

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: University of Kings College v. Edwards Dean and Company,
2006 NSSC 341

Date: 20061117

Docket: SH 260355A

Registry: Halifax

Between:

University of Kings College

Appellant

v.

Edwards Dean and Company

Respondent

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: October 24, 2006, in Halifax, Nova Scotia

Written Decision: November 17, 2006

Counsel: Robert Mann for the appellant
Thomas J. Singleton, for the respondent

By the Court:

[1] This is an appeal by the University of Kings College from an order made by Patrick L. Casey, Q.C., an adjudicator of the Small Claims Court, dated December 6, 2005.

[2] I have reviewed the order and stated case of the adjudicator including the summary report of findings and law.

[3] The appeal originates from a claim by the respondent, Edwards Dean & Company, against the appellant, the University of Kings College, for amounts owing for professional services rendered. The respondent was retained by the appellant to create a “Retirement Compensation Arrangement” (RCA) for three university employees. Such an arrangement provides benefits exceeding the allowable limits for an RRSP under the *Income Tax Act*. The services to be performed were set out in a letter of engagement dated February 16, 2004. The services included necessary research and instructions, trust registration with the Canada Revenue Agency, and having an affiliate, EDC Tax And Trust Services Inc., act as trustee for the arrangement. The fee to establish the arrangement was \$8,500.00. The university paid a retainer fee of \$4,000.00 on the date the letter of engagement was signed.

[4] The respondent commenced the work required to set up the arrangement, including retaining a lawyer to draft the documents. Draft documents were prepared and forwarded by February 27, 2004 and during the months of February and March there was correspondence among representatives of the parties, as well as an actuarial firm that was acting for the appellant. Ultimately, the appellant forwarded cheques for contributions and taxes to the respondent, with instructions to hold them pending the signing of the agreement. On March 25, 2004 the respondent was informed that the university had decided not to proceed with the arrangement through EDC Tax and Trust Services due to legal advice suggesting that the documents were unsatisfactorily drafted and concerns about “the distinct nature of the university environment as opposed to a corporate scenario”. The adjudicator noted:

- (35) When concerns had been raised initially by UKC that their solicitors were expressing an opinion that the documents were not satisfactory, Edwards had requested that he be contacted and have an opportunity to discuss

those concerns so that they could amend the documentation if necessary to address those concerns. His March 19 e-mail confirms this.

- (36) The initial documents prepared by Ling were forwarded on February 27, 2004, and with the exception of general concerns expressed in e-mails, the first indication that there were concerns from UKC's counsel was not until some time between March 19 and March 25.
- (37) Smith testified that one major concern that he had was that he did not want to incur extra legal fees that might be necessary to complete the contract. No evidence was provided as to the amount of legal fees that might have to be incurred.

[5] The adjudicator went on to address the complaints about the suitability of the documents as drafted. He noted that there were no particulars of the alleged inadequacy and that other drafting issues had been addressed earlier in the process. He referred, as well, to the opinion of the drafting lawyer that the documents should be signed by the participants, not only the university. He accepted "the evidence that similar documentation had been submitted to and approved by Canada Revenue Agency on previous occasions". He said:

- (43) I am unable to conclude from the evidence that the documents could not have been drafted in such a way as to satisfy the Defendants' concerns had those concerns been made known and conveyed in detail to Edwards and/or Ling promptly after receiving Ling's opinion.
- (44) Overall, the Court has not been provided with sufficient evidence from which it can conclude that the documents as drafted were inappropriate as an RCA for UKC.
- (45) While I accept that pensions at UKC are dealt with such that employees need not be signatories, I am unable to conclude from the evidence that the requirements of RCAs are the same. An RCA is, in fact, different from a pension in many respects.
- (46) On balance, I am unable to conclude that the Claimant has breached the contract on the issue of the signatories to the RCA.

[6] The adjudicator went on deal with the appellant's claim that EDC Trust, the affiliate that was designated as trustee under the arrangement, was required to be

licensed pursuant to s. 211 of the *Trust and Loan Companies Act*, which provides in part:

211(1) No person other than a ... licensed trust company shall conduct, undertake or transact the business of a ... trust company in the Province.

(2) No body corporate other than a licensed trust company shall offer its services to the public as or accept or execute the office of

[...]

(c) trustee.

(3) No person other than a licensed trust company shall hold itself out to the public in the Province as a licensed trust company by using in its name the words "Trust Corporation", "Corporation de fiducie", "Trust Corp.", "Trust Company", "Compagnie de fiducie", "Trust Co.", "Trustco", "Trustee Corporation", "Corporation fiduciaire", "Trustee Corp.", "Compagnie fiduciaire", "Trustee Company", or "Société fiduciaire" or any similar words in its name in conjunction with its business or undertakings, unless such name was lawfully in use before the day this Section comes into force.

(4) No company, other than a licensed company shall hold itself out to the public in the Province as a licensed company by conducting, undertaking or transacting any part or aspect of the business of a ... trust company.

(5) No person, other than a ... licensed trust company and a person authorized by that company to act on its behalf, shall solicit the business of a ... trust company in the Province.

(6) No person shall undertake, transact or solicit in the Province any part or aspect of the business of a ... trust company that is not licensed pursuant to this Act.

[7] Also relevant were ss. 2(1) and s. 3 of the *Act*:

2(1) [...]

(ab) "loan company" means a body corporate incorporated or operated for the purpose of receiving deposits from the public and lending or investing those deposits, but does not include a bank, a bank mortgage subsidiary, an insurance corporation, a trust company or a credit union incorporated pursuant to the Credit Union Act....;

(ai) "provincial company" means a loan company or trust company incorporated or continued pursuant to this Act and includes a loan company, trust company or any other body corporate authorized to execute the office of executor, administrator, trustee or guardian of a minor's estate or a mentally incompetent person's estate, incorporated pursuant to a special Act of the Legislature after the commencement of this Act, whether or not it is licensed pursuant to this Act, and "licensed provincial company" means a provincial loan company or provincial trust company licensed pursuant to this Act....;

(az) "trust company" means a body corporate incorporated or operated for the purpose of offering its services to the public to act as trustee, bailee, agent, executor, administrator, receiver, liquidator, assignee or guardian of a minor's estate or a mentally incompetent person's estate and for the purpose of receiving deposits from the public and of lending or investing those deposits....;

3 This Act applies,

(a) to every provincial company;

(b) subject to Section 4, to every loan company, trust company and every other body corporate authorized to execute the office of executor, administrator, trustee, guardian of a minor's estate or a mentally incompetent person's estate, incorporated pursuant to a special or general Act of the Legislature before the commencement of this Act; and

(c) subject to Section 8, to every extra-provincial company.

[8] The adjudicator held that there was no evidence that EDC Trust was incorporated or continued under the *Act*. He concluded:

(59) There is very little evidence before the Court concerning the activities of the company, EDC Trust. From the evidence, I conclude that it was a company incorporated for the purpose of acting as Custodian in respect of RCA arrangements being arranged by EDC for their clients.

(60) There is no evidence before the Court that EDC Trust, since its incorporation, has received deposits from the public other than through private RCA arrangements.

(61) The RCA which is the subject matter of this proceeding applied to three employees of UKC.

(62) From the evidence, I am unable to conclude that EDC Trust is the type of company which would fall within the ambit of the ... *Act* requiring that they be licensed pursuant to this *Act* for this particular transaction.

[9] After disposing of the argument under the *Trust and Loan Companies Act* the adjudicator found for the claimant, Edwards Dean and Company, ordering King's to pay the sum of \$5,775.00 plus interest of \$1,732.40 and costs of \$160.00 for a total amount payable at \$7,667.40.

[10] It is from this decision that King's appeals.

[11] Section 32 of the *Small Claims Court Act* R.S.N.S. 1989 c. 430 sets out the powers of the Supreme Court on an appeal:

A party to proceedings before the court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of:

- (a) jurisdictional error;
- (b) error of law
- (c) failure of follow the requirements of natural justice, by filing with the prothonotary of the Supreme Court a notice of appeal.

[12] The appellant filed a notice of appeal dated December 20, 2005 appealing from the order of the adjudicator on the ground of error of law.

[13] The particulars of the error from the grounds of appeal is as follows:

THAT the learned Adjudicator of the Small Claims Court erred in finding that the Retirement Compensation Agreement Plan set up by Edwards Dean and Company complied with all legal and regulatory requirements.

THAT the learned Adjudicator of the Small Claims Court erred in finding that the provisions of the *Trust and Loan Companies Act*, particularly section 211 of that *Act*, did not apply to Edwards Dean & Company.

[14] I am hearing the matter on appeal. I have not seen the witnesses give their evidence. I have not seen any transcript of the proceedings, as none is available. It is not for me, on an appeal, to overturn the decision of the adjudicator unless there is a palpable and overriding error.

[15] The circumstances in which this court ought to intervene in a Small Claims Court Order to redress reversible error was set out by Justice Saunders in *Brett Motors Leasing Ltd. V. Welsford* (2000), 181 N.S.R. (2d) 76 (S.C.), at para. 14:

One should bear in mind that the jurisdiction of this court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[16] The principle issue on the appeal is the adjudicator's conclusion that the *Trust and Loan Companies Act* did not apply to EDC Trust.

[17] The adjudicator found no evidence that EDC Trust was "a company incorporated or continued pursuant to the *Trust and Loan Companies Act*". From the evidence, he concluded that EDC Trust "was a company incorporated for the purpose of acting as custodian in respect of RCA arrangements being arranged by EDC for their clients". He found there was no evidence that EDC Trust since its incorporation had received deposits from the public, other than through these private RCA arrangements. Therefore, from the evidence, he could not conclude that the company was "the type of company which would fall within the ambit of the *Trust and Loan Companies Act* requiring that they be licensed pursuant to this *Act* for this particular transaction". In the summary report he stated that "there is no question that EDC Tax and Trust Services Inc. is not a licensed trust company pursuant to this legislation and that they were acting in the capacity of a trustee". He concluded that, in the context of the *Act* as a whole, the licensing requirement under s. 211 only applied to companies defined in s. 3 and found that the evidence did not prove that EDC Trust fell within those definitions.

[18] The appellant argues that the effect of the adjudicator's reasoning is to nullify the prohibition under s. 211 on unlicensed companies purporting to act as trust companies. It is implicit in the adjudicator's reasoning that he concluded that EDC Trust was acting in the capacity of a trustee without a license under the *Act*.

[19] The appellant argues that EDC Trust falls within the ambit of the legislation if it falls under the definition of "corporate body" (actually "body corporate") in s. 2(k): "a body corporate with or without share capital wherever or however incorporated".

Decision

[20] The adjudicator held that the prohibition in s. 211(2) must be read in view of s. 3. As such, although the company was not licensed pursuant to the regulation and was acting in the capacity of a trustee, s. 211(2) did not apply since the company was not shown to be caught by s. 3.

[21] With respect, I disagree and conclude that the adjudicator committed an error of law.

[22] Simply put, in my view, s. 3 describes entities to which the regulatory provisions of the *Act* apply. Section 211(2) is a blanket prohibition against bodies corporate offering their services to the public as a trustee unless they are licensed under the *Act*.

[23] Section 211(2) provides that "no body corporate other than a licensed trust company shall offer its services to the public as or accept or execute the office of ... (c) trustee". The adjudicator stated in his summary report that "there is no question" that EDC Trust "is not a licensed trust company pursuant to this legislation and that they were acting in the capacity of a trustee". He concluded, however, that:

Section 211 must be applied in the context of the legislation as a whole. I concluded that a proper interpretation of the *Trust and Loan Companies Act* was that it did not apply to each and every company but only to those companies defined in Section 3. I was unable to conclude from the evidence that the company ... fell within the definitions contained in Section 3 and, on the whole, I was unable to conclude ... that this was the type of company which fell within the

ambit of the legislation requiring that they be licensed for this particular transaction.

[24] The summary report prepared by the adjudicator adds several salient facts to the reasons set out in the decision: EDC was not a licensed trust company, and was acting as a trustee. These two facts bring the company into non-compliance with s. 211(2). Section 211(2) provides that “no body corporate other than a licensed trust company shall offer its services to the public as or accept or execute the office of ...(c) trustee”. A “body corporate” is a “body corporate with or without share capital wherever or however incorporated”. Having found these facts, however, the adjudicator declined to apply s. 211(2), suggesting that it only applied to companies referred to in s. 3. He has provided no reasoning for this interpretation of s. 211 and it would appear to be unsupportable in view of the plain wording of that section and of the definition of “body corporate”.

[25] In summary, the adjudicator does not explain why the words “this act applies” in s. 3 has the effect of ousting s. 211. Either s. 211(2) is a prohibition or it is not. The fact that a person who violates it commits an offence pursuant to s. 255(1)(c) suggests that it is a prohibition. The effect of the adjudicator’s interpretation of the *Act* is to make compliance voluntary; a company could operate in violation of the *Act* provided it avoided being classified under s. 3.

[26] Having concluded that the adjudicator erred in his interpretation of s. 211, I question whether he ought to have dealt with the *Act* at all. The invocation of the *Act* was evidently an after-the-fact rationalization for dispensing with the respondent’s services. The *Act* was not referenced in any of the correspondence between the parties cited by the adjudicator, nor was it raised in the pleadings.

[27] The real issue to be determined is the effect of the applicability of the *Trust and Loan Companies Act* upon the respondent’s claim. Having determined that the *Act* did not apply, the adjudicator then dealt with the claim as a simple claim for professional services rendered. However, he also stated that if the *Act* did apply, the respondent’s claim would fail. I am not satisfied that the adjudicator’s reasons explain why this would be the case. If the adjudicator was correct to state that the application of the *Act* would render the claim unsustainable, it was necessary to explain this conclusion, given that it would determine the result of the claim. In other words, even if the *Act* does apply, it is not clear from the adjudicator’s reasons why this creates a defence to the respondent’s claims. I believe it was an

error for the adjudicator not to address this issue and not to make the necessary findings of fact to support his conclusion. Accordingly, I am also remitting the matter back for hearing, on this basis, as well, before another adjudicator.

[28] To be clear, the conclusion I have reached on the apparent applicability of the *Act* is based on the facts as found by the adjudicator and my conclusion on the proper interpretation of s. 3 and s. 211(2) of the *Trust and Loan Companies Act*. If the *Act* is found to apply at a rehearing, the issue then to be determined is the effect of that finding on the main claim for services rendered.

[29] As I have indicated, this matter is being remitted back for hearing before another adjudicator.

Pickup, J.