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Judgment obtained for Construction Act breaches of trust which survives bankruptcy despite Limitations Act defences

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Robert C.
Harason

In *University Plumbing v. Solstice Two Limited*, 2019 ONSC 2242, commercial and construction litigation partner Robert Harason was successful in obtaining, on behalf of University Plumbing & Heating Ltd. (“University”), summary judgment against the defendants (i) Solstice Two Limited (“Solstice”), the owner of the residential condominium on which University performed its work, (ii) Davies Smith Developments Ltd., the corporate parent of Solstice who was paid substantial management and other fees approved by the cost consultant retained by the construction lender, and (iii) their officers and directors, Graham Chalmers and Ian Smith, each of whom was found to have breached the trust fund provisions of the *Construction Act*.

University was awarded payment of the balance owing for the price of its work done (\$103,047.48), interest under the CCDC2 contract at Royal Bank prime plus 6% per year, compounded monthly (\$242,128.35) and



substantial performance trust and vendors trust provisions of the *Construction Act* against all defendants.

Graham Chalmers and Ian Smith were found to have knowingly assisted Solstice in its breach of trust and to have been in knowing receipt of trust funds through their receipt of funds, including management fees, impressed with these trusts, and thereby liable for common law breach of trust in addition to being personally liable pursuant to section 13 of the *Construction Act*.

As a result, Justice Morgan found that Messrs. Chalmers and Smith had committed a wrongdoing that would survive a bankruptcy, should one ensue, and that this could now be the subject of a declaration even in advance of a bankruptcy.

The defendants defended on the basis that the action was commenced more than two years after University discovered its claims.



not set out the actual amount owing, some of which were over his Microsoft Outlook created email signature with his printed name and some of which simply said “sent from my Blackberry Wireless Device”, amounted to written acknowledgments of liability signed by the person making it or the person’s agent, in accordance with s. 13(10) of the *Limitations Act*, which acknowledged liability on the part of Solstice in respect of a claim for payment of a liquidated sum, so that the act or omission on which the claim was based was deemed to have taken place on the day on which the acknowledgment was made in accordance with s. 13(1) of the *Limitations Act*.

As both Solstice and Graham Chalmers were trustees, these acknowledgments were acknowledgments by a trustee which, in accordance with s. 13(6) of the *Limitations Act*, were also acknowledgments by the other defendants who were trustees of the same trust.



University, it only became appropriate for University to commence action when Graham first advised that Solstice would not have the money to pay University, and thus, University's claim was not discovered, in accordance with s. 5(1)(a)(iv) of the *Limitations Act*, until that date.

These promises were held to have induced University to forbear from commencing an action and thereby prevented the running of the limitation period.

In compliance with the general rule that breach of trust cases entitle the successful party to substantial indemnity costs, Justice Morgan made an award of substantial indemnity costs against the defendants.





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