Claim No: 443192

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Old Growth Timber Inc. V. RCS Construction Inc., 2016 NSSM 14

BETWEEN:

OLD GROWTH TIMBER INCORPORATED

Claimant

- and -

RCS CONSTRUCTION INCORPORATED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on January 11, 2016 and January 20, 2016

Decision rendered on April 27, 2016

APPEARANCES

For the Claimant	Edward Peill, Vice-President
For the Defendant	Katie Archibald, counsel

BY THE COURT:

Introduction

[1] The Claimant company is in the business of supplying specialized wood products. In the case here, that was wood that had been salvaged from trees blown down by Hurricane Juan in 2003.

[2] Such wood is considered to meet certain environmental standards, given that it did not require the cutting down of growing trees. It is considered to be "recycled" wood.

[3] The Claimant salvaged a large quantity of wood shortly after Hurricane Juan, and stored it as logs until needed to complete a sale. In the case here, after receiving an order for a large amount of wood, it was rough milled, kiln dried and delivered to the Defendant.

[4] The Defendant was the general contractor which in 2010 was doing the major renovation of what would become the Seaport Farmers Market in Halifax. That project had stringent environmental and sustainability targets, and to help meet those, the architects had specified that the Claimant's recycled wood be ordered and used in the project.

[5] This lawsuit arose because some of the wood developed a surface mould after being installed, and the Defendant refused to pay the balance of what was owing on the bill - namely $19,787.00. The Defendant says that it cost approximately $22,000.00 to replace the mouldy wood, and counterclaims for the excess over the admittedly owing amount from the original bill.

[6] The central question for this court, expressed in simplistic terms, is whether the Claimant is responsible for having supplied a defective product, or (as is contended by the Claimant) the Defendant failed to handle the wood properly and effectively caused the problem that resulted. Another way of asking the question is to ask who bore the risk of what occurred.

The facts and evidence

[7] The Claimant called as a witness Jeff Amos, who has been in the wood business for about 40 years. Among other things, he operates 5 kilns for drying wood. In 2009-2010, the Claimant brought him approximately 14,000 linear feet of Juan lumber to be dried. The wood included several different species, including basswood, maple, ash and locust.

[8] Much of the wood was “spalted.” Mr. Amos described spalting as a colouration that enters the wood via certain fungi, or moulds, which process has the characteristic of creating interesting and desirable wood grain patterns. Spalted wood is highly valued for certain applications where the decorative patterns create visual interest.

[9] In this case. Mr. Amos says that he dried the wood significantly, to a humidity level of between 6 and 10%, before delivering it to the Farmers’ Market worksite (as directed).

[10] According to Mr. Amos, wood dried to this extent must be treated carefully so that it does not simply reabsorb moisture. That is likely to happen if the wood

is exposed to a high moisture environment. Some of the woods, namely the softer ones, will reabsorb moisture faster.

[11] There are ways to prevent or at least minimize reabsorption of moisture. The wood can be wrapped with a waterproof material, such as for purposes of transport or storage. Once installed, he stated that the best form of protection is to place a finish coat on it. If spalted wood gets back up to 17 or 18% humidity, there is a danger that the wood will start to degrade and further invasion of fungi can occur. Mould spores are in the air in most places, looking for a hospitable environment in which to grow.

[12] Mr. Amos conceded that he has no formal training in wood science. He relies on his many years of experience. He also conceded that he had no kiln records, so was relying on his memory.

[13] He also stated that he did not send any specific instructions with the wood, such as how to handle kiln dried, spalted wood.

[14] Edward Peill is the Vice-President of the Claimant company. He explained that he was part of the group that came up with the idea to harvest Juan wood. The wood was still “in the round” (i.e. uncut) when he was contacted by the architects for the Seaport Farmers Market asking about the product they could supply. He estimated what they could supply, which was virtually all that they had harvested. A contract was then signed with the Claimant. The contract provided that the Claimant could reject any wood that was not usable for its purposes, which amounted to almost 40% of what was delivered.

[15] The reason that this wood was desirable was that it met the standard for "Leadership in Energy and Environmental Design" (commonly known as LEED) certification. The Seaport Farmers Market project was designed to be as environmentally friendly as possible, and (some) recycled wood meets that definition. The spalting was at most a bonus factor, in the sense that it was aesthetically pleasing, though it did not add anything to the LEED certification.

[16] Because of the large amount of wood involved, it had to be dried and delivered in several phases. Because of the urgency of getting product delivered, and to minimize exposure to humidity, it was delivered directly by Mr. Amos to the Seaport Farmers Market where it was inspected and cut to required sizes by the Defendant.

[17] Mr. Peill could not explain why mould growth happened so quickly, except to say that this is a risk with spalted wood that is exposed to excessively moist conditions. He pointed out that the project architect, when initially made aware of the problem, recommended that the wood be finished immediately upon installation, in light of the fact that the building was still open to the elements and contained a high moisture content.

[18] Mr. Peill conceded that he did not specifically warn the Defendant that this wood had to be handled with particular care and not exposed to excessive moisture and/or be treated. He assumed that the Defendant and the many consultants and experts associated with the project would know the proper way of handling a product that they had specifically ordered.

[19] Mr. Peill stated that he was only made aware of the mould problem about ten days after it first appeared, and that he was given no opportunity to inspect the problem and recommend solutions. Essentially, the decision to rip out all of the affected wood was made by others, at great expense, which expense is now sought to be recovered against his company.

[20] The Defendant witnesses described the issue, from their point of view. The decision to use this kind of salvaged lumber was thrust upon them by the owner and architect. The alternative would have been to use other kinds of certified wood products.

[21] These witnesses explained that at the stage this wood was being delivered, the building was not entirely sealed from outside elements because the huge doors that open to the cruise ship pier were still under construction, with a result that moist seaside air was entering the structure for much of the day.

[22] Within about three weeks of the Claimant's wood being installed, mould began to show up in places. It got quickly and progressively worse, to the point that it was considered a health hazard. The decision was made to remove large parts of the wood panelling, which also had the effect of damaging much of the drywall that was installed after the wood. The cost of this remediation was shared by the Defendant with the owner of the Seaport Farmers Market, which agreed (under some protest) to cover half the cost. The Defendant blames the Claimant for selling a defective product. One of the speculations is that the wood was not properly dried to the required moisture levels. Another

speculation is that mouldy pallets were used to deliver and, briefly, store the wood, which had the effect of contaminating the wood with mould spores.

[23] The Defendant's witnesses conceded that they did not do any moisture testing on the wood when delivered.

[24] Scott Whitehead was the site superintendent at the time the wood was delivered. He described it as very poor quality, which he would have rejected outright had it been his decision alone. However, he was directed by the architect and owner to accept the wood and store it temporarily in specially fabricated tents. He started using it, under protest.

[25] Within a few days some workers reported itchy eyes and scratchy throats. Also, the wood started to exhibit small black dots which grew larger each day. It was quickly confirmed that there was widespread, active mould growth. The decision was made (with no input from the Claimant) to have an environmental restoration company perform the removal of the wood, and a maple product purchased from Goodfellow was used to replace the removed sections, all at a cost of $19,864.18. Total cost of this remediation was said to be approximately $22,000.00.

[26] None of the witnesses gave any estimate of the percentage of the Claimant's wood that was removed and replaced, but it appears to have been substantial. It appears that some of the Claimant's wood was treated in a timely manner, and as such never developed any mould.

[27] It is clear from the documents placed in evidence that there were multiple parties involved in the decision-making, once the mould problem was noticed. There is nothing definitive to be gleaned from these documents. Different people had different theories, and blame was being tossed in various directions. It is also clear that Mr. Peill, as the human face of the Claimant company, was a very minor player in these meetings and discussions, and his word was not given much weight.

Findings and discussion

[28] I find as a fact that the wood ordered and delivered was a specialty product that was vulnerable to mould infestation if not handled with special care. I also find that the Claimant did not communicate any specific instructions as to how the product should be handled. The relevant question is whether there was any obligation to do so.

[29] I can only assume that when this particular product was specified, sourced and ordered by the project architect and owner, that they knew what they were ordering. This is not an off the shelf product available from Kent or Home Depot.

[30] It is also clear that the Defendant was not as familiar with the product, and would not have used it but for the fact that it had been specified. Even when the product was delivered, and the Defendant had reservations about the quality, they were directed to take the best pieces and reject what they did not think they could use. They did so under protest.

[31] Even in that light, I find that the Defendant did not take steps to educate itself generally about how to handle such a product, nor specifically did it do any

testing (such as moisture readings) to determine whether it was dry enough to meet specification.

[32] In other words, the Defendant ought to have known that the wood had to be handled in a certain way, failing which it was vulnerable. Obviously it did not come with a written set of instructions, but I find that the Claimant was entitled to assume that whoever was ordering this product knew what they were getting.

[33] I expect that had Mr. Peill been called for advice on how to handle the wood, he would have been only too happy to offer advice. However, no one called until weeks later when the problem was probably too advanced to remedy by less drastic means than removal.

[34] The likely source of the mould was the moist environment in the Seaport Farmers Market at the time the wood was being installed. It was not, and maybe never could have been, a moisture-controlled environment. Being essentially open to the air mere meters away from the ocean more likely than not caused high moisture levels in the air, that were incompatible with using a kiln-dried, untreated wood product that is known to be inoculated with mould - i.e. spalted. Had the wood been treated with the correct product, either before or immediately after being installed, the mould would likely not have gotten out of control.

[35] I also suspect that other construction activities, at the time, may have added moisture to the air - such as drywalling.

[36] It is pure speculation for the Defendant to contend that the wood may not have been dried to specification when delivered. It had the opportunity to test the wood before accepting it. It did no such testing. I find that its acceptance of

the wood waived any possible complaint that it was not dry enough, given that there was no way to confirm that level of dryness once it was exposed to moist air for a while.

[37] The sale here was governed by the *Sale of Goods Act*, a long-standing mercantile statute which attempts to place certain obligations on sellers of goods. It also assists in supplying the applicable principles for apportioning risk when things go wrong. The following sections have relevance:

> **Goods correspond with description**
>
> 16 Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
>
> **Quality or fitness for particular purpose**
>
> 17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the sellers skill or judgement and the goods are of a description that it is in the course of the sellers business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

> (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
>
> (d) an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith.

[38] This was a case of goods bought by description. The implied condition (section 16) was that they would correspond to the description. I find that they did.

[39] There is no indication that the buyer made known that it was relying on the seller's expertise (17(a)), and I find that there was no condition that the goods would be reasonably fit for the purpose. Indeed, the goods may have been quite unsuited to the purpose, given the conditions that the wood would be exposed to, but that is not the fault of the Claimant.

[40] I find that there was no breach of the merchantable quality condition (17(b)), because the Defendant had the opportunity to examine the goods. The wood may have been unmerchantable if it was too moist when delivered, but the Defendant did nothing to determine that fact (which a moisture meter could easily have done) and it cannot later complain about excess moisture - especially where, even to this day, there is no evidence to back up that proposition.

[41] In short, I find that the Claimant has not breached any condition or warranty and is entitled to be paid for the goods. Equally, it is not responsible for the additional costs incurred by the Defendant.

[42] The Claimant shall have judgment for $19,787.00 plus $199.35 for costs. The counterclaim is dismissed.

[43] The Claimant also seeks prejudgment interest from September 2010, namely 30 days after the last invoice. The applicable rate would be 4%, as per section 16 of the *Small Claims Court Forms and Procedures Regulations*.

[44] Prejudgment interest is discretionary. One of the factors that affects whether it will be allowed, in whole or in part, is the delay in bringing the claim. There is no explanation offered for why the Claimant took more than five years to commence this action. I am prepared to allow only two years of interest. That adds up to $1,582.96.

[45] The total judgment is therefore

Debt	$19,787.00
Interest	$1,582.96
Costs	$199.35
Total	$21,569.31

Eric K. Slone, Adjudicator