

1999

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: E.C.E. On Site Machining Ltd. v. Merrette , 2001NSSC32

BETWEEN:

E.C.E. ON SITE MACHINING LIMITED and ELLIS EISAN

PLAINTIFFS

- and -

HOWARD MERRETTE and ELLWOOD MERRETTE

DEFENDANTS

D E C I S I O N

HEARD: at Halifax, Nova Scotia, before the Honourable Justice
D. Merlin Nunn, on January 22 - 26, 2001

DECISION: February 21, 2001

COUNSEL: Peter Rumscheidt, Esq., on behalf of the Plaintiffs
Howard Merrette and Ellwood Merrett, self-represented

NUNN, J:

- [1] In this action the plaintiffs are claiming against the defendants for damages arising out of the condition and quantity of certain machinist equipment and tools recovered under a Recovery Order in another action between these same parties.
- [2] The plaintiff Eisan, a machinist by trade, had worked in his trade since obtaining his machinist's diploma from Vocational School in 1973, with a number of employers, finally leaving his last place of employment, the Halifax Dockyard in 1996. He had earlier decided to start his own business doing on-site machinist work for customers he would locate. To this end he had built a portable milling machine and a line boring machine which, with the other tools and equipment he had acquired over the years, provided him the necessary machines and tools for this kind of work. In May of 1996 the corporate plaintiff was incorporated with Eisan as its owner.
- [3] The business was less than successful, losing money in its first year and Eisan quickly began winding down his operations, returning, at least part-time, to regular shift work at the Halifax Shipyards.
- [4] Early in 1997 the defendant Howard Merrette, noticed the company name on Eisan's truck, approached him and invited him to the Merrette machine shop at

230 Wyse Road in Dartmouth. This shop was owned by Crawford Metal Industries with Howard Merrette and his brother Ellwood as partners. Ellwood was a regular Navy machinist and worked in the shop nights and weekends, and both Howard and Ellwood were machinists by trade. The Merrette business was in shop work and Howard felt that Eisan's on-site abilities would be an advantageous compliment to his business.

- [5] After some discussions Eisan and Howard orally agreed that Eisan would move his equipment to the Wyse Road shop, pay no rent and make no contribution to overhead costs but would share 50-50 on any earnings from the on-site work. Eisan moved his equipment in.
- [6] During the rest of 1997 and early 1998 Eisan was not making very much in his on-site work and he continued on and off as a shift worker at the Halifax Shipyards. By the summer of 1998 Eisan advised Merrette that he intended to terminate the relationship.
- [7] Coincidentally, at about this time there was a Crown Assets Disposal Auction coming up, with one item being a Colchester Lathe, a large machinist's shop lathe. Eisan attended and upon inspection felt that, though the lathe was 15 years old, it had never been used and there were a substantial number of extra accessories and parts, all in new condition. He put in a bid of \$12,250,

thinking first of resale but also of setting it up to generate work. He was aware the defendants had also inspected the lathe and put in a bid of \$13,010. Both bids were plus tax. The Merrette bid was successful but they declined and Eisan, the next highest, was awarded the lathe which he accepted.

[8] An interesting, and perhaps revealing, aside at this point is that Howard Merrette learned, before declining, that Eisan was the next highest bidder, a fact he should not have learned, and then declined realizing the lathe would be in his shop without any outlay of capital on his part.

[9] Eisan paid for the lathe on September 9, 1998 and had it delivered to the Wyse Road shop, and began to clean it up before setting it up for operation on the shop floor. Within a short time it was cleaned, wired up and operating. The Merrettes already had a new similar lathe in the shop and most of the parts and accessories of both lathes were interchangeable.

[10] According to Eisan the Colchester lathe was used on a daily basis by the Merrettes during October, November and December, so much so that he asked them to pay him something per hour of use though no amount was agreed upon and he was paid nothing.

[11] By early December Eisan had decided he was going to remove all his equipment and either sell the large equipment, keeping the smaller, or move to

another shop owned by a Mr. Minkoff who had already agreed Eisan could move his equipment to his shop. He advised Howard that he intended to move his equipment in January. There was no apparent objection, however, there was a discussion about the Merrette buying the Colchester lathe and its accessories which culminated in a signed "Letter of Intent Offer To Purchase" by Crawford Metal Industries Incorporated to purchase the Colchester lathe and the Peerless Shaper, with all accessories to both, for the sum of \$21,000 plus tax. There was a \$350. deposit. The offer was for 30 days (from January 28) and was conditional upon Crawford obtaining financing.

[12] Eisan also asked for a definite decision whether the purchase would take place by February 18th. When no clear answer was received by that time Eisan began to look for other interested purchasers and, having found a co-worker at the Shipyards who was interested, arranged to meet that person at the shop on February 23rd. He had advised Ellwood of this several days before who gave no indication of any objection.

[13] The prospective purchaser arrived at the Wyse Road shop on the appointed day and Howard would not allow him entrance to the shop and he left as did Eisan who was due for the 4:00 p.m. shift at the Halifax Shipyards. The next day Eisan went to the shop but his key would not work in the door. The locks had

been changed and he was denied entrance. On February 25th Eisan phoned Howard, was advised that things had changed between them and that he could pick up his equipment on Saturday, February 27.

[14] On his arrival on the Saturday with his truck to take his smaller equipment and tools he was advised by the defendants that they were too busy in the shop and they would not allow him to remove anything but suggested he return the following Saturday for the smaller equipment and tools and said he could take the larger equipment, i.e., the Colchester lathe and the Peerless shaper, on March 31st. It was made clear that he was no longer welcome at the shop and would not be allowed to enter it.

[15] After going home Eisan phoned Howard and told him he would be at the shop the next day with his lawyer and the police, which he was, and again was denied entry even though the police asked permission for him to get in.

[16] On April 8, 1999, Justice Saunders, then of this Court, in an action between the plaintiffs here and Crawford Metal Industries Incorporated, S.H. No. 154507, signed a Recovery Order for the Sheriff to seize the property listed on Schedule A to the Order on a day arranged by the Sheriffs (Ex. 1, Tab 14). According to Eisan he drew up the list from memory without the opportunity to go in the shop to compile it and it did not include all his property in the shop.

[17] The Order was executed on April 19th and both Eisan and the defendants were in attendance. The Sheriff's Report (also at Exhibit 1, Tab 14) lists the items of Schedule A and sets forth what was recovered and what was not recovered with reasons for things not recovered and indications of missing parts. It is unnecessary to set out all the items of that report. Essentially, Eisan was advising the Sheriff that parts were missing and that some of the items offered were not his but were substituted, and some were damaged.

[18] After the recovery the three larger pieces, the Colchester lathe, Peerless shaper and Ranger 8 electric welder were taken to Mr. Minkoff's shop and the rest to Eisan's home.

[19] The evidence is clear that there was no damage to any of these items in transit or while at Minkoff's shop.

[20] Aside from items Eisan never received, which are included in his claim, his position is basically that, before he was locked out, the following equipment was fully operating and fully functional:

Colchester lathe
Line boring machine
Shaper
Versa mill
Mill table

[21] After recovery none were functional due to missing parts and accessories. At Ex.1, Tab 24 there is a list prepared by Eisan of the cost of new parts to put this equipment back to the operating condition each was in prior to his being locked out of the shop. For the above equipment the total cost is approximately \$24,000 with a further \$4700 for his tool box and contents and for miscellaneous odds and ends he did not recover. It is to be noted that these would be new items replacing used and certainly any amount would be discounted to give effect to that fact. Eisan claims that all the items for which he has claimed under Ex. 1, Tab 24 were in the defendant's shop before the lockout.

[22] Several other witnesses were called by the plaintiff, the first being Tony Minkoff who testified that he had attended the defendants' shop and saw the Colchester lathe with work in it, though not spinning at the time. He was satisfied, having seen work in the machine, that it was operational and confirmed that it was not operational when it arrived at his shop after recovery as component parts were missing. He also confirmed that there were discussions regarding Eisan joining him and estimated a loss of revenue of approximately \$20,000 as a result of Eisan's machines not being operable (Ex. 1, Tab 20). Though there was an invoice from his company to Eisan for \$1200

plus tax for 6 months' storage that fee was settled by Eisan for \$1000 plus the shaper, which Minkoff sold for \$75.

[23] Rebecca Eisan, the plaintiff's wife, testified that she attended at the shop several times and, on at least one occasion in her presence Howard and Ellwood expressed how happy they were with the condition of the Colchester lathe and the price for which it was obtained. Mrs. Eisan had taken a machinist course at Vocational School and has her 1st and 2nd year machinist papers.

[24] Ralph Dunn, a salesman, knew all the parties to this action and visited the Wyse Road shop either daily or several times a week. He was aware of the two large lathes and several months before the lockout saw the Colchester lathe being operated by Howard Merrette. As well he testified that Howard told him it was a good machine and very expensive, a new one costing between \$40,000 and \$50,000.

[25] Errol Pierce, self employed owner of Pine Island Machine Works, engaged in buying, selling and reconditioning machine tools and machinery, testified that he also inspected the Colchester lathe at Crown Assets and put in a bid on it. He indicated the lathe was in excellent condition, as good as new, and very well accessoried, more so than usually and there was no evidence it had ever been used, with all accessories appearing to be in perfect working order.

[26] He visited the Wyse Road shop in February, 1999 and testified that, at that time, though the lathe was not actually turning, there was work in it and chips on the floor indicating that it was an operating machine. He said he discussed the lathe with both defendants who said they were planning to buy it and had an agreement in place to that effect at a price of \$20,000 while a new one would cost around \$40,000. He further testified that the defendants told him they did a review of the history of the lathe and found it was in storage since it was built. He further testified that certain parts, namely a 3 jaw chuck and a steady rest, were not the ones that came with the lathe.

[27] As a result of its then condition he bought the lathe from Eisan for \$4,000 plus tax (Ex. 1, Tab 22) which he asserted to be a fair price considering the missing parts and the costs necessary to make it operable.

[28] All of the plaintiff's witnesses, as well as the plaintiff himself, were cross-examined by Howard Merrette with no effect on either the credibility of any witness or the content of their testimony.

[29] The first witness for the defence was the defendant Ellwood Merrette, a Master Seaman in the Canadian Navy with 18 ½ years' service and a naval machinist specialist. He confirmed the oral arrangement between Eisan and the Merrettes but said that in June of 1998 they told Eisan that he would have to buy a big

machine and put it on the floor and use it or get out. Eisan had denied any such proposal had ever been made and was inconsistent with his arrangement to do on-site work as opposed to shop work.

[30] As to the lathe Ellwood testified he also closely inspected the Colchester lathe at Crown Assets and recognized it to be in poor shape, missing parts and was unimpressed with the accessories. Though they put in a bid of \$13,010 he felt that was “pricey” for the condition it was in. After it was set up on the floor he said it never was used to cut anything. While it turned it did not work well and did not have the required accessories to make it do what it should.

[31] He testified in detail as to the list of parts claimed in Ex. 1, Tab 24. In summary his evidence was that each particular part claimed either did not come with the machine, was never in the shop, was the part offered but declined by Eisan at the recovery, or belonged to Crawford.

[32] He gave as the reason for locking Eisan out as a loss of trust and that Eisan was a security risk for bringing people into the shop.

[33] On cross-examination he stated that the offer by Crawford to purchase the lathe from Eisan was never intended to go through and the only reason for it was they were interested in a big contract and it was important to have enough equipment on the floor to impress a prospective customer of their capability to

do the required work, i.e. it was a dodge so as to prevent Eisan from removing it during this period, possibly to the detriment of their business.

[34] Howard Merrette, a former naval machinist who had left the navy after 15 years' service, testified, also confirming the oral arrangement with Eisan. He said that he never made any ultimatum to Eisan, as Ellwood had suggested, but merely advised him that if he wanted to make a go of his machinist work a lathe would do it.

[35] He also inspected the lathe at Crown Assets, though not as closely as Ellwood, and felt it was pretty good despite some deficiencies and missing parts. He decided to put in a bid and did so at \$13,010 and was the top bidder. He declined, as I indicated earlier, knowing that Eisan was next in line at a lower price.

[36] In his review of the items listed on Ex. 1, Tab 24 his evidence was similar to Ellwood's to the effect that the parts claimed did not come with the lathe, were never in the shop, were, in fact, the parts offered at recovery and declined, removed earlier by Eisan, properly were owned by the defendants with all being returned in the same condition as when Eisan was last in the shop.

[37] He explained the reason for the offer to purchase as did Ellwod, to have the machinery on the floor to aid in obtaining a large contract, but said only gave

the \$350 because Eisan needed that amount and provided the written offer because Eisan needed it. There was no explanation for this alleged need. On cross-examination he said he never intended to purchase the lathe.

[38] Obviously there is a serious issue of credibility here and I am satisfied that the plaintiff's evidence is the most credible. His evidence as to the condition of the Colchester lathe at Crown Assets is supported by an independent witness; as to its having been operating by two independent witnesses; as to the genuineness of the defendants' offer to buy by one independent witness plus the plaintiff's wife and to its deteriorated inoperable condition again by two independent witnesses.

[39] As to the whole of the evidence I find the plaintiff's evidence to be credible and accurate, both as to the condition of the equipment before the lockout and after and, additionally, as to the items he did not receive from the defendants. Specifically I do not accept the defendants' evidence as to the condition of the Colchester lathe and its accessories at Crown Assets nor their suggestions as to its value nor do I accept that the lathe was not operating to produce work while at Wyse Road. Also I find the defendants' evidence regarding the written offer to purchase to be incredible. The price was negotiated and accepted by the

defendants and there is independent evidence to support their intention to buy and their satisfaction as to the quality of the lathe.

[40] As a result, all issues of credibility are resolved in favour of the plaintiffs.

[41] Turning to damages, I have been spared an item by item approach as in Ex. 1, Tab 24 as counsel for the plaintiff in his final argument indicated the proper approach to be to consider the value of each piece of equipment just before the lockout then subtract the amount Eisan received when he sold the items. With regard to the tool box and miscellaneous items he suggested that the amount claimed was the cost of new items and both should be discounted to take into account that the items not received were used.

[42] I accept the foregoing approach as the proper one and find as follows:

<u>Item</u>	<u>Value prior to lockout</u>	<u>Sale Price</u>	<u>Loss</u>
Colchester lathe	\$20,000	\$4,000	\$16,000
Shaper	1,000	200	800
Master Mill	2,000	300 (value)	1,700
Portable Line Boring Machine	4,000	600	3,400
Milling Table	400	200 (value)	200
		Total	\$22,100

[43] Taking into account that the red tool box and tools and the miscellaneous items were all used items of varying age and condition I would discount each and

award the sum of \$750 for the red tool box and tools and \$1,000 for the miscellaneous items.

[44] By way of special damages the plaintiff is entitled to recover the cost of storage of \$1,000 as had the equipment been operable this cost would not have occurred.

[45] While there is some evidence that the plaintiff incurred a much larger cost in moving the equipment on the recovery day than he would have incurred if not for the position taken by the defendants as to his removal of his equipment I do not make any award of compensation for this claim.

[46] As well there is not sufficient evidence here to form the basis for any claim for loss of profit.

[47] The plaintiff also requested exemplary damages based upon what he described as the deliberate and spiteful conduct of the defendants. While I agree that the defendants' conduct was indeed deliberate and spiteful I am not prepared here to award exemplary damages.

[48] Therefore the damages awarded are the total of:

\$22,100	Equipment
750	Tools
1,000	Miscellaneous
<u>1,000</u>	Storage

Total \$24,850

[49] The plaintiffs are also entitled to costs of this action in accordance with the regular scale.

J.