

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation: *Nova Doors and Windows Limited v. Weddleton*, 2018 NSSM 38**

Claim No: SCCH 472450

**BETWEEN:**

NOVA DOORS AND WINDOWS LIMITED

**Claimant/  
Defendant by  
Counterclaim**

-and –

GORDON WEDDLETON

**Defendant/  
Claimant by  
Counterclaim**

Darren McDonald and Jason Sadler represented the Claimant, Nova Doors and Windows Limited.

Anthony Nicholson represented the Defendant, Gordon Weddleton.

***Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.***

**DECISION**

(1) On July 27, 2017, the Defendant, Gordon Weddleton, received windows and doors for his new house at 8374 Highway #7, Musquodoboit Harbour, from the Claimant, Nova Doors and Windows Limited (“Nova”). The order consisted of 23 items, 20 windows and 3 doors. The total price was \$27,933.50. To date, the Claimants have received \$9118.35. They are suing the Defendant for the balance, \$18,815.15, plus interest and costs.

(2) Mr. Weddleton defends his claim alleging that since the windows were faulty, he is entitled to a substantial claim. He seeks almost \$25,000 for unsuitable material and

added expense.

### **The Issues**

(3) There are three significant issues:

- Were the goods and services provided by the Claimant of such a quality that they constituted a breach of contract, justifying an abatement or damages?
- Did the Defendant mitigate his losses?
- If so, how much of an abatement or damages are to be awarded?

(4) For the reasons stated below, I have allowed the claim and provided an abatement to Mr. Weddleton. The counterclaim is disallowed.

### **The Evidence**

(5) Jason Sadler is the general manager of Nova. He testified that Mr. Weddleton ordered the windows and doors in October 2016 which were delivered and installed on July 27, 2017. According to Mr. Sadler, there were leaks in the windows and deficiencies noted from September 7, 2017 until December 13, 2017 when the issues with the windows were resolved. The cause of the leak was attributable to a manufacturer's defect, namely caulking missing along the lower sill on each window.

(6) Mr. Sadler testified that the windows are covered by manufacturer's warranties. Apparently, the warranties appear on Nova's website. It is incumbent upon the parties standing behind warranties or other documentary evidence to provide copies of the applicable documents in court, either by hard copies, or if the document is extensive, a pdf copy saved to a "thumb drive" tendered into evidence. No such evidence of the warranties was tendered. Indeed, only the invoices were tendered into evidence. For the purposes of this matter, the invoices constitute the entire evidence of the contract.

(7) Mr. Sadler described the issue as a "weird problem" which he had not experienced before. The window experienced negative air pressure which drew water from the outside in. There were issues with one window attributable to a hole from a screw. When he did his inspection of the windows, he did not like how the flashings were situated on the windows. He did not know there were leaks until they were mentioned by Mr. Weddleton. He found some of the caulking problems arose inside the window. There was a screw hole in the wrong place. One window was cracked. The company offered to replace those windows free of charge.

(8) In cross-examination, he acknowledged the last leak was discovered in mid-December, with the repair taking place in the middle of January 2018. He also acknowledged that on September 13, 2017 he could not perform the leak test as it was not raining enough. He waited for a harder rain to occur in October.

(9) Darren McDonald is the President and principal owner of Nova. He has worked in the industry for approximately 39 years. Mr. McDonald indicated the windows were

prepared by Royal Building Products. The windows experienced a lack of caulking along the sill when manufactured.

(10) Mr. McDonald described the windows as having a lower rating for stability and sealing than he preferred. He did not provide evidence how the grade is calculated. He tendered into evidence a series of documents showing the redesign of the windows. He testified that there were no further leaks since their modification.

(11) In cross-examination, he testified that the window designs were upgraded after delivery. There are new products prepared in 2017 which have a better rating and better performance.

(12) Gordon Michael Weddleton has been a red seal carpenter since 1988. He carries certifications for stud and drywall work. Since 2004, he has had a gold seal for general contracting. He ordered windows and doors from Nova in hopes of obtaining a “net zero” energy efficient home. He has done work for Atlantic New Home Warranty. He has helped to design health and safety policies. Further, he has taught a carpentry and building course. While I have found this to be a consumer sale, Mr. Weddleton is not your typical consumer of construction and contracting services. Nevertheless, the Claimant’s obligations in a consumer sale remain.

(13) He described his house as an R2000 home with three bedrooms. It has a wood frame and “net zero” energy efficiency. In order to be rated in that way, it must produce and use an equivalent amount of power, 9999 kWh per year. The home must be well insulated to be effective.

(14) He ordered the windows from Nova through Mr. Eric Hilchie. Both Mr. Weddleton and Mr. Hilchie have known each other for a long time. He was advised by Mr. Hilchie that the windows should not leak. The construction started on the west side of the house. The house was wrapped with Typar, a blue plastic membrane designed to protect the insulation from moisture. The windows were all installed on that side on August 4 with the rest installed in September.

(15) Mr. Weddleton looked for signs of leakage every day, believing the systems should work together. It is necessary to protect the windows from outside elements. The windows sit on ½” plywood block and cedar shim. They are brighter in colour when wet. He observed in several spots where the windows looked wet and found water leaking in. There were seven windows identified in the binder of photographs as leaky windows. Most of the detailed shots relate to three windows.

(16) Mr. Weddleton spoke with Danielle, a Nova employee, who proposed the problem was attributable to human error. He noted the attic was wide open and only “the smallest amount of water” would come through the windows. He was documenting the leaks and notifying Nova of any problems. The Nova crew attended to the property and performed water tests. He believes the production manager knew the cause of the leaks. There is in evidence a substantial amount of e-mail correspondence showing heated exchange. There are numerous offers and counter offers made on a “without

prejudice” basis in an effort to resolve the problem. I am unable to take into account the offers and counteroffers as they are subject to litigation privilege. As noted below, I must base any claim for damages or abatement on that proven in evidence.

(17) Mr. Weddleton described in detail how several of the problems unfolded and his discovery of them.

(18) In reviewing the photographs, he showed how several of the windows were facing the wind. In particular on page 26, it showed the plastic was over exposed. He testified the project was substantially complete by February 9. He attributes two months delay in the construction of the house to the actions of Nova. Since then, there were no signs of leaking but no way of knowing if the windows leaked.

(19) In support of his counterclaim, he is seeking the cost for damage to the blue membrane as well as costs of delays and rework. His counterclaim amounts to \$24,840 plus interest and costs.

(20) Under cross-examination, he indicated he did not mention shipping blocks at the time the window arrived. He was concerned about the weight of the larger windows leaning against a small piece of vinyl. He did not have any concerns at the time.

(21) He described there was no way to seal leaks properly once the water started running into the window as the water ran to the beveled siding.

(22) He acknowledges that if the building were left open for awhile it was his responsibility to mitigate the damages. He believes he protected the site when the work was not going on. He noticed the blue shim around the windows for six weeks. He did not believe the windows needed to be removed because he was confident they were fixed. The leak was fixed prior to the screw hole incident.

(23) He operates a business known as WCCL Contractors-Builders, which he indicated is owned by his wife. He tendered into evidence work allegedly performed by that company on behalf of the Weddletons. I asked him if the invoice had been paid. He indicated it had not. The invoices total \$55,739.42. He is not pursuing that amount or most of the charges set out in it.

(24) In redirect evidence, he estimates that a few hundred windows have been installed by one of the Weddleton businesses. He does not recall any “call backs” related to leaks in windows that his companies installed. He does not recall delays arising from negative pressure testing. That was performed by taping up walls and applying pressure.

(25) In rebuttal evidence, Mr. McDonald testified that both negative and positive pressure is placed on the window using water in an attempt to imitate weather conditions. Negative pressure occurs in the same way as water being drawn into a syringe. In summary, he feels there were two problematic windows one with a hole and

the other with a crack. These were human errors with windows that have been replaced.

## The Law

(26) Despite the alleged involvement and losses to WCCL, I find this matter arose from a contract between Nova and Gordon Weddleton for the construction of his house, owned personally by him and his wife. (Lillian Weddleton's name did not appear on the

invoice and, more significantly, she was not named in the claim/counterclaim.) It did not involve his business in any way. This was a consumer sale.

(27) The law related to consumer sales in Nova Scotia is set out in the *Consumer Protection Act*.

### Implied conditions or warranties

26(1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale

- (a) to a purchaser for resale;
- (b) to a purchaser whose purchase is in the course of carrying on business;
- (c) to an association of individuals, a partnership or a corporation; or
- (d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

...(d) where there is a contract for the sale of goods by description, there is a 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;

(e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a 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;

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;...

...(h) a condition that the goods are of merchantable quality, except for such defects as are described;...

...(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale...

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

28 (1) Any written term or acknowledgment, whether part of a contract of sale or not, that purports to negative or vary any of the conditions or warranties set out in this Act or states that the provisions of this Act or the regulations do not apply or that a benefit or remedy under this Act or the regulations is not available, or that in any way limits or abrogates, or in effect limits, modifies, or abrogates, a benefit or remedy under this Act or the regulations, or that in any way limits, modifies or abrogates any liability of the seller including any limitation, modification or abrogation of damages for breach of any of the

conditions or warranties set out in this Act or the regulations, is void.

(28) In summary, the *Consumer Protection Act* requires goods supplied by a seller in the ordinary course of its business to be subject to certain warranties, namely, the goods (in this case windows) are fit for its purpose, of merchantable quality (i.e. saleable quality) and durable for a reasonable period of time. Any provision of services, such as installation, shall be performed in a skilful and workmanlike manner. As stated in the Act, it is not possible to modify these conditions or remove them. They apply regardless of any provision of any warranty provided by the manufacturer, even if the latter warranty has expired. They apply regardless of the cause of the problem whether originating from the seller or the manufacturer. The standard for any of the warranties is not one of perfection.

(29) The Claimant has argued the lack of caulking was a manufacturers' defects and they performed due diligence in ascertaining the problem. While the language of the statute can be ambiguous and vague, it is clear manufacturer's problems become the problem of the seller when products are sold in the ordinary course of business. A limited warranty is of no value if the warranty sets a standard which is lower than those found in the legislation.

(30) Secondly, and significantly, in a finding of breach of contract, the law requires the wronged party to mitigate his/her losses.

(31) Finally, an award of damages can only compensate actual losses proven in evidence. In a breach of contract, the object is to put the parties in the same position as if the breach had not occurred.

## **Findings**

(32) The evidence of each party is not corroborated by any third party witnesses. The evidence of the Claimant consisted of the President of Nova and its general manager. Mr. Weddleton was the sole witness on his own behalf.

(33) It is not disputed that the windows and doors were installed on July 27, 2017. The first problem was reported on September 13, 2017. Several of the windows, if not all, were manufactured without caulking on the lower sill. One was installed with a

misplaced screw, one was cracked. The Defendant argues there were seven leaky windows (at times, he has mentioned there were twenty). The Claimant acknowledges either two or three. I find there were three windows with significant leak issues and two others to a lesser degree. Significantly, I find the problems were remedied by January 2018, some six months after their installation and four months since the first reported leak. There was no evidence tendered there were any issues since January or February. I find there were none.

(34) There is no evidence of problems with the doors.

(35) In summary, I find the Claimant installed leaky windows which took approximately six months to rectify. When delivered, they were not fit for the purpose. They are now acceptable. The seller, Nova is responsible for their condition upon delivery and to install the windows in a skilful and workmanlike manner.

(36) There was no contract with WCCL or any businesses owned by the Weddletons. Therefore, it cannot be said that there was any lost business or contracting time related to any problems. There is no privity of contract.

(37) I find the evidence not sufficient to show the Tyvar had deteriorated. If there were any issues with the attic or other elements of the construction, it was the responsibility of the general contractor, in this case, Weddleton, to arrange for its protection. There is nothing in evidence to show how Nova caused the membrane and other materials to be exposed. Mr. Weddleton is an experienced contractor. He would know to arrange for the protection of the building materials. Nova's job was to deliver and install the windows.

(38) There is evidence Weddleton's crew installed one or two windows. I am also satisfied the Defendant is entitled to an abatement for the delay in having the windows water tight. I believe an abatement to address both contingencies is in order. I fix that amount at 10-15% of the sum remaining. (the amount paid already relates primarily to the sale and installation of the doors).

(39) Nova has proven its entitlement to the balance of the invoice (\$18,815.15) less an abatement of \$2000. There was no evidence of an agreement for financing charges or interest, so I award prejudgment interest at the rate stipulated by the *Small Claims Court Act*, 4%, from July 27, 2017 to the date of the hearing, May 22, 2018 or ten months. The Claimant shall also have its costs.

(40) Given my findings regarding abatement, the counterclaim is dismissed.

## **Summary**

(41) In summary, I answer the issues as follows:

- The Claimant, Nova, breached the condition of the windows being fit for their purpose. They have since rectified the problem. However, some abatement is in order.

- The Defendant, Gordon Weddleton, did not mitigate his losses.
- The damages and abatement are as set out below.

(42) The Claim is allowed. The Counterclaim is dismissed. The Claimant, Nova Doors and Windows Limited, shall have judgment against the Defendant shall have judgment against the Defendant, Gordon Weddleton, as follows:

Amount of Debt:	\$18,815.15
Abatement	(\$2000.00)
Prejudgment Interest (4%)	\$ 560.51
Costs	\$ <u>366.06</u>
<b>Total</b>	<b>\$17,742.08</b>

(43) An order shall be issued accordingly.

Dated at Halifax, NS,  
on August 3, 2018;  
Amended on September 3, 2018

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**Gregg W. Knudsen, Adjudicator**

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