IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: *Wilson v. Aviva*, 2015 NSSM 19

Claim: SCY No. 437387
Registry: Yarmouth

Between:

GEORGE WILSON and SHERISSE DOUCETTE

Claimant

– and –

AVIVA

Defendant

Adjudicator: Andrew S. Nickerson, QC

Heard: May 21, 2015

Decision: June 2, 2015

Appearances: The Claimants, self-represented
Justin D. Morrison, for the Defendant

FACTS

[1] The parties agree that the plaintiffs are the owners and occupiers of residential property at 24 Queen Street in the Town of Yarmouth. The plaintiffs' property was damaged by wind on March 26, 2014, which necessitated repairs to the roof, interior drywall and siding. The parties have settled the matters relating to the roof and the interior but are not in agreement with respect to the repairs necessary to the siding.

[2] There is no real essential difference between the parties in respect of facts. I will therefore not review the evidence given at trial in detail as I would if I had to make a credibility finding. I will set out the clearly undisputed facts and only reference specific evidence as necessary to this decision.

[3] The parties agree that the siding on the house is approximately 20 years old and no longer available commercially or otherwise. The parties do not dispute that reasonable

and diligent efforts were made to obtain siding that would match the existing siding in width, color and texture. They further agree that matching siding is no longer available in the marketplace.

[4] There does not appear to be any dispute between the parties that the substantial damage to the siding occurred on the upper part of the gable end of one part of the house and also on another gable end where a smaller roof meets the main part of the house. The damage in the latter is only to one side of that gable end. The defendant, through its contractors, was able to find siding which was of the same width as the original but could not match it in color and texture. Both the old and the new proposed siding are generally white in color, however from the photographs provided to this court in Exhibit 6, the shade is noticeably different. The existing siding appears to have a slightly grayer hue. The photographs show only a small piece of the new proposed siding and I find it quite difficult to envision how much difference would be noticeable if the entire gable end wall were replaced with the new siding. Undoubtedly, there would be noticeable difference but it is not entirely clear to me how much difference there would be after full installation. I can see in the photographs a difference in texture but I am unable to determine how noticeable that would be, upon completion of the work proposed by the defendant.

[5] The parties also agree that the defendant proposed reconstruction whereby the siding on one entire gable would be replaced with the new siding, which would allow the old siding removed from that end to be used to repair the other areas of the house. This would result in matching siding on all sides of the house with the exception of the one gable end.

[6] The plaintiff's essential position and evidence is that the defendant should be obligated to replace the siding on the entire house as opposed to the repairs proposed by the defendant.

[7] The plaintiff testified as to various items of correspondence between himself and the insurer and various offers back and forth. I do not consider this relevant to my consideration as this is simply the normal discussion and negotiation in matters of this

nature as nothing in the correspondence can be considered to have bound either party to an agreed resolution.

[8] Mr. Wilson, testifying for the plaintiff, gave evidence with respect to various small items of damage on the siding. It was suggested to him that some of these damages were not as a result of the windstorm. In a few cases he agreed but in the majority of cases, his evidence was that the damage was in fact due to the wind. Mr. Wilson agreed in cross examination that the repair proposed by the defendant would result in all areas of the house being repaired with siding which matches the existing siding except for one gable end.

[9] Mr. Wilson's evidence was that he had great concerns that with one side of his house looking different than the rest of it his house would be devalued. He suggested the only way to properly repair the property would be to replace the siding on the entire house.

[10] Mr. Wilson was cross examined and admitted that some of the windows in the house were older and some newer and a different style. Mr. Wilson also admitted in cross examination that he had another building on the property which had more than one type of siding on it. In that case it was wooden shakes and vinyl siding. Mr. Wilson also noted that sufficient good old siding could be removed from his house and be used to repair all areas with the exception of the gable end wall.

[11] Mr. Paul Rouleau, who is a senior adjuster for the defendant, gave evidence. He introduced the policy (Exhibit 7 Tab 1) between the parties which governs the determination of this case. He also introduced the report of the repair contractor First On-Site (Exhibit 7 Tab 6) which describes the repair proposed by the defendant and states the value of that repair to be $3584.78.

[12] I will not review the rest of Mr. Rouleau's evidence as it is essentially hearsay being merely comments on the policy and the First On-Site report. I find that Mr. Rouleau is qualified to give evidence confirming that the document provided is in fact the policy between the parties. However the policy speaks for itself and it is the court who must

interpret the policy. I therefore place no weight on Mr. Rouleau's interpretation of the policy.

[13] Mr. Rouleau is not the author of the First On-Site report and therefore his evidence submitting it to the court is technically hearsay. However, on the authority of **Towle v. Samad, 2013 NSSC 260** I may admit this evidence as I consider it to be reliable. **Towle v. Samad** establishes that I do not have to consider necessity in order to apply the principled exception to the hearsay rule in matters before the Small Claims Court. Again the report is the evidence that I must rely on and not Mr. Rouleau's comments upon it.

ISSUES

[14] What is the interpretation of the policy governing the relationship between the parties and what damage award should be granted based on the policy interpretation.

SUBMISSIONS

[15] The defendant submits and relies on various provisions of the policy. In particular, the following sections:

> **"Replacement cost"** means the cost, on the date of the loss or damage, of the lower of:
>
> 1. repairing the property with materials of similar kind and quality; or
>
> 2. new articles of similar kind, quality and usefulness;
>
> without any deduction for depreciation. *[my emphasis]*
>
> **Dwelling and Detached Private Structures**
>
> If you repair or replace the damaged or destroyed building on the same location with a building of the same occupancy constructed with materials of similar quality within a reasonable time after the damage we will pay the cost of repairs or replacement (whichever is less) without deduction for depreciation. *[my emphasis]*
>
> If you do not repair or replace we will pay the actual cash value of the damage on the date of occurrence.

Parts

In the case of loss or damage to any part of the insured property consisting, when complete for use, of several parts, we will not pay for more than the insured value of the part lost or damaged, including the cost of installation.

[16] The defendant says that pursuant to the “Parts” clause it is only responsible to repair that part of the property, which is damaged and is therefore not responsible to replace the siding on the entire house.

[17] The defendant submits that the policy wording stating "similar kind, quality and usefulness” and stating “materials of similar quality” should not be equated with "identical".

[18] The defendant submits for the court's consideration **Pearson v. Guardian Insurance Company [1996] B.C.J. No. 2225** a decision of the British Columbia Provincial Court where the court did not replace the entire siding on a house in similar circumstances. This case did allow a modest award for devaluation.

[19] The defendant points out that the defendant has agreed to waive the deductible of $1000 and states that the plaintiff has not filed a proof loss.

[20] The defendant argues that because the plaintiff had different kinds of windows on his house and used more than one type of siding on another building on his property that this court should infer that Mr. Wilson cannot complain that the siding in the proposed repair is insufficient.

[21] The defendant further argues that should the court award a greater amount than that proposed by the defendant, the court must take into account betterment.

[22] The plaintiff reiterates the position taken during his evidence, which was that his house would be devalued by having different colored siding on one wall. He argues that the only solution is to replace the siding on the entire house. He says that the wording in the policy says that the repair must be done "without depreciation" and that by not replacing the entire siding the value of his house is depreciated.

ANALYSIS AND DECISION.

[23] I start by saying that the policy under consideration is an indemnity policy. This means that it pays the insureds actual loss and, subject to the policy terms, and is intended to place the insureds in the position they would have been had the loss not occurred. It is not in dispute that the damage at issue was caused by windstorm which is listed in the policy as, and which the parties agree is, an insured peril.

[24] The waiver of the deductible does not influence my decision. This appeared to be offered and accepted early on in the proceedings, and I cannot see that at this stage it has any relevance. It would appear to me to be an act of bad faith if the insurance company, having made this representation, would now withdraw it simply on the basis that there is a contest as to the appropriate level of damages. Mr. Morrison did not urge this upon me and agreed that the waiver of the deductible would stand, but that does not change the analysis of the balance of the case.

[25] Neither do I place any weight on the fact that no proof of loss was filed. There is nothing before me to indicate that the defendant was denying the claim on that basis. I take judicial notice that it is quite common for a formal proof of loss to be filed at the end of negotiations not at the beginning. The defendant may be entitled to insist on the filing of a formal proof of loss before the actual delivery of payment, but I do not believe it affects the matter before this court, and I do not address that question.

[26] Equally, I do not consider the fact that the plaintiff had another building with more than one kind of siding, or that the plaintiff had different styles of windows or doors on his house, is determinative of anything. He is entitled to maintain his houses as he sees fit.

[27] The relationship between the parties depends entirely on the contract between them. The jurisdiction of the Small Claims Court is to make decisions with respect to the interpretation of that contract. I am sympathetic to the plaintiff's position and the reasoning he uses, however, my authority does not extend to any other considerations no matter how valid they may be in another context. What I must determine is based

entirely upon the contents and wording of the policy of insurance under which the plaintiff's claim is made.

[28] I cannot accept the plaintiff's argument that the wording "without depreciation" in the Replacement Cost clause can be applied in a way which he proposes. I interpret the clause to mean that the insurer cannot claim betterment if they replace older material with newer material. My interpretation equally applies to the insurer and results in the insurer not being able to claim betterment. That phrase simply means that when old is replaced with new that the insurer cannot claim that it should pay less because an insured is getting new and only lost old. I cannot see how it can extend any further.

[29] I agree that the policy only requires the insurer to repair those parts of the house, which were damaged. However, this is not always the end of the matter because, if in repairing a part the insurer had of necessity to repair something somewhat greater than the part that was damaged because it could not otherwise be repaired, this clause would not allow the insurer to escape liability. My conclusion is that the insurer would have to do whatever was necessary to repair that part, but in this case, I conclude that a repair meeting the terms of the policy can be effected by repairing only that part of the house where the siding was damaged.

[30] The locations of damage can be repaired. The policy provides that the repair must be done with materials of "similar kind and quality". This is the extent of the insurer's obligation under the policy as to repair. It is certainly true that identical siding cannot be found. I find that the parties have both diligently searched for the closest match available. Observing the photographs in Exhibit 6, I conclude that the siding offered is indeed "similar" in kind. There was no evidence or submission that the “quality” was inferior. There may be cases where the difference is so great that a court could conclude that the entire siding had to be replaced, but I do not think that the terms of the policy extend that far in the case before me.

[31] This is an indemnity policy so it does cover all non-excluded losses arising from the insured peril. I am satisfied that upon completion of the repair, there remains a depreciation of the value of the Plaintiff's home that is not compensated by the

Defendant's proposal. **Pearson v. Guardian Insurance Company** adopted a similar reasoning and concluded that there was a diminution in value of the Plaintiffs house due to the fact that the siding did not match. In that case the Court awarded roughly $1000 for the damage to the Plaintiff caused by this reduction in value.

[32] I am not bound by **Pearson v. Guardian Insurance Company** and am not obliged to follow its reasoning, but I do find the reasons set out in that case to very much align with my own analysis. I arrive at the same conclusion as the British Columbia Provincial Court that what is offered in respect of the repair meets the terms of policy.

[33] The word "similar" must be given some meaning and it cannot mean "identical". Each case must turn on the specific facts but I don't think that an independent observer could say based on the photographs in Exhibit 6 that the two sidings are not "similar". Our Courts of Appeal have made it abundantly clear that words in contracts must be given their plain and ordinary meaning. As will be seen below, I am not unsympathetic to the plaintiffs' argument but after considerable reflection I just cannot reconcile the plaintiff's position with the policy wording and the legal principles that I must follow.

[34] The only evidence I have of value is that contained in the First On-Site report. I therefore will award the sum of $3,584.78 to the plaintiff. However that does not end the matter. The Plaintiff's loss is more than that because that award does not take into account the reduction in value of the Plaintiff's property.

[35] I do believe that the fact of having one wall with different siding would have the effect of devaluing the plaintiff's home and that is a loss compensable in an indemnity policy. I do not have any evidence of the degree to which that would be, but I am satisfied that it would be as much, if not more, than the roughly $1000 awarded by the British Columbia Provincial Court.

[36] Here I must explain, particularly for the plaintiffs benefit, the legal concept of general damages. Courts award damages which can be specifically quantified and courts also grant damages which are of much more general nature and cannot be specifically quantified. Perhaps the most common example of general damages is the

damages granted in personal injury cases for pain and suffering. Courts also often award damages for other kinds of things in respect of which the evidence does not allow specific calculation.

[37] An award in respect of a reduction of the value of the plaintiff's house, where I do not have evidence from an appraiser or real estate agent or similar knowledgeable witness as to the amount of depreciation, would unquestionably fall under the heading of general damages. When I am forced to select an amount without evidence to calculate it, that is essentially what the term “general damages” means. The Small Claims Court Act specifically limits the amount of general damages, which I am allowed to award in the Small Claims Court to a maximum of $100. Section 10 of the Small Claims Court Act reads as follows:

> 10 Notwithstanding Section 9, no claim may be made under this Act
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>
> (e) for general damages in excess of one hundred dollars.

[38] I am satisfied that the repair proposed by the defendant would indeed result in a loss substantially in excess of the maximum amount that I am permitted to award. How much that figure would be is somewhat difficult to determine but I am satisfied that it would be substantially greater than the maximum I can award.

[39] In this case, the maximum on general damages, in my respectful view, does create an injustice but I am powerless to provide a remedy. The Legislature put that limit on this court’s jurisdiction and I do not have authority to go beyond that limit regardless of the fact that I regard the result to be unfair to the Plaintiff.

[40] I therefore will award the plaintiff the maximum I am permitted to grant in the amount of $100. If I were not constrained by this limit, I would have considered this matter much further and would have awarded an amount substantially greater than $100.

[41] The plaintiff has achieved success, albeit minimal in the practical result, which is greater than the offer of the defendant. I therefore will award the plaintiff the filing fee in the small claims court. No cost of service was sought or proven.

[42] Thus in summary, it will be ordered that the defendant paid to the plaintiff:

Cost of repair	$3,584.78
General damage for depreciation	$ 100.00
Costs	$ 193.55
Total	$3,878.33

Dated at Yarmouth this 2nd day of June, 2015.

Andrew S. Nickerson Q.C., Adjudicator