SUPREME COURT OF NOVA SCOTIA
Citation: *Knowles v. Viking Ventures Ltd.*, 2023 NSSC 403

Date: 20231207
Docket: 526971
Registry: Kentville

Between:

Jeff Knowles

Appellant

v.

Viking Ventures Limited

Respondent

Decision Small Claims Court Appeal

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	December 7, 2023, in Kentville , Nova Scotia
Written Decision:	December 12, 2023
Counsel:	John Shanks and David Barry, for the Appellant
	G. Bernard Conway and Katerina Hirschfeld, for the Respondent

By the Court:

Introduction

[1] This is an appeal of a decision of a Small Claims Court Adjudicator. The central issues are whether the Adjudicator failed to apply the proper legal principles in (a) denying the claimant's request for an adjournment and (b) finding that the claim was filed beyond the two-year limitation period.

[2] Jeff Knowles hired Viking Ventures Limited to build a house. Mr. Knowles moved into the house in April of 2016. He had trouble with the new HVAC system after he moved in. He filed a Small Claims Court claim against Viking on May 26, 2023. The Small Claims Court hearing took place on August 21, 2023. The Adjudicator dismissed the claim. The Adjudicator did not provide written reasons.

[3] Mr. Knowles listed three grounds in his Notice of Appeal:

1. The Adjudicator erred in refusing his request for an adjournment.
2. The Adjudicator failed to correctly apply the legal test for determining the limitation period defence.
3. Because Mr. Knowles was not represented by a lawyer, the Adjudicator was obligated to provide him with information about the process and the rules of evidence that resulted in the exclusion of key evidence he intended to rely on.

[4] The Adjudicator filed a Summary Report in response to the Notice of Appeal, as required by s.32(4) of the *Small Claims Court Act*.

Adjournment Request

[5] In the Summary Report, the Adjudicator referred to a request for an adjournment made by Mr. Knowles during his cross-examination, and provided some context as follows:

- During the pre-trial conference on July 19, 2023, Mr. Knowles was self-represented and Viking was represented by Mr. Bernie Conway. Mr. Knowles confirmed that he was intending to represent himself at the hearing and that he planned to call two witnesses.
- The hearing was scheduled for August 21, 2023 to provide adequate time to subpoena any witnesses. The parties agreed on the date and time of the hearing.
- On August 18, 2023, Mr. Knowles sent an email, referring in part to the reluctance of HVAC companies to testify. However, Mr. Knowles did not request an adjournment of the August 21, 2023 hearing date.
- During the hearing, Mr. Knowles testified, but did not call any other witnesses.
- During his cross-examination, Mr. Knowles stated that he wanted to seek legal advice.

[6] The Adjudicator gave the following reasons in her Summary Report for denying the adjournment request:

> This Adjudicator explained that there are rules to be followed in Small Claims Court and that this should have been done in advance. It was not appropriate to halt the hearing for this purpose.

[7] In his factum filed on this appeal, Mr. Conway, on behalf of Viking, stated that Mr. Knowles was given the chance at the beginning of the hearing to seek an adjournment, and that Mr. Knowles asked for an adjournment twice during the course of his testimony, once during his direct examination and a second time during his cross-examination:

> …
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> s. Prior to the hearing's official start and while all parties were on the Zoom call, both the adjudicator and Mr. Conway identified that the Appellant had not brought any witnesses as previously planned. The Appellant confirmed that he would not call any witnesses during the hearing as he had originally represented.
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> t. Both the Adjudicator and Mr. Conway brought to the Appellant's attention that he could request an adjournment of the hearing prior to its commencement, to seek legal representation or advice and/or seek and to subpoena witnesses that he would likely require to present much of the evidence in his Book of Exhibits.
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> …
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> v. The Appellant made the conscious and informed decision to proceed with the hearing. He did not request an adjournment prior to the hearing's commencement and after he was advised of the difficulties he would face with presenting evidence that was otherwise inadmissible without calling an HVAC expert witness. …
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> w. The hearing went forward. The Appellant attempted to prove his case on the basis of his own testimony as he did not have any witnesses.

> x. During his direct evidence, the Appellant requested an adjournment so that he could seek legal counsel. The Adjudicator denied the Appellant's request.
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> …
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> z. As Mr. Conway was conducting his cross-examination, the Appellant interrupted to state to the adjudicator that he was requesting for a second time to adjourn the hearing to seek legal advice. The Adjudicator denied the Appellant's request and Mr. Conway continued his cross-examination.
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> …

[8] Mr. Knowles argued that I should not rely on the representations of Mr. Conway. However, as there is no transcript of Small Claims Court hearings, I must consider what the parties tell me about what happened at the hearing. See *Gerhardt v. Scotia Best Christmas Tree*, 2004 NSSC 053 at para.6. Mr. Conway and his client attended the hearing before the Adjudicator. Mr. Knowles did not dispute what Mr. Conway said happened at the hearing. Mr. Conway is an officer of the court and owes a duty of candour to the court. He is to be commended for alerting the court to the fact that there was another adjournment request made by Mr. Knowles. Based on his representations, I conclude that Mr. Knowles made two adjournment requests during the course of his evidence.

[9] In reviewing the Adjudicator's decision to refuse the adjournment requests, I must give deference to the exercise of her discretion, unless the Adjudicator erred

in principle or did not exercise her discretion judicially: *Moore v. Darlington*, 2012 NSCA 68 at para.5.

[10] The Nova Scotia Court of Appeal set out the legal principles governing adjournment requests in *Moore v. Darlington*, *supra* at paras.47-51, relying on an earlier decision in *Moore v. Economical Mutual Insurance*, 1999 NSCA 81. A judge is required to consider the following in determining an adjournment request:

1. the prejudice to the party requesting the adjournment, should the adjournment not be granted; and
2. the prejudice, if any, to the other party that would be caused by granting the adjournment.

[11] The judge may also consider the prejudice to the public of granting the adjournment. The judge must balance the respective interests of the parties as they relate to the interests of justice in securing a fair trial on the merits: *Moore v. Darlington, supra* at para.47 citing *Moore v. Economical*, *supra* at para.37.

[12] If the effect of refusing an adjournment is to force the party requesting the adjournment to proceed without legal counsel, the judge should take into account the importance of legal representation in conducting the balancing exercise: see *Moore v. Economical*, *supra* at para.36. Although there is no absolute right to counsel in civil cases, it is relevant that the request for an adjournment to retain counsel is not done for the purpose of delay: *ibid.* The judge should also consider

the impact of the refusal of the adjournment on the fairness of the hearing having regard, for example, to the complexity of the issues raised: *ibid*.

[13] Viking argues that the Adjudicator's reasons show that she balanced the respective interests of the parties. Viking also says that, had the adjournment request been granted, Mr. Knowles would not have been able to discuss his evidence with a lawyer as he was still under oath, and therefore he would not have been able to instruct and retain a lawyer. Moreover, Viking argues that, had the Adjudicator allowed the adjournment and permitted Mr. Knowles to discuss his evidence with a lawyer, a new hearing would have been required before a new adjudicator, causing prejudice to Viking.

[14] I respectfully disagree with the submissions of Viking. With respect to the second adjournment request mentioned by the Adjudicator, she did not demonstrate in the Summary Report that she balanced the respective interests of the parties as they related to the interests of justice in securing a fair hearing on the merits. The Adjudicator did not address the first adjournment request at all in her Summary Report.

[15] I disagree with the submission of Viking that, had the Adjudicator granted either one of his two requests to adjourn the hearing, it would have permitted Mr. Knowles to reopen his case. In neither instance had Mr. Knowles closed his case.

[16] There is no indication that Mr. Knowles' adjournment request was being made for the purpose of delay. As the claimant, who was seeking monetary damages, he would have had little, if anything, to gain from delay.

[17] Moreover, the impact of the refusal of the adjournment on the fairness of the hearing is evident when one considers the reasons of the Adjudicator for denying the claim, which were as follows:

> …
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> [11] Upon cross-examination the Appellant testified that he did not file a claim under the Atlantic Home warranty and that cost and performance were the competing considerations.
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> [12] The Appellant failed to call any HVAC witnesses to testify to the deficiencies of the installed system.
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> [13] The Appellant failed to file the claim within the two-year time limit, starting from the date he discovered he had a claim.
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> [14] In this case, the Appellant also failed to provide clear and convincing proof of this claim, and accordingly the appeal was dismissed with costs.

[18] Even if Mr. Knowles had been prohibited from discussing his testimony with a lawyer, he could have benefitted from an adjournment to seek legal advice on the following issues: (a) whether he should call evidence from expert witnesses to testify about the alleged deficiencies with the HVAC system, whether by subpoena or not; (b) what legal arguments to make in response to the limitation period defence; and (c) what legal arguments to make concerning the impact, if any, of the Atlantic Home warranty on his claim.

[19] I acknowledge that the Adjudicator and Mr. Conway advised Mr. Knowles before the hearing started that he could seek an adjournment to seek legal advice or representation and to subpoena witnesses. The Adjudicator could have taken this fact into account in balancing the interests of the parties.

[20] However, the reasons given by the Adjudicator do not allow me to conclude that she applied the appropriate legal principles when she refused Mr. Knowles' requests to adjourn the hearing. The failure to do the proper analysis, or to record it in the Summary Report, constitutes an error of law. See *Brett Motors Leasing v. Wellsford* 1999 CanLII 1121 (NSSC) at pp.6-7; *Cameron v. Morris*, 2006 NSSC 9 at para.40; and *Sable Offshore Energy Inc. v. Bingley*, 2003 NSSC 20 at para.31.

The *Limitation of Actions Act* Defence

[21] Under s.8(1) of the *Limitation of Actions Act*, a claim may not be brought after the earlier of (a) two years from the day on which the claim is discovered; and (b) fifteen years from the day on which the act or omission on which the claim is based occurred. It is the two-year limitation period that is the subject of this appeal.

[22] Under s.8(2) of the *Limitation of Actions Act*, a claim is discovered on the day on which the claimant first knew or ought reasonably to have known:

> (a) that the injury, loss or damage had occurred;
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
> (c) that the act or omission was that of the defendant; and
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[23] In his claim, Mr. Knowles referred to the following dates:

- **Within days of taking possession on April 22, 2016**: He noticed ineffective home heating and cooling and poor airflow and brought these issues to the attention of Viking.
- **July 17, 2016**: His mother sent an email outlining the issues with the HVAC system.
- **July, 2020**: He lost confidence in the subcontractor hired by Viking and sought HVAC services from another company.
- **July, 2020 to June 2021**: HVAC performance and airflow issues continued, service costs approached $6,000, and he decided that the HVAC system was defective and sought quotes to have it replaced.

- **In or after June of 2021**: Three quotes identified 2 key defects that were responsible for the HVAC issues: (1) the heat pump was too big for the home's needs and (2) the ductwork layout was flawed and the location and spacing of the branches was causing the poor airflow and thus poor heating and cooling.

[24] Mr. Knowles claimed that these two defects, discovered when he received three quotes in or after June of 2021, were latent defects and that he would not have known about them and could not reasonably have been expected to know about them. He claimed that these latent defects were the material facts giving rise to his claim against Viking in breach of contract. He sought $25,000 in damages from Viking, based on the costs to service the faulty heat pump and the cost to replace the heat pump and air handler and modify the ductwork.

[25] In its Defence, Viking claimed, in part, that:

- Mr. Knowles knew or ought to have known about any defects with the HVAC in 2016 and therefore the claim was barred pursuant to s.8(1) of the *Limitation of Actions Act*, S.N.S. 2014, c.35.

[26] In her Summary Report, the Adjudicator referred to evidence given by Mr. Knowles about the following dates:

- **2015**: Mr. Knowles contracted Viking to build his home.
- **April 2016**: Mr. Knowles moved into the new home.
- **July 2016**: Communications were exchanged referencing concerns with the performance of the air conditioning unit.

- Things were fine until **Christmas 2020**, and it was not until **June 2021** that Mr. Knowles decided to replace the system.

[27] In her Summary Report, the Adjudicator dealt with the *Limitation of Actions* defence briefly at para.13: "The Appellant failed to file the claim within the two-year time limit, starting from the date he discovered he had a claim."

[28] The Adjudicator did not identify the date on which she found that Mr. Knowles discovered that he had a claim. The Adjudicator did not refer to or discuss s.8(2) of the *Limitation of Actions Act*, or the four-part test in that section for determining when a claim is discovered. The reasons given by the Adjudicator do not allow me to conclude that she applied the appropriate legal principles in allowing the limitation period defence. For example, when did she find that Mr. Knowles first knew or ought reasonably to have known that the act or omission was that of Viking, and when did she find that Mr. Knowles first knew or ought reasonably to have known that the injury, loss or damage was sufficiently serious to warrant a proceeding? The failure to do the proper analysis, or to record it in the Summary Report, constitutes an error of law. See *Brett Motors Leasing*, *supra* at pp.6-7; *Cameron v. Morris*, *supra* at para.40 and *Sable v. Bingley*, *supra* at para.31.

Obligation to Explain Process and Rules of Evidence

[29] Given my conclusions on the first two grounds of appeal, it is not necessary for me to address the third ground.

Conclusion

[30] The appeal is allowed. The claim is sent back to the Small Claims Court for a new hearing before a different adjudicator. Counsel for Mr. Knowles is to prepare the draft Order.

[31] If the parties cannot agree on the issue of costs, I will receive written submissions within 30 calendar days of this decision.

Gatchalian, J.