SUPREME COURT OF NOVA SCOTIA
Citation: Pyramid Properties Ltd. v. Johnston, 2010 NSSC 51

Date: 20100209
Docket: Hfx 315392
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 L. 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) (the subject of this appeal)

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)

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

[12] 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.

[13] 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".

[14] 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.

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

[16] 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.

[17] 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

[18] This appeal is against the decision to award the sum of $4,000 to Patrick Johnston as a result of the UC claim for the same amount.

ISSUES

[19] The issues, as restated by the appellant in argument, are:

1. Did the adjudicator fail to follow the requirements of natural justice when he amended the pleadings to include a new claimant despite the fact no amendments were requested by counsel and the amendment had the effect of granting an award to Patrick Johnston in excess of $25,000.00 by way of four separate claims?

2. Did the adjudicator err in law when he allowed Patrick Johnston in his personal capacity and in his capacity as principal of UC and 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?

3. (a) Did the adjudicator err in law and/or misapply the facts when he failed to consider relevant evidence that Patrick Johnston can not remember

why only $40,000.00 was repaid to UC Investments rather than $44,000.00?

(b) Did the adjudicator err in law and/or misapply facts when he failed to consider relevant evidence that Patrick Johnston did not demand repayment of the $4,000.00 at any time in his personal capacity or on behalf of UC Investments Inc.?

(c) Did the adjudicator err in law when he failed to consider relevant documentary evidence that Patrick Johnston felt his claim was limited to repayment of the balance of his $41,000.00 personal loan?

(d) Did the adjudicator err when he gave no weight to other business relationships between UC Investments Inc. and the appellant which may account for the failure to pursue repayment of $4,000.00 to UC Investments Inc.?

4. Did the adjudicator err in law when he found the appellant's counter claim was limited to interest and penalties regarding the line of credit for 3015010

Nova Scotia Limited and it appears he failed to consider the interest and penalties payable on the appellant's overdraft account when Patrick Johnston decided to pay himself $19,000.00 from this account?

5. 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
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> 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,

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.

Issue 1. *Did the adjudicator fail to follow the requirements of natural justice when he amended the pleadings to include a new claimant despite the*

fact no amendments were requested by counsel and the amendment had the effect of granting an award to Patrick Johnston in excess of $25,000.00 by way of four separate claims?

[25] Relevant to this argument are the findings of the adjudicator at paragraphs 40-42 of his decision which state:

> 40 I am satisfied on the evidence and the facts set out above that:
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> a. Johnston caused UC to advance $44,000 of its money to Pyramid by way of a short-term, bridge financing loan, and
>
> b. that Pyramid repaid $40,000 of those funds, and
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> c. Johnston then paid $4,000 of his own money to UC in order to satisfy the balance of the outstanding loan: see, for example exhibit D16b, Tab 15, exhibit 8 to the affidavit of Patrick Johnston, p. 2.
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> 41 Since UC has been fully repaid it has no claim against Pyramid. UC's claim would ordinarily be dismissed. However, it is also clear that:
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> a. Pyramid did use the $4,000 (as part of the overall loan), and
>
> b. Pyramid gained a benefit therefrom, and

> c. Johnston's payment of the $4,000 relieved Pyramid of the liability to repay that amount to UC.
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> 42 In the circumstances, I will make an order that Pyramid pay Johnston $4,000 rather than simply dismiss the claim outright.

[26] The appellant asserts that the adjudicator did not raise with counsel at the hearing that there was a possibility of Patrick Johnston being awarded the $4,000. This has not been contested by the respondent.

[27] The adjudicator's language is noteworthy. He never explicitly concludes that there was a contract between UC and Pyramid under which the former would pay the $44,000. Rather, he says that "Johnston *caused* UC to advance $44,000 of its money to Pyramid by way of a short-term, bridge financing loan..."

[28] An email from a Robert Johnston to Patrick Johnston, dated 21 May 2008, which was in evidence in the hearing suggests that the entire sum of $44,000 was charged to Patrick Johnston as a shareholder loan. If this is accurate then UC was not lending the money to Pyramid, rather it loaned the money to the respondent who in turn loaned it to Pyramid.

[29] The evidence relied upon by the adjudicator was contained in a May, 2008 letter from Sheree Conlon, who was acting for Mr. Johnston at the time, to Colin Bryson, also a lawyer, in relation to a collateral dispute to the one before the adjudicator. It appears that Mr. Johnston was being accused by other UC shareholders of misappropriating UC's funds when he advanced the $44,000 to Pyramid. Ms. Conlon represented that when Pyramid failed to pay the $4,000 balance there was a charge to Mr. Johnston's UC shareholder loan to reimburse the funds paid out. The letter continues that: "... the remaining $4,000 was paid by Patrick personally."

[30] Under either scenario it is accurate to say that the $44,000 debt to UC was paid, with $40,000 coming from Pyramid and the balance from Mr. Johnston. Those findings of fact are owed great deference and I am satisfied that they are reasonable having regard to the evidence adduced.

[31] To the extent that Pyramid may have been a debtor of UC's that debt was satisfied and the adjudicator was correct to conclude that UC's claim should be dismissed.

[32] Conventionally, only a party to a contract may sue upon it. There may be circumstances in which a third party may claim the benefit of a contract as between two other parties, but I am not satisfied that this is one of those cases.

[33] The adjudicator's desire to see Mr. Johnston recoup the $4,000 he paid to UC for Pyramid is understandable. There was substantial evidence before him on which to conclude that the appellant was the beneficiary of Mr. Johnston's payment on its' behalf. However, the Notice of Claim does not identify Mr. Johnston as a claimant. The Notice was not amended to include him as a co-claimant with UC. Neither is there a reference in the Notice to his having paid $4,000 to UC, nor is there an indication that he was seeking reimbursement of this amount.

[34] In my view the adjudicator's action gives rise to issues of compliance with the principles of natural justice, and of jurisdiction.

[35] Section 2 of the **Small Claims Court Act** sets out the purpose of the legislation in the following words:

> 2 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.

[36] Writing in *Whalen et al. v. Towle* 2003 NSSC 259 MacDonald A.C.J. (as he then was) addressed the compromise that the legislation creates between function and legal rigor:

> [5] This *Act* therefore represents a compromise in the area of civil justice in this Province. It provides for a less expensive, less formal and more efficient process for claims that involve relatively small amounts of money. For example, most of the expensive pre-trial safeguards are abandoned in the interest of efficiency. There is no formalized regime for the exchange of documents, no discovery process (either written or oral), no pre-trial conferences, nor mandatory pre-trial submissions.
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> ...
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> [8] Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that *perfect* justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of *R. v. O'Connor,* [1995] S.C.J. No. 98. At paragraph 193 she states:
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> > What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemeric as perfection in any other social agency. *What the law demands is not perfect justice but fundamentally fair justice.* [Emphasis added]

[37] Notwithstanding the increased informality of the Small Claims Court process, section 2 affirms that the proceedings of the court must conform with the principles of law and natural justice. It is intrinsic to the determination of a claim that there be procedural fairness which ensures that an affected party knows the case they must meet and is provided with a reasonable opportunity to present a response to that case. This principle is encapsulated by the Latin term *" audi alteram partem"*- that one should "hear the other side".

[38] The respondent has been ordered to pay monies to a person who was not a party. Pyramid did not know, as it went through the hearing, that it had to meet a case advanced on behalf of Patrick Johnston. This offends the principle that ensures the right to know the case to be met. Further, the introduction of a new party in the decision without prior notice to the defendant and without an opportunity to make representation offends the right to be heard.

[39] I say this while acknowledging that the appellant pleaded in its' defence, and in its' counterclaim, that certain actions of Mr. Johnston, acting personally, served

to defeat the claim of UC. The defendant's first line of defence, however, was that it did not owe UC the monies claimed. In this, Pyramid was correct.

[40] However logical the adjudicator's resolution may seem on the evidence before him, it is not necessarily accurate to say that the outcome would have been the same had the appellant had the opportunity to respond to a claim by Mr. Johnston in his personal capacity. In this regard, I reject the respondent's argument to the effect that there has been no prejudice to the appellant by adding Mr. Johnston without notice to the parties.

CONCLUSION

[41] I conclude that the adjudicator failed to comply with the requirements of natural justice, and committed jurisdictional error in making an award to Patrick Johnston, a non party, without notice to the parties and without an opportunity to make representations as to whether it was appropriate to do so, and without an opportunity to respond to the evidence found in support of such an award.

[42] The adjudicator found as a fact that the debt claimed by UC was paid in full. He was correct in concluding that the claim of UC must be dismissed for that reason. His error was in substituting the claimant on his own motion.

[43] The appeal is allowed and the claim of UC as against Pyramid is dismissed. Mr. Johnston was not properly before the court and so any adjudication of a claim by him as against Pyramid must await a separate proceeding. In view of my findings it is not necessary to consider the remaining grounds of appeal.

[44] Order accordingly.

Duncan, J.