Case Name:

Monarch Construction Ltd. v. Axidata Inc.

Between
Monarch Construction Limited, (Plaintiff), and
Axidata Inc. and HOOPP Realty Inc./Les Immeubles HOOPP Inc., (Defendants/Respondents in Appeal), and
Computing Devices Canada Ltd./Computing Devices Canada Ltee., (Third Party/Appellant), and
Tricont Projects Limited and 745789 Ontario Limited, (Third Parties/Respondents in Appeal), and
Plymouth Tool & Stamping Limited. (Third Party)
And between
Premium Properties Limited, (Plaintiff), and
Computing Devices Canada Ltd./Computing Devices Canada Ltee., (Defendant/Appellant)
Tricont Projects Limited and 745789 Ontario Limited, (Defendants/Respondents in Appeal), and
Abitibi-Consolidated Canadian Office Products Holdings Inc. and HOOPP Realty Inc./Les Immeubles HOOPP Inc., (Third Parties/ Respondents), and
Plymouth Tool & Stamping Limited and Monarch Construction Limited, (Third Parties)
And between
Abitibi-Consolidated Canadian Office Products Holdings Inc., (Plaintiff/Respondent in Appeal), and
Tricont Projects Limited and 745789 Ontario Limited, (Defendants/Respondents in Appeal), and
Computing Devices Canada Ltd./Computing Devices Canada Ltee., (Defendant/Appellant)

[2009] O.J. No. 723

2009 ONCA 166

41 C.E.L.R. (3d) 1

2009 CarswellOnt 907

Docket: C46914

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, R.J. Sharpe and R.G. Juriansz JJ.A.

Heard: February 19, 2009.
Judgment: February 24, 2009.

(9 paras.)

Environmental law -- Environmental liability -- Civil litigation -- Appeals -- Contaminated land -- Toxic real estate -- Specific contaminants -- Underground storage tanks -- Liability for contamination -- Appeal by underground storage tank installer from judgment determining liability of it and other parties for toluene contamination of land caused by migration of toluene from tank -- Appeal dismissed -- Appeal fact-driven -- No palpable error by judge in making determinations of liability, including judge's inferences from, and assessment of, contradictory evidence.

Appeal from a judgment determining the liability of several parties, including the appellant, for environmental damages caused by the escape of toluene from an underground storage tank. The appellant had installed the tank. It had had deposited toluene into the tank years before the escape and migration of the toluene was discovered. The judge had to draw inferences from the available evidence about the amount of toluene deposited by the different parties, the size of the tank, and the date at which the migration from the tank occurred. She had explained why she accepted some evidence over other evidence.

HELD: Appeal dismissed. The court would not retry the case. There was no palpable or overriding error in the judge's reasons justifying appellate intervention. The judge identified, discussed, and explained all of the deficiencies, contradictions, and points of difference in the evidence. Her findings were not speculative and did not lack foundation in the evidence.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 59.06(1)

Appeal From:

On appeal from the judgment of Justice E. Eva Frank of the Superior Court of Justice dated March 5, 2007.

Counsel:

Barbara J. Nicholls, for Computing Devices Canada Ltd.

Christopher Cosgriffe and James J. VanWiechen, for Tricont Projects Limited, 745789 Ontario Inc., HOOPP Realty Inc./Les Immeubles, HOOPP Inc., Abitibi-Consolidated, Canadian Office Products Holding Inc. and Axidata Inc.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- This is an entirely a fact-driven appeal. The issue at trial was the allocation of liability for environmental damages caused by the escape of toluene from an underground storage tank. It is common ground that because the escape and migration of the toluene was only discovered years after the appellant installed the tank and began depositing the toluene into the tank, the evidence as to certain "primary facts" relevant to the allocation of liability was less than complete. Those primary facts included:

* the amount of toluene purchased by each party;
* the amount of toluene put into the tank by each party;
* the size of the tank; and
* the date at which migration from the tank commenced

2 To make her findings on these disputed points of fact, the trial judge had to draw inferences from the evidence that was available. The trial judge fully recognized that there were gaps in the evidence. The trial judge provided exceptionally detailed reasons explaining the basis for the inferences she drew from the evidence that was available. She reviewed the evidence with meticulous care and attention to its strengths and weaknesses. She carefully explained why she accepted some but not all of the evidence of various witnesses and why she preferred the evidence she did accept on each specific point over the competing evidence.

3 In the end, the appellant is asking this court to retry the case. That is not our function. It is well-established that a trial judge's factual findings are entitled to deference and that an appellate court will not interfere unless it can identify a "palpable and overriding error". The appellant has failed to persuade us that there is any palpable and overriding error in the trial judge's reasons that would justify appellate intervention. All of the deficiencies, contradictions and points of difference in the evidence that are now advanced before us as grounds for appeal were identified, discussed, and explained by the trial judge. We are not persuaded that any of her findings can be challenged as being speculative and lacking any foundation in the evidence, as having been made contrary to the accepted evidence, or as being based on a misapprehension of the evidence.

4 Accordingly, the appeal is dismissed.

5 The appellant also seeks leave to appeal costs and appeals an amendment to the judgment to include GST, an item that had been inadvertently overlooked.

6 The trial judge provided detailed reasons explaining the basis for her costs award. It is well-established that the decision of the trial judge with respect to costs is entitled to a high degree of deference and that an appeal court should only set aside an award of costs if the trial judge has made an error in principle or if the costs award is plainly wrong. We see no such error and we are not persuaded that there is any arguable ground of appeal against the costs order.

7 Accordingly leave to appeal costs is refused.

8 The amendment to the judgment to include GST was well within the discretion conferred by Rule 59.06(1). The appeal from that order is dismissed.

9 The respondents are entitled to their costs of the appeal fixed in the agreed amount of $25,000, inclusive of disbursements and GST.

M. ROSENBERG J.A.
R.J. SHARPE J.A.
R.G. JURIANSZ J.A.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Sunday, June 12, 2016 14:50:03