Date: 2008 09 23
Docket: BK 2001000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF DARRYLD KINGSTON FEHR (SUMMARY ADMINISTRATION) and IN THE MATTER OF THE BANKRUPTCY OF CLAUDETTE ISABELLE FEHR (SUMMARY ADMINISTRATION)

BETWEEN:

Exelby & Partners Ltd. in its capacity as trustee in bankruptcy of the estates of Darryld Kingston Fehr, and Claudette Isabelle Fehr

Applicant

- and -

Darryld Kingston Fehr, and Claudette Isabelle Fehr

Respondents

Application by Trustee for payment of equity in home.

Heard at Yellowknife, NT on July 29, 2008.

Reasons filed: September 23, 2008

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant:	Douglas G. McNiven
Counsel for the Respondents:	Louis M. Walsh and Mark G. Mastel, Student-at-Law

Date: 2008 09 23
Docket: BK 2001000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF DARRYLD KINGSTON FEHR (SUMMARY ADMINISTRATION) and IN THE MATTER OF THE BANKRUPTCY OF CLAUDETTE ISABELLE FEHR (SUMMARY ADMINISTRATION)

BETWEEN:

Exelby & Partners Ltd. in its capacity as trustee in bankruptcy of the estates of Darryld Kingston Fehr, and Claudette Isabelle Fehr

Applicant

- and -

Darryld Kingston Fehr, and Claudette Isabelle Fehr

Respondents

REASONS FOR JUDGMENT

[1] Mr. and Mrs. Fehr, the Respondents, are discharged bankrupts. The Applicant, their Trustee, seeks an order that they pay the non-exempt equity in their home to the Trustee for the benefit of their creditors. If that order is granted, the Trustee seeks an order as to the date to be used for valuation of the home.

[2] There is a separate court file for each of the Respondents but there are no differences in the facts or issues and the two matters were heard together by agreement of counsel.

[3] The central issue on this application is whether the Trustee can now, after the Fehrs have been discharged from bankruptcy, claim the equity in their home for the benefit of their creditors. This may depend on whether the Trustee can be said to have waived its right to the equity or whether, because of its conduct, it should not now be permitted to make use of the equity.

Background

[4] On October 22, 2001, Mr. and Mrs. Fehr, a married couple, each made an assignment into bankruptcy.

[5] The major asset owned by Mr. and Mrs. Fehr was their family home, which was (and is) jointly held. In the Statement of Affairs filed upon their assignment, they showed the estimated value of the home as $147,000.00, with a mortgage owing in the amount of $117,000,00.

[6] There is a factual dispute as to whether the Trustee's right to the equity in the family home was discussed with the Fehrs by anyone from the Trustee. I heard evidence on that issue and will refer to it further on.

[7] On September 10, 2002, the Registrar in Bankruptcy granted each of Mr. and Mrs. Fehr an Order Setting Terms for Bankrupt's Discharge (the "conditional order"). The conditional order does not provide for any conditions relating to payment of the equity in the family home or disposal of the home. The s. 170 report filed by the Trustee at that time shows the value of the home to be $147,000.00 with the mortgage amount owing of $110,000.00. It also characterizes the home as "released".

[8] On June 16, 2005 the Registrar granted Mr. and Mrs. Fehr an absolute discharge from bankruptcy.

[9] On August 22, 2005, the Trustee registered a caveat against the title to the family home. In 2007 Mr. and Mrs. Fehr gave notice to the Trustee to take proceedings on the caveat. No proceedings were taken and the caveat was discharged. The Trustee says the notice to take proceedings was not communicated to it by the lawyer who was served on its behalf.

[10] The Trustee subsequently obtained an appraisal, dated September 14, 2005, which valued the home at $220,000.00.

[11] In 2006 or 2007 the Fehrs did some renovations to the home.

[12] By letter dated November 12, 2007, the Trustee advised the Fehrs that it had received a legal opinion that it must use the September 2005 appraisal for the calculation of excess equity in the home, as a result of which it was seeking

payment from them of $106,318.44 repayable on a schedule to be finalized by December 10, 2007.

[13] The Fehrs sought legal counsel and disputed their liability to pay the equity after having been discharged from bankruptcy.

[14] On May 8, 2008 the Trustee filed this application seeking an order for directions for the sale of the Trustee's interest in the home with the proceeds of same to be distributed to the mortgagee and any equity to be paid to the Trustee and distributed for the benefit of creditors. The application was heard on July 29, 2008.

[15] Also in July 2008, the Trustee obtained a second appraisal on the home, which valued it at $275,000.00.

[16] On July 29, 2008 the Trustee registered another caveat against the title to the home.

[17] The Trustee has not yet applied to be discharged as the Trustee for either Mr. or Mrs. Fehr.

Facts in dispute

[18] The factual disputes revolve around whether, and when, anything was discussed as between the Trustee and the Fehrs about the Trustee's right to any equity in the family home over and above the exempt amount, which in the Northwest Territories is $3,000.00 for each bankrupt (see statutory references later in these reasons).

[19] Two representatives of the Trustee testified, Mr. Exelby and Mr. Wilson. Their evidence was heard by telephone. Mr. and Mrs. Fehr also testified. Mr. Wilson, Mr. Fehr and Mrs. Fehr adopted in their testimony the contents of affidavits they had filed.

[20] Mr. Exelby, whose firm is located in Edmonton, testified that he initially met with the Fehrs at a hotel in Yellowknife in October 2001. He testified that he explained to the Fehrs that in the Northwest Territories there is very little exempt equity. He also told them that because the mortgagee on the home is a secured creditor, they would have to keep the mortgage current to avoid foreclosure. He

also testified that he believes that he told the Fehrs that equity is something the Trustee would have to deal with. He told the Fehrs they would have to come up with a payment plan but he did not set specific terms for that and did not put the question to them in terms of how did they want to pay out the equity. He was not able to recall any specific discussions about this but testified that he "may" have said that they would have to deal with real estate after the bankruptcy.

[21] Mr. Fehr testified that at that first meeting their home and vehicle were their major concerns. He testified that the discussion focused on making their mortgage payments so the bank would not take the home. They were not told anything or asked to make any arrangements about paying the equity, although there was some discussion at that meeting about the $3,000.00 exemption.

[22] Mrs. Fehr testified that they asked Mr. Exelby whether they should keep or get rid of their home and he said that as long as they made the mortgage payments they could keep it. She said there was no discussion about the equity in the home.

[23] Surprisingly, the Trustee did not have, or at least did not present in evidence, any documentation of what was discussed at that first meeting, apart from the Statements of Affairs signed by the Fehrs. While Mr. Fehr's acknowledgment that there was some discussion of the $3,000.00 exemption leads me to think there was likely also some discussion about the equity in the home, it is not at all clear to me what that discussion was. Mr. Exelby's evidence was not precise as to what was discussed and described mainly what he would usually discuss with a person making an assignment into bankruptcy. Even if I accept his evidence that he told the Fehrs that equity is something they would have to "deal with", that does not satisfy me that they were told clearly that the Trustee had a claim to the equity in the home and that it would or could take steps to realize on that claim. Nor am I satisfied that they were told that they needed to make payments to the Trustee for the equity.

[24] Mr. Exelby concedes that he told the Fehrs that they would have to keep mortgage payments current in order to avoid foreclosure and it is easy to see how they would understand that to mean that as long as they kept making the payments, they would not lose the home. Without a clear explanation that they could lose the home if the Trustee were to sell it to realize the equity, the impression they would come away with is that nothing like that would happen as long as they kept the mortgage current.

[25] There is a dispute about when the next meeting took place. Mr. Exelby testified that it was in May or June of 2002 whereas the Fehrs placed it in January 2002. Mr. Exelby testified that it was a "first counseling meeting" for which the matters to be discussed are set by the Superintendent of Bankruptcy. No one from Mr. Exelby's firm was able to attend due to a death in the firm, so a Mr. Miller, who was not a member of the firm, attended.

[26] Mr. Miller did not testify. The Fehrs' evidence is that they believed the Trustee's representative at that meeting was Mr. Wilson. Mr. Wilson's testimony is that he has never met the Fehrs face to face. In any event, the only evidence I have as to the actual content of that meeting is that of the Fehrs, who say that the home was not discussed.

[27] Mr. Exelby testified that "second counseling" meetings took place between him and Mr. Fehr in October 2002 and between him and Mrs. Fehr in March 2003. He was unable to recall any specific discussion about the home. Mr. and Mrs. Fehr say that they attended together at a meeting that took place in May or June of 2002, that the representative of the Trustee was the same person who had been at the last meeting, who they understood to be Mr. Wilson, and that they discussed their preference to pay down their mortgage rather than put money on prepaid credit cards to re-establish their credit rating.

[28] There was no cross-examination on these discrepancies as to timing of the meetings and who represented the Trustee. Nor was any documentation presented that might assist to resolve the discrepancies. In any event, there is no evidence that during the meetings subsequent to the initial meeting with Mr. Exelby there was any discussion about the equity in the home.

[29] Mr. Exelby testified that there were between two and four other discussions with the Fehrs about the need to pay the equity in the home to the Trustee. However, he was not able to describe any specific discussions, referring only to the affidavit of Mr. Wilson, whose testimony I will discuss below. Other than as indicated above about the initial meeting in 2001, Mr. Exelby could not identify any particular discussions with the Fehrs about the equity in the home prior to the absolute discharge order. Asked how the Fehrs could obtain a conditional order of discharge without addressing the equity in the home, Mr. Exelby testified that the Trustee will often take the position that a decision about realization of the equity is not a reason to hold up the discharge application as it is easier for the bankrupt to raise money to pay out the equity after he or she has been discharged.

[30] Mr. Exelby was questioned about the home being described as "released" in the s. 170 report filed on the application for the order of conditional discharge in September 2002. He testified that "released" means that the Trustee has verified the validity of the mortgage and has given a notional release to the mortgagee such that if there is a foreclosure, any amount realized in excess of the mortgage debt will be paid to the Trustee for distribution to unsecured creditors after taking into account any exempt amounts. He testified that the reason the s. 170 report filed in the Fehrs' bankruptcy said nothing about payment of the non-exempt equity in the home is that the Trustee did not wish to hold up the Fehrs' discharge from bankruptcy. For the same reason, the issue was not raised before the Registrar of Bankruptcy on the discharge application.

[31] Mr. Wilson, the second witness for the Trustee, did not recall any direct communication with the Fehrs. He also testified that since an individual in bankruptcy is unable to get bank financing, the practice is that the Trustee agrees to their discharge so they can obtain a mortgage and pay out the equity to the Trustee. He also explained the term "released" in the s. 170 report as meaning released to the creditor.

[32] Attached to Mr. Wilson's affidavit as an exhibit is a note dated October 27, 2004, which Mr. Wilson identified as a note he received from a Mr. MacIntosh. The Trustee relies on this note as proof that the Fehrs were told in 2004 that the Trustee was seeking to realize on the non-exempt equity in the home, which at that time was about $30,000.00. However, in the absence of any evidence from Mr. MacIntosh, that note is not evidence that there was such a discussion. Although the note is on a form entitled "Contact Record", it is not clear that it refers to actual contact with either of the Fehrs. It is equally consistent with being a direction from Mr. MacIntosh to Mr. Wilson that the equity in the home is to be realized and something registered on title. Neither of the Fehrs confirmed in their testimony that Mr. MacIntosh told them that the Trustee was pursuing payment of the equity in the home.

[33] The only other documentation in evidence post-dates the absolute discharge. There is a note dated April 24, 2007 by Mr. Exelby apparently reflecting a conversation he had with Mr. Fehr about Mr. Fehr trying to refinance the home. There is also a letter dated November 12, 2007 from Mr. Wilson to the Fehrs asking them to pay out the equity in the home which at that time the Trustee calculated at $106,038.44, using the appraised value of $220,000.00.

[34] Mr. Fehr testified that throughout the period leading up to his absolute discharge he continued to be of the understanding that so long as they made the mortgage payments, they would not lose their home. He said there was no discussion before the absolute discharge about making arrangements to pay out the equity. Income tax refunds of approximately $15,000.00 that had been sent to the Trustee in the spring of 2005 were returned to Mr. Fehr. This was confirmed by Mr. Wilson, whose explanation for why the money was not applied toward payout of the equity was that written consent would be needed for that from the Fehrs. He did not provide any explanation as to why that consent was not sought.

[35] Mr. Fehr testified that it was only after the absolute discharge was granted that the Trustee started to demand payment of the equity.

[36] Mrs. Fehr also testified that there was no discussion about the equity in the home belonging to the Trustee and that it was only shortly after the absolute discharge, when she called Mr. Exelby about some of the creditors listed in the documentation, that he told her the Trustee wanted $26,000.00.

Positions of the parties

[37] The Trustee takes the position that there was no formal disclaimer by the Trustee of its interest in the equity and that the Fehrs in fact agreed that they would pay out the equity. In any event, the Trustee says that the equity remains vested in it until it is discharged, so it makes no difference that the Fehrs have been discharged.

[38] The Fehrs take the position that the statements made by Mr. Exelby at the October 2001 meeting, that as long as the mortgage payments were made they could keep the home, amount to a disclaimer of the Trustee's interest in the equity. They say further that failure to deal with that interest at the time of their discharge extinguishes the Trustee's claim. Alternatively they say that the Trustee's conduct should give rise to a finding that the Trustee is now estopped from realizing on the equity.

Law and Analysis

[39] Under bankruptcy, the property of the bankrupt is vested in his or her trustee and the bankrupt ceases to have any capacity to deal with the property: s. 71

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"). The trustee then administers the estate by realizing on the bankrupt's property and distributing the proceeds of that property to the bankrupt's creditors.

[40] The BIA also provides, however, that certain property of the bankrupt is exempt from realization and distribution to creditors. Section 67(1)(b) states that any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province in which the property is situated and within which the bankrupt resides is also exempt from realization and distribution.

[41] In the Northwest Territories, the applicable exemption is found in s. 2(1)(e) of the *Exemptions Act*, R.S.N.W.T. 1988, c. E-9, which provides that the house and buildings occupied by the debtor and the lot on which they are situated, not exceeding $3,000.00, are exempt. Counsel agreed that Mr. and Mrs. Fehr would each be entitled to the exemption, for a total exemption of $6,000.00.

[42] The exemption in the Northwest Territories is obviously extremely low. In *ICI Paints v. Gazelle*, [2001] A.J. No. 371, 2001 ABQB 233, at paragraph 18, Burrows J. described the purpose of the exemption as "to permit the debtor sufficient assets so that he may maintain himself and his family at a reasonable standard of living and have a reasonable prospect of being able to continue to do so. This benefits both the debtor and his family, but also reduces the likelihood that their continued maintenance will fall to society."

[43] An exemption of $3,000.00 cannot be said to meet that purpose. It can be contrasted with the situation in Alberta, where the exemption became a maximum of $40,000.00 in 1984. In 2006, LoVecchio J. noted that amount "might well be past its best before date": *Re Piraux (Bankrupt)*, 2006 ABQB 409 at paragraph 51. As LoVecchio J. also noted, however, it is for the Legislature and not the Courts, to prescribe the amount of the exemption.

[44] There is no question that the Fehrs' property, including the equity in their home, became legally vested in the Trustee upon bankruptcy. The real question is whether the Trustee has waived its right to the non-exempt equity or released it or has conducted itself such that it should not be allowed now to realize on the equity.

[45] I am not satisfied on the evidence that Mr. and Mrs. Fehr or either of them agreed to pay out the equity. The evidence of Mr. Exelby and Mr. Wilson is very

vague and unsatisfactory as to any pre-discharge discussions about that issue. The Fehrs say that it was not discussed.

[46] However, I am not satisfied that the Trustee actually waived its right to the equity or released it. In my view, statements to the effect that the Fehrs would be able to keep the home so long as they made the mortgage payments do not amount to a waiver of the Trustee's right to the equity in the home. Under s. 20 of the BIA, a trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property or immovable of the bankrupt by a notice of quit claim or renunciation by the trustee. The Trustee did not execute a quit claim or renunciation.

[47] Nor am I satisfied that the Trustee can be said to have released the home to the Fehrs. The description of it in the s. 170 report as released could certainly lead someone to think that it was released to them, but from the evidence of both Mr. Exelby and Mr. Wilson it is clear that it was not the intent of the Trustee that it be released to Mr. and Mrs. Fehr, but rather to the mortgagee should it decide to foreclose.

[48] The issue on which this case turns is whether the Trustee has conducted itself in such a way that it should not now be allowed to realize on the equity. Based on the case authorities submitted by the parties, there are two aspects to this issue. The first is whether the Trustee can realize on the equity now that Mr. and Mrs. Fehr have been discharged from bankruptcy. The second is whether, if the Trustee can still realize on the equity, it is estopped from doing so.

[49] In *Re Mackay, Bankrupt*, 2002 ABQB 598, Master Funduk, Registrar in Bankruptcy, held that regardless whether a bankrupt has obtained an absolute, suspended or conditional discharge, nobody can later raise an issue about surplus (that is, non-exempt) equity in a house. The discharge is the latest time that issue is to be dealt with. In his usual succinct fashion, Master Funduk said, "The message to trustees and creditors is - advance claims for surplus equity in limited exemptions property by no later than the bankrupt's application for discharge, or forget it" [at paragraph 110]. He made it clear that the deadline applies equally to trustees and creditors.

[50] Master Funduk was also succinct in describing the reason why there should be a cut-off date for dealing with non-exempt equity: "the bankrupt should not be left to twist in the wind indefinitely" [paragraph 81]. He referred to a number of

cases where non-exempt equity had been dealt with at the time of discharge of the bankrupt, among them *ICI Paints, supra.*

[51] Master Funduk also relied on *Zemlak and Deloitte, Haskins & Sells Ltd.* (1987), 42 D.L.R. (4th) 395 (Sask. C.A.), where the Court disapproved of the trustee seeking to maintain a caveat against the bankrupt's home after the bankrupt's absolute discharge so that the home could appreciate in value and any increase in the non-exempt equity be used to satisfy creditors. Although the caveat was filed before discharge, the trustee had not taken any part in maintaining the home and made no reference to the caveat or any non-exempt equity in the home on the application for discharge.

[52] Speaking for the Court, Tallis J.A. said that the trustee's position would mean that any non-exempt equity acquired through paying off a mortgage or through inflation after the discharge would mean that property acquired by the debtor after absolute discharge would be appropriated to payment of the discharged debtor's debts: "The equity built up in the property after issue of an absolute discharge order would form a realizable fund for creditors at some future date, notwithstanding the final discharge. Such a result does not comport with the philosophy of the Act." [at page 403]

[53] Tallis J.A. explained further:

> We accept that it is a basic purpose of bankruptcy laws to give debtors a fresh start in life free from creditor harassment and from the worries and pressures of too much debt. Toward this end, certain property is allowed to be claimed by the individual debtor as exempt. Speaking generally, in the case of an absolute discharge, post-discharge earnings and acquisitions are immune from attachment. The ultimate result, if one adopts the respondent trustee's approach, is to attach post-discharge earnings and acquisitions if they have been ploughed back into the family home. We agree that such a result clearly offends the spirit and intent of the *Bankruptcy Act*. [at page 405]

[54] In *Zemlak,* the Court of Appeal also suggested some minimal requirements that should be met when dealing with non-exempt equity in a home [at page 404]. These include that the trustee set out the value of any non-exempt equity asserted in the home if the trustee intends to realize on it in the future so that the Registrar in Bankruptcy will be alerted to a potential trap for the unwary debtor and may give suitable directions.

[55] *Zemlak* differs from the case at hand in that there was little or no non-exempt equity in the home at the time the bankrupt was discharged. In this case, by the time of the absolute discharge in June 2005, the value of the home had presumably increased from $147,000.00 to something close to $220,000.00, the appraised value as at September 14, 2005. However, there is no evidence that either the Trustee or the Fehrs were aware of or had discussed that increase in value. Had the Trustee's representatives obtained an appraisal by June 2005 and disclosed that along with the Trustee's intention to realize on the equity after the Fehrs' discharge, that issue would have been placed squarely before the Registrar in Bankruptcy and the Fehrs. Directions could have been given as suggested in *Zemlak.* Although, as noted by Mr. Exelby in his testimony, that might have delayed the Fehrs' discharge for some time, it would at least have put them on notice as to the Trustee's intentions and given them the opportunity to negotiate a sale or some other arrangement with the Trustee for payout of the non-exempt equity with a view to settling that issue before their absolute discharge.

[56] The Trustee submitted that because there was no formal hearing before the Registrar in Bankruptcy, who had only documentation before her, any obligation to raise such issues is somehow lessened or non-existent. I disagree. In my view it is very important in such cases that there be full disclosure so that the bankrupt or the creditors or the Registrar can insist on a full hearing to ensure that matters are fully canvassed and understood by all parties.

[57] The concerns set out in *Zemlak* are echoed in the fairly recent case of *Re Pelkey (Bankrupts)*, 2006 ABQB 814, in which Registrar in Bankruptcy Laycock noted that there appear to be divergent practices in the trustee community in Alberta on how the issue of non-exempt equity is to be resolved. The Registrar noted that the trustee should not delay valuation of property for the purpose of allowing its value to increase and thus increase the amounts the bankrupt is required to pay to the trustee and enhance recovery for the creditors. It was suggested that if the bankrupt did not provide the trustee with material sufficient to allow the trustee to verify the value of the property, an evaluation should be obtained by the trustee 90 days after commencement of the bankruptcy. This would leave the trustee enough time to negotiate terms for the bankrupt to purchase any non-exempt equity or propose a method of sale of the asset. The Registrar observed that all of this information should be included in the trustee's s. 170 report, which should also disclose a summary of the steps taken by the trustee and the bankrupt to establish

the amount of the non-exempt equity to be paid to the estate and whether payment will be by the bankrupt or via sale to a third party.

[58] In *Re Piraux (Bankrupt)*, 2006 ABQB 409, LoVecchio J. considered what point in time in the bankruptcy the value of the bankrupt's residence should be set and which of the trustee and creditors on the one hand and the bankrupt on the other hand should receive the benefit or bear the burden of a fluctuating marketplace. In deciding that it is the point at which the property is effectively dealt with that should govern its valuation, he did not approve of the trustee delaying valuation or dealing with the property for the purpose of enhancing recovery for the creditors. He said:

> ... being a trustee is a statutory function and they are officers of the Court. As such, they must act responsibly and in an even handed fashion and I doubt speculating on the movement of real estate prices to gain a few dollars one way or the other should be a part of the job description. They should simply act expeditiously to settle the estate so the creditors may be paid and the bankrupts may get on with their lives.

[59] In the case at hand, the Trustee's explanation for not coming up with a plan to deal with the non-exempt equity and not bringing that issue to the attention of the Registrar at the time of either the conditional or absolute discharges is that since a bankrupt cannot get financing while in bankruptcy it makes sense and is to the bankrupt's benefit to delay the issue until after discharge. After discharge, the bankrupt can get a mortgage from which the non-exempt equity can be paid out to the trustee.

[60] The Trustee's explanation seems to me to be at odds with the philosophy of the BIA and the procedural recommendations in the cases referred to above. There was nothing in the s. 170 report in this case that would alert either the bankrupts or their creditors that there was any significant non-exempt equity in the home or any plan for dealing with same.

[61] It is clear that initially the figures provided and apparently accepted by the Trustee indicated relatively little non-exempt equity in the home. In their respective Statements of Affairs, Mr. and Mrs. Fehr estimated the value of the home at $147,000.00 with the mortgage balance at $117,000.00, leaving equity of $30,000.00. After an exemption of $3,000.00 for each of them, the non-exempt equity would be $24,000.00 (or $12,000.00 each). The Fehrs filed affidavit

evidence about the likely real estate commission payable on a sale, which would further reduce the non-exempt equity by $7,400.00, thus to $16,600.00, from which legal fees and other costs associated with sale would have to be deducted.

[62] Although the evidence does not go so far as to suggest that the Trustee was deliberately concealing its intentions while speculating on the home increasing in value, it does indicate that the Trustee did not move expeditiously to deal with the non-exempt equity in the home, perhaps because the amount was not very significant. There was also reference in the evidence to a Fort McMurray case the Trustee was following (although counsel were not able to locate the case) about whether creditors should benefit from an increase in property value following bankruptcy. The evidence suggests that the Trustee was awaiting the outcome of that case, perhaps hoping that it might coincide with an increase in value of the Fehrs' home. It was never clarified in the evidence why the Trustee did not obtain an appraisal on the home prior to the absolute discharge, which also leads me to conclude that the Trustee did not have any firm intention of realizing on the non-exempt equity prior to the Fehrs' discharge.

[63] As I have indicated earlier in these reasons, I find that the Trustee did not make it clear to Mr. and Mrs. Fehr that it had a realizable claim to the non-exempt equity in their home or that it intended to realize on that claim. The Trustee allowed the Fehrs to believe that so long as they made the mortgage payments they would not lose the home. The Trustee did not move expeditiously to deal with the non-exempt equity and did not alert the Fehrs, or the Registrar in Bankruptcy, at the time of either the conditional or the absolute discharge, that it intended to realize on its claim. All of this led the Fehrs to reasonably believe prior to their discharge that their equity in the home would not be taken by the Trustee and that after discharge the equity would remain theirs.

[64] Although I find the reasoning in *Re Mackay* compelling and am prepared to say that the Trustee has left it too late and cannot now, after the absolute discharge, deal with non-exempt equity, I have not found other cases that follow *Re Mackay*. Courts have, however, found other ways of dealing with similar situations. In the case of *Re Johnson*, 2006 NSSC 384, a Registrar in Bankruptcy used s. 37 of the BIA, which provides that where a bankrupt is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order as it sees fit. In that case the trustee was asking to maintain registration of its interest in the bankrupt's home some five years after her discharge from bankruptcy. The Registrar found that the

trustee's representations to the bankrupt that her home was not at risk and its conduct in allowing her to obtain her discharge and continue to make mortgage and other payments on the home, building up equity in the assumption that it was her home, and her reliance on those representations and that conduct, estopped the trustee from continuing to assert its interest in the home.

[65] Similarly, in *Re Marino* (2004), 2 C.B.R. (5th) 290 (Ont. C.A.), the trustee took no steps to realize on the equity in the bankrupts' home before their discharge. The bankrupts continued to live in it, pay the mortgage and make improvements. The trustee told them that it would not be selling the home but registered its interest on title and four years after their discharge pursued its interest in the home. The Court of Appeal held that the trustee was estopped from realizing on its registered interest and said that but for the trustee's assurance that it would make no claim against the equity, the bankrupts could have earlier begun the "fresh start" contemplated by the BIA, abandoned the property to the trustee and begun to build equity in another property.

[66] *Re Marino* says that to establish estoppel, the bankrupt has to establish that (i) the trustee, by words or conduct, made a promise or assurance which was intended to affect its legal relationship with the bankrupt and intended the bankrupt to act on it; and (ii) the bankrupt, relying on that representation, acted on it or in some way changed his or her position.

[67] I find that the following words and conduct by the Trustee amount to an assurance sufficient to satisfy the first part of the test for estoppel: the Trustee told the Fehrs that they could keep their home as long as they made the mortgage payments; the Trustee failed to take any steps prior to discharge to have the home appraised or settle the amount of equity in it; the Trustee returned the income tax refund to the Fehrs instead of applying it to payment of the non-exempt equity; the Trustee allowed the conditional and absolute discharges to go through without any reference being made to repayment of the non-exempt equity in the home. Relying on these words and conduct, the Fehrs put their efforts into paying down the mortgage and improving the home, believing they would be able to keep it after their discharge from bankruptcy.

[68] In my view, the equities favour the Fehrs. Having not dealt with the equity in the home when it should have, at the time of the conditional discharge, or, at the very latest, at the time of the absolute discharge, the Trustee should not now, three

years later, be permitted to do so. The Trustee is therefore estopped from realizing on its interest in the home. The application of the Trustee is dismissed.

[69] Counsel jointly submitted that in the context of this case the fact that a caveat was filed has no particular significance so I will not address the caveat except to say that my decision requires the Trustee to discharge any caveat still filed against the home.

[70] If counsel wish to speak to costs they may obtain a date to appear before me for that purpose.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
23rd day of September 2008

Counsel for the Applicant:	Douglas G. McNiven
Counsel for the Respondent:	Louis M. Walsh and Mark G. Mastel, Student-at-Law

BK-2001000058

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF DARRYLD KINGSTON FEHR (SUMMARY ADMINISTRATION) and IN THE MATTER OF THE BANKRUPTCY OF CLAUDETTE ISABELLE FEHR (SUMMARY ADMINISTRATION)

BETWEEN:

Exelby & Partners Ltd. in its capacity as trustee in bankruptcy of the estates of Darryld Kingston Fehr, and Claudette Isabelle Fehr

Applicant

- and -

Darryld Kingston Fehr, and Claudette Isabelle Fehr

Respondents

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
