SUPREME COURT OF NOVA SCOTIA
Citation: Casey v. Wheatley, 2009 NSSC 238

Date: 20090731
Docket: Hfx No. 304322
Registry: Halifax

Between:

Michael John Casey

Appellant

v.

Kevin Michael Wheatley

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 20, 2009, in Halifax, Nova Scotia
Written Decision:	August 10, 2009
Counsel:	Michael John Casey, on his own behalf Tim Hill, on behalf of the respondent

By the Court:

[1] An appeal from a decision of the Small Claims Court is governed by s. 32 of the *Small Claims Court Act* (the "*Act*").

[2] The relevant provisions of s. 32 of the *Act* are as follows:

> 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
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> (a) jurisdictional error;
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> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice,

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> (6) A decision of the Supreme Court pursuant to this Section is final and not subject to appeal.

GROUNDS OF APPEAL

[3] In the case that is before this Court, the appellant, Michael John Casey, argues that the Learned Adjudicator committed an error of law in reaching his determination.

[4] The particulars of the error or failure which form the grounds of appeal are:

> Boat was not part of Supreme Court action and therefore the full and final release should not act as an estoppel.

[5] To better understand the ground of appeal I will provide a brief summary of the facts that led to the claim in the first place.

[6] I will then state the appellant's position in support of the appeal.

[7] Following that I will review the Respondent's argument in opposition.

[8] My analysis of the parties' respective position and my reasons for the decision reached will conclude the matter.

SUMMARY OF FACTS

[9] The appellant and the respondent had been friends before going into business with one another.

[10] During the time they were in business together they had purchased a pleasure boat. The boat was registered in their joint names.

[11] Unfortunately the business relationship soured over time. The appellant commenced an application in the Nova Scotia Supreme Court against the respondent and a numbered company carrying on business as PCM Computers. The application

alleged that the respondent had breached a fiduciary duty and a duty of care to both the company and to the appellant. It also alleged that the respondent had acted in an oppressive and prejudicial manner towards the appellant who along with the respondent were the only shareholders of the numbered company.

[12] Eventually the parties, with the assistance of counsel, reached an agreement thereby avoiding a trial or hearing of the matter. A consent order was subsequently filed and each party signed a full and final release.

[13] Under the terms of the agreement the respondent agreed to pay the appellant $15,000.00; to resign his position as a Director and Officer of the numbered company; to transfer all his shares in the numbered company to the appellant; and to convey to the appellant his interest in the boat.

[14] Approximately seven months after the agreement had been finalized the appellant commenced a claim in the Small Claims Court seeking the sum of $8,249.25 plus interest along with costs and general damages of $100.00.

[15] His reason for making this claim was stated to be:

> This claim is for expenses that were incurred when the defendant and I co-owned a 9183 Bayliner powerboat. These are expenses that were paid for storage, repairs, insurance, and other miscellaneous fees while he was 50% owner. To date he has not paid his share of these expenses. I am seeking payment of fifty percent of these expenses from the defendant. His share of these expenses is eight thousand two hundred and forty nine dollars and forty five cents ($8,249.45).

[16] The respondent defended the claim on the basis that:

> The issue raised was the subject on [sic] a settlement agreement in a Supreme Court action, and the Defendant pleads issue *estoppel* a/or *res judicata*.

[17] The matter went to a hearing on August 26, 2008 and on October 24, 2008 the Learned Adjudicator granted an Order that included the following:

> The Claimant and Defendant were business partners who ended up having a dispute with each other and which dispute ultimately resulted in litigation. Prior to the matter being resolved by litigation, the parties attempted to resolve all disputes between themselves. One of the issues being dealt with between the parties involved

> the boat that was eventually transferred over to the Claimant as part of the final settlement. At the time of settlement, the Claimant, among other things, signed a full and final release releasing the Defendant "from all manner of actions, causes of action, debts, account, covenants, contract, claims, and demand existing up to the present time arising out of or attributable to the subject matter of the Supreme Court of Nova Scotia action", which action was dismissed by consent between the parties. Matters involving the boat were interwoven with the Supreme Court action and the resulting settlement and therefore the Claimant is estopped from bringing this action now against the Defendant.

[18] The decision was then appealed to this Court which required the adjudicator to "...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."

[19] The adjudicator's summary report was signed on the 19th day of January, 2009 and filed with this Court on March 3, 2009. The relevant portions of the report are found in paragraphs five to ten inclusive. They are not lengthy so I will recite them in their entirety.

> 5. I determined that the parties were in business together and during their business ventures they purchased a boat together.
>
> 6. The parties had a dispute about their business and other matters which included the boat.
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> 7. On August 19, 2005, the Respondent collected his belongings off the boat and had no contact with the boat after that date.
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> 8. Ultimately a proceeding was commenced in the Supreme Court of Nova Scotia by the Appellant against the Respondent on March 9, 2006. The Application by the Appellant herein was an *Inter Partes* Application by was of an Originating Notice seeking relief pursuant to the *Canada Business Corporations Act*, R.S. 1985, c. C-44.
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> 9. Prior to the Action's commencement and subsequent to its commencement the parties through Counsel attempted to resolve the parties' differences. Part of these negotiations involved settling the ownership of the boat.

> 10. Following negotiations of settlement the parties decided to settle their differences and the Appellant executed a release, releasing the Respondent from all matter of things arising out of or attributable to the Supreme Court of Nova Scotia's *Inter Partes* Application. I concluded this included all issues, including issues involving the boat. I also considered the issue of estoppel and the cases outlined and submitted to the Court, in Counsel's letter (Brief) of August 26, 2008, a copy of which is annexed hereto as Schedule "E".

APPELLANT'S ARGUMENT

[20] I will now turn to the appellant's arguments in support of his position that the adjudicator made an error in law by concluding that "matters involving the boat were interwoven with the Supreme Court action and the resulting settlement and therefore the claimant is estopped from bringing this action now against the Defendant."

[21] The appellant argues that the adjudicator made clear errors in the interpretation of documents of other evidence. As examples he points to the pleadings of the shareholder in claim SH No. 263494 and the Final Release which he signed upon settling the claim.

[22] Furthermore, the appellant contends that the adjudicator misapplied the evidence and points to Exhibit D-8 which was tendered in evidence during the hearing in the Small Claims Court. Exhibit D-8 is an email from the Respondent's counsel to the appellant's counsel which under the subject heading "Best" states:

> My client is not prepared to agree that the monies be held in trust. They have nothing to do with the dispute and we never agreed to hold them in trust.

[23] Exhibit D-8 is one of eight exhibits tendered and admitted during the course of the hearing. Counsel for the Respondent expressed concern about this Court's use of the exhibits in making its decision on the appeal. Since the Court does not have the benefit of a transcript of the evidence offered to introduce and explain the exhibits counsel was concerned that the Court not be left with an incomplete picture of what the adjudicator had to consider. Although I agree with respondent's counsel that care should be exercised when reviewing exhibits without the benefit of a transcript of the testimony surrounding their admission in evidence I do not think I am prohibited from reviewing and considering them for purposes of deciding the appeal.

[24] Indeed s. 32(4) requires the adjudicator when presenting the summary report to include "...any interpretation of documents made" by him.

[25] Having been persuaded to consider Exhibit D-8, I thought it prudent to review all the other exhibits as well. This should tend to allay some of the concerns that respondent's counsel has expressed.

[26] The appellant's argument for granting the appeal also included the assertion that the adjudicator failed to properly apply the principle of issue estoppel. The case of **Saulnier** v. **Bain**, 2009 Carswell N.S. 272 (NSCA) was cited as support for this proposition. Hamilton, J.A., writing on behalf of the Court borrowed from an earlier decision of that Court in **Hogue** v. **Montreal Trust Co. et al**. At para 6 she wrote:

> 6 The concept of res judicata was explained in Hoque v. Montreal Trust Co. et al. (1997), 162 N.S.R. (2d) 321, where Cromwell, J.A., as he then was, set out the relevant principles:
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> > [19] This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.
> >
> > [20] Res judicata has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in Angle v. M.N.R. (1974), 47 D.L.R. (3d) 544 at 555:
> >
> > > ... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ... The second species of estoppel per rem judicatam is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in Hoysted et al. v. Federal Commissioner of Taxation (1921), 29 C.L.R. 537 at pp. 560-1:
> > >
> > > > I fully recognize the distinction between the doctrine of res judicata where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being

> different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
>
> [21] Res judicata is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
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> [22] It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which could have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.
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> [37] Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, (1843-60) All E.R. 373, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[27] After citing with apparent approval this explanation of the concept of *res judicata,* Justice Hamilton added this succinct summary of the law at para. 7:

> 7 When an issue has been the subject of previous adjudication or when a party had the opportunity to raise an issue in a previous action and, in all the

> circumstances, should have raised that issue, it cannot be the subject of another action.

[28] Counsel for the Respondent argues that absent a "palpable and overriding error" the adjudicator's findings of fact and his determinations of mixed questions of law and fact in instances where the error of law cannot be isolated should not be interfered with. On behalf of his client he argues that the issue of the boat was completely resolved in the settlement. The boat and the expenses which the appellant seeks reimbursement of were the subject of discussions that eventually culminated in a settlement. As part of that settlement the respondent conveyed his ownership interest in the boat to the appellant "as is, where is."

[29] Counsel for the respondent cited the case of **McPhee** v. **Gwynne-Timothy**, 2005 NSCA 80; 232 N.S.R. (2d) 175; 737 A.P.R. 175; 44 C.L.R. (3d) 32; 2005 Carswell NS 191 as support for his contention. Paras 31 - 33 read as follows:

> 31 A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice Richard's findings of fact, and the inferences he drew from those facts. H.L. v. Canada (Attorney General) [2005] S.C.J. No. 24; Housen v. Nikolaisen, [2002] 2 S.C.R. 235; Campbell MacIsaac v. Deveaux & Lombard, [2004] N.S.J. No. 250, 2004 NSCA 87.
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> 32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, Housen, supra, at para. 1-5 and Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
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> 33 On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed

> fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error. See Housen, supra, generally at para. 19-28; Campbell MacIsaac, supra, at para. 40; Davison v. Nova Scotia Government Employees Union, [2005] N.S.J. No. 110, 2005 NSCA 51.

ANALYSIS/DISCUSSION

[30] I will begin my analysis by quoting from the case of **MacIntyre** v. **Nichols**, 2004 NSSC 36 decided by the Honourable Justice Arthur J. LeBlanc which was also cited with approval by Associated Chief Justice Deborah K. Smith of this Court in the case of **Clelland** v. **eCRM Networks Inc.**, 2006 NSSC 337; 249 NSR (2d) 212; 792 APR 212. At paras 23-25, Justice LeBlanc wrote:

> 23 I do not have jurisdiction to rehear the case and to make my own findings of fact. If the findings of fact of the adjudicator are reasonable on their face there is no basis on appeal to substitute for the decision of the adjudicator one I would prefer to make. It is evident that I did not have the opportunity to hear the evidence and make findings of reliability and credibility as did the adjudicator.
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> 24 I refer to the decision of Saunders, J. (as he then was), in Brett Motors Leasing Ltd. V. Welsford, [1999] N.S.J. No. 466 (S.C.). He stated at para. 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 filed 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.
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> 25 I adopt the analysis of Saunders, J. in Brett, supra and find that before I can overturn the adjudicator's decision, there has to be a clear error on her part. In other words, the appellant must show that the adjudicator misinterpreted documents or other evidence, that there was no evidence to support the conclusions reached, that she clearly misapplied the evidence in a material respect thereby producing an unjust result or that she failed to apply appropriate legal principles to proven facts. Only in such an instance, could I overturn the decision of the adjudicator.

[31] I, too, adopt the reasoning of Saunders, J. (as he was then) in Brett, *supra*.

[32] For the appellant to succeed he must show that the adjudicator misinterpreted documents or other evidence, that there was no evidence to support the conclusions reached, that he clearly misapplied the evidence in a material respect thereby producing an unjust result or that he failed to apply appropriate legal principles to proven facts.

[33] I must not interfere with the adjudicator's findings of fact unless there is a "palpable and over-riding error." (Reference to **McPhee** v. **Gwynne-Timothy**, *supra*).

[34] While I accept that the application commenced by the appellant in the Nova Scotia Supreme Court did not deal specifically with the issue of ownership of the boat and the expenses pertaining to its maintenance and repair the discussions which led to a settlement before trial or hearing clearly included both.

[35] The appellant's argument could possibly have merit if Exhibit D-8 was looked at in isolation. However, when one reviews the other seven exhibits tendered at trial there is ample support for the adjudicator's finding of fact that "matters involving the boat were interwoven with the Supreme Court action and the resulting settlement..." (Reference the Adjudicator's order dated October 24, 2008). They further support the adjudicator's findings of fact stated in paragraph nine of his Summary Report as follows:

> 9. Prior to the Action's commencement and subsequent to its commencement the parties through Counsel attempted to resolve the parties' differences. Part of these negotiations involved settling the ownership of the boat.

[36] By concluding as he did the Adjudicator made no error and certainly not a palpable and overriding error.

[37] The Adjudicator's application of the principles respecting issue estoppel demonstrated a clear understanding of the existing law relating to this topic.

[38] Even reviewing his decision on a standard of correctness as opposed to "palpable and overriding error" I conclude that no error of law was made.

[39] Clearly, the issue of the ownership of the boat and the expenses associated with its upkeep were an integral part of the negotiations that led to a full and final settlement capped off with a consent order and a written release "arising out of or attributable to the subject matter of Supreme Court of Nova Scotia action SH No. 263494". (Reference Exhibit C-2, SCCH 08-297884). They were not simply interwoven – they were inextricably linked and so, part of the issues that were resolved by agreement.

[40] Therefore, issue estoppel applies.

[41] The appeal is dismissed with costs payable by the appellant to the respondent in the amount of $50.00. The appellant will have 30 days from the date of this judgment to pay.

Justice Glen G. McDougall