

SUPREME COURT OF NOVA SCOTIA

Citation: *Ceilidh Construction Ltd. v. Optimum Construction Ltd.*,
2015 NSSC 190

Date: 20150526

Docket: Hfx No. 432653

Registry: Halifax

Between:

Ceilidh Construction Limited

Plaintiff

v.

Optimum Construction Limited, and John Stanley Rhymes
and Cindy Elizabeth Rhymes

Defendants

Decision

Judge: The Honourable Justice Suzanne M. Hood

Heard: May 4, 5, 2015, in Halifax, Nova Scotia

Oral Decision: May 26, 2015

Written Release of June 26, 2015

Oral Decision:

Counsel: Kevin C. MacDonald, for the Plaintiff
Nicholaus S.A. Fitch, for the Defendants

By the Court:

Introduction

[1] The plaintiff company claims it did work on several projects for the defendant company and has not been paid. It says further that the individual defendants have breached the trust provisions of the *Builders' Lien Act* and are personally liable for the debt. The defendant admitted at trial that the plaintiff is owed the money by the defendant company.

Issues

[2] The issues are:

1. whether there was a breach of trust; and
2. whether the individual defendants or either of them breached the trust provisions of the *Act*.

Facts

[3] The plaintiff is a company providing carpentry services. Ceilidh Construction Limited (“Ceilidh”) rendered invoices to Optimum Construction Limited (“Optimum”), which is a general contractor.

[4] There are five projects for which Ceilidh says it has not been paid in full.

The invoices for these jobs are in Exhibit 1 and they are:

1. \$724.50 for work at St. Mary's University and Pier 21;
2. \$19,878.34 for work at the Dingle;
3. two invoices for a project on Main Street in Dartmouth, one in the amount of \$11,903.52 and the second in the amount of \$3,941.63; and
4. an invoice for work done at the Windsor RCMP Detachment in the amount of \$340.57.

[5] The work at the Dingle was to construct an outdoor classroom for the Halifax Regional Municipality. The Main Street job was a fire restoration where Aviva was the insurer of a home that had been badly damaged by a fire. As Bruce Gallagher of Ceilidh described it, it was only a shell and had been "gutted to the studs".

[6] The total claimed by Ceilidh is \$36,788.56. Optimum admits that it is liable for these debts. The real issue is whether one or both of the individual defendants are liable for all or part of the debts pursuant to sections 44B and 44G of the *Builders' Lien Act*.

The Trust Provisions

Contractor trustee of trust fund

44B (1) All amounts

- (a) owing to a contractor or subcontractor, whether or not due or payable; or
- (b) received by a contractor or subcontractor,

on account of the contract or subcontract price of any of the purposes enumerated in Section 6 constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to any of the purposes enumerated in Section 6 who are owed amounts by the contractor or subcontractor.

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to any of the purposes enumerated in Section 6 are paid all amounts related to any of the purposes enumerated in Section 6 owed to them by the contractor or subcontractor. *2004, c. 14, s. 20.*

...

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 a corporation or 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.

(3) Where more than one person is found liable or has admitted liability for a particular breach of trust under this Act, those persons are jointly and severally liable.

(4) A person who is found liable, or who has admitted liability, for a particular breach of trust under this Act is entitled to recover contribution from any other

person also liable for the breach in such amount as will result in equal contribution by all parties liable for the breach unless the court considers such apportionment would not be fair and, in that case, the court may direct such contribution or indemnity as the court considers appropriate in the circumstances. 2004, c. 14, s. 20.

[7] First Ceilidh must establish that it is the beneficiary of the trust provisions.

Justice Weiler said at para. 83 of *Sunview Doors Ltd. v. Academy Doors and Windows Ltd.* [2010] ONCA 198:

[83] In order for Sunview to establish that it was the beneficiary of a trust under s. 8(1) of the Act, it must prove that

- (i) Academy was a contractor or subcontractor;
- (ii) Sunview supplied materials to the projects on which Academy was a contractor;
- (iii) Academy received or was owed moneys on account of its contract price for those projects; and
- (iv) Academy owed Sunview money for those materials.

[8] She continued:

[84] Once all four elements of the trust are proven, the onus then shifts to the contractor, in this case Academy, to demonstrate that payments made from trust funds were to proper beneficiaries of the trust. ...

[9] Section 44G of the *Act* is the provision dealing with liability for breach of trust. On the basis of these provisions, Ceilidh says both individual defendants are liable to pay all the invoices with a small exception of \$580.75 for work done on property owned personally by John and Cindy Rhymes.

[10] Optimum admits it received full payment for some of the work referred to on the invoices from Ceilidh. Those are smaller invoices for the St. Mary's University and Pier 21 jobs, and the Windsor RCMP detachment job.

[11] With respect to the Main Street job, John Rhymes says Optimum was not paid for extras and almost all of the work Ceilidh did was extra to the contract. I will deal with this further hereinafter.

[12] John Rhymes says Ceilidh was the only subcontractor on the Dingle job. The only other costs he says were incurred were for supplies he says he obtained from Payzant Building Products Limited. There is no invoice from Payzant in evidence. John Rhymes says it was \$7-8,000 and he paid only about one half of it.

[13] I am satisfied Optimum was a contractor and that Ceilidh did work on the jobs to which I have referred. This is not in dispute. There is some dispute about how much Optimum is owed or was paid for the jobs. I will deal with that hereinafter. Optimum does not dispute that Ceilidh is owed the amounts in issue.

[14] John Rhymes says with respect to the Dingle job the amount he received is less than the invoice from Ceilidh and the materials cost for which he paid. He says therefore there cannot be a trust for the total amount owed since it is less than what Optimum was paid.

[15] However, there is no evidence from Optimum of how much, if anything, it owed Payzant and what, if anything, was paid to them. There are many journal entries showing Accounts Payable to Payzant Building Products, but none were identified as relating to this job. The contract price was \$21,827 and the invoice from Ceilidh was \$19,878.34 from which I deduct the \$580.75, which was not related to the Dingle job, netting out to \$19,297.59.

[16] Pursuant to the *Act*, the amount of \$21,827 paid by Halifax Regional Municipality to Optimum was to be held in trust by Optimum. In the absence of evidence of the cost of any materials John Rhymes says Optimum purchased, I conclude the entire amount billed by Ceilidh for the job was to be held in trust for Ceilidh; that is, the total of \$19,297.59. Optimum's bank statement for the period June 20 to July 18, 2014, shows a deposit in that amount from Halifax Regional Municipality.

[17] The issue is more complicated with respect to the Main Street job. \$59,342 was paid on April 28, 2014 by Aviva, and \$43,157 on July 4, 2014. Exhibit 2, provided by the defendants, contains Optimum's September 30 final invoice to Aviva. It shows the work to be 100 percent complete at that time, including extras of \$18,062 plus HST. John Rhymes says Optimum was not paid for the extras. There is nothing in Optimum's journal entries or bank statements disclosing a

payment for the extras. The information from Aviva advising how much was paid does not include this amount. I accept that it was not paid.

[18] Ceilidh had submitted a quote to Optimum for \$2,570 plus HST. John Rhymes says this was one of the extras on the contract. That work is also referenced on page 3 of Exhibit 2 as an addition to the contract, as is \$1,507 for changes to the master bedroom shower and \$1,570 for carpentry relating to that.

[19] That exhibit also shows deletions from the original work and additions requested by the owner resulting in a difference of \$4,219.80, which John Rhymes says was never billed to the home owner. However, the deletions total \$25,736 which would have formed part of what was billed to and paid for by Aviva, although the specific items were not, in fact, done. It was only the amount of the shortfall which is actually unpaid, that is, the \$4,219.80. Accordingly, the work done by Ceilidh (\$2,570, \$1,507 and \$1,570), although not called for in the original scope of work, was paid in part when Aviva paid Optimum. Therefore I conclude there is only the proportionate part of Ceilidh's work relating to that unpaid sum which was not, in fact, paid by Aviva and not paid by the home owner.

[20] Also in Exhibit 2 there is a page entitled "Final Summary for Additional Work 210 Main Street". There are two additional items there which John Rhymes

says were Ceilidh's work, totalling \$4,300.46 and \$1,693.39. I am satisfied that these were extras for which Optimum has not been paid. There is therefore no trust with respect to those sums.

[21] I therefore conclude that Optimum did receive payment from Aviva for all but the two items on the extra list, to which I have just referred, and the proportionate part of \$4,219.80 which was not billed to or paid by the homeowner. With those deductions, what was paid by Aviva was to be held in trust by Optimum.

[22] The *Act* also provides for a trust for amounts "owing to a contractor". Although there are amounts owing to Optimum on the Main Street job, I conclude there is no prospect that these amounts will be paid. Aviva has not agreed to pay the extras referred to on Exhibit 2 and the homeowner has never been billed for the work done for him. These are accordingly not amounts owing to Optimum. Only the amounts actually paid constituted a trust fund.

Breach of Trust by Optimum

[23] To determine whether Optimum converted or appropriated trust monies for its own use or any use inconsistent with the trust, I must look at its journal entries

and bank statements. The first question to be answered is whether there was a breach of trust by Optimum. I am satisfied there was.

[24] The bank statements show many instances of John Rhymes' personal expenses being paid from Optimum's bank account. A few examples are illustrative:

1. February 27, Timberlea Dental
2. February 24, Sportswheels
3. April 8, John's daughter's car insurance
4. June 23, the Moosehead Cold Beer Store
5. June 23, the Nova Scotia Liquor Commission
6. June 23, Atlantic Superstore
7. June 24, Dean's Flowers
8. July 14, John's son's skates
9. August 8, John's daughter's car insurance.

[25] These payments are recorded as Owner's Loan in Optimum's journal entries. Although there may be nothing wrong with paying personal expenses and having them treated as loans to John Rhymes, it shows a pattern of using the company

bank account like a personal account. The real problem arises when these type of expenses are paid from Optimum's bank account when it contains amounts which must be held in trust for subcontractors and suppliers. In addition, there are payments to both John and Cindy Rhymes. Again, there would be nothing wrong with this if these payments were made after Ceilidh and others entitled to the trust provisions of the *Act* were paid.

[26] In this regard, I consider Cindy Rhymes' position that she was a subcontractor. On many occasions, she referred to herself as a subcontractor when explaining why she was paid when Ceilidh and others were not. However I conclude that this is not correct pursuant to the *Builders' Lien Act*. The *Act* provides that a person who performs work on or service to a property is entitled to the benefit of a trust fund for work done for the purposes set out in s.6 of the *Act*. The work done by Cindy Rhymes did not constitute an improvement to any of the structures listed. It is part of the overhead in the operation of Optimum.

[27] Many examples can be found to show that trust funds were used for purposes inconsistent with the trust while Ceilidh remained unpaid. I will deal with these in chronological order.

1) Windsor RCMP Detachment Job

[28] The first payments made that are relevant are with respect to the Windsor RCMP detachment. Optimum admits that Ceilidh did work on the Windsor RCMP detachment and that Optimum was paid for its work. There are journal entries showing payment was made for that job and Optimum's bank statement for that period shows a deposit of \$29,599.15. The bank balance at that time was over \$140,000 after a substantial withdrawal. Thereafter, there are a series of cash withdrawals, purchases at Cleve's Sporting Goods and at gas stations.

[29] On May 1, there was a cash withdrawal of \$2,000, which is explained in the journal entry of that date. It is entitled "Owner's Withdrawal". The next entry on that page is \$431.18, which Cindy Rhymes referred to in the entry as "hockey hockey hockey" followed by "spoiled son". Looking again at the bank statement for that period, there are two Interac purchases on May 5 at Cleve's, and on the same day there are purchases at Ultramar and one at Circle K Irving, as well as payment on a CIBC Visa.

[30] A series of cheques were cashed on the account, but no copies of these cancelled cheques were in evidence. No payment was made to Ceilidh.

2) Main Street Job

[31] The next payment in time was a payment by Aviva on the Main Street job in the amount of \$59,342 on May 7. On that same day, there was a cash withdrawal of \$157.53, a purchase at Main Street Esso of \$100, and a cheque to Cindy Rhymes for \$1,250 for her hourly wages as office manager.

[32] These are followed on May 8 by a payment of \$101.20 which Cindy Rhymes agreed was for their daughter's car insurance premium. On May 9, there were truck repairs of \$771.68 and on May 12, \$1,019.78 for Optimum's liability insurance premium.

[33] There are no cancelled cheques to explain the cheques which were cashed, but a journal entry for May 7 shows a payment to John Rhymes of \$2,199.10 (Exhibit 16).

3) St. Mary's/Pier 21 Jobs

[34] The next payments received were with respect to the St. Mary's and Pier 21 jobs. On July 7, a deposit of \$3,029.10 was made and the journal entry for that date shows it included \$1,642.20 from St. Mary's University. Ceilidh's invoice of \$724.50 was not paid. Before that deposit was made, the bank balance was

-\$31.01. On the same day, a cheque in the amount of \$2,195.51 cleared the account. It was dated June 18 and made payable to John Rhymes. On the next day, there was another car insurance payment of \$101.20, reducing the balance to \$589.88 at the end of that day.

4) Main Street Job

[35] Next in time, there was a further payment on the Main Street job from Aviva in the amount of \$43,157. Again Ceilidh's invoice was not paid. The bank statement for the period following July 9 shows purchases made at Ultramar, Cleve's Sporting Goods, and payments for John Rhymes' cell phone and on his CIBC Visa. Cindy Rhymes testified that the Cleve's purchase was hockey skates for their son. The journal entry shows it as a shareholder loan.

[36] There is also a substantial cash withdrawal of \$3,450 on July 14. The journal entries reflect \$2,200 as a withdrawal for John Rhymes and \$1,250 paid to Cindy Rhymes. She testified this was for her contract services to Optimum.

5) The Dingle Job

[37] With respect to the Dingle job, \$21,827 was paid by Halifax Regional Municipality to Optimum on July 17 for the Dingle job. I have addressed above

my conclusion about Ceilidh's work on this job and, again, Ceilidh was not paid. A review of the bank statement following that deposit discloses that on the same day there were purchases at Superstore Gas and Circle K Irving. In the days that followed, cheques cleared for payments to Payzant, a flooring company, a scaffolding company, a landscaping company, a painting company, and others. With the exception of Payzant, none of these companies did work or provided goods or services on the Dingle job. As I have said above, there is no indication of the amount owed to Payzant on this job.

[38] Cindy Rhymes testified she kept track separately of all the invoices related to each job, but that documentation was not produced. It would have been extremely helpful to have had this information.

[39] The *Act* in s. 44B provides that when amounts are received on a contract for one of the purposes set out in s. 6, those amounts constitute a trust fund for the benefit of subcontractors and others who performed work or provided services or materials for a s. 6 purpose. That section goes on to provide that a contractor (in this case, Optimum) is the trustee of the fund. As trustee it is not to use any part of the fund for its own purposes, or purposes inconsistent with the trust, until all subcontractors like Ceilidh and others are paid.

[40] The trust provisions of the *Ontario Construction Lien Act*, R.S.O. 1990, c.3, are identical in wording to those in the *Nova Scotia Act*. These provisions were considered by the Ontario Court of Appeal in *Rudco Insulation Limited v. Toronto Sanitary Inc.* [1998] O.J. No. 4105. Justice O'Connor, writing for the court, said in para. 1 of that decision:

This appeal concerns payments made by a contractor or subcontractor from funds received on a construction project towards its general overhead expenses before paying amounts owing to its subcontractors for the same project.

[41] He continued in para. 10 to explain the effect of the trust provision. He said:

Section 8(1) creates a trust in favour of subcontractors and other persons who have supplied services or materials to an improvement. ... Section 8(2) precludes the trustee from using trust funds for its own purposes or any purposes inconsistent with the trust until all of the beneficiaries of the trust have been paid.

[42] In paragraph 18, he referred to determining who has the benefit of the trust provision and said there were two factors in making that determination. He said:

The first is that s. 8(1) creates a preference for one class of creditors that did not exist at common law; the second is that the central purpose of Part II of the Act, which creates the trust benefit, is to provide a financial preference for those down the contractual chain on construction projects.

[43] The Court agreed with the trial judge that the payment of the company's overhead expenses does not reduce the company's trust obligations; that is, to pay the subcontractors and suppliers in priority. He concluded in para. 35:

I am of the view that Part II of the Act did not confer trust benefits on the recipient of the overhead expenses and payments to them did not reduce TSI's trust obligations to Rudco.

[44] The *Act* provides that when amounts were received by Optimum, those amounts, to which I have referred, were to be held in trust by Optimum. Instead, some were appropriated for Optimum's overhead expenses, and some were used for other purposes inconsistent with the trust. These include, to name just a few, paying personal expenses of John Rhymes, paying wages to John Rhymes, paying subcontractors on prior jobs from the amounts received, making shareholder loans to John Rhymes, making purchases unrelated to Optimum's business, paying Cindy Rhymes for her contract services as office manager and purchasing gas for the company truck.

Breach of Trust by John and Cindy Rhymes

[45] The more difficult question is with respect to s. 44G of the *Act*. I must consider whether John or Cindy Rhymes, or both, had effective control of Optimum or its related activities, and then determine if they assented to or acquiesced in Optimum's breach of trust.

[46] In *Sunview Doors*, the Ontario Court of Appeal considered the effect of the Ontario equivalent of our s. 44G. Justice Weiler, writing for the court, referred to the provision as one allowing the court "to pierce the corporate veil". She said:

[13] Section 13 of the Act enables the court to pierce the corporate veil by making any person, “including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities”, personally liable for a corporation’s breach of trust.

1) John Rhymes

[47] I conclude John Rhymes breached the trust. He is the president of Optimum and a director. I conclude it is clear from the evidence that he was in effective control of Optimum and assented to the breaches of trust committed by Optimum. In fact, he did more than assent to the conduct; he signed the cheques and was the person with a debit card for the Optimum bank account. It was he who used it to pay off his overhead expenses, such as gas for the company truck and his cell phone bill. I also note that some of these expenses may have been personal expenses, but no copies of invoices or receipts were produced. John Rhymes was also the one who made personal purchases from Optimum’s bank account for such things as his son’s hockey skates and a dental bill, and he paid his personal Visa from the account as well as his daughter’s car insurance.

[48] This was done when Ceilidh remained unpaid, although Optimum had been paid for almost all of Ceilidh’s work. (I have referred above to the issue of the extras on the Main Street job.)

2) Cindy Rhymes

[49] I now turn to a consideration of Cindy Rhymes' role with respect to Optimum. Justice Weiler in *Sunview* dealt with the role of Olympia O'Brien in that case. In para. 7, she referred to the testimony about her.

The third co-defendant, Olympia O'Brien, worked for Academy and is the sister of Vlasis and the cousin of Vlasios. Ms. O'Brien worked for Academy, handling the company's accounts payable, accounts receivable and payroll. She reconciled the company's accounts and prepared cheques that reflected what the company owed. It appears, however, that she did not have signing authority. At trial, Vlasis and Vlasios Pappas testified that Ms. O'Brien was in charge of the office. Mr. Di'Iorio gave evidence that Ms. O'Brien was Sunview's contact at Academy for accounts payable.

[50] Justice Weiler returned to a consideration of Ms. O'Brien towards the end of the decision when she considered whether Ms. O'Brien had effective control of the defendant company. She referred to the trial judge's observations about her, quoting them in para. 103:

The evidence clearly showed that Ms. O'Brien was actively involved in the accounting side of Academy's operations. She handled the company's accounts payable, accounts receivable and payroll but she did not have signing authority. Although she attempted to portray herself as playing second fiddle to the bookkeeper who came in weekly, Vlasios Pappas testified that he relied Ms. O'Brien to reconcile the company's accounts and to prepare cheques that reflected what was properly owing by the company. Vlasis Pappas testified that he assumed that if his sister made up a cheque, there must have been enough money in the company's account.

[51] Justice Weiler then went on in para. 106 to refer to other evidence. She said:

In addition to the trial judge's comments about Ms. O'Brien's role in the company, other evidence of Ms. O'Brien's active role in the management of the corporation's affairs is that she told Mr. Di'Iorio, during their telephone conversation in June or July 2006, that he would be paid as soon as Academy received some cheques from the projects in that they had installed the doors. The evidence of her active role in the company together with the evidence that she was able to have Academy pay her between \$150,000 and \$195,000 in excess of her salary over a short period of time, when the general ledger recorded that she was only owed \$7,500, indicates that she had effective control over the company or its related activities. Given her position, she had to know that the payments to her constituted a breach of trust.

[52] Each case must be decided on its own facts, but *Sunview* gives helpful guidance. I now consider Cindy Rhymes' role in Optimum. She is neither an officer or a director and is on contract with the company. She does not have signing authority. She testified that her duties included administrative duties in the office plus bookkeeping including doing the HST and Workers' Compensation returns and preparing the payroll. She kept the general ledger and made the journal entries.

[53] John Rhymes said that her duties were bookkeeping, filing, doing the HST reports, and those for WCB, as well as payroll. He said he did the invoicing and the emails with invoices to Optimum came to him. He said Cindy Rhymes did not have a debit card for Optimum's bank account.

[54] Cindy Rhymes said she only prepared cheques when John Rhymes asked her to and did not receive invoices directly from subcontractors. She said they went to John Rhymes who would then put them in a box or a basket in the office.

[55] She said she did not have access to Optimum's banking information until the monthly bank statement came in. This is evident from the journal entries which are not in chronological order because some entries were made only at that time, based upon the banking information.

[56] On cross-examination, she agreed that she knew monthly what the bank balance was and would know if there was a positive balance and what cheques had cleared. She said because the company is John's, she had no control over how he spent Optimum's money, even when it was clear it was for personal purposes.

[57] Throughout her testimony, Cindy Rhymes took pains to show how little her involvement was with the company, and that she only did what John Rhymes told her to do. However, there are several reasons why I do not accept her role was that limited. These related in part to the credibility of her evidence.

[58] There were a number of inconsistencies in her testimony and they were the following. First, when she was asked when she had seen the Ceilidh invoices, she said it was only in the past couple of months. Even then, she said she had not seen all of them. She then admitted she had seen them in July 2014 when they were sent to John Rhymes.

[59] Secondly, she said John Rhymes was taking advances from Optimum when subcontractors were not paid because the invoices were in dispute. However, John Rhymes testified he only had discussions with Bruce Gallagher of Ceilidh about the hourly rate charged on the Dingle project.

[60] Thirdly, in her Answer to Interrogatories, Cindy Rhymes said she did all the journal entries, but at trial said the accountant reversed some entries on occasion. Her explanation was that she understood that the Interrogatory was asking only who did the everyday entries.

[61] Fourth, when she was asked if she was ever paid in cash, she said she never got cash from John Rhymes and never benefitted from cash withdrawals.

Subsequently, when asked about a journal entry of July 14, she said she thought the payment to her was by cheque. But the bank statement for the period showed there was a cash withdrawal. She then said she had to be paid in cash because after the fiscal year end in June, the accountant was doing the books and she was unable to print cheques from the accounting system. She later admitted she may have been paid in cash one or two other times as well.

[62] Fifth, when she was giving her evidence about the DS matter, to which I will refer later, she said one of the reasons she wanted the matter to be resolved was so

they could pay Bruce Gallagher, that is, Ceilidh. However, she also said she never discussed with John Rhymes paying Ceilidh. She then said “I’m confused”.

[63] Sixth, she was asked about a payment shown on one of the bank statements and said it was for the vehicle owned by the company. When she was later asked if the truck was owned by the company, she said she was not sure.

[64] Seventh, when she was asked if their daughter’s car insurance was paid by Optimum, she said she was not sure. When an entry on the March 1 to May 20 journal entries was pointed out to her, she said it was paid by Optimum and she agreed on cross-examination that it appears regularly in the bank statements.

[65] Eighth, she said she did not know about the court case until mid-April of 2015. However, she is a named defendant and a defence was filed on her behalf in November 2014.

[66] For these reasons, I find Cindy Rhymes not to have been a credible witness. It casts doubt on all her testimony, including about the extent of her knowledge and control over what was paid and when. She professed not to have seen invoices, although she entered them in the general ledger. Then she admitted she saw Ceilidh’s invoices soon after John Rhymes received them.

[67] She received the monthly bank statements and knew how much was in the Optimum account at the date of the statement, what deposits had been made, and what withdrawals and payments had been made from the account.

[68] She said she knew little about the work Optimum was doing and said it was only by accident that she saw Optimum's quote for the Dingle job. Yet John Rhymes testified that one of her duties was to do the filing. She also testified that she kept a separate record of each contract with the expenses related to it. It is difficult to appreciate how she could have done that without knowing the jobs Optimum had successfully bid on or was otherwise hired to do. I do not accept her evidence in this regard.

[69] She testified she could not prevent John Rhymes from spending Optimum funds on personal and overhead expenses when subcontractors and suppliers were not paid. Although she may not have assented to these types of expenditures in advance, I conclude she acquiesced in them. This was not a one-time event. The journal entries disclose a pattern of this occurring.

[70] Since she was keeping a record for each job, she would have known when she prepared cheques that the subcontractor being paid did not, in fact, work on the job for which payment had been received.

[71] Furthermore, Cindy Rhymes herself took cash payments when John Rhymes withdrew cash from Optimum's bank account. I do not accept her evidence that she believed she was a subcontractor in the same way as those who worked on a job. She knew subcontractors were not paid when she was paid.

[72] I conclude she and John Rhymes worked as a team in the business. They were separated, but resided in an over and under duplex where John Rhymes' home and the office for Optimum were upstairs from her residence. I do not accept her testimony that she had little information about the jobs on which Optimum worked. Contrary to her testimony, I conclude that she had access to receipts and invoices. Otherwise she would have been unable to keep the record of expenses related to each job, which she said she did.

[73] Cindy Rhymes testified that when John Rhymes' credit was "maxed out", she let him use her credit card. Although her explanation was that he is the father of her children and she does not hate him, that sort of generosity does not sound like the usual employer/contract employee relationship. Nor does the fact that John Rhymes paid her when subcontractors were not paid. He paid Cindy Rhymes, bought their son hockey gear and paid their daughter's car insurance. He looked after his family ahead of his subcontractors and Cindy Rhymes accepted the payments to her.

[74] The unfolding of the story about DS, in my view, is another important indicator of Cindy Rhymes' role in Optimum. Cindy Rhymes explained that the invoices which were unpaid were as a result of a fraud perpetrated by DS. (I refer to her only by her initials.) Cindy Rhymes testified that she and John Rhymes had a property to sell and DS was interested in buying it. DS contracted to have what Cindy Rhymes says were \$80,000 worth of renovations done on it. It is not apparent from the minimal records Optimum produced that this work was done by Optimum. It may be that John Rhymes personally did the work.

[75] However, advances were made from the Optimum bank account to DS totalling \$2,450. Cindy Rhymes said this was done in an effort to "protect the sale" of the property. Cindy Rhymes said that the transaction was to close on June 30, but DS kept delaying the closing saying the money to close would be coming. She said DS was to pay them \$102,000 on September 2, but that did not occur then or, in fact, ever. According to Cindy Rhymes, had the transaction been completed, Optimum would have been able to pay Ceilidh and others.

[76] That money would have belonged to John and Cindy Rhymes, not Optimum, since the evidence is that the rental property was owned by them personally. However, it is clear that their intent was to put the money into the Optimum bank account. It was on the understanding that money would be there that cheques were

written dated September 2, the expected closing date with DS, including one to Ceilidh for \$11,903.52. It was never negotiated by Ceilidh because Colleen Gallagher inquired about it being honoured and found that there were insufficient funds.

[77] Other cheques dated on the same date were deposited by the payees and all were returned NSF. On September 2, the bank balance was -\$172.95.

Subsequently, insurance and vehicle payments were also reversed and on October 1, the balance was -\$1,478.74.

[78] Assuming half of the expected \$102,000 was Cindy Rhymes' as joint owner of the rental property, I conclude she was prepared to give \$51,000 to Optimum to help pay its bills. This is not the action of a mere contract employee, but one who is intimately involved in the business.

[79] Some further evidence of Cindy Rhymes' role with respect to the business and accounts payable comes from the testimony of Colleen Gallagher whose evidence I accept. Colleen Gallagher is the employee of Ceilidh who is responsible for office administration. Her duties include bookkeeping and banking. She has known John and Cindy Rhymes for approximately 29 years.

[80] She testified about the events of September 2014. She said that her husband, Bruce, received a cheque from Optimum dated September 2, which was in payment of Ceilidh's June invoice. She was told it "would be good" at three o'clock. Accordingly she went to the bank and tried to have it certified, but that could not be done. As a result, she said she telephoned Cindy Rhymes who swore at her and said it was supposed to be five o'clock, not three o'clock. At five o'clock, she testified, the cheque still could not be certified.

[81] I conclude from this that Cindy Rhymes knew about the cheque and also knew the transaction with DS had not yet closed. She knew the state of Optimum's bank account and told Colleen Gallagher to wait until five o'clock to cash the cheque.

[82] Cindy Rhymes admitted that she and John Rhymes discussed making cash advances to DS to protect the sale of their jointly owned rental property. She had to know more about the jobs Optimum was working on to keep track of each separately. She was also responsible for all the filing, which would include quotes and contracts. Although she said she only knew what was being spent from the Optimum bank account when the monthly bank statement came, she also said John Rhymes gave her receipts for expenses including fuel.

Events of September 2014 and thereafter

[83] Then there are the events of September 2014 and thereafter. Bruce Gallagher testified he was concerned about the unpaid invoices. He said he would call John Rhymes twice a week and John would tell him the money was coming. He said John told him he was trying to borrow the money and kept saying he would have it the next day or the next week.

[84] On September 3, Bruce Gallagher got a cheque from Optimum for \$11,903.52 dated September 2. He said John Rhymes told him he would let him know when he had the money to cover the cheque. After the cheque could not be cashed on September 3, this continued throughout September and into October until Bruce Gallagher was told not to contact John Rhymes anymore, but to contact his lawyer.

[85] When one looks at the Optimum bank statements following September 2 when the transaction with DS was supposed to have closed, one can see the effect that failed transaction had on Optimum.

[86] For whatever reason throughout 2014, and perhaps before, there was a pattern of paying overhead and personal expenses when subcontractors remained unpaid. There also appears to have been a pattern of paying subcontractors and

suppliers owed money on a previous job from funds received on a later job. The amounts received formed a trust fund for those who had worked on and provided goods or services to that later job, not those who were being paid for their prior work and materials.

[87] I conclude this was the reason that the payment from DS was of such critical importance to both Cindy and John Rhymes. There simply was not enough money in the Optimum account to pay everyone. John Rhymes agreed he was in “survival mode” and that is why cash was being withdrawn from the Optimum account after \$46,000 was paid to Optimum and deposited on November 5. To that point, the account had had a negative balance since September 2.

[88] Approximately \$15,000 was withdrawn in two installments on November 5. John Rhymes testified he gave Cindy Rhymes \$3,500 and put the balance in his personal bank account. Thereafter there were further cash withdrawals by John Rhymes which he said were used to pay personal bills and groceries since he was in “survival mode”. He agreed Cindy Rhymes was benefitting from these because he was paying the mortgage on her residence.

[89] Cindy Rhymes would have known the Optimum account had a negative balance for at least two reasons. She knew DS did not pay them \$102,000 on

September 2 and, secondly, she received the monthly bank statements. On the statement ending August 19, the balance was \$221.61. On September 19, it was -\$35,174.48 and on October 20, it was -\$13,491.06.

[90] When Cindy Rhymes received the cash payment of \$3,500 from John Rhymes on November 5, she would have known there were many outstanding invoices from subcontractors and others on jobs Optimum had done, yet she took the cash. That was also the case when she prepared cheques made out to her for John's signature on November 24, November 27 and December 28 in the total amount of \$2,500. Notably these were the only cheques written on the account in the period November 20 to December 19.

[91] John Rhymes testified that Cindy Rhymes gave him money which he deposited into the Optimum bank account. There are two deposits of \$4,010 each; one on December 22 and a second on December 30. He said this was to be used to repay his shareholder loans.

Conclusion

[92] Based upon all of the above, I conclude Cindy Rhymes had effective control of Optimum's activities and acquiesced in and, on occasion, assented to the breaches of trust to which I have referred. In the result, I conclude that both John

Rhymes and Cindy Rhymes are liable for breach of trust, and are jointly and severally liable for the amounts held in trust and owed to Ceilidh to which I have referred above.

Hood, J.