

SUPREME COURT OF NOVA SCOTIA

Citation: *C&J Martin Well Drilling Co. Ltd. v. Hanlon*, 2024 NSSC 368

Date: 20241129

Docket: Pic No. 526055

Registry: Pictou

Between:

C&J Martin Well Drilling Co. Ltd.

Appellant

v.

Kevin Wayne Hanlon

Respondent

DECISION

Judge: The Honourable Justice Frank P. Hoskins

Heard: January 18, 2024, in Pictou, Nova Scotia

Counsel: Hector MacIsaac, for the Appellant
Kevin Hanlon, self-represented

By the Court:

Introduction

[1] This is an appeal from the decision of Small Claims Court Adjudicator Raffi A. Balmanoukian.

[2] The Appellant, C&J Martin Well Drilling Co. Ltd. was hired by the Respondent, Kevin Wayne Hanlon to drill a well on his property situate at Owen Road, Hardwell Hill in Scotsburn, County of Pictou, Province of Nova Scotia.

[3] At the Small Claims Court hearing on July 25, 2023, the Claimant (C&J Martin Well Drilling Co. Ltd.) claimed for labour and materials respecting the drilling of a well on the Defendant's (Kevin Wayne Hanlon) property and related services. The Defendant claimed that he was billed for more than what he understood to be the quote.

[4] The Small Claims Court Adjudicator Balmanoukian dismissed the claim.

Grounds of Appeal

[5] It is from that dismissal the Appellant (Claimant) appeals. In the Notice of Appeal, filed on August 16, 2023, the Appellant raised two grounds of appeal:

1. The Adjudicator failed to consider well established principles of common law which establish that the worker should be paid for his labour and materials.
2. The Adjudicator failed to address the issue of "estimate" versus contract price.

[6] Following the filing of the Notice of Appeal, Adjudicator Balmanoukian prepared the required documentation pursuant to s. 32(4) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, including a summary report of findings of law and fact made in the case dated, August 22, 2023, which includes the following:

1. At the hearing on July 25, 2023, both parties gave evidence. The exhibits on file are marked by me as the hearing was conducted without a Clerk, and are in the Small Claims file.
2. The Claimant (at the Defendant's request and as part his financing requirement requirements) obtained an original estimate from the Defendant dated October 20, 2020 (Exhibit 3). That provided for a 120 foot wall, 40 feet of case pipe, and related items, for \$7,917.75.

3. The Defendant claimed that he had a better price elsewhere (not in evidence) and asked the Claimant to revisit its estimate, and to upgrade to a constant pressure system. This estimate, dated October 28, 2020, provided for a 100 foot well, the noted upgrade, and related items and came in at \$7,578.50.
4. Sarah Martin testified for the Claimant that they rendered two accounts (Cecil Martin later testified that this is their regular practice – and sometimes there is a third account as well, if there is an overflow process). These are Exhibits 1 and 2; Exhibit 1 is for the drilling which corresponds to the estimate only in the sense that the rate per foot is as quoted, and the materials are as quoted. It totals \$6,871.83 and states that the well is 205 feet deep.
5. Exhibit 2 is for the pump and related equipment, and “extra materials required for overflow.” It is for \$4,041.40.
6. The Defendant promptly paid \$2,500 (the maximum he could e-transfer), and \$1,541.40 the next day. These total the amount in Exhibit 2.
7. The Defendant later sent a cheque for \$2,830.43 – together with the \$4,041.40 previously remitted, this totals the \$6,871.83 that is the first invoice (Exhibit 1).
8. The parties met on February 21, 2023, to discuss the account. There was no complaint about the work performed; they were unable to resolve their differences.
9. Sarah Martin testified on cross examination that she could not identify where or when, if at all, the Defendant was made aware that the 100 feet noted in the revised estimate was a “guess” but pointed to both Exhibit 3 and 4 (which are stated as being “the following estimate”) as being “estimated dept of drilling and ease pipe are subject to change.”
10. Cecil Martin testified. The upshot of his evidence is that the depth of any given well is at best an educated guess and can vary enormously over short distances. On cross-examination he said he “usually” explains that the estimate could vary from the bill accordingly but could not confirm that he did so in this instance. He “thought” John Martin was texting the Defendant as drilling progressed.
11. John Martin testified. He said that the revised (100’ versus 120’) estimate was prepared so the Defendant could “compare apples with apples” with the competing estimate. He did not tell the Defendant that he did not think that this was an accurate estimate of depth.
12. He testified (Exhibit 5) that he texted the Defendant when they had reached 185 feet, with a flow of 1.5 gallons per minute. He was instructed to go to about 200 feet, and at 205 they hit 8 gallons per minute.
13. He testified that overflow can occur at any flow rate – what matters is not gallons per minute, but pressure. I conclude from this that the Claimant, having been in business for over 40 years, knew or should have known that this was at least a potential requirement as part of the project.

14. Mr. Hanlon was his only witness. He claimed that Cecil Martin misrepresented the estimated price, did not disclose the discrepancy in depth as it developed, and was “left in the dark” without an explanation until provided with invoices that totaled “close to double” without an explanation until provided with invoices that totalled “close to double” the revised estimate (the difference is actually \$3,334.73, or 44%). He said he “never would have hired them” if this was known.
15. He claimed, and I accept, that Cecil Martin told him that “if you quote that much higher, the bank may not approve the mortgage.” Mr. Hanlon claimed that he did not read the estimate “as well as I should have”. He focused on providing the estimates to his lender.
16. No other quotes for his construction went over estimate. The difference in depth (and cost of the well) did not result in any increased value of the property.
17. Sarah Martin gave rebuttal evidence. She said in effect “we can’t price every well at 400’ or whatever to cover every circumstance.”
18. I made the following additional findings of fact and law.
19. The estimates were provided not only for lending and decision-making purposes, but to compete with another estimate or quote and induce the Defendant to engage the Claimant. The revision to depth from 120 feet to 100 feet was arbitrary and for this purpose, and was not adequately explained to the Defendant, a first time buyer/builder.
20. There was no mention of potential work required for overflow, although this was known or should have known to the Claimant.
21. The Claimant is entitled to be compensated on a *quantum meruit* basis for the work authorized to be done. I found this to be 100’ in the revised and relied-on estimate, plus materials for the well and the upgraded pump, and for the 20’ the Defendant authorized in the text noted above (going from 185 feet to 205 feet). I found that the Claimant deliberately or negligently did not include the overflow work and this was not part of the authorized scope of work (which the Claimant, following my decision, characterized in Court as “theft” and “stolen goods” for which it should be able to enter onto the property and repossess).
22. I further found that although the Claimant provided an “estimate”, it was so wildly speculative and inaccurate, in circumstances that the Claimant knew or ought to have known were subject to radical variation, that it was for more than for the purposes of inducing the Defendant to engage its services, and to be provided to the lender for financing the construction. The Claimant knew or should have known that the Defendant would rely on this estimate, to his detriment, and the Claimant should be precluded (or estopped) from additional recover save for 20 extra feet authorized.

23. I therefore allowed the \$7,758.50 quoted, plus 20 feet at \$24 per foot (\$480 plus \$72 tax), less the \$6,871.83 paid, for a difference of \$1,258.67. I allowed \$244.60 costs, for a total of \$1,503.27.

Issues

[7] The appeal raises the following issues:

1. What is the standard of review?
2. Whether the Adjudicator erred in law by misapplying the evidence in material respects thereby, producing an unjust result.
3. Whether the Adjudicator erred in law in failing to apply the appropriate legal principles to proven facts.

The Small Claims Court Act

[8] Section 2 of the *Small Claims Court Act* defines the purpose of the legislation:

2. It is the intent and purpose of this 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.

[9] The *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32(1) sets out the available grounds of appeal:

32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of

- (a) jurisdictional error;
- (b) error of law; or
- (c) failure to follow the requirements of natural justice, by filing with the prothonotary of the Supreme Court a notice of appeal.

Standard of Review for an Error of Law

[10] In the context of Small Claims Court Appeals the leading case on what constitutes an error of law is *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) wrote:

[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.

[11] It is generally recognized in the authorities relating to appeals from courts of record that a high level of deference must be accorded to the trier of fact, and that any material finding of fact that is based on "palpable and overriding error" constitutes an error of law: *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, at paras. 31-33. Moir J. in *Hoyeck v. Maloney*, 2013 NSSC 266, articulated a somewhat different approach in the Small Claims context, which does not involve a review of Small Claims Court findings of fact for palpable and overriding error given that there is no record of the proceeding. Rather, it involves a review for error of law that extends to situations where there is no evidence to support the conclusions reached by the Adjudicator. It seems that Moir J's approach recognizes the distinctive aspects of the Small Claims Court appeal regime. He wrote:

[23] We do not review Small Claims Court findings of fact for palpable and overriding error. Our jurisdiction to review for error of law may extend to the situation "where there is no evidence to support the conclusions reached": *Brett* at para. 14. That would have to be apparent from the summary.

[24] In conclusion on this point, fact-finding in Small Claims Court is only reviewed when it appears from the summary report and the documentary evidence that there was no evidence to support a conclusion. An insufficient summary may attract review on the third ground, fairness, but it is not insufficient just because it is less satisfying than a transcript.

[12] In several decisions of this Court, Justice Moir’s approach to the standard for review for Small Claims Court appeals has been endorsed and applied, such as in *The Rendezvous Sports Bar and Lounge v. On Shore Construction Ltd.*, 2020 NSSC 319, where Keith J’s observations are apposite. He said, at footnote 1:

There is some question as to whether “palpable and overriding error” also constitutes an error of law in the context of a Small Claims Court appeal. LeBlanc, J. summarizes the debate at paras. 34 -36 of *C.M. MacNeill and Associates v Toulon Developments* 2016 NSSC 16. I prefer the analysis in *Hoyeck v. Maloney*, 2013 NSSC 266. In my view, it better accords with the statutory goals of the Small Claims Court as an efficient and economical forum to resolve disputes within a defined monetary limit. Moreover, importing the concept of a “palpable and overriding error” into a Small Claims Court appeal risks confusing or conflating the jurisprudence from other appeal proceedings which occur under very different circumstances. For example, appeals which are not brought under the *Small Claims Court Act* are obviously not subject to the statutory principles and procedures uniquely created for Small Claims Court proceedings – including the express legislative goal of inexpensive and informal adjudication (section 2 of the Act). The appeal record in a Small Claims Court appeal is also very different and does not include an actual recording of the original hearing. The judge hearing a Small Claims Court appeal is much more dependent on the written reasons and report prepared by the Adjudicator.

[13] While there may be a divergence of opinion as to whether this Court should review Small Claims Court findings of fact for palpable and overriding error, it is clear, as Justice LeBlanc stated in *C.M. MacNeil & Associates v. Toulon Development Corporation*, 2016 NSSC 16, at para. 37, that this Court may find an error of law where there was no evidence to support the conclusions reached. As Moir J. pointed out in *Hoyeck*, at para. 23, this would have to be apparent from the summary.

Positions of the Parties

The Appellant’s Position

[14] The Appellant says that Adjudicator Balmanoukian erred by “misapplying the evidence in material respects thereby producing an unjust result, and further failed “to apply the appropriate legal principles to proven facts.”

[15] The Appellant agrees with the Adjudicator where he stated:

The Claimant is entitled to be compensated on a *quantum meruit* basis for the work authorized to be done.

[16] The Appellant, however, says that the Respondent requested two “estimates” from the Appellant. The Appellant accommodated this request which the Respondent indicated he needed for his financing, and presumably an estimate of what the well would cost him.

[17] The Appellant argues that given the Adjudicator recognized Sarah Martin’s evidence that the “estimated depth of drilling and case pipe are subject to change”, it begs the question how could the Appellant know or ought to know how deep in the ground he needed to drill in order to hit water. The Appellant says that “Fundamentally, this impossible proposition is endorsed by the learned Adjudicator, in paragraph 24 of his summary report when he states, ‘the Claimant knew or should have known that the Defendant would rely on this estimate, to his detriment...’” He submits that:

This legal artifice cuts to the heart” of this decision. There is no case law or jurisprudence or indeed any cost effective science which would give the well driller any insight as to how far in the ground he should drill a hole in order to hit water in any given part of planet earth. By suggesting otherwise the learned Adjudicator denied labourer his expenditures and wages in an artful legal construct on unsafe footing leading to an unjust result (Appellant’s Factum at p. 8)

[18] Thus, the Appellant argues that the Adjudicator misapplied the evidence producing an unjust result and failed to apply the appropriate principles of *quantum meruit* as it relates to an estimate and price per foot for drilling a hole.

[19] The Appellant says that the Adjudicator seems to accept the evidence of the Respondent wherein he wrote:

He claimed that Cecil Martin misrepresented the estimated price, did not disclose the discrepancy in price, did not disclose the discrepancy in depth as it developed, and was ‘left in the dark’ without an explanation until provided with invoices that totaled ‘close to double’ the revised estimate...

[20] In doing so, he says that

[t]his appears to fly in the face of the evidence of John Martin (apparently accepted by the learned Adjudicator), who testified that he texted the Defendant at the 185 foot depth wherein 1.5 gallons per minute of water was

obtained and was instructed by the Respondent to go to about 200 feet. Again, this evidence was misapplied by the learned Adjudicator. He appears on the one hand to want state that the Respondent was kept in the dark and not aware of how deep the well being drilled, even though the estimate clearly stated that the 'estimated depth of drilling and casepipe are subject to change' and the Respondent was given actual time updates as per the testimony of John Martin quoted above. Again, failure to apply the facts to the law of Quantum Meruit leads to an unjust result.

[21] Lastly, the Appellant quotes the Adjudicator's report where he states:

No other quotes for his construction went over the estimate, The difference in depth (and cost of the well) did not result in any increased value to the property.

[22] He argues that this statement:

[I]s a preposterous position for the learned Adjudicator to adopt. To suggest that a building lot with little or no water has the same value as a building lot in the same area with lots of water is ludicrous and shows the sophistry of the construct which the learned Adjudicator was embarking upon.

[23] Thus, the Appellant says that this misapplication of the evidence in material respects provided an unjust result.

The Respondent's Position

[24] The Respondent's position is that the Adjudicator did not make an error in law in dismissing the Appellant's full claim. He notes that error of fact is not a ground for appeal in the Small Claims Court.

[25] The Respondents says that Cecil Martin recommended a constant pressure system for his home and told him that he could drill and have everything hooked up for between \$5000 - \$6000. The Respondent stated:

I agreed to hire him. His daughter Sarah sent a quote that was higher (\$7,917.75), and when I asked Cecil Martin why it was several thousand higher than he told me at my property, he said he would revise it and not to worry. It was revised to \$7,578.50, and although there was another quote to consider I agreed to it because I wanted to keep the business local and have local serving.

C&J Martin sent an additional bill, months after I had already made initials payments, totaling \$10,913.26. ...

I was court ordered to pay an additional \$1,503.27 to C&J Martin Well Drilling after the Small Claims Court decision. I reached out to C&J Martin, however, was unsuccessful confirming with C&J Martin a way to make the payment. Therefore, I sent a cheque via registered mail on August 15, 2023. It was received on August 17th, 2023, and the cheque has NOT been cashed.

[26] The Respondent submits that the learned Adjudicator’s decision was correct, he agrees with it, and requests the appeal be dismissed.

Reasons For Judgment

[27] The appeal is granted, for the following reasons.

[28] Having carefully reviewed the adjudicator’s Summary Report of Findings of Law and Fact Summary, it is unclear as to how he reached the conclusion that the driller should be compensated by *quantum meruit* for the last 20 feet of drilling but should not be paid for the intervening 85 feet.

[29] The adjudicator acknowledged that the estimate was expressly “subject to change.” He cited evidence of Cecil Martin that the depth of a well is “at best an educated guess and can vary enormously over short distances”, and that he “usually” explained the possibility of variation from estimate, but “could not confirm that he did so in this instance” (Summary Report, at para 12). The adjudicator found that Cecil Martin told the respondent that “if you quote that much higher, the bank may not approve the mortgage.” He also quoted the respondent as admitting that “he did not read the estimate ‘as well as I should have’” and that his focus was on “providing the estimates to his lender” (Summary Report, at para 17). This evidence raises the question – not clearly answered by the adjudicator – of what significance the parties intended the estimate to have. Were its specific terms meant to be contractual (despite the words “subject to change”), or was it primarily intended to provide an estimate low enough that a lender would not object to it? The adjudicator did find that the original estimate was prepared by the claimant “at the Defendant’s request and as part of his financing requirements” (Summary Report, at para 4). He also cites John Martin’s evidence that the revised estimate was “prepared so the Defendant could “compare apples and apples” with [a] competing estimate” (Summary Report, at para 13).

[30] The adjudicator found that the original (120-foot) and revised (100-foot) estimates were provided for multiple purposes, including lending, decision-making, and to induce the respondent to enter the contract. Further, he found, the revision

between estimates “was not adequately explained to the [respondent], a first time buyer/builder” (Summary Report, at para 21). However, the adjudicator also recounted that the revision occurred at the respondent’s request:

The Claimant (at the Defendant’s request and as part of his financing requirements) obtained an original estimate from the Defendant dated October 20, 2020... That provided for a 120 foot well, 40 feet of casepipe, and related items...

The Defendant claimed he had a better price elsewhere (not in evidence) and asked the Claimant to revisit its estimate, and to upgrade to a constant pressure system. This estimate, dated October 28, 2020, provided for a 100 foot well, the noted upgrade, and related items... (at para 5).

[31] The adjudicator concluded, at para 24 of the Summary Report:

I further found that, although the Claimant provided an “estimate,” it was so wildly speculative and inaccurate, in circumstances that the Claimant knew or ought to have known were subject to radical variation, that it was for little more than for the purposes of inducing the Defendant to engage its services, and to be provided to the lender for financing the construction. The Claimant knew or should have known that the Defendant would rely on this estimate, to his detriment, and the Claimant should be precluded (or estopped) from additional [recovery] save for the 20 extra feet authorized.

[32] It is not at all clear how the adjudicator reasoned from “educated guess” (in the words of Cecil Martin) to arbitrariness. The adjudicator seems to have treated the estimate if it automatically had contractual effect. He did not appear to consider the circumstances in which the estimate was provided – which could support the view that it was not intended by the parties to be a definitive statement of the anticipated price of the work – and did not explain why the respondent’s agreement to the last 20 feet of drilling did not amount to acquiescence to the previous 85 feet that exceeded the estimate.

[33] Why does is this matter? It matters because the law is clear that the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so, what margin of error may limit the extent to which the estimates are binding. This proposition finds support in *Atlantic Canada Log Homes Inc v Buergi*, 2023 NSSC 91, where Boudreau J. cited the following passage from *Dunn v Vicars*, 2007 BCSC 1598:

- [85] The law touching on the possible contractual effect of an estimate was aptly summarized by Masuhara J. in *Golder Associates Ltd. v. Mill Creek Developments Ltd.*, 2004 BCSC 665, 48 B.L.R. (3d) 241, at ¶20-24:
- [20] While an estimate for the cost of services to be provided is not a guarantee or warranty at law, it may have contractual effect, in essence setting a limit beyond which fees may not go: see *Price v. Roberts & Muir* (1987), 19 B.C.L.R. (2d) 375, [1987] B.C.J. No. 2279 (B.C.C.A.). In that case, involving a lawyer's estimate to the client, Madam Justice McLachlin, as she then was, for the Court, limited the circumstances in which such a finding may be made, at 378:
- Depending on the circumstances, a lawyer may not be bound by an estimate, if for example, he or she does work outside the estimate at the request of the client, or if the client by his or her conduct unduly increases the amount of the work, or if unforeseen circumstances add a new and unexpected dimension to the work.
- [21] In similar vein, the defendants cited *Kidd v. Mississauga Hydro-Electric Commission et al.* (1979), 97 D.L.R. (3d) 535, 23 O.R. (2d) 385 (H.C.J.), where the Court stated at 540:
- ... I do not, of course, mean to say that all estimates are necessarily binding. Clearly they are not, and the plaintiff here might well have been allowed, because of the vagueness of his estimate, a substantial margin of error. But where the eventual figure is almost three times the original estimate, it is my view that the estimator should be held to that original figure.
- [22] Mitigating in favour of an estimate having binding effect is the principle that although estimates are necessarily somewhat imprecise, persons in the business of providing work preceded by estimates should be able to do so with some accuracy: see *Kidd*, supra at 540.
- [23] The plaintiff cited the recent Alberta case of *Husky Oil Operations Ltd. v. Ledcor Industries Ltd.*, 2003 ABQB 751, [2003] A.J. No. 1111. In that case, the Court examined the principles underlying the question of whether an estimate is binding, and stated at ¶36: "It is clear the court has to look at the circumstances in which an estimate is provided, the positions of the two parties, the knowledge of the party providing the estimate and whether it was relied upon by the party requesting it."
- [24] In sum, the Court must determine if the estimates were made in circumstances which imbue them with contractual effect and, if so,

what margin of error may limit the extent to which the estimates are binding.

[86] Dorgan J. in *Strait Construction Ltd. v. Odar*, 2006 BCSC 690, 52 C.L.R. (3d) 139, mentioned a number of factors that the court could usefully consider in determining whether an estimate was intended to have contractual effect.

[18] I have reviewed the cases on this issue and have extracted the following factors which have been considered by the courts in determining the nature of a building contract:

1. Did the agreement provide for a percentage of the project cost as a fee to the contractor? [...]
2. Was price of overriding importance for the owner and was that communicated to the contractor? [...]
3. Was an estimate provided and did the owner rely on the estimate? [...]

[...]

4. Did the owner require the contractor to design a project at a specified cost or seek assurances as to what the project would cost? [...]
5. Did the contractor pay for the materials and labour and then bill the owner on a regular basis for the work done? [...]
6. Did the contractor make it clear that it was not assuming any of the risk that the final price would exceed the estimate? [...]
7. Did the contractor provide the owner with information regarding rates for labour and equipment rental etc.? [...]
[Some citations omitted.]

[34] In *Ili's Painting Services Ltd v Homes by Bellia Inc*, 2020 ABQB 248, the plaintiff company had rendered painting services in two homes owned by the defendant company. The plaintiff filed liens after invoices were not paid. After the work had begun, the plaintiff provided a written estimate in the amount of about \$38,000. While the defendant claimed that there had been an earlier estimate of about \$18,000, the court found that “the defendant never repudiated the estimate in any written form and, more importantly, was content to let the plaintiff continue doing the job. Irrespective of the exact timing, it is clear that the vast majority of the work was done, with the defendant’s consent, after delivery of the written estimate” (paras 20-25). Further, the court found, “[e]ither before or very near the outset of the work, the plaintiff sent the written estimate for \$38,377.50. The defendant received this

estimate and was likely unhappy with this amount, but there is insufficient evidence to find he ever objected to it, and zero evidence he did so in writing. Rather, he really needed the work done and was content to allow it to begin or continue...” (para 31). A dispute ultimately arose over the amount billed:

[35] The question then is what price prevails: the alleged oral estimate, the written estimate, the proposed compromise, the final invoice, or some *quantum meruit* amount? The factual conduct of the parties and the law both lead to the same result. The defendant accepted in its pleadings that the written estimate was rendered and that there was a “a written agreement”. That admission mirrors the legal effect of being given an estimate and permitting work to take place afterwards.

[36] A party to a commercial exchange who passively accepts and permits the performance of services, in the face of a prior assertion of terms by the other party, will be treated as accepting those terms in most instances. In *Saint John Tug Boat Co Ltd v Irving Refinery*, 1964 SCR 614 at 622 [“Saint John Tug”], the Supreme Court adopted the following explanation of this legal principle:

If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[37] The Supreme Court went on to made clear that, “the circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before binding contract will be implied.”

[38] In this case, the relevant circumstances are that: (i) the plaintiff delivered a detailed written estimate; (ii) that estimate was provided either before the work commenced or very shortly thereafter when most of it remained to be done; (iii) the defendant was in significant need of having the work done; (iv) the defendant was personally present and observed the work being done on a daily basis for much of its duration; (v) the defendant made no written objection to the work continuing on the proposed terms; (vi) the defendant’s pleadings acknowledge the existence of a “written agreement”— which could only refer to the estimate; and (vii) the defendant, on his own evidence, was subsequently was willing to pay an amount well above the supposed oral estimate he relies on, even for work he claims to have been thoroughly deficient.

[35] The court went on to review several decisions with similar facts:

[39] I find that these circumstances are even stronger than those considered by our Court of Appeal in *Beller Carreau Lucyshyn Inc v Cenalta Oilwell Servicing Ltd*, 1999 ABCA 122 at para 32. There, the Court of Appeal applied Saint John Tug to find that the beneficiary of the services had acquiesced to the terms proposed in a written contract never signed but acted upon. In that case, the responsible individuals at the recipient party were simply out of the loop due to internal communication problems. Here, however, the defendant was a one-man operation, and both knew and desired that the work was being done.

[40] The facts in this case are also very similar to those in *Prins Greenhouses v Garden Back to Eden*, 2010 BCSC 1939. In that case, an estimate was rendered, work commenced, and a formal contract was proposed. The recipient of the services demurred in signing, but permitted the work to continue to completion. On a summary judgement application, the plaintiff was successful in recovering the full proposed contractual price. Relevant to this case, Gaul J. concluded (at para 31) that:

I find Garden knew that Prins would be disassembling the greenhouses and new as well how much this work would cost. Even when he found out the cost of rebuilding greenhouses had increased substantially, Mr. Allen allowed the dismantling were to continue I find this constituted acceptance by conduct...

[36] In the result, the court in *Illi's Painting Services* concluded that the defendant acquiesced to the terms of the written estimate:

[41] I find that by allowing the work to continue long after having received the written estimate from Ili's, the defendant accepted those terms by acquiescence. The fact that he later attempted to negotiate alternative terms, and that the plaintiff may have engaged in those ultimately fruitless negotiations, changes nothing. It is a reasonable and understandable commercial practice for a party to accept the certainty of a lower payment than risk the uncertainty of an unpaid invoice. This does not alter the underlying contractual matrix of the relationship.

[42] By allowing the plaintiff to complete the job in the face of a clear written estimate, the defendant bound himself to the proposed terms. This conclusion would not be different even if Loscher did initially provide a much lower oral estimate. If the plaintiff did not want to pay the written price it should have said so and stopped the work. The plaintiff took the benefit of the contract offered. He is bound by its terms.

[37] The significance of *Ili's Painting Services* is the confirmation that a party can acquiesce to terms by allowing the work to continue.

[38] In this case, the evidence recounted and findings made by the adjudicator at least raise the question of whether “the circumstances ... give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before binding contract will be implied”, as per *Saint John Tug Boat Co.*

[39] There is no indication that the adjudicator considered this. Rather, he seems to have simply concluded that the 100-foot estimate was contractual and therefore bound the appellant, regardless of any other circumstances. I conclude that this amounted to an error of law in the circumstances.

[40] There is a second reason for finding error in this case. In *Lacombe v Sutherland*, 2008 NSSC 391, Justice Beveridge (as he then was) determined that the Adjudicator’s failure to provide the evidentiary foundation for his conclusion in his written Decision was an error in law. He wrote:

[36] Even prior to this recognition by the Supreme Court of Canada in 2002, there has been a recognition that a failure to provide reasons can constitute a reversible error in the context of a Small Claims Court appeal.

[37] In *Victor v. City Motors Ltd.*, [1997] N.S.J. No. 140 Davison, J. dealt with an appeal from a Small Claims Court decision. The basis of the appeal was that the summary report prepared by the adjudicator did not clearly set forth the findings of fact and in particular did not clearly set forth the basis for the findings of fact. Justice Davison wrote:

[14] Appeals from the Small Claims Court must be considered in a slightly different manner. In my view the difference is recognized by the legislature when they required the adjudicator to place in the summary report the basis for findings of fact. The Supreme Court, on appeal, does not have a transcript of the evidence and does not have a basis to consider the findings of fact made by the adjudicator. In my view, when the adjudicator prepares the summary for the appeal effort should be made to expressly state the findings of fact and the basis for those findings.

[15] Respect should be accorded the findings of fact, but where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable.

[41] As Justice LeBlanc's noted in *Morris v. Cameron*, 2006 NSSC 9:

[37] I do not accept the Respondent's argument that the reviewing court can never review the findings of fact of the Adjudicator. While this Court may not substitute its own findings for those of the Adjudicator, the Adjudicator's findings must be grounded upon the evidence. In order for the reasons to be sufficient, they must demonstrate the evidentiary foundations of the findings. This conclusion is supported by s. 32(4) of the *Small Claims Court Act*, which requires the Adjudicator to submit to the reviewing court a summary of his findings of fact and law. Accordingly, the Adjudicator has a duty to submit not only the decision, but also the basis of any findings raised in the Notice of Appeal. The Adjudicator thus has two opportunities - the decision and the summary report - to clearly state the basis for any findings of fact.

[42] Leblanc J. went on to conclude that the reasons are “insufficient where they do not make clear the evidentiary foundation and reasoning utilized by the Adjudicator” (*Morris*, at para. 38), which is my respectful view amounts to an unjust result in a quantum merit case, which is an error of law.

[43] In other words, the adjudicator did not provide clear reasons based on a solid evidentiary foundation in reaching his decision. Consequently, it cannot be said that the adjudicator reached a reasonable or tenable conclusion. I would therefore grant the appeal.

[44] As Justice Beveridge pointed out in *Lacombe v. Sutherland*:

[27] In Nova Scotia the *Small Claims Court Act* provides an appeal as of right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the *Act* does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. **Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.**

[Emphasis added]

[45] For all theses reasons, the Appeal is granted and a re-hearing is ordered before a different adjudicator.

Hoskins, J.