SUPREME COURT OF NOVA SCOTIA
Citation: *Weller v. Hailey's Auto Sales,* 2015 NSSC 120

Date: 2015-04- 21
Docket: Halifax No. 431858A
Registry: Halifax

Between:

Anthony Weller

Appellant

v.

Bryan Moser,
carrying on business as Hailey's Auto Sales

Respondent

Judge: The Honourable Justice Peter P. Rosinski

Heard: March 31, 2015, in Halifax, Nova Scotia

Counsel: Anthony Weller, Appellant
Bryan Moser, Respondent

By the Court:

Introduction

[1] Mr. Weller brought his car to Hailey's Auto Sales/operated by Bryan Moser in order to effect repairs on his 2001 Honda Civic. Work was done on the vehicle on May 9, 2014. The total bill was $351.26. Within 10 minutes of Mr. Weller driving his car away from Mr. Moser's garage, the vehicle suffered a complete engine breakdown – the Small Claims Court adjudicator that heard this case concluded that all eight intake valves were bent.

[2] Mr. Moser took the vehicle back to his shop on May 12th, 2014. He disassembled the engine and concluded that the tensioner was the source of the problem. On May 13 he offered, as part of a good business practice and without admitting liability, that he would fix Mr. Weller's vehicle at no cost to Mr. Weller and that he was ordering parts in order to do the work. Thereafter, the relationship deteriorated. With the vehicle still at Mr. Moser's premises, Mr. Weller had his vehicle towed to another mechanic's premises – Darryl Bethune.

[3] Mr. Bethune undertook repairs which were completed by him and invoiced on June 3, 2014. The total cost of his services was $1941.20 (which included sending the vehicle to Nova Automotive for valve repairs).

[4] On July 4, 2014, Mr. Weller sued Mr. Moser in Small Claims Court, claiming $2250 plus costs of filing, serving documents and witness fees. On July 23, 2014, Mr. Moser filed a defence/counterclaim in which he argued "I was not given an adequate amount of time to rectify the problem". He counterclaimed for "parts which cannot be returned, court costs and travel expenses ($200 plus costs)".

[5] The hearing proceeded on August 12, 2014. On August 29, 2014, Adjudicator Casey concluded that the defendant, Mr. Moser, should pay to the claimant Mr. Weller $1454.89 damages, plus 15% HST, and court costs of $96.80, totaling $1769.92.

The appeal grounds

[6] Mr. Weller filed a notice of appeal in this court on September 30, 2014. He argued that the adjudicator had erred and specified:

- Disagree with the adjudicator's decision;

- Disagree with the manner in which hearing conducted;
- Disagree with several of adjudicator's flawed, mistaken and incorrect assumptions and conclusions;
- Disagree with award;
- Assumed previous connection with Casey Law Firm not an issue.

Jurisdiction of this court in such appeals

[7] Section 32 of the *Small Claims Court Act* provides that:

> 32 (1) 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
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> (a) jurisdictional error;
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> (b) error of law; or
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> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.
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> (2) A notice of appeal filed pursuant to subsection (1) shall be in the prescribed form and set out
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> (a) the ground of appeal; and
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> (b) the particulars of the error or failure forming the ground of appeal.
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> (3) Upon the filing of a notice of appeal in accordance with this Section, the prothonotary shall transmit a copy thereof to
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> (a) the adjudicator; and
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> (b) where the prothonotary is not the clerk of the Court, to the clerk.
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> (4) Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

> (5) Upon receipt of a copy of the notice of appeal, the clerk of the Court, where the prothonotary is not the clerk, shall transmit the file for the case to the prothonotary.
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> (6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal. 1992, c. 16, s. 124; 1996, c. 23, s. 39.

Standard of review

[8] As to the meaning of an "error of law" and the "failure to follow the requirements of natural justice" I rely on two cases to interpret each of those references in s. 32, "grounds of appeal".

[9] Regarding what is an "error of law", Justice Saunders (as he then was) stated in *Brett Motors Leasing Ltd. v. Welsford*, 1999 NSJ 466:

> 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.

[10] I also rely on the comments of Justice Robertson in *Paradigm Investments Ltd. v. Bremner's Plumbing and Heating Ltd.* 2010 NSSC 263 where she relies on the reasons of our Court of Appeal in *McPhee v. Gwynne–Timothy*, 2005 NSCA 80 at paras. 31 – 33, and specifically at para. 33 that:

> On questions of law the trial judge must be right. The standard of review was one of correctness. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract the correctness standard. Where on the other hand the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable in a standard of palpable and overriding error.

[11] In relation to the term "the requirements of natural justice", I note that the *Small Claims Court Act* itself contains some reference in this respect.

[12] Section 2 of the *Small Claims Court Act* sets out the purpose of that legislation in the following words:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[13] Our Court of Appeal has recently commented on what is "natural justice" in *Waterman v. Waterman*, 2014 NSCA 110, per Beveridge J.A.:

> 63 Natural justice has two important and distinct rules: an adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard. These rules have been historically described by the courts using Latin phrases. Gonthier J., in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, described the rules as follows:
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> > [66] ...It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)

[14] Regarding when judges or adjudicators should recuse themselves from hearing a case as a result of perceived or actual bias, I keep in mind the comments of Chief Justice Glube in *MacEwan v. Henderson* 2003 NSCA 133:

> 1 THE COURT:-- This is an appeal from an order of Justice J. Edward Scanlan of the Supreme Court of Nova Scotia dated May 28, 2003. Ms. MacEwan appeals Justice Scanlan's dismissal of her motion that he recuse himself from hearing her appeal from the decision of a Small Claims Court adjudicator.
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> 2 Ms. MacEwan was the plaintiff in an action in the Small Claims Court. She is represented here, as she was before the Small Claims Court and, on occasion, in the Supreme Court, by Mr. Graham Johnston.
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> 3 It was Ms. MacEwan's submission to Justice Scanlan, that in the preliminary proceedings leading up to the hearing of the appeal in Supreme Court, he acted in a way that demonstrated a reasonable apprehension of bias on his part, unfavourable to her.
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> Actual or reasonably apprehended bias goes to jurisdiction and, if found, a new hearing must follow. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 this was expressed by Cory J. as follows:
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> > 99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction ... In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held" ...
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> 4 The party alleging bias bears the onus of proof to the following standard, again referring to the judgment of Cory J. in *R.D.S., supra*:

> 111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude ..."
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> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, [1989] O.J. No. 2123, *supra*, at pp. 54-55; *Gushman*, [1994] O.J. No. 813, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, [1994] O.J. No. 406, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

5 Contrary to the submission of the appellant, an application for recusal is properly heard by the judge whom the party is asking to withdraw from presiding over further proceedings. There was therefore no error on that account. We have applied the standard set out in R.D.S. to the record before us. We have considered, individually and collectively, the various points which the appellant says are reflective of disqualifying bias on the part of Justice Scanlan. We are not persuaded that the judge erred in dismissing the application for recusal.

Analysis

[15] In his January 26, 2015 filed "particulars of errors and failures forming grounds for this appeal", Mr. Weller sets out his arguments why the decision of

Adjudicator Casey ought to be overturned by this court. He elaborated on them in oral argument. He passionately argued that all he sought in damages from the Small Claims Court was his out of pocket expenses which totalled approximately $1000 more than what the adjudicator ordered Mr. Moser to pay to Mr. Weller.

(1) Perceived or actual bias

[16] I have no videotape or audiotape from the hearing so I must decide this appeal on imperfect information. What I have available to me are the documents filed, and the decision and report given in writing by the adjudicator.

[17] The adjudicator has taken an oath to impartially try all matters that come before him – s. 6(6) *Small Claims Act*. Thus, I must begin with the presumption of judicial impartiality. Is there anything in the record that suggests the adjudicator should have recused himself from hearing this appeal?

[18] The adjudicator expressly observed that "an issue arose at the outset of the hearing as the claimant [Mr. Weller] had had previous dealings with the law firm of which I am a partner… I was prepared to recuse myself from hearing the claim, adjourn the hearing, and arrange for another adjudicator to hear the claim. Both parties were adamant that they wished to proceed with myself as adjudicator notwithstanding the claimant's prior contact with our firm, and they were both

anxious to proceed and have the matter dealt with without further delay. It was explained to both parties that since they had been advised of a potential conflict of interest, if I were to proceed to adjudicate the claim they could not use this as a basis for overturning the decision if they were not happy with the outcome. I proceeded to hear the claim on that basis."

[19] As the adjudicator points out, he found against the defendant on a number of issues, and overall found that Mr. Weller as the claimant had proved his claim, although he reduced the claimed amount of damages owing by Mr. Moser to Mr. Weller.

[20] As I say, I was not present nor do I have a video or audio tape recording of the appeal hearing before Adjudicator Casey, so I am unable to, with any confidence, determine whether Adjudicator Casey's comment that Mr. Weller was "an impatient and impulsive person", was justified or not, however it is fair to say that I also understand why Mr. Weller would find that insulting.

[21] In all the circumstances, I am not persuaded that the adjudicator was biased, nor that a reasonable observer would have concluded that there was a perception of bias, such that his decision should be overturned, particularly given the informed

consent of both parties to him hearing the matter after the potential source of conflict was identified.

[22] This ground of appeal fails.

(2) Errors of law

[23] Mr. Weller's complaint that the "awarded damages are far less than what Mr. Moser's mistake has cost me" was expressly referred to by the adjudicator, and he accounted for not awarding the entire damages claimed by reference to facts and law. His conclusions, though not accepted by Mr. Weller, are however (with one exception) justifiable given the legal principles he relied upon correctly – which are largely outlined in his summary report to the court dated November 14 2014. For example, the adjudicator specifically noted he could not give much weight to the opinions of Nova Automotive or Portland Street Honda, noting "no one from either Portland Street Honda or Nova Automotive was called as a witness in this proceeding, and I consider the evidence provided in that regard to be hearsay, not subject to cross examination, and therefore, to be given little, if any, weight in my determination of the issues". That is a reasonable conclusion for the adjudicator to have arrived at – see paras. 13 and 29 of the decision.

[24] He properly accounted for the refusal to permit interest charges at para. 31 of his decision.

[25] In so far as the cost of Mr. Bethune's appearance in court as an expert witness, the adjudicator accounted for his refusal to permit expert witness fees for Mr. Bethune at paras. 33-34 of his decision. There he stated:

> Mr. Bethune stated that the cost of his appearance was $500 plus an hourly rate of $120 and expenses for travel. I disallow any such claim. As indicated, Mr. Bethune could not be seen as an objective witness who could be qualified as an expert. The court does have jurisdiction to award expert witness fees, but the expectation is that such fees would be for a neutral, objective person, not one who has a vested interest in the outcome or who has been or is in a contractual relationship with one of the parties relating to the very same issues that are before the court.
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> Having said this, I do not question in any way Mr. Bethune's honesty or integrity, nor should my comments reflect in any way upon his credibility as a witness. I am simply raising this as a consideration regarding the claim for costs of Mr. Bethune's appearance before the court. For the reasons given, I exercise my discretion to the extent that I may have jurisdiction not to award the payment of any such costs in this case by the defendant to the claimant." (see also paragraph 7 of his summary report)

[26] On a review of the decision, it is clear that the adjudicator relied on the expert opinion evidence of Mr. Bethune – see for example paras. 17 and 28. He found him credible. Mr. Bethune did effect the repairs to Mr. Weller's car that restored it to its working condition. The adjudicator's summary report is consistent with these comments.

[27] He notes therein, in particular, at para. 9(g)and (h):

> The Small Claims Court, under the authority of the *Small Claims Court Act* and the regulations, has discretion to award expert witness fees both for the preparation of reports in the preparation for and attendance to testify at trial. The adjudicator is in the best position to decide what costs should be allowed, provided that he exercises his discretion in a reasonable manner – *Glen Arbour Condominiums Inc. v. Learning* 2006 NSSC 5.
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> I exercised my discretion to disallow the claim for expert's fees in this case. It seemed to me disproportionate to seek a sum of $500 plus $120 per hour preparation time and travel costs in a claim of $2250. While both Mr. Bethune and the defendant were helpful in assisting the court in navigating through the technical issues involved, the hearing was not particularly lengthy and Mr. Bethune had already been paid by the claimant to perform the repair work."

[28] The awarding of a reasonable amount of the expense of necessary expert evidence was canvassed by Justice McDougall in *Glen Arbour Condominiums Inc. v. Learning* 2006 NSSC 5. There the adjudicator found good grounds for awarding damages for breach of contract in relation to an agreement of purchase and sale of a condominium, as a result of the potential purchasers having discovered mould in the unit caused by water intrusion. The adjudicator ruled in favour of the purchasers based primarily on the content of the tendered expert reports. The adjudicator awarded $8511.99 under the "out-of-pocket expenses" permitted by Regulation 15(g) of the Small Claims Court Forms and Procedures Regulations. Justice McDougall confirmed that amount, and that the adjudicators of the Small Claims Court have a discretion to exercise in the awarding of such expenses and the amounts thereof, although the *Act* is intended to be informal and efficient. Just

shortly thereafter (i.e. April 1, 2006) the maximum mandatory jurisdiction of the Small Claims Court was increased from $15,000 to $25,000.

[29] I note that in *Phillips v. Tyco International,* 2007 NSSM 100, a decision of Small Claims Court Adjudicator Parker, he found water damage to a condominium, and based on three reports from an engineering firm, that their invoices "do not appear unreasonable, and [were] required, in my view, to address the claim being alleged against the defendant.… Matters involving expert reports have been before the Small Claims Court on numerous occasions, and where appropriate have been allowed as a reasonable expense of the successful party… I shall grant the defendant the order and dismiss the claim against the defendant." He awarded $7915.40 for expert reports.

[30] Mr. Weller, as the claimant, had the onus to prove his case. He had to prove that Mr. Moser was liable for the damage to his car, and the amount of the damages associated with Mr. Moser's liability in relation to the car and its restoration to working order.

[31] Mr. Bethune was a necessary witness for Mr. Weller's case. The adjudicator accepted his expertise and his testimony as credible.

[32] The adjudicator exercised his discretion to disallow the claimed $500 plus $120/hour preparation time and travel costs on the basis that: "Mr. Bethune had already been paid by the claimant to perform the repair work"; and because "he did not file an expert's report with the court… He was also the person who would been retained by the claimant in this case to effect the repairs to the claimant's vehicle; therefore I felt he, although otherwise qualified, lacked independence and objectivity as he had an economic interest in the matter and had financially benefited from the fact that he had been retained to undertake the repairs".

[33] I agree with the principle that adjudicators should be reluctant to award expert fees, unless they are, truly necessary to a claimant's or defendant's case, and reasonable in amount.

[34] Respectfully, I disagree with the adjudicator here that Mr. Bethune had, as it were, "already been paid" and could have been called as a fact witness in essence, and compensated on that basis. As the Ontario Court of Appeal recently noted, such witnesses may better be described as "participant experts" – *Westerhof v. Gee Estate*, 2015 ONCA 206.

Conclusion

[35] I conclude that the adjudicator exercised his discretion in a manner that would render an injustice if Mr. Weller were not able to recover a greater amount of the costs of Mr. Bethune's attendance at court as an expert witness. Mr. Weller was successful, primarily because of Mr. Bethune's opinion evidence. Mr. Weller should not have to absorb the entire cost of the reasonable expenses associated with Mr. Bethune's opinion evidence.

[36] I conclude that $500 (HST included) is a reasonable amount to award to Mr. Weller in addition to the award determined by the adjudicator.

[37] To that extent this appeal succeeds.

Order

[38] The appeal is allowed to the extent only that $500 is added to the amount that was ordered by the adjudicator ($1769.92), for a total of $2269.92.

Rosinski, J.