

## construction litigation bulletin

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### trust me! – Ontario Court of Appeal expands pool of trust beneficiaries under the *Construction Lien Act*

Vendors supplying materials used by contractors or subcontractors have expanded avenues for recovery on delinquent accounts following the Ontario Court of Appeal's decision in *Sunview Doors Limited v. Pappas*.<sup>1</sup>

#### the facts

Sunview Doors Limited ("Sunview") manufactured custom sliding doors for contractors and subcontractors. One of its customers was Academy Doors and Windows Ltd. ("Academy").

After filling several of Academy's orders on credit, Sunview pressed Academy for payment. Sunview was told that payment would be made when Academy was paid for its work on various construction projects where Sunview's sliding doors were being installed. Sunview asked Academy to identify the construction projects at which the doors were being installed, but Academy refused to do so.

Academy went out of business and Sunview was left unpaid. Sunview sued Academy for breach of contract, and sued the three individuals who controlled Academy for breach of trust under sections 8 and 13 of the *Construction Lien Act*.<sup>2</sup>

Section 8 of the *CLA* imposes a trust obligation on a contractor or subcontractor for their suppliers' benefit. The trust fund consists of all amounts owing to the contractor or subcontractor under their contract with the person above them in the construction pyramid. Under section 13 of the *CLA*, individuals who control corporate contractors or subcontractors and allow the corporation to breach a trust are personally liable for the breach of trust. Such individuals may be directors, officers, employees, or agents of the company.

In this case, Academy had transferred monies to the three individuals who controlled the company - monies that Academy had received for its services in relation to the installation of the doors provided by Sunview.

<sup>1</sup> 2010 ONCA 198 (CanLII)[*Sunview*].

<sup>2</sup> R.S.O. 1990, c. C. 30 [*CLA*].

## decisions of the lower courts

The trial judge followed a 2001 decision of the Ontario Court of Appeal and held that a section 8 trust could not be established on the facts. In *Central Supply Co. v. Modern Tile Supply Co.*<sup>3</sup> the Ontario Court of Appeal ruled that such a trust was only formed where a supplier intended that the material sold be used for a known and identified improvement. Sunview supplied all of the sliding doors to Academy without knowing where the doors were installed. The trial judge accordingly found that the requirement in *Central Supply* was not satisfied.

The Divisional Court, however, allowed Sunview's appeal and found the individual defendants liable for breach of trust. The Divisional Court distinguished the present case from *Central Supply*. Whereas in *Central Supply*, a generic product was sold to a retailer who in turn sold the goods to the general public, Sunview had supplied custom-ordered doors to Academy, a contractor that was focused on the retrofit and renovation of condominium units. Had Academy made the required documentary disclosure to Sunview when the information was requested, Sunview would have known where its doors were being installed.

While the Divisional Court distinguished Sunview's case from *Central Supply* on the facts, the Divisional Court specifically disagreed with the principle espoused in *Central Supply* that "the supplier must have intended that its materials be incorporated into a specific and identifiable improvement in order to attract a trust remedy."<sup>4</sup> The individual defendants appealed the Divisional Court's ruling to the Ontario Court of Appeal. The Court of Appeal was asked to rule on whether the decision in *Central Supply* was correct.

## Court of Appeal rejects *Central Supply*

The Court of Appeal unanimously rejected the principle espoused in *Central Supply*:

The Act [i.e., the *CLA*] is unequivocal with respect to the creation of a trust. 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.<sup>5</sup>

Rather, to establish that it was a beneficiary of a trust under section 8 of the *CLA*, a supplier had to prove the following:

- (i) Its customer was a contractor or subcontractor;
- (ii) It supplied materials to projects on which its customer was a contractor or subcontractor;
- (iii) The contractor or subcontractor received or was owed monies on account of its contract for those projects; and

<sup>3</sup> *Central Supply Co. 1972 Ltd. v. Modern Tile Supply Co.* (2001), 55 O.R. (3d) 783 (Div. Ct.) [*Central Supply*].

<sup>4</sup> *Supra*, note 1 at para. 21 citing *Central Supply* at para. 54.

<sup>5</sup> *Supra*, note 1 at para. 74.

(iv) The customer owed the supplier money for the materials.<sup>6</sup>

Once the supplier proved all four elements, the onus shifted to the contractor or subcontractor to demonstrate that any payments made from the trust funds were to proper beneficiaries of the trust.

Applying this four-pronged test, the Court of Appeal found that Sunview was the beneficiary of a section 8 trust. The Court also found that monies Academy transferred to the individual defendants, who were aware of the debt owed to Sunview, were impressed by the trust. The individual defendants' conduct and receipt of the monies was accordingly a breach of their trust obligations owed to Sunview.

The Court of Appeal explained that the purpose of section 8 was to impress money owing to or received by contractors or subcontractors with a statutory trust to ensure payment of suppliers to the construction industry. Denying Sunview its payment in these circumstances would frustrate the object of the *CLA*.<sup>7</sup> No doubt the conduct of the individual defendants in its dealings with Sunview motivated the Court of Appeal's decision - conduct that attracted the trial judge's "strong condemnation".

## contractors, take note – suppliers, know your customer

Contractors and subcontractors should take extra care to be certain that their suppliers get paid out of monies received on account of construction projects before the monies are spent elsewhere - regardless of whether or not their suppliers know where their goods will be installed. Personal liability for a breach of trust on the part of directors, officers and others acting on behalf of the company may otherwise result.

In addition, vendors of construction materials would do well to confirm with their customers that the goods being supplied will be used in support of a contract for the construction of an improvement. While suppliers do not need to know where their materials are being installed, they do need to know that the materials were in fact installed.

If you would like further information on this bulletin or have any questions with regard to Construction Litigation please contact Jason J. Annibale at [jason.annibale@mcmillan.ca](mailto:jason.annibale@mcmillan.ca) (416.865.7912) or Jeffrey Levine at [jeffrey.levine@mcmillan.ca](mailto:jeffrey.levine@mcmillan.ca) (416.865.7791).

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<sup>6</sup> *Ibid.*, at para. 83.

<sup>7</sup> *Ibid.*, at para. 99.

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### a cautionary note

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