

NOVA SCOTIA COURT OF APPEAL

Citation: *MacNutt v. Acadia University*, 2017 NSCA 57

Date: 20170620

Docket: CA 455902 / CA 458781

Registry: Halifax

Between:

Laura MacNutt/PIER 101 Home Designs Inc.

Appellant

v.

Acadia University, T.A. Scott Architecture + Design Limited (3278638),
Troy A. Scott

Respondents

Judge: The Honourable Justice Van den Eynden

Appeal Heard: May 23, 2017, in Halifax, Nova Scotia

Subject: **Procedural fairness. Infringement of copyright**

Summary: The appellants' claim for copyright infringement and related damages was rejected in the court below. They seek to overturn that result and challenge the costs award. They allege the application judge made errors in law, palpable and overriding errors in his factual findings and they were denied procedural fairness. The appellants also made a motion to introduce fresh evidence. The appeal of the merits and the costs appeal were heard together.

Issues: (1) Was there a breach of procedural fairness?

(2) Did the judge err in finding no infringement of copyright?

(3) Did the judge err by also awarding costs against Ms. MacNutt personally?

Result: Motion to introduce fresh evidence denied and appeal on the merits dismissed. Leave to appeal the costs award granted, but appeal denied. This Court issued a confirming order to clarify that costs award was joint and several against appellants.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.

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Respondents

Judges: MacDonald, C.J.N.S., Fichaud, and Van den Eynden, J.J.A.

Appeal Heard: May 23, 2017, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Van den Eynden, J.A., MacDonald C.J.N.S and Fichaud J.A. concurring

Counsel: Laura MacNutt, appellant in person, and on behalf of appellant PIER 101 Home Designs Inc.
Jonathan Cuming, for the respondent Acadia University
Nadia MacPhee and Elaina Campbell, for the respondents T.A. Scott Architecture + Design Limited (3278638), Troy A. Scott

Reasons for judgment:

Overview

[1] The appellants seek to overturn a decision which rejected their claim for copyright infringement and associated damages. They also challenge the costs award levied against them. The appellants allege the application judge made errors in law and palpable and overriding errors in his factual determinations. In addition, the appellants, who were self-represented in the court below, allege they were denied procedural fairness. They say the application judge conducted the proceedings in a manner that violated principles of natural justice. On appeal, the appellants made a motion to introduce fresh evidence primarily in support of this last complaint.

[2] For the reasons that follow, I would deny the motion for fresh evidence and dismiss the appeal. With respect, the grounds of appeal have no merit. Although I would grant leave to appeal the costs award, I would not disturb the costs award, either quantum or the award being joint and several against both appellants. However, I would slightly amend the wording of the costs order to more clearly give effect to the joint and several consequences that were intended by the application judge.

Background

[3] Laura MacNutt designs buildings and she is the sole principal of the company PIER 101 Home Designs Inc. (PIER 101). In July 2013, Acadia University contracted with PIER 101 to prepare concept drawings for a contemplated expansion of one of its buildings. The concept drawings were primarily procured for facilitating donor funding for the planned expansion project. The concept work was performed promptly and Acadia University paid PIER 101 in full for its services.

[4] Acadia University was successful in securing funding; however, neither Ms. MacNutt nor PIER 101 were subsequently retained to carry out further design work on the expansion project. This was partly because Ms. MacNutt was not a licensed architect, nor did PIER 101 employ one at the time. Acadia University retained the Respondents Troy A. Scott and T.A. Scott Architecture + Design Limited (3278638) to complete the design work for the expansion project.

[5] In October 2015, Ms. MacNutt and PIER 101 filed a Notice of Application in the Court below. They alleged infringement of their respective copyright interests and sought damages. In addition, Ms. MacNutt intended to pursue a defamation claim; however, this aspect of the claim was withdrawn.

[6] The copyright registration certificate lists both Ms. MacNutt (in her personal capacity) and PIER 101 (corporate entity) as the registered owners of the copyright interest. Ms. MacNutt is listed as the author of the protected materials.

[7] Ms. MacNutt represented herself and PIER 101 in the court below. Her application was heard by Justice James L. Chipman on June 1 and 2, 2016. In his written decision, released on June 21, 2016 (2016 NSSC 160), the judge dismissed the appellants' claim in its entirety. A Notice of Appeal was filed on September 27, 2016 (CA 455920).

[8] The parties were unable to agree upon costs. So, following further written submissions, the judge rendered a written costs decision, released on August 9, 2016 (2016 NSSC 208). He awarded costs in favour of the respondents as follows:

- Acadia University \$16,250.00 plus disbursements of \$939.87
- T.A. Scott Architecture and Troy A. Scott \$16,250.00 plus disbursements of \$8,088.60

[9] The costs dispute continued post-release of the judge's costs decision. Although quantum was no longer in issue, Ms. MacNutt disputed any personal liability. She would not approve the form of the draft costs order counsel for Acadia University prepared. This led to further submissions to the judge on the form of the order. The respondents sought costs (joint and several) against Ms. MacNutt, in her personal capacity, and the corporate entity PIER 101. Ms. MacNutt advocated for costs only against PIER 101. After considering the supplemental submissions on this contested point, the judge confirmed he was satisfied with the form of the order as drafted by counsel for Acadia University. The order was then issued. A Notice for Leave to Appeal and Notice of Appeal was filed on December 28, 2016 (CA 458781). The appeal on the merits and costs appeal were heard together.

[10] Unfortunately, less than precise language was used by the judge in his costs decision as to whether the costs award was against both Ms. MacNutt and PIER 101. To further compound matters, the costs order also lacked precision in identification of both intended appellants being liable for the costs award. Later, I

will address the specific lack of clarity that arose and set out what language is needed to correct and give proper effect to the judge's costs decision.

[11] Although the style of cause in the court below used the singular term "applicant" (which continued through to the documents filed in this Court using the singular term "appellant") both Laura MacNutt and PIER 101 Home Design Inc. are listed as parties in the body of the style of cause. More importantly, it is clear from the proceedings in the court below that both Ms. MacNutt and PIER 101 advanced substantive claims and sought remedies.

[12] I will supplement additional background in my analysis as the respective issues require.

Issues

[13] Numerous grounds of appeal were alleged in the Notices of Appeal; however, only three were advanced by the appellants. I frame them as:

1. Did the application judge breach the rules of procedural fairness?
2. Did the application judge err in finding that there was no infringement of copyright?
3. Did the application judge err by also awarding costs against Ms. MacNutt personally?

Standard of Review

[14] I will address the applicable standard of review in my analysis of the issues.

Analysis

Did the application judge breach the rules of procedural fairness?

[15] This issue does not engage a deferential standard of review. A duty is owed to the appellants and the role of this Court is to determine whether there was a breach or not. (*Waterman v. Waterman*, 2014 NSCA 110; *Wolfridge Farm Ltd. v. Bonang*, 2016 NSCA 33)

[16] The appellants base their denial of procedural fairness allegation upon two complaints: 1) the judge did not hold a pre-trial conference in advance of the hearing; and, 2) the judge directed that the appellants' expert present himself for

cross-examination on his report without adequate notice. The appellants assert because they were self-represented parties this caused them prejudice.

[17] There is no merit to either complaint. I will explain why.

[18] Dealing with the complaint there was no pre-trial conference, I note that the matter in the court below proceeded by application not action. Thus, there was no requirement for a trial readiness conference (*Civil Procedure Rule 4.16*). More importantly, no pre-trial conference was requested by the appellants either in advance of the hearing or at the commencement of the hearing. On appeal, they assert this deprived them of an opportunity to raise issues to better understand the process and proper conduct of a hearing. The appellants specifically refer to being caught off-guard by the need to produce their expert witness for cross-examination. Apart from this one issue, the appellants have failed to substantiate how they suffered any prejudice by not having a pre-trial conference. The record reveals no other material difficulties in presenting their case.

[19] I accept that the appellants, looking retrospectively, genuinely might have preferred a pre-trial conference; however, they did not suffer any prejudice because none was held.

[20] I turn to the specific complaint surrounding the attendance of the appellants' expert witness. On appeal, Ms. MacNutt complains that the way in which her expert's attendance at the hearing for cross-examination unfolded was not appropriate. She now argues this unravelled her to the point she was ineffective. She did not raise these concerns with the judge. The record does not support these complaints.

[21] At the commencement of the hearing the judge reviewed how the proceeding would unfold. He was informed that the appellants' expert was not in attendance but they could make him available either the first day of the hearing or the second. Given that the appellants were the applicants and presenting their case first, the judge took a short recess so that Ms. MacNutt could contact her expert to check on his availability. The judge was mindful to avoid losing valuable hearing time between witnesses.

[22] After the recess, Ms. MacNutt confirmed the appellants' expert could be present within two hours. The hearing then carried on in the normal course without any complaints respecting the attendance of the appellants' expert. As Ms.

MacNutt was the only non-expert witness being called to present evidence in support of the appellants' claims, she was cross-examined on her affidavits.

[23] The cross-examination of Ms. MacNutt concluded before the court recessed for a lunch break. The judge reminded Ms. MacNutt that she was free to meet with her expert over the break. When court reconvened in the afternoon, Ms. MacNutt presented the applicants' expert for cross-examination. The expert did not raise any concerns respecting having to attend on short notice.

[24] Although on appeal, the appellants argue they were caught off-guard by having to produce their expert the day of the hearing for cross-examination, the record confirms Ms. MacNutt was aware of this possibility. Further, the expert confirmed in his report, in compliance with *CPR 55.04(1)(b)*, that he was prepared to testify and comply with any directions from the court.

[25] There is no basis for the appellants to now complain they did not have adequate notice that their expert might be required for cross-examination nor were they prejudiced by the manner in which he was presented for cross-examination.

[26] I am satisfied the appellants were afforded procedural fairness. They were not taken by surprise. They knew the case they had to meet. They had the benefit of detailed affidavits which all parties filed well in advance of the hearing. Similarly, expert reports had been filed and exchanged. A motion for directions was held early and various procedural matters were discussed. The appellants were given a fair opportunity to present their case. And the record bears out that even though Ms. MacNutt represented herself and PIER 101, overall, she did an admirable job of presenting her case, including cross-examining the respondent witnesses and their expert. She made articulate submissions to the judge, both in writing and orally. She seemed to have no difficulty identifying the appellants' legal position and supporting authorities.

[27] In these circumstances, the absence of any pre-trial conference was of no consequence. In short, there was no breach of procedural fairness. I would dismiss this ground of appeal.

[28] I will briefly address the appellants' motion to introduce fresh evidence under this ground of appeal. The test to introduce fresh evidence on appeal is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 at p. 760. Those principles are:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[29] Further, the evidence must be in admissible form. Otherwise it could not affect the result under the fourth *Palmer* factor: *R. v. O'Brien*, [1978] 1 S.C.R. 591, p. 602 per Dickson, J (as he then was); *R. v. Assoun*, 2006 NSCA 47, ¶ 302.

[30] The evidence sought to be introduced falls materially short of the first, second and fourth requirement. It does not warrant further analysis. I would deny the motion.

Did the application judge err in finding that there was no infringement of copyright?

[31] Some additional context is helpful in understanding the evolution of the appellants' allegations respecting the misuse of their copyright interests. I will review the evidence and relevant findings of the judge in more detail.

[32] As noted, Acadia University did not require the services of PIER 101 or Ms. MacNutt after the initial concept work performed in July 2013. Both appellants had hoped that their prompt effort in preparing the concept drawings (which turned out to be of assistance to Acadia University in securing the necessary donor funding for the project) would lead to more work for the appellants. This did not pan out, and an unfortunate sequence of events occurred which upset Ms. MacNutt.

[33] Ms. MacNutt learned through a January 23, 2014 newspaper article that the project for which she authored the concept drawings for was going ahead. The article reported on a public planning meeting pertaining to the expansion project and included a picture of the concept drawing Ms. MacNutt had authored. However, there was no mention of any creative credits to PIER 101 and Ms. MacNutt. These credits appeared on the actual concept drawing, but, as it turns out, they were removed by the journalist during publication of the image. The respondents played no part in the deletion of credits. The appellants complained

about the stripping of credits and that permission was not sought to use the concept drawings at the public meeting.

[34] The judge addressed these complaints in his decision. He said:

[30] The Applicant's allegations are addressed "head on" in the affidavits filed by the Respondents. For example, on behalf of Acadia, Mr. Falkenham deposes in the last paragraph of his affidavit, as follows:

It was my belief and understanding that, in preparing the concept drawings, Ms. MacNutt was fully aware that the drawings might be utilized for uses other than a presentation to a potential donor. In particular, it is my understanding that Ms. MacNutt understood that the concept drawings would be presented to the Town of Wolfville as part of a development agreement application and would be presented to the architect ultimately retained.

[31] On cross-examination, this assertion was left undisturbed. . . . Furthermore, Ms. MacNutt acknowledged that it was the development officer (and not the Respondents) who stripped the plans of the identifying credits.

[Emphasis added]

[35] Beyond using the appellants' concept drawings for the original intended purpose (presenting to donors and the Town for the development agreement application), the respondents claimed they made no further use of the concept drawings. The respondent architect, Troy Scott, who Acadia University retained to complete the project, explained why Ms. MacNutt's and PIER 101's concept work was of no use beyond their original scope. The judge summarized his evidence this way:

[33] With respect to Mr. Scott's characterization of the Pier101 concept drawings, he deposes:

17. I was provided with concept drawings for the Addition prepared by Pier101 Home Designs Inc. ("Pier101") by Acadia.
18. The Pier101 concept drawings utilized the architectural style of the existing Alumni Hall Building.
19. Copying the style of an existing building in designing an addition is referred to as "mimic architecture".
- ...
25. Upon reviewing the Pier101 design drawings, I held the view that there were many design deficiencies. For this reason, I did not feel that the design drawings were useful to the project going forward and I made no use of them in creating my design for the Addition.

...

38. I did not use any measurements from Pier101's concept drawings in the TAS design. ...

[36] The judge found that all of the respondents' lay witnesses testified under cross-examination in a straightforward manner and the appellants' cross-examination of them did nothing to weaken their sworn evidence.

[37] In paragraphs 39 to 47 of his decision, the judge sets out the competing expert opinions, their foundations and explained his reasons why he preferred and accepted the evidence of the respondents' (Troy Scott and T.A. Scott Architecture) expert. I will only set out paragraph 47 where the application judge concluded:

[47] In the result, I accept Christopher Young's expert opinion that the MacNutt/Pier101 concept plans are distinctly different from the Scott/TAS design. To the extent there are any similarities, they are as a consequence of the mimic architecture required by Acadia and the Town of Wolfville. In this regard, the original Alumni Hall was clearly of the Georgian style and this is picked up in both the concept drawings and the ultimate TAS design and drawings...

[38] Although the judge was satisfied that plans developed by respondents T.A. Scott Architecture + Design Limited (3278638) and Troy A. Scott were distinctly different than the concept drawings of the appellants, he went on to address an alternate argument. Specifically, that even if the concept drawings were protected, the appellants failed to prove any unauthorized use of original protected works. He said this:

[48] Turning to the Supreme Court of Canada authority, even if I were to find the concept drawings to be "original" within the meaning of copyright law, it is apparent there has not been an infringement (i.e., the unauthorized taking of that originality) by these Respondents. That is to say, when I weigh the evidence, it is clear to me that on a balance of probabilities, the Applicant has not established that any of the Respondents were involved in the unauthorized taking of her original plans.

[39] I now turn to the appellants' arguments respecting this ground of appeal. They allege the application judge (1) got the law on copyright wrong; (2) made factual errors in finding no unauthorized use of the appellants' concept drawings; (3) failed to give proper weight to the appellants' expert evidence, and thereby erred in accepting the respondents' expert witness's opinion that the respondents' design was distinct.

[40] Errors of law attract a correctness standard of review. Factual findings attract a deferential standard of review and are not to be disturbed on appeal absent palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33)

[41] In my view, the allegation of copyright infringement has no merit and can be rejected summarily. The factual findings of the judge and his reasons for preferring and accepting Mr. Young's expert opinion are unassailable. There was overwhelming evidence on the record to underpin his determinations. They were his to make. I see no palpable and overriding error. Similarly, I see no error in law. The judge set out the applicable law in his decision, and I see no error in his application. Furthermore, the decision below does not turn on whether the appellants' design is protected under the *Copyright Act* as the judge specifically found that regardless of whether it did, the respondents did not copy the design. As noted, that factual finding was his to make.

Did the application judge err by also awarding costs against Ms. MacNutt personally?

[42] Leave is required to appeal the costs award. The test is whether the appellant can raise an arguable issue. (See *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38) I am satisfied leave should be granted.

[43] In support of this ground, the appellants point out that in the background section of his decision on the merits, the judge incorrectly refers to PIER 101 as being Ms. MacNutt's "sole proprietorship". She claims this was a palpable and overriding factual error which led to his error in awarding personal costs against her.

[44] Based on the record, I am satisfied the judge understood PIER 101 was a corporate entity, and simply misspoke. This had no material impact on the costs award.

[45] There were two applicants in the court below, Ms. MacNutt and PIER 101. Prior to commencing litigation, Ms. MacNutt caused the ownership of the copyright to be registered to herself personally, as well as the corporate entity she solely owns and controls. On appeal, Ms. MacNutt claims that when she dropped her defamation claim she thought she was free from any personal cost exposure. However, based on the record, it appears this was dropped, because otherwise the application would need to be converted to an action, something the appellants wanted to avoid.

[46] The record also confirms that after the defamation claim was abandoned, both appellants continued to advance substantive claims for copyright infringement and sought damages and relief. The presentation of their claims and supporting evidence was intertwined, such that it would be difficult to parse out a costs award against each appellant.

[47] It is understandable and logical for the respondents to have sought (joint and several) costs against Ms. MacNutt personally and PIER 101. Any doubt that the respondents were seeking such a costs award was settled by their subsequent submissions to the judge respecting the form of the costs order. The order submitted for his approval was intended to capture a joint and several costs award, and the judge approved the form of the draft order knowing the respondents were seeking costs against both parties. Unfortunately, the costs order itself refers to “applicants” in the recitals and “applicant” in the substantive provisions of the order. During oral submissions before this Court, counsel for Acadia University acknowledged that he should have been more precise in drafting the order.

[48] Although the costs decision and resulting order could have been clearer, I am satisfied that the judge intended to and did order joint and several costs against Ms. MacNutt and PIER 101.

[49] I would dismiss this ground. In these circumstances, for clarity and efficiency, I am of the view that this Court should amend the judge’s order by confirming the costs are awarded joint and several.

Conclusion

[50] I would dismiss the appeal, issue the noted amending order, and award costs on appeal of \$2,500.00 (inclusive of disbursements) in favour of each respondent. The costs are payable by the appellants joint and several.

Van den Eynden, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.