Claim No. SCCH 07-284698

# IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Phillips v. Grinnell Fire Protection, 2007 NSSM 100

Between:

**PAUL PHILLIPS and Marina Ivimey**

**CLAIMANT**

- and –

**TYCO INTERNATIONAL OF CANADA LTD.**
**Carrying on business as GRINNELL FIRE PROTECTION**

**DEFENDANT**

## DECISION AND ORDER

Adjudicator: David T.R. Parker
Heard: October 30, 2007
Decision: December 19, 2007
Counsel: Wayne Francis represented the Claimant.
David A. Graves, Q.C., represented the Defendant

***Background***

This Claim was originally commenced by way of an Originating Notice and Statement of Claim in the Supreme Court of Nova Scotia. The Action was commenced on February 22, 2005. A Defence to the Claim was filed on June 9, 2005.

The Claimant provided the Claimant's List of Documents to the Defendant and this was filed with the Supreme Court on August 5, 2005.

The Defendant's List of Documents was filed with the Court on November 15, 2005.

The Claimant elected to have the proceedings transferred to the Small Claims Court on July 11, 2007.

The matter was set down for a two-day hearing on October 29 & 30, 2007.

The Claimant decided to not proceed with their claim; however, the issue of costs could not be agreed upon and the Defendant therefore requested the hearing to proceed on the issue of costs.

On October 30, 2007, Counsel met and a hearing proceeded on the matter of costs only as the Claimant's Counsel advised the Court that they would not be proceeding with the Claim.

Counsel for the Defendant advised the Court they were seeking an Order for the cost of an expert report commissioned by the Defendant to defend the Claim in the amount of $7,915.40 and $317.19 in out-of-pocket expenses.

***Analysis***

The Claim: This case arose as a result of the Claimant suffering water damage to the condominium unit which the Claimant alleged was caused by the Defendant. The Defendant had entered into a contract with Halifax Condominium Corporation 109 for the servicing of automated sprinkler equipment. The Claimant alleged that the contract required the Defendant to provide regular inspection and maintenance and it conducted its annual inspection in the fall of 2002 by flooding the sprinkler pipes supplying the inspector's test valve. The Claimant stated that on February 26, 2003, the water in the pipe froze, causing it to burst and causing significant flood damage to the Claimant's property. The Claimant alleged the manner of testing and inspection by the Defendant was in breach of its contract with the Condominium Corporation or was completed negligently and therefore was the sole cause of the Claimant's loss. The pleadings went on to specify that the Defendant failed to properly drain the system resulting in water being left behind and thereafter freezing and causing the pipes to burst.

The Defence: In addition to a general denial, the Defendant alleged any losses to the Claimant were caused by other causes than those alleged by the Claimant and put the Claimant to the strict proof of proving losses were caused as alleged. The other parts of the Defence are not relevant to this analysis.

The Condominium Corporation commissioned an expert report from Contrast Engineering Limited. This report dated April 30, 2003, concluded that the loss occurred because the system was not properly drained during the last inspection by the Defendant in the fall of 2001.

"Based on our site examination, metallurgical examination and testing and research, it is our opinion that some of the water most likely did not drain out of the fitting during the last testing of the sprinkler system and with the extreme cold temperatures experienced in Halifax during the end of February 2003, this water froze causing the failure of the fitting."

The Small Claims Court is a statutory court and its authority is no less or no more than what is

provided by statute. The relevant provisions in this case are Section 29(1) of the *Small Claims Court Act* and Section 15(1) of the *Small Claims Court Act's* regulations.

**29 (1) Subject to the provisions of this Act, not later than sixty days after the hearing of the claim of the claimant and any defence or counterclaim of the defendant, the adjudicator may**

**(a) make an order**

**(i) dismissing the claim, defence or counterclaim,**

**(ii) requiring a party to pay money or deliver specific personal property in a total amount or value not exceeding twenty-five thousand dollars, and any pre-judgment interest as prescribed by the regulations, or**

**(iii) for any remedy authorized or directed by an Act of the Legislature in respect of matters or things that are to be determined pursuant to this Act; and**

**(b) make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.**

**(2) No costs other than those authorized by this Act or the regulations may be awarded by an adjudicator.**

**15 (1) The adjudicator may award the following costs to the successful party:**

**(a) filing fee;**

**(b) transfer fee;**

**(c) fees incurred in serving the claim or defence/counterclaim;**

**(d) witness fees;**

**(e) costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;**

**(f) reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;**

**(g) additional out of pocket expenses approved by the adjudicator.**

**Clause 15(1)(e) amended: O.I.C. 2000-169, N.S. Reg. 58/2000.**

The primary issue here is can the Small Claims Court award the Defendant the costs of the expert reports it obtained to defend the Claimant's allegations.

In this particular case there was a hearing on October 30, 2007. The Claimant confirmed its earlier correspondence to the Small Claims Court that it was not proceeding with the claim against the Defendant. As there was to be a dismissal of the claim as indicated in the Claimant's correspondence, the Defendant is successful in this action. Therefore, I have in this case the authority to make an Order requiring the Claimant to reimburse the successful party, in this case the Defendant, from such costs and fees as determined by the Regulations.

The three reports commissioned by the Defendant were based on information provided in the Contract Engineering report, Defendant's correspondence, the sprinkler system maintenance contract, and information and inspection reports. The report concluded that the Defendant indicated the sprinkler system was tested in accordance with its contract with Condominium Corporation but that an on-site inspection would be required to confirm if the pipes were installed so the sprinkler system was capable of gravity draining.

The report of RJB Forensic, dated November 27, 2006, raised further questions that should be reviewed in the author's opinion. Again, the report suggested: "As discussed following discovery, it is recommended that R.J. Bartlett Engineering Ltd. visit the site".

The final report, dated June 22, 2007, completed a paper review "including a review of the Contrast Engineering report dated April 28, 2003; Simplex Grinnell correspondence, sprinkler system maintenance and inspection reports, and statements from Simplex Grinnell employees." It is not necessary to go into the report's final conclusion except to say it arrived at a different conclusion as possible.

The question then becomes, do the Regulations allow for reimbursement of the inspection reports and other costs incurred by the Defendant.

The relevant provisions of the Regulations in this case are 15(1)(a), (c), (d), (e), and (g).

Counsel for the Claimant presented several thoughtful reasons why the costs of the expert reports should not be awarded. He suggested that the loss occurred in a multitude of areas in the building and the Defendant was facing multiple losses. Therefore, there was the potential for other claims and therefore the Defendant would be required to obtain the reports in any event. I have considered this argument, however, I have concluded it is not a solid argument as there were no other claims and the reports are addressing the specific allegations pleaded. Counsel for the Defendant also suggested that the report commissioned by the Condominium insurers was not a report commissioned by the Claimant and therefore the Claimant should not have to pay for the Defendant's reports to refute the opinion contained in a report for another party. If the report commissioned by the Condominium Corporation's insurers was totally different than the allegations of the Claimant this argument might have merit. However, the report only supports the allegations of the Claimant and therefore the Defendant's reports were commissioned to refute the Claimant's allegations which happened to be crystallized in a report commissioned by the Condominium Corporation.

Counsel for the Claimant also argued that the Defendant's own witnesses could show how the system should work, they are the experts, and the reports were not necessary. It may well be that

able Counsel could have drawn together the facts that were provided by the Defendant's witness to draw the same conclusion as the reports. However, this is conjecture and it would be more appropriate to allow an independent expert to arrive at a conclusion through statements obtained from the Defendant's witnesses, which happened in part in this case.

Counsel also suggests that the reports have never been tested or subject to cross-examination as the matter never went to trial. This, however, is no fault of the Defendant and an inference can be drawn that it never went to trial due to the existence of the Defendant's reports.

Counsel for the Claimant said there is no breakdown of the billing rate, no site visits were performed, no travel was involved, no testing was done and it merely was a paper review.

Counsel for the Defendant has an obligation to meet the allegations of the Claimant in any court action commenced against the Defendant. In this case there are specific allegations of what happened and what caused the damage to the Claimant's property. Further, there was a subsequent report provided to both the Defendant and the Claimant which supported these allegations. It takes no stretch of the imagination that this report commissioned by the Condominium Corporation would be supportive of the Claimant's allegations and employed during the trial. The reports prepared by the Defendant were based on the information available to the Defendant and once the engineer doing the reports obtained further information, further analysis was necessary resulting in further reports supplied to the Defendant. The invoices to support the reports of a professional engineer do not appear unreasonable and required, in my view, to address the claim being alleged against the Defendant. It was not a frivolous claim as ultimately supported by the report of Contrast Engineering Limited. Matters involving expert reports have been before the Small Claims Court on numerous occasions and where appropriate have been allowed as a reasonable expense of the successful party. This now have been approved within the context of their importance by the Supreme Court of Nova Scotia Learning v Glen Arbour Condominiums Inc. [2006] N.S.J. No. 8.

With respect to the receiving out-of-pocket fees, these fall within the ambit of the legislation and are reasonable. I shall grant the Defendant the Order and dismiss the Claim against the Defendant.

IT IS THEREFORE ORDERED that the Claim by the Claimant against the Defendant be dismissed and that the Claimant pay the Defendant the following sums:

| | | |
|---|---|---|
| $ | 7,915.40 | Expert Reports |

| | | |
|---|---|---|
| $ | 24.32 | Long Distance Charges |
| $ | 123.75 | Photocopiers |
| $ | 29.12 | HST |
| $ | 80.00 | Filing Defence |
| $ | 60.00 | Service Costs |
| $ | 8,232.59 | |

DATED at Halifax, this 19th day of December, A.D., 2007.

_____

David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia