

**CONSOLIDATION, CARRIAGE AND
SALVAGE COSTS**

Glaholt & Associates
Barristers & Solicitors
141 Adelaide Street West
Suite 800
Toronto, Ontario
M5H 3L5

Duncan W. Glaholt
Markus Rotterdam

© Duncan W. Glaholt &
Markus Rotterdam
April, 2001

1. Introduction

Lien actions commonly involve many lien claimants with different degrees of privity of contract with the owner and each other. This results in multiple actions among various parties arising out of what is essentially a common fact situation. The *Construction Lien Act* accommodates this unique feature of otherwise summary lien proceedings by allowing, even requiring lien actions to be run as a kind of class proceeding. In order to allow the orderly conduct of such actions, Part VIII of the Act provides for the consolidation, conduct and carriage of the action.

Section 50 provides as follows:

Lien claim enforceable in action

50.--(1) A lien claim is enforceable in an action in the Ontario Court (General Division) in accordance with the procedure set out in this Part.

Trust claim and lien claim not to be joined

(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

Joinder in action

(3) Any number of lien claimants whose liens are in respect of the same owner and the same premises may join in the same action.

Section 59 provides for the consolidation of numerous actions into one action as follows:

Carriage of action

59.--(1) The court may at any time make an order awarding carriage of the action to any person who has a perfected lien.

Consolidation of actions

(2) Where more than one action is brought to enforce liens in respect of the same improvement, the court may,

- (a) consolidate all the actions into one action; and
- (b) award carriage of the action to any person who has a perfected lien.

The question is not therefore where the jurisdiction comes from to make creative orders dealing with consolidation, carriage and salvage costs, it is more a question of “how” these concepts come into play, and how and when to seek and obtain such orders.

2. History

Section 50 can be traced back to the original Mechanics' Lien Act. The initial 1873 statute incorporated the concept of a *pro rata* distribution among lien claimants. Although consolidation of actions was not specifically identified as such, the Act clearly foreshadowed the wording of the current day s. 50(3). A specific provision for consolidation by way of joinder of plaintiffs was added by the 1874 *Act to Amend the "The Mechanics' Lien Act of 1873"*, S.O. 1874, c.20, which provided in s. 13 that "any number of lien-holders may join in one suit, and all suits brought by a lien-holder shall be taken to be brought on behalf of all the lien holders of the same class" This wording changed over time to provide that only lien claims in respect of the same land may be joined as parties plaintiff. The current provision is that joinder must not only be in respect of the same "premises" but also in respect of the same "owner", both as now clearly defined in the Act.

A significant development in this Section was the exclusion of claims for breach of trust from the ambit of the statutory lien action. The Advisory Committee on the Draft *Construction Lien Act* specifically addressed this issue. The committee contemplated allowing claims for breach of trust to be advanced within actions enforcing a claim for lien pursuant to the underlying, guiding policy of the Act that "all claims relating to the improvement should be dealt with at one time where practical to do so". The Advisory Committee

concluded that "while the principle of joining these different claims is attractive in theory, in practice the joining of these different types of claims would result in hardship for many lien claimants. The issues as well as the parties would often be very different in a claim for lien as opposed to a trust claim. The avoidance[s] of undue delay should be the primary purpose of the Act".

As a result the breach of trust claims were excluded from joinder (section 50(2)) when the 1983 *Construction Lien Act* was enacted, although there seems to be an evolving practice in Toronto to have both the lien action and the separate trust action referred to the same master, to be heard together.

The carriage section, section 59, can be traced back to 1874. The *Act to Amend the Mechanics' Lien Act of 1873*, S.O. 1874, c.20, s.13, first provided that any number of lien holders may join in one suit, and that all suits brought by a lien holder shall be taken to be brought on behalf of all the lien holders in the same class. A provision for the carriage of proceedings appeared in the 1890 *Act to Simplify the Procedure for enforcing Mechanics' Liens*, S.O. 1890, c.37, s. 26, allowing any lien holder entitled to the benefit of the action to apply for carriage of the proceedings. These two provisions appeared together in 1896 in the *Act respecting Liens of Mechanics, Wage-Earners and Others*, S.O. 1896, c.35, ss. 35 and 36. Section 35 allowed any party to an action to realize liens in respect of the

same property to make an application to a judge or officer having power to try such actions to consolidate all actions into one action and to give the conduct of the consolidated action to any plaintiff to whom in his discretion he saw fit. Section 36 entitled any lien holder entitled to the benefit of the action to apply for carriage, which, if granted, made him the plaintiff of the action. These sections remained in their 1896 format for 84 years until the Revised Statutes of 1980. The carriage provision first appeared in its present form as s. 61 of the *Construction Lien Act, 1983*, when the prerequisite of an application by a party or any other interested person for carriage was dropped.

3. Other Provinces

As lien actions are to be disposed of in as summary a manner as possible, and as lien actions have now been recognized as a kind of class proceeding, most acts contain provisions similar to s. 59 in Ontario. In Prince Edward Island, actions can not only be consolidated on application of any party, but also on the Court's own initiative.

Section 50(1) has its equivalents in s. 26 of the British Columbia Act, s. 60 of the Manitoba Act, s. 30 of the Newfoundland Act, s. 33(1) of the New

Brunswick Act, s. 34(1) of the Nova Scotia Act, s. 33 of the P.E.I. Act and s. 86(1) of the Saskatchewan Act. Provisions regarding the joinder of actions can be found in s. 61 of the Manitoba Act, s. 30 of the Newfoundland Act, s. 38 of the New Brunswick Act, s. 34 of the Nova Scotia Act, s. 39 of the P.E.I. Act and s. 88(1) of the Act of Saskatchewan Act. Contrary to s. 55(2) of the Ontario Act, s. 89(1) of the Saskatchewan Act and s. 66 of the Act of Manitoba allow for a joinder of trust claims with the claim for lien.

4. Commentary and Case Law: Distinguishing “Conduct” from “Carriage”

There is little case law interpreting the sections regarding carriage, conduct and consolidation. The leading text in the field, Macklem and Bristow’s *Construction Builders’ and Mechanics’ Liens in Canada*,¹ comments as follows:

The word “carriage” in these sections, and the word “conduct” in the previous sections, have, in practice, been given the same meaning. It would appear that “conduct” applies where two or more actions have been commenced, and that “carriage” applies where only one action has been instituted. It is to be noted that “conduct” may only be given to a plaintiff, while “carriage” may be given to any lienholder. This might indicate that a

¹ D.N. Macklem, D.I. Bristow, *Construction Builders’ and Mechanics’ Liens in Canada*, Vol. 2, 6th edition (Toronto: Carswell, 1990) at § 157.

plaintiff may be awarded conduct of only the consolidated actions in the overall lien action, while a separate application for carriage of the entire proceedings might be made by any lien claimant. If the person having carriage of the proceedings is not properly prosecuting the action, then another lien claimant can apply to have carriage awarded to him. These sections have not, to date, been judicially interpreted.

While the Act is silent on this point, it has been suggested, and would be good practice, that an interested lien claimant bring a motion for consolidation at a very early stage of the proceedings, after the commencement of a second lien action, perhaps, in order to void as much unnecessary duplication as possible.²

The consolidation of actions does not change the essential character of the lien actions. In *Bruce-Grey Roman Catholic Separate School Board v. Carosi Construction Ltd.*,³ a plaintiff moved to strike out a jury notice based on s. 108(2)(6) of the *Courts of Justice Act*, which provides that the issues of fact and the assessment of damages in an action are to be tried without a jury in respect of a claim for the sale and distribution of the proceeds of property subject to any lien or charge. The plaintiff argued that by virtue of a counterclaim having been consolidated with lien actions, the counterclaim had assumed the character of an action in

² Ibid.

³ (1998), 39 C.L.R. (2d) 75 (Ont. Gen. Div.).

which one of the claims for relief involved the sale and the distribution of the proceeds of property subject to any lien. The Court disagreed:

The consolidation order is a procedural mechanism whose purpose is to assist in the orderly and expeditious trial processing of the disputes between the parties: it does not operate to change the essential character of the parties' claims.

In *Justwork Construction v. Groomes*,⁴ a contractor commenced an action against the owner under the *Construction Lien Act*. The parties consented to have the trial referred to a master. Subsequently, a second contractor, who had replaced the original contractor, also commenced an action against the owner. Although this second action was not an action under the Act, the owner moved to consolidate the actions. The original contractor opposed the motion, arguing that it should not be deprived of the summary nature of lien proceedings under the Act and that a pre-trial of the lien action had been scheduled at an early date. As there was considerable overlap in the two actions, the Court allowed the motion, reasoning as follows:

⁴ (1991), 48 C.L.R. 183 (Ont. Gen. Div.).

In my view, although certainly there may be some prejudice to the plaintiff Justwork in the form of delay, this is a proper case for the two matters to be tried one after the other and for the pretrial procedures to be streamlined and co-ordinated as much as possible.

I am therefore prepared to order that the judgment of Justice Conant be set aside so that the construction lien matter will not be referred to the master for trial. The construction lien action will continue under the Construction Lien Act to preserve the rights of the plaintiff under that Act but will be tried by a judge under that Act. The Josh matter will be placed on the list right after the Justwork case and shall be tried by the same judge either together or one after the other. The two cases shall also be pretried together. Although this may cause some delay to the plaintiff, in my view, there is no reason why the Josh matter should not be able to proceed through examinations for discovery and be ready to be placed on the list for trial within a short period of time. If an order to expedite is required at some point, or if it becomes necessary that the cases come under case management, a motion may be brought for that relief.

The Saskatchewan Court of Queen's Bench, in *355304 Alberta Ltd. v. Dot Energy Ltd.*,⁵ refused to consolidate numerous claims in one action because not all defendants or the interests affected were the same. The Court suggested a different approach, summarized in the headnote as follows:

⁵ (1991), 44 C.L.R. 137 (Sask. Q.B.).

The lien claimant should prepare a statement of claim in one of the proceedings to reflect the current parties, trace their respective interests and the nature of the claim. The draft was to be submitted to counsel for the defendants, and then to the Judge for approval. After that, the actions were to proceed in a normal way, making use of the applicable Rules to expedite matters.

The old Alberta case of *Olsen & Johnson Co. v. McLeod*⁶ stands for the proposition that a personal and a lien action should not be consolidated where the actions were commenced by different plaintiffs.

5. Salvage Costs

“Carriage” or “salvage” costs are a well-recognized feature of construction lien litigation. In *Gilvesy Construction v. 810941 Ontario Ltd.*,⁷ the reasons for this were stated as follows:

[The plaintiff] is asking for an award of carriage or “salvage” costs for, in effect, managing the action for the lien claimants and itself. Such costs are a well-recognized feature of construction lien litigation even though not expressly mentioned in the *Act*. A construction lien action is a class action that is *sui generis* and it is easy to discern the

⁶ (1913), 13 D.L.R. 945 (Alta. S.C.).

⁷ (1994), 22 C.L.R. (2d) 203 (Ont. Gen. Div.).

reason why the carriage party should receive a special award of costs for the extra work performed on behalf of the lien claimants at large: see *B.A. Robinson Plumbing & Heating Ltd. v. Dunwoodco Ltd. (Trustee of)*, [1968] 2 O.R. 826 (Master).⁸

In *B.A. Robinson Plumbing & Heating Ltd. v. Dunwoodco Ltd. (Trustee of)*, the Court commented:

With respect to the objection to the amount claimed for salvage costs, it has been suggested that some written direction might be given to the profession for their guidance in the conduct of actions brought pursuant to the Mechanics' Lien Act. First, the term "salvage costs" as used in this context denotes those additional costs over and above the costs fairly referable to the realization of the plaintiff's claim, the results of which benefit all of the lienholders equally.

A mechanics' lien action, while it is a class action, i.e., is brought on behalf of all lien claimants, differs from other class actions in that not only is a fund recovered in which all lien claimants are entitled to share but the individual lien claims are resolved as well so that the distribution of the fund is also determined. While there are questions as to which the lien claimants are in the same interest, e.g., the amount of the hold back and/or the amount properly owing by the owner to the person or persons through whom the individual lien claimants claim, there are also questions as to which the lien claimants are

⁸ See also *Chown, Cairns v. 601039 Ontario Ltd.* [1994] O.J. No. 2982 (Ont. Gen. Div.).

adverse to one another, e.g., the right of any other lien claimant to share in the hold back when the total lien claims exceed the hold back.

It is, one supposes, in recognition of the difficulties inherent in such actions that the Judge or officer who tries the action is given such wide powers as those granted to him by s. 42.

Salvage costs in the amount of \$3,000 were awarded to counsel who had conduct of the action throughout pretrial and two days of trial in *Bre-Aar Excavating Ltd. v. D'Angela Construction (Ontario) Ltd.*⁹ In *Nor-Min Supplies Ltd. v. Canadian National Railway Co.*,¹⁰ the Court held that:

Before apportioning the costs I must consider "salvage costs". These are the services which Nor-Min Supplies Limited, having carriage of the action, performs for the benefit of all claimants without which their claims could not have been expeditiously proven or which would have been duplicated if done by each of the claimants. It is suggested that these procedures are similar to work done by an agent who could tax against his principal on at least a solicitor-and-client basis. I have gone over the party-and-party bill of Nor-Min and have identified such items as the institution of action, the certificate of action, the statement of claim and service thereof on all defendants, five interlocutory orders with related services, discovery of documents, examinations for discovery, obtaining of

⁹ (1975), 8 O.R. (2d) 598 (Ont. S.C).

¹⁰ (1980), 28 O.R. (2d) 663 (Ont. S.C.).

certificates, subpoenas and the preparation for the first trial on the issue of lienability. Following this trial, which rested almost entirely on the efforts of counsel for Nor-Min, there were many preliminary matters and subsequent matters relating to the second trial proving the liens which were for the benefit of all. I have determined that perhaps 60% of the Nor-Min account as taxed on a party-and-party basis falls into this category. If taxed on a solicitor-and-client basis about one-third should be added to those portions of the account in the circumstances of this case. Without being able to do precise mathematics it is my feeling that salvage costs of \$2,500 would be appropriate, particularly where the issue in the first trial was carried to a very great extent by Nor-Min with such outstanding results for all the claimants.

6. Conclusion

As the sheltering provisions of the Act are now a last refuge, there will usually be numerous lien actions commenced.¹¹ The *Construction Lien Act* makes it clear that a lien action is to be conducted as far as possible as a class action. To this end, the Act not only makes provision for the consolidation of certain actions, it also provides detailed rules for consolidation and carriage. When determining who is to be given carriage of the action, factors such as the value of the individual claims, the validity of the claims and the experience of counsel will have to be considered. The practice of awarding salvage costs ensures that

¹¹ K. P. McGuinness, *Construction Lien Remedies in Ontario*, 2nd edition (Toronto: Carswell, 1997) at 737.

counsel carrying the case for the benefit of all claimants will be compensated for his or her efforts.