

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Fife Holdings Limited v. Van den Eynden*, 2023 NSSC 302

**Date:** 20230925  
**Docket:** 523455  
**Registry:** Halifax

**Between:**

FIFE HOLDINGS LIMITED

*Appellant*

v.

JEREMY VAN DEN EYNDEN

*Respondent*

**APPEAL DECISION**

**Judge:** The Honourable Justice Scott C. Norton  
**Heard:** September 18, 2023, in Halifax, Nova Scotia  
**Oral Decision:** September 18, 2023  
**Written Decision:** September 25, 2023  
**Counsel:** George Franklin and Dakota Bernard, for the Appellant  
Jeremy Van Den Eynden, unrepresented Respondent

## By the Court (Orally):

### Introduction

[1] This is an appeal by Fife Holdings Limited (“Fife”) from the decision of Small Claims Court Adjudicator, Blair Mitchell, dated April 18, 2023. That decision reversed the February 15, 2022, decision of the Director of Residential Tenancies that granted Fife’s application for early termination of the Respondent, Jeremy Van Den Eynden’s, lease with Fife.

[2] The Appellant filed a written factum and authorities. The Respondent filed a written response. As discussed at the appeal hearing, the issues raised by the Respondent’s written response regarding the ownership of the premises leased to the Respondent are not issues that are properly before me on this statutory appeal.

### Scope and Standard of Review

[3] An appeal of a Director’s Order to the Small Claims Court is heard as a hearing *de novo* pursuant to section 17D(1) of the *Residential Tenancies Act*, RSNS 1989, c. 401 (“Act”). The Adjudicator properly instructed himself on this procedure.

[4] The *Small Claims Court Act*, RSNS 1989, c. 430, limits the available grounds of an appeal to this court to jurisdictional errors, errors of law, and failures to follow the requirements of natural justice.

[5] The scope of this court’s review of a Small Claims Court decision was discussed by Justice Saunders, as he then was, in *Brett Motors Leasing Ltd. v. Welsford*, (1999) 181 NSR (2d) 76, wherein he explained that this court will intervene to redress an error in the following circumstances, at para. 14:

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.

[6] The Appellant submits that the Adjudicator made the following reversible errors:

- (a) He failed to apply the correct legal analysis and applied a legal test that required Fife to demonstrate that renovations were impossible without vacant possession. This was an error of law.
- (b) He imposed an overly high onus of proof on Fife by requiring that it adduce technical or industry evidence. This was an error of law.
- (c) He gave weight to the Respondent's untested hearsay evidence, while failing to consider evidence of Fife's representative. This was both a legal error and a failure to follow the requirements of natural justice.
- (d) He further failed to follow the requirements of natural justice by making an adverse inference against Fife for failing to provide rebuttal evidence in reply to evidence that Fife had only received one clear business day prior to the hearing.

### *Correct Legal Test*

[7] The Appellant's first argument is that the Adjudicator erred in his interpretation of subsection 10AB (3) of the *Residential Tenancies Act*, RSNS 1989, c. 401 ("Act"), that states:

#### **Early termination for demolition, repairs or renovations**

10AB (1) Where the landlord and tenant mutually agree to terminate a tenancy for the purpose of demolition or making repairs or renovations to the residential premises, the agreement must be in writing and in the form required by the Director.

(2) Where the landlord and tenant do not mutually agree to terminate a tenancy under subsection (1), the landlord may make an application to the Director for an order under Section 17A directing the landlord to be given vacant possession of the residential premises on the date specified in the order, but not less than three months and not greater than twelve months from the date of the order.

(3) In an application under subsection (2), the landlord shall satisfy the Director that the landlord has all the necessary permits and approvals required by law and that the landlord in good faith requires possession of the residential premises for the purpose of

(a) demolition of the residential premises; or

(b) making repairs or renovations so extensive as to require a building permit and vacant possession of the residential premises.

(4) When making a decision on an application under subsection (2), the Director shall consider any vacant possession guidelines prescribed by regulation.

[8] It is to be noted that there are no guidelines prescribed by regulation as contemplated by subsection (4).

[9] Subsection (3) imposes the following requirements on a landlord making an application for vacant possession to the Director; they must satisfy the Director:

1. That they have all the necessary permits and approvals required by law.
2. That they, in good faith, require possession of the residential premises for the purpose of either:
  - a. Demolition of the residential premises; or
  - b. Making repairs or renovations
    - i. So extensive as to require:
      - a. A building permit; and
      - b. Vacant possession of the residential premises.

[10] The Adjudicator cited section 10AB and then made the following observations about the requirements of the section, at paras. 9-12 of his Decision:

9. Section 10AB thus obviously seeks to strike a balance between the competing policy benefits of allowing the renovation of residential properties where required by renovation or repair needs on the one hand, and protecting the longer term occupation interest of tenants from the abuse of such access to the other ends, on the other. As appears from the section, the burden is on the landlord to “satisfy” the Director that, among other things, possession of the premises is required for the purposes of making repairs or renovation which is “so extensive” as to “require” “...vacant possession of the premises”. Further the section requires that the landlord establish its good faith in requiring vacant possession, including that the work is so extensive as to require such broad access for the purposes of such renovations or repair.

10. In other words:

- the onus is on an applicant landlord to establish the requirement for renovation or repair is so extensive as to require vacant possession; and
- the applicant landlord must satisfy the director that its requirement for vacant possession is asserted in good faith.

11. In this case, applying this onus to the evidence that vacant possession is required for the purposes of renovation and repair, I find that the respondent landlord in this case has failed to meet the same.

12. Accordingly, I allow the appeal and deny vacant possession of the Van Den Eynden unit of the Landlord. The tenant also confronted directly the Landlord's good faith in asserting that such possession was required on evidence that he specifically introduced for the purpose. I did not find it necessary to make a decision on that point.

[11] At the conclusion of his reasons, under the heading "Order", he stated, at para. 37:

I am not satisfied that the respondent landlord requires making repairs or renovations so extensive as to require vacant possession of the residential premises.

[12] In restating the requirements of the section in a summary fashion, the Adjudicator fell into error by imposing the additional burden on Fife of demonstrating that extensive renovations to the building were "required". This requirement is not contained in the *Act*. Throughout his reasons, the Adjudicator focused on the nature of the building and the necessity of the renovations rather than on the nature of the contemplated renovations. The adjudicator did not conclude that Fife's proposed renovations did not require vacant possession, nor did he conclude that Fife was not acting in good faith. Indeed, he failed to make any finding on that requirement of the legislation.

[13] Rather, his decision to allow the appeal turns entirely on his conclusion that Fife had not proven that the building "required" renovations so extensive as to necessitate vacant possession. The question is properly whether vacant possession is required in order to undertake the contemplated renovations. Evidence about whether the contemplated renovations are necessary may be admitted, to inform the decision as to whether the landlord is acting in good faith.

[14] The Adjudicator's error was material to the result. Accordingly, I find that the appeal should be allowed, and the matter returned to the Small Claims Court for a new hearing by a different adjudicator. I further order that the decision of the

Director of Residential Tenancies, dated February 15, 2022, be stayed until the determination of the rehearing of the appeal by the Small Claims Court.

[15] Having decided that the matter must be retried, there is no reason for me to address the other grounds of appeal.

[16] I direct the Appellant to draft the appropriate order.

Norton, J.