SUPREME COURT OF NOVA SCOTIA
Citation: Hoyeck v. Maloney, 2013 NSSC 266

Date: 20130822
Docket: Hfx No. 406743
Registry: Halifax

Between:

Elie Hoyeck and Your Mechanic Auto Corner

Appellants

v.

Michael P. Maloney

Respondent

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: March 25, 2013

Counsel: Kent Noseworthy, for appellants
Jason May, for respondent

Moir J.:

[1] Mr. Maloney sued "Your Mechanic Auto Corner a Registered Partnership" and Mr. Hoyeck in Small Claims Court. He alleged that they were liable in contract and tort for selling Mr. Maloney a defective motor vehicle.

[2] Mr. Maloney succeeded on liability and his damages were assessed at $6,320 plus costs and interest.

[3] Mr. Hoyeck appeals. He says he has no personal liability for the obligations of Your Mechanic Auto Corner. He is not the proprietor. Your Mechanic abandoned its appeal.

[4] For the remaining appellant, Mr. Noseworthy seeks to produce a printout from the Registry of Joint Stock Companies showing as "a matter of public record" that "Your Mechanic Auto Corner" is "a registered business name of the body corporate, Dartmouth Repo Auto Centre Ltd." rather than a business name of Mr. Hoyeck.

[5] Mr. Noseworthy says that Mr. Maloney's statement of claim in Small Claims Court shows that Mr. Hoyeck was sued personally "for breach of contract, for negligent or fraudulent misrepresentation and for breach of implied statutory warranties". He says that the adjudicator based his decision solely on statutory warranty. Mr. Hoyeck could not be liable on the warranty because he was not the seller.

[6] The answers to this defence are: (1) it was never pleaded or argued until submissions on appeal and, (2) the implicit finding that Mr. Maloney was the owner, or the proprietor of the owner, is not reviewable.

[7] The statement of claim alleged "Hoyeck held a partnership interest in Your Mechanic". Maloney "attended the premises of Your Mechanic … with the intention of purchasing a used vehicle". Mr. Hoyeck showed a car to Mr. Maloney. It needed safety inspection. Mr. Hoyeck made statements to the effect that the car was in good condition. But he said that the car could not be driven off the lot and made an excuse about the car being owned by a Volkswagen dealer, which was untrue.

[8] According to the statement of claim, Mr. Maloney bought the car from Mr. Hoyeck and gave him $5,600. Para. 22 says "Hoyeck sold Maloney a vehicle that was not roadworthy".

[9] No statement of defence was filed. The summary report shows that, at the hearing, Mr. Hoyeck contended that Mr. Maloney bought the car as is, where is. The adjudicator found otherwise, and his report shows a basis for such a finding.

[10] The adjudicator had no reason to elaborate in his report anything about whether Mr. Hoyeck was the seller. It does not appear that Mr. Hoyeck contested that at the hearing, and he does not specify such a ground in his notice of appeal. The grounds in the notice of appeal say that Adjudicator Parker committed an error of law and failed his duty of fairness. The only detail reads: "I don't think the [Adjudicator] was being fair to my side of the case and he was favoring the lawyers of the claimant."

[11] It is clear from the statement of claim, and from Adjudicator Parker's report, that there were causes of action besides seller's warranty that may well have been proved in light of the rejection of the defence evidence about sale as is, where is.

It would be unfair to send the case back for retrial on an issue not raised for inclusion in the summary report. For that reason alone, I would find that Mr. Hoyeck has not met the threshold for an appeal from Small Claims Court, that is, jurisdictional error, error of law, or breach of the duty of fairness.

[12] Even if the defence now sought to be raised by Mr. Hoyeck had been raised earlier, I would dismiss the appeal.

[13] Mr. May submits on behalf of Mr. Maloney that the question of the seller of the car was one of fact for the adjudicator to determine. He suggests that *Housen v. Nikolaisen*, 2002 SCC 33 applies.

[14] An appellate court defers to findings of fact made by a trial judge. It intervenes only when it is established that the finding results in palpable and overriding error. This standard ensures a "high degree of deference": para. 10. The same is true for inferences of fact: para. 19.

[15] *Housen* is a good case for Small Claims Court appeal judges to keep in mind because it reminds us that the principle of deference to fact-finding rests on

basics far stronger than the trial judge's better position to judge credibility, which is so often referred to as the justification for deference. Deference is based on:

- limiting the number, length, and cost of appeals
- promoting the autonomy and integrity of trial proceedings
- recognizing the expertise of the trial judge, including the advantageous position on credibility but not limited to it.

[16] It is well for appeal judges to remind themselves of the strong policy reasons for deference. On the first, para. 16 of *Housen* reads:

> Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

[17] On the second, para. 17 says:

> The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

[18] On the third, para. 18 says:

> The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[19] The need for deference to fact-finding becomes acute on a Small Claims Court appeal. The *Act*, true to its purpose of economical dispute resolution, limits appeals to an error about jurisdiction, an error of law, and a failure in the duty of fairness: s. 32(1). Note the absence of palpable and overriding error of fact.

[20] "... [T]he jurisdiction of this court is confined to questions of law that must rest upon findings of fact as found by the adjudicator": *Brett Motors Leasing Ltd. v. Welsford*, [1999] N.S.J. 466 (Saunders J.): para. 14. Despite what s. 3(1) of the *Small Claims Court Act* says, it is not a court of record in the ordinary sense of

that phrase. The testimony is not recorded. This, too, accords with the economical purpose of the *Act*.

[21] Instead of a record, the statute requires the adjudicator to prepare a "summary report of the findings of law and fact" if there is an appeal: s. 32(4). In recent years, Small Claims Court adjudicators have shown a tendency to burden themselves with written decisions in more complicated cases. The decision is attached to the summary and makes for a fresher record of the adjudicator's thinking.

[22] We have to rely on the adjudicator's summary: *Victor v. City Motors Ltd.*, [1997] N.S.J. 140 (Davison J.) at para. 14. The summary may offend the duty of fairness when it gives no information on the evidence that stood as the basis for an important finding of fact: *Morris v. Cameron*, 2006 NSSC 9 (LeBlanc J.) at para. 37. That does not mean that the adjudicator has to labour over the summary to nearly replicate a transcript. It is just a "summary" after all.

[23] We do not review Small Claims Court findings of fact for palpable and overriding error. Our jurisdiction to review for error of law may extend to the

situation "where there is no evidence to support the conclusions reached": *Brett* at para. 14. That would have to be apparent from the summary.

[24] In conclusion on this point, fact-finding in Small Claims Court is only reviewed when it appears from the summary report and the documentary evidence that there was no evidence to support a conclusion. An insufficient summary may attract review on the third ground, fairness, but it is not insufficient just because it is less satisfying than a transcript.

[25] As I said, the hearing before Adjudicator Parker proceeded on an uncontradicted plea that "Hoyeck sold Maloney a vehicle that was not roadworthy". According to the summary, the adjudicator found as a fact "The vehicle sold to the respondent by the appellant was not durable for any reasonable amount of time."

[26] Thus, the adjudicator found that Mr. Hoyeck, under his own name, as partner, or as proprietor, sold the car to Mr. Maloney. As no issue was made of it either at the hearing or in the notice of appeal, the adjudicator did not elaborate on the basis for this finding in his decision, or in his summary report for appeal.

However, we can see that some evidence on this subject was put forward at the appeal hearing.

[27] There was evidence that Mr. Maloney gave Mr. Hoyeck $5,600 in cash to purchase the car, and Mr. Hoyeck gave possession of the car to Mr. Maloney.

[28] The written evidence of the sale is a "Your Mechanic" invoice for $0.00 on which is typed Mr. Maloney's name, a description of the car, and these words with Mr. Hoyeck's signature under them:

> VEHICLE SOLD WITH 3 MONTHS 3000 KMS
>
> POWER TRAIN WARRANTY
>
> 200 DEDUCTABLE
>
> 600 MAX PAY PER CLAIM
>
> 4869.56 + 15% HST = $5600 PAID IN FULL.

Nothing on this "invoice" suggests that "Your Mechanic" is other than Mr. Hoyeck's partnership or trade name.

[29] The sale was accompanied by a form required by Service Nova Scotia when a vehicle is sold without safety inspection. It evidences a sale by the words "Sale of Vehicle". It describes the car sold to Mr. Maloney. It certifies that Mr. Maloney was advised by "Your Mechanic Auto Corner" that the car requires safety inspection. Mr. Maloney acknowledges that it is his responsibility to have the vehicle inspected and it says "... in the interim the vehicle will be recorded in my name". It is signed by Mr. Maloney as purchaser and, as seller, Mr. Hoyeck under the name "Your Mechanic Auto Corner".

[30] Nothing on either document suggests that the seller is a trade name for Dartmouth Repo Auto Centre Ltd. and no mention appears to have been made of such a company anywhere else in the evidence.

[31] I do not know exactly what was said in testimony about who was doing the selling. The evidence, as we know it, is consistent with the proposition that Mr. Hoyeck was a partner of, or traded as, "Your Mechanic" and "Your Mechanic Auto Corner". In any event, there was some evidence that Mr. Hoyeck was personally liable on the statutory warranties.

[32] Mr. Hoyeck did not choose to prove the document from the Registry of Joint Stock Companies at the hearing . The fact that it is public record does not make it evidence before the adjudicator. Without saying anything about whether fresh evidence can be introduced on a Small Claims Court appeal, I note that the circumstances do not appear to come close to meeting the criteria for introduction of fresh evidence on an ordinary appeal.

[33] The appeal is dismissed with the statutory costs plus disbursements.

J.