

HOLDBACK LIENS AGAINST HOLDBACKS UP THE CONSTRUCTION CHAIN - *HI-TIDE SHORING & FOUNDATIONS (2012) LTD. V CHANDOS CONSTRUCTION LTD.*

In the recent case of *Hi-Tide Shoring & Foundation (2012) Ltd. v Chandos Construction Ltd.*¹, the British Columbia Supreme Court considered whether a sub-subcontractor on a construction project may claim a holdback lien against the holdbacks held up the construction chain or was limited to claiming against the holdback that relates to the sub-subcontractor's own contract. The Court said that subcontractors may claim against holdbacks retained at each level of the construction chain up to the holdback retained by the owner. However, when it comes time to determine how much the subcontractor is paid for that claim of lien, section 34 of the *Builders Lien Act*² may limit the amount the lien claimant may recover through such a claim.

FACTS

Chandos Construction Ltd. ("**Chandos**") acted as the general contractor for the development and construction of an elementary school in Coquitlam, British Columbia (the "**Head Contract**"). Chandos contracted with Eagle Valley Excavating Inc. ("**Eagle Valley**"), for site preparation work, including excavating, earthworks and shoring (the "**EV Contract**"). In turn, Eagle Valley contracted with Hi-

Tide Shoring and Foundations (2012) Ltd. ("**Hi-Tide**") to perform a portion of the site preparation work, including shoring, shotcrete and anchoring (the "**Hi-Tide Contact**").

At some time during the project, Chandos terminated the EV Contract, alleging various defaults on the part of Eagle Valley. Chandos commenced an action against Eagle Valley, claiming amounts totaling around \$3 million. Eagle Valley counterclaimed and filed a builders lien claim for the amount of \$1,494,432.67. At the time of termination of the EV Contract, the amount of \$101,065.29 had been held back by Chandos in accordance with the *Builders Lien Act*³.

Hi-Tide had not been paid in full by Eagle Valley and it filed a builders lien against the land of the project in the amount of \$437,988.39. Upon the deposit of a lien bond in the amount of \$1,494,432.67 by Chandos, the Eagle Valley and the Hi-Tide liens against the land were cancelled by order of the Court.

Hi-Tide made an application to the Court, seeking, among others, a judgment on the lien in the amount of \$437,988.39. At the time of the hearing of the

application, there were eight liens filed against the land of the project, and five of the lien claimants had commenced actions to enforce their liens. Also, there had not yet been issued certificates of substantial performance in respect of the Head Contract or the Hi-Tide Contract.

THE PARTIES' POSITIONS

Hi-Tide's position was that its builders lien attached not only to the holdback retained in relation to the EV Contract but also the holdback associated with the Head Contract⁴. Hi-Tide relied on section 4(9) of the *Builders Lien Act*, that provides that any holdback retained under the Act is subject to a lien. In particular, section 4(9) provides that "each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained"⁵.

Chandos disagreed with Hi-Tide's position and said that Hi-Tide could only claim against the holdback in relation to the EV Contract. Chandos relied on section 34 of the *Builders Lien Act*, which provides the following:

- 34 (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of
- a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and
 - b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.

Chandos argued that this section contradicts Hi-Tide's

position that it has a claim against the holdback associated with the Head Contract because, according to Chandos' interpretation, section 34 limits Hi-Tide's claim to the greater of the EV Contract holdback or the amount owed by Chandos to Eagle Valley⁶.

Further, Chandos argued that no certificate of completion had been issued for the Head Contract, and thus, the 55-day holdback period had not yet begun and until it expired, Chandos could not make any payments from the holdback.

THE COURT'S ANALYSIS AND DECISION

The Court determined that it was premature to make a decision in respect to Hi-Tide's application for a judgement on the lien since the project was not complete and no certificate of completion had been issued. The Court considered that Hi-Tide's lien must be dealt with together with the claims of liens made by the other lien claimants. Although no longer necessary in light of its conclusion that Hi-Tide's application was premature, the Court decided to address the question as to whether Hi-Tide was entitled to claim against the holdback associated with the Head Contract.

The Court agreed with Hi-Tide's position. The Court determined that section 4(9) of the *Builders Lien Act* provides a lien claimant with the right to claim against any holdback retained up the construction chain. Thus, in respect of Hi-Tide, according to this determination, Hi-Tide may claim a lien against the holdback retained by the owner in respect of the Head Contract. The Court found that section 34 of the *Builders Lien Act* relates to the amount that can be recovered, if there are competing claims, and that this section "does not limit the maximum recovery by lien claimants generally, but instead "sets out the maximum amount for recovery by lien claimants claiming recovery *from the same contractor* (emphasis added)"⁷. Section 34 does not limit

the right of lien claimants under section 4(9) to claim against multiple holdbacks but may limit the amount the lien claimants may recover through such claims.

TAKEAWAYS

The Court's conclusion in this case is favorable to subcontractors as it provides them with recourse to multiple holdbacks, which may provide a greater chance of recovery of the amounts owned to them. Owners and contractors higher up the construction chain should be mindful of the risk of holdback lien claims made by participants at lower levels of the chain and should ensure that there is no lien attached to the holdback before they release or make payments from the holdback.

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Footnotes:

1. *Hi-Tide Shoring & Foundation (2012) Ltd. v Chandos Construction Ltd.*, 2024 BCSC 903
2. *Builders Lien Act*, SBC 1997, c 45
3. *Ibid*
4. *Supra* note 1 at para. 28
5. S. 4(9) of the *Builders Lien Act*
6. *Supra* note 1 at para. 27
7. *Supra* note 1 at para. 41 the Court citing para. 24 of *Greater Vancouver Sewerage and Drainage District v A-Millenia Construction Ltd.*, 2006 BCSC 1629



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