

COURT OF APPEAL FOR ONTARIO

CITATION: Airex Inc. v. Ben Air System Inc., 2017 ONCA 390

DATE: 20170516

DOCKET: C60178

Simmons, Rouleau, and Roberts JJ.A.

BETWEEN

Airex Inc.

Plaintiff (Respondent)

and

Ben Air System Inc. also known as Ben-Air Systems Inc., Beny Quattrociocchi  
and Juan Cumming

Defendants (Appellants)

Colin Holland, for the appellants

John Lo Faso and David Morawetz, for the respondent

Heard: May 1, 2017

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice, dated February 20, 2015.

**By the Court:**

[1] The appellants appeal from a summary judgment declaring them in breach of the trust provisions of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the “Act”) and ordering them to jointly and severally pay \$216,662.84 to the respondent, Airex Inc. (“Airex”).

[2] The corporate appellant, Ben Air System Inc. (“Ben Air”) entered into a subcontract with Omico Mechanical Ltd. (“Omico”) to do a portion of Omico’s HVAC work on a TTC facility (“the project”). Ben Air subsequently ordered certain HVAC equipment for the project from Airex.

[3] The appellant, Beny Quattrociocchi, is the president of Ben Air; the appellant, Juan Cumming, is the project manager of Ben Air. There was no dispute on the motion that Mr. Quattrociocchi signed a guarantee in favour of Airex, guaranteeing Ben Air’s present and future indebtedness to Airex.

[4] Further, subject to one issue regarding a claimed set-off and an argument concerning mitigation, there was no issue on the motion that Ben Air owes Airex monies on account of HVAC equipment for the project. There was also no issue that Omico paid \$387,228.32 plus HST to Ben Air on account of Ben Air’s subcontract and that those funds are trust funds in relation to the project under s. 8 of the Act.

[5] The main issue on appeal is whether the motion judge erred in failing to find a genuine issue requiring a trial concerning whether Ben Air breached s. 8 of the Act.

[6] Section 8 of the Act provides that monies received on account of a contract for an improvement constitute a trust fund for the benefit of subcontractors and other persons who supply services or material for the improvement (collectively

“subcontractors”) and prohibits use of any such funds for a purpose inconsistent with the trust until all such persons have been paid in full. (All sections of the Act referred to in these reasons are reproduced in full in Appendix ‘A’.)

[7] Section 10 of the Act discharges the recipient of trust funds from its trust obligations to the extent of payments to subcontractors. Section 11 of the Act permits the recipient of trust funds to reimburse itself from the trust funds for payments to subcontractors from monies not subject to the trust.

[8] Section 13 of the Act makes directors, officers and persons in effective control of a corporation personally liable for a breach of s. 8 where they assent to or acquiesce in conduct they know, or ought reasonably to know amounts to a breach of trust by the corporation.

[9] On appeal, the appellants argue that they filed evidence on the motion, which, at a minimum, raises an issue that Ben Air paid out more money on account of equipment purchases, payments to sub-contractors and wages and salaries for the project than it received from Omico, including payments made to itself from trust funds to reimburse itself for payments made in relation to the project. Relying on ss. 10 and 11 of the Act, the appellants submit that the motion judge erred in failing to find a genuine issue requiring a trial concerning whether Ben Air breached s. 8 and whether the personal appellants are liable for that breach.

[10] We do not accept this submission. Simply put, Ben Air failed to file evidence on the motion that carried sufficient weight to support its position.

[11] For example, in an affidavit filed on the motion, Mr. Cumming asserted that Ben Air used a cheque received from Omico in the amount of \$158,000 to pay invoices from other project subcontractors (Servocraft Limited and Engineered Air), which had been outstanding longer than Airex's invoices. However, Mr. Cumming did not provide any invoices or banking records to support this assertion. Moreover, we note that, in a letter confirming payment of the \$158,000, Omico stated it had agreed to forward the cheque "in part payment" of an amount allocated to goods supplied by Airex.

[12] Mr. Quattrociochi also filed an affidavit on the motion to which he attached Ben Air's Profit and Loss sheet for the project and various supporting documents. In his affidavit, he asserted that the Profit and Loss sheet demonstrated that Ben Air received \$387,228.32 plus HST from Omico in relation to the project and that Ben Air expended \$399,823.53 plus HST "to cover equipment purchases, wages and salaries, and payments to subcontractors", leaving Ben Air with a deficit on the project.

[13] In contrast to Mr. Cumming's evidence, the Profit and Loss statement appended to Mr. Quattrociochi's affidavit suggested Servocraft Limited and Engineered Air had been paid prior to the receipt of the \$158,000 cheque from

Omico. And the supporting documents attached to Mr. Quattrociocchi's affidavit were rife with shortcomings: in relation to several payments alleged to have been made in relation to the project, there were no supporting invoices and no other evidence to support the claim that the payments were made in relation to the project; in other instances there were no documents to support the assertion that monies claimed to have been billed in relation to the project had in fact been paid; in one instance, a cheque for \$305,100 payable to Engineered Air, there was an unexplained stamp on the back of the cheque that included the words "dishonoured items returned to Bank of Montreal".

[14] It is also noteworthy that neither Mr. Cumming's affidavit nor Mr. Quattrociocchi's affidavit was delivered in compliance with the timetable established for the motion. Mr. Cumming's affidavit was one day late. Mr. Quattrociocchi's affidavit was seven weeks' late and was delivered only ten days prior to the motion hearing date. In these circumstances, the appellants are not entitled to rely on any adverse inferences that might otherwise be drawn from a failure to cross-examine.

[15] We acknowledge that it was Airex's role to demonstrate no genuine issue requiring a trial.

[16] However, once Airex demonstrated the following matters (which were never really in dispute), Airex had established that it was the beneficiary of trust monies under s. 8(1) of the Act:

- it was a sub-contractor on the project;
- it supplied materials to Ben Air, a contractor on the project, for which it (Airex) had not been paid; and
- Ben Air had received payments on account of the project from Omico, another contractor on the project.

[17] It was then for Ben Air to show that the trust monies had been properly applied: *St. Mary's Cement Corp. v. Construc Ltd.* (1997), 32 O.R. (3d) 595 (Gen. Div.) at pp. 600-601; *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 ONCA 198, 101 O.R. 3d 285, at paras. 83-84. Moreover, the appellants were required to put their best foot forward on the summary judgment motion: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, aff'd [1997] O.J. No. 3754 (C.A.); *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, at para. 32; *Chernet v. RBC General Insurance Company* 2017 ONCA 337, at para. 12. Viewed as a whole, the evidence the appellants filed was contradictory and lacked documentary support. It certainly did not carry sufficient weight to support their assertions that they had paid out more money than they received in relation

to the contract – or even that payments they had made on the contract left them without sufficient trust funds to pay Airex.

[18] As for the claimed set-off, the respondent produced documents indicating it complied with the contract at issue. The appellants did not produce documents to demonstrate otherwise. We see no basis on which to interfere with the motion judge’s decision that there was no genuine issue requiring a trial concerning the set-off.

[19] The appellants submitted no authority to support their argument that Airex was under a duty to mitigate by filing a lien. We agree with the motion judge’s conclusion that its failure to do so “is not in any way a failure to mitigate its losses.”

[20] We would not grant leave to appeal costs.

[21] The appeal is therefore dismissed with costs to Airex fixed in the agreed upon amount of \$13,500 inclusive of disbursements and HST.

Released:

“MAY 16 2017”  
“PR”

“Janet Simmons J.A.”  
“Paul Rouleau J.A.”  
“L.B. Roberts J.A.”





## APPENDIX 'A'

### *Construction Lien Act, R.S.O. 1990, c. C.30*

#### **Contractor's and subcontractor's trust**

##### **Amounts received a trust**

**8.** (1) All amounts,  
    (a) owing to a contractor or subcontractor, whether or not due or payable;  
    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 persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1).

##### **Obligations as trustee**

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (2).

##### **Payment discharging trust**

**10.** Subject to Part IV (holdbacks), every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee. R.S.O. 1990, c. C.30, s. 10.

##### **Where trust funds may be reduced**

**11.** (1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust. R.S.O. 1990, c. C.30, s. 11 (1).

##### **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. R.S.O. 1990, c. C.30, s. 13 (1).

**Effective control of corporation**

(2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant. R.S.O. 1990, c. C.30, s. 13 (2).

**Joint and several liability**

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Part, those persons are jointly and severally liable. R.S.O. 1990, c. C.30, s. 13 (3).

**Contribution**

(4) A person who is found liable, or who has admitted liability, for a particular breach of a trust under this Part is entitled to recover contribution from any other person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 13 (4).