

SUPREME COURT OF NOVA SCOTIA

Citation: Pyramid Properties Ltd. v. Century 21 Team One Realty Inc.,
2010 NSSC 52

Date: 20100209

Docket: Hfx 315393

Registry: Halifax

Between:

Pyramid Properties Limited

Appellant

v.

Century 21 Team One Realty Inc.

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)

*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) (the subject of this appeal)

*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.

[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 parties, with the amounts ordered to be paid:

Century 21 Team One	\$ 12,882.00
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Patrick Johnston (UC Claim)	\$ 4,000.00
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310 NS Ltd.	\$ 1,989.97
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Patrick Johnston	\$ 18,500.00
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This appeal is against the decision to award the sum of \$12,882 to Century 21.

ISSUES

[19] The issues, as set out by the appellant, 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 the respondent 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. Did the adjudicator err in law when he found it was necessary to have evidence of assignment from the respondent to Patrick Johnston and David Yetman when evidence was led that David Yetman and Patrick Johnston were the sole shareholders and the only directors with authority to make decisions on behalf of the respondent?

4. Did the adjudicator err in law when he failed to consider relevant evidence and/or misapply the facts that Patrick Johnston and David Yetman considered the real estate commission to be their personal property and used it for personal benefit?

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

(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.

ANALYSIS

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?

[22] There is no dispute - the adjudicator made an order in favor of a non party to the claim. The factual underpinnings are found in the decision of the adjudicator:

26 I am satisfied on the evidence that Pyramid did have the benefit of the \$12,882 that would otherwise have been paid to Century 21 Team One on the purchase of 505 Herring Cove Rd. It obtained that benefit on the strength of a rather loose agreement to provide shares in Pyramid to Yetman and Johnston. Since that agreement has unraveled Pyramid should pay the commission it would otherwise have been liable to pay.

27 There is, however, a problem with the claim as it is framed. As noted above, the real estate commission was payable to Century 21 Team One, *not* Johnston and Yetman personally. That being the case Pyramid's liability is to Century 21 Team One, *not* Johnston and Yetman. It is the latter who make the claim. But there was no evidence of an assignment of Century 21 Team One's rights to them.

28 Under these circumstances I am not prepared to make an order that Pyramid pay Johnston and Yetman commission that was due to Century 21 Team One. On the other hand, it would not be right to simply dismiss the claim. I have accordingly decided to make an order that Pyramid pay Century 21 Team One (rather than Yetman and Johnston) the \$12,882.

[23] The appellant submits that the introduction of a new claimant after the close of submissions, without notice to, nor request by the parties, constituted a breach of natural justice and that it prejudiced the appellant's right to a fair hearing.

[24] It says that had it known that it was responding to a claim from the company then it would have structured its' case differently, but that they had no opportunity to do so.

[25] The appellant further alleges that if the award had been made to the claimant Johnston then it would have, when considered in conjunction with other claims, resulted in claims favoring Johnston that would have exceeded the jurisdictional limit of the court, \$25,000.

[26] The respondent says that even if the introduction of Century 21 as a party by the adjudicator is a breach of natural justice, that there has been no prejudice to the appellant and that the appeal should be dismissed.

[27] In the respondent's argument, they suggest that the claim was for a debt owing under a contract. Pyramid defended the claim on the basis that no monies were owing under the contract. The adjudicator rejected that argument. It has been submitted that whether the debt was owed to the company or its agents makes no difference to the fact that the appellant was found to owe the money.

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

[29] 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.

[30] 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.

...

[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:

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 chimeric as perfection in any other social agency. *What the law demands is not perfect justice but fundamentally fair justice.* [Emphasis added]

[31] 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 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”.

[32] 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 Century 21. 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.

[33] 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. Therefore I reject this submission made on behalf of the respondent as being speculative.

[34] Neither is it sufficient to suggest that Century 21's interests might have been reasonably anticipated by the respondent. It was not named as a party in any of the four claims under appeal from this hearing.

[35] While not determinative of the issue on appeal, I am concerned, as well, for the position of the original claimants, Messrs. Johnston and Yetman. Their claims were effectively dismissed by the adjudicator's decision without, apparently, an opportunity to respond to his conclusions that the claim was actually that of the company which they owned, and that they lacked authority to make the claim in their personal names. In this regard, I draw attention to the provisions of Regulation 6 made pursuant to the **Small Claims Court Act**, which reads:

6 A claim may be brought or defended in the name under which the business or partnership carries on its business or the name of one of more persons believed to own or carry on the business.

[36] I have considered, in assessing the character and purpose of the Small Claims Court, the decision of the Supreme Court of Canada in *Baker v Canada* [1999] 2 S.C.R. 817 which speaks to the flexible and variable nature of the duty of

procedural fairness, but do not find that the factors outlined therein offer the respondent a remedy for the adjudicator's decision to make an award to a non party.

[37] Further, I am not satisfied that the Small Claims Court had the necessary jurisdiction to make an award in favor of a non party in circumstances such as these, or in the alternative, to add a party on its' own motion and without notice to the parties.

CONCLUSION

[38] I conclude that the adjudicator failed to follow the requirements of natural justice, and committed jurisdictional error in making an award to 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.

[39] The appeal is allowed and referred back to the Small Claims Court for a rehearing as between the original parties to the claim and before a different

adjudicator. This decision is made without prejudice to any rights Century 21 may have to pursue this claim in its own right, or to seek to be added as a claimant on the rehearing. It is also without prejudice to the rights of the claimants, Johnston and Yetman, to address their authority to pursue the claim on behalf of Century 21.

[40] Having regard to my conclusion on the first issue, it is unnecessary to consider the remaining arguments put forth by the appellant.

[41] Order accordingly.

Duncan J.