NOVA SCOTIA COURT OF APPEAL
Citation: ***Morash v. Purdy***, 2011 NSCA 123

Date: 20111222
Docket: CA 339400
Registry: Halifax

Between:

Terrance Morash

Appellant

v.

Stephen Michael Purdy and Derek Andrew Purdy

Respondents

Judges:	Saunders, Beveridge and Farrar, JJ.A.
Appeal Heard:	September 27, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Saunders and Beveridge, JJ.A. concurring.
Counsel:	Jeff Aucoin, for the appellant Matthew J.D. Moir and Theresa Graham, for the respondents

Reasons for judgment:

Overview:

[1] In the action giving rise to this appeal, the respondents Stephen Michael Purdy and Derek Andrew Purdy sought damages arising from a fire which was found to have originated on the appellant, Terrance Morash's property. The respondents claimed amounts for damage to a steel Quonset hut owned by them, which they used in the operation of their fishing business.

[2] Nova Scotia Supreme Court Justice Gregory Warner in an oral decision dated June 16th, 2010 (unreported) awarded the respondents damages in the amount of $157,408.36 together with pre-judgment interest in the amount of $7,181.26, party and party costs in the amount of $24,750 and disbursements in the amount of $28,375.11 for a total judgment of $217,714.73.

[3] A portion of the damages awarded related to the removal and replacement of the Quonset hut broken down as follows:

1.	Removal of Quonset hut -	$3,550.00
2.	Installation of new building-	$63,000.00
3.	Management fee @ 15% -	$9,982.50
4.	HST -	$11,479.87
		$88,012.37

That is the amount in issue on this appeal.

[4] The appellant appeals arguing the trial judge erred in allowing damages for the replacement cost and removal of the Quonset hut in the absence of any evidence that it needed to be replaced.

[5] For the reasons that I will develop, I would allow the appeal, reduce the damage award by $88,012.37. and remit the matter to the trial judge to re-assess

the damages. I would also award costs of this appeal to the appellant in the amount of $2,500.

Facts

[6] The respondents' building is known as a Quonset hut, which is a dome shaped steel building sitting on a concrete foundation. A wooden structure was constructed inside the hut. It housed a fishing workshop, a lobster pound and a walk-in freezer. The hut and the wooden structure inside it had been placed on the property by the respondents' father approximately 40 years prior to trial. The distinction between the wooden interior of the hut and the steel exterior is an important one. It is only the replacement of the steel portion of the hut that is in issue on this appeal.

[7] The appellant's property is a small cabin-type wooden structure described as a "shanty". At the time of the fire, the property had been rented to Dorothy Wells and contained a wood stove for heat which had been installed by the appellant Morash. The appellant's and respondents' properties are located adjacent to each other on the Government Wharf Road in Eastern Passage.

[8] The fire which is the subject-matter of this proceeding occurred in the late evening on February 18, 2005. The fire originated in a wall behind the wood stove within the shanty. The fire quickly spread to the respondents' property causing damage to it.

[9] The trial judge found that the appellant breached the standard of care owed to the respondents by improperly installing the stove in the shanty. He found the appellant liable for damage to the Quonset hut, its interior and contents. The finding of liability is not challenged on this appeal.

[10] The amount claimed by the respondents at trial for the replacement of the Quonset hut was $124,889.43 and was presented in an estimate prepared by Grant Rhyno dated March 26, 2005. I will have more to say about Mr. Rhyno's evidence later in these reasons.

[11] It is not disputed that the wooden structure within the Quonset hut and equipment stored there sustained damage in the fire. Mr. Rhyno's estimate

includes prices for the removal of the damaged contents and wooden material and the reconstruction of the new interior wall, placement of joists and sub-flooring, and the re-attachment of the front and rear wooden structures. These amounts are not challenged on this appeal. The only items in dispute, as set forth previously, are the costs associated with the removal and replacement of the steel portion of the Quonset hut.

Issue

[12] The issue for determination on this appeal is whether the trial judge erred in awarding damages for the removal and replacement of the steel Quonset hut structure.

Standard of Review

[13] It is common ground that an appellate court is not entitled to substitute its own view of a proper damage award unless it can be shown that there was no evidence upon which the trial judge could have reached the conclusions he did, or he proceeded upon a mistaken or wrong principle of law or the amount is so inordinately high or low as to be a wholly erroneous estimate (**Naylor Group Inc. v. Ellis-Don Construction Ltd.**, [2001] 2 S.C.R. 943; **Halifax (Regional Municipality) v. Cheevers**, 2006 NSCA 54; **Plazacorp. Retail Properties Ltd. v. Mailboxes Etc.**, 2009 NSCA 40).

Analysis

Whether the trial judge erred in awarding damages for the removal and replacement of the steel Quonset hut structure.

[14] The trial judge had this to say about the evidence relating to the removal and replacement of the steel Quonset hut structure:

> The defendants challenge whether the replacement of the building was necessary and suggest that there wasn't evidence to that effect.
>
> There was minimal evidence. The evidence was from Mr. Stephen Purdy, but he wasn't cross-examined on it, and it was his view it would cost more to repair than

> to replace, and he said that there was damage to the building, which I think I read during arguments to counsel or at least read my notes on.
>
> And I'm satisfied, based on quite skimpy evidence but is the only evidence I had before me -- and as I indicated to counsel, Chapter 13 in Waddam's textbook on The Law of Damages in Canada, the looseleaf edition, suggests that I've got to go with what I've got in front of me, and I find as a fact that it was more likely than not necessary to replace the building. It was damaged.

[15] The trial judge was certainly accurate in his assessment that the evidence was minimal and skimpy. I would go on to add that the evidence that the damage to the Quonset hut was such that it needed to be replaced was non-existent.

[16] The trial judge's reliance on Mr. Stephen Purdy's evidence as the basis for replacing the Quonset hut was ill-founded. Mr. Purdy, when asked during direct examination whether the Quonset hut could be repaired, responded:

> I don't know personally, but I would say it would probably cost more to repair it than it would be to replace it.

[17] No evidence was led that it would, in fact, cost more to replace the Quonset hut than to repair it or that it was necessary to remove and replace it. The evidence relied upon by the trial judge from Stephen Purdy has no evidentiary value, it is a mere opinion without a factual foundation.

[18] There were only three potential examples of damage to the steel portion of the Quonset hut which can be gleaned from the evidence:

1. the tar on the exterior had burned off and/or melted;

2. some metal had buckled, particularly to doors and around the concrete slab that the hut sat on; and

3. some of the windows had cracked.

There was no evidence that these problems prevented the continued use of the hut; to the contrary, the evidence established that parts of the interior of the hut continued to be used by the Purdys in their fishing operations.

[19] Finally, no evidence was led on whether the hut could be repaired or the cost of any such repair.

[20] I will now discuss the evidence on the damage to the hut in more detail to illustrate the lack of evidence on the need to replace it.

Derek Purdy

[21] Derek Purdy, unfortunately, passed away before trial. His discovery transcript was admitted into evidence. On discovery, Mr. Purdy testified that the outside doors of the Quonset hut (which were made of steel) had buckled. He also said "the building itself" had buckled and rusted. It is unclear whether he was referring to the exterior or interior of the hut. He went on to state that the metal structure never caught fire. When asked whether the building was structurally intact, he answered that it had not "fallen down" yet.

Captain Terry Jesty

[22] At the time of trial, Captain Jesty was retired from the Halifax Regional Municipality Fire Department. He attended the fire on February 18, 2005. He testified that the tar (or insulation) on the Quonset hut had burned off such that you could see the steel. However, his evidence does not suggest the steel structure itself was damaged.

Gregory Rhyno

[23] Mr. Rhyno is the owner of CHI Home Restorations and was the author of the estimate which is in issue on this appeal. His evidence on the condition of the Quonset hut was very brief. The defendant objected to his evidence on the basis it was opinion evidence and that he was not qualified to give opinion evidence. The defence also objected on the grounds that the quote from J.W. Lindsay, which formed the basis of the contentious part of Mr. Rhyno's estimate, constituted hearsay evidence. The trial judge made a ruling on the parameters of Mr. Rhyno's proposed testimony and concluded that Mr. Rhyno's evidence did not constitute opinion evidence. Here is the excerpt from his ruling:

> I understand counsel for the Plaintiff is saying that he wants to put on a witness who prepared an estimate of what he would charge as a contractor to do "X"

> work, and that estimate includes components ... identified in a document that's been in the possession of the Defendants since the List of Documents were filed in some historic stage in this proceeding. In my view, that's not opinion evidence. It may or may not establish a damage claim. It's simply evidence of what one person says they will do "X" job for, and they've broken it down by whatever basis it's done, whether it's done with their hand or by someone else. And I'm prepared to admit evidence of that nature. That's not to say what someone else may have estimated the value of the job at or not.
>
> I don't see prejudice to the Defendant if they've been provided with that estimate at an early stage in the List of Documents. I can't see how they wouldn't have recognized that's a part of the claim for damages for the purpose of preparation in responding and defending. It's simply one person saying, "Here's what I would charge to do this 'X' job. Now, whether or not that establishes a claim for damages and whether that job needs to be done does not necessarily follow. But I'm prepared within those limits to permit this witness to give evidence...
>
> (Emphasis added)

[24] Mr. Rhyno was, therefore, permitted to testify, but the trial judge emphasized that his testimony would not necessarily prove damages.

[25] The key exchange on the damage to the steel Quonset hut was as follows:

> Q. And what was the condition of the Quonset Hut on those occasions that you visited?
>
> A. It was burnt, charred inside.
>
> Q. What about outside?
>
> A. Outside, pretty much the same way. The heat from the inside damaged the steel, the tar, everything.
>
> Q. What can you indicate about the damage to the steel?
>
> THE COURT: You are getting - this is getting more than an estimate. You're now getting into opinion about damage.
>
> (Emphasis added)

[26] Mr. Rhyno testified the heat damaged the steel and tar exterior of the Quonset hut, but we are left without more detail because the trial judge did not

allow him to give evidence on the alleged damage to the steel structure. The trial judge said he would not allow that line of questioning because it was crossing over into opinion evidence, which Mr. Rhyno was not qualified to give:

> ... You just asked him questions about opinion to damage to some steel, and quite candidly, my - the contest - Mr. Aucoin has got a proper grounds [sic] if you're starting to ask this person what was wrong with that building and why, or to justify that. In my view, you're here - I'm allowing him as a fact witness, not as an opinion witness.

[27] Mr. Moir for the respondents said he meant to ask Mr. Rhyno what he saw, but accepted the trial judge's decision and moved on.

[28] Mr. Rhyno went on to admit on cross-examination that he had never constructed, installed, or demolished/taken down a Quonset hut. He did not know the life span of a Quonset hut, whether it was even possible for one to be taken down and put back up and/or moved, whether there was a market for used Quonset huts, or whether the existing hut could continue to be used. He also did not know whether the existing Quonset hut was 20-gauge galvanized steel (the material in his estimate).

[29] In any event, the statement that the "heat from the inside damaged the steel", and the suggestion that the outside of the hut was "pretty much" burnt/charred, is insufficient evidence to support the trial judge's conclusion the building could not be repaired and needed to be replaced.

Stephen Purdy

[30] Stephen Purdy's evidence was consistent with the evidence of Derek Purdy and Captain Jesty - the fire affected the tar on the exterior of the Quonset hut, and some parts of the metal had buckled:

> Q. What can you tell us about the condition of the exterior of the Quonset Hut after the fire?
>
> A. After the fire, the tar had run down the sides. The metal had buckled and pushed away from the concrete, the slab that it sits on. The back door, which is - I'm not sure the size of the door, but it's probably 10 or 12 foot - that sprung outwards from the heat.

(Emphasis added)

[31] Mr. Purdy also said that some of the windows were cracked from the heat.

[32] This is the totality of the evidence relating to the damage to the building. Except for Stephen Purdy's opinion that he thought the building needed to be replaced, no other witness gave evidence as to the necessity to replace the building or whether the damage could be repaired or the cost of repairing the damage. There was very little evidence about the overall condition and actual damage to the steel structure. The evidence taken at its highest does not support the trial judge's conclusion the building needed to be replaced.

[33] I am satisfied that the trial judge erred in awarding the replacement cost of the Quonset hut when there was no evidence before him that it needed replacement.

Remedy

[34] Having found that the trial judge erred in finding that the evidence established that the Quonset hut needed to be replaced, what then is the remedy? Counsel for the appellant at trial acknowledged that there was damage to the Quonset hut and that the respondents are entitled to some damage award in compensation. He suggested that we ought to determine the amount. I would decline to do so. A better course of action is to return the matter to the trial judge for a re-assessment of damages. Let me explain why.

[35] I had earlier referred to the exchange between the solicitor for the Purdys and the trial judge relating to the damage to the Quonset hut. Mr. Rhyno was asked, and I repeat:

> Q. What can you indicate about the damage to the steel?
>
> THE COURT: You are getting -- this is getting more than an estimate. You're now getting into opinion about damage.

[36] As noted earlier, Mr. Moir explained to the trial judge that he simply wanted to ask Mr. Rhyno what he saw. However, he accepted the trial judge's decision and moved on.

[37] With respect, the trial judge's intervention, although well intentioned, was erroneous. The question did not seek to elicit opinion evidence but simply sought to have Mr. Purdy give his observations about what he saw when he attended at the site. That is not opinion evidence. The trial judge, by intervening, precluded the respondents from leading this relevant, probative and otherwise admissible evidence on the condition of the steel structure. In **Clarke v. O'Brien**, [1995] N.S.J. No. 458(Q.L.) this Court held:

> 46 A judge cannot arbitrarily exclude relevant, probative and otherwise admissible evidence. In failing to weigh the relevant factors when considering counsel's mistake, I conclude that the learned trial judge committed a reversible error.

[38] In **Clarke**, the trial judge had refused to admit surveillance videos into evidence and refused to permit counsel to recall the plaintiff for cross-examination on the evidence from the videos that was inconsistent with the plaintiff's claim of permanent disability. Bateman, J.A., writing for the Court, concluded that the trial judge committed a reversible error (¶ 46) and ordered a new trial. The trial judge, here, committed a similar error in preventing Mr. Rhyno from giving admissible evidence of his observations of the damage to the steel portion of the hut. An evidentiary error of this nature requires the Court's intervention which can be done in one of two ways:

1. substitute our own measure of damages; or

2. order a new trial on the issue of damages.

[39] The **Civil Procedure Rules** give very broad powers to this Court, in particular, **Rule** 90.48(1) states:

> 90.48 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> (a) amend, set aside, or discharge a judgment appealed from;

> (b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;
>
> (c) make such order as to costs of the trial, hearing, or appeal as the Court of Appeal considers is in the interest of justice;
>
> (d) direct a new trial by jury or otherwise, on terms the Court of Appeal considers is in the interest of justice, and for that purpose order that the judgment appealed from be set aside;
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.
>
> (My Emphasis)

[40] Whether our direction is characterized as a new trial or a re-assessment of the damages is immaterial. A similar situation arose in **Chernetz v. Eagle Copters Maintenance Ltd.**, 2008 ABCA 265 where the court held:

> 102 The nomenclature is not important. Whether our direction can be construed as a new trial only with respect to the issues identified herein, or the continuation of the assessment earlier undertaken by the trial judge, does not matter. We expect that the trial judge will hear such further evidence as is tendered relative to tax planning which he earlier excluded, including evidence relative to the workings and effect of an estate freeze. He will then be in a position to determine earnings available to Harry Chernetz, including potential sale proceeds, if such a plan were implemented compared to other plans that may also have been available if he had survived. The trial judge will then be able to project the loss of future income in conjunction with the retirement of Harry Chernetz. We do not foresee that additional evidence with respect to other matters will be necessary, although the trial judge may find it useful to obtain the further assistance of the expert witnesses for the purpose of quantifying the effect of some of the revisions. However, we do not wish to place the trial judge in a straight jacket. He has the discretion to allow such further evidence as he thinks appropriate and necessary, in order to make the corrections and revisions contemplated by this judgment and otherwise for the purpose of doing justice between the parties.
>
> (Emphasis added)

[41] To conclude, the erroneous evidentiary ruling by the trial judge on the admissibility of the evidence of Mr. Rhyno constitutes an error of law justifying our intervention. Where the lack of evidence on a key component of damages is as

a result of the trial judge's error and not the plaintiff's, fairness requires that we remit the matter to the trial judge for determination of damages having regard to all the relevant evidence.

[42] Like the court in **Chernetz**, **supra**, I do not want to place the trial judge in a straightjacket. Subject to the proper application of sound legal principles, he has the discretion to admit whatever additional evidence he considers appropriate and/or necessary in order to do justice between the parties.

[43] The appeal is allowed and the damage award shall be reduced by the amount of $88,012.37. The matter is remitted to the trial judge to assess damages. The issue of reduction in the cost award at the original trial will be left to the discretion of the trial judge after his determination of the proper award of damages.

[44] The appellant shall have his costs of this appeal in the amount of $2,500 plus taxable disbursements.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.