



Owner's Holdback Account Off Limits to Subcontractor

The Supreme Court of British Columbia has ruled that when there are competing lien claims from subcontractors, no part of an owner's holdback fund can be released to any subcontractor until the values of all competing lien claims have been determined at trial

In its lengthy judgment in ***M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd. et al.***, issued September 30, 2005, BC's Supreme Court dealt with two motions from builders involved with construction of an arena in Victoria.

The first motion was brought by the structural steel subcontractor wanting summary judgment for payment of accrued holdback (\$312,000) plus the unpaid balance of his subcontract price (\$16,000). The subcontractor had liened for those amounts, and for a further \$816,000 for contested extras and delay costs. In its motion, the subcontractor also wanted a direction that all of this amount be paid out of the owner's holdback funds under s.9(1) of the Builders Lien Act. The second motion was brought by the general contractor, who wanted the lien cancelled under s.24 of the Act with only nominal security because of its own substantial counterclaim for delay damages. The general contractor also wanted a stay of execution if the subcontractor succeeded in getting judgment on the balance of the contract price.

The subcontract in question had been certified complete months earlier. The general contractor admitted the balance of the subcontract price was owing, but for the counterclaim and set-off. There were no other liens below this subcontractor, although there were other liens from parallel subcontractors.

The judge gave judgment on the subcontract price, and declined to order a stay (which he considered would have been "unjust" in the circumstances). However he adjourned the part of the motion that sought payment from the owner's holdback. Despite s.9(1) of the Builders Lien Act, which suggests that the general contractor and therefore the subcontractor should have had access to at least the holdback, the judge ruled that "[This subcontractor] is not entitled to any part of the holdback fund until the last of the lien claims is determined at trial." Otherwise, other lien claimants might be prejudiced by depletion of the pool of holdback money. He said that all other lien claimants must have notice, and be allowed to argue their entitlements based on s.37 of the Act.

On the subcontractor's inclusion of what the general objected to as "damages" in the lien amount, the judge said: "If the claims are for work performed or provided, or material supplied, or are so closely connected to them that it is reasonable and proper that they should be included in the statutory regime under the Builders Lien Act, they are properly the subject of a claim of lien ... The damages claimed by [the subcontractor] for extras and delay appear to me to be sufficiently connected with the work and material to be supplied by [the subcontractor] under its subcontract that an arguable case might be made for their inclusion in [the subcontractor]'s claim of lien." However, the judge found enough evidence to conclude that there was some merit to the counterclaim and therefore ordered security at only \$115,000 rather than the \$816,000 lien claim balance. He said this lower sum "fairly represents an amount which will do justice between the parties under s.24".

We would be pleased to answer subcontractors' enquiries about the M3 Steel case. Contact Bob Jenkins QC or Don Thompson in Vancouver at 604 681.6564 or by e-mail to bjenkins@jml.ca.