

focus

Builders Lien Act

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FRASER MILNER CASGRAIN LLP

The British Columbia Court of Appeal released its reasons in the case of *Shimco Metal Erectors Ltd. v. District of North Vancouver*, 2003 BCCA 193 (Vancouver Registry No. CA029535) on March 26, 2003. This case has caused some controversy within the construction and banking industry because at the trial level (2002 BCSC 238 Vancouver Registry No. C995163), Mr. Justice Tysoe concluded that the *Builders Lien Act* contains two separate liens protecting the rights of unpaid contractors, subcontractors and workers. The first lien is available under section 2 of the present *Builders Lien Act* and basically is a lien as against the land interest of the owner. The second lien (and more controversial lien) is a separate and distinct lien as against the holdback monies to be held back by the various parties including the owner under the *Builders Lien Act*.

In this case, the District of North Vancouver (the "District") retained a contractor to construct a tennis facility on its lands. The contractor retained the plaintiff as a subcontractor to provide labour and materials in respect of this facility. The contractor ran into financial difficulties and a number of subcontractors were left unpaid. Seven of these subcontractors filed claims of builders liens against the land but only three of them "perfected" their liens by commencing an action and filing a certificate of pending litigation as against the lands within a year of their liens in accordance with the requirements of section 33(1) of the present *Builders Lien Act*. The District took the position that only the 3 claimants

who had in fact perfected their liens were entitled to share in the holdback retained by the District in respect of its contract with the insolvent contractor and the payment to these 3 claimants resulted in an excess holdback in the amount of approximately \$64,000 which the District claimed was available to it on account of deficiencies relating to its contract with the insolvent contractor.

At trial Mr. Justice Tysoe held that notwithstanding the fact that the plaintiff in these proceedings had failed to register a certificate of pending litigation against the lands within the time set out in section 33 of the *Builders Lien Act*, the fact that it had commenced an action within time and prior to the payout of the builders lien holdback was sufficient for it to establish its lien on the holdback amount.

Mr. Justice Esson in the unanimous decision of the Court of Appeal upheld Mr. Justice Tysoe's ruling and confirmed the existence in British Columbia of a lien against the builders lien holdback that is separate and distinct from the lien claimed against the owner's land under the *Builders Lien Act*. As such therefore in order for an owner or holder of a builders' lien holdback to be sure that the holdback funds can be released or otherwise distributed to claimants under the *Builders Lien Act*, the holder of the holdback funds will be required to not only conduct a land title search of the property on which the improvement is being constructed but also will have to conduct a search of the court registries

to determine whether a lien claimant has commenced an action in respect of a particular lien claim. The cases do not specifically address the point as to whether or not the action commenced by a claimant must specifically state that a claim of lien is being made as against the builders lien holdback. In most cases it is likely that lien claimants would simply plead a claim of lien without any specific language. In any event, it would appear that simply relying on whether the land title search discloses a certificate of pending litigation within the appropriate time limit is no longer sufficient.

Since the Court of Appeal recognizes the existence of a separate lien against the holdback this case also leaves open the possibility that a potential claimant might not even have to file a lien at all against the land as was the case here. It might simply commence an action and claim a lien against the holdback only. Therefore on a triggering event for the release of the holdback such as expiry of the 45 day period from the date of the Certificate of Completion by the payment certifier, it will be necessary not only to check title for this, but also to perform a court registry search. A difficulty may arise in such circumstances since an owner (or its bank) may not be aware of the identity of all potential lien claimants for court registry search purposes in order to ascertain whether the funds can be released. In these circumstances, an owner may wish to obtain an indemnity from the contractor to indemnify the owner for such potential lien claims against the holdback. Obviously this is an imperfect remedy which depends on the solvency of the contractor.

Please feel free to contact Bob Nikelski at Fraser Milner Casgrain LLP to further discuss the issues presented above or to clarify any possible concerns you may have regarding this decision and its implication to the banking and construction industry.

Bob is a partner in the Real Estate Group of the Firm as well as a member of the Firm's Construction Law Group. In the construction law context, Bob primarily represents developers in their dealings with regulatory agencies and contractors in the construction of residential and commercial development. He regularly advises his clients on construction contract issues and is fully familiar with the standard form construction

contracts used in Canada and British Columbia. Additionally, Bob regularly advises his clients on builders' lien issues and compliance. In this regard, he works with the commercial litigators within the Construction Law Group in the securing and removal of builders' liens filed during the construction process. In addition to acting for developers, Bob provides advice to engineering firms and contractors generally in respect of construction and builders' lien issues.

If you require further information or assistance in meeting your real estate development goals, please contact us at:



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