SUPREME COURT OF YUKON

Citation: *Mainer v. Jepsen*, 2013 YKSC 112

Date: 20131107
S.C. No. 12-AP011
Registry: Whitehorse

Between:

BRENDA JEAN MAINER

Plaintiff

And

KIM BOESEN JEPSEN

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Brenda Jean Mainer	Appearing on her own behalf
Kim Boesen Jepsen	Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Mainer appeals a judgment in the Small Claims Court of Yukon dismissing her claim for $19,250 from Mr. Jepsen. Ms. Mainer claims that the amount is the balance owing from the sale of a 2004 Dodge Ram 3500 pickup truck ("the truck") in 2009 for an agreed price of $31,000.

[2] Mr. Jepsen agrees that the truck was appraised at a value of $31,000 but says the agreed price was $13,000 to be paid in bi-weekly installments of $250, which he claims has been paid.

[3] The trial judge decided that the parties were equally credible and dismissed Ms. Mainer's claim on the basis that she failed to establish her case on the balance of probabilities. The focus of this appeal is the treatment of hearsay evidence presented by Mr. Jepsen which was admitted and relied upon by the trial judge.

EVIDENCE AND REASONS AT TRIAL

[4] The parties agreed that in the spring of 2009, the truck was valued at $31,000. Ms. Mainer and her daughter also testified that $31,000 was the agreed-upon price of sale. In contrast, Mr. Jepsen gave evidence that the sale price was $13,000, and that he received a deal because of his then-friendly relationship with the Mainer family. In any event, Mr. Jepsen took possession of the truck and started paying bi-weekly installments of $250 in June 2009.

[5] Ms. Mainer testified that Mr. Jepsen had paid $11,750 in total when he stopped paying on February 24, 2011. Mr. Jepsen says he paid $13,000 before he stopped paying. The trial judge accepted Mr. Jepsen's evidence on this point.

[6] In support of Ms. Mainer's case, a Bill of Sale dated October 6, 2009 was entered as an exhibit. It stated a purchase price of $31,000 for the truck and was signed by Ms. Mainer but not Mr. Jepsen. Mr. Jepsen testified that the Bill of Sale was prepared for insurance purposes only and did not reflect the actual purchase price. He testified that the Bill of Sale was used to arrange insurance coverage in October 2009.

[7] Mr. Jepsen testified that he spoke to five different people subsequent to the agreement to buy the truck in June 2009 and told them what he paid for the truck. To back up this testimony, Mr. Jepsen filed five documents in the form of notes which are at the heart of this appeal:

1. A note dated May 2, 2012, from Leif Jepsen, his father, stating that he had a telephone conversation in the summer of 2009 with the defendant in which he was told that the defendant had purchased the truck for $13,000.
2. A note dated April 11, 2012, from Steve Jepsen, the defendant's brother, stating that he had a conversation with the defendant in November 2010 during their annual hunting trip, in which he was told that the defendant had purchased the truck for $13,000.
3. A note dated May 7, 2012, from Luke Wadley, a co-worker of the defendant in the summer of 2009, stating that he had numerous conversations with the defendant that summer in which the defendant advised him that he had purchased the truck for "a very good price that made it hard to turn down", even though he already had a truck.
4. A note dated April 27, 2012, from Jim Strelioff, a friend of the defendant, stating that he had a conversation with the defendant in the summer of 2009 in which the defendant bragged about purchasing the truck for $13,000.
5. A note dated May 7, 2012, from Geoff Fletcher, a friend of the defendant, stating that he asked the defendant what he had paid for the truck and being told that the purchase price was $13,000.

[8] There was some discussion during the trial about these notes being entered as exhibits. Ms. Mainer did not object to the notes being adduced as evidence, although I acknowledge that she has been self-represented throughout these proceedings. The trial judge also offered Ms. Mainer the opportunity to apply to cross-examine the authors of the notes but she declined to do so.

[9] The trial judge and Ms. Mainer had the following exchange about the hearsay documents:

> THE COURT: But they're going to – but then if you don't challenge it I'm going to accept his evidence that he told all these people these things. Whether that makes it a deal – I mean I could buy a truck for $100,000 and I could go to 10 people and – and within a week, and say "Hey I got this truck for $1,000." That doesn't make it true in and of itself, right?
> THE PLAINTIFF: Correct.
>
> …
>
> THE COURT: I mean his answer might be "no, this happened exactly when I said it happened; it happened in November 2010." So I – I don't want to push you into not exploring an avenue of cross-examination that you might want to take. If you're not going to dispute that he had a conversation with his brother at that point in time –
> THE PLAINTIFF: No
> THE COURT: -- if you're prepared to accept the evidence of Steve Jepsen that "Yeah, sure," he had this conversation with Kim in November 2010, "fine, he had it but I wasn't there."—
> THE PLAINTIFF: That's fine, I don't – I don't –
> THE COURT: Then you don't want to cross-examine and you're prepared to allow me to consider their evidence –
> THE PLAINTIFF: Yes.
> THE COURT: -- as being true for what they are saying is that –
> THE PLAINTIFF: True.
> THE COURT: -- he told them this at about this point in time.
> THE PLAINTIFF: Yes
> THE COURT: Because then – I mean it is probative, it has a value, right, and I'm not sure – I appreciate what you're saying because you're not – you don't believe that you have any ability to undermine the authenticity of what they're saying was said to them.
> THE PLAINTIFF: Right.
> THE COURT: You're prepared to accept that. All right. All right, then what we get to, they're admissible under the Act, even unsworn; you have the ability to apply for cross-examination but based on the fact that it's acknowledged that you weren't there and this was information that came solely from Kim to them.
> THE PLAINTIFF: Yes.

> THE COURT: I'll – I'll consider them as evidence as part of the defendant's case. …

[10] The trial judge concluded as follows in his Reasons for Judgment:

> [20] Based upon their testimony in court, there was little to choose between the witnesses that would assist in assessing their credibility. The demeanour of each witness was unremarkable.
>
> [21] While it does not accord with common sense that the Plaintiff would sell a $31,000.00 vehicle for $13,000.00, common sense is not the legal test. I must consider all the evidence to determine whether the Plaintiff has proven her case. This includes the evidence provided by the Defendant that he had told several individuals, including shortly after purchasing the Truck, that he had purchased it for $13,000.00. This evidence is uncontradicted and cannot be disregarded. This evidence supports the Defendant's position. The Defendant had bank statements supporting his version of events with respect to how he paid for the Truck and ceasing payments upon the $13,000.00 being paid. His version of events is equally capable of being believed.
>
> [22] I find that I cannot disbelieve the evidence of the Defendant or choose the evidence of the Plaintiff above that of the Defendant. As such, the Plaintiff has not discharged her burden and I dismiss her claim.

ISSUES

[11] There are three issues to be determined:

1. What is the standard of review to be applied in this appeal?
2. Did the trial judge err in admitting the hearsay evidence regarding what Mr. Jepsen had told others about the purchase price?
3. Did the trial judge commit a palpable and overriding error in the weight given to the hearsay evidence?

ANALYSIS

[12] There is no doubt that prior consistent statements are generally inadmissible in court, as they are considered to be self-serving, self-corroborative and superfluous. There are exceptions to this rule, however the exceptions often limit the use to which the evidence can be put. As noted by Rosenberg J.A. in *R. v. Curto,* 2008 ONCA 161, at para. 35:

> "…The probative value lies in the fact that the statement was made. The contents of the statement itself do not add to the probative value because, as I have said, mere repetition of a story on a prior occasion does not generally make the in-court description of the events any more credible or reliable. …"

[13] The use and weight to be given to prior consistent statements has long bedevilled court cases and was fully addressed in *R. v. Stirling*, 2008 SCC 10. In that case, Stirling was appealing his convictions following a fatal car accident on the ground that the trial judge improperly based his finding that Stirling was the driver on the prior consistent statements of a surviving passenger.

[14] Bastarache J. described the variety of language that is employed to describe the effect of a prior consistent statement on a witness' credibility such as "bolstering", "strengthening", rehabilitating", or "in support". He stated at paras. 11 and 12, that

> [11] … What is clear from all of these sources is that credibility is necessarily impacted - in a positive way - where admission of prior consistent statements removes a motive for fabrication. Although it would clearly be flawed reasoning to conclude that removal of this motive leads to a conclusion that the witness is telling the truth, it is permissible for this factor to be taken into account as part of the larger assessment of credibility.
>
> [12] … Further, while it would clearly be an error to conclude that because someone has been saying the same thing repeatedly their evidence is more likely to be correct, there is

> no error in finding that because there is no evidence that an individual has a motive to lie, their evidence is more likely to be honest.

[15] These cases indicate that the use of prior consistent statements generally remains limited in court proceedings, although evidence similar to that tendered by Mr. Jepsen can be taken into account "as part of the larger assessment of credibility". As well, in instances where such evidence is admitted in proceedings, it would likely not be through unsworn letters in the absence of the author. However, the Small Claims Court is different by virtue of its governing legislation, and the use of prior consistent statements and hearsay must specifically be considered in that context.

Issue 1: What is the standard of review to be applied in this appeal?

[16] This Court has a broad power of review in the sense that it can hear matters from the Small Claims Court as an appeal on the record or by way of a new trial in this Court. See *Wilkinson v. Watson Lake Motors Ltd*., 2010 YKSC 48.

[17] It is trite law to state that a court of appeal should not interfere with a trial judge's findings of fact unless there is a palpable and overriding error. This standard of review was revisited in *Housen v. Nikolaisen*, 2002 SCC 33, at great length because it is somewhat more complex than meets the eye. The Court took the opportunity in *Housen* to clarify the standard of review for four types of questions:

1. Questions of law;
2. Questions of fact;
3. Inferences of fact; and
4. Questions of mixed fact and law.

[18] On questions of law, the standard of review is correctness, which means that an appellate judge can replace the finding of the trial judge with his own.

[19] On questions of fact, the appellate court cannot review a finding of fact by a trial judge unless it can establish that the trial judge made “a palpable and overriding error.” This standard gives a high degree of deference to the role of the trial judge in findings of fact.

[20] Similarly, the standard of review for inferences of fact is whether the trial judge made a palpable and overriding error in coming to an overall factual conclusion based on accepted facts. In paras. 22 and 23 of *Housen*, the Court makes it clear that it is not the role of appellate courts to second-guess the weight applied to the various items of evidence and give its different opinion. In other words, an appellate court is not entitled to interfere merely because it takes a different view of the evidence.

[21] The fourth category, the relevant one for this appeal, is the standard of review for questions of mixed fact and law, which involves applying a legal standard to a set of facts. This is undoubtedly a difficult standard to determine as it engages both the correctness standard and the overriding and palpable error standard. In essence, the appellate court has to distinguish between the legal standard being applied, for which an error can be subject to a standard of review of correctness, and the lower court’s weighing of the evidence or interpreting the evidence which should not be overturned absent palpable and overriding error.

[22] In the appeal before me, both a legal standard and factual findings are in play. The legal standard is the use the trial judge made of hearsay evidence about Mr. Jepsen’s prior consistent statements. His factual findings, based on the weight that he placed on the various aspects of the evidence, are also at issue.

Issue 2: Did the trial judge err in admitting the hearsay evidence regarding what Mr. Jepsen had told others about the purchase price?

[23] The Small Claims Court of Yukon has jurisdiction in actions for the payment of money or the recovery of personal property, as long as the money or the value of the property does not exceed $25,000.

[24] The rules of evidence are relaxed pursuant to the *Small Claims Court Act*, R.S.Y. 2002, c. 204:

> *Hearing and determination of issues*
>
> 3 Subject to this Act and any other Act, the Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make any order that is considered just.
>
> …
>
> *Evidence*
>
> 7(1) Subject to subsections (2), (3), and (4), the Small Claims Court may admit as evidence at a hearing any oral testimony and any document or other thing relevant to the subject matter of the proceeding and may act on that evidence, but the court may exclude anything unduly repetitious.
>
> (2) Evidence under subsection (1) may be admitted as evidence whether or not
>
> (a) given or proven under oath or affirmation; or
>
> (b) admissible as evidence in any other court.
>
> (3) Nothing is admissible at a hearing
>
> (a) that would be inadmissible because of any privilege under the law of evidence; or
>
> (b) that is inadmissible under any other Act.
>
> (4) Subsection (1) is subject to the provisions of any Act expressly limiting the extent to which or the purposes for

> which any oral testimony, documents, or things may be admitted or used in evidence in any proceedings.
>
> (5) If the presiding judge is satisfied as to its authenticity, a copy of a document or any other thing may be admitted as evidence at a hearing. (my emphasis)

[25] There is no doubt that the Yukon Legislative Assembly intended that there be a more relaxed approach to evidence in Small Claims Court so that cases can be heard in a summary way, without jeopardizing overall trial fairness.

[26] This approach to evidence is not unusual in the small claims context. Indeed, s. 27 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, permits that court to admit and act upon any relevant oral testimony or document whether or not admissible in another court. In *Sathaseevan v. Suvara Travel Canada Inc.*, [1998] O.J. No. 1055 (Div. Ct), in the context of determining whether a travel agent had wrongly recorded a passenger's name on an airplane ticket, Lane J. said in para. 4:

> … While ordinarily one would approach a case giving more weight to direct evidence than to hearsay evidence, it was open to the Trial judge to prefer the hearsay evidence over the direct evidence and although he did not say so it appears probable that part of his reasoning was that there is nothing to indicate that the defendant actually remembered the very occasion in question. Be that as it may, it was quintessentially the job of the Trial judge to weigh the evidence and that is not a function which an appellate court ought to interfere with unless it is clear that the Trial judge proceeded upon some wrong principle. I don't see in any of this that he proceeded upon a wrong principle. He had the evidence that the plaintiff's name was given to the agent by a person who knew what it was; it was open to the trial judge to find that it was given correctly and recorded incorrectly, and that is what he found. (my emphasis)

[27] In British Columbia, the *Small Claims Act*, R.S.B.C. 1996, c. 430, also allows the admission of evidence not normally admissible in court. However, s. 16 requires that the evidence be "credible or trustworthy" as well as "relevant". Arguably, this language

approximates the necessity and reliability test required by the principled approach, although it sets a lower standard. Ball J. wrote in *Kal Inspection & Truck Repair Ltd. v. King,* 2013 BCSC 110, at para. 16:

> Section 16 has been interpreted on a number of occasions to require a provincial court judge to be mindful of first principles of admissibility. However, this section is designed to permit evidence not otherwise admissible under the laws of evidence, such as hearsay, to be admitted in a trial under the *Small Claims Act*. No authority was cited which would restrict a provincial court trial judge from admitting hearsay evidence at a trial. This section is consistent with s. 2 of the *Small Claims Act* which requires the proceedings in the Small Claims Court to be conducted and concluded in a just, speedy, and inexpensive manner. (my emphasis)

[28] In *Kal Inspection* the issue was whether the Small Claims Court could admit King's evidence that a dispatcher told him that he missed out on a truck run to Texas because of wrongful seizure of his truck, resulting in a damage award of $14,200. The Appeal Court found that the hearsay was properly admitted:

> This was a rational and reasonable conclusion based on the facts as found by the trial judge. I am satisfied that the admission of the advice of the dispatcher was clearly within the jurisdiction of the trial judge. No injustice was created by the admission of that evidence on the whole of the facts. I will not give effect to this ground of appeal.

[29] At least one jurisdiction has imposed a relaxed form of the principled approach, in the absence of the statutory direction given in B.C. In *Morris v. Cameron*, 2006 NSSC 9, LeBlanc J. discussed the proper use of various vehicle appraisals in the adjudicator's findings of fact. He sated the following at para. 25:

> The evidence of the appraisals unquestionably amounts to hearsay. The documents were not under oath, were prepared by individuals who were not available for cross-examination and were adduced for their accuracy. In recent years the Supreme Court of Canada has adjusted the law of hearsay evidence by means of the "principled approach"

> developed in R. v. Khan, [1990] 2 S.C.R. 531 and R. v. Smith, [1992] 2 S.C.R. 915 and R. v. Starr, [2000] 2 S.C.R. 144. Hearsay may now be admissible on the basis of the principled approach, which requires consideration of its "necessity and reliability", even where it does not fall under an existing hearsay exception. While acknowledging the relaxed rules of evidence in Small Claims Court, I believe that the principled approach must apply, in a relaxed form, in order to determine whether hearsay evidence that a party seeks to adduce before an adjudicator meets the threshold requirement of reliability, and whether it is necessary to admit the evidence in order to prove a fact in issue. (my emphasis)

[30] In other words, LeBlanc J. was of the view that the acceptance of hearsay should still be subject to the principle of necessity and reliability, but in a relaxed form.

[31] In my view, the trial judges in the Small Claims Court of Yukon, while under an obligation to remain mindful of the general principles of admissibility, are empowered to admit any oral evidence or document so long as it is relevant and not prohibited by any Act. This approach does not require an analysis of necessity and reliability to admit hearsay evidence, but attention is still required to ensure reliability and fairness.

[32] I conclude, therefore, that the trial judge was correct and did not err in admitting the evidence.

Issue 3: Did the trial judge commit a palpable and overriding error in the weight given to the hearsay evidence?

[33] In my view, the trial judge correctly applied the standard of proof required in a civil case when he decided that he could not disbelieve the evidence of Mr. Jepsen or choose the evidence of Ms. Mainer above that of Mr. Jepsen, leaving the plaintiff in the position of not having discharged her burden of proof on the balance of probabilities. He is permitted to admit hearsay evidence so long as it is relevant.

[34] In the case before me, the trial judge accepted the hearsay evidence in the five notes of the third parties. Had these witnesses testified, these statements would generally be admissible for the use of rebutting an allegation of fabrication, or, as in *Stirling*, to be taken into account as part of the larger assessment of credibility. I do not find that the judge erred in so using them. While the trial judge did not overtly refer to the requirements of necessity and reliability, he did not consider the evidence lightly and went to great lengths to give Ms. Mainer an opportunity to cross-examine and explained how he would use the evidence. In any event, I am not satisfied that the principled approach to hearsay should be applied rigorously in Small Claims Court so long as an injustice is not caused and I am satisfied that there is none here.

[35] In my view, the intention behind ss. 3 and 7 of the *Small Claims Court Act* is to permit a summary procedure that gives the trial judge a great deal of flexibility in coming to a just result. The trial judge clearly stated that he considered the documents probative and no injustice resulted in their use as supporting the evidence of Mr. Jepsen.

[36] There is no doubt that trial judges should be careful to ensure that the focus of the trial is on what was said at the time of an agreement and that the trial should not be diverted into lengthy considerations of what was said to third parties after the event. If both parties called oral evidence on what they said to third parties, the summary procedure of the Small Claims Court could soon be diverted and unduly lengthened.

[37] In the case at bar, the trial judge has correctly imposed the onus of proof on the plaintiff. While I might reach a different conclusion on the evidence about whether that onus was met, that would simply be my opinion on the appropriate weight to be given to evidence that the trial judge was clearly in a better position to assess.

[38] While it may be that Ms. Mainer would have acted differently with respect to the proffered letters had she had legal counsel to advise her during the Small Claims Court trial, that is not a sufficient reason to set aside the judgment in this case and send the matter back for a new trial.

[39] I conclude that there is no palpable and overriding error in the weight given by the trial judge to the hearsay evidence.

[40] Finally, it is open to this Court to order a new trial, pursuant to s. 9 of the *Act*. I repeat the view I stated in *Wilkinson v. Watson Lake Motors,* cited above, that there is good reason to have finality and new trials should be granted sparingly unless there are special circumstances (paras. 25 – 26). I am not satisfied that this is an appropriate case to order a new trial in this Court.

CONCLUSION

[41] The appeal is dismissed and there will be no order as to costs.

VEALE J.