

**If No "Improvement" to Land Construction Lien Not Valid**

The Divisional Court has recently confirmed that a Construction Lien is only valid if there is an "improvement" to land.

In *Kennedy Electric Limited v Dana Canada Corp.*, Kennedy Electric Limited and its subcontractors assembled off-site components of an assembly line for the manufacture of vehicles installed at plant facilities in St. Marys, Ontario. The key components of the assembly line were mezzanine platforms and robots for the manufacturing of the Ford F150 pick-up truck. The entire line occupied approximately 100,000 sq. ft. of space, stood about 20 ft. tall and weighed approximately 1/2 million tonnes.

The assembly line was securely fastened to the floor by anchor bolts. The line could be readily disconnected from the building with nominal damage to the building or its services. The trial judge concluded that the assembly line was not an integrated construction improvement within the building addition giving rise to lien rights. The line was considered a free standing improvement on its own. The trial judge concluded, which decision was upheld by the Divisional Court, that the supply by installation of manufacturing equipment in a building did not constitute an "improvement" within the meaning of the *Construction Lien Act*.

**Liability Under a Tender Bid Does Not Extend to Persons Not a Party to the Tender Process**

In a recent decision the Federal Court of Appeal has confirmed that in order for there to be

liability in respect of a tender process there must be a party to the tender bid submitted. In *Design Services Ltd. v Canada* the general contractor, Olympic, relied on the knowledge of six companies in making a bid for a contract tendered by Public Works and Government Services Canada for the construction of a naval base. The contract was awarded to Westeinde although Olympic should have won the bid. Olympic and the six companies launched an action against the Crown. Olympic reached a settlement and the other parties remained in the suit.

The tender documents were submitted by Olympic along although the six companies considered themselves a team in submitting the bid. The Federal Court of Appeal held that it was not reasonably foreseeable that the Crown's negligence in issuing the contract to the wrong bidder would result in financial losses to these six companies and the Crown such that the Crown owed a duty of care to the six companies not to award the contract to the wrong bidder.

Had there been an agreement which existed between the six companies to share profits and losses or that they were joint venturers for the purpose of tendering for the contract, the result may have been different. The six companies were therefore not parties to the tender contract between the Crown and Olympic nor were they third party beneficiaries to the contract. All negotiations took place between the Crown and Olympic and did not involve the six companies. Accordingly the six companies which stood to benefit from the tender standing behind and/or assisting Olympic were unable to claim any losses from the Crown arising from the Crown's wrongful awarding of the tender.

**Not Laying Foundation of Home in the Proper Place Results in Builder Paying Damages**

The Plaintiff contracted with the Defendant to construct and install a prefabricated home on a vacant lot.

The Plaintiff retained a company to prepare the site plan and give it to the Defendant's excavation foreman. The footings were poured but not in accordance with the site plan. The foundation was not dug parallel to the shore as the Plaintiff wanted but parallel to the road. The Plaintiff claimed a significant loss of enjoyment and the Defendant builder attempted to rely on an exclusion clause in the contract.

The Plaintiff was awarded damages in the amount of \$22,800.00 as the project explicitly provided that the Defendant would site the foundation in accordance with the Plaintiff's instruction. The Plaintiff made her wishes clear to the Defendant's foreman and the Defendant's main office received a fax copy of the site plan. The Defendant breached the contract and could not rely on the exclusion clause in the contract which was ambiguous. The misaligning of the house had an effect on the value of the property. The court awarded damages based on 10% of 50% of the value of the property which cost \$456,000.00.

## **Defamatory Flyers Lead to Substantial Damage and Punitive Damage Award**

Second Cup sued the Defendants for damages for defamation. Ultimately the Defendants' Statement of Defence and Counterclaim was struck for failing to comply with a number of court orders. The Defendants issued defamatory comments about the Plaintiff/Franchisor and encouraged franchisees to sue Second Cup. The Defendants circulated seven flyers to franchisees which were defamatory in nature. The Court awarded general damages in the amount of \$425,000.00, punitive damages in the amount of \$75,000.00 and an injunction prohibiting the Defendants from issuing any further defamatory comments about the Plaintiff.

## **Wrongful Dismissal can Result in Significant Punitive Damages for Employer**

A 14 year employee of Honda Canada Inc. ("Honda"), Kevin Keays, obtained a Judgment for wrongful dismissal including punitive damages at trial in the amount of \$500,000.00. The award of punitive damages was upheld on Appeal although reduced to \$100,000.00.

Keays was diagnosed as suffering from Chronic Fatigue Syndrome ("CFS"). Keays was directed to meet with Honda's occupational medicine specialist, Dr. Brennan. Keays declined to without clarification from Honda as to the purpose of the meeting and methodology to be used in the parameters of Dr. Brennan's assessment. Honda refused to provide him with such clarification and terminated Keays for disobeying its direction.

The Trial Judge found that Honda's direction that Keays

see Dr. Brennan was unreasonable in the circumstances and moreover that it was not made in good faith but rather as a prelude to terminating Keays to avoid having to accommodate his disability.

The Trial Judge awarded 15 months payment in lieu of notice for wrongful dismissal and extended the notice period to 24 months based on the manner in which Keays was terminated. The Court found that Honda's conduct was outrageous, high handed, planned, deliberate and designed to intimidate and ultimately terminate the employment of a particularly vulnerable employee. The Court found that Honda was aware of its duty to accommodate the employee in view of his disability.