

Case Comment: *Robert Nicholson Construction Company Limited v Edgecon Construction Inc*, 2015 ONSC 1237

September 21, 2015 | Derrick Dodgson

This March 17, 2015 decision of the Ontario Superior Court of Justice concerns the liability of an owner to a subcontractor under the trust provisions of the *Construction Lien Act* (the “*CLA*”). Generally when an owner has made a payment pursuant to certification under a contract, the owner will not be liable for any issues further down the construction pyramid. However, in this case, the owners made the payment to a third party company related to the contractor but not to the project itself. This payment redirection was held to be a determining factor when the contractor failed to pay a subcontractor and the subcontractor sued the owners.

Factual Summary

RLC Stratford LP and Palstratford Group Inc (collectively the “Owners”) were developing The Royal Pallisades Retirement Complex (the “Project”) in Stratford, Ontario. The Owners entered into a construction agreement with Edgecon Contracting Corp. Several other companies were operated by the same individual, Enzo Mizzi, including Edgecon Construction Inc and 1809313 Ontario Inc. The Owners primarily dealt with the Edgecon Contracting and Edgecon Construction as their general contractor for the Project. Edgecon Construction entered into a subcontract with The Robert Nicholson Construction Company Limited (“Nicholson”).

During construction, a payment of \$1,364,620 was made by the Owners, but at the request of Mr. Mizzi, it was paid to 1809313 Ontario Inc. instead of to Edgecon Contracting or Edgecon Construction. Some subcontractors were paid out of this amount, but Nicholson was not, and as of the date of judgment, Nicholson remained owed \$141,089.48. Nicholson sued Edgecon Construction and the Owners, and made a motion for summary judgment that the Owners had breached the trust provisions of the *CLA*.

Decision

Justice George W. King considered the statutory framework of the *CLA* and found that under section 7(1), trust fund beneficiaries include all subcontractors “down the construction chain”. Under section 10, payment to “a person the trustee is liable to pay” discharges the trustee from liability to beneficiaries to the extent of that payment.

However in this case the Owners made payment to 1809313 Ontario Inc, a company not related to the Project. They did not pay the person they were liable to pay, and therefore did not comply with their *CLA* obligations concerning the trust funds. Summary judgment was awarded against the Owners and they were required to pay the balancing owing to Nicholson.

Comment

It has been recognized that a trustee has an obligation to make payments only to a party with whom it has contractual privity on a project,¹ but it is understandable that the result in this case could be surprising. The party whom the Owners were liable to pay specifically directed the payment to be made to 1809313 Ontario Inc. As a result of making a payment based on proper certification, the Owners expected to be discharged of their liability under section 10. Justice King enforced section 10 exactly as it is written, requiring the payee to be the specific party to the contract with the owner.

Aside from the substantive outcome, the decision takes a novel position regarding enforcement of a trustee's obligations. Courts have traditionally held that the class of trust fund beneficiaries under section 7(1) includes only those persons contracting with or employed directly by the owner or an agent of the owner.² Parties lower on the construction pyramid are beneficiaries only to their respective contractors'/subcontractors' trust under section 8. In this case, Justice King allowed a subcontractor to enforce an owner's trust based on the premise that a primary feature of the *CLA* is to "remedy the common-law requirement of privity between parties". This position does not appear to have been taken previously in Ontario construction trust decisions, and could be the subject of an appeal.

¹ Duncan W. Glaholt, *Conduct of a Trust Action*, (Toronto: Carswell, 2011) at ch 6.

² *1150402 Ontario Inc v Delfino* (2003), 62 OR (3d) 768 (SCJ) at para 42.