

TRUST ABOVE ALL

by R. Lorne Jamieson

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Builders' lien legislation is designed to protect those in the construction chain from the insolvency or wrongdoing of those above them. One mechanism is a statutory holdback, with this sum held as a trust account. Courts in Ontario and Manitoba have recently made it plain that company officers who play games with legislated trust accounts cannot use bankruptcy to shield them from personal liability.

Each case (*Superior Crane (Canada) Inc. v. Justan Consulting Ltd.*, an Ontario case, and the Manitoba Court of Queen's Bench decision in *MG Electric Ltd v. (CSE) Control Systems Engineering Inc.*) dealt with the equivalent of Section 16 of Saskatchewan's *Builders' Lien Act*. This section imposes liability on certain officers of corporations. Those officers become trustees under the Act. Briefly, for those not familiar with the construction business, the Act tries to ensure that the money paid to owners, contractors or sub-contractors is used to pay bills owing to the next person down the line, i.e. owners to contractors, contractors to subs or workers. Each recipient therefore holds that money in trust.

In the *Superior Crane* case in Ontario, Justan owed Superior approximately \$35,000. Justan was closed down in February of 2001 after it became insolvent. During the preceding year, Justan's sole director and officer, Stanley Kinsman, had provided Superior with unsworn Statutory Declarations. These said that all accounts owing on the projects involving Superior were paid in full. (The judge characterized these documents as containing "either a bald face lie or a gross misrepresentation of the truth.") Kinsman also wrote 27 NSF cheques on the Justan account, drew approximately \$25,000 dollars from the Company as his salary, and paid business and "overhead" expenses from payments received for the projects.

In the Manitoba case, the CSE company officer, Charles Evancio, was found to have dipped into the trust fund for personal draws, paying staff and making payments to pressing creditors.

After their businesses failed, both Kinsman and Evancio declared bankruptcy. There was little question that they were both "statutory trustees" under the builders' lien legislation. The Courts had to decide, however, whether their transgressions constituted a breach of the common law duty that met the requirements of *The Bankruptcy and Insolvency Act*. This Act states that an order for discharge of a bankrupt does not release the bankrupt "from a debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity". Under the relevant builders' lien legislation, at least in these cases, the "fiduciary" was the company that received the money. Both courts held that the fiduciary duty transferred to the company officers involved and they personally owed the money to the Plaintiff creditors. The bankruptcy did not end that obligation.

Judge Scurfield, the Manitoba judge, said he sympathized with Evancio's attempts to keep his business afloat. He heard evidence that it was a common practice in the industry to dip into the trust fund to finance other parts of contractors operation. To impose personal liability on Evancio in these circumstances, it was argued, would have a "dramatic impact on the construction industry" The judge's response was straightforward, "If indeed it is common

practice for contractors to mingle trust funds with general revenues and to use those funds for personal uses whenever they get into economic difficulty, then that practice must stop.... There is no logical support for the notion that breaches of trust within the construction industry should be treated less seriously than breaches by other fiduciaries”.

Trusts have, with good reason, always been treated with respect by courts, and these cases show that legal technicalities will not get in the way of enforcing their purpose. When dealing with any trust funds, the primary rules should always be prudence and caution.

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