SUPREME COURT OF NOVA SCOTIA
Citation: Wilson v. Hatt, 2012 NSSC 349

Date: 20121004
Docket: Hfx No. 383419
Registry: Halifax

Between:

Trina Wilson and Dave Wilson

Appellants

v.

Jackie Hatt and Paul Hatt

Respondents

Judge: The Honourable Justice Glen G. McDougall

Heard: August 27, 2012, in Halifax, Nova Scotia

Counsel: Shaun MacMillan and Kaitlin MacMillan, for the appellants
Ian Roderick Dunbar, for the respondents

By the Court:

INTRODUCTION

[1] This is an appeal from a decision of the Small Claims Court. The appellants allege that the Learned Adjudicator both failed to follow the requirements of natural justice and that he erred in law in his assessment of damages and in his decision on costs. The appellants request that the matter be remitted to the Small Claims Court for a reassessment of the award.

SUMMARY OF FACTS

[2] On the 23rd of April, 2010, Trina and Dave Wilson ("the appellants") returned home from a family vacation to discover that several trees on their property had been cut down. Their neighbours, Jackie and Paul Hatt ("the respondents"), were the culprits. Although this dispute was initially resolved amicably, the relationship between the two couples soon deteriorated and the appellants eventually filed a claim to recover compensation for the trees in the Small Claims Court.

[3] Before the Learned Adjudicator, the respondents admitted that they trespassed on the property of the appellants and had cut down at least one tree, so the only issues to be resolved were how many trees had been cut down and what amount of compensation should be given. The appellants insisted that the respondents had cut four trees off the property and, relying on the opinion of their expert as to the value of the trees, sought damages in the amount of $18,527.94. The respondents only admitted to cutting one tree off the property and tendered their own expert evidence valuing the tree at $1,615.29.

[4] The Learned Adjudicator decided that three trees had been cut down by the respondents, but declined to defer to either of the expert witnesses as to their value. He instead awarded $2000.00 to the appellants, relying on quotes provided by the respondents that that was the cost of replacing the trees. He declined to award costs to either party.

ISSUES

[5] The appellants raise the following six grounds in their Notice of Appeal:

> (1) The Learned Adjudicator erred in law by failing to assess damages based upon the evidence regarding the appropriate method of valuing the Appellant's loss as presented by experts for both sides at trial;
>
> (2A) The Learned Adjudicator erred in law in assessing damages on the basis of the Appellants' subjective enjoyment of the trees, when neither side's expert presented this as a component of their valuation;
>
> (2B) Alternatively, the Learned Adjudicator failed to follow the requirements of natural justice by not providing notice that this factor was under consideration and not providing the Appellants with an opportunity to address this factor;

> (3) The Learned Adjudicator erred in law in basing his damage award on quotes for replacement trees that pre-dated the Respondents' installation of a large fence that will make planting new trees more difficult and expensive;
>
> (4) The Learned Adjudicator erred in law by not awarding costs to the Appellants; and
>
> (5) The Learned Adjudicator failed to follow the requirements of natural justice by not providing adequate reasons for his decision to deviate from the Trunk Formula Method, which was accepted by experts for both sides.

[6] Appeals from decisions of the Small Claims Court are governed by section 32 of the *Small Claims Court Act,* RSNS 1989, c 430, which gives a right of appeal on grounds of jurisdictional error, error of law, or failure to follow the requirements of natural justice. Grounds 1, 2A, 3, and 4 all allege errors of law, while grounds 2B and 5 allege that the Learned Adjudicator failed to follow the requirements of natural justice. I will consider them in that order.

ERRORS OF LAW

Standard of Review

[7] Both parties agree that questions of law are to be reviewed on a standard of correctness, as per the analysis in **Brett Motors Leasing Ltd** v. **Welsford** (1999), 181 NSR (2d) 76 (SC). Although **Brett Motors** was decided before the standard of review analysis was changed by **Dunsmuir** v. **New Brunswick**, 2008 SCC 9, [2008] 1 SCR 190, it remains an accurate statement of the required standard of review (**Economical Mutual Insurance Co.** v. **Rushton**, 2008 NSSC 237 at paras 4-9). Decisions of the Small Claims Court are accorded no deference where there is an error of law.

Ground 1: The Learned Adjudicator erred in law by failing to assess damages based upon the evidence regarding the appropriate method of valuing the Appellant's loss as presented by experts for both sides at trial.

[8] Although each party's expert employed the "trunk formula" to assess the value of the lost trees, the Learned Adjudicator chose to instead award only the reasonable

cost of planting smaller and younger replacement trees. The appellants submit that this was an error of law since the experts on both sides had testified that the trunk formula was the only method that could be used to evaluate the trees. They submit that the trial judge should have relied on the experts since "the valuation of mature trees on a residential lot is not within the typical trier of fact's experience" (at 6).

[9] However, as the respondents correctly point out in their brief: "[w]hile expert evidence may be adduced to assist the Court, it is not an error of law for the Court to refuse to follow it" (at para 22). They cite **Miller** v. **Folkertsma Farms Ltd**, 2001 NSCA 129, 2001 CarswellNS 315, in which our Court of Appeal held at paragraph 42 that "[i]n establishing the amount of an award of damages, a trial judge may consider expert evidence but is not constrained by it." The Court of Appeal went on to cite **Lewis** v. **Todd**, [1980] 2 SCR 694, in which Justice Dickson recognized the importance of expert assistance when assessing damages but nevertheless held at pages 708-709 that:

> [T]he trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to an award which in all the circumstances seems to the judge to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award.

[10] In this case, the Learned Adjudicator explained his reasons for rejecting the evaluations of the experts at paragraphs 15 and 16 of his decision:

> 15. Both experts used roughly the same unit tree cost in their evaluation. The difference in their final evaluations related to the subjective factors of condition and location. Mr. Kochanoff noted these factors on the high side. Ms. Robertson noted them lower. Although helpful I am not satisfied that the value placed on the trees by either expert represents reasonable compensation for the loss.
>
> 16. The cut trees were not ornamental. They grew naturally in an uncultivated part of the claimant's lot. I don't doubt that the Claimants enjoyed the privacy that they provided as did the Defendants. I find, however, that the Claimants have overstated the value they placed on the trees. Their lack of interest when trees on their lot were blown or damaged leads me to the conclusion that they did not place a particularly high value on them. The trees themselves looked in poor condition from the photos. I am, however, required to assess the loss sustained by the

> Claimants as a result of the Defendants trespass. It would be reasonable for the Claimants to replace the trees lost with new ones.

The Learned Adjudicator found as a fact that the appellants were mostly indifferent to the existence of the trees, and he determined that the most appropriate remedy for the trespass was for the respondents to pay to have the trees replaced. It was not outside of the Learned Adjudicator's expertise to determine that the trunk formula was an inappropriate mechanism for approximating the actual loss experienced by the appellants. He was therefore free to reject the evaluations of both experts, and his reasons on this point do not disclose any error of law.

<u>Ground 2A:</u> The Learned Adjudicator erred in law in assessing damages on the basis of the Appellants' subjective enjoyment of the trees, when neither side's expert presented this as a component of their valuation.

[11] The wording of this ground of appeal appears to have confused the Learned Adjudicator, and he wrote at page 4 of his summary report that: "I am not sure what is meant by this ground of appeal. … My evaluation, however, was based on my best estimate of what would be a reasonable replacement cost." The respondents rely on this to insist at paragraph 28 of their brief that "[t]here is no evidence to suggest that the Learned Adjudicator based his assessment on the Appellants' subjective enjoyment of the Trees." I think the respondents overstate the Learned Adjudicator's position. It appears that the Learned Adjudicator read this ground of appeal as alleging that he calculated the quantum of damages by some subjective measurement, and he correctly asserts that his calculations were based on reasonable replacement costs.

[12] However, the appellants are not asserting that he used a subjective measurement to calculate the precise quantum of damages; they are objecting to the Learned Adjudicator's rejection of the trunk formula, and his reasons do disclose that he based that decision on his finding that the appellants "did not place a particularly high value" on the trees. In the appellants' view, it was inappropriate to consider these subjective values since, as they wrote at page 7 of their brief, the "appellants were not seeking damages for distress relating to the removal of the trees. They were seeking to be made whole for their loss."

[13] True though that may be, the appellants' submission ignores the fact that determining how a person is to be made "whole" when they lose property requires an

assessment of the actual value to which the owners assigned that property. As the respondents note at paragraph 29 of their brief, the "Learned Adjudicator's role was not to determine the market value of the Trees in the abstract. He instead was tasked with valuing the Appellants' loss" (emphasis in original). The appellants themselves, at page 4 of their brief, cite the following passage from Remedies in Tort (vol 4 (Toronto: Carswell, 2011) ch 27 at 27-162.84.1):

> The value of lost property is determined by assessing the actual value of the property to the plaintiff. As a general rule, market value is the best evidence of value but it is not always conclusive since it may not be ascertainable or may not establish the property's value to the owner. Some other elements which may assist in determining value are: i) the cost of replacing the lost property; ii) the value of comparable property; iii) the original cost of the property; and iv) the amount for which the property is insured. [citations omitted]

Applying that to the present case, that passage acknowledges that the value of the trees as determined by the trunk formula may not establish their actual value to the appellants. In determining whether the replacement cost of the trees more accurately compensated the appellants' loss than the trunk formula, the Learned Adjudicator committed no error of law by considering the value the appellants subjectively assigned to the trees.

Ground 3: The Learned Adjudicator erred in law in basing his damage award on quotes for replacement trees that pre-dated the Respondents' installation of a large fence that will make planting new trees more difficult and expensive.

[14] In assessing the quantum of damages, the Learned Adjudicator relied on some quotes for the cost of replacing a maple tree that had been provided by the respondents. Those quotes were obtained some time before the respondents had erected a wooden fence along the property line, and the appellants submit that it was an error of law for the Learned Adjudicator to rely on those quotes since the existence of the fence would make it more difficult to plant the new trees.

[15] Responding to this in his summary report, the Learned Adjudicator commented that "[t]he Appellants have access to the area where the trees were to be replaced. They argued that the trees would be more difficult to replace because of the fence however no one provided evidence that it would cost more." To that point, the appellants argued that they were unable to question the contractors because the quotes

were hearsay and no one was produced to speak to them. However, if the quotes were untested, it was because the appellants chose neither to test them nor object to their admittance. In the absence of evidence that the fence would make the replacement trees cost more, the Learned Adjudicator did not err by relying on the quotes.

Ground 4: The Learned Adjudicator erred in law by not awarding costs to the Appellants.

[16] The parties correctly agree that the decision to award costs is within the Learned Adjudicator's discretion pursuant to section 29(1)(b) of the *Small Claims Court Act*, RSNS 1989, c 430, and section 15 of the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93. Nevertheless, the appellants submit that the Learned Adjudicator's decision not to award costs constituted an error of law because it was inconsistent with his findings on liability and contravened the general principle that costs follow the result.

[17] Firstly, with regard to his findings on liability, it should be noted that the respondents admitted liability for one tree and only disputed the appellants' claim that they had cut down four trees. The adjudicator found that three trees had been cut down, so neither party was entirely successful. The appellants argue at page 10 of their brief that "the Respondents' maintenance of [the position that only one tree had been cut down] was a considerable factor in escalating the dispute leading to the action, and then in prolonging the hearing of the matter to two full evenings." However, it could just as easily be asserted that the appellants' maintenance of the position that four trees had been cut down had done the same.

[18] Secondly, while it is a general principle that costs should follow the result, there is nothing in the Act or Regulations which requires that consequence in all circumstances. In his summary report of findings, the Learned Adjudicator explained that he had "concluded that success was divided in this case and chose not to award costs. The Appellants claim was for $18,500.00. They were awarded $2,000.00." The Learned Adjudicator did not exceed his discretionary power in so deciding and, as such, he did not commit any error of law. This ground of appeal is dismissed.

DENIAL OF NATURAL JUSTICE

Level of Procedural Fairness

[19] Concerning the allegations that the Learned Adjudicator failed to follow the requirements of natural justice, the appellants note that this does not engage the traditional standard of review analysis and that the basic question is whether "the process was fair to the claimaint" (**Wiles Welding Ltd**. v **Solutions Smith Engineering Inc**, 2012 NSSC 255). The Supreme Court of Canada has noted that this concept of procedural fairness is "flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (**Baker** v. **Canada (Minister of Citizenship and Immigration)**, [1999] 2 SCR 817 at para 22). Neither party has provided submissions on the level of procedural fairness required in this case according to the **Baker** factors. However, I will assume that it is at least more than minimal and that it includes a duty to give reasons and a right for the parties to know the case to meet (**MacDonald** v. **Mor-Town Developments Ltd**, 2011 NSSC 281 at paras 41-45, 305 NSR (2d) 302, rev'd on other grounds 2012 NSCA 35).

Ground 2B: The Learned Adjudicator failed to follow the requirements of natural justice by not providing notice that this factor was under consideration and not providing the Appellants with an opportunity to address this factor.

[20] Although the Learned Adjudicator considered the appellants' subjective enjoyment of the trees, he was not required to give notice that it might be a factor. As was noted above, it is a general principle of tort law that "the plaintiff is entitled to the sum required to place him in the position he would have occupied had his property not been lost or damaged" (Remedies in Tort, vol 4 (Toronto: Carswell, 2011) ch 27 at 27.162.84.1). The actual value of the lost property to the claimant is therefore always in issue when determining damages. The appellants were represented by counsel and the Learned Adjudicator was entitled to presume that they were aware that the subjective value they placed on the trees was legally relevant; he had no duty to instruct them in the law. Further, the appellants do not argue that they did not have the opportunity to address the evidence on which the Learned Adjudicator relied. Therefore, the appellants' right to know the case to meet was not violated.

Ground 5: The Learned Adjudicator failed to follow the requirements of natural justice by not providing adequate reasons for his decision to deviate from the Trunk Formula Method, which was accepted by experts for both sides.

[21] In **R.** v **Delorey**, 2010 NSCA 65, Justice Oland held at paragraph 23 that the "functional approach calls for reasons which, examined in their entire context, are sufficient to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal". That same approach has been applied to decisions of the Small Claims Court (**Connors** v. **Mood Estate**, 2011 NSSC 287 at paras 19-20), and I am satisfied that, at the very least, the requirements for reasons in this context are not any more stringent than in the criminal context. More specifically, in **Cameron** v. **Morris**, 2006 NSSC 9, 240 NSR (2d) 123, Justice LeBlanc held at paragraph 38 that "reasons [of the Small Claims Court] are insufficient where they do not make clear the evidentiary foundation and reasoning utilized by the adjudicator."

[22] The appellants argue that, since both experts had agreed on the valuation methodology for the trees, the Learned Adjudicator's decision to "disregard the expert evidence 'came out of left field'." I have already decided that the Learned Adjudicator did not err in law by making this determination, but the appellants here submit that the Learned Adjudicator did not "provide a meaningful explanation in his decision to indicate why he chose to do this."

[23] I disagree. The Learned Adjudicator's reasons for rejecting the testimony of the experts were quoted at length earlier and are set out at paragraphs 15 and 16 of his decision. In those paragraphs, the Learned Adjudicator cogently expresses his finding of fact that the appellants "did not place a particularly high value" on the trees and he lays out the evidentiary basis for that conclusion - namely, that the trees were non-ornamental, uncultivated, in poor condition, and that the appellants lacked interest when other trees on their lot were destroyed or damaged. From this, he infers that using the trunk formula to calculate damages would overcompensate the appellants for their actual loss, and he explains that he thinks replacing the trees would be an adequate remedy. While the appellants may not be happy with those reasons or may not find them persuasive, they were sufficient to inform them of the basis of the decision, they do provide public accountability, and they have permitted a meaningful appeal. As such, there was no denial of natural justice.

COSTS OF THE APPEAL

[24] Section 23 of the *Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93 authorizes a judge to award limited costs on an appeal from the Small Claims Court. As the respondents were successful on all issues on appeal, they shall receive a $50.00 barrister's fee pursuant to section 23(b). The respondents have also requested $50.20 for photocopying expenses and $1.00 for a courier charge. I am satisfied that those are reasonable out of pocket expenses as contemplated by section 23(c), and I award them to the respondents as well.

DISPOSITION

[25] The appeal is dismissed with costs in the amount of $101.20 awarded to the respondents to be paid forthwith.

McDougall, J.