

## **Trust Provisions of the Construction Lien Act**

Builders, subcontractors and suppliers should be aware of the trust provisions of the *Construction Lien Act* ("CLA") because these provisions may apply whether or not a claim for lien has been made.

Recent case law has established important precedent for dealing with claims made for breach of trust that builders/subcontractors and suppliers should understand.

Specifically, subcontractors and suppliers should know that if they provide work or materials to a builder, they must to be able to trace what was provided and establish that such work or materials were part of the improvement of a particular home or building (i.e. a specific project).

If they can establish that the work and material supplied by them led to an improvement, they can sue the builder and its principals for breach of trust in the event they are not paid. If they are unable to show their goods or services led to a specific improvement, they cannot sue for breach of trust, but only as a trade creditor.

The trust provisions of the C.L.A. in essence, allow suppliers and trades to pierce the corporate veil of the builder/developer and permit trades and suppliers to make a claim against the builder as well as the principals of the company in their personal capacities.

However without being able to link suppliers, materials or work to a specific improvement in the construction process, trades and suppliers can only make a creditor's claim if they are not paid. If however a trust is established, they have a unique priority, as they are entitled to a trust claim against the builder and the principals.

To establish such unique trust priorities, suppliers and tradesmen must ensure that they do the following:

- specify in their invoices where the goods/services are going (the specific distribution)
- having sued the builder, require production of bank statements, cancelled cheques, purchase orders, change notices, invoices and deposit slips to confirm the funds being spent are from construction advances.

The above evidence can confirm the extent to which a builder may have improperly spent trust monies, thereby entitling tradesmen/suppliers to a trust claim and judgment.

In order for builders to avoid breaches of trust they must:

- segment bank accounts to each project or home
- earmark funds for each specific construction improvement
- avoid co-mingling of payment of expenses from account to account or company to company (this breaches the trust and makes the builder liable)

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