



SHIMCO LIEN LIVES ON

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On March 26, 2003, the Court of Appeal affirmed the trial level decision in *Shimco Metal Erectors*. This much anticipated decision puts the Appeal Court's weight behind the trial judge's finding that lien claimants are entitled to a second lien under the *Builders Lien Act*. That is, a lien against the holdback in addition to the traditional lien against the land.

The "Shimco Lien," which appears to owe its existence to sloppy legislative drafting rather than an expression of legislative intent, is a significant complication for owners attempting to achieve certainty at the conclusion of a construction project. Unlike a lien filed against the land, there is no practical method to determine whether a Shimco Lien has been asserted against the holdback prior to its payout. A filed, but unserved, writ of summons is probably sufficient to constitute a Shimco Lien. An owner who pays out a holdback fund in the face of such a lien, even where the owner has no notice of it, may be liable to that lien holder for what would have been that lien holder's proportionate share of the holdback.

There is no procedure in the Act governing what may constitute a Shimco Lien. A Shimco Lien may not even require the commencement of formal proceedings. In other words, a simple letter or perhaps even a telephone call to the owner asserting a Shimco Lien prior to pay out of the holdback funds may be sufficient to constitute a lien against the holdback.

More problematic still is that none of the extinguishment remedies provided for in the Act (such as sections 22, 23, and 33) appear to apply to Shimco Liens. The wording of those sections confine their application to "claims of lien" which the Court of Appeal affirmed is a term specific to land liens. Indeed, the definition of "claim of lien" found within the Act practically compels this conclusion.

Currently, the only limitation that appears to be on a Shimco Lien is that it must be asserted prior to the pay out of the holdback fund. Once the holdback is paid out, there is nothing for the holdback lien to attach and presumably, the Shimco Lien will then never come into existence.

Assuming the Act is not revised to either eliminate Shimco Liens all together or, alternatively, provide some mechanisms for their enforcement and extinguishment, the exact parameters of the Shimco Lien will have to be worked out by the courts on a case by case basis. At a minimum, the courts will hopefully import an actual notice requirement into the concept of a Shimco Lien. Clearly, it is unjust for owners to find themselves exposed to a Shimco Lien filed at a court registry prior to pay out of the holdback fund, but not served on the owner until sometime after the holdback fund was paid out.

For contractors who have inadvertently failed to file a land lien in time, the Shimco Lien may be a boon. A Shimco Lien holder has the same rights to participate in the proportionate pay out of the holdback fund as do land lien holders who filed their liens in time.

Stay tuned, the Shimco Lien provides an added dimension to builders' lien law in the province of British Columbia - one that will no doubt provoke further controversy and further litigation.

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