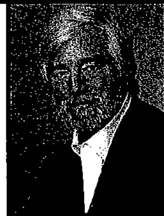

By Duncan W. Glaholt

MATTERS TO CONSIDER IN LIENING WORK FOR TENANTS

Liens against leasehold and freehold interests commonly arise during tenants' improvements. There is a tendency to under-rate the value of liens on leasehold interests alone. In addition to the market value of the remainder of a leasehold term, however, the real power of a lien against a leasehold interest is found in the standard terms of most retail leases. Under most retail leases, the landlord has the power to pay liens and add the amount to rent. The presence of a lien on a leasehold interest is often a strong incentive to early settlement. Also, where there is a cash inducement or rent abatement for the purpose of fitting out the rented space, or even a damage deposit from the tenant, there may actually be a fund earmarked for payment of such claims.

Many contractors in these situations wrongly assume that their work on leasehold improvements automatically gives them a right to lien the landlord's interest as well. In fact, there are only two ways to lien the landlord's interest in these circumstances. The easy way is to give notice to the landlord up front under section 19 of the Construction Lien Act; the harder way is to argue that the landlord is an "owner" under that Act.

In circumstances where the contractor has the presence of mind and confidence to serve the landlord with a notice that the contractor will look to the landlord's interest prior to commencing the work, there is a statutory form for that notice. The form is sufficient but not mandatory. As a result, contractors often either create their own notices or go back after the fact to identify some piece of correspondence to the landlord as a notice.

Until recently, the leading case on what constitutes proper notice held that at a minimum the notice had to contain the basic elements of the statutory form, being the name of the landlord and a reference to its capacity as landlord, the details of the contract, a description of the improvement to be made, a sufficient description of the premises, a reference to the contractor and the tenant by name and by capacity, and words sufficient to make it clear that the contractor is looking to the landlord's interest in the land, in addition to the tenant and his interest in the leasehold, to be responsible for payment of the improvement to be made. The court also required additional words sufficient to make it clear that the landlord had to give written notice back to the contractor within a certain time, if it wished to disclaim responsibility for the improvement to be made, and additional words sufficient for the landlord to know when the 15-day period, within which he may disclaim liability commenced.

Recently, this all changed. An Ontario appellate court, the Divisional Court, found the old test too stringent. They held that all that was required was that the written notice be "sufficiently distinct and memorable" to allow the landlord to know when its 15-day period to deny liability began. The Divisional Court also emphasized that so-called "notice events", such as the landlord's attendance at early site meetings, its review of plans, or its awareness of the work being done, were not enough on their own to constitute sufficient notice under s. 19(1), but could supplement an otherwise defective written notice. All that is required now is that the "notice" events took place before the delivery of the alleged written notice.

> "Many contractors wrongly assume that their work on leasehold improvements automatically gives them a right to lien the landlord's interest as well. There are only two ways to lien the landlord's interest.

The second and harder way to lien the freehold is to make the landlord a statutory "owner". The statutory test is onerous. It has two requirements. They must co-exist. First, there has to be a specific "request" by the alleged owner that the lien claimant do the work; second, the lien claimant must establish one of the following four additional requirements:

- that the work was done upon the owner's credit; or,
- that the work was done on the owner's behalf; or,
- that the work was done with the owner's privity or consent; or,
- that the work was done for the owner's direct benefit.

Direct dealing is not necessary to establish a "request". Still, there must be some evidence of a "request". If there is no "request", there is no lien against the landlord's interest even if the other requirements of the statute are met. That is a hurdle most claimants cannot cross. B

Duncan Glaholt is partner, Glaholt LLP barristers & solicitors