



By Keith A. Bannon, Glaholt LLP

NO INTENT, NO LIEN, NO PROBLEM? THINK AGAIN

A recent decision of the Divisional Court has eliminated a major hurdle to suppliers access to the trust remedies of the Construction Lien Act. In its decision in Sunview Doors Ltd. the Divisional Court decided that the intent of a supplier to have their materials incorporated into a specific project is not required in order to successfully prosecute a construction trust action. This decision is in direct contrast to the 2001 decision of the Divisional Court in Central Supply Co., which determined that because the intent a supplier to have their materials incorporated in a specific project was a prerequisite to register a construction lien, it was also a requirement of a construction trust action. This recent decision of the Court argues directly against its earlier ruling and, as a result, it has opened the door for many suppliers to use the trust provisions within Construction Lien Act to recover outstanding debts.

This development is of significance to suppliers throughout the province for very practical reasons. Many suppliers provide their clients with materials without knowing any details with respect to their final destination. This lack of information not only creates a legal bar to their registration of a construction lien, it also makes it far more difficult to monitor the project and/or their client. A supplier's detachment from a project often makes them the last to find out that a project has gone bad or that their client has gone under.

The remedies provided in Part II of the Construction Lien Act allow a supplier to commence an action not only against their corporate client, but also against the officers, directors, and controlling minds behind that corporate client. Furthermore, unlike a construction lien which must be registered (or given in some circumstances) within forty-five days of a supplier's final supply, followed by having the action commenced within ninety days of the final supply at the very latest, a supplier has two years to commence a construction trust action.

Two essential elements of a construction trust action are:

1. The corporate client of the supplier must breach its contract with the supplier by failing to pay for all or part of the materials supplied; and
2. The corporate client must have been paid for those materials that were incorporated into the construction project.

Upon being paid for the materials incorporated into the project, the client is in possession of trust funds which can only be paid out in accordance with the Construction Lien Act.

Sunview Doors, the supplier in the recent decision of the Divisional Court, was a manufacturer of custom patio doors. Their client Academy Doors and Windows Ltd. placed nine purchase orders with Sunview. Despite the fact that Sunview sold these doors to Academy without having any knowledge as to where the doors were going, they were able to successfully obtain a judgment against Academy and its officers and directors because: (1) they were able to show that Academy had failed to pay for the doors, (2) Academy was paid for the supply and installation of the custom doors to the project, and (3) Academy and its directors conceded that they could not demonstrate that they complied with their

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obligations as trustees. In other words, Academy could not show that they had properly distributed the monies to their supplier, which were paid to them for the construction project.

Suppliers' gaining access to this powerful legal tool is of great significance, especially considering the uncertain economic times that we are now facing. However, because there are now opposing decisions of the Divisional Court, suppliers long term use of the trust provisions of the Construction Lien Act will eventually need to be determined by the Court of Appeal.

In the meantime, without the ability to register a construction lien, suppliers throughout the province may now make use of the Construction Lien Act to gain access to an equally powerful means to recover their unpaid accounts. **B**

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