

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Pickup v. James McLennan Roofing Ltd.*, 2023 NSSM 48

Date: 20230624

Docket: SCAR No. 522668

Registry: Annapolis Royal

Between:

Marian Wendi Pickup

Claimant

v.

James McLennan Roofing Ltd.

Defendant

Adjudicator:	Andrew S. Nickerson, K.C.
Heard:	June 21, 2023
Decision	June 24, 2023
Counsel:	Marian Wendi Pickup, self represented Claimant Bruce W. Gillis, for the Defendant

By the Court:

[1] At a prehearing conference on June 21, 2023, this matter was set for trial at 6:00 PM on July 19, 2023 by way of telephone trial. At 6:00 PM on that date myself and the Claimant were on the call. No one was on the call on behalf of the Defendant. I delayed to dealing with the matter until approximately 6:10. I then heard the Claimant's evidence. The call ended at approximately 6:25 PM.

[2] Prior to the hearing I had received written submissions dated June 23, 2023 from Mr. Gillis, citing my decision in the case of **Wright v. McLennan SCAR 514050**. In that decision I had declared a deposit of \$2000 in respect of a quote of \$25,300 to be forfeit. Despite the fact that no one appeared on behalf of the Defendant, I have taken into consideration those submissions.

[3] On the evening of the hearing, I reserved decision.

EVIDENCE

[4] The Claimant testified that she had requested a quote for the replacement of her roof from the Defendant. The Defendant provided a quote of \$41,745. The Defendant informed her that he could not do the job that fall, but it would have to be added to his work for the following year's construction season. She states that

the Defendant assured her that the roof would be sufficient for the winter. The Claimant testified that there was no contract in writing other than the quote.

[5] She had to find another contractor and complete the work because shingles were blowing off her roof and it had begun leaking.

ANALYSIS

[6] Mr. Gillis is quite correct with respect to the decision I made in **Wright v. McLennan**, however this case contains an additional consideration which did not pertain in **Wright v. McLennan**. That is the question of proportionality.

[7] In **Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282** at para. 15, the Ontario Court of Appeal confirmed the two-part test for determining whether relief from forfeiture in relation to deposits should be granted, as follows:

1. whether the forfeited deposit was out of all proportion to the damages suffered, and
2. whether it would be unconscionable for the seller to retain the deposit.

[8] In **Wright v. McLennan** the deposit represented approximately 8% of the contract price. In the present case the deposit represents approximately 24% of the contract price.

[9] While I do not have evidence from the Defendant as to what his damages may have been, I believe that a deposit of 24% of the contract price cannot possibly fairly represent the Defendant's loss. I therefore consider this deposit to be out of proportion with the damages that can reasonably be inferred. I considered that the 8% that was dealt with in **Wright v. McLennan** was reasonable and in proportion to the damages suffered.

[10] In the result I am prepared to conclude that 8% of the contract price would be reasonable for the Defendant to retain, and I relieve against forfeiture for the rest of this deposit. By my calculation 8% of the contract price would be \$3,340.00

[11] I therefore grant judgement to the Claimant in the amount of \$6,660.00. (\$10,000 - \$3340) in addition, I will grant the filing fee of \$199.35. Judgement will issue for \$6,859.35.

Dated at Annapolis Royal this 24th day of July, 2023.

Andrew S. Nickerson K.C., Adjudicator