

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Atlantic Electronics Ltd. v. Dauphinee, 2008 NSSC 190

Date: 20080618

Docket: SH 280852(A)

Registry: Halifax

Between:

Keith MacKay, assignee of Atlantic Electronics Limited

Appellant

and

Harvey Dauphinee, Jardine Investments Limited and Nova Enterprises Limited

Respondents

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: December 4, 2007, in Halifax, Nova Scotia

**Final Written
Submissions:** January 18, 2008

Counsel: Keith MacKay, self-represented
Respondents non-appearing

By the Court:

[1] This is an appeal from an adjudicator's decision that the Small Claims Court lacks jurisdiction to grant leave to a judgment creditor to sell a judgment debtor's land free of the encumbrances of prior judgments, pursuant to s. 9 of the *Sale of Land Under Execution Act*.

Appeals from the Small Claims Court

[2] Section 32 of the *Small Claims Court Act* provides, in part:

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

(a) jurisdictional error;

(b) error of law; or

(c) failure to follow the requirements of natural justice....

Background

[3] The appellant is the Assignee of Atlantic Electronics Ltd., the original judgment creditor. The respondent Mr. Dauphinee is the judgment debtor. The respondents Jardine Investments Ltd. and Nova Enterprises Ltd. are additional judgment creditors of the other respondent, Mr. Dauphinee.

[4] The original creditor entered judgment against the judgment debtor on July 11, 1991. That judgment was recorded at the registry of deeds on October 11, 1991. It was assigned to the appellant on April 6, 2006, and an adjudicator granted an order declaring that the appellant was entitled to enforce the judgment in his own name and granting leave to issue an execution order.

[5] Nova Enterprises Ltd. was granted a judgment against the judgment debtor on November, 29, 1989. On September 3, 1991 Jardine investments Ltd. obtained judgment against the judgment debtor. As a result, the two judgment creditors who appear as respondents in this appeal recorded their judgments in priority to the judgment of the appellant. On June 19, 2006 of the appellant gave written notice to the other judgment creditors, calling upon them to sell the judgment debtor's

land pursuant to the *Sale of Land Under Execution Act*. No steps were taken by either creditor to effect the sale of the judgment debtor's interest in the lands. The appellant applied to the Small Claims Court on January 19, 2007, for an order granting leave to sell the judgment debtor's interest in the lands free of the two prior judgments. Notice of the application was provided to Nova Enterprises and Jardine Investments but neither took part in the application. The adjudicator dismissed the appellant's application for leave to sell the judgment debtor's land.

[6] The issue on appeal is whether the adjudicator was correct in dismissing the appellant's application for an order under the *Sale of Land Under Execution Act* granting leave to the judgment creditor to sell the judgment debtor's land free of the prior judgments.

[7] The relevant provisions of the *Sale of Land Under Execution Act* are sections 8 and 9, which state:

Notice to prior judgment creditor to sell

8 Where several judgments against the same person have been registered in the same registry or land registration office for one year and any judgment creditor whose judgment was so registered before the judgment of another judgment

creditor does not take effective steps to sell the land bound by the judgments, the subsequent judgment creditor may give written notice to the prior judgment creditor requiring the prior judgment creditor to sell such land within three months after the service of such notice upon the prior judgment creditor. Priority acquired by subsequent judgment creditor

9 Where such prior judgment creditor does not, in the opinion of the court or a judge, take effective steps to sell the land within three months from the service of such notice, the subsequent judgment creditor giving the notice shall acquire priority for his judgment over the judgment of the judgment creditor upon whom such notice is served, and may, upon notice of the application to such judgment creditor, obtain from the court in which his judgment was obtained, or a judge thereof, an order in the action for leave to sell the said land, free from the lien or encumbrance of the prior judgment.

[8] According to the appellant, the issue is whether the Small Claims Court has the jurisdiction to grant the relief sought, namely, an order directing that the appellants have priority to the proceeds of any sale of real property. A question which remains to be determined is whether the Small Claims Court has the jurisdiction to issue an order declaring that the appellant has priority over the two judgment creditors whose judgments were recorded before the appellant's judgment, but who failed to take any steps to enforce its judgments. The adjudicator determined that the court did not have jurisdiction, due to *s. 10(a)* of the *Small Claims Court Act*. This provision states:

10 Notwithstanding Section 9, no claim may be made under this Act

(a) for the recovery of land or an estate or interest therein....

[9] In *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.), Saunders J. (as he then was) discussed the Supreme Court's jurisdiction and the applicable standard of review on a small claims appeal:

[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 adjudicator's decision

[10] In his decision, the Adjudicator stated that he did not have jurisdiction because the Small Claims Court is a statutory court and does not have inherent jurisdiction, only the jurisdiction set out in the enabling statute.

[11] The adjudicator described the issue as one of statutory interpretation, requiring him to consider the entire statute in order to determine the intention of the Legislature. He considered of the purpose of the statute and the jurisdiction of the court. He concluded that jurisdiction in the circumstances was ousted by *s. 10(a)*. He rejected the appellant's argument that *s. 10(a)* should not be applied because the relief sought arose from the court's enforcement function rather than its adjudicative function; according to the appellant the court was not asked to adjudicate a question of interest in land, but simply to permit him to enforce his judgment. The adjudicator acknowledged that *s. 31(1)* of the *Small Claims Court Act* provides that an order of the court "may be enforced in the same manner as an order of the Supreme Court and Section 45 of the *Judicature Act* applies."

However, the adjudicator held that the result of the interpretation suggested by Mr. MacKay was that all of the remedies of the *Civil Procedure Rules*, common-law, equity and inherent jurisdiction would apply to small claims. He concluded that the Legislature did not intend for the small claims court to have such wide powers.

[12] The adjudicator also dismissed the appellant's argument that the form of execution order was prescribed by the *Small Claims Court Forms and Procedures Regulations*, and that this was therefore an indication of legislative intention. The adjudicator rejected this view on the basis that the regulations were not made by the Legislature.

[13] The adjudicator held that given the purpose of the statute – the adjudication of claims up to but not exceeding the monetary jurisdiction of the court, informally and inexpensively but in accordance with established principles of law and natural justice – s. 10(a) could not be read to allow the order requested. He stated:

[19] As part of the type of application being requested here, and the process surrounding it, various issues can be expected to arise. Without in any way suggesting this to be exhaustive, there might well be issues with respect to priorities between other interest holders, sufficiency of notice to interested parties, the potential disposition of surplus monies, and potentially issues surrounding requests for vacant possession. No doubt many other issues would arise.

[20] I am also mindful of the long history involving the often complex laws and approach of the common law (and historically, equity) and the legislature (in England, Parliament) to interests in land. In short, interests in land hold a special place in our system of laws. The court that I perceive to have been envisaged by the Legislature in creating the Nova Scotia Small Claims Court was not one that was intended to either adjudicate regarding interests in land (as explicitly made clear in s. 10(a)) or issue orders permitting that sale of land, albeit under the

cloak of enforcement. Here, I believe the proffered distinction between adjudication and enforcement loses its intended force.

[21] In my view, an application seeking this Court's approval for the sale of land is functionally and at its core a "claim...for the recovery of land or an estate or interest therein".

[22] The process of sale of land under execution can be likened to a foreclosure application. I think it appropriate in this regard to take notice that the Supreme Court exercises a significant supervisory role (as I understand, steeped in ancient principles of law and equity, and in part, codified in the Civil Procedural Rules) in such applications and is particularly vigilant in ensuring that the interests of the person whose property is being foreclosed are considered and that all items charged against the person are properly supported. Even if a sale of land under execution process were to viewed as requiring somewhat less of a meticulous process than foreclosure, I cannot conclude otherwise than that it would involve a substantial degree of supervision and to a degree that this statutorily-created court is not equipped to handle, either functionally or administratively or as a matter of legal jurisdiction.

[23] I conclude therefore that this Court does not have the jurisdiction to grant leave for sale of land under the Sale of Land Under Execution Act.

[14] The adjudicator also noted that *s. 45* of the *Judicature Act*, which exempts certain items from execution and is incorporated in *s. 31(1)* of the *Small Claims Court Act*, deals only with personal property. He went on to refer to two decisions to which he had been referred by Mr. MacKay:

[27] The applicant has referred to two decisions of this Court - *Wickwire Holm v. Wilkes reflex*, (2005), 237 N.S.R. (2d) 197 (Adjudicator Casey) and *Scaravelli & Associates v. Quinlan* (2005) 241 241 N.S.R. (2d) 64 (Chief Adjudicator Giles) - both of which found that the Small Claims Court had

jurisdiction to order discovery in aid of execution, and relied on s. 31 in coming to that conclusion. As a statutory tribunal, these decisions are certainly to be treated as persuasive but I do not think they assist the applicant here given what was being requested in those cases and what has been requested here. In no way are these decisions inconsistent with the notion that the Small Claims Court's enforcement powers were intended to only extend to personal property.

[15] The current appeal is based on jurisdictional error and error of law.

Arguments on appeal

[16] The appellant argues that his application before the Small Claims Court was to seek an order to enforce an execution order granted by the court, not to recover land or an estate or interest therein. At the hearing, I asked him to address the question of whether a recorded certificate of judgment constitutes an interest in land within the meaning of *s. 10(a)* of the *Small Claims Court Act*.

[17] Mr. MacKay submits that a certificate of judgment recorded under the *Land Registration Act* does not constitute an interest as contemplated by the *Small Claims Court Act*. He says the relief he seeks under *s. 9* of the *Sale of Land Under Execution Act* will affect the status of the two other creditors, who would lose

priority. The appellant points out that the claim was for debt, not for the recovery of land or an estate or interest in land. The order, if granted, would have the effect of eliminating the other two judgment creditors' interest in land.

[18] The appellant points out, in my view correctly, that the encumbrance on the judgment debtor's land is not the result of any court proceeding, but rather results from *ss. 65(2), 65(4) and 66(1) of the Land Registration Act*, which provide:

Judgment roll

65 ... (2) A judgment creditor may record a judgment for the recovery of money in the judgment roll for a registration district.

...

(4) A judgment recorded in a judgment roll binds and is a charge upon any registered interests of the judgment debtor within the registration district, whether acquired before or after the judgment is recorded, from the date the judgment is recorded until the judgment is removed from the roll.

Effect of judgment

66 (1) A judgment is a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgment.

[19] I have previously observed that the order of a court may be enforced in the same manner as an order of the Supreme Court and *s. 45* of the *Judicature Act* applies. The adjudicator concluded that, since *s. 45* is referred to in *s. 31(1)* of the *Small Claims Court Act*, the exemptions in *s. 45* in some manner restricts the ambit of *section 45* to personal property. I take a different view than the adjudicator. *Section 45* is simply a listing of items that the sheriff cannot touch on execution. These are personal items of the judgment debtor and his family. It must be noted that *section 45* also applies to judgments of the Supreme Court. I cannot conceive that an execution order out of the Supreme Court would be limited to a levy on personal property simply because of the wording of *s. 45* of the *Judicature Act*. *Section 45* has, in effect, no impact on whether personal or real property to generate is exempted or excluded. It is, in my opinion, an attempt to prevent the judgment debtor from being left in a position where he has no means to earn a living or to take care of himself and his family. There is no attempt to limit the reach of the judgment against the real property of the judgment debtor as the same is provided in *s. 64* of the *Land Registration Act*.

[20] It is important to understand what the legislature intended by the phrase "the recovery of land or an estate or interest therein" in *s. 10(a)* of the *Small Claims*

Court Act. Clearly *s. 10(a)* restricts the court from involving itself for the recovery of possession of real property or to have the court involved itself in any application for partition of land or to adjudicate upon claims of adverse possession or rights-of-way. Furthermore, I acknowledge that the court should not preside over a claim of constructive trust or resulting trust in so far as they affect the recovery of land. Nor should it involve itself in adjudicating any claim by any person under the *Matrimonial Property Act*.

[21] It is significant that the restriction applies to claims. I understand a “claim” in this context to mean a claim to enforce the performance or the payment of an obligation, such as a claim for liquidated damages. To suggest that this section prevents the court from adjudicating upon a claim which will in the course of time result in a judgment, represented by an amount of money, which judgment may then be recorded at the Registry of Deeds or under the *Land Registration Act*, thereby creating a charge upon the property of the judgment debtor, is a conclusion not supported by the legislation. There is nothing to prevent the registration of a Small Claims Court judgment from being recorded under the *Land Registration Act*.

[22] In *Cox Downie v. Patterson (Bankrupt)* (1992), 112 N.S.R. (2d) 148 (S.C.T.D.) Saunders J. (as he then was) considered the Supreme Court's jurisdiction over an application by a solicitor for a charge against a former client's real and personal property on account of unpaid legal fees of less than \$3,000.00. Saunders J. held that the court had jurisdiction although the amount was under \$3,000, because the applicant sought declaratory relief and not a debt or liquidated demand. Further, the Small Claims Court lacked jurisdiction where the applicant sought an interest in land.

[23] A lien constitutes an interest in land: see, for instance, La Forest, Anne Warner, ed., *Anger and Honsberger Law of Real Property*, 3d edn., at p. 34-15. A distinction has been made between "general" liens, arising pursuant to a contract, trade usage or statute, and "particular" liens, created at common law and encompassing property for which a service has been rendered: B. Ziff, *Principles of Property Law*, 4th edn., p. 428. I note the following passage in *Cox Downie*:

[22] To summarize, at common law a solicitor is entitled to a solicitor's lien where his services result in the recovery or preservation of property. The common law right is, in each jurisdiction, subject to the rules of court. In Nova Scotia, Civil Procedure Rule 63.26 provides that the solicitor "may" have such a right. Therefore the right in this jurisdiction is discretionary, such discretion to be exercised by the court taking into account all of the circumstances.

[24] In *Cox Downie* the creation of the solicitor's lien was specifically tied to a particular property. There is no such direct link on the facts of this case. I conclude that a certificate of judgment is somewhat analogous to, but not identical to, a solicitor's lien. While both may operate as a charge, a solicitor's lien arises as a matter of trade usage and is established law. On the other hand, a certificate of judgment creates a similar charge only once it is registered or recorded pursuant to a statute. There is authority to suggest that under New Brunswick law a "judgment lien" has the effect of placing a lien on any land owned by the judgment debtor. The relationship therefore changes immediately upon the judgment creditor obtaining a judgment. However, in Ontario and the western provinces a judgment is a mere declaration that money is owed and does not constitute a claim to real property: see John Williamson, "Execution Against Land in New Brunswick," 30 U.N.B.L.J. 131.

[25] Although it may be the case that in New Brunswick a judgment lien is created upon signing of the judgment, there is no authority supporting the conclusion that Nova Scotia has the same approach. The *Land Registration Act* makes it clear that it is upon registration of the judgment that the land of the

judgment debtor is subject to a charge. In fact, in addition to the provisions of the *Land Registration Act, s. 4* of the *Sale of Land Under Execution Act* provides:

Sale of land under execution

4 The land of every judgment debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds or land registration office of the registration district in which the land is situated.

[26] Regrettably, neither the *Land Registration Act* or the *Sale of Lands Under Execution Act* makes it clear whether a certificate of judgment creates an interest in land within the meaning of *s. 10(a)* of the *Small Claims Court Act*. There is no basis in the statute to conclude that an interest is created by a certificate of judgment. Furthermore, there is no provision in the statute which transforms an execution order into a valid lien. The *Small Claims Court Act*, by permitting a judgment for a debt, does not create a lien in favour of the judgment creditor, but permits registration of the judgment.

[27] I refer to the Small Claims Court decision in *MacMillan v. Broughm*, [2002] N.S.J. No.108, where Adjudicator Richardson said:

39 ... Mrs. MacMillan has no title to the property subject to the lien, and she can do nothing that will affect or diminish the claimants' title. The only issue is whether they are entitled to recover that payment from the defendant, on the grounds that she breached a covenant (that is, a contractual obligation) owed to them under the deed. This too is within my jurisdiction.

[28] In *Burton v. Cape Breton (Regional Municipality)*, [2001] N.S.J. No. 212,

Adjudicator Lloy said:

5 ... The legislature did not prohibit this court from considering interest claims. There is a part-prohibition on this court hearing municipal rates and taxes claims and an outright ban on hearing ownership to land cases, per s. 10(a). Small Claims Court is a creature of statute, and its entire authority evolves from the statute that created the court, so jurisdictional questions must reference the Act.

[29] In *Wickwire Holm v. Nova Scotia (Attorney General)* (2007), 258 N.S.R.

(2d) 259 (S.C.) Warner J. did an extensive review of the power of the Small Claims

Court to enforce its orders. He said:

[37] The Applicant's principal argument ... is that proceedings in and orders of the Small Claims Court will be ineffective if that court does not have full authority to enforce its orders. On this premise, the Applicant argues that a contextual and purposeful approach to interpretation of s. 31 of the Act should lead this Court to find that the Legislature intended that s. 31 be broadly interpreted so as to include the authority to issue orders that debtors attend for discovery in aid of execution, and orders directing that the Sheriff secure by force if necessary the attendance of debtors before the Small Claims Court to show cause why they should not be found in contempt for failing to attend the discovery in aid of execution (the only order which the Sheriff refused to enforce in the case at bar).

[38] The Adjudicator's determination appears to be based on his interpretation of *Royal Insurance Co. of Canada v. Legge*, [1996] N.S.J. No. 233 (S.C.), and *Imperial Life Financial v. Langille*, [1997] N.S.J. No. 550; 166 N.S.R.(2d) 46; 498 A.P.R. 46 (S.C.). *Royal Insurance* dealt with the Small Claims Court's monetary jurisdiction. In that context Justice Gruchy made several general statements about the relationship between the Supreme Court and Small Claims Court, including: "The Small Claims Court is not supervised by the Supreme Court other than by prerogative remedies for judicial review. This court's relationship to the Small Claims Court is as an appellate tribunal only".

[39] With respect to *Imperial Life Financial*, the adjudicator concluded that since the Court found that the Supreme Court had concurrent monetary jurisdiction with the Small Claims Court in respect of small claims, the corollary must also be true: that is, that s. 31 of the Act gives the Small Claims Court concurrent enforcement jurisdiction as the Supreme Court (para. 17). From this the adjudicator concluded that "A court order or execution order pursuant to that order would be a hollow remedy if no procedure existed to facilitate the enforcement of such orders" (para. 21).

[40] This is the background for the applicant's argument that the proper interpretation of s. 31 is that it, in clear and unambiguous terms, confers jurisdiction on the Small Claims Court to enforce its orders in the same manner as described in the Supreme Court Civil Procedure Rules 51 to 55, including not just execution and recovery orders but orders for discovery in aid of execution and contempt. The applicant specifically argues in its rebuttal memorandum at pages 15 - 16:

"... If the Nova Scotia Legislature intended that contempt Orders should be exempted from the Small Claims Court jurisdiction then it could have been expressly excluded, just as s. 45 of the Judicature Act is included ... Conceivably, under such an interpretation ['an overly narrow and restricted interpretation of s. 31'], Adjudicators could make an Order for discovery in aid of execution under the authority of Civil Procedure Rule 53.15 and not be able to proceed any further. A debtor would simply have to ignore such an Order to avoid ever having to fulfill payment to a party who has a valid Order granted in their favour from the Nova Scotia Small Claims Court."

[41] In my view, the underlying premise of the Applicant ... is wrong. The inherent common law jurisdiction of superior courts continues to be available to those statutory courts and tribunals which are intended to have the protection of contempt proceedings to enforce the orders of those statutory courts and tribunals.

[42] The nature of proceedings in the Small Claims Court are judicial, not administrative, and are therefore of the type for which *ex facie* civil contempt is intended to be available. However, I respectfully reject the premise, which underlies the applicant's approach to the interpretation of s. 31 of the Act, that the "inherent core" jurisdiction of the Supreme Court of Nova Scotia to deal with *ex facie* civil contempt of orders of the Small Claims Court does not exist, or has been eliminated by statute or otherwise....

[30] It is fair to say that if the opportunity and the right to enforce its order remains with a Small Claims Court it would mean that a judgment recovered in the Small Claims Court could not be satisfied if the only property the judgment debtor had to levy on was real property. In this way, the judgment debtor would always be in control, in that he could select of the court in which he would sued and then only have available real property upon which to levy. This is due to s. 19 of the *Small Claims Court Act*:

19 (1) A claim before the Court shall be commenced in the county in which

(a) the cause of action arose; or

(b) the defendant or one of several defendants resides or carries on business,

by filing a claim in the form prescribed by the regulations, accompanied by the prescribed fee, with the prothonotary of the Supreme Court in the proper county.

(2) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court or a city court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the defendant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court or the clerk of the city court, as the case may be, shall transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.

(3) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, the claimant may elect to have the proceeding adjudicated in the Small Claims Court whereupon the prothonotary of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act.

(4) Notwithstanding any other Act, where a proceeding commenced in the Supreme Court does not include a claim for general damages and is within the jurisdiction of the Small Claims Court, a judge of the Supreme Court may transfer the proceeding to the appropriate adjudicator in accordance with the regulations made pursuant to this Act. [Emphasis added.]

[31] An interesting point which this section raises is that the defendant can elect to have a proceeding commenced in the Supreme Court transferred to the Small

Claims Court and effectively bar the claimant from enforcing its judgment by a sale of real property under the *Sale of Lands Under Execution Act*. That would be an injustice. However, if the claim was over \$25,000.00, the defendant could not elect to have the matter tried in the Small Claims Court. In such situations the claimant or plaintiff would be entitled to recover on its judgment by levying on personal property as well as real property.

[32] In accordance with the regulations, the claim is commenced by a claimant. It is for a claim that is recognized a common-law. It is a claim that can be maintained in the small claims court unless it is excluded, such as a claim for the recovery of land or an interest or an estate therein. It is my view that a claim is the initial step taken by the claimant to enforce recovery. It is not an intermediate step taken in the proceeding once judgment has been obtained by one of the parties.

Conclusion

[33] It is my view that an execution order issued to enforce payment of a judgment which has the result of forcing a sale a real property is not a claim for

the recovery of land or an interest or an estate in land. An execution order issued by the court is simply a recognition by the court that the claimant is entitled to recover on its judgment. As such, the appellant is entitled to the order sought before the Small Claims Court, granting him leave to sell the judgement debtor's land free of the encumbrances of the prior judgements, in accordance with the *Sale of Land Under Execution Act*.

J.