

Update

Construction Law

Limits on Lien Rights?

Divisional Court Rules on *Kennedy Electric Ltd. v. Dana Canada Corporation and Rumble Automation Inc.*

March 31, 2006

On March 14, 2006, the Divisional Court of Ontario released its judgment in the matter of *Kennedy Electric Ltd. et al. v. Dana Canada Corporation and Rumble Automation Inc.* The outcome of the appeal was that the Divisional Court upheld the trial decision that the installation of an assembly line was **not** an “improvement” within the meaning of section 1(1) of the Construction Lien Act (“CLA”), and did **not** give rise to lien rights. Justice Chapnik disagreed with the majority decision of Justice O’Driscoll and Justice Wilson and wrote an extensive and strongly reasoned dissenting opinion.

The facts of the case, briefly stated, were as follows: In October, 2000, Dana Canada Corporation (“Dana”) entered into an agreement with Ford to build frames for the F150 pickup truck. A new assembly line was required to produce these frames, and Dana contracted with Rumble Automation Inc. (“Rumble”) to design, build and install it. Given the size and complexity of the proposed assembly line, Rumble could not do all of the work itself and subcontracted a portion of its scope of work to Kennedy Electric Ltd. (“Kennedy”), who in turn engaged subcontractors to complete the work. After a dispute arose in December, 2002, construction liens were registered against Dana’s plant.

The issue at trial was whether these assembly lines, which were manufactured off-site and then transported to the plant, bolted and otherwise affixed to the floor of the plant, constituted an “improvement” under the CLA. If the work was

found to be an “improvement”, Kennedy and its subtrades would have validly registered construction liens against the property.

At trial, the Trial Judge interpreted the rights to a statutory lien narrowly and as such, ultimately held an assembly line was not an “improvement” under the CLA.

On appeal, the Divisional Court, by a 2-1 majority, upheld the trial Judgment. The majority of the Divisional Court found that the Trial Judge had not erred in his application of the law and that in the circumstances of this case there was no basis to disturb the lower court decision. The Divisional Court held that the Trial Judge had correctly concluded that the assembly line was characterized as equipment designed and used for the operation of the business within the structure and was therefore not integral to the structure. Accordingly, it was not an “improvement” under the Act.

However, in a strongly worded dissenting opinion, and after an analysis of the case law, Justice Chapnik found that there was a legal basis which supported lien rights in these circumstances. She also held that factors like the actual size of the line (covering 100,000 square feet, standing 20 feet tall and weighing approximately half a million tons) and the estimated eight-year duration of the Ford F150 truck program at the plant provided the requisite degree of permanence and attachment between the building and the assembly line to qualify it as an “improvement” under the CLA. She would have overturned Justice Killeen’s trial decision and granted lien rights to Kennedy and the other subtrades pursuant to the CLA.

Given the lack of an unanimous decision at the Divisional Court and the well reasoned dissent, an appeal to the Ontario Court of Appeal seems likely. However, leave of the Court of Appeal is required in order for that Court to further hear the case. Until that time, one should be careful in assessing one’s risk when performing work on assembly line equipment and other similar types of work. It may be that in certain circumstances this work will be held not to be lienable.

For further information or if you wish to discuss this decision further, please contact a member of the Goodmans Construction Law Group listed on the next page.

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