

EXTRAORDINARY REMEDIES UNDER THE *Construction Lien Act*¹

This paper deals with a series of extraordinary remedies available under the *Construction Lien Act*.² Generally, “extraordinary” is defined as out of the usual course, additionally or unusually great. They are a series of powerful remedies for enforcing lien rights that are additional to the common construction lien or unusually great in the sense that they permit a person remedies over and above the common lien. They are, however, very technical in nature, and the failure to use them properly can result in the loss of rights or the diminution of lien security.

I Appointment of a Lien Trustee under s. 68 of the Act

Section 68(1) of the *Act* allows for the appointment of a trustee. The trustee is also permitted to act as a receiver and manager. The section provides as follows:

68(1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Our courts have generally concluded that this is a remedy to be used with caution, and that based on the powers given to a trustee, it may be of use only in a limited range of circumstances. The primary purpose of this remedy is to protect the interests of the lien claimants, with care being taken to protect the interests of others in the process. Section 68(3) of

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² All references in this paper to the *Act* are in respect of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, unless otherwise noted.

the *Act*, for example, makes the lien a charge upon any amounts recovered by the trustee. The *Act*, however, does not indicate under what circumstances a court will grant an order under this section and permit the appointment of a trustee.

(a) **When to Appoint a Lien Trustee**

An earlier authority, decided under the former *Mechanics' Liens Act*³, suggests that a trustee may be appointed in two circumstances: mismanagement or abandonment of a project.

In *Durcard Mechanical Contractors Ltd.* Justice Grange said that in his view:

“The remedies provided under s. 34 of the *Mechanics' Liens Act* are intended to be resorted to only when the present management is clearly unable to carry on with the business, either by reason of incompetence or dishonesty or neglect of the undertaking.”

Later on Justice Grange noted:

“I do not feel however, that the court should appoint a receiver or a trustee upon the application of one unsatisfied lien claimant where there is no evidence of abandonment of the premises or mismanagement of the project. . .”⁴

The Attorney General's Advisory Committee on the Draft Construction Lien Act also provided no guidance on the appropriate circumstances for the appointment of a trustee. This suggests that this powerful remedy is to be a flexible tool. Our courts have generally deferred to commentators on the *Act* as to when this remedy should be used⁵. Based on the powers given to

³ Section 34, *Mechanics' Liens Act*, R.S.O. 1970, c. 267.

⁴ *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.*, Ontario H.C.J., Grange J., April 19, 1975.

⁵ Kevin P. McGuinness, *Construction Lien Remedies in Ontario* (Toronto: Carswell, 1997, 2nd ed.); Harvey J. Kirsch, *Kirsch: A Guide to Construction Liens in Ontario* (Toronto: Butterworths, 1995, 2nd ed.).

a trustee under s. 68(2), there are three generally accepted circumstances when it may be appropriate to appoint a trustee:

1. where the premises is an income earning property, and the lien claim may be satisfied out of the income;
2. where the owner has become insolvent but the project itself would be a viable one if it were refinanced and carried to completion; or,
3. where the appointment of a trustee may be of use to obtain management of the premises, in order to prevent its deterioration.⁶

In addition, although it is not necessary that there be a preserved or perfected lien at the time the order is sought and made, there must at least be a subsisting lien.⁷ The *Royledge* decision suggests that, although any person with an interest in the premises, such as an owner or mortgagee, may apply to appoint a trustee, there must be a lien that is capable of preservation and perfection or a lien that is preserved and perfected before the court has jurisdiction under this section of the *Act*. This is a low threshold in most cases. Work on the project must have commenced, such that the lien claimant requires assistance of the court to protect its interests.

Justice Lane in *Royledge* stated this proposition as follows:

“Although on a literal interpretation, s. 70(1) [now s. 68(1)] could be interpreted as applicable even in the absence of a lien, I do not so read it. It must be remembered that it is found in a part of the *Construction Lien Act*, which is headed “Extraordinary Remedies” and the wide powers given to the trustee indicate it is a remedy to be used with caution.”⁸

⁶ *Royledge Industries Inc. v. Perma-Roof Ont. Ltd.* (1991), 2 O.R. (2d) 488, at p.497 b-c.

⁷ *Ibid*, at p. 497 d-e.

⁸ *Ibid*, at p. 497 d-e

Courts have consistently refused the appointment of a trustee where the appointment is sought for some collateral purpose. For example in *Ru-Ko Inc. v. Croatia (Republic)*,⁹ the owner, the state of Croatia, had taken the position that it was entitled to diplomatic immunity from the claim of the contractor. The contractor lien claimant both preserved and perfected a claim for lien. The owner had sought, in a separate proceeding, a determination on the availability of the defence of diplomatic immunity and lost. The owner was then selling the property and sought the consent of the contractor to an order to vacate the contractor's lien upon posting security into court. The contractor would not consent without extracting an agreement from the owner that it submit to the jurisdiction of the Ontario courts and would not claim diplomatic immunity. The owner refused and proceeded without notice to post security and vacate the registration of the contractor's lien by paying into court the value of the lien plus the appropriate amount for costs.

The lien claimant applied to appoint a trustee under s. 68 to receive and hold the proceeds of sale to the extent of the value of the lien. The court refused the application, in part, because the lien had been vacated, and the court was of the view that the lien claimant no longer had an interest in the land. This analysis is correct, of course, as once security is posted the lien ceases to attach to the premises and instead becomes a charge upon security posted¹⁰. The claimant is no longer a person having a lien, but rather a lien claimant with a "charge" upon the security posted to vacate that lien.

⁹ *Ru-Ko Inc. v. Croatia (Republic)* (1998), 38 C.L.R. (2d) 269 (Ont. Master).

¹⁰ Section 44(6), *Construction Lien Act*.

The contractor argued that Croatia's claims of diplomatic immunity would be diminished if the sale proceeds did not pass into Croatia's hands but rather into the hands of a court appointed trustee. The Master observed that the contractor's lien was not at risk as the full amount of the lien claim plus an amount for security for costs was paid into court. The Master refused to appoint the trustee and concluded that the facts of the case did not reflect the situations contemplated by s. 68 nor did they warrant the application of this extraordinary remedy.

In the *Royledge* case, the developer, Royledge, had sold its lands to Perma-Roof, a builder, on terms that required Royledge to install and pay for all of the servicing and all local and regional levies, park dedications and roadways for a subdivision of 137 lots. Perma-Roof had the right to review and approve of the subdivision agreement. Royledge, however, negotiated the subdivision agreement with the Town, without consulting Perma-Roof, who refused to execute the agreement on the grounds that it was not in accordance with the contractual obligations of Royledge. Perma-Roof changed the agreement to delete any reference to it as developer and to make it clear that all liability for the servicing, levies and dedications was the responsibility of Royledge. Royledge refused these changes and the agreement remained unsigned. The Town would not issue building permits until the subdivision agreement was signed. It was a classic stalemate.

Royledge engaged a contractor to install the services. The contractor did the work and was owed \$800,000. There was no serious dispute as to the quality or value of the work. Royledge refused to pay the contractor without the subdivision agreement being signed. The contractor liened.

On the application to appoint a trustee, Justice Lane noted that the real dispute has nothing to do with the contractor's lien and everything to do with the contractual relations between Royaledge and Perma-Roof. In refusing to appoint the trustee, Justice Lane stated as follows:

“There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk. The problem underlying this litigation is a dispute between Perma-Roof and Royaledge as to the meaning of the arrangements between them and as to whether the draft contract settled by Royaledge with the Town is in harmony with those contractual arrangements”.¹¹

(b) How to Appoint a Lien Trustee

Section 68(1) permits a person having a lien or a person with an interest in the premises to *apply to the Court* for the appointment of a trustee. The issue that has yet to be conclusively determined is whether the party seeking the appointment of a trustee is to proceed by way of motion or application. There is no definitive answer, as some authorities suggest that the courts view this type of objection as a technicality,¹² and will not permit the technicality to be used to

¹¹ Royaledge at p.497.

¹² *Atlas-Guest Inc. v. Brownstones Building Corp.* (1992) 2 C.L.R. (2d) 275 Ont. Gen. Div.); *G.C. McDonald Supply v. Preston Heights* (1991) 45 C.L.R. 293 (Ont. Gen. Div.)

defeat the substantive issue. In addition, as some authorities do not provide details as to the state of the action when then the appointment is sought, it is not clear whether the relief sought should be by motion or application.

One aspect of this issue came before Master Sandler in *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*¹³ The issue was whether a Construction Lien Master had jurisdiction to hear a motion to appoint a trustee where the lien action had been referred to the Lien Master under a judgment of reference. Master Sandler's comments are *obiter*, as he referred the matter to the Divisional Court as a state case. The matter was never heard by the Divisional Court, however, Master Sandler's comments are instructive and the proper forum for the proceeding to appoint a trustee can be summarized as follows:

No.	Circumstance	Proceeding
1.	Lien exists (subsisting or preserved), however no action commenced to enforce lien.	<u>Application</u> to a Judge
2.	Lien action commenced, however no judgment of reference referring lien action to Lien Master.	<u>Motion</u> in the lien action, to a Judge.
3.	Lien action commenced and action referred by judgment to Lien Master.	<u>Motion</u> in the lien action, to the Lien Master.

Whether the proceeding is by application or motion, there must be affidavit evidence sufficient to demonstrate the three generally accepted situations when a court will exercise its discretion and appoint a trustee. The affidavit should, generally, also include a complete

¹³ *Celebrity Flooring Systems Ltd. v. One Shaftesbury Community Assn.*, [2003] O.J. No. 304, (Ont. Master).

chronology of the project as it is known to the applicant, the status of the project, a basic accounting of the project including all available progress certificates and any responses to s. 39 demands, the current state of title including a specific reference to known encumbrances, the status of all pending or completed sales or any condominium declaration, the cost of completion, any safety considerations and evidence as to the deterioration of the building or value of the work and copies of all liens and copies of the pleadings in any lien actions. The material must also include the trustee's written, signed agreement to act as trustee. Although not required, the accepted and proper practice is to include a copy of the order sought on the motion or application.

In addition, the process to appoint the trustee and all subsequent actions by the trustee must be done openly and fairly. The key is "transparency". The process must not only be fair and reasonable but must be seen to be fair and reasonable by all those participating in the process.

In *The Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.*,¹⁴ the trustee had been previously appointed over a golf course development under s. 68 of the *Act*, on a motion by the mortgagee. The trustee came back before the court to seek approval of the sale of the golf course. The trustee sought to sell the golf course for some \$8.5 million. On the eve of the trustee's motion to approve the sale, an offer was received for some \$9.5 million. The lien claims totaled approximately \$2 million. If the trustee sold under the first offer, the prior, secured creditor would be paid in full, leaving little or nothing for the lien claimants.

¹⁴ *The Toronto-Dominion Bank v. Crosswinds Golf and Country Club Ltd.* (2002), 59 O.R. (3d) 376 (Ont. S.C.J.).

The lien claimants objected on the basis that the process was tainted by unfairness and that the trustee had not acted in an even handed manner with respect to all creditors. The lien claimants also objected on the basis that they had not been informed in any meaningful way of the status of the proceeding until four days before the trustee's motion to approve the sale. Justice Wilson asked several critical questions regarding the process generally and the conduct of the receiver, five of which are key:

- (a) were the lien claimants given notice of the proceedings to appoint the trustee and the Order granting the trustee the authority to negotiate with four prospective purchasers?
- (b) were the lien claimants given notice of the motion to seek approval of the sale?
- (c) what was the rationale for imposing a deadline of 28 days from the day the trustee was appointed for the presentation of offers to purchase the golf course, when selling the golf course in the dead of winter?
- (d) how was the list of potential purchasers put together and what were the criteria? and,
- (e) did other potential purchasers express an interest in buying the property only to be advised that it was too late?

The court refused to approve the sale. Justice Wilson noted that there were serious concerns with respect to whether sufficient efforts had been made by the trustee to market the golf course. With respect to the procedure, Justice Wilson stated as follows:

“Notice of the proceedings is, in my view, a fundamental prerequisite to ensure that participants have an opportunity to satisfy themselves as to the fairness and impartiality of the process. Objections may be made to the court to an approach taken by the receiver before those steps become written in stone. If participants

choose not to participate and have been given an opportunity to be heard, they cannot later complain about the fairness and reasonableness of the procedures.¹⁵

(c) **Pro's and Con's of Lien Trustees**

Some of the pros and cons of appointing a lien trustee, this list is not exhaustive, can be briefly summarized as follows:

Cons

- (a) the cost of the application or motion to appoint the lien trustee may be steep; the owners will usually resist this step resulting in responding material being filed followed by cross-examinations on the affidavits;
- (b) the fees of the trustee which can be substantial and are a first charge on any proceeds of sale or rents collected; and,
- (c) the process to appoint the lien trustee may show such that mortgage enforcement proceedings over take the appointment of the lien trustee.

Pros

- (a) the motion or application to appoint a lien trustee, whether granted or refused, is interlocutory. No appeal can be taken from the Order made;

¹⁵ *Ibid*, at pp. 382-383

- (b) the lien trustee can also act as a receiver and manager;
- (c) rationalize and consolidate all liens and lien actions;
- (d) the lien claimants may be paid more than if the project was not completed and the proceeds of sale applied to satisfy the liens;
- (e) the motion or application to appoint the lien trustee may be brought at any time, even before a lien is preserved;
- (f) steps can be taken by the trustee to maintain the economic value of the premises so that the lien security (the value of the premises) does not diminish;
- (g) once a lien trustee is appointed, the courts give defence to the receiver's decisions and the sale process adopted by the receiver; the courts rarely, if ever, second guess the decisions by the trustee;
- (h) the procedures adopted by the receiver must be commercially reasonable and fair (some might think that this is a low threshold making this a con);
- (i) the process or conduct by the lien trustee is done in an even handed manner with respect to all creditors, including lien claimants, such that there is disclosure of information, notice of proceedings and an opportunity to be formed and participate in the legal process; and,
- (j) the steps taken by and the expenses incurred by the lien trustee are reviewed by the court, the lien claimants and the other creditors in so that that the premises are protected to ensure maximum value is obtained for the property.

Although most mortgage documents permit the mortgagee the remedy of possession and sale, it may be more appropriate for the mortgagee to seek the appointment of a Trustee under the *Construction Lien Act*, particularly when the mortgagee expects to incur expenses preserving the property, or seeing the property to completion. In *Avenue Structures Inc. v. Pacific Empire Development Inc.*,¹⁶ the mortgagee, the Bank of China, took control of the construction project using its contractual right in the standard mortgage terms to do so. In the course of preserving the property, the Bank incurred expenses aggregating some \$255,000 related to realty taxes and penalties, interest and bailiff's costs, winter protection, hydro bills, insurance premiums, replacement of stolen electrical cable, fees of an architect, legal fees, inspection fees and payment to the City under a letter of credit. The Bank was not able to provide adequate evidence as to the necessity of these so called "forced" expenses.

The Master held that the only expense that would rank ahead of the lien claimants would be municipal taxes paid by the Bank, excluding penalties, interest and bailiff's costs. Master Sandler made it clear that a trustee appointed under s. 68 could recoup under s. 68(3) of the *Act* all reasonable business expenses and management costs incurred. Had the expenditures arisen while a s. 68 trustee was in place, the trustee could have applied to the court for directions as to whether such expenditures were absolutely necessary or essential for the preservation of the property and for the authorization to pay them. The lien claimants would have made submissions, and the decision of the court would have been binding on the lien claimants which

¹⁶ *Avenue Structures Inc. v. Pacific Empire Development Inc.* (2000), 8 C.L.R. (3d) 128 (Ont. Master).

may have resulted in permitting these expenses, paid by the mortgagee, a priority over the liens.¹⁷

II General Liens

The general lien is a very powerful tool, but, once again, very technical in nature. If not used properly, the claimant's lien rights may be irretrievably prejudiced, as happened in a recent case.¹⁸

Section 14(1) creates lien rights for the price of services and materials supplied in respect of an improvement. Section 20(1) creates a "general" lien in respect of the price of services and material supplied in respect of several properties. Section 20(1) provides as follows:

20(1) Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person's lien follow the form of the contract and be a general lien against each of those promises for the price of all services and materials the person supplied to all the promises.

(a) When to Use a General Lien

A claimant is not required to use a general lien even when it is available. Section 20(1) provides that the lien claimant may choose to have the lien follow the form of the contract and be

¹⁷ Section 68(3) of the *Act* provides that "Subject to subsection 78(7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2)".

¹⁸ See note 23.

a general lien. Therefore, even if the use of a general lien is available, the claimant may choose to preserve individual liens for the price of the services and materials supplied to each individual property.

Before reviewing the elements of s. 20(1) to determine whether it is appropriate to register a general lien, the claimant should review its contract to ascertain whether the contract includes a provision that the liens arise and expire on a lot-by-lot basis. If the contract contains this provision, then the claimant cannot have a general lien but rather has a separate lien against each lot for the price of the services and materials supplied to that lot.

Section 20(2) of the *Act* provides as follows:

20(2) Subsection [20(1)] does not apply and no general lien arises under or in respect of a contract that provides in writing that liens shall arise and expire on a lot-by-lot basis.

In *595997 Ontario Inc. v. MacDonald Homes Inc. (Trustee of)*¹⁹ the owner developed four blocks of townhouses totaling twenty-one townhouse units. The owner signed a contract with the numbered company for landscaping services consisting of the supply and installation of four inches of top soil and sod, patio stones on six inches of stone, and two patio slabs at that rear of each patio door. The price for this work amounted to some \$53,000. The owner transferred ownership of one of the townhomes to purchasers. Later that year, the landscaping contractor registered a general lien on title to eighteen of the lots in the development, including the property that was previously sold. The contract between the owner and the landscaping contractor contained the following clause:

¹⁹ *595997 Ontario Inc. v. MacDonald Homes Inc. (Trustee of)* (1997), 36 C.L.R. (2d) 61 (Ont. Div. Ct.)

- 7(b) “In the event that the Contractor, pursuant to this contract supply services and/or materials to more than one lot or premises, it is agreed that any lien that may arise hereunder, or as a result thereof will do so on a lot-by-lot basis and will be apportioned among the various lots or premises with respect to which the Contractor has supplied services and/or materials in such fashion as to reflect the actual services rendered or material supplied to each such lot or premises, and each lien arising will similarly expire on a lot-by-lot basis.”

On the basis of this contractual provision, the court concluded that the landscaping contractor had no general lien.

Consider also *Leo P. Abrams & Sons Ltd. v. MacDonald Homes Inc. (Trustee of)*.²⁰ It is not entirely clear from the endorsement of the Court of Appeal as to why the lien claimant was found not to have a general lien, although it appears that there may have been a contractual provision indicating that the lien arises and expires on a lot-by-lot basis. The court was critical of the lien claimant for having registered a general lien in these words:

“The appellant could have liened the lots it provided services to on a lot-by-lot basis. It did not do so because of its own negligence. To accede to the appellant’s position would permit it to take advantage of its own negligence to the detriment of the other creditors of MacDonald Homes”.

Section 20(2) essentially permits an owner to opt out of the application of a general lien, but not the application of a lien. Assume, however that the contract contains no such opting out. To determine if the general lien is available, s. 20(1) must be broken down to identify the circumstances that will permit the use of a general lien.

²⁰ *Leo P. Abrams & Sons Ltd. v. MacDonald Homes Inc. (Trustee of)*, [1996] O.J. No. 664 (Ont. C.A.)

The first requirement is a single contract between an owner and a general contractor. The second requirement is that the single contract must be for improvements (generally, alterations, repairs, additions, construction, erection or installation on land²¹) on more than one premises. The third requirement is that the several premises must all have the same owner. This latter requirement is all too often forgotten.

If anyone of these requirements are not met, the claimant should register a lien against each property for the price of only the work supplied to that particular piece of property.

In the *Boyle Heating* case,²² the contractor agreed to supply and install gas furnaces, and other related equipment in respect of nine units for a contract price of approximately \$52,000. The contract did not provide that the lien rights were to expire on a lot-by-lot basis. In November, 1994, the owner gave a mortgage to a numbered company securing \$570,000 against units 1, 2, 4, and 9. By the end of February, 1995, all construction on units 1, 2, 4, and 9 ceased, and the mortgagee went into possession. In May, 1995, Boyle remained unpaid and registered a general lien against title to units 1, 2, 4, and 9. After the registration of Boyle's lien, the mortgagee made an advance under its construction mortgage. The issue before the court was whether Boyle had priority over the mortgage to the extent of a deficiency in the holdback and to the extent of the mortgage advances made after the general lien was registered.

The court found that Boyle was entitled to a general lien. The court relied on *Kirsh's Guide to Construction Liens in Ontario* for the proposition that if it is determined that the general

²¹ See s. 1, "improvement"

²² *300016 Ontario Limited c.o.b. Howard Boyle Heating & Air Conditioning v. 176419 Canada Limited* (1997), 33 O.R. (3d) 154 (Ont. Div. Ct.)

lien is valid against five properties and invalid against three others which were sold to purchasers before the lien was preserved, the claimant may enforce the full value of the general lien for all eight properties against each of the five properties validly liened.

If you are going to try for a general lien, you had better get it right. For example, in the *Leo P. Abrams & Sons* case, Justice Laskin of the Ontario Court of Appeal had this to say:

“The majority is of the view that in the circumstances of this case, we should not treat the general lien that was registered as a lien on the lot in question for the work done on that lot. The statute sets out the two basis for claiming a lien. There is no curative provision in the *Act*. To accept Parkway’s submission on this issue would be to ignore the scheme of s. 20, and would encourage the improper registration of liens. The appellant remains a trust beneficiary for the amount of the work done on the lot in question.”

More recently, the Court of Appeal had occasion to consider general liens in the case of *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*²³ In this case, Gillies Lumber, a lumber supply company, supplied lumber to four different projects. Each project was located in a different city, and each project had a separate registered owner, although all four projects came under the umbrella of the Kubassek group of companies. In addition, Gillies did not have one written contract for the four projects. Individual contracts were formed by Gillies issuing quotations and, in response, the project owner issuing purchase orders for the supply of lumber to that project. Gillies was also instructed to, and agreed to invoice separately the company responsible for building each project.

²³ *Gillies Lumber Inc. v. Kubassek Holdings Ltd.* (1999), 176 D.L.R. (4th) 334 (Ont. C. A.).

Gillies itself assigned each project a separate customer number, issued quotations to each project owner and each project owner issued purchase orders to Gillies thereby creating four separate contracts when the Gillies quotations were accepted by the issuance of the purchase orders. Gillies, as agreed, not only invoiced each project owner separately but also delivered monthly statements showing only the amount owing for lumber supplied to that project.

By January, 1996, Gillies was owed just over \$300,000 for the supply of lumber to all four projects. Gillies preserved its lien by registering a general lien against each of the four projects for the total amount.

At the appeal, it was conceded that as the owners of the four projects did not enter into a single contract with Gillies for the supply of lumber, Gillies did not have any right to register a general lien against the four projects. The issue on the appeal was whether the court should save the Gillies liens, applying the curative provision, s. 6 of the *Construction Lien Act*. In a majority decision, the Court of Appeal held that Gillies could not be given specific liens by the application of s. 6. Although the result is a majority decision, the two judges agreeing with result arrived at that conclusion differently. Justice Borins held that s. 6 did not permit the court to rectify a claim for a general lien that is invalid for its failure to comply with s. 20. Chief Justice McMurtry, concurring in the result, suggested that the court could have used s. 6 to cure defects of the general lien that are minor or technical in nature. The Chief Justice did, however, find that the defects in this case were major because the amounts claimed against each property were substantially higher than actual amount due for materials delivered to the particular property.

Justice Laskin, dissented in the result, suggesting that the curative provision under s. 6 would be available to cure minor defects. Justice Laskin found that the Gillies failure to name the correct person for whom the materials were supplied and the contract price were minor errors that could be cured. However, Justice Laskin found the third error, the amount claimed in the general lien, was a significant error, that would only invalidate a lien if someone had been prejudiced by it. Justice Laskin went on to indicate that although the appellant's claimed they were prejudiced, they offered no proof of the prejudice. Justice Laskin's result would have been to hold that the lien is not invalid by operation of s. 6, however, the court did not have the power to rectify the non-compliance to amend the general lien to make it four individual liens.

These Court of Appeal decisions clearly indicate, that if the general lien is used, it must be used in the proper circumstances and the information in the lien document to be completely accurate, otherwise it will fail leaving the claimant with no security. Although the judges of the Court of Appeal in the *Gillies Lumber* case applied different reasoning, a common thread in the reasons of Chief Justice McMurtry and Justice Laskin, was that a major defect (i.e. the fact that the amount claimed is so much greater than what could reasonably be claimed against an individual lot) cannot be cured.

III Liening the Leasehold

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 asked for the improvement. The real issue is when does a 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.

(a) **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.*,²⁴ 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

²⁴ *Williams & Prior Ltd. v. Taskon Construction Ltd.* (2003), 22 C.L.R. (3d) 1 (Ont. Master).

contractor for the renovation and work at the store. Taskon entered into subcontracts with Williams & Prior and Alert.

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 that when preparing the claim for lien document, 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 search to determine the parties with a freehold interest and those with a leasehold interest.

In *William & Prior*, all the lien claimant had to do was to 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.”

(b) **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 doing work on these 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 and the premises. 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 *Veneri Engineering Ltd. v. Zonenward Leasex Management Inc.*²⁵, 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 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:

²⁵ *Veneri Engineering Ltd. v. Zonenward Leasex Management Inc.* (1994), 16 C.L.R. 141 (Ont. Master).

“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 drawing 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*,²⁶ 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*.

(c) **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*.

S. 35 of the *Act* provides as follows:

35. 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

²⁶ *Southern Plumbing Ltd. v. Quality Craft Interiors Ltd.* (1994) 17 C.L.R. (2d) 195 (Ont. Master).

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.

(d) Marketability of a Leasehold

Where a lien claimant has successfully prosecuted its lien against the leasehold interest of a tenant and has obtained a lien judgment in that regard, the Court, under s. 65(1) may make all orders necessary for the completion of a sale and for vesting an interest in the premises in the purchaser. In other words, the leasehold interest can be sold.

However, there are implications as between the landlord and the original tenant, particularly where that tenant has failed to make payment of rent. Under s. 19(4) of the *Act*, where the landlord has provided notice to enforce forfeiture or terminate the lease for the premises, the lien claimant, may make payment to the landlord of the amount of the unpaid rent, and those amounts would be added to the claimant's claim for lien.

The steps to market a leasehold interest, under direction of the court, have not occurred for many years, to the knowledge of the writer, although in one situation, it came very close. It appears, however, that where lease values are increasing, and the lien judgment refers to a leasehold interest of a tenant that is for example a long term lease at an extremely favourable lease rate, the leasehold interest may be marketable. Where however, lease values are declining,

it is more likely that a new tenant may be able to pick up the lease at a value less than the defaulting tenant, then the lease would have virtually no marketability.

IV Prevenient Arrangements

Prevenient arrangements have been described as understandings that are not binding contractually.²⁷ They are understandings that until the material supplier is notified to the contrary, he is to supply materials as requested. Some of the characteristics of a prevenient arrangement are as follows:

- (a) all the work is done, or all the materials are furnished under one entire continuing contract;
- (b) the work is done or the materials are furnished at different times;
- (c) it is not necessary that all the work or materials should be ordered at one time;
- (d) it is not necessary that the amount of work or materials should be determined at the time of the first order;
- (e) it is not necessary that the prices should be agreed upon, or the time of payment fixed.

A mere general agreement to furnish labour and materials for the particular building or improvement is sufficient, if complied with, to find a prevenient arrangement, even though the original arrangement was not legally binding.²⁸

²⁷ *Dufferin Concrete Products v. Waterbrooke Development Ltd.*, [1992] O.J. No. 2602 (Ont. Gen. Div).

²⁸ *Rocky Mountain School Division No. 15 v. Atlas Lumber Co.*, [1954] S.C.R. 589 (S.C.C.).

It was once generally accepted that prevenient arrangements could only apply to material suppliers, however, in the decision of *891178 Ontario Inc. (c.o.b. Marra Construction) v. Humphrey*²⁹, this changed. Florida Drywall had entered into a contract with the general contractor, Marra Construction for the supply and installation of drywall. By October 26, 1990, work under that subcontract was completed. Marra Construction, thereafter, retained Florida Drywall to do extra work, which included repairs and changes in the contract work. Sometime in mid November, 1990, Florida Drywall began to do the extra work. Florida Drywall was given individual “orders” to do the extra work. The owner argued that there were some 14 contracts, one for the initial contract, and one for each order for extra work, of which there were 13.

The Master found that there was the one subcontract and a prevenient arrangement or a continuing contract in respect of the extra work. The Master found that Florida Drywall agreed to do all the extra work in respect of to the drywall as it was ordered to do so by the general contractor as set out in the orders for extra work, and the cost was invoiced once all that work had been completed. He found that each item of extra work was not a separate contract, but rather part of one contract for extras. The Master appears to have assumed that there could be a prevenient arrangement for the supply of services without actually addressing the issue. The issue was dealt with in *Larochelle Group Corp. v. Cabral*³⁰.

In *Cabral*, the owner developer had relationships with the four lien claimants. The owner would build some forty to sixty homes each year, and contracted regularly with a number of tradesmen, including the four lien claimants. The pattern of contracting was similar with each

²⁹ *891178 Ontario Inc. (c.o.b. Marra Construction) v. Humphrey*, [2001] O.J. No. 1422 (Ont. Master).

³⁰ *Larochelle Group Corp. v. Cabral*, [2003] O.J. No. 1473 (Ont. S.C.J.).

claimant. No written contract, work order or purchase order was involved, the claimants were contacted by the owner, and told when their services and goods were required. The pricing was based on well understood assumptions as to quality, quantity and cost per unit. The claimants came in and did the work on each unit when called, doing the rough-in stage as needed in order to permit the next stage to proceed, and came back later to finish what was left outstanding, either on a priority basis if the unit was sold and closing, or as needed on a fill basis which meant they filled in a crew's time and completed the work when there was no higher priority demand for their services.

The claimants argued that they all had prevenient arrangements with the owner, and therefore it was not necessary for these trades to register liens every time they did work, or delivered materials to the premises. The owner argued that much of the work was done well before, and that only minor work, if any, was done within the 45 day period before the liens expired. In addition, it was argued that the concept of prevenient arrangement applied only to suppliers of materials, and not to workers providing services on the site. Justice Rutherford noted that he had not been referred to any authority for the proposition that the concept of prevenient arrangements applied exclusively to a supply contract, and that a prevenient arrangement cannot apply to contracts for materials and services or predominantly services. He reviewed the decision of the Supreme Court of Canada in the *Rocky Mountain* case, and noted that there, the Supreme Court of Canada relied upon an authority that clearly suggested that a prevenient arrangement could apply to "work", or the supply of "labour". Justice Rutherford held that the principals applicable to prevenient arrangements ought to entitle the claimants to protect their lien rights with respect to all the work and materials furnished under the

arrangements so long as their claims for lien were registered within 45 days of the last provision of labour or materials under the arrangements. The court therefore held that the liens of the claimants were therefore timely.

(a) **Implications for the Lien Claimant**

As the concept of prevenient arrangements makes the supply one continuous supply, lien rights will expire 45 days next following the last delivery or the last supply of services. This issue was considered in *Wood Lumber Co. (Ontario) Ltd. v. Eng.*³¹ where the Divisional Court had an opportunity to consider whether the “deemed completion” provisions, s. 2(3) of the *Construction Lien Act*, applied to prevenient arrangements. In this case, the owner, the Engs, entered into a prevenient arrangement with Wood Lumber for the supply of building materials for the home that the Eng’s were building. The last supply by Wood Lumber was made on February 14, and the lien was registered on February 23. The lower court had found that the contract was deemed “substantially completed” on January 30, and therefore the lien was out of time as the lien had not been perfected in 90 days, the certificate of action having been registered on May 8, some 100 days after the date of deemed completion. The court held that the deeming provisions of s. 2(3) of the *Act* did not apply to a prevenient arrangement and stated as follows:

“In my view, because a “prevenient arrangement” exists in this case, the time periods set out in s. 31 and s. 36 of the CLA do not commence until the last materials were supplied, being February 14, 1996.”

³¹ *Wood Lumber Co. (Ontario) Ltd. v. Eng.* (1999) 45 O.R. (3d) 795 (Ont. Div. Ct.).

The Divisional Court in *Wood Lumber* indicated that the time periods set out in s. 31 do not commence until the last materials were supplied. That case dealt with a situation where the owner tried to argue that the contract was deemed complete under s. 2(3) of the *Act*. The reasons of the Divisional Court suggest that even where a certificate of substantial performance of the contract is published, the time within which to register a lien would not commence 45 days from the date of publication of the certificate, but would rather commence from the last day that the materials were supplied.

It is also of note that s. 31 of the *Act* also sets out the time limits within which a subcontractor's lien expires. The Divisional Court's broad statement indicating that the time periods in s. 31 do not apply may also be an indication that even where the owner and contractor published a certificate of substantial performance, the subcontractors time period within which to register a lien under a prevenient arrangement may not commence until the last materials were supplied.

(b) Implications for Holdback Calculation

In *Dufferin Concrete Product*, the court had occasion to consider the holdback that is required to be retained under a prevenient arrangement. Dufferin Concrete supplied concrete and rendered invoices totaling \$218,258.67. As of January 4, 1990, Dufferin was paid \$192,332.22 leaving a balance owing of \$25,926.45. The owner had paid Dufferin in full with respect to the first 23 invoices rendered.

Dufferin attempted to argue that the holdback the owner was required to maintain with respect to the prevenient arrangement was equal to 10% of all invoices rendered, being \$21,825.87. The Court reasoned that as Dufferin had been paid in full on the first 23 invoices, the holdback with respect to those invoices that should have been maintained by the owner was in fact paid. Therefore, the court held that the owner was only required to pay a holdback on the remaining outstanding invoices, being \$2,592.65.

In *Dufferin Concrete*, the court was dealing with a lien claim by Dufferin, which had a direct contract with the owner. The court suggested that the result may have been different had the lien been by a subcontractor to Dufferin. The court indicated as follows:

“The legislation could have only intended this doubling effect when injured third parties are involved, in my opinion. In these circumstances, I agree that failure to retain the 10% holdback is to deprive those claiming under Dufferin, not Dufferin itself. Consequently, the plaintiff’s holdback collectable from the mortgagee is 10% of the unpaid contracts, the sum of \$2,592.65. I might add that it seems that practice adopted where invoices are paid in full to pay 10% on the unpaid balances satisfies the primary obligations where all prior invoices are paid in full. Of course, third parties need not be content with that.”

It therefore appears, that an owner is required to maintain a holdback with respect to payment of invoices rendered under a prevenient arrangement. Where the lien claimant is a subcontractor, the holdback applicable to the subcontractor will be equal to 10% of the value of all invoices rendered by the contractor to the owner under the prevenient arrangement. Owners should therefore be aware of the cautionary statement by the Court in *Dufferin Concrete*, in the event of a lien by a subcontractor to a contractor under a prevenient arrangement, as the owner may be paying the holdback twice.

V Sale of Property

The most extraordinary remedy provided for by *the Construction Lien Act* is an order for completion of sale of the property where the lien claimant has proceeded to trial and obtained a lien judgment and the judgment remains unpaid. In many cases, security in the form of a lien bond, letter of credit or cash, will have been paid into Court, and where the lien judgment is not paid, the judgment will provide for the Accountant of the Court to call upon the security to make payment. Where, however no security has been paid into Court for the lien, and the lien claimant obtains a lien judgment, the judgment will usually provide that if the owner fails to make payment within 60 days of the date of the judgment, the property be sold under supervision of the Court.

S. 65 provides as follows:

- 65(1) The court may make all orders necessary for the completion of a sale, and for vesting an interest in the premises in the purchaser.
- (2) Where an interest in the premises is sold under court order, or by a trustee appointed under part IX, the proceeds of sale shall be paid into court to the credit of the action.
- (3) A court may add to the claim of the party having carriage of the action the fees and actual disbursements of the party in connection with the sale.
- (4) The court shall direct to whom the proceeds shall be paid in accordance with the priorities established by this *Act*.
- (5) Where the proceeds of sale are not sufficient to satisfy the judgment in costs, the Court shall certify the amount of the deficiency and give personal judgment in the appropriate amount to each party whose judgment is not satisfied out of the proceeds against each person who has been found liable to the party.

Although the *Act* provides for the sale of property, there is no indication as to how this is to be done. Generally, a lien claimant will bring a reference by way of motion for directions for sale to the Master's office in the case of a judgment, or a continuation of the lien reference, in the case of a report. The reference is called a "reference for the conduct of a sale" and follows rule 55.06 of the Rules of Civil Procedure.³² Notice of the reference should be provided to the registered owner, all known persons with encumbrances, including other lien claimants, mortgagees and execution creditors.

Rule 55.06 provides a complete code for the judicial sale of the land in lien actions, including advertisement, conditions of sale (Form 55), hearings for directions, who may bid, who conducts the sale (the referee if no auctioneer is ordered), signature of the eventual agreement of purchase and sale with the successful bidder, terms of the deposit, delivery of vacant possession, and payment into and out of court of the proceeds of sale.

As with any lien reference, the Master controls the conduct of the reference and will give directions from time to time as circumstance require. The property may be sold by auction or by agreement of purchase and sale. If the property is sold by auction, the materials before the court should include a valuation of the property, indicate the name of the auctioneer and include curriculum vitae of the auctioneer. The materials should also include the advertisement of the auction and the terms of the auction, such as whether there will be a reserve bid. Where the sale is made by the auctioneer, the auctioneer will make an affidavit concerning the result of the sale and the Master may make an interim report on the sale.

³² The materials incorporated into this paper on the procedure to be followed for the sale of land are taken from *The Conduct of a Lien Action*, Duncan W. Glaholt.

Where the sale is to be by purchase and sale agreement, the lien claimant will be required to provide to the court an appraisal of the property, a listing agreement, curriculum vitae of the real estate agent selected and a draft form of purchase and sale agreement. The agreement of purchase and sale will have to ensure that there are no representations relied upon, that no chattels are included, that the premises are purchased on an “as is, where is” basis, that there are no representations about tenancy, use or occupancy, and that there is no warranty or liability for the existence or non-existence of urea formaldehyde, asbestos, PCB’s, or any other substance or liquid material which may be hazardous.

Where the sale is by auction or agreement, the interim report is confirmed by the passage of time, 15 days after service of the report upon all parties who attended the reference, or upon order of a judge of the court for immediate confirmation. The procedure to oppose confirmation of such a report would be the same as a motion to oppose confirmation of any Master’s report.³³

The purchase money is paid into court and the funds are paid out of court in accordance with rule 55.06(14) and in accordance with the initial judgment, or report of the master in the lien trial. In either case, the consent of the purchaser is required or proof to the Accountant of the Court that the purchase has received a transfer or vesting order of the property.

The lien claimant is paid its judgment from the proceeds of sale and is entitled to be compensated for the fees and actual disbursements of the reference. The sale of the premises to satisfy the lien judgment is, in the view of the author, the most extraordinary of all the remedies provided for under the *Construction Lien Act*.

³³ Rule 54.09(3), Rules of Civil Procedure.

