SUPREME COURT OF NOVA SCOTIA

Citation: *Ackermann v. Kings Mutual Insurance Company*, 2014 NSSC 147

Date: 20140424
Docket: Tru. No. 230417
Registry: Truro

Between:

Adrian Ackermann and Kelly Ackermann

Plaintiffs

v.

The Kings Mutual Insurance Company

Defendant

DECISION ON DAMAGES AND CLEANUP COSTS

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: November 25, 2011, in Halifax, Nova Scotia

Counsel: Robert Pineo, for the Plaintiffs
Scott C. Norton, Q.C., for the Defendant

By the Court:

[1] This is an application by the plaintiffs for aggravated damages and cleanup costs.

[2] The plaintiffs operated a dairy farm. Their barn and outbuildings were damaged as a result of Hurricane Juan in September, 2003. The plaintiffs' dwelling, barn and outbuildings were insured by the defendant.

[3] The plaintiffs initiated legal proceedings against the defendant on account of its refusal to pay for losses and damages for which they claimed under the policy. At the jury trial, the defendant was found liable to the plaintiffs under the insurance policy. The defendant was also found liable to pay punitive damages to the plaintiffs. The jury award was confirmed by the Nova Scotia Court of Appeal: 2010 NSCA 39.

[4] The issues of aggravated damages, interest and costs were reserved to the trial judge, on agreement of the parties.

AGGRAVATED DAMAGES

[5] The claim for aggravated damages relates to the claim by the plaintiffs that, but for the delay in payment of the insurance coverage by the defendant, they would have been able to access provincial relief funds. In other words, if the defendant had paid the amounts required to be paid under the insurance policy without delay, the plaintiffs would have been entitled to claim for reimbursement from the Disaster Relief Fund (the Fund) of the net uninsured losses that they experienced as a result of the hurricane damage. As a result of the defendant's action the plaintiffs secured a loan from the Nova Scotia Farm Loan Board bearing interest at the rate of 7% per annum.

[6] The plaintiffs eventually obtained payment from the Fund. After considering the amounts recovered from the defendant, the additional cost of rebuilding the barn, the costs of litigation less recovered costs, the Fund made a total payment to the plaintiffs of $98,775.86 ($62,822.79 on March 5, 2012 and $35,953.07 on July 12, 2012).

[7] The plaintiffs and the defendant agree that the plaintiffs are entitled to aggravated damages. However, the defendant argues that the plaintiffs failed to establish the amount of aggravated damages and that payment by the Fund does

not establish this. In other words, the defendant argued that the Fund paid for items that the plaintiffs claimed as being damaged or lost as a result of Hurricane Juan without sufficient supporting documents for items that may have been damaged prior to that event.

[8] Prior to this application, the defendant paid to the plaintiffs the policy limits and the amount for punitive damages. In addition, the defendant paid to the plaintiff the sum of $172,782. This represented an amount of $132,782 for interest and costs which I had ordered to be paid. It also included an amount of $40,000 the parties had agreed would be the costs for the plaintiffs' expert.

[9] The interest component of $132,780 was $65,892. Deducting the amount of $65,892 from the total payment of $132,782 left a balance of $66,890 for costs ($132,782-$65,892= $66,890) plus the amount of $40,000 for expert costs for a combined amount of $106,890 for costs recovery.

[10] The Fund paid initially $62,822.79 representing the uninsured building damage at 50% and other items at the actual replacement cost.

[11] I refer to Exhibit 10 of Mr. Ackermann's affidavit.

[12] The uninsured building damage of $37,180.76 was eligible for payment at the rate of 50% or $18,590.38. The feed bins, alley scraper/cleaner/ chain drive, feed tank, stabling, cow mats, chain clamps, net chain bits, water tank, milking parlor expenses were allowed at 100%. The building damage recovery of $18,590.38 together with the other items amounted to a total of $62,822.79. This is the amount that the Fund paid in March 2012.

[13] In order to do a final analysis of the total claim, the Fund prepared an analysis found in the lower portion of Exhibit 10 of Mr. Ackermann's affidavit.

[14] The Fund calculated the total claim as follows:

Total barn and equipment replacement, net of taxes	$347,313 17
Legal cost	$243,266.79
Total	$590,579.96
Less insurance recovery	$265,000.00
Less recoverable taxes on legal	$28,961.03
Less cost recovery	$106,890.00
Less punitive damages	$55,000.00
Less paid March 2012	$62,822.79
Net	$71,906.14

[15] Final payment was $35,953.07 calculated at 50% of the building replacement cost of $71,906.14.

[16] Therefore, the amount of $62,822.79 and the final payment of $35,953.07 for a total of $98,775.86 are the actual amounts paid to the plaintiffs by the Fund.

[17] I do not accept the defendant's argument that the items accepted by the Fund as being items that were legitimately lost or damaged as a result of Hurricane Juan should not be accepted without additional proof. I am satisfied that an independent, third-party such as the Fund, having carefully assessed the claim, would not have made any payment that was other than legitimate expenditures incurred by the plaintiffs to place themselves in the position they were prior to the losses caused by the effects of Hurricane Juan. I am also satisfied with the plaintiffs' explanation that all of the documents which the defendant claimed were not provided were in fact provided and are included in Mr. Ackermann's affidavit, albeit not in one single exhibit to Mr. Ackermann's affidavit.

[18] Therefore, I award as aggravated damages, the amount of $51,857.32 representing interest on $98,775.86 at 7% per annum for a period of 7.5 years. ($6,914.31 x 7.5 years = $51,857.32).

CLEANUP COSTS

[19] The plaintiffs also seek recovery of cleanup costs for the amount spent to clean the property in the aftermath of Hurricane Juan. Under the terms of the insurance policy, the plaintiffs claim they are entitled to 5% of the value of insurance awarded by the jury, provided the full amount of the insurance coverage was awarded.

[20] The order for judgment did not make any reference to the cleanup costs and the jury was not asked to answer a question about cleanup costs, notwithstanding that there was some discussion of this point between the Court and counsel in the absence of the jury.

[21] Counsel for the plaintiffs have not provided any case authority for the proposition that I have jurisdiction to rule on the question. On the other hand, counsel for the defendant argues that I am *functus officio* and consequently I am unable to rule on that issue.

[22] In the decision of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, the Supreme Court of Canada ruled that, except in strictly limited circumstances, the Court has no jurisdiction to revisit or amend a final order for judgment. The underlying rationale of the doctrine is to ensure that, subject to an

appeal, the parties can be secure in their reliance on the amount awarded in the proceedings.

[23] In this matter, a formal order for judgment was entered September 24, 2009. The issue of cleanup costs was not explicitly addressed in the Order. Nor did the jury deliberate on cleanup costs. It would appear at first glance that the Court is *functus officio* and therefore has no jurisdiction pursuant to the Order to award cleanup costs.

[24] Despite the above, there are limited exceptions to the doctrine of *functus officio*. In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, the Supreme Court noted, at para 19, that the doctrine only applies where a formal judgment has been "drawn up, issued and entered" and that it was subject to exceptions (1) "where there had been a slip in drawing it up" and (2) "where there was an error in expressing the manifest intention of the court." In such instances the Court would have jurisdiction to revisit or amend the final order or judgment.

[25] In Nova Scotia, this is known as the "slip rule", codified in *Rule* 78.08 of the Nova Scotia *Civil Procedure Rules*. This *Rule* permits the Court to, *inter alia*, "correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order" (78.08(a)) and to "amend an order to provide for something

that should have been, but was not, adjudicated on" (78.08(b)). *Rule* 15.01 of the Nova Scotia *Civil Procedure Rules* (1972) contained a substantially equivalent provision.

[26] The question to be determined is whether this case fits within the parameters of the slip rule, thus providing the Court with jurisdiction to effectively correct the omission by addressing the issue of cleanup costs despite being otherwise *functus officio*.

[27] The issue is not one of clerical mistake. Cleanup costs were not referred to in the Order and it is evident that the omission was not the result of an accidental mistake or slip. Therefore, the only provision potentially applicable to the current matter is *Rule* 78.08(b).

[28] In *Sydney Cooperative Society Limited v. Coopers and Lybrand*, 2006 NSSC 276, *Rule* 15.01 was held to be broader than the traditional slip rule, enabling the defendant to seek costs, despite the fact that the matter was not dealt with in the reasons for judgment or in the Order. It was determined that this was an appropriate result given that there was no prejudice to the plaintiff and that the defendant had asserted the claim for costs in the proceedings.

[29] Furthermore, it was held that it was an accidental slip that resulted in the failure of the decision or the Order to allow the defendant's costs, and, if this were not the case, the matter was one which would have been adjudicated upon.

[30] At first glance, it would appear that, while *Rule* 78.08 could be interpreted broadly, this case must be distinguished on the basis of the *Rule* that costs follow the event where liability is divided between the parties, while the claim for cleanup costs under the insurance policy does not fall into this category.

[31] *Rule* 78.08 (b) was considered by Warner J. in *Dawson v. Dawson*, 2012 NSSC 36, where he stated that the *Rule* authorizes the Court to amend a Corollary Relief Order to include costs for the petitioner, relief that was requested but not adjudicated on before the Order was granted. Warner J. noted that both parties had raised the issue of costs in their pre-trial briefs and that the petitioner had raised the issue during the divorce proceedings and before the issuance of the CRO. As a result, he found no prejudice to the respondent.

[32] It is evident that prejudice to the rights of the party is an important consideration when deciding whether to amend or vary an order.

[33] The above cases relate to the issue of costs. As I noted earlier, it must be remembered that there is a general rule the costs are to follow the event, unlike the

cleanup costs, which are explained in this instance. In addition, it seems relevant that the issue of costs was addressed by the parties in their trial briefs.

[34] It is well-established that the power of the Court to amend the judgment after it has become final is limited to making the record conform to the judgment pronounced or intended to be pronounced; it does not give broad authority to review the judgment in order to deal with a collateral matter, which was not actually involved in the Court's original decision: see *Ontario (Motor Vehicle Dealers Act, Registrar) v. A. Farber & Partners, Inc.*, 2008 ONCA 390 and *Bau-Und Forschungsgesellschaht Thermoform AG v. Paszner* (1992), 69 B.C.L.R. (2d) 52 (B.C.C.A.).

[35] The issue of cleanup costs was not put to the jury and was not reserved in the Order. Counsel for the plaintiffs did not raise the issue at earlier stages in the proceeding. The defendant submits that awarding cleanup costs in this instance would expand the slip rule beyond its intended scope.

[36] An additional argument which could have been raised, and which I wish to consider, is that the cleanup costs were clearly set out in the insurance contract between the parties, and therefore such payment should be automatically due. In *MacDonald v Trenchard*, 2011 NSSC 105, the respondent applied to vary an issue

contained in the "Agreement and Minutes of Settlement," which had been incorporated in a Corollary Relief Judgment. O'Neil J. (as he then was) considered *Rule* 78.08 (b). In refusing to vary of the terms of the judgment, he stated, "[i]n my view, this rule is not designed to be a back door to re-negotiating an agreement or a substitute for applying the principles of contract law to the Minutes of Settlement by seeking to vary the CRJ" (para. 40). O'Neil J. decided that the Rule did not provide him the basis upon which to vary the Order and saw a limited application of the *Rule*.

[37] It may be argued that the defendant will not be prejudiced by awarding cleanup costs, as the issue was explicitly set out in the insurance policy and discussed briefly by counsel and the Court prior to the jury returning its verdict. In his affidavit of October 25, 2012, the plaintiff, Mr. Ackermann, makes reference to portions of the trial transcript in support of the claim that there was sufficient discussion at the trial to allow the Court to consider payment of cleanup costs. At Tab 11, he stated that he had borrowed $320,000.00 to build a new barn, and received $265,000.00 from the defendant, i.e. the policy limits, as a consequence of the jury award. At Tab 12, line 6, p. 1346, there is a transcript of the discussion with respect to the issue of cleanup costs, as follows:

The Court: Anyway, so that's point number one I wanted to raise with you.

Point number two is it agreed that there is a 5 percent amount. Mr. Caldwell mentioned yesterday that I had limited the amount and my questions to 265 and he said well, there's also a 5 percent cleanup. Was that incurred? Was that cost incurred by – – –

Mr. Caldwell: It's in lieu of costs [inaudible]

The Court: So it doesn't have to be spent.

Mr. MacEwan: My Lord, and I can't quite place my finger on the clause in the actual insurance contract but I believe that the 5 percent is if the policy limit is paid that it's deemed to be 5 percent.

The Court: Assuming that they award the policy limits.

Mr. MacEwan: But if they don't award the policy limit then it would actually be no 5 percent but a different amount.

The Court: How much is that?

Mr. MacEwan: That would have to be proven as a loss.

The Court: Was there evidence on that point?

[Unidentified voice]: Not on the amount no, My Lord.

The Court: It's in Tab 3, isn't it?

Mr. MacEwan: My Lord it's at Page 12 of Tab 2.

The Court: Tab 12, thank you. Removal of debris.

Mr. MacEwan: So it pays for the cost of removing debris of the property insured under this policy as a result of any insured peril when the damage to the property plus the cost of cleaning and removal of the debris exceed the limit, an additional 5 percent of the limit of the insurance on the damaged building would be available. But it would only be if those combined costs exceed the policy limits.

The Court: Okay. I'm assuming – – my questions are framed as that what was the loss and if they give the limit of 265 then it will hide the 5 percent automatically.

Mr. Pineo: That is what Mr. Murray said in cross yesterday. He agreed that if the limit was paid then the cleanup costs would be 5 percent and he agreed it was $13,250.

The Court: Yeah, I think so. I heard him say that. Didn't Mr. Murray say that, that it was 5 percent of 265 and he calculated.

Mr. MacEwan: My Lord, my understanding is that the way you would calculate is when the damage to the property plus the cost of cleaning and removal debris exceed the limit of the insurance then there's an additional 5 percent added if it's needed to cover those costs of the amount of cleanup would still have to be

> quantified so that you could determine whether or not the two combined went over 265 and then there's an additional 5 percent that would be available to cover the cost. Because it's available to cover debris removal expenses.
>
> The Court: So if the award was say $200,000 then there would be no award.
>
> [Unidentified voice]: That's correct.
>
> Mr. MacEwan: Yes.
>
> The Court: Because they would be limited to 5 percent, would it?
>
> Mr. MacEwan: If the amount of the damage determined by the jury was $200,000.
>
> The Court: Yes.
>
> Mr. MacEwan: In the absence of any cleanup costs being put forward, there's nothing to add to the 200.
>
> The Court: But if it's to the jury says I want 265 well I'm not putting a limit on there for the moment, 265. If they award that.
>
> Mr. MacEwan: I think that under the terms of the policy it was still have to be some evidence on the cost of removal.
>
> The Court: Yeah, okay. I'll look at that. Okay. At any rate everybody can have a chance. That's one question, right?
>
> Mr. Pineo:: We maintain, My Lord, though that's not the evidence that Mr. Murray gave yesterday.
>
> The Court: No, but what I'm saying – – –.
>
> Mr. Pineo: He was talking about that provision.
>
> The Court: But I guess, well, I have to look at the policy.
>
> Mr. Pineo: Yes.
>
> The Court: I don't know if Mr. Murray could vary the policy, I don't think – – if you [have] some law that they can do that let me have it.
>
> Mr. Pineo: But he gave evidence on the interpretation though and how it works.
>
> The Court: Yeah, but I'm saying but if you look at the wording of the policy – – look at that. Okay…

[38] In *Custom Craft Construction Ltd. v. Williams*, [1993] O.J. No. 1424 (Ont. Ct. J. (Gen. Div.), a motion was made on behalf of the plaintiff for an amendment to the reasons for judgment following an order. The plaintiff claimed to be entitled

to a balance that was outstanding on the written contract between the plaintiff and the defendant. The trial judge had addressed the issues of costs and pre-judgment interest after the reasons for judgment were issued. At that time, the only outstanding issue was the amount of the defendant's costs, which the trial judge agreed to fix if counsel were unable to come to an agreement. He fixed the costs approximately five months later. Shortly afterwards, counsel for the defendant was unable to obtain the approval of the plaintiff's counsel to the draft judgment and the trial judge endorsed it and requested that it be returned to counsel for the defendant. In the interim, the plaintiff retained new counsel, who then gave notice that he wished to raise an issue with respect to the amount of damages that had been awarded to the plaintiff. The new counsel was then given the opportunity to bring a motion to amend the judgment.

[39] MacFarland J. allowed the motion, holding that the plaintiff was entitled to the balance outstanding on the contract. On the basis of the pleadings, it was clear that the issue relating to the balance was before the Court. Counsel for the plaintiff had drawn the Court's attention to the issue in his opening statement, but neither counsel dealt with the issue in their final submissions. MacFarland J. found, however, that the evidence before the Court regarding the contract price and the amount paid to the plaintiff at the time of trial was uncontroverted. He noted that

he did not address the issue in his reasons, and that it was a matter upon which he did not adjudicate. He was satisfied, however, that if the matter had been drawn to his attention prior to the signing of the judgment, the Court would have had jurisdiction to deal with it and retained jurisdiction. Finally, he found that there was no prejudice to the defendant, as the parties had agreed on the outstanding balance and the evidence was not contradicted at trial.

[40] On its face, *Custom Craft, supra*, appears to be quite similar to the matter in issue. There are some important differences, however, which suggest that these two cases may ultimately be distinguished.

[41] The issue of delay was discussed in *Custom Craft, supra*, and it was noted that when the motion to amend was first raised, the judge felt it was late in the day for counsel to be raising a concern about costs. He noted that while it would have been preferable if the matter had been raised earlier, he acknowledged that the plaintiff's new counsel (who was not counsel at trial) raised the issue very promptly after he was retained. As such, he did not feel that delay was a reason not to exercise jurisdiction. Delay however, could be an issue in the current matter, given that there were multiple earlier occasions on which the plaintiffs could have raised the issue of cleanup costs.

[42] Counsel for the plaintiffs argues that the plaintiffs are entitled to 5% as cleanup costs if the full policy limit of $265,000 was awarded. He relies on what Mr. Murray, witness on behalf of the defendant, stated in his cross-examination. Therefore, the full cleanup costs amount of 5% would be $13,250.00. On the other hand, at trial counsel for the defendant denied this automatic calculation and maintained that even if the full amount of the insurance policy was awarded by the jury, under the terms of the policy, there was a need for evidence on the cost of cleaning and removal of debris before any cleanup costs could be awarded. He maintained that if these combined costs exceeded the policy limits of $265,000 that an additional 5% would be available to cover debris removal expenses.

[43] Secondly, the issue of cleanup costs was not reserved in the order for judgment. Only aggravated damages, prejudgment interest and costs were reserved for future determination.

[44] Given that the cleanup costs were not reserved to the trial judge in the final order, and that, by claiming it at this time, the plaintiffs are, in effect, asking the Court to amend its judgment, the only way it is possible for a court to amend the final judgment is under *Rule* 78.08 (b).

[45] It must also be remembered as well that the plaintiffs did not claim cleanup costs in the amended statement of claim.

[46] If I were to agree with the plaintiffs, it would mean that I would be reopening the matter, a step that was declined by O'Neil J. (as he then was) in *MacDonald, supra*.

[47] Therefore, I am declining to award any amount for cleanup costs.

[48] Although the plaintiffs maintain that this is a step in the trial and therefore I should award costs on the basis that this is a trial continuation, the defendant maintains that this is an application and therefore, costs should be awarded on that basis. I agree with the position advanced by the defendant and award costs to the plaintiffs in the amount of $1,500 inclusive of disbursements.

LeBlanc, J.