S.C.A. No. 02248

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Freeman, JJ.A.

BETWEEN:

EASTERN BUILDING CENTRES LIMITED, a body corporate Appellant - and - TRANSEASTERN PROPERTIES LIMITED, a body corporate Respondent	David G. Coles for the appellant Michael J. Wood for the respondent Appeal Heard: February 4, 1991 Judgment Delivered: February 4, 1991

THE COURT: Appeal dismissed with costs per oral reasons for judgment of Jones, J.A.; Hallett and Freeman, JJ.A. concurring

The reasons for judgment were delivered orally by:

JONES, J.A.:

This is an appeal from an assessment of damages for breach of contract. The appellant agreed to supply the respondent with windows to be installed in the respondent's building at the corner of Argyle and Blowers Street in the City of Halfiax for $17,994.00. The windows were specified by the architect and were part of the unique design of the building. The windows as delivered did not fit the specifications. In order to avoid construction delays the respondent adjusted the framing and installed the windows. It sued for damages. The trial judge allowed $1,971 for installing the windows together with architectural fees of $1,386. There is no appeal regarding those items.

In allowing for loss of the windows the trial judge stated:

> "There is no doubt that the loss is significant. The windows occupy a large portion of the face of the building which is in line with the sidewalk. The disproportionate aesthetics is obvious to passers by, and I would consider that whichever of the two measures of damage is used, it could not be said that the sum of $14,171.91 would be unreasonable.
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> Nevertheless, I must consider that if I awarded the full amount of replacement, the plaintiff could benefit in two ways. It could receive betterment in that the windows which are removed, may have value. Also, the plaintiff may elect not to make the renovations and simply retain

> the cash. I suspect that these apparent advantages would be offset by the increase in cost of replacement since the date of the estimate or the diminution of value, depending on whether the replacement occurred. But if there is any doubt on these points, it should not be the defendant who should suffer. It is for the plaintiff to advance the damage claim to the court's satisfaction and some of these contingencies remain unknown to me and for this reason, I am going to reduce this head of damage from $14,171.91 to $10,000."

We agree with the appellant's contention that this was a contract for the sale of goods. Section 54 of the **Sale of Goods Act** provides as follows:

> "(1) Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but the buyer may
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> (a) set up against the seller the breach of warranty, in diminution or extinction of the price; or
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> (b) maintain an action against the seller for damages for the breach of warranty.
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> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
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> (3) In the case of breach of warranty of quality, such loss is **prima facie** the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty.
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> (4) The fact that the buyer has set up the breach of warranty, in diminution or extinction of the price, does not prevent the buyer from maintaining an action for the same breach of warranty if he has suffered further damage."

Essentially the appellant argues that the respondent failed to establish its damages and in particular that it suffered any financial loss. We are unable to agree. The principle applicable on the assessment of damages was stated by Clement, J.A. in **Sunnyside Greenhouses Ltd.** v. **Golden West Seeds Ltd.** 27 D.L.R. (3d) 434 at 438 as follows:

> "The principle there expressed is that upon a breach of an impled condition for fitness of purpose, where the buyer is compelled by the circumstances of the case to seek his remedy in damages rather than rescission, the damage is **prima facie** the amount of the full purchase price, subject to diminution by such residual value, if any, to the buyer that the seller may be able to establish. In so far as the panels alone are concerned, the evidence at trial was directed to assessment of damage on this principle."

No evidence was adduced by the appellant as to the residual value of the windows as installed. Given their unique design it is doubtful if they had any value. Having regard to the evidence we are satisfied that the damages as assessed by Davison, J. were reasonable and therefore the appeal is dismissed with costs which we fix at $1,000.00.

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.