Maintemp Heating & Air Conditioning Inc. v. Momat Developments Inc. et al.

[Indexed as: Maintemp Heating & Air Conditioning Inc. v. Momat Developments Inc.]

59 O.R. (3d) 270
[2002] O.J. No. 2722
Milton File No. C-19334/98

Ontario Superior Court of Justice
Langdon J.
April 16, 2002

Construction liens -- Actions -- Trust action -- Breach of trust -- Onus of proof -- Owner also acting as contractor -- Owner failing to establish that its management and disbursement of funds was consistent with trust imposed by Construction Lien Act -- Owner failing to account for payments made from trust fund -- Personal liability of officer for breach of trust for assenting to or acquiescing in offending payments -- Construction Lien Act, R.S.O. 1990, c. C.30, ss. 7, 8, 13.

In September 1996, the plaintiff, Maintemp Heating & Air Conditioning Inc. ("Maintemp"), entered into a contract with the defendant Momat Developments Inc. ("Momat") to supply and install heating and air conditioning systems in seven townhouses being built by the defendant 633227 Ontario Ltd. ("633227") in Oakville. The defendant GM was the president of 633227, and his brother, the defendant JM, was its general manager. JM was also the president of Momat, which was acting as an agent for 633227. All sums paid for the project were paid by cheques drawn on 633227's bank account at the TD Bank. Maintemp's first invoice was paid, but subsequently its relationship with Momat and 633227 broke down, and Maintemp was dismissed from the construction site. The air-conditioning work

was completed by another contractor, and Momat sued for payment under the contract. Momat also claimed that 633227 had breached the trust obligations imposed by s. 7 or s. 8 of the Construction Lien Act and that GM and JM were liable for 633227's breach pursuant to s. 13(1)(a) and (b) of the Act.

Held, there should be judgment for the plaintiff.

633227 was the owner and also the general contractor for the townhouse project, and Maintemp was entitled to a judgment of $28,261.06 against 633227. Maintemp's action against Momat, however, should be dismissed; Momat was 633227's agent, and it was not liable on the contract. Maintemp's contract was with the undisclosed principal 633227.

633227 breached its trust obligations, and GM and JM, who signed all the payment cheques, assented to or acquiesced in the offending payments and were personally liable for breach of trust. The onus of proof was on 633227 as trustee to establish that its management and disbursement of funds was consistent with the trust imposed by the Act. It had to account for payments made from the trust fund.

633227 failed to perform its trust obligations. It made no attempt to segregate trust funds or to ascertain if the disbursement of trust moneys was consistent with the Act, and hardly any effort was made to keep a record of the reason for making the payments. It disbursed moneys to pay the owner's and the contractor's obligations without making any real effort to discriminate as to source or application of funds. It made it impossible for Maintemp to demonstrate the source of the money in the account or whether any particular payment benefited the improvement. In these circumstances, to defend the breach of trust claim, the onus was on 633227 to demonstrate that the money found in its bank account was not trust money and that the moneys it disbursed benefited the improvement. 633227 never demonstrated that any particular funds were not trust funds, and GM, JM and 633227 failed to show that $80,401.58 was paid to the improvement. They were liable for breach of the trust provisions of the Act.

Cases referred to

Rudco Insulation Ltd. v. Toronto Sanitary Inc. (1998), 42 O.R. (3d) 292, 167 D.L.R. (4th) 121, 41 C.L.R. (2d) 1, 114 O.A.C. 272 (C.A.); Edward Stephens Associates Ltd. v. G.L. Trenching Ltd. (1989), 73 O.R. (2d) 112, [1989] O.J. No. 2562 (H.C.J.)

Statutes referred to

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 1 "materials", 7, 8, 13
Interest Act, R.S.C. 1985, c. I.5, s. 4

Authorities referred to

Waters, D.M.W., The Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984)

ACTION for payment under a construction contract and for breach of the trust provisions of the Construction Lien Act, R.S.O. 1990, c. C.30.

Justin J. Robinson, for plaintiff.
K. Watts, for defendants.

LANGDON J.: --

History

[1] [On] September 10, 1996, Maintemp entered into a contract with Momat to supply and install heating and air conditioning systems in seven townhomes being built by 633227 in Oakville. The contract price per unit was $5,616 for Model A and $5,813 for Model B. Other models were added so that the eventual contract price became $44,601.88 including GST. [See Note 1 at end of document] It was to be paid 40 per cent on completion of

ductwork to basement, 40 per cent on installation of furnace and completion of ductwork and gas piping, and 20 per cent on installation of air conditioner, registers, grilles and thermostat. GST was in addition. Contract sums were payable "net 30 days no holdbacks".

The relationship amongst the defendants

[2] The relationship amongst the defendants is critical to an understanding of how this case unfolded. The owner of the land and the developer was 633227. Regent's Quay Developments Inc. is not a legal entity. 633227 occasionally used Regent's Quay as a business style (not registered) to advertise or promote its product. The action against Regent's Quay is dismissed without costs.

[3] Gordon Matas and Jean-Pierre Matas are brothers. Gordon was the President of 633227. Jean-Pierre Matas was not an officer or director of 633227 but was its general manager.

[4] The authority to issue cheques on the TD Bank account of 633227 was shared by any two of Gordon, Jean-Pierre and Gary Mooney. Gary Mooney is a lawyer who guaranteed the mortgage to TD by which the project was financed. He appreciated that Jean-Pierre had more experience in construction and that Gordon was more of a technical person. Hence, it was Mooney who, in return for his guarantee, insisted that either he or Jean-Pierre sign every cheque issued by 633227. Gordon was authorized to co-sign.

[5] Momat is an Ontario Corporation of which Jean-Pierre is the president. Through that company he enters into contracts to manage construction projects. In return for a fee of either 5 per cent or 10 per cent of cost, [See Note 2 at end of document] he undertook to manage the construction of this townhouse project for (his brother and) 633227.

[6] What is important to understand is that Momat was not the general contractor for the project although, in their dealings with contractors, 633227, Momat and the Matas brothers certainly led others to believe that Momat was the general

contractor. This appearance was reinforced in dealings with Maintemp because Maintemp made its contract proposal to Momat. Jean-Pierre signed for Momat to form the contract. Thus, it was natural for Maintemp to infer that Momat would be responsible to pay contract money and to assume that Momat was the general contractor. [See Note 3 at end of document]

[7] In fact, Momat never paid anything to Maintemp. Such money as was paid to Maintemp on account of contract work was paid by 633227. Indeed, as far as the evidence disclosed, all sums due to contractors and suppliers were paid by cheques drawn on the TD account of 633227. If Momat paid anything in or towards the construction of the project, any such sum was both incidental and inconsequential.

[8] It appears as well that all sums that 633227 became obliged to pay by virtue of its capacity as owner, not towards construction costs but towards the owner's obligations, like the purchase price of the land or overhead, were also paid from the same TD account. This arrangement lends support to my conclusion that, for this project, 633227 was both the owner and the general contractor. More will be said of this later.

[9] Naturally this state of affairs spelled trouble when it came to ascertaining: (a) what funds were trust funds [See Note 4 at end of document] and (b) what payments were eligible to be considered payments to "subcontractors and other persons who supplied services or material to the improvement" within the meaning of s. 8(2) of the Act.

[10] The project was very tight for cash. Nearly every cent deposited into the TD bank account of 633227 came from mortgage draws. Since they were intended to finance the project, it follows that, for practical purposes, all money that found its way into the TD bank account was trust money.

The Claim in Contract

[11] The contract is silent about the placement, i.e., location, of the air conditioning compressor units. Normally they are placed at grade level in close proximity to the

condenser located in the furnace plenum where the condenser does its work. In this case, they had to be placed on the (flat) roofs of the units. This required a substantial increase in the length of lines carrying refrigerant from the condenser to the rooftop compressor, "lineset". Jean-Pierre claimed that the contract proposal was signed with this understanding already in place so that no extra would be claimed for lineset.

[12] Marc Traina, the principal of Maintemp, claimed that the requirement to place the air conditioning units on the roof happened after the proposal was signed and later became an extra. I prefer his testimony on this issue.

[13] The first invoice from Maintemp for stage one was sent January 6, 1997, and paid without incident. [See Note 5 at end of document]

[14] The second stage was invoiced [See Note 6 at end of document] March 31, 1997. Marc Traina said that the work involved in stage two was substantially completed when the invoice was delivered. Jean-Pierre denied this. Again, I prefer the testimony of Marc Traina. One reason for this preference is that Jean-Pierre said that he was unable to be specific as to what work was done at the particular time because he was "in the back office" and "Gord was on site". Gordon Matas was present in court throughout the trial but was not called as a witness. Marc Traina was on site doing the work. I thus prefer his testimony concerning the state of completion of the work at any given time.

[15] An invoice for extras [See Note 7 at end of document] was delivered May 26, 1997. Three of the items totalling $637.72 are undisputed. One item for $1,120 plus GST, total $1,198.40 is disputed. That invoice is for the additional "lineset" necessary to place the air conditioning units on the roof. That claim is allowed.

[16] Maintemp performed other fine-tuning extras in various units. For the most part these were made necessary because unit buyers added extra items, like washrooms, which necessitated

re-routing of ducts from original plan locations. Maintemp did these adjustments as requested. Marc Traina said that such minor adjustments were common and that he did not invoice Momat for them and never intended to.

[17] Maintemp also provided thermostats, grilles and registers towards satisfaction of stage 3 for which it was not paid. I accept Marc Traina's estimate of the value of that work at $150 per unit x 7 = $1,050 less one thermostat supplied by Sel Tech $40 = $1,010.

[18] A list of deficiencies was present at trial. [See Note 8 at end of document] For the most part, the claimed deficiencies were without merit. The gas pipes were not painted. No evidence was led as to the cost of doing so. I accept the testimony of Marc Traina as to the merits of the list.

[19] Thus, the total contract price including GST is $46,438.

[20] On May 26, 1997, Maintemp billed Momat for the final 20 per cent before the work was done. [See Note 9 at end of document] The invoice also demanded that Momat supply a crane to lift the compressors to the roofs of the units. This was not agreed on.

[21] It was about this time that the relationship between Maintemp and Momat broke down. Momat effectively dismissed Maintemp from the site. I do not think this action was warranted by their performance to that time. However, Maintemp was not entitled to the final draw before the work was fully performed. If they were insisting on that and on the crane, then, if that insistence amounted to repudiation of the contract, dismissal was warranted.

[22] Momat retained Sel Tech to complete the unfinished work. No serious issue arises as to justification for dismissing Maintemp, because Marc Traina took no issue with Sel Tech's charges to finish the work he did not perform. Those charges totalled $9,520.15.

[23] Maintemp also claimed interest at 2 per cent per month

based on a notation to that effect on the contract proposal. This term was not written so as to disclose the equivalent yearly interest rate and contravened s. 4 of the Interest Act, R.S.C. 1985, c. I.5. I will allow 5 per cent as the Act suggests. For ease of calculation, I will date the interest from one month after the last Sel Tech invoice, which was delivered at the end of July 1997.

[24] What Maintemp is entitled to therefore is:

Contract Price including extras	$46,438.00
Grilles, registers, thermostats	$1,010.00
Less amount paid	($14,857.59)
Less Sel Tech invoices	($9,520.15)
Net amount due	$23,070.26
Interest 5 per cent from 97-09-01 to date	$5,190.80
Total due 02-03-31	$28,261.06

[25] Maintemp will have judgment against 633227 for this sum. I do not award judgment against Momat because Momat was merely the agent of [633227]. The contract was created between the principal and the contracting party. Momat, the agent, is not liable on the contract any more than Jean-Pierre would have been liable if he, as general manager of 633227, had made the contract and signed it as general manager of 633227. The action against Momat is dismissed, but without costs.

[26] Jean-Pierre or Gordon talked Maintemp out of filing a construction lien claim. Maintemp never filed one.

The Claims for Breach of Trust

[27] Maintemp claims that 633227, the owner, is liable for the amount due because it breached the trust obligations

imposed on it by ss. 7 and/or 8 of the Construction Lien Act. The substance of the breach alleged is that it made payments from trust money that were "ineligible" as that term is used in para. [9] above.

[28] Maintemp asserts that Jean-Pierre and Gordon Matas are liable for the owner's breaches by virtue of s. 13(1)(a) and (b) of the same Act.

[29] Gordon Matas was a director of [633227] and Jean-Pierre was its general manager. If a breach of trust occurred in the disbursement of 633227's money, both these men assented to or acquiesced in it. Hence both would be personally liable. They or one of them signed all the cheques for all payments. "All payments" by definition includes any offending payments.

[30] Section 7 of the Construction Lien Act provides,

> 7(1) All amounts received by an owner . . . that are to be used in the financing of the improvement . . . constitute . . . a trust fund for the benefit of the contractor.

[31] Section 8 provides that,

> 8(1) All amounts,
>
> (a) owing to a contractor or subcontractor, . . . or
>
> (b) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other[s] . . .

[32] In the usual case, one expects to find a trail of money leading from the lender to the owner to the general contractor, thence to the subcontractors and suppliers.

[33] Here, money found its way from the lender to [633227]. 633227 did not issue cheques to Momat. The simple reason is that Momat was not the general contractor; it was merely the

manager of the project on behalf of 633227, which was acting as its own general contractor. Rather, after the funds were placed into the bank account of 633227, any two of Jean-Pierre and Gordon and Gary Mooney signed cheques to pay (a) obligations of the owner (633227), including overhead [and] (b) amounts due to subcontractors and suppliers, i.e., eligible amounts.

[34] The theory of Maintemp is that Momat, which was a party to the contract, effectively appointed 633227 its agent for the purpose of paying its contract obligations to Maintemp. This theory was one that the court rather forced on Maintemp because of the reasoning it used in dealing with a motion for nonsuit by the defendants at the close of Maintemp's case.

[35] Now that I have had full opportunity to consider the evidence and exhibits in the light of counsel's submissions, I have come to the conclusion that the true theory is that which Mr. Robinson advanced on the motion, viz., that Maintemp's contract was truly with 633227. When Mr. Robinson first advanced this theory I fear I reacted as if he had just grown two heads. I thought, mistakenly, that he was asking me, perhaps somewhat indecently, to "lift the corporate veil" and treat the Maintemp contract as having been made with the Matas brothers.

[36] What he was asking me to do, although it was not couched in these terms, was to treat Momat, the general manager, as the agent of [633227]. Since [633227] had no contract with Momat [See Note 10 at end of document] that would constitute Momat a general contractor, Momat had to be acting as the agent of [633227], which itself took on the role of general contractor.

[37] Viewed from Maintemp's perspective, [633227] was simply an undisclosed principal. Qui facit alium facit per se. The principal obtains the benefits and incurs the obligations under the contract procured by its agent when the agent acts within the scope of his authority or apparent authority.

The Ineligible Payments

[38] Maintemp next points to numerous cheques written by

633227 to pay costs that it alleges were not eligible costs, such as payments to subcontractors and suppliers of material, but were rather "overhead" costs of 633227. It says that the total of these ineligible payments exceeds the amount of the claim it has proved. Thus, 633227, as principal of Momat, is liable in contract and Jean-Pierre and Gordon Matas are vicariously liable under s. 13(1)(a) and (b) of the Construction Lien Act.

The Owner's Defence as to Trust Moneys

[39] [The] owner argues that the onus is on the plaintiff to demonstrate that any particular payment was made for overhead or for any other ineligible expense. He argues that because hundreds of cheques are written for most construction jobs, it ought not to be up to [the] defendant to produce and account for every one. Rather, Mr. Watt argues, [the] plaintiff must pinpoint those that are said to be in breach of trust and demonstrate the breach. Otherwise, [the] defendant bears an impossible onus.

Onus of Proof as to Disbursement of Trust Money

[40] I disagree with this argument. In an ordinary trust, if the cestui que trust sues the trustee asserting that the trustee has misappropriated money, is it up to the cestui que trust to demonstrate that the trustee, who has disbursed trust funds, has not complied with the trust? Surely the more "impossible" task would be for the cestui que trust to explain the trustee's disbursements; he has not had the day-to-day management and control of the funds.

[41] Conversely, it is surely simple for the trustee, who has had day-to-day control over the money, to keep track of and record the appropriate disbursement of funds. It is simpler and more efficient if the trustee is the person obliged to account.

[42] I should think that the cestui que trust should normally bear the onus of proving the existence of the trust. That is merely an example of the general rule that the onus of proving any fact lies on him who asserts it. Normally proving a trust

involves proof of:

(a) imperative words of the settlor, evidencing an intention to create a trust,

(b) subject matter of the trust, which must be demonstrated with certainty,

(c) the objects of the trust, [See Note 11 at end of document]

[43] In the case at hand, the first and third elements of the trust arise from proof of the relationship of the contracting parties and the words of the statute.

[44] Once the cestui que trust proves the intention, the subject and the object of the trust, the trustee bears the onus of establishing that his management and disbursement of funds is consistent with the trust. It is the trustee who must account to the cestui que trust for payments made by him from the fund. [See Note 12 at end of document]

[45] It is more than interesting to note precisely the extent of the duty of a trustee to account. Waters says,

> . . . accounts are to contain a true and perfect inventory of the whole property in question, and are to include normally: (1) an account showing of what the original estate consisted; (2) an account of all moneys received; (3) an account of all moneys remaining in hand. Clear and distinct accounts [are] required . . . this meant that the trustees have to give "full explanations of all their dealings, and of the causes why outstanding assets were not collected or property of the estate has disappeared. [See Note 13 at end of document]

(Emphasis added)

[46] In comparison with this statement of the legal duty of a trustee, the performance of 633227 rates somewhere between abysmal and appalling. No attempt was made to segregate trust

funds, no serious attempt was made to ascertain if disbursements of trust moneys were consistent with the statutory objects of the trust and hardly any effort was made to keep a record, by vouchers, invoices or otherwise, of the reason for making payments.

[47] In ordinary circumstances, it seems that Maintemp would have to demonstrate what part of all the money coming into 633227's hands was trust money, i.e., that it came from the lender or was otherwise earmarked for the project. Only after that was done would the duty fall upon the trustee to account, i.e., demonstrate that disbursements he made benefited "sub-contractors or other persons who have supplied services or materials to the improvement", [See Note 14 at end of document] as that expression has been interpreted by the Court of Appeal for Ontario. [See Note 15 at end of document] As a convenient shorthand, I shall refer to appropriate payments as those which "benefit the improvement".

[48] Because of the conduct of the trustee, I conclude that the onus that falls on it is even higher in the case at hand. Here, the Matas brothers set up the scheme, viz., that Momat (and Jean-Pierre Matas) were simply managing the project. 622337, wearing the hats of both owner and contractor, chose to place all its moneys in one pot, its TD bank account. If they received non-trust moneys, such were simply blended with trust moneys.

[49] It then disbursed moneys to pay both the owner's and the contractor's obligations without making any real effort to discriminate as to source or application of funds. By doing so, and by keeping appallingly bad vouchers [See Note 16 at end of document] for the cheques it issued, it has effectively placed the claimant at a double disadvantage: (A) it has made it virtually impossible for Maintemp to demonstrate the source of the money in that account, i.e., whether it came from the lender or was otherwise earmarked for the project; and (B) it has made it nearly impossible for the cestui que trust, Maintemp, to ascertain whether any particular payment benefited the improvement.

[50] In such circumstances, to place the onus on the cestui que trust even to identify the trust money, effectively enables any unscrupulous owner-contractor to defeat the purpose of the Act by the simple expedient of blending funds and keeping shoddy records.

[51] I therefore rule that 633227 bears a double onus of demonstrating, (A) that the money found in its TD account was not trust money, if it alleges that fact, and (B) that the moneys it disbursed from that account benefited the improvement.

[52] Effectively then, I shall conclude that Maintemp has demonstrated that any money in the TD account was earmarked as thus trust money unless 633227 demonstrates otherwise. Only in this way can the court create an appropriate disincentive to shoddy record keeping by a trustee.

[53] 633227 never demonstrated that any particular funds in the TD account were not trust funds.

Credibility

[54] I was most dissatisfied with the evidence of Jean-Pierre Matas. He had plainly made little or no effort to discover the reason for having made payments from the TD account, even though he had produced the cheques. Not one cheque was ever married to an invoice or voucher. His explanations for cheques were vague and often unlikely. I have already alluded to the fact that his brother, Gordon, who was present throughout the trial, who had signed many of the cheques, chose not to testify. I draw an adverse inference from that failure.

[55] I should also say that I regard Hampshire Homes as nothing more than a convenient device used by the defendants to allow them to scoop sums of money at will from trust funds. Again, not one piece of paper documents substantial sums of money that were diverted from legitimate to unknown uses.

Quantifying the Breach of Trust

[56] I have made a table of the disputed cheques, i.e., those with which Mr. Robinson took issue. I have allocated them in two columns as "Eligible" and "Breach" signifying respectively that 633227 either has demonstrated that amounts noted were properly paid "to the improvement" or that it has failed to demonstrate that fact. The failure of the trustee to demonstrate the fact results in a finding that the payment was in breach of trust.

TABLE OF CHALLENGED PAYMENTS/CHEQUES

EXHIBIT A-25

Page	Cheque	Date	Payee	Eligible	Breach	Note
89	56	96-7-9	Anderson Sinc.	58,752.11	0	s. 7(1)
64	13	96-5-21	"	0	7,088.55	N.F.I. [See Note 17 at end of document]
80	49	96-7-4	"	0	2,500.00	"
92	90	96-8-1	"	0	2,215.57	"
112	182	96-9-13	"	0	2,223.45	"
146	308	96-11-26	"	0	6,841.37	"
170	402	97-5-17	"	0	5,000.00	"
82	60	96-07-12	Am. Express	0	1,000.00	E.U. [See Note 18 at end of document]
68	31	96-5-29	Future Shop	3,345.71	0	E.U. [See Note 19 at end of document]
96	107	96-8-12	Meadowvale	0	1,323.00	Overhead

			Insurance [See Note 20 at end of document]			
107	151	96-9-1	"	0	1,201.50	"
120	152	96-10-1	"	0	1,201.50	"
66	23	96-5-24	Hampshire [See Note 21 at end of document]	0	1,000.00	E.U. [See Note 22 at end of document]
73	37	96-6-12	"	0	1,700.00	"
160	365	96-12-30	"	0	1,000.00	"
161	366	96-12-30	"	0	10,000.00	"
206	524	97-6-12	"	0	2,151.36	"
72	19	96-5-23	Mastercard	0	4,000.00	E.U. [See Note 23 at end of document]
71	12	96-5-21	Steve's Excav	2,171.00	0	
71	10	96-5-16	Town Oakville	0	13,753.39	N.F.I.
89	66	96-7-6	Illegible	0	447.35	E.U.
61	13	96-4-22	Bell Canada	0	977-16	E.U. [See Note 24 at end of document]
63	4	96-5-14	Hampshire	0	4,400.00	E.U.
65	20	96-5-23	Visa	0	2,000.00	E.U.
69	32	96-5-8	Nelson's Agg	0	925.69	Not this project.
69	34	96-5-9	Millway Carpet	8,000.00	0	Deposit [See Note 25

						at end of document]
94	100	96-8-8	Maintemp	0	7,451.69	Not this Project.
55	4	96-4-19	A. Matas	250.00	0	E.U.
67	26	A.M.		1,600.00	0	
				74,118.82	80,401.58	

Totals

[57] The conclusion I reach is that 633227, Jean-Pierre Matas and Gordon Matas have failed to demonstrate that $80,401.58 was paid "to the improvement". They have also failed to demonstrate that those sums were not paid from trust money. By their appalling disregard for record keeping they have made appropriate proof impossible. Such a state of affairs cannot be permitted when one is dealing with trust funds.

[58] There is no question that Gordon Matas was a director of 633227 and Jean-Pierre Matas, its general manager, had effective control of it as well. Both signed cheques with Mr. Mooney.

[59] Both these men acquiesced in conduct that they knew or by any reasonable standard ought to have known amounted to a breach of trust. Both fall squarely under s. 13 of the Act.

Privity and Agency

[60] Mr. Watts argued strenuously that Momat made 633227 its agent for payment only in respect of those payments that Momat directed 633227 to make. The view I take of the arrangement devised by the Matas brothers is that 633227 was in reality both the owner and the general contractor. 633227 used Momat as a convenient shield for the purpose of having it enter into contracts with sub-trades and suppliers. The apparent purpose of this was to use [See Note 26 at end of document] Momat's limited liability so that any claim or judgment against Momat was unenforceable as dry. I recall no evidence that Momat made even one payment to any supplier or contractor. How can this be? How can Momat enter into contracts with suppliers and expect to

fulfill them without coming into possession of any money whatever? The money flowed directly from 633227 to the supplier. Momat made contracts with suppliers as agent of its undisclosed principal, 633227. All the money that came into the hands of 633227 was trust money. 633227 and the Matas brothers were obliged to spend it to benefit the improvement.

[61] In my view, this means that the normal privity rule is simply inapplicable. Edward Stephens Associates Ltd. v. G.L. Trenching Ltd. [See Note 27 at end of dcoument] makes it clear that trust claims can only be asserted against the person or entity with whom one has a contract. The purpose of the rule is [to]

> prevent subcontractors well down the construction pyramid from tying up the flow of money on construction projects and that claimants to trust monies under this Act are now limited to those who have privity of contract with contractors, holding trust funds. [See Note 28 at end of document]

[62] But the defendants arranged their affairs so that the owner was the contractor. Maintemp's contract was with 633227. Privity exists.

[63] That 633227 was the principal is the only construction of the arrangement that is capable of lending legitimacy to the arrangement whereby Momat enters into all the contracts to pay for improvements yet never receives contract money. Any other construction of the arrangement would be tantamount to assisting a fraud under which Momat agrees to pay for work but, having arranged never to receive the money to pay for it, must be taken to intend never to pay for it.

[64] Maintemp had a contract with 633227, the undisclosed principal. Privity existed between them. Maintemp can claim against trust money held by 633227.

[65] [The] plaintiff is to have judgment against all defendants (except Regent's Quay and Momat) for $28,261.06.

[66] [The] plaintiff should have costs based on substantial

indemnity. [The] defendants' conduct amounted to a breach of trust. [The] defendants' shoddy record keeping and questionable arrangements were the seeds from which this litigation grew. If the quantum of costs cannot be settled, then the parties may make arrangements with the trial co-ordinator to speak to that issue.

Judgment accordingly.

Notes

Note 1: See defendant's calculations, filed at close of trial.

Note 2: Jean-Pierre said he was to receive 10 per cent of profits at trial but at examination for discovery he said the figure was 5 per cent.

Note 3: No document evidencing the relationship between Momat and 633227 was ever filed.

Note 4: Under ss. 7 and/or 8 of the Construction Lien Act, R.S.O. 1990, c. C.30.

Note 5: Ex. A-15. $14,857.59.

Note 6: Ex. A-16. $20,823.91.

Note 7: Ex. A-17. $1,836.12.

Note 8: Ex. A-37.

Note 9: Ex. 13. $8,920.38.

Note 10: Nor with anyone else.

Note 11: See Waters, The Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), c. 5, p. 107.

Note 12: Waters, op. cit., c. 19, pp. 871-72.

Note 13: See footnote 10.

Note 14: Section 8(1) [of the] Construction Lien Act.

Note 15: Rudco Insulation Ltd. v. Toronto Sanitary Inc. (1998), 42 O.R. (3d) 292, 41 C.L.R. (2d) 1 (C.A.).

Note 16: Indeed for the most part, none at all.

Note 17: N.F.I. = Not for Improvement. Too remote. Rudco [Insulation v. Toronto Sanitary Inc.], para. 26.

Note 18: E.U. = Explanation Unsatisfactory. The likelihood that an individual was reimbursed for materials in the exact amount of $1,000 is more than unlikely.

Note 19: Appliances bought before making of improvement is commenced but ultimately placed in units equals "materials", s. 1 [Construction Lien Act].

Note 20: Builder's All Risk Policy. Clearly an overhead expense.

Note 21: I emphatically disbelieve the "story" that 633227 was attempting to establish the creditworthiness of Hampshire as a business style by purchasing materials in its name and then making sure the material supplier was paid. These payments thus simply made trust money disappear.

Note 22: E.U. = Explanation Unsatisfactory. Onus to prove eligible payment not discharged.

Note 23: E.U. = Explanation Unsatisfactory. See footnote 16.

Note 24: Mr. Matas claimed, Without back-up documents, that this cost was incurred to bring phone services to the site. I disbelieve the explanation. The cheque memo refers to phone numbers -- and the payment is more likely overhead.

Note 25: Materials, s. 1.

Note 26: Abuse?

Note 27: (1989), 73 O.R. (2d) 112, [1989] O.J. No. 2562 (H.C.J.), O'Brien J.

Note 28: Ibid., p. 10 of [1989] O.J. No. 2562.