**CITATION**: **Trillium Masonry Group Inc v. Marydel Homes (Beaverton) Inc. et al**
**2025 ONSC 4194**
**COURT FILE NO.:** CV-22-00001514-0000
**DATE:** July 16, 2025

**SUPERIOR COURT OF JUSTICE – ONTARIO**

IN THE MATTER OF THE *CONSTRUCTION ACT*, R.S.O. 1990, c.C-30

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| **BETWEEN:** | ) | |
| Trillium Masonry Group Inc.<br>Plaintiff/Responding Party | ) | Brendan Bowles for the Responding Party |
| **– and –** | ) | |
| Marydel Homes (Beaverton) Inc. and Vito Montesano<br>Defendant/Moving Party | ) | Robert Kalanda for the Moving Party |

HEARD**:** May 2, 2025

## RULING ON MOTION

**MATHAI J.**

### A. Overview

[1] Pursuant to ss. 44(5) and 47 of the *Construction Act*, R.S.O. 1990, c. C.30 (the "*Act*"), Marydel Homes (Beaverton) Inc. ("Marydel") seeks to discharge Trillium Masonry Group Inc.'s ("Trillium") lien on Lot 121 of a subdivision in Beaverton, Ontario. Alternatively, Marydel seeks to reduce the amount of the posted security.

[2] For the reasons that follow, I dismiss Marydel's motion.

### B. Summary of Evidence

[3] On December 20, 2016, Trillium signed a contract with Marydel for the supply of masonry services and materials with respect to the development of several detached homes in the Town of Beaverton (the "First Contract"). Section 6 of the First Contract stipulates that "[a]ll liens, which may arise under the provisions of the *Construction Lien Act 1990*, shall arise and expire on a lot-by-lot basis". The First Contract covered work for 43 different lots of the subdivisions but did not include Lot 121. Masonry services on Lot 121 were to be completed once work on the other lots was finished.

[4] The First Contract did not include a "price" for the masonry services. Instead, Trillium provided a rate sheet that detailed the per brick price for its work. The rate sheet was appended to the original contract and was updated over the course of the project to reflect increases in labour costs.

[5] A dispute arose over the scope of the work under the First Contract. Trillium alleged that Marydel owed it $193,191.70. Marydel did not pay this outstanding amount. Trillium did not lien any of the lots that were subject to the First Contract.

[6] Trillium completed its work under the First Contract in or around December 2021. By May 2022, the remaining work on the other lots in the subdivision was completed and the homes on those lots were sold. As a result, Marydel requested that Trillium perform masonry work on the last lot, Lot 121.

[7] On May 5, 2022, Marydel and Trillium executed another contract for masonry services for Lot 121 (the "Second Contract"). The Second Contract was drafted by Trillium. As with the First Contract, the Second Contract stipulated the per brick price for the work, which had increased from the First Contract (from $1.85 to $2.40 per brick).

[8] At the heart of the dispute between the parties is one provision in the Second Contract. Specifically, the Second Contract includes the following provision under the heading "Unit Prices for Single Units": "The balance owed of $193,191.70 shall be forwarded to Lot 121 and shall form part of the contract price" (the "Contract Price Provision").

[9] The principal of Marydel, Vito Montesano, swore two affidavits in support of the motion. In one of his affidavits, Mr. Montesano states that he did not know that the Contract Price Provision was included in the Second Contract. Mr. Montesano states that had he been aware of the provision, he would not have executed the Second Contract and agreed to pay just over $190,000 for work that was unrelated to Lot 121. Mr. Montesano maintains that he never agreed to pay the outstanding balance because a full reconciliation was necessary at the end of the project to properly account for the bricks installed.

[10] The President of Trillium, John Domingues, also swore two affidavits. In his first affidavit, he states that Mr. Montesano agreed to pay the outstanding balance of $193,191.70 together with any work on Lot 121 and that the payment was to be made from the sale proceeds from Lot 121. Based on this discussion, Mr. Domingues drafted the Second Contract which included the Contract Price Provision. In cross-examination, Mr. Domingues admitted that the majority of the money Trillium was suing for and the majority of the money Trillium liened for was connected to the services provided under the First Contract. Mr. Domingues also states that he would not have

agreed to provide services to Lot 121 had the Contract Price Provision not been included in the Second Contract.

[11] On June 15, 2022, Trillium issued an invoice for the per brick price of masonry services on Lot 121 in the amount of $35,440.42. Two days later, Trillium registered a lien against Lot 121 for the sum of $228,632.12 (i.e. $193,191.70 + $35,440.42).

[12] Marydel admits that it did not pay the outstanding balance arising from the First Contract but disputes the propriety of the outstanding balance. Specifically, Mr. Montesano alleges that: (a) Trillium installed substantially more bricks than Marydel ordered; (b) many bricks were being wasted and not installed; (c) Trillium was leaving job sites incomplete and/or with numerous deficiencies; and (d) Trillium was "very late" in addressing warranty repairs. Trillium argues that these alleged deficiencies were never brought to its attention and were made up after the fact to justify not paying the outstanding balance owed under the First Contract.

[13] On June 29, 2022, Mr. Montesano and Mr. Domingues exchanged text messages about the lien. Mr. Montesano asked Mr. Domingues whether he was aware of the lien. Mr. Domingues denied knowledge of the lien. In response, Mr. Montesano replied:

> Well whether you know or not I was planning to pay you guys next Friday from the closing but tell Paolo [sic] he can chase the money in court for the next 2 years for being a dick.

[14] On July 11, 2022, the lien was vacated by Associate Judge Wiebe upon Marydel paying the value of the lien plus an additional $50,000 for costs into court.

### C. Procedural History of this Motion

[15] The procedural history of this motion is detailed in the Divisional Court's ruling in *Trillium Masonry Group Inc. v. Marydel Homes (Beaverton) Inc.*, 2024 ONSC 5668 (Div. Ct.). In that decision, the Divisional Court allowed an appeal from O'Connell J.'s order lowering the posted security to $35,440.42 plus a 25% premium for costs. I reproduce paragraph 52-53 of the Divisional Court's reasons, as it is directly relevant to my ruling:

> [52] In reaching that conclusion, I considered Trillium's submission that in deciding to reduce the posted security, the motion judge erred in law by either applying a meaning of "price" that deviated from the statutory definition, or exercising purported enhanced fact-finding powers that he did not have to determine the contract price based on conflicting evidence. I also considered Marydel's submission that Trillium's focus on the statutory definition of "price" was not helpful to the analysis, since it was clear on undisputed evidence that the motion judge correctly determined the amount of security required to vacate the claim for lien based on work Trillium performed on Lot 121.
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> [53] In fact, the record below discloses significant controversy on factual issues and provides little assistance in determining the actual basis for the

> motion judge's decision or whether it involved reversible errors. Resolving the controversy between the parties would involve interpreting the 2022 contract, with a view to determining whether the parties had agreed upon a "price" as defined in the *Construction Act* (as argued by Trillium) or a "price for those services and materials" within the meaning of s. 14(1) (as argued by Marydel). "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 50. In his reasons, the motion judge did not expressly deal with this issue, nor did his decision contain any findings (factual or otherwise) that would enable this court to assess whether he made any error in his assessment of the issue.



**D. Issues and Analysis**

[16] The primary conflict between the parties can be distilled into one central question: does the *Act* prohibit a lien claimant from registering a lien for the full amount of the agreed-upon "price" for a lienable service where the "price" includes an outstanding debt that is no longer lienable?

[17] Marydel answers this question in the negative.

[18] Marydel forcefully argues that s. 14(1) of the *Act* only provides a right to a lien for a person who has supplied services or materials that have improved a premise. Marydel argues that its interpretation of s. 14(1) is consistent with s. 17 of the *Act*, which requires a nexus between the lien amount and the work supplied to the improvement.

[19] Based on these legal propositions, Marydel argues that it is common ground that the outstanding balance of $193,191.70 was for services supplied under the First Contract. Those services are not lienable against Lot 121. As such, Marydel argues that the lien should be discharged, or the posted security lowered to the amount of lienable services on Lot 121.

[20] Trillium answers the central question in the affirmative.

[21] Trillium argues that the parties are free to contract for any price for lienable services they deem appropriate. The Contract Price Provision makes it clear that the price for the improvement of Lot 121 was the unpaid balance of $193,191.70 *and* the per brick unit price. Trillium further argues that on this motion it would not be appropriate for this Court to look behind the Contract Price Provision and undo the parties' agreement on the price for lienable services on Lot 121. Finally, Trillium argues that it completed work on Lot 121 and there is no dispute that its masonry services improved the lot.

[22] Before answering the central question, I will review some of the statutory provisions relevant to this motion and the scope of my powers on a motion brought pursuant to ss. 44(5) or 47 of the *Act*.

**(i) The *Construction Act,* R.S.O. 1990, c. C.30**

[23] Section 1 of the *Act* includes definitions for the terms "improvement" and "price". Both are relevant to this motion. The definitions read as follows:

> "improvement" means, in respect of any land,
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> (a) any alteration, addition or capital repair to the land,
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> (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
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> (c) the complete or partial demolition or removal of any building, structure or works on the land;
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> ***
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> "price" means,
>
> (a) the contract or subcontract price,
>
> (i) agreed on between the parties, or
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> (ii) if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and
>
> (b) any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor, as the case may be, is not responsible;

[24] A "price" is determined by the stipulated price in a contract. It is only necessary to ascertain the "value" of the services provided if there is no agreement on the price of the services (*RJ Concrete v. Eco Depot LTD.*, 2022 ONSC 1759, at para. 18; *HMI Construction Inc. v. Index Energy Mills Road Corp.*, 2017 ONSC 4075 (Div. Ct.) at para. 17; *Selectra Inc. v. Penetanguishene (Town)*, 2016 ONSC 2293, para. 28; *Scott Steel v. Ausenco*, 2025 ONSC 473 at paras. 135-139; *Marino v. Bay-Walsh Ltd.* [2002] O.J. No. 2211 (S.C.), at para. 112).

[25] Where there is a stipulated price, it may be necessary to determine the actual value of the services and materials supplied if work ended before the completion of an identifiable task or milestone. Otherwise, the price of the work is measured by the contract price (*RJ Concrete*, at para. 18).

[26] Part III of the *Act* relates to liens. Section 14(1) of the *Act* allows a person who supplies service to an improvement for an owner, contractor or subcontractor to register a lien upon the interest of the owner of the premises improved. The lien is for the "price" of the service or materials that improved the premises.

[27] Section 17 of the *Act* imposes limitations on the value of a lien. Pursuant to s. 17(1), a person registering a lien is limited to the amount "owed in relation to the improvement".

[28] A few cases have discussed the issue of distinguishing between lienable work and non-lienable work. For example, in *Carruthers & Wallace Ltd. v. Mathers & Haldenby Inc.* (1995), 26 O.R. (3d) 593 (Gen. Div.), Justice Molloy stated:

> …However, there are a number of cases dealing with the treatment of non-lienable items which form part of a construction contract price. The general principle applied in these cases is that the value of the non-lienable items should be deducted from the purchase price before calculating the holdback amount. This situation typically arises where the cost of chattels (such as furniture and appliances) or the cost of raw land are components of the general contractor's overall contract price. The principle is well stated in *Edmonton (City) Non-Profit Housing Corp. v. Regard Enterprises Ltd.* (1982), 40 A.R. 624 (Q.B.) at p. 627, in which Master Funduk held:
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> > It would be inequitable if the price of the chattels was to be included in the total contract price for lien fund purposes. If the parties had entered into two separate contracts as they easily could have done, one for the construction of the improvement and the second for the purchase of the chattels, there could be no question merely because the sale by Regard of chattels and the purchase by the applicant of those chattels is "rolled-in" to the construction contract should not give the lien claimants.

(See also *John Barlot Architect Ltd. v. 413481 Alberta Ltd.*, 2010 ABCA 51, 487 A.R. 105 at paras. 16-17; *Southdale Towers Ltd v. Carlton Management Group Inc.* (1994), 18 O.R. (3d) 233 (Gen. Div.) at para. 26.)

[29] Section 20 is also relevant to this dispute. It applies to a situation where an owner contracts with a person to provide improvements to multiple premises. In this scenario, the person registering a lien may choose to have a general lien against each premise for the price of all services and materials supplied to all the premises: see s. 20(1). A general lien is not applicable where a contract provides, in writing, that liens shall arise and expire on a lot-by-lot- basis: see s. 20(2).

[30] In this case, the First Contract explicitly states that liens arise and expire on a lot-by-lot basis. As such, Trillium cannot register a general lien on Lot 121 for the amount alleged to be owed for services provided on the remaining lots.

[31] Pursuant to s. 47 of the *Act*, a court may discharge a lien on the basis that the claim for the lien is “frivolous, vexatious or an abuse of process”. Additionally, s. 47 provides the court with the broad power to discharge a lien “on any other proper ground”.

[32] On a s. 47 motion, a moving party must prove on a balance of probabilities that there is no triable issue in respect of the bases upon which discharge of the lien is sought. The motion is analogous to a summary judgment motion in the sense that both motions require a court to determine whether there is a triable issue (*Maplequest (Vaughan) Developments. Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308, 3 C.L.R. (5th) 182 (Div. Ct.) at para. 25).

[33] While a s. 47 motion and a summary judgment motion are analogous, there are very important differences between the types of motions. The Divisional Court has found that the "enhanced powers" enjoyed by a court on a summary judgment motion are not available to the court on a s. 47 motion. In this context, "enhanced powers" means the jurisdiction to weigh evidence, assess credibility or draw reasonable inferences as set out in rr. 20.04(2.1) and (2.2) (see *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111, 13 C.L.R. (5th) 355 (Div. Ct.) at para. 61 and *Maplequest (Vaughan) Developments Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308, 3 C.L.R. (5th) 182 (Div. Ct.) at paras. 25-27). As a result, on a s. 47 motion, a judge is generally prohibited from making findings of credibility on a contested record (see *S3I Inc. v. Ecolomondo Environmental (Hawkesbury) Inc.*, 2023 ONSC 5071).

[34] On numerous occasions, this court has affirmed that the "enhanced powers" available on a summary judgment motion are not available on a s. 47 motion (see for example *Louis Jones Construction Ltd. v. Rocque*, 2022 ONSC 2362 (CanLII) at para. 22; *JP Reno Inc. v. Warner et al.*, 2024 ONSC 2935 at paras. 26-27; *DNR Restoration Inc. v. Trac Developments Inc.*, 2023 ONSC 1849 at para. 43; *708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc.*, 2023 ONSC 2301, at para. 27; *Accurate General Contracting Ltd. v. 485 Logan Developments Inc*, 2025 ONSC 3498, at para. 5; *S3I Inc. v. Ecolomondo Environmental (Hawkesbury) Inc.*, 2023 ONSC 5071).

[35] As an alternative, Marydel requests a reduction in the amount of security paid to $44,300.52 ($35,440.42 plus 25% for costs). This relief is sought pursuant to s. 44(5) of the *Act*, which permits a court to reduce the amount that was paid into court to discharge a lien. There are two reasons for which a lien amount can be reduced: (1) if a portion of the lien claim includes "non-lienable work"; or (2) if there are elements of the claim which are properly lienable but are clearly inflated (*Structform v. Ashcroft*, 2013 ONSC 4544, 26 C.L.R. (4th) 13 at paras. 14-15).

[36] A s. 44(5) motion is also analogous to a summary judgment motion in the sense that where there are significant contested issues of fact, it is generally preferable that they be resolved by way of a trial (see *Elegant Façade Inc. v. Broccolini Construction (Toronto) Inc.*, 2021 ONSC 8336 at paras. 26 and 28; *Pentad Construction Inc. v. 2022988 Ontario Inc.*, 2021 ONSC 824, at para. 5; *Structform*, at para. 12).

[37] Unlike the s. 47 jurisprudence, no appeal court has found that the "enhanced powers" available on a summary judgment motion are unavailable on a s. 44(5) motion. That being said, the decisions from this court establish that a judge hearing a s. 44(5) motion does not have the power to resolve significant evidentiary tensions by weighing evidence, assessing credibility or drawing reasonable inferences (*Elegant Façade Inc. v. Broccolini Construction (Toronto) Inc.*, 2021 ONSC 8336 at paras. 26 and 28; *Pentad Construction Inc. v. 2022988 Ontario Inc.*, 2021 ONSC 824, at para. 5; *Structform*, at para. 12). As a result, I find that the "enhanced powers" available on a summary judgment motion are not available to a judge hearing a s. 44(5) motion.

**(ii) Analysis and Findings of Fact**

[38] The following facts are not contested:

(a) In the First Contract, the parties agreed that liens would arise on a lot-by-lot basis;

(b) Trillium did not register any liens for the alleged outstanding balance owed under the First Contract;

(c) The time period for registering liens for services related to the First Contract has expired;

(d) The Second Contract was executed by both parties;

(e) The Second Contract includes the Contract Price Provision;

(f) The Contract Price Provision reads as follows: "The balance owed of $193,191.70 shall be forwarded to Lot 121 and shall form part of the contract price";

(g) The "balance owed of $193,191.70" relates to services rendered by Trillium under the First Contract;

(h) Trillium provided masonry services to Lot 121; and

(i) The per brick price for the masonry work on Lot 121 was $35,440.42.

[39] Based on the facts detailed above, there is no doubt that the Second Contract includes a "price" for the lienable services provided to Lot 121 and that the price includes the outstanding balance for services performed under the First Contract. It is that "price" that Trillium has chosen to enforce through a lien and an action. Further, there is no doubt that Trillium performed a lienable service on Lot 121.

[40] For Marydel to be successful on this motion, it must establish that the *Act* prohibits a lien claimant from registering a lien for the full amount of an agreed-upon price for lienable services where that price incorporates an outstanding balance for services that are no longer lienable. It does not.

[41] As mentioned above, this is not a summary judgment motion. I do not have the "enhanced powers" to weigh evidence or make credibility findings. As a result, I am not able to make any other findings of fact (other than those reflected in para. 38 above) given the conflicting evidence on the propriety of the outstanding balance and the conflicting evidence on whether there was a "meeting of the minds" with respect to the Contract Price Provision. Those are live issues for trial.

[42] Subsection 14(1) stipulates that a person has a lien upon the interest of the owner in the premises improved for the "price of those services or materials". "Price", as it is used in s. 14(1), incorporates the definition of "price" as found in s. 1(a) of the *Act.* As a result, in the context of s. 14(1), "price" means the "contract or subcontract price" for lienable services. Where the contract price or subcontract price for lienable services has been "agreed on between the parties", then that is the "price" for the lienable service. Subsection 17(1) limits the value of the lien to the difference between what has already been paid, if any, and the price that was agreed upon.

[43] In this case, the "price" for the lienable service was agreed upon and reduced to writing in the Second Contract. It is the price of the outstanding balance (i.e. $193,191.70) plus the per brick price of the masonry service. In that way, the "price" agreed upon by the parties is for the

improvement of Lot 121 – it is the price for the lienable masonry services. The parties are entitled to set their own "price" for lienable services which can then be enforced through the lien regime. If the *Act* was intended to limit the parties' freedom to set a price for lienable services, then it would have to do so explicitly. It does not.

[44] By incorporating the definition of "price" into s. 14(1), the Legislature made a deliberate choice to provide a lien claimant with the right to a lien for an agreed-upon price for lienable services. Where a contract stipulates a price for a lienable service, then that price becomes the benchmark for what can be liened.

[45] A hypothetical example helps drive home the point that the parties are free to contract for a price for lienable services. Consider a situation where the Second Contract did not include the Contract Price Provision and simply stated that the price for masonry services on Lot 121 was $228,632.12 (i.e. the outstanding balance plus the amount for the masonry services for Lot 121). In this situation, would Trillium not be entitled to register a lien for the full price notwithstanding the fact that the agreed-upon price is nearly eight times higher than the per brick price for the masonry services performed on Lot 121? Surely, the answer to this hypothetical question is "yes".

[46] The hypothetical demonstrates an important point: the fact that the Contract Price Provision breaks down the "price" for the lienable services to the outstanding balance plus the per brick price is not determinative of this motion. Instead, the Contract Price Provision is determinative of this motion because it reflects the parties' agreement on a price for the lienable service.

[47] In support of its position on this motion, Marydel relies on three decisions where liens have been discharged or reduced when the lien amount claimed included the price for non-lienable services: (1) *Carruthers*; (2) *John Barlot*; and (3) *Southdale Towers*. These decisions are distinguishable. None of these cases deal with a contract that includes an unpaid balance as part of the agreed-upon "price" for lienable services. A short summary of these decisions reveals this important distinguishing feature.

[48] Molloy J.'s decision in *Carruthers* arises from a motion brought by the City of Toronto opposing certification of a Master's construction lien report. In that case, the City of Toronto contracted with an architectural firm for architectural services in connection with renovations to an old-age home. Those services were not lienable under the *Construction Lien Act*, R.S.O. 1990, c. C.30 (see s. 3(4)). The architecture firm retained sub-consultants to assist in the renovation work.

[49] The architecture firm invoiced the City for a fee that included both the architecture firm's services (i.e. non-lienable services) and the sub-consultants' fees (i.e. lienable services). When the firm failed to pay the full amount of the sub-consultants' fees, the sub-consultants both registered a lien against the City and brought a civil action to enforce the lien.

[50] One of the issues before Molloy J. was whether the City was required to hold back 10 percent of the full amount paid to the architecture firm or 10 percent of the amount paid for the sub-consultants' services. Molloy J. found that the Master erred in finding that the City was required to hold back 10 percent of the full amount paid to the architecture firm. Instead, the City

was only required to hold back 10 percent of the amount paid for the lienable work conducted by the sub-consultants.

[51] In *John Barlot*, the issue before the Alberta Court of Appeal was whether the services provided by an architectural firm could support a lien. In that case, the owner hired an architect to provide services with respect to "rezoning, subdivision, and other development issues, for the preparation of construction documents, and for supervision during construction". The architect was to be paid a fee based on 4.5 percent of the cost of the project. The development did not proceed, and the owner terminated the architect.

[52] After being terminated, the architect sent the owner an invoice for services relating to "fees for preparing schematic design concepts and rezoning for the project". The total amount of this invoice was approximately $975,000.00. The invoice also included the architect's fees for preparing construction drawings for a sales centre that was built on the land that was to be developed. A few days after issuing the invoice, the architect registered a lien for the outstanding amount.

[53] The Alberta Court of Appeal found that the bulk of the work done by the architect related to rezoning and subdivision fees which were not lienable. The architect argued that it could "shelter" the non-lienable work under the lienable work done for the construction of the sales centre. The Alberta Court of Appeal rejected this argument, finding that the architect could not "shelter" a non-lienable claim under a lienable claim.

[54] In *Southdale Towers*, the owner of a property contracted with a company to provide property management services for one of its buildings. The owner paid the property management company to supervise repairs to units, rent units, enforce leases and purchase and supply appliances for the units. After the termination of the property management contract, the company registered a lien against the owner for unpaid services. On a motion to vacate the lien, Leitch J. found that the company was entitled to a lien for repairs and the supervision of repairs which were improvements to the premises. However, the company was not entitled to a lien for rental services, enforcing leases and purchasing and supplying appliances as those services were not "improvements" to the premises.

[55] In *Carruthers*, *John Barlot* and *Southdale Towers*, the liens were vacated or reduced because some of the underlying services supplied were not lienable. In those cases, there was a "price" for lienable services *and* a "price" for non-lienable services. The two prices were not incorporated into one price for lienable services. In the case at bar, the parties executed an agreement where the unpaid balance formed part of the "price" for lienable services. This "price" is what can be liened pursuant to s. 14(1) and s. 17 of the *Act*.

[56] Marydel also argues that accepting Trillium's argument could have profound effects on the construction lien regime. Specifically, it points to three consequences that flow from accepting Trillium's argument:

> (1) A party could secure virtually any debt with a lien, regardless of what the nature and extent of the debt actually was.

> (2) An agreement could be used to circumvent s. 48 of the *Act* which states that a discharge of a lien is irrevocable and cannot be revived. In support of this argument, Marydel relies on *Khalimov v. Hogarth*, 2015 ONSC 6244, 56 C.L.R. (4th) 167.
>
> (3) Other lien claimants could be prejudiced if one contractor "forwarded" a significant amount of old unrelated debt into a project and liened that forwarded debt. In that situation, the contractor who "forwarded" the debt could artificially increase their share of the available funds for minimal work, which would operate to the detriment of a contractor who did not engage in the same scheme.

[57] There is some merit to Marydel's policy concerns; however, they are largely speculative as they are premised on the unlikely event that an owner or general contractor would contract with a person to effectively revive expired or discharged liens.

[58] For example, in *Khalimov*, the primary issue was whether the owner owed a holdback to a subcontractor for services provided during a period of time leading up to the first lien being preserved. After discharging the first lien, the subcontractor preserved a second lien that purported to include a holdback amount for work provided before the first lien was preserved. In that case, Master Albert (as she then was) found that because the subcontractor had discharged the first lien, it could not claim a holdback for any services or materials supplied before and up to the date the first lien was preserved (paras. 32-34).

[59] Relying on *Khalimov*, Marydel argues that accepting Trillium's position would mean that a subcontractor who has already discharged a lien could enter into a fresh contract to supply nominal work to revive their lien rights. While this is a possibility, it remains remote. It would be a rare situation where an owner or general contractor would assist a subcontractor in reviving a lien that has been discharged. To do so would expose the owner or general contractor to greater liability.

[60] Similarly, it would be a rare situation where an owner would agree to "forward" a significant debt owed to a contractor and effectively revive an expired lien. Again, this would create more exposure for the owner in circumstances where the contractor had no right to forward the debt.

[61] In coming to this conclusion, I recognize that it appears unlikely that Marydel would agree to the Contract Price Provision, given that it significantly increased its exposure to Trillium in exchange for what amounted to $35,440.42 worth of services. Entering into this agreement seems especially improvident given that Trillium did not register liens for the outstanding balance and had not started an action for the outstanding balance. Ultimately, these factors may persuade a trial judge that Marydel did not agree to the Contract Price Provision. That, however, will be for the trial judge to decide.

[62] In light of the above, I find that Marydel's policy concerns are speculative. Put against these rare occurrences is the clear statutory language that permits the parties to agree to any price for lienable work they deem appropriate. If the *Act* was intended to interfere with the parties' freedom to contract, it would do so explicitly. It does not. As a result, Marydel's motion is dismissed.

**E. Costs**

[63] On the agreement of the parties, I order costs in favour of Trillium in the amount of $16,000.00, inclusive of H.S.T. and disbursements.

Released: July 16, 2025