

**SMALL CLAIMS COURT OF NOVA SCOTIA**

Citation: *Cull v. Murphy*, 2022 NSSM 25

**Date:** 20220414

**Docket:** SCCH 511678

**Registry:** Halifax

Between:

Donald Thomas Cull

*Claimant*

- and -

John Paul Murphy and Genevieve Victoria Ritchie

*Defendants*

**Adjudicator:** Eric K. Slone

**Heard:** April 1 and 5, 2022 in Halifax, Nova Scotia

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

For the Defendants, self-represented

**BY THE COURT:**

[1] The Claimant is a building and renovation contractor based in the Halifax area. The Defendants are homeowners in Bedford, Nova Scotia.

[2] In mid-2021 the Defendants hired the Claimant to work in their home. The main focus of the work was a kitchen renovation.

[3] The Claimant is suing for the amount of his invoice rendered after the job was finished, on December 12, 2021. The amount claimed in the invoice was \$18,711.57.

[4] It is important to state at the outset that there is no complaint about the quality of the Claimant's work. The Defendants are fully satisfied with the result.

[5] The Defendants have refused to pay because they believe that the charges are excessive. They say that when they first discussed the project with the Claimant, he gave a ballpark estimate for the work of \$8,000.00. They concede that this was never intended to be a fixed price, and that the Claimant would only take on the project on the basis of time and materials.

[6] The Defendants say that this figure was intended to be a "worst case scenario" which was important for them as they were having other work done at the same time and they needed to stay within a budget.

[7] The Claimant says that he was unwilling to give any firm estimates, in part because the scope of work was vague and shifting, which was why he would only work on a time and materials basis. He says that based on the verbal and text exchanges, there was never any mention of "worst case scenario" until the project was substantially complete, and the text exchanges between the Claimant and Ms. Ritchie show that he was careful to point out to her that the figure of \$8,000.00 was never any more than a guesstimate.

[8] The Claimant attributes the fact that his final bill vastly exceeded the guesstimate for a number of reasons. He says that the guesstimated figure did not include a separate electrician's bill (\$2,806.20), or HST (\$2,440.64). Also, several

items were added to the scope of work making the project take more time and therefore cost more overall.

[9] The Defendants concede that the scope of the project was expanded and admit that the figure probably did not include HST. However, they believe that the electrical work was intended to be included. They also contend that the Claimant made some errors in accounting for his hours, with the result that they were overcharged by perhaps \$1,000.00 for work not actually performed. They also complain that the Claimant is charging for some preliminary work that he did in assessing the project before he was actually hired.

[10] I believe it is fair to say that the Defendants expect to have to pay more than \$8,000.00, but the parties are some distance apart in their expectations.

### **Legal principles and types of contracts**

[11] In construction/renovation jobs, there are essentially two types of contracts: fixed price, or time and materials. Either type may be subject to qualifications or limitations. Where the terms of the contract are written, those qualifications are easier to discern.

[12] Here the contract is verbal, although later texts do provide some insight into the parties' thinking.

[13] Also, there is no denying that the basis for the contract was time and materials.

[14] That being said, the live issue for me is this: What is the value of a rough estimate or "guesstimate" in determining what a contractor can charge for work performed? There is scant authority to guide the court.

[15] It is tempting to cite the old joke that a verbal contract is not worth the paper that it is printed on, but verbal contracts are enforceable.

[16] In the absence of any authority brought to my attention, I will revert to some first principles.

[17] When a contractor is unwilling to quote a fixed price, the client cannot expect that any estimates or guesstimates are still contractually binding as if they were a fixed price. Contracts explicitly on a time and materials basis are inherently uncertain and only limited to the extent that specific limitations are

agreed upon. A budget ceiling or “worst case scenario” could provide that limitation.

[18] I believe that contractors working on a time and materials basis have a duty of care to spend only the time that is necessary to accomplish the aims of the project. They also have a duty to account for the time spent and materials used.

[19] Guesstimates are still intended to mean something, and a guesstimate that proves to have been artificially low is not only problematic for the relationship but can be seen as breaching the contractor’s duty of care.

[20] In the absence of a fixed price contract, compensation for work done must still be reasonable. The giving of a guesstimate at the outset should be a factor in determining what is reasonable.

### **Findings**

[21] Everyone agrees that the contract here in question was for time and materials. The figure of \$8,000.00 was floated as a guesstimate, but I reject the Defendant’s contention that it was intended to be a “worst case scenario.” If anything, it was closer to best case scenario in the mind of the Claimant. A “worst case scenario” quote would have placed a ceiling on the cost of the project and would have been tantamount to a fixed price. I find that this was never acceptable to the Claimant, and he would never have started the job on that basis.

[22] I agree with the Claimant that the guesstimate did not include HST, and that the electrical work was not predictable at that point and turned out to be more complicated than originally hoped.

[23] I also find that the scope of the project expanded in several respects, adding close to \$2,000.00 to the cost.

[24] I do fault the Claimant in a couple of respects. His guesstimate was a bit over-optimistic. The Defendants speculate that he did so to secure their business, but I do not read any sinister motives into his actions. I believe it is human nature to be optimistic. The natural tendency would surely not be to overestimate the cost. But he needs to be accountable for his over-optimism.

[25] The Claimant also ought to have been aware, if not at the outset but as the project progressed, that the Defendants were cost-conscious. He ought to have known that he was spending more time than he had estimated, and he ought to

have given the Defendants a heads-up to alert them to the need either to adjust their budget, or possibly scale back the project. He allowed his bill to mushroom to the point that it came as a shock to the Defendants at the end.

[26] As I stated earlier, a contractor on a time and materials contract has a duty of care both to account faithfully for his time, and also to do only what is truly necessary. I find that the Claimant fell slightly short on both counts.

[27] The final bill contained these components:

| <b>item</b>              | <b>qty</b> | <b>rate</b> | <b>amount</b> |
|--------------------------|------------|-------------|---------------|
| Don Labour               | 105        | \$55.00     | \$5,775.00    |
| Sub Labour               | 146.5      | \$45.00     | \$6,592.50    |
| Electrical subcontractor | 1          | \$2,806.20  | \$2,806.20    |
| materials purchased      | 1          | \$1,097.23  | \$1,097.23    |
| subtotal                 |            |             | \$16,270.93   |
| HST                      |            |             | \$2,440.64    |
| total                    |            |             | \$18,711.57   |

[28] Under a fixed price contract, in the absence of a mitigating factor such as unconscionability or misrepresentation, the amount charged does not have to be reasonable. The parties are obliged to live with the bargain that they have made. In the absence of a contractually agreed amount, the price charged must be reasonable.

[29] Finding a reasonable amount is not an exact science. Taking into account the factors that I have discussed, I find that a reasonable amount can be derived by deducting 20 hours of the Claimant's time @ \$55/hr and 40 hours of his crew's time @ \$45/hr, which totals \$2,900.00. The HST on that amount is \$435.00. The total reduction would therefore be \$3,335.00.

[30] The total amount due to the Claimant would be \$15,376.57.

[31] The Claimant has asked for interest and costs. I decline to award interest given that the Defendants have been partly successful in having the bill reduced.

[32] The Claimant is entitled to his costs of \$199.35 to issue the claim and \$85.00 to have it served. He has asked for additional costs for printing, which

includes multiple colour photos. I am prepared to allow \$75.00 for miscellaneous costs.

[33] In the result, an order is made allowing the Claimant:

|       |             |
|-------|-------------|
| Debt  | \$15,376.57 |
| Costs | \$359.35    |
| Total | \$15,735.92 |

[34] A separate order will issue.

**Eric K. Slone, adjudicator**