

**CASE LAW UPDATE**

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*Landmark II Inc v 1535709 Ontario Limited*

2011 ONCA 567 (Released August 31, 2011)

**Construction Liens – Value of a Claim for Lien – s 35 of the *Construction Lien Act***

In 2004, the plaintiff Landmark II Inc. (“**Landmark**”) entered into a written contract with the defendant 1535709 Ontario Limited (“**1535709**”) to expand a truck parking lot on 1535709’s property. The entire contract price was \$58,850, to be paid in four equal instalments based on the construction milestones set out in the contract. When 1535709 refused to pay the second instalment when due, Landmark abandoned the job, filed a lien for the unpaid balance of the contract and commenced a claim of *quantum meruit* for the same amount. 1535709 counterclaimed for damages suffered as a result of Landmark’s failure to complete the contract.

The trial judge found that 1535709 had breached the contract by failing to pay and that Landmark was not obligated to continue its work without payment. The trial judge found that Landmark’s work as of the date of abandonment was valued at \$16,000 and, after deducting the amount of the first payment, she determined that 1535709 owed Landmark \$1,287.50. 1535709’s counterclaim was dismissed. On appeal, the Divisional Court upheld the trial judge’s decision in brief written reasons.

Landmark subsequently appealed to the Court of Appeal. Of importance, Landmark contested the trial judge’s finding of liability for having registered a lien in an amount that was grossly excessive to the amount owed to it, pursuant to s. 35 of the *Construction Lien Act* (“**CLA**”). Landmark argued that it was able to lien for the unpaid balance of the contract. The Court disagreed.

Typically, the amount claimed in a construction lien relates to the value of work or materials supplied for which payment has not been received and not the value of work or materials not yet supplied. In this case, the Court found that it is not necessarily improper for a lien claimant to lien for the entire amount of a contract. Although a lien claimant is only secured for the actual value of the work or materials supplied (usually determined at trial) through a lien, if a lien claimant demonstrates an intention to stay on the job and finish the contract, the lien claimant can avoid liability under s. 35 of the *CLA* and effectively secure the value of future work to complete the contract.

The Court held that a lien claimant cannot lien for the value of the contract when it has left the job and does not intend to finish it. In other words, the Court held that a lien claimant cannot use a lien to secure a claim for breach of contract should it walk off the job.

In this case, the Court found that Landmark had improperly claimed a lien for the full contract value as it placed the lien two months after it had abandoned the job and had no intention of completing the contract. Landmark was therefore found liable under s. 35 of the *CLA* to 1535709 for the borrowing costs to vacate the lien.

The Court's expanded view of liens being used to secure future work or materials supplied to a project where a lien claimant intends to complete its work is especially problematic for project owners as the costs to vacate liens could rise to an insurmountable level.

On a second ground of appeal, the Court's decision followed existing jurisprudence setting out the election that a lien claimant must make between a claim for *quantum meruit* and a claim for breach of contract. In a construction lien action, a claimant must elect between these alternative remedies, at the latest by the time of judgment. Landmark argued that it was entitled to an election from the court.

In this case, the Court found that Landmark had not indicated it was pursuing alternative remedies with the intention of making an election. Further, there was no obligation on the trial judge to provide an election. If Landmark was seeking damages for breach of contract as an alternative to its claim for *quantum meruit*, it was required to so elect. Without the election, Landmark was not entitled to damages for the breach of contract as an alternative to the trial judge's assessment of damages under the claim for *quantum meruit*.

Landmark's results may have been significantly different if it had acted to preserve its right to an election for breach of contract. The decision highlights the importance of maintaining a lien claimant's right to an election between alternative remedies in order to ensure that the best recovery is obtained.