COURT OF APPEAL FOR ONTARIO

CITATION: Bowman v. Martineau, 2020 ONCA 330
DATE: 20200529
DOCKET: C66751

Rouleau, Hourigan and Roberts JJ.A.

BETWEEN

Aden Bowman personally
and as executor for the estate of Shirley Bowman

Plaintiffs
(Respondents)

and

~~Alma Emond, Shelley Emond, Paul Studholme~~, Suzanne Martineau
and Re/Max Hallmark Realty Limited

Defendants
(Appellants)

Paul Le Vay and Stephen Aylward, for the appellants

David A. Morin and Peter Reinitzer, for the respondents

Heard: March 12, 2020

On appeal from the judgment of Justice Guy P. Di Tomaso of the Superior Court of Justice dated March 4, 2019, with reasons reported at 2019 ONSC 1468, and from the costs judgment dated April 4, 2019, with reasons reported at 2019 ONSC 2141 and 2019 ONSC 2328.

Roberts J.A.:

A. OVERVIEW

[1] The appellant real estate agent and broker appeal from the judgment ordering them to pay damages to the respondent purchasers of a residential home. The trial judge ordered the appellants to pay for the costs necessary to repair water and mould damage that the respondents discovered only after their purchase due to the appellant real estate agent's negligence.

[2] The appellants do not appeal the trial judge's finding or apportionment of liability but submit that the trial judge erred in his assessment of damages.

[3] For the following reasons, I would allow the appeal, set aside judgment in respect of the damages awarded for the costs to repair the property, and remit the matter to the trial judge to determine the diminution in value of the property given its damaged state.

B. BACKGROUND

[4] The appellants acted both for the vendors, Alma and Shelley Emond, and the respondents on the sale of a house. The trial judge found the vendors liable to the respondents for non-disclosure and concealment of water damage. He determined that the appellants were negligent in the execution of their professional responsibilities and therefore liable to the respondents.

[5] Specifically, the trial judge determined that the appellant real estate agent, Ms. Martineau, had failed to review and verify with the vendors and then the

respondents the information contained in the Seller Property Information Statement ("SPIS"), the checklist of information about the property. The trial judge concluded that if she had done so, Ms. Martineau would have discovered that the property suffered from ongoing water leakage. As a result, the respondents were left without the means to find out about the ongoing roof leakage and mould problems.

[6] The trial judge assessed the respondents' damages at $450,215.35, calculated as follows: $332,706.59 for the cost to repair the property; $10,282.13 for out of pocket expenses for time and materials spent on the tearing out of the damaged portions of the house; $101,500 for the respondents' alternative living expenses from September 2014 to July 2019; $726.63 for hydro and insurance costs thrown away; and $5,000 in general damages. He apportioned the appellants' liability at 70% and the vendors' liability at 30%[1]. Accordingly, judgment was granted against the appellants in the amount of $315,150.74 (70% of $450,215.35) and costs of $144,679.55.

C. ISSUES

[7] The appellants submit the trial judge erred in his assessment of the respondents' damages as follows:

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[1] The respondents and the vendors entered in to a proportionate share agreement in settlement of the respondents' claim against them.

1. The trial judge erred by applying a cost of repair rather than a diminution in value measure of damages;
2. The trial judge erred in concluding that the respondents had not failed to mitigate their damages; and
3. The trial judge erred in determining that the frost heave damage was reasonably foreseeable.

D. ANALYSIS

(1) The Measure of Damages

(a) Applicable Legal Principles

[8] The general, well-settled rule for the assessment of compensatory damages in tort actions is that, as far as damages can accomplish this, the plaintiff is entitled to be put into the position he or she would have occupied but for the injury caused by the defendant: *Nan v. Black Pine Manufacturing Ltd.* (1991), 80 D.L.R. (4th) 153 (B.C.C.A.), at p. 157.

[9] Restoration of the plaintiff's position should not amount to under or over compensation but only result in the amount of compensation that will make the plaintiff whole. Accordingly, limits are placed on compensation: a plaintiff can generally only recover for actual injury caused by the defendant's conduct, and not for damages that are too remote in that they are speculative or not reasonably foreseeable: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para.

13; *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 77.

[10] Achieving the restoration of the plaintiff's position requires an approach that is not unnecessarily complicated or rule-ridden but responsive to the facts of each given case: *James Street Hardware and Furniture Co. v. Spizziri*, 1987 CanLII 4172 (Ont. C.A.), at pp. 27-28.

[11] In cases where the harm to be compensated for is property damage, damages have typically been assessed either as the cost to repair the property or its resulting diminution in value. The historical common law position was that damage caused to real property was measured by the diminution in the value of the land: *C.R. Taylor (Wholesale) Ltd. and others v. Hepworths Ltd.*, [1977] 2 All E.R. 784 (Q.B.) at pp. 790-91, citing *Jones v. Gooday* (1841), 8 M. & W. 146. However, later English cases held that the cost of reinstatement, or repair, could be awarded in an appropriate case: *Dominion Mosaics and Tile Co. Ltd. and another v. Trafalgar Trucking Co. Ltd. and another*, [1990] 2 All E.R. 246 (C.A.), at pp. 249-50; *Hepworths*, at p. 791, citing *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.*, [1970] 1 All E.R. 225 (C.A.). These later authorities have been received into the law of this country: *James Street Hardware*; *Nan*, at pp. 157-158. The application of one or the other of these approaches is governed by the specific facts of the particular case and the further regulating factors of causation, reasonableness and proportionality that I have already referenced.

[12] In professional negligence cases involving real property, like the present, careful attention must be paid to the causal link between the injury suffered and the act of negligence. Depending on the facts, the negligence may not actually have caused property damage, rendering the case law concerning the assessment of damages for harm to property inapplicable.

[13] In some cases, the professional negligence will actually have caused the defect in the property or will have caused the plaintiff to lose the right to recover for that defect. For example, in *Kienzle v. Stringer* (1981), 35 O.R. (2d) 85 (C.A.), leave to appeal refused, [1982] S.C.C.A. No. 252, the solicitor's negligence in conveying the property caused a defect in title and the plaintiff was entitled to recover the cost of putting the title in good order. In *Jarbeau v. McLean,* 2017 ONCA 115, 410 D.L.R. (4th) 246, the solicitor negligently failed to commence an action against an engineer who negligently certified the defective construction of a new home. But for the negligence, the plaintiffs would have recovered the cost to repair the property against the negligent engineer, whose negligence had, in turn, caused the defect in the property. Finally, in *Tabata v. McWilliams et al.* (1982), 40 O.R. (2d) 158 (C.A.), the solicitor negligently failed to warn the client, who was purchasing a home, of the need for an occupancy permit prior to occupation of the property. But for the negligence, the plaintiff could have insisted on an occupancy permit being obtained by the vendors prior to closing, which would have "in all probability" involved the repair of the property. Given these cases involve defects

in property, the case law concerning the assessment of damage to property applies.

[14] In other cases, however, the professional negligence will not have caused damage to property, but rather will have merely caused the plaintiff to enter into a transaction they would otherwise have avoided. For example, in *Messineo et al. v. Beale* (1978), 20 O.R. (2d) 49 (C.A.), a solicitor negligently failed to discover and report a pre-existing defect in the vendor's title but did not cause the defect. In *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1994), 119 D.L.R. (4th) 193 (Ont. C.A.), a solicitor negligently failed to report the existence of an option to rent the purchased property at below current market rents but did not bring the option into existence. Finally, in *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, leave to appeal refused, [2011] S.C.C.A. No. 319, the real estate agent negligently failed to take any steps to inquire into the accuracy of the vendors' representations concerning the condition of the property, but did not cause its poor condition. In these cases, damages were assessed by looking to the overpayment paid by the plaintiff and their consequential damages, rather than the cost to repair or remove the defect.

(b) The Trial Judge Erred by Mischaracterizing the Nature of the Harm Suffered by the Respondents

[15] Relying on the approach followed by this court in *Messineo* and *Posesorski*, the appellants submit that the trial judge erred in measuring damages as the cost to repair the premises because the appellants' professional negligence did not cause the water and mould damage to the property.

[16] The respondents argue that diminution of value is not the appropriate measure of damages. In their submission, in the case of the loss of a family home, where there is a reasonable desire to rebuild, cost to repair provides the appropriate measure of damages.

[17] I agree with the appellants' position. The difficulty with the respondents' argument is that it conflates the cause in fact of their damages with the reasonableness of the quantum. In my view, the trial judge erred in his approach to causation. Specifically, the trial judge mischaracterized the respondents' loss flowing from the appellants' negligence and misinterpreted this court's decision in *Jarbeau.*

[18] The trial judge properly concluded that but for the appellants' negligence, the respondents would not have entered into the agreement of purchase and sale to buy the house. This finding was supported by the respondents' pleading and Mr. Bowman's evidence at trial. It is not contested on appeal.

[19] However, the trial judge erred by mischaracterizing the respondents' resulting loss as their entitlement to a house free of mould and water damage. He also misinterpreted *Jarbeau* as standing for the general proposition that "cost to repair is a more appropriate measure of damages" when assessing loss related to defective property. These errors led the trial judge to reject the diminution in value calculation and apply the cost to repair approach without considering whether the latter measure of damages compensated for the injury actually caused by the appellants' negligence.

[20] Referring to *Jarbeau*, the trial judge explained his reasoning as follows:

> I reject the diminution in value approach for the following reasons. This approach fails to take into account the purpose of damages in a tort claim – to ensure that "the damages awarded to a plaintiff should put him or her in the same position as they would have been in had they not sustained the wrong for which they are receiving compensation or reparation." In the context of property loss matters, where a purchaser believes it had purchased a home free of defects, "the fairest measure of damages is that which would provide the [plaintiffs] with what they bargained for – a home free of defects." [Emphasis added.]

[21] *Jarbeau* does not stand for the general proposition espoused by the trial judge that cost to repair invariably represents "the fairest measure of damages" regardless of the causal link. *Jarbeau* was a solicitor's negligence action. The plaintiffs claimed damages against their solicitor for failing to commence an action within the requisite limitation period against the engineer who negligently certified

the design and construction of the plaintiffs' brand-new, but defective home. The plaintiffs were entitled to be put into the position they would have occupied had the action been commenced in time against the negligent engineer. In their proposed action against the negligent engineer, the plaintiffs would have been entitled to be put into the position they would have occupied had the engineer not been negligent, namely, they would have received the new, defect-free house for which they had bargained. It was in those particular circumstances that this court upheld the cost of reinstatement as the reasonable and proportionate measure of damages.

[22] In the present case, the trial judge erroneously equated the respondents' loss with the loss of a house free of mould and water damage. This reasoning is reflected in the trial judge's observations that: "No evidence was tendered at trial suggesting that damages calculated on a diminution in value basis would permit [the respondents] to obtain a home similar to the one they purchased that is free of mould and water damage" (emphasis added). However, the loss that the respondents suffered as a result of the appellants' negligence was not property loss of this nature.

[23] The respondents' loss consisted of entering into a transaction to purchase a house damaged by water and mould. The appellants' negligent provision of professional services caused the respondents to enter into a transaction that they would not have otherwise undertaken. But the appellants did not cause the water

and mould damage to the property. In other words, even if the appellants had not been negligent, the respondents would still not have received a water and mould-free property; they would merely have avoided this bargain. This takes this case outside the scope of *Jarbeau*, *Nan*, and other cases where the negligence was causally related to property damage.

[24] As the appellants' wrong did not cause the property defect, the respondents are not entitled to demand what they could never have had even if the appellants had not been negligent, namely, a house free of mould and water damage: *Posesorski*, at p. 210; *Avrom Evenchick (Trustee of) v. Ottawa (City)* (1998), 111 O.A.C. 132 (C.A.), at para. 12; *Samson v. Lockwood*, 1998 CanLII 1920 (Ont. C.A.), at p. 13. They are only entitled to damages to compensate them for entering into a bad transaction they would have otherwise avoided. These damages will include their overpayment for the defective property, namely, its diminution in value.[2]

[25] I do not accept the respondents' additional argument that the cost of repair is the default method for ascertaining damages in this case. Awarding cost to repair would over-compensate the respondents and therefore not put them in the position they would have occupied but for the appellants' negligence: *Evenchick*, at para.

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[2] These damages are not limited to overpayment. As reflected in the portion of the trial judge's damages award that is not challenged on this appeal, there may be various consequential losses suffered as a result of being wrongfully advised into the transaction: *Posesorski*, at p. 40.

12; *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 2 All E.R. 5 (C.A.), at p. 16; see also *Downs and another v. Chappell and another*, [1996] 3 All E.R. 344 (C.A), at p. 358.

[26] As a result, the trial judge's cost to repair approach to damages that awarded the equivalent of a house free of mould and water damage to the respondents was not the true measure of the respondents' loss caused by the appellants' negligence and must be set aside.

(c) The Assessment of Damages Must be Remitted

[27] While I conclude that the cost to repair the home was not an appropriate measure of damages in this case, it is not possible on the record before us to assess the damages flowing to the respondents from the appellants' negligence. There is, for example, no admissible evidence concerning the value of the property given the mould and water damage, which is necessary to calculate the magnitude of overpayment. The trial judge rejected the evidence of the real estate expert called by the appellants and the appellants have not challenged that ruling on appeal.

[28] In consequence, I would remit the assessment of damages to the trial judge for his determination, as well as the case management of what further evidence and submissions from the parties will be required for the determination of this issue.

(2) Mitigation

[29] The appellants argue that the trial judge erred in rejecting their submission that the respondents failed to mitigate their damages. Specifically, they say the respondents should have simply walked away from the property and the mortgage.

[30] I disagree.

[31] The respondents were required to make reasonable efforts to mitigate their damages. It is the appellants' onus to demonstrate they failed to do so: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163. I see no error in the trial judge's conclusion that the appellants did not meet that onus. The trial judge's determination of the mitigation issue was reasonable in the circumstances of this case. His conclusion is therefore entitled to deference on appeal.

[32] There was no evidence establishing that the respondents could have sold or walked away from the property, or that it was reasonable for them to take either course in their circumstances, which included their straitened finances and obligations under the vendor-take-back mortgage. Even accepting the appellants' real estate expert evidence of property value at $165,000, the respondents would not have been able to recoup enough money from a sale to repay the vendor-take-back mortgage. The unchallenged evidence at trial showed that the respondents were in difficult financial circumstances: they could not afford to buy another property, remediate this property, or maintain the property while paying the

mortgage and renting alternative living accommodations. As a result, it was not unreasonable for them to retain the property and seek damages from the appellants.

(3) Frost Heave Damage

[33] The appellants submit that the trial judge erred in his consideration of this issue in that the trial judge made inconsistent findings concerning the question of whether the frost heave damage was reasonably foreseeable. Specifically, the appellants say that the trial judge erred by determining that while the respondents could not have foreseen the cause of the heaving of the foundation, the frost heave damage was a reasonably foreseeable consequence of the negligence.

[34] I do not accept these submissions. In my view, the appellants are conflating the trial judge's findings on mitigation with those on remoteness of damages.

[35] At trial, the appellants argued that the frost heave damage was too remote and not causally connected to the appellants' negligence; and, further, that the respondents had failed to mitigate their damages. A fair reading of the trial judge's reasons shows that the trial judge dealt with both these issues.

[36] With respect to the issue of mitigation, the trial judge determined that it was fair and reasonable for the respondents to shut down the house rather than reinstate a heating system that they could not afford to operate in order to heat a house that was not insulated because of the gutting required by the water and

mould damage. He also found that it was reasonable for the respondents to follow the measures recommended by Mr. Korner, a professional engineer, to try to protect the house. As a result, he found that the appellants had failed to satisfy their onus to demonstrate that the respondents did not mitigate their damages.

[37] Turning next to the trial judge's findings concerning causation and remoteness of damages, he found that "it is foreseeable that a home rendered inhabitable by mould and water damage cannot be lived in, that a home not lived in will not be heated and that an unheated home subjected to the effects of freezing temperatures during the winter months could suffer from floor heaving". In consequence, he determined that "the basement floor heaving is not so removed as to be unrecoverable".

[38] It is clear that the trial judge concluded that the frost heave was reasonably foreseeable and hence the necessity for the respondents' efforts to protect the empty house's foundation with straw as recommended by their engineering expert. What was not foreseeable, and therefore not a failure to mitigate on the part of the respondents, was that the recommended protective steps would not be effective. The trial judge effectively concluded that the failure of the recommended measures to adequately protect the foundation should not be visited against the respondents as a failure to mitigate their damages. His mitigation finding was separate from the trial judge's findings respecting causation and remoteness.

[39] I see no inconsistencies or errors in the trial judge's findings concerning the issues of mitigation, causation and remoteness of the frost heave damage. They were available to him on the record.

(4) Conclusion

[40] Awarding the cost of repair was an error in this case because the defect in the property did not result from the negligence. This head of damage should be replaced with the diminution in value of the property as a result of the now-revealed defects. In light of my conclusions above that the respondents have not failed to mitigate their damages and that the frost heave damage is a reasonably foreseeable consequence of being negligently advised into this transaction, the relevant measure is the difference between the purchase price paid and the actual value of the property in its damaged state at the time of trial, including as a result of the frost heaving.

E. DISPOSITION

[41] Accordingly, I would allow the appeal in part and set aside the trial judge's March 4, 2019 judgment in relation to his award of costs to repair against the appellants in the amount of $232,894.61. The balance of the trial judge's award is not affected by this result. I would also set aside his April 4, 2019 judgment of costs, fixed in the amount of $144,679.55, against the appellants.

[42] I would remit to the trial judge the assessment of the respondents' damages arising from the overpayment and diminution in value of the property caused by the appellants' negligence and the issue of the costs from the first trial.

[43] In my proposed disposition of the appeal, since the appellants would succeed on only their first ground of appeal, the results would be mixed, and I would make no order as to costs of the appeal.

Released: May 29, 2020 ("P.R.")

"L.B. Roberts J.A."
"I agree. Paul Rouleau J.A."
"I agree. C.W. Hourigan J.A."