ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

NUTS AND BOLTS

February 2013 Construction Law Section

Breach of the Construction Trust Provisions and the "New" Limitations Act

By David Debenham*

Under previous limitations legislation, claims for breach of trust and fiduciary duty were not barred by legislation--- only the equitable doctrine of laches. It is clear under the "new" *Limitations Act*, 2002, S.O. 2002, c. 24 Sched. B. that the general, 2 year limitation period applies. The extent of the clarity is exemplified by *Ehrlich Electric Company v. BCC Interiors Inc.*,[1]. In this case the application of the limitation period was thought so clear that the motion was brought to strike a pleading under r. 21.01(1)(a) of the *Rules of Civil Procedure* as a determination of an issue of law by way of preliminary motion.

The motion was brought in the context of a second proceeding involving a claim for labour, materials and equipment that the Plaintiff claimed to have provided to the Defendant, BCC Interiors Inc. ("BCC"). The remaining Defendants, Edward Burns, Terry Klingenberg and Michael Scott Prokosch in this second proceeding (collectively "the Individual Defendants") were each directors and officers of BCC. The Statement of Claim in this action was issued on April 11, 2011. Essentially, the Plaintiff claims that BCC, the general contractor, had received monies and has been paid in full by the owner of the project, and that pursuant to Part II of the *Construction Lien Act* ("the *Act*") the the monies were trust funds. The Plaintiff further pleads that BCC committed a breach of trust by appropriating and converting the funds. Additionally, it is alleged that the Individual Defendants assented and acquiesced to the appropriation and conversion of the trust funds pursuant to s. 13 of the *Act.*

The Plaintiff had commenced an earlier action against BCC with respect to the same project claiming breach of contract for the exact same amount as sought in this action ("the first action"). The first action was commenced on September 25, 2008 and pleads that the Plaintiff's last day on site on the project was September 6, 2007. Given the Plaintiff's admission that its last day on site was September 6, 2007 and the fact that the Plaintiff commenced the first action on September 5, 2008 and the second action on April 11, 2011, it was "plain and obvious" that the limitation period had tolled since this second proceeding was issued outside of the two-year limitation period on the facts alleged in the Plaintiff's two Statements of Claim.

The court dismissed the motion. The defence raised by BCC in the first action, particularly in paragraph 9, is that no monies are currently owed to the Plaintiff. It was therefore possible, in the factual matrix of this case, that there was a legitimate dispute as to when monies were owing and thus when the limitation period began to run. The other missing facts raised by the Plaintiff may also affect the limitation period. The court also found that because the amount of the holdback, the date of Certification of Substantial Performance, when the holdback was payable; and when the Defendant, BCC Interiors Inc. received the holdback were not clear from the pleadings, the facts were not sufficiently clear on the face of the pleadings to grant the motion.

[1] 2012 ONSC 7071 (CanLII)

One would have thought that the issues in the first and second proceedings were so divergent that the pleadings in the first could not possibly bear on many of the issues in the second. The first "collection" action simply alleges monies owing. That simply grants the Plaintiff standing to commence a breach of trust action. The elements of a breach of trust proceeding against the contractor also requires a showing that (1) the contractor received trust funds from the owner, (2) that the contractor appropriated or converted any part of the fund to the contractor's own use or to any use inconsistent with the trust even though (3) monies were owing to the Plaintiff, (4) with respect to the improvement in question. It is only after the Plaintiff knows, or ought to have known with reasonable diligenct all 4 elements that the limitation period for the breach of trust proceeding commences.[2] With this in mind, the only thing "plain and obvious" is that these types of motions by defendants are bound to fail, particularly when they are brought by individual defendants who are alleged to have participated or acquisenced in the breach of trust---a further, fifth element that is far more difficult for the Plaintiff to ascertain without Examinations for Discovery or an Examination in Aid of Execution in the first, collection proceeding. Given that the trust is a class remedy,[3] and that anyone unpaid in the class has status to bring the claim, one would think that one of the trades would have status to bring the claim for breach of trust, and seek declaratory relief that would confirm the breach of trust that might protect the rights of the other trust claimants who may petition the contractor into bankruptcy, and then assert that the trust property does not form part of the contractor's estate. That, however, is litigation for another day.

**David Debenham, Partner, McMillan LLP*

[2] It is important to note that in Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd., 2008 CanLII 8595,at para 16 (ON SC) the court made a finding that counsel knew, or ought to have known with reasonable diligence all of these elements several years earlier. How counsel ought to have known of a breach of trust by the directors shortly after the project was completed is not clear from the report.

[3] Anron Mechanical v. L'Abbe Construction (1991) 46 C.L.R. 49 (Ont Gen. Div)