Court of King's Bench of Alberta

Citation: Sunray Manufacturing Inc v Prostar Painting and Restoration Inc, 2025 ABKB 344

Date: 20250609
Docket: 2403 09537
Registry: Edmonton

Between:

Sunray Manufacturing Inc

Appellant

- and -

Prostar Painting and Restoration Inc

Respondent

Reasons for Decision
of the
Honourable Justice Kelsey L. Becker Brookes

I. Introduction

[1] The Appellant, Sunray Manufacturing Inc. ("Sunray"), appeals the decision of Justice L.D. Young of the Alberta Court of Justice (the "Decision") under s 46 of the *Court of Justice Act*, RSA 2000, c C-30.5 ("*COJA*").

[2] The Decision granted judgment in the amount of $29,797.50, plus interest ($967.79) and costs ($3,454.17), in favour of the Respondent, Prostar Painting and Restorations Ltd. ("Prostar"). As stated by Justice Young, the damages of $29,797.50 are comprised of the deposit amount of $9,688.68, the Scaffcat Invoice of $10,836, and one half of the Devray Invoice, which is $9,688.82.

[3] For the reasons set out below, the appeal is dismissed.

II. Background

[4] Prostar brought an action against Sunray arising out of the purchase of a hot tub from Sunray. In an Amended Civil Claim, Prostar sought judgment against Sunray in the total sum of $49,070.31, plus interest and costs. Its claim included $10,000 of aggravated damages. Justice Young dismissed the claim for aggravated damages at the outset.

[5] Prostar wanted the hot tub installed on an outdoor patio located on the 31st floor of a residential condominium in Vancouver. Prostar agreed to purchase a split hot tub from Sunray. A split (or two-piece) hot tub is delivered in two pieces and can fit in an elevator and be assembled on site.

[6] Prostar alleged that Sunray, despite repeated requests, failed to supply the hot tub and failed to return the deposit that it paid. As a result, Prostar incurred significant expenses to arrange for the delivery and placement of an alternate hot tub on the 31st floor. Prostar sourced and had installed a used hot tub that ultimately required the use of a crane and scaffolding.

[7] Sunray defended the claim on the basis that the delivery date set out in the Sales Agreement between the parties "is an estimate and does not represent a warranty on the seller" and that "the delivery date is subject to, among other factors, the availability of materials and labour and demand upon the manufacturer."

[8] At trial, Sunray conceded that it failed to fulfill the terms of the Sales Agreement as it could not manufacture, supply, deliver, and install the hot tub to Prostar. The issue before the Court of Justice was what damages would flow from that failure.

III. Grounds of Appeal

[9] Sunray alleges Justice Young erred by:

a. Finding the parties reasonably contemplated Sunray would pay for the costs of installation of a hot tub on the 31st floor of a condominium in Vancouver, including scaffolding and crane costs;

b. Failing to properly consider the unforeseen disruptions suffered by Sunray in manufacturing the hot tub; and

c. Finding Prostar properly mitigated its damages.

IV. Standard of Review

[10] Neither party applied to have the appeal heard as a trial *de novo* under s 51 of the *COJA*, so it was heard as an appeal on the record.

[11] The standard of review on an appeal from a decision of the Court of Justice under Part 4 of the *COJA* is well established: correctness on questions of law and palpable and overriding error on findings of fact, factual inferences, or issues of mixed fact and law: ***Covey v Dueck***, 2025 ABKB 78 at para 31 [***Covey***].

[12] With respect to findings of mixed fact and law, where the issue is the application of a legal standard to a set of facts, the standard of review is palpable and overriding error. However, if the judge made an extricable error of law or principle with respect to the characterization of the standard or its application, the standard of correctness may apply: ***Covey*** at para 32.

[13] Palpable means an error that is obvious. Overriding means an error that goes to the very core of the outcome of the case: ***Canada v South Yukon Forest Corporation***, 2012 FCA 165 at para 46. An appeal court will only intervene on the basis of a palpable and overriding error if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: ***Covey*** at para 35.

[14] The Alberta Court of Appeal summarized the applicable standard of review principles engaged in the context of contractual interpretation in ***Chemtrade Electrochem Inc v Superior Plus Corporation***, 2025 ABCA 31, at paras 22-23:

> [22] Applying legal principles of contractual interpretation to the words of a particular contract, viewed in light of the factual matrix, is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 50; ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at para 21. If the trial judge applied incorrect principles in the interpretive exercise, failed to consider a required element of a legal test or failed to consider a relevant factor, those are extricable questions of law and lead to review on a correctness standard: ***Sattva*** at para 53.
>
> [23] A palpable error is one that is obvious. An overriding error is one that had a material impact on the result. In the context of contractual interpretation, an interpretation that is unreasonable, or not reasonably available to the trial judge on the record, amounts to a palpable and overriding error: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 64; ***Montrose Hammond & Co v CIBC World Markets Inc***, 2020 ONCA 219 at paras 8-9.

[15] The applicable standard of review relating to the Judge's interpretation of a contract is correctness: ***Covey*** at para 39.

V. Analysis

[16] Justice Young summarized the relevant law at p 16, line 8 to p 21, line 7 of the Transcript of the Decision, dated April 4, 2024. Sunray does not allege an error of law. The applicable legal principles were summarized by Justice Young as set out below.

[17] The objective in awarding damages for breach of contract is to restore the injured party to the position they would have been in if the contract had been fulfilled. The damages recoverable for breach of contact are limited to what was reasonably contemplated by the parties at the time the contract was entered into.

[18] The assessment of damages for breach of contract is subject to the plaintiff's duty to mitigate the damages when it is reasonable to do so. The objective is to give the plaintiff an incentive to take steps to minimize the total cost of the breach of contract, and to avoid overburdening the defendant with avoidable losses. The burden of proof is on the defendant to show the plaintiff failed to mitigate.

[19] However, a plaintiff is not required to make extraordinary efforts in mitigating its damages and courts will typically give considerable deference to a plaintiff's post-breach

decisions, provided they are considered reasonable. If the attempt to mitigate was reasonable and those efforts lead to higher costs, a plaintiff can recover those additional expenses.

A. Did the Justice err in finding the scaffolding and crane costs were reasonably contemplated by the parties?

[20] Sunray argues that Justice Young erred in finding the scaffolding and crane costs were reasonably contemplated by the parties when they entered into the Sales Agreement. This is an issue of mixed fact and law concerning the application of a legal standard to a set of facts; the standard of review is palpable and overriding error.

[21] At p 21, line 9 of the Decision, Justice Young states:

> I am satisfied, from hearing the evidence of the parties, that the Defendant was fully aware that the Plaintiff was purchasing a hot tub that would ultimately be installed on the rooftop deck on the 31st floor of a building in downtown Vancouver.

[22] At p 21, line 36 of the Decision, Justice Young states:

> The position of the Defendant is that because there was no discussion as to the necessity for a crane or scaffolding as part of its agreement with the Plaintiff, the costs incurred by the Plaintiff to source and have installed a replacement hot tub that ultimately required the use of a crane and scaffolding cannot rest at the foot of the Defendant. I disagree. The Sales Agreement involved the manufacture, supply, delivery and installation of a hot tub to the 31st floor, and the Defendant was fully aware that a two-piece hot tub would certainly be less expensive as an alternative to the Plaintiff than what I might call a traditional one-piece tub and that is because they knew it could be taken up in the building's elevator in two separate pieces.
>
> It is reasonable to conclude that a breach by the Defendant in terms of the manufacture, supply, delivery and installation of that two-piece hot tub and any consequential inability of the Plaintiff to source out another two-piece hot tub would definitely result in significantly more expense to the Plaintiff if some other method of installing the hot tub was its only choice, and that would have been within the reasonable contemplation of both parties at the time the Sales Agreement was entered into.

[23] To intervene, I must find Justice Young has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from the evidence.

[24] The evidence at trial was that the Sales Agreement involved the manufacture, supply, delivery, and installation of a two-piece hot tub to Prostar. The Sales Agreement was dated February 16, 2021. The Sales Agreement includes delivery and provides that overnight accommodation for two people will be required. It is reasonable to conclude Sunray would have known the delivery address was the 31st floor of a building in Vancouver.

[25] An email from Ricki Chandarana, the principle of Prostar, to Darrel O'Bertos, the Sunray salesperson, on February 3, 2021, advised "We are just trying to make sure we will be able to transport the tub to the roof of the property." Mr. O'Bertos testified that "from the beginning, it

was a two-piece to go up the elevator." This confirms Sunray was aware the hot tub was being delivered to and installed on the roof of the property, using the elevator.

[26] As a manufacturer, supplier, deliverer, and installer of hot tubs, Sunray would know that bringing a two-piece hot tub up in the elevator to the roof of any building would be less expensive than installing a traditional one-piece tub using alternative methods. Sunray knew using a crane was an alternative method because Brad Roberts, the principle of Sunray, testified that "We wouldn't - we don't pay for cranes for liability purposes."

[27] Justice Young correctly stated the legal test, that damages recoverable for breach of contract are limited to what was reasonably contemplated by the parties at the time the contract was entered into. What must have been reasonably contemplated by the parties at the time of the contract is the type of loss suffered not the quantum of those damages: ***Saramia Crescent General Partner Inc v Delco Wire and Cable Limited***, 2018 ONCA 519 at paras 44-47.

[28] The seminal decision of ***Hadley v Baxendale,*** (1854) 9 Ex 341 at 354 put a somewhat finer point on the test (emphasis added):

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or <u>such as may be reasonably be supposed to have been in the contemplation of the both parties at the time they made the contract, as the probable result of the breach of it.</u>

[29] Sunray did not submit that Justice Young ignored or misunderstood relevant evidence. Therefore, the issue is whether she drew an erroneous conclusion from the evidence.

[30] On the evidence, I am unable to find that Justice Young's conclusion that scaffolding and crane costs were reasonably contemplated by the parties when they entered into the Sales Agreement was not supported by the evidence because Sunray knew what the alternative methods were for getting a hot tub onto a roof and knew they were more expensive.

[31] The relevant time is when the parties entered into the Sales Agreement. The fact Prostar did not set out exactly what it intended on doing to mitigate its damages, while communicating with Sunray after the Sales Agreement was entered into regarding delivery and return of the deposit, is not pertinent to determining what was in the contemplation of the parties when they entered the agreement.

[32] Sunray may not have put its mind to the actual cost of the scaffolding and crane costs, but that is not the test. Sunray knew Prostar wished to purchase a two-piece hot tub so that it could be brought up in the elevator to the 31st floor of the condominium to be installed on the rooftop patio. It is reasonable to conclude that it was in the contemplation of both parties (or presumably would have been in the contemplation of both parties) that should the contract not be fulfilled, the alternatives available to Prostar could result in significantly more expense to Prostar — whether that meant sourcing another two-piece hot tub or using scaffolding and cranes to raise a one-piece hot tub.

[33] There is no palpable and overriding error.

B. Did the Justice err in not considering the disruptions suffered by Sunray?

[34] Sunray argues that Justice Young erred by not properly considering the disruptions suffered by Sunray in manufacturing and supplying the hot tub. This is an issue of mixed fact and law concerning the application of a legal standard to a set of facts, and the standard of review is palpable and overriding error.

[35] At p 21, line 14 of the Decision, Justice Young states:

> What is also clear from the evidence is the Defendant was not in a position to even manufacture the hot tub, let alone supply, deliver, and install it when the Sales Agreement was entered into as the manufacturing facility was moving. Nor was it even in a position to do so at trial some three years after the Sales Agreement was entered into and two and a half years from when the hot tub was supposed to be manufactured, supplied, delivered, and installed by the Defendant.

[36] To intervene, I must find Justice Young has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from the evidence.

[37] The Sales Agreement states, under the words "Estimated Delivery Date," "Priority build 3-4 [months]." It was not disputed that Sunray never manufactured, supplied, delivered or installed the hot tub to Prostar.

[38] At p 5, line 7 of the Decision, Justice Young states:

> It is to be noted that even at the date of trial, nearly three years after the parties entered into the Sales Agreement, the evidence made it clear that the Defendant was still not even able to manufacture, let alone supply, deliver, and install the hot tub. Again, it was clear on the evidence that the defendant did not, essentially throughout the entirety of the Plaintiff's dealings with the Defendant, actually have an operational oven in order to cast the fiberglass necessary to make the hot tub.

[39] Sunray argues the disruptions suffered by Sunray in manufacturing and supplying the hot tub were unforeseeable and unavoidable and should not be held against Sunray. Sunray does not dispute that they were unable to manufacture the two-piece hot tub throughout the entirety of Prostar's dealings with Sunray.

[40] Sunray's evidence was that in August of 2018, the building in which Sunray's operating facility was located was sold, forcing Sunray to move to a new facility on 30 days' notice. During the move and for several months after that the manufacturing equipment was not operational. In September of 2020, Sunray moved again, causing the manufacturing equipment to be non-operational again for a similar length of time. Sunray moved its manufacturing facility a third time in March of 2021 and a fourth time in the spring of 2022. In addition, starting in March of 2020, COVID-19 had an impact on Sunray's supply chain.

[41] The Sales Agreement was entered into on February 16, 2021. Despite an estimated delivery date of 3 to 4 months, Sunray did not have an operational oven when the Sales Agreement was entered into and did not have an operational oven by the time the matter went to trial.

[42] There is no basis to conclude Justice Young ignored or misapprehended the evidence. The issue is whether the disruptions suffered by Sunray in manufacturing and supplying the hot tub excuse Sunray's failure to supply a two-piece hot tub to Prostar. While non-performance due to circumstances beyond the Defendant's control can potentially excuse a breach, it is not automatic and will depend on the specific terms of the contract and the nature of the intervening events.

[43] The Sales Agreement does not contain a force majeure clause. The Sales Agreement does state the delivery date set out in the Agreement between the parties "is an estimate and does not represent a warranty on the seller" and that "the delivery date is subject to, among other factors, the availability of materials and labour and demand upon the manufacturer."

[44] Mr. Roberts testified that a typical delivery period would depend on many factors but would ordinarily be in the range of four to ten months. When pressed, he testified delivery could take more than a year for a special-order item like a two-piece hot tub. He also testified two years would be outside the norm if their plant was in full operation and there was an uninterrupted supply chain. He later testified three years would not be out of the question given the "surprises" that had been thrown at Sunray.

[45] Mr. O'Bertos testified that he was aware there were delays when the Sales Agreement was signed and knew the manufacturing plant was in the process of being moved. He testified the ordinary time frame for the supply of a hot tub would have been seven to eight months but given the bigger deposit paid by Prostar, he changed the time frame to three or four months. On cross-examination, he agreed a one-year time frame to supply a hot tub is unreasonable and a two-year time frame is even more unreasonable.

[46] The evidence from the Sunray witnesses was inconsistent as to the ordinary delivery time for a two-piece hot tub, the status of the move and the operation of the manufacturing facility, and what is a reasonable time for the supply of a two-piece hot tub. The Sunray witnesses were, however, consistent in their lack of concern that the delivery estimate contained in the Sales Agreement was unrealistic, relying on the statement the delivery date was only an estimate.

[47] Given her finding that the manufacturing plant was in the midst of moving and the ovens were not operational when the Sales Agreement was entered into by Sunray, and the fact Sunray refused to return the deposit until 2023, I am not convinced Justice Young committed a palpable or overriding error in her factual findings or their impact on her finding there was no available excuse for Sunray's breach of the Sales Agreement.

[48] Her decision was reasonably supported by the fact Sunray refused to return the deposit despite Mr. O'Bertos agreeing a one-year time frame to supply a hot tub is unreasonable and a two-year time frame is even more unreasonable.

[49] There is no palpable and overriding error.

[50] In any event, Sunray conceded at trial that it failed to fulfill the terms of the Sales Agreement as it could not manufacture, supply, deliver, and install the hot tub to Prostar. The disruptions allegedly suffered by Sunray are germane to whether or not there was a breach of contract, not the damages that flow from a breach of contract.

C. Did the Justice err in finding Prostar properly mitigated its damages?

[51] Sunray argues that Justice Young erred in finding Prostar properly mitigated its damages. This again is an issue of mixed fact and law concerning the application of a legal standard to a set of facts and the standard of review is palpable and overriding error.

[52] At p 23, line 34 of the Decision, Justice Young states:

> I am satisfied the Plaintiff made reasonable efforts to locate a two-piece hot tub in searching on-line and speaking to a local vendor. I am not satisfied the Defendant has shown the Plaintiff has failed to mitigate. The Defendant itself did not produce any evidence to show that a two-piece hot tub was available at the salient time. Not did the Defendant produce any evidence as to the cost for such a two-piece hot tub, nor what delivery and installation costs would have been.

[53] Mr. Chandarana's evidence was that Prostar purchased the hot tub from Sunray because it was the only hot tub he could find that could be manufactured and delivered in two pieces. Once he accepted the two-piece hot tub would not be delivered by Sunray, his evidence was that he did a Google search for another supplier of two-piece hot tubs and attended at a hot tub vendor in Vancouver who advised him they did not sell two-piece hot tubs and did not know anyone who did.

[54] As stated in S.M. Waddams, *The Law of Contracts*, 8th Ed. At p 538:

> If the plaintiff does attempt, reasonably but unsuccessfully, to reduce loss the plaintiff can add to the damages the cost of the attempt. This rule, though it may aggravate damages, appears to be a necessary corollary to the "duty to mitigate", for if the plaintiff must attempt to mitigate on pain of diminution of the right to damages, the cost of the unsuccessful attempt is attributable to the defendant's breach. Furthermore, it has been said that the reasonableness of the plaintiff's decision is not to be judged too rigorously for it is the defendant's breach that occasions it, and it lies ill in the mouth of the contract breaker to criticize the making of a difficult decision necessitated by the breach.

[55] Justice Young correctly stated the legal test, that the assessment of damages for breach of contract is subject to the plaintiff's duty to mitigate the damages when it is reasonable to do so.

[56] The onus is on Sunray to prove Prostar did not reasonably mitigate its damages (i.e. that Prostar failed to make reasonable efforts to find a substitute but also that a reasonable substitute could be found). Perfection is not required when it comes to mitigation; the expectation is that a plaintiff will use reasonable efforts to mitigate its damages.

[57] Mr. Roberts testified there are other manufacturers of two-piece hot tubs. However, despite being an owner of a hot tub manufacturing company and expressing this view, he did not provide any evidence to show that any two-piece hot tubs were available at the relevant time or how Prostar would have been able to find these two-piece hot tubs. It was his evidence two-piece hot tubs would not be advertised online, and one would have to phone the manufacturer. How could Prostar know that?

[58] Sunray did not produce any evidence there was a less expensive way for Prostar to be put in the same position it would have been in if the Sales Agreement had been properly performed, that is, having a hot tub installed on the patio on the 31st floor of the condominium. The Sales

Agreement included manufacture, supply, delivery, and installation of a hot tub, with only the one-night stay for two people left to be determined.

[59] In addition, Justice Young considered that by purchasing a second-hand hot tub from the 26th floor of the same building and raising it to the 31st floor, Sunstar chose an alternative that was more economical than purchasing a new hot tub and raising it from ground level.

[60] To intervene, I must find Justice Young has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from the evidence. There was ample evidence before Justice Young to support the conclusion Prostar reasonably mitigated its damages and no basis to conclude she ignored or misunderstood evidence.

[61] There is no palpable and overriding error. Sunray did not meet its onus of establishing that Prostar failed to mitigate its damages.

[62] While not argued by Sunray, the issue of mitigation is tied to the assessment of damages. A trial judge's assessment of damages is accorded deference on appeal. Appellate intervention is only justified if the assessment is based on an error of principle, or is wholly unreasonable: ***Elkow v Sana***, 2020 ABCA 350 at para 7.

[63] While Sunray did not introduce any evidence to show the Scaffcat Invoice or the Devray Invoice was unreasonable, Justice Young expressed concern with the reasonableness of the Devray Invoice and reduced it by half. I have been provided with no evidence or reasons to disturb this assessment of damages once Justice Young found Prostar reasonably mitigated its damages in purchasing a second-hand hot tub and hiring Devray to prepare the patio area and Scaffcat to raise the hot tub from the 26th floor to the 31st floor of the same condominium building.

VI. Conclusion

[64] For the foregoing reasons, the appeal is dismissed.

[65] If the parties cannot agree on costs within 30 days of this Judgment, the matter can be remitted to me for direction by way of written submissions not exceeding three pages, exclusive of authorities.

Heard on the 8th day of May, 2025.
Dated at the City of Edmonton, Alberta this 9th day of June, 2025.

Kelsey L. Becker Brookes
J.C.K.B.A.

Appearances:

Craig Floden
Floden & Company
for the Applicant

David Pollock
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for the Respondent