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# How the Summary Judgment Regime can be Applied in Construction Lien Cases

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This paper is a collection of case comments and other reference materials as well as a checklist for expeditious determination of matters in context of the *Construction Lien Act* (the "*Act*").[2]

The *Act* provides that the procedure in a lien action shall be "as far as possible of a summary character, having regard to the amount and nature of the liens in question" (section 67(1)). Interlocutory steps not provided for in the *Act*, including motions for summary judgment, require leave under section 67(2) upon proof that the steps are necessary or would expedite the resolution of the matters in dispute.

Many lawyers are familiar with the provisions of *Rule 20 Summary Judgment* and the impact on that rule of the Court of Appeal decision in late 2011 in the *Combined Air* cases.[3] What may not be as familiar is the statutorily granted jurisdiction to the lien court to summarily try lien actions.

This jurisdiction allows a lien court to:

- Make a determination, where appropriate, of the issues not in dispute, either on its own or because the parties have made a statement of settlement.

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[2] Construction Lien Act, R.S.O. 1990, c.C.30, as amended. An excellent source of reference materials is: Glaholt and Keeshan, *The 2012 Annotated Construction Lien Act*, (Carswell: Toronto, 2011), ISBN 987-0-7798-3557-7, and a 2013 version is due shortly.

[3] I authored an earlier case comment on *Combined Air Mechanical v. William Flesh et al* 2011 ONCA 764 was published in the OBA Construction Section newsletter in January 2012 upon which this short paper is based.

- Appoint, where appropriate, a Vetting Committee to report back on the timeliness and quantum of any liens.
- To dispense altogether with pre-trial productions and discovery except those provided in the *Act*.
- To order specific productions and summaries of information such as in a *Scott Schedule*.
- To order that the trial hearing take place with the aspects more usual of a summary trial as set out in Rule 76.12.

The foregoing illustrates that there are multiple tools in the judicial "tool kit" of the lien court to ensure a just and expeditious resolution of the matters in dispute.

Since summary judgment *per se* is not provided for under the *Act* leave is necessary to bring a motion for summary judgment. However the following general principles emerge:

A triable issue is not simply an "arguable" issue, but one which requires a trial for its resolution: *Urbacon et al v. City of Guelph* 2012 ONSC 81

- There is no reason in principle why a summary judgment motion may not proceed in a lien action : Towanda Timber Ltd. v. Ontario, 2006 CanLII 6919 (ON SC)
- Where triable issues exist, summary judgment is not desirable, such as where there is disputed set off under s. 17(3) Total Electrical v. Collège Boréal, 2011 ONSC 4586 (CanLII)
- Where set off is claimed but no evidence is led to support the set off, summary judgment is appropriate: 4 Star Drywall (99) Ltd. v. Nanak Homes Inc., 2009 CanLII 17972 (ON SC)
- A motion attacking a lien under s.47 is akin to a summary judgment motion and a triable issue as to quantum and timeliness raises a triable issue: Gordon Ridgely Architects and Associates Inc. v. Glowinsky, 2009 CanLII 6834 (ON SC)
- The question as to whether services and materials supplied are "lienable", such as construction management services, may well give rise to a triable issue: DCL Management etc

Such motions have been allowed or refused in the following circumstances, among others:

- To allow a plaintiff in a multiparty lien action to move for summary judgment to determine the minimum holdback obligation of an owner, where that issue materially advances the lien proceedings: *Urbacon et al v. City of Guelph* 2009 CanLii 72065
- To allow, as a follow up motion, a subcontractor to move for partial summary judgment for its pro rata share of the holdback paid into court by the owner: *Urbacon et al v. City of Guelph* 2012 ONSC 81

The Rule 20 changes at issue included:

- a wording change to Rule 20 - "genuine issue for trial" has been replaced by the phrase "genuine issue requiring a trial"
- a new ability under Rule 20.04(2.1) to weigh evidence, evaluate credibility and make factual inferences
- an ability to hear *viva voce* evidence on a summary judgment motion.

In deciding whether these powers should be used on a motion to weed out a claim as having no chance of success or to resolve part of an action the question is: can a *full appreciation* of the evidence and issues required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

In other words are the procedural and other safeguards associated with a trial necessary to do justice to the case. Do the interests of justice require a trial?

This "full appreciation" test as a new benchmark means that cases that call for multiple factual findings on conflicting evidence in a voluminous record will likely not be suitable for summary judgment. A trial will be required because a full appreciation of the evidence cannot be achieved without a trial. Full appreciation is not simply being knowledgeable about the factual record. The question becomes whether a full appreciation requires an opportunity to hear and observe witnesses first hand, to have the evidence presented by way of a trial narrative, and to

experience the fact finding process in real time. A trial (and its substitute the summary judgment motion in the appropriate case) still remains a search for the truth - through the crucible of contest, and through party prosecution and presentation. Yet the Court of Appeal seems to be signalling the interests of justice will often require a real time trial narrative to have a full appreciation of a case.

A party who moves for summary judgment must be in a position to present a case capable of being decided on the paper record before the court. In *Combined Air*, the Court of Appeal has said that a motion judge's discretionary resort to the summary trial or *viva voce* evidence provisions should only be made where there is some lingering doubt whether summary judgment can safely be granted. This is a judge directed inquiry, not a party directed inquiry.

On a last note, the standard of appellate review of a summary judgment motion will be deferential, presuming the motion judge applied the correct legal test as set out in *Combined Air* on the summary judgment motion. Any factual determinations made by the motion judge attract the "palpable and overriding error" standard of review.

In the context of Ontario construction lien proceedings under the *Act*, it has been settled law that a lien master or judge hearing a lien proceeding can grant leave to any party to the proceeding to bring a summary judgment motion: *Michaels Engineering v. 961111 Ontario Ltd*. [1996] OJ No. 2030. In *Michaels*, while the summary judgment was set aside on appellate review based on a failure by the moving party to give proper notice, the Divisional Court approved in principle the application of Rule 20 in "an appropriate case".

In contrast, the courts of Prince Edward Island, interpreting an older variant of the *Act*, the *Mechanics Lien Act*, (still apparently in force in that province) have held as a matter of

principle that a summary judgment motion is not available, the statutory language being different. Under the *Mechanics Lien Act*, there appears to be no pre-trial procedures. Following the delivery of the defence, any party to that action can fix a date for trial. Thereafter the notice of trial has to be served on every lienholder (and others with a registered interest) some days before the date fixed for trial. I note in passing one would think setting such a trial date would be faster not slower -- rendering the Rule 20 process moot. However, the point of it is that the PEI court focused on the class action aspect of the lien remedy, and the statutory language as a bar to summary judgment.

Recently in *Urbacon Building Group v. City of Guelph* 2012 ONSC 81, Justice Corbett of the Superior Court of Justice briefly referred to *Combined Ai* in granting summary judgment in favour of certain lien subtrades. It appeared unnecessary in *Urbacon* for Justice Corbett to have resort to the enhanced powers of Rule 20 to decide the summary motion. There was no conflict in the evidence. This recent January 3, 2012 ruling in *Urbacon* followed a prior contested motion ruling of December 23, 2009 that granted, in effect a motion for partial summary judgment to determine the owner's minimum basic holdback obligation. In that 2009 ruling, there was no arguable basis for a reduction in the owner's basic holdback obligation and some $3.2 million was ordered to be paid into court. What remained in dispute was, of the holdback amount, the rateable entitlement of the various subcontractor lien claimants. Between 2009 and 2012, through various consent dispositions, much of the holdback was paid out, except to subcontractor lien claimants who moved for summary judgment.

Prior to *Combined Air*, several Ontario court decisions have long affirmed the jurisdiction of lien courts to have resort to the summary process of Rule 20 in the appropriate case to dispose of a matter short of a full trial. See for examples – *6007325 Canada Inc v. LPQ 18 Yorkville*

2010 ONSC 2844 and in other cases not -- e.g. *DCL Management v. Zenith Fitness* 2010 ONSC 5915.

It is to be remembered that in Ontario lien proceedings, unlike regular court actions, there is no automatic right of pre-trial discovery either documentary or oral, and typically by convention lien parties have often used the statutory mechanism of the settlement meeting (ss.60 and 61) for the purpose of "narrowing or resolving any issues to be tried" with the result being embodied in a "statement of settlement". The settlement meeting threshold would appear to only allow an adjudication or consent disposition on an issue "where no dispute was raised" (s.61(5)(a)), a much lower threshold than the summary judgment threshold which only leaves "genuine issues requiring a trial" where the interests of justice require a trial

Regional practices vary as to practice at the settlement meeting. In Toronto, the construction lien master "pre-trial" effects the purpose of the settlement meeting but also provides binding directions on matters of process. Author Duncan Glaholt in his *Annual Annotated Construction Lien Act* writes in his commentary: "It should be noted that in Toronto, the long standing practice continues to override the express wording of the *Act* to the effect that pre-trials are still held in lieu of settlement meetings". But the pre-trials are not settlement meetings which leave little room for narrowing any issues absent consent of all parties. It should also be noted that the form of language of the judgement of reference typically obtained in Toronto from the Superior Court that refers the matter to the lien master for trial provides, among other things, "that the matter be referred to the master for trial" and that the master "determine all questions arising in this action and on the reference".

Further the first order of the local lien master typically obtained in Toronto provides "that the trial of this action take place by way of first pre-trial" cloaking the continuing proceedings

with the authority granted by the judgment of reference – not just that of a statutory settlement meeting. This jurisdictional foundation also ensures that the process actually fashioned narrows the issues for trial. This practice also allows for the fine tuning of pre-trial procedural matters on a case by case basis. For example, discovery can be ordered and tailored to the case. The amount of oral or documentary discovery may be justified in a large multi-party and multi-issue multi million dollar project, while the same procedures may not be warranted in a straightforward home renovation lien matter.

All of this is in service of the summary nature of lien proceedings, expressly recognized in the statutory provisions and in the express language of s.67(1) as an important objective of the *Act*. The procedure in a lien action shall be as far as possible of a summary character. *In the appropriate case*, the process of summary judgment may help to achieve the underlying *Act* objective to resolve construction lien cases expeditiously and in the least costly manner, particularly having regard to the fact that there is no lien for interest where time passes. A lien claimant should be entitled to an expeditious resolution.

All of this contributes to, and does not detract from, a more liberal approach to summary disposition of lien proceedings. What *Combined Air* does in the *Act* context in my view, is underline that a full appreciation of the evidence is required to dispose of matters summarily. Further that part of the Combined Air matter involving Parker v. Cenalese limits summary judgment in Rule 76 cases. But Rule 76 cases have an expressly different process under the *Rules* and expressly allows for summary judgment in limited circumstances with a proscribed process, excluding the "mini trial" and cross-examination. Under the *Act*, the Lien Masters' jurisdiction is statutory not monetary. They have to deal with cases that look sometimes like Rule 76 Simplified Procedure Cases in monetary terms and in other cases they have complicated

multi-party, multi-issue construction lien cases referred to them which may be as complex as the matters heard on the Commerical List. Lien Masters need more rather than fewer tools at their disposal to craft procedurally appropriate process to assist them to come to a full appreciation of the evidence. Sometimes that may require that a trial narrative, other times there should be room to grant summary judgment and to apply the expansive powers under Rule 20, including powers otherwise expressly reserved to a judge – (1) because a judge has already directed them to dispose of all matters under the judgment of reference, (2) their construction expertise should be recognized and (3) the *Act* expressly empowers the court to court ensure procedure shall be as far as possible of a summary character having regard to the matters referenced in section 67."

First, consent to bring such a summary judgment motion under s.67(2) of the *Act* must be granted. Typically such consent will be granted, only where the summary judgment motion would *expedite the resolution* of the matters in dispute.

Second, summary judgment under the expanded Rule 20 in the construction lien context allows for the weighing of evidence, evaluation of credibility and the making of reasonable inferences. In some cases, summary judgment may follow -- e.g. *6007325 Canada Inc v. LPQ 18 Yorkville* 2010 ONSC 2844 and in other cases not -- e.g. *DCL Management v. Zenith Fitness* 2010 ONSC 5915.

Now with *Combined Air*, a question arises as to whether lien courts should have regard to whether they have a "full appreciation" of the evidence. The presumption of the trial, is that the judge or lien master's "role as a participant in the unfolding of the evidence at trial provides a greater assurance of fairness in the process for resolving the dispute". Are the "attributes of the trial process necessary to fully appreciate the evidence and issues posed by the case"?

These quotes from *Combined Air* should apply, in my view to lien proceedings. There are portions of decision in *Combined Air*, however, that may not apply given the unique and summary character of lien proceedings. In lien actions, it is not presumptively the case (and frequently not the case that): "the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery". Should *Combined Air* be interpreted as not applying at all to lien proceedings? It seems hard to justify this conclusion.

Having said that, the specific expertise of the lien master must be given some deference as to the appropriate amount of not only fact finding, but also fair process in any particular case, notwithstanding Rule 20.04(2.1) which empowers a judge (not a master) to exercise the enhanced powers. First, construction cases are document intensive. Such cases typically involve contract issues, and a contemporaneous and extensive paper record of the party's dealings with each other. A detailed paper record. A lien master is uniquely situated in order to come to a "full appreciation" that a claim or defence has no chance of success given their recognized expertise in lien matters, since many of the documents are standard form which are used, with some modification, over and over. A Lien Master is probably in a better position to see through sham claims and sham defences to avoid unnecessary trials than a judge, and indeed the Lien Master's specialized expertise is the very reason for the reference.

The whole purpose of the amended Rule 20 was to allow for expansion of the available tools to assess evidence when determining whether a genuine issue for trial existed. Underlying the Rule 20 amendments, and as the Court of Appeal itself noted was "the view that the jurisprudence of this court" had placed limits on a motion judge's power to "assess the quality and cogency" of the evidence before him or her.

As the *Combined Air* case is interpreted and applied in the *Act* context, it would be more consistent with the underlying objectives of the *Act* and the form of judgment of reference, that a Lien Master be in at least the same, if not less constrained, position than a motions judge to hear and determine a matter summarily under the *Act* in the appropriate case.

*See: Exteriors By Design v. Traversy* 2012 ONSC 3164 (CanLII) attached

CHECKLIST

☐ What are the real issues in dispute?

☐ Is the quantum and timeliness of the lien disputed?

☐ Are there subcontractors involved? Is a determination of the holdback going to narrow the issues and/ or remaining parties?

☐ Will a s. 44 cross-examination advance

☐ Is a reference to the Master (or person agreed to by the parties) available?

☐ What are the key pieces of evidence in dispute if any?

☐ Is a summary trial appropriate?

☐ Is summary judgment an option?

☐ Can a trial happen faster than a motion?