IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gallant v. United Campers, 2008 NSSC 381

Date: 20081014
Docket: S. T. 298272
Registry: Truro

Between:

Tim Gallant, Sandy Hagen, Bay Gardens Ocean Resort & Campground

Appellant

v.

United Campers, Valerie Fage, Alisha Fage, Heather Harrison, David Harrison, Carol Farrell, Robert Farrell, Karen Farrell, Ricky Farrell, Gary Higgins, Marion Smith-Higgins

Respondents

DECISION

(Appeal)

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	October 14, 2008, in Truro, Nova Scotia
Written Decision:	December 15, 2008
Counsel:	Appellants, self-represented Respondents, self-represented

By the Court:

[1] This is an appeal by Tim Gallant, Sandy Hagen and Bay Gardens Ocean Resort and Campground from a decision of the Small Claims Court of Nova Scotia. Specifically the decision of Adjudicator James F. Richards, Q.C. That decision is dated the 9th day of June, 2008. Subsequent to the Appellants filing the appeal, Mr. Richards, the Adjudicator, filed a summary of findings pursuant to the **Small Claims Act**. The summary of findings is dated September 2, 2008.

[2] The actions that started this proceeding and lead to the decision of Adjudicator Richards, and the subsequent appeal, are basically five separate actions in the Small Claims Court that were informally consolidated and heard together by the Adjudicator. It took a substantial period of time to hear them because, based on his decision, it appears there was evidence heard on October 1st, October 22nd, November 1st, November 5th and November 6th, 2007 at the Court house in Truro.

[3] The Respondents who were all claimants were made up of a number of people, one of which was a group called the United Campers, being individual

parties, Garnet Mattison, Arlene Brown, Doug Reynolds and Holly Martin. The second file was a claim advanced by Valerie Fage and Alicia Fage. The third one was by Heather and David Harrison and the fourth one by Carl and Robert Farrell and Ricky and Karen Farrell and the fifth one by Maria Smith-Higgins and Gary Higgins.

[4] From perusing the material and reviewing the decision of Adjudicator Richards, a short background of the matter is all that is required. Basically it was that all the claimants were tenants or campers at the campground owned by the Appellant company, Bay Garden Oceans Resort and Campground. That company, as I understand the facts, is owned by Tim Gallant and Sandy Hagen. The process, as outlined by the Adjudicator, was that the previous owners of the campground, Robert and Dianne Jones, had a policy that involved if you had a trailer at the campground for the year, you would get a significant discount from the daily rate at the campground if you committed to being there for the entire season. If you would become a seasonal client. The practice, as I understand it, is that if you were there for one particular season, which would be the summer months, that you could, I believe at least in some cases, pay a deposit. You could then leave your camper there over the winter or at least guarantee yourself a spot the next summer.

You would then go at the first of the next season and pay the entire amount which would be set by the Jones' and then you could stay there for that full year.

[5] There were rules posted as to what your obligations were at the campground. The owners obviously had the right to post such rules which became the rules for that year. The suggestion is that sometimes the seasonable amount would increase or decrease but you had to decide at the start of the year whether you wished to pay the fee and stay there.

[6] This action arose as a result of the sale of the campground to Bay Gardens Ocean Resort and Campground Company owned by Mr. Gallant and Ms. Hagen in the spring, early May, of 2007. All the parties, the Respondents, prior to the conveyance by the Jones' of the campground had in effect paid their seasonal rates which were in the vicinity of $1,200.00 or $1,300.00 depending on the type of lot they had. The scenario was they either paid a deposit and got credit for the deposit when they paid the seasonal rate, or simply went in and paid their amount and got a receipt indicating they were entitled to be in the Jones' campground for the summer of 2007. However, after they had paid the amount the Jones' sold the campground.

[7] The issue then becomes, what is the standing of the seasonal campers? The new owners, the Appellants, took the view they had purchased the assets of the former company and the campers were now obligated to comply with their rules and their fee structure. In most cases, as I understand the evidence, the fee structure, because of a change in the supply of electricity to a number of the lots, would mean that most people were obligated to pay more than they had paid the Jones'. Not a significant amount more it seems in the scheme of things but it was something of just over $200.00.

[8] The evidence disclosed at the hearing by the Claimants was that they objected strenuously to the increase in fees and also objected to new rules that were posted by the new owners in regard to how the campground operated. They apparently were given an opportunity to adopt the new rules and the new schedule of fees or to leave the campground. Some of the claimants agreed, admittedly according to Adjudicator Richards, under duress to the new rules, paid the increased amount and were entitled to stay. Some people refused to sign up for the new rules. For the new owners, the Appellants, or at least part of the Appellants, because there is an issue also as to whether Mr. Gallant and Ms. Hagen are

individually liable here, the rule was that if you did not agree to the new seasonal arrangement and the imposition of the new rules, you would be then costed out at a daily rate for your days there. The longer you stayed the longer the daily rate was taken off the amount you had paid the Jones'. Once that amount ran out you were expected then to pay continuing on a daily rate. My impression, without doing the calculations, was that the daily rate if added up for the entire days of the summer would be significantly more than the seasonable rate. So it was a significant advantage to accept the seasonal rate as far as the money was concerned.

[9] We have at least five different scenarios and different factual situations for different people. Some had paid under duress. Some had not paid and a daily rate was imposed. However, everybody who is a claimant/respondent here eventually filed a claim against Mr. Gallant and Ms. Hagen and the company. They were claiming to be compensated for either the additional monies they had paid or for inconvenience because some of them left the campground early because of the new rules or because of the application of the seasonal rate or whatever.

[10] The process before the Adjudicator became really complicated. There was a lot of evidence. There was a lot of conflict in the evidence, which is apparent from

the decision, as to who said what and when and what was done. That was the Adjudicator's job to muddle through that and make findings and then impose the law on the findings and give a decision. He did so. However, he did so not quickly because the last day of hearing in the Small Claims Court was November 6, 2007. He did not render his decision until June 9, 2008, seven months later. Again, that is going to become an issue in this case.

[11] Following the filing of the Adjudicator's decision the Appellants filed a notice of appeal. They indicate in that appeal their objection to his decision. The Adjudicator then sees that notice of appeal and has an obligation, again within certain time limits, to file a summary of findings which he then did. In the summary of findings the process is that the Adjudicator is supposed to consider what is raised in the notice of appeal, respond to some extent to what is raised in the notice of appeal, but basically to outline his findings of fact. That then means this Court can review it on the appeal.

[12] What Adjudicator Richards did in this case was in his summary of findings he basically adopted his written decision and then addressed at least one issue

raised in the notice of appeal. That is an allegation against him that he was biassed in his hearing of the matter.

[13] Let me say this to all of the parties. The normal practice in Small Claims Court is when Adjudicators hear matters, most times they are not matters nearly as complicated as this matter was, they give a short oral decision in Court in the company of the parties in which he or she decides the case and tells the parties what the decision is and he makes an order. When an appeal is filed from that order the summary of findings is normally the substantial amount of material that comes before the Court because it gives the Adjudicator then opportunity to explain why he came to the order.

[14] In this case because there was a substantial decision filed by the Adjudicator of 16 pages, I agree that as far as he is concerned it is appropriate to adopt to some extent what has already been said in the decision. I think the Adjudicator is bound by what is said in the decision. The Adjudicator simply has to add to that decision any issues that he has not addressed in his decision that are raised in the notice of appeal. To that extent I believe the Adjudicator was correct in adopting his decision and attaching it to his summary of findings.

[15] I again point out that I am obligated to apply the law of this country to these issues even though sometimes the law might appear to be harsh or otherwise. I suggest the Adjudicator has the same obligation.

[16] I will summarize the main grounds of appeal raised by the Appellants in this case. They are in the notice of appeal. All parties have received them. I will summarize them and they were spoken to by Ms. Hagen here this afternoon. I suggest there are four main concerns.

[17] The first concern they raise is the question of the fact the Adjudicator found Mr. Gallant and Ms. Hagen personally liable as opposed to their company being liable.

[18] The second issue is the suggestion in the notice of appeal that the claimants that were listed under the claim “United Campers” should not have been entitled to advance their claim as a group since they are not a legal entity. Each of them should have been obligated to file a claim personally against the Appellants as opposed to a group action.

[19] The third, I would suggest more substantial ground of appeal, is the suggestion there was no contract between Bay Gardens Ocean Resort and the Respondents in regard to the renting of spaces at the campground. That concept is known as privity of contract and it stems from the fact that if you deal with a person you are obligated to continue to deal with that person. I will get to that later.

[20] The fourth ground of appeal is a suggestion that the process used by the Adjudicator constituted a denial of natural justice. That was based on the suggestion the proceeding itself was unfair and therefore it should be overturned. It was argued it was mainly the way the Adjudicator handled the evidence and handled the proceeding.

[21] I am going to attempt to deal with each of these grounds of appeal as I have summarized them in order.

[22] The first issue is the question of Mr. Gallant and Ms. Hagen being personally liable. It is clear the original claims filed by the claimants, some of

them were against Mr. Gallant and Ms. Hagen personally and some of them were against them personally and against the company. I believe one of them was just against Mr. Gallant. It is up to a claimant as to who he or she sues. You have to determine who you have a cause of action against. Just because you deal with somebody does not necessarily mean that you have a cause of action against that person personally. If that person is representing a company then your claim is against the company, if that person is simply an employee of the company or a director or owner of the company. However, it does not necessarily mean that the person cannot be personally liable. Many times if you are dealing with an employee of a company, if the employee does something to you, that employee can be personally liable to you in addition to their employer, the company, being liable to you. It depends on the facts. The impression I got here, I do note in the defence raised by the Appellants to their claims, this issue was raised. It was not Mr. Gallant and Ms. Hagen that were changing the rules for 2007 and changing the fee structure, it was the company they owned that owns the campground that was changing the rules. I do not think there is any suggestion here that any of the claimants had a claim against Ms. Hagen and Mr. Gallant personally in regard to the fee structure. They did not own the campground. The company owned the

campground, as I understand the facts. Therefore, they are entitled to have the Adjudicator deal with whether it is appropriate they be held liable for the issue.

[23] I guess my difficulty here was despite the fact that issue was raised, I am not saying the claim should only be against the company or that it could not be against these people personally, but the Adjudicator should have determined that. He should have made a finding since it was raised as an issue. He should have come to the conclusion that, yes your claim is only against the company if the evidence supported that.

[24] I think parties are entitled to have issues determined either by an Adjudicator or a Judge or a Court. Whether you are right or wrong in determining whether you are liable personally or the company is liable then that is a different issue. You are entitled to have that decided. That was not done here by Adjudicator Richards. He did not, as far as I can see, make a finding that any action, or judgment, or finding, should be only against the company, or against the individuals and the company. I understand his decision to mean the decision is against Mr. Gallant, Ms. Hagen and the company.

[25] The second issue is the question of the United Campers. That concept of a number of people joining together and taking an action I guess would be called to some extent a class action. In other words, it is an action and it is an action that is known in law now as a class action where people join together, who have common interests, against a common enemy so to speak. You take an action. However, that class action process is very complicated. It is normally not recognized in this province unless you specifically advance it and get an order entitling you to do a class action.

[26] To some extent I do find that Adjudicator Richards did deal with the matter in his decision. He basically said they are just a group of individuals and he says:

> They are in no way a legal entity but collectively individual claimants.

So he passed it over. I am not terribly upset with the fact that he permitted that group to go ahead. It did save, apparently, some filing fees from each individual that were in that group. However, it is an issue. It is not a big issue in my mind as far as this case is concerned.

[27] The next two issues are the issues that are significant to me. They are the privity of contract and the denial of natural justice.

[28] Privity of contract concept is that you have to sue the person who has wronged you. That concept is, has either wronged you or for which you have a contract. I understand the facts here are, and I do not think there is any dispute, the previous owners took the money from the claimants and then they sold or leased the assets to the campground. The claimants were then asked to pay more. The rules were changed. The question is who should have been sued in that circumstance. Quite obviously to a lawyer and to the Court the people who should have been sued were the Jones'. They were the ones that took the money from the claimants. They were the ones that had the cheques of the claimants. They were the ones that made the deal.

[29] What deal did they make? They made a deal that if the claimants paid $1,300.00 they could stay at their campground for the summer. Then they go out and they sell the campground out from under themselves. The question is do the claimants have a contract with the new owners of the campground? They can have a new contract with them if they wish. On the surface they do not. They

have no contract with them. They made no commitment to them when their money was given in. They did not tell them they could stay there. They, as I understand it, offered in effect to have the claimants continue to stay there if they paid the new fees and they followed the new rules. Some of them agreed to that. Some of them did not. The normal scenario of events in this case would be, I would have expected that if the new people came along and said the rules are now changed because we now own the campground and you have to pay more money for the camping, is for you to sue the Jones'. You sue the Jones' and you tell them, you had to pay more money for what you guaranteed us we could have for less money. At that point they could join the Appellants and say you have to abide by the deal we made with these people. That could be so. But the claimants' action is in effect against the Jones'.

[30] The Adjudicator in his decision attempted to address that issue. He did say at page 9 of his decision:

> The acceptance of seasonal camper fees as part of the asset purchase closing and the obtaining of credit for those fees was not a gift from the Jones'. They were existing seasonal contracts between individual seasonal campers and the Jones' for which the defendants are liable and responsible.

The issue is, is that statement correct? I have serious difficulty with that interpretation of the law by the Adjudicator. The Adjudicator seems to have assumed that if you bought a campground and there were existing obligations that somehow the obligations were conveyed to the new purchasers. He did mention that is done in many, many cases. That would be expected. The reason why that is done in many cases is to protect the sellers from claims by people who have contracts. In other words, so the Jones' would not be sued by anybody who they had taken money from. They have a clause in their contract that you have to honour all the contracts we have entered into. Apparently that was not done in this case when the Jones' conveyed the assets. Ms. Hagen has said to me, and she said apparently to the Adjudicator, we are not obligated to follow the commitments made by the Jones' unless we have undertaken to follow them. I agree. I agree.

[31] That does not necessarily mean that the people who have paid are left out in the cold. They are entitled to take an action to recover the money or any additional money they have had to spend in order to effect the deal they made with the Jones'. You sue the person you have the contract with. If you do not have a contract with somebody you cannot sue them on contract. It is a very simple concept.

[32] The Adjudicator did not deal with that issue adequately. I think he would have to, in much more detail, set out his legal basis for the findings that he made on that issue of law.

[33] The final issue is a denial of natural justice. There was a lot of talk about the proceeding. I have indicated to all claimants at the start, that I do not know. I was not there. There are different versions of what happened. I am not inclined to allow this appeal based on a denial of natural justice on allegations of what Adjudicator Richards might have said or not said at the hearing. Adjudicator Richards says that he does not know Mr. Higgins. That there was no reason, he was just being polite. He was asking him questions. That could very well be. In other words, sometimes people see things through different eyes. People see what they want to see not necessarily what really is happening. When Ms. Hagen saw Mr. Higgins talk to Adjudicator Richards she thought that was something because they were friends. It could very well be what Mr. Higgins said, they were just talking about whether he had to come back. It depends on the perception.

[34] I have a serious problem with how Adjudicator Richards dealt with this case generally. I am going to get a little bit legal for you here because I have to. Despite the fact that you are not lawyers.

[35] Smalls Claims Court is a Court that is intended to deal relatively quickly with claims. The whole intent of the process is you file a claim. You get a hearing date. You have a hearing. You get a decision. You are entitled to an appeal. You have an appeal. The matter is finished. There are lots of concerns about the fact that the speed in which we do things in Small Claims Court might in effect not bring perfect justice. It was never intended to be a perfect justice system. It was intended to be a system where people would have their day in Court without the benefit of lawyers. They could get a decision from a person who is not biassed one way or the other and that decision could be appealed based on the grounds of appeal I have set out. However, the **Small Claims Act** does indicate at s. 29(1):

> Subject to the provisions of this **Act** not later than sixty days after hearing the claim of the claimant and any defence or counterclaim of the defendant the adjudicator may make an order dismissing the claim, requiring the payment of money...

Within 60 days of hearing the claim he is obligated to file a decision. What happened in this case? The last day of the hearing was on November 6, 2007. His decision was June 9, 2008. If I give him two months, June, July, August 9th, that would be 60 days. He then waited five more months before he filed his decision. Five more months is five months late in effect.

[36] The question is what is the consequences of that? A number of our Judges of the Supreme Court have dealt with that issue. The decisions have gone a couple of different ways. Some of our Judges, notably Justice Davison and Justice LeBlanc in Halifax and Justice MacDonald in Sydney have dealt with cases where the Adjudicator has failed to file his decision within 60 days. In all three cases the Judge declared that because he did not file the decision the decision was a nullity and sent the matter back for re-trial.

[37] A couple of other Judges, Justice Edwards in Sydney and Justice Moir in Halifax dealt with the same issue where an adjudicator has failed to file a decision within the time limit set out in the **Act**. They did not find the decision was a nullity. Justice Edwards in his case, **MacNeil v. MacNeil,** [2002] N.S.J. No. 572 and [2003] C.C.S. No. 5717, held in that case the decision was filed six days after the 60 days. In other words, 66 days after the hearing. So it would be six days

late. Justice Edwards found he was not prepared to declare the matter a nullity because of that and held the decision was okay.

[38] Justice Moir in Halifax dealt with the issue in a little different manner. Justice Moir had a situation where the decision was not the decision of the Adjudicator but the actual filing of the summary of appeals. The **Small Claims Act** says that once you file a decision the adjudicator is supposed to file his summary of findings within 30 days of getting the notice of appeal. Again, these concepts are all designed to have the matter move swiftly**.** Justice Moir was faced with a situation where a considerable period of time had passed from the date of the decision of the Adjudicator until he filed the summary of findings. It was almost over a year. Justice Moir was faced with basically this conflict in the law as to whether he should go one way or the other. Justice Moir of the Supreme Court in his decision, **Scotia Recovery Services v. Dimensionally Specialized Carriers Inc.**, 2008 N.S.H. No. 302, dealt with that issue and he considered the facts in the matter. He basically said that if he found that the delay in filing the decision caused an unfairness to the parties, he would remit the matter back to an Adjudicator. In other words, he would consider the period of time that the Adjudicator was over the time limit and if that caused an unfairness he would order

the decision not stand. I tend to agree with Justice Moir, that is a good approach. Kind of a middle ground approach. You are not saying that because you are one day over the limit that the thing is a nullity. In other words, the Judge looks at the thing, sees if there is an unfairness in the consequences of being late and then decides whether it is a nullity.

[39] In this case I am convinced clearly, based on the confusion particularly of Adjudicator Richards about one of the claimants, Mr. Higgins' claim, that the effect of the adjudicator delaying seven months in filing his decision did cause an unfairness. I think to some extent he lost sight of the evidence. It is not something I find surprising because as a Judge I have had situations where I hear a trial and if I do not render a decision in a fairly short period of time when you go back to it, it is very difficult to reconstruct all the facts from your notes. As Trial Judges we have the advantage of being able to look at a transcript because we have a transcript of the hearing. If we want to review it we can look at the transcript. Adjudicator Richards here did not have a transcript because there was no transcript. He was forced to only rely on his notes.

[40] Seven months after Adjudicator Richards heard all this evidence over all these days he is trying to reconstruct the facts. Ms. Hagen has said he got confused. He got confused about the facts. He contradicted himself. I agree with her. It is fairly obvious what happened. In his summary he made a finding in regard to Mr. Higgins where he admitted that he did not know what the facts were. The question is, how can you decide something if you do not know what the facts are?

[41] In his summary of findings, number two, he says:

> If in fact the Jones' stayed and they did not pay the additional fee demanded by the defendants then of course my decision is wrong and there is nothing owing by the defendants to Mr. Higgins.

What is that? That is not a decision. That is a statement that I do not know what the facts are.

[42] The issue, therefore, is what is the remedy in this case? Based on my finding the delay by the Adjudicator has caused him to not be able to recite the facts properly and he has violated the terms of the **Small Claims Act** by five months, I find that his decision is a nullity and has no standing.

[43] I would, therefore, order the matter be remitted back to another Adjudicator to be reheard.

[44] It is very disconcerting that I have to do this. I do appreciate this has been a struggle on both sides. Both of you have rights. Both of you are entitled to have your hearing in Court done. I do not wish to prejudge what a new adjudicator might find based on the facts that are presented to him. However, I would suggest to all the claimants, you did hear of a compromise being offered here at the start of this proceeding. I would ask that you seriously consider that if it is still on the table. I would also ask that you seriously consider whether you should get legal advice as to whether you should proceed based on the claim you have already filed, or as to whether you should be adding somebody else, or suing somebody else in these circumstances. That is entirely up to you. A suggestion that you get legal advice it seems to me might be completely warranted because at this stage there is no winner and no loser. I am simply saying the decision made by the Adjudicator is being quashed. It is no longer in effect. You are entitled to bring the matter back to Small Claims Court if you wish before a new Adjudicator. Whether you do so or not is entirely your choice.

[45] Thank you very much.

J.

12/15/08