SUPREME COURT OF NOVA SCOTIA
Citation: *Landry v. Tivey,* 2014 NSSC 426

Date: 2014-12-02
Docket: Hfx No. 423272A
Registry: Halifax

Between:

B2B Trust in Trust for Nora Landry

Appellant

v.

Ann Valerie Tivey

Respondent

Judge:	The Honourable Justice Peter Rosinski
Heard:	June 30, 2014
Final Written Submissions:	September 19, 2014
Counsel:	D. Brian Newton, Q.C., for the Claimant, B2B Trust Richard Bureau for the Defendant, Ann Valerie Tivey

By the Court:

Procedural History

[1] On December 19, 2012 B2B filed a claim against the defendant for $19,208.94 plus interest and costs. The basis for the claim was stated thusly:

> The claimant held a third mortgage on a property owned by the defendant that had been foreclosed on by the first mortgage holder. Balance is amount owed on the second mortgage. See schedule "A" [calculation of the balance owing as of December 17, 2012 – $19,208.94].

[2] On August 9, 2013 a defence was filed; and amended on August 27, 2013. In summary, the defence argued that the defendant could not be said to be , in law, a mortgagor or debtor to the mortgage signed by her husband; in part because this was not the intention of her and her husband; she was not offered independent legal advice prior to signing the mortgage; she and her husband were separated and this was known to the claimant; and the monies were advanced to her husband alone before the signing of the mortgage by her [no consideration to her]. She also argues that as a result of undue influence upon her, brought on from the considerable mental stress she was enduring at the time, the mortgage should not be enforced against her.

[3] She also argued a limitation of actions defence.

[4] On December 12 2013, Adjudicator William Wilson Q.C., heard the matter. He issued a written decision, and in response to the appeal herein filed a "summary report" dated February 7, 2014.

[5] In his decision, the adjudicator found:

> **I find that the defendant signed the mortgage document believing that she would have no further responsibility for the debt**. To the extent that she knew she was putting the property up for security she understood what was proposed. To the extent that she would be liable for a deficiency if the debt was not covered she required advice either from her husband, Ms. Landry, Mr. McKinnon or the company administering the mortgage. **Would independent advice have made a difference? In my view, it would have**. In *Courtney v.Bank of Montréal* [2005 NSCA 153] the Court of Appeal posed this very question in its assessment of whether independent legal advice would have made a difference at paragraph 39. The court concluded it would not have made a difference in that case. In this case, I believe it would have. The mortgage company, Ms. Landry, or Mr. McKinnon, should have questioned the defendant, not having been party to the negotiations for the loan, independently. [Paragraph 22];
>
> In this case the defendant was advised that responsibility for repayment of the loan would be her husband's. She was not involved in negotiating the loan nor were its terms explained to her. **She thought she was signing the mortgage solely as security, not realizing that there was a possibility she would be called upon for a deficiency**. Mr. Tivey made only a few payments on the loan in 2005 and 2006. He left Ms. Landry's employee in 2006. There was no evidence led regarding the steps taken by Mr. Landry to recover the loan from Mr.Tivey. Mr. Tivey declared bankruptcy in 2008 and the property was foreclosed on in 2011. There was no evidence presented that Ms. Landry looked to repayment of the loan from the defendant from the time it went into default in 2006 until this claim was commenced in December 2012. The claimant is an experienced mortgage broker who should know the importance of informing the parties of their liability under a mortgage document. She claims to satisfy that requirement by suggesting that she advised them to obtain independent advice [Exhibit C – 1, Tab 2]. That agreement, however, was with Mr. Tivey.
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> In my view the innocent party in all of this was the defendant and she is entitled to raise the defense of non est factum as a bar to recovery from her of the outstanding loan.

> In conclusion, the claim against the defendant is dismissed. [Paras 26, 27 and 28]
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> [my emphasis added]

Grounds of Appeal

[6] The appeal grounds contained in the January 10, 2014 notice are alleged as "error of law," and read as follows:

1. The adjudicator failed to consider all of the security documentation signed by the respondent in addition to the mortgage document. In particular, the respondent signed a separate agreement agreeing to be responsible for the loan.

2. The adjudicator erred in law in finding that the defense of *non est factum* was available to the defendant.

3. The adjudicator erred in law by failing to properly apply the law relating to the defense of *non est factum*.

4. The adjudicator failed to consider significant inconsistencies contained in the evidence of the respondent's witnesses .

Standard of review

[7] As Bateman J.A., stated in *Flynn v Halifax Regional Municipality*, 2005 NSCA 81:

THE STANDARD OF REVIEW:

13 An appeal is not a re-trial. The powers of an appellate court are strictly limited. **A trial judge's factual findings and inferences from facts are insulated from review unless demonstrating palpable and overriding error. On questions of law the trial judge must be correct**. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and, therefore, be subject to a standard of correctness (Housen v. Nikolaisen, [2002] 2 S.C.R. 235).

14 Palpable error was clearly and simply described recently by the Ontario Court of Appeal in Waxman v. Waxman (2004), 186 O.A.C. 201; [2004] O.J. No. 1765 (Q.L.):

[296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: Housen at 246 [S.C.R.]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

[297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: Minister of National Revenue v. Schwartz, [1996] 1 S.C.R. 254; 193 N.R. 241 at 281 [S.C.R.].

…

[300] ... **the "palpable and overriding" standard applies to all factual findings** whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. ...

(Emphasis added)

Position of the parties

The appellant-B2B trust in trust for Nora Landry

[8] In summary the appellant argues:

1. The adjudicator **incorrectly applied the current principles of law** in finding that the requirements for *non est factum* were met – *Marvco Color Research Ltd. v. Harris* [1982] 2 SCR 774;

    a. This is because he relied on the statement from Mr. Tivey to his wife that she would not be liable for any payments that were to be made under the mortgage [as repayments or as a deficiency obligation if the mortgage were foreclosed], which according to *Marvco* is irrelevant to the determination of her carelessness in signing the document. B2B says that only B2B Trust can make such statements on which Ms. Tivey might rely and mistakenly conclude that she is signing only as effectively a "releasor". Her husband's assurance to her was an indemnification agreement by him, binding only him.

    b. This is also because Ms. Tivey's misunderstanding as to the extent of her liability is the only divergence between what she intended to execute and what she did execute by signing the document/thus the document was not "fundamentally different,

either as to content, character, or otherwise from the document that " she intended to execute.

2. The adjudicator made several findings that reveal **palpable and overriding error**:

a. He concluded at para. 26 that, although the mortgage agreement stated that the parties are advised to obtain legal and financial advice prior to signing the document, and that the agreement was only with Mr. Tivey [whereas it was also signed by Ms. Tivey], whereas the appellant argues Mrs. Tivey "was de facto advised to obtain legal advice, failed to do so, and cannot escape her liability as a result"; [I note here that he did not misinterpret that evidence in my opinion – he poorly worded it in his decision]

b. He concluded that the lack of participation in negotiating the terms of the loan coupled with the fact of her limited interaction with the bank triggered a requirement that she receive independent legal advice [paras 26 and 27]; whereas the appellant argues that she "had signed no less than three

mortgages prior to the one in question and the subsequent amendment thereto. There was no reason for either Ms. Landry or Mr. MacKinnon to believe that Mrs. Tivey did not understand what her obligations were under a simple mortgage agreement, especially given that she avoided informing Mr. MacKinnon and Ms. Landry that she and Mr. Tivey were allegedly separated."

c. He concluded that Mr. MacKinnon or Ms. Landry had an obligation to advise Mrs. Tivey to obtain independent legal advice whereas the appellant argues "Mrs. Landry… did include a provision in the one-page mortgage agreement that clearly stated that it is advised she seek independent legal and financial advice prior to signing the document. To require any further duty would be essentially to force Ms. Landry to impose independent legal advice upon Mrs. Tivey; as to Mr. MacKinnon, the adjudicator accepted that Mr. MacKinnon explained the mortgage document as he would to any married couple seeking an additional mortgage [paras. 5 and 19] however after coming to that conclusion, Mr. Wilson then later

> stated that Mr. MacKinnon ought to have questioned her independently"

[9] The appellant says that Ms. Tivey should have advised Ms. Landry and Mr. MacKinnon of her alleged separation at the time the first and second mortgages were executed, and since they were separated, she failed to make reasonable inquiries at all stages whether her responsibilities would be any different than she believed them to be.

[10] Similarly the appellant argues that there is no evidence to indicate that had Mrs. Tivey taken the written recommendation to obtain independent legal advice [if given] , that she would have indicated to that other lawyer that she and her husband were separated at the time. She states in her brief:

> As such Mr. Wilson's conclusion that independent legal advice would have made a difference in this case is a factual conclusion, without any reasonable nexus to the evidence tendered at trial. Additionally, Mr. Wilson's finding that Mr. MacKinnon or Ms. Landry ought to have conducted independent and individual interviews with Mrs. Landry [sic], goes well beyond the established standards of practice and places an unreasonable duty on them.

[11] The appellant further argues in relation to the adjudicator's finding of a successful defence of *non est factum*, that there was no fundamental difference in character or content from what Mrs. Tivey signed and what she thought she was signing, and nor was she diligent in determining the true nature character and

content of what she was signing, sufficient to allow her the benefit of the defence of *non est factum*.

[12] The Appellant also argued that since Ms. Tivey had received the assurance from her husband that only he would be liable for any payments on the mortgage, therefore, she must have realized that she could be, or would be otherwise liable for any payments as well he could be.

Position of Ms. Tivey, the respondent

[13] She argues: "despite the assertions of the appellant that Ms. Tivey 'willfully hid any alleged separation from Mr. MacKinnon at the time the first and second mortgages were signed', there is nothing in the decision or summary report of findings to suggest same, and if there was, we respectfully submit the decision would have been quite different"

[14] She notes that the adjudicator was faced with evidence only of the general practice of Mr. MacKinnon as legal counsel in conducting a review of the documentation with Mr. and Ms. Tivey in this case; whereas Mr. and Mrs. Tivey both testified for the defendant and had specific recall of the circumstances.

[15] Specifically she notes that the adjudicator based his decision on the following findings of fact:

i. Ms.Tivey was advised of the responsibility of the repayment of the loan was her husband's. [by her husband]

ii. Ms. Tivey was not involved in negotiating the loan.

iii. Mrs. Tivey thought she was signing the mortgage to provide the property as security, and not for her to be liable for any deficiency.

iv. There was no evidence that Ms. Landry attempted to recover the debt [as against Mrs. Tivey until 2012] suggesting B2B did not believe it had a good claim against her.

v. Ms. Landry as an experienced mortgage broker should know the importance of informing Ms. Tivey of her obligations under the mortgage document.

vi. Ms. Landry only advised Mr. Tivey to obtain legal advice.

These findings of fact are reasonable and contain no palpable and overriding error."

[16] In oral argument, Ms. Tivey also submitted that there were numerous "red flags" that ought to have alerted Mr. MacKinnon to the need to have Ms. Tivey get independent legal advice:

> i. Mr. MacKinnon, though his primary longstanding client was Nora Landry, could in proper circumstances represent both the Tiveys and Ms. Landry, but he did not provide the Tiveys with a "conflict" letter to spell out his responsibilities nor did he apparently make an inquiry about whether the borrower had availed themselves of the "legal advice" that the May 31, 2005 and January 4, 2006 bare bones "mortgage" document contained;
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> ii. Mr. MacKinnon ought to have known through Nora Landry that the Tiveys were separated throughout this time period, and the funds on two occasions had been advanced to Mr. Tivey alone "for his living expenses", thus it was questionable what benefit, if any, there was to Ms. Tivey (Why would/should she take on post-separation debt of her husband?)

The relevant Law

[17] As Justice Roscoe stated in *Chender v. Lewaskewicz*, 2007 NSCA 108:

> **54** The test for proving *non est factum* was correctly stated by Glube J., as she then was, in **Castle Building**, *supra*, at para. 31:
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> There are three elements to the defence of *non est factum*.
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> 1. The burden of proving *non est factum* rests with the party seeking to disown their signature. **(Saunders v. Anglia Building Society**, [1970] 3 All E.R. 961 (H.L.)). It is a heavy onus when the person is of full capacity.
>
> 2. The person who seeks to invoke the remedy must show that the document signed is radically or fundamentally different from what the person believed he was signing. (**Saunders v. Anglia**, *supra* and **Marvco Color Research Limited v. Harris and Harris** (1982), 141 D.L.R. (3d) 577 (S.C.C.))
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> 3. Even if the person is successful in showing a radical or fundamental difference, the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document. (**Saunders**, *supra*, **Marvco**, *supra* and **Dwinell v. Custom Motors Limited** (1975), 12 N.S.R. (2d) 524 S.C.A.D.))

55 The Supreme Court of Canada in **Marvco**, *supra*, adopted the House of Lords' decision in **Saunders**, supra, and confirmed that the plea of *non est factum* was not available to a person who was careless when the document was signed, even if the document is fundamentally different from that she thought she was signing. With respect to carelessness, Estey J. stated (at p. 785):

> In my view, with all due respect to those who have expressed views to the contrary, the dissenting view of Cartwright J. (as he then was) in **Prudential**, [[1956] S.C.R. 914], correctly enunciated the principles of the law of *non est factum*. In the result the defendants-respondents are barred by reason of their carelessness from pleading that their minds did not follow their hands when executing the mortgage so as to be able to plead that the mortgage is not binding upon them. ...
>
> In my view, this is so for the compelling reason that in this case, and no doubt generally in similar cases, the respondent's carelessness is but another description of a state of mind into which the respondents have fallen because of their determination to assist themselves and/or a third party for whom the transaction has been entered into in the first place. Here the respondents apparently sought to attain some advantage indirectly for their daughter by assisting Johnston in his commercial venture. In the **Saunders** case, [[1971] A.C. 1004], the aunt set out to apply her property for the benefit of her nephew. **In both cases the carelessness took the form of a failure to determine the nature of the document the respective defendants were executing.** Whether the carelessness stemmed from an enthusiasm for their immediate purpose or from a confidence in the intended beneficiary to save them harmless matters not. This may explain the origin of the careless state of mind but is not a factor limiting the operation of the principle of non est factum and its application. **The defendants, in executing the security without the simple precaution of ascertaining its nature in fact and in law, have nonetheless taken an intended and deliberate step in signing the document and have caused it to be legally binding upon themselves.** In the words of **Foster v. MacKinnon**, [(1869), L.R. 4 C.P. 704], **this negligence, even though it may have sprung from good intentions, precludes the defendants in this circumstance from disowning the document, that is to say, from pleading that their minds did not follow their respective hands when signing the document and hence that no document in law was executed by them.**
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> > This principle of law is based not only upon the principle of placing the loss on the person guilty of carelessness, but also upon a recognition of the need for certainty and security in commerce. This has been recognized since the earliest days of the plea of *non est factum*. ...

> I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of *non est factum* from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence. The policy considerations inherent in the plea of *non est factum* were well stated by Lord Wilberforce in his judgment in **Saunders**, *supra*, at pp. 1023-24:
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> > ... the law ... has two conflicting objectives: relief to a signer whose consent is genuinely lacking ... ; protection to innocent third parties who have acted upon an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.
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> **56** The conclusion of the chambers judge respecting the *non est factum* plea is essentially based on his assessment of the facts and the credibility of the appellant and her son. His determination that Henry told Klara about the RFR and that Klara did not read the document before signing it are supported by the evidence. That she was careless is a finding of fact entitled to deference by this court. I am not persuaded that the appellant has established reviewable error in this respect.
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> [emphasis added]

[18] The concept is also been nicely summarized by Justice Edwards in *Gardin v J&B Kozma Enterprises Ltd*. [1997] NSJ No 120 (SC) at para. 27:

> 1 The burden of proving *non-est factum* rests with the party seeking to disown their signature. It is a heavy onus when a person has full capacity.
>
> 2 The person who seeks to invoke the remedy must show that the document signed is radically or fundamentally different from what the person believed he was signing.
>
> 3 Even if the person is successful in showing a radical or fundamental difference, the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document.

[19] This is the determinative issue in this appeal.

[20] I should note that there is some question whether the Small Claims Court had jurisdiction in relation to this claim. Section 10 of the *Small Claims Court Act* RSNS 1989 c. 430 reads:

> "Notwithstanding Section 9, no claim may be made under this *Act*
> (a) for the recovery of land or an estate or interest therein;…"

[21] If the debt herein arose under a foreclosed mortgage, then it is questionable whether it can be separated and litigated in the Small Claims Court. Counsel did submit with their written position on this question the following cases: *Atlantic Electronics v. Dauphinee*, 2008 NSSC 190; *Van Amburg v. Halifax Condo Corp. 267*, 2007 NSSM 23; *MacKay v. Dauphinee*, 2007 NSSM 11; *Swaine v. Hackney*, 2010 NSSM 83. However, I need not answer that question, as I am satisfied that the appeal may be dismissed in any event.

[22] The parties have cited numerous references to the facts insofar as what witnesses purportedly said at the trial. Without the benefit of a transcript, this court is left with the written decision and summary report of the adjudicator regarding the evidence and factual findings at trial. Clearly there were also

documents submitted in the claimant's exhibit book, which I take it were not disputed.

[23] The adjudicator found that the defense of *non est factum* was applicable here.

[24] The adjudicator found that the documents signed by Ms.Tivey were radically or fundamentally different from what she believed she was signing. Her evidence and that of her husband was to the effect that she was signing in order to allow her interest in the joint tenancy owned property to be encumbered, although she did not intend to take any responsibility for repayment of any monies owing under the signed document.

[25] The adjudicator was squarely presented by counsel with the leading Supreme Court of Canada case on *non est factum*: *Marvco Color Research Ltd. v Harris* [1982] 2 SCR 774.

[26] In my opinion, the adjudicator correctly determined that there was a fundamental and radical difference between her being legally obligated for repayment of monies owing under the signed document, and her merely consenting to the property being encumbered in order to allow her husband to obtain monies for which he would be solely responsible.

[27] Can it be said that she was sufficiently careful that she may be excused under the defence of *non est factum*?

[28] Firstly I note, as the adjudicator determined:

> The mortgage document does not mention the right to seek a deficiency should the sale of security be insufficient to cover the debt. That right is provided by common law – *Batdorf v. MacLean* 2010 NSSC 462.

[29] Certainly, one would not expect a layperson to know this when they are signing a mortgage from a large lending institution.

[30] The exhibits included the $9,200 "mortgage agreement" between "Laurentian SDRRSP Nora Landry" and "Geoff Tivey" dated May 31, 2005 [at tab 2]. It is an extremely bare-bones one half page document. While it is signed by both Mr. and Mrs. Tivey, it refers to Mr. Tivey as "purchaser" [since he was initially the only anticipated party to the document, given that only his name is typewritten for signature].

[31] That document also contains a clause: "the purchaser is advised to seek legal and accounting advice prior to signing this document."

[32] On August 12, 2005 a more formalized mortgage was entered into between Mr. and Mrs. Tivey and "B2B trust – in trust for Nora Landry SDRRSP #820-3402"

[33] In that document Mr. and Mrs. Tivey are referred to as the "mortgagor". At the end thereof, is an affidavit of status, which confirms that they remain "spouses of each other".

[34] The adjudicator accepted that Nora Landry knew, directly from Mr. Tivey, before any of these documents were signed, that he and his wife were separated, and he inferred, and I accept, that their status remained such throughout all the relevant times herein.

[35] Notably the cheques of June 29 [$1500] July 15 [$2000] and July 31, 2005 [$3000] are all made out to Mr. Tivey alone, and are referenced as "advance".

[36] On August 17, 2005, $2038.80 are paid by cheque to Mr. and Mrs. Tivey referenced as "mortgage proceeds to client…".

[37] On January 4, 2006, another half page bare-bones "mortgage agreement" between "Laurentian bank SDRRSP 820-3402 Nora Landry" and Mr. and Mrs. Tivey is executed in the amount of $5600. That document does not identify who is "the borrower". However, it requires "the borrower" to be responsible for certain

expenses and notes that "the amount $5,600 will be added to the existing third mortgage which includes $100 administration fee [original mortgage was $9,200]"

[38] It also states:

> The purchaser is advised to seek legal and accounting advice prior to signing this document.

[39] That document is more formalized as an "amending agreement" dated January 18, 2006 between Mr. and Mrs. Tivey as "mortgagor" and "B2B trust – in trust for Nora Landry –SDRRSP #820-3402". That document is signed by both Mr. and Mrs. Tivey, as is the affidavit of status, indicating that they are "spouses of each other".

[40] The evidence indicates that Mr. MacKinnon, the counsel who represented both the mortgagee and mortgagors during the August 2005 and January 2006 "mortgage" signings, was not told by Nora Landry that Mr. and Mrs. Tivey were separated.

[41] In my view the adjudicator properly cited the law applicable to the defence of *non est factum* and applied its principles.

[42] He made no palpable and overriding errors in concluding that:

1. The August 2005 mortgage agreement had originally been intended only to be signed by Mr. Tivey, and therefore the reference that the "purchaser is advised to seek legal and accounting advice prior to signing this document" realistically could be seen as only applying to him, and not his wife.

2. There was no evidence at all that Ms. Tivey was in any way involved in the negotiating of terms of the loans, or participating in the drafting of the documents, or that she was intended to or did benefit therefrom. She signed believing she was only allowing her interest to be encumbered; she did not intend to assume responsibility for her husband's debt.

3. While the January 2006 bare-bones "mortgage agreement" again referred to "the purchaser is advised to seek legal and accounting advice prior to signing this document", Ms. Tivey was not "*de facto* advised to obtain legal advice" as the appellant claims.

4. It was not careless for Ms. Tivey to not advise Mr. MacKinnon that she and her husband were separated, since there was no reason for her to do so if she was only allowing her property interest to be encumbered, and they were still in law "spouses" by marriage in any

event, and she would honestly have believed her husband that he told Nora Landry of their separation, and therefore her lawyer Ms. MacKinnon also knew or should have known that.

5. Had Ms. Tivey obtained independent legal advice she would not have signed the documents in question.

Conclusion

[43] Ultimately, the adjudicator was justifiably satisfied that Mrs. Tivey had no hand in creating the "mortgage" documents; she was unaware of the legal effect of the documents; she did not appear to profit thereby; and provided a credible explanation about why she signed the documents in question, yet did not intend to be responsible for payment of any monies arising from the debt; and that she was not careless in signing the documents in all the circumstances, nor in not insisting on independent legal advice for herself. This conclusions are also consistent with Justice Cromwell's recent comments in relation to "the duty of honest performance" in the contractual context: *Bhasin v. Hrynew*, 2014 SCC 71.

[44] I dismiss the appeal.

Costs

[45] Costs are normally intended to do justice between the parties based on the extent of success of each party. While the respondent has been successful in having the appeal dismissed, the appellant presented reasonable arguments to question the validity of the adjudicator's decision.

[46] Therefore, in all the circumstances, here I am going to order the parties to bear their own costs.

Rosinski, J.