SUPREME COURT OF NOVA SCOTIA
Citation: Pyramid Properties Ltd. v. Johnston, 2010 NSSC 53

Date: 20100209
Docket: Hfx 315395
Registry: Halifax

Between:

Pyramid Properties Limited

Appellant

v.

Patrick Johnston

Respondent

Judge: The Honourable Justice Patrick Duncan

Heard: November 17, 2009, in Halifax, Nova Scotia

Decision: February 9, 2010

Counsel: Lisanne M. Jacklin, for the Appellant

William Mahody, for the Respondent

By the Court:

INTRODUCTION

[1] A falling out amongst business partners resulted in a total of five claims being filed in the Small Claims Court. The dispute has its origins in a business transaction involving the purchase of an income property in July of 2006. The decisions in four of those claims have been appealed by one defendant, Pyramid Properties Ltd. (Pyramid), which was held liable for various amounts, and to various persons. The claims under appeal are: (with appeal file numbers in brackets)

[2] SCCH 298725 (HFX 315391)

Patrick Matthew Johnston, David Anthony Yetman and 3105010 Nova Scotia Ltd. v. Pyramid Properties Ltd., John Walter Chennell and George Graham

This action claimed the sum of $1,989.97 as the outstanding balance of a loan of $22,000 alleged to have

been made by 3105010 Nova Scotia Limited to the defendant(s).

[3] SCCH 298727(HFX. 315392)

UC Investments Inc. v. Pyramid Properties Ltd., John Walter Chennell and George Graham

This action claimed the sum of $4,000, being the balance of a loan alleged to have been made by UC Investments Inc. to the defendant(s).

[4] SCCH 298728 (HFX. 315393)

Patrick Matthew Johnston and David Yetman v. Pyramid Properties Ltd., John Walter Chennell, and George Graham

This action claimed the sum of $12,882 as a real estate commission alleged to be payable by the defendant(s).

[5] SCCH298730 (HFX. 315395) (the subject of this appeal)

Patrick Matthew Johnston and Tracey MacDonald v. Pyramid Properties Ltd., John Walter Chennell, and George Graham

This action claimed the sum of $22,000 made as a personal loan to the defendant(s).

[6] By agreement of the parties the claims were litigated in a single hearing, both at trial and on appeal.

FACTS

[7] The adjudicator rendered a single decision that addressed each of the four claims. The following are the facts as set out in that decision.

[8] Patrick Johnston and David Yetman were principals of Century 21 Team One Realty Inc. (Century 21). Mr. Johnston also worked as a real estate agent for

the company. David Yetman was an active real estate agent who held a broker's licence.

[9] Mr. Johnston was a principal of, and through a holding company held shares in, UC Investments Inc. (UC). UC purchased underperforming apartment buildings, improved them and then either rented the units or resold the building.

[10] George Graham has been a contractor, who over the years has accumulated a number of income properties. He often buys buildings in need of repair, and renovates them, either to improve their ability to generate income or for purposes of resale at a profit.

[11] Messrs. Graham and Johnston met sometime in the latter part of the 1990s. In approximately 2005 they joined with Mr. Yetman to incorporate a company identified as 3105010 Nova Scotia Limited (310 NSL). It was formed to purchase a property on Miller Road. Their intention was to renovate the property and then resell it for profit. Messrs. Yetman and Johnston would achieve their profit in the form of the real estate commission on the sale while Mr. Graham would achieve his return on the renovation work performed on the property.

[12] 310 NSL had a $20,000 line of credit available to it.

[13] In early 2006, Mr. Johnston located a run down rental property at 505 Herring Cove Road in Halifax. He suggested to Mr. Graham that it was a good property to buy, renovate and rent. Mr. Graham agreed.

[14] On or about March 22, 2006, Graham "or Assignee" entered into an Agreement of Purchase and Sale for 505 Herring Cove Road at a purchase price of $565,000. Century 21 was listed as the "cooperating brokerage". The Agreement notes that the buyer had an agency relationship with Century 21 as the broker, and with Messrs. Johnston and Yetman as sales persons. Pursuant to Clause 18 of the Agreement, the seller agreed to pay commission to "the listing brokerage and/or the cooperating brokerage".

[15] In time the purchaser was determined to be the appellant, Pyramid Properties Limited, a Graham run company. As the closing date approached, it became apparent that Pyramid would not be able to raise all of the necessary funds needed to close the transaction. The adjudicator noted problems with the evidence of the

various witnesses as to how that shortfall was to be met, but concluded that he was satisfied that Johnston, Yetman and Graham reached the following agreement:

(a) $12,882.00 would be contributed by way of the real estate commission due to Century 21, in exchange for shares in Pyramid for Yetman and Johnston.

(b) $44,000.00 would be advanced by UC by way of a short term bridge financing loan to Pyramid.

(c) $22,000.00 would be advanced by 310 NSL by way of a loan to Pyramid; and

(d) $41,000.00 would be advanced by way of personal loan to Pyramid from Johnston.

[16] The purchase closed and Pyramid received the title to 505 Herring Cove Road in July 2006.

[17] In the year following the closing, protracted but unsuccessful negotiations took place regarding the issuance of shares by Pyramid to Mr. Yetman and Mr. Johnston. As a result of the failure of negotiations, the respondent together with others who provided financial assistance to Pyramid made demand for payment of their respective debts.

[18] The adjudicator concluded that Pyramid was the sole beneficiary of the monies claimed and therefore that it was solely liable for any outstanding debts owed to the claimants. Following three nights of hearings, the Adjudicator found Pyramid liable to the following "persons", with the amounts ordered to be paid:

Century 21 Team One	$ 12,882.00
Patrick Johnston (UC Claim)	$ 4,000.00
310 NS Ltd.	$ 1,989.97
Patrick Johnston	$ 18,500.00

This appeal is against the decision to award the sum of $18,500 to Patrick Johnston, being the unpaid balance owing by Pyramid on an initial loan amount of $41,000.

ISSUES

[19] The issues as set out by the appellant are:

1. Did the adjudicator err in law when he allowed Patrick Johnston in his personal capacity and in his capacity as principal of other companies to split a claim arising from one transaction into four separate claims which had the effect of granting an award to Patrick Johnston that exceeds the $25,000 monetary limit of Small Claims Court?

2. Did the adjudicator err in law when he found the appellant's counter claim was limited to interest and penalties regarding a line of credit for 3105010 Nova Scotia Limited and it appears he failed to consider interest and penalties payable on the Pyramid Properties overdraft account when Patrick

Johnston unilaterally decided to pay himself $19,000.00 and then $3,500.00 from this account?

3. Did the adjudicator err in law when he failed to take notice there was no agreement between the appellant and respondent to pay any penalties or interest on the personal loan, and, therefore, the appellant is entitled to be reimbursed for these amounts?

STANDARD OF REVIEW

[20] The statutory basis upon which an appeal may be advanced is found in the **Small Claims Court Act** R.S.N.S. 1989 c. 430:

> Appeal
>
> 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;
>
> (b) error of law; or

> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[21] Saunders J. (as he then was), writing in *Brett Motors Leasing Ltd. v. Welsford* 1999 NSJ 466 (S.C.) considered the scope of what constituted an "error of law":

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[22] The Supreme Court of Canada distinguished questions of law, of fact and of mixed fact and law in the following terms, as set out by Iaccobucci J. in *Canada (Director of Investigation Branch and Research) v. Southam Inc.* [1997] 1 S.C.R. 748:

> 35...Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

[23] Determinations of credibility and the weight to attach to the evidence are not questions of law. The Nova Scotia Court of Appeal, in *McNaughton v. Ward* 2007 NSCA 8, held:

> 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen, supra*, and *H.L. v. Canada (Attorney General),* 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result.

[24] That findings of fact are accorded a high degree of deference was reinforced in *Davison et al v Nova Scotia Government Employees Union* 2005 NSCA 51:

> 61 Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, per Iacobucci and Major, JJ. at paras. 10 and 23 to 25.
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> 62 The "palpable and overriding error" standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: *see Housen v. Nikolaisen, supra*, at paras. 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but "overriding and determinative."

I will add that an appeal against the decision of a Small Claims Court adjudicator is further restricted by the absence of a record of the testimony given in the hearing.

It is against this legal and practical background that an appeal of an adjudicator's decision is determined.

ANALYSIS

Issue 1. *Did the adjudicator err in law when he allowed Patrick Johnston in his personal capacity and in his capacity as principal of other*

companies to split a claim arising from one transaction into four separate claims which had the effect of granting an award to Patrick Johnston that exceeds the $25,000 monetary limit of Small Claims Court?

[25] The jurisdiction of the Small Claims Court is limited. Relevant to the argument of the appellant are sections 9(a) and 13 of the governing statute which read:

> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;
>
> ...
>
> 13 A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court. R.S., c. 430, s. 13.

[26] The appellant argues that Patrick Johnston split his claims which if joined as a single claim would have exceeded the $25,000 jurisdictional limit of the court.

[27] This argument was presented to the adjudicator as a preliminary motion. While it is true that Mr. Johnston was named as a claimant in three of the matters on appeal, with total claims of approximately $36,000, he was joined by different co-claimants including 310 NSL, Mr. Yetman and Ms. MacDonald. The adjudicator concluded at paragraph 25 of his decision that "... it is necessary to analyze and determine them [the four claims] before deciding whether or not the court's jurisdiction is being exceeded".

[28] In his Summary Report of Findings for claim SCCH 298725 (appeal file HFX 315391) the adjudicator incorporated by reference his response to this ground of appeal as it was advanced in all four appeals:

> 5. With respect to paragraph 5 of the Notice of Appeal, and the issue of whether the claims were being split (and this applies to all the notices of appeal in which this issue was raised),
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> > a. In my opinion the fact that Mr. Johnston may have been a principal of a corporation or the husband of a claimant did not mean that the Corporation or the spouse were one and the same as Mr. Johnston;
>
> b. The claims were claims that in law and on the evidence were claims by separate and distinct entities, notwithstanding that Mr. Johnston may have been involved with them.

[29] The result of the hearing provided Mr. Johnston with a total award of $22,500 which was within the jurisdiction of the court. The wisdom of the approach taken by the adjudicator is evident. He recognized that the claims involved multiple persons with varying interests and grounds for their respective claims. That Mr. Johnston was a co-claimant, or that the claims arose from a single property transaction was not determinative of the question, nor should it have undermined the ability of the co-claimants to seek justice in the more informal and less expensive forum of the Small Claims Court. The adjudicator made no finding that the "claim was being divided *for the purposes* of bringing it before the court". I conclude that the adjudicator made no error in allowing the claims to proceed in Small Claims Court.

[30] The goal of the Small Claims Court in effecting a cost effective and expeditious resolution of claims was achieved by addressing all claims in a single hearing, which was done with the consent of all parties and in accordance with section 25 of the **Small Claims Court Act.**

Issue 2. *Did the adjudicator err in law when he found the appellant's counter claim was limited to interest and penalties regarding a line of credit*

for 3105010 Nova Scotia Limited and it appears he failed to consider interest and penalties payable on the Pyramid Properties overdraft account when Patrick Johnston unilaterally decided to pay himself $19,000.00 and then $3,500.00 from this account?

Issue 3. *Did the adjudicator err in law when he failed to take notice there was no agreement between the appellant and respondent to pay any penalties or interest on the personal loan, and, therefore, the appellant is entitled to be reimbursed for these amounts?*

[31] I will address the last two issues together as they generate the same response.

[32] The original claim was for $22,000 plus interest and costs, as the unpaid balance owing of a loan made by Mr. Johnston and Ms. MacDonald to Pyramid in the amount of $41,000.

[33] In its' Statement of Defence filed with the Small Claims Court, the appellant pleaded that the claimant Johnston had, on behalf of himself and Ms. MacDonald, accepted $40,000 in full settlement of the loan and that therefore no further monies

were owing. The appellant did not file a cross claim/ "counter claim" as suggested by the wording of issue 2 above.

[34] The adjudicator's decision in this claim was set out in the following paragraphs:

> 34 I am satisfied on the evidence that Johnston (or he and his wife in effect) loaned $41,000 to Pyramid. With respect to the repayment of these amounts, I note that the claimant initially took the position that all but $22,000 of those funds have been repaid.
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> 35 On the stand Johnston then admitted in cross that he had in fact received $3500 more than he had originally thought; and that accordingly his claim should be reduced by that amount (from $22,000 to $18,500).
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> 36 There was really no defense to the balance of the claim, other than Graham's position that the purchase of 505 Herring Cove Rd. went ahead in the way that it did (albeit with his consent or at least acquiescence) because the financing that Johnston had originally thought was available was not. Notwithstanding this evidence, Graham (or rather Pyramid) did go ahead with the deal and did purchase 505 Herring Cove Rd. using, *inter alia*, the funds advanced by UC. Graham's other "defense"-which was that he didn't pay much attention to administration because he was too busy-did not impress me.
>
> 37 However, there is no evidence that Graham knew that the money was being advanced by both Johnston and his wife. Indeed, the Statement of Adjustments (Exhibit C1) refers only to funds received "from Patrick Johnston".
>
> 38 It may be that Johnston raised the money from his wife as well as his own resources. But insofar as Pyramid was concerned the money came from Johnston, and that is who is entitled on the loan to be repaid.

> 39 I will accordingly make an order to Pyramid pay Johnston $18,500 in this claim.

[35] The appellant's argument on appeal has been stated as follows:

> The documentary evidence, George Graham's direct evidence and Patrick Johnston's cross examination evidence established Patrick Johnston paid himself $19,000 and $3500 from the appellant's overdraft account as partial payment for his personal loan. The appellant, as a result, paid interest and penalties on this overdraft as reflected in exhibit D. 16 (a) Tab 12 and introduced and confirmed by George Graham. No evidence was led by any party which indicates there was an agreement that interest or penalties were payable on the loan. Documentary evidence establishes the interest and penalties owing and George Graham confirmed the appellant paid these amounts. Patrick Johnston confirmed in his cross examination that he did not pay any of the interest or penalties. There is no indication in the decision the adjudicator considered this documentary evidence or if he did, why he discounted it. We submit this is an error of law.

[36] This does not amount to a denial of the debt obligation, but only that there were certain amounts apparently claimed by way of set off that the adjudicator is alleged to have ignored. There is no merit in this argument.

[37] The adjudicator did not allow Mr. Johnston's claim for prejudgment interest on the unpaid amount claimed, notwithstanding that the amount had been outstanding for three years by the date of decision. To the extent that the appellant may have incurred penalties and interests in an account used to pay down some of

the debt, the appellant could be said to have benefitted in that he was not subject to a claim for the full $41,000 plus interest. Pyramid owed the money to Johnston and Pyramid has not suggested that Johnston lacked the authority to use the "overdraft account" as he did.

[38] In the end analysis, it was for the adjudicator to determine whether the facts supported the appellant's position. In the context of the whole decision it is clear that the adjudicator took some care in assessing and trying to come to a logical interpretation of the confused and often vague evidence surrounding the business arrangements entered into for the purpose of closing the sale of the property. It is apparent that he had reservations about accepting the evidence given on behalf of the appellant. His conclusions when seen across the various claims resolved in his omnibus decision support the view that the appellant was able to purchase the property with the considerable financial assistance of a variety of parties and then reneged on a substantial amount of the debt it incurred to achieve its ownership.

[39] It is not necessary for the adjudicator to explain every aspect of his thinking in rendering his decision. His findings are owed great deference. Upon review I conclude that he made findings of fact that appear reasonable in the context of the

evidence before him. I cannot say that he misapplied that evidence to achieve an unjust result, nor that he made a clear error in his interpretation of the extensive documentary evidence that he had before him. On the whole, I can find no error of law, nor any other basis upon which to support the appellant's position.

CONCLUSION

[40] I find that there is no reversible error in the decision of the adjudicator and therefore dismiss the appeal.

Duncan, J.