

Development will be defined to include:

- the erection of a building or the undertaking of which would have an irreversible impact on the heritage values of listed properties;
- the rebuilding, enlargement, extension of a building or work, or the placing or relocating of a building on a listed property.

Owners will be required to ensure that listed properties are maintained in a state of repair at least comparable to that applying at the same time of introduction of the Act.

Appeal Rights

No announcement has been made regarding appeal rights during the transitional period until the Act is proclaimed, although the Minister has said that full objection and appeal procedures will be included in the Act.

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PROTECTING SUBCONTRACTORS AGAINST THE INSOLVENCY OF THE MAIN CONTRACTOR

- Philip Davenport

The recent financial collapse of some large contractors highlights yet again the plight of subcontractors. Frequently the situation is that a subcontractor has done work or supplied materials and prior to payment the main contractor becomes insolvent. Then a bank may appoint a receiver pursuant to a charge given, perhaps years earlier, by the contractor to the bank to secure an overdraft. The receiver collects payment from the Principal for the work or materials and pays the moneys to the bank, leaving the subcontractor unpaid. A recent Canadian case illustrates an approach which protected the subcontractors in such a situation. It seems that it would be in the interests of both subcontractors and Principals to explore whether Australian States should introduce legislation similar to that in Canada.

The case is *Canadian Commercial Bank v. Simmons Drilling Ltd* [1989] 62 D.L.R.[4th] 243. The legislation which protected the subcontractors was the Builders' Lien Act, S.S. 1984-85-86, the relevant parts of which are:

7(1)

All amounts:

- (a) owing to a contractor, whether or not due or payable; or
- (b) received by a contractor; on account of the contract price of an improvement constitute trust fund for the benefit of:
 - (c) subcontractors who have sub-contracted with the contractor and other persons who have provided materials or services to the contractor for the purpose of performing a contract; and
 - (d) labourers who have been employed by the contractor for the purpose of performing the contract.

- (2) The contractor is the trustee of the trust fund created by subsection (1) and he shall not appropriate or convert any part of the trust fund to his own use or to any use inconsistent with the trust until all persons for whose benefit the trust is constituted are paid all amounts related to the improvement owed to them by the contractor.

15. In addition to any other priority which a beneficiary of a trust constituted by this Part may have in law, a beneficiary has priority over all general or special assignments, security interests, judg-

ments, attachments, garnishments and receiving orders, whenever received, granted, issued or made, of or in respect of the contract or subcontract price or any portion of the contract or subcontract price.

- 19(1) On the expiry of one year after the contract is completed or abandoned:
- (a) a person who is a trustee under this Part is discharged from his obligation as trustee; and
 - (b) no action to enforce the trust may be commenced.

In plain English, the legislation means that out of moneys received from the Principal a contractor must pay the subcontractors and suppliers on the project before the contractor pays the contractor's directors or other creditors, including the bank. Contractors may resist the introduction of such legislation because it may make it more difficult for a contractor to obtain overdraft facilities to finance a project. As the law stands, banks rely upon the fact that, when a contractor becomes insolvent, a bank with a charge over the assets of a contractor has priority over subcontractors. The reason why the Canadian legislation is effective is that the moneys received from the Principal are not assets of the contractor until all subcontractors are paid.

The legislation also protects workers and, indirectly, Principals who often have to pay workers or subcontractors to get the work recommenced. While there are measures designed to alleviate the plight of workers (e.g. in N.S.W. s.92(5) of the Industrial Arbitration Act 1940 and the Contractors Debts Act 1897) and workers have priority in a bankruptcy, it is only in Queensland that there is legislation specifically aimed at protecting subcontractors. The Queensland Subcontractors' Charges Act 1974 has given rise to much litigation and is not generally considered a model to follow. It would be interesting to discover more about the Canadian experience.

In the Canadian case the receiver was unaware of the claims of certain subcontractors until after the expiration of the one year referred to in s.19(1) of the Builders' Lien Act. In the light of the provisions of s.19, the receiver applied to the court for advice and directions on whether the bank or the subcontractors owned moneys received by the receiver. The receiver and the bank argued that the onus was on the subcontractors to assert their claims, rather than the receiver to discover them. However, the Saskatchewan Court of Appeal took a different view and held that when the receiver received moneys he did so as a trustee and the receiver had a duty to discover the claims of the subcontractors within a reasonable time. The failure to make payment to the subcontractors was a breach of the statutory obligation of the receiver and the Court ordered the receiver to pay the subcontractors from the funds received on account of the appropriate contract.

It would be possible to incorporate in a construction contract a provision similar to that in the Canadian Act. The form of Project and Construction Management Agreement in [1989] 2 Australian Construction Law Newsletter p.18 includes a trust fund, but the material difference is that the liability to the subcontractors in that form of agreement is that of the Principal not the Manager. However, there seems to be no reason why the contractor could not by a special condition in any form of contract be constituted a trustee for subcontractors. To counter the challenges that may be mounted by secured creditors, it would be preferable to have legislation to reinforce the trust arrangement. Direct payment provisions have been used for many years to protect nominated subcontractors and there appears to have been no case in which the effectiveness of the provisions have been challenged.