The Canadian Abridgment eDigests -- Remedies

2010-23
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REM.I.3.k

Subject Title: Remedies

Classification Number: I.3.k

Damages -- Damages in contract -- Breach by carrier

Plaintiff retained moving company to pick up items from various locations in Ontario and move them to new residence in British Columbia -- Items included antique piano -- Moving company did not pick up piano on date arranged on basis that driver did not have manpower necessary to load piano onto truck, and did not advise plaintiff of same -- Driver informed plaintiff that he would be returning to pick up piano and that new owners of home had consented to keeping piano until then -- Plaintiff eventually learned that new owners of home had concluded that piano had been abandoned and had disposed of it -- Plaintiff brought successful action against moving company -- At trial, plaintiff was awarded damages in amounts of $4,500 for loss and destruction of piano, $200 for loss of dresser, $8,000 in aggravated damages, and $276 for filing fees and expenses -- Plaintiff appealed award on basis that trial judge erred in not rewarding her claimed amount of $24,900 -- Appeal dismissed -- Plaintiff did not specify if claim was based in contract or tort -- There was no apparent reason why damages award from breach of contract should differ from damages award from tort of negligence -- There was no evidence to suggest that replacement cost of new or used piano of same model was sum of $19,700 as suggested by plaintiff -- On issue of aggravated damages, trial judge considered plaintiff's evidence regarding impact of loss and associated mental anguish -- Trial judge exercised appropriate discretion in not awarding exemplary damages and awarding compensatory damages only -- Plaintiff was not entitled to recover amounts paid to moving company for delivery of goods to British Columbia, as amount charged was based on weight of goods and distance travelled.

Wepruk v. Great Canadian Van Lines Ltd. (2010), 2010 BCSC 55, 2010 CarswellBC 106, Pitfield J. (B.C. S. C.); affirming (2009), 2009 BCPC 183, 2009 CarswellBC 1531, T.S. Woods Prov. J. (B.C. Prov. Ct.) [British Columbia]

REM.I.3.m

Subject Title: Remedies

Classification Number: I.3.m

Damages -- Damages in contract -- Mental distress

Plaintiff retained moving company to pick up items from various locations in Ontario and move them to new residence in British Columbia -- Items included antique piano -- Moving company did not pick up piano on date arranged on basis that driver did not have manpower necessary to load piano onto truck, and did not advise plaintiff of same -- Driver informed plaintiff that he would be returning to pick up piano and that new owners of home had consented to keeping piano until then -- Plaintiff eventually learned that new owners of home had concluded that piano had been abandoned and had disposed of it -- Plaintiff brought successful

action against moving company -- At trial, plaintiff was awarded damages in amounts of $4,500 for loss and destruction of piano, $200 for loss of dresser, $8,000 in aggravated damages, and $276 for filing fees and expenses -- Plaintiff appealed award on basis that trial judge erred in not rewarding her claimed amount of $24,900 -- Appeal dismissed -- Plaintiff did not specify if claim was based in contract or tort -- There was no apparent reason why damages award from breach of contract should differ from damages award from tort of negligence -- There was no evidence to suggest that replacement cost of new or used piano of same model was sum of $19,700 as suggested by plaintiff -- On issue of aggravated damages, trial judge considered plaintiff's evidence regarding impact of loss and associated mental anguish -- Trial judge exercised appropriate discretion in not awarding exemplary damages and awarding compensatory damages only -- Plaintiff was not entitled to recover amounts paid to moving company for delivery of goods to British Columbia, as amount charged was based on weight of goods and distance travelled.

Wepruk v. Great Canadian Van Lines Ltd. (2010), 2010 BCSC 55, 2010 CarswellBC 106, Pitfield J. (B.C. S. C.); affirming (2009), 2009 BCPC 183, 2009 CarswellBC 1531, T.S. Woods Prov. J. (B.C. Prov. Ct.) [British Columbia]

REM.I.5.d.i.C

Subject Title: Remedies

Classification Number: I.5.d.i.C

Damages -- Damages in tort -- Real property -- Nature of unlawful act -- Nuisance

Plaintiff's residence and that of defendants, his next-door neighbours to south, were separated by driveway on property owned by defendants -- In 2001, defendants changed their driveway surface from asphalt to cobblestone -- In 2002, plaintiff complained that as result of change to surface of defendants' driveway, water was leaking into his basement, initially through south foundation wall and later through west and north walls -- Plaintiff brought action for damages in nuisance -- Plaintiff awarded damages in amount of $12,723.16 -- Defendants failed to ensure that in construction of their cobblestone driveway -- Expenses incurred by plaintiff to investigate source of water leakage along south foundation wall and to waterproof that wall in 2006 were discounted due to pre-existing condition of water seepage -- Waterproofing of south foundation wall returned plaintiff to better position than he was in before driveway alteration -- It was fair and reasonable to apply discount of 25 percent to reflect pre-existing condition and betterment to plaintiff resulting from waterproofing -- Plaintiff was awarded $11,188.16 for these damages -- Plaintiff contributed to moisture damage suffered by his four-year delay in implementing waterproofing recommended by engineer -- Therefore, he should bear 50 percent of those costs for repair work done to basement bedroom along south foundation wall after waterproofing was done -- Plaintiff was awarded $1,535 for that category of damages -- Since alteration to driveway surface did not cause leaks to west and north walls of plaintiff's foundation, recovery for cost of those repairs was denied.

Alfarano v. Regina (2010), 2010 CarswellOnt 1470, 2010 ONSC 1538, D.M. Brown J. (Ont. S.C.J.) [Ontario]

REM.I.6.c.i.C

Subject Title: Remedies

Classification Number: I.6.c.i.C

Damages -- Valuation of damages -- Measure of damages -- Real property -- Repair value

Plaintiff's residence and that of defendants, his next-door neighbours to south, were separated by driveway on property owned by defendants -- In 2001, defendants changed their driveway surface from asphalt to cobblestone -- In 2002, plaintiff complained that as result of change to surface of defendants' driveway, water was leaking into his basement, initially through south foundation wall and later through west and north walls -- Plaintiff brought action for damages in negligence -- Plaintiff awarded damages in amount of $12,723.16 -- Defendants were negligent in construction of their cobblestone driveway -- Award of damages in negligence should return plaintiff to position in which he would have been in but for negligence -- Expenses incurred by plaintiff to investigate source of water leakage along south foundation wall and to waterproof that wall in 2006 were were discounted due to pre-existing condition of water seepage -- Waterproofing of south foundation wall returned plaintiff to better position than he was in before driveway alteration -- It was fair and reasonable to apply discount of 25 percent to reflect pre-existing condition and betterment to plaintiff resulting from waterproofing -- Plaintiff was awarded $11,188.16 for these damages -- Plaintiff contributed to moisture damage suffered by his four-year delay in implementing waterproofing recommended by engineer -- Therefore, he should bear 50 percent of those costs for repair work done to basement bedroom along south foundation wall after waterproofing was done -- Plaintiff was awarded $1,535 for that category of damages -- Since alteration to driveway surface did not cause leaks to west and north walls of plaintiff's foundation, recovery for cost of those repairs was denied.

Alfarano v. Regina (2010), 2010 CarswellOnt 1470, 2010 ONSC 1538, D.M. Brown J. (Ont. S.C.J.) [Ontario]

REM.I.6.c.i.E

Subject Title: Remedies

Classification Number: I.6.c.i.E

Damages -- Valuation of damages -- Measure of damages -- Real property -- Miscellaneous

Loss of chance -- Plaintiff was corporation which was wholly owned subsidiary of larger corporation whose business was building homes in Toronto area -- Defendant was school board -- Defendant entered into agreement of purchase and sale (APS) with plaintiff in June 2004 for sale of some of defendant's surplus land at purchase price of $3,440,000 -- Most of land in question was zoned industrial and therefore redevelopment potential for residential uses required rezoning and official plan amendment -- Pursuant to APS, defendant was obliged to use its best efforts acting in good faith to obtain consent from Committee of Adjustment (COA) to severance of subject lands -- Defendant did not obtain severance by closing date of transaction and took position that APS was therefore terminated -- Plaintiff brought successful action claiming damages for failure to close -- Defendant appealed -- Appeal allowed; judgment set aside with substitute judgment in plaintiff's favour for nominal damages -- Plaintiff made out breach of contract but failed to make out case for either specific performance or damages -- Trial judge erred in failing to find that plaintiff failed to make any effort to mitigate its loss.

Southcott Estates Inc. v. Toronto Catholic District School Board (2010), 2010 CarswellOnt 2602, 2010 ONCA 310, J. MacFarland J.A., R.A. Blair J.A., Robert J. Sharpe J.A. (Ont. C.A.); varying (2009), 2009 CarswellOnt 494, 78 R.P.R. (4th) 285, H. Spiegel J. (Ont. S.C.J.) [Ontario]

REM.I.6.d.i

Subject Title: Remedies

Classification Number: I.6.d.i

Damages -- Valuation of damages -- Duty to mitigate -- General principles

Plaintiff was corporation which was wholly owned subsidiary of larger corporation whose business was building homes in Toronto area -- Defendant was school board -- Defendant entered into agreement of purchase and sale (APS) with plaintiff in June 2004 for sale of some of defendant's surplus land at purchase price of $3,440,000 -- Most of land in question was zoned industrial and therefore redevelopment potential for residential uses required rezoning and official plan amendment -- Pursuant to APS, defendant was obliged to use its best efforts acting in good faith to obtain consent from Committee of Adjustment (COA) to severance of subject lands -- Defendant did not obtain severance by closing date of transaction and took position that APS was therefore terminated -- Plaintiff brought successful action claiming damages for failure to close and issue arose as to whether plaintiff had mitigated its loss by subsequent purchases of land -- Plaintiff admitted that it never had any intention and never tried to mitigate damages -- Defendant appealed -- Appeal allowed; judgment set aside with substitute judgment in plaintiff's favour for nominal damages -- Plaintiff made out breach of contract but failed to make out case for either specific performance or damages -- Trial judge erred in failing to find that plaintiff failed to make any effort to mitigate its loss.

Southcott Estates Inc. v. Toronto Catholic District School Board (2010), 2010 CarswellOnt 2602, 2010 ONCA 310, J. MacFarland J.A., R.A. Blair J.A., Robert J. Sharpe J.A. (Ont. C.A.); varying (2009), 2009 CarswellOnt 494, 78 R. P.R. (4th) 285, H. Spiegel J. (Ont. S.C.J.) [Ontario]

REM.I.6.d.iv.C

Subject Title: Remedies

Classification Number: I.6.d.iv.C

Damages -- Valuation of damages -- Duty to mitigate -- Types of mitigation -- Repair

Plaintiff's residence and that of defendants, his next-door neighbours to south, were separated by driveway on property owned by defendants -- In 2001, defendants changed their driveway surface from asphalt to cobblestone -- In 2002, plaintiff complained that as result of change to surface of defendants' driveway, water was leaking into his basement, initially through south foundation wall and later through west and north walls -- Plaintiff brought action for damages in negligence -- Plaintiff awarded damages in amount of $12,723.16 -- Defendants were negligent in construction of their cobblestone driveway, as they failed to ensure that it was graded to direct flow of water away from plaintiff's property so that no damage would result -- However, plaintiff failed to mitigate his damages -- Expenses incurred by plaintiff to investigate source of water leakage along south foundation wall and to waterproof that wall in 2006 were discounted due to pre-existing condition of water seepage -- Waterproofing of south foundation wall returned plaintiff to better position than he was in before driveway alteration -- It was fair and reasonable to apply discount of 25 percent to reflect pre-existing condition and betterment to plaintiff resulting from waterproofing -- Plaintiff was awarded $11,188.16 for these damages -- Plaintiff contributed to moisture damage suffered by his four-year delay in implementing waterproofing recommended by engineer -- Therefore, he should bear 50 percent of those costs for repair work done to basement bedroom along south foundation wall after waterproofing was done -- Plaintiff was awarded $1,535 for that category of damages -- Since alteration to driveway surface did

not cause leaks to west and north walls of plaintiff's foundation, recovery for cost of those repairs was denied.

Alfarano v. Regina (2010), 2010 CarswellOnt 1470, 2010 ONSC 1538, D.M. Brown J. (Ont. S.C.J.) [Ontario]

REM.I.7.a

Subject Title: Remedies

Classification Number: I.7.a

Damages -- Exemplary, punitive and aggravated damages -- General principles

Plaintiff car dealership dealt with individual defendant and his unincorporated vehicle brokerage business for several years -- Car dealership advanced funds to vehicle brokerage and registered security agreements against vehicle identification numbers provided by brokerage -- During recession vehicle brokerage business falsified information in order to obtain cash advances from plaintiff -- Business failed and defendant proprietor of business subsequently declared bankruptcy -- Car dealership brought action against proprietor and vehicle brokerage business for fraud -- On consent judgment was entered against vehicle brokerage business and proprietor -- Car dealership brought application for punitive damages -- Application dismissed -- Trial was not required because proprietor admitted his wrongdoing reasonably early in proceedings -- There was real possibility proprietor would face criminal sanction in future as car dealership filed complaint with RCMP -- Proprietor had not returned money but he and vehicle brokerage business were bankrupt -- Car dealership did not stand in vulnerable position in relation to vehicle brokerage business and proprietor -- Actions in fraud by their nature addressed similar objectives as award of punitive damages -- In circumstances of this case additional deterrent of punitive damages was not rationally connected to goals of denunciation and deterrence.

Fraser City Motors Ltd. v. Moore (2010), 2010 BCSC 146, 2010 CarswellBC 240, MacKenzie J. (B.C. S.C.) [British Columbia]

REM.I.7.c.ii

Subject Title: Remedies

Classification Number: I.7.c.ii

Damages -- Exemplary, punitive and aggravated damages -- Grounds for awarding exemplary, punitive and aggravated damages -- Breach of contract

Plaintiff retained moving company to pick up items from various locations in Ontario and move them to new residence in British Columbia -- Items included antique piano -- Moving company did not pick up piano on date arranged on basis that driver did not have manpower necessary to load piano onto truck, and did not advise plaintiff of same -- Driver informed plaintiff that he would be returning to pick up piano and that new owners of home had consented to keeping piano until then -- Plaintiff eventually learned that new owners of home had concluded that piano had been abandoned and had disposed of it -- Plaintiff brought successful action against moving company -- At trial, plaintiff was awarded damages in amounts of $4,500 for loss and destruction of piano, $200 for loss of dresser, $8,000 in aggravated damages, and $276 for filing fees

and expenses -- Plaintiff appealed award on basis that trial judge erred in not rewarding her claimed amount of $24,900 -- Appeal dismissed -- Plaintiff did not specify if claim was based in contract or tort -- There was no apparent reason why damages award from breach of contract should differ from damages award from tort of negligence -- There was no evidence to suggest that replacement cost of new or used piano of same model was sum of $19,700 as suggested by plaintiff -- On issue of aggravated damages, trial judge considered plaintiff's evidence regarding impact of loss and associated mental anguish -- Trial judge exercised appropriate discretion in not awarding exemplary damages and awarding compensatory damages only -- Plaintiff was not entitled to recover amounts paid to moving company for delivery of goods to British Columbia, as amount charged was based on weight of goods and distance travelled.

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REM.II.2.b.ii.A.1

Subject Title: Remedies

Classification Number: II.2.b.ii.A.1

Injunctions -- Availability of injunctions -- Prohibitive injunctions -- Interim and interlocutory injunctions -- Threshold test -- Strength of applicant's case

Defendant property owner's representative agreed that plaintiff could make use of property to run retreat for its business during two-week period in 2008 -- After retreat, plaintiff expressed interest in continuing to occupy property and operate its business there -- Parties were unable to complete lease negotiations -- Plaintiff had continued to occupy property since 2008 -- Plaintiff commenced proceeding claiming compensation for defendant's unjust enrichment consequent to its efforts to improve property and interest in property by way of constructive trust -- Plaintiff brought application for interim injunction restraining defendant from ousting it from property; defendant brought application for order for possession of property -- Application for interim injunction dismissed; application for order for possession granted -- There was no fair question to be tried between parties as to right to occupy property -- Plaintiff claimed for compensation to recover value of improvements it said it made to property and interest in land arising out of constructive trust -- Neither of these claims carries with it right to actually possess land -- Question raised by plaintiff's pleadings did not assert right to occupy lands in issue, and plaintiff went too far by seeking injunction to have that right, however temporarily -- Defendant was entitled to possession of land.

Initiate School of the Canadian Rocky Mountains Ltd. v. Wolfenden Ventures Ltd. (2010), 2010 BCSC 12, 2010 CarswellBC 15, P.J. Rogers J. (B.C. S.C.) [British Columbia]

REM.II.2.b.ii.A.3

Subject Title: Remedies

Classification Number: II.2.b.ii.A.3

Injunctions -- Availability of injunctions -- Prohibitive injunctions -- Interim and

interlocutory injunctions -- Threshold test -- Balance of convenience

Defendant property owner's representative agreed that plaintiff could make use of property to run retreat for its business during two-week period in 2008 -- After retreat, plaintiff expressed interest in continuing to occupy property and operate its business there -- Parties were unable to complete lease negotiations -- Plaintiff had continued to occupy property since 2008 -- Plaintiff commenced proceeding claiming compensation for defendant's unjust enrichment consequent to its efforts to improve property and interest in property by way of constructive trust -- Plaintiff brought application for interim injunction restraining defendant from ousting it from property; defendant brought application for order for possession of property -- Application for interim injunction dismissed; application for order for possession granted -- Factors upon which balance of convenience test turns generally favoured defendant's position and lay contrary to granting injunction -- Plaintiff's case for damages for unjust enrichment may or may not succeed but claim for interest in land consequent to constructive trust was extremely tenuous -- Default relief in any claim for unjust enrichment and constructive trust is order for damages -- Far from describing case where monetary award would be inadequate or impossible to assess, plaintiff put forward case that begged for money award -- Plaintiff's claim for interest in land had no strength at all and was very unlikely to succeed -- Even if conclusion that there was no fair question to be tried as to possession of land, this element of balance of convenience test fell in defendant's favour and weighed heavily against granting injunction.

Initiate School of the Canadian Rocky Mountains Ltd. v. Wolfenden Ventures Ltd. (2010), 2010 BCSC 12, 2010 CarswellBC 15, P.J. Rogers J. (B.C. S.C.) [British Columbia]
