SUPREME COURT OF NOVA SCOTIA
Citation: Adams v. Crowe, 2010 NSSC 324

Date: 20100812
Docket: Hfx No. 324509
Registry: Halifax

Between:

Jeffrey Adams

Appellant

v.

Donald Crowe

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: August 3, 2010, in Halifax, Nova Scotia

Written Decision: August 17, 2010
(Rendered orally on August 12, 2010)

Counsel: Jeffrey Adams, on his own behalf
David Green, Ll.B., for the respondent

By the Court (orally):

[1] This matter comes before this Court by way of an appeal from a decision of a Small Claims Court adjudicator.

[2] The appellant was the defendant in the original claim which was decided in favour of the respondent. The respondent was awarded damages of $750.00 (Cdn) along with costs of $89.68.

[3] This amount was intended to cover the cost for replacing the respondent's surf board. It had been damaged as a result of the appellant's alleged negligence. He was paddling his board out, to presumably catch a wave, as the respondent was riding a wave towards the shore.

[4] A collision ensued and as a result the respondent's surf board was damaged. The appellant's conduct was determined by the Learned Adjudicator to have been negligent. Furthermore, the Learned Adjudicator ruled out the defence of *volenti non fit injuria* and also decided there had been no contributory negligence on the part of the respondent.

[5] The appellant appeals the adjudicator's decision on the grounds of:

- Jurisdictional Error
- Error of Law
- Failure to follow the Requirements of Natural Justice

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

- The Adjudicator made a jurisdictional error in hearing a matter under federal jurisdiction;
- The Adjudicator erred in failing to apply relevant maritime law principles to the matter;
- The Adjudicator erred in finding that the principles of *volanti* [sic] did not apply to the action;
- The Adjudicator erred in finding that contributory negligence did not apply in this action;
- The Adjudicator erred in finding that the defendant was negligent;
- The Adjudicator failed to follow the requirements of natural justice by serving the defendant after the requisite deadline for service;
- The Adjudicator failed to [sic, follow] the requirements of natural justice by issuing the decision outside of the required sixty-day period.

[7] The Learned Adjudicator's 'Summary Report of Findings' of law and fact concisely lays out the basis for his findings. It incorporates his nearly 5-page decision given on January 19, 2010.

[8] The decision clearly sets out the nature of the claim and the defence offered by the appellant at first instance. It also offers a summary of the evidence provided by the two principals to the claim and makes reference to the testimony of the witnesses (or at least some of the witnesses) called by the two parties.

[9] Although labelled a court of record by the statute that creates it, the Small Claims Court functions without the formal requirement of a recorded hearing. On appeal there is no transcript of the proceedings. This limits or, at least, affects the nature of the appeal.

[10] The adjudicator's findings of fact are accorded great deference, as well they should. There are numerous decided cases from our Court that serve as precedents for this approach. In the often quoted case of **Brett Motor Leasing Ltd.** v. **Welsford**, (1999) 181 N.S.R. (2d) 76, Saunders, J. (now a member of the Nova Scotia Court of Appeal) stated the following:

> 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 found by the adjudicator and determine from the evidence my own findings of fact.

[11] Unless there has been a palpable and over-riding error in the interpretation of evidence or the Learned Adjudicator has made a finding of fact where there is no evidence to support such a finding, this Court, on appeal, must accept the factual findings made.

[12] In the case now before me, the Learned Adjudicator made clear and concise findings of fact and based his determinations on those findings.

JURISDICTIONAL ERROR:

[13] The appellant's grounds of appeal allege: jurisdictional error; error of law; and, denial of natural justice. Under jurisdictional error he argues that the matter was one that should not have even been heard in the Small Claims Court given that the collision, resulting in damage to the respondent's surf board, occurred in the coastal waters immediately adjacent to the Nova Scotia shoreline. He suggests that the matter falls under Federal jurisdiction. He does not refer to any particular piece of Federal legislation that might govern the situation.

[14] This ground of appeal has little, if any, merit. A surf board does not meet the definition of "ship" under the *Federal Courts Act,* R.S., 1985, c. F-7, nor does it meet the definition of 'vessel' or 'pleasure craft' under the *Canada Shipping Act*, R.S. 2001, c. 26.

[15] The claim for damages arising from the collision of the two surf boards is not specifically precluded by the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 (as amended). A claim for damage to property such as this can be head in that Court.

ERROR OF LAW:

[16] The appellant further argues that the Learned Adjudicator made an error of law by not mentioning the testimony of a particular witness – Mr. Michael Lewis (called by the defendant) – in the written decision.

[17] He also argues that the Learned Adjudicator erred in law in finding that there was negligence on the part of the appellant which resulted in physical damage to the respondent's surf board.

[18] Furthermore, the appellant submits there was an error of law when the Learned Adjudicator failed to find that the defence of *volenti non fit injuria* did not afford a complete answer to the claim or that the respondent was not contributorily negligent for his loss.

[19] Based on the findings of fact and the application of the law pertaining to negligence, the Learned Adjudicator did not err. The appellant owed a duty of care to other surfers including the respondent.

[20] While the parties each voluntarily participated in a sport or recreational pursuit that is inherently dangerous, the respondent cannot be said to have consented to the appellant's negligent conduct that resulted in the damage to his property. The appellant did not meet the required standard of care one would objectively expect in such situations.

[21] Furthermore the Learned Adjudicator's decision makes it clear that he considered both *volenti* and contributory negligence and ruled out both as possible mitigating circumstances.

[22] This Court is not persuaded to interfere with the Learned Adjudicator's findings nor the determinations arising therefrom.

DENIAL OF NATURAL JUSTICE:

[23] The appellant argues that the Learned Adjudicator's failure to render a decision within the 60-day time period allowed under subsection (1) of section 29 amounts to a denial of natural justice.

[24] Subsection 29(1) states:

> 29 (1) Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator may
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> (a) make an order
>
> (i) dismissing the claim, defence or counterclaim,
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> (ii) requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding twenty-five thousand dollars, and any pre-judgment interest as prescribed by the regulations, or
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> (iii) for any remedy authorized or directed by an Act of the Legislature in respect of matters or things that are to be determined pursuant to this Act; and
>
> (b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.

[25] The claim was initially heard in the Small Claims Court on November 10, 2009. The Learned Adjudicator reserved his decision. It was released on January 19, 2010 – some 10 days beyond the recommended 60 days stipulated in the *Act*.

[26] Although there are conflicting decisions from our Court on whether the 60-day time limit on rendering decisions is mandatory or simply suggestive, the majority of reported cases indicate that missing the deadline does not result in a nullity.

[27] More recent decisions from our Court follow the line of reasoning of the Nova Scotia Court of Appeal in the case of **Langille** v. **Midway Motors Ltd.**, 2002 NSCA 39, (2002) 202 N.S.R. (2d) 398; 2002 Carswell NS 120, Roscoe, J.A., at para. 8 of the Carswell version said this:

> ...Assuming without deciding that the decision in this case was reserved for longer than the six months permitted by s. 34 of the **Judicature Act**, we do not agree that there was a loss of jurisdiction in the circumstances. The time limit should not be considered to be mandatory but rather strongly directory. The appropriate remedy for failure to deliver a judgment after trial within six months, should be an order for mandamus, not an order for a new trial. Since the decision has now been delivered, no order is required.

[28] Justice Roscoe was dealing with the effect of sub-section (d) of section 34 of the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended, which allows a Judge of the Supreme Court to reserve a decision for six months after a hearing or trial. The exact wording of the statute is as follows:

> 34.... (d) upon the hearing of any proceeding, the presiding judge may, of his own motion or by consent of the parties, reserve judgment until a future day, not later than six months from the day of reserving judgment, and his judgment whenever given shall be considered as if given at the time of the hearing and shall be filed with the prothonotary of the Supreme Court for the county in which the hearing was tried, who shall immediately give notice in writing to the parties to the cause or their respective solicitors that such judgment has been filed, and each of the parties shall have and exercise, within twenty days, or within such further time as the Supreme Court may order, from the service of such notice, all such rights as he possessed or might have exercised if judgment had been given on the hearing of the proceeding;

[29] The reasoning advanced in **Langille**, *supra,* was followed by Edwards, J. in **MacNeil** v. **MacNeil**, 2003 NSSC 44.

[30] The reasoning in **MacNeil**, *supra* was considered by Moir, J. of this Court, in **Scotia Recovery Services** v. **Dimensionally Specialized Carriers Inc.**, 2008 NSSC 210. In **Scotia Recovery**, *supra*, the issue was delay by the adjudicator in filing a report with the prothonotary upon receiving a notice of appeal as is mandated by s. 34(1) of the *Small Claims Court Act*. In **Scotia Recovery**, *supra*, at para 29, Moir, J. stated that he agreed "with the conclusion reached by Justice Edwards in **MacNeil**," but that he disagreed with the appropriate remedy. Justice Moir held that *mandamus*

may not be the only appropriate remedy and that "delay by the adjudicator may give rise to a breach of fairness when the report is so stale that one cannot have confidence in it as a limited substitute for a record": **[Scotia Recovery** at para. 29]

[31] Justice Moir went on to find that "[t]he delay by this court in notifying the learned adjudicator, and the further delay by the adjudicator in filing a report, undermine confidence in the report as a limited substitute for a record. This breaches the duty of fairness": [**Scotia Recovery** at para. 32] On this basis, Justice Moir set aside the adjudicator's decision and ordered a re-hearing before a different adjudicator.

[32] In my view the facts in **Scotia Recovery**, *supra*, are distinguishable from **MacNeil**, *supra*. **MacNeil** deals with a delay in rendering a decision within the time mandated by s. 29(1) of the *Act*; **Scotia Recovery** dealt with a delay in providing a report to the prothonotary of this Court, as part of the appeal process, within the time mandated by s. 32(4) of the *Act*. This does not mean that the decision in **Scotia Recovery** is wrong or that delay cannot cause unfairness; however, the application of the reasoning in **Scotia Recovery** must be approached with some caution given that it dealt with a breach of s. 32(4) of the *Act* and not a breach of s. 29(1) of the *Act*.

[33] In **Gallant** v. **United Campers**, 2008 NSSC 381, the adjudicator issued his decision 11 months after the claim was heard. Justice Douglas MacLellan reviewed some of this Court's jurisprudence regarding the effect of such delay on appeal. In particular, Justice MacLellan reviewed the decisions of Edwards, J. in **MacNeil**, *supra* and Moir, J. in **Scotia Recovery**, *supra*, . Justice MacLellan determined that Edwards, J. refused to find a nullity because the adjudicator was only six days late. Justice McLellan stated that he preferred the approach of Justice Moir in **Scotia Recovery** : Justice MacLellan wrote this:

> ...He basically said that if he found that the delay in filing the decision caused an unfairness to the parties, he would remit the matter back to an Adjudicator. In other words, he would consider the period of time that the Adjudicator was over the time limit and if that caused an unfairness he would order the decision not stand. I tend to agree with Justice Moir, that is a good approach. Kind of a middle ground approach. You are not saying that because you are one day over the limit that the thing is an nullity. In other words, the Judge looks at the thing, sees if there is an unfairness in the consequences of being late and then decides whether it is a nullity. [**Gallant** at para 38]

[34] Justice MacLellan went on to find that the delay in **Gallant**, *supra*, did amount to a breach of fairness because it was evident that the delay had caused the adjudicator "to not be able to recite the facts properly." [**Gallant**, at para. 42]

[35] Justice MacLellan's interpretation of Justice Edward's decision in **MacNeil**, *supra*, is not entirely accurate. Edwards, J. did not base his decision on the fact that the adjudicator was only six days late in rendering his decision. The decision of Edwards, J. was based on his view that the Court of Appeal decision in **Langille**, *supra*, was a binding authority applicable to the facts in the case before him.

[36] A careful reading of s. 29(1) of the *Small Claims Court Act* and s. 34(d) of the *Judicature Act* suggests that the former is no more mandatory than the latter. To borrow the words of the Court of Appeal: the time limit in s. 29(1) of the *Small Claims Court Act* should not be considered to be mandatory but rather strongly directory. In this respect, Edwards, J. was warranted in applying **Langille**, *supra*, to the facts in **MacNeil**, *supra*. However, just because an adjudicator does not lose jurisdiction if he/she fails to render a decision within the prescribed time frame does not mean that delay cannot properly form the basis for a successful appeal, on other grounds.

[37] Subsection 32(1) of the *Act* clearly states that a Small Claims Court adjudicator's decision may be appealed on the basis of a jurisdictional error; an error of law; or, a failure to follow the requirements of natural justice. The Court of Appeal's decision in **Langille**, *supra*, only vitiates a jurisdictional attack on the basis of delay. The Court of Appeal in **Langille**, *supra*, did not address whether delay could amount to a breach of natural justice and it appears that this issue was not argued before the Court of Appeal.

[38] It is well accepted in the common law that delay can constitute a breach of natural justice: See e.g. **Blencoe** v. **British Columbia (Human Rights Commission)**, 2000 SCC 44. Whether a given delay amounts to a breach of natural justice depends on the circumstances of each case. In this regard, the reasoning of Justice MacLellan in **Gallant**, *supra*, is germane. Justice MacLellan candidly observes, at para. 39, that for many decision-makers, including himself, if a decision is not rendered "in a fairly short period of time when you go back to it, it is very difficult to reconstruct all the facts from your notes." MacLellan, J. further observes that Small Claims Court adjudicators, unlike trial judges, do not have the benefit of a transcript of the hearing.

A transcript can be a crucial tool, particularly in complex cases, in refreshing a decision-maker's memory when he/she eventually turns to writing a decision. In **Gallant**, *supra,* MacLellan, J. concluded that the delay in rendering a decision caused the adjudicator to misconstrue the facts and that this amounted to a breach of natural justice.

[39] With the exception of **Gordon Shaw Concrete Products Ltd.** v. **Staveley Weighing & Systems Canada Inc.** (29 March 1996), Hfx No. 121056 (N.S.S.C.) and **Bruce Jones** v. **Lloyd LeDrew** (18 July 1996), Syd No. 102161 (N.S.S.C.) which are inconsistent with **MacNeil**, *supra*, and likely wrong in light of **Langille**, *supra*, the decisions of this Court regarding the issue of delay and s. 29(1) of the *Act* are not contradictory. **MacNeil**, *supra*, stands for the proposition that an adjudicator is not *functus* if he/she fails to render a decision within sixty days of hearing a claim. **Scotia Recovery**, *supra*, and **Gallant**, *supra*, stand for the proposition that delay can form the basis for appellate review if it can be shown that the delay caused a breach of natural justice. Where a breach of natural justice can be shown the decision will be set aside, not because the decision is a nullity, as was found in **Gordon**, *supra*, but because the process in rendering the decision resulted in unfairness. Unfairness is a stipulated ground of review in the *Act*.

[40] Given the expedited Small Claims Court process it will be difficult to establish that delay caused a breach of natural justice. In **Gallant**, *supra*, the causation was on the face of the record, but this is unlikely to be frequently the case. Given the lack of a transcript of Small Claims Court proceedings, it may be possible to infer unfairness from delay but such an inference also requires assumptions that an adjudicator's memory has lapsed, that they were not working on the case during the delay, and that their notes are not adequate to overcome the passage of time. In my view, the party pleading a breach of natural justice based on delay must establish that the delay actually caused a breach of fairness – it is not enough to infer that the passage of time automatically results in a finding of a breach of natural justice.

[41] In the case that is before me there is nothing to indicate that the delay of 10 days in rendering the decision beyond the recommended 60-day period resulted in a breach of fairness. Consequently, this ground of appeal is dismissed.

[42] I need not deal with the other ground cited by the appellant to support a failure to follow the requirements of natural justice. That particular ground was stipulated

to be: “the adjudicator failed to follow the requirements of natural justice by serving the defendant after the requisite deadline for service”. It was abandoned by Mr. Adams in the course of his oral submissions. Asa such, it is not necessary to comment on it further.

FINAL RESULT:

[43] The appellant has failed to establish any of the grounds of appeal. Therefore, the appeal is dismissed with costs to the successful respondent as set out in the regulations. This includes a barrister’s fee of $50.00 and any reasonable out-of-pocket expenses incurred by the respondent. If the respondent is seeking reimbursement of out-of-pocket expenses, a list of these expenses along with an explanation will have to be submitted to the Court for approval.

McDougall, J