KEEL
COTTRELLE LLP
Barristers and Solicitors

Toronto —
36 Toronto Street, Suite 920
Toronto ON M5C 2C5

416-367-2900
416-367-2791 (fax)

www.KeelCottrelle.com

Construction Law Newsletter

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Supreme Court of Canada to Decide Whether City was the "Employer" of its Contractor's Employee under *OHSA*

The Supreme Court of Canada (the "Supreme Court") has granted the City of Sudbury (the "City") leave to appeal the decision of the Ontario Court of Appeal (the "Court of Appeal") in *Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252, which had held that the City was responsible for violations of *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("OHSA") following an accident caused not by an employee of the City, but by an employee of the City's contractor. The Court of Appeal's decision was covered in our Fall 2021 newsletter.

In this case, a woman died after being struck by a road grader performing repairs in downtown Sudbury. The driver of the road grader was an employee of Interpaving Limited ("Interpaving"), which was contracted by the City to complete road repairs. The City's inspectors were responsible for overseeing Interpaving's contract compliance.

Interpaving and the City were both charged with *OHSA* violations. The charge against the City was brought on the basis that it was both a "constructor" and an "employer" within the meaning of the *OHSA*. The trial judge found that the City was neither an "employer" nor a "constructor" within the meaning of *OHSA*, and thus owed no duties under it, and that in any event, the City would have had a due diligence defence to the charges.

The Court of Appeal overturned the decision of the trial judge, and found that, by employing inspectors who were present on the job site, and monitoring the work for progress and quality control purposes, the City met the definition of "employer" within the meaning of *OSHA*.

The Supreme Court's ruling on this case will have important implications for the construction industry. If the Supreme Court upholds the Court of Appeal's decision, owners of construction projects should expect greater legal exposure under *OSHA* and likely require greater involvement in

overseeing the project. In other words, outsourcing health and safety responsibilities to general contractors, which is a typical construction practice, will not be sufficient to protect the owner from *OSHA* liability.

Michael Tersigni, Associate

— KC —

Divisional Court Refuses Judicial Review of Adjudicator's Determination

In *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254 ("*SOTA Dental*"), the Divisional Court denied an application for judicial review of an Adjudicator's decision under the prompt payment provisions of the *Construction Act,* R.S.O. 1990, c. C.30 (the "*Construction Act"*), in part, because the applicant had failed to pay the amount awarded by the Adjudicator and did not obtain a stay of that award.

Background

The applicant, SOTA Dental Studio Inc. ("SOTA"), retained the respondent, Andrid Group Ltd. ("Andrid"), to build a dental clinic. Andrid did work and sent invoices to SOTA, which SOTA did not dispute within 14 days of receipt, as required by the prompt payment provisions of the *Construction Act*. Consequently, those invoices were due and payable, but SOTA did not pay them. Andrid then invoked the adjudication procedure under the *Construction Act* to settle the dispute. The parties exchanged written submissions, following which the Adjudicator ordered SOTA to pay Andrid $38,454.55 (the "Award").

As SOTA did not pay the amount of the Award, Andrid pursued enforcement of it and obtained $6,711.04 by way of a notice of garnishment delivered to SOTA's bank. The outstanding balance of the Award was thus $31,743.51.

No Stay of Award

SOTA sought leave to bring an application for judicial review, which the Divisional Court granted.

However, the Divisional Court noted that ss. 13.18(7) of the *Construction Act* provides that an application for judicial review of an adjudicator's award does not automatically stay the adjudicator's decision "unless the Divisional Court orders otherwise". Consequently, in order to stay an adjudicator's award, a motion for that relief needs to be brought before the Divisional Court. However, SOTA brought no such motion.

Comments on Prompt Payment Scheme

Although the Divisional Court declined to analyze the prompt payment scheme of the *Construction Act* in detail, it made the following observation:

> The whole point of these provisions is to require prompt payment to avoid the consequences of disruptions to construction projects of brinksmanship over disputes that arise…They provide for a quick and relatively informal adjudication, by an adjudicator experienced in construction law disputes. The decision is without prejudice to the parties contesting issues between them at the end of the project. It triggers an obligation on the part of the payee to make its payments to its subcontractors, suppliers and workers. Effective implementation of these provisions is intended to reduce terminations (by payors) and work cessations (by payees) in the midst of construction, either of which can cause cascading losses down the construction pyramid. The obligation to pay, and to pay promptly, when ordered to do so, is fundamental to the scheme of the prompt payment provisions.

The Divisional Court went on to note that prompt payment is also reinforced by limiting appeals from prompt payment decisions, and

permitting judicial review only with leave of the Divisional Court. Further, where leave is granted, that does not stay an adjudicator's decision unless the Divisional Court specifically grants that relief.

Counsel for SOTA argued that although Andrid was entitled to take the enforcement steps that it did, its failure to obtain a stay should not preclude its application for judicial review. The Divisional Court disagreed, and suggested that the following principles be kept in mind for future cases:

a) prompt payment is integral to the scheme of the *Construction Act*;

b) failure to pay in accordance with the prompt payment requirements of the *Act* may lead this court to refuse leave. Where leave is granted, an applicant must obtain a stay or must make payment, failing which this court may dismiss the application on motion to quash or at the hearing of the application.

The Divisional Court noted that it gave the parties advance notice of its concern about the stay issue so that it could be addressed at the hearing, and also gave SOTA an opportunity to make payment of the balance of the Award. During argument, counsel for SOTA advised that "there was no money" to make the payment. This reinforced the Divisional Court's view that "[i]f the owner is insolvent…it should not be permitted to run up costs and delays through recourse to litigation in the face of the order below and the prompt payment provisions of the *Act*". Further, if there were circumstances that should lead the Divisional Court to grant a stay, this needed to be established on a motion for a stay.

Decision

Accordingly, the Divisional Court dismissed the application without considering the underlying merits and awarded Andrid all-inclusive costs fixed at $10,000.00.

Takeaways

The Divisional Court's approach in this case is consistent with the underlying scheme and purpose of the *Construction Act*'s prompt payment provisions, and also suggests that parties to an adjudication ought to comply with the adjudicator's determination, and that a party's compliance may actually be necessary before the Divisional Court will give serious consideration to the underlying merits of a judicial review application, particularly where no stay of the adjudicator's award has been obtained.

Michael Tersigni, Associate

— KC —

Court of Appeal Confirms Voidance of Construction Company's Fraudulent Invoices for the Benefit of its Creditors

In *Ernst & Young Inc. v. Aquino,* 2022 ONCA 202, the Ontario Court of Appeal provided guidance on the test for voiding "transfers at undervalue" pursuant to section 96 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*").

Background

John Aquino ("Mr. Aquino") was the directing mind of Bondfield Construction Company Limited ("Bondfield") and its affiliate Forma-Con Construction ("Forma-Con").

Having run into serious financial trouble, Bondfield commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "*CCAA*"). The Ontario Superior Court of Justice appointed a third party as the monitor of Bondfield. A further third party was later appointed as the trustee in bankruptcy of Forma-Con.

Following their respective appointments, each of the monitor and the trustee discovered that Bondfield and Forma-Con had illegitimately paid out tens of millions of dollars through invoicing schemes over a

number of years prior to the commencement of *CCAA* and bankruptcy proceedings.

The monitor and the trustee challenged the false invoicing schemes and sought to recover some of the money under s. 96 of the *BIA* and s. 36.1 of the *CCAA*. They asserted that the false invoicing schemes were implemented by means of "transfers at undervalue" by which Mr. Aquino "intended to defraud, defeat or delay a creditor".

Mr. Aquino and most of his associates conceded that no value was provided to Bondfield and Forma-Con for the fraudulent transfers. However, they boldly asserted that at the time they took the money, both companies were financially strong and healthy enough to sustain the frauds. They argued that this established that they did not intend to defeat any actual creditors. They also argued that Mr. Aquino's intent could not be imputed to either Bondfield or Forma-Con such that the *BIA* could not require them to repay what they took.

The application judge required Mr. Aquino and the other participants to repay the money they took through the false invoicing scheme and held them jointly and severally liable. Mr. Aquino and the other participants in the fraud appealed to the Ontario Court of Appeal.

Court of Appeal Analysis

The Court of Appeal noted that s. 96 of the *BIA* permits trustees to seek a court order voiding a transfer by the debtor to another party at "undervalue".

In order to require Mr. Aquino and the other beneficiaries of the false invoicing scheme to repay the money they took, the monitor and the trustee had to prove: (1) Mr. Aquino and the other participants were not dealing with Bondfield and Forma-Con at arm's length; and (2) at the time they took the money they "intended to defraud, defeat or delay a creditor" of Bondfield or Forma-Con. The first element was amply established by the evidence, so the case turned on the second element.

Mr. Aquino and his associates disputed liability under s. 96 on two grounds. The first was that their fraudulent acts were not carried out at a time when Bondfield and Forma-Con were financially precarious, so they did not intend to defraud, defeat, or delay any of Bondfield or Forma-Con's creditors since the companies were not insolvent. The second ground was that the fraudulent intentions of Mr. Aquino could not be imputed to Bondfield and Forma-Con.

Timing of the Fraudulent Acts

The Court of Appeal summarized the application judge's conclusions, noting that she held that the debtor companies' financial health was relevant but not determinative regarding the intent to defraud, defeat, or delay creditors, particularly where there was strong evidence of "a number of badges of fraud". The application judge held that the presence of these badges of fraud "creates a rebuttable presumption of the intention to defraud, defeat or delay creditors" that has the effect of shifting the evidentiary burden "to those defending the fraud to adduce evidence to show the absence of fraudulent intent", and that Mr. Aquino and his associates failed to rebut this presumption.

The evidence suggested that Bondfield and Forma-Con were experiencing increasing financial difficulties which were known to Mr. Aquino and his associates at the time they continued to commit the fraudulent acts. Accordingly, the application judge concluded that it would have been entirely unreasonable for Mr. Aquino to believe that, during that time, the interests of the companies' creditors would not be endangered by this fraudulent scheme.

The Court of Appeal held that the application judge "took a pragmatic view on the totality of the evidence", and that deference was owed to her findings of mixed fact and law, including her inference that the false invoicing scheme was carried out with an

intent to defraud Bondfield and Forma-Con's creditors. The Court of Appeal concluded that there were no palpable and overriding errors or legal errors with the application judge's findings.

The Court of Appeal also noted that although the application judge did not make findings with respect to recklessness, it was clear that Mr. Aquino was reckless as to whether the scheme would defraud, defeat, or delay creditors. The Court of Appeal found that this recklessness as to the consequences of the fraudulent transfers with respect to the interests of the companies' creditors was sufficient for establishing intent under s. 96 of the *BIA*.

Imputating Mr. Aquino's Fraudulent Intent to Bondfield and Forma-Con

The Court of Appeal confirmed that for the purpose of construing the words, "the debtor intended to defraud, defeat or delay a creditor" in s. 96(1)(b)(ii)(B), the debtors were Bondfield and Forma-Con. Mr. Aquino and his associates cited the Supreme Court of Canada's decision in *Canadian Dredge & Dock Co. v. The Queen*, 1985 CanLII 32 ("*Canadian Dredge*") for the common law doctrine of "corporate attribution", which they argued did not permit the imputation of Mr. Aquino's intention to either of the companies.

The application judge held that the corporate attribution doctrine from *Canadian Dredge* was incompatible with s. 96 of the *BIA* and ought not to be applied in these circumstances.

The Court of Appeal noted a number of examples where common law doctrines have been used to interpret and supplement the *BIA* where necessary to better achieve the purposes of the legislation, but that the use of common law doctrines must respect the underlying policy of the *BIA*.

The Court of Appeal then considered the doctrine of corporate attribution, which permits the attribution of the fraudulent acts of an employee to its corporate employer where two conditions are met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him or her.

The Court of Appeal noted that the corporate attribution doctrine had been applied in the fields of criminal and civil liability, but had not yet been considered in the context of s. 96 of the *BIA*. The Court of Appeal distinguished the criminal and civil liability contexts from the bankruptcy context, noting that in bankruptcy proceedings, the company "is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors."

The Court of Appeal held that an approach that would favour the interests of fraudsters over those of creditors would be counterintuitive and should not be adopted. The Court of Appeal thus reframed the test for imputing the intent of a directing mind to a corporation in the bankruptcy context as follows: "The underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority – the fraudsters or the creditors?"

Conclusion

The Court of Appeal held that permitting the fraudsters to benefit at the expense of creditors would be perverse. It dismissed the appeal and concluded that the application judge did not err in finding that the "intention of the debtor" under s. 96 of the *BIA* can include "the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself."

Key Takeaways

This case provides guidance on the test for voiding fraudulent transfers under value pursuant to s. 96 of the *BIA*. The case also

represents the first time a court has considered the common law doctrine of corporate attribution in the bankruptcy context, and clarifies the circumstances in which a corporation can be responsible for the fraudulent actions of its directing mind.

Alex Smith, Associate

— KC —

Divisional Court Upholds Summary Judgment Finding That "Cost Savings Provision" Formed Part of Contract Price

In *Dominus Construction Corporation v. H&W Development Corp.,* 2022 ONSC 1240, the Ontario Divisional Court upheld a motion judge's decision to grant summary judgment in a construction lien dispute regarding the scope of the costs savings provision in a construction contract.

Background

H&W Development Corp. ("H&W") was the owner and developer of a residential condominium complex (the "Project"). It contracted with Dominus Construction Corporation ("Dominus"), which was to provide H&W construction management services for the Project (the "Contract").

Part of Dominus' fee for services included a share of any cost savings realized on the Project (the "Cost Savings"), which it was to divide equally with H&W. "Cost Savings" was defined as the difference between the Projected Workable Budget ("PWB"), as defined in the Contract, and the actual total cost of the Project.

After performing its services, Dominus invoiced H&W for approximately $7.5 million, which Dominus had calculated as its 50% share of the Cost Savings. Conversely, H&W maintained that no Cost Savings were achieved, and in fact claimed that Dominus owed it money. Dominus registered a lien claim and brought an action against H&W. H&W defended the action and brought a counterclaim against Dominus. The dispute at the centre of the case hinged on which party's interpretation of the Cost Savings provision prevailed.

H&W posted security with the Court, thereby vacating Dominus' lien claim. H&W thereafter brought a motion to discharge Dominus' lien claim on the basis that the Cost Savings were not lienable. The Court dismissed that motion and held that the Cost Savings were lienable. This decision was covered in our Spring 2020 Newsletter.

Dominus subsequently brought a motion for summary judgment for its share of the Costs Savings realized on the Project, which the motion judge granted. This decision was covered in our Spring 2021 Newsletter. H&W brought an appeal to the Ontario Divisional Court, which is the subject of this article.

The Divisional Court's Decision

On appeal, H&W argued that the motion judge made the following errors:

1. She failed to follow the proper framework for deciding a motion for summary judgment;
2. She erred in her assessment of an affidavit sworn by the principal of Dominus ("Mr. Cordiano") and thereby reversed the onus of proof;
3. She erred in finding that Dominus was the proper lien claimant;
4. She erred in refusing to revisit the issue of whether Dominus's claim was lienable; and
5. She erred in her interpretation of the term "actual total costs" in the Contract.

The Court began by confirming that the standard of review was the appellate standard, meaning that questions of law were to be reviewed on the correctness standard, while questions of fact or mixed fact and law were to be reviewed on the palpable and overriding error standard.

Issue 1: The Framework for a Motion for Summary Judgment

The Court rejected H&W's argument that the motion judge improperly ignored its evidence in finding that H&W failed to put its best foot forward by choosing not to cross-examine Mr. Cordiano. The Court found that H&W did not directly challenge Mr. Cordiano's evidence that Dominus supplied the work, despite invoices that were inadvertently sent out under a related entity's name ("Dominus 2005"). As such, there was no conflicting evidence requiring the motion judge to use her powers under Rule 20.04(2.1) of the *Rules of Civil Procedure*.

The Court agreed with the motion judge that, if H&W wanted to challenge Mr. Cordiano's evidence on this issue, it should have done so through cross-examinations. The framework applied by the motion judge was not an improper reversal of the onus of proof and the motion judge was entitled to rely on Mr. Cordiano's uncontested evidence that Dominus supplied the work despite the invoices that were inadvertently sent out under Dominus 2005's name.

Issue 2: The Motion Judge's Assessment of Mr. Cordiano's Affidavit

H&W argued that Mr. Cordiano's affidavit contained improper hearsay evidence, and that the motion judge erred in finding that H&W should have cross-examined Mr. Cordiano rather than striking the affidavit. The Court agreed that if Mr. Cordiano's affidavit contained improper hearsay evidence, then the motion judge should have struck it or portions of it, as there is no obligation on a party challenging an affidavit on the basis that it contains inadmissible evidence to cross-examine on the affidavit before challenging its propriety. However, the Court also noted that the risk in choosing not to cross-examine on an affidavit is that the motion judge will find that the evidence is admissible, which is what happened here.

The Court held that the motion judge was entitled to accept Mr. Cordiano's affidavit as admissible. Mr. Cordiano was not reporting on other people's conversations or matters over which he clearly had no firsthand knowledge. In the circumstances, it was appropriate for the motion judge to accept Mr. Cordiano's evidence and to find that, if H&W wanted to challenge his affidavit, it ought to have cross-examined him.

Issue 3: The Motion Judge's Finding that Dominus was the Proper Lien Claimant

Section 14 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*CLA*") provides that only the person who supplied the service is entitled to a lien. H&W argued that the motion judge erred in finding that Dominus was the proper lien claimant, as Dominus failed to provide evidence that it supplied the work rather than Dominus 2005.

The Court disagreed, finding that the evidence supported the motion judge's conclusion that it was Dominus, rather than Dominus 2005, which supplied the construction management services. Faced with unchallenged affidavit evidence that Dominus supplied the work and that the reference to Dominus 2005 was inadvertent, the Court held that the motion judge made no palpable and overriding error in accepting that evidence.

Issue 4: The Motion Judge's Refusal to Revisit Her Decision not to Discharge the Lien

H&W argued that the motion judge erred in refusing to revisit her decision not to discharge the lien in the context of the motion for summary judgment, and that the motion judge should have discharged the lien.

The Court agreed that the motion judge incorrectly stated in her summary judgment decision that H&W could have appealed the lien decision to the Divisional Court with leave. A decision not to discharge a lien under the *CLA* is an interlocutory decision, and at the relevant time, section 71(3) of the *CLA* did not allow for any appeals of an interlocutory decision. As such, the motion

judge should have reconsidered her decision on the validity of the lien.

That being said, the Court held that the motion judge's failure to do so did not affect the outcome of the appeal, because she made no error in refusing to discharge the lien on the lien motion. The motion judge reviewed the relevant case law and properly distinguished the Cost Savings from profit sharing. The Court agreed with this distinction and held that the motion judge made no error in finding that the Cost Savings were a service provided by Dominus and therefore properly the subject of a lien.

Issue 5: The Motion Judge's Interpretation of the Term "Actual Total Costs"

H&W argued that the motion judge erred in interpreting the term "actual total costs" to mean only those Cost Savings that fell within the scope of Dominus' work under the Contract. H&W argued that in reaching this conclusion, the motion judge failed to consider the plain meaning of the provision, and that she should have interpreted it to mean the total costs for the whole project. In the alternative, H&W argued that the provision was ambiguous, and should have been interpreted in H&W's favour because Dominus drafted the Contract.

The Court confirmed that the motion judge's interpretation of the Contract was entitled to deference and could only be overturned if she committed a palpable and overriding error. The Court found no such error in the motion judge's interpretation of the provision. Her conclusion on this issue was well supported by the wording of the Contract and the factual matrix. H&W's interpretation would lead to Dominus losing the benefit of any Cost Savings it achieved due to work or circumstances over which it had no control. Based on the wording of the provision and the Contract as a whole, the motion judge was entitled to prefer Dominus' interpretation.

Accordingly, the Court dismissed the appeal and upheld the motion judge's decision to grant summary judgment in favour of Dominus.

Key Takeaways

This decision confirms the usefulness of summary judgment as an effective means of substantially advancing an action where it allows the Court to resolve a key and discreet issue at the heart of a case. It also demonstrates the need for parties to put their best foot forward on a motion for summary judgment by directly challenging any disputed evidence.

Alex Smith, Associate

— KC —

Attendance and Production Orders Against Representative of Corporate Defendant is 'Interlocutory', not 'final', for Purposes of Appeal

In *Elegant Façade Inc. v. Broccolini Construction (Toronto) Inc.*, 2021 ONSC 6951, the Divisional Court determined that an order to answer questions that were refused during an examination, and to produce documents, was "interlocutory" where the person so ordered is a representative of a corporate defendant and not a "stranger" to the litigation, which might otherwise make such an order "final".

Background

The defendant, Broccolini Construction (Toronto) Inc. ("Broccolini"), was a general contractor to the co-defendant, Simon Halton Hills Holdings Inc. in respect of a construction project (the "Project"). Broccolini retained the plaintiff, Elegant Façade Inc. ("Elegant"), as its subcontractor on the Project.

Elegant is owned and operated by George and Doris Hazboun. Elegant registered a claim for lien. Broccolini sought to cross-examine Elegant on its claim for lien and

accepted Doris Hazboun as the witness for Elegant, as was proposed by Elegant's legal counsel. Various questions were refused during the cross-examination, and on her subsequent cross-examinations on an affidavit filed by Elegant in response to Broccolini's motion to reduce the amount of the claim for lien and for security for costs.

Order for Production

Broccolini thereafter brought a motion for Doris Hazboun to answer questions refused during her cross-examinations. Justice Gibson ordered Doris Hazboun to answer certain questions that had been refused, to re-attend examination at her own expense, and to produce certain documents (the "Order").

Appeal

Elegant sought to appeal the Order. Broccolini immediately advised Elegant that the Order was interlocutory and thus there was no right of appeal from it. Elegant did not respond to Broccolini. After being prompted by the Divisional Court, Elegant advised that it considered the Order to be final "…on the basis that Justice Gibson's Order requires a non-party (Doris Hazboun) to, *inter alia*, produce documents and to attend for examination at her own cost". Broccolini moved before the Divisional Court to have the appeal quashed. Consequently, the only issue on appeal was whether the Order was final or interlocutory as no appeal is available under the *Construction Lien Act*, RSO 1990, c. C.30 (the "*Construction Lien Act*") for interlocutory orders.

Divisional Court Analysis

The Divisional Court noted that "production and disclosure orders are generally interlocutory. However, where a production or disclosure order is directed against a 'stranger to the litigation', the order is final, in respect to that person". The Order directed Doris Hazboun to provide production and disclosure in her capacity as a representative of, and witness for, Elegant. Otherwise, she has no role in the proceeding.

The Divisional Court noted that "[t]he wording of the order – directed as it is to Doris Hazboun – does not transform an interlocutory order against the plaintiff into a final order against Doris Hazboun". While corporations are legal persons, they "can only be examined by way of examinations of natural persons". In this case, Doris Hazboun was proposed as the representative of Elegant by Elegant itself, which was a role she voluntarily undertook. She also voluntarily provided an affidavit in support of Elegant.

The Divisional Court distinguished this case from those where persons not so closely identified with a party are ordered to make disclosures, such as orders for banking records or records from professional advisors. The Divisional Court also noted that, in some of those cases, "where the order for disclosure crosses over from matters over which the party has control to matters where the private interests of the third person are implicated, that third party may well have a separate interest in the outcome". However, the Divisional Court noted that in such situations, it is the "stranger" that has standing to assert his or her independent interests. However, in this case, Doris Hazboun did not bring the appeal and has not asserted a personal interest in the outcome of the disclosure and production issues.

Finally, as the appeal was not brought by Doris Hazboun, Elegant had no standing to assert her personal interest with respect to it. Rather if she wished to challenge the Order, she would have had to bring the appeal in her own name.

Disposition

The Divisional Court thus held as follows:

> Doris Hazboun was put forward as Elegant's witness on a s.40 examination under the *CLA*. Although Ms Hazboun is

> not a party, as a witness in the proceedings, Ms Hazboun is subject to the court's process. A corporation cannot be examined except by way of an examination of a human being with knowledge of the corporation's affairs. An order for production and/or reattendance for examination made against a corporation's witness is not rendered final because that witness is not a party to the proceedings. Different considerations may apply where such an order is made against a person who is a "stranger" to the litigation. Those considerations do not apply here.

Accordingly, the Divisional Court granted Broccolini's motion to quash the appeal.

Takeaways

As this case makes clear, where an individual is put forth as a representative of a corporate entity, an order made against that person concerning matters of oral examination and/or documentary discovery are considered orders as against the corporate entity, and thus considered interlocutory for the purposes of appeals under the *Construction Lien Act*.

Michael Tersigni, Associate

— KC —

News

Keel Cottrelle is pleased to announce that on September 1, 2022, Christopher Wirth will assume his role as the Vice-Chair of the Ontario Bar Association's Administrative Law Section.

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

KEEL COTTRELLE LLP
Barristers and Solicitors

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP Construction Law Newsletter

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For advice on matters with respect to construction liens or litigation, please contact Christopher Wirth or Michael Tersigni at Keel Cottrelle LLP:

Christopher Wirth
Tel: 416-367-7708
E-mail: cwirth@keelcottrelle.ca

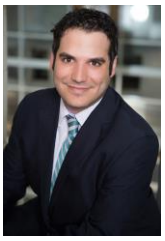
Michael Tersigni
Tel: 416-367-7688
E-mail: mtersigni@keelcottrelle.ca

For advice on matters with respect to public procurement or contract negotiation, please contact Anthony Rosato or James Easto at Keel Cottrelle LLP:

Anthony Rosato
Tel: 416-367-7697
E-mail: arosato@keelcottrelle.ca

James Easto
Tel: 416-367-7703
E-mail: jeasto@keelcottrelle.ca

Christopher Wirth
Executive Editor
Tel: 416-367-7708 |
E-mail: cwirth@keelcottrelle.ca



Michael Tersigni
Managing Editor
Tel: 416-367-7688
E-mail: mtersigni@keelcottrelle.ca