



Heal & Co. LLP LAWYERS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

Legal Remedies for Consultants: *What (and What Not)* to do to Get Paid!

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Pre-Contract

Do pre contract due diligence

Know your client

Who owns the property

Who is financing the work

Can you get a personal guarantee?

Promises should be put in writing

Clarify who is person giving instructions and their authority

Avoid Misleading Owners and Contractors

Explain the limitations of the investigation

Report accurately on all of the data

Make clear where findings or test results are not intended to be relied upon for other purposes

Your Contract

Your retainer letter or invoice

- A set of promises which are legally enforceable
 - Sets scope of work
 - Sets out assumptions and limitations relating to the work
 - should include limitations of liability
 - Sets expectations of performance
 - Sets rates and can limit price

Common & Important Contract Terms

Use your standard letters or invoices, but this can be interpreted against you where ambiguous

Prevenient arrangement

Dispute Resolution terms

- Mediation
- Arbitration

Schedule

- When is work complete
- Make completion conditional on Final report

What to do When Your Bills Are Getting Stale

Set a policy

- After “x” days a call, after “y” days a letter
- Get post dated cheques
- An acknowledgment of indebtedness
- Check your timing for lien purposes, 45 days from date contract completed
- Why aren’ t they paying?

What to do When There is a dispute about the Bill

Value the relationship

Ask them to set the fee

Give a discount where appropriate

Fire the client

What to do When They threaten to sue you

Report any potential claim in writing to head office and your insurer

Always bring in a colleague or partner for objectivity

What Happens when its Too Late

Each party has a responsibility to mitigate their losses.

Specific performance is exceptional and ordered only when an award of damages would be "inadequate."

Don't give the client the final report

Legal Remedies

Injunction can be used in some breach of contract cases where damages are inadequate.

Damages are an attempt by the court to compensate the innocent party to the contract, the party that suffers the breach. The purpose is compensation not punishment so only real, actual damages can be ordered by the court.

Legal Remedies

Generally, there are two main methods of calculating damages:

- The difference between what was contracted for and what was received. This is known as the diminution of value test.
- Whatever it costs to put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations. This is known as the cost of performance method.

Specific Remedies Available To Consultants

(1) Contract

(2) Lien

- (a) Written Notice of Lien
- (b) Claim for Lien

(3) Breach of Trust

The Construction Lien

is a charge upon all holdbacks required to be retained and all amounts owed in respect of the furnishing of supplies and material to an improvement

consequential right to sell owners property if insufficient holdback retained

The Construction Lien

- No Opting out of provisions of the Construction Lien Act
 - Holdback and Payment requirement
 - Trust Provisions
 - Lien Rights
 - Applies to consultants who have a lien to the extent their work is an improvement of the premises

Creation of the Lien

- (a) A person who supplies services or materials to an improvement for an owner, has a lien upon the interest of the owner in the premises for the price of those services or materials
- (b) It does not include interest
- (c) The lien arises and takes effect when the person first supplies services or materials
- (d) Does not attach to Crown land or Indian Reservation but to holdback

Creation of the Lien (continued)

- (e) Lien limited in value to the least amount owed by Owner (subject to set off)
- (f) If lien attaches i.e. tenants work, landlord's interest not affected unless notice is given

The Holdback

Basic

- Each payer upon a contract or a subcontract under which a lien may arise shall retain a holdback equal to 10% of the price of the services or material as they are actually supplied under contract
- Personal liability of owner
 - no set off
 - (suppliers of material not subject to holdback)

The Holdback (continued)

Finishing

- 10% on all work done after contract has been certified

Notice Holdback

- A Payer who has received written notice of a lien must retain an amount sufficient to satisfy the lien plus the 10% holdback:
 - A payer may set off as against his payee in respect of the notice holdback an amount equal to the balance in the payors favour of all outstanding debts, claims or damages, whether or not related to the improvement

Written Notice of Lien

(a) Any written notice

- must identify payer and premises
- must state the amount that the person has not been paid and is owed

(b) Can include a claim for lien

(c) Must be delivered to payer and to everyone else who is to be put on notice including owner

(d) If notice of lien is not preserved and perfected it will expire. Therefore written notice must be given within the 45 day preservation period

Preserving The Claim for Lien

- (a) on a project where there is substantial performance the earlier of 45 days after
 - (i) publication of certificate completion; and
 - (ii) where the contract is completed and/or abandoned
- (b) no certification – 45 days after contract is completed or abandoned
- Contract is deemed to be completed for contractor only when the price of completion is not more than the lesser of;
 - (a) 1% of the contract price
 - (b) \$1,000.00 (CSEC 2(2))

Preserving The Claim for Lien

not possible if there is publication of substantial completion

warranty and repair work does not extend 45 day period

if there is a series of separate PO's and invoices relating to the same project all the PO's will be looked at as one contract

Delivery of the final report extends the 45 day period, if the report is part of the contract and it enhances the value of the premises

How to Preserve a Claim for Lien

- (a) Register claim for Lien on title to land where supplies and/or services were delivered
- (b) if government land, deliver claim for lien to appropriate agency
- (c) claim for lien will be invalid if:
 - (i) Affidavit of Verification is not completed or commissioned
 - (ii) wrong legal description
 - (iii) fail to register against correct land
- (d) liability for exaggerated lien

Perfecting Lien

- If lien attaches to the premises and has not been vacated an action to enforce lien must be commenced and a certificate of action must be registered, both, within 45 days from the last day that the lien could be preserved

Effect of Preservation & Perfection

All Payers who have notice of claim for lien, either through delivery or search must retain an amount sufficient to pay lien...usually it means no mortgage advances or other payments

The lien claimant has right to share of holdback in each stream

The lien claimant can cause the owner's land to be sold if insufficient holdback

Discharging of Preserved or Perfected Liens

(1) By Release and Consent executed by Lien Claimant usually when there is a settlement

(2) By Court Order upon posting security by way of lien bond or cash equivalent to the full amount of the claim plus 25% for costs to a max of \$50,000

Discharging of Preserved or Perfected Liens

(3) By Court Order if upon motion it is proved that:

- (a) the lien is out of time (either preservation or perfection)
- (b) the lien amount is incorrect...court, can reduce the lien amount or discharge it

(4) By Court Order if lien claimant fails to set down the lien action for trial within 2 years of the date of issuance of Statement of Claim

The Trust

Owners Trust

- Financing Funds are held in trust for contract on behalf of contractor

Contractor & Subcontractors Trust

- All amounts owing to or received by a contractor or subcontractor on account of a contract or subcontract price are held in trust for the benefit of subcontractor and others who have supplied material or services to improve

The Trust (continued)

Vendor's Trust

- All amounts received by an owner who sells premises which has unpaid work, performed on it are held for the contractor (less reasonable expenses arising from sale and discharging mortgages)

Obligations of Trustee

Trustee shall not appropriate the trust until all beneficiaries under the trust have been paid

- (a) No overhead expenses may be paid until all trust beneficiaries are paid
- (b) Separate trust fund for every project in which the contractor is involved and separate accounting

Obligations of Trustee (continued)

- (c) Banker of Trustee may be liable to repay trust monies it removed to repay loans after it became aware of unpaid creditors
- (d) Trust Funds may be reduced by discharging loan used to pay for supply of services to that project
- (e) Trust Funds may be reduced by set-off against payee related to improvement equal to the balance in the trustee's favour of all outstanding debts, claims, or damages, whether or not related to the improvement

Who is Liable for Breach of Trust

directors, officers of corporations, and anyone who has effective control of the corporation who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust

almost strict liability for officers and directors especially one man corporation. Cannot rely on due diligence defence (i.e. honest belief found in *Trustee Act*)

unpaid suppliers may use

Lien Procedure

Can request information from owner as to state of mortgage financing

All claims including trust claims are joined in same action in the same court venue as liened property located

Pleadings exchanged

Reference directed to Master in Toronto and Windsor who has same power as judge

Lien Procedure (continued)

Carriage given to one, lawyer is more than one lien, and actions are consolidated

- settlement meeting and pre-trial
- trial
- personal judgment
- sale at property for holdback

- Extraordinary Procedures
 - appointment of Trustee by lien claimant to complete and sell project

Distribution of Proceeds

You want a valid lien

Lien claimants have priority over all judgments, executives, assignments, attachments and garnishments and receiving orders in respect of holdback and trust funds (Sec 77)

lien claimants have priority over subsequent mortgages and subsequent advances in financing mortgages

no priority between lien claimants in same class except for worker liens which have priority

Questions?

- thank you!