

NOVA SCOTIA COURT OF APPEAL

**Cite as: Goodfellow Inc. v. Heather Building Supplies Ltd.,
1996 NSCA 230
Roscoe, Pugsley and Flinn, JJ.A.**

BETWEEN:

GOODFELLOW INC.

Appellant

- and -

HEATHER BUILDING SUPPLIES LIMITED

Respondent

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)
) Joseph M.J. Cooper, Q.C.
) for the Appellant
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) Douglas J. Lloy
) for the Respondent
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) Appeal Heard:
) November 18, 1996
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) Judgment Delivered:
) November 18, 1996
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THE COURT:

The appeal is dismissed with costs payable to the Respondent in the amount of \$1,000.00 plus disbursements as per oral reasons for judgment of Roscoe, J.A.; Pugsley and Flinn, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

ROSCOE, J.A.:

This is an appeal from a decision of Justice MacAdam, in Chambers, on an application for a determination of a question of law pursuant to Rule 25.01. The question

posed on the application was whether the appellant, (Goodfellow), had a valid "secured creditor's interest" in lumber that it had supplied to the respondent (Heather) and later had the Sheriff seize pursuant to an interlocutory recovery order issued under Rule 48. Prior to the expiration of the three day waiting period provided for in Rule 48, after which the lumber could be delivered into the possession of Goodfellow, a Notice of Stay of Proceedings and Notice of Intention to Make a Proposal pursuant to Sections 50.4 and 69 of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 was filed and served on the Sheriff by Peat Marwick Thorne Inc. as Trustee of Heather.

The packing slips and invoices from Goodfellow contained the words:

"RESERVE ON OWNERSHIP: GOODFELLOW INC. WILL REMAIN THE RIGHTFUL OWNER OF ALL GOODS SOLD TO THE BUYER AS LONG AS THE PURCHASE PRICE HAS NOT BEEN PAID IN FULL."

In the decision, reported at (1996), 150 N.S.R. (2d) 341, Justice MacAdam found that, although as between Goodfellow and Heather, there were valid conditional sales agreements at common law, since the agreements did not comply with the **Conditional Sales Act**, R.S.N.S.1989, c. 84 the purported reservation of title was not effective as against the other creditors of Heather. It was also held, on the authority of **Re Berringer**, [1930] 1 D.L.R. 882 (N.S.S.C.), that there was no "curing" of the defects in the conditional sales agreements by the repossession of the lumber pursuant to the recovery order. Finally, Justice MacAdam found that the circumstances of this case were distinguishable from those in **Zutphen Bros. Construction Ltd. (Insolvent), Re** (1994), 132 N.S.R. (2d) 337 (N.S.C.A.). He decided that the Trustee was entitled to bring the application on behalf of the creditors because:

- (a) the specific power to challenge Goodfellow's security was contained in the proposal;
- (b) challenging the security was not inconsistent with the proposal; and,
- (c) Goodfellow had no basis for assuming that the Trustee was

acknowledging its security.

Justice MacAdam's order declared that Goodfellow had no proprietary interest in the lumber and that it therefore should be returned to a location directed by the Trustee.

Having carefully reviewed the decision, the record, and the authorities and having considered the written and oral submissions of counsel, we are satisfied that the learned Chambers judge made no error of law. The appeal is accordingly dismissed with costs payable to the respondent in the amount of \$1,000.00 plus disbursements.

Roscoe, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.