SUPREME COURT OF NOVA SCOTIA

Citation: *Lloyoll Custom Building Limited v. Dan's Ventilation, Heating and Burner Service*, 2021 NSSC 118

Date: 20210408
Docket: *Bridgewater*, No. SBW 491227
Registry: Halifax

Between:

Lloyoll Custom Building Limited

Applicant

v.

Dan's Ventilation, Heating and Burner Service

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	September 10, 2020, in Bridgewater, Nova Scotia
Counsel:	Heather M. Wyse, for the Applicant Thomas J. Feindel, for the Respondent

By the Court:

[1] The appellant Lloyoll Custom Building Ltd. (“Lloyoll”) requests that the Court make a finding that the adjudicator in this matter, through a misapplication or misinterpretation of the evidence, made errors in law. If successful, Lloyoll requests that the matter be remitted back for a re-hearing on its merits before a different adjudicator.

[2] The respondent Dan’s Ventilation, Heating and Burner Service (“Dan’s”) requests the appeal be dismissed.

BACKGROUND

[3] Lloyoll was engaged in constructing prefabricated “pods” intended for a residential project. The company encountered difficulties in meeting its production schedule. Lloyoll hired Dan’s to provide services and materials for a portion of the overall project, consisting of custom duct work, in order to achieve its own timely delivery goal. Lloyoll indicated to Dan’s that the work was needed on an “emergency basis”.

[4] Dan’s provided materials and completed the work within the time frame requested by Lloyoll. An invoice was sent to Lloyoll. Lloyoll disputed the invoice,

citing issues with the quality of workmanship, deficiencies, and reasonableness of the prices contained within the invoice for labour and materials.

[5] The hearing took place during two appearances in Small Claims Court before Adjudicator Brent Silver. In the course of the hearing, the parties addressed the initial claim for payment of Dan's invoice, and also a counterclaim by Lloyoll seeking adjustments to the invoice for deficiencies of the work and material costing, which Lloyoll submitted had created a loss.

[6] There was no executed formal agreement between the parties placed in evidence, that would readily outline their respective obligations, expectations, or pricing. In support of their respective claims under tort and contract, the parties submitted documentation of their email communications, policy, and related invoicing. This included: related supplier invoices; Dan's invoice with supplemental materials; related correspondence concerning the dispute between the companies detailing the work and materials; a copy of Lloyoll's internal policy for subcontractors documenting work on its projects; and a quote from an unrelated company setting out its estimate for labour and materials for similar work, which Lloyoll relied upon in its claim and response to Dan's claim.

[7] Adjudicator Silver, upon reviewing the documents and hearing from witnesses, concluded in his decision, dated June 26, 2019, that:

> On the basis of the evidence I am satisfied that Rennehan ("Dan's) provided services and materials to Lloyoll and that the invoice provided by Rennehan for these services was reasonable in the circumstances. I am not satisfied that there were any deficiencies for which Lloyoll must be compensated. I would note that the evidence for the respective parties was primarily similar and that to the extent the parties disagree I have found the evidence of Rennehan to be most convincing and informative.

ISSUES

[8] Seven grounds of appeal were first cited in the notice of appeal filed by Lloyoll. These were then limited further within the appellant's written submission to this Court setting out two broad grounds, which I have reproduced as follows:

1. By misapplying/misinterpreting the evidence when quantifying the amounts owed by the Appellant to the Respondent and specifically, by misapplying/misinterpreting the evidence with respect to the amounts invoiced by D.E. Barry Light Metal Works for materials and the amounts charged by the Respondent for those same materials;
2. By misapplying/ misinterpreting the evidence with respect to deficiencies and specifically, in finding that no copies of the Appellants record-keeping system were provided as confirmation of the Appellant's efforts to rectify deficiencies in the Respondent's work.

Small Claims Court Appellate Review and Error of Law

[9] Section 2 of the *Small Claims Court Act* R.S.N.S 1989, c.430 (or the "*Small Claims Court Act*") sets out its statutory purpose as follows:

> 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.

[10] The *Small Claims Court Act* provides an appeal as of right of an adjudicator's decision to the Nova Scotia Supreme Court. Section 32(1) of the Act sets out the grounds of appeal for a decision:

> 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
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> (a) jurisdictional error;
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> (b) error of law; or
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> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[11] The standard of review the Supreme Court applies when considering an appeal grounded upon an error of law is one of correctness. An error of fact, however, is not specifically cited within the *Small Claims Court Act* as a ground of appeal. That is not to say that errors of fact are left unaddressed in the course of a review of an adjudicator's decision by the Supreme Court.

[12] It is generally accepted that a finding of fact by a Small Claims adjudicator is accorded deference by a reviewing court, as the initial trier of fact is best placed to make a determination of fact upon the evidence presented and considered in the course of hearing, absent a palpable and overriding error.

[13] Arguably, there are two streams that have developed in the common law concerning whether, and how, the reviewing Court may address an appeal in which errors of fact in an Adjudicator's decision are alleged to have resulted in either error of law or constitute a failure to follow the requirements of natural justice.

[14] Justice LeBlanc, in the decision *C.M. MacNeill & Associates v. Toulon Development Corporation*, 2016 NSSC 16, canvassed the divergence in decisions on this aspect by the Court, and concludes with a simple and practical approach, as set out in paras 31- 37 of the decision:

> [31] The standard of review where a ground of appeal raises an error of law is correctness. On questions of law an adjudicator must be right: *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, [2005] N.S.J. No. 170 at para. 33.
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> [32] In the context of Small Claims Court appeals, the leading case on what constitutes an error of law is *Brett Motors Leasing Ltd. v. Welsford* (1999), 1999 CanLII 1121 (NS SC), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.) [Brett Motors]:
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> > 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.

[33] Saunders J. (as he then was) concluded as follows:

> 16 There was a great deal of evidence on this point during the adjudication. This pivotal issue was faced squarely by the adjudicator, as is reflected in both his Order and his Summary. He found, from the evidence, that the appellant was outside the six year prescription as set out in Section 2(1)(e) of that Act. … In coming to the decision that the act of repossession triggered the enforcement of Brett Motors' cause of action, it cannot be said that the learned adjudicator reached an unreasonable or untenable conclusion. I would therefore dismiss this ground of appeal.
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> [Emphasis added]

[34] Some decisions of this Court suggest that on appeals from Small Claims Court, a finding of fact may be reviewable where the adjudicator has made a palpable and overriding error. See *McInnis v. McGuire*, 2014 NSSC 437, [2014] N.S.J. No. 657, where Boudreau J. said:

> 21 Mistakes of fact are not reviewable absent palpable and overriding error: see *McNaughton v. Ward* 2007 NSCA 81:
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> > 34 While the appellant casts all of the grounds of appeal as errors "in law," the first three are, with respect, conclusions that derive from the trial judge's factual findings, assessment of the witnesses, and evaluation of the evidence. These are functions well within the jurisdiction of the trial judge, who enjoys a significant advantage in seeing and hearing the witnesses first hand. Such determinations draw a high degree of deference and will not be disturbed on appeal absent palpable and overriding error. As directed in such cases as *Housen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 supra, and *H.L. v. Canada (Attorney General*), 2005 SCC 25, "palpable" refers to a mistake that is clear, in other words, plain to see; whereas "overriding" is an error that is shown to have affected the result. Both elements must be demonstrated. We, sitting as an appellate court, will not interfere with a trial judge's findings of fact unless we can plainly discern the imputed error, and the mistake is such that it discredits the result. …

[35] Of similar effect is Rosinski J.'s decision in *Gallant v. Martin*, 2010 NSSC 375, [2010] N.S.J. No. 566 [*Gallant*]:

> 8 As noted above, this Court is only entitled to consider the "materials" from the Small Claims Court hearing. These "materials" usually consist of all the exhibits filed in the hearing, as well as the Adjudicator's Decision and Summary report of the findings of law and fact that they have made in a case on appeal, including the basis of any findings raised in the Notice of

Appeal and any interpretation of documents made by the Adjudicator -- see sections 32(3) and (4) of the Act. Notably, this Court does not have the benefit of the transcribed testimony of witnesses at the Small Claims Court trial.

9 This puts an appeal court at a substantial disadvantage in relation to the Adjudicator who had the benefit of seeing the testimony of the witnesses (in particular the testimony of witnesses in relation to the exhibits in the case) and who made findings of credibility that may be determinative of the outcome of the case.

10 A high level of deference must be accorded to the Adjudicator's findings of fact. Nevertheless, any material finding of fact that is based on palpable and overriding error constitutes an error of law.

11 As Robertson, J. observed at para. 18 in Paradigm Investments supra.:

> I have also considered the law on what constitutes palpable and overriding error. I refer to *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, at paras. 31, 32 and 33:
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> > 31 A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene ...
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> > 32 An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial ... Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
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> > 33 On questions of law the trial judge must be right. The standard of review is one of correctness. There may be

> questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error.

[36] However, in *Hoyeck v. Maloney*, 2013 NSSC 266, [2013] N.S.J. No. 421 [*Hoyeck*], Moir J. favoured a somewhat different approach:

> 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.
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> 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.

[37] **While opinions diverge on whether I am free to review the Adjudicator's findings of facts for a palpable and overriding error, it is clear I may intervene where there was no evidence to support the conclusions reached. [emphasis mine]** This is consistent with affording a high level of deference to the Adjudicator. In *R. v. O'Brien*, 2011 SCC 29, [2011] S.C.J. No. 29 at para. 17, Abella J. reiterated the importance of deferring to the trial judge's (or in this case, the Adjudicator's) findings:

> A trial judge has an obligation to demonstrate through his or her reasons how the result was arrived at. This does not create a requirement to itemize every conceivable issue, argument or thought process. Trial judges are entitled to have their reasons reviewed based on what they say, not on the speculative imagination of reviewing courts. As Binnie J. noted in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55, trial judges should not be held to some "abstract standard of perfection".

[15] I also reviewed and considered the case *Johnson v. Sarty*, 2019 NSSC 290, in which Justice Wright spoke to the law concerning the "permissible scope of review" at paragraph 16, quite similarly.

ANALYSIS and CONCLUSION

[16] The appellant submits that there is no divergence in case law, and that there are three areas in which errors of material fact may lead to errors of law, and then therefore subject to review on the standard of correctness:

(a) Where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence;

(b) Where there is no evidence to support the conclusions reached; or

(c) Where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result.

[17] I considered this matter in relation to these points, as submitted by the appellant in the preceding paragraph, and concluded that it is the difference in the adjudicator's interpretation and findings concerning the evidence presented by the appellant that is at issue, rather than an erroneous interpretation, misapplication or a lack of evidence to support the decision.

[18] Lloyoll submits that the amount for materials contained in Dan's invoice was supported only by evidence of one bill for materials that Dan's purchased from a supplier. It is submitted that as there was a difference between the bill's amount and the final total for materials in the invoice not supported by additional evidence of other purchasing, that this constituted a "gap" unaddressed by the Adjudicator. It was this "gap" that led to his error of law in finding that the total of Dan's invoice was reasonable. In short, as this difference was not accounted for by the adjudicator it was an error for him to conclude the invoice was reasonable in its totality.

[19] Adjudicator Silver did refer to this single materials bill in the course of the hearing as it was raised specifically by the parties and was the subject of *viva voce* evidence. It was open for Lloyoll to raise any issue concerning the accounting for all of the materials purchased or supplied by Dan's in relation to the contract in the course of the hearing.

[20] This single bill of the related supplier was the subject of an amount of debate in court which Adjudicator Silver referenced in his decision. Lloyoll then had the opportunity to press for more evidence on the point, if they intended to dispute the costs for materials fully in their counterclaim.

[21] I will defer to Adjudicator Silver's finding of fact in regards to the reasonableness of the invoice. I do not find that Adjudicator Silver erred in law by failing to make a finding of fact on the evidence before him on this aspect of the invoice. To do otherwise would mean finding that an error in law can be predicated upon a failure of the trier of fact to make a negative inference concerning a gap in evidence, on an evidentiary issue not raised by the parties in the course of the hearing.

[22] On the second point, the appellant submits an error in law was made by the Adjudicator in his finding of fact concerning deficiencies in the project. In support of this ground of appeal, Lloyoll cites a time sheet that was included in a package of materials submitted to the Small Claims Court concerning activities on behalf of Lloyoll's employees. Lloyoll submits that the Adjudicator erred in his review of this document in the package, specifically, and, that if it had been interpreted correctly, would have had a material effect in regard to the decision.

[23] Again, I find that this submission requests that the reviewing Court revisit the subject matter before the adjudicator to re-interpret the evidence, rather than make a finding that there was a material error in the interpretation.

[24] There was no dispute concerning liability in this matter. This claim was primarily centred on the amount claimed as a debt, as between the parties.

[25] Adjudicator Silver noted that Rennehan, on behalf of Dan's, testified that:

> …he had been asked to do his part of the work as soon as possible. He further testified that much of the duct work was "custom material" and that this job "would not be cheap". He said he was not ask (sic) for a quote and was simply instructed to get the job done quickly…

[26] Lloyoll did not dispute this. The primary dispute captured in the decision, and reiterated in the appeal, was that there was a lack of detail in Dan's invoicing and record keeping, and that Dan's did not do so in a manner similar in detail to that of Lloyoll. It appears that the primary submission of the appellant is that the adjudicator's failure to find and then probe the issue of deficiencies led to an error in fact, leading to an error in law in finding that the amount captured by the invoice was reasonable.

[27] Lloyoll tendered in the hearing a document entitled "Lloyoll Built Quality Control Manual" ("Manual"). The Manual appears to require a subcontractor to detail their work. I note that there is also contained within the Manual corresponding duties by Lloyoll to inform the subcontractor if they were not meeting its policy terms, presumably with some corresponding consequence. Issues raised by Lloyoll or Dan's in reference to the Manual were not in evidence.

[28] In relation to Dan's invoice, Lloyoll provided the Adjudicator with a quote from a different company in support of its position on the reasonableness of Dan's invoice, and submitted that this constituted evidence of a material divergence in pricing for both labour and materials. Adjudicator Silver noted in his decision that Lloyoll agreed in *viva voce* evidence that the quoted fees for this round duct work were in fact similar to Dan's invoice, with the Adjudicator making a finding of fact that he took "this as supportive in a general way of prices charged…".

[29] It is apparent in the written decision that the credibility of Dan's witness on this point was preferred by the Adjudicator, and was supported by the relevant documentary evidence concerning the agreement between the parties regarding costs, reporting, and the unusual circumstances in connection with the agreement for materials and labour. All of this evidence was appropriately referenced in Adjudicator Silver's decision as the basis for his reasoned decision.

[30] Adjudicator Silver also received evidence that Lloyoll did not raise issues concerning any contract deficiencies until after the project was completed and an invoice provided by Dan's. Lloyoll's position then was that Dan's invoice was priced too high, with the work done "inadvertently or negligently", and that the resulting quantum claimed was not in accordance with the agreement.

[31] As was noted by the Adjudicator at page 3 of his decision "… all employees ("Lloyoll") were required to account for their time on an electronic time keeping system. I note that no copies of this record keeping system were provided as confirmation of Lloyoll's efforts" in relation to addressing deficiencies.

[32] Lloyoll, in this appeal, submits that there was a timesheet in the package of materials that would have addressed this as evidence of deficiencies, and that Adjudicator Silver's failure to find and read this in context is an error of material fact. With respect, I have also reviewed this material, and it is not apparent what the entries are referencing on its face. If Lloyoll intended to rely upon this evidence, it was incumbent upon it to put it before the adjudicator at the hearing when this issue was being argued.

[33] Further, Adjudicator Silver noted that:

> …on cross examination Mr. Lloyoll acknowledged that Rennehan had commented that what he was being asked to do would be expensive. Mr. Lloyoll acknowledged sending an email dated February 26th, 2018 to Mr. Thomas Feindel, lawyer for the Claimant (Dan's). He further acknowledged that although he had requested a list of materials and labour he had not raised any question about workmanship.

[34] The trial judge, or adjudicator in this instance, should not have to seek out additional information or potential argument that was available to the claimant, but not advanced.

[35] I find that Adjudicator Silver's findings of fact were neither in error nor misinterpreted on the evidence before him. This evidence was put forward by the appellant and the respondent, and overlapped, as was noted by Adjudicator Silver.

[36] Adjudicator Silver was presented with evidence establishing that the parties had entered into an agreement for labour and materials. It was an agreement characterized as one for "emergency work" and required custom duct crafting, that would therefore attract a premium. The Adjudicator made a determination concerning the credibility of the *viva voce* evidence of both the respondent and the appellant's principals concerning the nature of the agreement, the scope of work, and services provided by the claimant. Upon considering this evidence, in combination with the documentary evidence presented he determined that the invoice rendered by Dan's was appropriate, and reflective of the terms and the circumstances in which the contract was made and performed.

[37] In conclusion, I do not find that the Adjudicator erred in law. The appeal is dismissed.

Rowe, J.