“Sheltering Under My Umbrella”:

Case Comment on Deslaurier v. Le Groupe Brigil

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There are certain things a lien claimant must do in order to assert the lien and then to keep it alive. Specifically, there are strict time requirements for “preserving” under section 34 of the Construction Lien Act\(^1\) (the Act), “perfecting” the lien under section 36 of the Act and for proceeding with the lien claim pursuant to section 37 of the Act. Generally speaking, pursuant to section 31 of the Act, a lien must be preserved by registration (where the lien attaches to the premises) within 45 days of the date of “last supply” and then must be perfected in one of two ways within 45 days of the date when the first 45 day time period would have expired. Pursuant to section 36 of the Act, the two ways are: 1) commencement of an Action and registration of a certificate of Action\(^2\); or 2) sheltering. A lien claimant may perfect its lien by “sheltering” it under another perfected lien. If an Action is commenced by lien claimant B to enforce a lien against the same property within the time limited for commencing lien claimant A’s Action, lien claimant A will be protected or “sheltered” by lien claimant B’s Action and it will be unnecessary for lien claimant A to commence its own Action.\(^3\) Provided a “preserved” lien has not expired (it was registered in time and more than 90 days have not elapsed since the date when the lien arose) the lien is “perfected” by sheltering as soon as any other lien claimant (having a lien arising from the same “improvement”) commences an Action and registers a certificate of Action.

It is not enough to perfect a lien because a perfected lien can also expire. The Act requires that active steps be taken to move the action forwards. There is an “unforgiving” expiry date and if it is missed, “any person” may move without notice to have the lien declared as expired, to dismiss the action and to release any security. More specifically, section 37(1) of the Act provides that:

\[\text{37(1) A perfected lien expires immediately after the second anniversary of the commencement of the Action that perfected the lien, unless one of the following occurs on or before that anniversary:}\]

1. An order is made for the trial of an Action in which the lien may be enforced;
2. An Action in which the lien may be enforced is set down for trial.

In *Deslaurier Custom Cabinents Inc. v. Le Group Brigil*\(^4\) (“Deslaurier”), Master MacLeod considered the argument made by the developer of a condominium project that when lien claimants commence their own Actions, that they have elected “not to shelter” and must set down their own Action to avoid the consequences of section 37, namely, the expiry of their lien claims. That argument was rejected by Master MacLeod. The following case commentary will examine the “sheltering” rules including whether or not the “nature of the relief claimed in the statement of claim in paragraph 3 of section 36(4) of the Act, namely, Rule 3, means that a lien claimant can only shelter under a perfected claim for lien where the nature of the materials and services supplied by the perfected lien claimant are similar or identical to those of the sheltering lien claimant”.

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\(^1\) R.S.O. 1990, Chapter C.30.
\(^2\) Where the lien does not attach to the premises, in order to perfect the preserved lien, the lien claimant is required to commence an Action to enforce the lien, or may seek to “shelter” under the lien of another lien claimant in accordance with the provisions of section 36(4) of the Act.
\(^3\) Section 36(4) of the Act.
\(^4\) 2012 CarswellOnt 7205, 2012 ONSC 3350 (Ontario Master). [“Deslaurier”]
The Doctrine of Sheltering

The sheltering provisions contained in the Act are arguably an integral part of the “class proceeding” concept of the Act. Lien Actions differ from ordinary civil Actions in that every Action commenced to enforce a lien is an Action in which all of the other liens may be enforced because by operation of the Act all lien claimants will become parties to the Action at the time of trial. The sheltering rules can provide protection to lien claimants who do not need to incur the expense of issuing and serving Statements of Claim where liens have been perfected prior to the expiration of the lien of the sheltering lien claimant. However, a sheltered lien claim is perfected only as to the “defendants and the nature of relief claimed in the Statement of Claim under which it is sheltered”.

The relevant section is section 36 and in particular, subsections (3) and (4) which provide as follows:

(3) How lien perfected – A lien claimant perfects the lien claimant’s preserved lien,

(a) where the lien attaches to the premises, when the lien claimant commences an Action to enforce the lien and, except where an order to vacate the registration of the lien is made, the lien claimant registers a certificate of Action in the prescribed form on the title of the premises; or

(b) where the lien does not attach to the premises, when the lien claimant commences an Action to enforce the lien.

Pursuant to section 36(4) of the Act, a preserved lien is perfected by sheltering under a lien perfected by another lien claimant in respect of the same improvement. Subsection 36(4) of the Act provides four statutory sheltering rules:

1. The preserved lien of a lien claimant is perfected by sheltering under the perfected lien of another lien claimant in respect of the same improvement where,

   i. the lien of that other lien claimant was a subsisting perfected lien at the time when the lien of the lien claimant was preserved, or

   ii. the lien of that other lien claimant is perfected in accordance with clause (3) (a) or (b) between the time when the lien of the lien claimant was preserved and the time that the lien of the lien claimant would have expired under subsection (2).

2. The validity of the perfection of a sheltered lien does not depend upon the validity, proper preservation or perfection of the lien under which it is sheltered.

3. A sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered.

4. Upon notice given by a defendant named in a statement of claim, any lien claimant whose lien is sheltered under that statement of claim shall provide the defendant with further particulars of the claim for lien or of any Act alleged in the claim for lien.

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5 Ibid at para.16.
The purpose of sheltering is to protect the liens of persons with very small claims for whom the prospect of retaining a lawyer and paying for a statement of claim was unreasonable. However, the potential consequences to the lien itself or to the jurisdiction of the Court over the lien are likely not worth what may amount to insignificant cost savings.

**Background of Deslaurier**

In *Deslaurier*, the developer of a condominium project brought a motion pursuant to section 46 of the Act for an order declaring that the lien of the Plaintiff Deslaurier had expired under section 37 of the Act and for associated relief including the release of security. Parallel motions were brought in two other Actions relating to the same construction project. Pomerleau Inc. was the general contractor under a CCDC 3 cost plus construction contract, and Brigil was the owner. A dispute arose between Pomerleau and Brigil and as a result Pomerleau registered a lien for more than $5 million against the project. Although Pomerleau was the general contractor with its own subtrades, Brigil had entered into direct contracts with three finishing trades, Tripoli (for drywall), Deslaurier (for cabinets), and Jo-Peach (for painting). Each of Tripoli, Deslaurier and Jo-Peach registered their own liens against the property. Each lien claimant also started an Action and registered a certificate of Action on the following dates:

a. Deslaurier: Action 09-46161 commenced September 9th, 2009 (lien was registered, July 28, 2009)
b. Jo-Peach: Action 09-46119 commenced September 10th, 2009 (lien was registered, Aug 7, 2009)
c. Pomerleau: Action 09-46228 commenced September 16th, 2009 (lien was registered, August 5, 2009)
d. Tripoli: Action 09-46270 commenced September 18th, 2009 (lien was registered, August 6, 2009)

The parties had sought an order for joint case management of the Actions and had discussed proceeding by a judgment of reference. All of the plaintiffs assumed there would be a judgment of reference and the case conference would serve as the first hearing for directions under the reference rules or what in the Toronto practice used to be referred to as the "first pre-trial". No judgment of reference had been obtained when the second anniversary of the first of these Actions approached.

On September 7th, 2011 the Pomerleau Action was set down for trial; none of the other Actions were set down. On September 28th, 2011 then counsel for the developer wrote to the plaintiffs and took the position that the Deslaurier, Jo-Peach and Tripoli liens which are the subject of these motions had expired.

**Analysis in Deslaurier**

In commencing his analysis, Master MacLeod noted that, although the Act is remedial legislation it creates a statutory remedy that did not exist at common law, and therefore it requires a liberal interpretation, at least with respect to the enforcement provisions set out in the Act. Authority for this proposition is found in the reasons of *Sesco Ltd. v. Life Centre Non-Profit Housing Corp. (Ajax)*, ("Sesco") where after an extensive review of the authorities, the Divisional Court concluded that the sheltering provisions form part of the enforcement provisions of the Act and should therefore be given

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a liberal interpretation.\textsuperscript{8} The Court held that the Act must be given a strict interpretation in determining whether any lien claimant is entitled to a lien, but if a person passes that threshold and is found to be entitled to claim a lien, then the statute should be liberally interpreted with respect to the rights conferred upon the lien claimant.\textsuperscript{9} In reaching this conclusion the Court followed Ace Lumber Ltd. v. Clarkson Co.\textsuperscript{10} (“Ace Lumber”) which stands for the principle that “[o]nce the existence of a valid lien is established, the enforcement provisions, being of a remedial nature, should be given as fair and liberal a construction as possible”.\textsuperscript{11} The reason the Courts have given a liberal interpretation once the lien has been created and preserved by registration is that the enforcement of the lien is governed by provisions designed to bring about the realization in as summary and expeditious a manner as possible.\textsuperscript{12} It follows that the sheltering provisions form part of the enforcement provisions of the Act because they are part of the mechanism designed to bring about the realization in as summary and expeditious a manner as possible.\textsuperscript{13}

As a preliminary matter, Master MacLeod observed that a preserved lien that has not expired can be perfected by sheltering as soon as any other lien claimant having a lien arising from the same “improvement” commences an Action and registers a certificate of Action.\textsuperscript{14} Master MacLeod also observed, that on the facts of this case, had no other lien claimant stated an Action, they would all have remained sheltered under the Deslaurier lien which was perfected when the Deslaurier certificate of Action was registered on September 9, 2009.\textsuperscript{15} The Court also concluded that although the lien claimants are not subtrades of each other and all stand in a direct contractual relationship with Brigil, the owner, there can be no doubt that the building they were all working on is the same “improvement” within the meaning of the Act.

Master MacLeod then went on to consider the impact of section 37 of the Act, noting that perfected lien can also expire if active steps are not taken to move the Action forward. Pursuant to section 37 of the Act, every perfected lien expires two years after commencement of the Action which perfected that lien, unless one of the two steps provided for in section 37(1) of the Act is taken: 1. An order is made for the trial of an Action in which the lien may be enforced; or 2. An Action in which the lien may be enforced is set down for trial.

The Pomerleau Action was set down before the second anniversary of the date on which the first of these Actions (Deslaurier) was commenced. In this case, the liens other than Pomerleau will have expired under section 37 of the Act unless the Pomerleau Action is “an Action in which the lien may be enforced” within the meaning of the statute. The Court found that the requirement is not that “the Action that perfected the lien” be set down for trial, but that “an Action” be set down.\textsuperscript{16} Lien Actions differ from ordinary civil Actions in that every Action commenced to enforce a lien is an Action in which all of the other liens may be enforced because by operation of the Act all lien claimants will become

\textsuperscript{8} Ibid at para. 34.
\textsuperscript{9} Ibid at para. 32.
\textsuperscript{11} Sesco at para. 15.
\textsuperscript{12} Ibid at para. 16.
\textsuperscript{13} Ibid at para. 34.
\textsuperscript{14} Deslaurier at para. 11.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
parties to the Action at the time of trial.\textsuperscript{17} This is consistent with the sheltering provisions, which provide that only one Action needs to be commenced to perfect all of the liens that are preserved but not expired.\textsuperscript{18} In addition, sections 51, 57(1) and 60 of the \textit{Act} make it evident that all lien claimants will become parties to the Action at the time of trial.\textsuperscript{19} Sections 44, 65, 80 and 84 of the \textit{Act} further evidence the \textit{Act} that all lien claimants are required to be before the court and bound by the result at the trial of any of the liens owing to the ultimate disposition of the land affected by the liens or of the security paid into court.\textsuperscript{20}

Moreover, as will be discussed in greater detail below, a lien proceeding is similar to that of a class Action. As a result, every Action commenced to enforce a lien is therefore hypothetically an Action in which every lien arising from the same improvement may be enforced.\textsuperscript{21}

The Court rejected the argument that when parties commence their own Actions they have elected not to shelter, which was analogized to opting out of a class Action. In addressing this argument the Court stated that if the legislature meant that the very Action which perfected the lien must have been set down for trial or ordered to trial, there would be no need for the saving language in the sub-section.\textsuperscript{22} Though the \textit{Act} requires specific timely steps to preserve and protect lien rights, it does not require every party to duplicate every step.\textsuperscript{23}

Ultimately, the Court held that the Pomerleau lien was an Action in which the other liens "may be enforced" and when it was set down for trial it was prior to the second anniversary of the date on which any of the Actions to enforce the liens were commenced. As such none of the other liens have expired under s. 37 of the \textit{Act}.\textsuperscript{24}

It is important to note that lien claimants cannot always rely on the Actions of other lien claimants to preserve their claims. If a particular lien has expired at the time the step is taken, it will not be saved by the Actions of the other lien claimant.\textsuperscript{25} More specifically, with respect to perfection under section 36(2) of the \textit{Act}, relying on another party to commence an Action will not avail a lien claimant if that Action is not commenced before his own lien expires under section 36 of the \textit{Act}.\textsuperscript{26} Similarly, relying on one of the other plaintiffs to set an Action down for trial will not save a lien that had already expired under section 37 of the \textit{Act} before any of the Actions are set down.\textsuperscript{27}

\textbf{“Nature of the Relief Claimed” and Horizontal vs. Vertical Sheltering}

In \textit{Sesco}, the Divisional Court considered the proper interpretation of the phrase “nature of the relief claimed” contained in section 36(4)\textit{b} of the \textit{Act}. More specifically, the Court considered whether “the nature of the relief claimed” in the statement of claim in paragraph 3 of section 36(4) of the \textit{Act} means that a lien claimant can only shelter under a perfected claim for lien where the nature of the materials

\textsuperscript{17} Ibid at para.16.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid at para. 17.
\textsuperscript{21} Ibid at para. 18.
\textsuperscript{22} Ibid at para. 34.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid at para. 33.
\textsuperscript{25} Ibid at para. 34.
\textsuperscript{26} Ibid at para. 19.
\textsuperscript{27} Ibid at para. 20.
and services supplied by the perfected lien claimant are similar or identical to those of the sheltering lien claimant.

Paragraph 3 or “Rule 3” of section 36(4) of the Act states that a sheltered claim for lien is perfected only as to the defendants and the nature of the relief claimed in the statement of claim under which it is sheltered. In the lower Court decision of Sesco, the motions judge concluded:

In my view, the requirement in rule 3, that the lien be "as to" the nature of the relief claimed in the statement of claim of the perfected lien means that the statement of claim would have to claim a remedy (eg. payment of money) and also, as a basis for the claim, plead a description of the services and materials supplied which can reasonably be said to include the scope of services and materials claimed in the lien seeking shelter. 28

As a result, the lower Court found that, since the statements of claim which could potentially provide shelter for the subcontractors’ liens at issue claimed relief in relation to specific services and materials which do not include any of the services and materials set out in the subcontractors’ Claims for Lien, those statements of claim cannot provide shelter and the subcontractors’ claims are not perfected. Moreover, since subcontractors’ preserved liens were not perfected within the time limit in section 36 of the Act, their liens have expired and cannot be pursued. 29

The Divisional Court overturned this decision on appeal, concluding that when relief such as the enforcement of a lien has been claimed in a statement of claim by a party commencing an Action, then others claiming the enforcement of lien rights should be able to shelter under the existing claim. Moreover, the sheltered claims do not need to be for the same services and materials as are included in the perfected Actions. 30

The Divisional Court held that the pleading requirements of Rule 25.06(1) of the Rules of Civil Procedure 31 requiring specification of the “nature of the relief claimed” should not be read into the interpretation of “the nature of the relief claimed” in Rule 3 of the Act. 32 It is important to note that the Attorney General's Advisory Committee on the draft Construction Lien Act altered the words in Rule 3 from "nature of the claim" to "nature of the relief claimed". 33 The words “nature of the relief claimed” entail only the remedies sought and not the substance of the claim. 34

In addition, in support of its conclusion that the sheltered lien claimed does not need to be for the same services and materials as the sheltering lien claim, the Divisional Court adopted Kent J.’s analysis in Chute Construction Ltd. v. Biacan Construction Corp. (1997), 34 C.L.R. (2d) 1 (Ont. Gen. Div.) that a construction lien Action is akin to a class Action:

Once one contractor or sub-contractor commences an Action, a process is created whereby the defendant owner can know all claims being made against it and an adjudication process is

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29 Ibid at para. 54.
30 Ibid at para. 55.
32 Sesco at para. 46.
33 Ibid at para. 47.
34 Ibid at para. 57.
Claimants, often small contrActors with small claims, are enabled to come to Court with whatever records they have and prove their claims, as was done in this case.  

Therefore, when relief such as the enforcement of a lien has been claimed in a statement of claim by a party commencing an Action, then others claiming the enforcement of lien rights should be able to shelter under the existing claim.  

In the article “Sheltering, Consolidation and Trial Together: The Construction Lien Action as a "Class Action”", authors R. Bruce Reynolds and Robert B. Pattison state that the effect of the Sesco lower court decision is to virtually eliminate the concept of “horizontal sheltering”.  

Duncan Glaholt defines “horizontal sheltering” in his book, Conduct of a Lien Action, as meaning that “it does not matter which “stream” of privity of contrAct with the owner contained the lien” (i.e. applying the sheltering provisions of the Act liberally).  

In contrast, Glaholt defines “vertical sheltering” as meaning that “a lien claimant could only shelter under the claim of someone in that lien claimant’s own “stream” of privity of contrAct with the owner” (i.e. applying the sheltering provisions of the Act strictly). In other words, if horizontal sheltering is eliminated, a subcontrAct or supplier is effectively prevented from sheltering under the statement of claim of a Plaintiff sub-contrAct or supplier in the same class.

As a result, the Divisional Court in Sesco found that, using a liberal interpretation, the words “nature of the relief claimed” do not require that a sheltered claim for a lien would only be perfected where the remedy claimed and the services and materials supplied could reasonably be said to be included in the scope of services and materials described in the statement of claim under which it sought to be sheltered. Rather, the words “nature of the relief claimed” set out in the Act refer only to the remedies sought as opposed to the substance of the pleading itself. Further, since sheltering provisions are part of the mechanisms designed to bring about realization in as summary and expeditious a manner as possible, it would be unreasonable to interpret the sheltering provisions in a manner that effectively eliminates horizontal sheltering.

Reverse Vertical Sheltering

In Buttcon Ltd. v. Beaver Construction Services Corp. the Court rejected the plaintiff’s argument that a contrActor’s lien cannot be perfected by sheltering under the properly perfected lien of its own subcontrActor, known as “reverse vertical sheltering”. This proposition was rejected on the basis that there is no case law supporting the position that “reverse vertical sheltering” is not available under section 36 of the Act. Further, following Ace Lumber, the Court held that once a valid lien is established, the enforcement provisions should be given a fair and liberal construction, since they are

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35 Ibid at para. 50.
36 Ibid at para. 50.
39 Ibid.
40 Reynolds and Pattison at 231.
41 Sesco at para. 55.
42 Ibid at para. 57.
43 Ibid at para. 56.
remedial in nature. Finally, the Court espoused the principle enunciated in Sesco that the sheltering provisions of the Act form part of the enforcement provisions and are a part of the mechanism designed to avoid a multiplicity of proceedings and to provide a summary and expeditious remedy.

**Risk of Sheltering**

Since a lien is only sheltered as to “the defendants and the nature of the relief” claimed in the statement of claim, there can be consequences when sheltering, particularly where the sheltering claim is a nullity. In *M&S Roofing and Sheet Metal Ltd. v. Arthur J. Fish Ltd.* a subcontrActor, M&S, filed a lien claim subsequent to that of another subcontrActor, IF Inc. In this Action M&S moved to set aside an order determining that its lien had expired and to set aside an order for the delivering up of the bond filed by the general contrActor, Arthur J. Fish Ltd. Although M&S had not commenced an Action to enforce its lien, it purported to shelter its lien claim under the perfected lien of IF Inc., which had commenced an Action. To set aside an order declaring that the lien had expired, M&S was required to show that its lien had been perfected pursuant to the Act. Since M&S had not commenced an Action, the only way it could perfect its lien is by sheltering under the lien of IF Inc., i.e. it must come within the provisions of section 36(4) of the Act. Although IF Inc. had commenced an Action, it did not commence an Action to enforce its lien pursuant to section 36(3)(a) of the Act. Instead, the Action was only against Fish, the general contrActor, and not against the owner of the property. In addition, there was no claim in IF Inc.’s Action to enforce the lien. Pursuant to section 36(4)2, the M&S lien could still be perfected even though the lien under which it is sheltering has not been properly perfected, however, it is perfected only as to the defendants and the nature of the relief claimed in the statement of claim. Therefore, the M&S lien is only against the defendant contrActor Arthur J. Fish and not the owner, and is only for the relief claimed in the IF Inc. statement of claim. As a result, the M&S lien was not properly perfected and its motion was dismissed.

**Conclusion**

Although sheltering can be extremely valuable to a lien claimant whose preserved lien may have otherwise expired (unless it can take advantage of the sheltering rules), the above cases demonstrate that sheltering has some risk and should not be relied upon in all cases as a legitimate alternative to commencing an Action to perfect a lien claim, but rather should be considered as a safety net when other avenues are no longer available.

46 Ibid.
47 Ibid.
50 Ibid at para. 15.
51 Ibid at para. 18.
52 Ibid.
53 Ibid.
54 Ibid at para. 19.
55 Ibid at para. 22.
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