

NEW CASE RESHAPES THE “SHIMCO” LIEN AGAINST HOLDBACK

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The recent decision of the British Columbia Court of Appeal in *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26, has provided further guidance concerning the nature and scope of the *Shimco* lien against holdback.

Except for general contractors and others who contract directly with an owner, the remedy provided by the builders lien is to give a claimant a potential right to obtain payment from the holdback retained by the party two contractual steps above the claimant from the party one contractual step above.

The decision in *Shimco Metal Erectors Ltd. v. Design Steel Constructors Ltd.*, 2002 BCSC 238, affirmed by *Shimco Metal Erectors Ltd. v. North Vancouver (District)*, 2003 BCCA 193, revolutionized builders lien practice in British Columbia, by identifying an alternative method for a subtrade to assert a builders lien. Prior to *Shimco*, a lien claim could only be made by filing a Claim of Lien in the Land Title Office against the title to the improved property, within time limits triggered by substantial completion or other contractual events. *Shimco* recognized a subtrade's additional right to lien against holdback simply by commencing legal action pleading that claim at a time prior to the retaining party's release of holdback to the intermediate contracting party.

A basic issue for the *Shimco* lien is whether it amounts to an additional remedy or is merely an alternative method of asserting the same lien rights. The question is whether a *Shimco* lien could be maintained in a case where the retention of holdback was not mandatory because no Land Title Office lien could arise. Case authority to date has not determined whether *Shimco* rights can exist when no valid Claim of Lien can be or could have been filed or maintained against the project property; for example, in the absence of patented property title such as on Crown land or when the improved property is owned by the Federal Crown.

That issue has been addressed in part by the decision in *Wah Fai*, along with the parallel issue of the relationship of the *Shimco* lien with the enforcement of holdback liability.

It is a basic aspect of the *Builders Lien Act's* multiple holdback system that a party required to retain holdback will need to put up that amount from other sources if that party has not complied with its statutory duty to hold back 10% from construction advances. It was generally assumed that a subcontractor could use a *Shimco* lien claim to enforce the holdback liability of a party who should have retained holdback, regardless of whether that party had actually held back.

The *Wah Fai* decision establishes that the *Shimco* lien remedy does not apply if holdback is not actually in hand. The basis for that decision is that a lien, whether crystallized in the Land Title Office or the court registry, is an *in rem* remedy; that is, a claim against a thing rather than against a person. On that analysis, the Court confirmed that a builders lien must attach either to property or to an existing holdback in order to be enforceable:

...Nor can the *Act* be interpreted to provide that where there is no holdback, or a holdback has been wrongfully paid out, a person whose land lien has been extinguished may later commence proceedings to enforce a lien against a nonexistent holdback....

The *Act* does not provide for enforcement of a holdback lien where there has been no holdback, nor is there any reason to extend *Shimco* to that factual circumstance....

A lien is a right in rem. It must attach to property. In *Shimco* there was a holdback; there was property to which the holdback lien could attach. In this case... there was no holdback. The owners did not retain the money required to be retained by s.4. There was no property to which the lien could attach.

This clarification of the scope of the *Shimco* lien restricts its significance to instances in which holdback has been retained in the first instance and either remains in the hands of the retaining party or has been wrongfully released by that party despite its prior notice of the claimant's assertion of a *Shimco* lien. The *Wah Fai* decision specifies that claimants must look elsewhere in the *Builders Lien Act* to find recourse against a party who either never retained holdback or released it prior to the filing of a *Shimco* action.

The decision also partly addresses the basic issue of whether a *Shimco* lien can be maintained if a Land Title Office lien cannot. It is clear from *Wah Fai* that a *Shimco* lien can have no application when no builders lien holdback is retained because a project or property is exempt from a land lien. This leaves outstanding only the question whether a *Shimco* lien could be successfully claimed in the not uncommon situation in which a holdback is in fact retained despite uncertainty as to the lienability of the project or even when it is certain that no valid lien against the land can be filed.