NOVA SCOTIA COURT OF APPEAL

Citation: D. Roper Services Ltd. v. Cape Breton Development Corporation, 2005 NSCA 7

Date: 20050120
Docket: 183925
Registry: Halifax

Between:

D. Roper Services Limited

Appellant
Respondent by Cross-Appeal

v.

Cape Breton Development Corporation

Respondent
Appellant by Cross-Appeal

Judges:	Cromwell, Oland and Hamilton, JJ.A.
Appeal Heard:	September 14, 2004, in Halifax, Nova Scotia
Held:	Appeal and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Vincent Gillis, for the appellant/ respondent by cross-appeal Aidan Meade and John W. MacDonald, for the respondent/appellant by cross-appeal

Reasons for judgment:

I. Introduction:

[1] The Cape Breton Development Corporation ("Devco") invited tenders in the spring of 1985 for the banking, blending and lifting of coal products at its Victoria Junction Coal Preparation Plant. D. Roper Services Limited ("Roper") was the successful bidder. Roper commenced work under the contract in July of 1985 and continued working until the contract was terminated by Devco in March of 1986.

[2] Devco sued, claiming that Roper had been unable to provide the services required under the contract. Devco claimed damages including the revenue lost from plant down time, the cost of renting substitute equipment, the cost of contracting for substituting services and the payments advanced to Roper in excess of work performed. Roper defended and counterclaimed in negligent misstatement and breach of contract. Roper alleged that Devco negligently estimated the quantities of product to be handled under the contract and, as a result, induced Roper to enter into a contract from which it was unable to derive anticipated profits and from which it incurred start up costs and operating losses. Roper also alleged various breaches of contract by Devco including wrongful termination.

[3] The action was tried over nearly 30 days before MacAdam, J. in the Supreme Court (reported at (2001), 202 N.S.R. (2d) 201). The trial judge held that both parties had breached the contract, Roper by failing to perform and Devco by failing to provide the approximate tonnages set out in the invitation for tenders and the contract.

[4] The judge assessed damages in favour of Devco in the amount of $270,307.05. These damages related mainly to the costs incurred by Devco in obtaining substituted performance of the contract and the refund of overpayments made to Roper for which no work had been performed. The judge also awarded $10,000 damages to Roper. These damages related to Roper's additional effort, costs and expenses beyond that contemplated in the contract. Aside from that, he awarded nothing to Roper. Critical to the judge's determination of Roper's damages was his finding that even if Roper had performed the contract and Devco had provided the approximate tonnages set out in it, Roper would have continued to operate at a loss. As a result, the judge held that Roper did not suffer any loss as a result of Devco's termination of the contract.

[5] Roper appeals, arguing that the judge erred in finding that it was in breach of contract, in failing to find Devco liable in negligent misstatement and in assessing damages as he did. Devco cross-appeals, submitting that the judge erred in finding that Devco was in breach of the contract and in holding that it was not entitled to rely on the exclusion from liability provisions in it.

[6] In my view, the appeal should be dismissed. Roper's appeal is directed primarily at the trial judge's findings of fact. However, the judge did not make any reviewable error with respect to the facts. As for the cross-appeal, Devco acknowledges that if the appeal fails, the cross-appeal will have no effect on the trial judge's order. It is, therefore, not necessary to address the issues raised by cross-appeal and it, too, should be dismissed.

II. Overview of the Facts and Findings of the Trial Judge:

[7] To understand the issues on appeal, it is necessary to know something about Devco's operations, about the tender and about the subsequent contract which has given rise to the dispute. I will set out that background and then turn to the claims made by the parties at trial and the key findings made by the trial judge.

1. Devco's operations:

[8] Devco mined coal from its Prince and Lingan Mines. The coal from the Lingan Mine was shipped by rail to the Victoria Junction Coal Preparation Plant ("VJCPP") for waste rock separation, ash removal and sulphur reduction. The so-called clean Lingan coal, which was the output of the VJCPP, was trucked from the plant load-outs to storage banks at the lifting and banking centre ("LBC"). Prince Mine coal was trucked to the LBC by independent contractors or Devco's own fleet.

[9] Coal was mixed at the LBC by banking and blending in order to achieve the required quality for use in electric power generating plants (thermal coal) or for the steelmaking industry (metallurgical coal). The various banks of coal were located in three general areas: a rectangular paved area, an area along "H" track and an area along "C" track.

[10] The banks were adjacent to rail lines. Front end loaders were used to lift coal from the base of the bank and deposit the contents of the loader's bucket into the rail car. Bulldozers were used along the banks to push the coal over the upper edge down to the loaders. This operation allowed the loaders to dig relatively loose coal without undermining the bank face.

Following banking and blending, rail cars were loaded with coal at the LBC for shipment to customers. Devco had its own rail cars for delivery to its customers and to transport coal to the international pier for loading on to ships.

[11] The banking, blending and lifting operations were carried out by an independent contractor. The contractor, in addition to banking, blending and lifting, was responsible for maintaining the banks and for cleaning access roads and ditches.

2. The tender:

[12] In the spring of 1985, the contract for banking, blending and lifting was coming to an end and Devco put the work out for tender. Fifteen contractors were invited to tender on a contract which was to run from June of 1985 to March of 1988. Roper responded and its bid was the lowest. The tender included unit prices, a list of equipment to be used, hourly rental rates and a single stand-by rate applicable to each piece of equipment.

[13] A pre-award meeting was held in May of 1985 among representatives of Devco and Roper. Donald Roper advised Devco that he did not have the equipment listed in the tender. He assured Devco, however, that it would be on site within two weeks of notification of the award of the contract. Devco awarded the contract to Roper.

3. The contract:

[14] The contract consisted of a purchase order and the general conditions and specifications set out in the invitation to tender which the purchase order incorporated. The purchase order covered the equipment rental costs and services required for the coal handling – banking, blending and lifting -- at the LBC and the VJCPP from June 17/85 to March 31/88. It listed the cost description, as tendered by Roper, for eight items:

Item1	The banking and blending of approximately $3,387,500 tonnes of VJCPP product at an average rate of approximately 2500 per shift at the rate of 35¢ a tonne.
Item 2	The banking of approximately 875,000 tonnes of thermal product from the VJCPP. This product could be from either the Thermal chute or the Met Chute, depending on the operation mode at the plant at the rate of 35¢ a tonne.

Item 3	The banking of approximately 980,000 tonnes of Metallurgical product from the VJCPP at a rate of approximately 3000 tonnes per shift at the rate of 35¢ a tonne.
Item 4	The blending and banking of approximately 3,906,228 tonnes of Prince Mine, Selminco and Guildcraft products delivered by CBDC and contracted vehicles at 20¢ per tonne.
Item 5	The banking of approximately 170,000 tonnes of Domestic screened and Pea products from the Thermal Loadout area. To a designated banking area. The Contractor will be required to use a bin radial stacker to handle these products to prevent extra handling and deterioration of quality and sizing.
Item 6	The lifting from various stockpiles of approximately 9,438,000 tonnes of product from the LBC and VJCPP at 18¢ per tonne.
Item 7	Stand by rate - Banking and Lifting:
	Banking, 680 hours
	Lifting, 680 hours = 1,360 hrs. at $22.00 per hr.
Item 8	Equipment rentals, Extra work, To cover machine rentals required for extra work outside specifications of contract for coal handling.
	Loaders, Cat. 992, 13 cu. yd. at $65.00/hr.
	Rubber Tire Dozer, 988 at $45.00/hr.
	Graders at $36.00/hr.
	Dozer, D-8 at $48.00/hr.
	Loader A-66 at $46.00/hr.
	Tandems at $30.00/hr.
	Tractor Trailer c/w bottom dump trailers @ $38.00/hr.

> From the time of the commencement of this work until the completion of same, you are to maintain insurance against any claims under Workmen's Compensation Acts, also any other claims for personal injury including death, also property damage which may arise from your operation under this contract.
>
> NOTE: Any change in cost of fuel, wages or subsidy rates subject to negotiation.

[15] With one exception, these cost descriptions contained the same estimated quantities of coal as set out in the invitation to tender documents. The exception relates to Item 4 in which the invitation to tender had referred to 4,503,300 tonnes of Prince Mine Selminco and Gillcraft products whereas the purchase order, as noted, refers to 3,906,228 tonnes.

[16] As noted, the contract also included a number of other specifications and conditions. Its term was three years on a three shift per day and five day per week for banking or seven days per week for lifting schedule. The trial judge summarized the other key provisions of the contract as follows (para. 11):

> Clause 1 "Contract Term" - Contract was to run from June 17, 1985 to March 31, 1988 "subject to cancellation - Clause 14".
>
> Clause 2 "Work Schedule" - The work was to be carried out twenty-four hours per day on a three-shift basis as needed. The banking and blending work was to be a five-day week on an "as required basis". The lifting was to be a seven-day week, again "as required". As well the contractor was to arrange his operations to coincide with the schedule of the Coal Preparation Plant and delivery of coal from other sources, as well as the lifting schedule as determined by the Superintendent of Coal Handling".
>
> Clause 5 "Contractor's Equipment" - The contractor was required "to supply and maintain" sufficient equipment. In particular, this clause listed trucks, regular dumps and/or bottom dump trailers, graders, rubber-tired dozer and loaders. This clause expressly stated that "delays in operations due to breakdown of equipment will not be tolerated. The contractor shall maintain sufficient standby equipment to prevent delays due to equipment failure". Devco reserved its right to reject equipment not in proper repair and to substitute from other sources at the contractor's expense if Devco deemed it necessary to maintain a continuous and consistent operation.

Clause 6 "Banking - CPP" - This clause also emphasized the need to have sufficient equipment available. In particular the contractor was to have enough equipment to truck coal from the wash plant and take it to the banking areas. Banking was to be carried out on an "as required" basis. It also called for the contractor to maintain banking areas in general.

Clause 7 "Banking & Blending Prince Coal & Other Production" - This clause once again emphasized the requirement to have sufficient equipment on hand to handle the banking and blending of coal from the Prince Mine as well as other sources. Prince Coal was to be blended with product from the wash plant.

Clause 8 "Lifting" - This clause set out in detail the many obligations of the contractor relating to lifting off banked and blended coal. There was emphasis placed on avoiding "unnecessary delays". Once again the contractor was obligated to "maintain sufficient loading equipment on the site". With regard to the CN railcars, the contractor was obliged to load to the proper weight.

Clause 10 "Coal Tonnages" - This clause is short but important in the context of this action and is therefore set out in full:

> "The tonnages of coal indicated in this Contract are approximate and are based on the latest information available. The Corporation assumes no responsibility for quantities above or below the tonnages indicated".

Clause 12 "Inspection" - This clause required the contractor to "thoroughly familiarize himself" with operations at the wash plant and LBC before submitting a bid.

Clause 14 "Contract Cancellation" - Again this is a short but important clause and is out in full:

> "This contract may be cancelled by either party following written notice thirty (30) days in advance of such intention or by mutual agreement by both parties."

4. Roper's Equipment:

[17] An important issue at trial was whether Roper had sufficient suitable equipment to perform the contract. The background, in brief, is this.

[18] On receipt of the purchase order, Roper advised Devco that it was not able to put the equipment on site by June 17th, 1985. There was a meeting with Devco on June 12th at which Roper estimated it could be on site by July 24th. Devco agreed to accommodate Roper by postponing the commencement of the contract to that date.

[19] Roper engaged the services of a Mr. Fisher, an equipment broker, to locate and arrange for the purchase of equipment suitable for the coal handling contract. Fisher was not called to testify. Roper eventually purchased an assortment of used equipment. Devco representatives saw Roper's equipment shortly after it arrived on the property. While they knew that it was different from the list in Roper's tender, they could not see anything inherently wrong with what Roper had purchased.

[20] Roper experienced problems with its equipment from the start. Breakdowns began in early August and increased in frequency and severity until Devco terminated the contract in March, 1986.

5. Work at "C "and "H" Tracks; Quantity of Coal; Contract Amendment:

[21] Roper raised concerns that the amount of coal being made available by Devco was considerably less than that contemplated by Devco's estimates in the invitation to tender and the contract. The lower quantities meant less money coming in for Roper.

[22] Roper's accountant suggested an amendment to the contract to allow for a weekly draw based on projected production. Devco agreed. The contract was amended in December of 1985 to provide for a weekly draw in an amount not to exceed $33,000.00 to be credited against the amounts owed by Devco to Roper for work performed under the contract. These weekly draws were paid by Devco to Roper beginning in mid-December until the termination of the contract in March of 1986.

[23] A significant issue at trial related to the operations at "C" and "H" tracks. Roper's position was that it was required to do far more work in these areas than contemplated by the contract and that this, in turn, adversely affected its ability to carry out the contract work.

[24] The trial judge found, and it is not now in dispute, that Roper's contractual obligations at "C" and "H" tracks were limited to depletion of banks existing as of the commencement of the contract. It appears to be common ground that a portion of Clause 8 of the contract, understood in the context of Devco's operations and the intentions of the parties, leads to this result. That portion of Clause 8 reads as follows:

> The Contractor shall maintain sufficient loading equipment and personnel on each shift to load rail cars and/or trucks with coal from the various stockpiles at the Coal Preparation Plant until their depletion.

[25] Devco's position was that only one new bank was built at "H" track and that there were only 12 days of lifting from that bank from January 1986 until the termination of the contract on March 11th. Roper's counsel conceded, during argument of the appeal, that all work performed by Roper on "H" track up until January was contract work and that, as "C" track was never depleted, all work performed there was contractual.

6. Termination of the contract:

[26] Clause 14 of the contract permitted either party to terminate the contract on 30 days written notice:

> 14. Contract Cancellation
>
> This contract may be cancelled by either party following written notice thirty (30) days in advance of such intention or by mutual agreement by both parties.

[27] From Devco's perspective, Roper's performance of the contract was a shambles. It terminated the contract effective March 11th, 1986 without notice.

7. Devco's claims:

[28] Devco sued for damages for breach of contract. Its position was (and is) that Roper simply could not perform the contract and that Devco is entitled to be reimbursed for the money it expended in securing alternative performance through renting equipment and hiring others to do the needed work. It also claimed for overpayment it says was made to Roper under the draw system set up in the amended contract.

8. Roper's claims:

[29] Roper claimed for damages for breach of contract, in particular for its loss of profit, alleging that the tonnages supplied by Devco were so substantially less than the estimates given in the contract that Devco was in breach. Roper also claimed against Devco in negligent misrepresentation. In essence, Roper claimed that the estimates of the quantity of coal were negligently made and induced it to enter into the contract. In addition, Roper claimed for losses it suffered in the forced liquidation of its equipment after Devco's termination of the contract and sought exemplary damages for what it said was Devco's bad faith.

9. The trial judge's findings: liability

a. breach by Roper:

[30] The trial judge found that Roper had breached the contract fundamentally and that Roper's inability to perform justified Devco's termination: para. 191. As explained by the Supreme Court of Canada in **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at para. 50, fundamental breach "... permits the non-breaching party to elect ... to put to an end all remaining performance obligations between the parties." This is what Devco purported to do and the trial judge found that Roper's breach entitled it to do so.

[31] The trial judge concluded that "[c]learly Roper Limited was unable to perform its obligations under and pursuant to the contract." (para. 94) In addition, the trial judge found that Roper was only "modestly successful" in obtaining substitute or third party rental equipment. This meant that Devco had to bring additional equipment on site to carry out the work: para. 85. The trial judge found that "... it is clear that in the vast majority of occasions Roper Ltd. was simply unable to provide substitute equipment as required.": para. 41.

[32] The trial judge emphatically rejected Roper's contention that the work it was required to do at "C" and "H" tracks was any sort of justification for its failure to perform the contract: para. 51.

b. breach by Devco

[33] The trial judge found that "..., there was undeniably a very substantial shortfall in the tonnages generated by Devco as compared to the tonnages set out in the purchase order." The trial judge accepted Roper's position that,

during its performance of the contract, the tonnages handled were between 30 and 40% less than the estimates contained in the invitation to tender and the contract: paras. 96 and 148. He found that Devco had contracted to provide the approximate tonnages indicated. While the tonnages of coal were approximate and, therefore, not warranted, this did not put the tenderer on notice in setting its rates that the volumes could vary by as much as 30 or 40% as they did. The judge found that the parties contemplated that the rates would be calculated on the basis of approximate tonnages and that the anticipated tonnage directly affected both the rate to be charged per tonne and the amount of equipment the tenderer was required to have on site.

[34] While Clause 10 of the contract stated that Devco assumed no responsibility for quantities being above or below the estimates, the judge found Devco could not rely on this clause. He concluded that Devco's failure to provide the approximate tonnages referred to in the contract was a fundamental breach and that it would be unconscionable to allow Devco to rely on this exclusion of liability: para. 151.

[35] A "fundamental breach" of the contract by Devco would have given Roper the right to terminate the contract, but Roper did not do so. It follows, as the trial judge was careful to point out at para. 153 of his reasons, that the concept of "fundamental breach" in the context of Devco's tonnage estimates is relevant only to the issue of whether Devco could rely on the exclusion of liability clause relating to its estimates. The trial judge did not hold that Devco's own breach of contract in any way undermined its right to terminate the contract as a result of Roper's breach.

[36] The trial judge rejected Roper's claim in negligent misstatement. The invitation to tender and the contract indicated that "the tonnages of coal indicated ... are approximate and are based on the latest information available." The trial judge found that Roper had failed to establish that the representation that the tonnages indicated were based "... on the latest information available" was untrue: para. 132. He also found that there was no evidence of negligence on Devco's part in formulating the estimates. Accordingly, the negligent misstatement claim was dismissed: para. 137.

[37] The trial judge rejected Roper's claim arising from alleged forced liquidation of its equipment: para. 177. The judge also rejected Roper's claims that Devco acted in bad faith or treated Roper unfairly: paras. 34 to 38. Roper's claim for exemplary damages was therefore dismissed.

10. The trial judge's findings: damages

a. Devco's damages

[38] The trial judge found Roper liable for sums Devco paid to rent equipment when Roper's equipment was not available, to restore conditions of the banks after termination and to repair damage to certain of its property caused by Roper. The trial judge also found that by the time of termination, Roper had received more money under the weekly draw than it was entitled to for the work done. The assessment of Devco's damages under these headings was as follows:

Rental of Equipment	$130,179.00
Restoration of Banks	$46,582.00
Damage to Devco Rail Cars, Steel Cable & Sling	$1,432.00
Overpayment to Roper	$92,114.05
Total Devco Damages:	$270,307.05

b. Roper's Damages:

[39] As noted, the trial judge rejected Roper's contention that the work it was required to do at "C" and "H" tracks was any sort of justification for its failure to perform the contract: para. 51. He found that Roper had been paid for the coal banked and blended on "C" and "H" tracks. In the judge's view, the only issue was whether the continued activities at these tracks entitled Roper to some reimbursement for any additional cost or expenses incurred by the continued use of these tracks: para. 181. In the absence of evidence as to the actual extra costs, and recognizing the virtual impossibility of establishing them, the trial judge found that Roper was entitled to fair and reasonable compensation under this heading. He assessed this in the amount of $10,000.00: para. 193.

[40] The trial judge rejected Roper's claim for loss of profit. He concluded that Roper operated at a loss during the period preceding the termination of the contract. He also found that it had been established beyond the balance of probabilities that Roper would have continued to lose money until its conclusion had it not been terminated. This would have been so, he found, even if Devco had supplied the approximate tonnages referred to in the

purchase order. He stated: "... there [was] nothing in the evidence to suggest Roper Ltd. would have ever achieved a profit, even if the tonnages suggested in the purchase order had been provided." (emphasis added): para. 172.

[41] The judge, therefore, found that there was no loss of profits arising as a result of Devco's termination. He further found that Clause 14 of the contract, permitting termination on 30 days' written notice, would have the effect of limiting any such damage claimed to 30 days from the date Devco actually terminated the contract: para. 192.

[42] Apart from the $10,000 which he awarded to Roper for extra work at "C" and "H" tracks, the judge dismissed all of Roper's damage claims.

III. Issues:

[43] In my view, the issues that determine the outcome of the appeal and cross-appeal are these:

1. Did the trial judge err in finding that Roper breached its contract with Devco and that the breach entitled Devco to terminate the contract without notice?

2. Did the trial judge err in awarding Devco damages?

3. Did the trial judge err in finding that Devco was not liable to Roper in negligent misrepresentation?

4. Did the trial judge err in finding that any breach of contract by Devco did not occasion loss to Roper?

IV. Analysis:

1. Standard of Review:

[44] Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the facts and to all of the trial judge's findings whether based on findings of credibility or not: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235 *per* Iacobucci and Major, JJ. at paras. 10 and 23 to 25.

[45] Mixed questions of fact and law, such as the application of a legal standard to a set of facts, should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be extricated from the mixed question of law and fact. Where that is possible, the alleged legal error should be reviewed on the standard of correctness: **Housen, supra** at paras. 26 through 35.

[46] Errors of law, such as the misstatement of a legal principle or a wrong characterization of a legal standard, attract the correctness standard of review: **Housen**, paras. 33-34.

2. Did the trial judge err in finding Roper in breach of contract justifying Devco's cancellation of the contract without notice?

[47] Roper acknowledges that there were production problems. Its principal argument, however, is that these problems arose from the fact that Devco required Roper's crews to spend inordinate amounts of time at the old coal bank sites at "C" and "H" tracks. Roper submits that Devco made a substantial change to the contract because it continued to stockpile coal at "C" and "H" tracks in addition to the operations at the new LBC. The working conditions at "C" and "H" tracks were difficult, says Roper, and this caused reductions in productivity and failure of equipment. Roper goes so far as to say that it "should not even have been operating" at "C" and "H" tracks and that the work at "C" and "H" tracks "was mostly outside the contract."

[48] These submissions attack the trial judge's findings of fact. In essence, Roper's position is that the trial judge did not "... fully take into account and draw the proper inferences from the testimony of witnesses who said Roper's equipment complied with job requirements ... or the evidence with respect to the damage that was being done to Roper's equipment by continuing to work at "C" and "H" tracks. ..." Roper submits that the trial judge drew an inference that was "unsupportable on the evidence" when he concluded that Roper's equipment was not suitable to the job and the production problems resulted from that.

[49] In summary, Roper says that the evidence at trial supports the submission that Devco's own actions and changes to the contract regarding where Roper was working ultimately caused the equipment and production problems.

[50] With respect, these submissions amount to an invitation to retry the case. While there was some evidence to support the position Roper now advances, this evidence was clearly not accepted by the trial judge. There was much

evidence to support his conclusions. I can see no palpable and overriding error made by the trial judge in reaching the conclusions he did.

[51] Roper's submissions exaggerate the extent of non-contractual work performed at "C" and "H" tracks. As noted earlier, the contract contemplated depletion of the banks at these locations. During oral argument, counsel for Roper conceded that all work done at "C" and "H" tracks until January of 1986 was work contemplated by the contract. It was also conceded that the banks at "C" track were not depleted prior to the termination of the contract. That being so, it is impossible to accept the submission that the trial judge erred by failing to find that there had been any major redirection of work to "C" and "H" tracks that was not contemplated by the contract.

[52] Similarly, I cannot accept the appellant's submission that the judge erred in finding that the work on "C" and "H" tracks caused Roper's equipment failures. Mr. Sobek, a senior mining engineer, gave evidence concerning heavy equipment utilization and productivity with respect to coal operations and the likely causes of equipment failure. Briefly put, he said that Roper's equipment failed because it was old, not because of the working conditions at "C" and "H" tracks. His evidence was to the effect that Roper's front end loaders and coal haulers were available on average 66 and 65% of the time, respectively. He further testified that acceptable industry standards of availability would be between 80 and 90% and that less than 70% over long durations indicates fundamental flaws in the equipment and/or maintenance practices. Mr. Sobek's opinion was that "excessive wear and tear and breakdown are the result of purchasing used equipment which we consider to be beyond their normal (industry standard) useful and productive lives." He rejected Roper's contention that the working conditions at "C" and "H" tracks contributed to the equipment problems, dismissing this effect as "negligible."

[53] Mr Sobek's opinion is supported by the evidence concerning extent of the work at "C" and "H" tracks. The vast majority of that work was contemplated by the contract. There was no evidence before the Court that the banks at "C" track were ever depleted and only one new bank was constructed at "H" track. After January of 1986, there was only minimal lifting carried out at "H" track and no lifting from "C" track.

[54] The trial judge obviously accepted Mr. Sobek's evidence and opinion and reached the following conclusions:

> **[51]** I am satisfied, to the extent Roper Ltd. was required to lift from "C" and "H" tracks, this was consistent with its obligations under the contract, providing the coal lifted had existed on the tracks at the time Roper Ltd. came on site. To the extent there was any banking or other lifting at either "C" or "H" track, this was additional to the contract. Although these were not, as suggested by Roper Ltd.'s counsel, some kind of justification for the equipment failures, I am satisfied there was additional time, effort and expense incurred in such activities.
>
> ...
>
> **[93]** The inability of [Roper's] equipment to perform as required is evident from the tabulation of breakdowns noted in the various shift reports ...
>
> **[94]** Clearly Roper Limited was unable to perform its obligations under and pursuant to the contract.

[55] In essence, counsel for Roper submits that the trial judge should have preferred the evidence of Mr. Ryder, its expert, to that of Mr. Sobek. However, counsel is unable to point to any palpable or overriding error in the trial judge's assessment of this evidence.

[56] The judge's decision to accept the evidence of Mr. Sobek should not be interfered with on appeal. I conclude that the trial judge made no palpable and overriding error in concluding that Roper was unable to perform its obligations under the contract or in rejecting Roper's contention that Devco's banking at "C" and "H" tracks contributed to Roper's inability. His finding, to paraphrase **Guarantee Co. v. Gordon Capital**, **supra**, at para. 50, was of a failure in Roper's performance of its obligations under the contract that deprived Devco of substantially the whole benefit of the contract. That being the case, the trial judge was right to conclude that this failure entitled Devco to terminate the contract without notice.

3. Did the judge err in awarding Devco damages?

[57] Roper submits that the judge erred in awarding any damages to Devco because he found that it was in "fundamental breach" of its contractual obligation to Roper. I reject this submission for two reasons.

[58] First, the judge made it clear that Roper did not at any point seek to terminate the contract, but instead continued to perform and obtained concessions by way of the weekly draw: para. 145. From Roper's perspective, the contract continued. Any breach by Devco, therefore, did not

undermine Devco's ability to terminate the contract as a result of Roper's breach.

[59] Second, the judge, in relation to Devco's breach, used the term "fundamental breach" only in the sense that the term is relevant to the effect of the exclusion of liability for the estimates contained in para. 10 of the contract. As he said at para. 153 of his reasons, "[t]he concept of fundamental breach is only relevant, in the present case, as a descriptive phrase for the nature of the failing by Devco, and it is in the construction of the exclusion clause that I have denied Devco exemption or exclusion from the breach."

[60] I therefore do not agree that the judge's use of the term "fundamental breach" in relation to Devco precluded the judge from awarding damages to Devco for Roper's failure to perform its obligations under the contract.

4. Negligent misrepresentation:

[61] As noted earlier, the invitation to tender and the contract contained estimates of the tonnages of coal to be banked, blended and lifted. These tonnages were indicated to be "approximate" and "based on the latest information available". Roper claimed that these estimates were negligently made by Devco and that Roper relied on them to its detriment.

[62] As noted, the trial judge rejected this claim. He set out the five elements of a claim in negligent misrepresentation as described by Iacobucci, J. in **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87 at p. 110:

> (1) there must be a duty of care based on a "special relationship"...
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> (2) the representation in question must be untrue, inaccurate or misleading;
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> (3) the representor must have acted negligently in making said representations;
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> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
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> (5) the reliance must have been detrimental to the representee in the sense that damage resulted. ...

[63] The trial judge found that Roper's claim failed primarily on the third element of the test: Roper failed to prove that Devco had been negligent in making the estimates.

[64] Roper challenges this conclusion on two bases. First, it is submitted that the burden of proof was on Devco to show that the information was compiled with reasonable care. Second, it is submitted that the trial judge erred in failing to draw the inference of negligence from the evidence presented. I do not accept either of these submissions.

[65] With respect to the first, the burden of proof of negligence was on Roper: **Hedley Byrne & Co. v. Heller & Partners Ltd.** , [1964] A.C. 465 *per* Lord Morris at 493; G.H.C. Fridman, *The Law of Torts in Canada* (2nd ed., 2002) at 403.

[66] As for the second point, the trial judge accepted the evidence of Devco's witness, Mr. MacVicar. He testified that he used the latest figures received from the production and marketing divisions in preparing the estimated tonnages. The trial judge also pointed out that the mere fact that a statement of future expectations turns out to be inaccurate, as these projections did, does not mean the statement was made negligently: para. 136.

[67] These findings of fact and the drawing of appropriate inferences are reviewable on the palpable and overriding standard. In my respectful view, the appellant has not met the standard of appellate review with respect to these conclusions. The judge did not err in dismissing Roper's claim for negligent misrepresentation.

5. Did the trial judge err in finding that any breach of contract by Devco did not occasion loss to Roper?

[68] The trial judge found as a fact that even if Devco had provided the tonnages estimated in the purchase order, Roper would still have lost money had it continued to perform the contract. In this respect, the trial judge accepted the evidence of Devco's witness Grant Thompson, an accountant, that using the tonnages provided for in the purchase order, Roper would still have incurred a loss over the term of the contract: para. 172.

[69] Assuming, without deciding, that Devco was in breach of contract, I see no error on the part of the trial judge in concluding that Roper had failed to prove damages. It was open to the judge to accept Mr Thompson's evidence and I see no palpable and overriding error in his having done so.

[70] Roper alleged that Devco exhibited bad faith in its dealings with Roper. The trial judge rejected these submissions: paras. 34 - 40. Roper's appeal against this finding was not strongly pressed during oral argument and I can see no error on the part of the trial judge in rejecting this claim. It follows that the

judge did not err by refusing the exemplary damages which Roper claimed on the basis of this alleged bad faith by Devco.

[71] Roper also claimed just under $300,000.00 as loss on the sale of its assets, maintaining that as a result of the early termination of the contract, the assets were sold at less than their value. Even if the judge had found Devco in breach for wrongful termination, he would have rejected this claim. He found that there was "no satisfactory evidence the liquidation of the equipment purchased by Roper Ltd., as a result of the termination of the contract, resulted in any loss that is otherwise claimable against Devco.": para. 177.

[72] In reaching this conclusion, the trial judge once again relied on Mr. Sobek's evidence. It was to the effect that Roper paid substantially in excess of market value for the equipment that it purchased, that the liquidation of the equipment occurred some time following the termination of the contract and that there was insufficient evidence to show that the amounts received on the sale were anything but appropriate given the state of the equipment at the time. The trial judge said:

> [176] On the evidence, it appears Roper Ltd. paid at least *"premium"* prices for this equipment; it was old at the time it was first placed on the site and it suffered a series of repeated breakdowns. It is therefore not surprising the amounts realized were substantially less than the apparent amounts paid by Roper Ltd. for the equipment, particularly the amounts as summarized in the Ryder report. Thompson, in his report, notes if the equipment had been depreciated over the term of the contract, the additional depreciation would have eliminated the suggested loss on disposal.
>
> [177] There was no satisfactory evidence the liquidation of the equipment purchased by Roper Ltd., as a result of the termination of the contract, resulted in any loss that is otherwise claimable against Devco. In the circumstance, I am satisfied there was no loss from any forced liquidation arising from the termination of the contract.

[73] Roper has not shown that the trial judge made any reviewable error in reaching these conclusions.

[74] In view of the conclusions I have reached, it is not necessary to consider whether Devco was entitled to rely on its early termination clause to limit losses by Roper.

5. Other issues:

[75] In light of Devco's concession that if the trial judge's assessment of damages is upheld, the issues raised by way of cross-appeal would have no practical effect on the outcome, it is not necessary to address those issues.

V. Disposition:

[76] I would dismiss the appeal with costs fixed at $5,000.00 plus disbursements. I would dismiss the cross-appeal without costs.

Cromwell, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.