

PUGSLEY, J.A.: (Orally)

After a three day trial in February, 1998, Justice Haliburton of the Supreme Court, sitting alone, reserved judgment and subsequently filed a written decision on April 22, 1998, determining that the respondent Robert Baker and his alter ego, R. Baker Fisheries Limited, were entitled to specific performance of a written and verbal agreement requiring the appellant Cameron Widrig, and his alter ego, 2434132 Nova Scotia Limited, to retransfer a clam fishing license to the respondents.

Justice Haliburton also awarded damages to Mr. Baker of \$130,000 (an amount agreed by the parties) arising from the loss of the use of his license for the fishing seasons 1996 and 1997, and the profits that would have been generated thereby.

Mr. Widrig's counterclaim of \$30,000 (an amount quantified by the parties) was dismissed. Costs of approximately \$10,000, together with disbursements were awarded to the respondent.

The issues raised by this appeal are essentially concerned with findings of fact made by the trial judge, based upon the credibility of the witnesses, as well as findings based upon inferences from established facts.

With respect to the first issue, **Sopinka and Gelowitz**, write in their

text, **The Conduct of an Appeal**, Butterworths, (1993) at p. 40:

There is perhaps no starker distinction between a trial and appellate tribunal than the functional distinction arising from the trial court's responsibility to find facts. In recognition of the advantage held by the trier of fact, who has seen and heard the witnesses, appellate courts traditionally treat findings of fact with deference...

With respect to the second issue, Canadian courts adopt the English principle that an appellate court is as well placed to draw inferences from primary facts as the trial court (**Sherman v. Monarch Chrome Furniture Ltd.** (1959), 15 D.L.R. (2d) 6 (Ont. C.A.)).

In a course of a well reasoned, and thorough decision, of 38 pages, Justice Haliburton made very definite findings respecting credibility.

He said in part:

Where there is a dispute of fact between Baker and Widrig, I prefer the evidence of Baker to that of Widrig who I find to be less credible . . .

Widrig himself testified as to his agreement, albeit saying that he had been deceived. I accept the evidence of Baker that it is in the nature of the trade that prices cannot be guaranteed over the long term and, accordingly, price was subject to be renegotiated from time to time. Based on the evidence of the conversation relative to the reduced price, I am not persuaded that Widrig was deceived . . .

And again,

Widrig argues that he was deceived and induced to reduce his price as a result of the deception practiced by Baker with respect to his own sale price to his market. I find Baker's evidence on this point to be the more credible . . .

And finally,

I accept the evidence of Baker on these points. I find that Widrig agreed to the reduction in price as a result of what he called their “extensive negotiations”. I am not persuaded that he was deceived by Baker . . .

In addition to preferring the evidence of Baker to that of Widrig, the trial judge, also rejected Widrig’s specific evidence (concerning the shipping of clams directly to the American market without processing them in Nova Scotia), in favour of two other witnesses who directly contradicted the testimony of Widrig.

The credibility of witnesses is:

. . . a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge. (MacDonald, J.A. in **Travellers Indemnity Company Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434 (C.A.) at p. 437, as approved by this Court in **Parsons v. Parker** (1997), 160 N.S.R. (2d) 321 at p. 334.)

After reviewing the evidence adduced at trial, we are satisfied that there are no reasons let alone, any strong and cogent reasons, justifying this Court to reverse the findings of credibility made by the trial judge.

Justice Haliburton found that certain conditions were implicit in the agreement entered by the parties, for example:

- the product must arrive in marketable condition with an acceptable shelf life;
- the price Baker was obliged to pay Widrig would be “adequate to return a reasonable profit” to Baker;
- there was an experimental aspect of the arrangements between the parties so that either was free to terminate at the end of the fishing season.

We are satisfied, after reviewing the evidence adduced at trial, that Justice Haliburton properly drew these inferences from the evidence before him. We would not make any different finding on these issues from that made by the trial judge.

We also concur that Justice Haliburton was correct when he pierced the corporate veil, in light of the conduct and actions of Mr. Widrig, and upon being satisfied that Mr. Widrig’s numbered company was a mere facade and an alter ego for his own actions.

The conclusion of Justice Halliburton that the conduct of Mr. Baker did not constitute a fundamental breach of the agreement with Mr. Widrig is fully supported by the evidence which he found to be credible. Further in reaching that conclusion, Justice Halliburton did not in our view misapprehend or fail to consider certain evidence, as is submitted by counsel for the appellants.

We would dismiss, accordingly, the appeal with costs to the respondents against both appellants in the amount of \$4,000, plus disbursements.

Pugsley, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOHN CAMERON WIDRIG, LAURELLE
WIDRIG and 2434132 NOVA SCOTIA
LIMITED)

Appellants)

- and -)

R. BAKER FISHERIES LIMITED and
ROBERT W. BAKER)

Respondents)

REASONS FOR
JUDGMENT BY:
Pugsley, J.A.
(Orally)