Court File No. CV-16-011354-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

BRIEF OF AUTHORITIES OF THE MOVING PARTY

December 1, 2017

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street W, Suite 1200
Toronto, Ontario M5H 2M5

Fred Tayar (23909N)

Tel.: (416) 363-1800
Fax: (416) 363-3356

Lawyers for Eco Energy
Home Services Inc.

TO: **TORKIN MANES LLP**
151 Yonge Street, Suite 1500
Toronto, Ontario M5C 2W7

Stewart Thom

Tel. (416) 863-1188
Fax. (416) 863-0305

Lawyers for the Court-Appointed
Receiver, Collins Barrow Toronto Limited

AND TO: SERVICE LIST

SERVICE LIST

TO: **BLANEY MCMURTRY LLP**
Barristers & Solicitors
2 Queen Street E.
Suite 1500
Toronto, ON M5C 3G5

Reeva M. Finkel
rfinkel@blaney.com

Tel: (416) 593-3959 (Direct)
Fax: (416) 593-5437

Lawyers for the Applicant,
2292912 Ontario Inc.

AND TO: **CHAITONS LLP**
Barristers & Solicitors
5000 Yonge Street
10th Floor
Toronto, ON M2N 7E9

Maya Poliak
maya@chaitons.com

Tel: (416) 218-8080 ext.1161
Fax: (416) 222-8402

Lawyers for BuiltRite Technologies Inc.

AND TO: **KAGAN SHASTRI LLP**
Lawyers
188 Avenue Road
Toronto, ON M5R 2J1

David Winer
dwiner@kslip.ca

Tel: (416) 368-2100 ext 225
Fax: (416) 324-4202

Lawyers for 2383603 Ontario Inc. and William Fong

AND TO: **OSCAR C. WONG PROFESSIONAL CORPORATION LAWYERS**
Barristers & Solicitors
330 Highway 7 East
Suite 503
Richmond Hill, ON L4B 3P8

Oscar Wong
ocwlaw@rogers.com

Tel: (905) 881-2992
Fax: (905) 881-8856

Lawyers for Atlantic Advantage Management Inc. and Atlantic (HS) Capital Inc.

AND TO: **ADVOCATES LLP**
Barristers and Solicitors
One London Place
255 Queens Avenue
16th Floor
London, ON N6A 5R8

Jeff Van Bakel
J.VanBakel@advocatesLLP.com

Tel: (519) 858-8220, Ext. 246
Fax: (519) 858-0687

Lawyers for Fan Xiao Bing a.k.a. Angela Fan

AND TO: **MARIO IACOBELLI**
22 Goodmark Place, Unit 6
Toronto, ON M9W 6S2

AND TO: **GINA IACOBELLI**
22 Goodmark Place, Unit 6
Toronto, ON M9W 6S2

AND TO: **GIACOMO FRANCESCONI**
c/o Schneider Ruggiero LLP
Barristers & Solicitors
120 Adelaide Street W.
Suite 1000
Toronto, ON M5H 3V1

Attention: George Ruggiero
gruggiero@srlawpractice.com

AND TO: **G & L CARPENTERS LIMITED**
c/o Schneider Ruggiero LLP
Barristers & Solicitors
120 Adelaide Street W, Suite 1000
Toronto, ON M5H 3V1

Attention: George Ruggiero
gruggiero@srlawpractice.com

AND TO: **MERCEDES FRANCESCONI**
c/o Schneider Ruggiero LLP
Barristers & Solicitors
120 Adelaide Street W, Suite 1000
Toronto, ON M5H 3V1

Attention: George Ruggiero
gruggiero@srlawpractice.com

AND TO: **RENATO FRANCESCONI**
c/o Schneider Ruggiero LLP
Barristers & Solicitors
120 Adelaide Street W, Suite 1000
Toronto, ON M5H 3V1

Attention: George Ruggiero
gruggiero@srlawpractice.com

AND TO: **LUCIEN CARPENTERS LIMITED**
c/o Schneider Ruggiero LLP
Barristers & Solicitors
120 Adelaide Street W, Suite 1000
Toronto, ON M5H 3V1

Attention: George Ruggiero
gruggiero@srlawpractice.com

AND TO: **CASSELS BROCK & BLACKWELL LLP**
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Attention: David Ward
dward@casselsbrock.com

Tel.: (416) 869-5960
Fax: (416) 640-3134

Lawyers for the City of Mississauga

AND TO: **PROFILEX INC.**
c/o Ernesto Alvarez
594 Newpark Boulevard
Newmarket, ON L3X 2S2

AND TO: **GARTH LOW**
Barrister
70 Bond Street, Suite 200
Toronto, ON M5B 1X3

Garth.low@garthlow.com

Tel.: (416) 365-9320
Fax: (416) 365-0695

Lawyers for Christophere Ho and
Ho and Associates Consulting Group Inc.

info@cnkhcanada.com

AND TO: **BAY POINT FINANCIAL SERVICES INC.**
125 Park Ridge Drive
Kleinburg, ON L0J 1C0

AND TO: **DEPARTMENT OF JUSTICE**
Attn: Diane Winters
The Exchange Tower
130 King Street W, Suite 3400, P.O. Box 36
Toronto, ON M5X 1K6

diane.winters@justice.gc.ca

AND TO: **MINISTRY OF FINANCE**
Legal Services Branch
33 King Street W, 6th Floor
Oshawa, ON L1H 8E9

Kevin J. O'Hara
kevin.ohara@fin.gov.on.ca

Tel: (905) 433-6934
Fax: (905) 436-4510

Court File No. CV-16-011354-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

INDEX

2010 ONSC 636
Ontario Superior Court of Justice [Commercial List]

Royal Bank v. Penex Metropolis Ltd.

2010 CarswellOnt 464, 2010 ONSC 636, [2010] O.J. No. 362, 184 A.C.W.S. (3d) 602, 95 C.L.R. (3d) 199

ROYAL BANK OF CANADA (Applicant) and PENEX METROPOLIS LTD., in its capacity as general partner of, and as nominee and trustee of and for, METROPOLIS LIMITED PARTNERSHIP, and METROPOLIS LIMITED PARTNERSHIP (Respondents)

Cameron J.

Heard: January 19, 2010
Judgment: January 29, 2010
Docket: CV-09-8157-00CL

Counsel: Fred A. Platt for Cambria Construction Management
Michael J.W. Round for Plan Group Inc.
Raymond M. Slattery for Ernst & Young Inc., in its capacity as interim receiver and receiver and manager of all of the assets, undertaking and properties of Penex Metropolis Ltd. in its capacity as general partner of, and as nominee and trustee of and for, Metropolis Limited Partnership, Metropolis Limited Partnership
Liz Pillon for EPR Metropolis Trust, a secured party
J. Davis Sydor for Van Wagner Communications Canada

Subject: Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

Headnote

Construction law --- Construction and builders' liens — Trust fund — General principles

Company built mixed-use entertainment complex — Supplier supplied work and materials to project — Supplier completed its work on February 11, 2009 — Electrical contractor supplied electrical work to project — Electrical contractor completed its work on April 18, 2009 — Interim receiver was appointed in respect of company on April 27, 2009 — Supplier filed construction lien on May 5, 2009 for $154,916.17 — Electrical contractor filed lien for $80,414.41 on May 28, 2009 — Receiver refused to issue certificates of substantial completion to supplier and electrical contractor — Supplier and electrical contractor brought motions for declaration that contracts were substantially performed, that monies were owing and that they were each beneficiaries of trust — Motions granted — Section 7(3) trust created by Construction Lien Act applied to completed contracts as well as to substantially completed contracts — Trustee could not avoid trust by refusing to certify substantial completion of contract — If any amount remained unpaid on contract, contract was outstanding — Contractor must be free to apply to court for declaration of substantial completion even if lien rights had expired — Statutory trust arose on court declaration of substantial completion.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Date order effective

Company built mixed-use entertainment complex — Supplier supplied work and materials to project — Supplier completed its work on February 11, 2009 — Electrical contractor supplied electrical work to project — Electrical contractor completed its work on April 18, 2009 — Interim receiver was appointed in respect of company on April 27, 2009 — Supplier filed construction lien on May 5, 2009 for $154,916.17 — Electrical contractor filed lien for $80,414.41 on May 28, 2009 —

Receiver refused to issue certificates of substantial completion to supplier and electrical contractor — Supplier and electrical contractor brought motions for declaration that contracts were substantially performed, that monies were owing and that they were each beneficiaries of trust — Motions granted — Section 7(3) trust created by Construction Lien Act applied to completed contracts as well as to substantially completed contracts — Trustee could not avoid trust by refusing to certify substantial completion of contract — If any amount remained unpaid on contract, contract was outstanding — Contractor must be free to apply to court for declaration of substantial completion even if lien rights had expired — Statutory trust arose on court declaration of substantial completion.

MOTIONS by supplier and electrical contractor for declaration that contracts were substantially performed, that monies were owing and that they were each beneficiaries of trust.

***Cameron J.*:**

Orders

1 This is a motion:

a) on behalf of Cambria Construction Management ("Cambria") for a declaration that under s. 32(1) 7 of the *Construction Lien Act* ("*CLA*")

i) 10 of its construction contracts with Penex Metropolis Ltd. in its capacity as general partner of, and as nominee and trustee of and for, Metropolis Limited Partnership, and Metropolis Limited Partnership ("Penex") have been substantially performed (with which Penex's receiver agrees),

ii) that the unpaid price of the substantially performed portions of these 10 construction contracts (following the application of certain credits) is $154,916.17, and

iii) that Cambria is a beneficiary of the trust created under section 7(3) of the *CLA* over the money that was in Penex's hands when Ernst & Young Inc. (hereinafter "Ernst & Young") was appointed as Penex's Interim Receiver under s. 47(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and receiver under s. 101 of the *Courts of Justice Act* ("*CJA*") (the "Receiver") and also over the money that Ernst & Young holds and received and will receive on behalf of Penex and that otherwise was or would be payable to Penex following Ernst & Young's appointment as Penex's receiver.

b) on behalf of Plan Group Inc. ("Plan") for a declaration that under s. 32(1) 7 of the *CLA*:

i) its contract with Penex has been substantially performed;

ii) Penex owes Plan $80,414.41 for the work that it performed under the contract;

iii) Plan is a beneficiary of the statutory trust created by section 7(3) of the *CLA* over the money held by Ernst & Young as the Receiver of Penex.

Facts

2 Penex constructed a 13 floor mixed use entertainment complex at the north-east corner of Dundas St. and Yonge St., in Toronto (the "Project"). The major tenants include Future Shop, AMC Theatres, Extreme Fitness, Shoppers Drug Mart, Milestone's Restaurant and Adidas. Penex was a self-financing owner.

3 On April 27, 2009 Ernst & Young was appointed Receiver of Penex (the "Appointment Order").

4 Royal Bank of Canada ("RBC") as lead in a syndicate is owed approximately $122 million secured against the assets. EPR Metropolis Trust ("EPR") is second secured creditor being owed $145 million. Two additional secured creditors are a union pension fund in the amount of $16 million and the City of Toronto in the amount of $9 million.

5 The Receiver has undertaken a sale process with the assistance of Brookfield Financial Real Estate Group Limited ("Brookfield") as approved by various Orders of the Court. A sale agreement has been entered into and a motion on January 28, 2010 is scheduled for approval of the transaction.

Cambria

6 Cambria contracted under 10 prevenient contracts to provide work and materials to the Project. It completed its work on February 11, 2009 and its work is now being used.

7 Following the Appointment Order it filed a construction lien on May 5, 2009, for $154,916.17, substantially beyond the 45 day period for preserving liens. It purported to perfect its claim but has taken no further steps in view of the Appointment Order. There is no dispute concerning the amount owing. It notified the Receiver of its claim. There was no payment certifier named in the contract.

8 On November 26, 2009 it requested a certificate of substantial completion but the Receiver refused.

Plan

9 Plan, an electrical contractor, contracted under a prevenient contract to supply electrical work to the Project. It completed its work on April 18, 2009 and the work is now being used. It filed a lien for $80,414.41 on May 28, 2009.

10 It gave notice to the Trustee of its intent to assert a trust under s. 7(3) of the *CLA* and filed an action for its lien on July 16, 2009.

11 There was no payment certifier named in the contract. On January 5, 2010 it requested a certificate of substantial completion but the Receiver refused. There is no dispute concerning the amount owing.

Discussion

12 Cambria and Plan ask that I grant a declaration of substantial completion *nunc pro tunc* as of the date of request for a declaration but certainly prior to the approval of a distribution of the proceeds of a sale transaction.

13 The Applicants argue that the money is subject to the statutory trust in s. 7(3) of the *CLA*, including rental payments but not including proceeds of any sale of the Project, which was, is or may come into the Receiver's possession on and after his appointment and after giving him notice of the claim. This is not a bankruptcy and he receives the money in trust for Penex. It remains Penex's money after the appointment of the Receiver. The *CLA* recognized that as between the trust claimants and the secured creditors the suppliers to the Project are to be preferred.

14 The Receiver acknowledges that the lien rights are independent of the trust rights. He argues that the contracts were totally completed before any request for a substantial completion certificate. Total completion trumps substantial completion and it is now too late to ask the Receiver to certify substantial completion. If there is no certificate of substantial completion under s. 32(1) 1 of the *CLA* there can be no s. 7(3) trust, particularly where no payment certifier is specified. Prevenient contracts can never have a trust claim because substantial performance is not possible.

15 I disagree with the Trustee's position. There is nothing limiting the time for a motion to the court under s. 32 to declare a contract substantially complete. If any amount remains unpaid under the contract, the contract is outstanding. If you have completion you must have had a prior substantial completion. The s. 7(3) trust applies to completed contracts as well as substantially completed contracts. The owner or Trustee cannot avoid the s. 7(3) trust by refusing to certify substantial completion. The contractor must be free to apply to the court for a declaration, whether the lien rights have expired or not.

16 The s. 7(3) statutory trust arises on agreement or court declaration of substantial completion: *Anden Vinyl Products Ltd. v. Gauss*, 1976 CarswellOnt 919 (Ont. Co. Ct.), cited with approval in *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*, 1998 CarswellOnt 4646 (Ont. Gen. Div.). Money then in the owner's hands or thereafter received becomes subject to the trust (s. 32(1) 8).

17 There will be a practical limitation where a Trustee and a sale is involved. Once the claim for an amount has been made to the Trustee, right to a trust claim for money must be made before an order for distribution of the sale proceeds or it will not succeed.

18 A lien claim is a claim for property rights and so will take priority.

19 The Project sale has not yet been approved. The claim for a trust interest is not too late.

Declaration

20 The declarations for: (1) substantial performance, (2) the amounts owing and (3) that Cambria and Plan are beneficiaries of the s. 7(3) trust to the extent of moneys held by the Receiver, are granted, effective January 19, 2010.

Costs

21 If costs cannot be agreed, Applicants are to make submissions within 15 days and the Respondent within 10 days thereafter.

Motions granted.

End of Document

CARSWELL

THE 2017 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

THOMSON REUTERS

ıg some value through a restructuring by em-
he corporation into bankruptcy. In the event it
eld that it has the inherent jurisdiction under
proposal in order to prevent one shareholder,
ıring that is in the best interests of all stake-
ital Ltd. (2005), 2005 CarswellOnt 1963, 10
al granted (2005), 2005 CarswellOnt 1834,
ıt. C.A. (In Chambers)).

ıt Purchaser

ale is null and void and title remains in the
142 (Ont. Reg.).

id into court prior to bankruptcy and who is
s, see F§165(11) "Payment of Money into

ıf Compensation or Restitution in

nce as bail is not given as a guarantee to
; or her criminal trial. The forfeiture of the
of the Crown: *Re Gross* (1931), 12 C.B.R.

bankrupt, a restitution order should direct
the trustee for distribution to all creditors:
3.R. (N.S.) 56; affirmed on other grounds

3enefits

ension benefits are not subject to execu-
ır alienated. By s. 67(1)(b), pension bene-
the bankrupt divisible among creditors.
can the trustee demand the collapsing or
krupt: *Bonus Finance Ltd. v. Smith*, 16
(3d) 544 (S.C.); *Re Pearce* (1985), 56
e (1988), 72 C.B.R. (N.S.) 255, 93 A.R.
Life Assurance Co. (1985), 58 C.B.R.
.R. (3d) 315, 108 D.L.R. (4th) 704, 116

s are assets of the bankrupt estate, save
'alldorsson (1993), 18 C.B.R. (3d) 143,
.B.R. (3d) 238 (Ont. Gen. Div.). In *Re*
27 (Q.B.). Registrar Herauf of the Sas-
ıw *Re Halldorsson* and *Re Burton* and
ion Plan were exempt from seizure but

A payment to a bankrupt relating to a surplus in a pension plan that is governed by the *Pension Benefits Standards Act, 1985* (Canada) constitutes income of the bankrupt that is therefore subject to s. 68 of the *BIA*, since the bankrupt regularly received payments from the pension plan, the surplus payment was just another payment to which the bankrupt was entitled by virtue of being a plan beneficiary and the provenance of the surplus payment was in remuneration for past labour: *Re Ruelland* (2005), 2005 CarswellNS 334, 14 C.B.R. (5th) 101 (N.S. S.C.).

A paper mill made an assignment in bankruptcy and the pension plans for employees were underfunded. The Province amended the distribution formula of the funds to apply retroactively, which had the effect of returning voluntary contributions to payors, continuing existing pensions for a fixed period, returning contributions of those entitled to benefits but not receiving a pension, and then returning the commuted value of the pensions. The New Brunswick Court of Appeal held that the amendments did not violate s. 7 or 15 of the *Charter* as the amendments eliminated certain benefits enjoyed by those over age 55 but they were still in an advantageous position as they had greater commuted value in the pensions; loss of a single advantage in the pension scheme did not turn the members into a disadvantaged group: *Melanson v. New Brunswick (Attorney General)* (2007), 2007 CarswellNB 79, 2007 CarswellNB 80, 29 C.B.R. (5th) 114 (N.B. C.A.); leave to appeal to S.C.C. refused (2007), 2007 CarswellNB 464, 2007 CarswellNB 465 (S.C.C.).

The New Brunswick Labour and Employment Board dealt with the same issue in the sar case in a human rights complaint by numerous employees. The administrator appointed the pension regulator had notified employees that a regulation made under the New Bru wick *Pension Benefits Act* specified that only those employees over age 55 would be entit to receive pensions, whereas those under age 55 were entitled to only their contributions p interest. The regulatory scheme was subsequently changed and the new regulation altered age-based distribution model to a *pro rata* share model, applying it retroactively. The bo held that the old regulation discriminated on the basis of age, contrary to the *Human Rig Act*, and that it had resulted in a loss of human dignity, meeting the factors regarding de of human dignity: pre-existing disadvantage, correspondence between the ground of dist tion and the actual needs and circumstances of the affected group; the ameliorative purp or effect of the impugned measure; and the nature and scope of the interests affected. board held that the administrator was providing a "service available to the public" admi tering the regulatory scheme. While the application for special damages was dismissed board awarded $3,000 in general damages to each complainant in recognition of the lo dignity and self respect caused in part by the angst associated with loss of pensions a same time as job loss: *Blair v. New Brunswick (Human Rights Commission)* (2008), CarswellNB 638, 51 C.B.R. (5th) 143 (N.B. Labour & Employment Bd.).

For a discussion of RRSP exemptions, see F§92 "Registered Retirement Savings Plan

See Ronald B. Davis, "Doomed to Repeat History? Retiree Benefits and the Reform of Canada's Insolvency Laws", *Annual Review of Insolvency Law, 2004* (Carswell, 2005) 199–242.

F§73 — Rule in *Ex parte James*

(1) — Generally

In *Re Condon* (1874), 9 Ch. App. 609, [1874–80] All E.R. Rep. 388 (C.A.), money was paid to a trustee under a mistake of law. In ordering the trustee to repay the money, the court held that the trustee, as an officer of the court, should do the fullest equity, and even if the trustee has a legal right to property, the court will not permit it to exercise that right if it would be inconsistent with natural justice to do so. This is known as the rule in *Ex parte James*. The

rule is a prerogative of mercy reposing in the bankruptcy court to alleviate cases of unusual hardship in which an adherence to strict legal or equitable rights would work a manifest injustice: *Re McDonald* (1971), 16 C.B.R. (N.S.) 244, [1972] 1 O.R. 363, 23 D.L.R. (3d) 147 (S.C.).

The rule is not restricted to cases of mistake of law but applies where the bankrupt estate has been enriched, and there is an element of unfairness in the trustee's insistence on its strict legal rights in retaining the enrichment: *Re Stormont Chemicals Ltd.* (1993), 20 C.B.R. (3d) 188 (Ont. Gen. Div.).

For the rule to apply, the following conditions must be met:

(1) The bankrupt estate must have been enriched or could be enriched at the expense of the person making the claim: *India (Minister of Finance) v. Taylor*, [1955] A.C. 491 (H.L.); *Re M.C.C. Precision Products Ltd.* (1972), 17 C.B.R. (N.S.) 28, [1972] 2 O.R. 825, 27 D.L.R. (3d) 4 (S.C.).

(2) In most cases, the claimant must not be in a position to file a proof of claim in the bankruptcy: *Re Clark*, [1975] 1 All E.R. 453, [1975] 1 W.L.R. 559; *Re Gozzett*, [1936] 1 All E.R. 79, 80 Sol. Jo. 146 (C.A.).

(3) To allow the trustee to retain the enrichment would be unfair and unjust. The court will not lend assistance to or encourage the trustee in any transaction that would result in a dishonest or unjust advantage being obtained by the bankrupt estate that would be inconsistent with natural justice: *Re Taylor Estate*, 7 C.B.R. 550, 30 O.W.N. 90, [1926] 2 D.L.R. 877 (S.C.).

(2) — Cases Where the Rule has been Applied

In *Re McDonald* (1971), 16 C.B.R. (N.S.) 244, [1972] 1 O.R. 363, 23 D.L.R. (3d) 147 (S.C.), a bankrupt had been given a conditional discharge on terms that he paid a certain sum of money to the trustee. He paid all the money except for $1.00. He died leaving a sizeable insurance policy payable to his estate. Since the discharge of the bankrupt was not complete, the trustee claimed the proceeds of the insurance policy. The court applied the rule in *Ex parte James* and directed the trustee not to collect the proceeds of the policy but to permit them to be paid to the family of the deceased bankrupt.

In *Re Stormont Chemicals Ltd.* (1993), 20 C.B.R. (3d) 188 (Ont. Gen. Div.), through a slip, a company that was indebted to the debtor paid the debtor the amount owing and also honoured a garnishee that had been issued against the debtor by paying the same amount to the sheriff. The debtor filed an assignment in bankruptcy, and the trustee obtained from the sheriff the money that had been paid. If the trustee had been permitted to retain the money, the company would, in effect, have paid the bankrupt twice for the same debt. The court applied the rule in *Ex parte James* and ordered the trustee to return the money to the company.

The rule in *ex parte James* generally provides that a court-appointed officer need not insist on strict legal rights where it would result in an unjust enrichment of the estate. The registrar of the New Brunswick Court of Queen's Bench noted that the principles underlying *ex parte James* are founded in the court's equitable jurisdiction and are based in fairness or natural justice. Although this rule has not been extensively applied in the field of bankruptcy, the registrar noted that it has been applied in jurisdictions throughout Canada. The courts have found that (a) the bankrupt estate must have been enriched or could be enriched at the expense of the person making the claim; (b) in most cases, the claimant must not be in a position to file a proof of claim in the bankruptcy; and (c) to allow the trustee to retain the enrichment would be unfair and unjust. The court will not lend assistance to or encourage the

2010 ONCA 198
Ontario Court of Appeal

Sunview Doors Ltd. v. Academy Doors & Windows Ltd.

2010 CarswellOnt 1450, 2010 ONCA 198, [2010] O.J. No. 1043, 101 O.R. (3d) 285, 186 A.C.W.S. (3d) 605, 265 O.A.C. 363, 317 D.L.R. (4th) 471, 63 C.B.R. (5th) 159, 87 C.L.R. (3d) 163

Sunview Doors Limited (Plaintiff / Respondent) and Academy Doors & Windows Ltd., Vlasis Pappas, Vlasios Pappas and Olympia O'Brien (Defendants / Appellants)

Karen M. Weiler, John Laskin, J.C. MacPherson, J. MacFarland, Gloria J. Epstein JJ.A.

Heard: September 22, 2009
Judgment: March 16, 2010
Docket: CA C50006

Proceedings: affirming *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2008), 300 D.L.R. (4th) 153, 74 C.L.R. (3d) 176, 241 O.A.C. 212, 47 C.B.R. (5th) 303, 2008 CarswellOnt 5780 (Ont. Div. Ct.); reversing *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2007), 63 C.L.R. (3d) 219, 2007 CarswellOnt 3096 (Ont. S.C.J.); and reversing *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2007), 2007 CarswellOnt 4197 (Ont. S.C.J.); additional reasons to *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2007), 63 C.L.R. (3d) 219, 2007 CarswellOnt 3096 (Ont. S.C.J.); additional reasons at *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2007), 2007 CarswellOnt 5340 (Ont. S.C.J.)

Counsel: Mauro Marchioni, Brent Pearce for Appellants
Michael A. Handler, Giovanna M. Paolucci for Respondent

Subject: Contracts; Corporate and Commercial; Estates and Trusts; Property; Insolvency; Civil Practice and Procedure

Headnote

Construction law --- Construction and builders' liens — Trust fund — Beneficiaries of trust

Plaintiff supplier manufactured and sold custom-made patio doors to defendant subcontractor — Doors were for specific improvements but supplier did not know location of improvements where doors were installed — Subcontractor failed to pay for nine orders of doors and went out of business — Supplier commenced action for breach of contract against subcontractor and for breach of trust against directors and officers and employee of subcontractor — Trial judge found that supplier was not entitled to benefit of statutory trust in s. 8(1) of Construction Lien Act — Trial judge held that supplier could not establish that, at time it sold or supplied doors to subcontractor, it intended that they be used for known or identified improvements — Supplier successfully appealed — Divisional court gave judgment against individual defendants for breach of trust in amount of $58,244.62 — Defendants appealed — Appeal dismissed — Supplier was entitled to benefit of s. 8(1) statutory trust — Reference in s. 8(1) to creation of trust fund for benefit of persons who have supplied services or materials to improvement generally requires that link be made between materials supplied and improvement — However, nothing in wording of section required that supplier intend that material be incorporated into known and specific improvement at time of sale or supply — Link between materials and improvement was established in this case because of subcontractor's conduct in deliberately frustrating supplier's attempts to obtain disclosure that would enable it to link its products to improvements — This interpretation best promoted purpose of s. 8 and object of Act — Having regard to custom nature of doors supplied by supplier and type of work done by subcontractor, there was no question supplier supplied "materials" to "improvements" on which subcontractor did work.

Construction law --- Construction and builders' liens — Trust fund — General principles

Plaintiff supplier manufactured and sold custom-made patio doors to defendant subcontractor — Defendant employee was sister of subcontractor's director — Employee did not have signing authority, but handled company's accounts

payable and receivable and payroll, reconciled company's accounts and prepared cheques — Subcontractor paid employee approximately $150,000 in excess of her regular annual salary — Subcontractor failed to pay for nine orders of doors and went out of business — Supplier commenced action for breach of contract against subcontractor and for breach of trust against individual defendants under ss. 8 and 13 of Construction Lien Act — Trial judge found that supplier was not entitled to benefit of statutory trust in s. 8(1) of Act — Trial judge stated that evidence raised strong suspicions that individual defendants had run subcontractor into ground with intention of opening new business under employee's name — Supplier successfully appealed — Divisional court gave judgment against individual defendants for breach of trust in amount of $58,244.62 — Divisional court held employee personally liable for subcontractor's breach of trust — Divisional court found that employee came within s. 13(1)(b) of Act as she had effective control of subcontractor or its relevant activities — Defendants appealed — Appeal dismissed — Divisional court did not make palpable and overriding error in holding that employee was personally liable for breach of trust — Evidence of employee's active role in company and that she had subcontractor pay her between $150,000 and $195,000 in excess of her salary over short period of time indicated that she had effective control over company or its related activities — Given employee's position, she had to know that payments to her constituted breach of trust.

Commercial law --- Sale of goods — Statutory contract — Miscellaneous issues

Table of Authorities

Cases considered by *Karen M. Weiler J.A.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), (sub nom. *Canada Trustco Mortgage Co. v. Canada)* 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada)* 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, 2005 SCC 54, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.)* 340 N.R. 1, 2005 CarswellNat 3212, 2005 CarswellNat 3213, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co. (2001), 2001 CarswellOnt 3138, 11 C.L.R. (3d) 1, 55 O.R. (3d) 783, 149 O.A.C. 180 (Ont. C.A.) — considered

Maple Leaf Homes & Cottages v. Zoellner Windows (1982) Ltd. (1989), 34 C.L.R. 6, 1989 CarswellOnt 692 (Ont. H.C.) — considered

Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd. (1955), (sub nom. *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.)* [1955] S.C.R. 694, [1955] 3 D.L.R. 561, 1955 CarswellBC 177 (S.C.C.) — considered

Plourde c. Québec (Commission des relations du travail) (2009), 2009 CarswellQue 11884, 2009 CarswellQue 11885, 2009 SCC 54, D.T.E. 2009T-846, (sub nom. *Plourde v. Wal-Mart Canada Corp.)* 2010 C.L.L.C. 220-002, (sub nom. *Plourde v. Wal-Mart Canada Corp)* 396 N.R. 1 (S.C.C.) — considered

Richmond Brothers Insulation Inc., Re (1989), 34 C.L.R. 29, 73 C.B.R. (N.S.) 284, 69 O.R. (2d) 22, 1989 CarswellOnt 157 (Ont. S.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Schulz Concrete Pipe Ltd., Re (1979), 1979 CarswellOnt 256, 32 C.B.R. (N.S.) 157 (Ont. S.C.) — considered

St. Mary's Cement Corp. v. Construc Ltd. (1997), [1997] G.S.T.C. 24, 33 C.L.R. (2d) 234, 29 O.T.C. 376, 32 O.R. (3d) 595, 5 G.T.C. 7115, 1997 CarswellOnt 939 (Ont. Gen. Div.) — considered

T. McAvity & Sons Ltd. v. Canadian Bank of Commerce (1959), 38 C.B.R. 10, 17 D.L.R. (2d) 529, 1959 CarswellOnt 44, [1959] S.C.R. 478 (S.C.C.) — considered

Statutes considered:

Construction Lien Act, 1983, S.O. 1983, c. 6

s. 1(1) ¶ 12 "materials" (i) — considered

s. 8 — referred to

s. 8(1) — considered

s. 39(6) — referred to

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Pt. II — referred to

Pt. III — referred to

Pt. V — referred to

s. 1(1) "contract" — referred to

s. 1(1) "contractor" — considered

s. 1(1) "improvement" — considered

s. 1(1) "owner" — referred to

s. 1(1) "payer" — considered

s. 1(1) "person having a lien" — considered

s. 1(1) "premises" — considered

s. 1(1) "subcontract" — referred to

s. 1(1) "subcontractor" — considered

s. 1(2) — referred to

s. 2(1) — considered

s. 7 — referred to

s. 7(4) — referred to

s. 8 — considered

s. 8(1) — considered

s. 8(1)(a) — considered

s. 8(1)(b) — considered

s. 8(2) — considered

s. 10 — considered

s. 13 — considered

s. 13(1)(b) — considered

s. 13(2) — considered

s. 13(3) — considered

s. 14 — considered

s. 14(1) — considered

s. 15 — considered

s. 20 — considered

s. 21 — considered

s. 22(1) — referred to

s. 38 — considered

s. 39 — considered

s. 39(1) ¶ 2 ¶ i — considered

s. 39(1) ¶ 2 ¶ ii — considered

s. 39(6) — considered

s. 50(2) — considered

s. 85 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 134 — referred to

s. 134(1) — referred to

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F

Pt. VI — considered

s. 67 — considered

Mechanics' Lien Act, R.S.O. 1970, c. 267

Generally — referred to

s. 2 — referred to

s. 2(1) — considered

s. 19 — referred to

s. 32 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 51.03(2) — referred to

R. 76.03 — referred to

R. 76.03(1) — referred to

APPEAL by defendants from judgment reported at *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.* (2008), 300 D.L.R. (4th) 153, 74 C.L.R. (3d) 176, 241 O.A.C. 212, 47 C.B.R. (5th) 303, 2008 CarswellOnt 5780 (Ont. Div. Ct.), finding defendants liable for breach of trust to plaintiff supplier.

***Karen M. Weiler J.A.*:**

Introduction

1 The primary question on this appeal is whether Sunview Doors Limited ("Sunview"), a supplier of custom-made doors to a subcontractor, Academy Doors and Windows Ltd. ("Academy"), is entitled to the benefit of a statutory trust pursuant to s. 8(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "Act").

2 Section 8 of the Act is as follows:

> 8(1) All amounts,
>
> (a) owing to a contractor or subcontractor, whether or not due or payable; or
>
> (b) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.
>
> (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services and materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

"Improvement" is defined in s. 1(1) of the Act:

> "improvement" means
>
> (a) any alteration, addition or repair to, or
>
> (b) any construction, erection or installation on,
>
> any land, and includes the demolition or removal of any building, structure or works or part thereof, and "improved" has a corresponding meaning.

Facts and Judicial History

3 Sunview manufactures custom sliding patio doors for contractors. Academy carried on business as a manufacturer, supplier and installer of windows, doors and curtain walls in retrofitted and renovated low and high-rise buildings until it went out of business in October 2006. Academy's customers were primarily property managers and general contractors.

4 Sunview supplied custom-made patio doors to Academy. Between September 2005 and October 2006, Academy gave Sunview nine purchase orders. Sunview knew that the doors Academy ordered were for specific improvements because of the information provided respecting dimensions, colour and door opening direction.

5 Sunview did not, however, know the location of the improvements where the doors were being installed. Neither the orders placed by Academy, nor the corresponding invoices issued by Sunview, identified where the doors would be installed. The parties arranged for Academy to pick up the doors from Sunview's manufacturing facility.

6 Sunview afforded Academy $100,000 in unsecured credit. Mr. Di'Iorio, Sunview's general manager, testified that he did not know where the custom doors were installed and did not care. However, after a number of the orders had been picked up and payment had not been received, Mr. Di'Iorio began to press for payment.

7 Two of the individual defendants, Vlasis and Vlasios Pappas, were directors and officers of Academy. The third co-defendant, Olympia O'Brien, worked for Academy and is the sister of Vlasis and the cousin of Vlasios. Ms. O'Brien worked for Academy, handling the company's accounts payable, accounts receivable and payroll. She reconciled the company's accounts and prepared cheques that reflected what the company owed. It appears, however, that she did not have signing authority. At trial, Vlasis and Vlasios Pappas testified that Ms. O'Brien was in charge of the office. Mr. Di'Iorio gave evidence that Ms. O'Brien was Sunview's contact at Academy for accounts payable.

8 Mr. Di'Iorio further testified about a telephone conversation with Ms. O'Brien, in June or July 2006, wherein she told him that Sunview would receive payment when Academy was paid on its projects. He then asked Ms. O'Brien to identify the projects to which the doors had gone. She refused to disclose that information to him.

9 During that same conversation, Mr. Di'Iorio requested that Ms. O'Brien fax him a copy of the cheque that she had informed him she had received on account of one of the projects. She agreed to send it to him. When the fax did not arrive, he called Ms. O'Brien back that same day. She told him she was directed not to fax it to him so that he would not get the customer's contact information. (She feared that Mr. Di'Iorio may contact the customer and make it aware that Sunview had not yet been paid.)

10 Also, in July 2006, Ms. O'Brien incorporated Magnum Windows & Doors Ltd. to carry on a business very similar to that of Academy. She ceased working for Academy in August 2006, just two months before the company went out of business. In January 2007, she leased space for her new company. Ms. O'Brien had no operational experience in the window and door business and did not know how to work the manufacturing equipment.

11 Once it became clear that Academy was not going to pay its outstanding debt, Sunview attempted, unsuccessfully, to resell the doors from the ninth order to other customers. The amount of this ninth order was $28,785.36 and no breach of trust is claimed in relation to it.

12 Sunview brought an action against Academy for breach of contract on the basis of the unpaid accounts and against the three individual defendants for breach of trust pursuant to the combined operation of s. 8 and s. 13 of the Act.

13 Section 13 of the Act enables the court to pierce the corporate veil by making any person, "including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities," personally liable for a corporation's breach of trust. This determination is a question of fact: s. 13(2). Where more than one person is found liable under s. 13, liability is joint and several: s. 13(3).

14 Academy did not defend the action. Pursuant to a request to admit, to which Academy did not respond, Academy was deemed to admit that it had been paid for Sunview's products. Provided that Sunview could establish that it was entitled to the benefit of the s. 8(1) statutory trust, the individual appellants conceded that they could not satisfy their onus under s. 8(2) to show that they had not appropriated any part of the trust fund to their own use until suppliers had been paid. The trial judge noted, at para. 17 of his reasons, that Academy's concession "... was an appropriate concession to make in light of the evidence tendered at trial."

15 The trial judge allowed the claim in breach of contract against Academy in the full amount of $87,029.98, representing the value of all nine orders. He found that Sunview had fulfilled its duty to mitigate by attempting, albeit

unsuccessfully, to resell the doors from the last order that Academy never picked up. However, he held that Sunview could not establish that it was entitled to the benefit of the statutory trust in s. 8(1) of the Act. The trial judge's conclusion was based on *Central Supply Co. (1972) Ltd. v. Modern Tile Supply Co.* (2001), 55 O.R. (3d) 783 (Ont. C.A.). In that case, a panel of the Court of Appeal sitting as the Divisional Court, held at para. 19 that, in order for a s. 8(1) statutory trust to arise, the claimant or supplier must "intend that the material sold be used for the purposes of a known and identified improvement". Although Academy was a subcontractor and Sunview was a supplier, Sunview could not establish that, at the time it sold or supplied its doors to Academy, it intended that they be used for known and identified improvements.

16 Further, due to Academy's conduct, the trial judge held that a nexus between the products Sunview had supplied and specific construction sites could not be made for two reasons. First, the individual defendants claimed that they did not know where Sunview's doors were installed. Second, the trial judge found the defendants failed to make proper documentary disclosure. [1] The defendants alleged that their landlord destroyed Academy's records when he locked them out of the building after they went out of business. The trial judge firmly rejected this explanation on thorough reasons. Despite the trial judge's strong condemnation of the defendants' conduct, he concluded that it was not enough to satisfy the requirement, imposed by *Central Supply*, that a supplier must intend the material sold be used for the purpose of a known and identified improvement before a trust arises.

17 As a result of the trial judge's conclusion that a s. 8(1) statutory trust had not arisen, he did not have to decide the claim against Ms. O'Brien. The trial judge did, however, comment on the evidence relating to that claim. Academy's general ledger showed that, between September 1, 2005 and August 31, 2006, the company paid her approximately $150,000 in excess of her regular annual salary. In her testimony at trial, Ms. O'Brien conceded that she received closer to $195,000 in payments from Academy during that time-frame, but she claimed that the money was disbursed to repay her for shareholder loans she had made to Academy during her tenure there.

18 The general ledger for that period only recorded a $7,500 advance from Ms. O'Brien to the company. Ms. O'Brien failed to produce any other documentation that supported her explanation. The trial judge observed that Ms. O'Brien's denial that she was a trustee belied the evidence from Academy's general ledger, which showed that she had been paid monies that should have been used to pay suppliers such as Sunview. The trial judge went on to state that even "if Ms. O'Brien in fact did lend a large sum of money to Academy, at a minimum Academy's general ledger disclosed that in the year before its demise the company preferred one creditor - Ms. O'Brien - to the detriment of others". Although the trial judge did not make definitive findings on the issue, he noted that the evidence raised strong suspicions that the individual defendants had run Academy into the ground with the intention of opening a new business under Ms. O'Brien's name, which they did in July 2006.

19 The Divisional Court allowed Sunview's appeal and, after deducting the sum of $28,785.36 on account of the ninth purchase order, gave judgment against the individual defendants for breach of trust in the amount of $58,244.62. Having regard to the evidence at trial, the Divisional Court held that Ms. O'Brien had "effective control" of Academy or its relevant activities, and that she, in addition to Vlasis and Vlasios Pappas, was personally liable for its breach of trust.

20 In distinguishing the facts of this case from those in *Central Supply*, the Divisional Court noted that, whereas in *Central Supply* the putative trustee was a retailer who sold to the general public, in this case, Academy was a contractor focused on the retrofit and renovation of low and high-rise rental and condominium units. *Central Supply* involved a retail situation dealing with generic products; Sunview dealt with custom-ordered doors. The doors were not stock items and were ordered according to precise measurement specifications. Moreover, while Sunview did not know the exact location of the improvements, this information was known by Academy at the time the materials were supplied. Had Academy made documentary disclosure when Mr. Di'Iorio had first requested the information, Sunview would have learned this information as early as June or July 2006. In giving judgment in favour of Sunview, the Divisional Court held that the trial judge was not bound by *Central Supply*.

21 Although it had distinguished *Central Supply* on the facts, the Court exercised its coordinate jurisdiction to the panel in *Central Supply*, and disagreed, at para. 54 of its reasons, "that the supplier must have intended that its materials be incorporated into a specific and identifiable improvement in order to attract a trust remedy."

22 The discussion of issues that follows my conclusion below is intended to resolve the conflicting jurisprudence concerning the interpretation of s. 8(1) of the Act and the subsidiary issue of whether the Divisional Court correctly held Ms. O'Brien personally liable. Because we were asked to consider whether *Central Supply* was correctly decided, in accordance with the court's usual practice, we sat as a panel of five.

Conclusion

23 I would resolve the primary issue of the interpretation of s. 8(1), a question of law, in favour of Sunview. The reference in s. 8(1) to the creation of a trust fund for the benefit of "persons who have supplied services or materials to *the* improvement" generally requires that a link be made between the materials supplied and the improvement (emphasis added). However, nothing in the wording of the section requires that the supplier intend that the material be incorporated into a known and specific improvement at the time of sale or supply and I would not read this requirement into s. 8(1). Provided that the supplier is able to link the material to the improvement for which the subcontractor was owed money or has been paid, the supplier will be entitled to the benefit of the s.8 statutory trust in the Act. Here, the link is established because of Academy's conduct in deliberately frustrating Sunview's attempts to obtain the disclosure that would enable it to link its products to the improvements into which they had been incorporated. This interpretation best promotes the purpose of the section and the object of the Act. The purpose of s. 8 is to impress money owing to or received by contractors or subcontractors with a statutory trust, a form of security, to ensure payment of suppliers. The object of the Act is to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom. Having regard to the purpose of s. 8 and the object of the Act, I would hold that Sunview is entitled to the benefit of a s. 8(1) statutory trust.

24 Inasmuch as I would hold that Sunview is the beneficiary of a s. 8(1) statutory trust, there is no issue that Academy is liable for breach of trust pursuant to s. 8(2). In addition, Vlasis and Vlasios Pappas, do not contest their liability under s. 13 in the event that Sunview is entitled to the benefit of a s. 8(1) trust. Ms. O'Brien contests the finding of fact by the Divisional Court that she is also personally liable. In my opinion, the Divisional Court did not commit any palpable and overriding error in so holding. In the result, I would dismiss the appeal.

Discussion of Issues

I. In order for a trust to arise under s. 8 of the Act, must the supplier intend that the material sold be used for the purposes of a known and identified improvement?

The Jurisprudence prior to Central Supply

25 Prior to *Central Supply*, the relevant court decisions in Ontario interpreted the trust provisions in the Act quite broadly, and trial judges explicitly rejected reading in any intention or knowledge requirement at the time a supplier entered into a contract. The relevant statute at the time was the *Mechanics' Lien Act*, R.S.O. 1970, c. 267 (the "MLA").

26 In *Schulz Concrete Pipe Ltd., Re* (1979), 32 C.B.R. (N.S.) 157 (Ont. S.C.), St. Mary's Cement Ltd., a supplier of concrete to Schulz Concrete Pipe Ltd., supplied all the concrete that Schulz used to manufacture its pipes. Schulz went bankrupt. It was agreed by the parties that Schulz "supplied its pipe to owners, contractors and subcontractors and that the money received by the trustee was derived from construction projects to which the bankrupt, [Schulz], had supplied concrete pipe": *Schulz Concrete Pipe Ltd., Re*, as per Registrar Ferron, at para. 4. Thus, all the money received was from construction projects. If St. Mary's was successful, it would be protected from the bankruptcy of Schulz on the basis that the money in the bankrupt's estate was impressed with a trust under s. 2 of the MLA, the predecessor to the current s. 8.

27 Registrar Ferron considered the wording of s. 2(1) of the MLA, which used the following language:

> All sums received by a ... contractor or subcontractor on account of the contract price constitute a trust fund in the hands of the contractor or subcontractor for the benefit of ... persons who have supplied materials on account of the contract.

28 Registrar Ferron further observed, at para. 9, that:

> Those entitled to the benefit of the fund in the context of these proceedings are those persons who have supplied material on "account of the contract price". The contract referred to must be a reference to the contract for the supply of pipe to either an owner, contractor or subcontractor, as the case may be, and it is only those persons who have supplied material in the fulfilment of such contracts who are beneficiaries under the trust section.

He went on to conclude, at para. 11, that no question of knowledge or intention arose when considering the trust provisions of the MLA. The supplier need not have intended his material be used in any specific project in order to qualify as a beneficiary of a trust for unpaid amounts owing to it.

29 *Richmond Brothers Insulation Inc., Re* (1989), 69 O.R. (2d) 22 (Ont. S.C.), involved a supplier delivering chemicals in bulk to a contractor who then processed them into foam insulation. The arrangement between the supplier and the contractor never specifically mentioned jobs where the final product would be used.

30 At issue was the wording of s. 8(1) of the *Construction Lien Act, 1983*, S.O. 1983, c. 6 (the "1983 Act"), which is the same as the current wording of the present Act.

31 In interpreting s. 8(1) of the 1983 Act, Granger J. had considered the definition of "materials". Section 1(1), para. 12 of the 1983 Act states:

> "Materials" means every kind of movable property,
>
> (i) that becomes, or is intended to become, part of the improvement

32 Having regard to the language defining materials in s. 1(1), para. 12(i), "that becomes or *is intended to become*" (emphasis added), Granger J. held that it was not necessary that a supplier know or intend that its materials end up in a specific improvement at the time of supply. He reasoned, at para. 14, that "[t]he trust provisions ... were intended to protect persons who supply raw materials that are subsequently incorporated into an improvement, whether they supply the materials directly to the improvement site or in bulk to the contractor working on the improvement." According to Granger J., the original intention of the Act was unchanged. He went on to conclude, in para. 14 of his reasons, that while "the language of the present legislation is considerably different [from the MLA provision examined in *Schulz Concrete Pipe Ltd., Re*], its reasoning is applicable in this case."

33 Equally relevant is the decision in *Maple Leaf Homes & Cottages v. Zoellner Windows (1982) Ltd.* (1989), 34 C.L.R. 6 (Ont. H.C.). Maple Leaf supplied a subcontractor, Zoellner Ltd., with windows and other building materials, which Zoellner used in the manufacture of its products and supplied under contract directly to owners or contractors who were building homes. When Zoellner went into receivership, it owed Maple Leaf $24,728.15, plus interest at 2.5 per cent a month. Maple Leaf asserted that it was entitled to the benefit of a statutory trust under s. 8 of the 1983 Act respecting money Zoellner had received from the contractors.

34 Maple Leaf brought a motion, pursuant to s. 39(6) of the 1983 Act, for an order that Zoellner comply with an earlier written request for disclosure of the identity of the persons to whom the products were sold, the location of the construction projects and the contract price of the various projects. Zoellner disputed Maple Leaf's claim on the basis that Zoellner had sold the material as a retailer, without regard for the purpose for which it was going to be used. It

submitted that, in order for a trust to arise, the material had to be used on some particular lands that were known at the time of sale, just as a supplier of materials is required to establish for a lien claim.

35 Vannini J., a Local Judge of the District Court, rejected this argument on two bases. First, in *Schulz Concrete Pipe Ltd., Re*, a supplier of bulk cement for use by a manufacturer of concrete pipe was held to be entitled to the benefit of a trust under the MLA, despite the fact that that supplier had no knowledge of the location of the projects in which the material would be used at the time the cement was supplied. Second, the trust remedy under the Act is separate, distinct and independent of the right to a lien claim.

Central Supply

36 Central Supply Company (1972) Limited ("Central Supply"), supplied floor and wall coverings to a retailer, Modern Tile Supply Company Limited ("Modern Tile"), and was not paid. The only issue at trial was whether Central Supply was entitled to payment from the two principals of Modern Tile pursuant to the trust provisions of s. 8(1) and s. 13 of the Act, which allows the corporate veil to be pierced.

37 The evidence indicated that Central Supply made deliveries to Modern Tile's store, not to any of Modern Tile's customers. Central Supply did not know the location in which its products were ultimately to be incorporated and the invoices did not refer to a specific work site or premises. From time to time, Modern Tile asked Central Supply to put the name of a customer for whom goods were intended on the invoice, but this was only so that Modern Tile could keep track of the material that was supplied, and match it up with its customer.

38 At trial, the claims against the personal defendants were dismissed on the basis that the trust provisions in Part II of the Act had to meet the same requirements as those for a lien in Part III. Under Part III of the Act, no lien entitlement is created if materials or services are supplied without knowledge of, or contact with, the improvement to which the supply is made. *Re Richmond*, *Schulz Concrete Pipe Ltd., Re* and *Maple Leaf Homes*, which held that the supplier need not know the location of the improvement at the time of sale or pickup of its product, were not followed.

39 Central Supply appealed. It appears that the appeal could have been dismissed simply on the basis that Modern Tile was not a contractor, in that it was not, as defined in s. 1(1) of the Act, "employed by the owner or an agent of the owner to supply services or materials". Furthermore, it was not a subcontractor, as per s. 1(1), because it was not a person "who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor." However, the appeal was not argued on that basis. The issue on appeal, as articulated by Abella J.A. at para. 6 of her reasons, was "whether moneys received by Modern Tile, from the retail sale of its product to members of the public, constitute[d] trust funds pursuant to the provisions of the Act." If so, the issue was whether the individual defendants should be personally liable for breach of trust. The Court dismissed Central Supply's appeal.

40 Writing on behalf of Justices Laskin, Rosenberg and herself, Abella J.A. distinguished earlier authorities on the basis that the MLA had been repealed and reenacted as the *Construction Lien Act*, which contained significant differences in the definition of various words. She considered the definition of "material", noting that in the MLA the definition contained no reference to an improvement. She had regard to the explanatory note concerning the word "improvement" contained in the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (Toronto: Ontario Ministry of the Attorney General, April 1982) (the "Committee"), and stated that "[t]he Act was not intended to apply to retailers who sell to members of the public in general and who have no direct connection to any improvement to any premises." She also cited the definitions of "contract", "contractor", "owner", "premises", "subcontract" and "subcontractor" - in s. 1(1) of the Act - when materials are supplied - at s. 1(2) of the Act - s. 7 respecting an owner's trust, the trust provision in s. 8, the tracing provision of s. 13 and the lien rights outlined in ss. 14 and 15.

41 At para. 18 of her reasons, she noted that ss. 14 and 15 in Part III (liens) use much the same language as the s. 8 trust provision:

> 14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.
>
> . . . . .
>
> 15. A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

42 Citing the principle of statutory interpretation espoused in Elmer A. Driedger's classic text, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), as amplified by Professor Ruth Sullivan, Abella J.A. held, at para. 16 of her reasons that the various parts of an Act are "meant to work together both logically and teleologically, as parts of a functioning whole": Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto, Butterworths, 1994), at p. 176.

43 There can be no disagreement with this principle of statutory interpretation. It is the Court's application of this principle that is the issue. The Court concluded that the supplier must "intend that the material sold be used for the purposes of a known and identified improvement" because the requirements to access the benefit of a statutory trust under s. 8(1) ought to be synchronized with the requirements for a lien. The Court's conclusion was likely inspired by Kuchar's article on "*Breach of Trust Actions Under The Construction Lien Act*" (1995), 20 C.L.R. (2d) 18, at p. 31 in which he criticized the existing jurisprudence under the subheading *A Trust Beneficiary Need Not Have Supplied with the Intention of Asserting Lien Rights* and advocated that the requirements to obtain the benefit of a s. 8 statutory trust should be the same as the requirements to obtain a lien. The Court also referred to an article by Mr. McGuinness, in which he advocated a similar conclusion in "Trust Obligations Under the Construction Lien Act" (1994), 15 C.L.R. (2d) 208, at p. 229.

44 The essence of the Court's reasoning, found at paras. 18-20, is as follows:

> [18] Although liens and trusts represent discrete remedies under the Act, the scheme and purpose of the Act argue for a consistent approach between Parts II and III of the Act. The similarity in wording between s. 8(1), which delineates when a trust arises under Part II, and in ss. 14 and 15, which outline when a lien is created under Part III also supports a consistent requirement in both that there be an identifiable improvement before either a lien or trust is established. Under s. 8(1) a trust arises for the benefit of those who have supplied services or materials to an improvement. Similarly, ss. 14(1) and 15 require that before a lien arises, there must be services or materials supplied 'to an improvement'...
>
> [19] In my view, therefore, the Act requires that a supplier must intend that the material sold be used for the purposes of a known and identified improvement before a lien or trust arises. *Where the supplier is selling material or services without any regard to the purpose or site for which the material is destined, it is deemed to be selling on the credit of the buyer alone, without access to the lien or trust remedies under the Act.* The trust provisions of the Act, therefore, create a trust only for the benefit of persons who have supplied services or materials to the improvement, not for the benefit generally of persons who supply contractors.
>
> [Emphasis added.]
>
> [20] The Act was not intended to apply to retailers who sell to members of the public in general and who have no direct connection to any improvement to any premises. Any other interpretation renders vulnerable to a trust obligation any retail store which supplies materials or services to members of the public, regardless of the ultimate use or destination of the product.

45 Applying that principle to the facts, the Court held that Modern Tile was not a trustee of contract monies for the benefit of Central Supply. Central Supply had failed to demonstrate that Modern Tile had received money on account of a contract for a particular improvement, and that Central Supply actually supplied materials to *that* improvement. There being no nexus between the material supplied and a specific improvement, the Court held that the relationship between

Central Supply and Modern Tile was too remote to justify the imposition of a trust. In light of that conclusion, it was unnecessary for the Court to deal with whether or not the individual defendants were personally liable for breach of trust.

General Principles of Statutory Interpretation

46 Statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Driedger, at p. 87.

47 This formulation has long been accepted by the Supreme Court in numerous cases: see e.g. *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at p. 41.

48 At the same time, when the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process: *Canada Trustco Mortgage Co. v. R.*, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10.

The Object of the Act and the Intention of the Legislature

49 Land benefitting from the supply of services or materials is improved and therefore generally increases in value. To prevent an owner receiving a benefit without paying for it, s. 14 of the Act gives contractors and subcontractors, as well as "a person who supplies services or materials to an improvement", a lien interest in the premises. Section 21 of the Act further secures the lien by providing that it is "a charge upon holdbacks required to be retained by Part IV [Holdbacks] of the Act". The concept of a holdback was created to provide some financial protection to persons, such as suppliers, who would not otherwise be able to assert a direct claim against the owner in circumstances where the supplier had no privity of contract with the owner.

50 The amount secured by the lien is not necessarily equal to the debt owed to the supplier by a contractor or subcontractor. The owner of the property is required to do two things. First, the owner must hold back a percentage of the value of the construction project, usually "equal to 10 percent of the price of the services or materials as they are actually supplied under the contract or subcontract", until the time period for filing lien claims has expired: s. 22(1) of the Act. Second, the owner must pay the holdback out in accordance with the provisions of the statute. Provided the owner complies with its statutory obligations, the liability of the owner to a supplier will be limited to the amount of the holdback at the time the owner receives notice of the lien claim. Thus, a subcontractor, who has not been paid by a contractor or subcontractor higher up in the construction pyramid, cannot demand more than the amount of the holdback from the owner, even if it is owed more.

51 Part II of the Act creates a series of statutory trusts. The intention of the legislature in creating the s. 8 trust in favour of a supplier, vis-à-vis a contractor or subcontractor, was to give a supplier a separate statutory form of security for full payment out of the monies received by the contractor or subcontractor. As explained by Rand J. in *Minneapolis-Honeywell Regulator Co. v. Irvine & Reeves Ltd.*, [1955] S.C.R. 694 (S.C.C.), in relation to the then MLA, at p. 696:

> The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him...
>
> For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 has been added. The contractor and sub-contractor are made trustees of the contract moneys and the trust continues while employees, material men or others remain unpaid.

52 Rand J.'s comments concerning the object of the trust provisions of the MLA were concurred in by Kellock, Estey and Fauteux JJ. In separate concurring reasons, Locke J. held that s. 19 of the MLA should be given its plain meaning.

Locke J. firmly noted his refusal, at p. 700, "to read into the section a provision that the rights given may be exercised only by those who then have a right to a lien upon the work."

53 Four years later, in *T. McAvity & Sons Ltd. v. Canadian Bank of Commerce*, [1959] S.C.R. 478 (S.C.C.), the Supreme Court held that a supplier is entitled to bring an action against a subcontractor for full payment, regardless of whether or not the supplier can lodge a lien against the owner of the land.

54 The 1982 report of the Attorney General's Advisory Committee, considered by the Divisional Court in *Central Supply*, advised the then Attorney General, the Honourable Roy McMurtry, on the proposed *Construction Lien Act*, which was enacted in 1983. The Committee considered the existing MLA and a Draft Act before making recommendations for modifying the Draft Act on a section by section basis. Section 8(1) of the current Act uses the exact wording recommended by the Committee. The Committee's explanation of its proposal, at p. 37, is as follows:

> Subsection 8(1) replaces 3(1) of the *Mechanics' Lien Act*. It is designed primarily to protect those working on an improvement from the insolvency or bankruptcy of a contractor or subcontractor. Where money is paid under a contract or subcontract after the contractor or subcontractor has gone bankrupt, the money received by the trustee administering the bankrupt's estate is impressed with a trust. The trust fund must first be used to satisfy the claims of the beneficiaries. The trustee in bankruptcy becomes entitled to the money paid to the bankrupt contractor or subcontractor for the benefit of general creditors of the bankrupt only if there is a surplus.

55 The Committee's commentary in relation to s. 8 does not suggest that it intended to change the existing jurisprudence in relation to the former MLA. By contrast, the Committee's commentary with respect to s. 7(4) of the Act *does*. [2]

56 The Committee was very specific when it wished to recommend a change to the pre-existing law. It did not recommend that previous jurisprudence respecting the object of the statutory trust provision in favour of suppliers to the construction industry be changed. [3] By implication, the Committee can be taken to have rejected a synchronized approach to the trust and lien provisions of the Act. Had it not agreed with the holding of Locke J., namely that the rights enshrined in the trust provision are capable of being exercised *independently* of whether or not a right to a lien exists, it would have said so. Moreover, the Committee expressed no disagreement with *Canadian Bank of Commerce*, in which the Supreme Court concluded that a supplier has a right to bring an action against a subcontractor for full payment, regardless of whether the supplier can lien the owner of the land.

57 The legislature followed the Committee's recommended wording and the object of the Act did not change.

The Wording of the Provision in Total Context, Read Harmoniously within the Scheme of the Act

58 Amendments to the wording of a legislative provision are presumed to have a purpose. That purpose need not necessarily be substantive, but may be to clarify the meaning: *Sullivan*, at p. 579. Indeed, "[i]n Canada, where making formal improvements to the statute book is a minor industry, the presumption of substantive change is weak and easy to rebut": *Ibid.* The presumption of substantive change may also be influenced by the interpretation provision set out in Part VI of the *Legislation Act, 2006*, S.O. 2006, c. 21 Sch. F. (formerly in the *Interpretation Act*), which states:

> The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

59 In the context of a formal statute revision, amendments which make express and explicit that which was previously implicit, and "harmonize the style of the legislation", are formal changes *not* intended to bring about a substantial change in the law: Sullivan, at p. 583.

60 As indicated, the MLA impressed "sums" that the contractor or subcontractor received "on account of the contract price" with a trust "for the benefit of ... persons who have supplied materials on account of the contract." Section 8 of the current Act states "all amounts" owing to or received by a contractor or subcontractor "on account of the contract

or subcontract price of an improvement constitute a trust fund for the benefit of subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor".

61 In my view, the "contract price" referred to in s. 2(1) and the reference to the "contract price of an improvement" in s. 8 simply make explicit what had previously been implicit. However, the Act now uses the phrase "persons who have supplied services or materials *to the improvement*", rather than "persons who have supplied materials *on account of the contract*" (emphasis added) in describing the beneficiaries of a s. 8 trust.

62 The Committee's comments concerning the definition of an "improvement", at p. 7 of its report, are particularly illuminating:

> The definition of the term "improvement" has been redrafted [from the Discussion Draft] to make it clear which types of work on land give rise to a lien.
>
> The purpose of the Act is to protect those who contribute their services or materials towards the making of an improvement to a premises. The types of work which constitute an improvement are set out in clauses a [any alteration, addition or repair] and b [any construction, erection or installation]. While the definition of "improvement" is broad, the Committee has attempted to draft it in such a way that it will be clear that the lien created by the Act applies only in the case of the construction and building repair industries.

63 The comments of the Committee led the Divisional Court in *Central Supply* to conclude, at para. 20 of its reasons, that, "[t]he Act was not intended to apply to retailers who sell to members of the public in general and who have no direct connection to any improvement to any premises." I would agree. Having regard to the Committee's remarks respecting the definition of an "improvement", it appears that, in using the word "improvement" throughout the Act, the Committee wished to make it clear that the purpose of the Act was that it benefit persons working in the construction and building repair industries and also to clarify the types of work covered.

64 The phrase used to describe the beneficiary of a s. 8 trust, "persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor", is almost identical to the phrase used in s. 14 of the Act to describe a person who can lien, namely, "a person who supplies services or materials to an improvement for an owner, contractor or subcontractor". I agree that the statutory presumption of consistent expression requires that the same words or phrases in an act be given the same meaning throughout: see *Sullivan*, at pp. 214-23.

65 That said, I would agree with the observation of the Divisional Court in the case before us, at para. 51 of its reasons, "[t]here is no language in s. 8, s. 14 or s. 15 that suggests that intent is a requirement." Nor is there any need to stretch the wording of ss. 14 and 15 to import a knowledge or intention requirement in those sections. Knowledge of the location of the improvement is explicitly addressed in Part V of the Act, which deals with the expiry, preservation and perfection of liens.

66 Simply because the beneficiaries are the same does not mean that *the requirements to access the different benefits* must be the same. While the beneficiary of the s. 8 trust provisions and the description of a person having a lien in ss. 14 and 15 are described in similar terms, the focus of each section is quite different. Under s. 14 "[a] person who supplies services or materials to an improvement for an owner, contractor or subcontractor has a lien upon the *interest of the owner in the premises improved*" (emphasis added). Under s. 8(1)(b), "amounts ... on account of *the contract or subcontract price of an improvement* constitute a trust fund".

67 Section 14 links the statutory remedy of a lien to "the interest of the owner in *the premises*" (emphasis added). Section 1(1) states:

> "premises" includes,
>
> (a) the improvement

(b) all materials supplied to the improvement

(c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made.

68 Section 8 links the statutory remedy of a trust to the *contract price of an improvement*, and the rights under the section follow the rules for privity of contract. It makes each payor a trustee for its payee, and, conversely, each payee is a beneficiary: David I. Bristow *et al.*, *Construction Builders' and Mechanics' Liens in Canada*, 7th ed. (Toronto: Thomson Carswell, 2008), at p. 9-1. The definition of "payer" under s. 1(1) of the Act does not suggest that payment for materials supplied must be made on account of the specific improvement, but rather links payment to "*an* improvement under a contract or subcontract" (emphasis added).

69 Pursuant to s. 15, a lien arises "when the person first supplies services or materials to the improvement." By contrast, as noted by Bristow *et. al.*, at p. 9-8:

> The trust itself and the rights of a statutory trust beneficiary in that trust come into existence only with the creation of the trust fund to which those rights attach. Unless and until a trust fund comes into existence in the hands of a trustee with whom the alleged beneficiary has privity of contract, the trust does not arise.

70 Unlike the provisions respecting a lien, the Act contains no limitation provision for making a claim that a statutory trust has been breached. Therefore, it appears that the general limitation periods for breach of trust apply. In this regard, the Committee states, at p. 47 of its report:

> In the opinion of the Committee, no claim arising from a breach of trust should be barred by a special limitation period. The ordinary limitation periods, as well as the equitable doctrine of laches, should apply to such claims. In these circumstances, there should be no special exemption for banks and other financial institutions.

71 In addition, s. 38 of the Act expressly provides that the expiration of a lien, "shall not affect any other legal or equitable right available." Also relevant, s. 50(2) stipulates that a trust claim shall not be joined with a lien claim.

72 To summarize, the phrase "persons who have supplied services or materials to the improvement" in s. 8 and the phrase "person who supplies services or material to an improvement" in s. 14 describe the beneficiary. Although ss. 8 and 14 use similar language in describing the beneficiary of a trust and a person benefitting from a lien, that description does not mean that the requirements to access the different benefits or rights must be the same. They were not the same under the MLA. The object of the statutory trust provision did not change when the Act was enacted and the MLA was repealed. Indeed, the focus of each section remains quite different. Section 8 is linked to amounts owing or received on account of the contract price of an improvement; ss. 14 and 15 are linked to the interest of an owner in the premises and to the improvement itself. The time when a lien and a trust arise is not the same nor is their expiry date. When the wording of these provisions is considered in total context bearing in mind the scheme of the Act, and the object and intent of the legislature, the s. 8 trust remedy is a discrete form of redress, not dependent upon a supplier having a valid subsisting lien right.

73 Thus, while I agree that the phrases "to *an* improvement" and "to *the* improvement" must be given a consistent interpretation throughout the Act, an intention that the material be used for a known and specific improvement at the time of sale or supply is not required; nor is there a requirement that a right to lien exist.

Intention of the supplier is not a requirement; a link to the improvement is sufficient

74 The Act is unequivocal with respect to the creation of a trust. The common law requirement that, for a trust to arise, the parties intend that a trust be created, is effectively negated by the legislation. The legislation imposes a trust obligation on the contractor and subcontractor vis-à-vis a supplier whether the parties intend that a trust arise or not.

Reading in a requirement that the supplier *intend* that the materials supplied be incorporated into a specific improvement in order for a trust to arise is not consistent with the imposition of a statutory trust.

75 The Act says the trust fund is for the "benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor".

76 To qualify as a beneficiary of the trust, the supplier must ordinarily show that it has supplied materials to "the improvement". In *St. Mary's Cement Corp. v. Construc Ltd.* (1997), 32 O.R. (3d) 595 (Ont. Gen. Div.), St. Mary's Cement supplied concrete blocks to Construc, a contractor, who used them in connection with a construction project on two adjacent lots. Some of the invoices did not specify to which of the two lots the materials were delivered. The contractor claimed he had no record of the amount of concrete blocks used on each lot because he had lost all his records. He submitted that the trust claim should, therefore, be dismissed in relation to those invoices. Also relevant, the contractor's wife owned one of the lots and had settled with St. Mary's prior to trial.

77 One of the issues at trial was the allocation of the material. Molloy J. held:

> It is common ground that there is an initial onus on the plaintiff to prove the existence of a trust under s. 8 of the Act. In order to discharge that onus in this case, the plaintiff would need to show that Construc received moneys on account of its contract price for a particular project, that the plaintiff supplied materials on that project and that Construc owes money to the plaintiff for those materials. If all of these elements are clearly proven on the evidence, the trust provisions of s. 8 come into play.

78 Molloy J. held that, although St. Mary's could not show precisely how much concrete it had supplied to each of the two lots, it had supplied material to the project and St. Mary's had met its initial onus under the Act. The money received by Construc from the owners of the adjacent property was impressed with a trust. The trial judge therefore allocated the amount of concrete on the invoices equally.

79 Section 67 of the *Legislation Act, 2006* provides that "[w]ords in the singular include the plural and words in the plural include the singular". Section 8 of the Act, therefore, can be read as meaning amounts received on account of the subcontract prices of "improvements" constitute a trust fund for the benefit of persons who have supplied materials "to the improvements". Section 67 supports the conclusion of Molloy J. in *St. Mary's Cement*.

80 In *Central Supply*, the Divisional Court relied on *St. Mary's Cement* in holding, at para. 21, that "the onus was on Central Supply (the supplier) to demonstrate the following three elements: (a) that Modern Tile (the alleged subcontractor) received money on account of a contract for a particular improvement; (b) that Central Supply supplied materials on that improvement; and (c) that Modern Tile owes money to Central Supply for those materials". The Court further held, at para. 22, of *Central Supply*:

> The first two elements are, on the evidence, absent in this case. Neither Modern Tile nor Central Supply knew what Modern Tile's customers did with the products after those products were picked up at the store. Notwithstanding that its invoices sometimes named the customer to whom Modern Tile would be selling the product, Central Supply *had never shown any interest in tracing the product supplied to Modern Tile to a specific work site, land, or improvement* such that a claim for a lien could have been registered under the Act.
>
> [Emphasis added.]

81 The comment of Abella J.A. with respect to "tracing" in this portion of her reasons in *Central Supply* implies that a path or link to the improvement is sufficient. As such, the comment can also be understood to support my conclusion that a link to the improvement is sufficient.

82 In light of this comment, the decision in *St. Mary's Cement* and the applicable principles of statutory construction, I would hold that the supplier need not intend that the material be incorporated into a known and specific improvement

at the time of supply. Moreover, where the contractor or subcontractor does not allocate the supplier's material to a particular piece of land or improvement within a project, but it is clear that the contractor or subcontractor has received money on account of the contract price for the project and that the contractor or subcontractor owes money to the supplier, a link to the contractor's or subcontractor's contract for the project will be sufficient to establish a s. 8 statutory trust.

This case

83 In order for Sunview to establish that it was the beneficiary of a trust under s. 8(1) of the Act, it must prove that:

(i) Academy was a contractor or subcontractor;

(ii) Sunview supplied materials to the projects on which Academy was a contractor;

(iii) Academy received or was owed monies on account of its contract price for those projects; and

(iv) Academy owed Sunview money for those materials.

84 Once all four elements of the trust are proven, the onus then shifts to the contractor, in this case Academy, to demonstrate that payments made from trust funds were to proper beneficiaries of the trust: see *St. Mary's Cement*, at pp. 600-01, *Central Supply*, at para. 21, *supra.*

85 The first element of the test, that Academy was a "contractor", is easily satisfied. Academy admitted in its pleadings that its business was to make windows and to install windows and doors. Mr. Di'Iorio's understanding was that Academy's business focused on retrofitted or renovated buildings. Its customers were property managers and general contractors. The trial judge had no hesitation in finding that Academy acted as a contractor.

86 Academy did not respond to Sunview's request to admit. Thus, pursuant to rule 51.03(2) it was deemed to admit the truth of the facts therein. Academy was thereby deemed to have admitted that "Academy was paid for the custom patio doors that it ordered and picked up from Sunview for various construction projects". This admission satisfied the third element of the test. The fourth element of the test was also satisfied. There was no issue that Academy owed Sunview money for those materials.

87 With respect to the second element, none of the purchase orders or corresponding invoices in relation to the materials that had been supplied identified the project or location where Sunview's material would be installed.

88 The evidence on the record shows that while Sunview initially sold to Academy on credit based on its prior dealings with it, Sunview later attempted to discover the location where its materials had gone or the identity of the party with whom Academy had subcontracted. Unlike in *Central Supply*, Sunview did, in fact, show an interest in linking its custom-made products to the location of Academy's improvements and the persons with who Academy had subcontracted.

89 Besides Sunview's general commercial practice of not delivering its products to the construction sites of its customers, the trial judge noted two additional reasons why Sunview was unable to establish a nexus between its products and specific construction sites. As I have indicated, the first was that the individual defendants claimed that they did not know where Sunview's products were installed. The trial judge found their denial entirely unpersuasive, expressing his doubt in the following terms, at para. 29 of his reasons: "I fully expect that at least one of the individual defendants knew where Sunview's product was used, but I cannot say who." The second was Academy's failure to make proper documentary disclosure. The individual defendants testified that Academy's landlord destroyed the company's records when he locked the company out of its premises in early October 2006.

90 In rejecting this explanation, the trial judge had regard to the evidence as a whole. He held, firstly, that the landlord gave evidence that when he attended at the premises after Academy's rent cheque bounced, anything of value had been removed. Secondly, the defendants put together an affidavit of documents in support of their counterclaim, which they

would not have been able to do if, as they claimed, the landlord had thrown out all their commercial records. Finally, on cross-examination, Ms. O'Brien admitted that Academy maintained ledgers for each construction project showing invoices and payments, ledgers for each supplier and ledgers recording what Academy did with the funds received from each customer. Ms. O'Brien's explanation as to why none of those ledgers was produced was simply that she did not ask the bookkeeper for them. The trial judge found that this answer showed a complete and utter disregard by Ms. O'Brien of her obligation to produce relevant documents pursuant to Rule 76.03. He held that those other ledgers should have been produced. The trial judge's credibility findings disclose no palpable or overriding error and are entitled to deference.

91 The Divisional Court was of the opinion that, in the circumstances, Sunview ought not to be foreclosed from asserting a trust claim and that the trial judge erred in dismissing the trust claim on the basis that the second criterion had not been satisfied. I would agree. Precedent, principle and policy support this conclusion.

92 *St. Mary's Cement* is a precedent that is indicative of a common sense approach to implementing what the statute seeks to accomplish. Having regard to the custom nature of the doors supplied by Sunview and the type of work done by Academy, there is no question Sunview supplied "materials" "to the improvements" on which Academy did work. Sunview is an intended beneficiary of the legislation. As the trial judge found, the reason Sunview could not trace its custom made doors to "the improvements" in which they were installed is due to Academy's conduct.

93 On principle, Academy's conduct ought not to be condoned. Considerations of unjust enrichment infuse the trust created by s. 8 of the Act. Academy's and the individual defendants' enrichment is to be avoided, as they are seeking to keep for themselves money that justly belongs to Sunview. Section 39 of the Act was amended in 1983 to give beneficiaries of a trust, under Part II of the Act, the right to obtain information from a contractor or subcontractor for the first time. This provision, derived from s. 32 of the MLA and s. 39 of the Draft *Construction Lien Act*, was intended to make significant changes in the law: Committee's report, at p. 104. The section spells out one aspect of the fiduciary duty on a statutory trustee, the duty of disclosure.

94 Section 39(1) specifically provides that:

> Any person having a lien [4] or who is the beneficiary of a trust under Part II or who is a mortgagee may, *at any time*, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, as follows:
>
> [Emphasis added].
>
> . . . . .
>
> 2. By the contractor or a subcontractor, with,
>
> (i) the names of the parties to a subcontract,
>
> (ii) the state of accounts between the contractor and a subcontractor or between a subcontractor and another subcontractor, ...

95 Under s. 39(6) of the Act, a person entitled to information under s. 39 can bring a motion to compel disclosure at any time, "whether or not an action has been commenced". The information obtained by using s. 39 can assist, and even enable, the enforcement of remedies under the Act: see Duncan W. Glaholt & David Keeshan, *The 2010 Annotated Ontario Construction Lien Act* (Toronto: Thomson Reuters, 2009), at p. 260. Academy and its principals were the only practical source of information Sunview had to trace the materials it had supplied. The stance taken by Academy's principals in their evidence at trial can hardly be said to comport with the spirit of disclosure required under the Act or Rule 76.03(1) respecting disclosure of relevant documents.

96 An indication that the legislature did not always intend that materials be linked to a specific improvement in order to access a benefit can be found in s. 20 of the Act, which creates the right to a general lien. It states:

> Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person's lien follow the form of the contract and be a general lien against each of the premises for the price of the services and materials he supplied to all the premises.

97 In relation to s. 20, the Committee states, at p. 58, that under the MLA, a general lien could only be claimed by a contractor, not subcontractors, and only in relation to supplies, not services. The Committee went on to state that the purpose of a general lien "is to assist all suppliers of services or materials to subdivisions." As such, this statutory protection "avoids the problem of allocating the total supply of services or materials generally to each of the individual buildings in a subdivision." While the right to a general lien only applies "where the work on several premises is done under a single contract", s. 20 is an indication that the legislature did not always intend that materials be linked to a specific improvement, as opposed to a group of improvements, in order to benefit from the protection of the Act.

98 In enacting legislation, it is impossible for the legislature to envisage every problem that will arise in relation to a matter. The exercise of statutory interpretation is not founded on the wording of legislation alone: *Rizzo, supra*, at para. 21. As Binnie J. recently held on behalf of the majority in *Plourde c. Québec (Commission des relations du travail)*, 2009 SCC 54 (S.C.C.), at para. 137:

> The interpretive analysis should be driven by the broad objectives of the legislation, not by a narrow and literal interpretation of the remedy. The better approach, it seems to me, is to interpret the legislative scheme in a way that connects recognized rights to meaningful remedies.

99 The object of the Act is to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom. In seeking to protect persons on the lower rungs from financial hardship and unfair treatment by those above, the Act is clearly remedial in nature. The remedial nature of the Act also supports a liberal construction so as to enable it to serve its purpose. The purpose of s. 8 is to impress money owing to or received by contractors or subcontractors with a statutory trust, a form of security, to ensure payment of suppliers to the construction industry. In this case, Academy's conduct makes it impossible to link the supply of Sunview's materials to a particular improvement or Academy's subcontracts for different projects. Yet, to deny Sunview payment would frustrate the object of the Act and deny it a meaningful remedy. I see no reason why, as a matter of policy, this should be so.

100 Where, as here, there is no issue that the material being supplied was used in improvements for which the subcontractor was paid and the subcontractor has deliberately frustrated the supplier's attempts to link its materials to the improvements in which they were incorporated, I would hold that recognizing the existence of a s. 8 statutory trust in favour of the supplier is the result that is the most compatible with the object of the Act.

101 In this case I am only concerned with whether or not a statutory trust existed in favour of Sunview. No issue concerning payment out of the trust among various beneficiaries or priorities arises. [5] In the event of insolvency, the Act regulates priorities amongst its beneficiaries. There may be cases where a contractor has worked on a number of improvements and different suppliers are claiming in respect of the different improvements. That is not this case. Sunview is the only person claiming the benefit of the trust fund created by payments to Academy. No other beneficiary under the Act is prejudiced by recognition of a statutory trust in favour of Sunview.

102 Accordingly, I would hold that Sunview is entitled to the benefit of a statutory trust under s. 8(1).

(1) Did the Divisional Court Err in Concluding, Pursuant to Its Authority under s. 134 of the Courts of Justice Act, [6] ***That Ms. O'Brien Is Liable for Breach of Trust under s. 13 of the Act?***

103 As the trial judge held that Sunview failed to establish a trust at trial, it was unnecessary for him to decide the issue of whether Ms. O'Brien was a person who exercised effective control over Academy. However, he did make findings and comment on the evidence in this regard. Although the trial judge stated, at para. 38 of his reasons, that Ms. O'Brien "did not have signing authority", he made the following observations about Ms. O'Brien's role at Academy:

> [T]he evidence clearly showed that Ms. O'Brien was actively involved in the accounting side of Academy's operations. She handled the company's accounts payable, accounts receivable and payroll but she did not have signing authority. Although she attempted to portray herself as playing second fiddle to the bookkeeper who came in weekly, Vlasios Pappas testified that he relied on Ms. O'Brien to reconcile the company's accounts and to prepare cheques that reflected what was properly owing by the company. Vlasis Pappas testified that he assumed that if his sister made up a cheque, there must have been enough money in the company's account.

104 The Divisional Court undertook a determination of Ms. O'Brien's liability pursuant to its power to make "any order or decision that ought to or could have been made by the trial judge" in s. 134(1) of the *Courts of Justice Act*. It held that she came within s. 13(1)(b) of the Act. That is, she was "an employee or agent of the corporation, who has effective control of a corporation or its relevant activities." The Court held her personally liable for Academy's breach of trust.

105 The appellants submit that Ms. O'Brien was not "an employee or agent of the corporation" who had "effective control" over Academy or its related activities. In support of their position, the appellants rely on the trial judge's finding of fact that Ms. O'Brien did not have signing authority for the company.

106 In addition to the trial judge's comments about Ms. O'Brien's role in the company, other evidence of Ms. O'Brien's active role in the management of the corporation's affairs is that she told Mr. Di'Iorio, during their telephone conversation in June or July 2006, that he would be paid as soon as Academy received some cheques from the projects in that they had installed the doors. The evidence of her active role in the company together with the evidence that she was able to have Academy pay her between $150,000 and $195,000 in excess of her salary over a short period of time, when the general ledger recorded that she was only owed $7,500, indicates that she had effective control over the company or its related activities. Given her position, she had to know that the payments to her constituted a breach of trust.

107 The Divisional Court properly exercised its discretion under s. 134 of the *Courts of Justice Act* in ordering judgment against Ms. O'Brien.

Disposition

108 For the reasons given, I would dismiss the appeal and uphold the decision of the Divisional Court granting judgment against the three individual defendants jointly and severally in the amount of $58,244.62. .

Costs

109 The respondent is entitled to its costs of the motion for leave to appeal and of the appeal against the appellants on a joint and several basis. The costs submissions of counsel were similar. I would fix costs in the amount of $25,000 on a partial indemnity basis.

John Laskin J.A.:

I agree.

J.C. MacPherson J.A.:

I agree.

J. MacFarland J.A.:

I agree.

Gloria J. Epstein J.A.:

I agree.

Appeal dismissed.

Footnotes

1 At the time, Rule 76.03 (1) of the Rules of Civil Procedure provided that: A party to an action under this Rule shall, within 10 days after the close of pleadings and at the party's own expense, serve on every other party,
(a) An affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power; and

(b) Copies of the documents referred to in Schedule A of the affidavit of documents.

2 Section 7(4) deals with the obligations of the owner as the trustee of the trust fund, usually comprised of money used for financing the improvement. The Committee states that the provision reverses existing case law and specifically cites the former Supreme Court of Ontario's decision in *Bre-Aar Excavating Ltd. v. D'Angela Construction (Ontario) Ltd.* (1975), 8 O.R. (2d) 598 (H.C.J.).

3 In addition to amounts received by the contractor or subcontractor, the Committee introduced s. 8(1)(a). It makes "[a]ll amounts, owing to a contractor or subcontractor, whether or not due or payable", "on account of the contract or subcontract price of an improvement", subject to a trust. The Committee's explanation, at p. 37, is as follows: Clause A clarifies the time at which the trust arises. It adopts the rule laid down by the Supreme Court of Canada in *Minneapolis Hone[y]well Regulator Co. v. Empire Brass Co.*, and rejects the approach taken in some earlier cases.

The rule, articulated by Rand J., is that an assignment of book debts by a subcontractor to a supplier, given prior to the subcontractor's receipt of money from the contractor, cannot defeat the statutory trust created under the Act.

4 Section 1(1) states "person having a lien" includes both a lien claimant and a person with an unpreserved lien. A lien claimant means "a person having a preserved or perfected lien." A preserved lien is a claim for a lien that has been registered. S. 36(3) describes how a lien is perfected. Generally it is by starting an action to enforce the lien.

5 Payment under s. 8 is governed by ss. 10 and 85 of the Act. Section 10 states that, subject to holdbacks, the payment to a supplier discharges the trustee's obligations to all the beneficiaries of the trust, to the extent of the payment. Ordinarily, a trustee is required to distribute trust monies rateably among all the beneficiaries. Section 10 alters this. During the course of construction, the trustee is permitted to discriminate between various suppliers who are beneficiaries. Upon insolvency, however, s. 85 of the Act governs priorities for the payment of the trust fund. It states:
(1) Where a payer becomes insolvent, the trust fund of which that payer is trustee shall be distributed so that priority over all others is given to a beneficiary of that trust who has proved a lien and a beneficiary of a trust created section 8 that is derived from that trust, who has proved a lien.

(2) Priority in the distribution of trust funds among those who have proved liens shall be in accordance with the respective priorities of their liens as set out in this Part.

(3) The remaining trust funds shall be distributed among the beneficiaries of that trust and the beneficiaries of trusts created by section 8 that are derived from that trust, whose liens have not been proved, in accordance with the respective priorities to which those liens would have been entitled as set out in this Part, had those liens been proved.
The section confirms, that although the right to a lien has not been proved, a supplier may still be a beneficiary of a s. 8 trust.

6 R.S.O. 1990, C. C.43 (The "CJA").

End of Document

2016 ONSC 1722
Ontario Superior Court of Justice

Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.

2016 CarswellOnt 3930, 2016 ONSC 1722, 264 A.C.W.S. (3d) 373, 63 C.L.R. (4th) 64

Employment Professionals Canada Inc. formerly known as Erie Personnel Corporation, Plaintiff and Steel Design and Fabricators (SDF) Ltd., Triwest Construction LP, Cody T. Church, Derek Martin, Norman Rokosh, Gordon Tozer, Ron Adams, Lorne H. Jacobson, and John Doe, Defendants

M.D. Faieta J.

Heard: November 16, 2015
Judgment: March 10, 2016 *
Docket: CV-14-500934

Counsel: Neil Kotnala, for Plaintiff
Brittany Déziel, for Defendants, Church, Martin, Rokosh Tozer Adams and Jacobson

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Headnote

Contracts --- Consideration — What constitutes consideration — Release of legal right — Forbearance (to enforce legal rights) — Extension of time

Plaintiff agreed to provide service of labourers to corporate defendant for purpose of construction of bridge — All but first invoice issued by plaintiff had to be paid within 30 days of date of issue — When president of plaintiff contacted defendant regarding payment of outstanding invoices, defendant explained that they were awaiting payment from owner of project — President of plaintiff agreed to amend agreement to provide that defendant would pay plaintiff within reasonable time after it received payment from project owner — Corporate defendants were currently bankrupt and 17 invoices from plaintiff remained unpaid — Plaintiffs brought action against individual defendants who were officers or directors of corporate defendants for breach of trust — Individual defendants brought motion for summary judgment on ground that action was commenced after expiry of applicable limitation period — Motion dismissed — Amendment to agreement was not unenforceable because corporate defendant didn't provide fresh consideration for amendment — Voluntary forbearance by mortgagee will not prevent running of limitation period unless mortgagor did or promised something in exchange, however request by borrower for forbearance may be sufficient consideration for new repayment agreement — Corporate defendant requested forbearance of its obligation to pay invoices and promised to pay invoices after it was paid by owner — Such forbearance was granted and corporate defendant enjoyed benefit of that forbearance as well as continued provision of services by plaintiff — Accordingly, consideration was exchanged and amendment was enforceable.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Plaintiff agreed to provide service of labourers to corporate defendant for purpose of construction of bridge — All but first invoice issued by plaintiff had to be paid within 30 days of date of issue — When president of plaintiff contacted defendant regarding payment of outstanding invoices, defendant explained that they were awaiting payment from owner of project — President of plaintiff agreed to amend agreement to provide that defendant would pay plaintiff within reasonable time after it received payment from project owner — Corporate defendants were currently bankrupt and 17 invoices from plaintiff remained unpaid — Plaintiffs brought action against individual defendants who were officers or directors of corporate defendants for breach of trust — Individual defendants brought motion for summary

judgment on ground that action was commenced after expiry of applicable limitation period — Motion dismissed — Applying discoverability principle in light of available evidence, individual defendants did not demonstrate that action was commenced after expiry of limitation period — Assessment of when plaintiff should have discovered claim in these circumstances turned on facts of case and not date on which payment was due under agreement — Plaintiff's submission that breach of trust did not exist if trust did not exist and that trust did not exist until monies had been received by contractor from general contractor or were payable was accepted.

Table of Authorities

Cases considered by *M.D. Faieta J.*:

Aldine Construction Ltd. v. Brucegate Holdings Inc. (2010), 2010 ONSC 3032, 2010 CarswellOnt 3605, 95 C.L.R. (3d) 194 (Ont. Master) — considered

Carmen Drywall Ltd. v. BCC Interiors Inc. (2013), 2013 ONSC 4644, 2013 CarswellOnt 9692 (Ont. S.C.J.) — considered

Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd. (2008), 2008 CarswellOnt 1163, 71 C.L.R. (3d) 54 (Ont. S.C.J.) — considered

Crears v. Hunter (1887), 19 Q.B.D. 341 (Eng. C.A.) — referred to

Fullerton v. Provincial Bank of Ireland (1903), [1903] A.C. 309 (U.K. H.L.) — referred to

Hamilton (City) v. Metcalfe & Mansfield Capital Corp. (2012), 2012 ONCA 156, 2012 CarswellOnt 2578, 290 O.A.C. 42, 347 D.L.R. (4th) 657 (Ont. C.A.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372 (S.C.C.) — referred to

Ross, Re (1931), [1932] S.C.R. 57, 13 C.B.R. 154, [1931] 4 D.L.R. 689, 1931 CarswellQue 19 (S.C.C.) — considered

Shook v. Munro (1948), [1948] S.C.R. 539, [1948] 3 D.L.R. 652, 1948 CarswellOnt 116 (S.C.C.) — considered

Sunview Doors Ltd. v. Academy Doors & Windows Ltd. (2010), 2010 ONCA 198, 2010 CarswellOnt 1450, 87 C.L.R. (3d) 163, 63 C.B.R. (5th) 159, 317 D.L.R. (4th) 471, 101 O.R. (3d) 285, 265 O.A.C. 363 (Ont. C.A.) — referred to

Sweda Farms Ltd. v. Burnbrae Farms Ltd. (2015), 2015 CarswellOnt 10365, 2015 CarswellOnt 10366 (S.C.C.) — referred to

Sweda Farms Ltd. v. Egg Farmers of Ontario (2014), 2014 ONSC 1200, 2014 CarswellOnt 2149 (Ont. S.C.J.) — referred to

Sweda Farms Ltd. v. Egg Farmers of Ontario (2014), 2014 ONCA 878, 2014 CarswellOnt 17095 (Ont. C.A.) — referred to

Tam-Kal Ltd. v. Stock Mechanical Inc. (1998), 1998 CarswellOnt 4346, 43 C.L.R. (2d) 94, 80 O.T.C. 161 (Ont. Gen. Div.) — referred to

Tam-Kal Ltd. v. Stock Mechanical Inc. (1999), 1999 CarswellOnt 3686, 127 O.A.C. 56, 50 C.L.R. (2d) 224 (Ont. C.A.) — referred to

Trotter v. Trotter (2014), 2014 ONCA 841, 2014 CarswellOnt 16579, 2 E.T.R. (4th) 1, 122 O.R. (3d) 625, (sub nom. *Trotter Estate, Re)* 328 O.A.C. 167 (Ont. C.A.) — referred to

Statutes considered:

Builders Lien Act, S.B.C. 1997, c. 45

Generally — referred to

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 8 — considered

s. 8(1) — considered

s. 13 — considered

s. 39 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

s. 4 — considered

s. 5 — considered

s. 5(1) — considered

s. 5(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — considered

R. 20.04(2)(a) — referred to

R. 20.04(2.2) [en. O. Reg. 438/08] — referred to

MOTION by individual defendants for summary judgment on ground that action was commenced after expiry of applicable limitation period.

***M.D. Faieta J.*:**

Introduction

1 In September 2011, the plaintiff agreed to provide the services of labourers to the defendant Steel Design and Fabricators (SDF) Ltd. ("SDF") for the purpose of the construction of the Strandherd-Armstrong Bridge in Ottawa, Ontario (the "Agreement"). The Agreement did not oblige SDF to use the plaintiff's services. The Agreement provided that all but the first invoice issued by the plaintiff had to be paid within 30 days of the date of issue. The plaintiff issued 26 invoices from October 4, 2011 to March 6, 2012.

2 The first nine invoices were paid by SDF. The remaining 17 invoices, which total $205,510.33, are unpaid. The corporate defendants, including SDF, are now bankrupt.

3 The defendants Church, Martin, Rokosh, Tozer, Adams and Jacobson ("Individual Defendants") were officers or directors of the corporate defendants. The plaintiffs claim that the Individual Defendants are liable in breach of trust pursuant to section 13 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the "Act").

4 This action under section 13 of the Act against SDF, its affiliated corporate entities, and the officers and directors of SDF was commenced on March 26, 2014.

5 The uncontradicted evidence of Marina Butler, the President of the Plaintiff, is that:

(1) the invoices were to be paid within 30 business days from the date upon which each invoice was issued;

(2) in late January 2012, Ms. Butler spoke with the defendant Martin, of SDF, regarding payment of the outstanding invoices who explained that he was awaiting payment from the owner of the project. At Martin's request, Ms. Butler agreed to amend the Agreement to provide that SDF would pay the Plaintiff within a reasonable time after it received payment from the project owner in April or May 2012 (the "Amendment").

6 The plaintiff continued to provide the services of temporary labourers to SDF after the above telephone call as it issued eight further invoices, totalling more than $41,000.00, to SDF on a weekly basis from January 30, 2012 until March 6, 2012.

7 The Individual Defendants also submit that the limitation period for all but five invoices, representing $15,413.75, had passed by the time this action was commenced.

8 The Individual Defendants bring this motion for summary judgment on the grounds that this action was commenced after the expiry of the applicable limitation period in respect of 12 of the 17 invoices. Their motion raises the following issues:

> (1) Is the Amendment to the Agreement (which extended the time for payment of the invoices) legally unenforceable because the plaintiff received no consideration for it?
>
> (2) Does the limitation period for an action under section 13 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*Act*") against the officers of a contractor commence when payment is due pursuant to the terms of the agreement between a supplier and a contractor?

9 For reasons that follow, my answer to both questions is "No".

Analysis

10 This motion for summary judgment is brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Its objective is to promote access to justice by providing a streamlined and fair process which results in the just adjudication of a dispute. [1]

11 The following principles are applicable on a motion for summary judgment:

- a court *shall* grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. [2]
- the onus is on the moving party to show that there is no genuine issue requiring a trial;
- the summary judgment process must:
  - (a) allow the judge to make the necessary findings of fact,
  - (b) allow the judge to apply the law to the facts, and
  - (c) be a proportionate, more expeditious and less expensive means to achieve a just result. [3]
- each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried; [4]
- a court may exercise any of the following powers for the purpose of determining whether there is a genuine issue requiring a trial, unless it is in the interest of justice for such powers to be exercised only at a trial.
  1. Weigh the evidence.
  2. Evaluate the credibility of a deponent.
  3. Draw any reasonable inference from the evidence.

4. Order that oral evidence be presented by one or more parties for the purposes of exercising the above powers. [5]

• If the court cannot grant judgment on the motion, the court should:

(a) decide those issues that can be decided in accordance with the principles described above;

(b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;

(c) In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion. [6]

Issue #1: Is the Amendment to the Agreement Unenforceable Because the Plaintiff Received No Consideration for It?

12 The Individual Defendants, being the principals of SDF, submit that the Amendment sought by SDF is unenforceable because SDF did not provide fresh consideration for the Amendment.

13 The Individual Defendants rely upon the following passages from In *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156 (Ont. C.A.), at paras 73-75, the Ontario Court of Appeal stated:

> At common law, a creditor and debtor can agree to forbear enforcement of a debt, and such an agreement would suspend the limitation period for the period of forbearance. In order to achieve this result, the creditor must promise not to enforce the debt, and the debtor must provide some consideration in exchange for this promise. In other words, a creditor's promise to forbear will not suspend the limitation period unless the debtor provides consideration for that promise: *Shook v. Munro et al*, 1948 CanLII 8 (SCC), [1948] S.C.R. 539. [Emphasis added]
>
> Each of the cases the City relies on dealt with a debtor-creditor scenario in which the creditor promised not to sue on the debt and the court had to determine whether the creditor provided consideration in return for that promise. In cases where there was no corresponding promise, the limitation period for the action to enforce the debt was not suspended: see *Shook Estate*; *Arrow-Kemp Heating and Air Conditioning Ltd. v. Oddi*, 2009 CanLII 23865 (Ont. S.C.). In a case where the creditor did provide a corresponding promise, the limitation period for the action to enforce the debt did not commence until after the period of forbearance: see *Mortgage Insurance Co. of Canada v. Grant*, 2009 ONCA 655, 99 O.R. (3d) 535, at para. 30.
>
> The cases relied on provide a means by which parties can agree to suspend the limitation period for an action to enforce payment on the debt. This makes sense because, if a creditor and debtor agree to change the repayment terms of the debt obligation, they have essentially renegotiated their debt agreement. So the limitation period for the creditor's action to collect on the debt would not run because - due to the agreement to change the repayment terms - the debtor is not effectively in default.

14 A voluntary forbearance by a mortgagee will not prevent the running of a limitation period unless a mortgagor has done or promised something in exchange for the forbearance. In *Shook v. Munro*, [1948] S.C.R. 539 (S.C.C.) Justice Rand stated:

> No doubt a mortgagor and a mortgagee can bind themselves to new times for the payment of the moneys, to be substituted for those provided in the mortgage. The effect would be to postpone the mortgagee's right to payment, extend the mortgagor's obligation to pay interest, and affect the times of both redemption and foreclosure. But the question here is not whether forbearance or a promise of it is good consideration: it is rather whether anything had been done or promised by the mortgagor to bind the mortgagees to forbear. If, for instance, the latter had in 1930 brought foreclosing proceedings, could they have been restrained on the ground that the mortgagor was

> not in default? Hope J.A. says yes, but I am forced to the conclusion that nothing had taken place that could have supported that plea: the forbearance was at most a voluntary abstention from exercising rights by the mortgagees which of itself could not affect the running of the statute.
>
> Voluntary forbearance may too in appropriate circumstances be sufficient when performed to bind the person requesting it to a new obligation arising at that time: i.e. if you forbear for a year, I will then pay you: but at any time during the year action could be taken on the existing default. In such case, it is not whether, by reason of the performance of the requested forbearance, the estate has become liable then as on a new promise to pay, but the title to the property in the mortgagees have not in the meantime been extinguished, whether the mortgagees have not in fact forborne themselves into the statute. It may be that the personal obligation would in effect be preserved, but that is not the point here.

15 However, a request by a borrower for forbearance from an existing obligation may be sufficient consideration for a new repayment agreement. In *Ross, Re* (1931), [1932] S.C.R. 57 (S.C.C.) the Appellant paid $100,000 towards his pledge to contribute $200,000 in five equal instalments of $40,000 starting in 1922 to a McGill University endowment fund when, due to financial difficulties, he asked for an extension of time for payment of the balance. McGill agreed and it accepted a promissory note in the amount of $100,000 that was payable three years after the date of its issuance in December, 1925. The Supreme Court of Canada dismissed the argument of the Appellant's trustee in bankruptcy that no consideration was provided by McGill for the promissory note. The Court stated "...as to the note, by the giving of which Mr. Ross, at his urgent request, secured an extension of the time limited for the payment of the balance of his subscription, the consideration was valuable...". In coming to this conclusion the Supreme Court of Canada relied on English cases that had decided forbearance was legally enforceable where the forbearance was extended to the person who asked for it. [7]

16 As noted earlier, SDF requested forbearance of its obligation to pay invoices and promised to pay the invoices after it was paid by the owner. Such forbearance was granted and SDF enjoyed the benefit of that forbearance as well as the continued provision of services by EPC. Accordingly, consideration was exchanged and the Amendment is enforceable. To come to any other conclusion would allow the doctrine of consideration to work an injustice.

Issue #2: Does a Claim for Breach of Trust under Section 13 of the Act Commence the Day After Payent is Due Under the Invoice?

17 The Individual Defendants submit that the limitation period for the plaintiff's claim against them under section 13 of the CLA began running the day after payment was due for each invoice. It submits that the limitation period for all but five of the invoices delivered by the plaintiff has expired.

18 EPC's claim against the Individual Defendants is based on section 13 of the CLA and indirectly on section 8 of the CLA.

19 The purpose of the CLA is "...to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom." [8] To that end, the CLA imposes trust obligations on contractors and their officers and directors.

20 Section 8 of the CLA imposes a trust on money owing to or received by contractors to ensure the payment of suppliers. To establish that it was a beneficiary of a trust under s. 8(1) of the Act, EPC must prove that:

- SDF was a contractor or subcontractor;
- EPC supplied services or materials to a project on which SDF was a contractor;
- SDF received or was owed monies on account of its contract price for the project; and,

• SDF owed EPC money for those services or materials.

21 Once a trust is established, the onus shifts to the contractor, SDF, to show that payments from the trust fund were made to proper beneficiaries of the trust. [9]

22 In order to promote compliance with section 8 of the CLA, the CLA imposes personal liability for breach of trust on certain persons in control of the corporate trustee. In order for EPC to prove that the Individual Defendants are liable under section 13 of the Act it must demonstrate that:

• The defendant is a director or officer of SDF or a person who has effective control of the corporation or its relevant activities; [10]

• The defendant assented to or acquiesced in conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation. [11]

23 Turning to the question of when does the limitation period for an action under section 13 of the Act commence, I note that the Act follows the recommendation of the Attorney General's Advisory Committee Report in 1982 which rejected a proposed provision that stated "no proceeding to assert a claim to any trust fund shall be brought later *than one year after the payment upon which the claim is made became due*". [Emphasis added] The Committee stated:

> In the opinion of the Committee, no claim arising from breach of trust should be barred by a special limitation period. The ordinary limitation periods, as well as the equitable doctrine of laches, should apply to such claims. In these circumstances, there should be no special exemption for banks and other financial institutions. [12]

24 Accordingly the determination of when a limitation period commences for an action under section 13 of the Act is governed by sections 4 and 5 of the *Limitations Act, 2002* (the "*LA*") [13].

25 Section 4 of the LA states that:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

26 In turn, section 5 of the *LA* provides that a claim is discovered when the plaintiff knew or ought to have known of the material facts of the claim, whichever occurs first.

27 Subsections 5(1) and (2) of the Act state:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

28 The Individual Defendants rely on *Carmen Drywall Ltd. v. BCC Interiors Inc.* [14] for the proposition that the claim arises when the payment is due. The Plaintiff completed its work in December 2007 and initially requested payment on January 8, 2008. The court stated:

> The *Anron Mechanical* case was decided prior to the *Limitations Act* which provides, pursuant to s. 5(1)(b), that a claim is discovered on the day on which a reasonable person with the abilities of the person with the claim first ought to have known of the injury, damage, or loss suffered.
>
> Thus, the limitation period commences to run not following any misappropriation of the trust funds by the contractor or knowledge of when the contractor received the trust funds, but on the day a reasonable person ought to have known that the damage or loss had occurred. Indeed, s. 39 of the *Construction Lien Act* entitled the plaintiff as a trust beneficiary of the hold back funds to request from TTC or BCC at any time, the state of accounts between the owner and the contractor and the material payment bond, posted by the contractor with the owner. Mr. Stornelli indicated in his affidavit that he only contacted the TTC in May 2010 seeking assistance to recover payments.
>
> This raises the question regarding "discoverability" of a statutory construction trust by a beneficiary of the trust. In *Cast-Con Group Inc. v. Alterra (Spencer Creek Ltd.)*...the court concluded that reasonable diligence when the contractor did not pay the sub-contractor could have revealed the trust claim and consequently, the limitation period ran concurrently with that of the breach of contract. A similar conclusion can be found in *Aldine Construction Ltd. v. Brucegate Holdings Inc.*
>
> . . .
>
> Based on these decisions, the plaintiff could well have and should have taken the required steps to commence its action against the defendants within two years of December 2007. The failure to do this means that the plaintiff's statement of claim filed in January 2012 is statute barred. [15]
>
> [Emphasis added]

29 I do not accept the submission that *Carmen Drywall*, or either of *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.* [2008 CarswellOnt 1163 (Ont. S.C.J.)] and *Aldine Construction Ltd. v. Brucegate Holdings Inc.* [2010 CarswellOnt 3605 (Ont. Master)] cited therein, stand for the principle that a claim for breach of trust under section 13 of the Act runs concurrently with a claim for breach of the construction contract. Had that been the Legislature's intention, then such words, similar to those proposed by the 1982 Advisory Committee, would have been used. In my view, the Courts in the above cases reached applied the discoverability principle.

30 As in *Carmen Drywall*, the Plaintiff as a beneficiary of the trust could have requested information on the state of the accounts between the SDF and the owner under section 39 of the Act. However, the assessment of when the Plaintiff should have discovered the claim in these circumstances, especially given the circumstances surrounding the Amendment, turns on the facts of this case and not the date on which payment was due under the Agreement. I accept the Plaintiff's submission that a breach of trust does not exist if the trust does not exist. The trust does not exist until monies have been received by the contractor from the general contractor or are payable. Nor is there a breach of trust if the funds were paid by the contractor to proper beneficiaries.

31 Applying the discoverability principle in light of the available evidence, it is my view that the Individual Defendants have not demonstrated that this action was commenced after the expiry of the limitation period for any of the invoices issued by the plaintiff.

Conclusions

32 For the reasons given above, I have dismissed the motion for summary judgment. I have concluded that consideration for the Amendment was exchanged and thus the Amendment is enforceable. I have also concluded that the limitation period for a breach of trust claim under the Act does not, as a matter of law, commence on the day after payment is due to the contractor.

33 I have seized myself of this action. I direct that a brief case conference, by telephone, be held on March 22, 2016 at 8:45 a.m. My assistant will provide the parties with the conference call details.

34 The plaintiff claims costs in the amount of $16,627.89 on a partial indemnity basis. The Individual Defendants' claim costs in the amount of $9,657.07 on the same basis. The main difference in the costs incurred for this motion is in counsel's actual hourly rate ($205 versus $375). In my view, it is fair and reasonable for the Individual Defendants to pay costs in the amount of $12,000.00, inclusive of disbursements and HST, to the plaintiff.

Motion dismissed.

Footnotes

* Leave to appeal refused at *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* (2016), 2016 CarswellOnt 15858, 2016 ONSC 4230 (Ont. Div. Ct.).

1 *Trotter v. Trotter*, 2014 ONCA 841, 122 O.R. (3d) 625 (Ont. C.A.), para. 49.

2 Rule 20.04(2)(a).

3 *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), at para. 49.

4 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), para. 11

5 Rule 20.04(2.2).

6 *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, [2014] O.J. No. 851 (Ont. S.C.J.), para. 33; aff'd [2014] O.J. No. 5815, 2014 ONCA 878 (Ont. S.C.J.), leave to appeal refused, [2015] S.C.C.A. No. 97 (S.C.C.).

7 *Crears v. Hunter* (1887), 19 Q.B.D. 341 (Eng. C.A.), at 346; *Fullerton v. Provincial Bank of Ireland*, [1903] A.C. 309 (U.K. H.L.), at 313

8 *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 ONCA 198 (Ont. C.A.)

9 *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, [2010] O.J. No. 1043, 2010 ONCA 198 (Ont. C.A.), para. 84.

10 *Sunview*, paras. 103-106;

11 *Tam-Kal Ltd. v. Stock Mechanical Inc.*, [1998] O.J. No. 4577 (Ont. Gen. Div.); aff'd [1999] O.J. No. 4371 (Ont. Gen. Div.)

12 Page 47. Such provision is found in the *Builder's Lien Act*, SBC 1997, c45, which provides that "[a]n action by a beneficiary or against a trustee of a trust created under section 10 must not be commenced later than one year after (a) the head contract is completed, abandoned or terminated, or (b) if the owner did not engage a head contractor, the completion or abandonment of the improvement in respect of which the money over which a trust is claimed became available."

13 S.O. 2002, c. 24, Sched. B.

14 [2013] O.J. No. 3245 (Ont. S.C.J.).

15 Paras 27-29.

End of Document

2016 ONSC 4230
Ontario Superior Court of Justice (Divisional Court)

Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.

2016 CarswellOnt 15858, 2016 ONSC 4230, 271 A.C.W.S. (3d) 458, 63 C.L.R. (4th) 78

Employment Professionals Canada Inc., formally known as Erie Personnel Corporation (Plaintiff) and Steel Design and Fabricators (SDF) Ltd., Triwest Construction (GP) Inc., Concreate USL LP., Triwest Construction LP, Cody T. Church, Derek Martin Norman Rokosh, Gordon Tozer, Ron Adams, Lorne H. Jacobson and John Doe (Defendants)

Stewart J.

Judgment: October 7, 2016
Docket: 144/16

Proceedings: refusing leave to appeal *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* (2016), 2016 ONSC 1722, 2016 CarswellOnt 3930, M.D. Faieta J. (Ont. S.C.J.)

Counsel: Neil Kotnala, for Plaintiff
Shadi Katirai, Brittany Déziel, for Defendants, Cody T. Church, Derek Martin, Norman Rokosh, Gordon Tozer, Ron Adams and Lorne H. Jacobson

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Civil practice and procedure --- Practice on appeal — Leave to appeal — General principles

Plaintiff company provided workers to defendant construction firm, to complete work on bridge project — Construction firm did not pay invoices, even after company extended deadline for payment — Company brought action against individual defendants who were directors of firm — Directors brought motion for summary judgment, stating that action against them was out of time — Motion was dismissed — Directors claimed that issue of consideration was not properly dealt with by motions judge — Directors also claimed that motions judge improperly determined limitation period issue, regarding breach of trust — Directors moved for leave to appeal — Motion dismissed — Decisions relied upon by directors on consideration issue were determined on differing analysis — There was no reason to doubt correctness of motion decision — Determination of when time began to run was dependent on facts of case — Starting date was not necessarily when payment was due on contract — Motion judge properly found that evidence did not conclusively show that limitation period had expired — Motion was dismissed with $9,000 in costs payable by directors.

Table of Authorities

Cases considered by *Stewart J.*:

Ash v. Corp. of Lloyd's (1992), 8 O.R. (3d) 282, 1992 CarswellOnt 1099 (Ont. Gen. Div.) — considered

Carmen Drywall Ltd. v. BCC Interiors Inc. (2013), 2013 ONSC 4644, 2013 CarswellOnt 9692 (Ont. S.C.J.) — considered

Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, 6 C.P.C. (3d) 271, 55 O.A.C. 316, 1992 CarswellOnt 429 (Ont. Div. Ct.) — referred to

Greslik v. Ontario (Legal Aid Plan) (1988), 28 C.P.C. (2d) 294, 65 O.R. (2d) 110, 30 O.A.C. 53, 1988 CarswellOnt 436 (Ont. Div. Ct.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Nazari v. OTIP/RAEO Insurance Co. (2003), 2003 CarswellOnt 3315, 3 C.C.L.I. (4th) 149, [2003] O.T.C. 794 (Ont. S.C.J.) — considered

Rankin v. McLeod, Young, Weir Ltd. (1986), 13 C.P.C. (2d) 192, 57 O.R. (2d) 569, 1986 CarswellOnt 463 (Ont. H.C.) — referred to

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 13 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 62.02(4) — considered

R. 62.02(4)(a) — considered

R. 62.02(4)(b) — considered

MOTION for leave to appeal by individual defendant directors, from judgment reported at *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* (2016), 2016 ONSC 1722, 2016 CarswellOnt 3930 (Ont. S.C.J.), dismissing summary judgment motion against plaintiff company.

Stewart J.:

Nature of the Motion

1 The Moving Parties, the individual Defendants Cody T. Church, Derek Martin, Norman Rokosh, Gordon Tozei, Ron Adams and Lorne H. Jacobson seek leave to appeal to the Divisional Court the Order of Faieta J. dated March 10, 2016 which dismissed their motion for partial summary judgment.

2 The Respondent Employment Professionals Canada ("EPC") submits that leave to appeal should not be granted.

Decision of the Motion Judge

3 This action arises out of the construction of the Strandherd-Armstrong Bridge in Ottawa, Ontario.

4 EPC alleges that it entered into a contract with Steel Design and Fabricators (SDF) Ltd. ("SDF") to supply labour for the project.

5 The contract contained a term which required all payments, except for the first payment, to be paid within 30 days of the date upon which each invoice was rendered.

6 SDF paid the first nine invoices it received. The next 17 invoices, totaling $205,501.33, were not paid.

7 SDF and the other corporate Defendants are now bankrupt.

8 EPC commenced its claim on March 26, 2014.

9 EPC claims that the Moving Parties breached their trust obligations under the *Construction Lien Act* R.S.O. 1990, c-30, as amended (the "*Act*"), and should be liable for all amounts owing to EPC.

10 On November 16, 2015, the Moving Parties brought a motion for summary judgment to dismiss the majority of Plaintiff's claim for damages on the basis that the action had been commenced after the applicable limitation period had expired.

11 In support of their position, the Moving Parties argued before the motion judge that the limitation period for a breach of trust claim runs concurrently with any breach of contract claim for unpaid invoices. Thus, the limitation period had expired with respect to the first 12 of the remaining invoices (totaling $190,096.58) before the action was commenced. Only 5 invoices (totaling $15,413.75) remained viable and within the limitation period.

12 In response, EPC adduced evidence that in January 2012 EPC and SDF had amended the payment terms under the contract. SDF had proposed that the parties agree to change the contractual terms for payment from due 30 days from the date of the invoice to payment once it had been received from the project owner. EPC agreed to this arrangement.

13 In his reasons for decision, the motion judge found that the contract did not obligate SDF to use EPC's services. SDF was at liberty at any time to cease using labour from EPC and was free to source labour in the market place.

14 The motion judge reviewed the issue of consideration for this alleged contractual amendment and found as a fact that SDF had requested forbearance from EPC. Such forbearance was granted by EPC. As a result, SDF enjoyed the benefit of EPC's forbearance as well as the continued provision of services by EPC. In paragraph 16 of his reasons, the motion judge stated:

> As noted earlier, SDF requested forbearance of its obligation to pay invoices and promised to pay the invoices after it was paid by the owner. Such forbearance was granted and SDF enjoyed the benefit of that forbearance as well as the continued provision of services by EPC. Accordingly, consideration was exchanged and the Amendment is enforceable. To come to any other conclusion would allow the doctrine of consideration to work an injustice.

15 The motion judge then considered the limitation defence issue advanced by the Moving Parties, including the legislative history and wording of the *Act* in that regard.

16 The Moving Parties rely on the decision in *Carmen Drywall Ltd. v. BCC Interiors Inc.*, [2013] O.J. No. 3245 (Ont. S.C.J.), for the proposition that the claim arises when the payment is due. In that particular case, the Plaintiff had completed its work in December 2007 and had initially requested payment on January 8, 2008. The court determined as follows:

> Thus, the limitation period commences to run not following any misappropriation of the trust funds by the contractor or knowledge of when the contractor received the trust funds, but on the day a reasonable person ought to have known that the damage or loss had occurred. Indeed, s. 39 of the *Construction Lien Act* entitled the plaintiff as a trust beneficiary of the hold back funds to request from TTC or BCC at any time, the state of accounts between the owner and the contractor and the material payment bond, posted by the contractor with the owner. Mr. Stornelli indicated in his affidavit that he only contacted the TTC in May 2010 seeking assistance to recover payments.
>
> This raises the question regarding "discoverability" of a statutory construction trust by a beneficiary of the trust. In *Cast-Con Group Inc. v. Alterra (Spencer Creek Ltd)*...the court concluded that reasonable diligence when the contractor did not pay the sub-contractor could have revealed the trust claim and consequently, the limitation period ran concurrently with that of the breach of contract. A similar conclusion can be found in *Aldine Construction Ltd. v. Brucegate Holdings Inc.*
>
> . . .
>
> Based on these decisions, the plaintiff could well have and should have taken the required steps to commence its action against the defendants within two years of December 2007. The failure to do this means that the plaintiff's statement of claim filed in January 2012 is a statue barred.

17 The motion judge did not accept the submission that *Carmen Drywall* or the other authorities referred to in that decision stand for the invariable principle that a claim for breach of trust under section 13 of the *Act* must run

concurrently with a claim for breach of a construction contract. Those cases merely applied the discoverability principle to the facts of the particular case.

18 In his reasons, the motion judge found as follows (at paras. 30 and 31):

> As in *Carmen Drywall*, the Plaintiff as a beneficiary of the trust could have requested information on the state of the accounts between the SDF and the owner under section 39 of the Act. However, the assessment of when the Plaintiff should have discovered the claim in these circumstances, especially given the circumstances surrounding the Amendment, turns on the facts of this case and not the date on which payment was due under the Agreement. I accept the Plaintiff's submission that a breach of trust does not exist if the trust does not exist. The trust does not exist until monies have been received by the contractor from the general contractor or are payable. Nor is there a breach of trust if the funds were paid by the contractor to proper beneficiaries.
>
> Applying the discoverability principle in light of the available evidence, it is my view that the individual Defendants have not demonstrated that this action was commenced after the expiry of the limitation period for any of the invoices issued by the plaintiff.

19 Accordingly, the motion for partial summary judgment was dismissed. As recommended in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) the motion judge seized himself of the action and gave directions to the parties with a view to implementing case management of the action toward an early trial.

20 The Moving Parties seek leave to appeal two aspects of the decision of the motion judge:

(a) the finding of consideration in support of a contractual amendment;

(b) the determination of when the limitation period may commence for a breach of trust action under the *Act*.

Test for Leave to Appeal

21 The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

22 Under Rule 62.02(4) (a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Ont. Div. Ct.).

23 Under Rule 62.02(4) (b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong — that aspect of the test is satisfied if the judge granting leave finds that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (Ont. S.C.J.); *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.) . In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (Ont. H.C.); *Greslik v. Ontario (Legal Aid Plan)* (1988), 65 O.R. (2d) 110 (Ont. Div. Ct.)

Analysis

24 The decisions on the issue of sufficient consideration referred to cannot be said to conflict with the decision of the motion judge only because their analysis is not identical. A conflicting decision is one where a judge has applied legal principles or modes of analysis which conflict with those mandated by another judgment.

25 An analysis of consideration is subject to several principles to ensure it leads to a fair outcome given the facts of the case. If there is any appearance of conflict between the motion judge's decision in this case and a decision of another court, this is a function of the fact-specific analysis of consideration, as opposed to any strict legal conflict. As such, these are not conflicting decisions that would justify the granting of leave to appeal.

26 Further, in my view, there is no reason to doubt the correctness of the motion judge's decision. The same result could have been arrived at by analyzing the facts using a benefit or detrimental reliance approach.

27 With respect to the limitation period issue, the motion judge did not conclude that a breach of trust claim does not run concurrently with the breach of contract because the trust could not be said to exist. Any such conclusion was, in any event, independent of his statement as to when the trust came into existence. The issue for consideration was the discoverability of a breach of trust, not the discoverability of a trust.

28 The motion judge held that a determination of when EPC could have discovered the breach of trust claim turns on the facts of the case, and need not simply be the precise date payment was due under the contract. In his view, the evidence before him did not demonstrate conclusively that the limitation period had lapsed.

29 The correctness of the decision is therefore not, in my opinion, open to serious debate.

30 In any event, it has not been demonstrated that either of the issues sought to be appealed is such that makes it desirable that leave to appeal be granted, or that raises any question of general or public importance.

Conclusion

31 For these reasons, the motion is dismissed.

Costs

32 In view of the result, costs fixed at $9000.00, inclusive of disbursements and all applicable taxes, shall be payable by the Moving Parties to the Respondent within 60 days.

Motion dismissed.

End of Document

2017 ONSC 5741
Ontario Superior Court of Justice (Divisional Court)

MGL Construction Inc. v. IBuild Corporation et al.

2017 CarswellOnt 15368, 2017 ONSC 5741, 283 A.C.W.S. (3d) 700

MGL CONSTRUCTION INC. (Plaintiff / Appellant) AND IBUILD CORPORATION, ROBERT WEXLER C.O.B. AS IBUILD CUSTOM HOMES, AND ROBERT WEXLER (Defendant / Respondents)

Lederman J.

Heard: September 26, 2017
Judgment: October 2, 2017
Docket: Toronto 572/16

Counsel: Robby Sohi, for Plaintiff / Appellant
David Strashin, for Defendant / Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Headnote

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Pleadings — Striking out

Plaintiff construction company brought action in April 2015 against defendant contractor to recover money claimed under June 2012 $2,452.10 invoice in respect of K project and January 2013 $14,916 invoice and May 2013 $12,438 invoice in respect of B project on basis of breach of contract, unjust enrichment, quantum meruit, and breach of trust provisions of Construction Lien Act — Defendant brought motion to strike certain of plaintiff's claims as statute-barred; plaintiff brought cross-motion for production of financial information as to contractor's accounts with owner which was settled before motion — Small claims court judge proceeded with defendant's motion before plaintiff received documents it sought — Judge held that limitation period which ran from dates of first two invoices was not extended by any agreement and granted in part contractor's motion to strike contract, unjust enrichment and quantum meruit claims in respect of June 2012 and January 2013 invoices on basis action was brought more than two years from dates invoices were rendered, allowing breach of trust claim in respect of B project to stand — Plaintiff appealed — Appeal allowed — Small claims court judge made palpable and overriding error in prematurely striking out breach of trust claim with respect to K project and striking out other claims relating to both projects — Plaintiff's uncontradicted evidence was that defendant delayed plaintiff by making unfulfilled promises to pay outstanding amounts — Promises could be found to extend limitation period as plaintiff continued to perform services in accordance with forbearance, so there remained triable issue and judge made palpable and overriding error in ignoring evidence and dismissing claims — As parties had ongoing working relationship on several projects pre- and post-dating unpaid invoices, it was premature for judge to strike plaintiff's trust claims before all relevant information was obtained pursuant to production order — Commencement of limitation period itself could not be determined until it was ascertained when funds flowed to defendant because trust did not exist until contractor received money.

Table of Authorities

Cases considered by *Lederman J.*:

O'Brien v. Ottawa Hospital (2011), 2011 ONSC 231, 2011 CarswellOnt 88 (Ont. Div. Ct.) — referred to

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 8 — considered

Rules considered:

Small Claims Court Rules, O. Reg. 258/98

R. 12.02 — considered

APPEAL by plaintiff from order of small claims court judge striking certain of plaintiff's claims in Construction Lien Act action.

***Lederman J.*:**

1 The plaintiff, MGL Construction Inc. ("MGL"), appeals from the Order of the Small Claims Court judge striking out certain causes of action as being outside the limitation period and statute barred.

BACKGROUND FACTS

2 On April 28, 2015, this action was commenced by MGL to recover outstanding monies for the provision of labour and supplies as a subcontractor for work performed on two sites, namely the Kirkton project and the Bannockburn project. The defendants performed general contracting services on the projects.

3 MGL's claim was based on three invoices that were rendered as follows:

(a) June 8, 2012 - invoice for $2,452.10 for the Kirkton project;

(b) January 4, 2013 - invoice for $14,916 for the Bannockburn project;

(c) May 1, 2013 - invoice for $12,438 for the Bannockburn project.

4 The defendants moved for summary judgment to strike the claims in respect of the first two invoices on the basis that the action that was brought on April 28, 2015 was more than two years from the dates when the invoices were rendered.

5 The Small Claims Court judge granted the motion as she found as follows at para. 13:

> "As there is no extension agreement proven, or even pleaded, I find that the limitation period for the first two invoices . . . expired prior to the commencement of the action. The contract claim and unjust enrichment claim and quantum meruit claim for the amounts claimed in those two invoices are statute barred and that portion of the claim is struck out on that basis."

6 MGL in its pleading also sought a declaration that the defendants are in breach of the trust provisions of the *Construction Lien Act* and are liable to MGL for damages. MGL alleged that the defendants received progress advance funds on these projects from the owner, which funds were held in trust under the provisions of s. 8 of the *Construction Lien Act* and that MGL is the beneficiary of such trust funds.

7 The Small Claims Court judge held that the breach of trust claim in respect of the Kirkton project was statute barred, whereas she allowed the breach of trust claim in respect of the Bannockburn project to stand, explaining it this way at paras. 17-18 as follows:

> On at least the Kirkton project, where the non-payment of the invoice claim [is] said to be the breach of trust, the alleged act or omission is more than two years before the action was commenced and I do not see the presumption being rebutted. The trust claim on Kirkland [*sic*] is statute barred.
>
> I do not see the same conclusion as warranted on Bannockburn which still has unpaid invoices within the two year period outstanding and therefore capable of being the subject of an act or omission in trust terms within that period.

8 There had been two motions before the Small Claims Court judge. MGL sought a production order for financial information as to the state of accounts between the owner and contractor. The defendants brought a cross motion seeking

dismissal of the plaintiff's claims as being statute barred. MGL's motion settled but the defendants' motion for summary judgment proceeded without MGL having received the documents that it sought.

STANDARD OF REVIEW

9 The Small Claims Court judge was proceeding under Rule 12.02 of the *Rules of the Small Claims Court* allowing a court to strike out or amend all or a part of any document that discloses no reasonable cause of action or defence. The issue before her was whether the claim had no meaningful chance of success and its dismissal at trial was effectively a foregone conclusion: see *O'Brien v. Ottawa Hospital*, 2011 CarswellOnt 88 (Ont. Div. Ct.) at para. 13.

10 The Small Claims Court judge made findings of fact or mixed fact and law and an appellate court should not intervene unless there has been palpable and overriding error.

CLAIMS FOR BREACH OF CONTRACT, UNJUST ENRICHMENT AND QUANTUM MERUIT

11 The Small Claims Court judge indicated that there was no extension agreement and that the limitation period ran from the dates of the first two invoices. However, in the affidavit of John Martelli, it is stated "that the defendants are not coming to court with clean hands. The defendants made promises to pay the outstanding amounts to me and my staff, thereby delaying me, yet failed to do so." No responding affidavit took issue with that comment.

12 The defendants and MGL had an ongoing working relationship on several projects which pre and post-dated the unpaid invoices.

13 On the state of the evidence and in particular, the uncontradicted affidavit of Mr. Martelli to the effect that there were promises to pay which delayed the commencement of the claim it would be open to a trial judge to find that the promises amounted to an extension of the limitation period as MGL continued to perform services in accordance with the forbearance. Accordingly, although there may not have been any formal extension agreement, there is a triable issue that the limitation period was extended by reason of the promises and forbearance. Therefore, I conclude that the Small Claims Court judge did make a palpable and overriding error in ignoring this evidence and dismissing these claims.

TRUST CLAIMS

14 Until all the relevant information is obtained pursuant to the production order, it cannot be stated conclusively that MGL does not have a meaningful chance at trial to establish its trust claims. It is premature to rule out these claims as the productions may demonstrate that the contractor did receive funds from the owner within the limitation period. A trust does not exist until the monies have been received by the contractor. Until it can be ascertained as to when funds flowed to the defendants, the commencement of the limitation period itself cannot be determined.

15 In fact, the Small Claims Court judge seemed to be of this view when she said at para. 21:

> "On the chance that the documents ordered to be disclosed on both projects reveals some breach of trust on Kirkton that is something other than non-payment of the statute barred invoices, I will allow the production order to stand for both projects . . . "

16 By stating as much, the Small Claims Court judge appears to be leaving open the possibility of a breach of trust claim depending on what the documents that are sought to be produced reveal. That being so, it was not reasonable for her to conclude that the breach of trust claim with respect to the Kirkton project should be statute barred but not the breach of trust claim with respect to the Bannockburn project.

CONCLUSION

17 For these reasons, I find that the Small Claims Court judge made a palpable and overriding error in striking out at this stage, the breach of trust claim with respect to the Kirkton project and striking out the other claims relating to both the Kirkton and Bannockburn projects.

18 The appeal is allowed, the order of the Small Claims Court judge is set aside and the matter is to proceed to trial.

19 Counsel have agreed that the costs of the appeal be fixed at $2,000, all inclusive. Accordingly, having been successful, MGL will have its costs in that amount payable by the defendants within 30 days.

Appeal allowed.

End of Document

2015 ONSC 3581
Ontario Superior Court of Justice

Frank's Drilling and Blasting Inc. v. Isbester

2015 CarswellOnt 10511, 2015 ONSC 3581, 127 O.R. (3d) 388, 256 A.C.W.S. (3d) 700, 51 C.L.R. (4th) 339

Frank's Drilling and Blasting Inc., Plaintiff/Moving Party and Andrew Isbester, Defendant/Respondent

Douglas M. Belch J.

Heard: May 28, 2015; July 3, 2015
Judgment: July 10, 2015
Docket: Kingston CV-14-291-00

Counsel: David M. Adams, for Plaintiff / Moving Party
Robert G. Smart, for Defendant / Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Plaintiff invoiced individual defendant for drilling and blasting services totaling $1,931,625.95 — Individual defendant was identified as principal and president of corporation developing six solar energy projects — Plaintiff alleged defendant breached trust provisions of Construction Lien Act — Plaintiff commenced action for unpaid balance and over alleged conversion of trust funds — Plaintiff brought motion for leave to amend statement of claim to add second individual as defendant — Proposed defendant was spouse of original defendant — Plaintiff alleged that proposed defendant was officer and controlling mind of corporation, and personally liable for breach of trust — Defendant claimed that action and motion were both statute-barred — Motion granted — Trust was imposed over monies received — Date monies were received determined when limitation period commenced — In late June 2013, plaintiff discovered defendant received $1,430,451.94 — Claim was filed July 2014, therefore was brought within limitation period — Motion commenced April 2015 to add proposed defendant to action was brought within limitation period.

Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant

Table of Authorities

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 8 — considered

s. 13 — considered

s. 13(1) — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

s. 21(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 5.04 — considered

R. 5.04(2) — considered

R. 26.01 — considered

MOTION by plaintiff for leave to amend statement of claim to add second individual defendant.

Douglas M. Belch J.:

1 This is the Plaintiff's motion for an Order allowing the Plaintiff to amend its Statement of Claim to add Michelle Isbester as a Defendant. For the reasons that follow, the Court grants leave to the Plaintiff to add Michelle Isbester and awards set-off costs to the Plaintiff of $800.00 including fees, disbursements and H.S.T. where applicable.

2 The Plaintiff, Frank's Drilling & Blasting Ltd., an Ontario Corporation caused to be issued a Statement of Claim on July 2, 2014. Andrew Isbester, (Defendant) was named as the only Defendant.

3 Andrew Isbester was identified as the principal and president of 1652472 Ontario Inc. o/a North Key Construction, (North Key). Details in the claim allege North Key contracted with the Plaintiff to provide drilling and blasting services for six solar energy projects. The work was completed. Invoices were submitted totaling $1,931,625.95 for services and materials provided. This balance remains owing.

4 In addition to the balance owing, the Plaintiff in his claim alleges North Key breached the trust provisions of the *Construction Lien Act*, R.S.O. 1990, (Act) as North Key received funds from the general contractors but converted all, or part, of these trust funds for its own use contrary to section 8 the Act.

5 Paragraph (k) of the grounds for this motion reads:

> Michelle Isbester, as an officer and person with effective control of North Key, is personally liable for North Key's breach of trust pursuant to section 13 of the Act. Michelle Isbester assented to, or acquiesced in, conduct that she knew, or reasonably ought to have known, amounted to a breach of trust by North Key.

6 Lenore Sinnett, a law clerk for the Plaintiff's lawyer deposes Michelle Isbester was, at all material times, an active officer and the founder of North Key and Michelle Isbester and Andrew Isbester are husband and wife.

7 In an Affidavit sworn June 12, 2015, Plaintiff's Counsel deposes:

> a. His client only received details of when North Key received the contract monies from Black & McDonald (B & M), the general contractors, in late June 2013 by way of an affidavit of Phillip O'Connor, project manager, for (B & M);
>
> b. By June 21, 2013, the date Phillip O'Connor's affidavit was sworn, B & M had paid the Defendant $1,430,451.94;
>
> c. None of the $1,430,451.94 was paid to the Plaintiff;
>
> d. The Corporate Profile Report for 1652472 Ontario Inc., North Key, shows Andrew Isbester as Director, President and Secretary of North Key. No other director is identified, however, a Detailed Document List Search of North Key shows Michelle Isbester had been a Director, Secretary and Treasurer until May 29, 2013;
>
> e. A Corporate Profile Report of North Key as of June 25, 2013 would make no mention of Michelle Isbester;
>
> f. Andrew Isbester has maintained throughout Michelle Isbester had nothing to do with the business of North Key;
>
> g. In early 2015, a search of news articles about North Key turned up two articles indicating Michelle Isbester had a very active role in the company during the time North Key received the monies from the general contractor.

Plaintiff's Position

8 The Plaintiff Submits:

a. Any limitation period for a trust claim commences when the claimant first discovers the monies to which the trust claim relate were received. With respect to Andrew Isbester, that date would be late June 2013 and as the Statement of Claim was issued July 2, 2014, the action was commenced well within the two-year limitation period.

b. Had the Plaintiff been aware of the active role of Michelle Isbester as a person with control or as a director in North Key as of late June 2013, the two-year limitation period for an action against her would also commence June 2013.

c. However, the Plaintiff discovered in early 2015 that Michelle Isbester played an active role in North Key from newspaper articles first published November 7, 2012 in the *Globe and Mail* and confirmed she was a director from a corporate point in time report as of June 23, 2013 received June 5, 2015.

d. The Plaintiff submits, at the very least, leave to amend the Statement of Claim should be granted with leave to allow Michelle Isbester to plead a limitation defence as there is a live issue as to when the limitation period began to run.

Position of Andrew Isbester

9 Andrew Isbester, in his affidavit, deposes North Key last received payment from the general contractors November 14, 2012 and the Plaintiff last worked for North Key on November 26, 2012. Accordingly, he requests an Order dismissing the Plaintiff's action to amend on the basis that any claim against Michelle Isbester would be contrary to the Act as the limitation period has expired.

10 The Defendant submits any limitation period regarding Michelle Isbester would start when the Plaintiff last performed work and services for the Defendant at the sites in the fall of 2012. Due diligence in the form of a corporate records search as of that date would have identified Michelle Isbester as a Director, Secretary and Treasurer of North Key/

Analysis

11 Rule 5.04(2) provides as follows: at any stage of a proceeding, the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

12 Rule 26.01 provides: on motion, at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

13 Section 21 of the *Limitations Act*, 2002 reads as follows:

21. (1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

14 The Court has found helpful the footnotes and case reviews found in the publication, Ontario Superior Court Practice 2015, Archibald Killen and Morton, LexisNexis, pages 765 through 772, particularly,

a. At page 770, the text reads "the difference in wording between Rule 26.01, which is mandatory and Rule 5.04, which is discretionary, has no bearing on how a court is to address the issue of prejudice when a limitation period has expired. The mandatory nature of Rule 26.01 only becomes important after the issue of prejudice has been dealt with....

b. At page 771, a Defendant may be added after the expiry of the limitation period where discoverability is a live issue and it is not clear that prejudice would result that could not be compensated for. Determining the application

of the discoverability principle in any given case necessarily requires a determination of facts - an exercise that is generally discouraged on interlocutory motions....

c. At page 768, if there is an issue of fact or credibility on the discoverability allegation, the proposed defendant should be added with leave to plead a to limitations defence. If there is no such issue, the motion should be refused; evidence is appropriate and necessary on a pleading amendment motion for a motion to add a party. The court must look at the evidentiary record to determine if there is a basis for the claim that a limitation period has not expired; ... Taking no steps to make necessary inquiries will not be sufficient. Ignorance of the possible liability of a particular defendant will not extend the limitation period....

d. Finally, at page 771, "...In order to add a defendant after the passage of the limitation period, the court should not require the plaintiff to put forward evidence of discoverability where the constituent facts relating to discoverability of the cause of action are properly pleaded in the proposed amendment."

15 Paragraphs 13-21 of the original Statement of Claim contain allegations of negligent and fraudulent misrepresentations of Andrew Isbester addressing financial issues which the Plaintiff alleges persuaded it to remain on the job sites or lulled it into a false sense of security about eventual payments for its work and services.

16 The Plaintiff's proposed amended claim sets out in paragraphs 3(a), 27(a), and 29(a) the nature of its claim against Michelle Isbester without details of discoverability. Those details are set out in the affidavit of Plaintiff's counsel sworn June 12, 2015.

17 The court has examined the proposed Amended Statement of Claim to determine whether the Plaintiff put forward evidence of discoverability. The Plaintiff pleads in paragraph 3(a), the Defendant, Michelle Isbester, at all material times was an active officer and the cofounder of North Key. Michelle Isbester and Andrew Isbester are husband and wife. At paragraph 27(a), the Plaintiff pleads Michelle Isbester, as an officer in person with effective control of North Key, is personally liable for North Key's breach of trust pursuant to section 13 of the *Construction Lien Act*. Michelle Isbester ascended to, or acquiesced in, conduct that she knew, or reasonably ought to have known, amounted to a breach of trust by North Key. At paragraph 29(a), the claim against Michelle Isbester is in the amount of $1,931,625.95 for breach of trust provisions.

Conclusion

18 Section 13 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 describes liability for breach of trust.

13. (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities, who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

19 I reject the Defendant's submissions the two year period commences in 2012 when the Plaintiff last worked at the sites.

20 A trust is imposed over monies received, therefore, the date monies are received is critical to a determination of when the limitation period commences.

21 Regarding Andrew Isbester, the court is satisfied the Plaintiff discovered in late June, 2013 (B & M) had paid North Key, $1,430,451.94. The limitation period starts late June 2013 and I find the Plaintiff, having issued its claim July 2, 2014 is within the two-year limitation period.

22 Regarding Michelle Isbester, even if I ignore the Plaintiff's contention it only learned of her active role in the company in early 2015 then confirmed she was a Director in June 2015 from a Corporate Records Search, and accept the limitation period starts in late June 2013, the Notice of Motion to add her as a party was issued April 9, 2015 and is within the two-year limitation period.

23 This is not a motion for summary judgment, but to add Michelle Isbester as a party. Rule 5.04(2) is discretionary and I am satisfied results in no prejudice which could not be eventually addressed in costs. When it is combined with Rule 26.01 which is mandatory, the court grants leave to the Plaintiff to amend its pleadings by adding Michelle Isbester as a party as again, I am satisfied it results in no prejudice which cannot be addressed by an award of costs.

24 The Court finds it is unnecessary to address whether the Plaintiff was lulled into a false sense of security causing it to remain on the job sites.

Costs

25 The Plaintiff's failure to originally file with this motion an affidavit outlining discoverability resulted in the need for the parties to return to court after their first appearance on May 28. Costs are awarded to the Defendant for attendance at and preparation for that first court appearance and fixed at $1000.00 payable by the Plaintiff.

26 The plaintiff was successful in having Michelle Isbester added as a party and is entitled to its costs. Counsel for both parties agreed that the successful party was entitled to costs for July 3 in the amount of $1800.00. Setting off the cost amounts, the Defendant is to pay to the Plaintiff costs of $800.00 including disbursements and H.S.T. were applicable.

Motion granted.

End of Document

2014 ONSC 918
Ontario Superior Court of Justice

Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.

2014 CarswellOnt 4708, 2014 ONSC 918, [2014] I.L.R. I-5595,
[2014] O.J. No. 1744, 239 A.C.W.S. (3d) 606, 36 C.L.R. (4th) 126

Dolvin Mechanical Contractors Ltd., Plaintiff and Trisura Guarantee Insurance Company, Samson Management and Solutions Ltd., Toronto Transit Commission and Martin Bamford, Defendants

Mew J.

Heard: January 28, 2014
Judgment: April 10, 2014 *
Docket: CV-12-466422

Counsel: Robert Harason, for Plaintiff
Samantha Ambrozy, for Defendants, Toronto Transit Commission and Martin Bamford

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Torts

Headnote

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious

Plaintiff mechanical subcontractor D Ltd. was retained to perform certain work on project owned by defendant owner TTC — As result of not being paid in full by defendant general contractor S Ltd., subcontractor obtained default judgment in amount of $122,010 — Subcontractor obtained notice of garnishment and served it on owner, who responded with copy of labour and material bond posted by general contractor — Subcontractor brought action against surety, general contractor, owner and owner's superintendent, seeking $122,010 under bond from surety, or declaratory relief and damages from other defendants — Owner brought motion for order striking out certain portions of statement of claim as not disclosing reasonable cause of action — Motion dismissed — Owner delivered statement of defence before bringing motion to strike out, practice that was to be discouraged — Statement of defence did not plead claims advanced in impugned paragraphs were legally untenable or that there was no cause of action made out — As such, in keeping with overall policy objectives of just, expeditious and least expensive determination of claims on merits, owner was denied leave to proceed with motion to strike out.

Construction law --- Bonds and sureties — Bonds — Payment bonds — Notice

Plaintiff mechanical subcontractor D Ltd. was retained to perform certain work on project owned by defendant owner TTC — As result of not being paid in full by defendant general contractor S Ltd., subcontractor obtained default judgment in amount of $122,010 — Subcontractor obtained notice of garnishment and served it on owner, who responded with copy of labour and material bond posted by general contractor, of which subcontractor had not previously been aware — Subcontractor brought action against surety, general contractor, owner and owner's superintendent, seeking $122,010 under bond from surety, or declaratory relief and damages, on ground that owner breached fiduciary duty and obligations under Construction Lien Act, and committed negligent misrepresentation in failing to disclose existence of labour and materials bond in parties' communications — Owner brought motion for summary judgment dismissing action against it — Motion granted in part — Subcontractor failed to make request under s. 39 of Act, and owner was not under duty to provide subcontractor with information about bond unless asked — Subcontractor's generic request to owner for "help getting paid" was insufficient to ground negligent misrepresentation claim — Evidence did not support subcontractor's contention that owner's superintendent said general contractor was

only person liable for payment — Elements of negligent misrepresentation, breach of fiduciary duty and of s. 39 of Act were not made out against owner or superintendent.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — General principles

Plaintiff mechanical subcontractor D Ltd. was retained to perform certain work on project owned by defendant owner TTC — As result of not being paid in full by defendant general contractor S Ltd., subcontractor obtained default judgment in amount of $122,010 — Subcontractor obtained notice of garnishment and served it on owner, who responded with copy of labour and material bond posted by general contractor, of which subcontractor had not previously been aware — Subcontractor brought action against surety, general contractor, owner and owner's superintendent, seeking $122,010 under bond from surety, or declaratory relief and damages — Owner brought motion for summary judgment dismissing action against it — Motion granted in part — Subcontractor commenced action more than two years after its communications with owner, but within two years of owner making payment to general contractor and immediately upon learning of bond — While it would have been better if subcontractor had simultaneously pursued owner for same information it requested from general contractor, subcontractor's efforts to discover existence of bond was not obviously unreasonable, until time that general contractor's defence was struck out in that action — Subcontractor's claim was not dismissed as against owner on basis of limitation defence.

Table of Authorities

Cases considered by *Mew J.*:

Apotex Inc. v. IVAX Pharmaceuticals s.r.o. (2009), 2009 CarswellOnt 1669 (Ont. S.C.J.) — referred to

Bell v. Booth Centennial Healthcare Linen Services (2006), 2006 CarswellOnt 7361 (Ont. S.C.J.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641 (S.C.C.) — followed

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 642, 2014 CarswellOnt 643, 2014 SCC 8, 27 C.L.R. (4th) 65, 37 R.P.R. (5th) 63, 2014 CSC 8, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 453 N.R. 101, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 314 O.A.C. 49, 12 C.C.E.L. (4th) 63, (sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 366 D.L.R. (4th) 671, 47 C.P.C. (7th) 1 (S.C.C.) — followed

Dominion Bridge Co. v. Marla Construction Co. (1970), 12 D.L.R. (3d) 453, [1970] 3 O.R. 125, 1970 CarswellOnt 743 (Ont. Co. Ct.) — referred to

Don Fry Scaffold Service Inc. v. Ontario (2007), 2007 CarswellOnt 5092, 65 C.L.R. (3d) 310 (Ont. S.C.J.) — referred to

Schulz v. Johns (2014), 2014 ONSC 387, 2014 CarswellOnt 638 (Ont. S.C.J.) — referred to

Terminal Warehouses Ltd. v. J.H. Lock & Sons Ltd. (1956), [1956] O.W.N. 581 (Ont. H.C.) — referred to

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Pt. IV — referred to

Pt. VI — referred to

s. 8(2) — considered

s. 39 — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 5(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04(1) — considered

R. 2.02 — considered

R. 20 — considered

R. 21 — referred to

R. 21.01 — considered

R. 21.01(1) — considered

R. 21.01(1)(b) — considered

R. 21.02 — considered

MOTIONS by owner for order striking out certain portions of statement of claim, and for summary judgment dismissing action against it.

***Mew J.*:**

1 The plaintiff ("Dolvin") agreed to perform certain mechanical and fire protection work on an interior renovation project at a Toronto Transit Commission ("TTC") building. The general contractor for the project was Samson Management and Solutions Ltd. ("Samson"). TTC was the project's owner.

2 The contract price for the work was $780,000 plus G.S.T. Samson has not paid Dolvin the entire contract price.

3 On 30 June 2010, Dolvin commenced an action against Samson and its principal, Jason Brasseur. Samson and Brasseur initially defended the action, but failed to deliver an affidavit of documents. Their defence was, as a consequence, struck out on 3 March 2012 and default judgment was obtained on 17 April 2012 for $100,684.15 plus costs, which resulted in a total judgment debt of $122,010.83. That judgment remains unsatisfied.

4 On 23 July 2012 Dolvin's lawyer obtained a notice of garnishment against the TTC as garnishee. Following that there were a number of communications between Dolvin's lawyer and the TTC culminating in an email dated 25 October 2012 from Dolvin's lawyer asking whether a labour and material payment bond had been posted by Samson with the TTC in relation to the project and, if so, requesting a copy.

5 On 26 October 2012 a lawyer from the TTC responded to this email, enclosing a copy of a labour and material payment bond posted by Samson.

6 Dolvin had not previously been aware of the existence of this bond.

7 On 26 October 2012, Dolvin commenced this action against Trisura Guarantee Insurance Company, ("Trisura"), the Surety under a Labour and Material Payment Bond dated 11 December 2007 (the "Bond"), Samson, the TTC and Martin Bamford (a construction superintendent employed by the TTC).

8 Dolvin seeks the sum of $122,010.83 from Trisura under the Bond. Alternatively, if it is determined that Dolvin is not entitled to payment pursuant to the provisions of the Bond, Dolvin seeks certain declaratory relief and damages against the TTC, Bamford and Samson.

9 Trisura has defended the action on the basis, inter alia, that:

- Dolvin does not fall within the definition of a "Claimant" under the Bond;
- Dolvin failed to deliver notice of its claim to Trisura within the time prescribed by the Bond; and
- The action against Trisura is barred by a one year contractual limitation period contained in the Bond.

10 Samson has not defended the action.

11 The TTC has defended the action and now brings a motion for:

(a) An order striking out certain paragraphs of Dolvin's amended statement of claim as disclosing no reasonable cause of action (pursuant to Rule 21 of the Rules of Civil Procedure); and

(b) An order granting summary judgment dismissing the balance of the action as against Mr. Bamford and the TTC on the basis that:

(i) Dolvin's claim against TTC is statute barred by operation of the *Limitations Act, 2002*;

(ii) TTC did not breach any fiduciary duty or other duty of care which it may have owed to Dolvin;

(iii) TTC did not engage in any misrepresentation in failing, prior to 26 October 2012, to disclose to Dolvin the existence of the Bond;

(iv) TTC did not breach s. 39 of the *Construction Lien Act*.

12 Trisura has a pending motion for summary judgment on the defences it has raised but did not participate in the present motion.

13 Both counsel on this motion acknowledge that if Dolvin is entitled to payment under the Bond, the substantive claim of the plaintiff in this action would essentially be satisfied (save for arguments that might be made about costs).

14 Dolvin asserts that there are genuine issues for trial "regarding its claim and when it was discovered" and, accordingly, that the motion should be dismissed, but "with a determination, by the motions court judge, of those material facts not in dispute". In particular, although there is no cross-motion, Dolvin argues that the issue of whether or not the TTC breached s. 39 of the *Construction Lien Act* could be resolved on the present motion if the relief sought by the TTC is denied.

The Motion to Strike

15 The impugned paragraphs in the amended statement of claim plead that TTC had paid Samson the sum of $9,267.48 on 6 June 2011, at which time TTC knew that Samson had failed to pay Dolvin the amount of $99,790.80 due and owing to it. Dolvin claims that by paying Samson, TTC knowingly assisted or was willfully blind to the fact that the payment would be appropriated or converted by Samson to its own use, or to a use inconsistent with the beneficial interest of Dolvin and s. 8(2) of the *Construction Lien Act*.

16 TTC delivered its statement of defence on 18 January 2013. It denies the existence of any obligation to Dolvin as a beneficiary under a *Construction Lien Act* trust (save for the obligation to respond to a request under section 39) and denies that it owes any other obligation to Dolvin in respect of its payment of $9,267.48 to Samson. TTC's defence does not assert that the portions of the amended statement of claim which it now attacks fail to plead a reasonable cause of action.

17 TTC waited until after it had delivered its defence before bringing its motion to strike on the basis that the impugned paragraphs disclose no reasonable cause of action.

18 According to TTC, the only circumstances in which an owner is precluded from releasing holdback funds to a contractor are those contemplated by the *Construction Lien Act*. The existence of a general duty on the part of an owner not to release funds to a contractor where it has knowledge of a claim by a sub-contractor that it has not been paid would run contrary to the scheme of the Act.

19 Dolvin argues that once a defendant has delivered a statement of defence it is too late to bring a motion to strike out paragraphs in a statement of claim (relying on *Terminal Warehouses Ltd. v. J.H. Lock & Sons Ltd.*, [1956] O.W.N. 581 (Ont. H.C.) (Master)).

20 Rule 21.02 requires a motion under Rule 21.01 to be made "promptly".

21 The *Terminal Warehouses* case addressed a former rule of practice which provided that any pleading that may tend to prejudice, embarrass or delay the fair trial of an action could be struck out or amended. The defendant in that case sought an order striking out a statement of claim as embarrassing on the ground that sufficient particulars had not been provided at the examination for discovery to support the allegations pleaded in the statement of claim or indicate the nature of the negligence alleged against the defendant. In rejecting the motion, the senior master made reference to another rule which provided that an application to set aside any proceeding for irregularity shall be made within reasonable time and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity.

22 As D. Brown J. noted in *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 (Ont. S.C.J.) at para. 5, Rule 2.02, the successor to the 'fresh step' rule, requires that a motion to attack a document for irregularity shall not be made, without leave of the court, "if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity".

23 Counsel could not point to any case decided under Rule 21.01(1)(b) which stands for the proposition that a motion to strike out a statement of claim *must* be brought before a defence has been delivered. As a general principle, however, the practice of delivering a statement of defence before bringing a rule 21.01(1) motion should be discouraged: *Bell*, *supra*, and *Schulz v. Johns*, 2014 ONSC 387 (Ont. S.C.J.) (CanLII) at para. 12.

24 As already noted, the statement of defence falls short of pleading that the claim advanced in the impugned paragraphs is legally untenable. It is arguable whether it even implicitly disputes that a cause of action has been shown. In that sense this is not one of the cases described by Perell J. as being in "a line of authorities that suggest that leave is not necessary where the statement of defence expressly or implicitly disputes that a cause of action has been shown" (*Schulz*, *supra*, at para. 11).

25 Having regard to the foregoing and to promotion of the overall policy objectives of the *Rules of Civil Procedure* "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" (Rule 1.04(1))., the 'fresh step' rule should, on this occasion, be observed and leave to the TTC to proceed with its Rule 21.01(1) motion should be denied.

The Summary Judgment Motion

26 TTC submits that the existing record is sufficient for summary judgment to be granted in its favour on one or more of the grounds listed above.

27 The granting of summary judgment is now subject to the guidance provided by the Supreme Court of Canada in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) [hereinafter Mauldin] (CanLII) and *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.) (CanLII).

28 In determining whether summary judgment is available, the threshold question is whether or not there is a genuine issue requiring a trial. No genuine issue for trial will exist:

> [W]hen the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> (*Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) at para. 49)

To reach a fair and just determination, the summary judgment process must give "the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (*Mauldin* para. 50)

29 Most of the facts are not in dispute. Where the evidence is in conflict, it has been already tested by cross-examination, examination for discovery, or both.

30 Documentary discovery is, essentially, complete.

31 The amount in dispute is no more than $122,010.83. This is relevant to a consideration of whether summary judgment would be a proportionate, more expeditious and less expensive means of achieving a just result.

32 Having regard to these principles, there is a sufficient record before the court to allow a judge to draw the inferences necessary to make the dispositive findings under Rule 20 on the issues submitted by TTC.

The Facts

33 I accept as accurate the following description of the facts provided in the factum of TTC (paras. 13 to 16, references and emphasis omitted):

> 13. On or about March 2, 2010, TTC received a fax transmission from Dolvin which stated in its entirety (the "March 2, 2010 Fax"):
>
> > Reza,
> >
> > We have been trying to for the past week to get in contact with you regarding the above mentioned project. We originally quoted this project to Samson Management based on the drawings only as we were never given a set of specifications to review and were not aware of any special turnover commissioning requirements. As stated in our previous letter to Samson Management a quote was submitted for $15,000.00 to perform the work required as outlined in the contract documents which were delivered to our office on September 17, 2009 (sic) by Andy Li.
> >
> > We have completed the mechanical portion of work based on mechanical drawings for the TTC N1-12 4th floor Inglis Building over a year ago and we still have an outstanding balance owing of $88,546.20. We have been very patient and cooperative and should not have to wait this long for payment. At this point we are left with no alternatives as we have not received any indication as to when the monies owing will be released leaving no alternative other than legal action. We do not wish to proceed with this alternative and are hopeful that we can discuss this matter further and receive payment on our outstanding balance of $88,546.20. Please feel free to contact our office to discuss this further.
> >
> > Yours truly,
> >
> > Dolvin Mechanical Contractors Limited

14. On or about March 22, 2010, Martin Bamford, TTC's Resident Superintendent for the Project from on or about June 30, 2008, received a telephone call from Mr. Italo DiBonaventura, Dolvin's President since 1976 (the "March 22, 2010 Call"), which both agree only lasted a few minutes.

15. Mr. Bamford recalls that during the March 22, 2010 Call:

a. Mr. DiBonaventura demanded that TTC pay Dolvin the funds owing to it from Samson (approximately $90,000); and

b. he advised Mr. DiBonaventura that demands for payment should not be made to TTC as Dolvin's contract was with Samson not TTC, however, if he wanted information to which he may be entitled under the Construction Lien Act, such as a statement of accounts, he could request it in writing; and

c. providing an LMP Bond that may have be *[sic]* posted by Samson in respect of the Project did not come to his mind.

But Mr. Bamford recalls that Mr. DiBonaventura did not:

a. mention a LMP Bond or a surety or request a copy of an LMP Bond at all; and

b. advise Mr. Bamford that Dolvin wanted all other potential payors, including any surety under any LMP Bond, if issued, to pay Dolvin the unpaid balance of services and materials supplied by it to the Project;

16. Mr. DiBonaventura on the other hand, states in his Affidavit that he recalls that during the March 22, 2010 Call:

a. he advised Mr. Bamford [that] Dolvin was the mechanical subcontractor of Samson on the Project and that Samson owed Dolvin money for its work done and that Samson was not paying Dolvin;

b. he asked Mr. Bamford how Dolvin could be paid the balance owing to it and for his help in seeing Dolvin paid the amount owing to it by Samson;

c. Mr. Bamford responded TTC could not pay Dolvin, that Dolvin should deal with Samson if it wanted to be paid and that Samson was the only person liable to pay the amount owing to Dolvin on this Project;

34 Mr. DiBonaventura did not record his conversation with Mr. Bamford or otherwise transcribe it. He has no contemporaneous notes of the discussion. In cross-examination on his affidavit however, Mr. DiBonaventura acknowledged that during the 22 March 2010 telephone call, he had not asked "what other potential payors Dolvin could seek payment from" but, rather, "who could help me get paid".

35 Mr. Bamford says that he offered to provide Mr. DiBonaventura with information he was entitled to under the *Construction Lien Act*, such as the Statement of Accounts *if it was requested by Dolvin in writing* (my emphasis).

36 On 22 March 2010, Mr. DiBonaventura of Dolvin wrote to Mr. Bamford requesting payment for monies owing to Dolvin for work completed on the TTC's behalf. There was also enclosed a copy of a lawyer's letter from a solicitor acting for Dolvin (not counsel appearing before Dolvin on the present motion) to Samson demanding payment by 26 March 2012 failing which Dolvin would "take whatever action is available to them in order to [recover] the monies owed to them".

37 On 25 March 2012 Mr. Bamford sent Dolvin a fax stating:

Further to our brief telephone conversation on March 22, 2010 and your fax of the same date, I have reviewed your request and we will issue you a State of Accounts in conformance with Part IV of the construction Lien Act. With respect to your request for direct payment, you will need to pursue payment from the general contractor.

38 On 1 April 2010, Dolvin sent another fax to the TTC saying, inter alia:

> **2ND Request for payment** as we have not yet had a response to our last fax dated March 22, 2010.

39 On 8 April 2010, the TTC wrote to Dolvin stating:

> We are in receipt of your facsimile date April 1, 2010 in which you have made a second request for direct payment for work claimed to be performed under TTC Contract N1-12. **However, it is not appropriate for us to deal directly with you in this matter as the Commission does not have a contract with your company.** Any further requests for payment should therefore be made to the appropriate party, in this case the General Contractor.
>
> Attached for your reference is a copy of our facsimile response to your first request for direct payment, which was sent to you on March 25, 2010. We have further attached a statement of accounts, to which you are entitled pursuant to Part IV of the Construction Lien Act, and which you were verbally advised on March 22, 2010 that you may obtain from us upon written request.

40 Mr. Bamford had consulted Stan Johnson, TTC's senior contract administrator on the project, about Mr. DiBonaventura's 22 March letter, telling Mr. Johnson that he had told Mr. DiBonaventura "that he could receive a status of accounts for us per the lien act if he requested to me in writing". This led to Mr. Bamford's 25 March email to Mr. DiBonaventura.

41 While Mr. Bamford did not know that there was a bond, other personnel at TTC, including Mr. Johnson, apparently did. There is, however, no evidence that Mr. Johnson mentioned the Bond to Mr. Bamford, or that anyone at the TTC turned their mind to the existence of the Bond while the correspondence between TTC and Dolvin was taking place in March and April 2010.

42 Mr. DiBonaventura's evidence is that based on his communications with Mr. Bamford he believed that the only person liable to pay the amount owing to Dolvin for the work was Samson.

43 Not long after these communications between Dolvin and the TTC in March and April 2010, Dolvin sent in two detailed requests to Samson for information pursuant to s. 39 of the *Construction Lien Act*, expressly requesting a copy of any Labour and Material Payment Bond if one had been posted by Samson on the project.

44 Dolvin's action against Samson included a claim for damages for failure to provide the information of access to the information which Dolvin was entitled to under s. 39 of the *Construction Lien Act*.

45 As already noted, Dolvin only found out about the Bond after it had obtained default judgment against Samson and sought to enforce that judgment.

TTC's Position

46 TTC argues that:

> (a) Dolvin ought to have asked TTC in writing, in accordance with s. 39 of the *Construction Lien Act*, whether Samson had posted a Labour and Material Payment Bond on the project;
>
> (b) No duty was owed by TTC to Dolvin prior to 25 October 2012 (because no section 39 request had ever been made before then);
>
> (c) Its responses to Dolvin in March and April 2010, which made no mention of the existence of a Bond and which told Dolvin that further requests for payment should be made to Samson, were not false, misleading, inaccurate or negligently made;

(d) It was not reasonable for Dolvin to rely on TTC's "silence" to believe that there was no Labour and Material Payment Bond posted by Samson; and

(e) Dolvin did not take any reasonably diligent steps to discover the existence of a claim against TTC for two and a half years and is therefore statute barred by the *Limitations Act*, 2002.

47 Because Dolvin's action was not commenced until 26 October 2012, TTC asserts that the two year limitation period under section 4 of the *Limitations Act, 2002* had expired. With the exercise of appropriate diligence Dolvin could and should have discovered the existence of its claim against the TTC sooner.

Dolvin's Position

48 Dolvin argues that although it made no express request was pursuant to s. 39 of the *Construction Lien Act*, TTC nevertheless turned its mind to the disclosure requirements of s. 39 of the Act. In its correspondence of 25 March 2010 and 8 April 2010 the TTC made reference to production of a statement of accounts (attaching such a statement to the 8 April 2010 letter). This was done despite TTC not having received a written request for information under s.39.

49 Because TTC knew that Dolvin had not been paid and that Mr. DiBonaventura was asking "who could help me get paid", Dolvin asserts that the TTC was under an obligation to tell it about the Bond, the lack of a formal request under s. 39 notwithstanding. Its failure to do so breached TTC's duty of care and fiduciary responsibilities owed to Dolvin and, further amounted to negligent misrepresentation.

50 Dolvin argues that the limitation period only started to run on 26 October 2012, when it found out that the TTC had failed to disclose the existence of the Bond.

Discussion

51 There were two possible ways for Dolvin to find out about the Bond. One was to ask Samson. The other was to ask TTC.

52 Based on his communications with Mr. Bamford in March and April 2010, Mr. DiBonaventura wrongly assumed that the only party liable to pay the amount owing to Dolvin for the work was Samson.

53 Yet, just weeks later, a written s. 39 request was made by Dolvin to Samson.

54 Had Dolvin made the same s. 39 request to TTC that it did to Samson, a failure on the part of TTC to provide the requisite information would have been actionable.

55 Dolvin's repeated demands to TTC for payment were misguided. Nevertheless, TTC did provide Dolvin with a statement of accounts, which is part of the information that it would have to have provided in response to a s. 39 request. TTC also expressly invited Dolvin to make a written request under "Part IV" of the *Construction Lien Act* (section 39 is in fact in Part VI).

56 Mr. DiBonaventura's evidence on cross-examination did not support Dolvin's pleaded assertion that Mr. Bamford had been asked for the information that Dolvin was entitled to under s. 39 or that Mr. Bamford had told Mr. DiBonaventura "that Samson was the only person liable to pay the amount owing to Dolvin on this project".

57 Prior to the enactment of the *Construction Lien Act*, it had been held that an owner/trustee/oblige of a labour and material payment bond was not under a duty to give a sub-contractor information about the existence of such a bond unless asked for it: *Dominion Bridge Co. v. Marla Construction Co.*, [1970] 3 O.R. 125, 12 D.L.R. (3d) 453 (Ont. Co. Ct.)

58 The Act has not conferred on the owner a duty, fiduciary or otherwise, outside of s. 39, to provide a labour and material payment bond to a sub-contractor: *Don Fry Scaffold Service Inc. v. Ontario*, 2007 CanLII 31780, (2007), 65 C.L.R. (3d) 310 (Ont. S.C.J.).

59 Furthermore, Mr. DiBonaventura's generic request for "help" was, in my view, insufficient to form the basis for Dolvin's negligent misrepresentation claim.

60 There are five general requirements of a claim in negligent misrepresentation: (1) there must be a duty of care based on a 'special relationship' between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted: *Apotex Inc. v. IVAX Pharmaceuticals s.r.o.* [2009 CarswellOnt 1669 (Ont. S.C.J.)], (2009) CanLII 14039.

61 Arguably none of these requirements can be satisfied. Suffice it to say that if the communications between TTC and Dolvin in March and April 2010 in fact led Dolvin to assume that TTC had provided all of the information that Dolvin was entitled to receive under s. 39, such an assumption was unreasonable.

62 It follows that I would answer three of the four issues posed by TTC as follows:

a. TTC did not owe Dolvin, and, hence did not breach, any fiduciary duty or other duty of care to inform Dolvin of the existence of the Bond, absent a clear request for such information having been made;

b. TTC did not engage in any misrepresentation in failing, prior to 26 October 2012, to disclose to Dolvin the existence of the Bond;

c. TTC did not breach s. 39 of the *Construction Lien Act*.

63 That leaves the issue of limitation.

64 There is a presumption that the limitation period will run from the date on which the act or omission on which the claim is based took place, unless the contrary is proved having regard to the principles of discoverability set out in s. 5 of the *Limitations Act*.

65 This action was commenced on 26 October 2012, more than two years after the communications between the TTC and Dolvin in March and April 2010, but less than two years after TTC paid Samson the sum of $9,267.48.

66 Dolvin only knew of its claim against the TTC when having served its garnishment notice, it received the Bond on 26 October 2012.

67 Section 5 of the Limitations Act, 2002, S.O. 2002, Chap. 24, Schedule B, provides:

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

68 The question, therefore, is when a reasonable person with the abilities and in the circumstances of Dolvin first ought to have known of the claim against TTC.

69 After being rebuffed by TTC in March and April 2010, Dolvin focused its attention on Samson. Samson initially defended the first action brought by Dolvin. Dolvin would have reasonably expected to get disclosure of information about the Bond through the discovery process in that action.

70 While it would clearly have been better if Dolvin had simultaneously pursued TTC for the same information (which TTC would presumably have yielded if a request had been made), I would not characterise Dolvin's efforts to discover the existence of a Bond (or any other possible source of payment) as obviously unreasonable, at least until it became apparent that the information would not be forthcoming from Samson. That would have been no later than March 2012 when Samson and Brasseur's defence and counterclaim in Dolvin's first action was struck out.

71 Appreciating that the result of my decision on the other issues submitted for summary judgment means that there may be little, if anything, that Dolvin can recover from TTC, I would not dismiss Dolvin's claim on the basis of TTC's limitation defence on this summary judgment motion.

Disposition

72 By reason of the foregoing the plaintiff's trust claim against TTC can be maintained. However, allegations are made against Mr. Bamford in respect of the trust claim so the action against him should be dismissed.

73 The claim against Trisura remains outstanding.

74 It would seem, subject to any submissions to the contrary, that all remaining issues between the parties could be dealt with summarily. In the circumstances the just, most expeditious and least expensive course going forward would favour my remaining seized of such outstanding matters, including Trisura's summary judgment motion. Counsel should, accordingly, schedule an appointment with my secretary so that appropriate directions can be given.

Costs

75 If the parties are unable to agree on costs, counsel shall provide brief written submissions and a bill of costs by 17th April, with the opportunity for responding submissions of not more than two pages in length by 25th April 2014.

Motion to strike dismissed; motion for summary judgment granted in part.

Footnotes

* A corrigendum issued by the court on April 15, 2014 has been incorporated herein.

End of Document

2292912 ONTARIO INC.
Applicant

v.

2380009 ONTARIO LIMITED
Respondent

Court File No. CV-16-011354-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LISTP

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE MOVING PARTY

FRED TAYAR & ASSOCIATES
Professional Corporation
Barristers and Solicitors
65 Queen Street W, Suite 1200
Toronto, ON M5H 2M5

Fred Tayar (23909N)
Tel. (416) 363-1800
Fax. (416) 363-3356

Lawyers for Eco Energy Home Services Inc.