See para. 19

Case Name:

Pinnacle Millwork Inc. v. Kohler Canada Co. (c.o.b. Canac Kitchens)

Between
Pinnacle Millwork Incorporated, Plaintiff, and
Kohler Canada Co., carrying on business
as Canac Kitchens, Defendant

[2014] O.J. No. 5046

2014 ONSC 5782

Court File No. CV-09-383676

Ontario Superior Court of Justice

T.R. Lederer J.

Heard: September 8-10, 2014.
Judgment: October 22, 2014.

(24 paras.)

Contracts -- Remedies -- Damages -- Action by the plaintiff Pinnacle Millwork to recover amounts for unpaid invoices and for damages for breach of contract allowed in part -- Pinnacle manufactured hardwood products used by the defendant in the manufacture of kitchen cabinets -- When the defendant withdrew from manufacturing, Pinnacle was left with material produced but not yet taken up by the defendant -- The defendant failed to pay for goods it undertook to purchase -- Nominal damages in the amount of $500 were awarded for the breach of contract -- Judgment in the amount of $3,065 was granted in relation to certain invoices.

Creditors and debtors law -- Judgment -- Action by the plaintiff Pinnacle Millwork to recover amounts for unpaid invoices and for damages for breach of contract allowed in part -- Pinnacle manufactured hardwood products used by the defendant in the manufacture of kitchen cabinets -- When the defendant withdrew from manufacturing, Pinnacle was left with material produced but not yet taken up by the defendant -- The defendant failed to pay for goods it undertook to purchase -- Nominal damages in the amount of $500 were awarded for the breach of contract -- Judgment in

the amount of $3,065 was granted in relation to certain invoices.

Damages -- In contract -- Breach of contract -- Action by the plaintiff Pinnacle Millwork to recover amounts for unpaid invoices and for damages for breach of contract allowed in part -- Pinnacle manufactured hardwood products used by the defendant in the manufacture of kitchen cabinets -- When the defendant withdrew from manufacturing, Pinnacle was left with material produced but not yet taken up by the defendant -- The defendant failed to pay for goods it undertook to purchase -- Nominal damages in the amount of $500 were awarded for the breach of contract -- Judgment in the amount of $3,065 was granted in relation to certain invoices.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43,

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 24(5)

Counsel:

Mark Wiffen, for the Plaintiff.

E. Di Iorio and N. Khouri, for the Defendant.

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1 **T.R. LEDERER J.**:-- The plaintiff, Pinnacle Millwork Incorporated ("Pinnacle"), is a manufacturer of hardwood products, in this case framing used by the defendant, Kohler Canada Co., (which carried on business as Canac Kitchens ("Canac")), in the manufacture of kitchen cabinets. The two companies had a relationship of some years, referred to by one of the witnesses as "subsisting". Generally, the pieces sold were the top and bottom of the framing (the horizontal pieces) referred to as "shorts" and the two sides (the vertical pieces) referred to as "longs". Not surprisingly, the names ("shorts" and "longs") are descriptive. The side pieces were longer than the top and bottom pieces which were shorter.

2 Canac required and Pinnacle produced the pieces using different species of wood (Cherry, Oak and Maple). The product was proprietary to Canac, meaning that it was made to specifications it set using tooling designed specifically to that purpose.

3 As described in the evidence, Pinnacle was expected to, and did, produce what was required in a way that generated the lowest cost to Canac. There were ramifications to this approach. For example, there could be circumstances where Canac required "longs", but not as many "shorts". Nonetheless, in order to maximize the use of the wood it purchased, and to keep the costs to Canac down, Pinnacle would buy the highest quality wood (fewer blemishes, less waste) and shape the

entire length of the pieces delivered by its supplier. When the wood, as shaped, was cut to produce the lengths required for "longs", there would be pieces left that did not have the length to be used as "longs", but could be used as "shorts". Canac understood that the inability of the quantities and lengths of wood purchased to accord precisely with what any individual order required left Pinnacle with inventory that was not immediately needed. Over the course of the relationship, it was understood that Canac would, over time, take up and pay for the remainder pieces.

4 The framing was supplied to a plant operated by Canac in Thornhill, Ontario. In May 2008, it was decided that the plant would close and the manufacturing would be picked up by a factory in Statesville, North Carolina. This did not trouble Pinnacle. It understood that it would be called on to supply product to the Statesville plant and did not foresee much of a change to its business. This optimism did not last long. In September 2008, partially in response to the economic slowdown that was beginning to take effect, Canac decided to close the plant in Statesville and withdraw from manufacturing entirely. Apart from the loss of a valued customer, Pinnacle was confronted with an immediate problem. It had, and still has, on its premises inventory which had collected as a result of orders it says were made by Canac. This was material that Pinnacle had produced but Canac had not yet required and had not yet taken up.

5 There was discussion. Canac agreed to pay for product that had been the subject of proper Purchase Orders. Its payment system would not allow for payment to be made without such a document being in hand. On October 24, 2008, without presenting any Purchase Orders, Pinnacle issued three invoices to cover the cost of the inventory it had on hand: one for $60,155.63; a second for $13,488.77; and a third for $517.86. It was unclear what the last of the three invoices represented. Early in the trial, Pinnacle acknowledged that the work it represented was part of an effort to see if at least some of the manufactured pieces could be re-processed for use by other of its customers. Either the invoice had been paid or it reflected a cost not associated with the inventory being charged for. It should not have been included in the claim and was withdrawn from further consideration.

6 This left the two other invoices, which represent the largest part of the claim being made on behalf of Pinnacle being ($60,155.63 + $13,488.77) $73,644.40. The remainder of the amount claimed is approximately $22,000, representing the total amount unpaid on invoices that were partially but not completely paid by Canac. This part of the claim is subject to separate and independent consideration, not the least of which is the consideration of the appropriate limitation period. I shall return to this later in these reasons.

7 It should be said that the closing down of the manufacturing plants in 2008 is not the first time the question of how the collected inventory was to be dealt with had come up. In 2004, a decision was made to rationalize the inventory. The reason for this was unclear. The evidence called on behalf of Pinnacle suggested that the operation of the Thornhill plant was problematic. Ratepayers in the area were unhappy. Production of doors (for which the framing provided by Pinnacle was used) was to be reduced. Pinnacle was to be phased out. Relying on documents from the time,

counsel for Canac suggested that Pinnacle needed the revenue and approached Canac for its assistance by clearing the inventory. It was said that the documents made clear that inventory was not to be "rebuilt" and that any pieces manufactured should be in response to a Purchase Order requesting their production.

8 Be that as it may, the policy of requiring a proper purchase order was not followed. For example, Canac required pieces of different wood to be joined (I assume glued together) to create "butcher block". The price shown on the purchase order was 0.01 dollar (1 cent) per unit which was conceded to be a default number used to allow the order to be accepted, but not one that reflected what would, in fact, be paid. It is clear that, from 2006 to 2008, requests were being made by Canac for rush delivery without Purchase Orders and that inventory was collecting. Inventory lists, dated May 3, 2007 and August 21, 2007, were sent by Pinnacle to Canac. Evidence, given by a former employee of Canac and called by Pinnacle, indicated that it was understood by both parties that, if pieces were built as a result of any order (including remainder pieces not specifically required at the time of the order), they would, in time, be taken and paid for.

9 Where the particular form of invoice that was used required the identification of the Purchase Order that the requested payment responded to, the two invoices relied on say only "as agreed". The two witnesses directly involved with Pinnacle, one in charge of its manufacturing operations and the other who referred to himself as a consultant to the company, differed as to the reason no specific Purchase Orders were referred to on the invoices. While it does not seem to me to be material, for the sake of completeness, I note that the former (responsible for manufacturing) is the son of the latter (the consultant), who observed that his participation in the business was directed to helping his son. The son (responsible for manufacturing) said the invoices did not refer to Purchase Orders because there were none that referred to the items being charged for. They would have been produced in response to rush orders, for example, made by telephone, which were not subsequently recorded. Items were purchased in response to rush orders without a Purchase Order "all the time". The father (the consultant) said that 20% of the orders received came in by telephone. He also said that while there would have been Purchase Orders, it would have been impossible to determine which ones identified any particular remainder pieces. The former Canac employee acknowledged there would have been rush orders made by telephone and that, over the years after 2004, inventory gathered and included remainder pieces not required at the time the orders were made. Taking the evidence of these three witnesses into account, I find that, on a balance of probabilities, some of the inventory that gathered arose from orders made but not confirmed on written Purchase Orders and some developed from remainders from Purchase Orders they could not be traced to. In other words, both witnesses from Pinnacle were, to some extent, correct as to why the two invoices did not refer to Purchase Orders and, in their place, say "as agreed".

10 The two invoices were prepared after Pinnacle had been notified that Canac was closing down its manufacturing operations entirely; that is to say, after the decision made in September 2008 to close the plant in Statesville, North Carolina. The people at Pinnacle inventoried the Canac product on hand, counted it up and prepared the two invoices. In the absence of any proof that the goods for

which they are being charged respond to orders made, Canac was not prepared to pay. Pinnacle has not produced records of orders made because it either had no Purchase Orders or cannot trace the product to Purchase Orders and has no other records. No memos were kept recording orders made over the telephone and no confirming e-mails, letters or other notes were prepared, sent or kept.

11 The immediate problem is not difficult to see. On one hand, it is clear that some portion of the remaining inventory was produced without having been the subject of a specific or written Purchase Order. This occurred when there were rush orders and when there were remainders that were not required as part of a Purchase Order that had been prepared. Either way, the parties understood and agreed that inventory accumulated on this basis would, in time, be taken up and paid for by Canac.

12 On the other hand, the former employee of Canac would not accept that all of the inventory for which Pinnacle now seeks to be paid could reasonably have been the result of orders or requests made by Canac. As he sees it, the amount of at least some of the product for which Pinnacle wishes to be paid is simply too high. He pointed out that the inventory that collected represented a backlog of 6 months to a year. In particular, he pointed to the claim for 5,715 units and 8,360 units, both of "shorts" made of cherry and both on the invoice in the amount of $13,489.77, as being beyond what was reasonable. The invoice for $60,155.63 also contained claims for unusually high numbers of units; this time, 16,596 units and 8,950 units of "longs" made of maple. While not directly relevant to the claim now being made, it is worth noting that this is not the first time Pinnacle and Canac disagreed as to how much inventory should have been on hand. In a letter, dated July 29, 2004, Pinnacle said the inventory on hand was valued at $90,146.61 when Canac believed, based on the purchases it had made, only $48,772.46 of product should have remained. Canac said it would not commit to purchase the difference.

13 In the absence of any records confirming the orders, it is impossible to know how much of the inventory that had been collected is subject to the claim now being made. It could be little of it. It could be most of it.

14 In the circumstances, has the claim made by Pinnacle been proved sufficiently such that damages can be properly assessed? Unhappily, counsel provided little guidance. In short, counsel for Pinnacle says it has; counsel for Canac says it has not. No case law was provided.

15 It is a given that the plaintiff must prove her, his or its damages. However, circumstances may dictate that it is not always possible for damages to be calculable with precision. In *Wood v. Grand Valley Railway*,[1] the Supreme Court of Canada referred to the earlier case of *Chaplin v. Hicks*,[2] where a claim was made as a result of a breach of a contract that resulted in the loss of an opportunity to be part of a limited class of competitors for a prize:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot 'relieve the wrongdoer of the necessity of paying

> damages for his breach of contract' and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do 'the best it can' and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.[3]

16 The significance of this case can be misread. It does not detract from the understanding that it is the responsibility of the plaintiff to prove her, his or its damages. The case does nothing more than recognize that, in some cases, there may be future contingencies where the impact on the value of the damages cannot be known. "[A] future contingency which can not [*sic*] be accurately characterized and calculated should not prevent the award of substantial damages where a breach has been made out and damages flowing from the breach have been established to the satisfaction of the court."[4] This is not an invitation to "guess" at damages that are subject to specific proof where, for whatever reason, the plaintiff has failed to provide that proof. A judge ought not to assess damages where, by the plaintiff's own conduct, "...the court is not furnished with evidence necessary to properly dispose of the damages portion of the case."[5] To put it directly:

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.[6]

17 How does this impact on the case that I am asked to decide?

18 It is clear that some part of the inventory that had collected was produced on the understanding and agreement that it would be taken up and paid for by Canac. The evidence of the past employee of Canac demonstrates that this is not so with respect to all of the inventory for which payment is claimed. In the absence of any records from Canac as to the orders it made, or from Pinnacle as to the orders it received, there can be no definitive means of understanding the extent of the loss. While there is a loss, its limits are not known. In such circumstances, it is not possible to calculate the damages that are representative of the loss that occurred.

19 Counsel for Canac says the court should not be left to guess. While it was not put this way, the proposition must be that this is a situation where the damages cannot be calculated as a result of the failure of the plaintiff to provide proof rather than the presence of some contingency that made it impossible for that proof to be provided. The difficulty arises from the failure of the plaintiff to keep proper records. This is not a problem that, by its nature, makes it impossible to calculate

damages. I agree with counsel for Canac. I am not going to guess at the value of the harm caused. Having said this, "nominal damages" may still be awarded.[7] "Nominal damages is a sum awarded where the plaintiff's legal right has been invaded but no damage has been proved." They "...are awarded if the plaintiff establishes a breach of contract or a tort of the kind that is said to be actionable *per se* but fails to establish a loss caused by the wrong."[8] In this case, Canac has failed to pay for goods it undertook to purchase. There was a breach of contract. Early cases in Canada assumed the appropriate amount for nominal damages to be $1.00 which has been awarded, in at least one case, as recently as 2010.[9] On the other hand, many different amounts have been used.[10] In the circumstances, I award, as nominal damages, in recognition of the breach of contract, of $500.00.

20 This leaves me to deal with the invoices, part of which are said to be unpaid. The failure to pay each invoice represents a new cause of action. In this case, some of them date back before the passage and proclamation of the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B. The transition from the old to this new *Limitations Act* is found in the new *Act* at s. 24 (5):

> If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:
>
> 1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
>
> 2. If the claim was discovered before January 1, 2004, the former limitation period applies.

21 The Statement of Claim is dated July 23, 2009. If clause 24(5) para. 2 is applied to the various invoices that are said to have been partially paid, the invoice of May 22, 2003, and all of those that pre-date it would be outside the six-year limitation that applied under the old *Act*. If clause 24(5) para. 1 is applied, there are no invoices said to have been partially paid that fall within the two-year limitation period that applies under the new *Act*. They are all earlier than July 23, 2007. The only invoices that remain unchecked by the application of either of the two limitation periods are:

* July 31, 2003 ... with an outstanding balance of $1,663.76

* August 14, 2003 ... with an outstanding balance of $122.14

* September 11, 2003 ... with an outstanding balance of $300.43

* September 3, 2003 ... with an outstanding balance of $979.04

The total claim for partially-paid invoices that remains is said to be $3,065.37.

22 Evidence was provided, on behalf of Canac, that was directed to explaining why invoices were not always fully paid. Perhaps the product was not all shipped. There may have been quality problems with what was shipped or the wrong pricing used. These statements were general in nature. No specific explanation was associated with any of the four invoices that remain the subject of the claim. This being so, I am not prepared to apply any of these explanations to the four invoices that support the claim for the balance owing of $3,065.37.

23 For the reasons reviewed, judgment is granted in favour of the plaintiff in the amount of ($500.00 + $3,065.37) $3,565.37, plus pre- and post-judgment interest, both pursuant to the *Courts of Justice Act* R.S.O. 1990, c. C.43.

24 No submissions were made as to costs. If the parties are unable to agree, I will consider written submissions on the following basis:

1. On behalf of Pinnacle, no later than 15 days following the release of these reasons. Such submissions are to be no longer that 3 pages, double-spaced, excluding any Costs Outline or Bill of Costs that may be relied on or caselaw that may be referred to.

2. On behalf of Canac, no later than 10 days thereafter. Such submissions are to be no longer than 3 pages, double-spaced, excluding any Costs Outline or Bill of Costs that may be relied on or caselaw that may be referred to.

3. If necessary, on behalf of Pinnacle, in reply, no later than 5 days thereafter. Such submissions are to be no longer than 1 page, double-spaced.

It may be useful if I point out that nominal damages may entitle a plaintiff to costs.[11] It has also been said that the plaintiff who has obtained only nominal damages will not always be regarded as the successful party for the purpose of costs.[12]

T.R. LEDERER J.

1 [1915] S.C.J. No. 17, 51 S.C.R. 283.

2 *Chaplin v. Hicks*, [1911] 2 K.B. 786.

3 *Wood v. Grand Valley, supra*, (fn. 1) at p. 289, quoted in *Martin v. Goldfarb*, [1998] O.J. No. 3403, 112 O.A.C. 138 (Ont. C.A.), at para. 71.

4 *Martin v. Goldfarb, ibid*, at para. 74**.**

5 *Ibid*.

6 *Ibid*, at para. 75; see also: *TMS Lighting Ltd. v. KJS Transport Inc.* 2014 ONCA 1, 314 O.A.C. 133, at paras. 61-66; and, *Toronto Transit Commission v. Aqua Taxi Ltd.*, [1956] O.J. 413, 6 D.L.R. (2d) 721, at paras.76-79.

7 See para. 16 above (the quotation).

8 S.M. Waddams, *The Law of Damages*, 5th ed., (Toronto: Canada Law Book, 2012), at para. 10.10, referencing *Hill v. Kilbrei*, [2005] 11 W.W.R. 1 (Man. C.A.), at para. 27; *Metis National Council Secretariat Inc. v. Dumont* (2008), 305 D.L.R. (4th) 356 (Man. C.A.) citing this passage at para. 41.

9 *Ibid*, (Waddams), at para. 10.20, and fns. 13 and 14 made in reference to that paragraph.

10 *Ibid*, at para. 10.20, and the various footnotes to which it refers.

11 *Ibid*, at para. 10.10 and fn. 7, referring to *Beaumont v. Greathead* (1986), 2 C.B. 494, at p. 499, 135 E.R. 1039 "a mere peg on which to hang costs", *per Maule J.; Marsh v. Royal Bank of Canada* (1922), 63 D.L.R. 659 (Sask C.A.) fn. 3, at p. 662; *Whitling v. Fleming* (1908), 16 O.L.R. 263 (H.C.J.); *Edwards v. Shore* (1956), 20 W.W.R. 240 (B.C.S.C.).

12 *Ibid*, at para. 10.10, referring to *Anglo-Cyprian Trade Agencies v. Paphos Wine Industries*, [1951] 1 All E.R. 873 (K.B.) followed in *Neville v. Page* (1977), 5 A.R. 8 (S.C.T.D.).