IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Lacombe v. Sutherland, 2008 NSSC 391

Date: 20081210
Docket: SH 299462A
Registry: Halifax

Between:

Richard Lacombe & Louise Gelinas

Appellants

and

Peter Shawn Sutherland

Respondent

Judge:	Justice Duncan R. Beveridge
Heard:	November 3, 2008, in Halifax, Nova Scotia
Written Decision:	December 19, 2008
Counsel:	Richard Lacombe & Louis Gelinas, self represented Peter Sutherland, self represented

By the Court:

INTRODUCTION

[1] This is an appeal from a decision by a Small Claims Court adjudicator. The stated purpose of the Small Claims Court is set out in its enabling legislation. Section 2 of the *Small Claims Court Act* provides:

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

[2] In addition there is ample reason to be believe that the intent of the legislature in setting up the Small Claims Court was to try to ensure speedy resolution to the dispute and any appeal arising from an adjudicator's decision.

[3] To better understand the issues raised in this appeal it is necessary to set out the history of these proceedings.

PROCEDURAL HISTORY

[4] The claimant was Peter Sutherland. The defendants were Richard Lacombe and Louis Gelinas. Mr. Sutherland filed his notice of claim March 17, 2008. The claim was for $4,577.00 for services he says he rendered to the defendants who ran a small business called AxxesMedia. At least part of the payment by AxxesMedia to Mr. Sutherland was to be by their provision of internet and related services. Mr. Sutherland was completely dissatisfied with the services supplied by Axxes and sued. From my review of the file it appears that no defence or counter-claim was

filed by Messrs. Lacombe and Gelinas. Nonetheless the hearing was set for April 29, 2008. All parties appeared and called evidence.

[5] The adjudicator reserved his decision and released it to the parties on May 9, 2008. Up to that point the system had appeared to be fulfilling its stated purpose of adjudicating claims informally and inexpensively in an expeditious fashion, but in accordance with established principles of law and natural justice. However, during the course of this appeal both parties expressed their dissatisfaction with the decision by the adjudicator.

[6] The adjudicator ordered Mr. Lacombe and Gelinas to pay to Mr. Sutherland $1,316.45 inclusive of HST plus costs of $85.44 for a total of $1,401.89. The adjudicator's decision is sparse, to say the least, in light of the issues and evidence presented by the parties. It is but two paragraphs:

> This is a difficult case upon which to make a decision. The parties made an agreement to exchange services. The claimant, Peter Shawn Sutherland provided renovation painting and flooring services to the defendants. The defendants, Richard Lacombe and Louis Gelinas provided IT services to Mr. Sutherland. This agreement broke down, and the parties are now disputing the value of their respective services to one another. Both sides say the work they were actually asked to do exceeded that which they agreed to do. It falls to me to try to calculate their value and set off one against the other.
>
> I calculate the value of Mr. Sutherland's painting services, including the baseboards to be $1,500.00 and the value of the flooring services to be $640.00. The total is $2,140.00. I calculate the value of the IT services to be $975.00. I allow $400.00 for the website design and the other services in full. I am satisfied that Mr. Sutherland sought an interactive web site whereas the original idea had been to set up of one that was entirely passive. I accept the former is more complex than the latter. Mr. Gelinas suggested a third party on line facilitator and provided advice to Mr. Sutherland about how to do it. Mr. Sutherland did not back up his content and so he lost it on line, but he still had the advice, and in any

> event, we all have to know that everything we do on a computer has to be backed up, even if it is by pen and paper. I do not allow his claim for the time he spent. I find the balance owing to Mr. Sutherland to be $1,165.00 or $1,316.50 including HST. Mr. Sutherland is also entitled to the cost of issuing the claim in the amount of $85.44.

[7] Mr. Lacombe and Gelinas wrote to the adjudicator requesting clarification. Their letter of May 30, 2008 was as follows:

> We request clarification regarding the amount owing to Mr. Sutherland of $1,401.89 (the difference between the calculated value of $2,140.00 for painting & flooring services and $975.00 for IT services)
>
> As an advance payment of $400.00 has already been paid to Mr. Sutherland, should this amount be reflected in the final order to pay?
>
> Respectfully submitted.

[8] The Small Claims Court adjudicator replied in his letter of June 20, 2008 as follows:

> I acknowledge that my notes record a payment of $400.00 to Mr. Sutherland and I presume this should have been included in the order. If Mr. Sutherland is not prepared to credit the order with this amount, then please advise and I shall consider an amended order.

[9] This was followed up by the adjudicator in a letter of July 7, 2008 wherein he wrote:

> Mr. Sutherland called to say that he was proceeding with the execution. I do not think I have power over this matter any longer. I have made a final order and the change you seek is too significant for me to treat as a clerical error and make a revised order based on my notes. I agree we should have clarification regarding the issue of the $400.00 but I think I could only have a hearing to address the issue if you filed an appeal and the court remitted the matter to me.

[10] Mr. Lacombe and Gelinas brought an application to extend the time for filing of an appeal, which application was granted. They filed a notice of appeal on August 12, 2008 alleging jurisdictional error by the adjudicator. In due course the notice of appeal was sent to the adjudicator as stipulated by the *Small Claims Court Act*. Upon its receipt the adjudicator has certain duties. These duties are set out in s.32(4) of the *Act* 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.

[11] A report from the adjudicator was sent pursuant to s.32(4) on September 15, 2008. It was not at all helpful. It simply said:

> On April 29, 2008, a hearing was held with respect to the within matter. My findings of law and fact, including the basis of any findings raised in the Notice of Appeal, are as they appear in the attached Decision and Order of May 9, 2008.

[12] The appeal came on for hearing before me on November 3, 2008. The position of the parties were as follows. The appellants argue that the adjudicator erred in failing to credit them for having paid to Mr. Sutherland's employee, David Delamere, $400.00 for his participation in the installation of laminate flooring. The appellants contended that the adjudicator's letters of June 20 and July 7, 2008 demonstrate an acknowledgement by the adjudicator that he overlooked the $400.00 payment. In reading these letters I was unable to come to such a conclusion. The letter of June 20, 2008 refers to "I presume this should have been

included in the order."; and in the letter of July 7, 2008 the adjudicator expresses his agreement there should be "clarification" regarding the issue of the $400.00.

[13] The respondent Sutherland argued that he entered into a verbal agreement to crackfill and paint the offices of AxxesMedia for $1,750.00 in exchange of the creation of a website. He says that the original quote of $1,750.00 was based on the information from Messrs. Lacombe and Gelinas that the baseboards would be rubber which does not require filling, caulking and painting. Mr. Sutherland also pointed out that his agreement to install flooring in the office was based on the use of a two foot square peel and stick product. Given the ease of installation he agreed to do that at .55¢ per square foot. However, on the day he arrived to install the flooring Messrs Lacombe and Gelinas presented laminate flooring. Mr. Sutherland contended that he said he would require .80¢ per square foot for installation and Messrs. Gelinas and Lacombe agreed. In support of the reasonableness of this price Mr. Sutherland tendered before the adjudicator quotes from Wacky's and Floors Plus for $1.25 and $1.75 per square foot plus HST.

[14] The only other evidence of value of the services performed by Mr. Sutherland was a quotation tendered by Messrs. Lacombe and Gelinas from B. Ruelland Painting Service for painting services in respect to the walls and trim for $1,500.00 plus HST. I note that this quote does not appear to include the crack filling work nor the installation and preparatory work needed to paint the baseboards.

[15] Mr. Sutherland argued that there was therefore no breakdown of how his services came to be valued at $1,500.00 for the painting including the baseboards

and $640.00 for the flooring. He says since it was acknowledged in his notice of claim and in the invoice dated February 22, 2008 tendered before the adjudicator that there had been a $400.00 payment for Mr. Delamere, this payment surely must have gone to the adjudicator's calculation of net value of the services he provided.

[16] As noted earlier, the report from the adjudicator under s.32(4) is supposed to address any findings raised in the notice of appeal. The report sent on September 15, 2008 completely failed to do so. I decided that, in fairness to the parties, to offer to them the option of my seeking clarification from the adjudicator. They agreed.

[17] In my opinion, regulation 22(8) of the *Small Claims Court Forms and Procedure Regulations* provides an arguable foundation to make such a request. That regulation provides:

> A judge may direct what additional material may be filed and may request a restatement of the case from an adjudicator.

[18] While this regulation may have been brought into force at a time where an appeal from a decision by a Small Claims Court adjudicator would have been by way of stated case, it is nonetheless helpful in terms of support for this court having the jurisdiction to seek a clarification of what transpired in the proceedings before the adjudicator. As things presently stand those proceedings are not recorded.

[19] I also take the view that I have the jurisdiction to require a Small Claims adjudicator to meaningfully comply with the provisions of s.32(4) of the *Act*.

[20] The appeal hearing was adjourned to December 10, 2008. I wrote to the adjudicator on November 7, 2008. I set out the factual context. I then made the following request:

> In light of the forgoing could you please clarify, if you are now able, how, if at all, the $400.00 payment made in relation to Dave Delamere's role in installation of the laminate floor played in the determination of the value of the services provided by Mr. Sutherland.

[21] The adjudicator promptly replied to me by letter dated November 13, 2008. He wrote:

> I am embarrassed. I neglected to address the issue of the $400.00 in my opinion. When the issue was raised, I had no memory of what the evidence was on the point. I went back to my notes and found them to be equivocal. I apologize to you and to the parties who have been put to so much trouble, but in fairness to both of them, I have to say that I was unable then and am unable now to recite the evidence on the matter in any meaningful way, much less to come to some conclusion about it.

[22] A copy of this letter was sent to the parties and further submissions were invited. None were forthcoming.

[23] The appeal hearing reconvened on today, December 10, 2008. The position of the parties in essence remain unchanged.

[24] Both parties express their frustration at this turn of events. The appellant still contends that the adjudicator made a valuation for the services involved, that is the flooring, the painting and the website, or IT services and seeks to uphold those

valuations but contends that the total amount owing should be reduced by the $400.00 payment that was made to Mr. Sutherland's employee.

[25] Mr. Sutherland repeats his earlier position that there were multiple occasions that the $400.00 payment was acknowledged as having been made. It was discussed by the defendants before the adjudicator and by himself. He therefore finds it hard to believe that in the short time between the hearing on April 29, 2008 and the date of decision on May 9, 2008 that these funds were not taken into account. He also today, for the first time, raises the issue that part of the valuation included his right to acquire a domain name which has not in fact been transferred into his control. I will have more to say about this later.

DECISION

[26] There are no appeals as of right. There is no inherent right accorded to a litigant to appeal or for a superior court to entertain an appeal. Appeals are entirely creations of statute. Typically an appeal is not a re-hearing of the dispute between the parties.

[27] In Nova Scotia the *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the *Act* does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.

[28] It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing *de novo*, the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice. Even in an ordinary civil case an appellate court can only intervene if the trial court made an error of law or an error of fact that amounts to a clear and palpable error.

[29] Furthermore, in a typical situation an appellate court cannot consider, absent leave being granted, any fresh or new evidence on the hearing of an appeal. Here the *Small Claims Court Act* contains no specific provision setting out a power to hear fresh evidence. I need not decide today if the parties to an appeal from a Small Claims Court adjudicator can adduce fresh evidence other than evidence that may go to establishing a jurisdictional error or a breach of natural justice. Neither party sought to adduce any new evidence before me.

[30] Although the appellant's notice of appeal originally alleged a jurisdictional error, at the hearing on November 3, 2008 I indicated that based on the materials and the argument presented, if any error occurred, it was an error of law. I was prepared to grant an amendment of the notice of appeal to reflect an allegation of an error of law rather than one of jurisdiction. The respondent could not point to any prejudice in amending the notice of appeal. I could see none and granted the amendment.

[31] What constitutes an error of law has been extensively litigated. In the context of a Small Claims Court appeal Saunders, J. (as he then was) described error of law in *Brett Motors Leasing Ltd. V. Welsford* (1999), 181 N.S.R. (2d) as follows:

> [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...

[32] The Supreme Court of Canada has recognized in the leading case of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 that even questions of mixed law and fact can amount to a pure question of law. Iacobucci and Major JJ. wrote:

> [27] Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> > ...if a decision-maker says that the correct test requires him or her to consider A, B, D and D, but in fact the decision-maker considers only A, B and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him

> or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
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> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

[33] My role in this appeal is to review the proceedings below to determine if there has been an error in law. Despite the provisions of the *Act* that seem to envisage the proceedings in the Small Claims Court being recorded, it appears that no such recording here was done, nor is apparently being done on a day-to-day basis. There is therefore no transcript for review to determine what evidence was actually before the adjudicator and hence no ability to assess the evidentiary basis for the findings of fact or mixed findings of fact and law by the adjudicator. What the *Small Claims Court Act* does envisage to assist in meaningful appellate review is for the adjudicator to file his or her report under s.32(4). Here the original report was not, in my opinion, a report within the meaning of s.32(4). It simply referred to his written decision of May 9, 2008.

[34] There may well be cases where the adjudicator's decision is all that is required in the report. This is not one of those cases.

[35] At one time it was accepted that there was in general no duty for a trial court to give reasons. This approach attracted much criticism and eventually has given way to the recognition by the Supreme Court of Canada in *R. v. Sheppard,* [2002] 1 S.C.R. 869 of the principle that a trier of fact is required to give sufficient reasons to the extent that either party may pursue meaningful appellate review.

[36] Even prior to this recognition by the Supreme Court of Canada in 2002, there has been a recognition that a failure to provide reasons can constitute a reversible error in the context of a Small Claims Court appeal.

[37] In *Victor v. City Motors Ltd.*, [1997] N.S.J. No. 140 Davison, J. dealt with an appeal from a Small Claims Court decision. The basis of the appeal was that the summary report prepared by the adjudicator did not clearly set forth the findings of fact and in particular did not clearly set forth the basis for the findings of fact. Justice Davison wrote:

> [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.

[38] Justice Davison concluded that the report was deficient and that this resulted in a breach of natural justice and ordered a new hearing before a new adjudicator with each party to bear their own costs.

[39] There has been what appears to be almost a growth industry in parties contending that a trier of fact has erred in law by failing to give sufficient reasons. Although the court in *R. v. Sheppard* was considering an appeal from a criminal case, the principles have in fact been applied across the legal spectrum. Saunders,

J.A. in the recent decision of *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia Human Rights Board of Inquiry*, [2008] N.S.J. No. 158 wrote:

> [32] Nevertheless, since the Court filed its judgment in Sheppard six years ago, the propositions therein contained have been applied in a host of cases covering a broad spectrum of subjects ranging from immigration to divorce to probate, from actions for wrongful dismissal to claims of bodily injury and breach of fiduciary obligations. Here we are concerned with the reasonableness of the Board's findings and awards of damages based on the evidentiary record. A protest that the Board's reasons are inadequate does not invoke a discrete right of appeal. Rather, the complaint as to an absence of paucity of reasons entails a functional inquiry: is it possible to undertaken an informed, principled and valid review for error? As this court recently observed in 2446339 Nova Scotia Limited v. A.M.J. Campbell Inc., [2008] N.S.J. No. 30, 2008 NSCA 9 at para. 90, it is important to emphasize that:
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> > Deficiencies in a trial judge's reasons do not afford a free standing substantive right of appeal in the civil context, any more than a criminal context.

[40] In *Morris v. Cameron*, [2006] N.S.J. No. 19 A.J. LeBlanc J. considered this very issue of sufficiency of reasons on an appeal of a Small Claims Court adjudicator. There the appellant argued that there was an error of law or a breach of natural justice resulting from the adjudicator's failure to make clear whether he had considered certain evidence. Justice LeBlanc wrote:

> [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.32(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.

[41] He went on to conclude:

> [38] I am satisfied that reasons are insufficient where they do not make clear the evidentiary foundation and reasoning utilized by the adjudicator...

[42] He then set out some additional authorities, and concluded:

> [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.

[43] The appeal was allowed. He granted a new hearing and directed it be heard before a different adjudicator.

[44] In this appeal the appellant alleges an error by the adjudicator in failing to credit him the payment of $400.00, in effect making the order, if upheld, a judgment in the amount of approximately $1,800.00. The appellant argues that the adjudicator did the valuation and simply forgot to deduct the $400.00. If that is the case it would be a simple matter for the adjudicator to have said so in either his decision, in his initial Summary Report, or in the reply to this Court's request that he clarify his reasons with respect to the $400.00 payment.

[45] Although I can well understand why the appellant would be encouraged by the initial reply by the adjudicator that it appeared to be a simple error or oversight by the language used, the adjudicator in his final communication on this issue of

November 13, 2008 is telling. He specifically says in this letter of November 13, 2008:

> When the issue was raised, I had no memory of what the evidence was on the point.

[46] He goes on to say:

> I have to say that I was unable then [which can only be when it was raised] and am unable now to recite the evidence on the matter in any meaningful way, much less come to some conclusion about it.

[47] The respondent argues that the adjudicator must have taken the payment into account as it was in the exhibits, his notice of claim and it was discussed by the parties at the time. Although the respondent has not cross-appealed, he expresses his discontent on how the valuation was done by the adjudicator. He further says that the adjudicator referred to the value of the IT services and set off those against his claim, but he has not in fact received the value of his IT services, as the domain name is still in the control of AxxesMedia. I do not know if this information was before the adjudicator.

[48] As noted, no cross-appeal has been filed by the respondent. In these circumstances I conclude that I should ignore, for the purposes of deciding this appeal, this aspect of the dispute between the parties.

[49] I am satisfied that the reasons by the adjudicator are not sufficient for the purposes of providing meaningful appellate review. Neither the parties nor the court can find any chain of reasoning that led the adjudicator to make the

evaluations he did. We know only his bare conclusions. There is no indication how he dealt with important evidence and hence committed an error of law. Since he may well have taken the $400.00 payment into account in arriving at his valuations, they cannot stand.

[50] I am therefore allowing this appeal and directing that there be a new hearing before a different adjudicator.

[51] In the circumstances there will be no award of costs.

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Beveridge, J.