

**SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation:** *Purchase v. Sarty Siding and Windows Limited*, 2019 NSSM 50

**Date:** 20190806

**Docket:** SCCH 489352

**Registry:** Halifax

Between

:

Tony Purchase and Sheila Butler

*Claimants*

- and

-

Sarty Siding and Windows Limited

*Defendant*

**Adjudicator:** Eric K. Slone

**Heard:** July 23, 2019 in Halifax, Nova Scotia

**Appearances:** For the Claimants, self-represented

For the Defendant, Tim Hill, QC, counsel

## BY THE COURT:

[1] The Claimants seek \$6,770.65 in contractual damages, general damages of \$100.00, plus costs, from the Defendant who, they say, failed to properly perform a contract on the exterior of their home in the Fairmount area of Halifax.

[2] In about late 2018 the Claimants were experiencing water leaks in and around the windows on the east-facing rear of the building. The Claimants had suspected that the window units themselves might be leaking and obtained several opinions to the effect that it was not the windows themselves that were leaking.

[3] None of the individuals who expressed such opinions to the Claimants were called to testify; nor are there any written expert reports to this effect. As such there are limitations on what I can do with what is simply Mr. Purchase's hearsay evidence to this effect. While hearsay is not *per se* inadmissible, and is frequently relied upon by this court, it would be improper and grossly unfair to the Defendant if I were to accept the hearsay evidence as proof that the windows were not the source of the leaks in late 2018. The most I can conclude is that the Claimants believed that it was not the windows, and this belief informed what they communicated to the Defendant and what they did next.

[4] The Defendant was at all times represented in its dealings with the Claimants by Fred Hutchinson who is the owner of the business.

[5] The Defendant's business, as its name suggests, is to supply and install, and repair, both windows and siding.

[6] On November 16, 2018, the Defendant produced a written quote which read as follows:

**Strip wood siding from 1 end wall carefully approx half wood siding to be replaced install new Tyvek, tape seams. Reflash openings. Install new wood siding & reinstall some existing. Homeowner to paint.**

[7] The quote was preceded by a site visit where Mr. Hutchinson met with the

Claimants and determined, at least in his own mind, what the project would entail. He saw the areas inside the home where the leaking had caused damage, including rotting wood in and around the window frames.

[8] It is important for this case to describe the shape of the building at the rear. The rear wall has a slight jog in it, such that (if viewed from the east) about half the wall on the left juts out by about two feet, or to put it another way, the right side is recessed by a couple of feet. The right side contains the kitchen on one of the two levels, which clearly had been experiencing water leaks.

[9] Mr. Hutchinson insisted on describing the east wall as only including the left half, on the theory (I suppose) that it extends further east by a couple of feet. I find this to be a fundamental misconception which coloured what happened thereafter. To the extent that there is an east wall of the home, I find that it would include both sides.

[10] After the quote was given, work did not begin for a number of weeks.

[11] Looking only at the written quote, it might be unclear why this particular work was being done. The Claimants did not profess any expertise in the area of windows and siding work, although they communicated the opinions that they had received that the windows were not the source of the water leaks.

[12] It is the role of the court in any claim involving a contract to determine as best it can what was the mutual expectation. The primary written documents (such as a quote) may or may not fully disclose that. It may be necessary to look at surrounding documents and conversations.

[13] The evidence of Mr. Purchase was to the effect that he made it clear to the Defendant that he was looking to stop the water leaks that the Claimants had been experiencing. Mr. Hutchinson's evidence suggests that the expectation was narrower than that, which is why he concluded that particular work was to be done, as reflected in the quote, while other work was not included.

[14] If there was any doubt about the Claimants' expectations, such doubts are dispelled by looking at an email which Mr. Purchase sent to Mr. Hutchinson on January 3, 2019, which stated:

We have been waiting a long while and are happy that the project will finally be undertaken this month and within 2-3 weeks. Just to emphasize, our issue is leaks on the eastern side of our home and this is the problem that Sarty has been contracted to correct. As (sic) essential part of addressing and correcting the problem, all siding on that side requires removal and replacing. You and I discussed the advice provided by others, i.e. the windows should be removed for thorough analysis. You indicated that Sarty will do whatever is required to solve the problem and if that meant 'pulling the windows' then that would be done. This is one of our concerns with the delay, but as I stated we are agreeable to whatever is required to fix our problem for good even if that means wearing winter coats indoors. We are really looking forward to getting on with it and getting over our leakage issues.

[15] Mr. Hutchinson acknowledged receiving this email, which passed without reply. Had there been any doubt in his mind as to what was the problem that he was intended to address, or what expectations his clients had, he ought to have voiced some protest at that time. He did not.

[16] Mr. Hutchinson had already determined in his own mind that one half the east-facing wall required the siding to be removed and partly replaced. He had no intention of touching the indented part of the east wall. He also had no intention of removing windows and subjecting them to analysis.

[17] The work, such as it was, commenced on Friday, January 18, 2019 and wrapped up a few days later. I believe it is fair to say that the Claimants did not closely monitor what was being done in their back yard. Mr. Purchase was actually away from home during this time frame. In particular, they did not notice that only one half the east wall had been touched. I note that it was winter when people are less likely to visit their back yards.

[18] The invoice for \$5,888.00 was rendered and paid promptly.

[19] Within three weeks of the work being done, some leaking occurred. The Defendant sent out some men to add some caulking in certain areas. Some weeks later, the Claimants experienced further leaking and contacted the Defendant.

[20] On April 17 or 18, 2019, Mr. Hutchinson came out to the property with a couple of his men. They trained a hose on various parts of the wall that they

had repaired and could not get it to leak. When water was directed at the windows of that wall, according to Mr. Hutchinson the window units themselves showed evidence of leakage. He accordingly took the position that his work had been satisfactory and that he had no responsibility for faulty windows, given the information that he had received to the effect that there was no problem with the windows.

[21] This position, such as it is, does not explain how Mr. Hutchinson had concluded that his work was only on half the east wall, and in particular how it made sense to ignore the wall between the kitchen and the outside, given that he had been shown the leaks plaguing the kitchen window.

[22] The Defendant takes the position that he performed the work that he had been contracted to complete, and that this work was properly performed.

[23] The question for the court boils down to this: was the Defendant contracted simply to repair and replace siding on half the east wall (including Tyvek, flashing and everything else that entails) or was it contracted to address leaks on the entire eastern side of the building, in particular around the windows?

[24] If there was any doubt before January 3, 2019 as to what the Claimants expected, that doubt should have been thoroughly dispelled by the January 3, 2019 email. Mr. Hutchinson unilaterally decided what specific work he would undertake. The Claimants were looking for a solution to their leaking problem and assumed that Mr. Hutchinson knew what he was doing.

[25] The matter is made somewhat confusing by the information that the Defendant was given to the effect that the window units were to be considered as functioning properly. Mr. Hutchinson may be forgiven for concluding that the source of the leaks had to be behind the siding. However, he ought not to have lost sight of the overall intention of the project, which was to address leaks at the windows of the east side of the home.

[26] It was unreasonable of him to exclude the kitchen wall, given that he had been shown the leaky areas on the inside.

[27] He also ought to have better understood that the Claimants expected him to remove and inspect the windows, if necessary.

[28] I conclude that the Defendant did not perform the key component of the contract, stopping the leaks, which amounted to a fundamental breach of contract.

[29] The remedy for a fundamental breach is normally that a Claimant is entitled to be put back (as much as possible) into the same position he occupied before the contract was performed.

[30] The Claimants based their claim on the amount that of the contract (\$5,888.00) plus \$252.65 for the cost of stain and \$630.00 for the cost of labour for applying the stain to the siding being supplied. The total is \$6,770.65.

[31] I note that the latter two items were not supported by documentary evidence, but there is no question that the Claimants had to purchase stain and pay people to apply it, and the amounts claimed seem reasonable.

[32] The Claimants say that, given that the leaking continued, the project had no real value to them. Fixing the leaks was their singular concern. They did not believe that the siding itself needed to be replaced because the house had been completely resided in 2012. Even so, they do end up with something slightly better than they started with, and as such the concept of betterment must be factored in. The Claimants should not profit from the fact that they end up with something better than what they started with. I would allow a small percentage for betterment, namely 15%.

[33] The bottom line is that, somehow, the Defendant lost sight of what the Claimants were trying to accomplish and became fixed in his mistaken belief that he was being asked specifically to replace the siding job on one half of the east wall.

[34] I believe that justice requires that the Claimants have returned to them the \$6,770.65 that they spent on the siding job, minus 15% for betterment, for a total of \$5,755.05.

[35] I am also prepared to allow \$100.00 in general damages for all of the inconvenience and stress associated with the Defendant's failure to perform the required work. The Claimants are also entitled to their filing fee of \$199.35, for

a grand total recovery of \$6,054.40.

**Eric K. Slone, Adjudicator**