

SUPREME COURT OF NOVA SCOTIA
Citation: *Kel-Greg Homes Inc. (Re)*, 2015 NSSC 274

Date: 2015-10-02
Docket: Hfx No. 418312
Registry: Halifax

IN THE MATTER OF THE BANKRUPTCY OF KEL-GREG HOMES INC.

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Judge: The Honourable Justice Peter Rosinski

Heard: June 25, 2015, in Halifax, Nova Scotia

Subject: The interaction of s. 44B *Builders Lien Act*, R.S.N.S. 1989, c.277 (*BLA*) trust monies deposited in the pre- bankruptcy period to the bankrupt contractor’s single bank account, and post-bankruptcy period claim by trustee in bankruptcy that the monies lost their “trust” character and are therefore included as property of the bankrupt pursuant to s. 67(1)(a) *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3 (*BIA*).

Summary: Kel-Greg was a general contractor of residential housing units. It had a single bank account into which flowed trust and non-trust monies. No means of distinguishing between them were put in place. Numerous subcontractors remained unpaid and had filed lien claims against Kel-Greg. A number of the residential housing unit owners had paid Kel-Greg monies (in trust) owing to it, up to the time of bankruptcy. Kel-Greg became bankrupt August 2, 2013. The trustee in bankruptcy requested the court to declare that all monies in Kel-Greg’s bank account at the time of bankruptcy [\$50,483.96], as well as amounts he collected post-bankruptcy as owing to Kel-Greg [\$8,657.63 and \$500] from ongoing residential housing unit projects [the collected funds], were the property of the trustee, and not excluded as monies held

“in trust” pursuant to s. 67(1)(a) of the *BIA*.

Issues:

Are the collected funds the property of the trustee in bankruptcy, or do they retain their trust character and are thus to be distributed accordingly? The trustee in bankruptcy argued that because of co-mingling trust and non-trust funds by Kel-Greg in the pre-bankruptcy period, and the trustee in bankruptcy in the post-bankruptcy period, there remained no certainty of subject matter and the monies therefore lost their trust character- relying on *British Columbia v. Henfrey Samson Belair Limited*, [1989] 2 SCR 24 and its progeny.

Result:

Henfrey dictates that before a statutorily created trust pursuant to provincial legislation can satisfy the “in trust” wording of s. 67(1)(a) *BIA*, the purported trust must exhibit the three certainties [intention, object and subject matter] required of common-law trusts. Moreover, *Henfrey* is properly interpreted as permitting the co-mingling of trust and other monies, without destroying the certainty of subject matter of the trust monies, provided the trust monies are still identifiable or traceable. That is the case herein. The bank balance in dispute was \$50,483.96. Due to a deposit of \$82,796.38 by one residential housing unit owner the day before the bankruptcy, and presuming all the \$56,238.57 of deductions from the account thereafter came from the \$82,796.38 trust monies, there necessarily remained as traceable at least \$26,557.81 derived from the \$82,796.38 deposit. Therefore, at least \$26,557.81 retained their trust character and were excluded from property of the trustee in bankruptcy pursuant to s. 67(1)(a) *BIA*.

However, relying on the principles in *Re Hallett's Estate* (1880) 13 Ch.D. 696 (CA) - namely, that a trustee may be presumed to have spent all its own money first before spending any trust monies in its possession, and that the onus is on the trustee to rebut such presumption by identifying its own funds - the court was able to go further and conclude that the entire \$50,483.96 bank balance monies retained their trust character and were excluded from property of the trustee in

bankruptcy pursuant to s 67(1)(a) *BIA*.

The amounts due and owing to Kel-Greg from owners of residential housing units, at the time of bankruptcy, \$8,657.63 and \$500, were also found for similar reasons to have retained their trust character and were excluded from property of the trustee in bankruptcy pursuant to s. 67(1)(a) *BIA*.

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