NOVA SCOTIA COURT OF APPEAL
Citation: ***Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)***, 2013 NSCA 4

Date: 20130103
Docket: CA 387839
Registry: Halifax

Between:

Jacques Home Town Dry Cleaners

Appellant

v.

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in right of the Province of Nova Scotia

Respondent

Judges:	Saunders, Oland and Fichaud, JJ.A.
Appeal Heard:	October 11, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Michael P. Scott and Alison A. Morgan, for the appellant Duane Eddy, for the respondent

Reasons for Judgment:

[1] It is not often that this Court is called upon to decide a case where the amount in dispute is $66.94. Clearly this is a case where an important principle is at stake.

[2] The issue is a narrow one, but raises broad implications.

[3] The question is whether the appellant is responsible for a 10% "administration fee" levied by the Nova Scotia Department of Transportation and Infrastructure Renewal ("DTIR") for overhead expenses related to remediation of third-party damage to government owned property. A collateral, but equally important question, is what evidence is required to prove entitlement to recover such an expense, whether as charged at 10% or at any rate.

[4] In a decision of the Nova Scotia Supreme Court (now reported at 2012 NSSC 42) Justice M. Heather Robertson found in favour of the respondent, concluding that the 10% administration fee was reasonable, not arbitrary or artificial, was suitably linked to the damages claimed, and did not include any mark-up for potential profit.

[5] The appellant appeals saying that while the motions judge averted to the relevant legal principles, she failed to apply those principles correctly, and that she made other palpable and overriding errors with respect to the facts, or matters of mixed law and fact.

[6] The appellant asks that the decision be overturned and that the respondent's attempt to recover a 10% administration fee of $66.94 be dismissed, with costs to the appellant throughout.

[7] For the reasons that follow I would dismiss this appeal, but with a strong caution that the result here is driven by the relatively insignificant amount of the claim. For reasons that will become apparent, were the amount of third-party damage greater, the outcome may well have been different.

[8] Before stating and addressing the issues I will briefly review the background to provide context.

Background

[9] On October 24, 2008, the appellant's motor vehicle veered off the road and collided with the respondent's wooden culvert. As a result, the respondent's culvert was damaged. It cost the respondent $669.40 to repair the culvert. Added to the cost was a 10% "Administration/Overhead Fee" of $66.94, which the appellant's insurer (Wawanesa Mutual Insurance Company) refused to pay. As stated in the appellant's factum "the dispute turned not on whether overhead expenses are potentially compensable at law, but whether DTIR had provided sufficient, and more specifically any, foundation for its quantification of loss". The appellant argued that calculating overhead as simply 10% of "hard costs" bore no rational connection to the damages claimed and moreover that the percentage itself was arbitrarily derived. The respondent took the position that DTIR is a large organization and as such is entitled to claim damages in the manner it did.

[10] The case was started as an action pursuant to **Civil Procedure Rule** 4, but was converted to an application by consent pursuant to CPR 5. The dispute was heard in Chambers before Nova Scotia Supreme Court Justice M. Heather Robertson on August 31, 2011. The only evidence led was in the form of an affidavit of Ms. Jane Fraser-Coutts, the Executive Director of Finance at DTIR. The appellant called no evidence and declined to cross-examine Ms. Fraser-Coutts on her affidavit.

[11] At ¶18 *ff.* of her reasons, Robertson, J. stated:

> [18] In the circumstance of this case the 10% administrative fee of $66.94 can be said to be a reasonable overhead charge,that is in fact related to the particular claim. The Crown has satisfied me that this charge has a reasonable foundation for the purpose of recovering costs associated with staff processing this transaction through the Province's financial system ("SAP"), dealing with invoices and purchase orders, set up of job numbers, tracking repair costs, and a certain amount of coordination with operational staff. These are administrative tasks, not otherwise budgeted for by the department and which can be said to arise directly from the act complained of. I am also satisfied that this modest percentage contains no element of profit.

> [19] In my view, it would be unreasonable to expect the Province to institute any more detailed an overhead recapture, and to do so would likely result in higher overhead cost in recovering these third party additional expense items.
>
> [20] I find the 10% charge reasonable and not in the circumstances arbitrary or artificial.
>
> [21] In the result, the application is allowed. I will sign an order compelling the respondent to pay the sum of $66.94 to the Province.
>
> [22] If the parties cannot agree on costs, I will be happy to receive written submissions.

[12] I will turn now to a consideration of the issues and the appropriate standard of review.

Issues

[13] In its Notice of Appeal the appellant lists four grounds:

> (1) That the Learned Trial Judge erred in law and in fact in finding that the Respondent has discharged a positive burden to demonstrate that the damages claimed were not arbitrary and artificial.
>
> (2) That the Learned Trial Judge erred in law and in fact in finding that the 10% administration fee was a reasonable overhead charge in the circumstances.
>
> (3) That the Learned Trial Judge erred in law and in fact in finding that the Respondent had demonstrated that the impugned administration fee did not contain an element of profit.
>
> (4) That the Learned Trial Judge erred in law and in fact in finding that it would be unreasonable to expect the Province to provide a more detailed overhead recapture.

[14] The parties do not agree on their statement of the issues. In its factum the appellant describes the issues this way:

> **Arbitrary and Artificial**: Did the Learned Trial Judge err in mixed law and fact by concluding that the Respondent had properly demonstrated its loss and that its quantification of damages was not arbitrary and artificial?
>
> **Reasonableness**: Did the Learned Trial Judge err in mixed law and fact by finding that the 10% administration fee claimed by the Respondent was "reasonable"?
>
> **Opportunity for Profit**: Did the Learned Trial Judge err in mixed law and fact by holding that the Respondent had demonstrated that the impugned administration fee did not contain an element of profit?
>
> **Standard of Proof**: Did the Learned Trial Judge err in mixed law and fact in holding that it would be unreasonable to expect the Respondent to provide a more detailed overhead recapture?
>
> The Appellant says that the issues of reasonableness and opportunity for profit are closely connected to the issue of arbitrariness. The Appellant will argue that damages which are arbitrarily derived are, by their very definition, unreasonable as they lack any rational foundation. Similarly, if the damages awarded were arbitrarily derived, there can be no logical measure by which to determine whether they include a potential for profit.

[15] Whereas in its factum the respondent says:

> 14. ... the grounds of appeal identified in the appellant's Notice of Appeal give rise to the following issues:
>
> a. Are the damages claimed by the respondent reasonably connected to the culvert repair?
>
> b. Was the way that the respondent derived the overhead charge to recover its overhead expenses reasonable?
>
> c. Does the overhead fee include an element of profit?

[16] As far as the standard of review is concerned, the parties appear to adopt the same position, that being that the motions judge's conclusion and the analysis which led her to it was principally fact-driven and therefore subject to a standard of review based on palpable and overriding error.

[17] I prefer to address the problem by considering one simple question – did the motions judge err in concluding that the DTIR was entitled to charge a 10% administration fee as part of the loss claimed against the appellant's insurer?

Analysis

[18] In concluding that a 10% administration fee was a recoverable expense and one that could be legitimately claimed against the appellant's insurer, the motions judge's analysis touched upon both factual and legal matters. In order for Justice Robertson to arrive at the conclusion she did, she was required to consider the evidence and make certain factual findings. We defer to such findings unless we think they are the product of palpable and overriding error. The motions judge was also obliged to apply the civil standard of proof to the evidence and decide whether the respondent had met its burden by producing sufficient evidence to prove its claim. This aspect of the judge's analysis raises questions of law, obviously triggering a standard of review based on correctness.

[19] Reading the judge's reasons (the operative portions of which I have set out in ¶11, **supra**), one can isolate the essential findings which led to her conclusion as being:

— the 10% administrative fee of $66.94 was a reasonable overhead charge

— that was related to the overall claim

— and was connected to staff processing the claim through a variety of administrative steps that included having to deal with invoices, purchase orders, setting up job numbers, tracking repair costs, as well as co-ordinating staff

— those administrative tasks were not otherwise budgeted

— but could be said to arise directly from the appellant's negligence

— such a "modest" percentage did not contain any element of profit

— it would be unreasonable to expect government to institute any more detailed overhead recapturing methods, as to do so would likely result in higher overhead costs

— and therefore, the 10% charge was "reasonable and not in the circumstances arbitrary or artificial".

[20] In my opinion all of these factual findings are fully supported in the record and are in no way the result of palpable and overriding error. However, our evaluation of the merits of this appeal does not stop there.

[21] Rather, what lies at the heart of this appeal is the appellant's complaint that the respondent offered no proof at all to show the basis for which a rate of 10% (as compared to any other percentage) was selected by government as being appropriate in dispensing with all claims across the board. The appellant asks: why not 5%, or 8%, or perhaps some percentage figure even greater than 10?

[22] In this I think the appellant is right and had good reason to resist accepting responsibility for such an administration fee, without obliging the province to produce proper proof, sufficient to explain and justify the chosen rate.

[23] At the appeal hearing we were told that there were a number of other claims such as this one, currently being held in abeyance by consent of the parties, until the result of this appeal is known.

[24] It is settled law that overhead expenses are recoverable as part of the cost of effecting repairs to one's damaged property. The only issue is one of proof. See for example **Bell Telephone Co. v. Montreal Dual Mixed Concrete Ltd.**, [1960] 23 D.L.R. (2d) 346 (Que. C.A.); **Canadian Pacific Railway v. Fumagalli (**1962), 38 D.L.R. (2d) 110 (B.C.C.A.); and **Canadian Pacific Railway v. Canadian Freightways Ltd.** (1962), 39 W.W.R. 191 (B.C.C.A.). The appellant concedes as much. But the appellant takes the position that choosing a rate of 10% as an added administration fee bears no rational connection to the damage to the culvert, and says the percentage itself was arbitrarily derived. In its factum the appellant put it this way:

[28] ...In the instant matter, the Respondent ... simply argued that a loss was likely incurred and 10% of the remediation costs seemed to be a convenient number to subscribe to those damages. The 10% quantification could not be more arbitrary were it fished from a hat. ....

[30] ... no reference is made in the Decision to any evidence that the Court relied on in determining that the Respondent had discharged its duty to prove the loss and absolutely no evidence was called to suggest that the amount was not arbitrarily derived. ...

[33] Beyond the concerns associated with fixing the calculation at an arbitrary 10% is the demonstrable lack of any logical connection between the percentage and the total costs of remediation. ...

[35] ... it is nonetheless demonstrative of the utter lack of rational connection between the cost of replacing damaged property and the administrative resources required to facilitate the associated paperwork.

[36] That the amount in issue is very small in this case does not make the calculation any less artificial. ... There is no authority for the proposition that only damage claims above a fixed amount will require rational proof. The Appellant submits that no evidence was led to found a rational connection between "hard costs" incurred and the quantum of administrative costs expended. That the methodology is convenient does not make it any less artificial.

...

[40] ... cannot support the proposition that large organizations are to be relieved of the need to prove their damages in favour of simply applying an arbitrary percentage that the claiming party feels is reasonable − convenient as that might be. ....

[42] ....no such finding can be reasonably made when no evidence, beyond a bare claim, was presented to substantiate the fact that any costs associated with staff processing transactions were actually incurred by DTIR. Affidavit evidence was led to support the fact that actions were undertaken by administrative staff, but no evidence was led to support the proposition that the net result was a measurable loss of any kind. ...

[25] To this point I am prepared to accept the merits of the appellant's assertions. It is trite law to say that in order for damages to be recoverable, both their quantification and their causal connection to the wrongdoing must be proved to the civil standard based on a balance of probabilities. **Red Deer College v. Michaels**, [1976] 2 S.C.R. 324 at 330. It is also well-settled that damages may be recovered from a wrongdoer, even if their calculation is difficult, cumbersome or cannot be determined with absolute precision. **Silver Sands Ltd. and Trynor Construction Co. Ltd. v. Minister of Lands and Forest and Attorney General for the Province of Nova Scotia** (1977), 23 N.S.R. (2d) 273 (N.S.C.A.). In such cases where, due to lack of evidence, it is impossible to calculate the loss with "any degree of exactitude" a court must make its "best estimate" of the damages. **Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.**, [1976] 1 S.C.R. 267.

[26] I accept the appellant's complaint that what was lacking in this case was *any* evidence which would serve to explain and justify the basis upon which the Province of Nova Scotia as a matter of policy chose 10% as being a fair and appropriate additional charge called an "administration fee" to be added to every claim following third-party damage to property owned by the province, for which DTIR takes responsibility, in every case across the board. But that does not end the inquiry either.

[27] What saves this case from reversal is the evidence contained in Ms. Fraser-Coutts affidavit, (accepted by the motions judge) that certain specific administrative tasks not otherwise budgeted, were in fact undertaken on account of the appellant's negligence and that an administration fee was levied to off-set these overhead expenditures which were an added expense to DTIR (to quote from Ms. Fraser-Coutts' affidavit):

> 11. .... associated with repairing department assets damaged in motor vehicle accidents by third parties ... (and) ... are in direct support of the repair activities related to the damaged property.

[28] In view of this finding, it would be perfectly reasonable to infer that an expense of $66.94 was *actually* incurred in having to oblige staff to do all of the things described by Ms. Fraser-Coutts as part of processing this third-party claim.

In other words, it was open for Justice Robertson to infer that the value of that effort (under any method of calculation) was at least $67.

[29] While the motions judge did not state explicitly that this was the inference she drew in order to arrive at her conclusion, I am confident, having read the whole of her reasons, that this is what she meant.

[30] Here, it may be useful to provide a brief commentary on inferences, and their application, to the process of decision-making.

[31] An inference may be described as a conclusion that is logical. An inference is not a hunch. A hunch is little more than a guess, a 50/50 chance at best, that may turn out to be right or wrong, once all the facts are brought to light. Whereas an inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts. When engaged in the process of reasoning we are often called upon to draw an inference which acts as a kind of cognitive tool or buckle used to cinch together two potentially related, but still separated propositions. In the context of judicial decision-making, drawing an inference is the intellectual process by which we assimilate and test the evidence in order to satisfy ourselves that the link between the two propositions is strong enough to establish the probability of the ultimate conclusion. We do that based on our powers of observation, life's experience and common sense. In matters such as this, reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning.

[32] Two examples will illustrate my point. We anticipate it being more likely than not, that a wild toss of the football towards the sideline by a fleeing, desperate quarterback will land out of bounds. We know where the sidelines are, we see the errant throw sail off in that direction, and we can be sure the pass will be whistled out of bounds without needing to see the proof on instant replay. Similarly, noticing puddles on the street, and then a wet umbrella by the door tells us that it was raining, without having been outside in the rain to witness it.

[33] When it comes to reviewing inferences on appeal we apply the same "palpable and overriding error" standard of review to inferences, as we do to facts found to exist by direct evidence. See for example, **Housen v. Nikolaisen**, 2002

SCC 33; **H.L. v. Canada (Attorney General)**, 2005 SCC 25; and **McPhee v. Gwynne-Timothy**, 2005 NSCA 80 where this Court said at ¶31-32:

> [31] A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice Richard's findings of fact, and the inferences he drew from those facts. [Cases omitted]
>
> [32] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, **Housen, supra**, at para. 1-5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."

[34] Inferences, like findings of fact, will not be disturbed unless they fall outside a spectrum or range of reasonableness. Such restraint and deference was explained by Professor Adrian A.S. Zuckerman in his text *Civil Procedure* (London: LexisNexis U.K., 2003) cited with approval by the Court in **H.L., supra,** where the author stated:

> ...if the appeal court cannot conclude that the lower court's inference from the primary facts was wrong, in the sense that it fell outside the range of inferences that a reasonable court could make, the appeal court should allow the lower court's decision to stand ... Put another way, as long as the lower court's conclusions represent a reasonable inference from the facts, the appeal court must not interfere with its decision.

[35] My colleague Justice Fichaud put it nicely in **Johansson v. General Motors of Canada Ltd.**, 2012 NSCA 120 where in the context of a non-suit motion brought in a civil jury trial he said:

> [81] ... An inference is a finding deduced or induced from a premise without direct evidence of the inferred fact. It is a factual jump on the reasoning path. The judge ensures that the span is not so broad or irrational that a reasonable jury would stumble. Otherwise the system trusts the jury's common sense and agility to mind the gap and land softly. ...

[36] In this case the two disconnected facts the motions judge needed to bridge were the cost of repairs to the culvert totalling $669.40 and the fee claimed for necessary additional administrative work in the amount of $66.94. Assuming both facts were established, the question the judge had to ask herself was whether there was a direct connection and correlation between the two which would justify the conclusion that the added fee was recoverable as part of the claim against the appellant. In the absence of evidence which would speak to the policy or accounting principles adopted to support such a claim, the question then became whether the judge could draw an inference to reach such a conclusion. In the circumstances of this case I believe she could.

[37] After accepting as a fact that extra administrative tasks were actually undertaken to process the claim as a direct result of the appellant's negligence, and that the cost of the extra work was quantifiable and bore a logical correlation to the initial cost of repairs, the judge did not need further evidence to establish those essential links.

[38] This was not a situation which called for further evidence to satisfy the trier of fact as to why the province chose 10% as being a fair and appropriate percentage to charge and include as part of its overall damage claim. In other words, it could not be reasonably suggested that a loss of $66.94 was not in fact incurred as a direct result of the appellant's negligence. The "jump" in the path of reasoning was hardly far.

[39] In another case, on different facts, the chasm separating the two propositions might be too broad to traverse by inference. I think it unwise and impractical to set any hard and fast rule or attempt to draw a bright line between the kinds of cases

where such an inference would be sensible and sound, from other cases where it would be suspect and open to challenge. But simply to illustrate, using round numbers to make the point, if the extent of damage to property caused by the third party's negligence totaled say $50,000, I suggest it would take more than an inference to prove entitlement to a 10% administration fee (thus $5,000) bringing the total claim for which government sought recovery to $55,000. To use my example, one would expect that the evidence proffered to satisfy the trier of fact as to the legitimacy of recovering the total claim, would at least include evidence which would seek to explain the accounting, policy-making and other principles or rationales by which government came to choose a rate of 10% as being reasonable, and which would also provide a basis for concluding that the expense claimed as an administration fee was actually incurred, and reflected a clear correlation to the cost of repairing or replacing the damaged property. We see such an approach in cases like **Canadian Freightways, supra**, where Norris, J.A. recognized the fact that operations like CPR were extremely "far flung, complex and diverse in their nature" such that its "system of accounting [was] equally complex". He described what was required, in that case, to establish a reasonable foundation for the overhead rates at p. 197:

> ...The question is purely and simply as to whether or not the appellant discharged the burden of proof on it to demonstrate its loss, whether by proving a system of cost-accounting and damages on the basis of a proportion of overall cost applied to the particular loss in this case, or otherwise. (Underlining mine)

[40] Similarly, in **British Columbia Telephone Co. v. Shell Canada Ltd.** , [1987] B.C.J. No. 1055 (Q.L.)(B.C.S.C.), Callaghan, J. disallowed certain claims for overhead costs, but allowed others where he was persuaded on the expert evidence presented as to the cost-accounting practices "on a province-wide basis according to generally accepted cost-accounting principles".

[41] In conclusion, were the quantification of the third party claim in this case substantially larger, it seems obvious to me that the likelihood of successfully persuading a trier of fact that such an inference was reasonable and ought to be drawn would – absent further proof – be significantly diminished.

Conclusion

[42] While there is considerable merit to the appellant's submissions I would dismiss this appeal. On the unique facts of this case I am not prepared to reverse the result. The factual findings and inferences drawn by the judge fell within a range that a reasonable court could make and they ought not to be disturbed. The appellant had good reason to challenge the claim and seek this Court's consideration of the issues and principles that arose in the case on appeal. Under the circumstances I would decline to make any order with respect to costs.

Saunders, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.