



Case Note: Paul D'Aoust Construction Ltd. v. Markel Insurance Co. of Canada

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THE SUPREME COURT OF CANADA HOLDS THAT TO BE EFFECTIVE, A PERFORMANCE BOND MUST BE DELIVERED.

The pertinent facts of the *D'Aoust* case were that the performance bond in issue was signed by a broker on behalf of the surety and given to the principal, following which the president and the treasurer of the principal signed the bond (in October 1989), but the bond was then put in a file in the principal's office, and was never physically delivered to the obligee. The president of the principal gave evidence that he never intended to issue or deliver the bond, and that he removed the bond from the file and took it to his home in early March 1990. The treasurer of the principal gave evidence that he signed the bond for "administrative convenience" but never intended to deliver the bond, given the deteriorating state of his relationship with one of the other co-owners of the principal. The principal, which had known since September 1989 that it had the contract, began work on the project in late December 1989 or early January 1990, following which the contract was executed on January 31, 1990. The surety, for its part, believed that the bond had been delivered, and in late March 1990 sent a "Contract Progress Report" to the obligee. By the end of April the principal had defaulted, and the contract was terminated by the obligee on May 4, 1990. The surety investigated, denied liability on the basis that, the principal not having delivered the bond, the surety was not bound.

The trial judge found that the plaintiff's action failed because the bond was not delivered.

A majority in the Ontario Court of Appeal agreed with the trial judge that the bond was not valid and effective since it was not delivered. The court dealt with two issues on the question of delivery as follows:

1. **Must a bond be delivered to be effective?** While Mr. Justice Doherty, dissenting, held that the bond was effective since it did not expressly make delivery a condition precedent to its effectiveness, Mr. Justice Rosenberg, speaking for the majority, stated



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“In my view the starting point in this case is not the language of the bond, but an understanding of the nature of the bond itself. This is set out succinctly and I believe accurately in Scott and Reynolds at s. 2.3(a), p. 2-14:

“A bond is simply a deed (a deed being a document in writing on paper which is signed, sealed and delivered ...) whereby one person undertakes to pay a specified sum of money to another, either immediately or at a future date.”

and later, after reviewing the law with respect to the enforceability of a deed:

“To be effective a deed, and thus a bond, must be delivered. I can see no reason to depart from this settled law.”

2. **Was the bond delivered?** Mr. Justice Rosenberg distinguished the Helm case, an Alberta Court of Appeal case which found that delivery to the principal in that case was delivery to the owner, stating that the evidence from the bonding company in the *D'Aoust* case was different:

“Mr. Shand testified that in his lengthy experience the owner expected to receive the bond and if the contract required a performance bond the owner would not make any payments until the bond has been delivered. There was no evidence of any industry practice that the contractor holds or takes delivery of the bond as agent for the owner. The evidence in this case appears to be consistent with the view expressed by Scott and Reynolds. At s. 2.3(c)(vi), p. 2-33 they offered the opinion that Helm must, in any event, be restricted to its own facts which facts turn on the evidence of Mr. Charters. In the writers' view, available evidence of current industry practice is much stronger from the surety's point of view than that offered in [Helm] and would compel the conclusion that a surety bond which has not in fact been executed and delivered by the principal as well as the surety is inoperative either upon the basis that delivery to the principal is conditional or an escrow.

“In this case, the owner appointed the appellant Paul D'Aoust Construction Ltd. as its agent on this construction project and the bond was not delivered to it. In the circumstances, it is not possible to find that P & L [the principal under the bond] or someone else was the owner's agent for taking delivery of the bond.”

Last December, the Supreme Court of Canada, after hearing argument, released its unanimous decision *“that the appeal should be dismissed for the reasons of the Court of Appeal of Ontario with costs”*.