

CASE SUMMARY



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TRUST CLAIMS AND LIEN CLAIMS ARE DIFFERENT CONCURRENT REMEDIES

Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel

Facts

In *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, the Supreme Court of Canada held that the posting/filing of lien bond security for a lien does not extinguish an associated trust claim. This appears to be a fairly obvious conclusion; however, with the payment of a draw from the owner to its contractor being held up because the subtrade threatened to sue the owner for breach of trust, an application was brought to address this issue.

Dominion was the general contractor of the newly built University of Manitoba football stadium. Dominion entered into a subcontract with Structal for the supply and installation of structural steel, a roof truss system, and for the installation of precast

bleachers and vomitory wall. There were certain deadlines to be met by Structal, and they were not. Structal asserted that it had experienced extensive added costs because of work scope changes and circumstances, conditions and events that were beyond its control. Structal advised Dominion that it would seek an adjustment to the subcontract price and time. Dominion, in response, asserted that it held Structal responsible for the failure to meet the deadlines and that it intended to seek recovery from Structal for its added costs and expenses. Structal eventually delivered a comprehensive claim for \$8,067,558.59. Dominion responded with an unparticularized claim for between \$9 to \$12 million.

Counsel for Structal wrote to Dominion, demanding payment of \$4,171,915.25 for five rendered invoices. Counsel for Structal referred to the trust provisions of the Manitoba legislation and asserted that the funds received by Dominion from the owner were for the benefit of Structal and that Dominion could not appropriate or convert any part of the trust funds to its own use until all subcontractors had been paid.

Structal then filed a lien in the amount of \$15,570,974.53 comprised of three elements: (1) five unpaid invoices totalling \$4,171,915.25, (2) statutory holdback in the amount of \$3,331,500.69, and (3) Structal's claim of \$8,067,558.59. Dominion filed a lien bond in the full amount of Structal's claim. The lien bond provided in part that the surety would pay if Dominion did not promptly pay "any judgment for lien which may be obtained by [Structal] against [Dominion] in any action upon the lien".

As arrangements were being made to file the lien bond and dispose of the lien from title to the property, Structal continued to demand payment of its unpaid invoices and continued to assert that Dominion was required to comply with the trust provisions of the legislation. Dominion claimed it had a set-off against Structal, that there was no breach of trust, and, in any event, that Structal was fully secured by the lien bond. Structal then turned to the owner and asked it to withhold from Dominion an amount equal to four of the five outstanding

invoices, failing which, Structal would sue the owner under the trust provisions of the legislation.

A certificate of substantial completion of the sub-contract was issued. There were no deficiencies in the work of Structal, and the owner would have paid the progress payment to Dominion but for the threat that Structal would commence an action against the owner.

As a result, Dominion brought an application that the lien bond it filed satisfied Dominion's trust obligations under the Manitoba *Builders' Lien Act*. Structal brought its own motion for an order that Dominion or the owner pay to Structal all or part of the progress payment to which Dominion appeared to be entitled to from the owner.

The Lower Courts

The court at first instance held that the filing of the lien bond satisfied Dominion's trust obligations relating to Structal and that upon receipt of the progress payment in question from the owner, Dominion could disburse the funds, without being in breach of the trust provisions. Structal's motion was dismissed, as no case had been made out for an order for payment. The lower court appears to have decided the case based on three conclusions. First, after reciting s. 56(1) of the Manitoba legislation that provides that the lien bond stands in place of the land, the lower court went on to state that "the bond stands in place of the lien, securing the sum of money claimed by Structal". Second, there was no dispute that payment of a claim need not be made twice. The court appears to have equated the posting of security with payment. Third, the court concluded that if a trust fund could be reduced or eliminated by a set-off, then it made commercial sense that the trust fund could be reduced or exhausted by filing a lien bond in the full amount of the claim. However, the case relied-on for this proposition was based on an entirely different set of facts and would have been akin to the owner paying the progress draw into court to extinguish any breach of trust claim by Structal against it.

The Court of Appeal unanimously set aside the judge's declaration that the filing of the lien bond by Dominion satisfied its trust obligations relating to Structal. The Court of Appeal agreed with the

dismissal of Structal's motion. The Court of Appeal made it clear that the lien bond stood in place of the land and not the lien. The Court of Appeal also referred to several authorities that made it clear that aside from any common law remedy, the lien legislation provides for two separate remedies—namely, the remedy provided under the trust provisions of the legislation and the remedy provided under the lien provisions of the legislation.

The Supreme Court of Canada

The issue before the Supreme Court of Canada was whether the filing of the lien bond with the court extinguished an associated trust claim. In a unanimous decision, the S.C.C. affirmed the Court of Appeal's decision and found that "the filing of a lien bond has no effect on the existence and application of the trust remedy".

The S.C.C. first outlined the nature of lien and trust remedies and held that they are two separate remedies that exist independently and can be pursued concurrently. Then, on the basis that a lien bond provides only security for the lien, the S.C.C. found that the mere filing of a lien bond could not extinguish an owner's or a contractor's trust obligations. In order to collect under the bond, the lien claimant must prove its claim and obtain a judgment in the lien action. If, however, the lien is found invalid (for instance, if it were registered or perfected out of time), all "liability under the lien bond would be extinguished". This would leave the claimant with no lien claim and no trust monies, which, the S.C.C. held, would be contrary to the intent of the trust provisions. In addition, the S.C.C. found that trust obligations do not expire until all subcontractors and suppliers have been paid all amounts owing to them. Since the registration of a lien (or the subsequent filing of a lien bond) does not amount to payment but merely secures the lien claim, it does not extinguish the owner's or the contractor's trust obligations.

Finally, the S.C.C. held that Dominion's argument about potential double payment "blurs the distinction between payment and security". To avoid double security (posting a lien bond and holding trust funds), a contractor may pay cash into court when vacating the registration of a lien. If the lien is found invalid, the cash, once returned to the

owner, contractor, or subcontractor would remain impressed with the trust and would remain available for payment once a trust claimant obtained a favourable judgment in its breach of trust action.

Going Forward

Several provincial builders' and construction lien statutes in Canada provide for both a trust and lien remedies. Simply put, had the case related to the statute in any of those provinces, the result would have been the same regardless of some minor differences between the statutes. For example, one of the indicia that was used by the S.C.C. to decide that the remedies are separate is that claimants in Manitoba can join a breach of trust claim with their lien action. In Ontario, however, a lien claimant can only join a breach of contract claim with its lien action and must commence a separate trust action. This difference between Ontario and Manitoba would not have changed the result had the case been argued under Ontario law.

A more interesting question relates to the amount of cash security that should be paid into court to extinguish a breach of trust claim. The S.C.C. indicated that had the security paid into court been cash security, the breach of trust remedy would have been unnecessary. However, two issues arise. First, the order paying or filing the cash security with the court would have to indicate that the security was not only for the lien but also for the breach of trust claim. Second, the S.C.C. did not indicate the amount of cash security that should be posted to extinguish the breach of trust claim. Structal's claim consisted of three discrete amounts. Presumably, to extinguish the breach of trust claim, Dominion would have had to pay cash security into court for the invoices and the holdback but not for the delay claim. That would then permit Dominion to file a lien bond for the delay claim of Structal.

Third, had a project bank account been utilized, the cash for the Structal invoices and holdback would be in the project bank account and available to pay into the court. The S.C.C. refers to a contractor posting a lien bond "while still holding trust funds". This appears to be the rationale for the statement that "so long as the trust funds themselves are deposited with the court, the funds are

secure and the trust has not been breached". This statement, however, does not take into account the fact that there is no requirement in the builders' and construction lien statutes that an owner or contractor pay trust funds into court, nor do they give trust claimants the opportunity to seek an order compelling an owner or contractor to do so. Furthermore, a contractor paying cash security into court may increase its overall liability, as one could argue that cash security paid into court is converted into trust funds, even though the contractor may have used funds other than project funds to pay into court. For a contractor to avoid this liability creep, the use of a project bank account would clearly identify where the funds came from and their use.

Supreme Court of Canada

Rothstein J., McLachlin C.J., Cromwell, Moldaver, Wagner, Gascon and Côté JJ.
September 18, 2015