

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Faulkner v. Nature Ridge Homes Ltd.*, 2023 NSSM 15

Claim No. SCCH 515117

Between

Victoria And Christopher Faulkner

Claimants

-and

Nature Ridge Homes Ltd

Defendant

DECISION & ORDER

Appearances: Claimant – John Eddy - Counsel
Defendant – Jeremy Ryant - Counsel

Hearing: March 6, 2023

Introduction

1. There is no area of the economy not adversely affected by the COVID 19 Pandemic. The impact was particularly bad in the construction industry. When supply chains were affected, prices rose significantly. When stay at home orders were in place, it was difficult to get workers.
2. This case involves the legal consequences of the price of lumber escalating dramatically. Should the increased costs be borne by the contractor, even though they are beyond its control, or by the intended homeowner, who is innocent and is awaiting completion of a newly constructed house?

The Evidence

3. There is general agreement on the facts.
4. The Claimant, Victoria Faulkner, a Chartered Professional Accountant serves in the Canadian Armed Forces. She was the primary contact with the Defendant. The Claimant, Chris Faulkner is also in the Canadian Armed Forces. They have two young children. Porters Lake, Nova Scotia is where they had made their home and is the community in which they wanted to raise their family.
5. The Claimants contracted with the Defendants to build them a house in Porter's Lake.
6. The parties signed an Agreement of Purchase and Sale for New Construction on February 5, 2021. The purchase price was \$559,000.
7. The contract, prepared by the Defendant and presented to the Claimants, was detailed. It consisted of twenty-five pages plus four schedules. Schedule B covered allowances for certain items included in construction. If the sum expended on a named allowance, such as decking, exceeded the allowance, the Claimants would pay the extra incurred cost. If the cost was less than the allowance, a credit would be given.

8. The contract states at page 6:

Work Changes/Cost Overages/Allowances

At any time during the progress or work, upon giving reasonable notice to the Vendor, the Purchaser(s) may, in writing, request changes to the work described in this Agreement. If changes are capable of being made, the Vendor will confirm to the Purchaser(s), in writing the

additional cost of the changes which are to be paid by the Purchaser(s) or the reduction in cost which will reduce the purchase price of the Purchaser and said changes shall be reflected on the HST Rebate form as provided by the Vendor on closing. The Purchaser(s) is to pay the Vendor for the extra upon closing date. The Purchaser(s) is to pay the Vendor for cost overages exceeding the allowances noted in the attached “Construction Specifications” document (Schedule B) upon closing date. ...

9. Schedule B covers allowances for the decking, exterior walls and roof (siding), plumbing, ventilation, heating, light fixtures, flooring, countertops, excavation and a fence. The agreement does not include an allowance for lumber, used for studs or trusses.
10. Ms. Faulkner’s father worked in construction. Though him the Claimants learned lumber costs had escalated significantly. On March 2, 2021, Ms. Faulkner emailed Anne Norwood, the Defendant’s Client Relations Manager (and the only witness for the Defendant) asking ‘if the prices of lumber go up, are we sheltered from that since our lumber will have already been ordered?’
11. On April 7, the Claimants and Ms Norwood exchanged text messages and spoke about the increased costs of lumber. In a text message, Ms Norwood says: ‘The cost of lumber has gone up on sheathing and studs so we need to talk about how that impacts your build.’
12. The parties spoke later that day.
13. The content of that conversation is reflected in an email from Ms Norwood on May 18, 2021
My sincere apologies that I didn’t send this email sooner. I wanted to circle back on the discussion we had regarding the increase in lumber costs back on April 7th. At that time I gave you and Chris 3 choices to handle these increases;
 - You were given the option to adjust your spending,
 - Pay the additional whether in your financing or from your own resources,
 - Last we gave you the option to walk away from the contract without any penalties.

You and Chris decided to move forward and allow for the additional costs in your savings or mortgage at this time. I had said at that time we would send an email to recap the overall discussion so you could acknowledge and I would add to your file. Once we have a total on the additional charges we can do a formal work change order to reflect the total difference for your (sic) both to sign.

The Claimants did not reply to this email.

14. There were no numbers provided by the Defendant regarding increased costs of lumber. For the Claimants, it was not an option to cancel the contract. They had sold their house and were eager to move into their new place. Housing prices were escalating. The Claimants waited for details from the Defendants about the extent of the impact increased lumber costs would have.
15. Between May and November, though the Claimants requested an amount for the increase associated with lumber, the Defendant provided no written information on the increased costs
16. On November 5, 2021, the Defendant delivered a proposed Schedule E, 'Work Change Order' describing changes to the work, current overages and credits. The Claimants received legal advice they should ask for details including invoices to support the proposed change order. The parties met. The Claimants indicated they were not pleased with all the claims for overages, especially relating to lumber. They had been asking for details for several months. None had been provided.
17. On November 8, the Claimants emailed the Defendants twice, asking for cost breakdowns for Schedule B and inquiring about the cost of lumber and 'what category it falls in as per Schedule B.'
18. On November 10, Ms Norwood emailed Ms Faulkner, with copies of previous emails sent in the spring. Referencing the May 18 email, Ms Norwood asserts 'This email to which you acknowledged would be legally considered an amendment to the original building contract.' Though reference is made to an acknowledgement, there was no evidence of a written response.
19. The next day, Ms. Norwood sent a detailed email with a list of the items charged under Schedule B. Included in this email was a charge of \$7245.08 +HST for 'Interior/exterior/sheathing lumber' and \$8050 for 'trusses'.

20. The Claimants stated these two items were not the subject of allowances in Schedule B. They did not dispute the other enumerated items.
21. On November 23, 2021, the Defendants sent a long email to the Claimants. The message explains why they must recover costs they have incurred because of 'astronomical cost increases' for building materials. In it they reflect on discussions in April 2021 (on April 7) between the parties before commencement of construction. It was forecast there would be price hikes for lumber. The email notes: "it was explained to you then that we were not prepared to proceed with your home without the additional costs being covered by you."
22. The Defendants say they only are claiming for costs they incurred and no profit is included.
23. The Defendants state they are at 'cross-roads' and 'if you refuse to pay the overages as presented in Schedule "E" our company cannot afford to continue construction of the home. You have until November 30th at 5:00 pm to let us know that you agree to pay...'
24. The ultimatum was that if payment was not received the contract would be terminated and the Claimants' deposit would be returned.
25. The Claimants' lawyer replied to that email. He states here is no reason to threaten termination of the contract. He says the Faulkners, despite their concerns about including overages for lumber, are prepared to sign Schedule 'E' if they receive information regarding the charges.
26. The November 30th deadline came and went.
27. The Claimants continued to seek details about the cost increases relating to lumber. On December 17, 2021, Ms Norwood provided the Claimants with a copy of a letter from Taylor Timber Mart, which notes lumber cost increases as high as 43%. The letter is not specific to the Claimants' project.
28. On December 22, the Claimants again ask for invoices for increased lumber costs. They reiterate 'this is not an allowance noted in our contract.'
29. The Defendant replies that the letter from the supplier should be sufficient, and no invoices will be provided. At the same time the Defendant advises 'total building supplies accounted for was in fact \$65,087.32 making the lumber

overage \$20,087.32 not \$7245.08 as previously noted'. A new deadline of December 30 at 5:00 pm is imposed.

30. Unknown to the Defendant, Ms Faulkner was facing a tragic personal circumstance. Her mother was critically ill and was hospitalized. Ms. Faulkner was pre-occupied with her family responsibilities. Her mother died on January 1.

31. Though this time both parties had the access to legal advice.

32. On December 30, The Claimants' counsel again wrote to the Defendants.

...They reluctantly agree to sign the amendments you propose....They are in the midst of a family emergency today. They will sign by the end of day on January 5... There is no legal basis for your arbitrary deadline of December 30. You can expect that if you nevertheless terminate the contract today....they will be immediately filing a claim....They will not be agreeing to any additional overages without clear evidence in the form of invoices...

33. On January 5, 2022, the Claimants signed Schedule E (Work Change Order). They continued to take exception to the charges in Item # 2 (Trusses roof/floor - \$8050 + HST) and #6 (Lumber for interior/exterior/sheathing - \$20,007.32 + HST).

34. Before signing Schedule E, the Claimants indicated they would contest the charges for which there were no provisions in the contract. They signed because, as Ms Falkner testified 'There was too much going on – I can't fight – No choice but to sign or we'd have nothing.' 'Either that (sign) or we didn't have a home.' 'The market had gone crazy. There were no homes for sale in Porters Lake.'

35. Closing the sale and payment to the Defendants of all amounts required by the Agreement of Purchase and Sale and its associated schedules occurred on January 27, 2022.

36. Anne Norwood testified for the Defendant. She explained the processes used to establish a construction price. The Defendant uses a few suppliers and subtrades. In this project, they received oral quotes for supplies, based on the drawings. Using the provided numbers, the Defendant established its construction costs and the amount to be changed to the Claimants.

37. In March and April 2021, the construction industry was unpredictable, according to Ms Norwood. They were experiencing additional expenses based on the rise of costs of building materials. They could not ascertain the full extent of the increases on a job until it was completed. At the time she indicated they were addressing all contracts where unforeseen price increases would affect costs not covered by allowances.

38. Ms Norwood confirmed the chronology provided by Ms Faulkner. She noted the Defendant could not fix the extent of the costs increase until the job was nearly complete, which for her was in December, when the Defendant received and could allocate costs from invoices. By December the Claimants' house was nearly complete, but additional costs could still be incurred.

39. Ms Norwood dealt with the increased costs applicable to the Claimants' project. She noted the increases were not addressed by proposing an amendment to Schedule B, which was attached to the agreement when it was executed, but were only included in Schedule E when it was prepared for closing.

Claim

40. The claim is for \$25000, the maximum authority of this Court, though the Claimants assert they had to pay an additional \$28000 + HST to close on the sale in January 2022.

Issues

41. The parties agree the issues to be determined are:
- a. Does the contract allow the Defendants to claim additional charges for lumber without the free consent of the Claimants?
 - b. Is there a basis to set aside Schedule E, which was executed with legal advice, based on duress or another equitable principle?

Positions of the Parties

42. The Claimants assert there was no contractual basis for adding increased lumber costs to the contract. There were provisions in Schedule B to deal with unforeseen costs, increased costs and changes in the scope of work. That Schedule did not establish an allowance to deal with the rise in costs of lumber for trusses or

interior/exterior sheathing, though it allowed for raises in other building material expenses to be passed on to the Claimants.

43. The Claimants allege they were in a state of duress when they signed Schedule E and that it is therefore invalid as it relates to the charges included for trusses and interior/exterior sheathing lumber.
44. The Defendant's position is the Agreement of Purchase and Sale allowed for the increase costs of lumber to be added to the sale price, as it did for other items in Schedule B.
45. They further assert there is no legal basis to set aside any portion of Schedule E, as the legal requirements for duress as established in *Kawartha Capital Corp v. 1723766 Ontario Limited*, 2020 ONCA 763 are not met.

Analysis

46. No one is at fault in this matter. It is well known and accepted the COVID 19 Pandemic had significant impacts on many industries. Common knowledge was that supply chains were disrupted and costs escalated substantially. That was true in the construction industry, in general, and relating to the costs of wood in particular. A doubling or tripling of costs for basic wood products was widely reported. When the parties entered into their Agreement of Purchase and Sale, it is not clear what the Defendants should have known about anticipated costs increases. The evidence does not disclose that. Nor does it indicate if they contemplated specifically including anything regarding the general state of flux their industry faced.
47. The question then is who must bear the risks of unforeseen cost increases for lumber, as the other areas where costs escalated were addressed by the allowances in Schedule B?

Does the contract allow the Defendants to claim additional charges for lumber without the free consent of the Claimants?

48. The contract provides for changes to the contract (through change orders), additions and credits in the section 'Work Changes/Cost Overages/Allowances'. It allows the purchaser to request changes in the work. It requires the purchaser to pay for 'cost overages exceeding allowances'. It states changes less than the allowances will create a credit to the purchasers. This section deems certain items not to be included in the price, such as rock blasting, environmental costs and

engineering fees. It also deals with the costs associated with sub-trades not being registered with the Workers' Compensation Board.

49. The contract does not address how to address extra costs incurred because of inflation or increased material costs, not associated with allowances.
50. The Defendant's position regarding the contract is that it can be amended by consent and the additional costs for lumber are contemplated by the 'Work Changes' portion of the contract.
51. The contract is a standard form contract prepared by the Defendants. It addresses several variables expected in new home construction. It provides several schedules to address situations reasonably expected to arise. The evidence surrounding the execution of the initial agreement is limited; however, a review of the documents constituting the entire agreement reflect there were few changes from the form presented by the Defendants to the Claimants.
52. The contract is a contract of adhesion – 'where the signatory does not really have the opportunity to negotiate its terms, but is obliged either to agree, and sign, or forego whatever such a contract might bring him.' See: *ETI Explosives Technologies International (Canada) Ltd. v. East Coast Explosives Ltd.*, 1994 CanLII 4265 (NS SC) quoting from Prof. Friedman's *Law of Contracts*, 1986. The law applicable to such contracts requires the Court to apply the *contra proferentum* rule of interpretation if the contract is ambiguous.
53. There are many cases where this principle has been discussed. In this Court, Adjudicator Knudson correctly summarized the applicable approach in *Alderwood Village v. Uwins*, 2018 NSSM 40

However, when considering the wording of standard form agreements, in the event of ambiguity, one turns to the principle of *contra proferentum* whose purpose, as stated by Iacobucci, J. in *NovaPharm* at paragraph 53, is:

“to protect one party to a contract from deviously ambiguous or confusing drafting on the part of the other party, by interpreting any ambiguity against the drafting party.”

As stated by the Nova Scotia Court of Appeal in *Ryan v. Sun Life Assurance*, per Cromwell, JA (as he then was):

“Its operation depends, therefore, on a finding of ambiguity in the language to be interpreted. Ambiguity in this context means that a term in

the contract is reasonably capable of more than one meaning: see for example *Chilton v. Co-operators General Insurance Co.* (1997), 1997 CanLII 765 (ON CA), 143 D.L.R. (4th) 647 at 654 (Ont. C.A.).”

54. I find the contract does not contain a provision allowing the Defendants to charge extra for increased costs for items not specified in Schedule B under ‘allowances’. By requiring an amendment to the contract to add the additional lumber costs, the Defendants pressured the Claimants to amend the contract to allow them to recover the inflationary charges being passed to them by their suppliers. The pressure was in two forms – a deadline to indicate if they would agree (where nothing in the contract allowed that) and threats to cancel the contract for the nearly completed house and return the Claimants’ deposit.

55. I note here, based on the evidence of the rapidly increasing costs of houses it is reasonable to believe the Defendant could have sold the house at a price higher than the Claimants paid. The evidence did not address that specifically, but it is clear the Defendant did not hesitate to threaten to cancel the agreement and did not appear to be concerned about the consequences that would result from that.

56. An alternate way to reach this conclusion is to find the contract provision relied on by the Defendants (the general language round allowances) is ambiguous, as it addresses some increased costs but not all. In that case, I would apply the *contra proferentum* rule and find the ambiguity must be interpreted in favour of the Claimants because the Defendants prepared the standard form contract.

57. Regardless of the approach I take, I find there was no express authority for the Defendants to add the increased lumber costs to its charges to the Claimants, unless the Claimants freely consented to having those charges in the final price paid on closing.

Consent

58. Parties can amend a contract as they can enter into it initially. The requirements for contract formation apply to contract amendments. Relevant to this matter is whether the Claimants freely consented to the amendment to add the additional cost of lumber or whether they were under duress or agreed based on an error or a misrepresentation. If the consent of the parties is vitiated, the contract or the amended portion, can be declared null and void.¹

¹ A straightforward analysis on this is in the Canadian Encyclopedia section on ‘Contract Law’ - <https://www.thecanadianencyclopedia.ca/en/article/contract-law>.

59. The Claimants assert they only agreed to include the increased costs of lumber in Schedule E because they had no choice. They had sold their home. The housing market in Halifax had witnessed significant increases in prices and they could not have afforded a new home or find one in Porters Lake within the short time available to them. They had small children and were committed to being in the community where they had had their home constructed.
60. The proposed amendment to the contract, in the form of Schedule E was presented to them in November 2021, with anticipation the closing on the house would occur in early 2022. If they did not agree to have the lumber costs increase in Schedule E the Defendants threatened to unilaterally cancel the agreement, when it said to the Claimants ‘if you refuse to pay the overages as presented in Schedule “E” our company cannot afford to continue construction of the home. You have until November 30th at 5:00 pm to let us know that you agree to pay...’ The ultimatum was that if payment was not received the contract would be terminated and the Claimants’ deposit would be returned. Though the deadlines were extended, the nature of the Defendant’s threat did not.
61. The position of the Claimants was they had no choice but to sign Schedule E with the lumber costs included as failure to do so would have left them without a choice in a volatile housing market. It was explained to the Defendants by the Claimants’ lawyer they were reluctantly agreeing to the content of Schedule E. The pressure on the Claimants was exacerbated by the personal health emergency they were dealing with, but even without that, the pressure to sign, to take it or leave it, was extreme.

Is there a basis to set aside Schedule E, which was executed with legal advice, based on duress or another equitable principle?

62. Based on the pressures applied to the Claimants to consent to an amendment to the contract by adding the lumber charges to Schedule E, in the circumstances is there a basis to set aside that portion of the Schedule? The Defendants note this raises the question of ‘duress’ and whether on the facts here, there was duress to the extent that would cause the Court to find the amendment that relates to the increased lumber costs is null and void.
63. The Defendant’s also noted a material misrepresentation may cause a court to strike an amendment. The Claimants have not made misrepresentation an issue and therefore I will not address it.

64. The Defendants urge me to assess the facts based on the law as outlined by the Ontario Court of Appeal in *Kawartha Capital Corp. v. 1723766 Ontario Limited*, 2020 ONCA 763 At para. 11 the Court states:

For a party to establish economic duress, it must show two things: first, that it was subjected to pressure applied to such an extent that there was no choice but to submit, and second, that the pressure applied was illegitimate. On the first prong of the test, the court considers four factors:

- (a) Did the party protest at the time the contract was entered into?
- (b) Was there an effective alternative course open to the party alleging coercion?
- (c) Did the party receive independent legal advice?
- (d) After entering into the contract, did the party take steps to avoid it?

If the party alleging duress satisfies those four factors, it must go on to satisfy the second prong, by showing that the pressure exerted was illegitimate: *Techform Products Ltd. v. Wolda* (2001), 2001 CanLII 8604 (ON CA), 56 O.R. (3d) 1 (C.A.), at paras. 31-34, leave to appeal refused, [2001] S.C.C.A. No. 603.

65. Applying this multi-stage approach, I must first consider whether the Claimants were subjected to so much pressure that there was no choice but to submit. I conclude they were.

66. By the time they were provided with the numbers that the Defendants intended to charge them, they were between the proverbial rock and a hard place. They had no place to live and moving to their new home was the only viable option for them. Thus they had no choice but to submit to the Defendant's demand that they sign Schedule E with the increased lumber costs included.

67. Given my answer to this, I must then consider the four factors.

- (a) Did the party protest at the time the contract was entered into?

The Claimants protested. For the entire duration of construction, they sought information about what would happen to their home given the widely publicised fact that lumber costs were unpredictable and increasing because of the Pandemic. The Defendants did not provide them with any information that would allow them to decide until there were numbers available in November and December. The information provided by Timber Mart was too general to be of any use to the Claimants. It was not until a proposed Schedule

E was given to them where the final costs were included that they knew the extent of the proposed charges. Directly and through their lawyer they objected but indicated they would reluctantly sign the Schedule in order not to lose their new home, as the Defendants had threatened to cancel the contract and return their deposit.

(b) Was there an effective alternative course open to the party alleging coercion?

The Claimants had no option, or effective alternative to closing their home purchase under the terms of the Agreement of Purchase and Sale as amended by the inclusion of the lumber costs in Schedule E. Their position was there were no options at the late date they faced making a decision. The housing market was inflated; they were dealing with a personal emergency; and this was happening through late December when the whole community is pre-occupied with holiday celebrations and the ability to seek alternate permanent housing would have been extremely difficult. It is in recognition of the circumstances of the Claimants I interpret the Claimants' lawyer's reference to there being no basis for setting a December 30 date arbitrarily. The lawyer was not finely interpreting or opining on all legal issues applicable from the hardball position taken by the Defendants.

(c) Did the party receive independent legal advice?

The Claimants had a lawyer advising them. Though the specific advice given was not disclosed, their lawyer wrote to the Defendant objecting to the proposed inclusion of the extra charges and to the Defendant's threat to cancel the sale. His emphasis was on the remedies available to the Claimants in that event, as that was the threat the Defendant had made. They imposed several deadlines to have the Claimants agree to adding charges or costs to their contract, that were not included in it.

The Defendant suggests the lawyer's December 30 email could have been clearer and more specific. I have noted, given the time of year and the emergency facing the Claimants on that day, it is unnecessary to critically assess what the lawyer did not say. It was clear he was objecting to the Defendant's tactics.

(d) After entering into the contract, did the party take steps to avoid it?

No actions were taken to avoid the obligations imposed by the amended contract. In January, the Claimants closed on their purchase, paid all they owed and then commenced an action to recover what they believed was improperly charged to them.

68. Based on these four factors I conclude the Claimants were subject to significant pressure that amounted to duress. Given that conclusion I must address the second part of the test – was the pressure exerted illegitimate?

69. As I found above, there was no basis in the contract for the Defendant's to treat the escalation in the price of lumber as they did with other price increases provided for in the allowance provisions in the contract. The Defendants prepared the Agreement of Purchase and Sale. It was open to them before it was signed, based on their knowledge of their industry and environment, to include a reference or provision to deal with price escalation in other areas. They did not do that. The contract is long and extensive and addresses a multitude of circumstances that might arise. In doing so it allocates the risks of those things referred to happening and states who will bare responsibility for them.

70. Schedule E was signed under duress applied by the Defendants on the Claimants. Because of that the charges in Item # 2 (Trusses roof/floor - \$8050 + HST) and #6 (Lumber for interior/exterior/sheathing - \$20,007.32 + HST) are null and void and are not part of the amended contact. The Claimants are entitled to have the sum paid for these items returned

71. The Defendants are ordered to pay to the Claimants:

- a. Damages - \$25000
- b. Interest at 4% from January 2022 - \$1167.00
- c. Costs - \$199.35

TOTAL - \$26366.36

72. In conclusion, I reiterate the Defendant's bear no responsibility for the increased costs presented to them by their suppliers. These reasons reflect an analysis of who must shoulder responsibility for unforeseen increases in expenses during an unprecedented time in the Canadian (and world) economy. In the context of a contract, the application of the equitable principle of duress, does not suggest fault. The Defendants believed they should not have to pay significantly higher costs for materials without passing them along to their client/house purchaser. They are in business and thought, as it was with increases covered by allowances, they could or even should charge for unknown and unexpected charges. My conclusion is that they could not.

73.I recognize it is small comfort to the Defendant that I appreciate they may have lost all or most of their profit on this project.

74.If an order is required, I ask counsel for the Claimant to prepare it and have the Defendant consent to form. I will then sign it.

Dated at Halifax, Nova Scotia, March 23, 2023

Adjudicator, Small Claims Court