CITATION: J. Jenkins and Son Landscape Contractors Limited v. Iron Trio Inc., 2025 ONSC 1781
DIVISIONAL COURT FILE NO.: 24-255
DATE: 20250321

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Trimble, and Mew JJ.

BETWEEN:	
J. JENKINS AND SON LANDSCAPE CONTRACTORS LIMITED Appellant (Plaintiff)	*Julian Heller* and *Kevin Fernandes,* for the Appellant
– and –	
IRON TRIO INC., ORIN CONTRACTORS CORP. Respondents (Defendants)	*Ryan Hauk* and *Marco Falco*, for the Respondents
	HEARD at Hamilton: 1 November 2024 (by video conference)

MEW J.:

REASONS FOR DECISION

(Appeal from a decision of Parayeski J. dated 31 January 2024 and a costs ruling dated 9 August 2024)

[1] Between 30 September 2019 and 7 November 2019, the appellant claims that it delivered 16,558 cubic yards of soil to the respondent, Orin Contractors Corp. (hereafter "the respondent"). The respondent responds that only 9,507.68 cubic yards of soil were delivered. It refused to pay the appellant's invoices totalling $796,429.80, instead paying $442,212.11, leaving an unpaid balance of $354,217.69.

[2] At trial, the respondent acknowledged that, due to an accounting error, it owed the appellant a further $15,433.45. The trial judge gave judgment for the appellant in that amount, but denied

the balance of the appellant's claim. In his subsequent costs ruling, the trial judge ordered the appellant to pay the respondent's net costs of $97,191.03.

[3] The grounds of appeal raise issues of contractual interpretation, evidentiary findings by the trial judge, deficient reasons for decision and improper exclusion of the appellant's witnesses.

[4] For the reasons that follow, I would allow the appeal in part and award the appellant damages of $61,198 and its costs at trial.

Background

[5] The respondent is a general contractor. It secured a contract with the City of Hamilton to construct a multiple sports field and a contiguous cricket pitch. The appellant was contracted to supply soil for the project. The other named respondent, Iron Trio Inc. was not a party to the contract. The action against it was entirely dismissed.

[6] The appellant's business includes purchasing topsoil scraped from development land. The topsoil is then screened and mixed with aggregates to create a blend that complies with its purchasers' requirements. The soil mix is then loaded onto trucks which, in the present case, were driven from the appellant's yard in north Brampton to the work site at Stoney Creek. The appellant says that some 662 truck deliveries were made.

[7] The appellant's claim that it delivered 16,558 cubic yards of soil is premised on its evidence that each truckload contained 25 cubic yards of soil (if, in fact, there were 662 truck deliveries, that would amount to 25.01 cubic yards per load).

[8] The contract between the appellant and the respondent was set out in a written quote dated 3 August 2019. The quote provided unit prices for the two main types of soil to be delivered. The originally estimated quantities required were 3,000 cubic yards for each of the two categories of soil. The quote "provided", *inter alia*, as follows:

> PRICING:
>
> PRICES REFLECT ABOVE QUANTITIES ONLY. PRICES ARE SUBJECT TO CHANGE WITHOUT NOTICE. PRICES BASED ON JENKINS TRUCK VOLUMES/TICKETS. JENKINS NOT RESPONSIBLE FOR MATERIAL SUBSEQUENT TO DELIVERY.

[9] The quote also provided for surcharges on all deliveries of under 20 cubic yards.

[10] A delivery ticket accompanied each of the deliveries made by the appellant's trucks (either owned or brokered through third party truck owners). The delivery tickets provided that "*TRUCKS MUST BE LOADED*" and required a signature from the customer's representative on site accepting each load as it was delivered.

[11] The respondent has acknowledged that it had no reason to doubt the appellant's truck tickets and invoices at the time they were received. The two companies had a ten-year history of

working together on construction projects. The respondent trusted the appellant to ensure that the total invoiced amounts provided by the appellant reflected the actual delivery of goods to the project.

[12] On 6 November 2019, one day before the final deliveries by the appellant, the respondent brought to the appellant's attention for the first time a concern about whether each truckload delivered by the appellant had in fact consisted of 25 cubic yards of soil. The respondent had become aware that its estimator had underestimated the amount of soil mixes required for the job, and that had prompted the respondent to look into, and ultimately question, the volume of soils delivered by the appellant.

[13] As part of its project agreement with the City of Hamilton the respondent had retained a surveyor, MRM Surveyor Inc. ("MRM"). After the final delivery by the appellant, the respondent, with the assistance of MRM, undertook an investigation of its concerns over the quantity of soils delivered to the project.

[14] One of the challenges in determining the volume of material delivered was that almost immediately upon delivery, each load was spread.

[15] On 22 November 2019, the appellant was advised by the respondent that there was a clear discrepancy between the invoices which it had submitted, and the amount of soils delivered to the project. Reference was made to the respondent's internal measurements and to the results of a verification survey undertaken by MRM.

[16] The appellant maintained its position that it had, in fact, supplied all the soil loads which it had invoiced for.

[17] On 7 December 2019, the respondent undertook a survey on fourteen stockpiles which had been left on the project site, and that had not yet been spread.

[18] A volume calculation was taken in relation to these stockpiles. Thereafter, MRM finalised its verification surveys.

[19] In reliance on the results of the verification and stockpile surveys, on 18 December 2019 the respondent confirmed that it would pay the appellant only for the amount of soil that the respondent believed to have been supplied to the project.

Decision of the Trial Judge

[20] The trial judge described the process employed at the appellant's yard to fill each dump truck. The standard tri-axle truck boxes used by the appellant would contain 18.55 cubic yards of material. However, when augmented with wooden boards, the capacity of the truck boxes could be increased to 22.38 cubic yards. The appellant's evidence was that if a standard box filled with topsoil was "peaked" at 18 inches above the upper edges of the box, it would contain 25.81 cubic yards. However, none of the loads placed into the truck boxes at the appellant's yard were ever measured.

[21] Upon delivery of the load to the job site, a two-part paper chit was handed to whoever was receiving the delivery. The chit acknowledged the delivery of 25 cubic yards of soil mix. The chit would be signed by the receiver, and the signed portion given to the appellant's driver who would take the signed portion back to the appellant's yard where it would be given to the bookkeeping staff. The other portion of each chit would be retained by the receiver. There was no evidence that load inspections were made on delivery, which the trial judge said would have entailed the receiver climbing up on the dump trucks themselves, to ensure that each actually contained 25 cubic yards of soil mix, before the chits were signed.

[22] The trial judge considered evidence of the appellant's employees and hired brokers that the trucks were "full" when they left the appellant's yard. He also looked at several photographs of loaded trucks at that site. He observed that some of the trucks were not equipped with wooden boards attached to the metal sides of the boxes, and that all of the photographs were taken from what appeared to be ground level. As a result, the trial judge found that the photographs did not address the "live issue" of whether the dropped soil mix had spread out to fully fill the truck boxes from edge to edge to edge.

[23] The trial judge did not allow three witnesses tendered by the appellant to testify. In each case, the rejected evidence would have addressed:

a. Whether an industry standard for the sale and distribution of composts, soils, mulches and other related products was on a loose cubic yard basis; and

b. The typical rate of compaction through hauling, spreading and weathering of the topsoil once spread.

[24] These three witnesses proposed by the appellant were rejected by the trial judge because none of the letters or reports tendered by them complied with the expert witness requirements of Rule 53.03. Although the trial judge acknowledged that he had discretion to admit the evidence, notwithstanding non-compliance with Rule 53.03, he declined to do so. In respect of two of the three proposed witnesses, he found that the evidence of the proposed witnesses amounted to little more than conclusionary statements. Another witness was rejected because the expert's acknowledgment had been provided by the son of the author of the email containing the opinion evidence, with no indication about the qualifications of either individual.

[25] While the trial judge did not find that the appellant had set out to cheat the respondent, he preferred the evidence of the respondent's witnesses, including the calculations undertaken by MRM, and the expert evidence of William Burmeister, a professional engineer[1], to what the trial judge referred to as the rudimentary "eyeball" approach relied on by the appellant's witnesses.

[26] The trial judge rejected the appellant's argument that the contract between the parties, as evidenced by the written quote, specified that prices were based on "truck volumes/tickets" and,

[1]Mr. Burmeister was qualified to provide opinion evidence on a) the interpretation of survey data in relation to materials on site; b) how stockpiling materials may impact survey data (if at all); and c) industry standards regarding the use of surveys for measuring volumes of materials.

accordingly, that the signed delivery tickets were evidence of the respondent's acceptance of the amounts delivered by the appellant. The trial judge described this as a "black letter" approach to the interpretation of contract law which, he said, has "long been replaced by a more pragmatic and contextualized one", adding that "there was no agreement that the [respondent] would pay for more soil mix than was delivered".

[27] The trial judge declined to accept the evidence of what he described as a surreptitiously recorded telephone conversation between two employees of the parties, tendered by the appellant, as an admission by an employee of the respondent that the arriving loads were "full".

[28] The trial judge also declined to draw a negative inference from the failure of the respondent to call James Murphy, the respondent's employee who had signed the majority of the delivery slips relied on by the appellant.

[29] On the issue of damages, the trial judge wrote (at para. 15) that:

> The defendants [*sic*] approach to damages reflects an estimated rate of compaction through hauling, spreading, and weathering, of 10 percent.

[30] The trial judge accepted Mr. Burmeister's evidence that while a normal compaction of ten to fifteen per cent could be expected, no amount of reasonably anticipated compaction could, or would, account for the difference in the respective calculations of material delivered put forward by the appellant and the respondent respectively.

[31] On the issue of costs, the respondent had made an offer to settle on 28 April 2023 which involved payment of $49,132.31 plus HST, with no express reference to costs.

[32] Noting that in its closing submissions, the respondent had asked for the action to be dismissed, despite recognising that, due to an accounting error, it owed the appellant a further $15,433.45, the judge nevertheless accepted that the respondent appeared to have beaten its offer. He awarded the respondent its costs up to the date of the offer to settle in the amount of $10,000 plus HST of $1,300. This was set off against the respondent's costs subsequent to the offer to settle, which were fixed in the amount of $90,000 inclusive of HST, plus $18,491.03, inclusive of HST, for disbursements. In fixing the respondent's costs, the trial judge applied reductions to the costs claimed by the respondent to reflect the fact that the case did not merit two counsel at trial, and that there were other examples of duplication of costs.

Issues on Appeal

[33] There is no dispute between the parties on the applicable standards of appellate review. Errors of law are subject to the standard of correctness. Errors of fact are subject to the more deferential standard of palpable and overriding error. Questions of mixed fact and law (including matters of contractual interpretation) will engage the palpable and overriding error standard, unless a question of law can be extricated, in which case the correctness standard will apply.

[34] The appellant asked this court to find that the trial judge:

a. committed a palpable and overriding error, or an error in law, by failing to provide adequate reasons and, as a consequence, exercised a wrong principle or exercised it in circumstances which can properly be characterised as arbitrary, capricious or unreasonable;

b. committed a palpable and overriding error, or an error of law, by not considering the ordinary meaning of the terms of the contract, instead effectively creating a new agreement;

c. committed a palpable and overriding error, or an error in law, by not drawing an adverse inference from the failure of the respondent to call a "crucial" witness, James Murphy (who signed a majority of the delivery slips);

d. committed an error in law by not applying Rule 53.08(1) when declining to exercise his discretion to admit expert evidence tendered by the appellant;

e. committed a palpable and overriding error, or an error in law, by simply relying on expert testimony without making an effective and critical assessment of the evidence, and in discounting the numerous fact witnesses (of the appellant) without a principled basis; and

f. committed a palpable and overriding error by failing to consider the evidence of compaction of ten to fifteen per cent, such that the damages awarded should be increased to $84,080.82.

[35] The appellant also seeks leave to appeal the trial judge's award of costs and, if leave is granted, a finding that the trial judge committed a palpable and overriding error or an error of law by:

a. ruling that the respondent "beat" their offer to settle;

b. failing to explain why he declined to exercise his discretion under the *Construction Act* to deviate from the usual rules on costs; and

c. awarding the respondent surety bonding fees as a disbursement.

The Trial Judge's Reasons

[36] The appellant criticises the trial judge's reasons for not referring "to a single decided case", and for references to witnesses and exhibits that were "unspecific".

[37] As the Supreme Court of Canada observed in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 13:

> Reasons need not be extensive or cover every aspect of the judge's reasoning; in some cases, the basis of the reasons may be found in the record. The question is whether a reasonable person would conclude that the alleged deficiency, taking into

> account all relevant circumstances, is evidence that the decision-making process was fundamentally unfair, in the sense that the judge did not put her mind to the facts, the arguments and the issues, and decide them impartially and independently.

[38] To similar effect, albeit in the context of reasons in criminal trials, in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55, Binnie J. articulated a number of propositions in relation to the duty of a trial judge to give reasons which are apposite in the present case:

> a. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.
>
> b. Regard will be had to the time constraints and general press of business in the [criminal] courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
>
> c. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

[39] Following a seven-day trial, the trial judge delivered a seven-page decision consisting of seventeen paragraphs in which he provided the background to the dispute, explained the evidence and the parties' respective narratives of the facts, and provided analysis and findings on the issues of liability and damages.

[40] I would reject the overall criticism of the trial judge's reasons. Brevity alone should not be a basis for attacking the reasons of a trial judge if they demonstrate why he or she arrived at his or her decision. The absence of reference to other cases is easily explained where, as in the present case, the applicable principles of contractual interpretation were uncontroversial.

[41] That said, inadequate, or an absence of, reasons will constitute an error of law and, as a result, there is no requirement of deference to conclusions which are unsupported by reasons. An appellate court should, however, refrain from performing its own analysis of the trial record to resolve issues that the trial judge did not adequately address if the resolution of those issues requires making findings or discretionary decisions: *Penate v. Martoglio*, 2024 ONCA 166, 496 D.L.R. (4th) 50, at para. 23. Under such circumstances, if the error cannot be corrected on appeal, the case should be sent back for a new trial.

Contractual Interpretation

[42] The appellant submits that, the parties having specified in the contract the means by which acceptance of delivery of goods would be effected, it was an error for the trial judge to allow surrounding circumstances to alter or undermine the parties' agreement.

[43] Section 34(a) of the *Sale of Goods Act*, R.S.O. 1990, c. S.1., provides that a buyer and seller of goods shall be deemed to have accepted the goods when the buyer intimates to the seller that the goods have been accepted. The appellant asserts that, in accordance with the parties' contract, the respondent accepted each delivery, including the quantities of soil represented as having been delivered, when its employee on site signed the corresponding delivery ticket. This was how the parties had done business with each other for a decade. In the soil business, it was also commercially sensible to be paid per load, and to specify that the delivery tickets are conclusive.

[44] The appellant supports its position by referring to the express provision in the agreement that it was "not responsible for material subsequent to delivery", pointing out that the appellant lost all control over the soil, including the ability to respond to any concerns about the volume of soil delivered, once each truck had been unloaded and the soil spread. By finding that the parties did not agree that the respondent would pay more for soil mix than was delivered, the appellant argues that the trial judge effectively substituted a different contract than that which the parties had agreed.

[45] The trial judge did not, in my view, rewrite the parties' contract. He referred to the "black letter" approach to the interpretation of contract law having been replaced by a more contextualised and pragmatic approach. That view is consistent with the Supreme Court of Canada's statement that the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction, and that the overriding concern is to determine "the intent of the parties and the scope of their understanding": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47.

[46] It was open to the trial judge to conclude on the evidence before him that when the parties agreed to the system of delivery of volumes of soil by the truckload, they did not intend that the signing of chits on a busy worksite, where there was pressure to get things done, would be the sole determinant of the amount of soil delivered, even where there was evidence that less soil was actually delivered than the appellant claimed.

[47] Rather, the trial judge's interpretation and application of the contract was consistent with the practice and expectations of the parties at the time the contract was entered into, namely that the loads delivered by the appellant would each contain 25 cubic yards of soil mix, but that the respondent would not be required to pay for more soil mix than had actually been delivered.

[48] No legal, or palpable and overriding error on the part of the trial judge concerning his interpretation and application of the parties' contract has been identified by the appellant.

Drawing an Adverse Inference from the Respondent's Failure to Call James Murphy as a Witness

[49] James Murphy was a bulldozer operator employed by the respondent who signed the majority of the truck slips on the respondent's behalf. One of the appellant's drivers testified that the respondent's bulldozer operators looked at every load, saying "they stand on the dozer and look at our load". Mr. Murphy was still employed by the defendant at the time of the trial. The appellant argues that Mr. Murphy was a witness to a crucial fact, and that the trial judge should have drawn a negative inference from the respondent's failure to call him.

[50] The authors of Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto; LexisNexis, 2022) at ¶6.509, note that an unfavourable inference can be drawn when, absent an explanation, a party fails to call a material witness with knowledge of the facts who would be assumed to be willing to assist that party. And in *Barry v. Ontario*, 2023 ONSC 4299, at para. 58, Ryan Bell J. stated:

> The authorities establish that an adverse inference may be drawn from the failure to call a witness where: (i) a party has not explained the failure to call an important witness; (ii) the evidence of that witness has not been provided from other sources; (iii) a *prima facie* case has been established by the opposing party that the party failing to call the witness must disprove or risk losing the case; and (iv) that party alone could bring the witness before the court.

[51] While his reasons do not specifically address the issue of Mr. Murphy, the trial judge found that to ensure that each truck load actually contained 25 cubic yards of soil mix, someone would have to have climbed up on the dump trucks themselves. In coming to that conclusion, he had before him photographs (which he found to be of limited assistance) as well as the evidence of other employees of the respondent who had been on site and who had supervised, *inter alia*, Mr. Murphy's work.

[52] Further, as the respondent points out, if the appellant was concerned about the absence of Mr. Murphy's evidence, it could have summoned Mr. Murphy to testify.

[53] In my view, the elements that could animate the drawing of a negative inference from the respondent's failure to call Mr. Murphy were not present. As Ryan Bell J. observed in *Barry*, and the same would apply in the present case, "[t]he witness was equally available to be called by both parties".

[54] I would therefore reject this ground of appeal

Failing to Exercise the Court's Discretion to Admit Expert Witnesses Tendered by the Appellant

[55] The appellant tendered three potential expert witnesses at trial. Each of these witnesses had completed an Acknowledgment of Expert's Duty in Form 53. However, none of them had provided experts' reports containing the information required by Rule 53.03(2.1).

[56] The trial judge declined to receive their opinion evidence.

[57] John Durzi was a "Sales and Business Development" employee at Miller Compost. The appellant wished to call him to provide opinion evidence on the industry standard relating to the supply and sale of composts, soils, mulches and other related products on a cubic yard basis.

[58] In lieu of an expert report, the appellant wished to rely on a letter from Mr. Durzi, consisting of one paragraph. In addition to expressing an opinion on the industry standard for supply and delivery of soil and related products, the letter disclosed that Mr. Durzi's employer, Miller Compost, had been supplying its soil and mulch products to the appellant for over twenty years.

[59] The appellant submitted to the trial judge that Mr. Durzi's opinion evidence could be admitted pursuant to Rule 53.03(3) which empowers a trial judge to grant leave for an expert witness to testify, despite an expert report not having been served under Rule 53. Rejecting that request, the trial judge concluded that, beyond the fact that Mr. Durzi's letter did not comply with Rule 53.03(2.1), it "essentially is a bald conclusion on an issue that is my responsibility to decide".

[60] Another proposed expert, Richard Hawkins of Hawkins Contracting, had signed a Form 53. A summary of his proposed testimony on topsoil compaction was set out in an email from Matt Hawkins, the president of Hawkins Contracting (and the son of Richard Hawkins).

[61] Again, aside from non-compliance with the requirement for an expert report, the trial judge commented that he did not know anything about the qualifications of either Matt Hawkins or Richard Hawkins, adding that their proposed evidence, including that one would get greater compaction with the use of heavier equipment, did not sufficiently advance the issues to be decided enough to overcome the flaws. He added: "You do not need a degree in engineering or a background in gardening commercially to know that [you are going to get greater compaction with heavier equipment.]"

[62] A third witness presented by the appellant, John Celenza, Vice President of Tri-Star Landscaping, was supported by a letter consisting of two sentences purporting to express an opinion on industry standard for purchase and supply of soil mixtures using "loose" cubic yards, truck measurement. In refusing to allow Mr. Celenza to testify as an expert, the trial judge stated:

> This is not what expert reports are about. It is not fair to proceed on the basis as though there had been compliance with just about anything. It is almost simply a conclusionary statement. It talks about this practice in the business, and the business is not even very well defined, frankly. There is a whole lot of landscaping and different kinds of landscaping. There is no effort to differentiate.

[63] None of the trial judge's rulings on these potential experts made express reference to Rule 53.08, which sets out that leave to admit evidence, despite a failure to comply with Rule 53.03(3), may be granted if the party responsible for the failure satisfies the judge that: (a) there is a reasonable explanation for the failure; and (b) granting leave would not cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or would not cause undue delay in the conduct of the trial.

[64] In my view, it was not necessary for the trial judge to carry out a point-by-point analysis of the factors set out in Rule 53.08(1). The trial judge was aware that the proposed witnesses' non-compliance with Rule 53, would not necessarily be fatal. Yet a review of the transcript discloses that no explanation, let alone a reasonable one, was offered for the failure to deliver compliant expert reports.

[65] The provisions of Rule 53.08(1) are conjunctive. There needs to be a reasonable explanation for the failure and the court must be satisfied that granting leave would not cause prejudice or undue delay. The absence of an explanation for the failure to deliver compliant reports was fatal to the appellant's request for the trial judge to exercise his discretion to allow the witnesses to testify.

[66] The trial judge had clear grounds for exercising his discretion by excluding the evidence of the appellant's proposed experts. Accordingly, this ground of appeal should also be dismissed.

Uncritical Acceptance of Expert Testimony

[67] The trial judge was faced with, on the one hand, what he described as the "eyeball" testimony of the appellant's witnesses, and, on the other hand, the "more scientific" calculations put forward by the respondent's witnesses.

[68] In essence, the appellant argues that the trial judge was too deferential to the expert evidence of Mr. Burmeister. Aside from alleged flaws in Mr. Burmeister's report, including his reliance on measurements taken by MRM extrapolated from an area designated by the respondent which it was alleged did not necessarily correspond with the area over which the soil was spread, the appellant argues that the trial judge made no effort to explain his rejection of the appellant's evidence.

[69] The appellant points out, in particular, that if the soil volumes delivered by the appellant were in the amounts calculated by Mr. Burmeister, each truckload delivered by the appellant would have had little more than half of the load that should have been delivered.

[70] The appellant is attempting to relitigate the arguments which were made to the trial judge.

[71] In addition to explaining why he accepted the evidence of Mr. Burmeister, the trial judge made it clear that he attributed only limited weight to the evidence of the appellant's employees and hired brokers that the trucks were "full" when they left the appellant's yard due to their perceived partisanship. He explained why he found photographs placed into evidence by the appellant to be of limited assistance. He discounted the appellant's reliance on a surreptitiously recorded telephone conversation in which an employee of the respondent was said to have acknowledged that the arriving loads were "full". He also acknowledged, albeit in the context of damages, that compaction could be a factor in determining the amount of soil delivered.

[72] It is unfortunate that the appellant (represented by different counsel at trial) did not tender admissible expert evidence. I would reject, however, the assertion that the trial judge uncritically accepted the respondent's evidence. Rather, he weighed and considered the evidence presented by both parties, and explained why, ultimately, he preferred the case put forward by the respondent.

Failing to Consider Evidence on Compaction

[73] In his reasons for judgment, the trial judge recorded that the respondent's approach to damages reflected an estimated rate of compaction through hauling, spreading, and weathering of ten per cent.

[74] Manny Mirzakhaniou gave evidence on behalf of MRM concerning MRM's volume calculations. He acknowledged that no allowance or calculations were made for compaction, something he described as outside his area of expertise.

[75] The evidence of Michael Allan, the vice president of Orin Contractors Corp., was that the respondent figured compaction to be about two per cent. He explained how the respondent does things in a way to minimize compaction. Conor Sheehan, the respondent's project manager, testified that a compaction rate of 1.5 to two per cent was applicable. Under cross-examination, when the compaction rate of 1.5 to two per cent suggested by Mr. Allan and Mr. Sheehan was put to Mr. Burmeister, he responded that, "I would have a conversation with them on where they came with the one to two per cent cause that's not my understand [*sic*]. The…difference I don't believe is that small…"

[76] It is unclear where the trial judge derived his conclusion from that the respondent had allowed for compaction of ten per cent. Mr. Allan and Mr. Sheehan, as noted, said that compaction would have been in the range of 1.5 to two per cent. The evidence of Mr. Burmeister was that compaction could be expected in the range of ten to fifteen per cent. The respondent's calculation of what it said the appellant should be paid, namely $457,645.56 (once the accounting error referred to above was factored in) does not appear to have been adjusted to take into account the possibility that soil compaction may have occurred prior to the respondent's measurements being taken and calculations performed.

[77] The appellant argues that in determining damages, the trial judge failed to consider the evidence of Mr. Burmeister that compaction would have been in the range of ten to fifteen per cent, such that the quantity of soil delivered would have been greater "and damages suffered by the Appellant would be, at 15%, $84,080.25 and not $15,433.45".

[78] Throughout the record, and in the trial decision, the figure of $15,433.45 is referred to as an "accounting error". If it is supposed to be an allowance for compaction, that is not apparent from either the trial judge's reasons or the record. Nor does it correspond with either a two per cent figure (the compaction tolerance of the respondent, as explained by Mr. Allan) or the ten per cent figure mentioned in the trial judge's reasons.

[79] An appellate court will only interfere with a trial judge's assessment of damages if the trial judge committed an error in principle or law, or misapprehended the evidence, or if the quantum awarded was palpably incorrect: *Konstan v. Berkovits*, 2024 ONCA 510, at para. 87.

[80] The respondent argues that the appellant has failed to refer to any of its own evidence to support its theory of a ten to fifteen per cent compaction and, consequently, that there is no basis for this court to interfere with the trial judge's award of damages.

[81] I would agree that the trial judge accepted the respondent's evidence that "heavy compaction was avoided in the spreading process so as to avoid creating a dangerously hard playing service [*sic*]." However, having accepted the respondent's position on compaction, which was clearly tied to the Burmeister report, Mr. Burmeister's opinion on compaction in the range of ten to fifteen per cent does not appear to have figured in the trial judge's assessment of damages.

[82] In my view, it matters not whether the evidence on compaction was put before the court by a witness called by the appellant or by the respondent. In the absence of any admissible evidence from the appellant, the only evidence on compaction was that of Messrs. Sheehan and Allan, both of whom worked for the respondent, and Mr. Burmeister. There is no reason to suggest that the trial judge did not consider all of this evidence.

[83] I agree with the appellant that the calculation of damages appears to be an error. It is also clear that the allowance of a compaction of ten per cent referred to by the trial judge, which he attributed to the respondent's "approach to damages", is consistent with the evidence of Mr. Burmeister, whose testimony he generally accepted, that compaction in the range of ten to fifteen per cent could be expected.

[84] An allowance of ten per cent for compaction would, based on the respondent's adjusted figures, produce a further $45,764.55 towards the appellant's claim. When added to the accounting error recognised by the trial judge, that would produce a total shortfall payable to the appellant in the amount of $61,198, rather than the $15,433.45 awarded by the trial judge.

[85] Neither party asked for the issue of damages to be remitted to the trial judge (or another judge of the Superior Court) if the damages appeal was upheld. The appellant requested that this court that if it did not allow the appeal as a whole, it should in the alternative substitute an amount reflecting the proper adjustment for compaction in place of the damages awarded by the trial judge.

[86] The record is sufficient to enable this court to correct the apparent error in determining damages. That said, the record does not support the amount claimed in the alternative by the appellant. I would, accordingly, substitute the trial judge's award of damages with an award of $61,198.

Appeal of Costs Award

[87] The appellant seeks leave to appeal the trial judge's award of costs, and if leave is granted, asks this court to award the appellant partial indemnity costs throughout the action in the amount of $20,000 plus HST, or such greater amount as the court sees fit, and disallowing any costs to the respondent. Alternatively, the appellant asks that the partial indemnity costs awarded to the respondent should be reduced by the amount of the surety bonding fees which the trial judge awarded as a disbursement in the amount of $8,855.

[88] The general rule is that when an appeal is allowed, the costs order at trial is set aside, and costs at trial and on appeal are awarded to the successful appellant. However, the court has a discretion to depart from this approach in "unusual circumstances": *Tripkovic v. Glober* (2003), 64 O.R. (3d) 481, 227 D.L.R. (4th) 718, 34 C.P.C. (5th) 316, 2003 CanLII 43027 (ON CA), at para. 82.

[89] In the present case, the appellant has enjoyed partial success, albeit for a far lesser amount than it sought. Nevertheless, in such circumstances, leave to appeal the trial judge's award of costs is not required.

[90] The appellant enjoyed very limited success at trial. The majority of the costs awarded by the trial judge were to the respondent. This was because the respondent had made an offer to settle on 28 April 2023 for $49,132.31, plus HST. Although, as the trial judge noted, there was no express provision for costs in that offer, he concluded that the appellant had achieved a result at trial that was less favourable than the respondent's offer. He therefore awarded the respondent its costs from the time of the offer onwards.

[91] Having now determined on this appeal that the appellant should have been awarded $61,198 for damages, it can no longer be said that the respondent beat its offer (which, with HST factored in, would amount to $55,519.51).

[92] Accordingly, I would set aside the trial judge's award of costs and award the appellant costs of the action as requested at this hearing of $20,000 for fees, plus disbursements of $4,894.61 (as per the appellant's costs outline filed at trial), plus HST on the fees and disbursements.

Costs of the Appeal

[93] Counsel agreed that the successful party on appeal should receive costs of $30,000 all inclusive, unless success was divided, in which case the parties advised they would defer to the court's discretion, unless the court requires further submissions.

[94] Given the divided success, I would award costs of the appeal to the appellant in the all-inclusive amount of $15,000.

_____
Mew J.

I agree _____
Backhouse J.

I agree _____
Trimble J.

Released: 21 March 2025

CITATION: J. Jenkins and Son Landscape Contractors Limited v. Iron Trio Inc., 2025 ONSC 1781
DIVISIONAL COURT FILE NO.: 24-255
DATE: 20250321

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Trimble, and Mew JJ.

BETWEEN:

J. JENKINS AND SON LANDSCAPE CONTRACTORS LIMITED

Appellant (Plaintiff)

– and –

IRON TRIO INC., ORIN CONTRACTORS CORP.

Respondents (Defendants)

REASONS FOR DECISION

MEW J.

Released: 21 March 2025