an improvement is never constructed."

*Harmony* was also good news on the issue of what aspects of architectural services would support a lien. Henceforth it would be unnecessary to demonstrate that each increment of the architect's fee was directly related to physical construction. The court reasoned that "knowledge-based" inputs to a project were just as varied as the "physical" inputs had been under the old scheme. Just as the price of a delivered product like concrete includes hidden costs for fuel, haulage and administration time, all of which would unquestionably support a lien:

> "... similarly the knowledge-based services provided as an architect or engineer also have a variety of inputs which may include drafting, estimating, printing, revising, administrative time, secretarial services, information gathering on building codes, design standards, market data, zoning requirements and other unseen inputs."

According to the *Harmony* case, only if a component of the architectural or engineering services were "manifestly unrelated" to the improvement must its cost be excluded from a lien claim. The very next case to consider the new language conferring lien rights on architects, *E.C.R.A. v. Loeppky Consulting Ltd.* (1999), 45 C.L.R. (2d) 122 (B.C.S.C.), took back some of the gains. In a return to orthodoxy, E.C.R.A. said that the court has no discretion to broaden the category of lienable services beyond those mentioned in the *Builders Lien Act* (i.e. "services as an architect or engineer"), and must carefully distinguish such activities as promotional development, site planning and preparation, and physical construction. The *E.C.R.A.* judge held that only the latter service activities may give rise to a lien, opining that "the court must cleave closely to the narrow view".

Two years later, in its ***Chaston Construction Corporation et al. v. Henderson Land Holdings (Canada) Ltd. et al***. decision (9 C.L.R. (3d) 133), the Supreme Court of British Columbia cast further doubt on *Harmony*. The court rejected the aspect of the decision in *Harmony* which had suggested services would support a lien even if no improvement was ever constructed, and held that Harmony must be taken to mean only that the improvement, though required to exist, need not have been constructed by the lien claimant.

A unanimous Court of Appeal in *Chaston* has now confirmed that *Harmony* should be disregarded on the "liens for abandoned projects" point. As a result, unpaid architects can forget about recouping their losses via a lien claim if a project for which they have prepared plans fails before ground is broken.

Ironically, in neither *Harmony* nor *Chaston* was it necessary for the court to have decided the issue of whether lien rights exist in the absence of a physical improvement. Both cases involved actual nuts- and-bolts construction on site. In *Chaston*, the real issue was whether any construction which flowed from the work of the architect would suffice to support a lien or, on the contrary, whether it was the specific improvement contemplated by the architect's contract which had to materialize.

The claimants in *Chaston* were an architect and a construction manager, each of whom had contracted with a tenant in a commercial complex. The tenant, Manna, planned to build and operate a brew pub and restaurant on its premises. To this end Manna had commissioned and received construction drawings from the architect, and had received several months worth of pre-construction services from the construction manager. Pursuant to the lease and following the architect's specifications, Manna's landlord had carried out certain "base building" preparations, including revision of perimeter walls, floor-strengthening, and installation of an interior stair.

Before tenant improvements could begin, Manna ran into financial difficulties and abandoned its lease, and left the architect and the manager unpaid. The subsequent tenant made no use of the base building changes, the architect's drawings or the construction manager's services. The architect and the construction manager filed lien claims against the landlord's property, and then applied for summary judgment.

Mr. Justice Clancy, who heard the Chaston application, focused his attention on the question of whether an improvement had come into being which was capable of sustaining the liens, and concluded that none had. In the pivotal part of his judgment, Judge Clancy stated that the work carried out by the landlord to the architect's design:

> "... was all part of preparation of the premises to make them suitable for occupation by the tenant. It was part of the Landlord's Base Building Work. It did not become part of the leased premises, nor was it intended that it would. It makes no difference that the floor was strengthened, the design of the perimeter walls was changed to accommodate the tenant, or that the staircase was built to accommodate the tenant. It was never intended that they become part of the 'improvement'. It is uncontradicted that no use was made of the changes by the new tenant, nor was any value or benefit derived from those changes. If no use was made of the changes then factually it appears obvious that there was no addition which enhanced the value of the property."

Finding that nothing of value to the landlord had come into existence, the chambers judge concluded that the requisite improvement was missing, and therefore that the lien claims must fail.

On appeal by the lien claimants, the Court of Appeal agreed that the twist introduced by the chambers judge (that a benefit had to accrue to the owner before a lien could arise) had no basis in the legislation. In retrospect, this conclusion seems to have been inevitable. After all, the Act stipulates in section 1 that "*anything* made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it" is an "improvement".

The chambers judge was presumably led into error by accepting that the "improvement" whose existence he was testing was the brew pub and restaurant which Manna had set out to construct. He overlooked the fact that the floor-strengthening, perimeter wall revisions, and interior stairwell were themselves an "improvement". [A similar error – testing the wrong improvement – was committed at the lower court level but corrected on appeal in *Deal S.r.l. v. Cherubini Metalworks Ltd.* (2000), 50 C.L.R. (2d) 297 (B.C.S.C.).]

The Court of Appeal in *Chaston* saw no reason to interfere with one aspect of the chambers judge's decision: that the construction manager's activities fell squarely within the definition of "services as an architect or engineer." As *Harmony* had held on similar facts, the *Act* does not go so far as to require services to have been performed by an accredited professional to qualify for the security of a lien. In *Chaston* the work done by the construction manager included co-ordination of architectural, mechanical and electrical design services; assistance with preparation of drawings and plans; and attendance on site – services which according to the court were "very similar if not identical to the services that architects and engineers commonly provide." That was sufficient.

After *Chaston*, an architect who contracts with anyone having ownership rights in B.C. land (including a tenant) will be entitled to claim a builders lien if those services have led to physical changes in the land. The nominal value of the lien will not be limited to the value of services provided after construction begins. On the other hand, construction based on the architect's services must begin before the lien will be imbued with value and capable of enforcement.

A careful reading of the Act, however, will show that even a brief (and perfectly normal) interruption in a project's progress from drawing board to reality might snuff out an architect's lien rights. If a 30- day period elapses with no work being done on the improvement, it is deemed to

have been abandoned (per s.1(5)). A 45-day countdown begins (s.20(2)(b)), after which liens are extinguished unless the architect has been prescient enough to file in the appropriate Land Title Office (s.22).

For architects, the lien rights roller coaster has returned to its pre-1998 equilibrium.

*We would be pleased to answer architects' enquiries about the Chaston case. Contact Bob Jenkins QC, or Scott Booth in Vancouver at 604 681.6564.*