Cash is King: A Development for the use of Lien Bonds on Crown Land Projects

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A recent decision of the Manitoba Court of Queen's Bench has brought into question the continued use of lien bonds for construction projects on Crown Land. In *Bird Construction Group v. Trotter and Morton Industrial Contracting Inc.*, 2021 MBQB 233, Dewar J. held that a lien bond was not an acceptable form of alternate security to vacate the liens filed by a sub-contractor on a Crown Land construction project. A Crown Land project includes any project where the owner of the land or the structure upon or in respect of the work being done or services provided or material supplied is the Crown, a Crown agency, or a municipality.

Bird Construction Group ("Bird") was the general contractor for the City of Selkirk Wastewater Treatment Plant Project (the "Project"). Trotter and Morton Industrial Contracting Inc. ("TM") was a sub-contractor to Bird. Differences arose between the parties and TM provided notice of two liens to the Owner.

Bird then filed an application under sections 55(2) and 55(3) of *The Builders' Liens Act*, C.C.S.M. c. B91 (the "*Act*") and requested an order vacating the liens upon providing to TM two lien bonds with face values equivalent to the liens. Bird denied that it owed TM the money claimed, but was prepared to provide the lien bonds in order to ensure the Project continued to progress.

TM opposed the application, arguing that lien bonds were inappropriate forms of security in this case because the Project was on Crown Land.

This case highlights the difference between a lien registered against non-Crown Land and a lien registered against Crown Land. For Crown Land projects, the lien is "registered" against the Owner's holdback account rather than against the land itself. When the Owner is provided notice of lien, this causes the Owner to refuse to pay the holdback and unpaid funds to the contractor. The security given to a lien claimant on Crown Land is a charge on cash rather than a charge against the land, as is the case in non-Crown Land liens. Dewar J. found

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that this was an important distinction when considering whether a lien bond could, or should, stand in place of the lien while entitlement to the disputed funds remained at issue.

The main issue before the Court was whether, on a Crown Land project, the security offered to vacate the liens should be in the form of cash (i.e. the holdback funds) or a lien bond. Justice Dewar explained that any security ordered under section 55(2) of the Act should be at least as good as, if not better than, the security provided to a lien claimant on a non-Crown Land project.

Dewar J. first considered whether a lien bond is as good as cash. In the context of a lien registered against land on a non-Crown Land project, Dewar J. commented that a lien bond from a reputable surety is often better security than the land it attaches to, as there is less potential for the bond's value to decrease. Noting as well that it is generally easier to enforce one's rights under a lien bond than a lien registered against land.

On a Crown Land project, however, Dewar J. drew a distinction, and held that a lien bond is not as good as cash, because:

- Cash paid into court to stand in place of the lien is easy to obtain once a judgment has been issued;
- There is a risk that the credit worthiness of the surety will have diminished by the time of the judgment in a civil case to enforce the lien claimant's rights/entitlement to the lien and corresponding funds;
- A lien bond needs to be enforced against the surety after a judgment is obtained, which can sometimes be problematic; and
- There is a "tighter" relationship between the trust and lien remedies of the *Act* on Crown Land projects compared to non-Crown Land projects. Justice Dewar found that the holdback and any unpaid sums the liens are registered against are the same monies designated as trust funds under section 4 of the *Act*. Therefore, payment of these funds into court ensures compliance with the trust provisions of the *Act*. The general contractor (i.e. Bird) is unable to use the funds improperly, as they would never receive them. Meanwhile, if a lien bond is used, the general contractor could then requisition those funds from the Owner, and the sub-contractor would have no practical ability to ensure that the contractor complies with the trust provisions under the Act.

Dewar J. ultimately concluded that absent agreement between the parties that a lien bond is acceptable security, lien bonds are not an acceptable substitute for the cash that was charged by the liens on the Crown Land project. Cash provided by the general contractor for the cash represented by the Owner's holdback would be acceptable, as even if the liens were declared invalid, the cash would still be available against which TM could execute a judgment against Bird.

Dewar J. therefore ordered payment of the amount of the first lien and the provision of a lien bond in the amount of the second lien into court in order to vacate the liens against the holdback funds and any other funds claimed in the notice of lien.

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Bird has filed a Notice of Appeal of the decision of Dewar J. to the Manitoba Court of Appeal. Those in the legal, construction, insurance and bonding industries will no doubt await the outcome of this decision to better understand the role lien bonds will play in the future.

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