SUPREME COURT OF NOVA SCOTIA

Citation*: John Ross & Sons Limited v. Federal Express Canada Corporation,* 2022 NSSC 336

Date: 20221207
Docket: Hfx No. 510873
Registry: Halifax

Between:

John Ross & Sons Limited

Appellant

v.

Federal Express Canada Corporation

Respondent

APPEAL DECISION

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	Wednesday, June 22, 2022
Written Decision:	December 7, 2022
Counsel:	Norman Ross and Cindy Fenton, for the Appellant Timothy Riggs, for the Respondent

By the Court:

Introduction

[1] This is an appeal from the decision and order of Small Claims Court Adjudicator Augustus M. Richardson, K.C., dated September 22, 2021.

[2] John Ross & Sons Limited ("JRS") brought a claim in Small Claims Court against Federal Express Canada Corporation ("FedEx"), for the cost of meat that was shipped by FedEx from a Deli in Montreal to the claimant in Halifax.

[3] In dismissing the claim, the Adjudicator held that there was no contract of carriage between JRS and FedEx. Based on an Intra-Canada Air Waybill (the "waybill") that was in evidence, he found that the contract was between the Deli and FedEx. He found that JRS was not a party to the contract and, further, that any representation made by FedEx's local courier, David Thomas could not be laid at FedEx's door. He found that JRS could not reasonably place any reliance on Mr. Thomas's statement that overnight delivery was possible given the season, given COVID, and given that the goods being shipped were perishable.

[4] JRS has appealed on the basis that learned Adjudicator Richardson made an error in law in finding that the contract was between JRS and the Deli.

Grounds of Appeal

[5] In the Notice of Appeal dated November 16, 2021, the appellant, JRS, advanced only one ground of appeal, error of law. The appellant particularized the error of law in their Notice of Appeal, as follows:

> The statement that the contract of carriage was not between the claimant and the defendant is incorrect. It was stated it was the deli and the defendant but that is incorrect. We at John Ross & Sons placed the order via the deli: on our account to have a shipment done. This was not a request by the deli: they only took our instructions for the delivery so this statement is incorrect. Also the fact that overnight delivery was not honoured as stipulated from the company so that part was in default as well. When we spoke to the courier (Mr. Thomas) he stated as far as he was aware, all deliveries were being delivered without delays. A week later, on the FedEx site they did state deliveries were behind.

[6] Following the filing of the Notice of Appeal, Adjudicator Richardson prepared the required documentation pursuant to s. 32(4) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, including a Summary Report dated April 13, 2022, and

his written reasons for decision and order dated September 22, 2021. The Summary Report states, at paras. 2 and 3:

> [2] My findings of fact, and my reasons based on those findings, are set out in my decision and order of September 22, 2021.
>
> [3] The "waybill" referred to in para. 4 of my reasons was a "FedEx Intra-Canada Air Waybill" that was attached to the Notice of Claim. On its face it was between "Deli – 5265 Decarie-Mtl" as sender and "John Ross" as recipient. I was not provided with a waybill or contract between John Ross & Sons Limited and FedEx.

[7] Given its succinct nature, I include Adjudicator Richardson's decision and order in their entirety:

> [1] This is a claim for the cost of meat that was shipped by the defendant from a deli in Montreal to the claimant in Halifax.
>
> [2] On December 20, 2020, the claimant asked the defendant's courier (David Thomas) whether overnight delivery was possible. He told them that to his knowledge everything east of Toronto was available for overnight service from the defendant. On the strength of that statement the claimant ordered some deli meat from Snowden Deli in Montreal. Snowden Deli then contracted with the defendant to ship the meat to the claimant. The order was picked up in Montreal on a Thursday. Overnight delivery would have got the package to the claimant by Friday. Unfortunately, it did not arrive until Monday. The meat (at a cost of $136. 10) was as a result spoiled and had to be thrown away.
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> [3] Mr. Thomas pointed out that he was just the local courier, and that he had no control over what happened in Montreal. He had no knowledge of why there had been a delay.
>
> [4] The claimant attached the waybill. It established that the contract was not between the claimant and the defendant. It was between the deli and the defendant. The claimant was not a party to the contract. That being the case, any representation made by the courier cannot be laid at the door of the defendant.
>
> [5] Moreover and in any event, I was not persuaded that the claimant could reasonably place any reliance of the courier's statement that overnight delivery of the defendant's part was possible given the season, given COVID, and given that what was being shipped was a perishable. Under such circumstances it was in my view unreasonable of the claimant to expect that there was no risk of late delivery.
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> [6] On these facts and for these reasons I make the following order:
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> > IT IS ORDERED that the within claim be and the same is hereby dismissed without costs.

Issue

[8] The issue before this Court is whether the learned Adjudicator made an error of law, as that is the only stated ground of appeal advanced in the Notice of Appeal.

Positions of the Parties

[9] The parties provided written and oral submissions on appeal.

Appellant

[10] RJS submits that the Adjudicator committed an error of law by finding that the contract of carriage was not between the claimant (RJS) and the respondent (FedEx). The appellant argues that the contract was between RJS and FedEx. The position of the appellant is that after a discussion with Mr. Thomas, a FedEx courier, who confirmed that their package could be delivered on time, they placed an order from the Deli, which was paid by them on their FedEx's account for overnight delivery. According to the appellant, the Adjudicator's finding that RJS was not a party to the contract was incorrect, because RJS placed the order and paid for it.

[11] The appellant further takes issue with the Adjudicator's remark that he was not persuaded that RJS could reasonably place any reliance on the courier's statement about the availability of overnight delivery due to the time of year and COVID, and that RJS should have expected late delivery. In essence, RJS submits that the Adjudicator's findings were incorrect because they (RJS) were informed by the FedEx courier, and by FedEx's online services, that their package would be delivered on time. RJS further submits that the entire order was not perishable as stated by the Adjudicator. Lastly, the appellant asks, if FedEx believed they were not in the wrong regarding the delivery, then why did they reimburse RSJ for it?

Respondent

[12] The respondent submits that the Adjudicator found that there was no contract of carriage between JRS and FedEx; the contract was between FedEx and the Deli. That being the case, any representation made by Mr. Thomas, the FedEx Courier, could not be laid at FedEx's door. The respondent argues that the Adjudicator further found that JRS could not reasonably place any reliance on Mr. Thomas's statement that overnight delivery was possible given the season, COVID, and what was being shipped was perishable.

[13] The respondent argues the appellant's appeal of the finding that the contract was between JRS and FedEx is an attempt to appeal a finding of fact by the

Adjudicator. The jurisdiction of this court, on appeal, is confined to questions of law which rest upon findings of fact by the Adjudicator. The respondent submits that the appellant has not identified an error of law. Rather, it seeks to challenge the Adjudicator's findings of fact.

[14] The respondent also says it reimbursed JRS as a goodwill gesture.

The *Small Claims Court Act*

[15] Section 2 of *Small Claims Court Act* defines the purpose of the legislation:

> 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.

[16] The *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32(1) sets out the available grounds of appeal:

> 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.

[17] As previously stated, the appellant advanced only one ground of appeal, alleging an error of law.

[18] Before embarking upon an analysis of the standard of review for a Small Claims Court Appeal, a brief comment on the unique scope of that review is needed to provide the necessary context to understand the distinctiveness of Small Claims Court appeals.

The Uniqueness of Small Claims Court Appeals

[19] The Small Claims Court is not a "court of record" as that term is generally understood in law, which makes it unique in the sense that there is not a full and complete official record of what transpired in court, including a record of witness testimony. Section 34(2) of the *Act* requires the adjudicator to prepare a summary report of findings of law and fact, including the basis of any findings raised in the notice of appeal, and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

[20] The uniqueness of Small Claims Court Appeals has been acknowledged and described in several decisions of this Court. In *Hoyeck v. Maloney*, 2013 NSSC 266, Moir J. commented on the scope of review for Small Claims Court appeals:

> 19. The need for deference to fact-finding becomes acute on a Small Claims Court appeal. The Act, true to its purpose of economical dispute resolution, limits appeals to an error about jurisdiction, an error of law, and a failure in the duty of fairness: s. 32(1). Note the absence of palpable and overriding error of fact.
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> 20. "... [T]he jurisdiction of this court is confined to questions of law that must rest upon findings of fact as found by the adjudicator": Brett Motors Leasing Ltd. v. Welsford, [1999] N.S.J. No. 466 (Saunders J.): para. 14. Despite what s. 3(1) of the Small Claims Court Act says, it is not a court of record in the ordinary sense of that phrase. The testimony is not recorded. This, too, accords with the economical purpose of the Act.
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> 21. Instead of a record, the statute requires the adjudicator to prepare a "summary report of the findings of law and fact" if there is an appeal: s. 32(4). In recent years, Small Claims Court adjudicators have shown a tendency to burden themselves with written decisions in more complicated cases. The decision is attached to the summary and makes for a fresher record of the adjudicator's thinking.
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> 22. We have to rely on the adjudicator's summary: Victor v. City Motors Ltd., [1997] N.S.J. No. 140 (Davison J.) at para. 14. The summary may offend the duty of fairness when it gives no information on the evidence that stood as the basis for an important finding of fact: Morris v. Cameron, 2006 NSSC 9 (LeBlanc J.) at para. 37. That does not mean that the adjudicator has to labour over the summary to nearly replicate a transcript. It is just a "summary" after all.

[21] In *Malloy v. Atton*, 2004 NSSC 110, Murphy J. wrote:

> 8 Unfortunately, there is no official record of what happened at the Small Claim Court hearing. Most court proceedings are recorded, and during an Appeal a Judge can review a transcript to determine exactly what occurred. This is not the way the system works. Small Claims Courts are designed to be efficient and to operate with minimal expense, and when they were first established, their jurisdiction was very limited. When there is no transcript, and nothing in the record relating to the issue raised by an Appeal, the Court reviewing the Adjudicator's decision must decide based entirely on what the parties advise occurred at the hearing. The absence of a transcript from Small Claims Court places the parties and any judge hearing an Appeal from an Adjudicator's decision at a significant disadvantage. Adversarial litigants cannot be expected to accurately and objectively recall details about procedural and evidentiary issues addressed at a hearing several months earlier in an environment with which they are not usually familiar. This problem has existed since Small Claims Courts were first established, but is exacerbated now with the expanded Small Claim Court jurisdiction. Cases

> involving up to $15,000.00 are very important to litigants, who should be able to have Appeals considered by Judges who have had an opportunity to become fully informed of events which took place in Small Claims Court before assessing whether parties' rights have been properly addressed.

[22] Similarly, in *Gallant v. Martin*, 210 NSSC 3775, Rosinski J. observed the uniqueness of Small Claims Court Appeals wherein he wrote:

> 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.

[23] As Rosinski J emphasized, this puts the appeal court at a disadvantage in relation to the Adjudicator, who has the benefit of observing and hearing the witnesses:

> 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.
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> 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.

[24] Lastly, the distinctive nature of the Small Claims Court appeal regime was described by MacDonald A.C.J. (as he was then) in *Whalen v. Towel*, 2003 NSSC 259:

> 7. Furthermore, there is no record of the proceedings in Small Claims Court. As well, the appeal process is limited in that this Court, the Supreme Court of Nova Scotia, is the forum of last resort. In other words, in order to provide an efficient and inexpensive process, certain judicial safeguards are sacrificed. This is to ensure that matters involving small claims can be processed efficiently and fairly.
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> 8. Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme

> Court of Canada decision of *R. v. O'Connor*, [1995] S.C.J. No. 98. At paragraph 193 she states:
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> > What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemeric as perfection in any other social agency. *What the law demands is not perfect justice but fundamentally fair justice*. [Emphasis in *Whalen*.]

[25] As Wood J. (as he then was) observed in *Electec Engineering Inc. v. Costa*, 2015 NSSC 130, the "lack of a recorded hearing and transcript may limit the appellate review that can be carried out, at least with respect to challenging findings of fact. To the extent that this might be seen as compromising the fairness of the appeal, it is simply a function of the statutory regime which established the Small Claims Court" (para. 18).

Standard of review for Small Claims Court appeals

[26] 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), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.), where Saunders J. (as he then was) wrote:

> 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.
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> [Emphasis added.]

[27] Saunders J. concluded that:

> 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]

[28] It is generally recognized in the authorities relating to appeals on the record that a high level of deference must be accorded to the trier of fact, and that any material finding of fact that is based on "palpable and overriding error" constitutes an error of law: *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, at paras. 31-33. Moir J. in *Hoyeck*, articulated a somewhat different approach in the Small Claims context, which does not involve a review Small Claims Court findings of fact for palpable and overriding error, but rather involves a review for error of law that extends to situations where there is no evidence to support the conclusions reached by the Adjudicator. It seems that Moir J's approach recognizes the distinctive aspects of the Small Court of appeal regime. He wrote:

> 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.

[29] In several decisions of this Court, Justice Moir's approach to the standard for review for Small Claims Court appeals has been endorsed and applied, such as in *The Rendezvous Sports Bar and Lounge v. On Shore Construction Ltd.*, 2020 NSSC 319, where Keith J's observations are apposite. He said, at footnote 1:

> There is some question as to whether "palpable and overriding error" also constitutes an error of law in the context of a Small Claims Court appeal. LeBlanc, J. summarizes the debate at paras 34 -36 of *C.M. MacNeill and Associates v Toulon Developments* 2016 NSSC 16. I prefer the analysis in *Hoyeck v. Maloney*, 2013 NSSC 266. In my view, it better accords with the statutory goals of the Small Claims Court as an efficient and economical forum to resolve disputes within a defined monetary limit. Moreover, importing the concept of a "palpable and overriding error" into a Small Claims Court

> appeal risks confusing or conflating the jurisprudence from other appeal proceedings which occur under very different circumstances. For example, appeals which are not brought under the *Small Claims Court Act* are obviously not subject to the statutory principles and procedures uniquely created for Small Claims Court proceedings – including the express legislative goal of inexpensive and informal adjudication (section 2 of the Act). The appeal record in a Small Claims Court appeal is also very different and does not include an actual recording of the original hearing. The judge hearing a Small Claims Court appeal is much more dependent on the written reasons and report prepared by the Adjudicator.

[30] While there may be a divergence of opinion as to whether this Court should review Small Claims Court findings of fact for palpable and overriding error, it is clear, as Justice LeBlanc stated in *C.M. MacNeil & Associates v. Toulon Development Corporation*, 2016 NSSC 16, at para. 37, that this Court may find an error of law where there was no evidence to support the conclusions reached. As Moir J. pointed out in *Hoyeck*, at para. 23, this would have to be apparent from the summary.

Analysis

[31] The appellant's only ground of appeal alleges error of law. An appeal of an Adjudicator's decision is not a new hearing and is based on the limited record, which consists of Adjudicator Richardson's Summary Report and his decision setting out his findings of law and fact, the documents he considered, and the pleadings. The Summary Report and reasons provide the basis for his decision. He succinctly explained his reasons for finding that there was no contract between RSJ and FedEx. In his summary report, the Adjudicator stated:

> [3] The "waybill" referred to in para. 4 of my reasons was a "FedEx Intra-Canada Air Waybill" that was attached to the Notice of Claim. On its face it was between "Deli – 5265 Decarie-Mtl" as sender "John Ross" as recipient. I was not provided with a waybill or contract between John Ross & Sons Limited and FedEx.

[32] Further, in the Adjudicator's decision, he wrote:

> [4] The claimant attached the waybill. It established that the contract was not between the claimant and the defendant. It was between the deli and the defendant. The claimant was not a party to the contract. That being the case, any representation made by the courier cannot be laid at the door of the defendant.

[33] As emphasised earlier, I am limited to the findings of the learned Adjudicator. I do not have the authority to go outside the facts found by Adjudicator Richardson and determine my own findings of fact.

[34] Adjudicator Richardson had the benefit of hearing the evidence of the parties and, based on all the evidence presented, including the exhibits, he made a specific factual finding that the contract of carriage was between the Deli, and John Ross. The Adjudicator's findings are not appealable unless they amount to an error of law in that his reasons and summary indicate that there was no evidence to support his findings, or that he disregarded, overlooked, or misunderstood relevant evidence.

[35] The learned Adjudicator based his decision that the contract of carriage is between RJS and the Deli, on the evidence of the waybill proffered by the claimant at the hearing, which states that the sender is the Deli and the recipient is John Ross (RJS). Adjudicator Richardson specifically stated that he "was not provided with a waybill or contract between John Ross & Sons Limited and FedEx." Put differently, Adjudicator Richardson based his finding on the materials that were submitted to him, in particular the waybill. The Deli's name is on the waybill as well as its address, as the sender. Mr. Ross, with an address, is stated on the waybill as the intended recipient of the package. The conditions of the contract are set out on the document as well.

[36] In essence, the appellant argues that there is a mistake on the waybill, in that the sender was FedEx, not the Deli. The appellant's argument appears to be that the Adjudicator misapprehended the evidence on this critical point and should have made a different finding as to the parties to the contract.

[37] In this case Adjudicator Richardson made a finding of fact. He was not asked to determine whether the legal requirements for a contract, such as offer, acceptance, and consideration, were in place. The Adjudicator found as a fact (as stated in Para. 3 of the Summary Report) that he was not provided with a waybill or contract between JRS and FedEx. It is clearly stated in Adjudicator Richardson's decision that the only contract adduced at the Small Claims Court hearing was between the Deli and John Ross as established by the waybill.

[38] It is not enough for the appellant to claim that Adjudicator Richardson's findings of fact were incorrect or that he weighed the evidence incorrectly, and thus committed an error of law. The appellant must show that there was no evidence to support the conclusion that Adjudicator Richardson reached, or that Adjudicator Richardson clearly misapplied the evidence in material respects thereby erring in

law. Such an error would have to be apparent from the Adjudicator's reasons or Summary Report.

[39] Adjudicator Richardson further elaborated on his findings by stating that he was not persuaded that the claimant could reasonably place any reliance on the courier's statement that overnight delivery was possible, given the season, COVID, and that what was being shipped was perishable. Under such circumstances Adjudicator Richardson found that it was unreasonable of the claimant to expect that there was no risk of late delivery. This (arguably *obiter*) comment was made "in any event", and does not affect the correctness of his finding on the principal issue, the parties to the contract.

[40] As the respondent argued, it is not sufficient for JRS to point out reasons why it thinks that Adjudicator Richardson's findings of fact were wrong or incorrect. It must show that he had no evidence with which to arrive at his factual findings. The appellant has not established that the Adjudicator erred in law in making his findings. Therefore, I find no basis to disturb the Adjudicator's decision.

Conclusion

[41] For all the foregoing reasons, this appeal is dismissed. The respondent is awarded costs in the amount of $50.00 as requested by counsel pursuant to the regulations enacted under the *Small Claims Court Act*.

Hoskins, J.