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C.A. 141820

NOVA SCOTIA COURT OF APPEAL

Cite as: Tait v. Royal Insurance Co. of Canada, 1999 NSCA 60

Bateman, Hart and Flinn, JJ.A.

BETWEEN:

THEODORE J. TAIT Appellant - and - ROYAL INSURANCE COMPANY OF CANADA Respondent	)	Peter C. Ghiz for the appellant David A. Miller, Q.C. and Nancy I. Murray for the respondent Appeal heard: March 23, 1999 Judgment delivered: May 13, 1999

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Hart and Bateman, JJ.A. concurring.

FLINN. J.A.:

[1] The business premises of the appellant, at New Waterford, Nova Scotia, were destroyed in a fire on March 30th, 1985. The premises, and the equipment therein, were covered by a fire insurance policy issued by the respondent insurer. The insurer refused to indemnify the appellant, claiming that the fire had been deliberately set by the appellant, or by some person acting under his direction.

[2] Following a 20 day trial in the Supreme Court, Justice MacAdam dismissed the appellant's claim against his insurer for indemnification of the loss under the terms of the insurance policy. Justice MacAdam decided that the insurer had satisfied the onus upon it to prove that the fire was incendiary in nature, and that the appellant had the opportunity and motive to set the fire. On that basis, he decided that the fire had been deliberately set by the appellant, or by some person acting under his direction. The trial judge also dismissed a claim which the appellant had made against his insurer for punitive damages. The dismissal of the claim for punitive damages is not an issue in this appeal.

[3] The appellant appeals the decision of the trial judge dismissing his claim for indemnification under the fire insurance policy. The appellant raises, essentially, three grounds of appeal:

(i) The trial judge's findings of fact are not supported by the evidence, and the trial judge made palpable and overriding errors in his assessment of the evidence;

(ii) The trial judge misapplied the onus of proof in a civil arson case, and, essentially, placed the burden of proof on the appellant to prove alternative theories on the cause of the fire;

(iii) The trial judge erred in law in permitting the appellant's counsel to withdraw from the case.

[4] The appellant was the owner of "Nova Rite Drycleaners", a dry cleaning business carried on in premises owned by the appellant on Victoria Avenue, New Waterford, Nova Scotia.

[5] The appellant testified that on Saturday, March 30th, 1985, at approximately 5 o'clock in the afternoon, as was his usual custom, he closed, locked and left the business premises. The shutters on all windows, as well as the customer entrance door, were secured. One flourescent light was left on. All other electrical power had been turned off. The heat had not been turned on that afternoon. The appellant testified that when he left the premises, shortly after 5 o'clock on that day, the building was secure and there were no signs of fire.

[6] The appellant further testified that he proceeded to his residence where he was joined by his common law spouse. The two then proceeded in the direction of Glace Bay to make deliveries to two customers. By the time the appellant returned to New Waterford from Glace Bay, the appellant's premises were in flames. The fire had been discovered by an unknown person at approximately 5:45 p.m. and was reported to

the New Waterford Fire Department. On arrival at the scene the fire department found the building secure. An employee of the appellant appeared on the scene, with a key, and opened the building to allow the firefighters access.

[7] There is no direct evidence that the appellant, or anyone acting under his direction, set the fire.

[8] In considering the insurer's defence that the appellant, or someone acting under his direction, had deliberately set the fire, the trial judge said the following about the burden of proof on the insurer:

> It is not disputed that once the plaintiff establishes the applicable insurance contract and the loss, the burden shifts to the defendant to establish the basis on which coverage may be declined. .....

And further:

> In determining whether the defendant has met the onus, in respect of maintaining a defence of arson, there has generally been applied a three-fold test, namely:
>
> 1. Was the fire incendiary in nature;
> 2. Was there opportunity on the part of the plaintiff to set the fire;
> 3. Did the plaintiff have motive?

[9] In defining the extent of the insurer's burden, the trial judge referred, at length, to the case of **Lewis v. Royal Insurance Co. of Canada (1990)**, 94 N.S.R. (2d) 166, affirmed on appeal to this Court (1990) 99 N.S.R. (2d) 421, and the decisions of the Supreme Court of Canada in **Hanes v. Wawanesa Mutual Insurance Co.**, [1963] S.C.R. 154 and **Dalton Cartage Co. Ltd. v. Continental Insurance Co.**, [1982] 1 S.C.R. 164. On the basis of those authorities, he concluded that, in a civil case, where

arson is alleged as a defence to a claim under a fire insurance policy, the insurer is only required to establish the defence of arson on a balance of probabilities. However, since that defence alleges conduct of a criminal nature, the balance of probabilities must be found on clear and cogent evidence which makes it reasonably probable that the crime of arson was perpetrated, and that there is no other reasonable inference.

[10] While the appellant takes issue, in this appeal, with the manner in which the trial judge applied the burden of proof, there is no suggestion that the trial judge did not correctly articulate the law with respect to the onus on the insurer in a civil case where arson is alleged as a defence to liability under a fire insurance policy.

[11] As to whether the fire was incendiary in nature, and not accidental, the trial judge, firstly, decided the question of where the fire originated. He reviewed the evidence of three witnesses who had been qualified as experts, namely: Vincent Penny, the Deputy Fire Marshall; James Carroll, a retired member of the Royal Canadian Mounted Police; and Donald Bartlett, a former member of the Royal Canadian Mounted Police and presently a special agent with the Insurance Crime Prevention Bureau. All opined that the fire originated in the area of the premises where the pant topper was located. That opinion evidence was corroborated by the evidence of the Deputy Fire Chief as well as by the evidence of the first firefighters on the scene. Having reviewed that evidence the trial judge said the following:

> ..... I am satisfied the most probable area of origin is the floor area in the vicinity of the pant topper. Clearly the investigation was less than thorough, a fact acknowledged in the evidence of Mr. Carroll. There was, nevertheless, sufficient

> evidence tendered to justify the conclusions this was the likely area of origin. Suggestions by the plaintiff of various other possibilities are not sufficient to dissuade me from the conclusion the floor area in the vicinity of the pant topper was in fact the likely area of origin.
>
> The conclusion the likely origin of the fire was on the floor in the vicinity of the pant topper was corroborated by the evidence of the Deputy Fire Chief, Bernard F. Chiasson, who, being one of the first persons on the scene, was able to sufficiently pry loose a shutter to peek in and to observe flames on or near the floor in the approximate area of the building where subsequent evidence determined the pant topper was located. The evidence of the first fire fighters to enter the premises as well as that of Deputy Chief Chiasson does not negate, and in fact is corroborative, of the subsequent determination of Messrs. Penny, Bartlett and Carroll that the floor area in the vicinity of the pant topper was the most likely area of origin in respect to the fire.

[12] As to whether the fire was accidental or deliberate, the trial judge again referred to the opinions of Messrs. Penny, Bartlett and Carroll. All of these witnesses testified that in their opinion the fire was deliberately set. They eliminated all sources of accidental ignition. As evidence of an incendiary fire, they noted irregular burn patterns on the plywood in the vicinity of the pant topper as indicative of an accelerant having penetrated this plywood, and following ignition, having caused the fire to burn downward rather than in its usual configuration of burning upward. The trial judge said:

> Having considered the various speculations advanced by the plaintiff, there is no reasonable alternative conclusion than, at the location of the origin of the fire, an accelerant had been introduced. This accelerant is not accounted for in any of the evidence detailing the chemicals and solvents present in the premises prior to the fire. The only reasonable inference, having considered the evidence as a whole, is that the accelerant was introduced to the floor area, in the vicinity of the pant topper, at some point shortly before the fire and it was the presence of this accelerant having soaked into the plywood that, when introduced to the source of ignition, caused the irregular burns patterns.
>
> The fact a chemical analysis is often inconclusive as to the presence of an accelerant, as stated by Mr. Bartlett, is not a basis on which to justify the failure to conduct such an analysis. However, in the present circumstances, even with the absence of such analysis, I am satisfied the evidence is consistent with a fire incendiary in nature and the suggested explanations to the contrary, including speculation as to spontaneous combustion, electrical causes, mechanical heating causes are nothing more than speculation and are not supported on the basis of

> the evidence tendered in Court. Similarly, I am satisfied the evidence is consistent that the irregular burn patterns were caused by an accelerant intentionally applied to the plywood in the area of the pant topper and the suggested explanations to the contrary, including speculation of flash over, long extinguishing times, hot embers, hot gases, building collapse or the plastic bag film from either the sewing room or loft area, the nylon covering of the suzie, a machine located nearby the pant topper, or, for that matter, any plastic vapour barrier in the roof of the building, having melted and caused these patterns are nothing more than speculations and not supported on the basis of any evidence.

[13] On the question of opportunity, the trial judge said the following:

> In the present circumstances, the plaintiff, on the day of the fire, was the last person to leave the building and on his evidence, when he left, all windows and doors were locked and secured. The only other persons with keys to the premises were Earl Tortola and Barry Campbell, and there is no suggestion that either visited or returned to the premises after the plaintiff left. Also, on the evidence, the premises were secure, with the windows and doors locked, when the fire personnel arrived on the scene, in response to an alarm called in between 5:45 and 6:00 p.m.
>
> Given an incendiary fire, originating within the premises, the inescapable conclusion is that the person or persons responsible either ignited the fire before leaving and securing the premises or had use of a key to enter, start the fire and leave, locking the door behind. Clearly, in the period between Mr. Campbell leaving and the unidentified person calling in the alarm, the plaintiff or someone acting by or at the direction of the plaintiff, had such an opportunity.

[14] Finally, the trial judge decided that motive, on the part of the appellant, was to be found in the approaching expiration of his insurance, in combination with the appellant's deteriorating financial condition. The trial judge referred to the evidence of the marginal profitability of the appellant's dry cleaning business; and, after referring to a series of borrowings by the appellant from the bank, said:

> The sequence of subsequent loan transactions indicates the lack of overall profitability of the business and the necessity to increase debt in order to finance current operations. By the time of the fire, the monthly debt obligations had increased to the point they were a substantial drain on the cashflow and this is reflected by the number of outstanding accounts, some of substantial duration, that existed at the time of the fire. Tait had been unable to pay his insurance premium and had failed to respond to correspondence from his agent requesting the payments be brought up to date. As well, there were outstanding taxes and other debt that was not current as of the time of the fire.

[15] The trial judge then referred to the evidence that the appellant's fire insurance policy was due to expire shortly after midnight on March 30th, 1985, and, therefore, a little more than six hours after the time the fire was initially discovered. The trial judge then said:

> ....There was no evidence Tait had made any real efforts to obtain alternative insurance and his evidence to the effect that his agent had undertaken responsibility to effect an alternative coverage is simply not credible. It is clear from the evidence of both Ms. Morrison and Mr. Hinchey that no such undertaking was ever given to Tait nor was any suggestion made to him by which he could reasonably have assumed his agent had undertaken such a responsibility. Despite Tait's assertion to the contrary, it is clear he knew his insurance was about to expire. His evidence that he was not aware of the status of his insurance at the time of the fire is simply not believable in light of all the other evidence indicating that Mr. Hinchey had, shortly before the fire, informed him of the decision by Royal to deny further coverage, and that the brief extension in order to provide him an opportunity to find alternative coverage was itself due to shortly expire. .....
>
> Motive, on the part of Tait, is to be found in the approaching expiration of his insurance in combination with his deteriorating financial condition.

[16] The appellant testified at length during the trial of this action. He denied having anything to do with setting the fire, that he had no opportunity, nor motive, to set the fire. He expressed his own views on the origin of the fire, and the cause of the fire. The trial judge made the following findings with respect to the appellant's evidence:

> Tait's [the appellant's] tendency to depart from the truth is no better exemplified than by the fact in three statements made shortly following the fire he made no mention of Ms. Durdle [the appellant's common law wife] having accompanied him during his trip to Glace Bay on the evening of March 30th. Apparently it was only later, during discovery examinations held in April 1987, that he first said she was present with him at this time. His response to counsel that he did not want to have her involved in anything pertaining to himself constituted nothing more than an acknowledgement that where it suited his purpose, he was prepared to lie and nothing during his eight days of testimony, nor the ensuing period of the trial, has changed my opinion that where it would most suit his purpose, Tait was and continues to be prepared to mislead and deceive.

And further:

> ..... During the course of the trial, evidence was given and documents introduced of a number of financial statements, for the same years, reported to Revenue Canada, in conjunction with tax filings, and to the Bank of Montreal, in respect to borrowings and ongoing financial reporting. The statements are unsigned, and although denied by Tait as having been prepared by him, clearly were prepared by him or at his direction. There is nothing in the evidence to support the suggestion they may have been prepared by his now deceased accountant without any input or assistance by Tait. It is patently obvious from the statements they were manipulated in order to show reduced levels of income and profitability in respect to the filings with Revenue Canada and increased levels of income and profitability in respect to the filings with Bank of Montreal.

[17] There was a conflict in the testimony between the appellant and the insurance agent as to the appellant's knowledge concerning the status of his fire insurance, and the trial judge decided that where that evidence conflicted, the evidence of the agent was to be preferred. The trial judge also decided that the appellant's evidence was not to be preferred to the evidence of a former employee of the appellant as to certain descriptions of the premises which were destroyed. For example, the trial judge said:

> By way of further example only, Tait testified under direct examination to various electrical problems he had encountered prior to the fire. He was then referred by counsel to his statement given to Douglas Skinner, an insurance adjuster, in which he said: "The electrical was good. I had no problems with it." Later, upon being challenged by counsel for the insurer, he said he had never looked at the statement, although on direct examination by his then counsel, he had acknowledged having read the statements before signing it.

[18] After having reviewed other inconsistencies in the appellant's testimony, the trial judge concluded his general assessment of the appellant's evidence as follows:

> These are not, nor are they intended to be, an exhaustive listing of all the inconsistencies and contradictions in Tait's evidence. Throughout his evidence, and presumably when it suited his purpose, he was evasive in his responses, less than frank in explaining obvious inconsistencies between statements given shortly after the fire to the police and investigators, and subsequent evidence and at trial, and in explaining or clarifying documentary evidence that brought into question the credibility of his oral evidence at trial.

> Although in some instances discrepancies in Tait's testimony appear to be indicative of a decrease in memory over the approximately 12 years since the date of the fire, others are more likely the result of a deliberate intent to deceive. Whatever the origin, it is clear the evidence reflected in the documents and photographs as well as the testimony of other witnesses is to be preferred to that of Tait.

[19] In the first ground of appeal, the appellant's counsel challenges two findings of the trial judge. Firstly, he submits that the trial judge, in his finding as to the origin of the fire, was in error to rely on opinion evidence, because certain assumptions upon which the opinions were based were not borne out by the evidence. Secondly, counsel submits that the trial judge erred in law in deciding that the insurer had discharged its onus of proving that the appellant had opportunity and motive.

[20] These findings of the trial judge are findings of fact based on the totality of the evidence, and based, partly, on findings of credibility. The reluctance of this Court to interfere with such findings, and the standard by which this Court would interfere with such findings, has been repeatedly stated. This Court will not interfere with the trial judge's conclusions on matters of fact unless there is palpable or overriding error, or unless the trial judge has ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it. Nor does the Court of Appeal interfere merely because it takes a different view of the evidence. The findings of fact and the drawing of evidentiary conclusions from the facts is the province of the trial judge, not the Court of Appeal. See **Toneguzzo-Norvell (Guardian Ad Litem of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 (S.C.C.); **Travellers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434 (N.S.C.A.); **Parsons v. Parker** (1997), 160 N.S.R. (2d) 321

(N.S.C.A.).

[21] The opinion evidence, as to the origin of the fire, was corroborated by the evidence of the Deputy Fire Chief, and the firefighters who first entered the building. Further, there was ample evidence to support the trial judge's conclusion that the appellant had both opportunity and motive to set the fire. It is apparent, from the submissions of counsel for the appellant, that he is asking this Court to take a different view of the evidence than did the trial judge. It is not this Court's role to retry the case. The findings of the trial judge are supported by the evidence and, for that reason, this Court should not interfere with those findings.

[22] I would dismiss this ground of appeal.

[23] In the second ground of appeal, counsel for the appellant submits that the trial judge erred in his general approach to the burden of proof on the insurer in an arson case. Counsel's argument is difficult to follow. He appears to be saying that, in rejecting the appellant's own evidence (as to the possible origins and causes of the fire), the trial judge was requiring the appellant to prove that the fire was accidental. He argues that the trial judge placed too much responsibility on the appellant to "explain matters", and diverted the focus from the insurer's obligation to prove its defence.

[24] I reject that submission.

[25] The trial judge placed no onus on the appellant. It is apparent from the decision of the trial judge, and his review of the legal authorities, that he clearly understood that the onus was on the insurer, and the extent of that onus. That is also borne out by the trial judge's conclusions; firstly, that "there is no reasonable alternative conclusion than, at the location of the origin of the fire, an accelerant had been introduced". That the appellant had the opportunity to set the fire was "the inescapable conclusion" of the trial judge. In considering whether the appellant had motive to set the fire, the trial judge considered the deteriorating financial condition of the appellant's business. He noted, however, that financial circumstances "are not conclusive" of motive. The trial judge found, despite the appellant's assertions to the contrary, that the appellant knew that his fire insurance was due to expire shortly after midnight on March 30th, 1985, a little more than six hours after the time the fire was initially discovered; and his finding that there was no evidence that the appellant had made any real efforts to obtain alternative insurance. It was the combination of deteriorating financial circumstances, together with the approaching expiration of the appellant's insurance, upon which the trial judge relied for his conclusion that the insurer had established motive. The trial judge placed no onus on the appellant in coming to these conclusions.

[26] It was the appellant himself, during his testimony, and in cross-examination of the insurer's experts, who suggested alternatives both as to the location of the fire and as to whether the fire was incendiary in nature. Simply because the trial judge rejected, as "speculation", those alternatives which the appellant advanced, is no reason for concluding that the trial judge was placing any onus of proof, on the appellant, in

respect of the insurer's defence.

[27] I would dismiss this ground of appeal.

[28] In considering the appellant's third ground of appeal, it would be helpful to set out a chronology of the events which led to the decision of the trial judge to permit the appellant's counsel to withdraw from the case.

[29] In May, 1985, the appellant retained E. Anthony Ross, Barrister, to represent him. Mr. Ross commenced this action on behalf of the appellant, and continued as solicitor on the record until the events which give rise to this ground of appeal.

[30] In December, 1996, Mr. Ross announced that he was moving his law practice to Toronto, Ontario. Brian Hebert, a former associate of Mr. Ross, agreed to assist at the trial of the action on condition that Mr. Ross ensured that certain financial commitments would be met.

[31] The trial commenced on January 23rd, 1997, and continued for a total of seven days in the month of January, 1997. It became apparent during these seven days that the trial could not be completed in January. Considering the availability of the Court, and counsel, additional dates were set. The trial continued for one day on March 17th, 1997, and for twelve days in May and June of 1997. During the initial eight days of trial, Mr. Hebert was acting as trial counsel for the appellant. Mr. Ross remained as

solicitor on the record, although he was residing, and practicing, in Ontario.

[32] Following the adjournment of the trial, after the March 17th, 1997, date, Mr. Hebert wrote a letter to the Court, which he copied to counsel for the insurer, dated April 5th, 1997, in which he indicated that Mr. Ross, who had remained solicitor on the record throughout, would be handling the matter alone and that further communication should be directed to Mr. Ross. The problem, as far as Mr. Hebert was concerned, was financial. While the matter was being conducted on a contingent fee basis, the appellant had agreed with Mr. Ross to reimburse him for disbursements incurred. Mr. Ross, in turn, agreed to reimburse Mr. Hebert for disbursements incurred. Mr. Hebert had incurred disbursements in the $2,000.00 range, for which he was not reimbursed. Mr. Ross had incurred disbursements in the $14,000.00 range for which he was not reimbursed.

[33] On April 16th and April 23rd, 1997, respectively, the appellant filed complaints with the Nova Scotia Barristers' Society against Mr. Ross and Mr. Hebert. The complaints were not solely related to withdrawal of services. They were both wide ranging complaints concerning delay, inactivity, failure to follow instructions, inadequate representation, etc. Although it is not relevant for the purpose of this appeal, I understand that both of those complaints were subsequently withdrawn.

[34] By letter dated April 29th, 1997, to the Court with a copy to counsel, Mr. Ross indicated that "new developments" made his continued involvement in the case

untenable. He indicated in the letter that he believed it would be in the appellant's best interests to have the matter adjourned to give him an opportunity to retain and instruct new counsel and to arrange for an orderly transfer of the file. The insurer opposed any such adjournment.

[35] On May 5th, 1997, a telephone conference call was held with the trial judge. Mr. Ross, Mr. Hebert and counsel for the insurer participated. The appellant refused to take part in the telephone conference call. He had indicated to the Prothonotary that he wanted the trial to continue and that he did not give permission for counsel to withdraw nor did he wish to request an adjournment. During the telephone conference call Mr. Ross advised the trial judge that because of commitments which he had in the Federal Court he could not possibly be in a position to take the matter forward. Mr. Hebert advised the Court that he could not continue with the case. The trial judge directed that the trial would proceed as scheduled on May 20th, 1997. He further ordered Mr. Hebert and Mr. Ross to file with the Court, counsel for the insurer and Mr. Tait, copies of any documents in connection with any applications they wished to make, in advance, so that the application could be heard on May 20th. Mr. Ross advised the Court that he was not planning to make any application before the trial resumed on May 20th, nor was he planning to appear on that day.

[36] Because there was some concern that material in support of these applications might disclose solicitor and client information to which the trial judge should not be privy, a preliminary application was heard before Justice Goodfellow, in

Chambers, on May 14th, 1997. Justice Goodfellow agreed to "supervise what should go to the trial judge so as not to contaminate the trial in any way".

[37] Justice Goodfellow decided that he would not deal with the application by counsel to withdraw, nor with any request for an adjournment, because he felt those matters should be dealt with by the trial judge. He ruled that certain portions of the affidavits of Mr. Hebert and the appellant be deleted. Revised affidavits were filed with the trial judge by the appellant and Mr. Hebert. No objection was taken, on the grounds of solicitor and client privilege or otherwise, to the revised affidavits.

[38] From a review of the record of the proceeding before Justice Goodfellow, it is clear that the appellant was well aware of his right to apply for an adjournment should counsel be permitted to withdraw from the case. Indeed, when he was directly questioned by Justice Goodfellow as to what he might do in those circumstances, the appellant responded "I would have to seek an adjournment".

[39] On the hearing of the application by Mr. Hebert to withdraw, the trial judge permitted Mr. Hebert to withdraw from the case. He made it clear, however, that he was granting the order solely because of the outstanding, and wide-ranging, complaint which the appellant had filed against Mr. Hebert with the Nova Scotia Barristers' Society. He said the following:

> First of all Mr. Hebert, in my view the financial matters here are not grounds for withdrawal. Chapter 11, Rules 6 and 7, would in my view be applicable, and they would say that this was a critical stage of the hearing since a trial had already

> started, and in my view that would not be grounds for any counsel to withdraw. However I am also privy to the fact that a complaint has been filed, and in that complaint checked off are a number of matters apart from the withdrawal of services, and on that basis I am prepared to grant your withdrawal. That it would be untenable to have a solicitor in Court, in the nature of the complaints made against you by your client, to then have to conduct a case and to feel that you can conduct a case. So I am prepared to grant your withdrawal, but it is not for the financial matters. In my view ... Ms. has amplified on the law and as you can tell I have only seen it this morning, but it seems to me if you look at Rule 6 and 7, clearly this would be such a critical stage that would preclude withdrawal of counsel for financial reasons, even ... because it is not a level playing field in the sense that, although the solicitor may be dismissed by the client virtually at any stage of the proceeding, apart from any agreements in the contingency ... and we are not into all that. The similar right does not exist with the lawyers ... part of their code of conduct, and although the code of conduct is not necessarily law per se, it is certainly highly influential and guiding to the Court.

[40] At the conclusion of these proceedings on Thursday, May 22, 1998, when Mr. Hebert had been permitted to withdraw as trial counsel, and when it was apparent that Mr. Ross would not attend at the trial, the following exchange then occurred between the trial judge and the appellant:

> THE COURT: But I want to know ... he is not here, and Mr. Tait, what do you wish to do? This matter ... you have had counsel for a number of years. You have had Mr. Ross, I gather, I can't remember the exact number of years, 1985. This is litigation that you have commenced or has been commenced on your behalf and affects you obviously and I am trying to, without directing you to do anything, ask you what your preference is today. I will then decide. I will hear from Mr. Miller and Ms. Murray in response, depending on what it is and then I will make a decision, but I have to know today, are you satisfied and confident to go ahead and proceed with the case?
>
> MR. TAIT: Yes, My Lord and I still would like Mr. Ross to represent me.
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> THE COURT: But you realize he is not here?
>
> MR. TAIT: No, I understand that.
>
> THE COURT: So, as a practical matter, do you wish to go ahead today, though ...

> MR. TAIT: Yes.
>
> THE COURT: Knowing he is not here?
>
> MR. TAIT: Yes, yes.
>
> THE COURT: And you are satisfied on that?
>
> MR. TAIT: Yes, My Lord.
>
> THE COURT: Okay, that is all I am trying to get at, okay? I realize you are not agreeing or consenting to Mr. Ross withdrawing. I take it that is what you are saying?
>
> MR. TAIT: Yes, My Lord.

[41] The trial then proceeded, with the appellant being unrepresented by counsel.

[42] On June 5th, 1997, with only two further days left in the trial, the trial judge dealt with an application by Mr. Mozvik, counsel for Mr. Ross, seeking an order to permit Mr. Ross to withdraw as solicitor on the record. At this point in the proceeding, Mr. Ross has had nothing to do with this matter since it resumed on May 20th, Mr. Tait had elected to proceed to represent himself, and there was no request for an adjournment. The trial judge dealt with the application for Mr. Ross to withdraw as follows:

> ... Here's what I'm prepared to do, Mr. Mozvik. Under the circumstances I recognize the reality, that is, that Mr. Ross is not attending but the order -- any order I sign will have to contain a clause that is without prejudice to any rights of any party arising from Mr. Ross' failure to attend at the trial or to represent the plaintiff. I won't sign any order that does not have an exclusion so that my order cannot be used as a basis to excuse his non-attendance. It is simply to recognize

> the reality that he is not here representing the plaintiff with that -- exclusion worded along the general lines that I've said I'm prepared to sign.

[43] The appellant takes the position, on this appeal, that the trial judge erred by permitting trial counsel to withdraw from the case, and by failing to order counsel to appear and represent him under the circumstances. Alternatively, the trial judge erred in not adjourning the case, in any event, to permit the appellant to obtain and instruct other counsel. On the basis of those alleged errors, the appellant requests a new trial.

[44] In my opinion, there is no basis in law to order a new trial of this matter and the following are my reasons for coming to that conclusion.

[45] The appellant was aware, at the time of the hearing before Justice Goodfellow, that if his counsel were permitted to withdraw, he would be entitled to seek an adjournment. He stated before Justice Goodfellow that if his counsel were permitted to withdraw "I would have to seek an adjournment". The appellant chose not to do that. He insisted, before the trial judge - when Mr. Hebert was permitted to withdraw and when he knew that Mr. Ross was unavailable - to proceed with the trial on his own. He did not request an adjournment. Having completed the trial, and having lost his case, he cannot now be heard to request a new trial because he should have asked for an adjournment, or because the trial judge should have adjourned the matter in any event, notwithstanding his stated wish to proceed on his own.

[46] This trial lasted 20 days. There were 22 witnesses testifying about a matter

that had taken place 12 years ago, in 1985. Three expert witnesses testified on behalf of the insurer. It is obvious that the trial involved great expense to the insurer. The insurer had nothing to do with the problem that arose, during the trial, between the appellant and his counsel. The insurer's rights have to be taken into account here. A new trial would be dealing with a matter which happened 15 years ago. There would be additional great cost and inconvenience to the insurer, to say nothing about the costs and inconvenience to the court system. Cogent reasons would have to be advanced to warrant such a retrial, and such reasons have not been advanced by the appellant.

[47] During the course of oral argument, counsel for the appellant submitted that there were real deficiencies in the presentation of the appellant's case at trial because he was forced to represent himself. He made reference to the failure of counsel for the insurer to file experts' reports of Messrs. Carroll and Penny. He referred also to the lack of qualifications of Mr. Bartlett to give opinion evidence. These submissions have no merit. The opinions of Messrs. Carroll and Penny were elicited during their respective pre-trial discovery examinations by Mr. Ross. Notice was provided by counsel for the insurer to the appellant's counsel - before the trial - that these witnesses would be called to provide that opinion evidence which was given on discovery. With respect to Mr. Bartlett, the trial judge accepted him as qualified to give opinion evidence. There was evidence to support that decision. These submissions provide no basis for ordering a new trial of this matter.

[48] There are two points which I note, here. Firstly, the entire time period during

which the appellant was on the witness stand (eight trial days), testifying in support of his claim, both on direct and cross-examination, he was represented by Mr. Hebert. Secondly, prior to the trial the appellant's counsel, Mr. Ross, had retained an expert to give an opinion on the origin and cause of the fire. At a pre-trial conference, counsel advised the court and counsel for the insurer that the author of the opinion would not be called as a witness.

[49] In general terms, I agree with the submission of counsel for the insurer that this case involved overwhelming evidence in favour of the findings and conclusions reached by the trial judge. There is no basis upon which this Court can, or should, interfere with the trial judge's decision.

[50] I would, therefore, dismiss this appeal. I would order the appellant to pay to the respondent its costs of this appeal which I would fix at $2,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Hart. J.A.

Bateman, J.A.