

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

BETWEEN:

ROBERT HENRY MCDONALD trading and carrying on business as SURPLUS DIRECT)	
)	
(Plaintiff) Appellant	)	D. G. Hill
	)	for the Appellant
- and -)	
	)	B. C. Ross and
PIOTR BIALOWAS, TOMASZ BIALOWAS	)	D. A. Chicoine
trading and carrying on business as TOP PRO	)	for the Respondents
ROOFING LTD.)	
	)	Appeal heard and
(Defendants) Respondents	)	Decision pronounced:
	)	April 8, 2022
- and -)	
	)	Written reasons:
THE CITY OF WINNIPEG	)	April 27, 2022
)	
(Intervener))	

On appeal from 2021 MBQB 161

MONNIN JA (for the Court):

[1] The plaintiff appeals from a decision, after trial, dismissing his claim for a declaration that a door on his building is governed by, required and compliant with the *National Building Code, Canada, 1941* (the *1941 Code*) or, in the alternative, satisfies the requirements of the current building code of

the intervener. After the hearing of the appeal, we dismissed it with brief reasons to follow. These are those reasons.

[2] While the claim was commenced by way of a notice of application, it was later continued as a statement of claim seeking various relief against the defendants who are the plaintiff's next-door neighbours. The relief claimed included an easement by prescription and a declaration that a party-wall agreement existed and was in force, as well as the declaration.

[3] By the time of the trial, the only relief still sought was for a declaration that the door at issue was governed and compliant with the 1941 *Code*. At trial, the intervener also challenged the jurisdiction of the Court to deal with the issue given that there were proceedings pending before various of its committees.

[4] After an eight-day trial, the trial judge reserved his decision. He issued lengthy reasons. In his decision, he assumed jurisdiction to deal with the issue and found that the plaintiff had failed to prove that the door was in existence during the time that the 1941 *Code* was in effect. As well, he found that, in the alternative, the plaintiff would still have to comply with the current building code requirements since the door created an unsafe condition as it could not be used safely without access to the defendants' property.

[5] On appeal to this Court, the two issues raised can be summarized as follows:

- (a) Did the trial judge err in concluding that the plaintiff had failed to meet his onus to prove that the door existed at the time of the 1941 *Code*?

- (b) If the door did comply with the 1941 *Code*, did it meet the requirements of being an emergency exit door and could be used as such?

[6] Counsel for the plaintiff agreed that, if he was unable to convince us that he should succeed on the first issue, then the second issue was moot. The plaintiff also raised an issue of procedural unfairness, namely, that he was denied an adequate right of reply. In our view, the argument is without merit. The record is clear that the plaintiff was provided with an opportunity to reply.

[7] The main thrust of the plaintiff's argument on the first issue is that the trial judge erred in law by not accepting the evidence of Allan Adelman (Mr. Adelman), whose father occupied the property where the door in question is located from 1945 until 1963 and who remembered it as a young boy. He argues that this was the best evidence of the existence and timing of the door and should have been accepted by the trial judge over the evidence of the defendants' expert and photographic evidence tendered at trial to the effect that the door was not built until much later.

[8] The trial judge found Mr. Adelman's evidence unreliable. Mr. Adelman passed away prior to trial and was not available to be cross-examined. His evidence was adduced under section 58 of *The Manitoba Evidence Act*, CCSM c E150. The trial judge noted that Mr. Adelman's affidavit was based on events which had occurred some 56 to 76 years before he swore it at a time when he was 12 years old. The trial judge also found that Mr. Adelman's evidence was inconsistent with the evidence of the defendants' expert mason, who testified that the design and materials used in the door indicated that it was likely built in the 1980s. The trial judge also

relied on the fact that there was no indication of the door in any of the plans, permits or the intervener's inspection reports, noting that it can be difficult to locate permits for older buildings in the intervener's records. He reviewed an aerial photograph of the building taken in November 1959, produced by the plaintiff, which he found did not show the door.

[9] The decisions of a trial judge on issues of reliability and credibility are entitled to substantial deference. They should not be set aside unless there is a palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33). We see no error in the trial judge's assessment of the evidence or his conclusions with respect to the likely date of the construction of the door. We have no reason to interfere with his determination that the plaintiff had failed to meet his onus of proving that the door came into existence during the currency of the 1941 *Code*.

[10] That would determine the first issue on this appeal and render any discussion of the second issue unnecessary.

[11] We therefore dismissed the appeal with costs in favour of the defendants.

Monnin JA

Pfuetzner JA

Spivak JA
