

CONSTRUCTION LIENS: GET IT RIGHT¹

This past year has seen, once again, an affirmation of the importance of lien procedure and the necessity of getting it right.

There have been four areas of construction lien law where parties and their counsel have gotten things wrong. A reading of some case law from the past year demonstrates that the procedure for taking a Toronto lien claim to trial is still a mystery to many involved in construction lien law. Secondly, liening for work done for tenants, while it should be relatively straightforward, still seems to present another mystery. Thirdly, preserving a lien against Crown property appears to have caused some confusion. These first three areas are tied into the fourth. If you get it wrong, or even if you are right but go to unreasonable lengths to prove it, you will be paying the costs.

I. Taking a Toronto Lien Claim to Trial

The procedure for taking a Toronto lien claim to trial appears to remain a mystery to many lawyers. Regularly, courts will face at

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least some inconsequential technical errors in the materials before them. However on rare occasions, they will be provided with materials so fundamentally flawed that they feel compelled to offer a tutorial on how to get it right. *Pineau v. Kretschmar Inc.*² was such a case. It demonstrated all the wrong steps to follow and provided the platform for a tutorial on how to get it right.

Facts

Pineau supplied and installed steam, water and air systems to Kretschmar's property in Toronto. When Pineau's contract was terminated, he registered a claim for lien for some \$96,000. Pineau's Statement of Claim was issued June 18, 1999, by his lawyer, who happened to practice in Brampton. The place of trial was Toronto. All defendants named in the Statement of Claim defended and pleadings were completed by August, 1999. Pineau's counsel served s. 39 demands on all four defendants. Two of the defendants responded, two others did not. Pineau's lawyer also wanted to schedule discoveries and had encountered problems scheduling the

² [2004] O.J. No. 396 (Master).

discoveries. So Pineau's lawyer served a motion, returnable before a construction lien motions master in Toronto, on all defendants, asking for the following relief:

1. To have a day, time and place set by the court for a settlement meeting.
2. To have a day, time and place fixed by the court for a trial date.
3. Requiring the defendants Perry/709 to answer the demand for information.
4. Granting leave to have full documentary and oral discovery.
5. To have an inspection of the premises.

The motion was heard by Master Saunders and an Order made, dated May 8, 2000. A draft Order, prepared before the attendance on the motion was placed in front of Master Saunders to sign.

How to Get it Wrong, Act 1

Ask a Toronto construction lien master to order a settlement meeting:

Lien masters in Toronto do not, as a matter of practice, order settlement meetings under s. 60(1) of the *Construction Lien Act*,

because the first “pre-trial”, which is supervised by the lien master, is considered a more effective procedure than an unsupervised settlement meeting under s. 61. Master Saunders crossed out this paragraph of the draft Order.

How to Get it Wrong, Act 2

Ask a master to fix a day for trial, without obtaining a judgment of reference:

Paragraph 2 of the draft Order provided that “the trial of this action shall be held in the week of October 30, 2000, or such subsequent date as may be agreed to between counsel or ordered by this Court”. Master Saunders allowed this part of the Order, even though without a judgment of reference, a lien master has no jurisdiction to make such an order under s. 60(2) fixing a day, time and place for the trial of a lien action. Also, a master has no jurisdiction to make an order that deals with the scheduling of trials on the Toronto judges’ trial list. Such orders can only be made by judges.

How to Get it Wrong, Act 3

Fail to properly comply with s. 37(1):

This was perhaps the biggest mistake of all in *Pineau*. Under s. 37(1) of the *Act*, if within two years after the date of issuance of the statement of claim, the action, or an action in which the lien may be enforced, has not been set down for trial, or an order has not been made fixing a trial date under s. 60(2), the lien expires, and a motion may then be brought, without notice, to declare the lien expired under s. 46.³ A judgment of reference under s. 58(1) is not an order fixing a trial date. In order for the clock to stop ticking for the purposes of s. 37(1), an order under s. 60(1) is required.

Further Facts

On September 22, 2000, Mr. Pineau died. His widow tried to deal with Mr. Pineau's lawyer without success, so she retained new

³ See for example *B.R. Davidson Mining & Development Ltd. v. Lac Des Iles Mines Ltd.* [2003] O.J. No. 3966, where the lien claimant, B.R. Davidson, did not set its action down for trial, and no order was made fixing a trial date, within two years of the commencement of its lien action. The B.R. Davidson \$2.4 million lien was declared expired, the owner's letter of credit was returned for cancellation, the lien action was dismissed without prejudice to continue a separate civil action and substantial costs were ordered to be paid by B.R. Davidson.

counsel. They attempted to deliver a notice of change of solicitors, to which the defendants objected without an order to continue being obtained. The order to continue was obtained on June 1, 2001, on motion before Master MacLeod.

When the new solicitor ran into difficulties scheduling discoveries and attempting to reschedule the trial, a motion was brought asking for the following order:

- (a) to set a date for a "settlement conference" (a similar request for a "settlement meeting" had been refused by Master Saunders on May 8, 2000);
- (b) to set a date(s) for oral examinations for discovery of the parties;
- (c) to restore this action to the trial list.

The motion was heard by a Toronto motions court judge on December 6, 2001. The Court made the following Order:

1. This Court Orders that a settlement conference under section 60(2) of the *Construction Lien Act*...shall be convened by the Master in Toronto on a date and at a time to be fixed by the Registrar.

2. This Court Orders that examinations for discovery of all the parties in this action shall be completed by no later than July, 2002.
3. This Court Orders that this matter be referred to the Master in Toronto for the purposes of re-scheduling a pre-trial hearing date and re-scheduling a trial date.

How to Get it Wrong, Act 4

Ignore previous Court orders and ask for the same relief again:

Paragraph 1 of the Order again ignores the fact that settlement meetings are not used in Toronto. It further ignores the proper procedure for settlement meetings and the fact that where such meetings are conducted, they are not conducted by masters. There is no "Registrar" who has the authority to schedule a master's work, and finally, paragraph 1 ignores the fact that Master Saunders struck out any reference to holding a settlement meeting in his Order of May 8, 2000.

The one thing that is clear about the Order obtained from the motions judge on December 6, 2001, is that it is not a judgment of reference. The Order did not “Order and Adjudge that the action be referred to the master at Toronto for trial”, and did not order the master to determine all questions arising in the action, as required by Form 16 under the *Construction Lien Act*.

Further Facts

On October 14, 2003, the plaintiff’s lawyers brought a motion, before one of the construction lien masters at Toronto, without notice, under s. 60(1) of the *Act* to fix a trial date (first construction lien pre-trial). The only documents referred to in the preamble of the Order are the Statement of Claim and abstract of title. No mention is made of a judgment of reference.

Through an oversight of the sitting construction lien master, the plaintiff obtained the order fixing a first construction pre-trial date without having obtained a judgment of reference. The Order fixed the first construction pre-trial for November 28, 2003, at 1:30 p.m.

The plaintiff's lawyers then proceeded to file a document called "Notice of Settlement Meeting under s. 60 of the Act" to have directed that a "settlement meeting in respect of the action be held on Friday, November 28, 2003, at 1:30 p.m.". The defendants' solicitors responded by preparing and delivering a "Pre-Trial Conference Memorandum" and the plaintiff's lawyer prepared and delivered a "Pre-Trial Conference Brief".

How to Get it Wrong, Act 5

File with the Court materials that are not used or required in Toronto construction lien actions.

Pre-Trial Memoranda and Briefs are used and required for settlement conferences in case managed actions under Rule 77, which rule does not apply to construction lien actions, and for pre-trial conferences in non-case managed actions under Rule 50, which rule also does not apply to construction lien actions. They are not used or required in Toronto construction lien actions.

Further Facts

The November 28, 2003, attendance was heard by Master Sandler.

The Master described the situation as follows:

During the hearing on November 28, 2003, I asked each counsel what he thought was supposed to happen that day, and who was to try this action - a master or a judge.

The plaintiff's counsel believed that a judge was to try the action, and that all I was to do was to conduct a "settlement conference". (I note that under s. 61 of the Act, this procedural step is properly called a "settlement meeting" and yet paragraph 1 of the judge's order (of December 6, 2001) refers to a "settlement conference under Section 60(2)". The proper terminology would have been a "settlement meeting" and the proper statutory references are s. 60(1), and s. 61(1) and (2). And, as I have already noted, these "settlement meetings" are held in one of the lawyers' office and conducted by one of the lawyers involved - it is not a court hearing presided over by a master or judge.)

Counsel for the defendant Kretschmar told me he was confused. He believed that the plaintiff's lien had long ago expired under s. 37(1), but he was not sure of the legal impact of Master Saunder's order or the judge's order. In effect, he was asking me to declare the plaintiff's lien expired and

to dismiss the action pursuant to s. 46(1) of the Act. I am treating his request as an "oral" motion.

Counsel for the defendants Perry/709 was also totally confused. He thought that what I was supposed to do under the judge's order, and the master's order of October 14, 2003, was to conduct the usual first construction lien pre-trial, as per the usual practice, and he wanted me to give directions for the completion of discovery, and to fix a trial date, and give trial directions, and proceed to try this case on its merits. He argued that his clients have a good defense on the merits to the plaintiffs' claim. He asked me to ignore all the procedural irregularities and just "get on with it".

How to Get it Wrong, Act 6

Show up before the master "totally confused".

When questioned about procedural problems, one of the counsel for the defendants asked the Master to ignore all procedural irregularities and recommend to "just get on with it". In the face of this comedy of errors, Master Sandler felt it was necessary to remind solicitors who find themselves engaged in Toronto lien actions of the proper procedure for lien actions in Toronto. In the final result, no

laughing matter, the Master declared the lien expired as no Order fixing a trial date was obtained within two years of the commencement of the lien action.

How to Get it Right

If the premises are within the City of Toronto, the action must be commenced by the issuing of a statement of claim in the Toronto office of the Superior Court of Justice.

Pleadings are to be exchanged according to sections 53, 54, 55 and 56 of the *Construction Lien Act*.

Counsel has to elect whether the case is to be tried by a judge or by a master.

If counsel wants a master to hear the case, a judgment of reference must be obtained under s. 58, which provides as follows:

Reference

58. (1) On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge may refer the whole action or any part of it for trial,

- (a) to a master assigned to the area in which the premises or part of the premises are situate;
- (a.1) to a case management master; or
- (b) to a person agreed on by the parties.

Notice

(1.1) Notice of a motion for a reference under clause (1) (b) shall be given to every person who is or would be entitled to a notice of settlement meeting under subsection 60 (2).

Requirement for consent

(1.2) A reference under clause (1) (b) shall not be made unless the persons entitled to notice under subsection (1.1) consent to the reference.

Deemed consent

(1.3) A person given notice under subsection (1.1) who does not oppose the motion or does not appear at the hearing of the motion shall be deemed to consent to the reference under clause (1) (b). S.O. 1994, c. 27, s. 42 (5), in force December 9, 1994 (R.A.).

Idem

(2) A master or a case management master shall not hear or dispose of a motion made under subsection (1).

Reference directed

(3) At the trial, a judge may direct a reference to a master assigned to the area in which the premises or part of the premises are situate, to a case management master or to a person agreed on by the parties.

Powers of master on reference

(4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

Powers of person agreed on by parties

(4.1) Subsection (4) also applies to a person who is agreed on by the parties and to whom a reference has been directed. S.O. 1994, c. 27, s. 42 (7), in force December 9, 1994 (R.A.).

Application to set aside order of reference

(5) Where under subsection (1) the action has been referred to a master, to a case management master or to a person agreed on by the parties for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action, make a motion to a judge of the court that directed the reference to set aside the judgment directing the reference.

Effect on subsequent party to action

(6) Where no motion is made under subsection (5), or where the motion is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if the person had been a party to the action at the time the reference was directed.

Section 67(6) provides as follows:

Manner of making motion

(6) Where in this Act the court is empowered to do anything upon motion, the motion may be made in the manner provided for in the rules of court for the making of motions, regardless of whether any action has been commenced at the time the motion is made.

The form of the judgment of reference is mandated by Ont. Reg. 175, R.R.O. 1990, s. 2(16) and Form 16. A judgment of reference is not an order fixing a trial date for the purpose of s. 37(1).

Once a judgment of reference has been obtained, a motion must be made to a master, without notice, to have a date, time and place fixed for the trial of the action. This date will be known as the “first construction lien pre-trial”. It is, in fact, the first day of trial.

The party that obtained this order must serve a notice of trial and a copy of the order on all persons listed in s. 60(2), i.e. mainly any other lien claimants and those with a registered interest in the property.

Toronto lien masters do not order settlement meetings, because the pre-trial supervised by the master is more effective.

Finally, and most importantly, the lien claimant’s solicitor should always be aware of s. 37, which reads as follows:

Expiry of perfected lien

37. (1) A perfected lien expires immediately after the second anniversary of the commencement of the action that perfected the lien, unless one of the following occurs on or before that anniversary:

1. An order is made for the trial of an action in which the lien may be enforced.
2. An action in which the lien may be enforced is set down for trial.

If there is one section of the *Construction Lien Act* that should be memorized by counsel, this is it. This is the one section that, if ignored or improperly interpreted, will inevitably lead to having the lien declared expired.

II. Liening the Leasehold Interest

The second area of law where parties and their solicitors have gotten things very wrong recently is the area of liening the leasehold interest.

A lien claimant is entitled to register a lien against the freehold of a property, where the work is done for the registered owner of the property or where the registered owner of the property is also an

“owner” as defined by the *Act*. The “freehold” is a term used to describe a registered owner’s interest in real property. A claimant is also entitled to register a lien against the leasehold interest of a tenant where the tenant has requested the improvement. The real issue is when does a lien claimant who has done work for a tenant get the right to lien the interest of the registered owner of the land?

In this regard, s. 19(1) of the *Act* provides as follows:

19(1) Where the interest of the owner to which the lien attaches is leasehold, the interest of the landlord shall also be subject to the lien to the same extent as the interest of the owner if the contractor gives the landlord written notice of the improvement to be made, unless the landlord, within 15 days of receiving the notice from the contractor, gives the contractor written notice that the landlord assumes no responsibility for the improvement to be made.

1. The Need to Lien the Leasehold: Know your “Owner”

Where a claimant supplies labour and materials to a tenant, when the claim for lien is registered, the tenant must be included on the claim

for lien document as a person who has an interest in the premises against which the lien is sought to attach. If the lien claimant inadvertently fails to include the name of the tenant, for whom the services and materials were supplied, but rather only names the landlord (being the registered owner of the property), the lien claim will be held to be invalid and can be discharged by motion with a resulting loss of security.

For example, in the recent case of *Williams & Prior Ltd. v. Taskon Construction Ltd.*,⁴ a tenant, Hugo Boss Canada, entered into a written lease with the head tenant for certain premises. Hugo Boss hired a group of individuals, all known as Millworks, as either project manager or general contractor. Millworks then entered into a contract with Taskon Construction to act as contractor for the renovation and work at the store. Taskon entered into subcontracts with Williams & Prior and Alert.

⁴ *Williams & Prior Ltd. v. Taskon Construction Ltd.* (2003), 22 C.L.R. (3d) 1 (Ont. Master).

Each of Taskon, Williams and Alert registered liens. Only Taskon and Williams perfected their liens by commencing actions, Alert was a sheltered lien claim, not having commenced its own action. The issue before the Master was whether the Williams lien should be held invalid as it failed to name the tenant, Hugo Boss, as the person whose interest in the premises was sought to be attached by the lien. The lien merely named the registered owner and head tenant.

The Master held that as no lien was asserted against the interest of Hugo Boss, it resulted in a loss of lien rights against that person. The lien could not be preserved against the premises at large, but must be preserved against the interest of the specific person alleged to be the owner.

The Master also considered whether s. 6, which permits the Court to relieve against minor or technical irregularities where the *Act* is not strictly complied with, would apply where the owner was not named in the claim for lien. The Master found that failing to name the

owner at all is not merely a minor or technical error, but rather a serious error.

This total omission to make any allegation against [Hugo Boss] in either of the Claims for Lien and to preserve these liens against [Hugo Boss's] interest in the premises, within the statutory 45 days of last supply, is an extremely serious error. It is neither a minor nor technical error, but rather a fundamental error in the assertion of a valid claim for lien against [Hugo Boss's] interest in these "premises".

It is therefore absolutely imperative when preparing the claim for lien document, that counsel should be fully advised by the client as to whom the work is being performed for. In many situations, it may be obvious that it is a tenant that is having the work performed, for example in a shopping mall or office tower. In other situations it may not be very clear, for example the construction of a stand alone coffee shop on the lands of a shopping mall. In any event, counsel should review with their client the parties in the construction pyramid, as

well as closely review the title abstract to determine the parties with a freehold interest and those with a leasehold interest.

In *Williams & Prior*, all the lien claimant had to do was say something (anything!) in the claim for lien to indicate that the lien was against the leasehold interest. Master Sandler had this to say:

If the lien claimant (or its solicitors) do not know the exact name of this "owner", ..., then it must use the best description it has. In this case, if the exact name had not been known, then perhaps, "Hugo Boss store, suite 108, as tenant," or, at least, "the tenant's interest in Suite 108, 130 Bloor Street West," or some other such wording to indicate that a claim for lien was being made against the leasehold interest of the tenant in the leased premises, might have been used. Then the lien claimant (and its solicitors) must hope that s. 6, the "minor irregularities" section, will protect the lien from invalidation. If the leased premises have a separate legal description, then registration against that description (interest) must be used in addition to the legal description of any other alleged "owner," i.e., the landlord. But these views are obiter since this is *not* what occurred here.

2. Section 19 Notice to the Owner

As set out above, s. 19 permits a lien claimant to actually lien the owner's interest in the land for the value of unpaid work, services and materials supplied to a tenant, but only if the lien claimant sent a notice to the "landlord" before the work was done giving the landlord an opportunity to disclaim any financial responsibility for the work. In some circumstances, the landlord will also be the registered owner, in others, such as in the *Williams & Prior* case, the landlord may be the head tenant. Although s. 19 does not set out the specific content of the written notice to be given to the landlord, Form 2, Notice to Landlord Under s. 19(1) of the *Act*, sets out the particulars that are required including:

- (a) the person to whom the notice is addressed;
- (b) the name of the contractor;
- (c) the name of the tenant;
- (d) the date the contract was entered into;
- (e) a copy of the contract, or details of it, including details of the work.

The purpose of s. 19(1) is to provide a mechanism whereby a person contemplating performing work on the premises can hold the landlord liable for the price of the work. Notice is given to the landlord about the contract, the landlord then has 15 days to disclaim any responsibility for the payment. If the landlord fails to do so, the lien against the tenant will attach to the landlord's interest in the property. If, however the landlord does disclaim responsibility, then the contractor will have to make a decision whether to proceed with the job anyway, trusting that they will be paid by the tenant and knowing that the contractor has no lien rights against the interest of the landlord. As section 19(1) provides an extraordinary remedy for the lien claimant, it must be followed if it is to be relied upon. Arguing after the fact that the conduct of the landlord is some sort of implied notice or that the owner reviewed plans and invoices will not amount to sufficient notice. Simply put, if the lien claimant wants the interest of the landlord to be available to satisfy the lien, give written notice by using a Form 2.

What if a contractor uses a form other than Form 2 under the *Act*? In *Venneri Engineering Ltd. v. Zonenward Lease Management Inc.*⁵, Master Sandler indicated that where a notice under s. 19(1) is given, that is not a Form 2, the notice must be sufficiently “arresting” or “attention-getting” or “sufficiently distinct and memorable” to allow the landlord to know that the landlord’s property is being looked to be financially responsible for any money that might be owing by the tenant to the contractor. Master Sandler went on to indicate that the notice must contain the basic elements of Form 2, being the name of the landlord, including a reference to their capacity as landlord, details of the contract, a description of the improvement to be made, a sufficient description of the premises, 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 its interest in the leasehold, to be responsible for payment for the improvement to be made. Master Sandler also indicated that there must be additional words sufficient to make it clear that the landlord must give written notice back to the

⁵ *Venneri Engineering Ltd. v. Zonenward Lease Management Inc.* (1994), 16 C.L.R. 141 (Ont. Master).

contractor within a certain time if the landlord wishes to disclaim responsibility for the improvement and there must also be words sufficient for the landlord to know when the 15 day period, within which he may disclaim liability commences.

Master Sandler went on to indicate as follows:

Of course, the safest procedure is for the contractor to use Form 2, in which case there can be no question as to the adequacy of the notice.

In the *Venneri* case, the lien claimant Venneri entered into a contract with the tenant in early January, 1991, for the supply of services and materials related to the business of a food depot. In late January, 1991, Venneri having discovered the name of the landlord, sent a letter to the landlord that notified the landlord that Venneri was retained by the tenant to design the mechanical and electrical systems, and included this paragraph:

This work will involve considerable renovation to the existing mechanical and electrical systems and we would appreciate receiving your acknowledgement by returning the signed copy of this letter as soon as possible.

The contractor's letter also included a place for the owner to sign, to acknowledge receipt of the letter. The landlord wrote back a note on the letter indicating that all work was to be done in accordance with the applicable codes, no work was to begin without appropriate permits, no work was to begin without prior approval from the landlord, and that all drawings were to be submitted to the landlord prior to work commencing.

Venneri argued that this letter and the owner's response effectively gave the written notice under s. 19(1) of the *Act* to the landlord. Master Sandler found otherwise as the notice was not sufficiently arresting.

In *Southern Plumbing*,⁶ the Master found that receipt of copies of mechanical plumbing plans by the owner showing the contractor as the plumbing contractor, would not constitute the requisite notice. In addition, the landlord seeing the contractor's bid, approving of the contractor to do the work, and even the landlord having been presented with copies of the contractor's invoices much later, all did not constitute notice under s. 19 of the *Act*.

3. Landlord as "Owner"

There is only one other way of making a landlord liable, and that is to allege that the landlord is an "owner". The test is extremely difficult, and recent case law has shown that it will rarely succeed.⁷ The statutory definition of "owner" has three requirements, and they must all exist: first, the person must have an interest in the property; second, there has to be a specific "request" by that person that the lien claimant do the work; and, third, the lien claimant must establish one of the following four additional requirements:

⁶ *Southern Plumbing Ltd. v. Quality Craft Interiors Ltd.* (1994) 17 C.L.R. (2d) 195 (Ont. Master).

⁷ *Winnen Construction Group Conditioning Ltd. v. Oxford MRC Inc.* (2002), 21 C.L.R. (3d) 129 (Ont. Master); *Haas Homes Ltd. v. March Road Gym & Health Club Inc.* (2003), 29 C.L.R. (3d) 243 (Ont. S.C.J.).

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

With respect to the first part of the test, there is usually no issue that the person alleged to be an "owner" has a registered interest in the premises.⁸

With respect to the second arm of this test, there must be a 'request'. It is clear that direct dealing may not be necessary. Still, there must be some evidence of a "request", as such. One Court has described the concept of a "request" as a "significant element of direct contractual dealing" between the landlord and the contractor. If there is no "request", there is no lien against the landlord's interest even if the other requirements of the statute are met.

⁸ See However *Graham Mining Ltd. v. Rapid-Eau Technologies Inc.* (2001), 7 C.L.R. (3d) 300 (Ont. S.C.J.); affirmed (2001), 155 O.A.C. 70 (Div. Ct.); affirmed [2002] O.J. No. 1549 (C.A.), where the defendants alleged to be "owners" had no interest in the property, having been given the use of the land by a series of work permits issued by the Provincial Government.

The most comprehensive recent decision on landlords in the context of the *Construction Lien Act* is Master Sandler's decision in *Winnen Construction Group Conditioning Ltd. v. Oxford MRC Inc.*⁹ In *Winnen*, a landlord developed a portion of a shopping centre parking lot into a separate building and entered into a lease with a tenant for a fast food franchise on the site. The tenant was responsible for improvements, which consisted of the construction of a building and the interior finishing. The landlord's responsibility was restricted to work on the perimeter of the proposed building. The tenant hired a contractor. After construction was completed, the tenant made an assignment in bankruptcy. The contractor registered a lien and brought an action against the landlord for enforcement of the lien.

Master Sandler dismissed the action, holding that the landlord had never requested the work, that the work was not done for the direct benefit of the landlord, that the contractor never submitted any invoices to the landlord, and that the approval of plans by the landlord did not amount to "privity or consent".

⁹ (2002), 21 C.L.R. (3d) 129 (Ont. Master).

The Master relied on the decision of Heeney J. in *Sloot Construction-Design Ltd. v. North Maple Mall Ltd.*¹⁰ In *Sloot*, on facts very similar to those in *Winnen*, the Court conducted an extensive review of the relevant case law, which is worth repeating at some length:

To determine whether Loblaws is an "owner" within the meaning of the Act, the central issue to be determined is whether the work done by the Plaintiff was done at the request of Loblaws. These three kiosks were being constructed within the confines of Loblaws' grocery stores, so it is not surprising that they would have had at least some supervisory involvement as construction proceeded, in order to ensure that the finished product was compatible with the rest of the store. The evidence describes the involvement of Loblaws in the Cedarbrae project as follows:

- representatives of Loblaws attended site meetings along with representatives of Zally's and Sloot;
- at these site meetings, issues such as design, layout and timing were discussed;
- Loblaws asked for changes to the counter design and

¹⁰ (1999), 50 C.L.R. (2d) 145 (Ont. S.C.J.), affirmed Kirsh's C.L.C.F. 1.17.44 (Div. Ct.).

lighting in order to make it consistent with the balance of the store and to ensure proper traffic flow within the store;

- representatives of Loblaws advised Sloom as to where it should make its mechanical and electrical hookups;
- Zally's designer submitted its designs to Loblaws in advance of the construction of the kiosks for approval.

The involvement of Loblaws at the other locations was somewhat less. It is stated to consist of the following:

- representatives of Loblaws attended at site meetings;
- at those site meetings, discussions were had with respect to the construction and the fact that those stores were open for business and that Loblaws did not want its business interrupted in any way;
- representatives of Loblaws coordinated Sloom's hookup into the mechanical and electrical systems;
- the only representative of Loblaws on site was the store manager who did not direct Sloom's forces in any way

but was simply ensuring that his or her customers were not interfered with.

In order for a landlord to be found to have "requested" improvements to the premises, the lien claimant must show "a significant element of direct contractual dealing between the landlord and the supplier": *Venneri Engineering v. Zonenward*, (supra) at p. 159. In that case, a landlord leased an industrial building to tenants for the purpose of operating a food depot that consisted of 20 kitchen areas. The landlord was notified of the mechanical and electrical work that needed to be done, and signed a letter permitting the work to be done, provided that it met all relevant building codes and that the landlord's prior approval was obtained. Master Sandler held that the landlord was not an "owner" because the required element of contractual dealing was not present.

In his reasons, Master Sandler referred to and followed the Divisional Court decision of *Pinehurst Woodworking Co. v. Rocco* (1986), 38 R.P.R. 116. That case involved a shopping mall, where premises consisting of little more than a shell were leased to the tenant. The lease required the tenant to pay for all ceilings, floor coverings, partition walls, electrical controls, air distribution ducts, plumbing, doors, lighting and other fixtures, as well as all finishing work and trade fixtures. The landlord

agreed to contribute an allowance equal to \$75 per square meter to help defray these costs. The plans and specifications were subject to the approval of the landlord.

The trial Judge, in finding the landlord to be an "owner", relied on several factors: the fact that the landlord was contributing a monetary allowance toward the improvements; the extent to which the landlord's approval was required; and the extent to which the landlord or its project manager dealt directly with the contractor, for example, in relation to the substitution of a larger electricity transformer.

The Divisional Court found the trial Judge to be in error, and held that the landlord was not an "owner" within the meaning of the Act because there was neither a request by the landlord nor any privity or consent to the work done by the contractor. Sutherland J. held that there must be a significant element of direct contractual dealing between the landlord and the supplier before the landlord could be found to be an "owner", and there was no evidence of such direct contractual dealing before the trial Judge.

Sutherland J. also reviewed and distinguished several cases which suggested that a specific request and direct contractual dealings were no

longer required to satisfy the definition of "owner". He summarized those decisions as follows:

Where there is not a direct request, as in Muzzo, these decisions depend upon the closeness or common ownership of the titular owners and the entities found to be statutory owners. The decisions are therefore exceptions to the general rule. There is no such close relationship between Eaglebrook [the landlord] and Pinehurst [sic] and those decisions, based as they are on such relationships, do not support the position of Pinehurst.

I believe that the first reference to Pinehurst in the above passage was intended to refer to the tenant Rocco, not the lienholder Pinehurst. It is the relationship between the titular owner, being the landlord Eaglebrook, and the statutory owner, being the tenant Rocco, that was under discussion.

Applying these principles to the cases at bar, there is no evidence, on the record before me, of any significant element of direct contractual dealings between Loblaws and the Plaintiff. The actions of Loblaws amount, in my view, to nothing more than the actions that one would expect of a landlord in these circumstances, the purpose of which was: to ensure that

the tenant's installation was erected in an orderly fashion; to ensure that these kiosks were aesthetically and functionally compatible with the rest of the landlord's premises and operations; and to ensure that the installation could be completed without unduly interfering with the customers of Loblaws or their ongoing business.

There is also no evidence of any close relationship between Loblaws and Zally's that might lead to a finding that Loblaws was the true instigator of these projects.

As a result, the Court in the *Sloot* case found that Loblaws is not an "owner" within the meaning of the *Act*, so that no lien is created under s. 14(1) of the *Act*.

4. Implications of Liening the Freehold

For the purposes of this paper, it should be noted that where no s. 19 notice has been provided to the landlord, and where the landlord or the registered owner would in no way be found to have made a request for the improvement, and the lien claimant in any event, registers its lien against the interest of the tenant and the landlord or

registered owner, the lien claimant may be found liable for damages under s. 35 of the *Construction Lien Act*.

Section 35 of the *Act* provides as follows:

In addition to any other ground on which the person may be liable, any person who preserves a Claim for lien or who gives written notice of a lien,

- (a) for an amount which the person knows or ought to know is grossly in excess of the amount which the person is owed; or,
- (b) where the person knows or ought to know that the person does not have a lien,
- (c) is liable to any person who suffers damages as a result.

Lien claimants and their counsel should take careful note of this provision, as it could be used to make the lien claimant liable for any damages that may be suffered by the landlord in circumstances where the lien claimant has no lien against the interest of the landlord. In the worst scenario, the lien may offend the terms of a registered mortgage and the mortgagee may exercise its rights under the mortgage such that the owner loses the property. The damages in this scenario could be staggering.

III. How Not to Lien the Interest of the Crown

The *Construction Lien Act* binds the Crown. The *Act* defines “Crown” as including a Crown agency to which the *Crown Agency Act* applies.

However, when preserving a lien against the interest of the Crown ss.

16(1) and 34(1) provide as follows:

16(1) A lien does not attach to the interest of the Crown in a premises.

34(1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attached to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and

(b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien together with the affidavit of verification required by subsection (6).

In the recent case of *Dirm Inc. v. Dalton Engineering & Construction Ltd.*¹¹, Master Sandler reviewed the proper procedure for preserving a lien against the interest of the Crown. The reasons of Master Sandler disposed of two motions, the first in *Dirm* and the second in *Bianchi v. Eastern Construction*.

¹¹ [2004] O.J. No. 3524

The concrete subcontractor, Dirm, entered into a contract with Dalton Engineering for concrete forming and cast in place concrete work for a construction project on lands owned by Centennial College at 951 Carlaw Avenue. On July 25, 2003, Dirm's solicitor electronically registered a Claim for Lien against the premises at 951 Carlaw Avenue. The lawyer also sent a letter to Centennial, by registered mail, enclosing a copy of the electronically registered Claim for Lien, and a copy of the Affidavit of Verification, however, the letter was addressed to "The Board of Governors of the Centennial College of Applied Arts and Technology" at 951 Carlaw Avenue.

In the *Bianchi* case, Bianchi entered into a contract with Eastern Construction for excavation and backfill work for a construction project on lands owned by George Brown College of Applied Arts and Technology at their Casa Loma campus on Kendal Avenue in Toronto. On December 11, 2002, Bianchi's lawyers electronically registered a Claim for Lien against the premises at 146 Kendal Avenue. Bianchi's lawyers also sent letters to George Brown College.

The Master first had to determine whether either George Brown College or Centennial College are the “Crown” or are a “Crown Agency”. First the Master turned to the *Crown Agency Act*¹² provides that a Crown Agency means a board, university, or agency, owned, controlled or operated by Her Majesty in Right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council. The Master then reviewed the *Ministry of Colleges and Universities Act*¹³ which continued 23 colleges of applied arts and technology including George Brown College and Centennial College. As the *Act* did not specifically designate them as Crown Agents, the Master turned to the common law. Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control that the Crown exercises over it. The Master found that on the basis of the nature and degree of control test, that George Brown College was a Crown Agency.

With respect to Centennial College, the *Ministry of Colleges and Universities Act* was repealed and replaced by the *Ontario College of*

¹² R.S.O. 1990, c. C.48, as amended.

¹³ R.S.O. 1990, c. M.19.

Applied Arts and Technology Act ¹⁴ This *Act* specifically provides that a college is an agency of the Crown. As Centennial College was established under this *Act*, the Master found that Centennial College was a Crown agency.

The Master then went on to review the proper procedure for preserving a lien once it is clear that it is a Crown agent, and that s. 34(1)(b) applies. Under this section, a copy of the Claim for Lien together with an Affidavit of Verification has to be “given” to the owner. This of course must be done by the prescribed time period in order to preserve the lien before it expires. Also, s. 34(3) directs the lien claimant, where the owner of the premises is the Crown, to give a copy of the Claim for Lien together with an Affidavit of Verification to “the office prescribed by regulation”. The regulation, in this case, prescribes that the Claim for Lien and the Affidavit of Verification must be given to “the office of the President of the college”.

¹⁴ 2002, S.O., c. 8, Sched. F.

Dirm's solicitor had registered the lien on title on July 25, 2003. Dirm's solicitor, also, on July 30, 2003, sent a letter, by registered mail, addressed to the Board of Governors of Centennial College of Applied Arts and Technology at the Carlaw Avenue address enclosing a copy of the Claim for Lien and the Affidavit of Verification. However, as the letter was addressed to the Board of Governors of the college, and not the office of the President of the college, which had a different address, P.O. Box 613, Station A, Toronto, the Master found that Dirm's lien was not properly preserved. The Claim for Lien and Affidavit of Verification should have been given to the office of the President as required by the *Act* and Regulation.

With respect to Bianchi's lien, on the day the lien was registered, December 11, 2002, Bianchi's lawyers sent three envelopes by registered mail. The first envelope was addressed to Eastern Construction. The second and third envelopes were addressed to the Board of Governors of George Brown College of Applied Arts and Technology at a P.O. Box address, and at the 146 Kendal Avenue

address. Each envelope enclosed a copy of the electronic registered Claim for Lien. There was some dispute as to whether the letters sent to George Brown College also included a copy of the Claim for Lien together with an Affidavit of Verification. The Master held that Bianchi's lien was not properly preserved because a copy of the Claim for Lien document and Affidavit of Verification were not given to George Brown College, the Crown Agent, as required by the *Act*.

In each of the two cases, the Master ordered that the liens as a charge upon the security posted by Dalton and Eastern be discharged and the security be delivered up for cancellation.

These cases once again highlight the importance of understanding who the "owner" is of the premises and then complying with the correct procedure. Where, however, counsel may be in doubt as to whether or not the owner is the Crown or a Crown Agency, then counsel should adopt the procedure suggested by Master Sandler which is to follow both, register the lien and give a copy of the Claim for Lien and Affidavit of Verification to the appropriate office.

IV. Costs

One popular way of getting it wrong in lien actions is to vigorously defend an action that is obviously well founded or to vigorously maintain an action that is clearly devoid of merit. Courts, which today are generally overextended, tend to be less than lenient toward such behavior and may express their disapproval with an award of costs against that party.

In *Bellissimo Excavating Ltd. v. Ding*,¹⁵ the owners failed to retain the necessary holdback and paid the entire sum owing to the contractor. The contractor took the money and was never seen or heard from again. The subcontractor remained unpaid. The full amount of the subcontractor's claim of \$15,242.55 was within the owner's holdback obligation. Although it was clear that the owners had to pay the subcontractor, they defended the action vigorously. Master Albert held that an award of costs under s. 86 was appropriate.

¹⁵ [2004] O.J. No. 2430 (Master).

Counsel for the owners argued that the costs should be capped by the quantum of the claim, relying on the decisions in *Alan Webster Family Trust v. Midland Walwyn Capital Inc.*¹⁶ and *Trafalgar Industries of Canada Limited v. Pharmax Limited*,¹⁷ two cases decided under the simplified procedure r. 76. In *Alan Webster*, what should have been a three day trial ended up as a nine day trial because counsel insisted upon a full length trial and did not submit background evidence by way of agreed facts, which would have saved many days of trial. Justice Wilson held that:

Counsel cannot afford the luxury of launching a multi-faceted full length trial when relatively modest amounts are in issue.

In *Trafalgar*, also decided by Justice Wilson, the court held that the simplified procedure was introduced to promote affordable access to justice, and that costs under those rules have historically been lower than those in ordinary cases. Therefore, Justice Wilson held that costs in simplified procedure cases have to be reasonable and

¹⁶ (2003), 64 O.R. (3d) 716 (S.C.J.).

¹⁷ (2003), 64 O.R. (3d) 288 (S.C.J.).

proportionate to the amount recovered. Counsel for the owner in *Bellissimo* argued that the same principles applied to actions under the *Construction Lien Act*. Master Albert disagreed:

I disagree. Rule 76 was proclaimed after much study and debate on the issue of access to justice. The predecessor to the CLA, the Mechanics Lien Act, was enacted much earlier, to provide quick access to the courts in construction cases, and to create additional remedies for those who provide services and materials to property owners without direct contractual recourse to them. While procedures in construction lien actions are sometimes streamlined to take into account the amount in issue, the construction lien regime was not proclaimed for the specific purpose of creating affordable access to justice. In fact, many cases brought under the CLA are complex and technical, involving multiple parties, multiple issues and protracted trials that are too often out of proportion to the amounts in issue. The *Trafalgar* case does not apply.

It would be unfair to saddle *Bellissimo* with costs when he did everything properly. To do so would be to suggest that he should have walked away from his claim of \$15,242.15 when he saw that the costs were escalating, when he tried repeatedly to settle the claim on a reasonable basis. That

would send the wrong signal to construction lien claimants for whose protection the CLA was enacted.

The Court relied upon the decision of Justice Lane in *163972 Ontario v. Isacco*:¹⁸

That the costs significantly exceed the amounts at stake in the litigation is regrettable, but it is a common experience and is well known to counsel as one of the risks involved in pursuing or defending a case such as this to the bitter end rather than finding a compromise solution. To reduce the plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the defendants in this case.

Therefore, the owners were held to be liable for all costs, including the costs of various interlocutory proceedings. In all, in an action for \$15,242.55, the plaintiff subcontractor was awarded costs in the amount of \$30,825.42.

¹⁸ [1997] O.J. No. 838 (Gen. Div.).

In *Golden Age Construction Ltd. (and Roger Boadway Ent. Ltd., sheltered lien claimant) v. Khanna*,¹⁹ the plaintiff had a sheltered lien for \$6,112.22. The plaintiff sought costs in the amount of some \$22,000.00. The court considered that on a number of occasions, the plaintiff had tried to resolve the matter, without success. The defendant brought three motions, all of which were unsuccessful. The plaintiff, on the other hand, was entirely successful. Still, while the court did not cap the cost award at the quantum of the claim, it refused to award the entire amount, because, as Madam Justice Lack held, she “must also consider the small amount claimed here in relation to the amount expended”. Costs were fixed at \$11,000.

If you get it as wrong as the plaintiff did in *Pineau*, the court may not hesitate to award costs against the solicitor personally. *Pineau*²⁰ also makes it clear that solicitors who misinterpret the statutory procedures to the extent as occurred in *Pineau* will have costs awarded against them personally. The Master held that the solicitor’s

¹⁹ Newmarket Ct. File # 54575/00, Justice Lack, August 6, 2002.

²⁰ *Pineau v. Kretschmur Inc. et al.*, heard June 28, 2004, reasons released July 29, 2004 (Master Sandler).

conduct fell within s. 86(1)(b)(ii), i.e. it prejudiced and delayed the conduct of the action, even though such delay was not intentional. The Master also held that s. 86(1) and Rule 57.07 are mutually reinforcing of one another, covering all the different scenarios that can arise in the problematic conduct of a lien action. In the *Pineau* case, Master Sandler found that the various lawyers of the plaintiff are fully and solely responsible for all the problems. The Master awarded costs to all the defendants. Then the Master found that the costs in the amount of some \$15,000 should be paid, jointly and severally, by all the plaintiff's lawyers.

V. Conclusion

There is no magic to getting it right. Every single mistake made here could have been avoided by reading the *Construction Lien Act*. As an exasperated Master Sandler indicated in *Pineau*, "it's all there. The whole procedure". The same is true for the s. 19 problem and for preserving a lien against Crown property. It's all in the *Act*. If you fail to familiarize yourself with the statute and if you fail to read the decision in *Pineau* before appearing before a Toronto construction

lien master, the one section of the *Construction Lien Act* that you may become familiar with is s. 86.

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