SUPREME COURT OF NOVA SCOTIA
Citation: MacCormick v. Tomlik, 2011 NSSC 233

Date: 20110613
Docket: SCP 329510
Registry: Pictou

Between:

Leonard MacCormick

Appellant

v.

John Tomlik

Respondent

Judge: The Honourable Justice Patrick J. Murray

Heard: March 24, 2011, in New Glasgow, Nova Scotia

Counsel: Leonard MacCormick, for the Appellant
Joel Sellers, for the Respondent, John Tomlik

By the Court:

[1] The Appellant/Tenant, Leonard MacCormick, is appealing a decision of the Small Claims Court, which allowed an appeal by his Landlord, John Tomlik, the Respondent. Mr. Tomlik as Landlord appealed to the Small Claims Court from a decision of the Director of Residential Tenancies which awarded Mr. MacCormick as Tenant the sum of $1,837.25. Mr. MacCormick rented an apartment from Mr. Tomlik on a month to month basis which lease began on or about October 1st, 2008. The lease continued for about a year and a half when the Landlord gave notice to the Tenant to deliver up the premises in March of 2010. At that time Mr. MacCormick filed a complaint with the Residential Tenancies Board on March 4th, 2010. Mr. MacCormick ultimately left the apartment in September of 2010, almost two years after the lease began.

[2] The amount ordered to be paid by the Director pertained to essentially three items.

(i) Deletion of service for second bedroom,

(ii) No heat in three rooms, kitchen, bathroom and bedroom,

(iii) Refund of rent for October 1st - 15th, 2008.

[3] The Director also ruled that the Notice to Quit effective May 15th, 2010 be set aside.

[4] The Small Claims Court Adjudicator rendered its decision on September 10, 2010 and found that the numerous claims put forward by the Tenant had not been proven. Consequently the Court set aside the Order of the Director of Residential Tenancies issued on May 14th, 2010. This meant that the Landlord was no longer responsible to pay to the Tenant the said amount.

BACKGROUND

[5] The Director of Residential Tenancies held a hearing into the complaint of Mr. MacCormick on May 10, 2010. The Landlord, Mr. Tomlik, had not been served or represented at that hearing held before the Director. In its decision of May the 14th, 2010, the Order of the Director noted that attempts had been made by the Tenant to serve the Landlord.

[6] In his Notice of Appeal to the Small Claims Court the Landlord, Mr. Tomlik stated, “My reason for this appeal is that I was unaware of these proceedings”. He

stated that Mr. MacCormick, the Tenant, had both his phone number and his cell phone number, but at no time did the Tenant contact him regarding the proceedings before the Director.

[7] The finding of the Small Claims Court Adjudicator was that the Landlord's appeal should be allowed, it having been properly perfected and served on the Tenant, Mr. MacCormick. Therefore, jurisdiction of the Small Claims Court is not in issue on this appeal.

THE ISSUES:

[8] 1. Whether there was a failure by the learned Adjudicator to follow the requirements of natural justice?

2. Whether there was an error of law by the learned Adjudicator in his decision?

GROUNDS OF APPEAL:

[9] The grounds of appeal as contained in the Tenants Notice of Appeal to this Court are as follows (in summary form):

1. Delay in Proceedings - The Tenant was unable to call a key witness.
2. The Landlord's Lawyer - He did not appear in court.
3. Adjudicator - He did not consider Appellant's testimony or Respondent's testimony.
4. "Missing documents" provided by Mr. MacCormick - were not reviewed by the Adjudicator.

[10] The Appellant having listed the four (4) Grounds of Appeal above, further "restated" his Grounds of Appeal exactly as follows:

> "A) On the first appearance in court there was a delay in the proceedings due to missing files resulting in my key witness not being able to testify although he was present in court for over three hours.
>
> B) On the second appearance in court the Respondent's lawyer did not show up, thus my key witness was not able to testify for the second time although he was present in court.
>
> C) On the third appearance in court my witness could not appear as he moved out of the Province.

D) The Adjudicator did not take the appellant or the respondent's testimony into consideration on a major key point in the case before making his decision, thus he did not follow the requirements of natural justice.

E) Both the Adjudicator and the respondent's lawyer claimed there were missing documents in the files although they were readily available from the Rental Review Board files. Also, I had presented them to the Respondent's lawyer. In fact, I introduced them in court but the adjudicator said he didn't need to see them, although they were important and should have been considered before the adjudicator made his decision.

F) The adjudicator did not use common sense in making his decision, thus he was not fair and did not follow the requirements of natural justice."

SUMMARY REPORT OF FINDINGS OF ADJUDICATOR

[11] The Adjudicator, Mr. O'Blenis, provided a Summary Report of his Findings as required by the Small Claims Court Act and Regulations. This report is dated December 1, 2010 and was prepared in response to the Tenant's Notice of Appeal which was dated October 8, 2010 and filed on the same day.

[12] In his Summary the learned Adjudicator provided the following background which repeats to some extent what has already been stated:

"1. This matter was an appeal by the Landlord to the decision and Order of the Director dated May 14, 2010.

2. The appeal to the Order of the Director was heard on July 12, 2010, and September 8, 2010, at New Glasgow. The appeal filed by the Landlord, John Tomlik, was on the basis he was not aware of the proceedings before the Residential Tenancies Board.

3. The Appellant/Landlord was represented on this appeal by Joel Sellers of MacIntosh MacDonnell & MacDonald; the Tenant/Respondent was self-represented.

4. The Tenant, Leonard McCormick, who is no stranger to the court setting, now appeals the decision and Order of the Small Claims Court, issued on September 10, 2010, wherein the Order of the Director was set aside and the claims of the tenant dismissed."

THE LAW - APPEALS FROM SMALL CLAIMS COURT

[13] The law to be applied to Small Claims Court appeals has been summarized by Justice Saunders in the case of **Brett Motors Leasing Ltd. v. Welsford** [1999] N.S.J. No. 266 (N.S.S.C.) and approved by the Courts of this province. At paragraph 14 the test is outlined as follows:

> "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."

[14] The Appellant, Mr. MacCormick, has represented himself throughout and on this appeal. He provided no brief to the Court in respect of the Appeal, apart from setting out the Grounds. The Respondent, Mr. Tomlik , through his counsel, Mr. Sellers, filed a legal memorandum in respect of this Appeal dated March 10, 2011. Although Mr. MacCormick did not file a brief, he was given ample opportunity to make his submissions in respect of all 60 paragraphs in the Summary of Findings. He did so having an opportunity to review both it and Mr. Sellers' memorandum prior to completing his submissions before this Court.

GROUND # 1 - Delay of Proceedings - Adjournment on June 1st, 2010

[15] The first appearance in this matter was held on June 1, 2010. Both parties acknowledge there was some need for disclosure as did the Adjudicator . Both parties were present including Mr. Sellers on behalf of the Respondent. Mr. Sellers requested an adjournment to obtain copies of documents from the Residential Tenancies file. The learned Adjudicator "ordered" that both parties exchange documents that they intended to enter into evidence. I have reviewed carefully paragraphs A1 and 2 of the Findings of Fact. I find that setting the matter over to July 12, 2010 and ordering disclosure in the interim was an entirely reasonable decision of the Adjudicator. As was noted there was no indication that either party's witnesses would not be available for the new date. In fact both parties were directed to have their witnesses available "for that night"(meaning the new date of July 12, 2010).

[16] In considering the Landlord's request for an adjournment the Adjudicator found that there was no prejudice to the tenant and that the request was reasonable. It is true that the Appellant did not get to call his key witness, but the parties had not received disclosure. The Appellant has referred to certain "missing files" in his re-stated Grounds of Appeal. There is no mention of "missing files" by the Adjudicator in his Summary of Findings. The Respondent through Mr. Sellers has

argued the situation is stated accurately by the Adjudicator. Based on the findings of the Adjudicator, I find that this ground of appeal does not have merit. Accordingly it does not constitute an error of law or failure to follow the rules of natural justice.

GROUND # 1 continued- Delay of Proceedings - Hearing - July 12th, 2010 and subsequent adjournment

[17] The Report of the Adjudicator confirms that the hearing proceeded as scheduled on July 12, 2010. The Landlord completed it's evidence at 9:35 pm. at which time the Adjudicator adjourned the matter with the parties to be notified of the next date.

[18] The Appellant argues that his key witness was unable to testify a second time. The Respondent states the tenant Mr. MacCormick was present and had a full opportunity to cross examine the Landlord, Mr. Tomlik. The Landlord further states that upon conclusion of the Appellant's case, the hearing had reached a natural breaking point and that the Adjudicator made a reasonable decision to adjourn to another date.

[19] On this ground I find the Adjudicator's decision to adjourn at 9:35 pm on July 12, 2010 was appropriate, not only because of the late hour but also because it was a natural breaking point, the Appellant having completed his evidence. It would not have been prudent for the Adjudicator to continue later than 9:35 p.m.

[20] There was no objection expressed by the Tenant at that time nor was there any indication that his witness would not be available at a future date. The Clerk sent a registered letter to both parties on July 20th, 2010 notifying them of the new date of August 4, 2010. I find no error of law or denial of natural justice by the Adjudicator's decision to adjourn from July 12, 2010 to August 4, 2010. There being no objection from either party the Adjudicator made a prudent decision, one in which he had little choice in any event.

GROUND # 2: Third Appearance on August 4th, 2011 - Respondent's Lawyer Not Appearing in Court. (This Ground Was Stated in Error by the Appellant to be the Second Appearance.)

[21] The Summary Report of the Adjudicator confirms in paragraph 4 and 5 that Mr. Sellers, the Respondent's solicitor, was not present at the August 4, 2010 hearing. The Adjudicator found that he had not been notified and adjourned to allow Mr. Tomlik to have his lawyer Mr. Sellers present. He found that Mr. Tomlik wished to have his lawyer present for cross-examination of the Tenant and his witness. The Appellant argues once again his witness, Mr. Taylor, did not get to testify. While there was some confusion as to who would notify Mr. Sellers, the Tenant is correct in his position that it was not up to him, nor was it his "problem" (to notify Mr. Sellers).

[22] The Respondent, Mr. Tomlik, stated as follows in its brief:

> "In any event, on August 4, 2010 Adjudicator O'Blenis made the reasonable and appropriate decision to adjourn the matter so that Mr. Tomlik's lawyer could be advised and present. Mr. McCormick did not object or indicate that his witness would be unavailable on another date."

[23] Here I think it is important to note that Mr. MacCormick raised no objection nor made any indication this adjournment would be a problem for his witness. At paragraph 5 of the Stated Case the learned Adjudicator states:

> "I found that Mr. Sellers had not been notified of the new date, August 4th and his whereabouts that evening were unknown. **There was no evidence before me that either party would be prejudiced**

> **by adjourning the matter to the next available date, and Mr. McCormick did not indicate his witness could not be made available for a new date**. Both parties were notified the matter would reconvene on September 8, 2010, as this date was available to both parties." (emphasis added)

[24] The Adjudicator having found Mr. Sellers had not been notified was faced with a decision. In making his decision he turned his mind to whether there would be any prejudice to the parties. I find once again his decision to adjourn was reasonable and appropriate in the circumstances. Although it was the third adjournment, it was only the second where no evidence would be called.

[25] It is evident from his report that he turned his mind to the importance of Mr. Tomlik having his lawyer present. Consequently I find no error of law or denial of natural justice as a result of this aspect of ground number two. Both parties were notified of the new date of September 8th and both parties confirmed they were available on that date.

GROUND C, RE-STATED GROUNDS - Mr. MacCormick's Witness Not Available on September 8th, 2010 (Ground 1 in Notice of Appeal)

[26] The Appellant's main argument with respect to a failure to follow the rules of natural justice results from his witness not being available to testify at the "third appearance" but actually it would be the fourth and final appearance on September 8, 2011. Mr. MacCormick argues that his key witness, Mr. Taylor, was prepared to testify:

> 1) that the landlord said he would rent the second bedroom to the tenant.
> 2) that the apartment was not ready for occupancy until October 15th, 2008. (And not October 1st, 2008)

[27] Mr. MacCormick submits that his witness had since moved out of the province and he (MacCormick) did not know his whereabouts. Therefore he submits his witness was unavailable for the September 8, 2010 hearing. This Court inquired of the Tenant as to whether Mr. Taylor was present on August 4, 2010 when the new date of September 8, 2010 was announced. Mr. MacCormick was unable to confirm this at the appeal hearing. Mr. Taylor was neither subpoenaed nor did Mr. MacCormick request an adjournment. Had Mr. MacCormick requested an adjournment of the September 8th hearing, it is likely from the previous adjournments and reasons for same, he would have been granted one. This would have allowed Mr. MacCormick to subpoena Mr. Taylor or otherwise contact him to arrange for his availability on a future date.

[28] The Respondent argues there were a number of options available to Mr. MacCormick, none of which he chose to exercise. The Respondent submitted in his brief:

> "Mr. MacCormick had ample notification of the September 8th hearing date. If he believed that the appearance of his third party witness was critical to his case, he had a number of options available to him. He could have had a subpoena served upon this witness. In addition, whether or not a subpoena was served, he could have requested an adjournment in order to have a further opportunity to bring his witness before the Court. Mr. MacCormick availed himself of neither of these alternatives. Rather he proceeded to present his case, including the sworn Statement of his witness. After presenting the evidence he wished to present, he closed his case and the Adjudicator made his decision. "

[29] Mr. MacCormick, at the September 8th hearing, submitted an affidavit of Mr. Taylor. In his Summary the Adjudicator referred numerous times to this affidavit and Mr. Taylor's evidence at paragraphs 32-41 of the Adjudicator's Findings. As the Respondent argues the Adjudicator ultimately chose to give no weight to the sworn affidavit of Mr. MacCormick's key witness, Mr. Taylor.

[30] I agree with the Respondent that there were several options available to the Appellant. Given what had previously occurred, the Appellant would have been

well aware of his ability to request an adjournment or to indicate that his witness was unavailable. He did neither nor did he indicate that he would attempt to have his witness available at a future date. Although the previous adjournments were not as a result of Mr. MacCormick, this did not relieve him of his duty to maintain contact with his witness to ensure his attendance or request an adjournment to ensure Mr. Taylor's attendance, or issue a subpoena to him as the Rules provide.

[31] While it is unfortunate his witness had left the province, it appears Mr. MacCormick had prepared for the alternative in submitting an earlier prepared affidavit signed by Mr. Taylor. He chose the option of submitting his witness' affidavit to the Court. He now claims on this Appeal that not having Mr. Taylor testify in person constituted a breach of natural justice.

[32] According to the Summary Report the issue of Mr. Taylor not being available to testify does not appear to have been raised as an issue by Mr. MacCormick, before the Court, on September 8, 2011. Thus it was unnecessary for the Adjudicator to make a finding in respect of same. On this Appeal, the Appellant submits this as a key issue denying him of natural justice.

[33] I agree with the Respondent's position that no error of law or breach of natural justice has been made out on this point. Mr. MacCormick presented his evidence and closed his case thus allowing the Adjudicator to render his decision. This is not to suggest that the Appellant would not have preferred to have Mr. Taylor present. It appears however that Mr. MacCormick decided to submit the affidavit evidence on September the 8th. He chose further not to avail himself of any of the other options to attempt to have Mr. Taylor present to give evidence.

GROUND # 3- Failure to Consider Testimony of Appellant or Respondent

[34] The Appellant based the majority of its submissions in this appeal on the alleged failure of the Adjudicator to consider the testimony of the witnesses, including the Respondent and in particular the evidence called by the Appellant, Mr. MacCormick.

[35] The key points which the Appellant argued the Adjudicator did not properly address and consider in the testimony were:

(i) That the Landlord had agreed to rent to the Tenant a second room;

(ii) That the Tenant was entitled to a rental rebate for not obtaining the second room;

(iii) That the Adjudicator failed to consider a “major key point” in relation to a wire which had been disconnected from the thermostat.

(Including whether or not the Landlord was in the Appellant’s apartment);

(iv) That the apartment was not ready to rent until October 15, 2008;

(v) That the Tenant had no heat (including whether the tenant complained to the Landlord)

(vi) Miscellaneous points including the following:

a) Plugs and electrical system were not working;

b) That the Tenant had not proven claims for the “OPP stove and heater”.

c) Damages for loss of heat by the Tenant for four (4) days.

d) That the record of temperatures submitted by the tenant appeared to be prepared on the same date and,

e) That although the furnace was fixed in 1 day it took 4 days to pump the water from the basement.

i) One bedroom vs. two bedroom

[36] The Adjudicator found as a fact that the Tenant, Mr. MacCormick had rented a one bedroom apartment. In his submission Mr. MacCormick did not understand how he could have arrive at this finding as there was only the evidence of Mr. Tomlik and Mr. MacCormick on this point which evidence was in contradiction. Throughout the summary report however, the learned Adjudicator made findings of credibility together with findings of fact, based on the evidence he heard. For example in paragraph 26 of his Report the Adjudicator stated:

> "I found as a fact and accepted the Landlord's evidence that the Tenant approached him in September, 2008, **and asked if he had a one bedroom apartment available in October, 2008**. Where the evidence of the Tenant and that of the Landlord are contra, on this point, I prefer the evidence of the Landlord, when looking at all the evidence of the parties as a whole." (Emphasis added)

The Adjudicator found as a fact that the tenant rented a one bedroom apartment. This court is therefore bound by that finding. There are additional findings on this point contained in the Adjudicator's summary which satisfy me that the Landlord rented the Tenant a one bedroom apartment. (See paragraph 53 in the Summary).

ii) Rental rebate

[37] With respect to the rent of $575 and whether it should have been $535, thereby entitling the tenant to a rebate of $40 per month, the Adjudicator stated succinctly and clearly at paragraph 27:

> "I found as a fact and accepted the evidence of the Landlord that he informed the Tenant he had a one bedroom apartment, which included heat, lights, washer, and dryer and completely furnished **at a rental of $575 per month**." (Emphasis added)

[38] Once again, the Adjudicator found as a fact that the tenant rented a one bedroom apartment at a rental of $575. The tenant argued his witness would testify to the second bedroom issue. The Adjudicator did not find the affidavit evidence of Mr. Taylor credible.

[39] Credibility findings are a matter for the trier of fact. He accepted the evidence of the Landlord that there was no relationship between the cost of a one bedroom and a two bedroom apartment. After he did the renovations the Landlord decided to charge $575 (Paragraph 54 of Summary).

[40] Therefore this Court accepts this finding of the Adjudicator and finds no error of law on this point.

iii) Major Key Point - Wire Disconnected on Thermostat (Restated Ground of Appeal "D") and whether Landlord made entry into Tenant's apartment.

[41] In regard to the major key point, the Appellant argued that the Landlord disconnected a wire which disabled the second of two heating zones in the apartment. This he argued left him with no heat in three rooms, the bathroom, bedroom, and kitchen. He says the Adjudicator erred in concluding there would be no heat at all if the wire was disconnected, as there would still be heat to the remaining room(s) heated by the other zone.

[42] The Appellant made the following submission during his appeal:

> "The Adjudicator did not agree with the Respondent nor did he agree with me? When he made his decision he said that if a wire was disconnected there would be no heat at all in the apartment. It is apparent he did not take the Respondent's testimony or my testimony into consideration before he made that decision. Thus he did not follow the requirements of natural justice and made an error in law by not taking the testimony of the Respondent and myself into consideration before making his decision."

[43] The Tenant says the Respondent/Landlord agreed the wire was disconnected but did not agree that he (the Landlord) disconnected it. The Tenant referred to pictures showing the disconnected wire and argued that the Landlord was the only one with a key to the "lockbox" enclosing the thermostat. Therefore the Tenant argues that the Landlord had to be the one to disconnect it.

[44] In regard to this argument and the removal of the wire, the Adjudicator made certain findings at paragraph 52:

> "I accepted the evidence of the Landlord and found as a fact the Landlord found, after the Tenant moved out, a wire partly removed from the thermostat and sticking out of one side (Exhibit 7(a) & (b)). I accepted the evidence of the Landlord that this wire was not sticking out from the thermostat when he rented the apartment in October, 2008, to the Tenant. I found as a fact the Landlord had not been back into the apartment between the time the Tenant (Respondent) rented it, October 2008, and September, 2010, except to take pictures sometime between March and June, 2010."

[45] In this instance, like many others in his submissions, the Appellant was in effect rearguing the evidence or what he believed the Adjudicator should have found on the basis of the evidence. The Adjudicator found on the basis of the evidence that the wire was attached when the lease commenced. Further the

Adjudicator found that the Landlord was in the apartment only to take pictures after that. In effect he was not satisfied that it was the Landlord that disconnected the wire.

[46] As to whether the Landlord was in the Tenant's apartment without the Tenant's knowledge, the Adjudicator found at paragraphs 55 and 56:

> "55. I accepted the evidence of the Landlord that he could not have gone into the apartment without the knowledge of the Tenant because he, the Landlord, had no key to the apartment and the Tenant had changed the lock on the back door and never gave the Landlord a key to the apartment.
>
> 56. I accepted the Landlord's evidence that the only time he entered the apartment after it was rented was sometime between March and June 2010, when he was accompanied by the police, in order to take pictures of the condition of the apartment and on this occasion he gave the Tenant notice and the Tenant was present."

[47] The Adjudicator found as a fact that the Landlord was not in the apartment (except to take pictures sometime between March and June of 2010) but did not find that the Landlord disconnected the wire as Mr. McCormick argues. In fact the Adjudicator found at paragraph 14 that:

> "I was not satisfied on a balance of probabilities that a wire on the thermostat had been disconnected by the

> Landlord. I accepted the Landlord's evidence that if the wire were taken off the thermostat, then the furnace would not go on and provide any heat."

[48] The Tenant argued that the Landlord agreed with him that if the wire was disconnected, one of the zones wouldn't work, that being the kitchen, bathroom and bedroom. There was no express finding by the Adjudicator that the Landlord and Tenant agreed on this point. There was also no expert or independent evidence on this point. In this regard the Tenant argues the Adjudicator erred in concluding there would be no heat at all, "in the apartment."

[49] The Adjudicator further found at paragraph 24 that there were two thermostats:

> "I found as a fact that the apartment had two thermostats, one in the living room for heating that room and one in the bedroom that heated the bedroom, kitchen and bathroom."

[50] He also found at paragraph 53 as follows:

> "I found as a fact and accepted the evidence of the Landlord, which was not disputed, by the Tenant that the Tenant had never complained about the heat in his apartment during the tenancy."

[51] As with other submissions made by the Appellant the Adjudicator made findings of fact contrary to his position which on appeal are not to be disturbed by an Appeal Court.

[52] The Adjudicator found that the Tenant never complained about the heat in the apartment, during the entire tenancy. It is apparent from paragraph 24 of the Summary that the Adjudicator knew, found in fact that each thermostat heated separate rooms. In addition, he concluded that the Landlord had not disconnected the wire. All of these finds this contributed to his finding on the “major key point” key point, that the landlord was not responsible to the tenant, due to the disconnected wire. In coming to this conclusion he accepted the evidence of the Landlord over the Tenant (para. 52 of Summary). This he is entitled to do as part of his assessing the evidence as the trier of fact. Accordingly it is beyond this appeal court to overturn that assessment .

[53] I find therefore there was no error of law or breach of natural justice on the “major key point”.

iv) Whether apartment available on October 1 , 2008

In regard to whether or not the apartment was ready to rent on October 1st, 2008 (instead of October 15th as claimed by the Appellant) the Adjudicator found at paragraph 31 as follows:

> "I accepted the Landlord's evidence that he received the first month's rent of $575 from the Tenant when the Tenant went over to check on the moving in on or about October 1st, and I accepted the Landlord's evidence he was at the premises with the Tenant on **September 30th, and on that date, the apartment was ready for occupancy with all renovations completed**." (Emphasis added)

[54] On this point the Appellant says Mr. Taylor was ready to testify otherwise.

[55] With regard to the evidence Mr. Taylor gave through his affidavit, the Adjudicator cited several paragraphs highlighting the difficulties with Mr. Taylor's evidence. Further he allowed Mr. Sellers to cross examine Mr. MacCormick on this affidavit. He also admitted evidence of the Tenant as to what Mr. Taylor had said in court on a previous occasion (at paragraph 35 of Summary).

[56] In the end the Adjudicator concluded that Mr. Taylor's evidence was not credible and where it differed with the Landlord he accepted the Landlord's evidence and made appropriate findings of fact, including whether the apartment was ready

for occupancy on October 1st. As mentioned above, the learned Adjudicator found that it was. Consequently this Court will not interfere with that finding.

v) Whether there was a loss of heat

[57] As to whether there was a loss of heat the Adjudicator found as a fact and accepted the evidence of the Landlord that "the Tenant never complained about the heat in his apartment during the tenancy" (at paragraph 53 of summary). The Tenant states otherwise, that he complained every month when he paid his rent. The finding of fact of the Adjudicator on the amount of heat was contained in paragraph 51 which stated:

> "I accepted the evidence of the Landlord that the thermostat in the bedroom was set at the 'comfort zone' and the thermostat in the living room was set at 68 degrees."

[58] He also found in paragraph 13 that this was consistent with the Tenant's evidence, thereby considering the Tenant's evidence in addition to that of the Landlord. Paragraph 13 of the Summary reads as follows:

> "I found as a fact and accepted the Tenant's evidence that the thermostat switch in the bedroom was set at the 'low comfort zone'. I also found as a fact the thermostat in the living room was behind an

> entertainment centre belonging to the Tenant and it was set at 68 degrees."

[59] The Respondent's position on this Appeal is summarized in his brief:

> "It is the Respondent's submission generally that the Adjudicator afforded Mr. McCormick every reasonable opportunity to present his evidence. The facts were thoroughly and exhaustively vetted. It is apparent from the reasons of the Adjudicator that the Adjudicator considered the arguments of Mr. McCormick and ultimately found that he did not accept the facts alleged by Mr. McCormick. Such factual determinations, which are largely based on credibility, are in the exclusive purview of the trier of fact."

[60] In the case of **The "British Fame" v. The "MacGregor"** [1943] AC 197, 112 LJP 6, [1943] 1 All ER 33, the Court's Chancery division spoke of the role of an Appellate Court as follows:

> "It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge."

[61] In the present case I apply this reasoning and accept the findings of the Adjudicator that there was no loss of heat, except on one occasion when the furnace

broke down. In that instance the Adjudicator found that this was remedied by the Landlord (paragraph 57).

[62] At one point during his submission the Appellant/Tenant contemplated whether it was a matter that the Adjudicator "just didn't believe me." This view expressed by the Appellant himself may best summarize the decision of the Adjudicator. The Adjudicator has made his findings of credibility in a thorough and detailed summary, which was 13 pages in length. In it he made conclusive findings of fact with respect to each of the Tenant's allegations, none of which findings were in the end result , favourable to the Tenant.

[63] For example, the Adjudicator concluded that the Landlord gave Notice to Quit to the Tenant on March 1, 2010 and it was only after that, on March 4, 2010 the Tenant filed a complaint. The Tenant moved out and vacated the premises on September 3, 2010. The Adjudicator found as a fact that the Tenant had received proper notice and thus overturned the decision of the Director on this point.

vi) Miscellaneous and Final Points Raised by Tenant

[64] The Tenant also argued on the appeal that the Adjudicator's findings were in error with respect to the following.

(a) That the wall plugs and electrical system were not working.
(b) That the Tenant had not proven it's claims for the OPP stove and heater.
(c) Damages for loss of heat by the Tenant for four days.
(d) That the record of temperatures prepared by the Tenant were written on the same day.
(e) That although the furnace was fixed in one day, it took four days to pump the water from the basement.

[65] I have considered all of these arguments of the Appellant and I note that each one was dealt with and analysed by the Adjudicator in paragraphs 15, 19, 23 and paragraphs 57and 58. The Adjudicator found as a fact and accepted the evidence of the Landlord over the Tenant on each of these items. Referring once again to the test for review on appeal from Small Claims Court, I would repeat from the quote of Justice Saunders referred in paragraph 13 herein wherein he stated:

> "**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."
>
> (Emphasis added)

I adopt what the learned Justice said and I apply that same principle to the findings of the Adjudicator in the present case.

Ground # 4 - Failure to use common sense and Failure to view important documents.

[66] In regard to the various grounds of appeal (including this one alleging failure to review documents) the Adjudicator stated repeatedly throughout that his findings were made "after reviewing all of the evidence". From the thoroughness of the Findings of Fact and the Summary in general it is reasonable to infer that the Adjudicator considered all of the evidence including the Residential Tenancy File.

[67] The learned Adjudicator stated in the Order of September 10, 2011 that the Tenant(the Respondent in Small Claims Court) had not proven on the balance of probabilities, the merits of his claim against the Landlord. Under section 17 (d) of the *Residential Tenancies Act* of Nova Scotia, the Adjudicator was entitled to issue any order which the Director could have issued, or confirm, vary or rescind the order of the Director . That Adjudicator's Order rescinded and set aside the Order of the Director dated May 14th, 2010.

[68] The Respondent's argument that the Adjudicator said he did not need to see the Rent Review Board files must be he looked at in context. The Respondent's

position is that the Adjudicator was asked as he was adjourning to deliberate whether he needed those files at that particular time. The Respondent further submits that at that particular time the Adjudicator indicated he did not, having previously reviewed them. The Respondent says this should not be taken out of context.

[69] There is little in the Stated Case on this specific point but the Adjudicator in his decision referred to the Director's file throughout his decision, as I have said in paragraph 66 herein. Thus, I am not satisfied this is a valid ground of appeal resulting in an error of law or breach of natural justice.

[70] As to whether the Adjudicator failed to apply common sense, any failure to do so must result in an error of law or failure to follow the principles of nature justice to be successful on appeal. I am not persuaded or satisfied that the Adjudicator failed to apply common sense to his reasoning and his conclusions. His conclusions were based on credibility findings he made as between the Landlord Mr. Tomlik and the Tenant, Mr. MacCormick.

[71] I agree with the Respondent who said that the reasons and analysis given by the Adjudicator are cogent, thorough and logical. The Appellant has a different view

of the evidence and how it should have been assessed. I am not persuaded that the findings of fact by the Adjudicator should be disturbed or overturned.

[72] Based on the foregoing and accordingly I am not satisfied that the Adjudicator committed any error of law or failed to comply with the rules of natural justice in respect of this matter. I therefore dismiss the appeal by the Appellant Mr. MacCormick and award costs to the Respondent as permitted by the Regulations.

J.