Cash or Credit? – Posting Security for Liens post-Stuart Olson

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The Supreme Court's decision in *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43 ("***Stuart Olson***") addresses the interplay between the two *Construction Lien Act*remedies available to an unpaid supplier on a construction project: the claim for lien and the claim for breach of trust.

The claim for lien ties up the owner's land, and allows the unpaid supplier to collect some of its debt from the sale of the owner's land if the debt goes unsatisfied.

The breach of trust claim allows the claimant to sue the debtor, and if the debtor received funds on account of work done by the claimant but used the funds to pay overhead (for example), the trust remedy pins personal liability on anyone who caused the debtor to breach its trust obligations.

The two claims are often used in tandem, first to get as much as a claimant is entitled to get from the owner in the lien claim action, then to pursue the debtor and its principals for breach of trust for the balance.

At its heart, much of *Stuart Olson* travels over old ground, with the court noting that lien rights and remedies are distinct and separate from trust rights and remedies.

While *Stuart Olson* is a decision coming out of Manitoba (with some nuances in its lien legislation not applicable to every province in Canada), for the Ontario construction context, one new and interesting statement from the court is a requirement that **where bond security has been posted as security to vacate a lien from title (as opposed to cash as security), the party posting the bond is not relieved from its trust obligations, and must continue to hold cash to satisfy its trust obligations**. Before the *Stuart Olson* decision, some contractors thought that when a lien is bonded off, they could treat their trust obligations as discharged, freeing up the trust monies for other uses. The court has unequivocally stated that this is not the correct view of the trust obligations, and the party posting a bond who also owes trust obligations must maintain the trust fund as if the bond had not been posted. The effect of this decision is to provide double security where a bond is posted to vacate a lien, but a party can avoid providing double security by paying the trust funds into court to vacate the lien. In short, from the point of view of the party vacating the lien, cash is king.

Facts of Stuart Olson

In Manitoba, as in Ontario, the provincial lien legislation creates two rights to assist contractors and subcontractors in securing payment: the lien and the trust. In Ontario, all trust rights and remedies have a requirement of privity of contract, meaning the relationship only goes one level up the construction pyramid. In Manitoba, there is no requirement for privity of contact for an owner's trust obligations, meaning the owner owes trust duties all the way down the pyramid (and can face an action from the beneficiaries if it breaches the trust obligations).

In *Stuart Olson*, the owner hired Stuart Olson Dominion Construction Ltd. (the "**GC**") to construct a football stadium. The GC subcontracted part of the structural work to Structal Heavy Steel, a division of Canam Group Inc. (the "**Sub**").

The Sub asserted a lien claim, which was bonded off by the GC. The GC then requested payment from the owner. The Sub advised the owner that if it paid any amount down to the GC, the Sub would assert a breach of trust claim against the owner. As an aside, had this case occurred in Ontario and the lien was bonded off, there would be no breach of trust claim by the Sub against the Owner, and the Owner could have paid the funds to the GC.

The result of the positions taken by the GC and the Sub was a flurry of motions, and the court of first instance was asked to determine whether, once the lien claim was bonded off, the effect was also to discharge the trust obligations owed to lien claimant.

Effect of Posting Security on the Trust Claim

The motions court found for the GC, in effect holding that once a bond had been posted in court for the lien claim, the trust monies were freed up and could be used as the owner wished.

The Court of Appeal and Supreme Court both held to the contrary, finding that simply bonding off a lien does not have the effect of discharging the trust obligation owed to a lien claimant. Among other things, the Supreme Court reasoned that bonding off a lien cannot discharge trust obligations, because if the lien claim failed, there would be no trust funds left for the supplier to access. This would defeat the key purpose of lien legislation throughout Canada: to ensure payment down the construction pyramid and encourage liquidity in the flow of funds.

This means that when a bond is posted as security for a lien claim, the trust obligations are not discharged, and the funds have to continue to be held in trust for the claimant.

The Supreme Court noted that had cash been posted into court instead of a bond, there would be no requirement to hold additional security, as this is exactly what the lien act requires – ensuring the monies are held in trust (i.e. by the court) for the beneficiary.

Going Forward

Typically, bonds are posted because for a relatively small cost (a percentage of the lien claim being secured), they free up title to a property and get project funds flowing again.
Before *Stuart Olson*, it was also thought by some in the industry that cash that was otherwise impressed by trust obligations could be used to pay other suppliers, or to pay overhead. The court has now clarified that this is not the case.

Where the contractor has received funds on account of work done by a subcontractor who has also advanced a lien claim, and posts a bond as security for the lien claim, the contractor must also continue to hold the trust funds for the benefit of the subcontractor. This will result in double security being held, and unrecoverable bond premiums.

Where a set of facts give rise to both a lien claim and a trust claim, prudent contractors will use the trust funds to secure the lien instead of a bond, eliminating the need to post and hold double security.