SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Horodyski v. I.C. Property Management Solutions Inc.*, 2025 NSSM 52

Date: 20250821
Docket: 542111
Registry: Halifax

Between:

Robert Horodyski

Claimant

v.

I.C. Property Management Solutions Inc.

Defendant

Adjudicator:	Darrel Pink
Heard:	August 13 and 19 in Halifax, Nova Scotia
Decision:	August 21, 2025
Counsel:	Samuel D. Ward, for the Claimant Anna-Marie Manley, for the Defendant

By the Court:

The Facts

[1] The Claimant owns a twelve-unit apartment building at 32 Rose St. in Dartmouth. In 2019, he hired the Defendant to undertake a life extension program for the building's roof. No problems were evident but following the Defendant's work on the Claimant's condominium building in Halifax, he approached the Defendant to determine if a similar approach might work on his apartment complex. As preventative maintenance, he sought to extend the roof's life by fifteen to twenty years.

[2] The Defendant proposed applying a GAGOFlex roof recovery system on top of the existing modified bitumen. He proposed to 'clean and prepare the substraight (sic), apply Unibase primer bleed blocker and GAGOFlex as per spec'. The price was $26185.50[1]. The parties contracted for the proposed work.

[3] There were two sleeper curbs on the roof. The Defendant agreed to remove them and reinstate the affected roofing membrane. A new roof hatch and new roof drains, to accommodate the roof's slope, were to be installed.

[1] Ex. 1/Tab 1

[4] The installation occurred in the summer of 2019. The Claimant stated the work began without advance notice to him. When he arrived on the jobsite, he went onto the roof and saw the Defendant's forces sweeping the existing bitumen roof with a push broom. He saw no other cleaning procedure. He stated that the application of silicon primer over the bitumen, the first step in the process, commenced that day.

[5] Richard Sterling, the Defendant's owner, was not on the site on day one, though he attended on occasion when his company's forces were working. No one involved in the install, including the primary worker/supervisor, Brandon, testified.

[6] As part of the contract, the Defendant provided a ten-year manufacturer's warranty on materials and a five-year workmanship warranty from his company.

[7] In 2020, there was a roof leak. The Claimant went on the roof to find its source. At the northwest corner, he found holes in the roof that had not been patched.

[8] Over the following months, he discovered further problems with the roof. Where the sleeper curbs were removed, the roof was not smooth. There were holes that would allow water entry if the silicone failed; there were gashes in the roof that were never patched; there were issues with the area around the roof drains; he

believed the primer used was inappropriate for the application used by the Defendant[2].

[9] Though these were some of the issues identified by the Claimant, his primary concern was the delamination of the roof membrane from the substrate which he was observing.

[10] On numerous occasions, the Defendant, under its workmanship warranty, sent roofers to repair the roof and address issues identified by the Claimant, who says these repairs addressed 'a fair amount of the roof'. According to the Claimant, Mr. Sterling saw the extent of the delamination and ordered the work. Repairs were done in 2020, 2021 and 2022.

[11] Though problems continued, it was not until late 2023 that the extent of the roof problems and the suggested causes became clear to both parties.

[12] On September 27, 2023, the Claimant emailed Mr. Sterling. In the aftermath of Hurricane Leo, he was on the roof and noted:

> With regret, (I) noticed there was a lot of water under the membrane, delamination on some joints, found two places where the membrane was cut (assuming last year) to allow the spot to dry, but was not patched, etc.

[2] Ex 1/Tab 10 & 11

[13] Mr. Sterling replied immediately:

> ….The system is self terminating so there's no way water can travel underneath it. The few blisters that occurred happened due to the fabric not stretching quite enough to embed into the product at the time of installation….Looks like Brandon didn't have enough fabric with him when he was last there and never told me.

[14] By return email the Claimant advised a 'significant' area of the roof had water. 'It's not just small isolated pockets anymore,' he noted.

[15] A repair visit was scheduled for early October 2023. Mr. Sterling then notes:

> My concern is you have had further **structural movement** in your building, causing the fabric reinforcement to separate in places. As over time. you previously said and was discussed, the building has been starting to sag in the middle (emphasis added)

[16] Mr. Sterling frequently repeated the notion of 'structural movement' to explain why there were problems with the roof. His evidence at trial clarified that. The roof deck's supposed movement is the gravamen of the defence to this claim.

[17] The Claimant responded to emails in which the structural movement suggestion was made. He was adamant that there was no movement, and it was not a consideration. He refuted any suggestion made by Mr. Sterling that this issue was raised before the project started. Mr. Sterling testified that he recommended a structural analysis and reinforcement of the roof deck from underneath to avoid a problem he foresaw.

[18] There is no written evidence that he suggested that the Claimant obtain expert structural engineering advice. No emails raise the issue. It is not noted in the invoice or any documents surrounding the contract. It is not until 2023, long after the Claimant had raised his concerns with the Defendant and the Defendant had made repairs and committed to further work, that he mentioned the possibility of 'structural movement'.

[19] At the same time, Mr. Sterling explained that the Defendant's work was designed to reflect UV rays and had nothing to do with the roof's integrity, which was provided by the bitumen layer under the protective GACO coating. Numerous times, he described the work done by his forces as 'idiot proof'.[3] In his view, the Defendant's work was very simple, and, as he explained in his emails in October 2023, even if the membrane failed, leaks were not possible.

[20] At trial, there was no factual or opinion engineering evidence to suggest any issue with the structure supporting the roof. Though raised by the Defendant, the court cannot find that structural movement is somehow a cause of the roof problems because there is no reliable or believable evidence to support that theory.

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[333] See Ex 1/Tab 7/p.3 of 9

The Defendant's theories are self-serving and cannot be accepted as reliable on this point.

[21] In late 2023, Mr. Sterling stopped communicating with the Claimant or dispatching his forces to make repairs. Though Brandon, the supervisor, attended the site around October 29, 2023, he said there was insufficient time to complete the work and that Mr. Sterling would reschedule him to do so. That never occurred.

[22] The Claimant explored his options. He contacted the manufacturer of the product used by the Defendant. On June 3, 2024, he advised Mr. Sterling of the results of his consultation with GACO and his conclusions. He said[4]

- The membrane has delaminated on most of the roof.
- The entire roof had a membrane embedded in the liquid membrane. (The GACO product is to be used only on corners and joints).
- The primer used was not GACO's; they cannot guarantee product compatibility if a competitor's product is used.
- The roof cannot be fixed by patching, as there is too much delamination.

[4] Ex 1/Tab 7/ p1/3

- The silicone membrane needs to be removed, and they do not recommend reapplying the same product as the adhesion has been compromised.

[23] The Claimant then began to look to others for a permanent solution. Several roofing contractors provided proposals for a permanent solution to the issues evident on the roof.

Limitations of Actions

[24] In April 2025, the Claimant filed his Notice of Claim against the Defendant.

[25] The Defendant argues that the *Limitations of Actions Act* bars the claim. The relevant sections to consider are:

> 8 **(1)** Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is **discovered**; and
>
> **(2)** A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or con- tributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) **that the injury, loss or damage is sufficiently serious to warrant a proceeding**.
>
> (Emphasis added)

[26] The Defendant asserts the ‘injury loss or damage’ was ‘discovered’ in 2020 or 2021 when the Claimant identified problems with the roof and called the Defendant to return to perform repairs. Counsel argued that the ‘discoverability’ principle, as interpreted in ***Smith v. Parkland Investments Limited***, 2019 NSSC 74 should be applied here.

[27] The Claimant says the calls to the Defendant were to require it to fulfil its obligations under its workmanship warranty and that it was not until the Defendant refused to perform any further work, in late October 2023, that the damage to the roof warranted a proceeding. In other words, the Court should apply s. 8(2)(d) of the Limitations Act.

[28] The psition of the Claimant is the correct one on these facts. In ***Install-A-Floor Limited v. The Roy Building Limited***, 2022 NSSC 67, Justice Norton considered s. 8(2)(d) of the *Limitations of Actions Act* and adopted the analysis of the Ontario Court of Appeal in ***Dass v. Kay***, 2021 ONCA 565, leave to appeal to SCC refused, 2022 CanLII 14384 (SCC). The Ontario Court applied a three-step analysis when considering the legislative provision in Ontario, similar to s.8(2)(d).

[29] The first step requires a determination of whether a proceeding is an appropriate means to seek to remedy an injury, loss, or damage. Second, the court

recognized two non-exclusive factors that can operate to delay the date on which a claimant would know that a proceeding would be an appropriate means to remedy a loss, e.g. the defendant's superior knowledge and expertise and whether an alternative dispute resolution process is available or mandated. The third relates to "appropriate" and that it is legally appropriate to bring a proceeding, rather than practically advantageous.

[30] On the facts of this case, the Claimant relied on the Defendant's 'superior knowledge' of roofing as demonstrated by his repeated requests and expectations that the Defendant would return to make repairs under its warranty obligations. As long as the Defendant continued to do so, as it did from 2021 to late 2013, a 'proceeding' was not appropriate, since the Defendant was fulfilling its contractual obligation. Not until late October 2023, when the Defendant failed to return to do the promised work and ceased communication with the Claimant, was it appropriate to consider a proceeding. At that point, the Claimant mustered the evidence required to make a claim, which he subsequently filed.

[31] The claim was filed in the Small Claims Court within the two-year limitation period.

Expert Evidence

[32] Kevin Cochrane, the owner of Foam & Coatings Pros, provided a quote and then an opinion[5] on the state of the roof. At trial, he was qualified to provide an expert opinion on 'the use of roofing coatings to seal roofing systems and, in particular, the use of silicone to seal roofs'.

[33] The Defendant challenged Mr. Cochrane's neutrality and ability to provide an expert opinion. When he initially saw the roof and gave his opinion, he had not been asked to provide a quote for restoration work. He had no financial interest in the state of the roof. Though his company, as one of the few that provide roofing applications similar to what the Claimant had, was asked by the Claimant to provide an estimate for a long-term solution, I found that his opinion would be admitted and any interest he had in future work would go to the weight I assigned to his evidence.

[34] Mr. Cochrane attended 32 Rose St. in late November 2024. His report records his observations, which include:

- Over 50% of the membrane is delaminated from the bitumen.
- Some areas of delamination have air pockets.

[5] Ex.1/Tab 9

- Large areas of delamination had standing water trapped between the membrane and the bitumen.

- Patching was unsuccessful and was of poor quality, as in some areas the patch seams are not properly fused or not fused at all, allowing for water penetration.

- In areas where the membrane was not fused, he observed that the surface to which the membrane was applied was not properly cleaned to support proper adhesion.

[35] His report notes:

> Prior to applying silicone roof membrane, proper surface preparation steps must be followed in order to ensure adhesion. The correct procedure dictates that the area intended for this type of roofing material application must be thoroughly swept and pressure washed using commercial cleaner to remove any dirt, debris and oil residue. Subsequently, the roof must be allowed to dry thoroughly before the process of coating application to begin.

[36] He concludes that:

a. Proper surface preparation procedures were not used;

b. Patches were not done properly, with many seams not properly fused.

c. To date, water trapped under the membrane has not led to active leaks, but the friction of water and ice and fine debris between the membrane and the bitumen will at some point compromise the surface.

d. Prompt action is needed to find a new roofing solution, as active leaks are just a matter of time.

e. A silicone membrane cannot be reapplied to the bitumen because silicone will not adhere to silicone.

f. The current roof is beyond salvage. It must be removed and another roofing solution must be found.

[37] The essence of Mr. Cochrane's opinion, which he elaborated on in his testimony, is that there are three causes for what is happening on the roof. They will, in the near term, lead to a failure of the roof. The first is that the modified bitumen surface was improperly cleaned and prepared. The second is that an improper primer was used. The third is that the incorrect silicone was used. Collectively, these three improper actions, which were contrary to the manufacturer's recommended procedures or industry standards, have resulted in the delamination that is evident.

[38] I accept the opinion of Mr. Cochrane and find it both credible and reliable. He showed no bias. His evidence was not influenced by the fact that he had subsequently given an estimate for the roof restoration.

Findings

[39] Three possible causes of action, alone or in combination, arise from the facts and are listed in the Notice of Claim. There could be a claim in negligence, a claim for breach of contract, relating to the roof installation and a claim under the workmanship warranty. Given the risk of a catastrophic failure, the warranty claim will not satisfy the Claimant's needs as the Defendant has made it clear that it will do no further repairs or patching, which have turned out to be interim solutions. Because there is a contract between the parties, as is outlined below, the proper legal framework around which to construct the court's analysis is in the law of contract, not in negligence.

[40] The only evidence of the work done and the processes used when the roof was installed is that of the Claimant. He was there and saw the roof being swept. He said there was no additional cleaning with pressure washers or cleaners. He stated that on the first day of the job, the silicone was applied early on after the work commenced. I accept the Claimant's evidence on this point. Mr. Sterling

suggested that sweeping was all that was necessary, as any remaining debris would sink into the membrane when it was torched before placement of the silicone. Though that ay be his view, it is contrary to other evidence and I find that more preparation was required before the proposed solution was applied.

[41] I find that the Defendant swept the bitumen surface but did no other cleaning to prepare it for the application of silicone. I accept Mr. Cochrane's evidence on what proper membrane preparation entailed. Sweeping does not constitute ‘clean and prepare the substraight (sic)’ as proposed by the Defendant, who failed to properly prepare the bitumen surface for the application of a layer of silicone.

[42] I accept Mr. Cochrane's opinion that failure to properly prepare the surface led to delamination of the GACO membrane, that water pooling between the membrane and the bitumen will cause deterioration of the bitumen, and that the roof needs to be replaced.

[43] There is no controversy about what primer and silicone the Defendant used. Gray silicone was used, though white silicone was called for. A Unibase primer was used.

[44] I find the Defendant's repairs under its warranty were not done properly, and they failed to remedy the issues that would eventually lead to the roof's

degradation. In 2023, two “X” cuts were noted on the roof. The only people on the roof in 2022 were the Claimant and the Defendant’s workmen, who were making repairs. These cuts were made to allow drying from below. They ought to have been sealed. They were not and risked or allowed water to leak through the membrane. This may indicate the Defendant’s approach to the repairs, which, in several instances, were poorly done.

[45] Regarding the defendant’s suggestion of structural movement of the roof as the cause of the problems, I do not accept Mr. Sterling’s evidence. Though he says otherwise, I find Mr. Sterling did not suggest to the Claimant that he should consider structural reinforcement of the roof deck. If the roof sagging or structural movement were as serious an issue as he suggested at trial, he would have written something to the Claimant, for no reason other than to protect himself. He acknowledged that once he applied a roof to a deck, he was responsible and could not blame the deck for the failure.

[46] Furthermore, if he had identified the issue, he would have repeated it immediately after the Claimant brought the developing problems to his attention in 2020 and 2021. It was three years before this explanation for the roof leaks was identified. I do not accept that prior to commencing its work in 2019, the Defendant or Mr. Sterling made any recommendation in this regard.

[47] I find that there is no evidence to support the Defendant's assertion that structural movement is the cause of the roof's failure. There is nothing before the court to support this conclusion. The Defendant had an opportunity to present expert evidence to support this theory, but did not do so.

[48] There was considerable evidence about GACO and GAF roofing products and whether what was used was proper. Both parties testified about differing roofing systems, various products and the use of GAF and GACO products in a single application. Much of the evidence relied on product descriptions and specifications from manufacturers. Given my findings on the cause of the roof failure, I make no findings relating to the Defendant's selection and application of products from different manufacturers, other than as noted above, where Mr. Cochrane says improper products were used.

The Contract and Standard

[49] The contract between the parties consists of the defendant's accepted proposal, as evidenced by the paid invoice[6]. Because the contract is silent on terms relating to quality, I imply a term to the contract to specify a standard applicable to the work to be done. Similar to what would be included if this were a consumer

[6] Ex 1/Tab 1

contract, the contract contains an implied term that the work would be done skillfully and competently. Though the *Consumer Protection Act* does not apply to this contract for services, the standard contained in s. 26(4) is useful here, as it imports the concept of reasonableness by requiring the work to be done to the standard of one who is skillful and competent. The parties have agreed this standard imports the same requirements as 'good and workmanlike'.

[50] The evidence supports a conclusion that the Defendant failed to install or repair the roof competently. In particular, given the expectation that the roof surface would be adequately cleaned to remove debris and grime and that the Defendant failed to prepare the roof for applying silicone correctly, its work fell below the standard of a competent and skillful installer of silicone roofs. The Claimant has established on the balance of probabilities that the Defendant thus breached its contract with the Claimant.

Damages

[51] The damage award that flows from the Defendant's breach is the amount required to provide the Claimant with the equivalent of performance. The principle is called the 'expectancy principle'. Its classic formulation in ***Robinson v Harmon***, (1848), Exch 850, 154 ER 363 is:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[52] The Claimant must replace the roofing application installed by the Defendant at 32 Rose St. His damages are the costs of replacing the roofing membrane and the value added by what the GACO product would provide. The arrangement between the parties was to get a roof that would extend the life of his present roof by 15-20 years.

[53] The Claimant is entitled to damages that will provide a new roof with a lifespan of at least 15-20 years.

[54] The Defendant argues that if damage are to be awarded the Claimant must not get better than it had at the time of the contract breach.

[55] Considering the concept that damages must not provide a 'betterment', in ***Byrne Architects Inc. v. A.J. Hustins Enterprises Ltd***. 2003 NSCA 21, Hamilton, JA, quoting the trial judge who discussed betterment:

> [98] When dealing with how the betterment of the upper parking deck should be taken into account in awarding damages the trial judge stated:
>
> > [146] The award must also reflect the fact that, notwithstanding that the membrane-joint system failed, the plaintiff installed an entirely new system with an anticipated lifespan of 20 years. That is, his position was improved or bettered. The authors of *Damages for Breach of Contract, supra* describe the situation at 2-3(c)(i):
> >
> > > The issue of betterment arises in situations where the court adopts the "cost of performance" test and awards the cost

> of carrying out the repairs or, in the extreme, awards an amount sufficient to rebuild a defective structure. As a result of the repair of (sic)replacement of the damaged product or building, the plaintiff will receive a new product or building which will have a greater value than that which existed prior to the damage being sustained. The court, therefore, must decide whether to factor the "betterment" into the calculation of damages and reduce the damage award accordingly.
>
> For example, a plaintiff employing the use of a machine in the manufacturing business may anticipate the machine's life expectancy to be twenty-five years. If, as a result of a breach of contract (or tort), the plaintiff is required to replace that machine after twelve and one-half years, he or she will then be possessed of a new machine that has a life expectancy of twenty-five years, double the life expectancy of the machine in the plaintiff's possession at the time of the breach. In another example, a roof on a commercial building is expected to have a lifespan of ten years. After four years, as a result of negligent construction, that roof must be replaced. The new roof, when installed, will have a new life span of ten years. As a result, the plaintiff will have received a "betterment" consisting of a new roof which will last an additional four years.

[147] They continue at 2-3(c)(ii):

> In the example provided earlier, it can readily be seen that unless betterment is taken into account, the plaintiff will end up with a new roof or rotor, all at the defendants' expense. This would conflict with he basic principle of contract and tort law that the plaintiff is entitled to the recovery only of his or her losses. The authors proceed to (sic) describe the two stage method used in Ontario as introduced in *North York (City) v. Kent Chemical Industries Inc.* (1985) 33 C.C.L.T. 184 (Ont. H.C.) to calculate the amount of betterment by which a replacement award will be reduced. I have found no authority that suggests such a method has been adopted in Nova Scotia. The approach used in this province is well illustrated by the case of *Dartmouth (City) v. Acres Consulting et al.* (1995), 1995 CanLII 4551 (NS SC), 138 N.S.R. (2d) 81 (S.C.).

[99] The principle rule for measuring damages is to effect a restitutio in integrum so far as the damage is concerned. Cheshire, C.G. *Law of Contract* , 11th ed., (London: Butterworths, 1986), at p.588. Hustins is to be placed in the position that he would have been in had the contract not been breached; no

> better, no worse. The trial judge applied this rule when he adjusted certain amounts of damages by 25%, to take into account the longer time Hustins would have the use of the waterproofing system because of its replacement, and in doing so he made no reversible error. (Emphasis added)

[56] The Claimant is entitled to be compensated only for the loss he has suffered. In 2019, a new roof membrane was installed. It required repairs within months of and ongoing repairs have been undertaken. The Defendant did them until 2023; since then, the Claimant has done his own remedial work. Now, five years after the initial job, which was not performed to the standard required by the contract, the membrane needs to be replaced. The Defendant contracted for fifteen -twenty years of protection. He has had five years of irritation, but the membrane has served its primary purpose. Adopting that twenty years was the life expectancy, he is entitled to compensation for fifteen more years or 75% of the value of a replacement product.

[57] The Claimant submitted several quotes for a roof replacement[7]. Most of them propose a roof replacement, including removing the modified bitumen. In other words, he would get a new roof. Only one, the proposal from Foam and Coating Pros[8] proposes to only replace the membrane for $35650.00. This is the most appropriate estimate of the Claimant's loss.

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[7] Ex 1/Tabs 2-7
[8] Ex 1/Tab 6

[58] Applying the betterment analysis, the Claimant is entitled to the value of a membrane that will protect his roof for an additional fifteen years. Using 75% of the costs to do so, he is entitled to damages of $35650 x 75% or $26737.50.

[59] The damages the Claimant deserves exceed the monetary jurisdiction of the Small Claims Court. Therefore, the court awards damages to the Claimant of its maximum monetary authority of $25000. The costs of $199.35 for filing the claim and $114.00 for service are to be included in the award.

[60] If an order is required, counsel for the Claimant should prepare it, have counsel for the Defendant consent to the form and forward it to the court for signature.

Darrel Pink, Small Claims Court Adjudicator