NOVA SCOTIA COURT OF APPEAL
Citation: ***Gwynne-Timothy v. McPhee***, 2005 NSCA 80

Date: 20050505
Docket: CA 222133
Registry: Halifax

Between:

John L. Gwynne-Timothy

Appellant

v.

Michael Joseph McPhee & Jane Anne McPhee

Respondents

Judge(s): Saunders, Hamilton & Fichaud, JJ.A.

Appeal Heard: March 24, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed and cross-appeal allowed, as per reasons for judgment of Saunders, J.A.; Hamilton & Fichaud, JJ.A. concurring

Counsel: George W. MacDonald, Q.C. & Kevin Gibson, for the appellant/respondent by cross-appeal
Michael E. Dunphy, Q.C., & W. Harry Thurlow, for the respondents/appellants by cross-appeal

Reasons for judgment:

[1] An improperly constructed fireplace caught fire causing such extensive smoke damage within the interior walls and spaces of a family home that the residence had to be thoroughly gutted from the inside out necessitating repairs to building and contents exceeding $1,000,000.00.

[2] The trial judge found liability against the appellant Gwynne-Timothy who was the general contractor (and also happened to be the previous owner and vendor) and fixed damages at close to $685,000.00, including some $427,000.00 found to be the amount reasonably required to return the building to its pre-fire condition. The trial judge dismissed the bulk of the respondents' contents claim worth close to $118,000.00 on the basis that there was "no evidence" to substantiate that part of the claim.

[3] The appellant appealed saying the trial judge erred in not applying proper principles of tort law when deciding the question of a general contractor's liability, and further erred in assessing damages, by fixing the loss based on the estimated cost of performing such remedial work instead of the respondents' actual expenditures in undertaking repairs and restoration.

[4] The respondents cross-appealed alleging error on the part of the trial judge in dismissing their substantial contents' claim.

[5] I have concluded that there is no merit to the appellant's appeal and that it ought to be dismissed. I would allow the respondents' cross-appeal and remit the matter to the trial judge for a proper assessment and quantification of the respondents' claim for loss of contents.

[6] Before commencing my analysis, I will outline the background that gave rise to these proceedings by referring to certain material facts.

Introduction

[7] After a six day trial Nova Scotia Supreme Court Justice K. Peter Richard found the appellant, John L. Gwynne-Timothy ("the appellant" or "Gwynne-

Timothy") liable to the respondents, Michael Joseph McPhee and Jane Anne McPhee ("the respondents" or "the McPhees") for damages in the amount of $684,159.27, plus pre-judgment interest and costs.

[8] In 1985-86 Gwynne-Timothy constructed a residence for himself and his family at 289 View Mount Drive, Allen Heights, St. Margaret's Bay ("the home"). It was a very large and "high end" type of home comprised of three levels, including a finished basement. There were approximately 7,500 square feet of inside living space. The home included a sauna, hot tub, exercise room and pool room. It also included various fixtures and appliances throughout, which were of a very high quality, including a large spiral staircase with a marble fountain, a marble floor in the main hallway, and marble facing on the kitchen fireplace. The trial judge said the term "luxurious" could be fairly used in describing the home.

[9] Gwynne-Timothy acted as his own general contractor in the construction of the residence. The evidence disclosed that he had no previous experience in this kind of work and had never read the National Building Code. He hired a draftsman, Wayne Comeau, to prepare a detailed set of architectural drawings. These architectural drawings were available throughout the construction and used by Gwynne-Timothy and various tradesmen he engaged. These architectural drawings had a notation on the front of the plans "Construction of this building to comply with the National Building Code."

[10] The original architectural drawings included the design for six fireplaces including the design for a "see-thru" fireplace with a raised hearth in the kitchen area of the main floor. This design allowed for the fireplace to be viewed from both sides - in this case from the kitchen and a sitting room. The fireplace design complied with the National Building Code. It included a raised concrete/brick hearth under the firebox and extending 16 inches in front of the firebox. The purpose of the raised hearth was to ensure proper separation between the fire (in the firebox) and combustible materials below, and in front of the firebox. This separation was necessary to eliminate the risk of the combustibles igniting from exposure to heat.

[11] The appellant hired James Moore, a mason, to construct all of the fireplaces in the home - including the kitchen/sitting room fireplace. Moore built all of the fireplaces in the home, other than the kitchen/sitting room fireplace, in accordance

with the architectural drawings prepared by Comeau. Moore intended to construct the kitchen/sitting room fireplace in accordance with the architectural drawings, until Gwynne-Timothy changed his mind during construction and decided against the see-thru fireplace in the kitchen/sitting room area. The appellant decided he wanted two separate fireplaces in the area - one being a floor level fireplace on the kitchen side of the chimney, and the other being a firebox on the opposite side (a new fireplace).

[12] Before Gwynne-Timothy changed his mind, Moore had already built the concrete block frame and poured the concrete hearth in accordance with the original architectural drawings. Moore told the appellant that the new fireplaces would be bigger (as there would then be two fireplaces) and that there would now have to be two flues and a bigger chimney. Moore said this would add considerably to the price. Gwynne-Timothy then asked Moore to rough-in the new fireplace (rather than finish the complete fireplace as originally contemplated). Moore completed the rough-in of the new fireplace as requested. However, he did not do any of the other work necessary to complete the new fireplace, which was found to include:

(a) The installation of firebrick on the inside of the firebox;

(b) The installation of an additional course of brick on the exterior of the rough-in brick. This was necessary to allow the installation of the marble façade;

(c) The extension of the concrete hearth to ensure it was under the firebox and extending 16 inches in front of the firebox;

(d) The installation of marble tile on the floor in front of the firebox.

[13] When Moore completed his rough-in of the new fireplace he did not know who was going to finish the new fireplace, nor did he know precisely what work was going to be done, or how the new fireplace was to be finished. Moore's understanding was that the person finishing the fireplace would have to install the firebrick in the firebox, extend the concrete hearth, and install the additional course of brick over the roughed-in brick. Moore described a falling-out he said he had had with the appellant, and testified he left the construction site before any

of the finishing work was done on the new fireplace. He had no idea who performed that work.

[14] When the appellant changed the kitchen/fireplace he did not take any steps to have the new fireplace designed. Although the initial architectural drawings set out the design for each of the fireplaces in the home (in accordance with the National Building Code) Gwynne-Timothy did not consult with Comeau, the draftsman he hired to prepare the architectural drawings, or anyone else regarding redesigning the new fireplace. The new fireplace was bigger and required much more material than the initial "see-thru" fireplace design. Among other things, it required a redesign of the concrete hearth to meet the requirements of the National Building Code.

[15] Although Moore was originally hired to build and finish all of the fireplaces in the residence, when Gwynne-Timothy decided to change the configuration, he also made changes regarding who was to complete the construction of that fireplace. Rather than having Moore responsible for building the entire unit, three separate individuals became involved in the construction:

(a) Moore, who roughed-in the new fireplace;

(b) As found by the trial judge, some unknown person who did additional work to finish the new fireplace before a marble façade was added. This additional work included installing firebrick in the firebox, installing an additional layer of brick on the outside of the fireplace to allow the installation of the marble façade, and installing marble tiling over the wood floor in front of the firebox; and

(c) Tony DiQuinzio, a flooring contractor, who installed the marble façade on the front of the new fireplace.

[16] As the evidence disclosed and as found by the trial judge, the new fireplace was negligently designed and constructed. In particular:

(a) The new fireplace should have had a concrete hearth under the firebox and extending at least 16 inches in front of the firebox;

(b) The new fireplace was constructed without the required concrete hearth. The hearth, instead of extending 16 inches in front of the firebox, actually stopped nine inches *inside* the firebox. Plywood flooring abutted the edge of the concrete hearth inside the firebox. Therefore, some firebrick inside the firebox was installed onto the plywood (instead of on a concrete hearth). In addition, the marble tile in front of the firebox (16 inches) was installed directly onto the plywood (instead of on a concrete hearth).

[17] Gwynne-Timothy did not know who the person was who performed the finish work on the new fireplace before the marble façade was installed. This unknown individual finished the construction, creating an obviously dangerous structure (with both firebrick inside the fireplace and marble tile on the front of the firebox installed directly onto plywood).

[18] Gwynne-Timothy and his family resided in the home from 1986 until mid 1996, using the fireplace in question several hundred times over the years without any difficulty. No smell of smoke was ever detected when the fireplace was used.

[19] The respondent, Michael McPhee, a professional hockey player, was contemplating retiring from the NHL and planning to move to Halifax. McPhee was contacted by telephone at his residence in Dallas, Texas by Gwynne-Timothy who told McPhee he had heard of his retirement plans and wanted him to know that his house was for sale. Negotiations ensued, which concluded with the purchase of the residence. Before buying the home the respondents engaged the services of a home inspector who made a complete inspection of the premises, including the several fireplaces. The McPhees then closed the transaction and moved in.

[20] On December 9, 1996 a fire ignited in the area under the firebox/marble tile intersection of the new fireplace. Allison D. Tupper, P. Eng., an expert in the origin and cause of fire, was retained by the respondents' insurers to investigate the loss. He concluded that the fire occurred as a result of pyrolysis of wood which had been installed with improper clearances, contrary to common sense and the provisions of the National Building Code. The failure to design and construct the new fireplace to include a concrete hearth under the firebox and extending 16 inches in front of the firebox led to the ignition of the fire. The installation of

firebrick and marble tile on the plywood floor was contrary to the National Building Code.

[21] Justice Richard found that Gwynne-Timothy was negligent as the owner/general contractor.

[22] At the time of the fire the respondents were insured by Lombard Insurance ("Lombard"). Once notified of the fire Lombard retained ServiceMaster, a fire restoration contractor, to handle the assessment and restoration of the fire damage to the building and contents. The McPhees had a replacement cost endorsement on their insurance policy. They were paid a total of $1,117,633.00 for their building, contents, ServiceMaster, and miscellaneous claims. Lombard then commenced action against Gwynne-Timothy seeking recovery of $857,049.42. The difference between the amount paid to the McPhees ($1,117,633.00) and the amount claimed against Gwynne-Timothy ($857,049.42) is primarily made up of depreciation on the building and contents.

[23] As a result of the fire the home suffered fire and smoke damage. Virtually the entire interior of the residence was contaminated by smoke odour and soot. As a result it became necessary to do substantial demolition work, in effect ripping out the interior from the inside out, to effectively eliminate the smoke damage. Before the new walls could be built all of the interior beams, joists and studs had to be sprayed with a laquer sealant, a very labour intensive task. The trial judge accepted that this demolition work was necessary in order to eliminate the fire and smoke damage and restore the residence to its pre-fire state.

[24] Once the demolition work was complete, ServiceMaster prepared an estimate of the cost to restore the home to its pre-fire condition using materials of like quality. In preparing this estimate ServiceMaster obtained quotes on various components of work from more than one sub-contractor. The estimate was then subject to negotiation between ServiceMaster and Lombard to ensure that it was reasonable. There was then further negotiation between the McPhees and Lombard to finalize an estimate which reasonably reflected the cost to restore the home to its pre-fire state using like quality materials. To account for betterment, a 20% depreciation rate was applied to the estimate. The resulting quantification to restore the home to its pre-fire condition total $427,197.63.

[25] As noted earlier, the respondents' home was virtually gutted as a result of the demolition work necessary to resolve the fire and smoke damage inside the residence. The respondents elected not to reconstruct their home exactly as it was prior to the fire. They made additions to the home, for example an outside deck with hot tub, and chose not to replace numerous items which were damaged in the fire, such as the fireplace in the kitchen area. They ultimately spent approximately $575,000.00 - $580,000.00 to reconstruct their home. However, the scope of work to reconstruct their house was different than that which was required to restore the home to its pre-fire condition. The trial judge found that the actual cost incurred in reconstructing their home was of little value in assessing the reasonable cost required to restore the property to its pre-fire condition. In the circumstances the trial judge found as a fact that the estimate prepared by ServiceMaster (and the resulting amendments to that estimate) reflected the reasonable cost required to return the home to its pre-fire condition.

[26] As a result of the fire all of the contents in the home were exposed to fire and smoke damage. It was necessary to remove all of the respondents' contents from the residence in order to attempt any cleaning and rehabilitation of these items. It took at least two tractor trailer loads to move the entire contents to a warehouse where the items could be inventoried and the necessary restoration process could be completed.

[27] Significant amounts of the McPhee's contents were able to be successfully cleaned and restored. However, a large number of items were not initially salvageable or did not respond to cleaning and rehabilitation. A process was followed whereby contents were assessed following cleaning to determine if there was ongoing smoke damage and smoke odour. If it appeared that an item could not be cost-effectively cleaned or restored, the item was included on a list of items to be replaced. A final list (Schedules of Loss) outlining the items that required replacement was produced as a result of the efforts and assessments of the McPhees, their insurer Lombard, and ServiceMaster. Once it was determined which items needed replacement, the respondents provided information regarding the original date of purchase, the original cost, and the replacement cost of those items. Lombard then applied appropriate depreciation rates. The resulting contents claim was the sum of the depreciated values for the contents which required replacement.

[28] After taking steps to attempt to clean and rehabilitate the contents of the home, Lombard concluded that the contents set forth in the respondents' Schedules of Loss required replacement. The depreciated value of these contents totalled $118,769.23, which is what Lombard paid the McPhees. The trial judge denied this portion of the respondents' claim for damages.

[29] It is this sum which forms the basis of the cross-appeal.

Issues

[30] The grounds of appeal and cross-appeal may be conveniently stated as whether or not the trial judge erred:

APPEAL

(1) *in finding that Gwynne-Timothy was liable for the McPhees' loss, in particular by failing to find that a general contractor who engages competent and qualified sub-contractors to carry out work that is not inherently dangerous is not liable in tort for negligent work performed by such sub-contractor?*

(2) *in assessing the damages sustained by the McPhees for remedial work carried out on their home on the basis of the estimated cost of performing such work instead of basing the damages on the respondents' actual expenditures to perform such work?*

CROSS-APPEAL

(3) *in finding that the McPhees were not entitled to recover damages for the contents in their home that were damaged as a result of the fire?*

Standard of Review

[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. **H. L. v. Canada (Attorney General)** [2005] S.C.J. No. 24; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Campbell MacIsaac v. Deveaux & Lombard**, 2004 NSCA 87.

[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 ¶ 1-5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at ¶ 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."

[33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law 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 isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error. See **Housen**, supra, generally at ¶ 19-28; **Campbell MacIsaac**, supra, at ¶ 40; **Davison v. Nova Scotia Government Employees Union**, 2005 NSCA 51.

[34] Finally, in cases involving the assessment of damages, a trial judge's award of damages should not be disturbed unless it can be demonstrated that the judge applied a wrong principle of law or has set an amount so inordinately high or low

as to be a wholly erroneous estimate. See, for example, **Nance v. B.C. Electric Railway Company Ltd.**, [1951] A.C. 601; **Toneguzzo-Norvell et al v. Savein et al**, [1994] 110 D.L.R. (4th) 289; **Campbell MacIsaac**, supra, at ¶ 41; **Couse v. Goodyear Canada Inc.**, 2005 NSCA 46; and **Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada**, 2005 NSCA 53.

[35] Applying these principles I will now proceed to a consideration of the grounds of appeal and cross-appeal advanced by the parties.

Analysis

APPEAL

First Ground of Appeal:

> *Whether the trial judge erred in finding that Gwynne-Timothy was liable for the McPhees' loss, in particular by failing to find that a general contractor who engages competent and qualified sub-contractors to carry out work that is not inherently dangerous is not liable in tort for negligent work performed by such sub-contractor?*

[36] The crux of the appellant's first ground of appeal is the assertion that the trial judge erred by holding Gwynne-Timothy to a much too onerous standard; that as an individual who simply decided to go out and build his own residence he ought not, in the circumstances of this case, to have been held liable for the negligence of the sub-contractors whom he engaged, in good faith, to do the work. As the appellant's counsel put it in their factum:

> 24. The Appellant is a local businessman who undertook to build a home for his family; he is not, and never was, a general contractor in the construction industry, and is no more a general contractor than any homeowner who arranges for work to be done and hires independent contractors to perform that work. Notwithstanding any duty imposed upon an individual who undertakes to have such work done in his own home, it is well established that a contractor will not be liable for the negligence of his subcontractors, unless the work contracted out is "inherently dangerous". This principle was succinctly stated as follows in ***Hudson's Building and Engineering Contracts***, 1995, v. 1, at para. 1-310:

> In all cases of negligence owners and contractors may sometimes be liable vicariously for the negligence of their contractors or subcontractors respectively, but unless the work in question is held to be of an inherently dangerous nature they will usually be protected by the independent contractor doctrine.

(Emphasis as it appears in the Factum)

[37] During oral argument appellant's counsel conceded that Gwynne-Timothy was both owner and general contractor in this case, but again, referring to "sound policy reasons . . . particularly in the construction context" (citing **Hudson**, supra, at ¶ 2-114 and 2-115) repeated the assertions in their factum that:

> 29. . . . A building project involves the engagement of various specialized trades, a contractor will not usually possess all of the skills necessary to perform, plan or supervise all of the work himself
>
> . . .
>
> In such circumstances, it is submitted that it would be absurd to hold a contractor liable for the consequences of negligence in the performance of work by his independent contractor which he himself would have been incapable of performing properly.
>
> 33. . . . It is submitted that maintaining the imposition of liability on the Appellant would have serious and far-reaching implications, requiring that a general contractor know all of the Code provisions governing the design and installation of every component of a building. In essence, therefore, a general contractor would become a guarantor of the work performed by sub-contractors.
>
> . . .
>
> 35. There was no evidence of any direct negligence on the part of the Appellant. . . . Any finding of liability had to be based upon imputing liability to him for the conduct of a third party: in this case, the contractor who carried out the redesign and installation of the masonry work around the fireplace in question.

[38] With great respect, I am of the opinion that the appellant has mistakenly characterized the basis upon which Justice Richard imposed liability and that as a

result the appellant's entire submission with respect to vicarious liability is irrelevant to this appeal.

[39] It must be remembered that the claim brought by the McPhees against Gwynne-Timothy was brought on alternative bases. It is obvious from their statement of claim that they sued the appellant both in his *personal* capacity for negligence as the designer and/or general contractor of the residence acting on his own; and in the alternative, on the basis of vicarious liability for the faulty work of the sub-trades whom he engaged and were under his control or supervision.

[40] Richard, J. found that Gwynne-Timothy was *personally* negligent, for his acts and omissions. The trial judge did not find that Gwynne-Timothy was *vicariously* liable for the negligence of the sub-contractors.

[41] The basis for imposing liability on Gwynne-Timothy appears at pages 7-8 of the trial judge's decision where he states:

> From this outline of the facts I draw the following conclusions. Had the kitchen fireplace been constructed according to plan there would have been a See Thru fireplace, properly and safely constructed, and in compliance with the National Building Code. When the decision was made to construct two separate fireplaces, instead of one, it was incumbent upon the owner/general contractor to insure that the new design was safe and in compliance with the National Building Code. I find as a fact that there was no effort made to change the building plans to accommodate the new design, in spite of the comments made by Moore respecting the added costs involved in the reconstruction. Gwynne-Timothy said that he had no idea why the concrete slab (hearth) does not extend out. I find the Gwynne-Timothy, through his lack of experience and knowledge of the home building process, did not appreciate the vital importance of the extended concrete hearth and therefore, unwittingly, allowed the construction of an inherently dangerous structure. This, combined with Gwynne-Timothy's failure, as a general contractor, to familiarize himself with the relevant portions of the Building Code constitute negligence, and it was reasonable foreseeable that such negligence could cause damage and loss to a subsequent purchaser of the dwelling.
>
> (Underlining mine)

In these very clear findings, the trial judge outlined the conduct of the appellant which in his view constituted negligence and further that it was reasonably foreseeable that such negligence could cause damage and loss to the McPhees as

subsequent purchasers of the home. In short, the assessment of liability against the appellant was neither based upon, nor had anything to do with a consideration of Gwynne-Timothy's vicarious liability for the negligence of his sub-contractors.

[42] The law is settled that someone in Gwynne-Timothy's position as the owner and general contractor directly involved in the design and/or construction of a building owes a duty of care to subsequent purchasers. Liability will be imposed if the owner/general contractor is negligent in his or her responsibilities in the design and/or construction, and if such negligence causes damage to the subsequent owner.

[43] In **Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.**, [1995] 1 S.C.R. 85, litigation arose when a storey-high section of cladding, approximately twenty feet in length, fell from the ninth storey level of a building to the ground below. The structure had been initially built and used as an apartment block, but had been converted into a condominium some years later. The directors of the condominium corporation had observed that some of the mortar had broken away and that cracks were developing in the stonework. As a result of these concerns they retained a firm of structural engineers and the original architects to inspect the building. These consultants recommended some minor remedial work, but offered the opinion that the stonework on the building was structurally sound. Seven years after these consultants had rendered their opinion, the near disaster occurred when the huge section of cladding fell nine storeys to the ground below. Further inspections were carried out following which the condominium corporation had the entire cladding removed and replaced at a cost in excess of $1.5 million. An action was commenced and various proceedings ensued including motions for summary judgment and motions to strike the statement of claim, which are not important for the purposes of my analysis. When the matter came before the Supreme Court, at issue in the appeal was whether a general contractor responsible for the construction of a building might be held tortiously liable for negligence to a subsequent purchaser of the building, who was not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction. In allowing the appeal and, in effect, reinstating the decision of the Chambers judge permitting the action to go forward, Justice LaForest, writing for a unanimous court, stated at ¶ 21:

> . . . The underlying rationale for this conclusion is that a person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.

and further at ¶ 35:

> In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable. Buildings are permanent structures that are commonly inhabited by many different persons over their useful life. By constructing the building negligently, contractors (or any other person responsible for the design and construction of a building) create a foreseeable danger that will threaten not only the original owner, but every inhabitant during the useful life of the building.

and finally at ¶ 43:

> I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants.
>
> (Underlining mine)

[44] I digress at this point to comment upon a brief portion of the trial judge's reasons, selected by the appellant as evidencing error in law. For convenience I will repeat the part which contains the impugned reference:

> When the decision was made to construct two separate fireplaces, instead of one, it was incumbent upon the owner/general contractor to insure that the new design was safe and in compliance with the National Building Code.
>
> (Underlining mine, for emphasis)

[45] If the trial judge intended the word "insure" to be taken literally then I agree with the appellant that such a statement would constitute legal error, requiring our intervention. However, I do not read the trial judge's reasons, when taken as a whole, to mean or infer any such thing. I see it as simply a poor choice of words. He never intended to suggest that in these circumstances Gwynne-Timothy was obliged to "warrant" the safety of design and construction. Such a characterization would assign the role of guarantor to the appellant, a proposition soundly rejected for well recognized substantive and policy reasons.

[46] When the trial judge's use of the word "insure" is read in context, it is my opinion that all he intended to say was that in the circumstances of this particular case it was incumbent upon the appellant as owner/general contractor to take reasonable steps to see that the new design was safe and in compliance with the National Building Code.

[47] In any event, it is clear from reading the judge's reasons in their entirety that he understood and properly applied the principles enunciated by the Court in **Winnipeg Condominium**, supra. Indeed, after referring to certain portions of Justice LaForest's judgment, the trial judge observed:

> This case (Winnipeg Condominium) clearly sets out the duty in tort for "a contractor (or any other person)" who negligently plans or constructs a building and this is the law applicable respecting the liability of this defendant in the instant case.

Applying a correctness standard to this, a question of law, I am satisfied that Richard, J. made no such error in concluding that the appellant was personally and solely at fault for the respondents' loss.

[48] From the record in this case it is apparent that there was no serious dispute as to the cause of the fire and extensive resulting damages. The trial judge commented favourably upon the investigation and report completed by Allison D. Tupper, P. Eng., an expert engaged by Lombard, who was qualified to give opinion evidence. Evidently Mr. Tupper's work provided a very thorough and compelling analysis of the improper construction of this fireplace; the origin, cause and spread of the subject fire; and the extensive collateral smoke damage which resulted. Justice Richard observed that Mr. Tupper's "report was clearly

written and understandable and assisted the court greatly in reaching conclusions as to the source and cause of the fire, as well as the ensuing damages." Mr. Tupper's conclusions, which the trial judge accepted were:

> 1. The fire which caused significant damage to the McPhee house in Allen Heights subdivision, Tantallon, Halifax County, Nova Scotia, on December 9, 1996, started in the ceiling/floor assembly between the basement and main storey, below the firebox of the fireplace in the west wall of the main floor breakfast nook.
>
> 2. Ignition occurred from heat of a friendly fire in the fireplace, as a result of pyrolysis of wood which had been installed with improper clearances, contrary to common sense and the provisions of the National Building Code of Canada.

[49] Pyrolysis may be described as a process or a condition by which the ignition temperature of a combustible material is decreased through heating and baking over time, whereby volatile gases are expelled and after further molecular activity the resulting gases mix with the ambient air and, should necessary combustion conditions be present, they will ignite and burn with flames. Pyrolysis may occur quickly as with the presence of fire, or slowly as often occurs with the baking of wood or other combustibles located near a continuing heat source, for example a hot pipe, chimney, or fireplace.

[50] As is apparent from Mr. Tupper's investigation, photographs and schematic illustrations, the subject fireplace design differed from that set out in the original drawings in that, for example, it was constructed with a floor level hearth and not a raised hearth; the hearth stopped about eight inches inside the front of the firebox, rather than outside of it by the mandated sixteen inches; and the outer eight inches of firebox rested directly on the wooden floor assembly and not on the required concrete slab.

[51] All of this prompted Mr. Tupper to express the opinion in his report that:

> The framing detail at the base of the living room fireplace was patently disastrous for a level hearth installation, and contrary to the code of the day, even for a raised hearth installation. In order to have been built in accordance with the code requirements:

1. The concrete base of the hearth must have extended 24 inches beyond its actual position, so that it was run 16 inches beyond the face of the fireplace; and

2. The flooring and joists must have been located beyond the edge of that hearth.

[52] After considering this and other evidence the trial judge declared:

> I find, on a high degree of probability that the cause of the fire which caused the extensive damage to the plaintiffs' home was the process described as Pyrolysis. I further find, on an equally high degree of probability, that the process of Pyrolysis was developing over an extended period of time - perhaps since the first fire was ignited in that fireplace.

[53] Further, as found by the trial judge, this process of pyrolysis occurred in a concealed area of the house, under the fireplace and above the basement ceiling. The particular configuration of floor joists and strapping attached to it created air spaces through which very significant smoke and soot penetration throughout the house occurred. The penetration rose to other parts of the residence through holes cut to permit the electrical, heating and plumbing lines which passed to those higher levels leaving serious smoke residue throughout the building. Richard, J. observed:

> There is no evidence to suggest that this contamination was the result of anything but the permeation of smoke as the by-product of the pyrolysis process. The fact that Gwynne-Timothy did not smell smoke does not suggest that pyrolysis was not in process during his occupancy of the house.
>
> . . .
>
> It is probable that the smoldering, which caused most of the smoke and soot damage . . . continued throughout the evening hours of 8 December and into the morning of 9 December until it reached the intensity to drive smoke into the living area of the house. This is consistent with the opinion expressed in the Tupper report and in Tupper's testimony at trial.

[54] The trial judge considered and rejected the assertion that the respondents had in some way brought about or added to the loss by their own contributory negligence. No appeal is taken with respect to that determination.

[55] I have reviewed the evidence with respect to the cause, origin and spread of this fire and collateral damage in some detail as it provides a strong evidentiary basis for the trial judge's clear findings and his ultimate determination that Gwynne-Timothy was personally liable to the McPhees as subsequent purchasers on account of his negligent acts and omissions as owner and general contractor.

[56] In argument at the hearing counsel for the appellant argued that Gwynne-Timothy only owed two duties to the respondents as subsequent purchasers: first, a duty to retain a competent designer and second, a duty to hire competent tradesmen. No authority was offered in support of such a limited standard. In my view, such a proposition would advance far too narrow a test for liability in this case.

[57] Acts or omissions fall below the standard of care required by the law of negligence if they create an objectively unreasonable risk of harm. To avoid liability, a person must exercise a standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The standard of care applicable to the appellant is one of a reasonable and prudent person who undertakes the construction of a house. Thus, duties owed and the measure of what is reasonable depend "on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury." per Major, J. in **Ryan v. Victoria (City)**, [1999] 1 S.C.R. 201 at 222.

[58] The record in this case including the appellant's own admissions during his testimony, provided an ample evidentiary foundation for the several and specific findings of fault made against him by Justice Richard. In my respectful opinion none of such findings, whether in the area of construction or design, could be said to have resulted from palpable and overriding error. The appellant has failed to demonstrate any basis whatsoever for disturbing the trial judge's decision that Gwynne-Timothy was personally and solely liable for the respondents' loss and resulting damages.

[59] In conclusion, I see no error of law or any palpable and overriding error of fact in the findings and conclusions expressed by Justice Richard. I would dismiss this ground of appeal.

Second Ground of Appeal:

> *Whether the trial judge erred in assessing the damages sustained by the McPhees for remedial work carried out on their home on the basis of the estimated cost of performing such work instead of basing the damages on the respondents' actual expenditures to perform such work?*

[60] Here, the appellant's complaint is directed towards the type of proof relied upon by the trial judge in fixing the amount of damages to restore the home to its pre-fire condition. The appellant submits that Richard, J. was wrong to assess damages based on an *estimate* of the reasonable cost to restore the home to its pre-fire condition.

[61] I would reject the appellant's submission.

[62] Justice Richard found that the scope of work undertaken by the McPhees to repair their home (following the fire) and the actual cost of doing so was of little, if any, value in assessing the "reasonable cost required to restore the property to its pre-fire condition." This was a finding of fact and the trial judge did not make any palpable and overriding error in arriving at that conclusion.

[63] Similarly, the trial judge found as a fact that the amount necessary to restore the home to its pre-fire condition was $427,197.63. This sum was based on a construction estimate prepared by ServiceMaster to restore the home precisely to its pre-fire condition, after applying depreciation. The estimate was based on restoring the home to its exact configuration, prior to the fire, using like materials. The trial judge also found that there was no cogent evidence before him to support allegations of excessiveness or lack of necessity in the claim for damage to the home.

[64] The McPhees did restore their home and repaired the damage. Because most of the interior of the residence was gutted (to get rid of fire, soot and smoke damage) they did not reconstruct the interior identically to its pre-fire condition. They were under no obligation to restrict themselves in such a fashion. They made some additions and some deletions to the pre-fire condition of their home. They spent approximately $575,000.00 - $580,000.00 to restore the house which is

well in excess of the amount claimed by the respondents ($427,197.63) for the cost of restoring the home to its pre-fire condition.

[65] While the McPhees were not obligated to restore their home to its exact pre-fire condition, neither were they entitled to recover any more than the reasonable cost in doing so.

[66] Finally, it is to be noted that the appellant did not lead any evidence that the reasonable cost to restore the home to its pre-fire condition was anything less than $427,197.63.

[67] The appellant acknowledges that the test used by Richard, J. to quantify damages was appropriate. He does not suggest that the trial judge was wrong in finding:

> The defendant is liable at law for those reasonable costs required to restore the property and its contents to their pre-fire condition.

In fact, the appellant acknowledged that the proper approach at trial was to quantify the damages based on the cost of repair in restoring the home to its pre-fire condition.

[68] The appellant also acknowledged that a guiding principle in assessing damages in this type of loss is that damages should, so far as money can, put the plaintiff in the same position as he or she would have been, had the tort not been committed.

[69] While the appellant does not suggest that the trial judge applied incorrect legal tests regarding the proper measure of damages, he does argue that Richard, J. used the wrong evidence to establish the reasonable cost required to restore the home to its pre-fire condition. The appellant argues that the trial judge erred in law in using an estimate of the cost to restore the home to its pre-fire condition rather than using evidence of the actual cost. The appellant has failed to produce any legal authority for such a proposition.

[70] In my respectful view the argument fails for a number of reasons.

[71] First, as I have already observed, the respondents did not actually restore their home to the same condition it was in prior to the fire. Therefore, the actual monies spent in reconstruction does not and would not reflect the trial judge's determination that all they were required to recover was the "reasonable cost required to restore their property . . . to their pre-fire condition."

[72] Second, because the respondents did not actually restore their home to its pre-fire condition, there is no evidence (and never will be any evidence) of the actual cost such a restoration would have incurred.

[73] Third, the estimate prepared by ServiceMaster (which was the basis of the trial judge's award for the building claim totalling $427,197.63) was the only evidence of the "reasonable cost required to restore their property . . . to their pre-fire condition."

[74] Finally, the appellant's position on this ground of appeal may hold some theoretical attraction but, with respect, ignores the reality of the circumstances that actually arose in this type of case. It is not unusual when real property is damaged or destroyed by fire or some other peril, that the structure is reinstated but restoration is not identical to the pre-damage condition. One could ask rhetorically "how would a plaintiff prove the loss in such circumstances other than by an estimate of the reasonable cost (as opposed to the actual cost) of restoring the property to the pre-damaged condition?" It is impossible to adduce evidence of the actual cost of restoration to a pre-damaged condition, when the property has not been so restored.

[75] Richard, J. specifically addressed his mind to whether the actual costs incurred by the respondents was of any probative value given that the work did not reflect what was necessary to restore their home to its pre-fire condition. He found that their actual costs ($575,000.00 - $580,000.00) reflected a different scope of work and so were irrelevant to what might be the reasonable cost expended to restore the property to its pre-fire condition. He stated:

> It is trite to say that the burden is on the plaintiffs to prove their loss on a preponderance of evidence. Further, the fact that the plaintiffs' claim was subrogated to their insurers is of no relevance. What the insurer paid to the plaintiffs is not the measure of damages for which the defendant is liable. The defendant is liable at law for those reasonable costs required to restore the

> property and its contents to their pre-fire condition. Once that monetary calculation has been determined and the plaintiff reimbursed accordingly, the defendant has fulfilled the requisite legal obligation and the mater is concluded. I make this comment because there was much testimony respecting the rebuilding of home by the plaintiffs. They made additions to the home, such as an outside deck with a hot tub. They also chose not to replace numerous items which were damaged in the fire, such as the fireplace in the kitchen area. For these reasons, the contract which the plaintiffs entered into to restore the home is of little probative value - it does not address the issue of restoration to pre fire condition.
>
> (Underlining mine)

[76] The approach taken by Richard, J. is consistent with the principle to be applied in the assessment of damages in this type of loss, that is that damages, so far as money can, should put the plaintiff in the same position as if the tort had not occurred. See, for example, **Canada (A.G.) v. Clorey**, [1996] P.E.I.J. No. 64 (T.D.), upheld on appeal, [1998] P.E.I.J. No. 50 (C.A.).

[77] Before concluding my analysis of this ground of appeal it seems to me that the real thrust of the appellant's submission is that the estimate used by the trial judge did not - so it is argued - accurately reflect the reasonable cost of restoring the McPhees' home to its pre-fire condition. If Gwynne-Timothy contested this estimate he should have led evidence at trial to prove that some lower dollar estimate better reflected the reasonable cost of restoration to the pre-fire condition. The appellant did not call any evidence at all to contest the reasonableness of the ServiceMaster estimate. The trial judge found:

> On the basis of the documentary evidence and explanations in support of that, I am satisfied that the estimated cost of $427,197.63 is the amount reasonably required to return this building to its pre fire condition.

[78] It is clear from the record that it was open to the trial judge to make this finding of fact. There was no palpable and overriding error in his doing so. I would therefore dismiss this ground of appeal.

[79] In conclusion, I would dismiss the appeal and award costs on appeal to the respondents based on 40% of the costs awarded at trial, plus disbursements as taxed or agreed.

CROSS-APPEAL: *Whether the trial judge erred in finding that the McPhees were not entitled to recover damages for the contents in their home that were damaged as a result of the fire?*

[80] Here, in simple terms, the respondents/appellants by cross-appeal ("the McPhees") claim error on the part of the trial judge in three respects: first, that the award was unreasonably low; second that he erred in law in misapprehending the evidence; and third, that he erred in law in virtually not allowing anything for the damage to contents claim.

[81] In reply, the respondent by cross-appeal ("Gwynne-Timothy") argues that Justice Richard did not err because he "did not dismiss" the contents claim, but rather decided as a matter of proof that the McPhees had not adduced sufficient cogent evidence in support of their claim and had therefore failed to meet their burden, resulting in a dismissal of this portion of their suit for damages.

[82] After careful consideration of the submissions and the record, I respectfully conclude that the trial judge did err in law in rejecting the McPhees' claim for damaged contents. I would remit this single aspect of the case to the trial judge for proper consideration in accordance with the directions I will stipulate.

[83] The trial judge's treatment of this aspect of the claim is relatively brief and for ease of reference I will repeat it *verbatim*. He said:

> I am concerned respecting the disposition of the contents list as shown in Tab 5. This is comprised of some 38 pages of contents and the amount claimed for some 900 items. The list appears to have been meticulously prepared and sets out the description, date of purchase, purchase price, depreciation and amount claimed. Many of the items are personal clothing and there is no evidence as to what effort was made to clean, rather than replace these. It is impossible to reconcile this list of replacement items with the very substantial claim for cleaning of contents as set out in several of the schedules at Tab 7 of Ex. 2. As I earlier indicated, David Hatter, the senior adjuster on site did not give evidence at trial. Nor did Richard Orrell, who is described as a Cleaning Supervisor, working with a crew of about 8 cleaning technicians on the contents. I am not satisfied that all of the items described in this category ought to have been replaced. For example, one wonders why a Maytag dishwasher (presumably built-in) would require replacement due to smoke damage or smoke odour. The same applies to the myriad of small appliances such as electric wok, microwave, steam iron, electric fry pan or deep fryer. There is no evidence, other than the documentation, which

> supports the replacement of these items as reasonably necessary to restore them to pre fire condition. The defendant was denied the opportunity to determine, through cross-examination whether the claims were reasonable and necessary. It is not up to the court to rule on the efficacy of each of these items and determine whether or not the claim is reasonable. Therefore, I am not satisfied that the plaintiff has discharged the burden or proof with regard to this category. There are portions of this segment which relate to restoration and rehabilitation, as opposed to replacement, and I find these to be reasonable claims. The segment is adjusted to reflect only restoration and rehabilitation and the balance of the segment is disallowed. I note one item relating to restoration, Glen Fisher Restorations - $21,815.50. There are also charges for the transportation and storage of the contents during cleaning efforts. These charges are also allowed. If counsel is able to extract other restoration or rehabilitation items, as well as the transportation and warehousing charges, from this category, such items ought be included in the final order.
>
> (Underlining mine)

[84] With respect, the passages I have underlined for emphasis indicate to me that the trial judge either misapprehended the evidence, or lost sight of important, material evidence relating to the very points he said were found to be wanting. In either event his conclusions were the result of palpable and overriding error, such that his rejection of the McPhees' claim must be overturned and remitted to the trail judge for proper consideration.

[85] Justice Richard allowed virtually the entire amount claimed for the damage to the residence, the ServiceMaster charges, and the miscellaneous components of the claim. He also allowed some restoration and rehabilitation expenses claimed under the contents portion of the claim. However, he did not allow any damages for the replacement of damaged contents in the home. Evidently he did not accept that any of the contents in the residence had to be replaced because they could not otherwise be restored. Such a conclusion was the result of palpable and overriding errors in his assessment of the evidence, which then resulted in findings which are not supported by the evidence and which are contrary to the evidence.

[86] The MacPhees' home was described by the trial judge as "very large" and "high end." The home had 7,500 square feet of inside living area. The trial judge found that at least two tractor trailers were required to move the McPhees' belongings from Dallas to Halifax. Following the fire all of the contents of the

home were trucked to a warehouse and inventoried by ServiceMaster. In his reasons the trial judge observed:

> At least two tractor-trailer moving vans were required to move the plaintiffs from Dallas to Halifax. Much of this was either damaged or degraded by the fire, smoke and soot from the fire. All of the contents were inventoried and the condition of these were commented upon where practical. Four books of documents containing some 1600 pages were introduced in evidence, much of which pertained to the contents of the home.
>
> (Underlining mine)

[87] ServiceMaster either cleaned the contents or had other third parties clean items that they felt were salvageable. The evidence, for example, testimony from Michael McPhee as well as Dan Murray, owner/operator of ServiceMaster, clearly established that the cleaning process did not eliminate smoke odour from many of the items cleaned. It was therefore agreed that those items had to be replaced. For example, after all the clothes were cleaned, approximately 50% were deemed acceptable after cleaning. The other half had a lingering smoke odour.

[88] Very close checks and balances were maintained to avoid any suggestion that the claim was out of control, or offered a *carte blanche* to the home owners. The file was handled personally by Mr. Ross Trueman, claims manager for the Atlantic region, who reported directly to the senior vice-president of claims at Lombard's head office. Trueman described the regular process of consultation and negotiation between ServiceMaster and Lombard as well as between Lombard and the McPhees before final amounts for individual contents, less depreciation, were approved.

[89] The exhibits at trial outline in great detail the contents which were damaged by the fire and smoke and for which Lombard allowed replacement because they couldn't otherwise be cost effectively restored to their pre-fire condition. Richard, J. did not allow any damages for these items which totalled $118,769.23, made up of $107,214.14 (Ex. 2, Tab5) and $11,555.09 (Ex. 15).

[90] The sum of $107, 214.14 represents the cost of restoring the McPhees' contents to their pre-fire condition for those items that had suffered or fire damage and which could not be restored or could not be cost effectively restored. This

schedule of contents consists of approximately 75 pages of contents with 1039 individual items. This schedule of contents does not include the contents that responded to cleaning. The sum of $11,555.09 represents those contents which were required shortly after the fire to allow the McPhees to continue with their lives while their home and contents were being dealt with by ServiceMaster.

[91] The evidence is clear that there was significant smoke damage throughout the interior of the home. The trial judge found that the interior had to be virtually gutted in order to rid the residence of the smoke and soot damage throughout. He allowed the claim of approximately $427,000.00 to restore the building (primarily due to smoke damage) and one would logically expect therefore that the contents of the home also suffered fire and smoke damage. The trial judge found that "B(y) any measure, the claim is extraordinary in both its scope and quantum." He determined it "was necessary to remove all of the owners' contents from the house to attempt cleaning and rehabilitation "of those items. (Underlining mine)

[92] Having found that all of the McPhees' contents required cleaning and rehabilitation (and were therefore damaged) it follows that the trial judge must have found that all contents were successfully cleaned, in deciding to dismiss the McPhees' contents claim. There was no evidence to support a finding that all contents responded to or would respond to cleaning. In fact, there was overwhelming evidence to the contrary.

[93] With respect, the trial judge was clearly wrong in finding there was "no evidence as to what effort was made to clean, rather than replace" the contents, particularly personal clothing. Messrs. Murray, McPhee and Trueman all described the substantial efforts in that regard.

[94] Further, the trial judge erred in finding it "impossible" to reconcile the list of replacement items with the substantial cost of cleaning. The two are easily reconcilable. ServiceMaster's Dan Murray described the attempts made to clean contents which were not completely successful, resulting in the list of items in the Schedules of Loss that had permanent smoke damage and therefore had to be replaced. There was no evidence to the contrary. Thus, there was absolutely no evidence to support the trial judge's finding that it was "impossible" to reconcile the lists of replacement items and the cost of cleaning.

[95] Further, the trial judge erred in finding there was "no evidence" other than the documentary evidence, to support the replacement of various contents. The uncontradicted *viva voce* testimony was that if an individual item could reasonably be cleaned (rather than replaced) steps were taken to clean the item. The inventory of items that were included in the contents claim either could not be cost-effectively cleaned or did not respond to cleaning.

[96] Having found that all of the contents were exposed to smoke and that it was reasonable and necessary to attempt the cleaning and restoration of these items, the only basis on which the trial judge could find that the McPhees were not entitled to recovery for the cost of replacement (less depreciation) for those specific contents, was if he were satisfied that all of the contents either were or could have been successfully cleaned or rehabilitated. As noted, there was no evidence to support this finding. In fact, there was overwhelming evidence to the contrary.

[97] It would appear from the trial judge's reasons in rejecting the McPhees' contents claim, that he was perturbed that certain items such as a "Maytag dishwasher," and "electric wok," "deep fryer" required replacement due to smoke damage or smoke odour. However, witnesses including McPhee, Murray and Trueman described how many of the kitchen appliances did not respond to cleaning and that despite best efforts they couldn't get rid of the smoke odour. In the case of other electrical appliances, witnesses said that it would not be cost effective to clean those items - if they had to be disassembled, cleaned and reassembled in order to get rid of the smoke odour - and so those were simply replaced.

[98] The trial judge said:

> "it is not up to the court to rule on the efficacy of each of these items and determine whether or not the claim is reasonable."

With respect, this is precisely the type of analysis a trier is obliged to conduct in quantifying the extent of any claimant's loss.

[99] While the exercise may be ponderous, that is no reason to avoid it. Difficulties in accurately assessing damages cannot relieve a wrongdoer of the duty of paying damages. See, for example, **Wood v. Grand Valley Railway Co.**

(1915), 51 S.C.R. 283; **Penvidic Contracting Co. v. International Nickel Co. of Canada**, [1976] 1 S.C.R. 267; and **Cadbury Schweppes Inc. v. FBI Foods Ltd.**, [1999] 1 S.C.R. 142.

[100] This is not the kind of case where I would be prepared to review the evidence, quantify the loss and substitute my own assessment of damages. Such an analysis would oblige me to make findings of fact or draw inferences from fact and while there is no question that this court has the necessary jurisdiction to do so "it is always, for sound reasons, sparingly exercised." per Freeman, J.A., writing for this court in **Ken Murphy Enterprises Ltd.**, supra, at ¶ 34.

[101] This is a case where the unique features and circumstances will be well familiar to the trial judge and counsel. The detailed examination and eventual quantification of the McPhees' claim for damage to the contents of their home is an exercise which in this case is best left to the trial judge.

[102] Whether the trial judge ultimately decides to review this aspect of the claim on a line by line basis, or prefers to perhaps categorize the contents by type, or apply some other methodology, is entirely up to him.

[103] But to illustrate the level of inquiry that will be expected, I see that in the Schedule of Loss reproduced as Ex. No. 2, Tab 5, appear the following items:

> Line 265 Mans long dress wool overcoat 1990 - Montreal

said to be "HUGO BOSS" and showing a replacement cost of $550.00, less depreciation of $181.50 yielding a new amount claimed of $368.50.

> Line 274 Ladies blk suede skirt/jacket suit

said to be "`DICAPRA" and showing a replacement cost of $300.00, less depreciation of $99.00 yielding a new amount claimed of $201.00.

[104] If the trial judge were to determine that either or both of these sums ought not to be allowed either wholly or in part, then he would have to go on to decide (or estimate) how much had been spent in attempting to clean the item, before it was decided by the McPhees and their representatives that it couldn't be restored to anyone's satisfaction. In such circumstances as I have just described above the

tortfeasor, Gwynne-Timothy would still be liable for the cost of cleaning the item(s) even if Justice Richard were to decide that all or a portion of the cost of replacing the item(s) was not made out, provided of course the trial judge was satisfied that the McPhees had established the alternative measure of damages based upon proof of the cost of cleaning the items.

[105] Consequently, I would remit this portion of the McPhees' claim to the trial judge for disposition, with the following directions:

- Whether the trial judge ultimately decides to review this aspect of the claim on a line by line basis, or prefers to perhaps categorize the contents by type, or apply some other methodology, is entirely up to him.

- All of the evidence is in. The case is closed. Neither party will have any opportunity to adduce further evidence.

- Counsel for the parties will be free to make whatever further arguments, if any, Mr. Justice Richard feels would be helpful to his disposition of the matter, and at a time and in a format of his choosing.

- The point of the exercise is that the trial judge is directed to determine the extent to which any or all of the McPhees' individual claims for lost contents (which total $118,769.23) are allowed and found to be the responsibility of the appellant Gwynne-Timothy because they had to be replaced.

- In such instances those sums are reflected in the documentary evidence (Ex. 2, Tab 5 and Ex. 15) and the trial judge will have to pass upon the legitimacy of those sums and the manner in which they were calculated, including the deductions for depreciation.

- In instances where the trial judge declines to allow the full or partial portion of the replacement cost reflected in the documentary evidence, he will have to go on to decide (or do his best to estimate) the cost to the McPhees to clean the item.

- In such circumstances, the tortfeasor, Gwynne-Timothy would still be liable for the cost of cleaning the item(s) even if Justice Richard were to decide that all or a portion of the cost of replacing the item(s) was not made out.

- The trial judge, in his discretion, will decide the question of costs and disbursements, if any, relating to this remittance.

- The trial judge, in his discretion, will also decide the amount of costs and disbursements to which the respondents may be entitled for their contents' claim at trial following their success in the cross-appeal herein.

[106] For all of these reasons I would allow the McPhees's cross-appeal and would award them their costs on the cross-appeal based on 40% of whatever costs are fixed by Richard, J. for their contents' claim, plus disbursements on the cross-appeal as taxed or agreed.

Disposition

[107] In summary, I would dismiss the appeal with costs on appeal to the respondents based on 40% of the costs awarded at trial, plus disbursements as taxed or agreed. I would allow the cross-appeal, remit that portion of the claim to which the cross-appeal relates to the trial judge for disposition according to the directions I have given, and would award the appellants by cross-appeal their costs on the cross-appeal, based on 40% of the costs to be fixed by the trial judge with respect to the McPhees contents' claim, plus disbursements on the cross-appeal as taxed or agreed.

Saunders, J. A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.