Claim No: 313377

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Thyssenkrupp Elevator (Canada) Ltd. v. Grafton Developments Inc., 2010 NSSM 11

BETWEEN:

THYSSENKRUPP ELEVATOR (CANADA) LIMITED

Claimant

- and -

GRAFTON DEVELOPMENTS INC.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 27 and February 3, 2010

Decision rendered on February 19, 2010

APPEARANCES

For the Claimant	Daniel Wallace Counsel
For the Defendants	Daniel Weir Counsel

BY THE COURT:

[1] This action was originally commenced in the Supreme Court on January 8, 2009 as a Rule 57 damages claim under $100,000. It was eventually transferred to the Small Claims Court in September 2009 and came before this court on January 27 and February 3, 2010.

The Facts

[2] The Claimant constructs and services elevators. The Defendant is the owner of a mixed-use building at 1646 Barrington Street which contains two elevators serving its apartments and businesses.

[3] In 1998 the then-owner Nasco Consulting Limited (a predecessor company to the Defendant) signed a contract with Northeast Elevator Limited (a predecessor company to the Claimant) which required the latter to provide service for the elevators, at a base price of $450 per month, plus HST.

[4] This case claims outstanding amounts billed, as well as damages for an alleged anticipatory breach of contract brought about by the purported cancellation of the contract by the Defendant on October 12, 2008.

[5] The original contract was effective July 1, 1998, and contained a number of clauses that are noteworthy for my purposes:

a. The Company (Northeast at the time) was not responsible to renew or repair parts that became faulty through negligence or misuse by

others. This section was commonly invoked where vandalism was the suspected cause of an elevator problem.

b. The Owner would be responsible for the overtime portion of any repairs that were done outside of Monday to Friday, daytime hours.

c. The contract price could be raised annually by the Company up to a maximum of 3%.

d. The contract would renew automatically for a further five year period unless terminated with a minimum of 90 days' notice before the end of the current period.

[6] Between 1998 and now, each of the two corporate parties to this contract was amalgamated with another corporation, becoming the entities that they are now. Nothing turns on this, except to note that when Thyssenkrupp bought Northeast Elevator, it took over this contract and, it appears, brought it into its computerized billing system without carefully reviewing all of the terms. In particular, it failed to note the 3% ceiling on increases and instead in 2002 began automatically increasing the rate by 6.9% annually.

[7] As such the Claimant was systematically overcharging the Defendant by a factor that compounded, year over year, until it was eventually discovered by the Defendant. It was this discovery that was the prime reason for the Defendant's purported termination of the contract.

[8] It also appears that in the early part of 2008, the principal of the Defendant, Mr. Ghosn, became more actively interested and involved with the

details of this contract. Responsibility for the day to day dealings with the Claimant had been delegated to another individual whose employment has since been terminated. He was not called as a witness at the trial.

[9] At or around the time of that employee's termination, when Mr. Ghosn took a closer look at what had been going on, he concluded that the Claimant had been overcharging him for elevator repairs not covered by the monthly maintenance fee. Several of the charges that he came to question blamed the need for repairs on vandalism.

[10] No one disputes the fact that the Defendant could have cancelled the contract by giving notice 90 days in advance of the July 1, 2008 renewal date. Clearly Mr. Ghosn did not do that. His evidence was that, frankly, he did not look carefully at the contract. He says that when he became aware that he had been overcharged for years, combined with his belief that he was being unjustly charged for certain repairs, he felt justified in terminating the contract.

[11] From a legal perspective, the question is whether the contract had been fundamentally breached by the Claimant, thus releasing the Defendant from any obligations thereunder.

Fundamental breach

[12] There are many reported cases which discuss fundamental breach. Essentially, the performance by one party has to be so outside of reasonable expectations that it has become something totally different from what the other party reasonably expected. The faulty performance itself amounts to a repudiation of the contract. As succinctly put by the English Court of Appeal in

Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. at p.64:

> ... the question to be answered is, does the breach .... go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

[13] The question to be asked here is whether by systematically over-billing, the Claimant essentially repudiated the contract thus entitling the Defendant to end it upon learning of the facts.

[14] Counsel for the Defendant argued that “price” is obviously fundamental to any contract, and that getting the price wrong must therefore be a fundamental breach. He offered no authority for that proposition.

[15] I do not regard this inadvertent over-billing as a fundamental breach. Had there been any evidence that it was a deliberate act, which would amount to a fraud upon the other party, the result might have been different.

[16] The fact that it went on for so long magnifies the dollars involved, but does not change the fundamental character of the deed. It simply speaks to both parties being asleep at the switch for so many years. While it might be seen as primarily the obligation of the Claimant to bill correctly, it was also the Defendant’s responsibility to pay attention to what was going on.

[17] Also, the effect of such a breach by the Claimant is easy to remedy. The Defendant is entitled to a credit, with interest. I will return to this later in this decision.

[18] As such, the Defendant cannot rely on the over-billing as a fundamental breach entitling it to treat the contract at an end.

Other grounds to terminate

[19] The Defendant also claims that it had the right to terminate because the Claimant persisted in billing extra for services that should have been covered under monthly maintenance.

[20] The evidence was to the effect that there were several instances where repairs were needed that the technician deemed to have been caused by vandalism. The established practice was that the elevator technician would be dispatched to investigate and repair a malfunction, and would submit a “ticket” to the office indicating whether the changes were within or outside the normal maintenance contract. The person in change at the office, at least in later years Julie MacCrae, would generate a bill.

[21] Sometimes, but not always, the technician would get a signature on the ticket from the person in charge of the building, either the Defendant’s former employee or in a couple of instances Mr. Ghosn himself.

[22] A number of these invoices are outstanding and form part of the claim. I will examine these more carefully below. However, the Defendant states that this type of overcharging also amounts to a fundamental breach of contract,

either as a separate ground or cumulative with the systematic overcharging already referred to.

[23] Assuming - without deciding - for present purposes that the Claimant wrongly categorized one or more repairs as chargeable, I do not believe that this would amount to a fundamental breach of the contract. Under the contract, a matter is chargeable if caused by vandalism and not chargeable if caused by normal wear and tear. Administering this provision requires the Claimant at first instance to make a determination. There is judgment involved. Even if that judgment was incorrectly exercised, getting to the bottom of any such charge would fall under routine contract administration. It would not evidence a repudiation of the contract.

[24] As such, while Mr. Ghosn's belief that he was being wrongly billed for some of these repairs may have been honestly held, and may explain why he took the action he did in terminating the contract, it does not justify in law the action taken.

[25] It is accordingly my finding that the Defendant did not have the legal right to terminate the contract. As such, when the Defendant purported to terminate the contract on October 12, 2008, it was committing an anticipatory breach excusing the Claimant from any further performance and entitling it to sue for its legitimate losses.

The monetary claims

[26] The Claimant sues for amounts under three separate headings:

a. Outstanding monthly charges, up to the date of termination,
b. Outstanding invoices for repairs outside the monthly maintenance contract, and
c. Damages for loss of profits over the balance of the contract.

[27] I will deal with these in turn.

Outstanding monthly charges

[28] The Claimant asks for monthly charges for the months of June, July, August, September and October of 2008, up to the point of termination. The calculations provided claim these months at the rate of $700.95 for June, and $749.31 for July through October. Unfortunately, counsel has forgotten that these amounts need to be adjusted because of the improper annual increases. According to my calculations, June was properly chargeable at $537.32 per month and July through October at $553.44 per month. Those five months would accordingly total $2,751.08.

[29] Subject to the reduction for years of overcharging, which I will deal with later, this amounts is allowed.

Repairs outside the monthly maintenance contract

[30] The repair invoices claimed include some signed by a representative of the Defendant, and some not. As indicated, the signature obtained was (except in one case) not a formal work order but was on a slip prepared by the technician which simply has a spot for “customer’s signature.”

[31] The invoices were summarized by counsel in a table:

Tab	**invoice number**	**date**	**notes**	**amount (incl. HST)**
A	490062933	June 30, 2008	claiming balance outstanding	$663.01
B	490063018	June 11, 2008	Claiming purchase order signed by MF	$960.50
C	490063384	June 30, 2008	claiming overtime for 2 hours	$248.58
D	490063385	June 30, 2008	Floor roller forced off track	$994.31
E	490063416	June 19, 2008	Condition report	$113.00
F	490064644	September 30, 2008	Vandalism - time ticket signed by N. Ghosn	$393.91
G	490065097	September 30, 2008	Vandalism - time ticket signed by MF	$2,056.17
				$5,429.48

[32] Dealing with these items generally, I must consider what to make of the evidence. The Claimant called a witness who created the bills, based upon the tickets filled out by the technician, but did not call the technician himself.

[33] While I hesitate to be critical of the Claimant for not calling the technician, I observe that the Defendant was clearly disputing invoices for which he felt he was being improperly billed. The Claimant could not have been under any misapprehension of the nature of the defence. As such, the onus was on the Claimant to provide some evidence to prove its case.

[34] Counsel for the Defendant noted that there was no discovery, and therefore he had no ability to investigate the invoices in question.

[35] The Claimant may be able to succeed where the evidence is uncontradicted or the appropriateness of the charge is obvious, but where the very propriety of the charge is the issue I must find that the claim is not proven.

[36] Although not argued, I have considered the effect of s.23 of the *Evidence Act* which would have allowed the tickets to be admitted as business records prepared in the ordinary course of business:

> **Business records**
>
> 23 (1) In this Section,
>
> > (a) "business" includes every kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;
> >
> > (b) "record" includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) Evidence to the effect that the records of a business do not contain any record of an alleged act, condition or event shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such records of all such acts, conditions or events at the time or within reasonable time thereafter and to retain them.
>
> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.

[37] What this provision directs me to do is allow the tickets to be admitted if I find that they were prepared in the ordinary course of the Claimant's business, which I do find. However, the amount of weight that they bear given the lack of personal knowledge of the witness called to tender the documents must be minimal, in the face of the Defendant's clear objection to the charges reflected in these tickets.

[38] With this in mind I will consider the items in turn.

[39] **Tab A** appears to be an invoice that was partially paid, and $663.01 is the balance owing after applying the payment. According to the ticket, this involved work done on a Saturday owing to a blown fuse. I am satisfied that this is a proper charge as there is no dispute that work requested on a Saturday is chargeable, and I accept the ticket as evidence that the work was done on a Saturday.

[40] **Tab B** appears to be an invoice for which a purchase order was signed in advance. I cannot give any credence to Mr. Ghosn's evidence that he felt that he was being pressured into agreeing to this. The evidence falls far short of proving duress. This is accordingly a proper charge.

[41] **Tab C** appears to be an invoice involving the incremental charge for overtime hours. Again I find no substantial answer to this charge and it is allowed.

[42] **Tab D** is an invoice claiming that a repair was for a “roller broken, forced off track” and thus vandalism. I do not regard this claim as proved. There is no substantial evidence to support the claim and the Defendant did not sign for it.

[43] **Tab E** is an invoice to prepare a Condition Report. While the Defendant complained ta the trial, the evidence confirms that this was a new requirement as a result of changes to the law and properly chargeable. I allow it.

[44] **Tab F** is an invoice to supply and install new buttons on the 3rd and 7th floors, which were said to be broken and which the Claimant says was vandalism. Mr. Ghosn signed the ticket. However, as observed, the ticket is not a work order. It is not even clear that all of the information on the ticket in evidence would necessarily have been on it at the time the customer signed it. Both this ticket and the one for Tab G (below) appear to have printing on it which may have been made in a different hand and/or at a different time, judging by the darkness of the lettering.

[45] I am not casting any aspersions. This is only to observe that I am not willing to go so far as to say that the signature of Mr. Ghosn or his employee indicates any full understanding, let alone an acceptance, of the claim of vandalism. I remain unsatisfied that this is a proper claim.

[46] **Tab G** falls to a similar fate. It is a substantial charge, $2,056.17, with MF’s initials on the ticket. This may well have been the invoice that finally inspired Mr. Ghosn to end his contract with the Claimant. I am not willing to find that there was an acceptance of the charge or an acknowledgment of its propriety, and I find that this claim is unproven.

[47] In the result, the following items are allowed:

A	490062933	June 30, 2008	claiming balance outstanding	$663.01
B	490063018	June 11, 2008	Claiming purchase order signed by MF	$960.50
C	490063384	June 30, 2008	claiming overtime for 2 hours	$248.58
E	490063416	June 19, 2008	Condition report	$113.00

[48] These items total $1,985.09.

Damages for loss of profits over balance of the contract

[49] When Mr. Ghosn terminated the contract without legal cause, he rendered the Defendant liable for the damages that the Claimant can demonstrate that it has suffered over the 4 years and 8 months remaining. The Claimant claims that it has incurred and will incur a loss of profit, and it puts forward an estimate of its lost profit of 35% of the revenue from the contract.

[50] The Defendant disputes this claim.

[51] The evidence of profit margins on elevator maintenance contracts was very thin. No direct evidence on this point was actually called by the Claimant. Counsel for the Claimant was able to extract on cross examination of a witness employed by another elevator contractor, Don Knowles, that they may be able to realize a 30% profit, but that it would depend on the costs involved.

[52] Damages for loss of future profit are inherently speculative, but this has not necessarily stopped courts from awarding them. Certain assumptions can be made. Essentially, we may assume that the Claimant is in the business to make a profit, and that its longevity in the business attests to its ability to do so. As such, I may accept on a balance of probabilities that there will be a loss and I must make the best out of the evidence that I have and estimate those losses.

[53] I note the evidence of Mr. Knowles, which was hardly self-serving. I also take notice that the Claimant is a reputable elevator contractor that could not stay in the elevator maintenance business, and would not likely continue, were it not profiting. Under all of the circumstances, I am prepared to find that its anticipated margin on the balance of the contract - allowing for all contingencies - would have been 20%.

[54] The anticipated revenue for the balance of the contract term would have been this:

2008 - 9 (8 mo)	$553.44	$4,427.52
2009 - 10	$570.04	$6,840.52
2010 - 11	$587.15	$7,045.73
2011 - 12	$604.76	$7,257.11
2012 - 13	$622.90	$7,474.82
		$33,045.70

[55] The loss of future profits are accordingly assessed as $6,609.14.

Credit for overcharging

[56] The Claimant has accounted for the overcharging in two steps. Initially, it incorrectly calculated the amount as $1,127.16, and issued a credit invoice accordingly. It later realized that the methodology was flawed and issued a further credit in the amount of $2,517.56. The total of those credits is $3,644.72.

[57] It is unfair, in my opinion, for the Claimant simply to credit back that money without accounting for an interest factor. This practice went on for about seven years. The discrepancy was small at the outset, but compounded over the years. As such, most of the money was overcharged over the last few years.

[58] While this is not an exact science, in my view it would be appropriate to add another 15% of interest, bringing the credit up to $4,191.43.

Summary

[59] In conclusion, the Claimant is entitled to the following:

Outstanding monthly charges, up to the date of termination	$2,751.08
Outstanding invoices for repairs outside the monthly maintenance contract	$1,985.09
Damages for loss of profits over the balance of the contract	$6,609.14.
Credit for overcharges	($4,191.43)
	$7,153.88

COSTS

[60] Normally costs are not much of an issue in Small Claims Court. Because this was started in Supreme Court, the Claimant seeks a total of $450.13 as the cost of issuance of the action in Supreme Court, the cost of transfer and service of the documents.

[61] Having been successful only in part, I find that it is fair to award costs to the Claimant as if the matter had been started in this court, and thus award $179.35 plus the claimed cost of service of $145.00, for a total of $324.35 in costs.

[62] In summary the Claimant shall have judgment for $7,153.88 plus $324.35, for a total of $7,478.23.

Eric K. Slone, Adjudicator