



RE: ARTICLE FOR CONSTRUCTION ASSOCIATION – CONSTRUCTION NORTHWEST MAGAZINE

“The Breach of Trust Claim”

Most jurisdictions in Canada contain a provision in their Lien Acts that payments under a construction contract are to be held in a trust fund for the benefit of those who supplied services or materials to the project and are entitled to payment. The officers, directors or guiding minds of the payee who breach the trust can be held personally liable under such legislation.

In Ontario, Sections 7 to 13 of the *Construction Lien Act* set out the trust obligations of owners, contractors and subcontractors in Ontario. These sections have recently come under scrutiny in a number of court decisions. Two issues of particular interest have been whether payments made by a contractor for overhead, in varying degrees of relationship to the project in question, could be set off against the trust monies, and under what circumstances can the directors be held personally liable.

Subsection 8(2) of the *Construction Lien Act* provides that monies paid to a contractor are to be held in trust until all subcontractors and other persons who supplied services or materials to the improvement have been paid. Contractors have repeatedly argued that this entitles them to pay taxes, project overhead costs such as insurance, project superintendents, site trailers, telephones, and a portion of overhead office expenses. This argument received initial support in the Courts on the basis that contractors could otherwise not afford to administer their projects. More recently, however, the Courts have altered their position on this issue. In the case of *Home Depot v. Fieder*, Justice Killeen reviewed the wording of subsection 8(2) of the *Construction Lien Act* and concluded that because the supply of services and materials are defined under the Act, overhead expenses such as office rent, vehicle leasing charges, employee hotel bills, bonuses and wages which do not fit the strict definition under the legislation could not be included.

More recently, in *St. Mary's Cement Corp. v. Construc Limited*, the Court decided that payments for liability insurance on the project, legal fees relating to a construction lien claim, project site telephones, and salaries of clerical employees, even if their work was performed at the job site office, would not constitute appropriate payments from the trust fund. This case represents the high watermark as to what do not constitute appropriate payments from the trust fund.

Officers and directors of corporations have also attempted to argue that they were unaware of the trust provisions of the *Construction Lien Act*, or that their actions constituted a breach of trust. As a result, they should be absolved of liability. The “test” of this argument was formulated by the Divisional Court as follows:

“It is not disputed that the two Defendants against whom Judgment was given knew in fact what they were doing. That is that they knew that the cheques written were in payment of the contractor’s expenses. As the subtrades had not been paid, they ought to have known that there was a breach of trust.”

In that case, the Judge goes on to say that, “Whether or not [the directors] knew that particular conduct might, as a question of law, constitute a breach of the trust provisions of the Act is not determinative. If the corporation’s conduct constitutes a breach of trust, and if he knew or ought to have known of the constitute factual elements of the corporation’s conduct, then the requirements of Section 13(1) are met.”

In this case, the Judge ultimately found the director in question to be liable for breach of trust and personally liable to pay the contractor the amount due and owing to it.

The current judicial trend in Ontario is in favour of finding officers and directors in breach of trust where their corporations either used trust monies for their own purposes or paid such trust monies to third parties. Officers and directors must be very cautious to ensure that trust funds flow to those parties who are entitled to such funds so as to avoid personal liability.

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