SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantica Mechanical Contractors Inc. v. Steve Tsimiklis Holdings Ltd. and Steve Tsimiklis*, 2020 NSSC 76

Date: 20200317
Docket: *Hfx No.* 292257
Registry: Halifax

Between:

Atlantica Mechanical Contractors Inc., Davies Plumbing and Heating Ltd., Duron Atlantic Limited, East Coast Sheet Mental Ltd., Kejofo Ltd., Diaden Masonry & Construction L.P., Lead Structural Formwork Limited, Marid Industries Limited, Pinaud Drywall & Acoustical Limited, Precision Concrete Services Limited, Rendan Fabricators Limited, Twin City Alarms Limited, Twin City Electric

Plaintiffs

v.

Steve Tsimiklis Holdings Ltd. and Steve Tsimiklis

Defendants

Judge:	The Honourable Justice Ann E. Smith
Heard:	November 27, 28; December 2, 3, 4, 5, 2019, in Halifax, Nova Scotia
Post-trial Submissions:	Plaintiffs, March 6, 2020; Defendants, March 10, 2020
Counsel:	John Kulik, QC, Ian R. Dunbar, Robert Mroz, for the Plaintiffs Michael C. Moore, for the Defendants

By the Court:

Introduction

[1] This is an action under the trust provisions of the Nova Scotia *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended (the "*Act*").

[2] The trial of this action came before the Court on November 27, 2019 nearly 12 years after it was started, and took place over approximately four days.

[3] The action raises the question of when an individual, in this case the Defendant Steve Tsimiklis, should be held personally liable for breach of the trust provisions of the *Act*. Amendments to the *Act* effective January 1, 2005, allow for the finding of personal liability of individuals who breach the trust provisions. This of course means that the Court must first determine whether the trust provisions were in fact breached, and if so, by whom.

[4] There were originally eight Plaintiffs, Atlantica Mechanical Contractors Inc., Duron Atlantic Limited, East Coast Sheet Metal Ltd., Kejofo Ltd., as general partner in Diaden Masonry & Construction L.P., Lead Structural Formwork Limited, Pinaud Drywall & Acoustical Limited, Precision Concrete Services Limited and Rendan Fabricators Limited. The Plaintiffs, Davies Plumbing and Heating Limited, Marid Industries Ltd and Twin City Alarms Limited c.o.b. as Twin City Electric, each discontinued its action against the Defendants before the start of the trial.

[5] There are two defendants, Steve Tsimiklis and Steve Tsimiklis Holdings Limited ("STHL"). Steve Tsimiklis is the sole owner, director and officer of STHL. The action concerns only Mr. Steve Tsimiklis' personal liability, if any, as STHL has been noted in default and judgment in the amount of $1,849,006.36 has been entered against it by the Plaintiffs. STHL ceased operations in November, 2007.

Background

[6] In 2006 or 2007 each of the Plaintiffs provided labour and/or materials in accordance with construction contracts with STHL, as "owner" in connection with

the construction of a 108-unit residential apartment building on property located at 5620 South Street, Halifax, Nova Scotia (the "Property" or the "Project").

[7] Starting in September and October 2007, when their invoices were not being paid, each Plaintiff filed a builders' lien against the Property. The Plaintiffs each claim that STHL was at all material times the owner of the Property and indeed admitted that it was owner in its defence to this action. They say that STHL borrowed funds from lenders to be used for the construction of the apartment building, and that those lenders secured repayment of the funds advanced by registering mortgages against the Property. The Plaintiffs claim that in accordance with s. 44A of the *Act*, the funds borrowed by STHL, and any other funds obtained by STHL used to finance the Project, should be deemed to constitute a trust fund for their benefit.

[8] The Plaintiffs say that STHL failed to pay all the amounts it owed each of them, pursuant to their contracts. The total global amount claimed by all of the Plaintiffs is in excess of 1.2 Million dollars. The Plaintiffs claim that the failure on the part of Steve Tsimiklis to provide any proper accounting of the receipt of trust funds in and of itself constitutes a breach of the trust provisions of the *Act*. They seek judgment for the amounts owed to them, as well as an order for the tracing of trust funds to any non-beneficiary of the trust.

[9] The Plaintiffs claim that Steve Tsimiklis is personally liable for any breach of trust by STHL.

[10] Steve Tsimiklis denies that he was the owner of the Property at all material times. His evidence was that, starting in 2003, Amalthea Holdings Limited ("AHL"), a company owned and controlled by him, acquired several parcels of land on which the apartment building was eventually built on the Property. By 2003 all of these parcels were acquired by and owned by AHL. Mr. Tsimiklis says that on October 22, 2004, AHL sold the Property to his parents, Dimitrios and Dimitra Tsimiklis. Steve Tsimiklis says that at that time his parents became the registered owner of the Property. His evidence was that on July 30, 2007 his parents sold the Property to STHL for 3.5 Million dollars.

[11] Mr. Steve Tsimiklis says that any failure to comply with the trust provisions of the *Act* during the time period when his parents were the registered owners of the Property (October 22, 2004 to July 30, 2007) was his parents' fault, and not his, and that his parents should have been named defendants in this action, if the

Plaintiffs wished to claim against them for breach of the *Act*'s trust provisions. In this regard, he says that the Plaintiffs sued the wrong person.

[12] Steve Tsimiklis denies that STHL entered into contracts with the Plaintiffs as "owner" and says that when he signed these construction contracts for STHL as "owner" he did so as agent for his parents and for their benefit since they were the registered owner of the Property at the time. Steve Tsimiklis blames Aecon Atlantic Group ("Aecon"), the project manager hired by STHL for the Project, for any error in the drafting of these contracts and the fact that STHL is listed as the "owner." Steve Tsimiklis admits that when he acquired the Property from his parents in late July, 2007, he became the registered owner of the Property and responsible for trust monies received from that date forward.

ISSUES:

[13] The issues this Court must determine are as follows:

(1) Has each Plaintiff established that it rendered construction services for STHL for the Project and that it has not been paid in full for those services?

(2) Have the Plaintiffs established that STHL received funds for the Project that were impressed with a trust in their favour pursuant to the trust provisions of the *Act*?

(3) Has Steve Tsimiklis properly accounted for the use of the funds?

(4) Did STHL breach the trust provisions of the *Act*, and if so, is Steve Tsimiklis personally liable for any breach?

(5) If STHL breached the trust provisions of the *Act*, what remedy is each of the Plaintiff entitled?

Decision in Brief

[14] For the reasons which are detailed below, this Court finds that STHL breached the trust provisions of the *Act*, and that Steve Tsimiklis, as the sole officer, director and shareholder of STHL, is jointly and severally personally liable for those breaches.

[15] As will be reviewed further in this decision, this is not a case where there has been a technical breach of the trust provisions. Rather, this is a case where there have been flagrant and ongoing breaches of the trust provisions, through the diversion of trust monies which should have been used to pay the Plaintiff trade contractors, to the benefit of Steve Tsimiklis and other non-beneficiaries of the trust.

Evidence before the Court

The Plaintiffs' Evidence

Kevin Fougere – Kejofo Ltd., as general partner in Diaden Masonry & Construction

[16] Kevin Fougere gave evidence that in 2006 and 2007 he was the owner of the Plaintiff Diaden Masonry & Construction L.P. ("Diaden") of which Kejofo Ltd. ("Kejofo") was the general partner. Kevin Fougere said that Diaden was engaged to perform the masonry scope of work on the Project. Kevin Fougere said that Diaden had a contract with Tsimiklis Holdings to do this work.

[17] The document Mr. Fougere pointed to as being Diaden's contract with Tsimiklis Holdings to perform work for the Project was a contract dated January 24, 2007 between AHL and Diaden, with AHL noted as "owner" and Diaden as "Trade Contractor." The contract is signed by Steve Tsimiklis as President and owner of AHL and by Kevin Fougere as President of Diaden. The contract provides that Aecon is the Construction Manager.

[18] Kevin Fougere testified that on March 23, 2007 he received correspondence from Johnathan Mullin, Senior Project Manager with Aecon that provided, in part, as follows:

> Attached please find two subcontracts which replace the trade subcontracts issued to you by Amalthea Holdings Ltd.
>
> This contract reflects the name change to Steve Tsimiklis Holdings Limited; this change has been necessitated by the mortgage lender. The price, terms, and conditions of the new contracts are identical to your previous subcontracts.
>
> [emphasis added]

[19] Kevin Fougere referred to a September 24, 2007 statement of invoices, paid and unpaid, prepared by Diaden for work on the Project. This statement of

invoices shows that as of September 24, 2007 Diaden had several outstanding invoices in the total amount of $365,937.44. The document also shows a builders' lien holdback of $181,600.65. Kevin Fougere's evidence was that as of September 24, 2007 Diaden was owed $547,538.09 for work on the Project.

[20] Mr. Fougere's evidence was that in the late summer and early fall of 2007 payments on Diaden's invoices were not being made. He said that Diaden stopped work on the Project, as did other contractors. On September 24, 2007 Kejofo Ltd., as general partner in Diaden, filed a lien in the amount of $547,538.09 against the estates of Dimitrios Tsimiklis, Dimitra Tsimiklis, Steve Tsimiklis, AHL, Tsimiklis Holdings Ltd and STHL. The description of the property to be charged is the Property, with its registered owner noted to be STHL, Steve Tsimiklis, AHL, Tsimiklis Holdings Limited. Dimitrios Tsimiklis and Dimitra Tsimiklis are identified as "beneficial owners or holding interest" in the Property.

[21] Progress billings in support of the amounts owed to Diaden were in evidence and identified by Kevin Fougere.

[22] Kevin Fougere testified that Diaden was never paid by STHL the $547,538.09 owed to it for work on the Project. However, Kevin Fougere testified that Diaden was paid 25 cents on the dollar of what it was owed by a purchaser of the Property, who wanted the liens released.

[23] Kevin Fougere pointed to an Agreement in evidence dated November 16, 2007 between a numbered company, STHL, Aecon Limited, Trade Contractors (of which Diaden was one) and Banc Properties Limited ("Banc Properties"), as guarantor.

[24] Kevin Fougere testified that he signed this Agreement on behalf of Kejofo on November 15, 2007. A Schedule to this Agreement lists Kejofo as owed, inclusive of HST, the total amount of $547,870.09. The Schedule includes a calculation of 25 per cent of the total amount as $136,967.52. Kevin Fougere testified that Diaden was paid that amount by Banc Properties. The lien it filed against the Property was discharged on November 19, 2007 in exchange for receiving the payment of $136,967.52.

[25] The difference between those two amounts is $410,902.56. Kevin Fougere's evidence was that Diaden has not been paid any part of that amount. Diaden performed further work on the Project once it was owned by Banc Properties.

Mr. Fougere's evidence was that Diaden went out of business because it could not survive the stress from the cash flow, resulting from its losses on the Project.

[26] Kevin Fougere gave evidence that he had some direct dealings with Steve Tsimiklis with respect to Diaden's work on the Project. He said that he called Steve Tsimiklis about unpaid invoices and he recalled that Mr. Tsimiklis had attended a couple of the monthly contractor meetings. Kevin Fougere said that when Diaden was performing work on the Project he understood that Steve Tsimiklis was the owner of the building and was the person directing all of the decisions made on the Project.

Gary Pinaud – The Plaintiff Pinaud Drywall & Acoustical Limited ("Pinaud Drywall")

[27] Gary Pinaud gave evidence that Pinaud Drywall was incorporated in 1983 and he has been the president of the company since that time. Pinaud Drywall is a drywall contractor.

[28] Gary Pinaud's evidence was that Pinaud Drywall had a contract with the owner of the Project to do interior framing and drywall.

[29] Gary Pinaud pointed to a construction contract dated December 19, 2006 between AHL and Pinaud Drywall. Aecon is noted as Construction Manager. The contract is signed by Steve Tsimiklis, as president of AHL, the "owner", and by Gary Pinaud as president of Pinaud Drywall.

[30] Gary Pinaud, as did Mr. Fougere, testified that the contract later changed in that STHL became the owner. He pointed to a December 19, 2016 construction contract between Pinaud Drywall and STHL as "owner." When asked if he knew why this change of ownership occurred, Gary Pinaud said that he thought it had something to do with financing for the Project.

[31] Gary Pinaud pointed to what he called a Performance Bond and a Labour & Material Payment Bond dated March 19, 2007 between Pinaud Drywall and STHL and Industrial Alliance and Financial Services Inc. ("Industrial Alliance"). He said that the purpose of the Bonds was to guarantee that Pinaud Drywall would perform the labour and materials that was required in its contract.

[32] Gary Pinaud gave evidence about Pinaud Drywall's Statement of Account for the Project, dated October 11, 2007. He described the document as a

spreadsheet as to what was paid, and not paid on the Project. The document lists ten claims (invoices), with three of the claims being unpaid, or partially paid. Those claims total $544,720 plus HST which equals $620,980.80. The document shows that that amount includes a 10 per cent builder's lien holdback. The supporting documents underlying the outstanding amounts were confirmed by Gary Pinaud's evidence in direct examination.

[33] Gary Pinaud also gave evidence that in July 2007 Steve Tsimiklis gave his (Steve Tsimiklis') lawyer, John Young, Q.C. of Boyne Clarke, a Direction to Pay Pinaud Drywall the amount of $300,140.00. The monies were to be paid once the law firm was in receipt of the first advance of mortgage funds from Industrial Alliance.

[34] Pinaud Drywall later received a cheque dated August 2, 2007 from Boyne Clarke in the amount of $300,140.00 pursuant to the Direction to Pay from STHL. STHL also gave Boyne Clarke a second Direction to Pay Pinaud Drywall the sum of $259,030.00 from the net proceeds of the second advance of the Industrial Alliance mortgage.

[35] Gary Pinaud's evidence was that in the late summer or early fall of 2007, payments to Pinaud Drywall for its work on the Project stopped.

[36] On September 25, 2007 Pinaud Drywall filed a lien against the Property in the amount of $621,000. The lien was filed against the estate of STHL.

[37] Gary Pinaud's evidence was that Pinaud Drywall was never paid the $621,000 owed to it for work on the project by STHL. However, Mr. Pinaud testified that Pinaud Drywall was paid 25 cents on the dollar of what it was owed when Banc Properties took over the Project.

[38] Mr. Pinaud referred to the November 16, 2007 Agreement between a numbered company, STHL, Aecon Limited, Trade Contractors (of which Pinaud Drywall was one) and Banc Properties.

[39] Gary Pinaud signed this Agreement on behalf of Pinaud Drywall. A Schedule to this Agreement notes that Pinaud Drywall was owed, inclusive of HST, the total amount of $620,980.80. The Schedule includes a calculation of 25% of the total amount as $155,245.20 . Pinaud Drywall was paid that amount. The lien Pinaud Drywall filed against the Property was discharged on November 15, 2007.

[40] The difference between those two amounts is $465,735.60. Gary Pinaud's evidence was that Pinaud Drywall has not been paid any part of that amount. Pinaud Drywall performed no further work on the Project.

[41] Gary Pinaud's evidence was that on several occasions Steve Tsimiklis attended job meetings related to the Project when he was present. Gary Pinaud viewed Steve Tsimiklis as the owner who made a lot of decisions on the Project.

Donald Deveaux – The Plaintiff Rendan Fabricators Limited ("Rendan")

[42] Donald Deveaux testified that he has been the general manager of Rendan for the past twenty years. He said that in 2006 and 2007 Rendan was a contractor for the supply and installation of concrete reinforcing on the Project. Rendan had a contract to perform that work with AHL, as owner. Donald Deveaux pointed to a contract dated April 24, 2006 signed by Donald Deveaux on behalf of Rendan and Steve Tsimiklis on behalf of the owner, AHL.

[43] Like Kevin Fougere and Gary Pinaud, Donald Deveaux testified that the contract Rendan had with AHL, as owner, was later changed to show STHL as owner. The terms of the second contract, also dated April 24, 2006, were identical to the first.

[44] Donald Deveaux testified that while Rendan was working on the Project, he had no personal dealings with Steve Tsimiklis. He understood at that time that Mr. Tsimiklis was the building owner.

[45] Donald Deveaux pointed to invoices rendered by Rendan for its work on the Project. A statement of account for Rendan's work dated October 1, 2007 shows outstanding billings of $7,995.93 and an outstanding holdback of $55,518.21, for a total outstanding amount of $63,514.14. The various invoices rendered by Rendan for work on the Project, supporting the amounts owed, were confirmed by Donald Deveaux's evidence. An invoice rendered by Rendan dated November 24, 2007 shows the total owing to it for work on the Project as $63,290.76 (the holdback plus HST). Mr. Deveaux's evidence was that the Project had reached substantial completion at the time of this November invoice. The unpaid billings of $7,995,93 remained outstanding. The total owed to Rendan for work on the Project was $71,286.69.

[46] Donald Deveaux's evidence was that in the late summer, or early fall of 2007 Rendan stopped work on the Project for non-payment. Rendan filed a lien against the Property on October 2, 2007. The lien is against the estate of STHL.

[47] Donald Deveaux's evidence was that Rendan was subsequently paid 25 cents on the dollar of what it was owed when Banc Properties took over the Project. Rendan released its lien against the Property on November 15, 2007. Rendan was paid $17,821.67 of the total amount of $71,286.69, leaving outstanding the sum of $53,465.02.

[48] Donald Deveaux's evidence confirmed that on August 17, 2017 STHL gave John Young, Q.C. of Boyne Clarke a Direction to Pay Rendan the amount of $7,995.82 from the net proceeds of the second advance from the Industrial Alliance mortgage. Mr. Deveaux's evidence was that Rendan did not receive those funds from Boyne Clarke.

Allan MacQuarrie – the Plaintiff Precision Concrete Services Limited ("Precision")

[49] Allan MacQuarrie testified that he is a manager with Precision and that Precision contracted with STHL to perform work on the Project. In 2006 and 2007 Precision placed and finished concrete in the apartment building.

[50] Precision entered into a contract with STHL dated December 19, 2006. The contract provides for STHL, as "owner", and Precision as "Trade Contractor." The contract was signed by Steve Tsimiklis as president of STHL and by Allan MacQuarrie on behalf of Precision.

[51] A letter dated March 26, 2007 addressed to Precision from Jonathan Mullin, senior project manager with Aecon, advised that two subcontracts were attached which replaced the trade subcontracts issued to Precision by AHL. This is the same or similar letter that Kevin Fougere of Diaden received from Aecon dated March 23, 2007.

[52] Allan MacQuarrie testified that he did not have any personal dealings with Steve Tsimiklis or anyone on his behalf. He understood that Steve Tsimiklis was the owner of the building Project.

[53] Allan MacQuarrie testified that as of October 4, 2007 Precision was owed a holdback of $10,009.20. At that point, Precision had completed its work on the

Project, but the holdback owing to it had not been released. By the fall of 2007, Mr. MacQuarrie said that the Project had come to a standstill because the contractors were not being paid. Precision filed a lien against the Property dated October 4, 2007. The lien is against the estate of STHL.

[54] Allan MacQuarrie testified that when Banc Properties took over the Project, Precision settled for 25 cents on the dollar and on November 15, 2007 discharged its lien. Precision was paid $2,502.30 of the total amount of $10,009.20. The amount outstanding is $7,506.90.

Tom Vincent – The Plaintiff Atlantica Mechanical Contractors Inc. ("Atlantica")

[55] Tom Vincent gave evidence as the president of Atlantica. Life Safety Systems ("Life Safety") is a division of Atlantica which does fire protection. In 2007 Tom Vincent was president of both Atlantica and Life Safety.

[56] Tom Vincent's evidence was that in 2006 and 2007 Atlantica had a contract with the owner of the Project to provide fire protection and install sprinkler systems to the apartment building. He pointed to a contract dated February 1, 2006 between AHL, as owner, and Life Safety, as trade contractor. Aecon is noted as the Construction Manager. Tom Vincent's evidence was that as the Project progressed, Life Safety's contract with AHL was changed from AHL, as owner, to STHL as owner. His evidence was that all other aspects of the original contract remained unchanged.

[57] Tom Vincent pointed to a letter from John Young, Q.C. of Boyne Clarke to Life Safety dated July 18, 2007 which letter confirmed receipt by Boyne Clarke of a Direction to Pay Life Safety for its work on the Project by STHL in the amount of $100,530.04 from the net proceeds of the first advance of a STHL's mortgage with Industrial Alliance.

[58] Tom Vincent testified that Atlantic was not paid for all of the work it did on the Project. In that regard, Tom Vincent pointed to three invoices totalling $42,632.03 issued by Atlantica for work on the Project which were not paid. Tom Vincent's evidence was that in the late summer and early fall of 2007 Life Safety stopped work on the Project because its invoices were not being paid. On October 2, 2007 it filed a lien upon the estate of STHL, i.e., the Property, in the amount of $42,632.03.

[59] Tom Vincent testified that STHL did not pay the amount owing. In November, 2017 Atlantica was paid 25 cents on the dollar when Banc Properties took over the Project in exchange for Atlantica releasing its lien. Atlantica was paid $10,655.76 of the $42,623.03 owing, leaving an outstanding balance of $31,967.27. Atlantica discharged its lien on November 15, 2017.

[60] Tom Vincent said that he did not have personal dealings with Steve Tsimiklis while Atlantica was working on the Project.

David Pottier – The Plaintiff Lead Structural Formwork Limited ("Lead Structural")

[61] David Pottier gave evidence that he is the president of Lead Structural and that Lead Structural was involved in the Project in 2006 and 2007. He was the president of Lead Structural at that time. Mr. Pottier testified that Lead Structural contracted with the owner of the Project to do the concrete formwork and the placement of the concrete.

[62] David Pottier's evidence was that Lead Structural had a contract directly with the owner of the Project. He pointed to a contract dated May 10, 2006 between STHL and Lead Structural. STHL is noted as the "owner" and Lead Structural as the "trade contractor." The contract is signed by David Pottier as president of Lead Structural and by Steve Tsimiklis as president of the owner, STHL.

[63] David Pottier testified that when he signed this contract, he had no reason to doubt that STHL was the owner. His evidence was that by the fall of 2007 Lead Structural had just completed its work on the Project but was owed money from progress billings it had issued. On September 26, 2007 when Lead Structural had not been paid, it filed a lien against the Property in the amount of $199,908.68 plus interest of $7,693.54 for a total of $207,602.22. The lien is against STHL as owner of the Property.

[64] David Pottier testified that in November 2007 Lead Structural was paid 25 cents on the dollar when Banc Properties took over the Project. Lead Structural was paid $49,977.17 of the total owing of $199,908.68, leaving a balance owing of $149,931.51. Lead Structural discharged its lien against the Project on November 21, 2007.

[65] David Pottier's evidence was that Steve Tsimiklis attended job meetings every week or so. He understood Steve Tsimiklis' role to be as owner. David Pottier's evidence was that Mr. Tsimiklis worked with the architects and engineers to build the building.

Roger Bourque – The Plaintiff East Coast Sheet Metal Ltd. ("East Coast")

[66] Roger Bourque gave evidence that he has been the president of East Coast for 31 years. He said that East Coast was involved with the Project as the H-VAC contractor. His evidence was that Aecon was the Construction Manager and that East Coast had a contract to do the work with the owner.

[67] Roger Bourque pointed to a contract between AHL and East Coast dated July 5, 2006. AHL is noted as "owner" and East Coast as "trade contractor." Aecon is noted as Construction Manager. The contract is signed by Steve Tsimiklis as president of AHL and by Roger Bourque as president of East Coast.

[68] Mr. Bourque's evidence was that the contract later changed from AHL, as owner, to be with STHL as owner, but all other terms of the contract remained the same. The second contract with STHL as owner and East Coast as trade contractor is also dated July 5, 2006. Roger Bourque said that he did not know why there was a second contract.

[69] Roger Bourque's evidence was that bonding was required on the Project. He pointed to a Labour & Material Payment Bond dated March 28, 2007 between East Coast, STHL and Industrial Alliance in the amount of $118,500.00.

[70] Roger Bourque also pointed to various progress billings East Coast issued for work on the Project which he said were not paid. In the late summer/early fall of 2007 when East Coast had not been paid, it filed a lien against the Property. The lien is dated September 28, 2007 and is upon the estates of STHL, Tsimiklis Holdings Limited, Dimitrios Tsimiklis, Dimitra Tsimiklis and AHL for work done by East Coast on the Project.

[71] Roger Bourque's evidence was that in November 2007, Banc Properties took over the Project and paid East Coast 25 cents on the dollar to release its lien. East Coast was paid $19,267.84 of the total amount owed to it of $77,071.36, leaving a balance owing of $57,803.52. East Coast discharged its lien against the Project on November 15, 2017.

[72] Roger Bourque said that he had no direct dealings with Mr. Steve Tsimiklis in relation to East Coast's work on the Project.

Alvin MacDonald – The Plaintiff Duron Atlantic Limited ("Duron")

[73] Alvin MacDonald testified that he has been a vice-president with Duron since approximately 2000. His evidence was that in 2006 and 2007 Duron was involved with the Project, providing the foundation, water proofing and insulation for the Project.

[74] Alvin MacDonald's evidence was that Duron had a contract to perform this work with the Project owner. He pointed to a contract dated December 19, 2006 between AHL as "owner" and Duron as "trade contractor." The contract is signed by Steve Tsimiklis as president of AHL and by Alvin MacDonald as vice-president of Duron. Alvin MacDonald's evidence was that the contract was later changed to be between STHL, as owner and Duron. Alvin MacDonald did not produce a copy of that second contract at the trial. He said that the contract could not be located.

[75] Alvin MacDonald pointed to four invoices in evidence which Duron had issued to Aecon for payment by the owner. His evidence was that only the first two of these invoices were paid by STHL. The two unpaid invoices total $32,975.64 plus HST.

[76] Alvin MacDonald testified that at some point in the fall of 2007, when Duron had not been paid for the two outstanding invoices, it stopped work on the Project. On September 28, 2007 it filed a lien against the Property in the amount of $32,975.64 plus HST for a total of $43,016.76. The lien is against the estates of STHL and Aecon.

[77] Alvin MacDonald testified that Duron was later paid 25 cents on the dollar by Banc Properties, when it took over the Project, in exchange for Duron releasing its lien. Duron was paid $10,754.19 of the total balance owing of $43,016.76, leaving an outstanding balance of $32,262.57. Duron discharged its lien against the Property on November 19, 2007.

The Expert's Report Prepared for the Plaintiffs by James A. Pomeroy, CPA, CA, CFE of Price Waterhouse Cooper dated February 23, 2017

[78] This expert's report was filed with the Court and provided to the Defendants' counsel on May 10, 2017. A statement of Mr. Pomeroy's qualifications was filed with the Court on September 13, 2019, the Finish Date.

[79] For the first time, during the trial, counsel for the Defendants indicated that he wished to cross-examine Mr. Pomeroy. Up until that point in time, the Defendants had raised no objection, nor made a motion to contest Mr. Pomeroy's qualifications. Given that the Defendants had ample opportunity to object to the contents of the report and to challenge Mr. Pomeroy's qualifications, this Court did not permit cross-examination on the report. It is true that the Defendants' counsel had no access to his office on September 13, 2019 and for ten or so days thereafter as a result of a mandatory evacuation of counsel's office building arising from the falling of a crane in the building's vicinity on September 7, 2019. However, at that point the Defendants' counsel had had the Pomeroy Report for over two years without ever indicating that he wished to cross-examine Mr. Pomeroy. Counsel obviously knew that the trial was scheduled to begin on November 27, 2019.

[80] Counsel for the Defendants did not raise the issue of wanting to cross-examine Mr. Pomeroy during a November 20, 2019 pre-trial conference this Court had with counsel in advance of the trial. Nor did defence counsel raise at the start of the trial that he wished to cross-examine Mr. Pomeroy. He also did not communicate to the Plaintiffs' counsel in advance of trial that he wished Mr. Pomeroy present for cross-examination. The Court notes that the Plaintiffs' counsel, in a letter to the Defendants' counsel dated November 12, 2019, advised that he would not be calling Mr. Pomeroy as a witness, since counsel had received no notice under *Civil Procedure Rule* 55.13 with regard to Mr. Pomeroy or his report. The Defendants' counsel did not respond to this letter, but says that he does not recall seeing it, given that he was dealing with the disruption of being out of his office, in temporary office space, until November 8, 2019, with his own office not being fully functional until November 12, 2019.

[81] As a practical matter, the Court was advised that Mr. Pomeroy is no longer resident in Nova Scotia, but rather resides in the Virgin Islands, and accordingly would obviously not be available for cross-examination at the trial without adjourning this action that had taken 12 years to get before the Court.

[82] In any event, counsel for the Defendants was able through his direct examination of Mr. Tsimiklis, to bring to the Court's attention Mr. Tsimiklis' objections to certain of the findings in the Pomeroy report.

[83] This Court will return to the findings in the Pomeroy Report later in this decision.

The Evidence of Steve Tsimiklis

The Tsimiklis "Master Account"

[84] Steve Tsimiklis' evidence was that he, his parents, his brother George Tsimiklis and companies owned or controlled by him and his brothers and parents had, for many years, all used a single bank account, in his name, for the deposit and payment of all business-related and personal expenses for each of the individuals noted above. They dealt with this account in this manner for many years prior to 2006 and 2007.

[85] Steve Tsimiklis testified that he had sole signing authority on this account which was a personal account in his name. Into this account went all rent monies from apartments owned by his brother or parents, or companies owned or controlled by them, as well as mortgage proceeds for the Project and for projects unrelated to the Project. Steve Tsimiklis referred to this account as the "master account." Out of this master account came payments for personal and business expenses of each of the persons and entities noted, as well as payments to the Plaintiff trade contractors.

[86] Steve Tsimiklis had no separate bank account for STHL. Nor, after July 30, 2007 when he became the registered owner of the Property, did he have any process or system in place to separate trust fund monies from other monies in the master account. His counsel admitted that he co-mingled trust fund monies with other monies after he became the registered owner of the Property. His counsel also conceded in closing argument that in August 2007, STHL breached the trust provisions of the *Act*, when Steve Tsimiklis personally received $85,300.87 from mortgage funds advanced for work on the Project by a lender at a time when the Plaintiffs had not been fully paid under their construction contracts.

[87] Steve Tsimiklis gave evidence as to how AHL acquired various parcels of land, and from whom, and how he obtained development agreements and permits from HRM, the process of which culminated in AHL owning the Property by 2003.

AHL's Sale of the Property to Dimitrios and Dimitra Tsimiklis

[88] Mr. Tsimiklis testified that AHL sold the Property to his parents on October 22, 2004 for 3.5 Million dollars, referring to a warranty deed from AHL to his parents dated October 22, 2004.

[89] Mr. Tsimiklis' evidence was that in October 2004 his parents had experience in real estate acquisition and development. He testified that together they personally owned several hundred multi-use properties in the Halifax Regional Municipality. Mr. Tsimiklis' evidence was that his father started acquiring property in 1969, and that over more than thirty (30) years he acquired several hundred properties which he operated by himself with the help of his children.

[90] Mr. Tsimiklis testified that the 3.5 Million purchase price was established through an independent appraisal. The appraisal was not in evidence before the Court. He said that this was a non-arms length transaction, with his parents obtaining a 2.1 Million dollar loan from Assumption Mutual Life Insurance Company ("Assumption") to finance the purchase. The mortgage between Steve Tsimiklis' parents and Assumption is signed by Steve Tsimiklis, as attorney for each of his parents. A Power of Attorney dated July 15, 1998 between Dimitrios Tsimiklis and Dimitra Tsimiklis appointing their son, Steve Tsimiklis as their attorney, was entered into evidence at the trial.

[91] Steve Tsimiklis pointed to a statement of receipt and disbursement of funds arising out of the sale of the Property to his parents on October 22, 2004. This document shows $2,099,700 received in mortgage funds from Assumption Life, payout of existing mortgages and various disbursements, with a balance to the clients (Dimitrios Tsimiklis and Dimitra Tsimiklis) of $830,585. The documents also show that deed transfer tax on the transaction was paid in the amount of $52,500. The Court notes that there was no cheque in the amount of $830,585 payable to any party in evidence. Steve Tsimiklis' evidence was that he did not know to whom the cheque was paid. However, he referred in his evidence to a copy of a Royal Bank funds transfer receipt dated October 10, 2004 showing that the sum of $830,000 was transferred to AHL. That money then went into Steve Tsimiklis' bank account (the "master account"). He described the $830,000 as the profit that AHL had made from the sale of the land. His evidence was that after he acquired the land, he and then AHL increased the value of the Property by securing developments agreements and permits.

[92] Mr. Tsimiklis' trial evidence was that the reason the Property was transferred from AHL to his parents by deed dated October 22, 2004 was because he had been having family difficulties and was trying to keep his family (wife and children) together. He said he could not continue and wanted to sell the Property. His evidence was that his parents said that they would like to purchase the Property and keep the Project going.

[93] Steve Tsimiklis' trial evidence as to why he sold the Project to his parents on October 22, 2004, is to be contrasted with his discovery evidence in December 2012, seven years previously, when he did not know why the Project was sold to his parents. His discovery evidence was as follows:

> Q. Okay. Octo – Exhibit 7 is a deed dated October 22, 2004 from Amalthea Holdings to your parents, correct?
>
> A. That's correct.
>
> Q. Okay.
>
> A. That's what it says, yeah.
>
> Q. And this transfers that YST, which we saw on Exhibit 6…
>
> A. Um-hum.
>
> Q. …is the land assembled for the project, to you[r] parents' name?
>
> A. That's correct. Well, that's what it says.
>
> Q. Why was this done?
>
> A. I don't know.
>
> Q. Okay. You did it?
>
> A. That's correct.
>
> Q. Okay. Do you know why you did it?
>
> A. No. Can't recall.
>
> Q. Okay. Anybody you could, you know, you could talk to figure out why you did it?
>
> A. Why I did it? No, I don't know.
>
> [emphasis added]

[94] At no time during the seven years after he gave this evidence, did Steve Tsimiklis provide counsel for the Plaintiffs with any correction to his evidence.

[95] This is but on example when Steve Tsimiklis' trial evidence (in cross-examination) was highly contrived, and not credible.

[96] When this discovery evidence was put to Mr. Tsimiklis in cross-examination he said that that was what he recalled in 2012 and that he answered questions to the best of his recollection at that time. He said that his trial evidence was a further elaboration which did not take away from what he said actually happened.

[97] Mr. Tsimiklis also gave a discovery undertaken at his December 2012 discovery as to the purpose of the surplus funds from the Assumption Life mortgage. The answer provided was, "The purpose of the surplus funds from the Assumption Mutual Mortgage was to facilitate the construction of the multi-unit residential building at 5620 South Street, Halifax, Nova Scotia." Yet, Mr. Tsimiklis testified that he viewed the surplus funds, i.e., the $830,000 as his money, or his profit earned by him and AHL as a result of increasing the value of the Property. When it was put to Mr. Tsimiklis in cross-examination that the reason for the transfer from AHL (a company which at the time owned nothing but the Project land) to Mr. Tsimiklis' parents was to try to secure better terms from Assumption Mutual for its mortgage loan, his answer was "no." When the same question, in essence, was put to Mr. Tsimiklis seven years earlier in December 2012 his answer was that he did not know.

[98] Mr. Tsimiklis testified that after his parents purchased the Project on October 22, 2004, he acted as their agent and Power of Attorney. When asked in cross-examination whether his parents were communicating with him and telling him what to do on the Project, his answer was "one hundred per cent." Yet there was no documentation in evidence before the Court of any such directions to Mr. Tsimiklis. Mr. Tsimiklis maintained that he talked to his father several times a day and there was no documentation of such conversations because "none was required." He said that his father died in 2011 and his mother did not have as much input into decision-making as his father.

The Construction Contracts between AHL and subsequently STHL

[99] Mr. Tsimiklis testified that when he signed the construction contracts with the Plaintiffs in 2006, he did so as his parents' agent. When it was put to Mr. Tsimiklis in cross-examination that none of the construction contracts with the Plaintiffs refer to him as "agent" for his parents, he blamed Aecon for drawing the contracts up in this manner. This is despite the fact that Mr. Tsimiklis personally

signed the contracts as owner of AHL, with AHL a party to the contract. His evidence was that he signed the contracts as owner of AHL, and not as owner of the Project or Property.

[100] In the Defence filed in March 2008 by Steve Tsimiklis and STHL to the within action, nowhere is it plead that STHL did not have contracts with the Plaintiffs, but rather signed the construction contracts with the Plaintiffs as the undisclosed principal of Mr. Tsimiklis' parents. Mr. Tsimiklis said that he was not disavowing the contracts because his parents had not signed. He pointed to the fact that the Plaintiffs were paid for work they had performed until there was no more money to pay them.

[101] When asked in cross-examination why some of the contracts were between the Plaintiffs and STHL and some with AHL, Steve Tsimiklis' immediate reply was "Aecon Atlantic. You ask them. They drew up the contracts."

[102] The evidence before the Court established that prior to signing these construction contracts with STHL, the Plaintiffs had previously executed identical contracts with AHL.

[103] The evidence disclosed:

(a) A contract between AHL, as owner and Atlantica (Life Safety Systems) dated February 1, 2006; Mr. Vincent's evidence, as president of Atlantica, was that the contract was later changed to show STHL as owner.

Neither AHL or STHL was the registered owner of the Property on February 1, 2006.

(b) A contract between AHL, as owner, and Rendan dated April 24, 2006; a second contract between STHL, as owner, and Rendan dated April 24, 2006.

Neither STHL or AHL was the registered owner of the Property on April 24, 2006.

(c) A contract between STHL, as owner and Lead Structural dated May 10, 2006;

STHL was not the registered owner of the Property on May 10, 2006.

(d) A contract between AHL, as owner and East Coast dated July 5, 2006 and a second contract between STHL and East Coast of the same date.

Neither STHL or AHL was the registered owner of the Property on July 5, 2006

(e) A contract between AHL, as owner, and Duron dated December 19, 2006. Alvin MacDonald, the vice-president of Duron testified that there was a later contract between STHL, as owner, and Duron (identical to the first) but it could not be located.

AHL was not the registered owner of the Property on December 19, 2006.

(f) A contract between AHL, as owner, and Pinaud Drywall dated December 19, 2006; a second contract of the same date, with identical terms, between STHL, as owner, and Pinaud Drywall.

Neither AHL or STHL was the registered owner of the Property on December 19, 2006.

(g) A contract between AHL, as owner, and Precision, replaced in late March, 2007 by a contract between STHL, as owner, and dated December 19, 2006 (the date of the first contract).

Neither AHL or STHL was the registered owner of the Property on December 19, 2006 or in March, 2007.

(h) A contract between AHL, as owner, and Kejoko/Diaden dated January 24, 2007 and a contract delivered to Kejoko/Diaden on March 23, 2007 between STHL, as owner and Kejoko/Diaden, with identical terms.

Neither AHL or STHL was the registered owner of the Property on March 23, 2007.

[104] When it was put to Mr. Tsimiklis in cross-examination that he signed each of these contracts representing initially that AHL was “owner” and later that STHL

was "owner", Mr. Tsimiklis replied, "I signed the contracts that were provided to me from Aecon. I don't know why they did them like that." His evidence was that AHL was agent of the owners of the Property. When asked whether the change from AHL to STHL was required by Industrial Alliance as mortgage funder, Mr. Tsimiklis testified that on October 22, 2004 none of the construction contracts were signed. His evidence was that as of that date the Property was "clear and free from AHL, clean and severed." He said that his parents did not inherit any of these contracts from him. When the same question was again put to Mr. Tsimiklis in cross-examination, i.e., whether the change in the contracts from AHL to STHL was due to the involvement of Industrial Alliance and its requirements, Mr. Tsimiklis replied, "I have no clue. I don't know the answer to that.

[105] The letter from Aecon to Diaden (testified to by Kevin Fougere) dated March 23, 2007 was put to Mr. Tsimiklis in cross-examination. That letter states, in part:

> Attached please find two subcontracts which replace the trade subcontracts issued to you by Amalthea Holdings Ltd.
>
> This contract reflects the name change to Steve Tsimiklis Holdings Limited; this change has been necessitated by the mortgage lender. The price, terms, and conditions of the new contracts are identical to your previous subcontracts.
>
> [emphasis added]

[106] Mr. Tsimiklis' evidence was that this letter does not refer to the name of the mortgage lender and that it could have been Besim (Besim Halef of Banc Properties) or possibly Industrial Alliance.

The November 29, 2006 Banc Properties Mortgage

[107] On November 29, 2006, Banc Properties registered a mortgage against the Property for $3,300,000 in favour of Dimitrios and Dimitra Tsimiklis, with AHL as guarantor. Mr. Tsimiklis testified that he negotiated the loan and mortgage on behalf of his parents. He agreed that the money that was loaned by Banc Properties was for the Project.

[108] Mr. Tsimiklis testified that Banc Properties does not operate as a typical or traditional bank when it lends funds. He said that Banc Properties charges a kind of "placement fee" of about ten per cent. In that regard, Mr. Tsimiklis pointed to a statement of adjustments prepared by Boyne Clarke dated December 4, 2006 which shows funds received from Banc Properties as $2,897,150 and a separate

amount of $361,699.66 for a total of $3,258,849.66. The statement of adjustments shows that the Assumption mortgage and other disbursements were paid out. STHL received a total of $3,196,618.46. Mr. Tsimiklis maintained in cross-examination that the $361,699.66 was a placement fee paid by STHL to Banc Properties. The actual cheque to Boyne Clarke was in the amount of $300,000 with the words "top up of second mortgage" written on the cheque. Mr. Tsimiklis' evidence was that Mr. Pomeroy in his report incorrectly concluded that the purpose of these monies was unclear and should not have been deducted as a placement fee.

[109] Proceeds from the Banc Properties mortgage (2.7 Million) were deposited into Mr. Tsimiklis' personal bank account on December 4, 2006. Immediately prior to that deposit, the account was overdrawn by approximately $100,000.

[110] The evidence disclosed that Rendan was paid $113,239.63 from the Banc Property mortgage funds. The cheque is written on the personal account of Steve Tsimiklis and signed by him. There is nothing on the cheque to indicate that Mr. Tsimiklis was paying as agent for his parents who he said owned the Property at that time. There was also a payment to Rendan on the same date in the amount of $56,619.81. It is to be remembered that Rendan's contract at the time was with AHL as "owner." There was also a cheque written to Lead Structural in the amount of $211,939.87 and a cheque written to Precision Concrete in the amount of $20,314.80 as well as a cheque in the amount of $12,174.24 payable to East Coast. A number of other non-Plaintiff contractors also received payments.

[111] On December 15, 2006, the day after the Banc Properties mortgage funds were deposited, a cheque was written by Steve Tsimiklis to his brother George Tsimiklis' company "Tsimiklis Holdings Limited" in the amount of $15,000. Mr. Tsimiklis said that his brother's company was paid that amount for personal and business expenses. There was a cheque written to a Tsimiklis family member (ex-wife) on December 6, 2006 in the amount of $13,995.00. There was a $5,000 deposit to the account but there was no evidence where that money came from.

[112] On December 7, 2006 the balance of the account was approximately 1.6 Million dollars. That amount included the second installment of the Banc Mortgage in the amount of $496,219.84. All of that money was proceeds of the Banc Properties mortgage except for approximately $5,100. There was a deposit to the account of $22,072.60 on December 15th. On December 19th there were four branch-to-branch transfers made from the account to unknown parties in the total amount of approximately 1.2 Million dollars. On December 21, 2006 there was a

$500,000 cash withdrawal from the account. The only money that had come into the account since the 2.7 Million Banc mortgage funds was $5,500. By the end of December, 2006 the account was back into overdraft. All of the 3.2 Million dollars advanced by Banc Properties was spent in that one-month period. As noted above, some of the funds were used to pay trade contractors.

[113] Mr. Tsimiklis reiterated that his parents owned the Property when these payments were made and it was their obligation, not his, to place the 2.7 Million in trust. His evidence was that there was no requirement for him to separate the trust funds in the master account. He agreed that the Banc Mortgage proceeds were co-mingled with all other funds going in and out of that account, including for personal and business expenses for his family members. He emphasized that what he did on receipt of the Banc Properties mortgage funds was the same in terms of paying business and personal expenses, as he had done for the 20-year history of the account. Everything went in and out of one pot of money. What he did with the trust fund monies was not out of the norm, but rather how he operated the account for 20 or more years.

<u>The Industrial Alliance Mortgage and the Change in the Construction Contracts from AHL as "Owner" to STHL as "Owner"</u>

[114] In cross-examination, Mr. Tsimiklis was then taken to a commitment letter dated February 9, 2007 from Industrial Alliance, addressed to him and to STHL, which sets out the term of a "first-ranking registered mortgage and charge on" the Property, "with the usual securities", such as "assignment of all major sub trade contracts." STHL is noted as borrower, and Steve Tsimiklis as guarantor. The loan amount is $14,492,687.50. The mortgage funds were not paid out until July 30, 2007. Mr. Tsimiklis described the commitment letter as pre-approving a mortgage and locking in a favourable interest rate should STHL wish to purchase the Property at a later date. Mr. Tsimiklis said that the contracts with the Plaintiffs may have been done early, before STHL owned the Property, but that his parents were then the owners of the Property, and he was not the owner until July 30, 2007. He maintained, even after reviewing the February 9, 2007 commitment letter, that he had "no clue why and still to this day why they (Aecon) put in front of me two contracts with two different…they if anything did a disservice to the contractors for them to put STHL on one and AHL on the other, and they consciously made me sign both in front of them, why would they do that to me?"

[115] When counsel for the Plaintiffs suggested to Mr. Tsimiklis in cross examination that it was necessary to "back-date" the contracts so that the contractors' claims for the holdbacks could be preserved and would not lie against AHL, Mr. Tsimiklis responded, "never."

[116] In late April, STHL obtained the loan from Industrial Alliance secured by a mortgage on the terms set forth in the February 9, 2007 commitment letter. The face value of the loan was $14,492,687.50, but only $12,075,000 of the loaned amount was advanced for construction related to the Project.

The April 2007 Banc Properties Mortgage

[117] A new mortgage with Banc Properties was registered against the Property on April 16, 2007 for $6,650,000 in favour of Dimitrios and Dimitra Tsimiklis, with AHL as guarantor. At the same time, the old $3,300,000 Banc mortgage was discharged. Steve Tsimiklis signed the mortgage documents as his parents' Power of Attorney.

[118] On April 13, 2007, John Young, Q.C., counsel for AHL, wrote to Mr. Tsimiklis advising that pursuant to the agreement with Banc Properties, he was enclosing his firm cheque in the amount of $3,000,000. Mr. Young stated:

> These funds are to be used to pay contractors, sub-contractors, suppliers and others providing services and materials to facilitate the construction and development of the multi-unit residential building now under construction at 5620 South Street, Halifax.
>
> [emphasis added]

[119] The 3 Million dollars went into the Tsimiklis master account on April 13, 2007. At that time, there was approximately $16,700 in the account. Several of the Plaintiff contractors received payment cheques at that time:

- Diaden - $203,862.10
- Rendan - $169,859.43
- Pinaud - $164,140.00
- Pinaud - $133,380.00
- Diaden - $107,507.97

- Life Safety - $55,619.46
- Rendan - $52,042.62
- Rendan - $28,309.91
- East Coast - $73,045.42
- Lead Structural - $71,820.00
- East Coast - $24,348.47
- Lead Structural - $5,351.15
- Precision Concrete - $3,078.00

[120] Other non-Plaintiff contractors also received payments.

[121] A few days later, on April 18, 2007, approximately $58,000 comprising several payments were made from the Banc Properties mortgage trust funds to non-fund beneficiaries:

- James Tsimiklis (Steve Tsimiklis' father) - $25,000
- Tsimiklis Holdings Limited (George Tsimiklis' company) - $15,000
- George Tsimiklis - $15,000
- George Tsimiklis - $3000

[122] Those payments, totalling $58,000, exceed the amount in the account ($16,700) when the 3 Million dollars Banc Properties funds went into the account. Mr. Tsimiklis did not track the use of the Banc Properties monies. When he made payments to various individuals or companies, he did not track the source of the funds, i.e., whether they were trust fund monies or not.

[123] Also on April 18, 2007, Mr. Tsimiklis made a $75,000 payment from the master account to pay his personal VISA account. He said that he was entitled to use this money because his parents still owed him 1.4 Million from his parents' purchase of the Property from AHL in October 2004.

[124] Mr. Tsimiklis' evidence was that it was his parents' responsibility, and not his, to ensure that the Banc Properties mortgage funds were used to pay contractors working on the Project (as he had been advised by Mr. Young in his April 13, 2007 letter).

[125] On June 20, 2007, Boyne Clarke, Mr. Tsimiklis' law firm, issued a cheque in the amount of $600,000 to Tsimiklis Holdings Limited (George Tsimiklis' company). These funds were deposited to the master account, according to Mr. Tsimiklis, to advance the Project. Steve Tsimiklis said that a second cheque written by Boyne Clarke to Tsimiklis Holdings Limited on June 20, 2007 in the amount of $300,000, also deposited to the master account, was an advance by George Tsimiklis for the Project. A third Boyne Clarke cheque dated June 29, 2007 written to George Tsimiklis in the amount of $500,000, was also deposited to the master account. Mr. Tsimiklis said that this was also an advance by George Tsimiklis for the Project. A further Boyne Clarke cheque in the amount of $129,500, payable to George Tsimiklis, was also deposited to the master account. Those cheque amounts total slightly over 1.5 Million.

[126] It is not contested that the money contributed by George Tsimiklis, or the vast majority of it, was used to pay the invoices of trade contractors, including some of the Plaintiffs. Mr. Tsimiklis said that he went to his brother George and implored him to contribute money to the Project for the benefit of his parents, because if he did not get money, the Project would stop. Mr. Tsimiklis testified that George would only contribute money on condition that he was one hundred per cent secured. Steve Tsimiklis said that the money was contributed to help his parents who owned the Property.

The Conveyance of the Property by Dimitrios and Dimitra Tsimiklis to STHL on July 30, 2007

[127] Steve Tsimiklis testified that on July 30, 2007 the Property was conveyed to STHL by Dimitrios and Dimitra Tsimiklis for the purchase price of 2.4 Million.

[128] The evidence before the Court showed that by the time STHL became the registered owner of the Property on July 30, 2007, each Plaintiff had a contract with STHL dated the same date as the original contracts the Plaintiffs had with AHL. Mr. Tsimiklis maintained that these contracts were with his parents as the owner of the Property, and not with STHL. However, there was no assumption

document in evidence which showed STHL assuming these contracts from his parents when he purchased the Property.

[129] Mr. Tsimiklis said that his parents' decision to sell the Property was because the day-to-day operations of the building construction were weighing on his father. He said that there were cost overruns and more money was required. He testified that he had a general conversation with his parents and said that he would try to get them further financing so that he could get them out of the Project, and he would take it on.

[130] This evidence is to be contrasted with Mr. Tsimiklis' discovery evidence in December 2012 when his testimony was that he did not know why the Property was conveyed to him by his parents on July 30, 2007. In that regard, the following exchange took place between counsel for the Plaintiffs and Mr. Tsimiklis:

> Q: Okay. And Exhibit 23 is the aff- transfer of the property…
>
> A: Um-hmm.
>
> Q: …from your parents to yourself.
>
> A: To the company.
>
> Q: To the – exactly, sorry
>
> A: Steve Tsimiklis Holdings.
>
> Q: Yes. Steve – why was this done?
>
> A: I don't know.
>
> Q: Is there any way you can determine why this was done?
>
> A: I don't know.
>
> Q: At this time?
>
> A: What's that?
>
> Q: Is there any way you can determine why this was done?
>
> A: No.
>
> Q: Can you check the records and see if there was a purpose for this transfer and why it was made at this time? Okay.
>
> A: I don't think, no.
>
> [emphasis added]

[131] Mr. Tsimiklis related this difference in his sworn evidence by referring to the tragedy of his father dying on July 14, 2011. He maintained that he answered

truthfully at his discovery examination, but that his trial evidence was also true in that the "fog lifted" and he remembered having this "general conversation" with his father which led to the transfer of the Property to STHL.

[132] At his second discovery examination in May 2014, Steve Tsimiklis gave a discovery undertaking to check his records to see if any money was paid between STHL and Dimitrios and Dimitra Tsimiklis on July 30, 2007. The answer to the undertaking was as follows:

> No money was paid on July 30, 2007 but a Promissory Note dated July 30, 2007 for the balance of the $2,400,000.00 purchase price i.e., $224,330.83 subject to interest at 6% per annum payable on July 30, 2008 was provided by Steve Tsimiklis Holdings Ltd. to Dimitrios Tsimiklis and Dimitra Tsimiklis.

[133] The Promissory Note was not in evidence before the Court. Mr. Tsimiklis valued the Property at 2.4 Million at that time.

<u>The August 2, 2007 Proceeds from the Industrial Alliance Mortgage</u>

[134] In late April 2007, STHL obtained a loan from Industrial Alliance secured by a mortgage. At this point in time, STHL was the registered owner of the Property. Steve Tsimiklis guaranteed the mortgage. The face value of the Industrial Alliance Loan was $14,492,687.50, but only $12,075,000 of the loaned amount was advanced for construction.

[135] On August 2, 2007, the sum of $10,064,000 was received by STHL pursuant to the Industrial Loan. That sum was paid into the trust account of Boyne Clarke, solicitors for STHL. The trust listing for the STHL account shows that the Industrial Alliance Loan funds were used, *inter alia* as follows:

- The Assumption Mortgage was paid out in the amount of $2,175,669.17;
- Banc Properties was paid $4,472,645.15 for its mortgage. The remaining $2,400,000 owed to Banc Properties was secured by a second mortgage on the Property, second to the Industrial Alliance mortgage;
- George Tsimiklis was paid $1,529,000;
- Boyne Clarke was paid $80,000;
- Steve Tsimiklis was personally paid $85,300.87;

- Landry McGillivray, counsel to Banc Properties, was paid $6,840.00;

- The remainder of approximately $1,714,780 was paid to contractors or to the Halifax Regional Municipality. This included $300,140.00 to Pinaud (pursuant to a Direction to Pay) given to Boyne Clarke by STHL dated July 18, 2007; $416,476.94 to the Plaintiff Diaden; $100,530.04 to the Plaintiff Life Safety and $170,608.52 to the Plaintiff East Coast.

[136] In cross-examination, it was put to Mr. Tsimiklis that when George Tsimiklis was paid $1,529,500 from the Industrial Loan, he did not owe any money to STHL. Rather, according to Steve Tsimiklis' own evidence, George Tsimiklis owed money to his parents, who he maintained owned the Property in June 2007 when George loaned them $1,529,500 to facilitate the Project.

[137] Mr. Tsimiklis testified that he would have to see the Irrevocable Letters of Direction given to Boyne Clarke to pay George Tsimiklis before he could answer the question. Counsel for Mr. Tsimiklis agreed that there were no Irrevocable Letters of Direction to George Tsimiklis in the Plaintiffs' 12 volumes of exhibits, nor in Mr. Tsimiklis' single Book of Exhibits.

[138] After Mr. Tsimiklis' cross-examination was concluded, the Court took a lunch break. Mr. Tsimiklis returned to Court with a document which he said was the Irrevocable Letter of Direction given by STHL to Boyne Clarke, about which he had earlier testified. The introduction of this document into evidence was opposed by the Plaintiffs' counsel, in part because Steve Tsimiklis had never produced an Affidavit Disclosing Documents in this proceeding. Mr. Tsimiklis took the position, including in evidence before this Court, that all documents in his possession with respect to the Project had been given, by him, to Mr. Halef, at Mr. Halef's insistence when Banc Properties took over the Project. This Court ruled that the interests of justice favoured allowing the document to be entered, and allowed counsel for the Plaintiffs to cross-examine Mr. Tsimiklis on the document.

[139] As noted above, Steve Tsimiklis was personally paid $85,300.87. The sum of $87,117.87 was deposited to Steve Tsimiklis' account on August 10, 2007. Mr. Tsimiklis did not account for these trust funds monies. There was a cheque written on the account to pay Steve Tsimiklis' credit card account in the amount of $1,288.82. There were a number of branch-to-branch transfers, but the reason for these transfers were not identified in evidence. By August 16, 2007, all of the

$85,300.87 was gone from the account. Mr. Tsimiklis admitted that the $85,300.87 was trust fund money.

[140] As noted earlier in this decision, by this point in time, STHL was falling behind in paying the Plaintiff contractors. As a result, they put liens against the Property in relation to the amounts owed to them.

[141] On October 5, 2007, Banc Properties obtained an Order of Foreclosure against STHL on the Project. By November 20, 2007, Steve Tsimiklis resigned or was replaced as the sole director and officer of STHL. Banc Properties effectively took control of STHL at that time.

[142] On November 16, 2007, the Plaintiffs entered into the agreements with Banc Properties, STHL and other entities so that they would be paid 25 per cent of what was owing on their outstanding accounts. The Plaintiffs' evidence in this regard was reviewed earlier in this decision. The agreement was without prejudice to the Plaintiffs' right to pursue STHL and Mr. Tsimiklis personally, for the shortfall in the payments to each of them.

[143] With that review of the relevant evidence before the Court, I return to the issues the Court must decide.

Issue 1: Have the Plaintiffs established that they rendered construction services for STHL for the Project and that they were not paid in full for those services?

[144] In order to determine this issue, it is necessary to review the relevant provisions of the *Builders' Lien Act.*

The Relevant Provisions of the *Builders' Lien Act*

[145] The relevant provisions of the *Act* are ss. 44A and 44 G. Section 44A(1) creates the trust fund and provides:

> **Owner trustee of trust fund for contractor**
>
> 44A(1) All amounts received by **an owner** that are to be used in the financing of any of the purposes enumerated in Section 6 [e.g. construction], including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.

> (2) Where amounts become payable under a contract to a contractor by the owner, an amount that is equal to an amount that is in the owner's hands or received by the owner, at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> …
>
> [emphasis added]

[146] Section 44A(4) is the liability provision and provides:

> (4) The owner is a trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to **any use inconsistent with the trust** until the contractor is paid **all amounts** related to any of the purposes enumerated in Section 6 owed to the contractor by the owner.
>
> [emphasis added]

[147] By virtue of s-s. 44A (1), it is clear that funds received by an owner to be used in the financing of a construction project and monies used to pay for the land, as well as the payment of prior encumbrances and subject to those funds being used to buy land and pay out prior encumbrances, constitute trust fund monies – any monies left over constitute a trust fund for the benefit of the contractors.

[148] As of January 1, 2005, the *Act* was amended to provide for personal liability of the directors and officers of a corporate trustee, for any breaches of trust by the corporation. Sections 44G(1) and (2) of the *Act* provide:

> **Persons liable for breach of trust**
>
> 44G (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Act,
>
> (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 its relevant activities,
>
> who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.
>
> (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.
>
> [emphasis added]

[149] What this provision means on the facts before this Court, is that if STHL breached the trust provisions of the *Act*, Steve Tsimiklis, as STHL's sole director and officer, will be personally liable for such breach if he knew, or reasonably ought to have known that the conduct of STHL amounts to breach of trust. Steve Tsimiklis was the only officer, director or employee of STHL. All acts of STLH were personally carried out and directed by Mr. Tsimiklis.

[150] Further, during the time when Steve Tsimiklis' parents were the owners of the Property, Mr. Tsimiklis would also be liable as their agent if he engaged in conduct on behalf of his parents which he knew, or ought to have known, breached the trust provisions. Mr. Tsimiklis' evidence at trial was that he was acting as his parents' agent throughout the time period when they owned the Property, including when STHL signed construction projects with the Plaintiffs as "owner."

[151] The *Act* also contains a lengthy definition of "lien" in section 6:

> s. 6(1) Unless he signs an express agreement to the contrary and in that case subject to Section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building…..shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building…and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.
>
> [Emphasis added]

[152] Steve Tsimiklis does not dispute the quantum of the amounts claimed by any of the Plaintiffs. He does dispute that he is personally liable to pay those amounts. Nor did Steve Tsimiklis dispute the validity of the liens themselves.

Who was the "Owner" of the Project at 5620 South Street?

[153] It is not disputed that as of July 30, 2007 STHL was the registered owner of the Property. The Plaintiffs contend that STHL was also the owner of the Property prior to acquiring it by deed from Steve Tsimiklis' parents, i.e., during the time period when Dimitrios and Dimitra Tsimiklis were the registered owners of the Property (October 22, 2004 to July 30, 2007). The Plaintiffs base this contention on the following:

(1) The Pleadings

[154] Paragraphs 12 and 14 of the Statement of Claim provide:

> 12. The Defendant Steve Tsimiklis Holding Limited ("Tsimiklis Holdings") is a body corporate, incorporated pursuant to the laws of Nova Scotia, and at all material times was the registered owner of property known as PID No. 41030727 also known as 5620 South Street, Halifax, Halifax County, Nova Scotia upon which a 108 unit residential apartment building was constructed (the "Project").
>
> 14. Tsimiklis Holdings entered into a series of construction contracts with the Plaintiffs, amongst others, to construct the Project. In particular, the Plaintiffs supplied labour and/or materials in accordance with their contracts with Tsimiklis
>
> Holdings which improved the lands of Tsimiklis Holdings in accordance with section 6 of the *Builders' Lien Act*, R.SN.N.S. 1989, c. 277, as amended, all of which ultimately resulted in the construction of the Project.
>
> [emphasis added]

[155] Paragraphs 2 and 3 of the Statement of Defence of Steve Tsimiklis provide:

> 2. Tsimiklis admits paragraphs 1-12 and 14 of the Statement of Claim. Tsimiklis denies the facts and allegations contained in paragraphs 15 through 21 of the Statement of Claim.
>
> 3. Tsimiklis ceased to be a director or officer or a person "who has effective control" of Steve Tsimiklis Holdings Limited ("Tsimiklis Holdings") in September 2007. Tsimiklis specifically denies the allegations in paragraph 13 of the Statement of Claim.
>
> [emphasis added]

[156] This Court finds that the "material times" (as per paragraph 12 of the Statement of Claim and paragraph 2 of the Defence) in this action are the times when trust funds were received. In this case, the evidence shows that trust funds were received at various times throughout the Project to finance the construction.

[157] The Statement of Defence was not amended and no amendment was ever sought. Accordingly, the Plaintiffs' counsel says that Steve Tsimiklis has admitted that STHL was the registered owner of the Property when the Banc Properties money was received.

[158] However, the evidence before the Court clearly shows that Steve Tsimiklis' parents were the registered owner of the Property during the period October 22, 2004 to July 30, 2007.

[159] Although Steve Tsimiklis admitted in his defence the he was the "registered" owner of the Property, the fact remains that he was not. I find that the Plaintiffs' argument that he is estopped from asserting that he is not the registered owner is not made out.

(2) The Extended Definition of "Owner" in the *Act*

[160] The definition of "owner" found in the *Act* is set out in s. 2(d) of the *Act* as follows:

> 2(d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and upon whose credit, on whose behalf, with whose privity and consent, or for whose direct benefit, work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

[161] An owner includes a person or corporation who has "any estate or interest" in the land upon which services are provided or materials are placed. "Owner" also includes, as per the statutory definition, any person or corporation "on whose behalf work or services or materials are placed" and "all persons claiming under him (the owner)" whose "rights are acquired after the work or service. . . . is commenced or the materials furnished."

[162] Counsel for the Plaintiffs says that the legislative reference to a person having an estate or interest means that the definition of "owner" includes not just registered owners, but also beneficial owners. Counsel says that STHL's rights were acquired after the work or services were commenced and therefore STHL is deemed to be the owner with respect to that work or those services.

[163] This Court agrees. The evidence clearly established that STHL's rights were acquired after the Plaintiff contractors provided work and services and accordingly STHL is deemed to be the owner with respect to those work or services.

(3) The Construction Contracts Executed by STHL

[164] As is evident by this Court's review of the evidence of the Plaintiffs, or their representatives, in 2006 and 2007 STHL executed a series of construction contracts

with the Plaintiffs stating that STHL was the owner. These contracts with the Plaintiffs are each made between STHL as "owner" and each Plaintiff as "Trade Contractor" and are each signed by Steve Tsimiklis as president of STHL, the owner.

[165] The evidence established that in February 2007, Steve Tsimiklis started the process of obtaining a construction mortgage on the Property between STHL and Industrial Alliance. One of the terms of the financing required by Industrial Alliance was that all major sub-trade contracts had to be assigned from STHL to Industrial Alliance.

[166] The evidence established that Aecon, the construction manager for AHL and STHL, prepared the new contracts with STHL indicated as owner. Clearly, Aecon was agent for AHL initially and later on, for STHL.

[167] Steve Tsimiklis' evidence was that at the time the Plaintiffs' construction contracts were signed with AHL and later with STHL, he was acting as the agent of his parents.

[168] However, the contracts indicate that AHL, and then STHL, was owner and record nothing to the effect that Steve Tsimiklis was the agent of Dimitrios and Dimitra Tsimiklis. Mr. Tsimiklis faulted Aecon for not showing that he was acting as agent for his parents when he signed these contracts. However, there was no evidence before the Court that prior to this trial, Steve Tsimiklis ever disavowed the acts of Aecon or said that his parents should be signing these contracts, and not him.

[169] This Court is satisfied that as of April 2007 all of the Plaintiffs' construction contracts were changed from AHL as owner to STHL as owner, with the identical terms, and even the identical date. From that point forward, each Plaintiff had a contract with STHL. When STHL became registered owner of the Property on July 30, 2007, those contracts simply continued. The Court is also satisfied that Aecon was acting as agent for AHL and STHL and those companies are bound as disclosed principals to Aecon's actions.

[170] I find that Steve Tsimiklis is estopped from arguing that STHL was not the "owner" of the Project within the definition of "owner" in the *Act*, during the time period October 22, 2004 to July 30, 2007.

[171] In cross-examination each of the representatives of the Plaintiff contractors was asked by the Defendants' counsel if he instructed his counsel to conduct a search to ascertain the registered owner of the Property prior to entering into a construction contract with that owner.

[172] Each Plaintiff representative said that he did not so instruct counsel.

[173] There was no obligation on the part of the Plaintiffs to do a search to determine who was the registered owner of the Property. Each of the Plaintiff contractors received a representation through their construction contracts with STHL (or AHL) that STHL (or AHL) was the owner. The Plaintiff contractors were entitled to rely upon those representations. As such, the Plaintiff contractors had no legal duty to seek to determine if some other entity was the owner.

[174] In *Freedman v. D. Thompson Limited*, [1968] S.C.R. 276 (S.C.C.) Martland J. stated:

> 15. I am of the opinion that this was a representation by the appellant that the respondent's work was being done for him. The respondent agreed not to file a lien on the basis of the representations made in that document. That is the way the document itself reads.
>
> 16. In short, the respondent contracted with an agent to do the work for the owner. The appellant represented that he was the owner, and the respondent acted on that representation, to its own detriment. The appellant is estopped from denying that he was the owner.
>
> [emphasis added]

[175] The Plaintiff contractors were entitled to rely upon the representation (in the form of their contract) that STHL was the owner of the Property. STHL is estopped from denying that he was the owner, within the meaning of the *Act*, at least from April 2007 when the new construction contracts showing STHL as owner were signed.

[176] Further, there was no evidence before this Court, that Mr. Tsimiklis' parents had anything to do with the Project, apart from being the registered owners of the Property. There was not a single document in evidence before the Court that showed that Dimitrios or Dimitra Tsimiklis were involved in retaining contractors, retaining Aecon, directing Aecon's work on the Project or had any role whatsoever in the Project.

[177] This Court finds that STHL (or AHL) was the true beneficial or equitable owner of the Property throughout the October 22, 2004 to July 30, 2007 time period when Mr. and Mr. Tsimiklis were the registered owners.

[178] Each Plaintiff has proven that it rendered construction services for STHL as beneficial, equitable and registered owner of the Project (as of July 30, 2007) and was not paid in full for those services.

Issue 2: Have the Plaintiffs established that STHL received funds for the Project that were impressed with a trust in their favour pursuant to the trust provisions of the *Act*?

[179] Section 44A of the *Act* states that all amounts received by an owner that are to be used in the financing or improvement of property, including any amount that is to be used in the payment of the purchase price of the land and the payment or prior encumbrances, constitutes, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit (as equitable beneficiary or legal owner) of the contractor.

[180] Contrary to his trial evidence that Steve Tsimiklis (AHL) transferred the Property to his parents in October 2004 because of his personal family difficulties, with his parents advising that they would like to purchase the Project and keep it going, at his discovery in 2012, Mr. Tsimiklis' sworn evidence was that he had no idea why the Project was transferred to his parents. In the seven years after he gave that evidence, Mr. Tsimiklis never corrected that discovery evidence.

[181] The evidence disclosed that the Property was mortgaged in October 2004 (Assumption Life) for the purpose of obtaining funds for the Project. The purpose was not to profit Mr. Tsimiklis. Mr. Tsimiklis says that there was an independent appraisal (the appraisal itself was not in evidence before the Court) which valued the Property at 3.6 Million prior to its transfer to his parents.

[182] This Court notes that the fact that a deed transfer tax was paid could simply be the cost of obtaining the mortgage. The mortgage was obtained, and funds for the Project were received.

[183] Apart from Mr. Tsimiklis' own evidence, there was no confirmatory evidence that his parents owed Mr. Tsimiklis a 1.4 Million debt as a result of this transfer.

[184] The Pomeroy Report, as well as the evidence before this Court, establishes that the following funds were advanced for the Project:

Project Funds Advanced

Royal Bank	Credit Line	Feb 15, 2000	180,680.55
Esquire Trust Co		Dec 15, 2000	187,500.00
Royal Bank	Collateral Mortgage	Oct 2, 2001	1,520,000.00
Assumption Life Ins Co		Oct 22, 2004	2,100,000.00
Banc Properties Mortgage 1		Nov 29, 2006	3,000,000.00
Banc properties Mortgage 2		April 12, 2007	3,350,000.00
Industrial Alliance		Aug 4, 2007	10,651,736.00
Loans from George Tsimiklis		June-July,2007	1,529,500.00
Total Project Funds Advanced			**22,519,416.55**

[185] The Court has deducted $300,000 from the first Banc Properties mortgage advance on the basis of Mr. Tsimiklis' evidence that this amount was a placement fee.

[186] This Court finds that all of the above funds were trust funds for the Project and as a result, STHL was required to hold these funds in trust for the benefit of the Plaintiff contractors, subject to payments permitted under the *Act*.

[187] A failure to deal with those trust funds constitutes a breach of trust.

[188] This Court refers to the following sections of the Plaintiffs' pre-trial brief which it has reviewed and determined accurately sets forth the law:

44. Knowledge that money has been received by a corporation and is being disbursed to persons who are not contractors is sufficient to give rise to personal liability. In *Belmont Concrete Finishing Co. Limited v. Marshall*, 2009 CanLII 72102 (On SC) the Court stated the following regarding the counterpart legislation in Ontario, at paras. 23:

> For an individual to be liable for a corporation's breach of trust under section 13 of the *Construction Lien Act*, there are three elements that must be established. First, there must have been a breach of trust by the corporation. Second, the individual must be a director or officer or else a person in effective control of the corporation or its relevant activities. Third, the individual must have assented to, or acquiesced in, conduct that they knew or reasonably ought to have known amounted to breach of trust by the corporation. This third element requires proof by the plaintiffs of actual assent or acquiescence in particular conduct amounting to breach of trust, coupled with proof of actual knowledge, or proof that a reasonable person would have known, that the conduct amounted to a breach of trust.
>
> …
>
> It is the third element, assent or acquiescence, coupled with knowledge or constructive knowledge, where the plaintiffs have some difficulty. The plaintiffs do not have to establish actual assent – mere acquiescence will do. They do not have to show actual knowledge – constructive knowledge will do. Acquiescence and constructive knowledge may be difficult to establish, even on a balance of probabilities. In addition, just as the second element of the test has a temporal element – when was the person sought to be made liable an officer, director or person in control? – so does the third. When, if ever, did Marshall acquire the degree of knowledge that would make him liable for the corporation's breach of trust?
>
> …
>
> I find that from the end of May, 2002 on, Marvin Marshall had become involved in the monitoring of receipts and disbursements to the extent that he knew or should reasonably have known that payments were being made by Internorth in breach of its trust obligations toward the plaintiffs, and that he not only acquiesced in but also assented to those payments.

45. In *St. Mary's Cement Corp. v. Construc Ltd.*, 1997 CanLII 12114 (ONSC) the Ontario Court specifically considered the knowledge requirement in relation to a "one man" operation and concluded that knowledge of the legal requirements of trusts is not necessary to establish a breach. It stated at page 29:

> Construc was essentially a one-man operation. When it acted, it did so through, or at the behest of, Mr. Paniccia. This is not a situation of an officer or director who had little involvement in the day-to-day operations

> of the corporation. Mr. Paniccia had knowledge of the conduct of Construc and all of the relevant circumstances of that conduct. Whether or not he knew that particular conduct might, as a question of law, constitute a breach of the trust provisions of the Act is not determinative. If the corporation's conduct constituted breach of trust, and if he knew or ought to have known of the constituent factual elements of the corporation's conduct, then the requirements of s. 13(1) are met. In regard, I am in full agreement with the view expressed by Jenkins J. in *BPCO Inc. v. Deelstra* (1994), Kirsh's C.L.C.F. 8.28 (Ont. Gen. Divs), December 20, 1984, at p.8. 172:

…

47. In *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, the Ontario Court of Appeal confirmed that the burden is on the trustee to prove that the funds held in trust were properly managed. At paragraph 81 the Court stated:

> In order to establish a breach of trust under s. 7 of the Act, the Contractor was required to demonstrate that **[1]** the Developers had received funds that were to be used in the financing of the Projects (s. 7(1)) **[2]** that the Contractor had supplied materials or services related to the improvement of the Projects (ss. 7(2) to (4)), and **[3]** that the Contractor remained unpaid for at least some of those materials or services (s. 7(4)). On proof of these prerequisites, it fell to the Developers to demonstrate that they had complied with their trust obligations under the Act.
>
> [emphasis added]

[189] Mr. Tsimiklis says that the trust provisions of the *Act* came into force on January 1, 2005 and are not retroactive. The Plaintiffs agree.

[190] This means that there cannot be a breach of the trust provisions of the *Act* if funds were received and improperly disbursed for the Project before January 1, 2005.

[191] However, if funds are received prior to January 1, 2005 and have not been disbursed as of that date, the *Act* does apply to those funds and they are deemed to be trust funds which must be protected and accounted for pursuant to the *Act*.

[192] It is impossible to know whether the funds received prior to January 1, 2005 for the purpose of this Project were still in the Steve Tsimiklis' personal bank account or not. There is simply no way of knowing, given how Steve Tsimiklis operated this account. It was his responsibility as trustee of those funds on

January 1, 2005 to know what monies constituted trust funds as of that date. This was not done. An inability to account is a breach in and of itself, of the *Act*.

[193] However, since January 1, 2005 there were a number of sources of trust funds. The first are the two Banc Properties mortgages of November 29, 2006 and April 16, 2007. The proceeds of those mortgages were deposited into Steve Tsimiklis' personal bank account.

[194] There was also the Industrial Alliance funds ($10,651,736) of August 4, 2007.

[195] There is no question that STHL was the registered owner of the Property when STHL received the Industrial Alliance mortgage funds on August 7, 2007. The purpose of the funds was for the construction of the apartment building. The funds were not used to purchase land. The land had been purchased by 2003. The funds were properly used to pay out encumbrances (the prior Banc Properties and Assumption Life mortgages).

[196] However, the money left over after those mortgages were paid out was pure trust funds to be used to benefit the contractors.

[197] It is to be recalled that section 44A(4) of the *Act* provides that the owner "shall not appropriate or convert any part of a (trust) fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid in full."

[198] The phrase "paid in full" was considered by the Ontario Court of Appeal in *Andrea Schmidt Construction Ltd. v. Glatt, et al.* (1980), 28 O.R. (2d) 672 in the context of interpreting the *Ontario Mechanics Lien Act*. This language is similar to, but not identical to subsections 44A(1) and (4) of the Nova Scotia *Act*.

[199] Saunders J., speaking for the Court of Appeal in *Andrea Schmidt* found that trust funds must be maintained until the construction is complete, and all contractors paid, and only then, can the funds be used for any other purpose.

> The terms of the trust are that the owner shall not appropriate or convert any part of the trust fund to its own use or to any use not authorized by the trust until the claims have been paid of all persons mentioned din s-s. (1). The problem is to describe the "claims" referred to in s-s. (4). Bearing in mind that the s-s. (4) trust is for the benefit of persons mentioned in s-s. (1), it seems to me that the question should be answered by a reference to s-s. (1) where the claims of such persons are described. Looking at s-s. (1), the claim in the case of Schmidt is for work done

> or materials supplied on the contract. In my view, it is too restrictive to require that the claim must be payable and enforceable at the time the trust moneys are received. It seems to me that the trustee is not free to divert trust funds for non-trust purposes merely because there are no current unpaid claims of beneficiaries. It is only when the work has been completed and materials have been supplied on the respective contracts and in each case paid for that the obligations of the trustee are satisfied and he is then free to appropriate or convert funds for other purposes.
>
> [emphasis added]

[200] This is an important point, because at the time the Industrial Alliance mortgage funds were received, some, but not all, of the Plaintiffs had invoices for holdbacks. That was because the Project was not complete at that point.

[201] Trust funds cannot be co-mingled with other funds. Steve Tsimiklis admitted, through his counsel, that trust funds were co-mingled. His argument in this regard was that his personal bank account had been used in the same manner for more than 20 years prior to STHL becoming the registered owner of the Property on July 30, 2007, i.e., he did not co-mingle trust funds with other trust funds in an effort to thwart paying the Plaintiffs.

[202] That "defence" is irrelevant because Steve Tsimiklis had a statutory duty, as trustee, not to co-mingle trust funds. He failed in that duty.

Issue 3: Has Steve Tsimiklis properly accounted for use of the funds?

[203] The Plaintiffs have shown that they provided labour and materials to the Project, that they were not paid in full and that the owner, STHL, received trust funds for their benefit.

[204] The burden then falls to STHL, the owner, to show that he did comply with the trust fund provisions. Steve Tsimiklis did not do so; he did not account for the trust fund money.

[205] While he provided an attempt to account for the trust funds in May, 2015 (as a result of a discovery undertaking given in December, 2012), at no time did Mr. Tsimiklis provide a dollar in/dollar out accounting. Nor did Mr. Tsimiklis provide evidence at trial which came anywhere remotely close to an accounting for the trust monies received. The May, 2015 accounting provided by Mr. Tsimiklis was woefully inadequate.

[206] The Plaintiffs were left to retain James Pomeroy to attempt to provide an accounting.

[207] A key finding of the Pomeroy Report, which this Court accepts, was that there was a co-mingling of trust funds and an inability to account. Mr. Pomeroy used a kind of global approach, which was the best he could do in the circumstances. He was unable to do a dollar in/dollar out approach.

[208] Mr. Pomeroy concluded that there was a shortfall of $3,486,043 between the amount of trust funds deposited into Mr. Tsimiklis' account, and the amount of Project disbursements. Accordingly, he found that an additional $3,486,043 should have been available to pay contractors, but was not.

[209] Mr. Pomeroy states:

> …we calculated that during the periods of review the total value of Project Funds deposited to the RBC 5002043 (row A, $8,641,020.71) exceeded the total value of Project Related Disbursements from the account (row H, $5,154,977.50) by $3,486,043.21. This is the value of funds paid Out of Trust which remains unaccounted for.

[210] Even if the $300,000 Banc Properties placement fee is deducted, there should have been more than enough money to fully pay all the Plaintiffs.

[211] It is to be noted that Mr. Pomeroy's analysis dealt only with mortgage funds actually deposited to Steve Tsimiklis' account, and not mortgage funds paid directly from Boyne Clarke to non-trust beneficiaries.

[212] In that regard, Boyne Clarke at Steve Tsimiklis' direction, paid George Tsimiklis approximately 1.53 Million from the trust fund as well as legal fees. Steve Tsimiklis himself was personally disbursed $85,300.87 of trust funds.

[213] If those funds are included, an even greater shortfall than the 3.1 Million should have been available to the Plaintiffs.

[214] The evidence established that Boyne Clarke was paid $80,000 from the Industrial Alliance mortgage funds and Landry McGillivray was paid $6,840.

[215] A number of the Plaintiffs or non-Plaintiff contractors were properly paid.

[216] Payments of legal fees are not proper payments out of a builder's lien trust fund. For example, see *RSG Mechanical Inc. v. ABCO Construction Inc.*, [2000] O.J. No. 4287, (O.S.C.J.) wherein Molloy J. stated at paragraph 36 as follows:

> In my opinion, law firms are not eligible recipients of trust funds under s. 8 or 10 of the Act. The Act contemplates that the payment out of trust funds should only be to beneficiaries of the trust. It cannot be said that the services of the law firms were performed upon or in respect of the improvement itself. On the contrary, such services are more in the nature of the kinds of services that have been held to be overhead and not eligible for payment out of trust funds I consider the exclusion of law firms from the class of trust beneficiaries to be a logical extension of the principles of interpretation applied by the Court of Appeal in *Rudco*. A strict construction of the provisions of the Act creating trust beneficiaries is required in order to preserve the entitlement of those whose claims the provisions were designed to protect, i.e. those whose work is directly related to the improvement itself. In *Rudco*, the Court of Appeal cited with approval the decision in *Oliver v. Muer Construction Ltd.*, *supra*, in which the services of solicitors who had obtained a severance of residential lots, which substantially increased the value of the property, were found to be too remote from the improvement itself to qualify for a lien. The services rendered by the law firms in this case are even more remote from the improvement of the property itself. The services were rendered after the fact to assist ABCO in collecting monies owing to it. As such, these were services rendered to ABCO, are properly characterized as overhead, and are not payable out of trust funds.
>
> [emphasis added]

[217] Molloy J. also made the following comments which are particularly apt to the facts before this Court:

> Neither do I accept the argument of the defendant that what happened in this case was merely a "technical breach" of the trust provisions and that it should not be punished by a damages award. This was not a technical breach. ABCO took the trust funds from Project A and put them in its bank account, along with money from other sources. It then proceeded to pay its debtors out of whatever money it had available at any given time without any regard whatsoever to the trust provisions of the Act. Thus, it paid non-beneficiaries out of Project A trust monies, it paid its own overhead out of Project A trust monies, and it paid Project A beneficiaries out of money that was, at the time, held in trust for other beneficiaries. In short it juggled its funds, hoping to keep all of the balls in the air until such time as it was in a position to see everybody paid on all of the projects, with money left over for itself. ABCO breached the trust provisions of the Act, gambling that it would be able to continue to pay obligations on previous projects from money on subsequent projects. The gamble did not work. This is a clear

> breach of trust and flies in the face of the intention of the Act. It is not a mere "technical" problem.
>
> The defendants insisted that the plaintiffs' interpretation of the trust provision runs counter to the consistent practice of construction companies throughout the industry and therefore should not be accepted. I am not sure that I can simply accept the evidence of the defendants that "everybody" in the industry deals with trust funds in this manner. However, this is certainly not the first case in which submissions of this nature have been made to me. It has also been urged upon me that a literal interpretation of the trust provisions is totally unworkable and would grind the construction industry to a halt. Even if I accepted the accuracy of those submissions (and I have a great reluctance in doing so), that does not change the clear direction given in the legislation. The trust provisions were intended to protect those who did actual work on the improvement by ensuring that payments made from the top trickled down to them. The clear intention of the legislation is to apply all monies received in respect of the work done on any given project first to the workers and suppliers. The practice of playing fast and loose with trust monies, intermingling them with funds of all sorts of description (including other trust funds) and then paying out to all and sundry without any regard to the source of the funds or whether the recipient is a beneficiary, is a practice which is wholly inconsistent with the Act. It is no defence that "every body is doing it", Indeed, if that is the case, this is all the more reason to scrupulously uphold the provisions of the Act lest they be rendered complexly meaningless in practice and undermine the protections which the Act was designed to provide.
>
> [emphasis added]

[218] To the same effect, the Halifax Regional Municipality was paid property taxes out of the trust funds received from the Industrial Alliance mortgage when contractors remained unpaid.

[219] Nor should STHL have paid George Tsimiklis $1,529,500 out of trust funds received. He did no work on the Project. He was not someone who could file a lien under the *Act*; yet, he was paid every cent he advanced for the Project by STHL. It is to be remembered that Steve Tsimiklis maintained throughout the trial that his parents owned the Property in June 2007 when George Tsimiklis advanced $1,529,000 to keep the Project going. Yet, it was STHL who repaid George Tsimiklis and not Dimitrios and Dimitra Tsimiklis. Regardless of the fact that the money advanced by George Tsimiklis was used to pay contractors, he should not have been paid a penny of the monies he advanced until all contractors were paid in full. Further, the fact that STHL gave Boyne Clarke an irrevocable direction to pay George Tsimiklis out of the Industrial Alliance funds, does not

change the fact that George Tsimiklis had no legal right to receive trust funds money in preference to unpaid contractors which is exactly what happened. Plus, a direction to pay is not, and was not, an encumbrance on the Property.

[220] Further, the bank records show that in June, 2007 when George Tsimiklis made three deposits ($600,000, $300,000 and $500,00) there was approximately $11,000 of other non-trust funds. Mr. Tsimiklis' evidence was that the money received from George Tsimiklis was urgently needed to keep the Project going. Yet, a review of the way these monies were used belies that assertion. For example, on July 3, 2007, a $25,000 cheque was written to Steve Tsimiklis' father, a $15,000 cheque was written to George Tsimiklis' company and a $10,000 cheque written to George Tsimiklis personally. Mr. Tsimiklis also paid a credit card account of $165,066.64.

[221] Other breaches of the trust fund provisions, based on this Court's finding that STHL was the beneficial or equitable owner of the Project from October 22, 2004 until July 30, 2007 when his parents were the registered owners, are payments out of the two Banc Properties mortgages.

[222] The first financing from Banc Properties in the amount of $2,700,000 was deposited into Steve Tsimiklis' bank account on December 4, 2006. At the time of this deposit, the account had a negative balance of over $100,000. Further Banc Properties funds of $496,219 were deposited on December 7, 2006. As of December 7, 2006, all of the money in the account, except for approximately $7,000 came from Banc Properties. Yet on December 19, 2006, there were branch-to-branch transfers in the amount of $447,740.16, $342,689.33 and $50,000. All of these sums were unaccounted for. There was a cash withdrawal of $500,000 which was not explained.

[223] Over 3 Million from Banc Properties went into the account by December 7, 2007, and by December 21, 2007, $1,340,429.49 in trust funds was gone from the account. That amount would have been sufficient to pay all the Plaintiff contractors in this case.

[224] The second Banc Properties mortgage funds in the amount of 3 Million were received into Mr. Tsimiklis' account on April 13, 2007. At the time, the amount in the account was approximately $18,700.

[225] Unexplained disbursements from those 3 Million trust funds include branch-to-branch transfers on April 18, 2007 of $75,000 and $18,000 and cash

withdrawals on May 1, 2007 of $40,000, $20,000, $20,000 and $19,000. That means that $192,000 was removed from trust funds money without explanation.

[226] Steve Tsimiklis had no effective control over Project funds coming in. There was no way to know if there was enough money to complete the Project. There was no system in place to account for the Project funds.

[227] The Plaintiffs have proven that Steve Tsimiklis did not properly account for the trust funds both when he was beneficial owner and registered owner of the Property.

Issue 4: Did Steve Tsimiklis personally breach the trust provisions of the *Act*, and if so, is he personally liable for such breaches?

[228] STHL was the true "owner" of the Project at all material times. There was a failure by STHL to properly account for all trust funds received. Mr. Pomeroy found that there was an almost a 3.5 Million shortfall (3.1 Million if the $300,000 placement fee is deducted) of trust funds in Steve Tsimiklis' account, not including the Industrial Alliance mortgage funds which had been disbursed to non-trust beneficiaries.

[229] The most egregious breach of the trust provision, was the payment to George Tsimiklis of 1.59 Million. There was no legal basis to make that preference to George Tsimiklis over the Plaintiff contractors, the rightful recipients of the trust fund monies.

[230] Mr. Tsimiklis was the only officer, director and employee of AHL and STHL. He was and is a sophisticated property developer. He should have known his obligations under the *Act* to account for, and properly disburse trust funds. If, as he contends, he was acting as his parents' agent while they were the registered owner of the Property, he was responsible as their agent to properly account for, and disburse trust funds.

[231] Further, as of April 13, 2007, Mr. John Young, Q.C., his legal counsel, had specifically advised him, in writing, that the proceeds of the Industrial Alliance mortgage were to be used to pay trade contractors. Steve Tsimiklis chose not to follow that advice.

[232] Steve Tsimiklis is personally liable for those breaches.

Issue 5: If STHL breached the trust provisions of the *Act*, to what remedy is each Plaintiff entitled?

Remedies

(1) Judgment

[233] Each Plaintiff is entitled to judgment against Steve Tsimiklis personally in the following amounts:

Atlantica Mechanical Contractors Inc:	$ 31,967.27
Duron Atlantic Limited:	$ 32,262.57
East Coast Sheet Metal Ltd:	$ 57,803.52
Kejofo Ltd:	$410,902.56
Lead Structural Formwork:	$149,931.51
Pinaud Drywall and Acoustical Limited	$465,735.60
Precision Concrete Services Limit:	$ 7,506.90
Rendan Fabricators Limited:	$ 53,465.02

The combined total of the outstanding accounts is $1,209,574.95.

(2) Interest

[234] Each Plaintiff's construction contract with STHL set forth a contractual interest rate as follows:

> Should either party fail to make payments as they become due under the terms of the Contract or in an award by arbitration or court interest at Two per cent (2%) per annum above the prime rate to be compounded on a monthly basis. The prime rate shall be the lowest rate of interest quoted by the Royal Bank of Canada to the most credit-worthy borrows for prime business loans.

[235] The Plaintiffs are entitled to interest on that basis. However, the Plaintiffs claim, in the alternative, interest at 5% per annum in accordance with the *Interest on Judgments Act*, R.S., c. 233, s.1.

[236] The Court finds that the Plaintiffs are entitled to simple interest pursuant to the *Interest on Judgments* Act. Interest is to be calculated from November 16, 2007 which is the date that the last monies were received by the Plaintiffs.

(3) Costs

[237] The Plaintiffs are entitled to costs. They seek costs on a solicitor and client basis.

[238] Counsel provided the Court with post-trial submissions on the effect, if any, of a costs award in light of s. 41 of the *Act* which provides:

> 41(1) the Costs of **the action** under this Act awarded to the plaintiffs and **successful lien holders**, shall not exceed, in the aggregate, an amount equal to twenty-five per cent of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge who tries the action may direct.
>
> (2) Where the costs are awarded against **the plaintiff or other persons claiming the lien**, such costs shall not exceed an amount, in the aggregate, equal to twenty-five per cent of the claims of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge may direct.
>
> (3) In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken.
>
> (4) Where a lien is discharged or vacated under Section 29, or where in an action judgment is given **in favour of or against a claim for a lien**, in addition to the costs of an action, the judge may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration of the lien.
>
> (5) **The costs of and incidental to all applications and orders made under this Act, and not otherwise provided for, shall be in the discretion of the judge**.
>
> [emphasis of the Plaintiffs' counsel added]

[239] The Plaintiffs' counsel says that s. 41(1) of the *Act* has no bearing on a costs award in this matter because the Plaintiffs' action is not to enforce a lien. As a result, the Plaintiffs say that costs remain in the discretion of the Court. Counsel for the Defendant maintains that costs in this matter are "capped" pursuant to s. 41(1). He refers to the decision of Muise J. in *Omer Deveau Construction v. Foster*, 2012 NSSC 313.

[240] This Court concurs with the position of Plaintiffs' counsel as set out in his March 6, 2020 brief, which provides as follows:

> 3. Prior to the enactment of sections 44A through 44G (the "Trust Provisions") on January 1, 2005 the Act contemplated one type of action: an action to enforce a lien. Section 34(1) of the Act states:
>
> > 34 (1) **The liens created by this Act may be enforced by an action** to be brought and tried in the Supreme Court of Nova Scotia, whether the amount claimed is over fifty thousand dollars or not, and according to the ordinary procedure of such court, except where the same is varied by this Act.
> >
> > [emphasis added]
>
> 4. Sections 35 through 38 of the Act set out procedures for an action to enforce a lien. Sections 39 and 40 of the Act were repealed in 2004 [**Tab 1**, section 19], leaving section 41, which states:
>
> …
>
> 5. Section 41(1) of the Act relates only to an action in which one or more plaintiffs claim entitlement to enforce a **lien**. Section 41(1) addresses costs of "**the action**" in which the plaintiffs become "**successful lien holders**", after having successfully established their entitlement to a enforce lien [*sic* enforce a lien], while s. 41(2) deals the opposite situation in which costs are awarded against the plaintiff or person "**claiming the lien**".
>
> 6. The Plaintiffs in this matter are not advancing an action in which they claim to be entitled to a lien – the evidence at trial established that that issue has long since been addressed. Accordingly, the Plaintiffs are not seeking a remedy that would engage section 41(1) of the Act.
>
> 7. The Plaintiffs' action seeks relief based on the Trust Provisions. The Act does not state how costs are determined in an action that is based on those provisions. Accordingly, section 41(5) of the Act applies, and the costs of this action are entirely within the discretion of the Court.
>
> [emphasis of the Plaintiffs' counsel added]

[241] The decision of Muise J. in *Omer Deveau Construction v. Foster* did not concern an action which sought relief based upon breach of the trust provisions of the *Act*. Section 41(1) of the *Act*, was therefore applicable. Those are not the circumstances before this Court.

[242] I find that costs remain in the discretion of this Court.

[243] The Court also notes that Steve Tsimiklis unreasonably refused to admit a number of requests for admission set out in a Request for Admission dated October 23, 2019. He refused to admit that the amounts this Court determined were owed to each Plaintiff after the agreement with Banc Properties were owed

by STHL, stating that the construction contracts with the Plaintiff contractors were with AHL, or in the case of the Plaintiff Lead Structural, with his parents. Although the Request for Admission was filed after the Finish Date, and therefore does not attract costs consequences, *per se* (*Rules* 20.03 and 20.06) the Court nonetheless notes that Mr. Tsimiklis' failure to reasonably admit these requests is emblematic of how he conducted his defence of the Plaintiffs' claims throughout this lengthy litigation.

[244] Steve Tsimiklis also refused to admit that George Tsimiklis and/or Tsimiklis Holdings Limited lent STHL $1,529,000 in order to finance the Project, stating that those monies were borrowed by his parents. This was the case even though George Tsimiklis was repaid the entirety of the $1,529,000 by STHL out of the loan monies advanced by Industrial Alliance.

[245] Steve Tsimiklis committed flagrant breaches of the trust provisions of the *Act*. Each Plaintiff was put to the onerous task of suing Mr. Tsimiklis in order to recover monies which were rightfully and legally theirs. Instead, their money went to non-trust beneficiaries, including Mr. Tsimiklis himself, his father, his brother George Tsimiklis and others.

[246] It took 12 years for this matter to get before this Court for trial. On three separate occasions Steve Tsimiklis was found to have committed an abuse of process pursuant to *Civil Procedure Rule* 88. He was so found by Murray J. on December 4, 2013 as a result of his failure to respond to undertakings given at his discovery examination on December 5, 2012. He was ordered to provide answers to those undertakings by December 30, 2013.

[247] By order of the Court dated March 23, 2015, Steve Tsimiklis was found to have committed an abuse of process pursuant to *Rule* 88, having failed to respond to the undertakings which were the subject of the December 4, 2013 Order of Murray J. On September 24, 2015, Steve Tsimiklis was found to have committed an abuse of process pursuant to *Civil Procedure Rule* 88 by Duncan J. In his written decision relating to that order dated May 29, 2015, Justice Duncan stated:

> [3] Over the past five years, the defendants have demonstrated a persistent history of non-compliance with the rules of, and orders issued by, this Court. There has been no, slow or incomplete compliance with requests for production of documents, attendance at discovery, and fulfilment of undertakings.

> [4] The current motions represent the fifth time in the last five years that the plaintiffs have brought the defendant to court on motions seeking to force the defendants to respond to existing orders and obligations.
>
> [emphasis added]

[248] The Plaintiffs are not entitled to be compensated twice for their success on these various motions. I mention these motions and orders because they show how Mr. Tsimiklis has chosen to conduct himself throughout this litigation. In so saying, I do not attribute any fault to his counsel, Mr. Moore.

[249] The Nova Scotia Court of Appeal has continually affirmed the "rare and exceptional" rules for solicitor-client costs. For instance, in *National Bank Financial Ltd v Barthe Estate*, 2015 NSCA 47, the court said:

> [458] It has long been settled law in this province that an award of solicitor-client costs is reserved for cases said to be "rare and exceptional". For example, in *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43 (C.A.), Pugsley, J.A. said at p. 55:
>
> > [94] While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (*P.A. Wournell Contracting Ltd. et al. v. Allen* (1980), 37 N.S.R. (2d) 125).
>
> See as well, *Campbell v. Lienaux et al.*, 2001 NSSC 44, aff'd on appeal 2002 NSCA 104; *Young v. Young*, [1993] 4 S.C.R. 3; *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160; and *Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.*, 2010 NSCA 17.

[250] Saunders J.A. in *Liu v Atlantic Composites Ltd*, 2014 NSCA 58 summarized the law with respect to the award of solicitor-client costs:

> 75. The Respondent submits that this is an appropriate case for an award of solicitor-client costs. The *Civil Procedure Rules* provide the discretion to make this award:
>
> > 77.01(1) The court deals with each of the following kinds of costs:
> >
> > ...
> >
> > (b) solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation.
> >
> > 77.03(2) A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law.

76. The principles of solicitor-client costs are settled and well-expressed in *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44... Though lengthy, Justice Hood's comments are worthy of reproduction:

> [479] It is not disputed that solicitor-client cost awards are made only in rare and exceptional circumstances. In *Coughlan et al. v. Westminer Canada Limited, et al* (1994), 127 N.S.R. (2d) 241, the Court of Appeal upheld the decision of Nunn, J., the trial judge, [1993] N.S.J. No. 129, with respect to costs. The Court of Appeal quoted from his decision at para. 170:
>
> > The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonesty, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pre-trial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client basis as, in my opinion, this does constitute one of those 'rare and exceptional' cases wherein such awards are, and should, be made.
>
> [480] In *The Law of Costs*, Orkin, 2nd Edition, the authors say at pp. 2-144-146:
>
> > An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional circumstances to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:
> >
> > > [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which make such costs desirable as a form of chastisement.
> >
> > The Supreme Court of Canada has approved the following statement of principle:
> >
> > > Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.
> >
> > ...
> >
> > At the same time, it has been said that an award of solicitor-and-client costs is not reserved for cases where the court wishes to show his disapproval of oppressive or contumelious conduct.

> There is, as well, a factor frequently underlying such an award, although not necessarily expressed, namely, that the circumstances of the case may be such that the successful party ought not to be put to any expense for costs.... As well, an award of costs on the solicitor-and-client scale is an important device that the courts may use to discourage harassment of another party by the pursuit of fruitless litigation.
>
> ...
>
> [emphasis added]

[484] In Orkin, the author says at para 219 beginning at p. 2-146:

> The exercise of discretion must be based on relevant factors, for example, the conduct of the litigation, and not on otherwise unrelated conduct. Orders of this kind have been made where a litigant's conduct has been particularly blameworthy, for example, where there were allegations of criminality, arson; fraud or impropriety either unproven or abandoned at trial; particularly when the allegations are made against professional persons carrying out their professional duties; .... Solicitor-and-client costs were awarded where a party brought wanton and scandalous charges; or allegations of perjury; ... or dishonesty; ... or deceit, conspiracy and breach of fiduciary duty; ….
>
> [Emphasis by Saunders JA]

[251] This Court is satisfied that this is a proper case where the Court should exercise its discretion to award solicitor-client costs throughout. The underlying action is for breach of trust provisions. The Plaintiffs should not have been put to any legal expense to recover trust fund monies that were rightfully theirs.

[252] Further, Mr. Tsimiklis' conduct throughout led to the length of time it took (12 years) for this matter to be tried. He ignored Court orders and persistently failed to comply with the *Civil Procedure Rules*.

[253] Although the trial took place over a relatively short period of time (four days), Mr. Tsimiklis' conduct as a witness nonetheless lengthened the trial. His evidence in cross-examination was often combative and argumentative.

[254] In all of the circumstances, the Court declines to award either aggravated or punitive damages.

(4) Tracing Order

[255] The Plaintiffs seek a declaration that any deemed trust funds under the *Act* that were wrongfully disbursed by STHL and Mr. Steve Tsimiklis that can be traced into the hands of any third parties who were not entitled to receive them, be disgorged.

[256] Counsel for Mr. Tsimiklis opposed the granting of such an order on the basis that third parties who received trust funds are not party to the within proceeding, and on that basis, no order should be made against.

[257] However, that position is not supported by the case law.

[258] Tracing is an equitable discretionary remedy available to the Court when there has been a breach of trust. The circumstances, of course, must justify the granting of such an order.

[259] A tracing order is not an instant judgment to a non-party, but rather the ability of a plaintiff to take proceedings against third parties to recover trust funds. A tracing order allows the proceeds from a breach of trust to be traced into the hands of third parties. The third parties may then raise any defences available to them in connection with that process.

[260] In *Cohen v. Zagdanski* 2006 CarswellOnt 5629 (O.S.J.C.), the issue for determination was whether, in an action for breach of trust, the plaintiffs were entitled to a tracing for profits in the hands of third parties before the claims of breach of trust had been made out. Lane J. stated:

> [27] Another justification for the broad exploration of all companies related to the defendants' investments is the plaintiffs' claims to recover all the profits made by the recipients of their assets. I accept that the loss may be measured by the profits earned on the diverted assets in many fiduciary claims. The plaintiffs are not seeking damages in this part of their case, but a proprietary right: each seeks to recover her own property. This she can do by tracing the property taken from her until it becomes unidentifiable or comes into the hands of a *bona fide* purchaser for value without notice. But the first step is to establish the proprietary interest at the trial. The tracing comes after the trial and not before. In *Waxman* [[2002] O.J. No. 2528 (S.C.J.); appeal allowed in part, [2004] O.J. No. 1765 (C.A.)] the trial court ordered tracing of the amounts found to be subject to constructive trusts in support of the constructive trust remedy. In the Court of Appeal this order was attacked but the Court upheld the trial judge saying that tracing was not itself a remedy. The remedy was the finding of the constructive trust and the tracing was a process to make that finding effective. Until the constructive trust is proved, disclosure for the purposes of tracing is inappropriate.

[emphasis added]

[261] This decision makes clear that the tracing process does not require a third party who has received trust funds to be a part of the proceeding in which breach of trust is asserted. Rather, the tracing process follows after there has been a decision that a breach of trust has occurred. This Court has made that decision.

[262] In *Waxman v. Waxman* 2002 CarswellOnt 3047 (O.S.C.J.), Sanderson J. sets forth the proper tracing sequence:

> *The Proper Tracing Sequence*
>
> 26 Counsel for the Defendants submitted that, having failed to call evidence at trial about the transfer of the trust fund into the hands of others or its substitution in the same or other hands for other assets/value, the Plaintiffs should not be allowed to cure the deficiency by gathering information and tracing in stages. It is correct to speak of a post-judgment tracing order.
>
> 27 I do not accept that it was encumbent (sic) upon counsel for the Plaintiffs to explore on discovery and to call evidence at trial about the present whereabouts, value and content of the trust fund. I have no doubt that if Chester and his sons had been questioned at discovery or trial about those matters, they would have refused to answer, *inter alia*, on the ground that such inquiries were inappropriate and premature.
>
> 28 Were courts to require parties to call such evidence at trial, the cost and length of litigation would be greatly increased. Further, the Plaintiffs are entitled to information about present whereabouts and value.
>
> [underlining by this Court, italics by Sanderson J]

[263] The Ontario Court of Appeal (186 O.A.C. 201) upheld this part of the decision of Sanderson J., stating:

> [58] The appellants also argue that the trial judge erred in making her tracing orders, saying that she used them as an additional remedy. They contend that a tracing order cannot be used as a remedy, but is merely a process. The appellants also argue that the tracing orders are too invasive of the lives of Chester and his sons to be a proper exercise of judicial discretion.
>
> [59] We do not agree. The tracing orders here do not constitute additional remedies. They simply provide the process by which Morris can attempt to trace the property in which he has a beneficial interest through the remedy of constructive trust. If the process is successful, it is the constructive trust that will provide Morris with his remedy should he elect it. As that process unfolds, those into whose hands the property can be traced will be able to advance any defences available to them.

[emphasis added]

[264] Finally, in *Mroz v. Mroz*, 2014 ONSC 1030 Willson J. stated:

> [71] Having found Helen in breach of trust respecting her obligation to pay Adrianna and Martin $70,000 each under the 2004 will, this opens up the possibility of a proprietary remedy for the plaintiffs. Such a remedy allows the grandchildren to trace the trust funds into assets into which they were converted, and to follow those assets into the hands of a third party where they ended up. This may be necessary since, regrettably, Helen appears to have spent a large portion of the proceeds of the sale of Kay's house on consumables for her and her friend Atkinson. Helen, on her own evidence, converted an amount greater than $140,000 into a 600 square foot addition and other improvements to Atkinson's property which Helen does not hold title. If the grandchildren cannot recover the $140,000 from Helen, they may have a claim against Atkinson's property. The court will not speculate on the outcome of any such claim against Atkinson's property.

[265] "Atkinson" was not a party to the *Mroz v. Mroz* proceeding.

[266] This Court is satisfied that tracing should be ordered by this Court for the following transactions in relation to Boyne Clarke's August 7, 2007 disbursement of funds received from Industrial Alliance:

1. Payment to George Tsimiklis - $1,529,500.00
2. Payment to Halifax Regional Municipality - $9,338.36
3. Payment to Landry McGillivray - $6,840.00
4. Payment to Boyne Clarke - $80,000.00
5. Payment to Steve Tsimiklis - $85,300.87

Conclusion

[267] The Plaintiffs' action is allowed, with costs to each Plaintiff on a solicitor-client basis throughout, except with respect to motions where costs awards have been set.

[268] If counsel cannot agree on the amount of solicitor-client costs, this Court will receive written submissions on same within thirty (30) calendar days of this decision.