

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** 778938 *Ontario Limited v. Annapolis Management Inc.*, 2022 NSSC 139

**Date:** 20220518

**Docket:** *Halifax*, No. 480460

**Registry:** Halifax

**Between:**

778938 Ontario Limited

*Applicant*

v.

Annapolis Management Inc. and Ruby LLP

*Respondents*

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** March 9 and 10, 2022 and May 6, 2022, in Halifax, Nova Scotia

**Counsel:** Dillon Trider, for the Applicant  
Peter Planetta, for the Respondents

**By the Court:**

**Introduction**

[1] The Applicant, 778938 Ontario Limited (“Starfish”), owns a building on Barrington Street in Halifax (“the Attica”). The Respondents, Annapolis Management Inc. and Ruby LLP (“Annapolis”), own the building next door (“the NFB Building”). Annapolis extended the roof of the NFB Building 18 feet above the Attica’s roof. Starfish claimed that Annapolis workers trespassed by walking on and working from the Attica’s membrane roof, that Annapolis workers caused a nuisance because debris migrated onto the Attica roof, and that Annapolis caused a nuisance because the increased height of the NFB building caused a snow load danger to the Attica’s roof. Starfish requested a permanent injunction restraining any further trespass and nuisance and restraining any further construction until the Attica roof could be reinforced.

[2] The issues of liability for trespass and nuisance, and the question of any resulting permanent injunction, were bifurcated from the damages hearing. The Honourable Justice Kevin Coady made the following four findings on liability and the request for a permanent injunction:

(1) Annapolis workers accessed the Attica roof and regularly used it as a work platform, amounting to trespass, but the trespass was either trivial or with the license of Starfish and did not amount to a nuisance: paras.25-26.

(2) Damage to the roof was not established and therefore there was no nuisance caused by debris: paras.27 and 30.

(3) The snow load danger constituted a nuisance, as acknowledged by Annapolis: para.31.

(4) A permanent injunction restraining trespass and nuisance for the anticipated snow load was not an appropriate remedy: para.35.

[2019 NSSC 36]

[3] The Court of Appeal upheld the decision of Coady J. to deny the request for an injunction: 2020 NSCA 19.

[4] Starfish subsequently amended its Notice of Application to claim that there were further instances of trespass in February of 2021. Annapolis did not file an Amended Notice of Contest in response to this new claim.

[5] In this hearing, Starfish seeks the following:

- (1) \$103,922.60 plus HST in general damages for nuisance, representing the estimated cost of reinforcing the Attica's membrane roof to mitigate the snow load risk;
- (2) \$20,000 plus HST in general damages for trespass, representing the estimated cost of tying the Attica's roof to the NFB Building and replacing copper flashing that was removed and damaged by Annapolis;
- (3) \$13,050 in compensatory or equitable damages in lieu of the denied injunction for trespass, representing what Annapolis should have paid to access the Starfish roof;
- (4) a finding of further incidents of trespass in February of 2021; and
- (5) \$50,000 in punitive damages for the February 2021 instances of trespass.

[6] Starfish filed affidavits with estimates of the cost of reinforcing the Attica roof, tying the roof to the NFB Building and replacing the copper flashing. Annapolis did not file any evidence of estimated cost by the deadlines set by the court. When Annapolis asked for an adjournment two days before the hearing to enable them to obtain and file such evidence, I declined the request in a decision dated March 8, 2022: 2022 NSSC 65.

[7] In order to determine whether Starfish is entitled to the relief claimed, I will consider:

1. With respect to the reinforcement of the Attica roof:

- (a) The acknowledgement of liability on the part of Annapolis.
  - (b) Evidence of quantification of the estimated cost.
  - (c) The position of Annapolis that Starfish failed to mitigate its damages.
2. With respect to tying the Attica roof to the NFB Building and replacing the damaged copper flashing:
- (a) Whether Coady J. addressed the question of liability for the tie-in and flashing.
  - (b) Whether I should decide the question of liability for the tie-in and flashing.
  - (c) Whether Annapolis is liable in trespass for the estimated cost of this work.
  - (d) Evidence of quantification of the estimated cost.
  - (e) The position of Annapolis that Starfish failed to mitigate its damages.
3. With respect to compensatory or equitable damages representing an access fee in lieu of the injunction to restrain trespass:
- (a) Whether Coady J. found that Annapolis had trespassed on the Attica roof.
  - (b) Whether Starfish is entitled, given the findings of Coady J., to such equitable damages.
4. With respect to the alleged instances of trespass in February of 2021:
- (a) The unchallenged evidence of Starfish that Annapolis workers trespassed on the Attica roof in February of 2021.
  - (b) Whether the exceptional remedy of punitive damages is warranted in this case.
  - (c) What, if any, is the appropriate amount of compensatory damages?

## **Reinforcement of the Attica Roof**

### ***Liability***

[8] Annapolis agrees that it is responsible for the cost of reinforcing the Attica roof to address the snow load risk caused by the increased height of the NFB Building, which it admits constitutes a nuisance. As noted by Coady J., Annapolis “never questioned their responsibility to construct and pay for the reinforcement of the Attica roof”: at para.13. Annapolis disputes the amount requested by Starfish, but does not say what the appropriate amount should be.

### *Quantification*

[9] Starfish must prove quantification of its damages on the civil standard based on a balance of probabilities: see *Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)*, 2013 NSCA 4 at para.25. Damages may be recovered from a wrongdoer, even if their calculation is difficult, cumbersome or cannot be determined with absolute precision: *ibid.* In arriving at the best estimate of damages, the court may have to draw inferences from the evidence: *ibid.* In such cases where, due to lack of evidence, it is impossible to calculate the loss with any degree of exactitude, a court must make its “best estimate” of the damages: *ibid.*

[10] Starfish relies on the evidence of Mike Ryall, Project Manager with Seagate Construction Limited, for the anticipated cost of reinforcing the Attica roof. Mr. Ryall has 17 years of experience working in the construction industry and eight or nine years as a project manager, first with Lindsay Construction and then with Seagate Construction.

[11] Mr. Ryall first provided Starfish a quote for the roof reinforcement in October of 2018, when he was employed by Lindsay Construction. Neither party referred to the amount of the 2018 quote in the hearing before me. Mr. Ryall provided an updated quote to Starfish in March of 2021, costing the roof reinforcement at \$98,648.60 plus HST. Mr. Ryall provided a further updated quote dated February 8, 2022, which says that Seagate will reinforce the Attica roof for \$103,922.60 plus HST. Mr. Ryall’s March, 2021 and February, 2022 quotes rely on the factors that Mr. Ryall relied on to generate the 2018 quote. The only difference between the 2018 quote and the later quotes is the increased price of materials.

[12] For the original 2018 quote, Mr. Ryall visited the Attica twice. He relied on a plan by BMR Construction, structural engineers, dated September 18, 2018, that detailed reinforcements to the Attica roof. Annapolis had provided Starfish with

the BMR plan. Mr. Ryall consulted with drywall contractors, electricians, and his direct manager at Lindsay Construction.

[13] In drafting the 2018 quote, Mr. Ryall used a proprietary spreadsheet at Lindsay, with up-to-date data on pricing. Mr. Ryall acknowledged that he did not review the spreadsheet when he updated the quote in March of 2021 and then again in February of 2022, as he no longer had access to the spreadsheet, having left the employment of Lindsay. As such, he cannot now identify with accuracy some of the data that factored into the quotes, for example, the length and cost of the required joists. Nonetheless, he expressed confidence in the accuracy of the information he used in 2018 to generate the original quote.

[14] When he updated the quote in 2021, he consulted with the owner of Seagate.

[15] The written quote dated February 8, 2022 describes the following scope of work for reinforcement of the Attica roof:

- Remove & Reinstate architectural Ceiling Feature
- Supply and install all new J1 & J2 joists between grid A&B – 1-6 as per BMR plan dated September 18, 2018
- Partial Street Closure and Sidewalk Closure to allow for Boom Truck to load materials to site.
- Supply and install staging for access to underside of ceiling.
- Clean up & Supervision.

[16] In cross-examination, while Mr. Ryall was not able to recall at this point how much it would cost to remove and reinstate the architectural ceiling feature, he was able to provide the following information about the material, cost and labour that this aspect of the project would involve:

- A crew of three would be required to erect staging or scaffolding.
- Four to six electricians would be required to remove the architectural bulkhead.
- A crew of three would be needed to dismantle the staging or scaffolding.
- It would take about two days to erect the scaffolding.

- It would take approximately 48 hours of labour to take down the feature and preserve it.
- It would take approximately 60 to 80 hours of labour to put the feature back up, as well as to do drywalling.
- The hourly cost of labour is approximately \$65 per hour.

[17] With respect to supplying and installing new all new “J1 and J2 joists between grid A & B – 1-6 as per BMR plan,” Mr. Ryall could not recall how many linear feet of joists was required. Such joists come in certain lengths, so in determining price, it is not simply a matter of calculating how many linear feet are needed and multiplying by the price per foot. For example, if they needed 12 foot joists, there might only be 14 foot joists available. However, Mr. Ryall was able to provide the following information about the material and cost of this aspect of the project:

- A substantial number of joists would be required, in the hundreds, perhaps 150 to 250.
- At the time of the February 8, 2022 quote, the joists cost \$2.59 per linear foot.
- It would cost in the range of \$5,000 to \$7,000 to rent a crane on the weekend.

[18] At the point that he was asked about the fourth bullet of the February 8, 2022 quote, with respect to how long it would take to erect the scaffolding, Mr. Ryall stated that he was not comfortable answering questions about how long the work would take because it was four years ago that he reviewed the data for the original quote. Had he been asked then how long each stage would take, he would have been able to answer accurately.

[19] With respect to supervision, Mr. Ryall stated that the whole project would take from four to six weeks, and a supervisor would be there for the duration of the project, and that on average, a supervisor is charged out at \$1800 to \$2000 per week.

[20] With respect to clean up, he said that they typically assume eight hours of labour per week at a cost of approximately \$45 to \$55 per hour.

[21] Mr. Ryall said that the estimate of the cost of reinforcing the roof would not be limited to the six bullet points in the written quote, but would include a number of items, potentially a list of 30, that are assumed to be included in the work of a general contractor, for example, items related to safety and insurance.

[22] In re-examination, Mr. Ryall stated that, when he prepared the original quote, he would have considered all the factors he believed were relevant, and that the physical scope of the work has not changed. Mr. Ryall stated that he trusts the estimate that he originally did in 2018 and that it was created based on his experience in the industry, his experience as a certified carpenter, using a proprietary spreadsheet that was up-to-date and therefore the data was accurate.

### ***Conclusion re: Quantification***

[23] Mr. Ryall was subject to a lengthy cross-examination. I found him to be a credible and reliable witness. He was straightforward in his answers, and readily acknowledged the limitations of his memory. He no longer has access to the spreadsheet used to generate the original 2018 quote as he no longer works for Lindsay. Despite this, and his understandable inability now to remember with accuracy all of the data that factored into his 2018 quote, I am satisfied that Mr. Ryall took into account relevant factors in arriving at his quote in 2018, and then in 2021 and 2022.

[24] In providing the quotes, Mr. Ryall drew on his experience as a certified carpenter and his lengthy experience working in the construction industry and as a project manager. The 2018 quote was reviewed by his direct manager at Lindsay Construction and then again in 2021 with the owner of Seagate Construction. Given the significant scope of the work and the fact that it will likely take four to six weeks to complete, I am satisfied, based on all of the evidence, that \$103,922.60 is a reasonable estimate of what it will cost to reinforce the roof of the Attica.

### ***Mitigation***



[25] Annapolis argued that Starfish acted unreasonably by not reinforcing the roof itself in 2018, and as a result, the cost of reinforcing the roof has increased. Starfish's witnesses agreed in cross-examination that the cost has increased, but could not say by how much.

[26] Not only must Annapolis discharge the onus of showing that Starfish could have mitigated its loss if it had reacted reasonably, but Annapolis must also show how and to what extent that loss could have been minimized: see *Janiak v. Ippolito*, 1985 CanLII 62 (SCC) at para.33.

[27] Annapolis did not adduce any evidence in this hearing of what the cost of the work would have been in 2018. This is despite the fact that, as of June 20, 2018, Annapolis had budgeted for the cost of reinforcing the Attica roof in its construction estimate: see the decision of Coady J. at para.11. As well, Annapolis knew that Mr. Ryall had provided a quote to Starfish in 2018, but did not ask him in cross-examination what the amount of the 2018 quote was. Annapolis has therefore not shown how and to what extent that loss could have been minimized.

### **Tying Attica Roof to NFB Building and Replacing Damaged Flashing**

[28] Starfish claims \$20,000 plus HST for the cost of tying the Attica roof to the NFB building and to replace damaged copper flashing. The tie-in, with flashing, is required to protect the Attica building from water. Before the NFB construction, a parapet served this function for the Attica roof. Annapolis workers removed the parapet. Annapolis workers also removed a portion of copper flashing that had run along approximately 10 feet of the Starfish roof that abutted the NFB Building. The copper flashing was an aesthetic feature.

#### ***Did Coady J. Decide Liability for the Tie-In and Flashing?***

[29] In closing arguments, Annapolis denied liability for the cost of the tie-in and flashing, apparently for the first time in these proceedings. Annapolis argued that because Coady J. did not address liability for these items, he implicitly found no liability for them.

[30] I reject this argument. Coady J. did not deal with the liability of Annapolis for the cost of the tie-in and flashing. The parties' argument before Coady J., and the resulting decision, was focussed on whether or not a permanent injunction should be granted to restrain Annapolis workers from accessing the roof (trespass), causing harm to the roof by walking on the roof and leaving debris on the roof (nuisance), and to address the increased risk of snow load (nuisance).

*Should I Decide the Question of Liability for the Tie-In and Flashing?*

[31] Under s.41(g) of the *Judicature Act*, R.S.N.S. 1989, c.240, this Court has the authority and the responsibility to completely and finally determine all matters in controversy between the parties. I find that, even though the hearing of the merits was bifurcated from the damages hearing, it would not be just for me to decline to decide the issue of liability for the tie-in and flashing.

[32] First, the issue was properly pleaded. In its Notice of Application, Starfish claimed that Annapolis altered and damaged the parapet. Annapolis admitted this allegation in its Notice of Contest. Second, Annapolis has repeatedly acknowledged that it is responsible for replacing the damaged parapet and flashing. For example, in closing arguments before Coady J., counsel for Annapolis argued that a permanent injunction would prevent it from tying in the Attica roof to the NFB Building and replacing the parapet, work that he said must be done. Third, this is a matter of controversy between the parties that has not yet been determined.

*Liability*

[33] Annapolis admitted in its Notice of Contest that, in or about May, 2018, Annapolis or its agents, while engaging in construction activities on the NFB property, took steps to alter and damage the Parapet.

[34] Annapolis did not dispute the evidence of Starfish, filed in the hearing before me, that Annapolis damaged the parapet and copper flashing, and that, in order to remedy this damage, the Attica roof must be tied-in to the NFB Building and the copper flashing replaced: Affidavit of Simon Wilbee sworn July 30, 2021, paras.17 and 20.

[35] In its brief, Annapolis relied on a June 15, 2018 email from David Garrett, on behalf of Annapolis, to Louis Reznick, President of Starfish, stating that Annapolis

will be removing the parapet and reconstructing a new parapet, and attaching a BMR plan showing the connection of the Attica roof to the new wall of the NFB Building: Affidavit of David Garrett sworn January 3, 2019, Exhibit H.

[36] In fact, there are repeated references in Mr. Garrett's January 3, 2019 affidavit to the agreement of Annapolis to replace the parapet and flashing that they removed by tying the Attica roof to the NFB building. For example, in an email from Mr. Garrett to Mr. Wilbee dated July 31, 2018, Mr. Garrett says that Annapolis will develop the additional parapet and flashing details for Mr. Wilbee's review, and in the meantime will install "temporary plastic flashing to run up and be secured to the NFB wall and cover the existing displaced folded 1566 roofing from the earlier parapet."

[37] In an earlier email, dated June 5, 2018, from Mr. Garrett to Mr. Reznick, Mr. Garrett states that Annapolis will be removing the parapet from its present location, reconstructing it and flashing the roofing to the NFB wall, and proposes a meeting to review how Annapolis plans to secure and flash the roofing material of the Attica roof to the NFB wall.

[38] As well, when Mr. Garrett returned a draft indemnity agreement to counsel for Starfish on September 18, 2018, it included minor modifications to those parts of the agreement that referred to the parapet tie-in, leaving the language as follows:

...

AND WHEREAS the NFB construction may result in increased snow load on the Attica roof requiring reinforcement of the Attica roof and will require tie-in details with the Attica building, parapet and roofing system.

...

**Parapet tie-in**. Annapolis agrees to provide Starfish the final design details relating to the tie-in of the Attica parapet into the NFB building and to pay all reasonable expenses incurred by Starfish to have the design reviewed by a professional engineer. Upon acceptance of the design by Starfish, Annapolis agrees to execute the tie-in at its own

expense and to repair any damage to the Attica's roof or parapet, returning it to as close to the original condition as possible. Annapolis agrees to indemnify Starfish for any and all losses, costs, out of pocket expenses, and damages arising from or in connection with the parapet tie-in.

[Affidavit of David Garrett, sworn January 3, 2019, Exhibits E, I and K]

[39] Based on the above, I am satisfied that Starfish has established that Annapolis removed the parapet and flashing, including the copper portion of the flashing; that Annapolis has repeatedly acknowledged responsibility for the cost of the roof tie-in and flashing; that Annapolis' conduct in removing the parapet and flashing constitutes trespass; and that Starfish is entitled to compensated for the cost of tying in the Attica roof to the NFB Building and replacing the copper portion of the flashing.

### *Quantification*

[40] Annapolis disputes the amount requested by Starfish for the cost of the roof tie-in and replacement of the copper flashing, but does not say what the amount should be.

[41] Starfish relies on the evidence of Edgar Nava Velasco for the estimated cost of tying the Attica roof to the NFB Building and replacing damaged flashing. Mr. Velasco is the principal of GA Roofing & Waterproofing Systems 2018 Inc. He is a roofing contractor with over 18 years of experience in commercial roofing.

[42] Mr. Velasco provided a written quote dated February 8, 2022 of \$20,000 to supply and install:

- 10 linear feet of new 24 gauge copper flashing to North/East corner where damaged by removal
- build a wall approximately 80 feet along the edge of the building next to new block wall
- degranulate the existing roof membrane to allow for additional layer of roof membrane 6 feet wide

- flash in new wall of modified bitumen cap sheet
- terminate the modified bitumen cap sheet to the block wall with termination bar
- all clean up and supervision

[43] Mr. Velasco also relied on the BMR Construction plan provided to Starfish by Annapolis.

[44] In cross-examination, Mr. Velasco testified that the 80 foot wall along the edge of the building would require 240 linear feet of lumber, six inches wide and two inches thick. He was not able to give the cost per linear foot of lumbar.

[45] There will be two membranes involved in the tie-in of the buildings: one to accommodate for movement of the building, and another for ultra-violet protection. Degranulation of the existing membrane will be very time-consuming. If the membrane is new, it will take less time.

[46] The flashing in of the new wall will involve heating, melting and attaching pre-fabricated asphalt to the wall. They will require about ten to eleven rolls of the pre-fabricated asphalt at a cost of \$65 each, for a total cost of approximately \$650 to \$715. They will require eight rolls of bitumen cap sheet at \$95 per roll for a total cost of approximately \$760. The length of time involved in terminating the cap sheet to the wall will depend on the integrity of the wall.

[47] The copper flashing is an aesthetic feature. It will have to be bought in a sheet and then customized to the required shape. The price of copper fluctuates. Mr. Velasco estimated that this piece of copper would cost approximately \$3800, not including installation.

[48] Mr. Velasco said that the tie-in and flashing replacement work will likely require two workers, and that the hours of work required will depend in part on what they find when they start the work and whether anything has to be repaired first. The hourly rate for labour will be \$37/hour for one worker and \$22/hour for the other, in addition to the cost of a supervisor.

***Conclusion re: Quantification***

[49] Mr. Velasco was subject to detailed cross-examination. I found him to be a credible and reliable witness. He was straightforward in his answers, and readily acknowledged the limitations of his knowledge. While Mr. Velasco was not able to provide every single detail to support his quote, he provided a great deal of detail. I was not concerned about his inability to estimate the number of hours of labour required to complete the work. He gave a reasonable explanation as to why this was the case. I would have preferred to have some evidence of the estimated cost of the lumber required for this work. Nonetheless, Mr. Velasco gave enough detail in support of his estimate to satisfy me that he provided a reasonable estimate of what it will cost to tie-in the roof of the Attica to the NFB building, including the aesthetic copper feature. It makes sense to me that, given the scope of this work compared to the work required to reinforce the entire roof, that the tie-in and flashing would cost approximately one-fifth of the cost of the roof reinforcement. I am satisfied that \$20,000 is a reasonable estimate of what it will cost to tie the Attica roof to the NFB building to replace the damaged copper flashing.

### ***Mitigation***

[50] Annapolis argued that Starfish failed to mitigate its damages by failing to complete this work in 2018. Annapolis did not adduce any evidence of how much less it would have cost to do this work in 2018, even though Annapolis obtained the BMR plan in 2018 and even though Annapolis had planned to do this work itself in 2018. Annapolis has not discharged the burden on it to establish a failure to mitigate on the part of Starfish.

### **Compensatory Damages**

[51] Starfish claims \$13,050.00 in compensatory or equitable damages in lieu of an injunction for trespass, based on the draft indemnity agreement proposed by Starfish and rejected by Annapolis in August of 2018. The draft indemnity agreement included, in part, a fee of \$12,000 for complete access to the Attica

roof, inclusive of \$4500 in legal costs, plus a per diem rate of \$70 for each day of access.

[52] In the decision upholding the decision of Coady J., Bryson J.A., writing for the Court of Appeal, confirmed that the Nova Scotia Supreme Court has the equitable jurisdiction to award damages as a substitute for a foregone injunction: paras.22-24. Justice Bryson described such damages as “prospective and may include such things as ... the lost opportunity to bargain for access that would otherwise be a trespass”: para.24, citing *Jaggard v. Sawyer*, [1994] EWCA Civ 1, in which the English Court of Appeal affirmed a refusal to grant an injunction and upheld an award of damages for trespass, representing the estimated cost of securing a right-of-way over an existing private road.

[53] The following is a helpful description of how a court approaches the quantification of equitable damages in lieu of an injunction:

... If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost.

*Jaggard, supra*, per Sir Bingham MR at para.40, citing Megarry V-C in *Tito v. Waddell (No 2)*, [1977] Ch 106 at p.335D

[54] Starfish must establish that trespass occurred, that an injunction is not appropriate remedy (which was already decided by Coady J.), that equitable damages representing a fee for access should be granted, and if so, the appropriate amount.

### ***Trespass in 2018?***

[55] Coady J. found that Annapolis workers trespassed on the Attica roof, but that any such trespass was trivial or with the license of Starfish, either express or implied: para.26. I interpret the decision of Coady J. as finding that there were instances of trespass that were trivial and for which Annapolis apologized, and that

after August 3, 2018, there were instances of trespass that were done with Starfish's consent.

***Entitlement to Equitable Damages in Lieu of Injunction?***

[56] Is Starfish entitled to compensatory damages in lieu of an injunction for trespass, representing what Annapolis should have paid to access the Attica roof?

[57] Coady J. found that Mr. Reznick's conduct created barriers to an effective working relationship, and criticized in particular his attempt to achieve other benefits in the draft access and indemnity agreement when the main issue had always been the snow load:

Given that the respondents were always willing to accept responsibility for the reinforcement of the Attica roof, ***I conclude that Mr. Reznick must accept responsibility for the current state of affairs.*** I find that Mr. Reznick created barriers to an effective working relationship. The main issue has always been the snow load, yet Mr. Reznick sought to achieve other benefits in his draft access and indemnity agreement. He could easily anticipate that those terms would be problematic given that the Respondents had already rejected the financial clauses in its June 17, 2018 correspondence.

[at para.19, emphasis added]

[58] As the Court of Appeal stated in this case:

Of course in this case, mitigation of any potential injury from trespass or nuisance required reasonable cooperation from Starfish which the judge effectively found was unforthcoming.

The Court cannot compel intransigent neighbours to agree on terms that would accommodate both if they will not do this for themselves. But it can withhold equitable relief from those whose intransigence would extract an unreasonable price for reasonable forbearance. ...

[paras.42-43]

[59] It is clear that Coady J. viewed the proposed access and indemnity agreement for the 2018 trespasses to be unreasonable in the circumstances of this case. Moreover, he found that any trespass was either trivial or with the license of Starfish. In light of these findings, I decline to award equitable damages, representing a fee for access, in lieu of the denied injunction for trespass.



## **February, 2021 Trespass?**

### *Liability*

[60] Starfish has established that Annapolis workers trespassed on the Attica roof in February of 2021.

[61] Starfish relied on the Affidavit of Simon Wilbee, Vice President of Construction for Starfish, sworn on July 30, 2021, to support its allegation of trespass in February of 2021. As noted, Annapolis did not file an Amended Notice of Contest in response to this new claim, and therefore did not dispute the claim.

[62] Mr. Wilbee states as follows in his affidavit:

4. On February 19, 2021, I attended the rooftop of 1566 Barrington and found evidence that Annapolis Management, Inc.'s ("Annapolis") workers had been accessing the rooftop of 1566 Barrington.

5. It appeared that workers for Annapolis had accessed the roof by a ladder, erected scaffolding and placed materials on the roof of 1566 Barrington.

6. Based on the footprints in the snow and ice build-up, it appeared as though Annapolis' workers had been using the roof of 1566 Barrington as a work platform for some time to install Blueskin. Attached as Exhibit "A" are photos I took of the works on the rooftop on February 19, 2021.

7. At this time, none of the staff or any contractors of Starfish Properties had been walking on the roof to my knowledge. I believe all of the footprints shown in the photos were from Annapolis' workers.

8. At no time after 2018 did I or anyone with Starfish Properties give permission to Annapolis' workers to access the rooftop of 1566 Barrington.

...

12. Later that afternoon ... I returned to the rooftop and was very surprised to find that workers from Annapolis had returned to the roof again without permission and had begun dismantling the scaffolding.

13. I observed Annapolis' workers in the process of descending onto the roof of 1566 Barrington and removing their scaffolding and other materials.

...

16. To my knowledge the workers have not returned to the roof to perform further works since this time but, due to its location, it is difficult to know when the roof is being accessed.

[63] In cross-examination, Mr. Wilbee estimated, based on what he observed on the roof, that Annapolis workers had been on the roof for two or three days.

### ***Punitive Damages?***

[64] Starfish initially claimed only punitive damages for the February, 2021 trespass. Starfish claimed that the conduct of Annapolis in February, 2021 was high-handed and deeply-troubling, that Annapolis did not notify Starfish that their workers intended to be on the Attica roof, and that Annapolis workers compacted ice on the rooftop and erected scaffolding when it knew that the rooftop was vulnerable to increased loads. Starfish points out that the Annapolis workers trespassed on the Attica roof while the litigation between them was still ongoing and when it was absolutely clear that they were not permitted to access the Attica roof.

[65] Starfish relies on a line of authorities in which punitive damages were awarded against developers who did not seek consent of their neighbours before underpinning beneath the neighbours' property.

[66] An award of punitive damages is only justified in exceptional cases, when the defendant's conduct departs markedly from ordinary standards of decency and is malicious, oppressive or high-handed, and requires punishment: *Whiten v. Pilot Insurance Company*, 2002 SCC 18 at para.94.

[67] I am not satisfied that this is one of those exceptional cases warranting an award of punitive damages. While the evidence establishes that Annapolis committed further acts of trespass in 2021, years after Starfish made it clear that it objected to Annapolis accessing the roof of the Attica without consent and after years of litigation, it falls short, in my view, of establishing a marked departure from ordinary standards of decency or conduct on the part of Annapolis that was malicious, oppressive or high-handed.

### *Compensatory Damages*

[68] At the hearing, I asked counsel for their views as to the appropriate amount of compensatory damages, if any, for the February 2021 instances of trespass. In consultation with counsel, I set a deadline of May 16, 2022 for the parties to provide me with written submission on this issue. Starfish provided written submissions. Annapolis did not.

[69] Starfish states that \$7500 would be an appropriate amount of compensatory damages for the February, 2021 instances of trespass, representing what Annapolis should have paid to have its workers access and walk on the Attica roof, erect scaffolding, and work from the Attica roof to place Blueskin on the NFB Building. Starfish says that this amount is somewhat more than half of the compensatory damages that it seeks for the 2018 instances of trespass, pointing out that the installation of Blueskin in February, 2021 was less extensive than the work undertaken by Annapolis in 2018.

[70] I am satisfied that Starfish is entitled to something more than nominal damages for the February, 2021 instances of trespass. These instances of trespass were not *de minimus*. There was no consent. There is no evidence to suggest that, in February of 2021, Mr. Reznick was responsible for the failure of Annapolis to seek permission to access the Attica roof. The February, 2021 trespasses solely benefitted Annapolis. Annapolis took without paying something for which Starfish could have required payment.

[71] I am not persuaded that \$7500 in compensatory damages, as an access fee in lieu of an injunction for trespass, is proportionate to the nature or the length of the trespass in February of 2021, which, according to Mr. Wilbee, occurred over two or three days. The fee proposed by Starfish for the 2018 trespasses for “complete access” was \$12,000, inclusive of \$4500 in legal costs. Without legal costs, the

proposed fee for “complete access” in 2018 would have been \$7500. Half of that amount is \$3750. In my view, \$3750 also seems disproportionate to the nature and length of the February, 2021 trespasses.

[72] In my view, an access fee of \$500 per day for three days is a more reasonable amount in the circumstances of this case. Such an amount recognizes that Starfish has the right to restrict access to its roof, but is not so high as to discourage or prevent Annapolis from performing work that it is required to do on the NFB Building that can only be done from the Attica roof.

[73] I award \$1500 in compensatory damages to Starfish as a remedy for the February, 2021 instances of trespass.

### **Conclusion**

[74] In conclusion, I order as follows:

- (1) Starfish is awarded \$103,922.60 plus HST in general damages, representing the estimated cost of reinforcing the Attica’s roof to mitigate the risk due to the increased snow load;
- (2) Starfish is awarded \$20,000 plus HST in general damages, representing the estimated cost of tying the Attica’s roof to the NFB Building and replacing copper flashing that was removed and damaged by Annapolis;
- (3) The request of Starfish for compensatory or equitable damages in lieu of the denied injunction for the 2018 instances of trespass is dismissed;
- (4) There were further incidents of trespass by Annapolis on the Attica roof in February of 2021;
- (5) Starfish is awarded \$1500 in compensatory damages for the February, 2021 instances of trespass.

[75] Starfish is entitled to their costs. Starfish reserved the right to speak to the cost of the adjournment of this hearing in November of 2021. If the parties cannot agree on costs, this Court will receive costs submissions within 30 calendar days of this decision.

**Gatchalian, J.**