SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Seagull Cabinets Limited v. Johnstone*, 2023 NSSM 23

Date: 20230203
Docket: SCCH 516867
Registry: Halifax

Between:

Seagull Cabinets Limited

Claimant

v.

Kelly Johnstone and Malcolm Johnstone

Defendants

Reasons for Decision and Order

Adjudicator:	Eric K. Slone
Heard:	November 24, 2022, in Halifax, Nova Scotia
Appearance:	For the Claimant, Cameron Bruce, co-owner For the Defendants, self-represented

BY THE COURT:

[1] This case involves a claim and a counterclaim arising out of the Claimant's design and installation of a kitchen in the Defendants' home.

[2] The Claimant seeks $18,805.00 - being the remaining unpaid 50% of the original $37,610.05 invoice for the kitchen. The counterclaim seeks damages over and above that amount, of $13,955.00 on the basis of alleged deficiencies in what was supplied. Another way of expressing this is that the parties are almost $34,000.00 apart in their positions.

Deficiency cases

[3] This type of case - involving construction deficiencies - is quite common in the Small Claims Court. And there are familiar themes to these cases that are worth mentioning, which will seem familiar to most adjudicators.

[4] Though not every case fits the mould entirely, and at the risk of being accused of over-generalization, I have observed:

a. Most construction projects, especially renovations, generate deficiencies. Usually they are handled routinely, with the contractor returning to repair them under warranty.

b. Sometimes, for a variety of reasons, the project generates deficiencies that are greater in number or seriousness. This does not necessarily lead to a lawsuit, or even a dispute, but the potential is there.

c. When the process of fixing deficiencies takes too long, or does not appear to be resolving the deficiencies, the relationship between the contractor and the client may break down with the result that the client no longer trusts the contractor to repair their work. The contractor often becomes *persona non grata* at the work site.

d. Such a breakdown of trust may have the incidental effect of making the client more sensitive to, and unforgiving of, minor

imperfections. The client will often exaggerate the seriousness of the problems. The

contractor will often minimize the problems and blame the client for not allowing them to honour their warranty by rectifying their work.

e. The client will often seek input from another contractor or expert, who concludes that much of, if not the entirety, of the work must be ripped out and redone, at considerable expense. Contractors are very reluctant to repair someone else's work, and will rarely quote on such a job because:

(a) it is too uncertain;
(b) they believe that they cannot offer any type of warranty in such a situation;
(c) they are in something of a conflict of interest because they are in line for a larger job, if it has to be redone.

f. The estimate for ripping out and replacing the work is often more expensive than the initial job.

g. The prospect of ripping out the work, particularly if it will be at the expense of the original contractor, often seems wasteful and inefficient. There is great reluctance to endorse that remedy when the most logical solution would be to give the original contractor a full, and perhaps final, opportunity to make good on its warranty.

h. Unfortunately, the court cannot force reluctant parties to work together, and that option is no longer available. Instead, a financial remedy must be fashioned which will likely disappoint both parties.

[5] Of course, there may be additional factors which complicate the case. This applies to the situation here, where the Defendant blames a third party for having set in motion the chain of events.

The facts

[6] The Defendants' home is in the Papermill Lake area of Bedford, which was undergoing a significant renovation in early 2021, which included a new kitchen.

[7] The Claimant Seagull Cabinets Limited ("Seagull") is a wholesale cabinet vendor. Seagull claims to have sold approximately 200 kitchens in 2021. Most of their product comes from Asia and New Jersey and is relatively high-end. Though their cabinets are normally sold to contractors, because of personal connections Seagull agreed to contract directly with the consumers, i.e. the Defendants.

[8] Seagull's responsibility here was to design, supply and assemble the cabinets on site, where they would be installed by the renovation company, Winmar Halifax/Dartmouth, a company apparently[1] operated by David Lovett and Blair Stewart.

[9] Winmar supplied Seagull with a sketch of the Defendants' kitchen space, which was used as a starting point for the kitchen design.

[10] Renderings and plans were created by Seagull and a final kitchen design evolved.

[11] The kitchen was understood by everyone to have 8-foot ceilings, but the exact ceiling height was not measured with precision at any time before it was too late. Cameron Bruce of Seagull says that he asked Winmar to check the measurements. Mr. Stuart testified that he had no direct contact with Mr. Bruce, and Mr. Lovett did not testify. Mr. Stuart testified that it is normally the responsibility of the kitchen designer to verify the measurements.

[12] There is nothing in the written records of emails going back and forth which directly supports the position that Seagull was relying on Winmar's measurement. There is one significant email dated March 30, 2021, where Mr. Bruce writes to Ms. Johnstone:

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[1] I say "apparently" because it does not appear to have a registered profile with the Registry of Joint Stocks.

> I left a message for Dave [Lovett] letting him know I'd like to check all the measurements prior to ordering the cabinets and he has a copy of our floorplan to enable him to do that so we should be good.

[13] On March 31, 2021, Ms. Johnstone wrote to Mr. Bruce stating:

> David [Lovett] has confirmed the measurements of the kitchen ... so just the slight change on the beverage centre and we are good to go ...

[14] It is not clear to me what measurements Mr. Lovett actually confirmed. There is nothing in the evidence before me that passes directly between Winmar and Seagull concerning the measurements of ceiling heights.

[15] Not all of the cabinets were floor-to-ceiling, but those that were ordered were precisely 96 inches. When they arrived at the home and were assembled, it was found that they did not fit. A much later email from Mr. Bruce to both the Defendants and Mr. Lovett states what occurred:

> The day [Seagull employees] were on site assembling the cabinets, they discovered the wall pantry would not fit. They measured at that time and it was determined the ceiling was under 96". Dave was notified and came to the site. His first suggestion was the cabinet was more than 96" tall, but after measuring, it was confirmed that was not the case. He then measured the ceiling height and agreed the ceiling was less than 96". It was discussed that perhaps the floor lifted when the load bearing wall in the kitchen was removed (as is often the case). It was then decided the base cabinets would all have to be cut. Clearly this was not our error and therefore the cost of these modifications is not the responsibility of Seagull Cabinets.

[16] Nowhere did Winmar agree that the error was theirs. Most of the correspondence centred on who would bear responsibility for the extra work done to cut down and modify the cabinets so they would fit the available space. There is nothing in writing which clearly assigns blame for this miscalculation. Mr. Stuart of Winmar testified that he was told (by someone) that Seagull was taking responsibility. Mr. Bruce denied that he did so.

[17] Ms. Johnstone testified that she made sure that she had a commitment from Seagull to pay for all of the customization necessitated by the cabinets being too tall. She stated that otherwise she might have sent the cabinets back, though she was highly motivated to make it work given the delays that would have resulted.

[18] The cutting down of the wall pantry had a ripple effect, which was that it lowered the height of the associated counters and the Defendants insisted that all countertops should be at the same height. This necessitated cutting down some other cabinets.

[19] Apart from the problems associated with the cutting down of the cabinets, there were numerous other deficiencies that became a major source of dispute. I will touch on those later.

Some key findings

[20] I think it is important to make some findings of fact and place responsibility, as this will in turn dictate many aspects of the result.

[21] The Defendants themselves are not responsible for the fact that the cabinets were too large for the available space. So the only parties who can be held responsible are Winmar or Seagull.

[22] I believe that what most likely happened was that Seagull understood that this kitchen had 8-foot ceilings, but they should have taken more care to satisfy themselves that 8-foot cabinets would have sufficient tolerance. It is common knowledge that drywall ceilings and corners may be marginally less or more than the "nominal" eight feet. The kitchen plans that were supplied to Winmar give a great deal of detail on the width of the cabinets but do not appear to show ceiling heights. At the time when Winmar was being asked to verify measurements, there were questions about the width of certain cabinets and the question was whether they would fit in the space.

[23] I find it most probable that Winmar had no idea that they were being asked to verify the ceiling measurements, and if they reported anything back to Seagull, I do not believe that there was any mention of ceiling height. I find that Seagull could not reasonably have relied on Winmar to verify this very precise

and critical measurement. I make this finding notwithstanding the fact that Dave Lovett did not testify.

[24] Seagull also knew, or ought to have known, that there was a major renovation going on which included the movement of at least one kitchen wall, which in turn ought to have dictated even greater care to ensure that the ceiling height was consistent with expectation.

[25] I find that Seagull failed in its responsibility to check the measurements itself, with precision, before ordering the wall-to-ceiling cabinets.

[26] The most direct consequence of this finding is that Seagull should be held responsible for the additional cost of Winmar cutting down the cabinets, which was $4,256.00.

Other deficiencies

[27] Every construction project has deficiencies. I find that the number of deficiencies here was more than average.

[28] I do not propose to try and catalogue every single deficiency. But they fall into several categories, including:

a. Many of the dove-tailed joints in the drawers are substandard, based on the photographic evidence.

b. There are holes, scratches and poorly patched areas.

c. The Defendants expected all wood, yet there were some MDF panels.

d. There are areas of missing paint.

e. There are cracks in some frames and doors.

f. Some of the hardware requires adjustment.

[29] Many of these deficiencies can be rectified (if they have not already

been rectified) with touch-up tools and materials. Some areas would require more extensive work.

[30] I believe that the main reason that the Claimant and Defendants could no longer work together was because they could not agree on whose responsibility it was to pay for Winmar's additional work.

[31] I will place a value on repairing these deficiencies later.

The claim and counterclaim

[32] The Claimant seeks payment of $18,805.00, which is the second half of the contracted amount.

[33] The Defendants counterclaim for $28,054.00 to repair and replace the kitchen, $4,256.00 for Winmar's additional work during the install, and $100.00 for general damages. Offsetting these amounts (plus costs) from what is still owing on the contract, they say that the Claimant owes them $13,955.00.

A few key principles

[34] As already mentioned, the most cost-efficient solution would have been for the Claimant to correct their work, which they seemed willing to do. However, the Defendants lost faith in the Claimant and have insisted that someone else, at considerable cost, should be hired to do it.

[35] I do not consider it fair to saddle the Claimant with the full cost associated with this loss of trust.

[36] This brings up the question of economic waste. This is a topic that comes up fairly often, whether explicitly mentioned, or not. I had occasion to comment upon it in the case of *Century 21 Classic Realty Ltd. v. Eye Catch Signs Ltd.*, 2008 NSSM 82 (CanLII), admittedly in a slightly different context:

> [16] I do not accept that under the circumstances the Claimant should be obligated to work with the Defendant. It is entitled to damages representing the cost of repairing the sign, subject to the

> caveats that it is not entitled to impose a standard of perfection; nor is it entitled to commit economic waste by insisting that something which is serviceable be converted at disproportionate cost into something that is simply more of what it wants.

[37] A related concept is that the receiving party should not be unjustly enriched by being awarded a sum of money (based on replacement cost estimates) which they might choose to spend differently.

[38] The case of *Farmer Construction v. Doncaster Holdings Ltd.* (1990), 46 C.L.R 80 (cited in *Green View Homes Ltd. v. Larssen and Hughes*, 2006 BCSC 685) provides an example.

> [9] ... There a leak in the membrane of the system was found to be the fault of the architect who had specified the materials. But no evidence was led that the repairs were done, or that there was a market value lost.
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> [10] At page 10 Millward J. said :
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> > I find that the general approach used by the courts to determine damages in cases of defective buildings is either to assess damages based on the cost of repair or the diminution in the value of the building as a result of the defect. I am satisfied that in determining which of the two tests it will use, the court may consider whether the evidence indicates that the party claiming for the cost of repairs actually intends to carry out the repairs. If it is apparent that the party claiming for repairs does not intend to carry out those repairs, the court may then adopt the diminution in value approach to determine the amount of the award, if any. I find authority for this proposition in the cases of *Strata Corporation NW 1714 v. Winkler* (1987), 1987 CanLII 2509 (BC CA), 20 B.C.L.R. (2d) 16 (C.A.),
> > *SEDCO v. William Kelly Holding Ltd. et al* (1988), 29 C.L.R. 245 (Sask. Q.B.), and *Eldon Weiss Home Construction Ltd. v. Clark* (1982), 1982 CanLII 1803 (ON SC), 39 O.R. (2d) 129.

[39] There was no evidence led suggesting that there has been any diminution

of value as a result of the (allegedly) substandard state of the kitchen. Nor was there any convincing evidence to the effect that the deficiencies cannot be repaired. The Defendants are asking me to make a finding that the kitchen requires in excess of
$28,000.00 of work to produce a result satisfactory to them. I have difficulty accepting that. The only evidence tendered on this point is a set of estimates by Dave Lovett of Winmar, who was not called as a witness and was unavailable to be cross-examined on these estimates. I also question whether Winmar, and in particular Dave Lovett, is impartial, given that there were allegations by Seagull that Winmar was responsible for the problems with the cabinet heights.

Findings on damages

[40] I do not have the tools to find with precision how much it will cost to repair every single deficiency.

[41] I find that the Claimant, had it been given the full opportunity to do so, could have done a reasonable job of rectifying the deficiencies. On the premise that the Defendant should not be burdened with all of the responsibility for the parties not being able to work together, I will make a global award of $12,000.00 on the counterclaim, which encompasses both the extra work done by Winmar, with the balance as a fund to correct all of the deficiencies to a reasonable standard.

[42] In the result, I allow the Claimant its claim of $18,805.00 and offset the amount awarded on the counterclaim of $12,000.00, for a net payment by the Defendants to the Claimant in the amount of $6,805.00.

[43] Under the circumstances, neither side shall be entitled to interest or costs.

[44] This is not a case for general damages.

ORDER

1. THIS COURT ORDERS that the Claimant have judgment in the amount of $18,805.00 against the Defendants, and the Defendants have judgment on the counterclaim against the

Claimant in the amount of $12,000.00, which amounts shall be offset against each other with the Defendants paying $6,805.00 to the Claimant.

2. THIS COURT ORDERS that there be no costs or prejudgment interest payable by any party.

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Eric K. Slone, Adjudicator