

Construction Law

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Court of Appeal Opens the Door on Breach of Trust Remedies

by Joe Cosentino and Brad Halfin

Sunview Doors Ltd. v. Academy Doors & Windows Ltd., Vlasios Pappas, Vlasios Pappas and Olympia O'Brien

On March 16, 2010, the Ontario Court of Appeal released its reasons upholding the ruling of the Divisional Court in *Sunview Doors Limited v. Academy Doors & Windows Ltd., Vlasios Pappas, Vlasios Pappas and Olympia O'Brien*. In overturning the trial judge, the Court ruled that in order for a s. 8(1) statutory trust to arise pursuant to the *Construction Lien Act* (the “*Act*”) it is not necessary that a supplier intend that its materials be incorporated into a specific and identifiable improvement in order to attract a trust remedy.

In addition, the Court of Appeal confirmed that the Divisional Court correctly held Olympia O'Brien (“O'Brien”), one of the individual defendants, but not an officer or director of Academy Doors, personally liable for breach of trust.

The Trial Decision

The facts of the case were as follows:

1. Between September, 2005 and October, 2006, Sunview Doors Limited (“Sunview”) supplied custom made doors to Academy Doors & Windows Limited (“Academy”) pursuant to nine purchase orders. Sunview knew that each purchase order was for a different improvement but did not, however, know the location of any of the projects or improvements to which the doors were supplied.
2. After failing to receive payment on a number of orders, Sunview sought payment from Academy but was denied both payment as well as information identifying the projects or improvements to which the doors were

supplied. Sunview was informed that it would be paid once Academy had been paid by the owners of the respective projects.

3. Two of the individual defendants, Vlasios and Vlasios Pappas, were directors and officers of Academy. O'Brien worked for Academy and handled the accounts payable, accounts receivable and payroll but did not have signing authority nor was she an officer or director of the corporation. O'Brien was the contact person for Sunview and was the individual who refused to disclose to Sunview the information regarding the location of the improvements.

4. Academy's general ledger disclosed that Academy had paid O'Brien in excess of \$195,000 in payments from Academy during this time-frame, but she claimed that the money was disbursed to repay her for shareholder loans she had made to Academy. In actual fact, the loans O'Brien made to the company were approximately \$7,500.

5. In addition, at around the same time as the above-noted events, O'Brien incorporated a business substantially similar to the one carried on by Academy and ceased working for Academy approximately two months before the company went out of business.

6. Sunview brought an action for breach of contract on the basis of unpaid accounts and against the three individual defendants for breach of trust pursuant to sections 8 and 13 of the *Act*. Section 8 of the *Act* states that monies received on account of an improvement constitute a trust fund for the benefit of those persons who have supplied services and/or materials. Section 13 of the *Act* imposes personal liability for breach of trust on officers, directors or persons who have effective control of the corporation.

7. Academy did not defend the action and was thus deemed to admit that it had been paid by the various owners for Sunview's products. The trial judge allowed the claim for breach of contract, but, basing his decision on the reasoning in the earlier case of *Central Supply Co. 1972 Ltd. v. Modern Tile Supply Co.* (“*Central Supply*”), held that Sunview could not satisfy the s.8 requirements to substantiate a claim for breach of trust. In *Central Supply*, a panel of the Court of Appeal, sitting as the Divisional Court, held that in order for a s.8(1) statutory trust to arise, the claimant or supplier

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must “intend that the material sold be used for the purposes of a known and identified improvement”. The trial judge held that Sunview could not establish that it intended its product be used for specific improvements.

8. The trial judge concluded that, as no s.8(1) trust had arisen, it was not necessary to decide whether O’Brien could be considered “an employee or agent of the corporation, who has effective control of a corporation or its relevant activities” pursuant to s.13(1) of the *Act*. However, the trial judge did note that there was strong evidence suggesting that the individual defendants had purposefully run Academy into the ground in order to open a new business under O’Brien’s name.

The Divisional Court Ruling

The Divisional Court allowed Sunview’s appeal and gave judgment against the individual defendants. It further held that O’Brien had “effective control” of Academy and that she, in addition to Vlasis and Vlasios Pappas, was personally liable for its breach of trust. The Divisional Court held that O’Brien came within s.13(1) of the *Act*.

The Divisional Court distinguished the facts of *Sunview* from those in *Central Supply*, noting that:

In *Central Supply*, the putative trustee was a retailer who sold products to the general public... Academy was a contractor focused on the retrofit and renovation of low and high-rise rental and condominium units. *Central Supply* involved a retail situation dealing with generic products; Sunview dealt with custom-ordered doors which were not stock items and were ordered according to precise measurement specifications. In addition, while Sunview did not know the exact location of the improvements, this information was known by Academy at the time the materials were supplied.

The Divisional Court further disagreed with the Court’s decision in *Central Supply* in that “the supplier must have intended that its materials be incorporated into a specific and identifiable improvement in order to attract a trust remedy”.

Court of Appeal

In confirming the ruling of the Divisional Court, the Court of Appeal held that:

The reference in s. 8(1) to the creation of a trust fund for the benefit of “persons who have supplied service or materials to *the* improvement” generally requires that a link be made between the materials supplied and the improvement (emphasis added). However, nothing in the wording of the section requires that the supplier intend that the materials be incorporated into a known and specific improvement at the time of sale or supply ... Provided that the supplier is able to link the materials to the improvement for which money is owed, the supplier will be entitled to the benefit of the s.8 statutory trust. Here the link is established because of Academy’s conduct in deliberately frustrating Sunview’s attempts to obtain the disclosure that would enable it to link its products to the improvements into which they had been incorporated.

The Court of Appeal further dismissed O’Brien’s appeal and confirmed that she was personally liable. In addition to the trial judge’s comments, the Court of Appeal held that the evidence of her active role in the management of the corporation, together with the evidence that she was able to have Academy pay her between \$150,000 and \$195,000 in excess of her salary indicated that she had effective control over the corporation.

The Court of Appeal’s decision potentially relieves restrictions on suppliers and gives them greater access to the breach of trust remedies under the *Act*. The tracing requirements and direct knowledge of a known and identified improvement have been modified. It is now sufficient for suppliers to demonstrate a link of their product to an improvement. This is especially so in cases where a supplier can show that a contractor has received money for the product, owes money to the supplier and has thwarted efforts made by the supplier to find out where its products were used.

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