SUPREME COURT OF NOVA SCOTIA
Citation: *Thorne v. Pointon*, 2021 NSSC 293

Date: 20211013
Docket: Truro, No. 500339
Registry: Truro

Between:

Robert K. Thorne

Appellant

v.

Danielle Pointon

Respondent

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	April 6, 2021, in Truro, Nova Scotia
Written Decision:	October 13, 2021
Counsel:	Robert K. Thorne, Self-Represented Appellant Danielle Pointon, Self-Represented Respondent

By the Court:

Overview

[1] This Small Claims Court appeal is a dispute over unpaid monies for contract work and sales commissions allegedly owed to Ms. Pointon from Mr. Thorne's company. Ms. Pointon alleged that her employment contract with Mr. Thorne's company was orally varied and, as a result, she is entitled to unpaid monies.

[2] Based on my reading of the Report of Findings and review of the evidence, I cannot agree with the adjudicator's finding that the parties varied the original employment contract orally in June. First, although she found that Mr. Thorne accepted the proposition to pay 4% commission, there is contradictory evidence which is not addressed in the report. Also, the language used by the adjudicator in her report does not evoke clear and unequivocal acceptance on the part of Mr. Thorne. Furthermore, although she found that there was valid consideration, she does not say what it was. This is problematic, given that she awarded the 4% commission to Ms. Pointon for past work that was already billed, not as a go-forward incentive from late June onward. Although there are exceptions to the general rule that past consideration is not good consideration, the report does not say how this past consideration grounds the agreement in this case.

[3] I find that the adjudicator erred in law in her alternative finding of *quantum meruit*. A key aspect of the *quantum meruit* doctrine is that the damages are limited to the reasonable value of the actual work done. There is no indication in the report that the adjudicator engaged in any analysis of what specific work went over and above the original contract, and what the value of that work ought to be. It was Ms. Pointon's burden to prove this claim with evidence, but there is no evidence in the record setting out specific duties and their objective valuation. The adjudicator erred in her application of the *quantum meruit* doctrine and thus committed a legal error.

[4] The oral variation of the employment contract is at the heart of the matter and, therefore, I believe that it should be sent back to Small Claims Court to be heard by a different adjudicator.

Introduction

[5] In this case, the adjudicator found that Ms. Pointon and Mr. Thorne were parties to an oral contract, the result of which was that Ms. Pointon was owed 4% commissions on her sales dating back to the start of the employment contract in April. In the alternative, the adjudicator found that the doctrine of *quantum meruit* compelled a decision in favour of Ms. Pointon. The adjudicator also allowed Mr. Thorne's counterclaim for the balance due on items Ms. Pointon purchased at her employee discount.

Issues

[6] Mr. Thorne appealed to the Supreme Court of Nova Scotia on several grounds; however, these can be broken down into three issues:

(a) Did the adjudicator err in finding that an oral contract was formed to vary the initial employment agreement, based on the evidence before her?

(b) Did the adjudicator err in issuing an order against Mr. Thorne in his personal capacity?

(c) Was Mr. Thorne denied natural justice regarding his ability to cross-examine the claimant?

Standard of Review

[7] The *Small Claims Court Act*, RSNS 1989, c 430, s. 2 (the "*Act*"), provides that appeals of Small Claims Court decisions may only be brought based on certain questions:

> 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.

[8] Mr. Thorne appeals only under grounds (b) and (c).

[9] Therefore, this Court cannot review factual errors. The standard of review for errors of law and natural justice is correctness. However, the following often-quoted passage from Justice Saunders in *Brett Motors Leasing Ltd. v. Welsford* provides some insight into these limits (as quoted in *Noble v. Mulgrave (Town)*, 2012 NSSC 248):

> 18 The standard to be applied by this court on an appeal from the Small Claims Court is set out in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.), where Saunders, J. (as he then was) said, at para. 14:
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> > ... 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.
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> > [*emphasis added*]

[10] Some of these examples stray into the territory of mixed fact and law; however, there are strong juristic grounds for allowing an appeal where a legal conclusion is unsupported by the evidence.

[11] The presiding adjudicator must provide the Supreme Court with a summary of their factual and legal findings in the case because there is no recording or transcript of what transpired at the Small Claims Court hearing (see: s. 31(4) of the *Act*). The Report of Findings should guide the reviewing Court by setting out a clear path from the factual findings to the legal conclusions. Where these do not add up, it may be appropriate to find that such a failing is a legal error, as was the case in *Sable Offshore Energy Inc. v. Bingley*, 2003 NSSC 20. In that case, Justice LeBlanc (as he then was) found that, although the adjudicator made an award in

negligence, no one at the hearing appeared to turn their mind to the issues of negligent act and standard of care, without which no finding in negligence can be made. Although the Court could draw inferences from the record and the report, the failure to deal with essential elements of the legal findings amounted to an error of law:

> 31 I respectfully find that the Adjudicator committed an error of law in this case as there appears to be no basis in law for his decision. It is possible that Mr. O'Neil considered the elements of negligence that I outlined above, but if this is the case, there is no record of it. Small Claims Court is not a court of record and there are no transcripts to provide a record of the evidence of what transpired at trial. Thus even if Mr. O'Neil did consider whether there was a duty owed in this case, it is not before me. Davison J. commented on this situation in *Victor v. City Motors Ltd. (c.o.b. City Mazda)*, [1997] N.S.J. No. 140 (N.S.S.C.) at paras. 14-15:
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> > [Unlike the Court of Appeal on review of the Supreme Court,] [a]ppeals from the Small Claims Court must be considered in a slightly different manner. In my view the difference is recognized by the legislature when they required the adjudicator to place in the summary report the basis for findings of fact. The Supreme Court, on appeal, does not have a transcript of the evidence and does not have a basis to consider the findings of fact made by the adjudicator. In my view, when the adjudicator prepares the summary for the appeal effort should be made to expressly state the findings of fact and the basis for those findings.
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> > Respect should be accorded the findings of fact, but where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable.
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> See also *Murray v. Stokes*, [1996] N.S.J. No. 435 (N.S. S.C.) where MacLellan J. commented at para. 17:
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> > Once the appeal was filed, [the Adjudicator] should have simply stated his findings of fact, as disclosed by the evidence given before him, and the law he applied to these facts. That would have provided this Court with a basis to determine if he had made an error of law. Because he has not stated what findings of fact he has made, and because there is no record of the proceedings before him, I am not able to determine how he came to his decision.

[12] In *Morris v. Cameron*, 2006 NSSC 9, Justice LeBlanc similarly said:

> 37 I do not accept the respondent's argument that the reviewing court can never review the findings of fact of the adjudicator. While this Court may not substitute its own findings for those of the adjudicator, the adjudicator's findings must be grounded upon the evidence. In order for the reasons to be sufficient, they must

> demonstrate the evidentiary foundations of the findings. This conclusion is supported by s. 34(4) of the *Small Claims Court Act*, which requires the adjudicator to submit to the reviewing court a summary of his findings of fact and law. Accordingly, the adjudicator has a duty to submit not only the decision, but also the basis of any findings raised in the Notice of Appeal. The adjudicator thus has two opportunities - the decision and the summary report - to clearly state the basis for any findings of fact.
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> 38 I am satisfied that reasons are insufficient where they do not make clear the evidentiary foundation and reasoning utilized by the adjudicator; see also *Bingley v. Sable Offshore Energy Inc.* (2003), 211 N.S.R. (2d) 15 (S.C.) at paras. 31-32. […]

[13] Therefore, while this Court must be careful to avoid reweighing evidence, where the report and evidence do not reveal the factual grounds for a legal finding, even when read generously, that can amount to an error of law. In addition, where the report itself and the evidence appear to contradict the legal findings, that can also support a finding of legal error.

Analysis

Variation of the Oral Contract

[14] In March 2019, Mr. Thorne agreed to employ Ms. Pointon in his company, North Atlantic Watersports Inc. They agreed that Ms. Pointon would work five days a week for seven hours a day, at a rate of one hundred dollars ($100) plus HST per day. No commission was agreed to at this time, but the parties agreed that Ms. Pointon could purchase watersports equipment from the company at an employee discount, with the amounts she owed deducted from her pay. The Report of Findings and the evidence on the record do not make clear the terms of the original contract, but some terms can be gathered. Ms. Pointon was expected to work in the shop and deal with inventory. Eventually, she took on things like social media and teaching kayak lessons for the business (although Mr. Thorne disputes the kayak lessons), and the adjudicator found, as a fact, that she was working "overtime". The contract was set to begin in April and continue into the fall, but Ms. Pointon says that she expected to stay with the company long term and believed that she would eventually take on a partnership role. On appeal, Mr. Thorne disputes that the prospect of partnership was ever on the table between the parties. The report does not refer to Ms. Pointon's expectation of partnership.

[15] It appears that the relationship between the parties started to sour in June. Shortly before Mr. Thorne went on vacation, Ms. Pointon expressed her

dissatisfaction with some aspects of the job and indicated that she did not want to stay working with the company until September 2019, as she had originally agreed. The adjudicator found that the parties orally agreed to change the terms of the employment contract to include a 4% commission for Ms. Pointon, retroactively applied to her sales starting in April, as follows:

> In June 2019, as the Appellant [Mr. Thorne[1]] prepared for a vacation to Newfoundland, he discussed with the Respondent [Ms. Pointon] her increased workload and overtime she was incurring. The Claimant's [Ms. Pointon] evidence is that the Appellant asked her, in her words, "what would it take for me to stay." The Respondent proposed a 4% sales commission and testified that the Appellant said he would "put it on paper" upon his return.
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> […] No written evidence was presented by the Respondent to suggest that the Appellant agreed to the 4%, but examining the circumstances in their totality, the Claimant's case against the Appellant was successful.

[16] I first considered that, when the Respondent had proposed the 4% commission, the Appellant did not reject this idea out of hand. The evidence of the Respondent is that the Appellant said he would "put something on paper". While the evidence is unclear regarding the Respondent's discount purchasing of product arrangement with the Appellant, the Appellant nonetheless intimated to her in June that she deserved more and did promise to put it in writing.

[17] It is on these grounds that the adjudicator found the employment contract was varied orally. In contract law, acceptance must be clearly communicated, unambiguous, and unequivocal before the offeree can be bound by the agreement.[2] I note the specific language used by the adjudicator: she does not find that Mr. Thorne expressly agreed to pay Ms. Pointon commission but, rather, that he "did not reject the idea". She does not indicate what conduct of his, outside of not rejecting the idea completely, gave Ms. Pointon the reasonable belief of his unequivocal acceptance. It is Ms. Pointon's evidence that he agreed to put "something" on paper. However, not rejecting something is not the same as accepting it. Also, promising to eventually put some incentive in writing is not the same as expressly agreeing to 4% commission backdated to April.

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[1] In her Report of Findings, the Adjudicator refers to Mr. Thorne as both the Appellant and the Defendant, and Ms. Pointon as both the Respondent and Claimant, interchangeably.

[2] See Halsbury's Laws of Canada (online), *Contracts (2021 Reissue) (Swan, Adamski)*, "Offer and acceptance: Acceptance: Unequivocal Nature of the Acceptance" (II.3.(1)) at HCO-19).

[18] Mr. Thorne took the vacation accompanied by a woman with whom he was having an extra-marital affair. While he was away, Ms. Pointon inadvertently exposed the affair to Mr. Thorne's spouse. This led to further degradation of the relationship between Ms. Pointon and Mr. Thorne and the pair ended the employment contract on July 11, 2019.

[19] Mr. Thorne argues on appeal that, while there was a conversation prior to his vacation regarding the terms of employment, he never agreed to 4% commission, let alone retroactive commission dating back to April. He says that the discussion was about the relationship going forward, and that he only agreed to discuss the matter again when he returned from vacation. He points to a corroborating email from Ms. Pointon dated July 11, 2019. The email reads, in part:

> I communicated to you last month- i [*sic*] will not proceed with Freedom after this season. […]
>
> […] Additionally prior to your holiday you asked me to propose something that was incentive to stay the rest of the summer. I asked for 4% return in sales towards product because you are not paying me benefits or commissions.
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> […]
>
> We need to come to a mutually agreeable contract for the remainder of the summer so i know where i stand.
>
> […]
>
> The time in [*sic*] now to come to our agreement leading up to September. […]

[20] By July 11, several weeks after the adjudicator found that an oral contract was formed, Ms. Pointon does not appear to believe that there is a "mutually agreeable contract" in place. She also uses language to indicate that the change in terms was to be an "incentive" for staying on "for the remainder of the summer". Mr. Thorne says that this email shows that there was no agreement that 4% commission would be paid dating back to April.

[21] In her report, the adjudicator refers to the July 11 email in her list of evidence, but does not discuss the email in her reasons. Instead, the adjudicator discusses further conversations between the parties on July 11, as follows:

> When the Respondent approached the Appellant on July 11, some weeks after the pre-vacation discussion about the 4%, the Appellant testified that the Respondent indicated that to stay with the company until September, she would require more money. She once again mentioned the 4% commission. Tensions had grown over several issues including copies of the store inventory the Respondent had

> undertaken. The Appellant testified that on that day, he still indicated that they could "work something out". At some point on that day in their conversations the Respondent pointed out the work she had done on behalf of his business, including a complete inventory of the business, her testimony was that the Appellant snapped at her, responding that it was "my company, not yours" and that he "didn't ask me to do any of it." Frustrated, with the deterioration in relations, the pair ended their t [*sic*] on July 11, which was the last day the Respondent worked for the Defendant.
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> On the whole, I found that the Claimant, viewed from the vantage point of a reasonable person, working hard and facing increased demands on her time in the Defendant's busy business, **was led to believe by the Appellant in June that she would be paid the 4%.** Although the breakdown of the relationship occurred later that day on July 11, **it appears as though the Appellant agreed a commission was being contemplated between parties.**
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> [*emphasis added*]

[22] Once again, I note the language used by the adjudicator: by July 11, Ms. Pointon believed that she "*would be*" paid the 4%, and Mr. Thorne agreed that commission "*was being contemplated*" by the parties. Based on this language, it appears that the issue of commission was still being negotiated. It appears from the adjudicator's findings, that Ms. Pointon still believed that there was no incentive in place for her to stay on until September, and she mentioned the 4% commission "again". Mr. Thorne indicated that they could "work something out". The adjudicator does not reconcile this language with her earlier finding that there was, in fact, an oral agreement to vary the initial contract in place in late June.

[23] Mr. Thorne says that the adjudicator misconstrued the evidence and that there is no evidentiary basis for the finding of an oral contract, which amounts to a legal error. Without having her reasons to explain these apparent discrepancies, I am inclined to agree. The modern approach to contractual interpretation is to focus on the objective intentions of the parties: *Creston Moly Corp. v. Sattva Capital Corp.* , 2014 SCC 53, at para. 55.

[24] In this case, because we are dealing with an oral variation of a contract, evidence of these intentions must weigh heavily. While this Court is limited in terms of its review of the factual findings made by the adjudicator, where the evidence does not support a legal conclusion and, instead appears to contradict that conclusion, that can be construed as an error of law.

[25] Furthermore, the report does not address the legal issue of past consideration. The adjudicator found that the oral variation was grounded in good

consideration; however, she did not say what that consideration was. Even if Mr. Thorne had promised to reward Ms. Pointon retroactively, such a promise was not enforceable due to there being no past consideration. The work (i.e. , Ms. Pointon's sales), had already been done and billed for as part of the original agreement, and the adjudicator found, as a fact, that there was no provision for commission at the outset of the contract. Therefore, there was no added benefit flowing to Mr. Thorne from April to June.

[26] This issue of past consideration commonly arises in employment contracts, as was discussed by the British Columbia Court of Appeal in *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25. In that case, the employee signed an initial employment agreement but, as a term of employment, the employer required the employee to sign a subsequent agreement. This second agreement changed the employment term from a fixed year to monthly, which was less beneficial to the employee. The Court of Appeal upheld the trial judge's finding that there was no past consideration to ground the second contract:

> 12 **Employment contracts, even where reduced to writing, rarely define the consideration for the contract.** They are commonly devised so that the benefit (consideration) received by the employer is the services of the employee, and the benefit received by the employee is the pay and other emoluments flowing on performance of the duties. **From time to time employment contracts, both written and oral, are modified. When that occurs, we may come to the issue as to which terms apply: those of the original agreement or those after modification.** An example of an oral agreement subsequently modified to the disadvantage of the employee in a written agreement is *Singh v. Empire Life Ins. Co.*, 2002 BCCA 452. In Singh, Chief Justice Finch explained:
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> > [12] I am also of the opinion that the defendant cannot rely on those provisions of the subsequently signed Regional Manager's Agreement, which are less advantageous to the plaintiff than the terms of the original contract. In *Watson v. Moore Corporation Ltd*., [1996] B.C.J. No. 525 (C.A.), **a majority of the court held that continued employment, without more, could not amount to consideration. There was no evidence that forbearance to discharge the plaintiff could amount to consideration**.
> >
> > [13] A similar conclusion was reached by the Ontario Court of Appeal in *Francis v. Canadian Imperial Bank of* Commerce (1994), 21 O.R. (3d) 75. **The court affirmed the general principle that modification of a pre-existing contract will not be enforced unless there is a further benefit to both parties.**
> >
> > [emphasis added]

[27] Similarly, Ms. Pointon's promise of leaving the position early (i.e., upholding the original terms) is not consideration for commissions on sales that already occurred. Although the adjudicator found that there was good consideration to support this variation, this Court is left with little ability to test the legal validity of this finding because it is not provided for in the report or decision. As such, this is further grounds for finding an error of law.

Quantum Meruit

[28] In the alternative, the adjudicator found that the principle of *quantum meruit* compelled a decision in favour of Ms. Pointon. She found that, because both parties believed Ms. Pointon was entitled to some further remuneration for the extra work she had been doing, "but did not settle on a number", it would be unjust for Mr. Thorne to avoid paying now. Mr. Thorne argues that Ms. Pointon did not perform any extra work for which she was not compensated. Ms. Pointon says that she did perform extra work, but that she did so, in part, on the expectation that she would be made partner in the business come September.

[29] *Quantum meruit* is an equitable doctrine meaning "the amount one has earned". It is based on the notion that, where one party receives a benefit from the work or services of the other that was not performed gratuitously, the benefiting party ought to compensate the other party for the work done. There are two streams of *quantum meruit* cases – cases based on contract, and cases based on a quasi-contractual promise, also known as restitutionary or unjust enrichment. The Northwest Territories' Court of Appeal in *McElheran (cob Gord-Mar Enterprises) v. Great Northwest Insulation Ltd*, [1994] NWTJ No 66, explained the distinction as follows:

> 6 There is a distinction between a quantum meruit claim based on purely restitutionary or unjust enrichment grounds and a claim based on a contract but where some aspect of it is not provided for in the agreement between the parties. The first type of claim is said to be quasi-contractual, since no contract exists. The second is truly contractual in nature as its foundation is the agreement between the parties.
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> 7 In most contract litigation, in the event of repudiation the innocent party may sue for damages or claim quantum meruit for the value of the services rendered prior to repudiation. This may result, in the case of an unprofitable bargain, in higher recovery under a quantum meruit basis for part performance than what would have been paid for complete performance. In this case, however, the respondents put forth a claim on the basis of the full contract price plus extra work on a quantum meruit basis. The trial judge held that the claim for extra work

> was not recoverable since the respondents could have left the job site earlier and since they should not be able to seek payment for partial completion which would result in receiving more than the total fixed price they had agreed to in the contract.
>
> 8 We agree with the trial judge that a true quantum meruit claim (based on restitutionary principles) is incompatible with a contractual damage claim. They are in essence alternative claims. Quantum meruit claims of a contractual nature are, however, in a different category. They are, to use other terminology, claims for "extras" flowing from the contract but not specifically provided for in the contract. The trial judge found as a fact that the various breaches of its obligations by GNI resulted in delays and additional work for the respondents. These breaches therefore led to damages. One does not need to put it in quasi-contractual terms.

[30] Presumably, because the adjudicator found that *quantum meruit* applied in the alternative to an express agreement, she relied on the restitutionary or unjust enrichment branch of *quantum meruit* in this case: although the pre-vacation "promise" did not amount to variation of the original contract, Ms. Pointon performed valuable work outside the contract that Mr. Thorne accepted and should therefore compensate. To make this finding, the adjudicator would have had to find that this extra work was not contemplated by the original contract. However, the terms of the original contract are not clear in the report or evidence on the record, nor are the specific types of work that Ms. Pointon did that went above and beyond what was originally contracted for. Therefore, it is difficult to test the legal justification for a finding in *quantum meruit* on this appeal.

[31] The second key aspect of restitutionary *quantum meruit* is that the damages must amount to the "reasonable remuneration" for the services actually provided: *Stevens & Fiske Construction Ltd. v. Johnson*, [1973] NSJ No 150 (NSSC-TD), at para. 24. The claimant must establish, with evidence, the reasonable value of the work performed. In this case, it appears that the adjudicator simply allowed the full amount of damages sought by Ms. Pointon regarding the 4% commission without any regard for the value of the specific work performed. How many kayak lessons did she teach and what was the value of that work? What about the social media – was that outside the original contract and what was the value of that work if it was? There is no evidentiary or legal foundation for the finding that the value of the extra work performed by Ms. Pointon just happened to be the same as the damages regarding the commission.

[32] Therefore, even if it is appropriate to award damages in *quantum meruit* in this case, the Adjudicator ought to have determined the value of the specific work

done that was not a part of the original contract. There is nothing in the record or evidence to indicate that she did so. Failing to do so was an error of law.

Corporate Personhood

[33] Mr. Thorne says that the order emanating from the Small Claims Court hearing improperly names him personally, whereas it should name his company North Atlantic Watersports Inc., thus amounting to an error of law.

[34] The contract at the heart of the claim arises out of an employment relationship between Ms. Pointon and Mr. Thorne's company, North Atlantic Watersports Inc. North Atlantic Watersports is an incorporated company. Mr. Thorne is the sole shareholder and president (and recognized agent, although that information is not in evidence). On the Statement of Claim filed in Small Claims Court, Ms. Pointon named "Robert K. Thorne" as the Defendant. The address listed is the same as the corporate address for North Atlantic Watersports (although that could be Mr. Thorne's residence too) and the email provided by Ms. Pointon for the Defendant is "info@paddlefreedom.com". There is nothing on the Small Claims Court Statement of Claim form to indicate to a layperson that corporations are named separately from individuals. The *Regulations* provide that claims may be brought against a business by naming one or more persons believed to own or carry on the business (*Small Claims Court Forms and Procedures Regulations*, NS Reg 17/93, s 6). Both parties were self-represented at both hearings and the issues of corporate personhood and privity did not arise at the Small Claims Court hearing.

[35] Throughout the contract's duration, there is little doubt that Ms. Pointon understood that she was dealing with an incorporated entity; each of her invoices were directed to Bob Thorne of North Atlantic Watersports Inc. and each of Mr. Thorne's invoices to her were on his company's letterhead. On appeal, Ms. Pointon agreed that her services were provided to North Atlantic Watersports Inc. and there is no evidence that she believed she was employed by Mr. Thorne personally. Therefore, privity of contract would dictate that Mr. Thorne was not a party to the employment contract but, rather, his company was. However, the order issued by the adjudicator fails to name North Atlantic Watersports Inc. and instead holds Mr. Thorne personally liable for his company's debts. Similarly, the adjudicator allowed Mr. Thorne's counterclaim that Ms. Pointon owed his company for equipment she purchased. But for the larger amount due to Ms. Pointon setting it off, the damages for Mr. Thorne's counterclaim would flow to him personally.

[36] Since both parties were self-represented at the hearing, the adjudicator has an added duty of assisting the parties in ensuring a claim or defence is heard on its merits, although they must be careful not to cross the line between assistance and advocacy: *Earthcraft Landscape Ltd. v. Clayton*, 2002 NSSC 259, at para. 28. Small Claims Court is less formal than Provincial and Superior Courts when it comes to rules of evidence and other procedural concerns. This is particularly true when both parties are self-represented litigants. However, identifying the parties to an order correctly is not a mere procedural formality; it substantively deals with the parties' rights and obligations. This is why the *Small Claims Court Act* specifies that, while the admission of evidence is less formal (s. 28), orders have the same legal effect as orders of the Supreme Court (s. 31).

[37] I do not believe that the adjudicator erred in allowing the matter to proceed based on Ms. Pointon's Statement of Claim naming Mr. Thorne personally; however, I do believe that the adjudicator ought to have raised the issue of corporate personhood and privity at the hearing. The parties would have had an opportunity to make submissions on the issue, and the style of cause may have been amended to include North Atlantic Watersports Inc. It is possible that the matter may have been adjourned. Even if the parties assumed that Mr. Thorne appeared at the hearing on behalf of North Atlantic Watersports, the resulting judgment and the order should have reflected the actual parties to the contract. I do not think that it is fair to Mr. Thorne to say that, by defending himself at the hearing, he accepted that he is personally liable on the employment contract because it does not appear that either party considered, let alone was aware of, the consequences of such a finding. Therefore, because the order only names Mr. Thorne in his personal capacity and does not reference the company that was party to the contract, it is an error of law. Otherwise, litigants could use Small Claims Court's informality to circumvent the corporate veil.

[38] There are a few options regarding the remedy for this error, but I believe the most suitable is to send the matter back to be reheard by a different adjudicator. The Court's jurisdiction to correct a final order is limited. This error is not analogous to a clerical mistake, such as a typo or miscalculation, which could be remedied pursuant to *Civil Procedure Rule* 78.08(a). Nor do I believe that Rule 82.22(c) applies (which would allow the Court to vary an order if the text would have it apply in circumstances in which it was not intended to apply) because the issue was not raised, the parties and the adjudicator intended that the order should apply as it is written. Furthermore, in her report, the adjudicator does not say that she was mistaken or that her intentions differed from those set out in the order.

[39] This Court could potentially remedy the order *nunc pro tunc*, or "now for then". Practically speaking, the prejudice against Mr. Thorne (if the order was amended now) is minimal, as was the finding in *Gallant v. Martin*, 2010 NSSC 375, at para. 46, which was also an appeal from Small Claims Court. If North Atlantic Watersports had been named as defendant, Mr. Thorne still would have been served and likely would have still represented his company at the hearing. The effect of the Order is wrong in law and, because the matter should be reheard on the other grounds discussed above, I do not believe that it is appropriate to simply amend the order now as though it had named the company all along. It should be set aside.

Cross-Examination

[40] On appeal, Mr. Thorne said that, during his cross-examination of Ms. Pointon, the adjudicator cut him off when he had at least 30 questions left to ask and he felt like the hearing was rushed, particularly regarding his evidence. He says that this breached his right to natural justice or procedural fairness. Ms. Pointon said that she believed that the hearing took approximately one hour. She said that she recalled that the adjudicator asked Mr. Thorne if he had any further questions and he said he did not, and that there was a clear conclusion to the meeting. She said that she asked if she could leave at the end because the hearing had gone silent for a period and it appeared to her that everyone was finished. The adjudicator does not address this issue in her report.

[41] It is not always necessary for the adjudicator to respond to every issue and argument arising from the Notice of Appeal, and inferences can be made by the reviewing Court based on the record: *McIntyre v. Omers Realty*, 2012 NSSC 35, at para. 18. Some will obviously be without merit; however, this is one where the adjudicator's failure to offer any insight leaves this Court with little substantive information to go on. The Court may infer that the adjudicator believed this issue was without merit, but the Court is unable to test that inference based on the limited record before it. The adjudicator herself could have easily dispelled the issue by saying that, for example, she confirmed with the parties whether they had any more questions or that she deliberately cut Mr. Thorne off because he was straying into irrelevant questioning.

[42] That being said, this issue was Mr. Thorne's burden to prove on appeal. He did not say what his questions would have dealt with, or the degree of importance they might have had for his defence and counterclaim. Without knowing what

effect these extra questions would have had, Mr. Thorne has not proven any injustice occurred. That fact, coupled with Ms. Pointon's recollection that the hearing had a natural conclusion such that she had to ask whether she could leave, and the inference that the adjudicator failed to address it in her report because it lacked merit, all point to the conclusion that this ground of appeal be dismissed.

Conclusion

[43] Although this Court must be careful to avoid reweighing evidence or delving into factual findings, in this case I find the adjudicator erred in law because her legal conclusions are unsupported or contradicted by the evidence on the record, and such contradictions are not explained in her reasons. The issue of whether there was a variation in the contract is at the heart of this claim, and the finding that there was acceptance and consideration to ground the contract are not supported in either the Report of Findings or the record.

[44] The adjudicator erred in law in awarding damages in *quantum meruit*, in the alternative, because she did not determine the value of the specific work performed by Ms. Pointon that was not part of the original contract.

[45] Privity and corporate personhood were not raised at the hearing even though Mr. Thorne was personally named as the Defendant in the Statement of Claim, yet it was his company that employed the Appellant. The resulting judgment and Order should have reflected the actual parties to the contract. This is an error of law.

[46] I find that the most appropriate remedy is for the matter to be sent back to Small Claims Court to be reheard by a different adjudicator.

Bodurtha, J.