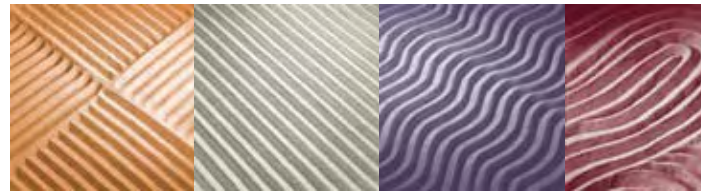




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BUILDERS LIEN UPDATE: CHANGE IN SECURITY FOR COSTS PRACTICE!

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Property developers, owners and contractors should take note of a recent decision of the British Columbia Supreme Court which has substantially altered the usual practice regarding posting security for costs as part of an application to cancel a lien.

In *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 253, Mr. Justice Burnyeat held that the *Builders Lien Act*, R.S.B.C. 1996, c. 41 (the "Act") does not provide the Court with any authority to order the payment of the anticipated costs to prove the claim of lien along with security for the lien.

Prior Practice Regarding Security for Costs

Prior to the decision in *Tylon*, the common practice was to fix the amount of security for costs in the range of 10% to 15% of the amount of the lien. This practice may have been an attempt by the Court to restore some balance or equality between a large property owner who refuses to pay and a small contractor, with limited resources, who is required to resort to litigation to enforce their contractual rights.

Facts & Decision

In *Tylon*, the defendants obtained an order cancelling the lien upon payment into Court of a sum of money as security. The amount paid into Court included security for costs. The order was without prejudice to the defendants' right to claim that the lien was improper. The defendants later applied to cancel the lien on the basis that it was vexatious, frivolous and an abuse of process.

The lien filed against the defendants' property was far in excess of the amount owing and included improper claims such as loss of future profits. Mr. Justice Burnyeat accepted that it was excessive and reduced the amount of security held in Court. In deciding whether to reduce the security, Mr. Justice Burnyeat also had to decide whether the amount held in Court should include an amount for costs.

Mr. Justice Burnyeat canvassed the law and reviewed the provisions of the Act. He noted that builders lien legislation in other provinces specifically establishes that security for costs must be included in the amount paid when an order is made discharging a lien. The British Columbia Act contains no such provision. Mr. Justice Burnyeat decided that the Court has no jurisdiction to entertain the well-established practice of including a sum as security for costs.

The defendants sought leave to appeal Mr. Justice Burnyeat's decision, but leave was denied. The result is that the *Tylon* decision stands until the issue is considered by the British Columbia Court of Appeal.

How *Tylon* Will Affect the Construction Industry

British Columbia Courts will most likely adopt the approach set out in *Tylon* and, in the future, owners will not be required to post security for costs when applying to cancel a lien by paying security into Court.

The decision in *Tylon* may have immediate ramifications for those involved in the construction industry as it may permit owners who have posted security for costs to apply to Court to have those sums paid out. Owners who currently have large sums of money held in court as security for costs may wish to take advantage of the *Tylon* case and apply for payment out of those sums.

Aside from the former security for costs practice under the Act, security for costs can also be ordered pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 or the inherent jurisdiction of the Court. In *Tylon*, Mr. Justice Burnyeat kept the door open for plaintiff contractors to apply for security for costs against a defendant owner; however, he cautioned that it would be “extremely rare” for the situation to justify such an “extraordinary remedy”. Contractors faced with an application by an owner to remove their lien and post security may wish to bring a cross-application for this type of security for costs order. However, contractors should carefully discuss with their lawyer whether it is worthwhile to make this type of application, given the very high threshold established by Mr. Justice Burnyeat in *Tylon*.

Questions?

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