

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gulf Excavating Ltd. v. Otter Bay  
Developments Ltd.*,  
2012 BCSC 644

Date: 20120504  
Docket: 07-1233  
Registry: Victoria

Between:

**Gulf Excavating Ltd. and 555870 B.C. Inc.**

Plaintiffs

And

**Otter Bay Developments Ltd. and others**

Defendants

- AND -

Docket: 07-1260  
Registry: Victoria

Between:

**Edwards Electric Ltd.**

Plaintiff

And

**Otter Bay Developments Ltd. and others**

Defendants

Before: The Honourable Mr. Justice Crawford

## **Reasons for Judgment**

Counsel for the Plaintiffs:

N.W. Lott

Counsel for the Defendants:

T.G. Keast, Q.C.

Place and Date of Hearing:

Victoria, B.C.  
February 23, 2012

Place and Date of Judgment:

Victoria, B.C.  
May 4, 2012

[1] Joint applications are made by the defendants, who are the registered owners of quarter-share interests in a strata lot development, generally known as "Otter Bay" and located on Pender Island. The applications are made under ss. 88 and 89 of the *Strata Property Act*, S.B.C. 1998, c. 43 [SPA] and alternatively under s. 24 of the *Builders Lien Act*, S.B.C. 1997, c. 45 [BLA] to discharge Claims of Builders Liens and Certificates of Pending Litigation relating to those Claims of Builders Liens filed against their titles in September and October 2006.

[2] The timeline of events is as follows:

Date	Charge on Title	Amount of Lien
August 31- September 21, 2006	Title conveyed to purchasers.	
September 28, 2006	Edwards Electric Ltd. ("Edwards Electric") files lien.	\$44,707
October 10, 2006	Gulf Excavating Ltd. ("Gulf Excavating") files lien.	\$397,381.36
	555870 B.C. Inc. files lien.	\$22,361
October 30, 2006	Edwards Electric files lien.	\$44,707.21
March 21, 2007	Gulf Excavating files certificate of pending litigation ("CPL").	
April 2, 2007	Edwards Electric files CPL.	

[3] In August and September 2006, when the conveyances of strata lots were completed, the purchasers retained 7% of their purchase price as required by s. 88 of the *Strata Property Act* and s. 5.2 of the *Strata Property Regulation*, B.C. Reg. 43/2000. The total amount of the 7% holdbacks retained by the purchasers was \$143,990.14, which funds were then paid into the trust account of the solicitors for Otter Bay (the developers).

[4] I digress to set out the statutory scheme regarding liens on strata lot titles.

[5] Section 88(1) of the *Strata Property Act* prescribes the limitation period for the filing of Claims of Lien against strata lots which have been conveyed to individual purchasers and reads as follows:

Builders lien after purchase from owner developer

88(1) Despite any other Act or agreement to the contrary, if an owner developer conveys a strata lot to a purchaser, a claim of lien under the *Builders Lien Act* filed against the strata lot, or against the strata lot's share in the common property, must be filed before the earlier of

- (a) the date on which the time for filing a claim or lien under the *Builders Lien Act* expires, and
- (b) the date which is 45 days after the date the strata lot is conveyed to the purchaser.

[6] Subsection 88(2) prescribes the holdback period and specifically states:

(2) Despite any other Act or agreement to the contrary, a purchaser of a strata lot from an owner developer must retain a holdback of an amount set out in the regulations until the earlier of

- (a) the date on which the time for filing a claim of lien under the *Builders Lien Act* expires, and
- (b) the date which is 55 days after the date the strata lot is conveyed to the purchaser.

[7] Subsection 88(4) provides for payment of the 7% holdback to the owner developer at the end of the holdback period unless a lien or liens are filed or an action is commenced against the holdback. Subsection 88(4) reads:

(4) The purchaser must release the holdback to the owner developer at the end of the holdback period provided for in subsection (2) unless in the meantime a claim of lien has been filed, or proceedings have been commenced, to enforce a lien against the holdback.

[8] Thus, if no liens are filed and no action is commenced against the holdback, the balance of the purchase price of the strata lot must be paid to the owner developer as the limitation period for filing Claims of Lien has lapsed. If liens are filed and an action commenced against the holdback during the holdback period, the purchaser must continue to retain the 7% holdback.

[9] If a lien or liens are filed against a strata lot within the times prescribed in s. 88(1) of the *SPA* and the *BLA*, s. 89 of the *SPA* sets out a procedure for the purchaser to apply to the Supreme Court to pay the 7% holdback into court and obtain discharge of the lien or liens. This section limits the purchaser's liability for liens to the 7% holdback or less, if the amount of liens is less than 7% of the purchase price of the strata lot.

[10] Section 89 of the *SPA* states:

Removal of claim of lien after purchase from owner developer

89 (1) If one or more claims of lien under the *Builders Lien Act* are filed against a strata lot purchased from an owner developer, the purchaser may apply to the Supreme Court for an order for permission to pay into the court the lesser of

(a) the total amount of the claims of lien filed, and

(b) the full amount of the holdback under section 88 (2).

(2) Payment into the court discharges the lien and releases the purchaser from liability to the owner developer or the lien claimant for the liens.

(3) The order under subsection (1) must provide that the claims of lien be removed from the title to the strata lot.

(4) The money paid into the court is security for the liens in place of the strata lot.

(5) If the full amount of the holdback has not been paid into the court, the purchaser must release the balance of the holdback to the owner developer.

[11] The procedure to discharge liens filed after the conveyance from an owner developer would appear fairly straightforward, i.e. if a lien or liens are filed after the conveyance, the purchaser simply applies to court to pay into court the holdback retained at the time of purchase and obtains an order discharging the liens, releasing the purchaser from liability to the owner developer and the lien claimants.

[12] However, there is a major problem with the definition of "purchaser" in the *SPA*:

"purchaser" means a person, other than an owner developer, who enters into an agreement to purchase a strata lot or to acquire a strata lot lease in a leasehold strata plan as defined in section 199, but to whom the strata lot or strata lot lease has not yet been conveyed or assigned; [Emphasis added.]

[13] The problem becomes obvious. Sections 88 and 89 allow for a “purchaser” to retain a holdback and apply to court for an order discharging liens on payment into court of the 7% holdback. However, the definition of “purchaser” does not permit a “purchaser” who has completed the conveyance and is now an “owner” whose title is encumbered with Claims of Lien, to apply for an order under s. 89.

[14] The legislature clearly erred in drafting the definition of a “purchaser” in the *Strata Property Act* which should have included a person who had received a conveyance of a strata lot from an owner developer.

[15] Accordingly, the applicants in this case, now being registered owners of their interests in the strata lots in question, do not satisfy the definition of “purchaser” under the *Strata Property Act* and are not able to apply under s. 89 for cancellation of the Claims of Lien and resulting Certificates of Pending Litigation.

[16] My comment in this regard is reinforced by the comments of two authors who have written on this subject.

[17] In Derek A. Brindle, Robert W. Jenkins & J. Marc MacEwing, eds, *British Columbia Builders Lien Practice Manual*, loose-leaf (consulted on 2 May 2012), (Vancouver: CLEBC, 2011), ch 6 at 6-35, Mr. MacEwing writes with respect to the reasoning of Pearlman J. in *W Redevelopment Group, Inc. v. Allan Window Technologies Inc.*, 2010 BCSC 1601:

In the course of its analysis of the operation of ss. 89 and 90 of the *Strata Property Act*, the court identified a previously unrecognized difficulty with the scope of s. 89.

The court pointed out that it is a “purchaser” rather than an “owner” who is entitled to take advantage of the summary procedure provided by s. 89. Section 1(1) of the Act defines a “purchaser” as:

... a person, other than an owner developer, who enters into an agreement to purchase a strata lot... but to whom the strata lot... has not yet been conveyed...

This means that a person who purchases a strata unit cannot use s. 89 and the condominium purchase price holdback to discharge builders liens from the strata lot after the lot has been conveyed to the person. The right to make the application will therefore in most instances expire before the applicable builders lien filing time limit, which is the time at which one would otherwise expect to determine whether there are any liens needing to be discharged.

The problem is not remedied by either s. 90 of the *Strata Property Act*, which makes no reference to the purchase price for the holdback, or s. 23 of the *Builders Lien Act*, which relates to parties involved in and holdbacks arising from the construction process.

The Continuing Legal Education Society of B.C. *Strata Property Practice Manual* deals with the practical ramifications of this issue in its chapter 4.11B, advising that:

Until s. 89 of the Act is amended to correct this problem, the purchaser's lawyer must ensure that the undertakings placed on the vendor's lawyer include an undertaking to the effect that, if any builders liens are filed against the purchaser's strata lot before the expiration of the holdback period, the vendor's lawyer will take such action as is necessary to effect cancellation of all such builders liens in accordance with s. 24 of the *Builders Lien Act*.

[18] David A. Coulson, *Guide to Builders Liens in British Columbia*, loose-leaf (consulted on 2 May 2012), (Scarborough, Ont.: Carswell, 1992), ch 5 at 96.23 writes:

The application of the definition to strata lots which have "not yet been conveyed or assigned" seems to counter the intention of s. 89. This apparent legislative oversight, it is submitted, ought not to be seen as an attempt to remove the remedy.

[19] I agree with counsel and the commentators: the plain intent of the legislature was to allow the first purchaser from the owner to be able to remove liens by the statutory method in s. 89 of the *SPA*.

[20] I now return to the facts.

[21] On October 4, 2006, Otter Bay Developments filed a notice of intention to make a proposal with the Superintendent of Bankruptcy. On November 2, 2006, Otter Bay Developments was placed in the hands of a Receiver appointed by the Court.

[22] On December 18, 2006, on the application of the Receiver for Otter Bay, the Master granted an order that the holdback funds be paid by the developer's solicitors to the solicitors for the Receiver "to be paid out in the normal course in accordance with the *Strata Property Act* and the *Builders Lien Act*". Although it is not clear just what "the normal course in accordance with the *Strata Property Act* and the

*Builders Lien Act*" may mean, one would have to assume since the funds, under ss. 89(4) of the *Strata Property Act* are security for the liens, the funds paid to the Receiver were to be held as security for the Claims of Lien.

[23] This has not happened. The Receiver has now been discharged and evidently the funds paid under the protection of the order of December 18, 2006 have been disbursed to the lender appointing the Receiver. It would appear an appropriate remedy available to the lien claimants may be against the Receiver for failing to pay out the funds "in accordance with the *Strata Property Act* and the *Builders Lien Act*".

[24] In terms of the application brought before me by the purchasers, to get around the plain wording of the statute, counsel suggested that the Master's order of December 18, 2006 transferring the funds to Otter Bay Developments should be treated as the equivalent of the s. 89 procedure. This I decline to do; I doubt I have jurisdiction to do that; no precedent or authority was put forward; and while such an order would remove the liens, there would be no money to pay the contractors, and is therefore patently unfair.

[25] Even if the purchasers could apply under s. 89 of the *Strata Property Act* for cancellation of the Claims of Lien and Certificates of Pending Litigation, the order entitling them to cancellation would only be granted upon payment into court of the 7% holdback retained under s. 89(1), which in this case would be the sum of \$143,990.14 retained at the time of the conveyances. In that case, those funds would then be available to the lien claimants who were able to prove their Claims of Lien or at least would be available to be credited against the sum of the Claims of Lien.

[26] There are two other courses open to the purchasers at their cost. They may consider an application under s. 24 of the *Builders Lien Act* to have the Claims of Lien and Certificates of Pending Litigation cancelled upon the purchasers posting with the court security for the Claims of Lien. Generally, applications under s. 24 of the *BLA* require the full amount of the Claims of Lien be posted as security. If the purchasers intend to proceed with their application under s. 24, they may do so,

however, they may not wish to do so if that would require posting the full amounts of the Claims of Lien.

[27] Secondly, the contractors suggest that the purchasers utilise s. 90 of the *Strata Property Act* which provides another process for removal of liens and other charges. Section 90 permits an owner to apply to the court for the removal of a claimant's lien under the *Builders Lien Act* and any registered charges on more than one strata lot.

[28] The court may then order that the lien or other charge be removed from title to the owner's strata lot on payment into court of "the strata lot's share of the amount secured by the claim of lien or other charge": *SPA*, s. 90(2). That payment releases the owner from liability to the lien claimant (s. 90(3)), as the money paid into court is security for the lien (or other charge) in place of the strata lot: s. 90(5).

[29] Section 90(4) provides that the strata lot's share of the amount secured by the claim of lien is calculated as set out in s. 166.

[30] The purchasers need to consult with their solicitors as to the appropriate, quickest, and cheapest method to discharge the liens. The purchasers should also ask their advisors as to the whereabouts of the holdback funds and what responsibilities lay on those entrusted with the holdback monies.

"The Honourable Mr. Justice Crawford"