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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Does A Construction Lien Bond Satisfy A Trust Fund Claim?

There are several different remedies provided in construction and builders lien legislation that do not necessarily fit together well. Two remedies available to a subcontractor are the lien claim against the land and the trust fund claim against funds received or receivable by a contractor.

In the case of a lien claim, the payment of money into court or the provision of a bond discharges the lien against the land. But does it discharge the trust fund claim? If it doesn't, does that mean that a subcontractor can pursue a trust fund claim, so that it gets paid through that remedy while at the same time the monies remain in court or the lien bond remains in place? And if the subcontractor can do that, how does that affect the contractor's counterclaim and set off for delay? Through its trust fund claim can the subcontractor force the owner to pay the full amount of the subcontractor's claim before the trial of the contractor's delay claim?

These were the issues addressed in the recent decision of the Manitoba Court of Queen's Bench in *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*.

The Background

In December 2010 Stuart Olson entered into a contract with the owner BB Stadium Inc. for the construction of a new stadium in Winnipeg. In April 2011, Stuart Olson entered into a subcontract with Structal for the structural steel and other facilities. The deadlines in the subcontract were not met and the opening of the stadium was delayed for a year.

Claims and counterclaims were asserted between Stuart Olson and Structal. Structal claimed over \$8 million due to work scope changes and other factors. Stuart Olson asserted a delay claim against Structal in an amount over \$9 million.

In September 2012, Structal demanded payment from Stuart Olson for its outstanding invoices in the amount of about \$4.2 million. Structal also asserted that the monies due to Stuart Olson from the owner were impressed with a trust fund claim in Structal's favour and that Stuart Olson must use those monies to pay subcontractors and not itself. Structal also filed a lien against the land in the amount of about \$15 million.

In October, 2012, Stuart Olson obtained a lien bond, approved by Structal, for the full amount of the lien on payment of a premium of \$159,003.07 per year, and Structal discharged its lien against the land.

Structal continued to demand that Stuart Olson pay its outstanding invoices and claimed that the monies receivable by Stuart Olson from the owner were impressed with a trust in Structal's favour. Stuart Olson continued to maintain that it had a set-off against any claim asserted by Structal and maintained that Structal's claim, whether in a trust fund form or otherwise, was fully secured by the lien bond that had been filed.

Structal then asked the owner to withhold funds from Stuart Olson failing which it would sue the owner under the trust provisions of the **Manitoba Builders' Liens Act**. (the "Act"). In response, Stuart Olson commenced an application to determine the legal position.

In the meantime, Stuart Olson commenced an action against Structal asserting its delay claim.

A certificate of substantial completion had been issued relating to the subcontract with Structal. There were no lien or trust fund claimants other than Structal. There are no deficiencies in the work done by Structal and the owner was ready to make the remaining payment to Stuart Olson which had not paid because of Structal's threat. The real and remaining issue was the delay claim by Stuart Olson against Structal which would be dealt with in the separate action.

The Decision

The application judge held that the posting of the lien bond exhausted the contractor's trust fund obligations in the particular circumstances of this case.

First, the judge held that prior judicial authority in Manitoba supported the principle that the filing of a lien bond discharges any trust fund obligations of the contractor.

Second, he held that prior judicial authority also supported the proposition that a set-off could apply to, and reduce, a trust fund claim.

Third, he held that it would be unfair to determine, at this stage, whether Stuart Olson had or didn't have a right of set-off. So the present issue could not be decided on the basis that Stuart Olson had no rights of set-off. It would not be fair to order payment of the trust funds to Structal in the presence of the delay claim by Stuart Olson.

In all the circumstances, the judge held that the filing of the lien bond by Stuart Olson satisfied its trust fund obligations and that upon receipt of the progress payments from the owner, Stuart Olson could disburse those funds without being in breach of the trust fund obligations under the Act.

Discussion

Assuming that the contractor, Stuart Olson, was financially capable of paying the future lien bond premiums, this decision makes eminent business sense. But it does raise some practical concerns. What if Stuart Olson could not or did not pay the future premiums? Would the bond have remained in place? What protection for the subcontractor would there have been in this eventuality?

What if other subcontractors had liens or trust fund claims? In some provinces, a lienholder must share with other lienholders the amount of a lien bond posted to satisfy its lien. In these circumstances, a lien bond may be an uncertain source of funds for a trust fund claim. And why shouldn't the remaining payments by the owner be paid into court, with the amount of the lien bond being reduced accordingly? Wouldn't that be a better way of resolving the conflict between the purpose of a lien and the purpose of a trust fund claim? Since the contractor had no other subcontractors or suppliers to pay, the real question was: whose litigation claim should be financed through the lien bond: the contractor's delay claim or the subcontractor's claim to payment under the subcontract? An argument could be made that the

purpose of the Act is to give priority to the subcontractor's claim for payment. If that is so, then that result could be achieved by paying the remaining monies due by the owner into court and reducing the amount of the lien bond.

The present decision highlights the different wording in the different provincial lien statutes. In Manitoba, sub-section 5(3) allows the owner to retain trust funds if "provision for the payment of other affected beneficiaries of the trust fund has been made." The words "provision for payment" also appears in sub-sections 4(3) and 4(4) with respect to the trust fund obligations of contractors and subcontractors. These words seem to contemplate a lien bond and may envisage that if a lien bond is in place then the owner, contractor or subcontractor can make payments from trust funds. In contrast, sub-sections 7(4), 8(2) and 9(2) of the Ontario Act state that the trust is in place until the contractors or subcontractors "are paid." In the Ontario Act, specific provision is made in section 12 for set-off by a trustee such as an owner, but not in respect of the amount of holdback. No specific provision for setoff is made in the trust fund sections of the Manitoba Act. The judge did not comment on the presence or absence of these provisions in the Manitoba Act. It certainly seems odd that the trust fund sections of the provincial Acts do not specifically deal with the impact of lien bonds and other forms of security for the lien upon trust fund claims.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., chapter 11, parts 2(g) and 3.

***Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2013 MBQB 48**

Construction and builders liens – trust funds – discharging liens – lien bonds

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