NOVA SCOTIA COURT OF APPEAL

Citation: *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61

Date: 20170627
Docket: CA 457148
Registry: Halifax

Between:

Hatch Ltd., a body corporate formerly known as SGE Acres Limited

Appellant

v.

Atlantic Sub-Sea Construction and Consulting Incorporated, Beaver Marine Limited, a body corporate, Bermingham Construction Limited, Dywidag Systems International, Canada Ltd., a body corporate, Factory Mutual Insurance Company, and Martin Marietta Materials Canada Limited, a body corporate

Respondents

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: April 11, 2017, in Halifax, Nova Scotia

Subject: **Summary Judgment. Rule 13.04. Weighing of Evidence on Summary Judgment Motion.**

Summary: This appeal arises out of the collapse of a portion of a wharf in Auld Cove, Nova Scotia in November 2008, approximately three years after its construction. The collapse spawned a number of lawsuits including a third party claim by the appellant, Hatch Ltd., who designed the wharf, against Atlantic Sub-Sea Construction and Consulting Incorporated who was involved in its construction.

Atlantic moved for summary judgment on the Third Party claim. In response to the summary judgment motion, Hatch

filed a number of affidavits including two experts' reports.

The motions judge allowed the summary judgment motion and dismissed Hatch's Third Party claim against Atlantic.

Issues: Did the motions judge err in granting summary judgment?

Result: Appeal allowed. The motions judge erred in weighing the evidence before her rather than simply determining whether there was a genuine issue of material fact requiring a trial. In particular, she attached no weight to the experts' reports. By weighing the evidence in the manner she did she usurped the role of a trial judge. The summary judgment order was set aside and costs were awarded to Hatch in the amount of $2,000.

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Respondents

Judges:	MacDonald, C.J.N.S.; Farrar and Scanlan, JJ.A.
Appeal Heard:	April 11, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed with costs to Hatch Ltd., payable by Atlantic, in the amount of $2,000 per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Scanlan, J.A. concurring.
Counsel:	Geoffrey A. Saunders and Dillon Trider, for the appellant Murray J. Ritch, Q.C. and Colin Gale, for the respondent, Atlantic Sub-Sea Construction and Consulting Incorporated Harvey Morrison, Q.C., for the respondent Beaver Marine Limited (Watching Brief) Robert Purdy, Q.C., for the respondent Dywidag Systems International, Canada Limited (Watching Brief) David A. Cameron, for the respondent Martine Marietta Materials Canada Limited (Watching Brief)

Daniel M. Campbell, Q.C., for the respondent, Bermingham Construction Limited not appearing

Stuart Kugler, for the respondent Factory Mutual Insurance Company not appearing

Reasons for judgment:

Overview

[1] This appeal arises out of a multi-party construction dispute. The underlying lawsuit involves the collapse of a wharf belonging to the respondent, Marietta Materials Canada Limited. The appellant, Hatch Ltd. (formerly SGE Acres Limited), designed the wharf. It was constructed by the respondent, Beaver Marine Limited with the aid of one of its sub-contractors, the respondent, Atlantic Sub-Sea Construction and Consulting Incorporated. Hatch, a defendant in the original action, third partied Atlantic alleging that Atlantic was negligent in failing to properly assemble a portion of the wharf resulting in or contributing to the collapse.

[2] Atlantic brought a motion for summary judgment on Hatch's third party claim. It alleged there was no evidence that anything it did, or failed to do, caused or contributed to the collapse.

[3] The summary judgment motion was heard before Justice Denise Boudreau. In a decision dated September 21, 2016 (reported as 2016 NSSC 226), she allowed the motion and dismissed Hatch's claim against Atlantic.

[4] Hatch appeals alleging that the trial judge erred in weighing the evidence in reaching her conclusion that summary judgment should be granted.

[5] For the reasons that follow, I would allow the appeal, set aside the summary judgment and award costs to Hatch, payable by Atlantic in the amount of $2,000 inclusive of disbursements, in any event of the cause. To the extent that Hatch has paid any costs to Atlantic as a result of the summary judgment motion below, those costs are to be reimbursed to Hatch.

Background

[6] This litigation concerns the collapse of a portion of a wharf in Auld's Cove, Nova Scotia in November 2008, approximately three years after its construction. The wharf owner, Martin Marietta, sued the prime contractor in the wharf construction, Beaver, a components manufacturer, DYWIDAG Systems International, Canada Ltd. and the engineers for the project, Hatch.

[7] Hatch's Amended Statement of Claim (Third Party) makes the following allegations against Atlantic:

> 17. …Atlantic Sub-Sea was negligent in not ensuring that the lower waler was properly assembled with all the component parts in proper position and properly tightened were [sic] the walers themselves, the splice plates, the tie plates, the spacer bolts and pipe spacers and the tie rods.
>
> …
>
> 19. … Atlantic Sub-Sea failed to properly tighten the hex nuts provided by DSI on the end of the tie rods and only tightened them by hand when it was possible to tighten them by wrench but they failed to do so.
>
> 20. …Atlantic Sub-Sea was negligent in not taking other steps to secure the hex nuts at the end of the tie rods at the waler end of the assembly by using such methods as tack welding. Hatch also says that Atlantic Sub-Sea did not reference the original Issued for Construction Plans of Hatch nor did it consult the Dywidag Shop Drawings to install double beveled washers as opposed to one beveled washer.
>
> 21. …Atlantic Sub-Sea were negligent in that they failed to install washers for all bolts, tie rods, and nuts on the work that they were performing when they knew or ought to have known they were required to do so in accordance with the plans.

[8] In support of its motion, Atlantic filed two affidavits sworn by John Hedley, a legal analyst with Ritch Williams & Richards, attaching multiple excerpts of discovery transcripts.

[9] Atlantic relied, primarily, on the discovery evidence of its employee, Mr. Lennan Hart. No expert evidence and no evidence which was capable of being tested by way of cross-examination was led by Atlantic.

[10] Hatch filed six affidavits in defence of Atlantic's motion:

(a) Two affidavits sworn by Gordon Proudfoot attaching contract details between Beaver and Atlantic, discovery excerpts, plans, drawings, specifications, reports, invoices and photographs relating to Atlantic's work on the wharf;

(b) An affidavit sworn by a geomatics expert, Curtis Speight;

(c) An affidavit sworn by Frank Villano, a professional engineer, attaching an expert report analyzing and providing his opinion on Atlantic's role in the wharf failure;

(d) An Affidavit sworn by David Lewis, a professional engineer, attaching an expert report analyzing and providing his opinion on Atlantic's role in the wharf failure; and

(e) An affidavit sworn by Grant McCharles, the engineer of record for the wharf project, speaking to evidence he gave on discovery and providing factual details relating to Atlantic's work on the wharf.

[11] There was no cross-examination on any evidence submitted by either party; Atlantic did not challenge the qualifications of any of Hatch's experts or the admissibility of their reports.

[12] In his affidavit, Mr. Lewis identified six areas where he felt Atlantic failed to perform its work to the appropriate standard:

(a) it cut holes in the steel sheet pile (SSP) using an acetylene torch, as opposed to drilling them as specified in contract documents, without the permission of the engineer;

(b) it improperly installed ASTM A307 bolts in the lower waler connections;

(c) it only used one bevelled washer on the lower tie rod as opposed to the two specified and supplied to the site by the supplier;

(d) it hand-tightened the lower tie rod hex nuts as opposed to using a wrench to hard-tighten them;

(e) it failed to apply specified Denso Tape on the uncoated ends of the threadbar on the lower waler; and

(f) it did not adequately inspect the lower waler installation.

[13] Mr. Lewis concluded in his report:

> **When the various factors and opinions previously discussed are taken together, it is my opinion that the manner in which the lower waler tie back system was installed by Atlantic Sub-Sea Construction, contributed to or even initiated a multifactorial catastrophic collapse of the failed SSP bulkhead wharf.**
>
> [Emphasis in original]

[14] Mr. Villano affirmed and provided supporting analysis for Mr. Lewis' conclusions.

[15] The motions judge reviewed the evidence in considerable detail, particularly the evidence of Mr. Hart, on behalf of Atlantic, and Mr. Lewis and Mr. Villano on behalf of Hatch. She concluded that there were no genuine issues of material fact requiring a trial on this claim [¶67] and granted Atlantic's motion. I will address the trial judge's decision in more detail later.

[16] Hatch appeals alleging the motions judge erred in her consideration of Rule 13.04.

Issues

[17] Hatch raises a number of issues on this appeal. I would reduce the issues to two and address them as follows:

(i) Should leave to appeal be granted?

[18] Atlantic acknowledges that Hatch's appeal raises an arguable issue satisfying the test for leave. I agree. Leave to appeal is granted.

(ii) Did the motions judge err in granting summary judgment in favour of Atlantic?

Standard of Review

[19] The standard of review was described by Saunders, J.A. in *Burton Canada Co v. Coady*., 2013 NSCA 95:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless the wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. [Citations omitted]
>
> [Emphasis added]

Analysis

[20] This appeal centers on Hatch's argument that the motions judge impermissibly weighed the evidence on the summary judgment motion.

[21] Rule 13.04 states:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or defence in an action.
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[22] In *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89 (which was released after the motions judge rendered her decision in this case), Fichaud J.A. identifies 5 questions that should be asked when considering a summary judgment motion under Rule 13.04. Only Question 1 is relevant to this appeal:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 … or go to trial.
>
> The analysis of this question follows *Burton's* first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz,* 2011 NSCA 74, para. 27, adopted by *Burton,* para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton,* paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> [Emphasis added]

[23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.

[24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.

[25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:

> [87] …
>
> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, **or the appropriate inferences to be drawn from disputed facts**.
>
> 11. **Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility**.
>
> [Emphasis added]

[26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does "weighing the evidence" mean?

[27] *Black's Law Dictionary*(10th ed.) defines weight as follows:

> **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.
>
> *Black's Law Dictionary*, 10th ed, sub verdo "weight of the evidence"

[28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:

> Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence.
>
> [Emphasis added]
>
> John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Vol 1 (Toronto: Little, Brown and Company, 1983)

[29] The *Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the

> emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law.
>
> [Emphasis added]

[30] Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

[31] On this motion, admissibility of the experts reports was acknowledged for the purposes of the motion. Therefore, it was conceded they were relevant and had probative value. The only issue remaining was the weight to be given to the evidence, which is a question of fact.

[32] In my view, the motions judge erred in weighing the evidence in arriving at the conclusion that summary judgment should be granted.

[33] Before embarking on her analysis, the motions judge set out the law she relied on, first quoting from the Ontario case of *Kiden Used Furniture v. Pearson*, 2014 ONSC 4625 as follows:

> [42] … To succeed, the plaintiff must also show that the fire was caused by the defendant's negligence. The plaintiff's circumstantial evidence, even after making assumptions in the plaintiff's favour regarding the cause identified by the defence expert, fails to prove any particular cause of the fire on a balance of probabilities, let alone that the defendant's negligence caused the fire.
>
> [43] Thus, even if I make certain assumptions and conclusions that are favourable to the plaintiff and to some extent not called for on the material before me, I nonetheless conclude that there is no genuine issue for trial regarding the plaintiff's negligence claim given the absence of an expert report demonstrating the requisite causation. The plaintiff's "cumulative circumstantial evidence" is insufficient. …

[34] Judges, in this province, should be careful in relying on case law from Ontario when considering summary judgment motions. *Kiden* and the Ontario Rule 20.04 under which it was decided is clearly distinguishable from Nova Scotia Rule 13.04. Ontario Rule 20.04(2.1), which was added in 2008, provides the following:

> 20.04(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties

> and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3 Drawing any reasonable inference from the evidence.
>
> [Emphasis added]

[35] The Ontario Rule gives the Court the power to weigh the evidence, evaluate credibility and draw inferences from the evidence. That is not the case in Nova Scotia.

[36] Justice Fichaud addressed the distinction between the Ontario Rule and the Nova Scotia Rule in *Shannex*:

> [38] Two reasons are often cited to support the request that an action be determined by a chambers judge upon affidavits. First is that the responding party's pleading has no merit. Second is that the disputed issues may be determined more efficiently by an abbreviated procedure without a full trial.
>
> [39] Some jurisdictions address both factors with one Civil Procedure Rule: *e.g.* Ontario's amended Rule 20, that was discussed in *Hryniak*. Ontario's Rules do not have a general mechanism to convert actions into hybrid applications. Nova Scotia separates the functions with two Rules. Rule 13 addresses the first scenario with summary judgment. Rule 6 permits a chambers judge to convert an action to an application that will more proportionately allocate resources. Rule 6.02 lists the governing criteria, and a body of jurisprudence under Rule 6 has developed the principles for conversion. These include factors like those discussed in *Hryniak*.

[37] In Ontario, disputed issues may be determined by an abbreviated procedure without a full trial by assessing and weighing evidence. As explained by Fichaud, J.A., that is not the situation in Nova Scotia. Rule 13 addresses whether the action is without merit. If a claim has merit, Rule 6 allows a motions judge to convert an action to an application when it is appropriate to do so.

[38] Further, *Kiden* can be distinguished in another important respect. In that case, the central issue was that the plaintiff did not have any expert evidence with respect to the cause and origin of an electrical fire on their rented premises. The defendant provided an expert report on their motion for summary judgment. Ultimately, after weighing what evidence was available, and engaging in several

favourable assumptions to the plaintiff, the court concluded that expert evidence was required to prove negligence. As the plaintiff was unable to prove any cause of the fire on a balance of probabilities, the motion was allowed. This decision was upheld on appeal. (2015 ONCA 170)

[39] The case of *Chan v. White*, 2014 NSSC 383, also referred to by the motions judge (¶53), is analogous to *Kiden* in this respect: the plaintiff failed to produce an expert report linking the plaintiff's death to the medical treatment he received. Summary judgment was granted in favour of the defendant.

[40] In *Szubielski v. Price*, 2013 NSCA 151, another case referred to by the motions judge, the responding party had no expert evidence to support one of her claims with respect to use of an improper device in her medical treatment. As in *Kiden* and *Chan*, it was necessary to have expert evidence capable of proving causation. Summary judgment followed.

[41] Finally, the motions judge refers to *MacNeil v. Bethune*, 2006 NSCA 21 as follows:

> 28. …
>
> In my view, in this case, after considering the evidence presented by all parties on the applications, it can be said with confidence that there was no controversy of fact or law that required resolution by a trial. If the matter were permitted to go to trial, the plaintiffs would have no chance of success <u>because they have no evidence to support their allegations that the damages they suffered were caused by or contributed to by any act or omission of the defendants</u>.
>
> [Emphasis added]

[42] In *MacNeil* there was "no evidence" to support the plaintiffs' allegations. It was not a situation where there was some evidence and the Court weighed that evidence to determine that it could not establish causation.

[43] With respect, the case law cited was of no assistance to the task before the motions judge here where there was admissible expert evidence that spoke directly to causation.

[44] After citing this case law, the motions judge asked herself the following question:

> [55] What evidence do I have before me relating to causation?

[45] The motions judge then attaches no weight to Hatch's experts' reports, primarily on the basis they are "speculative":

> [59] In the context of this motion, my role is not to establish ultimate causation. However, it is clear that there is no evidence of causation before me that implicates the applicant. There is, in my view, no evidence pointing to any failure on the part of the applicant Atlantic which led to this loss.
>
> [60] The expert reports, as can be seen by the excerpts that I have quoted, are speculative. Both Mr. Lewis and Mr. Villano have raised concerns with the work of Atlantic, and/or with the assembly of the lower waler connection. Those concerns may or may not be valid. In some cases, they are not founded in the evidence, but on "possibilities". In any event, the best the experts can say is that some of these "possible" deficiencies could "possibly" have, in theory, contributed to the failure. Neither expert has done any testing, or analysis, to provide any actual confirmation that those failings, if they occurred, led to this loss. This evidence, were it tendered at trial, could not base a finding of causation.
>
> [Emphasis added]

[46] There are a number of problems with this portion of the motions judge's decision. First, there was no issue with respect to the qualifications of the experts. Nobody objected to them providing opinion evidence. The expert opinion, as set out earlier, was that the manner in which the lower waler tieback system was installed by Atlantic contributed to or even initiated a multifactorial, catastrophic collapse of the failed SSP bulkhead wharf (¶13 above). That is evidence of causation; what weight is to be given to that evidence is a matter for the trial judge.

[47] Secondly, it fails to consider the nature of expert evidence. An expert's opinion is a question of fact which may be accepted or rejected as seen fit by the trial judge, (*R. v. Abbey*, [1982] S.C.R. 24 at 43). Expert evidence is based on assumptions and an opinion is often required to be given in a hypothetical manner (see for example, *McWilliams Canadian Criminal Evidence*, 5th ed., loose-leaf (Toronto: Thomson Reuters, 2016) at p. 12-125). It is by its very nature somewhat speculative.

[48] Finally, the determination of causation in negligence cases is, itself, often a speculative exercise. In *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 64, Bourgeois, J.A. highlighted that causation is an evaluative and speculative exercise:

> [42] The appellant complains that requiring him to prove what would have happened if the bridge had been maintained is speculative. It is. But that, as explained by Professor Klar in *Tort Law*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2012) at page 450, is the nature of the beast:
>
> > The "but for" test is evaluative and speculative. It requires the trier of fact to predict what would have happened to the plaintiff had the defendant not acted unreasonably. … Since a court cannot repeat a past event, controlling some conditions while altering others to see what results, the issue is necessarily speculative. The court must guess at what would have occurred, using its best judgment, intuition, common sense, experiences, expert evidence, and whatever else might be of assistance. [Footnotes omitted]
>
> [Emphasis added]

[49] The present case, a wharf collapse, where part of the structure was underwater, is a perfect example of a situation where there will be a certain amount of speculation by the trier of fact in determining causation. This was not recognized by the motions judge in her decision. Indeed, it formed the very basis of her rejection of the experts' opinions.

[50] It is evident from other parts of her decision that the motions judge was weighing the evidence. Hatch, in its Third Party Statement of Claim, alleged that Atlantic was deficient in its work by hand tightening the lower tie rod hex nuts as opposed to using a wrench to hard tighten them. The motions judge evaluated the evidence on this issue and rejected it:

> [61] Both applicant and respondent agree that the hex nuts were hand tightened by the applicant. The evidence before me is, firstly, that this was done pursuant to instructions of the lead contractor, Beaver; secondly, that this may be an appropriate way to install these nuts. However, there is no evidence that there were any loose hex nuts at the time of the failure of the wharf. Furthermore, there is no evidence that, if there were any loose hex nuts, that they contributed or caused this failure.
>
> [62] The experts who spoke about the “hex nuts” issue are talking about industry practice, possibly relevant to the appropriate standard of care. However, both reports are completely speculative; neither expert can say whether any nuts were, in fact, loose, or whether the “hand-tightening” caused or contributed to the loss.
>
> [Emphasis in original]

[51] She came to the conclusion there was no evidence that "if there were loose hex nuts, that they contributed or caused this failure". Again, with respect, that is precisely what Mr. Lewis opined to in his report. He said that hand tightening of the bolts raised concerns about the proper orientation of the assembly of this critically important element of the structure. It remains to be seen whether that evidence will be accepted at trial.

[52] The motions judge continued:

> [63] Both applicant and respondent agree that the bolt holes were cut, not drilled. Again, the evidence shows that was done pursuant to instructions of Beaver (starting with the bid package). Other than speculation by Mr. Lewis and Mr. Villano, there is no evidence that this "cutting" either caused or contributed to the failure.

[53] This relates to Hatch's allegation that Atlantic was negligent in cutting holes in the steel pile sheet using an acetylene torch as opposed to drilling them as specified in the contract documents. The motions judge says "this is mere speculation". She noted this was done on the instructions of Beaver. She did not consider what Atlantic's own standard of care might be in the circumstances. There was evidence that the contract specifications required the holes to be drilled absent permission from Mr. McCharles, an employee of Hatch, which was not obtained. Again, that is the evidence to be evaluated by the trial judge, not by a motions judge.

[54] The same issues arise with respect to the motions judge's analysis in the following paragraphs relating to Hatch's other allegations of negligence:

> [64] Both applicant and respondent agree that the applicant used a single bevelled washer at each waler end of the assembly. Again, the evidence shows that this was done pursuant to instructions of the lead contractor. Again, there is no evidence, other than speculation, that this single bevel caused or contributed to the failure. In fact, post-failure inspection appeared to show the hex nuts and bevelled washers still seated and aligned properly.
>
> [65] As to reporting and inspection issues, the respondent (and his experts) have spoken at length about their understanding of industry practice. While this might be interesting reading, it is in no way helpful to the issue of causation. Poor reporting and poor inspection, even if they occurred, did not cause this wharf to collapse.
>
> [66] In my view, without the respondent being able to show some evidence of causation as against the applicant, this matter cannot and should not proceed to

> trial, since an essential element of the claim is already known to be lacking. There is no evidence of any causal link between the work of Atlantic and the loss.

[55] The motions judge goes on to determine that there is no evidence the use of a single bevelled washer caused or contributed to the failure. She noted that Beaver instructed Atlantic to use a single bevelled washer, again concluding the expert evidence on these issues was speculative.

[56] With respect to the allegation of improper inspection, as the motions judge indicated, it may not have caused the wharf to collapse. However, it may have been a factor in failing to identify deficiencies.

[57] The motions judge determined causation rather than determining whether there was a genuine issue of material fact in dispute. As noted earlier, in *Ketler*, *supra*, speculative evidence under the "but for" test is "the nature of the beast". A trial judge could rely on the expert evidence opining on the various alleged failures and determine that Atlantic should bear some of the liability. That is a trial judge role to decide, it is not mine nor was it the motions judge's. The motions judge usurped the trial judge's role by taking the decision of whether to rely on this expert evidence into her hands. In doing so she erred.

Conclusion:

[58] I would allow the appeal and set aside the order for summary judgment with costs to Hatch, payable by Atlantic in the amount of $2,000, inclusive of disbursements, in any event of the case.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Scanlan, J.A.