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IN THE SMALL CLAIMS COURT
OF NOVA SCOTIA

Cite as: Nepogodin v. Austin Contracting Ltd., 2008 NSSM 17

Claim No. 286647

Between:

ANDREW NEPOGODIN

CLAIMANT

- and –

AUSTIN CONTRACTING LTD.

DEFENDANT

AND

Claim No. 287914

Between:

AUSTIN CONTRACTING LTD.

CLAIMANT

- and –

HALIFAX INSULATORS LIMITED

DEFENDANT

AND

Claim No. 288752

Between:

HALIFAX INSULATORS LIMITED

CLAIMANT

- and –

JD IRVING LIMITED
cob KENT BUILDING SUPPLIES

DEFENDANT

AND

Claim No. 284374

Between:

ANDREW NEPOGODIN

CLAIMANT

- and –

AUSTIN CONTRACTING LTD.

DEFENDANT

DECISION

Adjudicator: David T.R. Parker

Heard: November 27, 2007; February 12 , 13 and 14, 2008

Decision: April 2, 2008

Counsel: The Claimant was assisted by Albert W. Njeim M.Eng., P.Eng., CCEP
Joseph Cooper Q.C. represented the Defendant Halifax Insulators Limited.
Mark Freeman represented the Defendant J. D. Irving Ltd.
Cory J. Withrow represented the Defendant Austin Contracting Ltd.

This matter came before the Small Claims Court in Halifax on November 27, 2007; February 12, 13 and 14, 2008.

The proceedings involved four separate actions which, with the consent of the parties and pursuant to section 25 of the *Small Claims Court Act*, shall be dealt with together.

Summary of the Four Actions:

1. SCCH # 286647--- Andrew Nepogodin [" Andrew"] commenced an action against Austin Contracting Limited [" Austin"] as a result of a strong chemical odour coming out of the wall in the recreation room of his home built by Austin.

2. SCCH #287914--- As a result of the above action, Austin commenced an action against Halifax Insulators Limited [" Halifax Insulators"] who were subcontracted by Austin to install the insulation in the home of Andrew.

3. SCCH #288752--- As a result of the above action, Halifax Insulators commenced an action against J. D. Irving Limited [" Irving"] carrying on business as Kent Building Supplies, claiming Irving is responsible for supplying faulty materials during the construction of the Andrew House.

4. SCCH #284374--- The fourth action is an action by Andrew against Austin for an improperly installed roof by Austin

At the beginning of the trial Andrew made a motion requesting the Court hear the "leaking roof" action first and that action to be followed by the action involving the

odour problem. As the latter action involved the other parties, that is, Halifax Insulators and Irving as well as Austin, and all of their witnesses were present and ready to proceed, Andrew's motion was denied. As I stated earlier, all these actions were to be heard together and it was justifiable to hear the issue involving all the parties rather than the leaking roof issue which only involved Austin and Andrew.

The strong chemical odour action against Austin sought a total claim against Austin of an amount in excess of $37,000.00 which the Claimant agreed to reduce to $25,000.00 to fit within the monetary jurisdiction of the Small Claims Court. Following the hearing of the chemical odour action and the two other actions which sprang from it, the fourth action pertaining to the leaking roof commenced.

Counsel for the Defendant Austin made a motion that the leaking roof claim should not proceed and referred to section 13 of *the Small Claims Court Act* which reads as follows:

> "**Division of Claim**
>
> **s.13 A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the Court. R.S., c. 430, s. 13. "**

Counsel, Corey Withrow, argued that this is the same contract, same parties, and there are simply different deficiencies, that is one is dealing with an odour problem and the other is dealing with a leaking roof problem. Mr. Withrow contended that if this were allowed then next month or sometime in the future the Claimant could make a claim for another deficiency and on and on it would go. To support this contention Counsel made reference to two cases.

First Case:

In the ***Imperial Life Financial v. Langille*** 166 NSR (2d) 46 reference was made to the following passages:

> **"1 MacDONALD J. (orally):— This application raises a very interesting access to justice issue. Can an insured's claim for disability benefits be prosecuted in Small Claims Court on a piecemeal basis so as not to exceed that Court's monetary jurisdiction?**
>
> **2 The facts are quite simple. The applicant issued a policy of insurance to the respondent. It provided for disability benefits of $796.00 monthly in the event of the respondent becoming disabled as defined in the policy. The respondent became disabled and claimed accordingly. The applicant paid the benefits for almost two years, up to and including June of this year. At that time, the applicant ceased paying because it felt that the respondent was no longer disabled according to the terms of the policy. In October of this year, the respondent commenced a Small Claims Court action claiming $3,980.00 representing the five months from July to November of 1997."**

AND

> **11 In this case the amount at stake is not modest but very high. Its potential value far exceeds the monetary limit of the Small Claims Court. To circumvent the discovery process by allowing claims like this to go forward on a piecemeal basis in Small Claims Court would represent a potential disservice to both sides and would be contrary to the stated purpose of the *Small Claims Court Act.***
>
> **12 Therefore, I feel that to allow this claim to proceed in Small Claims Court would be an abuse of that Court's process. In reaching this conclusion, I am persuaded by the reasoning of Saunders, J., in *Paul Revere Life Insurance Company v. Herbin* (1996), 149 N.S.R. (2d) 200 In that case my learned colleague addressed an almost identical factual situation seeking identical relief. Beginning at paragraph 20, the Learned Trial Judge concluded:**

- **I accept counsel's submission on behalf of the insurer that the very rationale for the establishment of the Small Claims Court was that small claims would be quickly and inexpensively adjudicated. Naturally, such claims are heard without access to the usual pretrial procedures, productions, discovery of parties and discovery of experts, as would be accommodated under our own Civil Procedure Rules.**

- **This case is anything but a small claim. Having found as I do that there is a real potential for this claim to lead to repeated and identically issue-based claims approaching half a million dollars, it seems to me that the Legislature could hardly have intended the statute to apply to cases such as this.**

And continuing at paragraph 24, he states:

- **I also agree with the submission of counsel for the insurer that a nice question involving res judicata arises here. I have been referred to the judgment of Roscoe, J. (as she then was) in Big Wheels Transport and Leasing Ltd. v. Hanson et al. (1990), 102 N.S.R. (2d) 371 ; 279 A.P.R. 371 (T.D.). Based on the conclusions she came to in that case, it may well be that if the Small Claims Court adjudicator found that Mr. Herbin were totally disabled, then in subsequent proceedings, Herbin might well argue that the issue of his disability had been resolved, and barring any change in his medical condition, that the issue having been decided, was res judicata. The result and consequences of such a finding to the defendant insurer would be, to say the least, profound."**

Second Case

In ***Paul Revere Life Insurance Co. v. Harbin*** [1996] N.S.J. No. 88, Counsel referred to paragraph 7, 10, 18, 22 and 23 which read as follows:

"**7 His present claim advanced in the Small Claims Court is confined to those benefits said to be owing from July 12, 1995, when the payments ceased, through to November 24, 1995, that is, the day following the**

commencement of his action in the Small Claims Court. The total monies said to be owing came to $5,593.40 and Mr. Herbin then waived the difference of $593.40 so as to bring his claim within the monetary jurisdiction of the Small Claims Court.

10 In considering the issues raised in this motion, it is not simply a question of the Small Claims Court's monetary jurisdiction to consider the case. I think this court must look at the type of claim, this is, the rationale for the creation of the Small Claims Court in the first place, and, as in any request for a stay of proceedings, must consider and weigh the prejudice to each side.

18 The situation before me now is entirely different. I accept Ms. Smith's submission that there is a real likelihood here of as many as 69 separate applications by Mr. Herbin before the Small Claims Court tribunal, with a potential exposure of almost half a million dollars. All of that could well lead to contradictory decisions from different adjudicators on what would arguably be the same material evidence, to say nothing of the added and continuing expense of having to relitigate the same issues, with perhaps the same testimony, repeated by the same witnesses, including experts every time the matter was heard in the Small Claims Court.

22 I also refer to s.9 of the Act which provides that the Court lacks jurisdiction to deal with any claim exceeding $5,000.00. As well, s.13 of the Act states,

- **A claim may not be divided into two or more claims for the purpose of bringing it within the jurisdiction of the court.**

Notwithstanding the fact that Mr. Herbin has not yet decided what his next step will be; given the result, whatever it might be, of the Small Claims Court hearing on February 5, 1996, I conclude that the reality is that this would be simply one in a long line of claims advanced by the plaintiff pursuant to the terms of his insurance contract.

23 Ms. Smith's analogy is apt when she suggested that if this were a wrongful dismissal case and someone were seeking damages in lieu of notice for a period of 12 months, this Court would not permit the break up of such a claim into 12 separate claims each to be adjudicated in the Small Claims Court."

The Claimant Andrew said he simply wanted justice. I then asked Andrew if there was a reason for separating both claims and his response was that he started the odour claim in the Supreme Court of Nova Scotia and, due to financial burdens of carrying the case forward in that court coupled with the advice of Counsel, he decided to transfer to the Small Claims Court. The leaking roof claim was already started in the Small Claims Court and, according to the Claimant; he was told the two claims could be heard at the same time.

I asked the Claimant if he was prepared to accept that the total amount of two claims would never be more than $25,000.00. In other words, if he would be prepared to combine both deficiencies and reduce the global amount of his claims to $25,000.00. The Claimant responded affirmatively.

Section 13 of the *Small Claims Court Act* simply refers to jurisdiction, it does not specify monetary jurisdiction; however, presumably it encompasses that situation. In this case the Claimant advised the Court that the total claim amount for roof and odour would be reduced to $25,000.00. Therefore the purpose of having two claims in this case was not to obtain an amount in excess of the $25,000.00 limit. The purpose was to determine if Austin was responsible for these deficiencies. The Claimant's approach was that he was not concerned with money but he simply wanted the truth to come out.

In this particular case I will not grant Counsel Withrow's motion as a claim for deficiencies was not to divide the claim into two claims to bring it within the monetary

jurisdiction of this court.

Summary of Facts.

In May of 2006, the Claimant purchased a newly constructed home from Austin. On November 22, 2006, the Claimant noticed a strong chemical odour emanating from the recreational room. The Claimant contacted the defendant Austin about the problem and Maritime Testing [1985] Limited was sent to determine what exactly was the problem. On November 23, 2006, Maritime Testing concluded that there were high concentrations of xylene and ethyl benzene in the air samples taken from the wall cavity. It determined that it was doubtful that it was a construction issue and suspected that someone, either vandals or the homeowner, poured chemicals [paint thinner] down the drain at the back of the house. The report of Maritime Testing reads in part as follows:

"The data indicate that the odour is almost entirely that of xylene and ethyl benzene, both common constituents of paint thinners and similar solvents. There was no naphthalene as I had thought, ruling out camping gas a source of the problem.

Concentrations of these chemicals were very high[total 990 mg/m3] and efforts to remove them from the air are needed.

I suspect that somebody has poured paint thinner and down the drain at the back of the house that serves the landing to the basement door. Since this is not connected to any drainage system, the chemical has simply gone under the house around the footings explaining what the odour seems to be originating in the wall cavity. Efforts may be required to address the contamination in the soil under the house.

It is very doubtful if this is related to any construction issue. It may be related to vandalism or actions of the homeowner. There is clearly a stain around the drain that indicates that a solvent of some sort was poured there."

The Claimant then contacted its insurer, ING Insurance, who sent CBL Environmental Ltd. [" CBL"] to investigate. On December 16, 2006, Albert W. Njeim M.Eng., P.Eng., CCEP produced a report for ING Insurance. The report of Mr. Njeim in short concluded that the source of the fumes or chemical odour was not from paint thinner or chemicals being dumped in the outside drain as concluded by Maritime Testing, but instead the source was the acoustic sealant used on the vapor barrier. Mr. Njeim recommended the recreational room area be sealed off and that mechanical aeration be employed that would speed up the process of expunging the odourous air.

Analysis:

Mr. Njeim was a very credible witness notwithstanding he, in effect, was the Claimant's acknowledged advocate. There is no doubt that the chemical odour came from the sealant that was used in putting up the vapor barrier on the outside of the insulation and the inside of the gyprock.

There are three problems which the Claimant must overcome and one is referenced to specifically by Mr. Njeim in his recommendations, in particular number six:

> **"The owners [the Claimant] are advised to contact and retain qualified or specialized individuals who may be able to access the use of this product to determine whether the acoustic product was used properly or whether there was a construction flaw in the design of the wall itself that resulted in the fumes diffusing on the inside"**

The only credible information I have before me that answers these questions was provided by the installers of the product. The evidence was clear and not in refute, the method of application was within the standards employed on several styles and homes and the construction was approved by the Municipality's building inspectors. The evidence was that in thousands of homes where vapor barriers were put in place and this acoustic sealant was used, there has never been a problem.

I cannot conclude on the evidence that is before this Court, based on the civil standard, that there was poor or unacceptable workmanship.

Justice Leblanc in ***Flynn v. Halifax*** [2003] NSJ No. 483 at paragraph 102 referenced ***Markland Associated Limited v. Lohnes*** (1973) 11, NSR (2d) 181 and ***Girroir v. Cameron*** (1999) 176 NSR (2d) 275 and concluded:

> **"Certain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good and workmanlike manner, the materials and work, when completed, must be fit for their intended purposes, and the work must be completed without undue delay"**

As a result of hearing from the subcontractor who used the acoustic sealant and had done so throughout his lengthy career, and the company Halifax Insulators, the sealant was of proper quality. I have already discussed the application of the sealant and the application of the vapor barrier and there is no evidence to conclude that the work was not performed in a workmanlike manner. The question remains was the material, in this case the acoustic sealant, fit for the intended purpose. The only purpose of the sealant that I have before me was that the sealant was intended to seal the vapor barrier when it was put into the home.

The Claimant in his pleadings stated a claim is for the fact that the Defendant [Austin] failed to comply the requirement stated in the purchase and sale agreement that the house must be suitable for living.. When a house is constructed there is always the implied condition that the house when built is fit for human habitation. The Claimant failed to point out where there was any oral or written collateral warranty that survived the closing. I can accept the fact that there is implied warranty that the home would be fit for habitation; however, this warranty cannot override the expressed enumerated features of the home which are found in the agreement of purchase and sale. There is no evidence before me that there has been a breach of the specifications and features accorded to the sale. There is also no evidence before the Court that the odour was due to the contractor or the subcontractor failing to install materials in a workmanlike manner. There is also no evidence before this Court that the materials were defective. Even if the Claimant was able to satisfy on the balance of probabilities that the odour that occurred in November was a result of poor workmanship or poor materials, he could have mitigated the situation by having mechanical aeration take place. This he did not do. For all these reasons the Claimant will not succeed against Austin, a claim against Halifax Insulators has not been proven and the claim against J.D. Irving Ltd. has not been proven.

This leaves me with the fourth claim and that involves the roof of the Claimant that leaked. The amount being claimed here was $1560.00. The Claimant in his pleadings stated that on July 21, 2007, water leaked from the ceiling in the master bedroom. There is sufficient pictorial evidence before me to show that this roof leaked and that the workmanship in shingling the roof was of poor quality. While the documentation from the roof and from their people could be considered hearsay it is relevant and it

is necessary and, along with the pictures, I give it some weight. Therefore on the roof leaking claim the Claimant shall succeed and will have his costs.

Dated at Halifax, Nova Scotia, this 2nd day of April, A.D., 2008.

David T. R. Parker

Adjudicator of the Small Claims

Court of Nova Scotia