IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cameron v. Morris, 2006 NSSC 9

Date: 20060111
Docket: SH 239827
Registry: Halifax

Between:

Robert Cameron

Appellant

v.

Alan W. Morris

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	May 19, 2005, in Halifax, Nova Scotia
Final Written Submissions:	August 26, 2005
Counsel:	Douglas J. Livingstone, for the Appellant Michelle M. Kelly, for the Respondent

By the Court:

[1] This is an appeal from a Small Claims Court adjudicator's decision in a dispute over the valuation of a car.

The Adjudicator's decision

[2] The respondent – who was the claimant in Small Claims Court – bought a used BMW automobile from the appellant for $8,500.00. The respondent claimed that he purchased the BMW on the basis of the appellant's representation that it was an "M" series car with 300 horsepower. He said he made it clear that he wanted the car for rally racing. In Small Claims Court the appellant did not dispute the respondent's claim that the car was not, in fact, an "M" series, and that it "did not have an engine which produced anywhere near 300 horsepower" (decision, para. 5). He nevertheless took the position that the car was worth the price the Respondent paid.

[3] The adjudicator held that the law of *caveat emptor* ("let the buyer beware") generally applies to the purchase of used automobiles. As such, "the risk of an impropitious purchase of a used automobile is usually a risk to be borne by the purchaser" (decision, para. 6). He referred to *Peters v. Parkway Mercury Sales Limited* (1975), 10 N.B.R. (2d) 703 (C.A.). The adjudicator concluded that the car "worked very well. It was an attractive automobile. It may have burned a little too much oil; that point was not quite clear. In all other respects, it was in excellent

condition; especially for an automobile approaching 20 years of age.... The manner in which the BMW worked did not amount to 'such a congeries of defects as to destroy the workable character of the machine'" (decision, paras. 8-9).

[4] The adjudicator went on to consider the fact that the seller represented the car to the buyer as an "M" series car, which it was not. He referred to *Dick Bentley Productions Ltd. and Another v. Harold Smith (Motors), Ltd.*, [1965] 2 All E.R. 65 (C.A.). Given the seller's long experience in the trade, and his own evidence that he "fancied himself as an aficionado of BMW automobiles", he had to know that an "M" series BMW was a special car. Additionally, when the buyer, after a test drive, doubted that the car had 300 horsepower, the seller responded that "the engine had originally produced 300 horsepower but that because of age and wear, its horsepower rating was down to approximately 250." The adjudicator held that with his general experience and particular knowledge about the BMW, the seller "should have known that such a representation was not true" (decision, paras. 9-15). He concluded:

> [16] At the end of the day, what the Defendant had was an ordinary 1985 model year "3" series BMW automobile. It had been "dressed up", either by the Defendant or by others who preceded him in his ownership of the automobile, to look like an "M" type. Although there was some evidence that the automobile had

> been fitted with a non-standard engine, there was no indication from the manufacturers of the engines used in actual “M” type BMWs that it was theirs. Nor was there any evidence that the engine of the automobile produced anywhere near even the 250 horsepower represented to the Claimant by the Defendant. I make those findings as fact.

[5] As to remedy, the adjudicator accepted the buyer’s submission that he had overpaid for a 1985 “3" series BMW as a result of the misrepresentations and breach of warranty by the seller, and that he was entitled to compensation for the overpayment:

> [20] The Claimant reproduced in evidence a number of prices for automobiles similar to the BMW he had purchased from the Defendant. One was a certified appraisal which the Claimant had done in Ontario. It put the value of the vehicle at $3,000. Other prices were contained within advertising. One price was $2,100. One price was $2,695.
>
> [21] The Claimant argued that taking all of the prices into consideration, the value of the BMW he purchased from the Defendant was no more than $3,000. In the result, he argued that he was entitled to damages of $5,500 together with consequential damages of $400 for travel, $517.50 for storage, $178.06 for miscellaneous disbursements and $181.70 for the cost of engine analysis which provided him his first “clue” that the BMW he had purchased was not what he had bargained for.

[6] The adjudicator awarded damages of $6,777.26. He went on to consider interest. Stating that interest would be “difficult to calculate”, the adjudicator said, “[s]ome of his interest expense would start at the time of his purchase of the BMW. Other interest expenses would start at different times. Accordingly, and to deal

with the interest issue roughly but fairly, I will simply put the Claimant's claim to damages up from $6,777.26 to $7,000" (decision, paras. 22-23).

[7] In the defence filed by the appellant in Small Claims Court he stated that "the price for the car was fair" and that it "is worth $17,500.00." This alleged value is not mentioned in the adjudicator's decision.

GROUNDS OF APPEAL

[8] The appellant alleges that the Adjudicator erred in law and failed to follow the requirements of natural justice in determining the vehicle's value. The appellant submits:

> (1) the Adjudicator erred in law in failing to consider the Appraisal Report on the vehicle in question introduced by the Appellant.
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> (2) in the alternative, the Adjudicator failed to follow the requirements of natural justice in failing to consider the Appraisal Report on the vehicle in question introduced by the Appellant.
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> (3) the Adjudicator erred in law by rendering findings of fact that were wholly unsupported on the evidence.

> (4) the Adjudicator erred in law by awarding damages to the Respondent in an amount exceeding $100.00 which, in actuality, constituted general damages.
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> (5) the Adjudicator erred in law in making a decision that resulted in the respondent being unjustly enriched.
>
> (6) in the alternative, the Adjudicator failed to follow the requirements of natural justice in making a decision that resulted in the Respondent being unjustly enriched.

[9] The authority of a judge of this Court on an appeal from the Small Claims Court was discussed by Saunders J. (as he then was) in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.):

> ¶ 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.

THE APPELLANT'S APPRAISAL

[10] The appellant says that in addition to the two advertisements and the appraisal introduced into evidence by the respondent – and referred to in the adjudicator's decision – there was additional evidence to which the adjudicator did not refer. He refers to Exhibit D-10, "a Vehicle Evaluation Report by Independent Auto Appraisal Limited" (the "Independent appraisal"). This appraisal attributed to the vehicle a value of $17,500.00. Based on the fact that it is not referred to in the decision, the appellant submits that the adjudicator failed to weigh the Independent appraisal with the other evidence, and thereby erred in law or failed to follow the requirements of natural justice. He submits that the Independent appraisal was a crucial part of the case and the adjudicator should have addressed it in his reasons.

[11] The appellant points out that the advertisements and appraisal introduced by the respondent all originated in Ontario, where the respondent lives, while his own appraisal was from Nova Scotia, where the car was bought. He also points out that the purpose of the appraisal provided by the respondent – a "Motor Vehicle Appraisal Record prepared by a third party for establishing tax payable to

Ontario's Ministry of Finance's Retail Sales Tax Branch" – was for calculating tax payable. He suggests that such evidence should receive little weight.

[12] The appellant takes the position that if the car's value was determined incorrectly, through an error of law or a failure to observe the requirements of natural justice, then the damages were also incorrectly assessed. If the proper value was greater than that set by the adjudicator, the appellant says, the respondent was unjustly enriched or the appellant is entitled to general damages.

[13] The respondent's position is that "decisions of the Small Claims Court are to be reviewed with considerable deference on appeal.... [T]he adjudicator's consideration of the evidence, weighing of the evidence, ignoring of certain evidence, and determinations of fact are unassailable on appeal." He refers to *Otto v. Gordon* (1996), 151 N.S.R. (2d) 389 (C.A.) at para. 9; *Laura M. Cochrane Trucking Ltd. v. Canadian General Insurance Co.* (1995), 148 N.S.R. (2d) 200 (S.C.) at para. 3; and *Armoyan v. Morris (c.o.b. WDM Excavators Ltd.)*, [2000] N.S.J. No. 106 (S.C.)(QL) at para. 15. He argues that the grounds of appeal permitted under s. 32(1) of the *Small Claims Court Act* limit this Court to reviewing for jurisdictional error, error of law or failure to follow the requirements

of natural justice. The respondent submits that evidentiary matters are not a valid ground of appeal. Thus, he argues, on the facts as the adjudicator found them, he "correctly applied the law of buyer beware, as well as the law associated with representations and warranties ... and ... his verdict should not be overturned."

[14] In the alternative, the respondent goes on to address the grounds of appeal. On the question of the Independent appraisal, relying on *Armoyan*, the respondent says this Court has no "jurisdiction to analyse the interpretation of evidence, nor is there jurisdiction to analyse an adjudicator's decision to ignore certain pieces of evidence." He says the failure to consider the Independent appraisal is not reviewable as an error of law or failure to follow the requirements of natural justice, but is a matter of fact and therefore unreviewable. A similar analysis applies to the allegation of findings of fact wholly unsupported on the evidence.

[15] The respondent also denies that the adjudicator made an award of general damages in excess of $100.00 – which he says, in any event, would be an error of jurisdiction, not law. Because the loss predates the hearing and is quantifiable, the respondent says, it actually constituted special damages. He refers to *Singer v. Forbes Chevrolet Oldsmobile Ltd.,* [1984] N.S.J. No. 40 (Co. Ct.)(QL); *British*

Transport Commission v. Gourlay, [1956] A.C. 185; and *Brightwood Gold and Country Club v. Pelham*, [1990] N.S.J. No. 182 (Co. Ct.).

[16] The respondent says there was no unjust enrichment because the adjudicator put the appellant back in the position he would have been in had the warranties been accurate.

HEARSAY

[17] After the hearing, I asked counsel for additional submissions on the question of whether the various appraisals that the parties placed before the adjudicator were hearsay, and whether they ought to have been admitted. Both parties took note of the purpose of the Small Claims Court, as described in section 2 of the *Small Claims Court 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." Both parties went on to refer to section 28 of the *Act*, which provides:

> 28 (1) An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
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> (a) any oral testimony; and

> (b) any document or other thing,
>
> relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.
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> (2) Nothing is admissible in evidence at a hearing that
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> (a) would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) is inadmissible by any statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

[18] The parties both took note of *Whalen et al. v. Towle* (2003), 223 N.S.R. (2d) 135 (S.C.), where MacDonald A.C.J.S.C. (as he then was) discussed the purpose of the Small Claims Court. After referring to section 2, he said:

> ¶ 5 This Act therefore represents a compromise in the area of civil justice in this Province. It provides for a less expensive, less formal and more efficient process for claims that involve relatively small amounts of money. For example, most of the expensive pre-trial safeguards are abandoned in the interest of efficiency. There is no formalized regime for the exchange of documents, no discovery process (either written or oral), no pre-trial conferences, nor mandatory pre-trial submissions.
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> ¶ 6 In keeping with the Act's stated purpose of being informal, the hearsay rule is rendered inapplicable with the issues of relevancy and efficiency being the only barriers to the admission of evidence. I refer to s. 28(1) of the *Act* [...]
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> ¶ 7 Furthermore, there is no record of the proceedings in Small Claims Court. As well, the appeal process is limited in that this Court, the Supreme Court of Nova Scotia, is the forum of last

> resort. In other words, in order to provide an efficient and inexpensive process, certain judicial safeguards are sacrificed. This is to ensure that matters involving small claims can be processed efficiently and fairly.
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> ¶ 8 Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of *R. v. O'Connor*, [1995] S.C.J. No. 98. At paragraph 193 she states:
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> > What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. *What the law demands is not perfect justice but fundamentally fair justice*. [Emphasis added by MacDonald A.C.J.]

[19] After The respondent insists that the question relating to evidence – essentially, the issue of whether the adjudicator considered the appellant's appraisal and weighed it against the documents provided by the respondent – is an issue of fact, and therefore beyond appeal. The appellant, on the other hand, suggests that the traditional hearsay rule has a role to play in Small Claims Court proceedings, noting that it has been held to be a denial of natural justice to rely solely on hearsay for the factual basis of a Small Claims Court decision. For instance, in *City Motors Limited v. Victor*, [1997] N.S.J. No. 140 (S.C.)(QL), the

respondent's car's brakes failed in Ottawa after being checked by the appellant's mechanic in Nova Scotia. The adjudicator held that the appellant was negligent in failing to diagnose the brake problem and awarded the respondent the difference between what the repairs cost him in Ottawa and what they would have cost him in Halifax if the appellant had discovered the problem.

[20] On appeal in *City Motors*, the appellant claimed that the adjudicator's finding was based on hearsay, namely a statement made by a mechanic in Ottawa to the effect that the problem should have been discovered in Halifax, as well as a notation on the Ottawa invoice. The appellant's principal argument was that the summary report filed by the adjudicator did not contain the basis for the findings of fact. Davison J. noted that the Court "would be slow to overturn findings of fact made by an adjudicator" and noted the distinction between appellate review of a Supreme Court decision, where a transcript is available to the Court of Appeal, and appeals of Small Claims Court matters:

> ¶ 14 Appeals from the Small Claims Court must be considered in a slightly different manner. In my view the difference is recognized by the legislature when they required the adjudicator to place in the summary report the basis for findings of fact. The Supreme Court, on appeal, does not have a transcript of the evidence and does not have a basis to consider the findings of fact made by the adjudicator. In my view, when the adjudicator prepares the summary for the appeal effort

> should be made to expressly state the findings of fact and the basis for those findings.
>
> ¶ 15 Respect should be accorded the findings of fact, but where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable.

[21] Davison J. concluded:

> ¶ 16 It may be there was a solid basis to find the facts, but that is not apparent from the record. The adjudicator found the brakes of the Honda failed in Ottawa because of "a broken brake (flex) line. See Exhibit C-2". Exhibit C-2 is an invoice from Canadian Tire Auto Centre in Ottawa and the only indication of the cause of the problem is the comment "vehicle towed in - police claimed that a flex line had blown". That evidence is hearsay and there is no indication why the police would make the statement.
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> ¶ 17 The summary of facts are advanced to the court for consideration by the court on the appeal. The summary says - "the Claimant stated that the Ottawa mechanic informed him that the problem should have been detected at that time (when the claimant had the brakes checked in Halifax). I accepted the Claimant's evidence as truthful". Effectively it is the mechanic in Ottawa whose evidence is accepted as being truthful and this was inadmissible evidence.

[22] As such, there was a breach of natural justice. Davison J. allowed the appeal and ordered a new hearing before another adjudicator.

[23] The respondent argues that *Victor* should be distinguished on the basis that in that case “there was no solid basis for the adjudicator accepting the evidence of the Ottawa mechanic and the police officer as being truthful” and the impugned

evidence provided “nothing concrete that the adjudicator should have found the evidence truthful on.” Here, on the other hand, “the adjudicator had in front of him a certified appraisal form completed by a certified appraiser.... Moreover, the adjudicator had Auto Trader advertisements that further explained how the appraiser could have found what he did in terms of the value of the BMW....” The adjudicator was “well within his power to accept the documentary evidence and ... to weigh this evidence against the documentary evidence submitted by the Appellant and come to a finding that he preferred the evidence of the Respondent.”

[24] It is worth noting that the purpose of the Small Claims Court, as set out in section 2 of the *Act*, is not only to adjudicate matters “informally and expensively”, but to adjudicate “in accordance with established principles of law and natural justice.” There is no doubt that rules evidence, including hearsay, are relaxed. The question remains, however, of whether, and to what extent, the principles of hearsay are relevant when documents are produced in a Small Claims Court proceeding. Subsection 28(1) of the *Act* provides for the admission of “any document or other thing”, whether or not admissible in a court, that is “relevant to the subject-matter or the proceedings”, and states that the adjudicator “may act on

such evidence.” Despite this general relaxation of the rules of evidence, there must be some rules by which adjudicators come to rational conclusions upon reliable evidence.

[25] The evidence of the appraisals unquestionably amounts to hearsay. The documents were not under oath, were prepared by individuals who were not available for cross-examination and were adduced for their accuracy. In recent years the Supreme Court of Canada has adjusted the law of hearsay evidence by means of the “principled approach” developed in *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915 and *R. v. Starr*, [2000] 2 S.C.R. 144. Hearsay may now be admissible on the basis of the principled approach, which requires consideration of its “necessity and reliability”, even where it does not fall under an existing hearsay exception. While acknowledging the relaxed rules of evidence in Small Claims Court, I believe that the principled approach must apply, in a relaxed form, in order to determine whether hearsay evidence that a party seeks to adduce before an adjudicator meets the threshold requirement of reliability, and whether it is necessary to admit the evidence in order to prove a fact in issue.

[26] In *Sutherland Estate v. MacDonald*, [1999] O.J. No. 785 (Ont. C.J. (Gen. Div.), the Court applied a version of the principled approach in considering the admissibility of a letter written by a testator. It was suggested that section 27 of the Ontario Courts of Justice Act – which contained evidentiary provisions very similar to section 28 of the Nova Scotia Act – superseded the general law of hearsay (paras. 11-12). Young Deputy J. said:

> ¶ 13 Whatever effect s. 27 may once have had, my view is that with the development of the principled framework by which hearsay evidence is assessed on the basis of necessity and reliability, much of its function with respect to such evidence is now, largely procedural. Approached from a different direction, I cannot see s. 27 or its predecessors as having ever sanctioned the admissibility of hearsay evidence that was unnecessary and unreliable. In my view, the principles of "necessity" and "reliability" must be applied in all cases, adopting the flexible guidelines laid down by the Supreme Court and adapting them appropriately to this court's overriding mandate to hear and determine in a summary way all questions of law and fact and to make such orders as are considered just and agreeable to good conscience. The wisdom of the *Courts of Justice Act* is that it permits judges in this informal court of summary procedure to hear all such evidence without first canvassing by *voir dire* or otherwise, its necessity and reliability. In Small Claims Court, this exercise, while still required, may routinely be carried out after the evidence has been adduced and heard. That is the approach adopted in this case.

[27] I find this reasoning persuasive; I believe it is possible to apply the principles of necessity and reliability while allowing the parties to be heard and rendering justice without sacrificing the principles of the *Act*. An adjudicator can

apply the principles of necessity and reliability, and is then in a position to determine the weight to be given to the evidence, if admitted.

[28] Although it may appear that applying the principled approach to hearsay may complicate the work of adjudicator, I do not think this approach is overly burdensome. Hearsay evidence will continue to be admissible in most cases. An analysis of necessity and reliability will only be required where the evidence, on its face, does not appear to meet these basic requirements. The purpose of applying these principles to Small Claims Court proceedings is to set a minimum threshold for the admission of hearsay evidence. This requirement will be most pronounced in cases such as the present one, where both parties have attempted to prove a key fact in issue – the value of the car – by way of hearsay evidence and nothing else. An assessment of the relative reliability and necessity of such evidence will help to ensure a fair hearing. Encouraging adjudicators to engage in an analysis of the reliability of the evidence at the threshold stage would then hopefully carry over to a consideration of the competing evidence and its relative weight.

[29] The use of the principled approach by adjudicators does not allow for expanded appellate review of the weight accorded to evidence by the adjudicator.

Weight continues to be within the purview of the adjudicator, with great deference to those findings. The appeal court may only intervene where there has been overriding error.

The Principled Approach Applied to the Present Case

[30] All of the documents in question – the provincial sale tax assessment, the want ads and the independent appraisal – are clearly hearsay, which the adjudicator had a discretion to admit. I am satisfied that, on an application of the principled approach, the respondent's hearsay evidence meets the minimum requirements of necessity and reliability. There are indica of reliability upon which the adjudicator could reasonably have preferred this evidence to that offered by the appellant. I find it more doubtful that the appellant's independent appraisal is admissible.

[31] As to the sale tax assessment, there are indicia of reliability. The document certifies that the assessor is registered pursuant to the relevant legislation or is an appraiser authorized by the Ministry of Finance. The appraisal is accompanied by a receipt for sales tax paid, demonstrating that the Ministry of Finance accepted the appraisal. The document also states that the appraised value of the vehicle is "NOT

intended to be a “trade-in” value but represents the value that one might expect to receive in a sales transaction between a willing buyer and a willing seller.” These elements of reliability provide a basis for the admissibility of the document, as well as a foundation upon which the adjudicator could have afforded it significant weight.

[32] The admissibility of the e-Bay want ads is more doubtful, and demands a consideration of the principled analysis. The goals of efficiency and affordability require some easily accessible means for a party to a Small Claims Court proceeding to demonstrate fair market value. This provides such “Auto Trader”-type advertisements with a degree of necessity. The reliability of the ads depends on the degree to which the “Auto Trader” can be considered an accurate reflection of the user car market. Given that the publication focuses on the buying ands selling of used cars across the country, this publication has a degree of reliability as a source of information about market value and reasonable selling prices. But this must be tempered against the evidence submitted by the appellant. The want ads were for cars for sale in Ontario, and for slightly different vehicles from the one involved in this proceeding. As such, the ads provide a very limited “snapshot” of

the market. While they meet the threshold test for admissibility, the ought to be accorded very little weight.

[33] The independent appraisal submitted by the appellant is clearly hearsay. Affordability and efficiency support its admissibility, although it is noteworthy that the author was local, and there was no evidence to show that he was unavailable for the hearing. The more troubling question with respect to this document is reliability. The document does not indicate the appraiser's qualifications or experience, or the context in which the appraisal was prepared. As in *Victor v. City Motors*, there is no indication as to why the out-of-court declarant made the statement, nor any indicators of truthfulness. These considerations suggest that the appraisal ought to have been excluded. However, it appears that the adjudicator exercised his discretion to admit the document, and then gave it little weight, if any, in his analysis. In the circumstances, I believe it was necessary for the adjudicator to inform the self-represented party that the appraisal could be accorded more weight if the appraiser was called to testify and, if necessary, to adjourn the hearing until this could be done. As I pointed out in *Clayton v. Earthcraft Landscaping*, it is important to alert self-represented parties to the difference in weight that may be accorded a bare document as opposed to a witness

who may be able to testify about the document. A failure to do so may amount to a denial of natural justice.

Sufficiency of Reasons

[34] The appellant also argues – without any supporting authority – that there was an error of law or a denial of natural justice resulting from the adjudicator's failure to make clear whether he had considered the independent appraisal. Assessing the sufficiency of reasons in the context of a Small Claims Court appeal is a difficult matter, as there is no record against which to consider the reasons. I have been directed to the following comments by Hall J. in *Laura M. Cochrane Trucking Ltd. v. Canadian General Insurance Co.* (1995), 148 N.S.R. (2d) 200 (S.C.):

> ¶ 3 At the outset I must remind the parties that this is an appeal by way of stated case. In such an appeal the appeal court does not see the evidence that was placed before the Small Claims Court. Indeed, the Small Claims Court is not a court of record and there is no record of the evidence presented at the hearing or trial. Thus, there is no transcript of the evidence for the appeal court to examine or review in order to determine whether there was evidence to support the findings of fact made by the Adjudicator. Accordingly, the appeal court is obliged in such a form of appeal to accept as fact, without question, the findings of fact made by the Adjudicator as set out in the stated case. It is not, as Ms. Rubin suggests in her brief, a matter of the appeal court deferring to the findings of fact of the Adjudicator, rather the appeal court is, as a matter of law, bound to accept such findings as fact.

[35] There is another line of authority, however, as set out in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.), where Saunders J. (as he then was) said:

> ¶ 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.

[36] I have had occasion to apply the principle stated by Justice Saunders in appropriate circumstances; see, for instance, *MacIntyre v. Nichols* (2004), 221 N.S.R. (2d) 137 (S.C.).

[37] I do not accept the respondent’s argument that the reviewing court can never review the findings of fact of the adjudicator. While this Court may not substitute its own findings for those of the adjudicator, the adjudicator’s findings must be

grounded upon the evidence. In order for the reasons to be sufficient, they must demonstrate the evidentiary foundations of the findings. This conclusion is supported by s. 34(4) of the *Small Claims Court Act*, which requires the adjudicator to submit to the reviewing court a summary of his findings of fact and law. Accordingly, the adjudicator has a duty to submit not only the decision, but also the basis of any findings raised in the Notice of Appeal. The adjudicator thus has two opportunities – the decision and the summary report – to clearly state the basis for any findings of fact.

[38] I am satisfied that reasons are insufficient where they do not make clear the evidentiary foundation and reasoning utilized by the adjudicator; see also *Bingley v. Sable Offshore Energy Inc.* (2003), 211 N.S.R. (2d) 15 (S.C.) at paras. 31-32. I agree with the following comments by Edwards J. in *Bidart v. MacLeod* (2005), 234 N.S.R. (2d) 20 (S.C.):

> ¶ 11 Finally, Adjudicators should keep in mind that this Court does not have a transcript of the Small Claims Court hearing. Consequently, the quality of a party's right of appeal is dependent upon the content of the Summary Report and the written decision. Here, the Adjudicator provided a three page written decision. Unfortunately, the reason(s) why the Adjudicator found the Appellant's work ineffective is not clear from the decision. Specifically, having found the Claimant's evidence inadequate on January 10, he does not say what, if any, expert evidence he relied upon to come to this conclusion. A party is entitled to know why he lost.

> ¶ 12 The foregoing should not be interpreted as a plea for lengthy, written decisions. Brief reasons for key findings will usually suffice and will at the same time be consistent with the philosophy of the Act.

[39] I note also the remarks on sufficiency of reasons by Binnie J. (for the Court) in *R. v. Sheppard*, [2002] 1 S.C.R. 869:

> ¶ 28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (I) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

[40] I am forced to conclude that the written reasons of the Chief Adjudicator do not address the contradiction in the evidence before him, thereby creating an obstacle to meaningful appellate review. While it is possible that this matter was addressed in the hearing, there is no record, and I cannot speculate as to what transpired. The valuation of the vehicle is clearly a key issue in the proceeding. I

find that the failure to do the analysis, or to record it in the decision or summary, constitutes an error of law.

Other Arguments

[41] The appellant has raised the additional hearsay-related argument that, given that he was unrepresented at the original hearing, there was a duty on the adjudicator to inform him that his documentary evidence would carry less weight than would oral evidence from the same source. On this point the appellant refers to *Earthcraft Landscape Ltd. v. Clayton* (2002), 210 N.S.R. (2d) 101 (S.C.) at para. 28. He suggests that the adjudicator should have informed him that the appraisal would receive less weight than would evidence given by the appraiser in court.

[42] The respondent also refers to *Earthcraft*, but with a different point in mind. In *Earthcraft* it was clear that the adjudicator had weighed the letter with the other evidence (para. 20). Based on this, the respondent says I should follow *Earthcraft* on the basis that in this case, “there was no contrary oral evidence presented. The adjudicator admitted into evidence all documents submitted on behalf of the Claimant and all documents submitted on behalf of the Defendant. The adjudicator

then proceeded to weigh each piece of evidence against each other and found he preferred the evidence of the Claimant. As in [*Earthcraft*] ... this conclusion should be open to the adjudicator. For this reason, [it] should not be relevant that the appraisal report and other advertisements are technically hearsay....”

Conclusion and Disposition

[43] As Davison J. said in *Victor*, “where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable.” n *Bingley v. Sable Offshore Energy Inc.* (2003), 211 N.S.R. (2d) 15 (S.C.) I said, “I must not hypothesize as to what occurred at trial” (para. 32). The reasons given by the adjudicator do not allow me to conclude –as the respondent submits – that he weighed the evidence provided by the appellant with that of the respondent, and preferred the respondent’s evidence. All that can be said with confidence is that the adjudicator relied on the appraisals supplied by the respondent.

[44] I am, as a result, allowing the appeal, granting a new hearing and directing that the matter be heard by a different adjudicator.

J.