

COURT OF APPEAL FOR ONTARIO

CITATION: Sundial Homes (Sharon) Limited v. Wei, 2025 ONCA 102

DATE: 20250214

DOCKET: COA-23-CV-0970

Tulloch C.J.O., Paciocco and Nordheimer J.J.A.

BETWEEN

Sundial Homes (Sharon) Limited

Plaintiff (Appellant/
Respondent by way of cross-appeal)

and

Roger Wei Wei

Defendant (Respondent/
Appellant by way of cross-appeal)

Karey Anne Dhirani and Daniel Nishiguchi, for the appellant/respondent by way of cross-appeal

Leon Li and Katie Ludwig, for the respondent/appellant by way of cross-appeal

Heard: January 31, 2025

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated July 20, 2023.

Nordheimer J.A.:

[1] Sundial Homes (Sharon) Limited appeals from the order of the trial judge that awarded it damages arising from a failed agreement of purchase and sale for a new home. The appellant submits that the trial judge erred in not including the sum of \$32,763.06 in that award of damages. Roger Wei Wei cross-appeals on

two issues. One is his contention that the trial judge erred in her conclusion that the appellant had mitigated its damages. The other is with respect to the trial judge's order of costs. At the conclusion of the hearing, we dismissed the appeal and reserved the cross-appeal. I now provide our reasons for both matters.

A. THE APPEAL

[2] The respondent admitted liability arising from his failure to close the agreement to purchase the house. After that failure, the appellant sold the house to another purchaser but at a reduced price. The appellant sought damages of \$281,386.10 which included prejudgment interest of \$133,584.97. In her original decision, the trial judge awarded the appellant \$142,148.15. She declined to award any prejudgment interest on the basis that the deposit held by the appellant of \$140,050.80 was forfeited and, since it almost equalled the amount of damages, no interest should be allowed.

[3] After the release of her decision, the parties advised the trial judge that there were mathematical errors in her calculation of damages. The parties appeared before the trial judge on November 29, 2023. By that point they had agreed on the proper calculation of the damages but for one item, namely, \$32,763.06 that the respondent had paid on account of certain upgrades. The appellant contended that this amount was separate and apart from the total purchase price of the house. The respondent disagreed.

[4] The trial judge rejected the appellant's claim for this amount. In doing so, she directly addressed the issue of whether the amount for these upgrades was "non-refundable" based on language contained in the appellant's Standard Purchaser's Extras form. The trial judge concluded that this issue had not been raised at trial and that it should not be considered after the trial decision had been released. She also found that the amount should be treated as a deposit in the same fashion as the other deposits had been treated.

[5] The appellant has not shown any error in the trial judge's analysis on this point. The appellant's documentation showed a pattern of adding the costs of upgrades to the overall purchase price. For reasons that are not adequately explained, the appellant treated these particular upgrades as a standalone obligation, again, it seems coming from the "non-refundable" language.

[6] The trial judge was entitled to conclude that there was no proper legal basis for treating these upgrades any differently than the other upgrades. That led her to treat the amount in issue as a deposit like all the other deposits. I do not see any error in her conclusion on this point.

[7] It is for these reasons that the appeal was dismissed.

B. THE CROSS-APPEAL

(1) Mitigation

[8] The respondent cross-appeals with respect to the trial judge's conclusion that the appellant had mitigated its damages arising from the failed agreement of purchase and sale.

[9] The respondent complains that the appellant did not place the house on the open market. Rather, the appellant chose to sell the house to a party who was looking to buy another house in the same development. The respondent says that the trial judge "failed to properly weigh" this evidence in her mitigation analysis.

[10] The trial judge correctly held that whether reasonable steps were taken to mitigate damages is a question of fact in each case. She also noted that the respondent bore the onus of showing a failure to mitigate.

[11] In reaching her conclusion on mitigation, the trial judge referred to the fact that, at the time, the housing market had taken a significant downturn. There was evidence that sales activity in the appellant's sales office was almost non-existent. As a consequence, the appellant approached existing customers to see if they were interested in buying this particular house. That led to the ultimate sale of the house to one of those customers.

[12] The trial judge listed seven factors that she took into account in deciding whether the appellant's efforts to mitigate were reasonable. She concluded that

they were. In particular, she pointed to the downturn in the market; the appellant's continuing marketing efforts; and the relatively quick resale of the house.

[13] The trial judge concluded that the respondent had not met its burden to prove that the appellant had not made reasonable efforts to mitigate. The respondent must show a palpable and overriding error in the trial judge's factual findings on this issue. The respondent has failed to do so.

[14] The respondent's cross-appeal on the mitigation issue fails.

(2) Costs

[15] The respondent also seeks leave to appeal the trial judge's costs award. The respondent asserts the following errors: (a) the trial judge improperly awarded costs for an *ex parte* motion brought by the appellant to obtain a certificate of pending litigation; (b) the trial judge did not give proper consideration to two offers to settle that the respondent made; (c) the trial judge did not critically examine the quantum of costs sought by the appellant; and (d) the trial judge failed to apply the costs consequences set out in r. 76.13 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Given my conclusion regarding this fourth issue, I do not need to address the other three.

[16] As I earlier noted, after the trial decision was released, the parties notified the trial judge that there were mathematical errors in her damages calculations. This led the trial judge to issue an amended endorsement on December 7, 2023

that addressed those errors. This is the endorsement that dealt with the “non-refundable” upgrades amount to which I earlier referred. Having dealt with that issue, the trial judge concluded that the appellant was entitled to damages in the amount of \$70,036.31 plus prejudgment interest. In her endorsement, the trial judge said: “If the parties are unable to agree to costs by reason of the operation of the Rules **as a result of offers to settle**, [the appellant] may make submissions of no more than two pages” (emphasis in original).

[17] I note that the trial judge had included substantially the same costs direction in her original reasons.

[18] The parties made written submissions to the trial judge that led to her releasing a costs endorsement on January 10, 2024. In that endorsement, the trial judge referred to the costs direction she made in the amended endorsement, which I have set out above. She emphasized that the invitation for submissions in the amended endorsement was restricted to costs arising from offers to settle and then said: “The [respondent’s] further cost submissions with respect to the [appellant’s] failure to commence the action under the simplified rules, do not meet this criteria. Those submissions should have been made when the parties were directed to make their cost submissions following trial”.

[19] The trial judge’s response to this issue reflects two errors. First and foremost, the trial judge fails to recognize that the issue of the possible application

of r. 76.13 only arose after the trial judge settled the damages amount. The submissions respecting r. 76.13 could not have been made at the conclusion of the trial because neither of the parties knew, at that time, what damages would be awarded. Second, it was inappropriate for the trial judge to restrict costs submissions, in these circumstances, only to possible effects of offers to settle. Judges are generally required to consider all factors that may bear on a proper costs award. While judges are entitled to (and often do) restrict the volume of submissions by page limits, they should not normally limit the topics to which those submissions are to be addressed when they may be unaware, at that time, of factors that may be relevant to a proper costs award.

[20] It was an error for the trial judge to refuse to hear submissions on the r. 76.13 issue. It was a relevant consideration in determining the appropriate award of costs in this case. In light of the trial judge's failure in this regard, this court could remit the matter to her for determination. However, in the interests of bringing this matter to a close, I choose to resolve it here.

[21] The costs consequences under r. 76.13 are triggered when a party brings a claim under the ordinary procedure, as opposed to the simplified procedure under r. 76, and subsequently recovers a money judgment that is less than the amount prescribed under the *Rules*. It is agreed that in this case, at the relevant time, that prescribed amount was \$100,000. The operative provision of r. 76.13(3) reads:

The plaintiff shall not recover any costs unless,

(a) the action was proceeding under this Rule [i.e., simplified procedure] at the commencement of the trial; or

(b) the court is satisfied that it was reasonable for the plaintiff,

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with subrule 76.02 (1), (2) or (2.1) [which mandate simplified procedure].

[22] There is no issue that the appellant was entitled to commence this action under the ordinary procedure since it was, at that time, seeking damages in the amount of \$1,671,363.95. As may be obvious, the issuance of the statement of claim predated the resale of the house. However, as matters progressed during the course of the action, the amount that the appellant could reasonably have expected to recover for damages dropped significantly. Indeed, when the house was resold on July 15, 2018 for \$1,430,000, those damages had already dropped to less than \$250,000.

[23] As earlier noted, the appellant held deposits of \$140,050.80. Deposits are a deduction from the damages that are to be awarded: *Azzarello v. Shawqi*, 2019 ONCA 820, 439 D.L.R. (4th) 127, at paras. 49-55, and the authorities cited therein, leave to appeal refused, [2019] S.C.C.A. No. 521. Thus, when one is considering the damages that are actually in issue, one has to deduct the amount

of the deposits. In this case, that left the additional damages being pursued very near the \$100,000 limit.

[24] The appellant attempted to drive up its damages claim, over the amount of the lost purchase price, through two mechanisms. One is that it sought prejudgment interest at the rate of 11.95% under the agreement of purchase and sale. The trial judge disallowed that interest rate on the basis that it was stipulated in a standard form contract that was not brought to the attention of the respondent. The other is the claim that the upgrades, addressed in the main appeal, were to be treated as non-refundable.

[25] Ultimately, the appellant recovered damages in the amount of \$70,036.31. That amount is below the prescribed amount of \$100,000 and thus the costs consequences of r. 76.13 are triggered. The language of r. 76.13 is mandatory. It stipulates that a party “shall not recover any costs” unless the court is satisfied that it was reasonable for the party to continue the action under the ordinary procedure.

[26] I do not view it as reasonable for the appellant to have continued the action under the ordinary procedure in circumstances where it knew that there was a significant risk that it would ultimately recover less than the prescribed amount. It sought to avoid having its damage claim fall below that limit through the two questionable mechanisms I have set out above. It should have known the risks

associated with that effort. It could choose to take those risks, but it must suffer the consequences of having made the wrong choice.

[27] On the point of reasonableness, I would add that this is not a case like ones the appellant cited which involved jury verdicts; or the assessment of general damages for personal injuries; or issues of contributory negligence; or where the issues involved were complicated thus requiring the fulsome discovery process under the ordinary procedure.

[28] The objective behind the simplified rules is to make claims for lesser amounts move more expeditiously and at less cost. It is an attempt to address, in one small way, the burgeoning costs of civil litigation along with the inordinate amount of time it takes to get cases through the court system. If the simplified rules are to achieve those objectives, then they must be enforced: *Garisto v. Wang*, 2008 ONCA 389, 91 O.R. (3d) 298, at para. 17. Parties must know that if they wrongly start or continue a claim under the ordinary procedure, there will be consequences to that decision. To quote the commentary to r. 76, these costs consequences are “the device that drives the whole system”: Michael Foulds & Peter Henein, eds., *Watson & McGowan’s Ontario Civil Practice 2025* (Toronto: Carswell, 2024), at p. 1614.

[29] As a result, I would apply the costs consequences of r. 76.13(3) and deny the appellant its costs of the action.

[30] Therefore, I would grant leave to appeal the costs award, allow the cross-appeal, and set aside the trial judge's award of costs in favour of the appellant.

C. CONCLUSION

[31] The appeal is dismissed. The cross-appeal is allowed in part, and paragraph 4 of the judgment is set aside. If the parties cannot resolve the issue of costs, the respondent may make submissions on costs, both of the appeal and of the cross-appeal, limited to five pages, that are to be delivered within 10 days of the date of these reasons. The appellant may deliver responding submissions, also limited to five pages, within 10 days after the respondent's submissions. No reply submissions are to be filed.

Released: February 14, 2025 "M.T."

"I.V.B. Nordheimer J.A."
"I agree. M. Tulloch C.J.O."
"I agree. David M. Paciocco J.A."