SUPREME COURT OF NOVA SCOTIA

Citation: *Nature Ridge Homes Ltd. v. Faulkner*, 2024 NSSC 216

Date: 20240729
Docket: 524735
Registry: Halifax

2024 NSSC 216 (CanLII)

Between:

Nature Ridge Homes Ltd.

Appellant

v.

Victoria and Christopher Faulkner

Respondents

Judge: The Honourable Justice Glen McDougall

Heard: October 30, 2023, in Halifax, Nova Scotia

Counsel: Noah Entwisle, for the Appellant
Sarah Dobson, for the Defendants

By the Court:

Introduction

[1] This is an appeal of a decision of the Small Claims Court. The proceeding arises out of a dispute over costs for construction of a house. The Adjudicator ruled that the buyers had overpaid, on the ground of duress. The builder appeals, claiming that the Adjudicator erred in finding duress in the circumstances. As I will explain, I conclude that the appeal must be allowed and the Adjudicator's decision quashed.

The Adjudicator's Decision: Evidence and Factual Findings

[2] The parties concluded an Agreement of Purchase and Sale for New Construction ("the APS") on February 5, 2021. The Respondent purchasers retained the Appellant construction company to build them a house in Porter's Lake for a purchase price of $599,000. In a section headed "Work Changes/Cost Overages/Allowances", the APS contemplated that cost implications of changes would be dealt with at closing, as would "cost overages exceeding the allowances" noted in Schedule "B". The Adjudicator stated that Schedule "B" covered "allowances for the decking, exterior walls and roof (siding), plumbing, ventilation, heating, light fixtures, flooring, countertops, excavation and a fence" but did "not include an allowance for lumber, used for studs or trusses" (para. 9).

[3] In March 2021 the Respondents, having heard that lumber prices were rising, inquired about the effect this might have on the project. There ensued an exchange of emails and text message with Anne Norwood, the Appellant's Client Relations Manager, who wrote on April 7 that "[t]he cost of lumber has gone up on sheathing and studs so we need to talk about how that impacts your build" (paras. 10-11). Ms. Norwood summarized the discussion in an email to the Respondents on May 18:

> 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.

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> 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. ….. [para. 13].

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[4] The Adjudicator found that the Respondents did not reply to this email. He also found that “[f]or 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” (para. 14). This was nearly ten months before the eventual closing date.

[5] Over the next several months the Respondents requested a number for the increase in lumber costs, but “the Defendant provided no written information on the increased costs” (para. 15). On November 5, 2021, however, the Appellant delivered a proposed Schedule “E” “Work Change Order” which included claims for overages for lumber, among others. The Respondents requested cost breakdowns, particularly respecting lumber, and asked what category this fell into under Schedule “B”. On November 10, Ms. Norwood replied that the May 18 email “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 (paras. 16-18).

[6] Ms. Norwood sent a list of Schedule “B” charges on November 11, 2021. The Respondents objected to two of these: $7,245.08 +HST for interior and exterior sheathing lumber and $8,050 for trusses (paras. 19-20). Subsequently, on November 23, 2021, in a further email, the Appellant explained that the increases were necessary due to “astronomical cost increases.” They also referred back to the April pre-construction discussions, when, the Adjudicator stated, “[i]t 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’” (paras. 19-21). The Appellant stated that they would be unable to continue construction if the Respondents refused to pay the overages set out in Schedule “E”, and gave them until November 30 to agree. Failing that, the APS would be terminated and the Respondents’ deposit would be returned (paras. 21-24).

[7] The Respondents did not agree by the deadline, but their lawyer advised the Appellant that there was “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" (paras. 25-26). On December 17, 2021, Ms. Norwood forwarded the Respondents a letter from Taylor Timber Mart referring to lumber price increases of up to 43%, though it was not specific to the Respondents' project. On December 22 the Respondents again requested further information, but the Appellant replied that "the letter from the supplier should be sufficient, and no invoices will be provided" (paras. 25-29). The Appellant further advised that "total building supplies accounted for was in fact $65,087.32 making the lumber overage $20,087.32 not $7,245.08 as previously noted", and set a new deadline of December 30 at 5:00 p.m. (paras. 29-31).

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[8] On December 30, 2021, while the Respondents were dealing with Ms. Faulkner's mother's illness that led to her death on January 1, 2022, their counsel wrote to the Appellant, advised that the Respondents were dealing with a family emergency, and added that they would sign Schedule "E"

> "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" (para. 32).

[9] The Respondents signed Schedule "E" on January 5, but "continued to take exception to the charges in Item #2 (trusses roof/floor - $8,050 + HST) and #6 (lumber for interior and exterior sheathing - $20,007.32 + HST)" (decision at para. 33). Before signing, they indicated their intention to "contest the charges for which there were no provisions in the contract" (para. 34). Closing occurred on January 27, 2022.

[10] The Adjudicator reviewed the evidence of Anne Norwood, who explained the Appellant's processes for determining construction costs. Ms. Norwood noted that in March-April 2021 the construction industry was experiencing rising costs of building materials, so that they "could not ascertain the full extent of the increases on a job until it was completed", which in this case was in December, when the Appellant "received and could allocate costs from invoices", although "additional costs could still be incurred" (paras. 36-38). With respect to the increased costs on the Respondents' project, she said, "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" (para. 39).

The Adjudicator's Decision: The Adjudicator's Reasoning

[11] The Respondents brought a claim in Small Claims Court for the additional amount they were required to pay to close the sale, which they quantified at $25,000 to bring it within the Court's monetary jurisdiction. The issues were (a) whether the contract allowed the Appellant to claim additional charges for lumber without the Respondents' agreement, and (b) whether Schedule "E" should be set aside based on duress or another equitable principle (paras. 40-41).

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[12] The Adjudicator began his analysis by announcing that:

> [n]o one is a [*sic*] fault in this matter... 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" (para. 46). He took apparent judicial notice of the impact of the COVID 19 pandemic on supply chains, including that of 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 (para 46).

[13] On the first issue, the Adjudicator found that the APS contemplated change orders, additions, and credits under the heading "Work Changes/Costs Overages/Allowances", but held that these provisions did not "address how to address extra costs incurred because of inflation or increased material costs, not associated with allowances" (paras. 48-49). The Adjudicator held that the APS was a contract of adhesion, requiring application of the principle of *contra proferentem*, and that the contract did not authorize the extra charges:

> 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.

[14] These findings seem inconsistent with the Adjudicator's prior statement that no one was at fault.

[15] The Adjudicator observed (notwithstanding the lack of evidence) that due to rising house prices it was "reasonable to believe" that the Appellant could have gotten a higher price for the house than the Respondents paid and could therefore be unconcerned about the consequences of cancelling the APS (para. 55). He did not allude to the fact that the Respondents would presumably benefit from rising house prices as well. He concluded that "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" (para. 57).

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[16] On the issue of whether there was consent to amend the APS, the Adjudicator said:

> 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 lave 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.

[17] The Adjudicator moved to the question of whether Schedule "E" should be set aside on equitable grounds. He framed the issue as one of duress, relying on *Kawartha Capital Corp. v. 1723766 Ontario Limited*, 2020 ONCA 763 where the Court said:

> [11] 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:
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> (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...

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[18] The Adjudicator found, first, that the Respondents had been subjected to so much pressure that they had no choice but to submit:

> 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.

[19] The Adjudicator found that the Respondents had protested, both directly and through their lawyer, and that they had no effective alternative to closing the purchase, given that 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" (paras. 66-67(a)-(b)).

[20] They had independent legal advice. They did not take steps to avoid the contract; rather, "[i]n 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" (para. 67(d)). Based on these considerations, the Adjudicator concluded that there was "significant pressure that amounted to duress" (para. 68).

[21] The Adjudicator then moved on to the second stage of the analysis in *Kawartha Capital*, whether the pressure exerted was 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 [*sic*] 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.

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[22] As such, the Adjudicator held that Schedule "E" was signed under duress, and that "the charges in item # 2 (trusses roof/floor - $8050 + HST) and #6 (lumber for interior and exterior sheathing - $20,007.32 + HST)" were null and void, and ordered these amounts repaid to the Respondents (paras. 70-71).

[23] In the course of his decision, the Adjudicator emphasized several times that the Appellant was not at fault for, or otherwise responsible for, the increased lumber costs (paras. 46 and 72).

Grounds of Appeal

[24] The *Small Claims Court Act*, R.S.N.S. 1989, c. 430, permits an appeal on grounds of jurisdiction, law, or natural justice: s. 32(1). In written submissions, dated October 13, 2023, the Appellant framed the grounds of appeal as follows, at para. 34:

> The Learned Adjudicator erred:
>
> (a) in law, natural justice, and jurisdiction by applying the unpleaded doctrine of economic duress as a cause of action rather than a defence;
>
> (b) in law, by concluding that the facts supported a legal finding of economic duress; and
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> (c) in law and jurisdiction, by 'partially' voiding Schedule E to the benefit of the Respondents and failing to require the Respondents to account to the Appellant for the benefits they received as a result of the signature of Schedule E.

[25] While this represents some variation from the framing of the issues in the Notice of Appeal, there was no apparent objection.

[26] The Adjudicator filed a summary report, as required by s. 32(4) of the *Act*. He noted, with reference to the ground of appeal alleging error for considering an un-pleaded issue, that the Small Claims Court "does not rely on pleadings in the same way the Supreme Court does. Because most parties... are self-represented... the legal basis for [a claim] often bears no resemblance to the evidence and the facts disclosed by" the language appearing in the claim (para. 7). He added that Adjudicators "are required to analyze the cases before them based on their interpretation of the legal principles applicable to the facts" (para. 8). As authority for this proposition, he cited *3311876 Nova Scotia Limited v. Trenton (Town)*, 2023 NSSC 60, where the Claimant had been self-represented (*Trenton* at para. 4).

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[27] The Adjudicator noted that the Respondents had filed an amended claim, which was not objected to, in which they advanced a claim of misrepresentation. In the Adjudicator's view, this was not the relevant legal principle based on the evidence, hence his focus on economic duress. He added that the Appellant had put *Kawartha Capital* before the Court in response to the Respondents' evidence about the pressure they faced, thus placing the issue of duress before the Court (paras. 9-12). In the decision the Adjudicator stated that the Respondents "have not made misrepresentation an issue and therefore I will not address it" (para. 63).

[28] Finally, the Adjudicator reported that there was no evidence led at the hearing as to "the value of the benefits received by the Respondents as a result of their payment of the sums claimed by the Appellants", an issue that "might have addressed the value of the home after the payment..." Acknowledging that the issue was not addressed, the Adjudicator observed that it would be for the Court of Appeal "to determine if failure to do so constituted an error of law or jurisdiction" (paras. 13-14).

Standard of Review

[29] A summary of the standard governing appellate review of a Small Claims Court Adjudicator's decision for error of law appears in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.), where Saunders J. (as he then was) said:

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to

> redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[30] Natural justice requires above all that "an Adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard": *Waterman v. Waterman*, 2014 NSCA 110, at para. 63. The question is simply whether the process was fair: *Wiles Welding Limited v. Solutions Smith Engineering Inc.*, 2012 NSSC 255, at paras. 10-12. A Court considering the content of the duty of fairness in a particular set of circumstances should consider "the nature of the decision being made, the nature of the statutory scheme, the importance of the decision to the individual(s) affected, the legitimate expectations, and the choice of procedures made by the decision-maker": *MacDonald v. Mor-Town Developments Ltd.*, 2011 NSSC 281, at para. 42, citing *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.

Economic duress and Practical Compulsion

[31] The Appellant says the Adjudicator exceeded his jurisdiction, breached the requirements of natural justice and erred in law by using the un-pleaded doctrine of economic duress to give the Respondents a remedy.

[32] The Small Claims Court is a statutory tribunal. The Court's purpose is described at s. 2 of the *Act*: "to constitute a Court wherein claims up to but not exceeding the monetary jurisdiction of the Court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice." The Adjudicator's jurisdiction in this case was limited to ordering "a monetary award in respect of a matter or thing arising under a contract or a tort", within the Court's monetary jurisdiction (s. 9(a)).

Duress Only a Defence

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[33] The Appellant takes the position that duress is not a cause of action, only a defence. Gogan, J. (as she then was) described the principles of economic duress in *Keating Construction Company Limited v. Ross*, 2015 NSSC 173: "[d]uress is a coercion of will so as to vitiate consent. If established, the contract will be unenforceable against those so coerced" (para. 34). Similarly, in *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545, [1988] O.J. No. 134 (Ont. C.A.), the majority said, "[d]uress has the effect of vitiating consent and an agreement obtained through duress is voidable at the instance of the party subjected to the duress unless by another agreement or through conduct, either express or implied, he affirms the impugned contract at a time when he is no longer the victim of the duress" (para. 49).

[34] With respect to the defensive nature of duress, the Court in *Dairy Queen Canada, Inc. v. M.Y. Sundae Inc.*, 2017 BCCA 442, said:

> [48] Duress is a common law defence to the enforceability of a contract. If duress is made out, the agreement is voidable at the instance of the party who signed under duress...
>
> [49] Economic duress is now recognized as a form of duress that may constitute a defence to the enforceability of a contract.
>
> [50] For the essential elements of the defence, the trial judge relied upon the following passage in Lei v. Crawford, 2011 ONSC 349 at para. 7:
>
>> Duress involves coercion of the consent or free will of the party entering into a contract. To establish duress, it is not enough to show that a contracting party took advantage of a superior bargaining position; for duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner.

[35] The Appellant cites *Luu v. O'Sullivan*, 2012 CarswellOnt 9897 (Sup. Ct.), for the more specific proposition that "duress is a defence and not a cause of action" (para. 46). The Court referred to no authority for such exclusivity.

[36] In *Katz v. Grand Brook Homes*, 2008 CarswellOnt 9674 (Sup. Ct.), the Plaintiff contracted with the Defendant builder to have a house built. The Plaintiff agreed to supply a Jacuzzi tub, which the Defendant would install, although the Defendant was "relieved of any responsibility there for" (para. 1). During construction, the Plaintiff asked the Defendant to buy a jacuzzi, without specifying particular features, and to provide pictures and a model number. The Defendant installed a tub from his usual supplier. The Plaintiff objected to the first tub, and the Defendant installed a new one that the Plaintiff selected. The Defendant absorbed

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the expense of removing the first tub and installing the new one. On closing, the Defendant included the first tub as a charge on the statement of adjustments. The Plaintiff then requested extensions of the closing date, first by one day, then for two more days. The Defendant insisted that in return for agreeing to the second extension, the Plaintiff must pay an additional $5,500 and sign a release of all claims against the Defendant arising out of the supply or installation of the first tub. The Plaintiff did so, but subsequently brought an action, claiming he acted under duress:

> 12 The Plaintiff pleads he was under duress when he signed the Release. While admitting that his solicitor did advise him of the content and effect of the Release, that he fully understood he was relinquishing all claims with respect to the Original Tub, he felt pressured as he would have no where to live and might lose the Deposit. He pleads he was 'bullied into submission by the Defendant, *who did not exhibit any good faith*' [emphasis by trial judge], that the Release is invalid as being coerced.

[37] The Court noted the four considerations for a finding of duress from *Pao On v. Lau Yiu Long*, [1979] 3 All E.R. 65 (Hong Kong P.C.), which in substance track the factors in *Kawartha*. The Court found that the Plaintiff, having asked the Defendant to deal with the tub, was bound by the Defendant's decisions as his agent. The Court also dismissed the duress claim, stating that "the Defendant has submitted the plea of duress is generally applied as a defence in an action and not as a basis for a cause of action. The issue of economic duress cannot in law succeed in the facts of this case and therefore, does not raise a genuine issue for trial" (para. 38).

[38] The Court in *Katz* may have been implicitly endorsing the Defendant's submission that duress is "generally applied as a defence... and not as a basis for a cause of action", but even if so, the qualifier "generally" does not support the position that duress cannot be the basis for a Plaintiff's claim. Moreover, the Court held that duress could not succeed "in the facts of this case", implying that the result might change with different facts. It is not clear that this is an "entirely novel cause of action that does not exist at common law", as submitted by the Appellant (Appellant's Brief at para. 55).

[39] The Respondents point to several decisions that they say establish that a Plaintiff may rely on "practical compulsion," where economic duress is applied to force payment.

[40] In *Knutson v. The Bourkes Syndicate*, [1941] SCR 419, the Appellant held real property subject to an option and an agreement of sale to the Respondents. It was agreed that the Respondents would receive title free of an interest held by a third

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party, which the Appellant acquired. The Appellant claimed that there was an understanding that the Plaintiffs would assume the discharging of the third party interest and demanded additional payments to cover it. The Respondents already had an agreement to transfer the property to another party. They made the payments, under protest, then brought an action to recover them. The Supreme Court of Canada held that the payments were recoverable, having been made under circumstances of practical compulsion:

> Here the evidence is plain that the payments were made under protest and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O.L. Knutson thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment. The appeal should be dismissed. [*Knutson* at 425.]

[41] The requirements for a finding of practical compulsion, as drawn from *Knutson*, were summarized in *EFP Holdings Ltd. v. British Columbia*, 2002 BCSC 1511, at para. 48, where the Court stated that "the payment may be recovered if: (a) the payment was made in order to get possession of goods for which the owner has an immediate pressing necessity; and (b) the claim for payment was clearly void."

[42] The Appellant submits that *Knutson* is distinguishable in that the Appellant in that case compelled payment at closing in order to go through with the sale. There was no amendment to the original agreement.

[43] In *Cook v. Redwood Management Ltd.* (2016), 380 Nfld. & P.E.I.R. 281, 2016 CarswellNfld 64 (Nfld. Prov. Ct.), the Plaintiff agreed to buy a condominium in a new building. The Defendant property company asked the Plaintiff to assign it the new home buyer's HST rebate before closing. The Plaintiff protested that this was not in the Agreement of Purchase and Sale, but agreed in order to take possession. The Plaintiff brought an action to recover the amount of the rebate. The Court held that the Defendant had no right to the rebate and gave no consideration for it, and that the Plaintiff agreed to the assignment under economic duress. The Court said:

> 20 In the case at bar, there is evidence that Mr. Cook did protest the variation at the time it was sought and did so on a timely basis. He did have independent legal advice but his legal alternatives were very limited. He could have declined to close

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> the sale but to do so would have been difficult as he had already invested money into the project which he could not recover.
>
> 21 To succeed the Plaintiff must establish that there was no reasonable legal alternative before he can complete the contract and then claim relief based on his allegation of duress.

[44] The Court noted that "in considering the ability of the Plaintiff to seek other remedies Courts have considered the inequality of bargaining power between the parties" (para. 24), as in *Knutson*. The Court concluded:

> 29 By the same token a contract is voidable if there is evidence of economic duress...
>
> 30 In this case, the Plaintiff is not seeking to set aside the sale of the condominium but is seeking to set aside or void the assignment of the HST rebate. That assignment was completed in a separate agreement as there was no reference to the HST rebate in the original purchase and sale agreement. As there was a separate agreement for the HST, the doctrine of merger does not apply.
>
> 31 In this case, the evidence was that the Defendant was not entitled to the HST rebate and there was no consideration for its assignment. The Plaintiff made it clear he did not agree to assigning the HST Rebate prior to the closing date. He testified that he felt he had little option but to agree to the assignment. The Defendant was in the [position] to carry out the threat of denying him occupancy of the condominium into which he had, as evidenced by the receipts in Exhibit 3, invested approximately forty thousand dollars. It was not practical for him to treat the agreement as breached and refuse to close as to do so would be to jeopardize his investment.
>
> 32 I am, as a result, satisfied that the assignment was not voluntary and that the Defendant was not entitled to the assignment of the funds.

[45] The Appellant submits that the HST rebate at issue in *Cook* was a unilateral benefit, not an agreement, and that there was no consideration for it. Alternatively, the Appellant says that, as a Small Claims decision from a different jurisdiction, *Cook* is of little persuasive value.

[46] In *Day v. G & G Homes Ltd.*, 2016 CarswellNfld 253 (Nfld. Prov. Ct.), decided, like *Cook*, by Orr Prov J., the Plaintiffs bought an unfinished home which the Defendant was to complete before they took possession. The Plaintiffs found deficiencies in a pre-closing walk-through and asked for a breakdown of the cost of installing a fireplace. Instead of accepting the deficiencies, the Defendant had the property re-listed for sale. The Plaintiffs then closed, without receiving full cost estimates for the fireplace work. Their evidence was that "that they felt they had no

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option but to complete the transaction as they had committed significant funds into the house..." (para. 13). They subsequently brought a claim alleging that the Defendant "did not act in good faith in relisting the property for sale and forcing them to close the sale before they had an estimate of the fireplace cost and before deficiencies had been corrected" (para. 22). The Plaintiffs submitted that they only agreed to close under economic duress. The Court said:

> 28 In the case at bar, the evidence was that the Plaintiffs did protest the closing prior to receiving a breakdown of the cost of the fireplace and had asked for it at the time, on a timely basis. They did have independent legal advice but the legal alternatives were very limited. They could have declined to close the sale but to do so would have been difficult as they had already invested money into the project which would take time to recover. In addition, they had sold their own home and did not have anywhere to live. They were residing with a family member and had stored their furniture.

[47] On the question of whether the Plaintiff had established that there was no reasonable alternative, Orr Prov. J. repeated the law as set out in *Cook*, and found that the Plaintiffs had been in an unequal position, "as they had already invested in the property and did not have possession of it. They did not have a readily available alternative place to live. It seems clear on the evidence that the Plaintiffs would not have closed the transaction but for this pressure..." (para. 36).

[48] In *Intermarket Cam Limited v. Weiss*, 2021 ONSC 4445, the Applicant developer agreed to buy a property from the Respondent farmers and investors. The net area of the property was not known, but the Applicant later determined it to be about 123 acres, while the Respondents claimed it was about 156 acres. The parties closed without agreeing on the area, with the Applicant paying the full purchase price while reserving the right to pursue remedies, which it did. The Court found that at the time of closing the Applicant already had an agreement to sell the property to a third party, and was therefore "under practical compulsion to close the transaction... notwithstanding its payment for the disputed lands. The Supreme Court of Canada makes clear that restitution is available for precisely this form of practical compulsion, namely where a party is forced to complete an agreement or a transaction under threat of litigation by a third party" (para. 49). The Court said:

> 50 The common law has long recognized that transfers made under duress are vulnerable to judicial intervention, and are subject to reversal on the basis of restitution. A basic premise of the law of restitution is that "a benefit conferred involuntarily upon another may generally be recovered in restitution", including in circumstances where "the victim had [no] practical alternative but to capitulate to

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> the demand". The source of the compulsion - whether it be the defendant or some third party - is irrelevant, "[a]s long as the claimant can prove that the transfer was not a function of free choice".

[49] The Court emphasized that the duress arose from the pressure of the third party to whom it had agreed to transfer the property; the third party had threatened "a 'legal shit-show'" if the property was not transferred, and the Court held that with "the proverbial 'gun to its head'", the Applicant "had no alternative but to submit - under strong protest - to the demands of the Weiss parties" (para. 53). The Applicant had not advanced a claim in contract, but the Court held that it was entitled to recover the overpayment on the basis of unjust enrichment and practical compulsion. The Court also held that the doctrine of merger did not apply, given that the claim was in restitution, not contract (paras. 54-57).

[50] The Appellant maintains that none of the cases relied on by the Respondents contradict the principle that duress is a defence.

Failure to Make Necessary Findings

[51] While the Adjudicator's weighing of the four discretionary *Kawartha* factors is entitled to deference, it must be based on correct legal principles and cannot result in a patent injustice: *Clyde Bergemann Canada Ltd. v. Lorneville Mechanical Contractors Ltd.*, 2018 NSCA 14, at para. 27.

[52] The Appellant says the Adjudicator gave no weight to the facts that the Respondents had legal advice and that they did not take steps to avoid the contract, but instead went ahead with the closing. The result was that the Adjudicator found duress notwithstanding the "total absence" of two of the four necessary considerations (Appellant's Brief at para. 62). Additionally, the Appellant says the Adjudicator did not make the necessary finding that the Respondents had no effective alternative to proceeding with the sale. The Adjudicator said the following about this factor:

> 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'

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> 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. [para. 67.]

[53] The Appellant submits that while the Adjudicator did consider some potential alternatives, such as the possibility of finding new housing, he did not consider the alternative course of a civil action for specific performance, and a registration of a caveat against title, to protect the Respondents' interests under the original agreement. This was among the deciding factors in *Katz*, where the Plaintiff "failed to institute any civil proceedings prior to the Final Completion Date to protect his interest in the Property and the Deposit, acted upon legal advice, and is bound by the acknowledgment of his lawyer agreeing to the Release..." (para. 38). *Katz* was not before the Adjudicator because the Appellant did not have notice that duress would be applied "in an unprecedented manner to partially void only the sections of Schedule "E" that the Respondents took issue with" (Appellant's Brief at para. 64).

[54] The Respondents say the caselaw, as exemplified by *Cook* and *Day*, supports the Adjudicator's finding that a threat by a builder not to close "can amount to economic duress" (Respondents' Brief at para. 43). The Respondents say the following remarks by the Adjudicator are sufficient to justify a conclusion that there was practical compulsion:

> 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.

[55] The Respondents say the finding that they had no other place to live is sufficient to support the Adjudicator's decision under the doctrine of practical compulsion. The Adjudicator did not mention practical compulsion, but the Respondents submit that he found they made the payment to get possession of their house, which they had a pressing necessity for, and which was not required by the contract and was therefore invalid. The Respondents also say the Adjudicator's decision supports the finding, which he did make, of duress.

[56] The Respondents insist that the Appellant has established no basis to overturn the Adjudicator's findings that the contractual variation was extracted by pressure and that they had no other practical alternative but to comply. They say the fact that they had legal advice is not determinative. As to whether they had an alternative, the Respondents say this is answered by the fact that they had sold their home and

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were facing "traumatic personal circumstances" (Respondents' Brief at paras. 54-55).

Discussion

[57] The Adjudicator's analysis did not address his own findings that the Respondents had been aware that there would be increased lumber costs since at least April, and had been offered the chance to withdraw from the APS at that time, but had declined. He focused entirely on the Respondents' dissatisfaction with the information they were provided in November and December. Nor does he address the relevance of their lawyer's statement in November that they were "prepared to sign Schedule "E" if they receive information regarding the charges" (para. 25).

[58] The first stage of the duress analysis in *Kawartha* asks whether the party alleging duress was "subjected to pressure applied to such an extent that there was no choice but to submit..." While this Court cannot second-guess the Adjudicator's findings of fact, *Brett Motors* indicates, *inter alia*, that an error of law can arise from a "clear error... in the interpretation of documents or other evidence"; "where there is no evidence to support the conclusions reached"; and "where the Adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the Adjudicator has failed to apply the appropriate legal principles to the proven facts" (*Brett Motors* at para. 14). In my view the Adjudicator misapplied the evidence in finding that the pressure that was exerted left the Respondents with no choice but to submit.

[59] In finding that the Respondents protested, the Adjudicator stated that "[f]or the entire duration of construction," the Respondents "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", but the Appellant "did not provide them with any information that would allow them to decide until there were numbers available in November and December" (para. 67(a)). He did not address Ms. Norwood's evidence that the Appellant "could not ascertain the full extent of the increases on a job until it was completed" and "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" (paras. 37-38). Nor did he address the evidence that the Appellant made it clear to the Respondents in the spring of 2021 that there would be a price increase. If the basis for finding a "protest" was that the Respondents were dissatisfied with the

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information they were receiving, it was an error for the Adjudicator not to consider all the relevant evidence.

[60] On the second consideration, whether there was an "effective alternative course" open to the Respondents, the Adjudicator focused entirely on the situation in the final months of 2021. He ignored the extensive evidence he had already recounted to the effect that the Respondents had been aware that there would be a cost increase since at least April. As the Adjudicator framed it, the Respondents were unexpectedly presented with a cost increase late in the year, shortly before closing. However, based on his own review of the evidence (and as implied by his own analysis of the first factor), they had been aware of a pending increase – if not the exact amount – for nearly nine months. This context was relevant and necessary to the Adjudicator's determination of whether the Respondents had an effective alternative course open to them. It is clear from the evidence and findings of fact that this case is distinguishable from virtually all the duress cases relied on by the Respondents, where the purchasing parties were presented with last minute demands at closing. By contrast, the Respondents had nearly a year of prior notice that there would be additional charges for lumber. This was not a situation where the new demand was put to them on the eve of closing without warning.

[61] On the last two factors, the Respondents had the benefit of independent legal advice, and the Adjudicator found that "[n]o actions were taken to avoid the obligations imposed by the amended contract" (para. 67(b)).

[62] Having considered the four factors going to the first question, the Adjudicator found that duress was established (para. 68). On its face this misstates the analysis. The Court's duty under *Kawartha Capital* was to determine whether "economic duress" was established by application of a two-stage analysis. It was still necessary to decide whether the pressure exerted was illegitimate. Only then would economic duress be established. The Adjudicator did go on to consider illegitimacy, however. He held that the pressure exerted was illegitimate on the basis that "there was no basis in the contract for the Defendant's [*sic*] 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" (para. 69). Given that the Appellant prepared the contract, he held that it was open to them to address price escalation and they had not done so.

[63] As with the first branch of the *Kawartha* analysis, the Adjudicator's applied the evidence and findings selectively in determining that the pressure was

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illegitimate. He did not consider the course of communications between the parties throughout most of 2021, which was clearly relevant to the question of whether the Respondents had acquiesced to the possibility of cost increases. Nor did he reconcile his conclusion with his own statements that the Appellant was not at fault and bore "no responsibility for the increased costs presented to them by their suppliers" (paras. 46, 72).

[64] Based on the evidence he recounted and the facts he found, I am satisfied that the Adjudicator misapplied the evidence under both branches of the *Kawartha* analysis in finding that duress was established, and thereby erred in law.

Alternative Causes of Action and Defences

[65] Alternatively, the Respondents submit that they can recover for unjust enrichment, which there is some authority to suggest is within the jurisdiction of the Small Claims Court: *Wacky's Carpet & Floor Centre v. Joseph*, 2006 NSSC 353, at para. 17. In the further alternative, they say the objectionable provisions of Schedule "E" should be declared void for misrepresentation. The Adjudicator did not consider unjust enrichment, and it is not this Court's job to apply entire doctrines that were neither pleaded nor considered by the Adjudicator, simply to preserve the decision. As for misrepresentation, this was the cause of action specifically pleaded by the Respondents, and specifically rejected by the Adjudicator. Like the speculative finding of unjust enrichment, it is not before the Court on this appeal.

[66] In view of the result on the issue of duress or practical compulsion, I also find it unnecessary to deal with the Appellant's submission that the Respondents' decision to close resulted in merger.

[67] The Appellant also submits that the "sole remedy" available on account of economic duress is rescission of the contract. The only case cited for this proposition is *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, where the Court distinguished between rescission and repudiation, and confirmed that rescission is an appropriate remedy for misrepresentation. There was no mention of duress (paras. 39-47). The Appellant also points to authority indicating that the Small Claims Court "does not have the authority to grant the equitable remedy of rescission": *Bruce v. Corra*, 2023 NSSM 39, at para. 20. The Adjudicator characterized the remedy as damages, not rescission. In view of the result on the main issue, I need not decide this point.

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[68] The Appellant also says the Adjudicator's order to set aside only the parts of Schedule "E" that the Respondents objected to, rather than the entire schedule, was wrong in law. The authorities submitted by the Appellant support the view that partial rescission should not be ordered: *Rosas v. Toca*, 2018 BCCA 191, at para. 50, citing Angela Swan, *Canadian Contract Law*, 3rd ed. (Markham, Ontario: Lexis Canada Inc., 2012) at 74-75; *Hearn v. Hearn*, 2004 ABQB 75, at para. 62; *Victorov v. Davison* (1988), 20 C.P.R. (3d) 481 (Ont. S.C.), at para. 83.

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[69] The Adjudicator did not consider the credits that accrued to the Respondents under Schedule "E", nor did he consider that the Respondents received a rapidly appreciating asset in the form of the home; he did allude to the possibility that the Appellant could benefit by selling the house at a price higher than the original contract price (para. 55). In any event, the Appellant notes, the Respondents did seek to rescind Schedule "E", but completed the transaction; their pleadings only sought damages for misrepresentation. The Adjudicator "fashioned the remedy of partial rescission... out of whole cloth, based on *Kawartha*, a decision that bears no resemblance to the case at hand" (Appellant's Brief at para. 75). The Respondents reply that the Appellant's objections are "technical arguments" that are no answer to their right to recover the "financial windfall that was unjustly conferred" on the Appellant (Respondents' Brief at paras. 58-59). They refer to no authority suggesting that the Adjudicator was entitled to pick and choose which provisions of Schedule "E" should be rescinded.

[70] As with the previous point, it is unnecessary to decide whether partial rescission was an available remedy. It is necessary to note, however, that much of the confusion arises from the Adjudicator's decision to ignore the cause of action and remedy pleaded and to craft alternatives that may or may not have been available to him, apparently without considering the legal foundations of what he was ordering.

Natural Justice

[71] The Appellant says the Adjudicator failed to observe the requirements of natural justice by ruling on the basis of the un-pleaded ground of economic duress. As noted earlier, the Adjudicator acknowledged that the Respondents had pleaded misrepresentation. He stated in his summary report that the Small Claims Court "does not rely on pleadings in the same way the Supreme Court does. Because most parties... are self-represented... the legal basis for [a claim] often bears no resemblance to the evidence and the facts disclosed by" the language appearing in

the claim (para. 7), and that Adjudicators must "analyze the cases before them based on their interpretation of the legal principles applicable to the facts" (para. 8). He cited *3311876 Nova Scotia Limited v. Trenton (Town)*, 2023 NSSC 60, where the Claimant was self-represented (*Trenton* at para. 4).

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[72] In *Dennis v. Langille*, 2013 NSSC 42, one of the grounds of appeal was that the Adjudicator erred by permitting submissions on the un-pleaded issue of whether the subject property's susceptibility to erosion was a latent defect. Dismissing this ground of appeal, Murphy J. referred to the following passage from *Popular Shoe Store Ltd v. Simoni* (1998), 163 Nfld & PEIR 100 (Nfld. C.A.):

> Particularly in Small Claims Court, where claimants, as here, are often unrepresented, a liberal approach ought to be taken to the pleadings that are presented so as to ensure that access to proper adjudication of claims is not prevented on a technicality. [...] If a claimant by his or her pleading or evidence states facts which, if accepted by the trier of fact, constitute a cause of action known to the law, the claimant should prima facie be entitled to the remedy claimed if that is appropriate to vindicate that cause of action. The only limitation would be the obvious one that if the case takes a turn completely different from that disclosed or inferentially referenced in the statement of claim, thereby causing prejudice to the other side in being able properly to prepare for or respond thereto, the court may either decline to give relief or allow further time to the other side to make a proper response. [Simoni at para. 24, cited in Dennis at para. 17. [Emphasis added.]

[73] Murphy J. held that "*Simoni* stands for the proposition that an Adjudicator is entitled to grant a remedy if the evidence makes out a cause of action, even if that cause of action was not specifically pleaded. If necessary, he or she can adjourn the proceedings to cure any prejudice to the other party that results from surprise" (para. 17). He added that *Simoni* had been followed in Nova Scotia, and that it reflected "the objective set out in s.2 of the Act to adjudicate claims within its monetary jurisdiction "informally and inexpensively but in accordance with established principles of law and natural justice"" (para. 17). Murphy J. concluded:

> [18] The learned Adjudicator's reasons at pp.7-9 of his Summary Report disclose no error in how he identified the question of latent defect as being material to the case. In his words, "[t]he case from the start was directed towards the question of whether or not there was a latent or patent defect and what, if any, duty of disclosure there was." Both parties addressed the issue at the hearing, and "[t]here was never any objection from Defendant's counsel and in fact the conduct of the Defendant's case and Defendant counsel's arguments evidenced an awareness of the issue." ... Moreover, the matter was adjourned for a month in order to address whether vendors can be liable for not disclosing a latent defect; therefore, even if

> the Appellant had initially been surprised there was ample opportunity to address the issue when the hearing continued. There is no merit to this ground of appeal. [Emphasis added.]

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[74] The Respondents submit that this was not a case where the hearing took "a turn completely different" from the pleadings, given that it was clear that they did not agree that they should be responsible for the increased lumber costs and they promptly filed a claim to recover the extra amount paid. They pleaded that the Appellant threatened to terminate the APS if they did not sign Schedule "E". It was not a case where new facts emerged at the hearing that gave rise to a completely new un-pleaded remedy (Respondents' Supplementary Brief, November 6, 2023).

[75] The Adjudicator did not indicate that there was any objection. However, the Appellant submits that it was not aware that duress "would be presented as a 'stand alone' cause of action, and as such the issue was not briefed for the benefit of the Court", and that this prejudice was compounded by having the doctrine applied in "a highly irregular manner not recognized at common law" (Appellant's Brief at para. 56).

[76] The flexible approach to pleadings in the Small Claims Court is clearly motivated to some extent by the fact that self-represented litigants are common in that Court (*Simoni* at para. 24). The law does not make this a formal prerequisite, however. Nevertheless, to the extent that the Adjudicator's summary suggests that Adjudicators effectively have an unlimited scope to rewrite pleadings, this goes too far. In particular, where the relevant party has counsel, Adjudicators should be cautious.

[77] That being said, in this case it is not clear on the materials before the Court on appeal that the Adjudicator's reliance on duress took the Appellant by surprise to the extent that there was a denial of natural justice. It appears that the issue was raised in the hearing. The fact that the Adjudicator applied the doctrine in a manner that the Appellant believes was wrong in law does not make its use a denial of natural justice.

Conclusion

[78] The Adjudicator erred in law in his analysis of duress. The order of the Small Claims Court is hereby quashed. Given the extensive recounting of evidence and findings of fact provided by the Adjudicator, I see no reason to remit the matter back to the Small Claims Court.

[79] Any monies paid to the Respondents by the Appellant shall be repaid forthwith. In addition to this, the Appellant shall have its costs as allowed by the Regulations to the *Small Claims Court Act*.

McDougall, J.

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