IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Scotia Recovery Services v. Dimensionally Specialized Carriers Inc. 2008 NSSC 210

Date: 20080627
Docket: S.H. No. 264653A
Registry: Halifax

Between:

Scotia Recovery Services

Appellant

v.

Dimensionally Specialized Carriers Inc.

Respondent

D E C I S I O N

Judge:	The Honourable Justice Gerald R P Moir
Heard:	26 May 2008 in Halifax
Counsel:	Mr. David A Copp for the Appellant Mr. Dennis James and Mr. Matthew Dill for the respondent

Moir, J.:

INTRODUCTION

[1] Scotia Recovery Services appeals from an order of the Small Claims Court giving Dimensionally Specialized Carrier Inc. judgment for $14,737 and $160 in costs against Scotia Recovery.

[2] Scotia Recovery repossessed a truck that was in the control of Dimensionally Specialized. The learned small claims court adjudicator found the repossession amounted to an actionable conversion.

[3] The substantive issue in dispute is whether the adjudicator paid sufficient attention to evidence that Scotia Recovery was the owner of the truck. There is also a procedural issue about which this court finds itself embarrassed. The court failed to communicate to the adjudicator that a notice of appeal had been filed. This resulted in a long delay before the adjudicator's report was filed.

Ownership

[4] The learned adjudicator found that the truck was purchased by G W Holmes Trucking (1990) Limited in 2002. The sale was financed by a conditional sales agreement with Ford Credit Canada Limited. A year later, the truck was transferred by G W Holmes, or its trustee in bankruptcy, to either Canadian American Specialized (CAS) Inc. or to a related company named by number. CAS, or the numbered company, assumed the obligations to Ford.

[5] An employee of CAS purports to have sold the truck to Dimensionally Specialized Carrier Inc., the respondent. That company is owned by David MacDonald, who had had control of the truck on behalf of G W Holmes and then CAS. This transfer was contested by Scotia Recovery as a sham.

[6] CAS, who remained liable to Ford Credit, appointed Scotia Recovery to repossess the truck. Mr. MacDonald refused to allow agents of Scotia Recovery to come on his property and take the truck away. They waited until he was absent, they trespassed on his property, and the truck was taken to CAS facilities in Quebec.

[7] The case was tried over two nights, and much evidence was devoted to the issue of ownership. Submissions were heard, and a decision given, on a third night.

[8] For Scotia Recovery, Mr. Copps argues that the adjudicator failed to determine whether CAS was the owner. Mr. James argues that the adjudicator fully considered the issue.

[9] Mr. James refers to a lengthy passage beginning on the sixth page of the report in which the adjudicator reviews the evidence about ownership. This passage concludes as follows:

> The reasonable conclusion on the evidence and testimony was that with respect to the truck, Jason Jenkins had actual and apparent authority to sell the truck and did so with the knowledge and consent of sole shareholder of CAC, Mr. Goyette.

[10] One does not split hairs with a Small Claims Court report, and a reference to the "reasonable conclusion on the evidence" may well signify a finding. However, in this case the rest of the report makes it clear that the adjudicator was merely reviewing evidence and made no finding on ownership.

[11] The lengthy passage begins with this:

> It was not specifically necessary to make a determination on the ownership of the truck in order to render a decision on the issue of the liability of SRS. In the circumstances here the issues of trespass, conversion, and rightfulness of seizure were all related to the concept of "legal possession" of the truck, that is, who had physical control over the truck and the intention to control the truck.

His review of the evidence begins with "there was certainly evidence of ownership in David MacDonald's company". Later in the report, he indicates that it is unnecessary for him to decide whether that company paid anything on the disputed sale. And, the report concludes by referring to "red herrings and other irrelevant matters counsel for the Defendant seemed interested in pursuing".

[12] In effect, the adjudicator concluded that it did not matter whether the person who seized the chattel was the agent of the owner. The adjudicator was of the view that a third party with full authority of the true owner may be liable in conversion to a party in possession without title.

[13] The adjudicator's report refers to *Associates Financial Services Ltd.* v. *Bank of Montreal*, [1983] N.S.J. 417 (SCAD) and quotes paragraphs 28 and 29. That was a case in which a second mortgagee seized the mortgaged chattel against the direction of the first mortgagee.

[14] In the report, the learned adjudicator refers to passages at pages 80 and 82 of Lewis N. Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003). Professor Klar states at p. 80 "The tort of trespass to chattels protects a person's possession

of chattels against wrongful interferences." At page 81 he refers to the concept of legal possession as "fascinating and important". One of the passages referred to by the adjudicator is provided in Professor Klar's discussion of legal possession at pages 81 and 82:

> The central policy behind the common law's adoption of the concept of legal possession and the decision to protect it is to prevent violent or antisocial acts of dispossession, even if this means protecting the legal possession of a wrongful possessor. The concept of legal possession is at the heart of the torts which deal with direct interferences with chattels. The fact that trespass is a direct interference with legal possession means that only the person whose legal possession was interfered with has the right to sue for trespass. An owner of chattels who is out of legal possession of them when an interference occurs does not have the status to bring an action in trespass.

[15] I am referred by Mr. James to passages in John G. Flemming, *The Law of Torts*, 8th ed. (Sydney, Law Book, 1992), as adopted in *Musgrave* v. *Basin View Village Ltd*., [1998] N.S.J. 35 (SC):

> The plaintiff in an action for conversion must have been either in actual possession or entitled to immediate possession of the goods when they were converted. This emphasis on possession, rather than ownership, is a legacy from an earlier time when wealth was primarily associated with tangibles and the law was preoccupied with repressing physical violence, combined with the persistent influence on legal thinking of the forms of action which developed out of these conditions. This explains the seeming paradox that a possessor without title such as a finder, a bailee, a sheriff who has seized goods, and perhaps even a thief, may recover their full value; whereas an owner who has neither possession nor a right to immediate possession, like a lienor or bailor during an unexpired term, cannot compel the wrongdoer to buy him out. So great is the emphasis on protecting possession that even an owner may be guilty of conversation, as by dispossessing his bailee during the subsistence of a bailment not determined at will. (pages 64 and 65)
>
> Possession, even without title, is protected against wrongful appropriation, whether the plaintiff chooses to sue in trespass or conversion. A possessor of goods has a good title as against every stranger, and one who takes them from him cannot defend himself by

> showing that the true title lies in some third person: he cannot, in the technical idiom, plead the *jus tertii*. This principle, derived from the medieval axiom that possession is as good as title against all but the true owner, vindicates the actual possessor's right to *retain* possession by discouraging seizure committed in the hope of finding a flaw in the possessor's title. It is subject to two exceptions where a jus tertii (a third party's superior right) may be pleaded. First, where the true owner has authorized or ratified the act of the defendant: and secondly, where a bailee, under the true owner's authority, is defending an action brought against him by his bailor or where he has been evicted under the owner's title paramount. Perhaps this may be generalized to cover every case, not limited to bailees, where a third party has intervened to claim title. (pages 66 and 67)

[16] Although Professor Klar finds the subject of legal possession fascinating and important, others may find it difficult and important. The difficulty is relieved somewhat when one bears in mind the peculiarities of the concept of ownership in English law. We do not have the civilian concept of direct ownership, and we do not have the same concept of indirect ownership for real property as for personal property. One is based on estates, the other is based on rights to possession.

[17] With respect, the learned adjudicator lost sight of the fact that, on the evidence in this case, whichever party owned the truck had a right to immediate possession of it.

[18] As I said, *Associates Financial* involved a unlawful seizure by the agent of a party who did not have an immediate right of possession, a second mortgagee forbidden from making a seizure by the party who had the immediate right to possession.

[19] To say, with Professor Klar, that

> An owner of chattels who is out of legal possession of them when an interference occurs does not have the status to bring an action in trespass.

is not to say that the owner, or the owner's agent, is liable in trespass for taking what belongs to him or her.

[20] The evidence permitted only two possible findings. Dimensionally Specialized owned the truck, or Scotia Recovery's principal owned the truck and had an immediate right of possession. There was no suggestion of the owner "dispossessing his bailee during the subsistence of a bailment not

determinable at will." A bailment at will is not protected. The owner remains possessed: *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*, [1952] A.C. 582 (HL) at p. 611, to which Mr. Copp referred.

[21] Nor was this a case of a third party attempting to escape liability by denying the ownership of a person in legal possession. Scotia Recovery was the agent of the person who claimed ownership. Fleming puts it as an exception: "where the true owner has authorized ... the act of the defendant". However, unlike ratification, it could be a case of the owner taking possession (if the principal was the owner).

[22] To conclude discussion of the first issue, it was essential to determine whether Scotia Recovery's principal had an immediate right to possession of the truck or Dimensionally Specialized had that right. The adjudicator, holding in effect that an owner entitled to immediate possession is liable in conversion to a stranger in legal possession or a bailee at will, chose not to make that determination. The holding and the failure to determine ownership were errors in law.

DELAY

[23] Subsection 32(4) of the *Small Claims Court Act* reads as follows:

> 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.

Regulation 22(6) under the *Small Claims Court Act* requires a prothonotary to send a copy of a notice of appeal to the adjudicator and it requires the adjudicator to file a report no more than thirty days after the notice is sent. Regulation 22(12) provides that non-compliance does not avoid the proceeding, but the proceeding may be "set aside as irregular or otherwise dealt with as the court may direct".

[24] In this case, the notice of appeal was filed at Halifax on April 2006. It was sent to Pictou over three months later. It was sent to the learned adjudicator in April 2007, a year after the filing. The report was signed on February 19, 2008. The court lost track of the appeal twice, and the adjudicator explains: "Unfortunately, until I received a faxed inquiry from the Prothonotary in Pictou on February 7, 2008, I had lost track of the file myself."

[25] Subsection 29(1) of the *Small Claims Court Act* requires the adjudicator to make an order no later than sixty days after the day of the hearing. It was once thought that failure to meet this deadline terminated jurisdiction: *MacNeil* v. *MacNeil*, [2002] N.S.J. 572 at para. 4. In the *MacNeil* case Justic Edwards held otherwise.

[26] In *Stokes* v. *Murray*, [1996] N.S.J. 435 Justice MacLellan dismissed a ground of appeal based on the deadline in s. 32(4). His main reason was that he was unable to determine when the adjudicator received a copy of the notice of appeal (para. 14). He also chose to "point out" what are now regulations 22(6) and 22(12).

[27] The Small Claims Court is not a court of record. The absence of a record is a part of the "compromise" between reducing expense, formality, and delay and providing procedural protections, a compromise that is at the heart of the statute's purpose: see *Whalen* v. *Towle*, [2003] N.S.J. 528 (SC) at para. 5. In the absence of a record, there is less expense, formality, and delay, but there is also a greater risk that error will go without redress. To provide some protection, the statute allows a very limited review through an appeal that is based on the adjudicator's report rather than a record. The reason the Act requires swift preparation of the report is so the parties and the public can have some confidence in the limited review on appeal. That, as I see it, is the primary purpose of s. 34(1).

[28] Subsection 34(1) is part of a legislative scheme of mechanisms for bringing a dispute on for swift hearing, and determination without broad appellate review.

[29] The wording of s. 34(1) is mandatory, but it does not provide for consequences when the mandatory deadline is not met. I agree with the conclusion reached by Justice Edwards in *MacNeil*, but I do not think mandamus is the only possible remedy. In my opinion, delay by the adjudicator may give rise to a breach of fairness when the report is so stale that one cannot have confidence in it as a limited substitute for a record.

[30] Regulations 22(6) and (12) provide for consequences but, as regards the prothonotary, no specific deadline. In light of the purpose of the statutory provision for a report, I interpret regulation 22(6) as requiring the prothonotary to immediately send a copy of the notice of appeal to the adjudicator. Failure to comply leads to the discretion in regulation 22(12).

CONCLUSION

[31] In a case in which there is no question of a bailment on terms, a case in which the only issue is which party had the right to immediate possession, it is necessary to decide on ownership. The learned adjudicator refused to make a finding, which was an error.

[32] The delay by this court in notifying the learned adjudicator, and the further delay by the adjudicator in filing a report, undermine confidence in the report as a limited substitute for a record. This breaches the duty of fairness.

[33] I will grant an order setting aside the learned adjudicator's order, directing a rehearing before another adjudicator, and providing for costs to the appellant of $50 plus disbursements.

J.