

Form 7(c) - Order
in the Small Claims Court of Nova Scotia
Cite as: Clarke v. Our Neighbourhood Living Society, 2004 NSSM 32
Claim No: SCCH 213734
Date: 20040430

BETWEEN:

Name: Arthur Hugh Clarke
Claimant

Name: Our Neighbourhood Living Society
Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 22, 2007.

- [1] This matter was heard on February 27, 2004, in Halifax.
- [2] At a point in the evidence it became apparent that there was an existing action in the Supreme Court between these same parties on, at least, some of the same issues and that there was a potential issue regarding jurisdiction. The issue arises from s. 15 of the *Small Claims Court Act*, which reads:
- “The court does not have jurisdiction in respect of the claim where the issues in dispute are already before another Court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with s. 19.”*
- [3] At the February 27, 2004 Hearing, I asked Ms. Gillis to file a written submission on the jurisdictional issue by March 12, 2004 and for Mr. Clarke to respond by March 19, 2004. Ms. Gillis did file a submission on March 12, 2004. I have received no written submission from Mr. Clarke.
- [4] The Claimant, Arthur Hugh Clarke, is claiming unpaid revenues against the Defendant,

Our Neighbourhood Living Society (“ONLS”) in respect of alleged unpaid wages for provision of residential services. Mr. Clarke was not represented by counsel. ONLS was represented by Ms. Mryna Gillis.

- [5] ONLS is a non-profit society which operates small options homes and provides other residential and related services for adults with disabilities. The Department of Community Services would appear to be the primary funding agent for its operations
- [6] Mr. Clarke gave evidence on his own behalf. As well, evidence was given by Brenda Clarke (Mr. Clarke’s mother). Wynn Wilson and Juantita Swinamer gave evidence for the Defendant.
- [7] The claim filed by Mr. Clarke in this Court appears to relate solely to respite services in respect of a resident named “RF”, at what is known as the Gerrard location. There was no written contract in respect of these services.
- [8] The Supreme Court claim (S.H. No. 205393) appears to relate to services at what is called the Orchard Drive location and relates to Residents “DW” and “JS”. There is a written contract in respect of these services. It is clear that both contracts (the verbal and the written) were terminated by the Defendant at the same time and this was done because of a May 17th incident allegedly involving Mr. Clarke and a resident.
- [9] The Defendant’s counterclaim in this Court would seem to relate entirely to the Orchard Drive location and the services for the two residents known as DW and JS. Certainly, that creates an overlapping of issues. The basic question is whether this situation falls under s. 15 of the Small Claims Court Act - are the “issues in dispute already before another court”.
- [10] The Statement of Claim is dated August 22, 2003, and is S.H. No. 205393. Hugh Clarke is the Plaintiff and the Defendants are the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, the Department of Community Services, and Our Neighbourhood Living Society, a body corporate.
- [11] Paragraphs in the Statement of Claim which have relevance to this matter are as follows:

7. *The Plaintiff states that on or about May 28, 2002, the Defendant, ONLS, renewed the contract for services with the Plaintiff in the form of a written contract. The contract provided, amongst other terms, the following:”*

[There is then recited paragraph 6 of the contract and the requirement to give 30 days’ notice to remove a client from the RA home and 90 days’ notice to terminate the agreement without cause.]

- “8. *The Plaintiff states that the Defendants did, on or about May 16, 2003, without written notice to the Plaintiff, remove the two adults in the care of the Plaintiff from the home on 49 Orchard Drive Middle Sackville.*
9. *The Plaintiff states that Wynn Wilson, the Plaintiff’s immediate supervisor at ONLS, did terminate the Plaintiff’s contract for services by letter dated June 2, 2003.*
15. *The Plaintiff states that by causing the removal of the two adults without notice to the Plaintiff, the Defendants thereby committed a breach of contract and are liable for damages.*
16. *The Plaintiff states that by terminating the Plaintiff’s contract for services, without any notice to the Plaintiff and without any remuneration as stipulated in the Plaintiff’s Contract, the Defendants thereby committed a breach of contract and are liable for damages.”*

[12] Portions of the Defendant, ONLS’s, defence, filed October 6, 2003, which are relevant to this proceeding, include:

- “4. *The Defendant ONLS states that the Plaintiff’s contract was for a fixed term and was not renewed in or about May, 2003 and thus no contract existed to be terminated.*
5. *In the alternative the Defendant, ONLS, states that if the contract was renewed in or about May, 2003, the contract was breached by the Plaintiff, and the contract was terminated for cause.*
8. *The Defendant, ONLS, states that the Plaintiff failed to discharge his duties under his contract to a reasonably acceptable standard.*
9. *The Defendant, ONLS, states that the Plaintiff breached his contract in the following manner, including but not limited to:*

[There then follows a recitation of various particulars]”

[13] The counterclaim of the Defendant in the Small Claims Court relates to monies allegedly owing by Mr. Clarke to ONLS in respect of the clients referred to as DW and JS. These are the clients under the written contract, which contract is the subject of the Supreme Court Action.

- [14] It seems to me to be an inescapable conclusion that I could not rule on the counterclaim matters without making a ruling on whether or not the contract to which it relates was terminated for proper cause. I note in this regard that the written agreement dated August 8, 2002 contains, at paragraph 6, specific terms with respect to the termination of adult care services.
- [15] Further, it would also be necessary to determine whether, as a matter of law, the written contract had been renewed.
- [16] Both of these issues are substantial issues and are squarely before the Court in the Supreme Court Action S.H. No. 205393. In fact, both the Statement of Claim and the Statement of Defence specifically refer to the issue of termination of the contract and the termination for cause. (I should note, for purposes of completeness, that there is no indication that the Supreme Court Claim has been withdrawn, abandoned, struck out or transferred in accordance with s. 15 of the *Small Claims Court Act*).
- [17] This is not the end of the story however.
- [18] The further question that arises is whether or not it would be proper for this Court to sever the counterclaim or set off from the proceeding in this Court. That appears to be the approach followed in the case of *Haines, Miller & Associates Inc. v. Fosse* (1996) 153 N.S.R. (2d) 44 (S.C.). As well, the case of *Llewellyn Building Supplies Limited v. Nevitt* (1987) 80 N.S.R. (2d) 415 (C.C.) also would provide authority for the Small Claims Court severing the counterclaim or set off from the main claim.
- [19] Parenthetically, I pause here to note neither of those two cases involved a determination pursuant to s. 15 of the Act. Rather, they involved situations where the counterclaim amount would have exceeded the then jurisdictional limit of the Small Claims Court. In the *Haines* case, there was a Supreme Court action filed **after** the Small Claims Court action and, therefore, Glube, C.J.N.S., found that the s. 15 argument did not apply and accepted the position of Saunders, J., in *American Home Assurance Company* (1991), 105 N.S.R. (2d) 425 (S.C.) that the word “already” must refer to proceedings previously commenced in the Supreme Court. Nevertheless, these cases remain instructive, and obviously binding on this Court, in respect of the question of severing a counterclaim
- [20] In *Haines*, Glube, C.J.N.S., states (at para. 23):

“In the present case, the total counterclaim of the applicant [the defendant/claimant by counterclaim] if proven would exceed the jurisdiction of \$5,000.00. The applicant claims the facts on this issue, whether it was a loan or a deposit on the purchase of the shares, are all tied up together with the allegations in the counterclaim against Mr. Fosse. In my view, this is not the case. I find that

unless and until the adjudicator finds otherwise, that is, that it is necessary to determine the other issues in the counterclaim in order to deal with Mr. Fosse's claim, then his claim and the defence raised is a matter which can be decided in the Small Claims Court. I acknowledge the claim and counterclaim by Haynes, Miller are not frivolous, but at this time, the issue of alleged breach of duties and the other allegations regarding Mr. Fosse's employment are a separate matter." (Emphasis supplied)

[21] At paragraph 22, Glube, CJNS adopts with approval the following comments from the Llewellyn case:

*"...I have examined the case of **Llewellyn (R.) Building Supplies Ltd. V. Nevitt** (1987), 80 N.S.R. (2d) 416; 200 A.P.R. 415 (Co. Ct.) and the passage as follows quoted at p. 417 by both parties which outlines the duties of the Adjudicator:*

*'It will be apparent, then, that the Adjudicator of the Small Claims Court must exercise his judicial discretion as to the most effective and convenient way for the matter before him to proceed. **He must bear in mind the objective of the Small Claims Court procedure; which is to provide a cheap, effective and relatively speedy method of adjudicating civil disputes.** It is his duty in exercising his discretion to ensure that specious or frivolous allegations raised by a defendant in the pleadings before him not be permitted to subvert the purposes of the Act and of his court. **He must be mindful of the right of a plaintiff to choose the forum in which his action will be heard. He must consider whether the issues raised in the claim and the counterclaim can be conveniently severed and be heard in that fashion without adding unnecessary or unreasonable expense to the proceedings, or whether the most 'judicious' method of dealing with the issues before him would be to have the whole proceeding consolidated in an action which is outside his jurisdiction and which would, therefore, involve the proceedings being commenced in another court'** (Emphasis supplied)*

The applicant also refers to para. 10 at p. 417, which is as follows:

"Where the claims of the two parties 'arise from the same set of facts', it will ordinarily be advisable to consolidate the two matters and hear them as one. That will be so even if the effect is to remove the combined proceeding from the jurisdiction of the Adjudicator."

[22] These cases seem to me to support an approach to sever the set off or counterclaim and

deal solely with the claim of Mr. Clark, if I consider that the counterclaim deals with a separate matter. I find that the counterclaim does indeed deal with a separate matter - the written contract for services at the Orchard Street location.

- [23] Ms Gillis argues that if the counterclaim is not considered at this point and if the Supreme Court action were withdrawn there would be potential prejudice to the Defendant. To that I would note that the Defendant would have been in the identical position prior to the Claimant commencing this Small Claims action. As well, and as noted above, it appears to me, based on the materials filed and the evidence at the Hearing, that all of the matters raised by way of counterclaim/set off relate to the Orchard Drive matter and the two residents known as DW and JS. In my opinion, these claims by the Defendant certainly could have been raised by way of counterclaim in the Supreme Court claim in S.H. No. 205393. I have no indication of why they were not; certainly it would remain open to the Defendant to amend its pleadings to make these claims or, if the Claimants Supreme Court action were withdrawn, to start a new action..
- [24] With respect, most of the submissions and the points raised at page 4 of Ms. Gillis' letter support a finding that these two matters are sufficiently separate and distinct such that the Defendant's set off claims can be severed from the main claim. Thus, I do so find and would sever the counterclaim from this proceeding.
- [25] I would request the parties to contact the clerk to schedule a date to re-appear to conclude this matter in accordance with this ruling.

Dated at Halifax, Nova Scotia,
on April , 2004

Michael J. O'Hara Adjudicator

Original Court File
Copy Claimant(s)
Copy Defendant(s)