

COURT OF APPEAL FOR ONTARIO

CITATION: Belmont Concrete Finishing Co. Limited v. Marshall, 2012 ONCA 585

DATE: 20120910

DOCKET: C55093

Goudge, Gillese and Armstrong JJ.A.

BETWEEN

Belmont Concrete Finishing Co. Limited and Gage Metal Cladding Limited

Plaintiffs (Appellants)

and

Marvin Marshall, Dian Hooks, Michael Brodigan a.k.a. Michael Brodigan Junior,
Thomas Leverty, Robert M. Wheler and Internorth Construction Company

Defendants (Respondent)

Dan J. Leduc, for the appellants

Ronald Chapman, for the respondent

Heard: August 22, 2012

On appeal from the order of the Divisional Court (Ferrier, Swinton and Wilton-Siegel JJ.), dated June 30, 2011, with reasons by Wilton-Siegel J. and reported at 2011 ONSC 1560, 338 D.L.R. (4th) 144.

Goudge J.A.:

[1] In this litigation the appellants, who were suppliers of building materials to the general contractor on several projects, sued the respondent under s. 13(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the Act). They claimed that the

respondent was liable for breaches of trust by the general contractor of which he was an officer and director.

[2] The appellants succeeded at trial. The Divisional Court reversed that finding and dismissed their action against the respondent. This is their appeal from the Divisional Court.

[3] Section 13(1) of the Act reads as follows:

Liability for breach of trust

By corporation

13. (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,

(a) every director or officer of a corporation; and

(b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

[4] The Divisional Court correctly interpreted that section to say that a person can be held liable for a breach of trust by a corporation only where: (1) there is conduct by the corporation that amounts to a breach of trust; (2) the person is a director or officer of the corporation, or in effective control of it; and (3) the person knows or ought reasonably to know that the conduct amounts to a breach of trust and assents to or acquiesces in that conduct.

[5] Neither the appellants nor the respondent contest the finding by the trial judge that only from the end of May 2002 was the respondent in a position with the general contractor such that he would have known or reasonably should have known about and would have assented to or acquiesced in any breach of trust by the general contractor that took place after that date.

[6] The question is whether there were any such breaches after that date.

[7] In finding the respondent liable, the trial judge relied on the summary judgments against the general contractor in this same action. These judgments establish that during the period from 2001 to 2003 the general contractor received funds for several projects (that therefore became trust funds under the Act) and dispersed them in breach of trust, leaving the appellants unpaid.

[8] However, for the respondent to be liable for these breaches of trust under s. 13(1), the breaches had to occur after the end of May 2002 when he took control of the general contractor sufficiently for s. 13 purposes.

[9] The Divisional Court found that not only did the trial judge make no finding as to when these breaches took place, before or after May 2002, but that there was no evidence that would support any such finding. I agree. It is simply unknown whether the breaches of trust established by the summary judgments occurred on the respondent's watch.

[10] The appellants argue that the onus is on the respondent to fill this evidentiary void. I do not agree. Unlike s. 8 of the Act, s. 13 is not about liability as a trustee. It is about an individual's liability for breach of trust by the corporation. The onus for the elements required by s. 13(1) is on the party seeking to attach liability to the individual: see *Duncan Ceiling & Wall Systems of Oshawa Ltd. v. Vin-Bon Retail Systems Ltd.* (2007), 67 C.L.R. (3d) 17 (Ont. Div. Ct.).

[11] Since there was no evidence that any of the breaches of trust by the general contractor encompassed by the summary judgments took place after the end of May 2002, there was no basis to find that the respondent could be held liable for them under s. 13 of the Act.

[12] It is unclear whether the trial judge as an alternative sought to rely on payments made after May 2002 by the general contractor to the respondent as constituting the breaches of trust for which the respondent could be held responsible under s. 13(1). The Divisional Court considered this alternative and found that it, too, was fatally flawed. There is simply no evidence that the funds used for these payments by the general contractor were funds impressed with a trust in favour of the appellants. Without such evidence, the payments to the respondent cannot serve as the basis for his liability to the appellants for breach of trust under s. 13. I agree with the Divisional Court on this.

[13] In summary, I agree with the Divisional Court and would dismiss the appeal. Costs to the respondent fixed at \$10,000 in total.

Released: September 10, 2012 ("S.T.G.")

"S.T. Goudge J.A."

"I agree E.E. Gillese J.A."

"I agree Robert P. Armstrong J.A."