<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Hirtle v. S.G.M. Garage Doors Ltd.*, 2023 NSSC 194

Date: 20230612
Docket: *Bridgewater*, No. 513761
Registry: Bridgewater

Between:

Lorraine David Hirtle

Appellant

v.

S.G.M. Garage Doors Ltd.

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	November 24, 2022, in Bridgewater, Nova Scotia
Oral Decision:	May 17, 2023
Counsel:	Lorraine Hirtle, Appellant, self represented Shawn McDonald obo S.G.M. Garage Doors, Respondent, self represented

By the Court, orally:

Introduction

[1] This is an appeal from the Small Claims Court decision made by Adjudicator Brent Silver, dated October 19, 2021.

[2] Lorraine David Hirtle claimed against Shawn MacDonald, who's carrying on business as S.G.M. Garage Doors ("S.G.M."). Mr. Hirtle had contracted with S.G.M. for the installation of a garage door. He had initially requested a 12 foot high garage door, but upon S.G.M. measuring the garage opening in preparation for a quote, he was advised that only a 10 foot high garage door could be installed as there was a bulkhead in the overhead ceiling that would limit the swing and closure of the door jamb which only a 10 foot high garage door could accommodate. An agreement was made between the parties to install a 10 foot high door.

[3] When S.G.M. arrived to install the 10 foot high garage door, the installer discovered alterations were made since the initial measurements to the overhead opening by Mr. Hirtle. Mr. Hirtle had removed the bulkhead which resulted in a larger overhead clearance area. S.G.M. proceeded to install the 10 foot door. Mr.

Hirtle was dissatisfied with this door, and he contracted with a different garage door supplier for a 12 foot door to be installed, as he required a higher clearance for his garage.

[4] Mr. Hirtle claimed damages against S.G.M., stating that the company had made a mistake in its initial measurement of the doorway and he relied on their accuracy in ordering the 10 foot door, to his detriment. Mr. Hirtle claimed that S.G.M. acknowledged the fist measurement was wrong and that he was to "come back and add a panel to make it a 12 foot door", with a handshake and then an additional payment of $1000.00. This addition did not take place, with Mr. Hirtle stopping payment on the invoice.

[5] He then claimed damages against S.G.M for negligence and for breach of contract seeking the costs of modifying the doorway to a higher clearance, the installation of a 12 x 12 foot garage door by the alternate supplier, and three days lost income.

[6] S.G.M. denied the claim in full, disputing that the initial measurement was made in error, and that Mr. Hirtle's own subsequent modifications in removing the bulkhead occurred without their knowledge. S.G.M. counterclaimed for the

remainder of the contract for the installation of the 10 foot garage door, which was unpaid by Mr. Hirtle.

[7] The Appellant, Mr Lorraine Hirtle, is appealing Adjudicator Silver's decision on the grounds that there was an error of law and a failure to follow the requirements of natural justice. The particulars in the Notice of Appeal filed by Mr. Hirtle states that there is a "conflict of interest between Appellant and adjudicator" with the next line on the form appearing as "order a payment for an uncompleted job". It is unclear if these are separate or joined, however, I will consider them in both senses.

[8] The Summary Report filed by Adjudicator Silver, dated April 29th, 2022, states under the heading of Findings, that he was not satisfied that S.G.M. made an error in measuring the door opening. The Adjudicator noted at paragraph 4 of the Findings that:

> 4. Considering the whole of the evidence, I accept Mr MacDonald's version of events regarding the first measurement of the garage door opening. That being he measured from the floor to the bulkhead which protruded past the jam [sic] of the door. The Claimant was not present and none of the Claimant's witnesses disputed this fact. I found it particularly convincing that the Defendant had detailed the issue of the bulkhead and its position that it has been moved after the first measurement in its Statement of Defence and Counterclaim, yet the Claimant chose not to address this directly in his evidence. On Cross-examination he said the "bulkhead" had been lowered but did not comment on its position in relation to the door opening.

[9] The Adjudicator proceeded then to decide that "The Claimant received exactly what he bargained for" in the agreement and that there was no negligence or a breach of contract established. The Adjudicator dismissed Mr. Hirtle's claim, finding as fact that S.G.M. did not make an error in the measurement of the garage door opening.

[10] The Adjudicator also noted that all parties acknowledged there was an amount outstanding on S.G.M.'s invoice for the installation of the 10 foot garage door, which was the subject of the counterclaim, and he awarded this amount to S.G.M., without an additional award of costs.

[11] The Court will consider that this part of the Order appealed from pertains to the payment for an uncompleted job.

[12] In regard to the issue of a "failure to follow the requirements of natural justice" or "failure to follow the requirements of natural justice order a payment for an uncompleted job", Adjudicator Silver indicated in the Summary Report that it is his law firm's practice to maintain an electronic timekeeping system over the course of the past 20 years. It is his own practice as an Adjudicator to complete a "conflict search" of his records upon receipt of a docket sent to his attention in advance of a review of Small Claims Court matters. This review did not reveal any

conflicts with Mr. Hirtle, nor did he have any recollections of interactions with Mr. Hirtle in any context.

Issue

[13] First, did the Adjudicator make an error in law in ordering the completion of payments to S.G.M. for the 10 foot door?

[14] And two, did the Adjudicator fail to follow the requirements of natural justice by proceeding to hear the matter despite a potential conflict of interest?

Positions of the Parties

Appellant

[15] I will begin by noting that Mr. Hirtle is a self represented person, as are S.G.M. Garage Doors, a sole proprietorship headed by Mr. MacDonald. They both, however, received legal advice and information from counsel to assist them with their claims although neither had counsel appear for them before the Court.

[16] Mr. Hirtle's written brief with the Court referenced the manner in which the Small Claims Court hearing was held as a barrier, as part of the issue of whether there was a breach of natural justice that was not raised in his Notice of Appeal. In his oral submissions, he also alluded to some technical difficulties he experienced

in participating in the hearing, that was held over a teleconference due to the Covid-19 restrictions in place. He did acknowledge that the Adjudicator had all the documentary evidence required, and that he was able to present his witnesses and cross examine these witnesses over the teleconference.

[17] Mr. Hirtle appeared to re-argue the subject matter of the claim, indicating that he interpreted S.G.M.'s acceptance of a second payment on the garage door invoice as an indication of its willingness to contract with him to install a 12 foot garage door. He submitted that the correct interpretation of the text on the invoice is that the remainder of the invoice is "due upon completion" and that, as the Adjudicator had failed to find that there was an agreement that S.G.M. install a 12 foot door, instead of a 10 foot door, that the Adjudicator had misinterpreted the evidence and the agreement and made an error in ordering Mr. Hirtle to pay the remainder for an "uncompleted job".

[18] In regard to the "conflict of interest", there was a very vague reference in oral submission to a "divorce" but there were no particulars offered by Mr. Hirtle about what it was, or how Mr. Silver was implicated or involved.

Respondent

[19] S.G.M. noted that the standard of review of an Adjudicator's decision upon an appeal is correctness when considering whether there was an error in law or a failure to follow the requirements of natural justice.

[20] S.G.M. argues that there is no explanation offered concerning what the error in law is within the Adjudicator's decision. Further, there is no basis for the "conflict of interest".

[21] S.G.M. seeks the dismissal of the appeal and an Order from this Court for: costs of this appeal; payment for legal advice received from a local firm in the amount of $661.25; a Canada Post charge for $28.76; the employee cost for the trial of $40.00; and "such further and other relief." as the Court may order.

Standard of review and *Small Claims Court Act*

[22] Section 2 of *Small Claims Court Act R.S.N.S. 1989, c. 430*. defines the purpose of the legislation:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[23] The *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32(1) sets out the available grounds of appeal:

> 32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
>
> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice, by filing with the prothonotary of the Supreme Court a notice of appeal.

[24] In the case *Gallant v. Martin*, 2010 NSSC 375, Rosinski J. observed that the materials before a reviewing Court when considering a Small Claims Court Appeals are limited in scope, with a corresponding effect concerning the required level of deference, at paragraphs 8 and 9 :

> 8 As noted above, this Court is only entitled to consider the "materials" from the Small Claims Court hearing. These "materials" usually consist of all the exhibits filed in the hearing, as well as the Adjudicator's Decision and Summary report of the findings of law and fact that they have made in a case on appeal, including the basis of any findings raised in the Notice of Appeal and any interpretation of documents made by the Adjudicator -- see sections 32(3) and (4) of the *Act*. Notably, this Court does not have the benefit of the transcribed testimony of witnesses at the Small Claims Court trial.
> 9 This puts an appeal court at a substantial disadvantage in relation to the Adjudicator who had the benefit of seeing the testimony of the witnesses (in particular the testimony of witnesses in relation to the exhibits in the case) and who made findings of credibility that may be determinative of the outcome of the case.
> 10 A high level of deference must be accorded to the Adjudicator's findings of fact. Nevertheless, any material finding of fact that is based on palpable and overriding error constitutes an error of law.

[25] Further, as Hoskins, J. concluded in his most recent analysis of the standard of review to be applied to an Adjudicator's decision, at paragraph 30 of *John Ross & Sons Limited v. Federal Express Canada Corporation*, 2022 NSSC 336:

> [30] While there may be a divergence of opinion as to whether this Court should review Small Claims Court findings of fact for palpable and overriding error, it is clear, as Justice LeBlanc stated in *C.M. MacNeil & Associates v. Toulon Development Corporation*, 2016 NSSC 16, at para. 37, that this Court may find an error of law **where there was no evidence to support the conclusions reached. As Moir J. pointed out in *Hoyeck*, at para. 23, this would have to be apparent from the summary.**

[26] In addition, I have considered Justice Gogan's commentary in *Connors v. Anderson McTague & Associates Ltd.*, 2020 NSSC 405 at paras 25 and 26:

> [25] In terms of the standard of review, there is little controversy. On questions of law, the standard is correctness. There are a multitude of authorities on this point but I refer to paras 12-15 of the decision of Justice Duncan in *Paine v. Air Canada*, 2018 NSSC 215 as an example:
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> > [12] A question of law is reviewed on a standard of correctness.
> >
> > [13] The Supreme Court of Canada distinguished questions of law, of fact and of mixed fact and law in the following terms, as set out by Iaccobucci J. in *Canada (Director of Investigation Branch and Research) v. Southam Inc*., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748:
> >
> > > 35 ...Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.
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> [26] There is no standard of review analysis engaged when considering a claim of denial of natural justice or procedural fairness. It is a question of law (see *Wolfridge Farm Ltd. V. Bonang*, 2016 NSCA 33 per Justice Bourgeois at para. 38). The question on review is whether the process was fair (see *CIBC Life Insurance Company v. Hupman*, 2016 NSSC 120, Hood, J. at para. 6). The adjudicator either

> fulfilled the duty or did not (see *Waterman v. Waterman*, 2014 NSCA 110, Beveridge, J.A. at para. 23).

[27] I am going to set aside the issue of a potential breach of procedural fairness raised by the Appellant as there is no basis in the summary or on the limited record before me to support this ground of appeal. The process undertaken by the Adjudicator before the hearing was sufficient to identify for himself a potential conflict of interest. The claimant also had the ability to raise the potential conflict of interest in the context of the hearing, but did not do so, and was unable to articulate it in oral submissions on the appeal.

[28] That is similarly the case in regard to the difficulties encountered in the teleconference hearing of the matter. While inconvenient, the hearing was not unfair. The hearing took place with an opportunity for all parties to be heard, present their evidence with an opportunity to cross examine the witnesses offering direct testimony, and with documentary evidence before the trier of fact.

[29] Moving on the to ground of whether the Adjudicator had made an error of law, I have examined the Summary Report, as well as the documentary materials, that were before the Adjudicator.

[30] There appears to be no palpable and overriding error in the finding concerning whether there was an agreement between the parties for the 10 foot door. The documentary evidence before the Court in the form of the invoice is explicit in the details concerning the contract for the installation of a 10 foot door, with two separate payments towards the total made by the Appellant. However, in regard to whether there is a "second agreement" of some sort, there is no corresponding notation on this invoice to indicate there was an agreement concerning a potential 12 foot door and whether the "second installment" paid toward the invoice was in regard to this "other agreement" for an additional panel to create a 12 foot door.

[31] This documentary evidence, when paired with the Adjudicator's Finding that, on the whole of the direct evidence that was before him, which included witnesses to the measurement and installation of the door with S.G.M.'s employees' evidence, support his finding of fact that the contract, in effect, was for the installation of a 10 foot garage door, that was initially measured from the bulkhead to the floor before there was an adjustment to the bulkhead by the Appellant. As a result there was no negligence proven in the measurement.

[32] The Adjudicator also found that this contract was executed fully, in S.G.M.'s delivery and installation of the 10 foot garage door.

[33] Mr. Hirtle's evidence concerning the oral agreement for an additional panel was not accepted by the Adjudicator, as the second payment was made toward the existing contract for delivery and installation of the 10 foot garage door, with all parties acknowledging there was an additional $1000.00 (approximately) owing on the invoice for a 10 foot garage door. Any further steps taken to install a 12 foot garage door were done, implicitly, at the Appellant's own choice and own cost.

[34] This Court defers to the Adjudicator's finding of fact on the evidence as set out in the Adjudicator's Summary.

[35] The Appellant must demonstrate that the Adjudicator had no evidence to arrive at his findings of fact, which is not the case here. The Court sees no basis to disturb the Adjudicator's decision, as there were no errors in law arising on the findings of fact made on the claims of negligence or breach of contract.

Conclusion

[36] The appeal is dismissed, for the reasons that have been set out before.

[37] The Respondent is awarded costs in the amount of $50.00 pursuant to the regulations enacted under the *Small Claims Court Act*.

Diane Rowe, J.