

CANADA / JUDGMENT

Nickel v. Phoenix Construction Systems Ltd.

2021 BCCA 268

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 268 Nickel v. Phoenix Construction Systems Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nickel v. Phoenix Construction Systems Ltd.,

2021 BCCA 268

Date: 20210618

Docket: CA47081

Between:

Herb Nickel and Eugenie Nickel

Respondents

(Plaintiffs)

And

Phoenix Construction Systems Ltd. and Nirmal Takhar

Appellants

(Defendants)

And

Kuldip Takhar, Harbans Takhar, John Doe No. 1 and John Doe No. 2

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated
October 1, 2020 (Nickel v. Takhar, 2020 BCSC 1462, Vancouver Docket S054802).

Oral Reasons for Judgment

Counsel for the Appellants, appearing via videoconference:

P.F. Lewis

J.I. Meikle-Kahs

Counsel for the Respondents, Herb Nickel and Eugenie Nickel, appearing via videoconference:

K.E. Ducey

Place and Date of Hearing:

Vancouver, British Columbia

June 10, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 18, 2021

Summary:

Following a summary trial on quantum of damages, the appellants were ordered to pay \$1,340,220 to the respondents. The judge reached this quantum by relying on the respondents' expert report, which set out a preliminary plan for remediating the respondents' property. The appellants challenge the judge's decision to proceed by way of summary trial. Held: Appeal dismissed. A judge's decision to proceed by way of summary trial is discretionary and entitled to deference. Here, the judge's decision was not clearly wrong and he did not ignore or fail to place enough weight on relevant factors. He was alive to the frailties of the expert report and, despite the criticisms of that report advanced by the appellants' expert, determined that it was sufficient to assess damages fairly and reasonably. Additionally, the judge was not obliged to accept the opinion of the appellants' expert, whose report did not provide any estimate of damages but only criticized the respondents' expert report.

DICKSON J.A.:

Introduction

- [1] This is an appeal from a judgment against the appellants, Phoenix Construction Systems Ltd. and Nirmal Takhar, and two other defendants, awarding \$1,340,220 in damages to the respondents Herb and Eugenie Nickel following a summary trial. The sole issue for determination on the summary trial was the quantum of the damages to which Mr. and Ms. Nickel were entitled in connection with damage caused to their property by Phoenix and Mr. Takhar. Phoenix and Mr. Takhar caused the damage in question when they conducted excavation work on the adjoining property owned by the other two defendants, Mr. Takhar's parents, Kuldip Takhar and Harbans Takhar. Kuldip Takhar and Harbans Takhar are both deceased.
- [2] Phoenix and Mr. Takhar damaged the Nickels' property in 2003. Thereafter, they promised repeatedly to remediate it, but have failed to do so. The Nickels commenced the underlying action in 2005 and settled it with all defendants in 2012 on the basis that the property would be remediated at the expense of the defendants. When the defendants did not follow through, the Nickels applied under Rule 9-7 of the Supreme Court Civil Rules to enforce the settlement agreement. The defendants admitted liability and, when the application came on for hearing on the damages issue, the judge held that he was able on the whole of the evidence to find the facts necessary to decide the quantum of damages.
- [3] Phoenix and Mr. Takhar contend on appeal that the summary trial judge erred in making the damages award because there were insufficient facts before him to permit an assessment of the quantum of the damages. As a result, they submit, it was unjust to proceed with the summary trial and determine the damages issue. According to Phoenix and Mr. Takhar, in the circumstances the judge should have dismissed the summary trial application, directed a conventional trial on damages and granted the parties liberty to apply for another summary trial determination on damages based on proper and sufficient evidence.
- [4] In my view, the judge did not err in proceeding with the summary trial and assessing the quantum of the damages. For the reasons that follow, I would dismiss the appeal.

Background

- [5] Mr. and Ms. Nickel are 81 years old and 73 years old, respectively. They have owned and lived in a residential property located at 14264 Trites Road, Surrey, British Columbia since 1985. In 2003, Mr. Takhar's parents, Kuldip and Harbans Takhar, acquired title to the property adjoining the Nickel property when Mr. Takhar assigned the right to purchase that property to them.
- [6] The Nickel and Takhar properties are each steeply sloped in the back area. In the summer of 2003, Phoenix and Mr. Takhar conducted excavation operations at the bottom of the slope, which resulted in landslides and slope failures on both properties. In 2005, the Nickels commenced the underlying action for damages in respect of the landslides and slope

failures on their property. Thereafter, the action remained dormant for several years while they waited for direction regarding necessary steps for the remediation from the City of Surrey and the Metro Vancouver Regional District, which has a right-of-way over a portion of the Nickel property.

- [7] In January 2012, the parties settled the underlying action. The settlement agreement contemplated a remediation plan for both properties agreed upon by their respective engineering experts or, failing such agreement, determined by an independent engineer. Pursuant to the terms of the settlement agreement, the defendants were to carry out the remediation work at their expense. The Nickels retained Golder Associates Corporation as their engineering experts in connection with the settlement. The defendants retained GeoPacific Consultants Ltd.
- [8] In June 2013, the parties' engineers agreed upon a remediation plan for the two properties. Based on that plan, in 2014, Golder provided the Nickels with a "Class 2" cost estimate for the proposed work of \$1,172,735. The work required a building permit, but the defendants did not apply for a permit until after February 2014, when the Nickels sought judgment against them for the \$1,172,735 amount estimated by Golder. In March 2014, the parties agreed to a consent order, which included requirements that the defendants notify the Nickels within two days of the issuance of the building permit and commence remediation work within 14 days of its issuance or as soon as reasonably possible thereafter.
- [9] The City issued a building permit on April 20, 2015, but the defendants failed to notify the Nickels of its issuance and failed to commence the remediation work as required by the terms of the consent order. On May 20, 2015, the Nickels rescheduled the hearing of their application for judgment. The next day, Mr. Takhar proposed a change in the remediation plan to the Nickels, and a meeting was held at the property with engineering and City representatives to discuss a newly proposed retaining wall that would result in slightly more usable land for the Nickels. The Nickels agreed to have engineers create a so-called "Plan B" to this effect, but emphasized the importance of moving forward expeditiously with the project. However, despite repeated requests from the Nickels, Phoenix and Mr. Takhar did not proceed in a timely way.
- [10] On March 6, 2017, the Nickels renewed and updated their 2014 application for judgment based on the original remediation plan. On March 28, 2017, the defendants obtained two quotes from contractors for implementing aspects of the original remediation plan in the amounts of \$268,600 and \$262,000, both of which included numerous and significant exclusions. Justice Holmes, as she then was, heard the application on April 7, 2017 and, in doing so, alerted counsel to the illogic of seeking an award pertaining to the remediation of both properties. Among other things, she ordered that the Nickels amend their application to include a claim for damages based on the loss in value of the Nickel property alone and adjourned the hearing to allow the parties to take various litigation steps.

- [11] In June 2019, the Nickels served the defendants with an expert report prepared by Richard Butler, an engineer at Golder. Written in September 2018, the report outlined a preliminary design for remedial stabilization of the Nickel property and provided a "Class 4" cost estimate of \$1,340,220 based on that design. The Golder design included a secant pile wall installed along the toe of the existing slope and extending approximately 5 metres north along both the west and east property lines, together with installation of geogrid reinforced wall sections for a total wall height of approximately 25 metres. It also included drilled soil anchors and shotcrete, which would require adjacent property owners to permit encroachment onto their properties for installation purposes.
- [12] Mr. Butler described a "Class 4" estimate as generally prepared with limited information and with engineering typically at 0% to 2% complete. He described the cost range as expected to be within -30% to +60% of the actual contract award for new construction, after the application of a \$223,370 contingency. Among other stated assumptions, Mr. Butler's opinion in the Golder report was based on the assumption that all required permits would be obtained.
- [13] The Nickels also served the defendants with a letter from Matcon Construction Company, providing a \$1,340,000 quote for the estimated cost of the remediation and an updated appraisal of the fair market value of the Nickel property. The appraisal report included an expression of opinion to the effect that the property was not marketable without sureties being provided in relation to the slope failure issues.
- [14] The Nickels scheduled the hearing of the application for October 30, 2019. However, the defendants sought and obtained an adjournment on the basis that they had not yet received a responsive expert report. The adjournment order included a term that a new hearing would be set for March 2020 and set deadlines for the service of any expert reports from the defendants. The defendants missed the deadlines, but they eventually served two reports on the Nickels: the first prepared by Kevin Bodnar, an engineer at GeoPacific; and the second by a real estate appraiser.
- [15] Mr. Bodnar did not provide a cost estimate for remediation of the Nickel property in the GeoPacific report. Rather, he critiqued the opinion expressed by Mr. Butler in the Golder report and the Matcon quote for construction costs. For example, he noted that the Golder design included the entire slope of the Nickel property, extending beyond the zone where it was impacted by the 2003 slide. He also noted that the Golder design differed significantly from the original 2014 remediation plan, which was based upon a geotechnical investigation report that formed part of the permit submission and described the data the engineers relied upon to create that plan. In contrast, he observed, there were no geotechnical analyses provided with the Golder design, which was a conceptual plan that had not been fully engineered nor permitted by the City of Surrey.

- [16] Mr. Bodnar stated further that, in his view, the cost numbers in the Golder report and Matcon quote were budgetary figures, not quotes, and would not be open for acceptance to proceed with construction. He described the typical process for obtaining quotes as including the submission of a fully engineered set of drawings for a building permit and the revision of the drawings to incorporate any comments from the City, then the issuance of the revised drawings for tender to multiple contractors for competitive bids.
- [17] Mr. Bodnar opined that more economical solutions to remediate the Nickel property could be employed than that proposed by Mr. Butler. For example, he stated, it was very uncommon for secant pile walls to be used for single family lots due to the high cost of mobilizing large drilling equipment to install the wall and the cost of the wall itself. He also noted that Mr. Butler did not explain the reason for proposing geogrid retaining wall tiers, which would add significant cost to the project and had a knock-on cost effect, and stated that the extent of the retaining walls could be greatly reduced, which would also reduce construction costs.
- [18] Neither party cross-examined the experts on their respective reports.
- [19] The Nickels' summary trial application was not heard in March 2020 because no hearing dates were available. The hearing was scheduled for April 6, 2020, but the courts were closed due the COVID-19 pandemic and the hearing was rescheduled to September 30, 2020. At the outset of the hearing, counsel for the defendants sought another adjournment. The judge denied the application and proceeded with the summary trial.

Reasons of the Summary Trial Judge

- [20] After setting out the background of the case, the judge described the defendants' adjournment application and his reasons for denying it. In doing so, he said this:
- [49] The plaintiffs have, for many years, made every reasonable effort to have the damage to their property repaired by the defendants. They have been patient in the extreme. There comes a point in time in every litigation when the delay of a party becomes unacceptable and the matter must be heard and resolved. In this case, by any measure, the delay is at the extreme end of the range.
- [21] Then, the judge addressed the question of whether the application for an assessment of damages was appropriate for summary trial. He concluded that it was:
- [52] The application before me is precisely the kind of application for which our summary trial rule was created. The sole issue requiring determination is the quantum of damages to which the plaintiffs are entitled. All parties have served the reports of experts on that issue after having had ample time to do so. Although the defendants' experts have criticized various of the approaches taken by the plaintiffs' experts, I find that I am able on the whole of the evidence to find the facts necessary to decide the issue before me. I also find that in the circumstances of this case, it is just that I do so.

- [22] Turning to the damages assessment, the judge expressly accepted Mr. Butler's expert opinion evidence. He also noted, but gave little weight, to the Matcon cost quote evidence:
- [54] The plaintiffs rely on the expert report of Richard Butler, PEng dated September 18, 2018. Mr. Butler is a Senior Geotechnical Consultant at Golder. Both Mr. Butler's qualifications and the quality of his report are impressive and I have no hesitation accepting his opinions in their entirety.
- [55] Mr. Butler opined that his "Class 4" estimate of the cost of remediating the damage caused to the Nickel Property by the defendants is \$1,340,220, including a contingency of \$223,370, and that this estimate is generally expected to be accurate within the range of -30% to +60% of the actual contract award for new construction, after the application of the contingency.
- [56] Despite [Matcon's property manager's] estimate being remarkably close to that of Mr. Butler, I give it little weight because it was not properly tendered as an expert opinion.
- [23] Next, the judge discussed the evidence of Mr. Bodnar. He observed that Mr. Bodnar had critiqued Mr. Butler's opinion, but did not provide his own estimate of the cost of remediating the Nickel property. After noting certain specific criticisms advanced by Mr. Bodnar, he stated:
- [60] The difficulty I have with Mr. Bodnar's report is that he does not provide the court with any alternative design or cost estimate for it. The Court is left with no other basis upon which to assess the damages in this case. My conclusion is that this omission is deliberate. The defendants do not want to be faced with having to pay for a remediation of the Nickel Property independent of a complete remediation of both properties. That is common sense. However, the defendants have demonstrated beyond any doubt that they are only prepared to repair the damage they caused in 2003 on a timetable that suits them.
- [24] The judge went on to state that the only other evidence presented by the defendants regarding the cost of remediating the Nickel property was the March 2017 letters from contractors, which set out unhelpful and incomplete cost quotes. Although he considered it unfortunate that Mr. Butler's cost estimate was not more current, he described it as "[t]he best evidence available to the Court regarding the cost of remediation": at para. 63. He also noted that the fact damages are difficult to assess does not mean that the court should not assess them and that, in some cases, the best that can be achieved is a rough estimate, citing three authoritative cases for this principle. After briefly summarizing Mr. Butler's evidence, including his opinion that the cost estimate could be expected to vary from a low of \$938,154 to a high of \$2,144,352, he expressed his conclusion on the assessment of damages like this:
- [65] After having considered all of the foregoing, and recognizing that I am only able to make a rough assessment on the evidence, I conclude that the plaintiffs' claim of \$1,340,220 is fair and just in the circumstances.

- [25] Based on this conclusion, the judge considered it unnecessary to deal with the Nickels' alternative claim for judgment based on the loss of value of their property and awarded judgment against the defendants, jointly and severally, in the amount of \$1,340,220.

On Appeal

- [26] As I noted at the outset, two of the named defendants in the summary trial proceeding below, Kuldip Takhar and Harbans Takhar, are deceased. Neither is known to have an estate in Canada and, therefore, only Phoenix and Nirmal Takhar are appellants on this appeal.
- [27] Phoenix and Mr. Takhar contend that the judge wrongly exercised his discretion and that his decision was clearly wrong, resulting in an injustice, in awarding substantial damages against them on a summary trial where there was insufficient evidence upon which to base a proper assessment of damages. In their submission, there were severe deficiencies in the Golder report identified by Mr. Bodnar that should have alerted the judge that the necessary facts could not be found on the whole of the evidence. They say that the judge committed a palpable and overriding error in accepting Mr. Butler's opinion in its entirety, as stated in para. 54 of his reasons, in the face of Mr. Bodnar's unanswered expert evidence and the obvious gaps in the Golder report.
- [28] In support of their submission, Phoenix and Mr. Takhar emphasize the many deficiencies in the Golder report identified by Mr. Bodnar. For example, they say, Mr. Butler did not explain why the Golder design was necessary or preferable to other alternatives, why the cost estimate was higher than that estimated in 2014 for remediating both properties or why a secant pile wall and geogrid reinforced wall sections were called for now when previously they were not. In addition, they say, given the absence of a building permit or evidence that a permit would likely be obtained, the Nickels' ability to carry out the Golder plan was unknown, which was unlike the original plan that was supported by an issued building permit. Further, they say, given its preliminary nature, the Golder design lacked a factual foundation grounded in actual data, which again was unlike the original plan.
- [29] According to Phoenix and Mr. Takhar, Mr. Butler had ample time to respond to the points raised by Mr. Bodnar, which cried out for a response if damages were to be assessed based on his opinion. However, he did not respond and thus those compelling points were left unanswered. While they acknowledge that they were at fault for much of the long delay that occurred, Phoenix and Mr. Takhar argue this did not lessen the burden on the Nickels to provide reliable evidence upon which a judge could base a fair, reasonable and realistic award of damages, citing *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.). Given the alternatives to immediate adjudication, the unreliable state of the Nickels' evidence, the complexity of the damages question and the substantial amount at issue, they say it would have been more just for the judge to direct a conventional trial on damages, with liberty to apply for another summary trial determination on damages based on proper and sufficient evidence. Accordingly, they seek an order that the matter be remitted to the Supreme Court for a trial on the issue of damages.

Discussion

Legal Framework

- [30] The applicable standard of review is uncontroversial. A judge's decision on the suitability of proceeding by summary trial involves the exercise of discretion. Accordingly, it is entitled to appellate deference: (a) in the absence of a clear conclusion that the discretion was wrongly exercised, in that no weight or insufficient weight was given to relevant considerations; or (b) unless it appears that the decision is clearly wrong and may result in an injustice: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34. In addition, where, as here, a factual finding such as an assessment of damages is challenged on appeal, the standard of review is palpable and overriding error: *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 86, leave to appeal ref'd [2019] S.C.C.A. No. 10.
- [31] The general principles that apply to summary trials are also uncontroversial. They were thoroughly summarized by Justice D. Smith in *Gichuru*:
- [28] A summary trial is governed by R. 9-7 of the Supreme Court Civil Rules (previously R. 18A of the Supreme Court Rules). Subrule (2) permits a party to an action, to which a Response to Civil Claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally. In support or response to the application for a hearing by summary trial, subrule (5) provides that a party may tender evidence in a variety of forms: (i) affidavit; (ii) answers to interrogatories; (iii) examination for discovery transcripts; (iv) admissions; and (v) expert reports.
- [29] The scope of a summary trial application is set out in R. 9-7(15) of the Supreme Court Civil Rules:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining

the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner.
- [35] The authorities are also clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s) and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised.

Analysis

- [32] In my view, the judge did not fail to give any or sufficient weight to relevant considerations, nor did he fail to assess appropriately the justice of determining the damages issue on the summary trial application. Although his reasons on the point were brief, his remark that the application was "precisely the kind of application for which our summary trial rule was created" makes it apparent that he considered the well-known factors listed in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), in deciding to proceed. I note, for example, that the judge specifically mentioned the sole issue for determination was the quantum of damages and that the proceedings had reached a stage where expert reports on the damages issue had been exchanged. To the extent that he took into account the long and prejudicial delay suffered by the Nickels in obtaining remediation of their property, this was a proper consideration, as the Chief Justice explained in *Inspiration Management*.
- [33] Most importantly, in my view, the judge was not clearly wrong to conclude that he could find the facts necessary to decide the quantum issue or assess the damages based on Mr. Butler's evidence. He was alive to Mr. Bodnar's criticisms of Mr. Butler's opinion, some of which he discussed, but which he discounted on the basis that Mr. Bodnar did not provide any

alternative proposals or estimates. Although Mr. Butler did not answer Mr. Bodnar's criticisms directly in a responsive report, the judge was not obliged to accept the conclusions Mr. Bodnar expressed on the deficient nature of Mr. Butler's expert evidence. On the contrary, as the Court stated in *Kates*, "there is no requirement that any of the conclusions presented to the court be accepted": at 332.

- [34] Mr. Butler's expert evidence was admissible and, despite its frailties, provided an evidentiary basis for the judge's assessment of damages. As he observed, it was the only sufficiently reliable evidence in proper form regarding the cost of remediation available to assist him in making what would inevitably be a rough estimate of the damages suffered by the Nickels, who were not obliged to take further costly steps to establish their claim. As Justice Griffin, then of the Supreme Court of British Columbia, explained in *Encorp Pacific (Canada) v. Rocky Mountain Return Center Ltd.*, 2008 BCSC 779, damages are assessed by the court, not calculated, and a plaintiff is required only to prove sufficient facts upon which they can be estimated fairly and reasonably: at para. 130. That being so, in my view the judge did not err in concluding that he could find the facts necessary to decide the issue of the quantum of damages, nor did he commit a palpable and overriding error in accepting Mr. Butler's admissible opinion evidence on that question.

Conclusion

- [35] I would dismiss the appeal.
- [36] GROBERMAN J.A.: I agree.
- [37] MARCHAND J.A.: I agree.
- [38] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Madam Justice Dickson"

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