

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Matthews and Chipman, J.J.A.

BETWEEN:

ECONOMICAL MUTUAL INSURANCE)	J. Michael MacDonald
COMPANY, a body corporate, of P. O. Box)	for the appellant
1082, Armdale, Province of Nova Scotia,)	
B3L 4L5)	Gerald MacDonald, Q.C.
)	for the respondent
)	
Appellant)	
)	
- and -)	
)	Appeal Heard:
)	October 6, 1992
)	
B.& G. GROCERIES LIMITED, of Arichat)	
in the County of Richmond and Province)	Judgment Delivered:
of Nova Scotia)	October 6, 1992
)	
Respondent)	

THE COURT: Appeal dismissed with costs set at 40% of those at trial, plus disbursements per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

MATTHEWS, J.A.:

The respondent claims it suffered losses as a result of theft from its premises, a convenience store, on April 22 or 23, 1990. It reported those losses to the appellant who insured the respondent for loss by theft. The claim for compensation was mainly for tobacco products but included video games, VCR's and various grocery items. The appellant denied the claim alleging that:

"(a) The Respondent through its principals was directly involved in fraudulently orchestrating this alleged loss;

(b) Alternatively, the Respondent through its principals fraudulently exaggerated its claim thereby vitiating coverage under the policy."

After trial, Mr. Justice Gruchy, on January 17, 1992, granted the respondent's claims. This is an appeal from that decision.

The applicable law has been stated and restated in numerous cases. The appellant alleges in effect, criminal conduct. Counsel agree that the burden upon the appellant is heavy: it must prove the allegations with a higher degree of certainty than that which a court would require in other civil actions. However, that burden remains proof on a balance of probabilities. **Dalton Cartage Co. Ltd. v. Continental Insurance Co.**, [1982] 1 S.C.R. 164.

Before the trial judge both counsel argued that the issues centered upon questions of fact involving the credibility of witnesses. The trial judge made such findings of fact. He made definitive findings of credibility, favouring the respondent's witnesses. The appellant was, and is, understandably suspicious of the claims. With respect, in essence, it

desires that we substitute its conclusions upon the evidence, for those of the trial judge. Again the burden upon the appellant is a heavy one. In *LaPointe v. Hopital Le Gardeur*, [1992] 1 S.C.R. 351, L'Heureux-Dubé, J. reiterated the principle that an appellate court should not interfere with a trial judge's findings and conclusions of fact failing a manifest error. Further, findings of fact based on the credibility of witnesses should not be reversed unless the trial judge made some palpable and overriding error.

We have reviewed the evidence and considered the written and oral submissions of counsel. It is our unanimous opinion that the trial judge made no such errors which would permit us to substitute a contrary opinion for his.

We dismiss the appeal with costs which we set at 40% of those at trial, plus disbursements.


J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.


