IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Austin v. Dunne*, 2024 NLCA 28
Date: August 2, 2024
Docket Number: 202301H0035 and 202301H0039

BETWEEN:

PETER AUSTIN — APPELLANT/ RESPONDENT BY CROSS-APPEAL

AND:

DARLENE DUNNE — RESPONDENT/ APPELLANT BY CROSS-APPEAL

Coram: D.E. Fry C.J.N.L., W.H. Goodridge and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201901G5152 (2023 NLSC 77)

Appeal Heard: April 16, 2024
Judgment Rendered: August 2, 2024

Reasons for Judgment by: K.J. O'Brien J.A.
Concurred in by: D.E. Fry C.J.N.L. and W.H. Goodridge J.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Jonathan Martin
Counsel for the Respondent/Appellant by Cross-Appeal: Johnathan E. Earle

Authorities Cited:

CASES CITED: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Morgan v. Oates*, 2007 NLCA 40; *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Fiander v. Mills*, 2015 NLCA 31; *Walsh v. TRA Company Limited*, 2023 NLCA 23; *Portugal Cove - St. Phillips (Town) v. Willcott*, 1997 CanLII 14702 (NLCA); *Hiscott v. Hall*, 2015 NLCA 1; *R. v. Garford*, 2021 ABCA 338; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397.

K.J. O'Brien J.A.:

[1] This appeal concerns the division of profits from the sale of a property and the availability of aggravated and punitive damages for breach of contract.

OVERVIEW

[2] Following a trial, a judge of the Supreme Court of Newfoundland and Labrador, General Division, found that Peter Austin and Darlene Dunne embarked upon a common enterprise to purchase, fix-up, and sell a house for profit. Mr. Austin paid the down payment and Ms. Dunne purchased the house and obtained the mortgage solely in her name. Unhappy differences arose between the two and the house was eventually sold.

[3] The parties did not have a written contract and did not agree on the terms of their agreement. Mr. Austin alleged that terms were as per a draft agreement that he presented to Ms. Dunne but that she did not sign. That draft agreement stated that Mr. Austin would pay an $18,000.00 down payment, that Ms. Dunne would obtain a $72,000.00 mortgage to finance the purchase of the property, and that when the property was resold, the proceeds would be used to pay out the mortgage first and then be shared between the two in proportion to the equity that each had invested. The draft agreement further stated that each would pay one-half of the mortgage payments throughout the term of the mortgage. Finally, it stated that in the event of a major disagreement, the property would be listed and sold without undue delay so that the proceeds could be divided in accordance with each party's equity position.

[4] Ms. Dunne alleged that Mr. Austin was to live in the property as a tenant, paying the mortgage and property taxes, or a portion of them. If he did any renovations to the property, they would be for his benefit while he lived there. She did not attribute much value to the house. Her position was that she would make her money back from selling the land, but she also indicated that if Mr. Austin had reimbursed her by paying off the mortgage, she would have transferred the property to him.

[5] What ultimately happened was not as either party alleged they had agreed. Ms. Dunne purchased the property in her name only in June 2014 for $73,500.00. She obtained a mortgage for $58,800.00 and the rest of the money came from Mr. Austin. Mr. Austin lived in the house and did considerable renovations. To a lesser extent, Ms. Dunne contributed to renovations. Mr. Austin, over a period of several years, paid the mortgage payments and property tax.

[6] In April 2019, Ms. Dunne learned that the mortgage was in arrears. She settled the arrears and made the mortgage payments going forward. In May 2019, she listed the property for sale. She received an offer to purchase the property for $153,900.00 but the sale fell through. Ms. Dunne's position was that it fell through because Mr. Austin refused to give vacant possession. Mr. Austin's position was that the sale fell through because Ms. Dunne refused to acknowledge his ownership interest in the property. He also believed that the property was worth over $170,000.00.

[7] In August 2019, Mr. Austin filed a statement of claim against Ms. Dunne and Ms. Dunne filed her defence and counterclaim. The property was sold in December 2022 for $135,000.00. The net proceeds of sale, $124,216.23, were held in trust pending the outcome of the litigation between the parties.

[8] Following trial, the judge gave a written decision (*Austin v. Dunne*, 2023 NLSC 77 ("Decision")). He found that there was no tenancy agreement, as claimed by Ms. Dunne. Based on the parties' actions, he found that they had an agreement to buy the property together with a view to fixing it up and selling it for a profit. He further found that they had agreed that each would contribute to the property, and that when it was sold, they would be reimbursed for their contributions and split the proceeds.

[9] The judge found that Mr. Austin had unreasonably intervened and caused the sale for $153,900.00 to fall through because he felt that the selling price was too low.

The judge stated: "Ultimately [Ms.] Dunne was able to sell the property for $135,000.00. The loss in value of $18,900.00 is attributable solely to [Mr.] Austin's actions, and I shall take that into account in my final assessment of damages in this matter" (Decision, at para. 58). He also found it was unreasonable for Ms. Dunne to have taken the position that Mr. Austin had no legal interest in the property.

[10] From the net proceeds, the judge ordered that Mr. Austin be reimbursed for his down payment and insurance payments, and that both parties be reimbursed for their mortgage and property tax payments. He also ordered that Mr. Austin be reimbursed for materials and services he purchased, for which he had receipts, and that Ms. Dunne be reimbursed for a water pump she had purchased. After these reimbursements were made, $15,534.43 remained to be divided.

[11] The judge did not accept Mr. Austin's accounting for the hours that he had spent working on the property nor the hourly rate that Mr. Austin expected to be paid. That said, the judge stated that he would not "discount his efforts entirely" (Decision, at para. 69).

[12] The judge discounted part of Ms. Dunne's claim, in particular, her claim for a per diem for checking on the property after Mr. Austin had vacated it.

[13] The judge ultimately decided that Mr. Austin was entitled to 85% of the remaining funds, and Ms. Dunne 15%:

> [72] When one considers the contributions of the parties to the acquisition, renovation, marketing and sale of the property, I find that Austin's efforts are considerably in excess of those of Dunne's. A fair division of the remaining proceeds of the sale would give Austin 85% of the remainder and Dunne 15%. This works out to $13,204.27 for Austin and $2,330.16 for Dunne. I am not unmindful of the fact that Austin lived in the property for a number of years. That residence is taken into account in arriving at the 85/15 split mentioned herein.

[14] A table prepared by the judge to show the result of his decision is attached to these reasons as an appendix.

[15] Mr. Austin appealed and Ms. Dunne cross-appealed the Decision, both alleging specific errors. However, neither of them appealed the judge's finding that they had an agreement to buy, fix up, and sell the house, and share any profit. Nor did they appeal the judge's decision to reimburse each of them for the out-of-pocket expenses that he considered proven.

[16] For the reasons that follow, I would dismiss the appeal and cross-appeal.

ISSUES

[17] Mr. Austin alleges the judge erred by:

a. accepting the value of the property as $135,000.00, the price it sold for in December 2022, instead of $160,000.00, the value it was given by a certified property appraiser;

b. failing to indemnify him for monetary contributions to the property in the amount of $13,300.69;

c. treating labour contributions differently from monetary contributions and by attributing 15% of the remaining funds to Ms. Dunne when she had not contributed 15% of the labour;

d. holding him responsible for the loss of the $153,900.00 sale;

e. not awarding him aggravated and punitive damages; and

f. not awarding him costs.

[18] Ms. Dunne alleges the judge erred by:

a. failing to indemnify her for the $18,900.00 loss in value of the property due to Mr. Austin's actions;

b. failing to indemnify her for her contributions to maintaining the property and preparing it for sale; and

c. not awarding her aggravated and punitive damages.

[19] Ms. Dunne initially appealed the costs award, but she withdrew this ground of appeal at the oral hearing.

STANDARD OF REVIEW

[20] The standard of review on appeal is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. For questions of law, the standard is correctness. On a question of law, an appellate court can replace the trial judge's opinion with its own. For questions of fact and of mixed fact and law, the standard is palpable and overriding error. On this standard, the appellate court can only intervene if there is an obvious error in the trial decision that is determinative of the outcome of the case. The fact that an alternative factual finding could be reached based on a different assignment of weight does not mean that a palpable and overriding error has been made. However, if the judge made an extricable error in principle with respect to the characterization of the legal standard in question or its application, that error amounts to an error of law and the applicable standard is correctness (*Housen,* at paras. 8, 10, 26-27, 36-37; and *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33).

ANALYSIS

Did the judge err by accepting the value of the property as $135,000.00?

[21] Mr. Austin submits that the judge accepted the value of the property as $135,000.00, the price it sold for in December 2022. He states the judge erred by accepting this price as the fair market value because it was a "liquidation sale" and Ms. Dunne had not done anything to market the property for six months prior to that sale.

[22] Mr. Austin further submits that the judge erred when he wrote:

> [22] No expert evidence was led by either party to justify the valuations that they sought, or the reasonableness of the price that was eventually obtained.

[23] Mr. Austin argues that this is a palpable and overriding error because he had called a certified property appraiser at trial, William Balsom, who appraised the property as worth $160,000.00 in October 2020.

[24] I do not agree that the judge erred as alleged. First, at trial Mr. Austin had testified that he considered the property to be worth between $170,000.00 and $175,000.00 (Transcript, Vol. 1, at 129, 179; and Decision, at paras. 32, 57, 76). So, although the judge did not reference Mr. Balsom's appraisal, he was not incorrect

when he stated that Mr. Austin did not lead any expert evidence to justify his valuation of the property. Mr. Balsom's appraisal was $160,000.00, over $10,000.00 less than Mr. Austin's valuation.

[25] Second, it is not accurate to state that the judge accepted the value of the property as $135,000.00. On a fair reading of the Decision, the judge accepted that the property could have sold for $153,900.00 in 2019, but for Mr. Austin's intervention. In apportioning the net proceeds, the judge stated that he would account for Mr. Austin being responsible for a loss of value of the property of $18,900.00, which was the difference between the actual sale price in December 2022 and the $153,900.00 offer received in 2019. The 2019 offer was a third-party offer received after the property had been listed for sale with a real estate agent for $169,900.00 (Decision, at para. 40; and Transcript, Vol. 2, at 179). Although the judge did not reference the Balsom appraisal in the Decision, it was open to him to prefer the value indicated by the amount for which the house could have previously sold.

[26] Finally, the Balsom appraisal was from October 2020, more than two years before the property was sold. Although Mr. Balsom testified that the property prices had generally increased in the period immediately following his appraisal date, he also testified that there was a downturn in the market starting in the last quarter of 2022 (Transcript, Vol. II, at 130, ln 14 to 132, ln 8). He did not testify as to what his appraisal of the property would be as of December 2022.

[27] The judge divided the actual net proceeds of the sale of the property. This is consistent with his finding that the parties had agreed to divide the profit between them. Having found that neither of them had abided by their agreement, the judge endeavored to put both parties in the position they would have been in had they done as agreed.

[28] Mr. Austin has not identified any error of law or any extricable error of law in what the judge did. Nor has he identified any palpable and overriding error in the judge's assessment of the evidence.

Did the judge err by disregarding Mr. Austin's expenditures of $13,300.69?

[29] Mr. Austin had the burden to prove his claimed contributions to the property. The judge found that Mr. Austin had proven the expenses for which he provided receipts. The judge did not accept as proven other expenses for which Mr. Austin had either paid cash or produced only a credit card statement.

[30] Weighing the evidence and determining if it is sufficient to meet the burden of proof is a matter for trial judges. This Court will not intervene simply because it might have weighed the evidence differently.

[31] The credit card statements Mr. Austin provided listed only vendors and amounts, not the goods or services purchased. Mr. Austin did not present evidence from any third parties from whom he had purportedly purchased these goods and services. As such, his evidence was the only evidence supporting these claims. Special damages, or out-of-pocket expenses, are expected to be proven to as great an extent, or as fully, as possible in the circumstances of a particular case (*Morgan v. Oates*, 2007 NLCA 40, at para. 39). The judge did not accept Mr. Austin's evidence as sufficiently credible or reliable to establish the payments. I would not interfere.

[32] There are three expenses for which Mr. Austin produced corroborating documentation, either an invoice or e-transfer proof, for which the judge did not compensate him. The first was for a home inspection of the property that Mr. Austin commissioned before Ms. Dunne purchased the property. The second was for a survey for a larger parcel of land than what Ms. Dunne purchased. The third was for a septic design that was never used.

[33] The judge did not address these claims in the Decision. As a result, I cannot know if the judge considered but rejected them, or if he overlooked them. Overlooking them would be an error, but such an error is only reviewable on appeal if it reasonably could have affected the outcome of the case. I am not satisfied that it could. None of these expenses relates to improvements to the property or carrying costs of the property, such as insurance or property tax. They were expenses incurred by Mr. Austin before Ms. Dunne agreed to purchase the property or, in the case of the septic system, never used for the benefit of the property. So even if the judge failed to consider these claims, given his findings as to the terms of their agreement, I am not satisfied that his decision on apportionment would have been any different had he considered them.

Did the judge err by treating monetary contributions differently from labour contributions and by attributing 15% of the remaining funds to Ms. Dunne?

[34] Mr. Austin submits that the judge apportioned the remaining proceeds on an 85%-15% split based on the estimated labour contributions of the parties. He says this was an error because his labour contributions were 95% of the overall

contributions. He further submits that, having found that only Ms. Dunne was in breach of the contract, the judge should have made Mr. Austin whole by fully compensating him. Making Mr. Austin whole, in his submission, would have been to compensate him for 2300 hours of work at $20 per hour less an amount for him not paying rent on a property for which he was only a 50% owner.

[35] There are several problems with Mr. Austin's submission. The first is that the judge did not decide the 85%-15% split based solely on the estimated labour contributions of the parties. The Decision, read in its entirety, reveals that in settling on this split, the judge considered: (1) the $18,900.00 loss in value to the property due to Mr. Austin impeding its sale in 2019 (para. 58); (2) the contributions of the parties to the acquisition, renovation, marketing, and sale of the property (paras. 69, 72); and (3) Mr. Austin's residence in the property for a number of years (para. 72).

[36] The second problem with Mr. Austin's submission is that the judge did not find that only Ms. Dunne was in breach of their agreement. He found that Ms. Dunne was entitled to mitigate her losses by "getting out of a deal that [Mr.] Austin was abandoning by his failure to keep up the mortgage, tax and other payments" (Decision, at para. 76). The judge also found that Mr. Austin's interference in the 2019 sale was improper (Decision, at paras. 58, 76). Finally, he held that "[b]oth parties share the blame for this investment derailing as it did" (Decision, at para. 77).

[37] Lastly, the judge did not accept Mr. Austin's accounting of his hours or the hourly rate that he claimed:

> [69] I am not satisfied with Austin's accounting for the number of hours that he might have spent in effecting the renovations. He did not keep an ongoing tally of his hours, and attempting to put a number on the hours that he might have spent on the project long after the fact does not satisfy me, on a balance of probabilities, that the amounts claimed are correct. While I will not discount his efforts entirely, I will not accept either the number of hours that he is claiming, nor the value in terms of a price per hour that he expects to be paid.

[38] Weighing the evidence is a matter for trial judges. The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Salomon*, at para. 33; and *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38). It was open to the judge to reject Mr. Austin's claimed hours and rate for being unproven, and there is no basis for this Court to interfere with his finding.

[39] Mr. Austin has not established any reviewable error by the judge in accounting for his labour contributions to the property.

Did the judge err by holding Mr. Austin responsible for the loss of the $153,900.00 sale?

[40] Mr. Austin submits that the judge should not have held him responsible for the loss of the $153,900.00 sale in 2019. His position is that he was entitled to block the sale because Ms. Dunne was refusing to recognize his interest in the property. In essence, Mr. Austin objects to the judge's finding that Ms. Dunne was entitled to sell the property to mitigate her losses caused by Mr. Austin's breach of the agreement by failing to make mortgage payments.

[41] Mr. Austin is raising errors of mixed fact and law. To be successful before this Court, he must show that the judge made a palpable and overriding error. He has not.

[42] The judge heard considerable and often contradictory evidence. Much of the contradictory evidence came from Mr. Austin and Ms. Dunne, so the judge had to assess their credibility and the reliability of their testimony. It is clear from the Decision that he did not believe everything testified to by either of them, but that he believed some of what each of them said. Trial judges, who hear from witnesses under both direct and cross-examination, are best placed to assess credibility. They may believe all, some, or none of what a witness says.

[43] Mr. Austin has not established that the judge failed to consider relevant evidence, misunderstood evidence, or made any legal error. He simply disagrees with the judge's findings and urges this Court to find differently. However, as I have already indicated, this Court cannot intervene simply to reweigh evidence and come to a different conclusion. Mr. Austin has not shown a reviewable error in the judge's assessment of the evidence or his findings.

Did the judge err by not awarding either party aggravated or punitive damages?

[44] At trial, both parties claimed aggravated and punitive damages against the other. The judge addressed their claims in the Decision as follows:

> [61] Both sides have made allegations against the other, are claiming all manner of damages flowing from the ill treatment each has suffered at the hands of the other. I am not awarding aggravated, punitive or any similar type of damages to either side. As far as I am concerned each party has treated the other poorly. Neither one should receive compensation in the form of aggravated or punitive damages.

[45] Both parties now ask this Court to overturn this aspect of the judge's decision. They both submit that they should be entitled to aggravated and punitive damages and I will deal with their arguments together. To begin, it is helpful to briefly review the law applicable to the two types of damages claimed.

[46] The term "aggravated damages" has not always been used consistently by courts. However, it is often used to describe claims for compensation for mental distress, humiliation, or loss of enjoyment caused by a breach of contract. Mr. Austin and Ms. Dunne both seek damages of this nature.

[47] In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, the Supreme Court of Canada described this type of damages as "mental distress damages" (para. 53) and I will do the same. Although the Supreme Court affirmed that mental distress damages are compensable in breach of contract cases, the Supreme Court noted:

> [45] It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. …

[48] The Supreme Court went on to articulate the conditions under which mental distress damages will be awarded:

> [47] …The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

[49] Unlike mental distress damages, punitive damages are not of a compensatory nature. Instead, they are designed to address the purposes of retribution, deterrence, and denunciation (*Fidler*, at para. 61; and *Whiten v. Pilot Insurance Co.*, 2002 SCC

18, [2002] 1 S.C.R. 595, at para. 43). To attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; and *Whiten*, at para. 36). In breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. For example, where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement (*Fidler*, at para. 63).

[50] The judge did not articulate the legal test he was applying in evaluating the claims for mental distress or punitive damages. It would be preferrable if he had. However, failing to state the legal test is not a reversible error if, based on the record, it is apparent that the judge took into account the appropriate law, and it is further apparent that the decision was justifiable on the basis of the proper tests (*Fiander v. Mills*, 2015 NLCA 31, at para. 16).

[51] Here, it is apparent that the facts as found by the judge do not meet the legal tests for mental distress or punitive damages. With respect to the former, the contract was a business dealing – the parties planned to buy, renovate, and sell a house for profit. The object of the contract was to make a profit, not to secure a psychological benefit that would bring mental distress upon breach within their reasonable contemplation. Moreover, the judge found that each party "treated the other poorly" (para. 61). This was a two-way street and not the type of case in which the degree of mental suffering caused by the breaches was sufficient to warrant compensation by one to the other.

[52] With respect to the punitive damages, nothing in the judge's findings suggest that the conduct of the parties departed markedly from ordinary standards of decency. The type of conduct that attracts punitive damages is only found in exceptional cases and has been described as "malicious, oppressive and high-handed" (*Hill*, at para. 196; and *Whiten*, at para. 36). Additionally, neither party has established an independently actionable wrong such that punitive damages would be awarded.

[53] In short, although the judge did not articulate the tests he was applying, I do not find any reviewable error in his decision, based on the facts found, to deny each party's claim for mental distress and punitive damages.

Did the judge err by not awarding Mr. Austin costs?

[54] The judge declined to award either party costs because of their actions and the mixed result (Decision, at para. 79). Mr. Austin appeals this finding primarily because he disagrees that there was a "mixed result". He submits that he was, in fact, the successful party, and as such, he has a reasonable expectation of receiving his costs. He also submits that he should receive costs at a higher level because Ms. Dunne owed him a fiduciary duty, which she breached.

[55] Mr. Austin is correct that a successful party has a reasonable expectation of receiving costs (*Walsh v. TRA Company Limited*, 2023 NLCA 23, at para. 248; and *Portugal Cove - St. Phillips (Town) v. Willcott*, 1997 CanLII 14702 (NLCA), at para. 10). However, I cannot agree that he was the successful party. The judge found that Mr. Austin breached his agreement with Ms. Dunne by failing to make mortgage payments. He also found that Mr. Austin wrongfully interfered in the 2019 sale. Mr. Austin did not succeed in his claim for damages because Ms. Dunne prevented a sale of the property for $170,000.00 (Decision, at para. 32). Nor did he succeed in his claim for aggravated and punitive damages. He was only partially successful in his claim for compensation for his monetary and labour contributions to the property. In these circumstances, he cannot reasonably be viewed as the successful party. This was a mixed result case.

[56] This Court owes deference to a trial judge's cost award, including the findings of fact supporting that discretionary decision. A judge's decision that each party shall bear their own costs is entitled to deference provided that the discretion has been exercised judicially (*Walsh*, at para. 253; and *Hiscott v. Hall*, 2015 NLCA 1, at para. 13). Here, I am satisfied that it was. This is not a case where the judge departed from the usual rule that costs be awarded to the successful party. This was a mixed result case, for which it is common that no costs be awarded to either side.

[57] Regarding Mr. Austin's claim that he should be awarded costs on a higher scale because Ms. Dunne breached a fiduciary duty, his submission does not align with the facts as found by the judge. The judge did not find that Ms. Dunne was in a fiduciary position. He found that both parties breached their agreement and took unreasonable positions against the other. Mr. Austin does not accept the judge's finding of facts, but he has not established any error that would permit this Court to interfere with them or with the judge's costs decision.

Did the judge fail to account for the $18,900.00 loss in value of the property due to Mr. Austin's actions?

[58] This issue was raised by Ms. Dunne on cross-appeal. She submits that the judge erred by omitting to credit her for a 15% portion of the $18,900.00 loss of value of property due to Mr. Austin's interference with the 2019 sale.

[59] In the Decision, the judge stated that he would take into account in his final assessment the loss in value of $18,900.00 that was solely attributable to Mr. Austin's actions (para. 58). However, later in the Decision, when he decided that a fair division of the remaining proceeds of the sale would be 85% for Mr. Austin and 15% for Ms. Dunne, he did not mention that factor again (para. 72). Because of his failure to mention the loss in value in the later part of the Decision, Ms. Dunne assumes that the judge forgot to consider it.

[60] However, Ms. Dunne's assumption does not accord with how appellate courts review judicial reasons. On appellate review, judicial reasons are read functionally and holistically, in light of the evidence and the arguments at trial. A fair reading of a judge's reasons does not isolate one passage, as all parts of the decision must be read in the context of the whole (*R. v. Garford*, 2021 ABCA 338, at para. 16; *Housen*, at para. 4; and *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at paras. 2, 16-18, 23).

[61] The judge stated that he was going to account for the loss of value in his final accounting. As such, this Court will presume that he did as he said he would, unless there is reason to hold otherwise. Failing to mention the loss of value a second time when he decided the fair division of the proceeds is not enough, and there is nothing else in the Decision, or the record generally, to suggest that he did not account for it. Clearly, the 85%-15% split was not the result of a precise calculation, rather it was the judge's assessment of a fair division based on all of the factors that he recited in the Decision.

[62] As a result, I am not satisfied that the judge erred as Ms. Dunne has alleged.

Did the judge err by failing to indemnify Ms. Dunne for her contributions to maintaining the property and preparing it for sale?

[63] The issue, raised by Ms. Dunne on cross-appeal, arises from the judge's dismissal of her claim for per diem costs related to her visits to the property following Mr. Austin vacating it. The judge wrote:

> [63] In the same vein [as Mr. Austin's labour claim], Dunne is claiming a per diem for attending at the property every other day after Austin had vacated same. She claimed that this was done in order to ensure that the property was safe and to satisfy the insurance. This claim is overkill. The safety of the property and the insurance requirements could have been satisfied by installing an alarm system at much lower cost. Parties are expected to mitigate their losses, not inflate them.

[64] Ms. Dunne submits that the judge failed to recognize that she had a legal duty to maintain the property and that his assumption that an alarm system could have been used and been less costly was an error. She asks to be indemnified in part or in full for the expenses she incurred during this period.

[65] I agree with Ms. Dunne that the judge erred by speculating about the effectiveness and costs of an alarm system when there was no evidence before him to support his conclusions. However, I am not satisfied that this error is an overriding one, meaning, that I am not satisfied that it affected the outcome of the case.

[66] At trial, Ms. Dunne did not produce gas receipts or any other receipts evidencing out-of-pocket expenses. Instead, she claimed a "per diem" based on $15 an hour for time spent travelling to and from the property and for work she did to make the property ready for sale (Transcript, Vol. III, at 25-27). Similar to his treatment of Mr. Austin's claimed labour hours and rate, the judge found this to be an inflated claim. Like Mr. Austin's claimed hourly rate, Ms. Dunne's hourly rate was not based on any agreement between the parties.

[67] In his final accounting, the judge considered Ms. Dunne's contributions to the marketing and sale of the property (Decision, at para. 72). Even if he had not erred by speculating about the alarm system, I am not satisfied that he would have awarded Ms. Dunne more than the 15% that he did. He treated each party's claim for hourly rates for their personal time similarly, by considering them in his final division.

DISPOSITION

[68] For these reasons, I would dismiss the appeal and the cross-appeal.

[69] Given that the parties have had mixed success at this Court, I would not order costs.

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K.J. O'Brien J.A.

I concur : _____

D.E. Fry C.J.N.L.

I concur : _____

W.H. Goodridge J.A.

APPENDIX

Monetary Entitlement of the Parties

Item	Austin	Dunne	Total
Refund of down payment	17,758.50		17,758.50
Refund of mortgage payments	26,405.96	5,000.00	31,405.96
Mortgage payout		27,778.09	27,778.09
Reimburse property taxes	2,983.90	2,600.00	5,583.90
Reimburse insurance	7,429.35		7,429.35
Verifiable materials and labour	18,226.00		18,226.00
Paid for water pumps		500.00	500.00
Parties share of remainder	13,204.27	2,330.16	15,534.43
Total	86,007.98	38,208.25	124,216.23