IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Dicaire v. Livingstone*, 2017 NSSM 3

Claim: SCCH-457558
Registry: Halifax

Between:

Dominic Dicaire and Lucie Michaud

Claimants

v.

Brian Edward Livingstone

Defendant

Decision

Adjudicator:	Eric K. Slone
Heard:	January 3, 2017
Date of Decision:	January 9, 2017
Appearances:	Stephen Russell, Counsel, For the Claimants
	Brian Edward Livingstone, Defendant, Self-Represented

By the Court:

Introduction

1 This case arises out of a recent abortive real estate transaction.

2 In October 2016, the Claimants put in an offer to purchase a high-end home in Fall River, Nova Scotia, from the Defendant, which was accepted. In the days that followed, the Claimants (through their lawyer) came to learn of the existence of an easement in favour of Nova Scotia Power that covered as much as 80% of the area of the lot. The existence of this easement had not been disclosed to the Claimants prior to them putting in their offer.

3 The Claimants also came to learn that there were some problems with the septic system on the property.

4 Through their lawyer, the Claimants sought to terminate the Agreement of Purchase and Sale and receive back their $5,000.00 deposit. The Defendant disputes that the Claimants had the right to terminate the Agreement, or that they legally did so, and seeks to retain the deposit to apply toward the damages which he says he has sustained, and for which he counterclaims.

5 The threshold issue is thus broadly stated: did the Claimants legally terminate the Agreement of Purchase and Sale? The answer to that question then spins off additional questions which the court is obliged to resolve, and which will be articulated after deciding the main point.

The Facts

6 The Defendant's property at 27 Sheffield Court in Fall River was listed for sale with Remax Nova for $579,000.00 in the fall of 2016. On October 17, 2016 the Claimants put in an offer for $565,000.00, which was accepted that same day by the Defendant. The offer was on a standard form in use by real estate brokerages in Nova Scotia.

7 The Defendant testified that he actually had another offer at the same time, but accepted this one because the other purchasers had offered $15,000.00 less. The Defendant described himself as a highly motivated seller, who was under considerable financial pressure and needed urgently to sell this home. He did not elaborate on the source of this urgency, but little turns on his particular financial circumstances anyway.

8 There are several clauses in the Agreement that are critical to this case. One of them is paragraph 13, the so-called "Lawyer's Approval" clause:

> This Agreement is subject to the approval of both the Buyer's and Seller's lawyers acting reasonably with respect to wording and content within the Agreement. This approval shall be deemed to have been given unless the other party or their Agent is notified to the contrary, in writing, on or before the 24th day of October 2016. If notice to the contrary is received, then either party shall be at liberty to terminate the Agreement, and the deposit shall be returned to the Buyer.

9 In an appendix to the Agreement is an inspection clause , which reads:

> 2. This agreement is subject to the Buyer, at the Buyer's expense, having the property inspected by an inspector(s) of the Buyer's choice, and the inspection(s) meeting the Buyer's satisfaction. This inspection shall be

> deemed to be satisfactory unless the Seller or the Seller's Agent is notified in contrary in writing on or before the 24th day of October 2016. If notice to the contrary is being provided, it shall be accompanied by the pertinent sections of a written inspection report, following which either party shall be at liberty to terminate the Agreement and the deposit shall be returned to the Seller.

10 A third relevant clause ("the requisition clause") which is also in the appendix to the Agreement, deals with property migration and title:

> 5(b) Within ten (10) days of acceptance of this Offer the Seller shall provide, to the Buyer, the applicable PID(s) for the property after receipt whereof the Buyer is allowed seven (7) business days to investigate title to the property, which the Buyer shall do at the Buyer's expense. If within that time any valid objection to title is made in writing to the Seller, which the Seller is unable or unwilling to remove and which the Buyer will not waive, this Agreement shall be null and void and the deposit herein shall be returned to the Buyer, and without liability by the Seller for any expenses incurred or damages sustained by the Buyer.

11 These clauses read in their totality gave the Claimant buyers several mechanisms by which they could legally terminate the transaction. Perhaps more accurately, it could be said that the transaction was at all times conditional on the Claimants being satisfied as to certain aspects of the property and the transaction as a whole. Only upon the expiry or satisfaction of these conditions could the transaction ever be said to have been "firm."

The Nova Scotia Power easement

12 The Claimants testified, and I fully accept, that there was nothing brought to their attention before putting in their offer that would have alerted them to the existence of an easement in favour of Nova Scotia Power. The Defendant had filled out a Property Condition Disclosure Statement (PCDS) and in the section

that asked if he was aware of any “easements or rights of way” he answered in the negative. The Defendant testified that he honestly did not know about this easement, as he had bought the property some years earlier in a private sale. I am more inclined to the view that he probably had been aware of it at some time, but did not consider it important or forgot about it, in line with his stated position that the easement is entirely “innocuous” and that Nova Scotia Power would never actually make use of this easement because it passes right through a developed residential area. (I will comment on that view below).

13 The easement is also prominently shown on the survey sketch of the property which was apparently available during the time the property was being shown, but I accept that the Claimants either did not see the survey or, if they did, that they did not appreciate the significance of the easement shown.

14 I accept that the Claimants entered into the transaction in good faith, with a genuine desire to buy the property and reside there. Of course, they were also rightly concerned that it be a good long-term investment.

15 After signing the Agreement and receiving a signed copy back from the Defendant, the Claimants took it to their lawyer, Stephen Russell, who did precisely as any experienced real estate lawyer would do. He obtained the PID(s) for the property, looked at the available information on line, and carefully reviewed the agreement. He noted that there were certain things that had to be done within a short time. The Lawyer Approval Clause gave him until October 24 to indicate his approval, or not, of the Agreement. The requisition clause actually gave a few more days to lodge objections, because it gave seven business days

after October 17, which would have created a deadline of October 26, or thereabouts.

16 At some point before October 24, 2016, Mr. Russell discovered the easement and brought it to the attention of his clients. On the face of it, the easement cuts a wide swath through this subdivision, creating a corridor through which Nova Scotia Power retained the right to run power lines or erect other infrastructure. The Claimant, Mr. Dicaire, testified that he immediately began making calls to determine whether this easement was still active. What the Claimants and Mr. Russell hoped was that this easement was an anachronism that Nova Scotia Power might be willing to release. No such assurances were to be had; in fact, Nova Scotia Power flatly refused a request to release the easement.

17 Mr. Russell then prepared a letter dated October 24, 2016, in which he combined his requisitions (dealing with routine matters such as a mortgage that needed to be discharged) as well as lodging his lack of legal approval under the Lawyer Approval clause for, among other things, the Nova Scotia Power easement. This letter was faxed to the Defendant's lawyer, and there is clear evidence confirming that it was, in fact, received by the Defendant's lawyer on the day it was sent.

18 As such, there is no question of the timeliness of the objection lodged by Mr. Russell under the Lawyer Approval Clause.

19 At the trial, the Defendant appeared to take several positions which I will dispose of now. At one point, he appeared to dispute the validity of the letter

because it was not sent to him or his real estate agent. This is without merit, as notice to his lawyer is as good as notice to him. Having designated a lawyer to act for him on the sale, the Defendant delegated to his lawyer the legal authority to receive communications on his behalf.

20 The other point that the Defendant made was that the letter of October 24 did not explicitly terminate the transaction. It was not until November 2, 2016 that the formal notice of termination was sent.

21 My interpretation of the Lawyer Approval clause, which I believe to be consistent with the way real estate is practised in Nova Scotia, is that it does not require an immediate decision as to whether or not the transaction is to be terminated. The concluding words of the clause are "*If notice to the contrary is received, then either party shall be at liberty to terminate the Agreement, and the deposit shall be returned to the Buyer."* This contemplates a two-step procedure. First there is "notice to the contrary" which may be issued by either party's lawyer. Secondly, regardless of who gave the notice, there may be notice of termination initiated by either party.

22 The reality of real estate purchases is that many objections can be resolved or shown to be mistaken, and it would be counterproductive to require a purchaser to terminate the deal before solutions can be explored. The Seller will, in many cases, have additional information that needs to be communicated, or other things may be done which might satisfy the Buyer. There is no doubt in my mind that the Claimants here communicated their objection in a timely manner, and essentially "stopped the clock," allowing further time before deciding whether or not to terminate the transaction.

23 What the Defendant does not seem to appreciate is that as of October 24, 2016, he also had the right to terminate the transaction, and could have done so to clear the way for his other purchasers, assuming they were still interested.

24 There is no evidence before me to suggest that the Defendant, or his lawyer, did anything to allay the Claimants' concerns about the Nova Scotia Power easement. The formal termination came about 8 days later, which I find was within a reasonable time after lodging the "notice to the contrary" that the Lawyer Approval clause requires.

Was this a valid exercise of the Lawyer Approval clause?

25 On first blush, one might conclude that the Lawyer Approval clause is concerned only with the form of the agreement. Indeed, at one time, it may have been so restricted. It is well known that buyers of real estate often sign agreements without any legal advice. Having an experienced real estate agent advising a buyer partly satisfies the concern, though not every purchaser has their own agent, and not all agents are legally trained. The bottom line is that people often sign complex legal agreements involving perhaps the largest financial transaction of their lives, and only see a lawyer after the deal is signed.

26 The Lawyer Approval clause, at a minimum, gives buyers (and sellers) the opportunity to have a lawyer go over the agreement to make sure that it properly reflects the deal that the client has made, or believes they have made, and that it contains the protections one would expect to find.

27 However, the question remains as to whether the Lawyer Approval clause has broader application, which would allow it to be used to raise the objection to the Nova Scotia Power easement.

28 There does not appear to be any jurisprudence from Nova Scotia on this issue, although Mr. Russell brought to my attention case law from other provinces that supports the view that the Lawyer Approval clause does, indeed, give a broader scope for withholding approval than mere legalistic concerns about the language of the agreement.

29 The case of *Megill-Stephenson Co. v. Woo*, 1989 CanLII 5285 (MB CA) stands as a strong, long-standing authority (coming from the Manitoba Court of Appeal) in support of the view that the Lawyer Approval clause is wide enough to encompass both legal and business terms:

> [18] But I conclude that there is no binding contract because the entire transaction was made subject to the approval of Mr. Woo's solicitor, and in that respect, I wholly endorse the similar conclusion reached by the learned trial judge. Allen made it clear that there would be no agreement until it was reviewed by the lawyer Mercier. Solicitor's approval meant more than a review of the wording to ensure that all things were properly in place. It meant that there could be no deal without the concurrence of the lawyer, and consequently Woo was free to accept an intervening offer before the intended meeting at Mercier's office.

30 In a case some twenty years later, the same view was expressed at much greater length by an Alberta Court of Appeal judge (in dissent) in *Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc*., 2009 ABCA 148. While dissenting opinions do not typically hold much weight, they may do so where the majority opinion decided the case on other grounds. Here the character of a lawyer approval clause was not even commented upon by the majority, as they found other issues to be determinative. Therefore the

dissenting opinion carries persuasive authority, and indeed it has since been cited for its persuasive reasoning in other cases and in learned articles. In his opinion, Justice Slatter stated:

> [79] In this legal context it is entirely artificial to think that the lawyer would exercise the power to approve the contract contrary to the wishes or best interests of the client. The following scenarios might be imagined:
>
> > (a) The client says to the lawyer: "I had my doubts about this contract, but I signed it because I knew it was subject to your approval, and I was quite sure you wouldn't approve it."
> >
> > (b) The client says to the lawyer: "I signed this contract, but I'm really having second thoughts about it. Here are my concerns; do you agree?"
> >
> > (c) The client says to the lawyer: "I signed this contract, but my [spouse, accountant, associates] point out that I overlooked an important [personal, tax, business] consequence of the deal. I don't want you to approve it."
> >
> > (d) The client says to the lawyer: "Look at this fantastic contract I negotiated!!"
>
> Because of solicitor-client privilege the other contracting party will not know which scenario has unfolded. In all of them (even the last one) the diligent lawyer will discuss the pros and cons of the contract with the client, and go through any concerns of the client. If at the end of the meeting the client has been satisfied, the lawyer will undoubtedly grant the necessary approval. However, **if at the end of the meeting the client is unwilling to proceed with the contract (even though the client may initially have been enthusiastic) the lawyer has no alternative but to withhold approval**. That is exactly why the lawyer's approval was contracted for, and that is exactly what the parties must be taken to have intended. Absent express wording to the contrary, any other interpretation is inconsistent with the role of lawyers.
>
> [80] A similar clause was considered in *Chung v. Jim*, [1984] B.C.J. No. 1353 (Q.L.), where the Court held:
>
> > [18] The clause itself, of course, is the place to start when considering what the rights of the parties were arising out of this

> agreement, and the clause in my view was one, and I find was one which was put in at the request of the Defendants. It was put in so that they would have an opportunity to consult their solicitor. The wording, it seems to me, is clear that they sought and obtained by this wording the right to take advice with respect to the interim agreement, and if their solicitor did not approve it then this would be their way out of the agreement. They reserved unto themselves, it seems to me, that right. The limitation which was put on it was that they had until the 10th of April to do something in this regard.
>
> [19] . . [The solicitor] acted reasonably and with great despatch, it seems to me, to deal with the question of searching and the suggestions which he put forward to the Defendants as to how this agreement might be made into an acceptable agreement insofar as the Defendants were concerned.
>
> [20] But does that mean that the Defendants were obliged to go out then and renegotiate with the Plaintiffs the agreement to find out whether or not the Plaintiffs would accept the suggestions of their solicitor, Mr. Yoke Lam? I can find in the agreement no such requirement.
>
> [21] The simple test is whether or not their lawyer approved the agreement. He did not approve it as it was drawn and that, therefore, put them in the position where they were not obliged to complete. [emphasis added]

In this case the vendor also reserved unto itself the right to take and act on its lawyer's advice, and it cannot object to the purchaser's reliance on the same right.

[81] The British Columbia Supreme Court in *Jung v. GNR Property Management Inc*., 2006 BCSC 1692 (CanLII), 60 B.C.L.R. (4th) 217 at para. 44 held that a "subject to lawyer's approval" clause turned the contract into a mere unenforceable option. This is, however, one of the line of cases that holds that a subjective condition precedent prevents the formation of a contract. As discussed supra, para. 69, these cases do not appear to reflect the law on the subject.

[82] It is not accurate to describe the effect of a "subject to lawyer's approval" condition as functionally turning the contract into a mere option. A binding contract exists but its performance is suspended: *Dynamic Transport*. It is true that the presence of any condition precedent means that no performance is due until the condition is satisfied or waived. The

more subjectively based the condition, the more it may look like an "option", but it is still a binding agreement subject to the condition being met or waived. **If the parties sign a contract containing a "subject to lawyer's approval" clause, they must accept that, while they have an "agreement in principle", the party stipulating for that clause wishes to have a sober second thought after consulting its closest adviser**. There is nothing inherently unfair or commercially unreasonable about that, especially where (as in this case) both the vendor and *FastTrack* stipulated for such a clause. There are many good reasons why one or both parties might want to "lock-in" the terms of the deal before taking the contract to their lawyer or other advisors.

[83] It is true that the generic "good faith" clause applies to the "subject to lawyer's approval" clause. That only means, in this context, that the client may be obliged to take the contract to the lawyer and instruct the lawyer to review it: *Dartington Properties Ltd. v. Harris*, [1979] B.C.J. No. 729 at para. 10 (C.A.) (QL). The good faith clause does not mean that the client has to try to talk the lawyer into approving the contract. The whole point of the clause is that the lawyer will give the client advice, not the other way around.

[84] The proper approach to clauses of this type is set out in *Gordon Leaseholds Ltd. v. Metzger*, 1967 CanLII 270 (ON SC), [1967] 1 O.R. 580 at p. 585-6, 61 D.L.R. (2d) 562:

> Not infrequently the performance of a contract may depend upon the opinion or approval of a third person in respect to particular matters which may arise, or are to be performed, in the course of the contract.
>
> Ordinarily, the purpose of making the opinion of a specified person an ingredient in the existence of a right, makes the opinion of that person and not the opinion of a Court, the criterion for determining whether the facts give rise to the right. In such cases the question for the Court is not whether in its opinion the facts which give rise to the right exist, but whether the specified person has formed the opinion. If he has, it is implicit that the opinion must be honestly held, even though it may be unreasonable: *Caney v. Leith*, [1937] 2 All E.R. 532, where the English authorities are reviewed (see particularly p. 538).
>
> **Where the clause is unrestricted in its scope, a lawyer who declines to give his approval because the contract is not in his or her client's best interest is acting in good faith.**

> [85] In conclusion, the "subject to lawyer's approval" clause in the FastTrack agreement is legally enforceable. **The vendor's lawyer's discretion to approve the contract was not limited, and could be exercised on any basis that impacted on the vendor's best interests.** The letter from the vendor's lawyer of September 7 had the legal effect of terminating the FastTrack contract. **(Emphasis added)**

31 Not a single authority from Canada has been brought to my attention, which casts any doubt on this issue which has been central to, or peripherally involved, in litigation in other provinces going back an entire generation. Apparently there is contrary jurisprudence in New Zealand, which is interesting. Presumably the New Zealand real estate and legal professions are aware of that interpretation, and conduct their business accordingly.

32 I conclude that the existence of an undisclosed easement is an issue well within the scope of the Lawyer Approval clause. The fact that it took a further week or more for the Claimants to disavow the transaction indicates to me that they were not looking for an easy "out" but were rather considering their options and acting in good faith.

33 I am also of the view that the objection to the easement could have been made under the requisition clause. An easement is a cloud on title. A buyer is surely entitled to demand that the cloud be lifted before being obligated to proceed to closing, assuming that the objection was made in a timely manner. Even so, I accept that Mr. Russell appeared to prefer to make the objection under the Lawyer Approval clause, and I expect that he may have had good reasons to do so. In either case, neither the Defendant nor his lawyer did anything to allay the concerns of Mr. Russell or his clients.

Good faith?

34 There must be some minimum of good faith before the lawyer's disapproval may be considered a ground to terminate the contract. As observed by Justice Slattery in the *FastTrack* case, because of the nature of solicitor client privilege, the seller may never learn why the buyer's lawyer is withholding approval. But where the ground is stated, I believe that the question of good faith could be tested.

35 The issue that requires some consideration is this: was the presence of the easement a serious enough concern that a buyer, in good faith, might conclude that the transaction is no longer in their interest?

36 The Defendant stated baldly that the easement is innocuous. This characterization was unsupported by anything except the rhetorical question of why would Nova Scotia Power ever decide to put power lines through a residential neighbourhood? I can appreciate the logic of such a view, and perhaps some or even many people would be willing to take the risk that nothing would be done by Nova Scotia Power, ever, or at least not in their lifetime. But the risk is far from zero. It is pure speculation to speak of what Nova Scotia Power might, or might not do. The fact is that as much as 80% of the land area of this property is encumbered by an easement which is way larger than the typical (and predictable) utility easements that most properties have for basic services to the property. As Mr. Russell pointed out, even though the house itself is not currently subject to the easement, any other structure that the Claimants might contemplate erecting on the land (such as a swimming pool) would be at

risk of having to be removed if Nova Scotia Power decided that it needed to use some or all of the easement.

37 It is not for this court to weigh the risk in absolute terms. Mr. Dicaire testified that he has a particular family history of someone contracting cancer, possibly as a result of proximity to high power lines, and he would not want to expose his family to that risk. Even without this concern, I would not second guess a party for saying that the easement is not something that they wish to accept. The health concern may be objectively remote, but the implications for resale and value are significant enough that they cannot be said to be held in bad faith.

38 In my opinion, these findings would be sufficient to hold that the transaction was legally terminated.

The septic issue

39 As mentioned earlier, the transaction was also subject to a satisfactory inspection. There was an inspection which discovered some problems with the septic system. Because the Claimants were still considering proceeding with the purchase, they agreed with the Defendant to allow a further inspection to determine the extent of the problem. In the result, that further inspection - scheduled for November 4 - never took place because the Claimants terminated the agreement on November 2. The Defendant was particularly incensed that the Claimants cancelled the second inspection, but that did not really change anything in terms of the legal rights and responsibilities of the parties.

40 Inspection clauses are common in real estate transactions, except in “hot” markets where sellers have the clout to refuse to agree to a transaction being subject to inspection or conditional in any way. The effect of an inspection clause is to make the deal conditional. I take notice of the fact that the result of many inspections, where some latent defect is found, is a negotiation to preserve the transaction, either with an agreement to repair the deficiency or at perhaps a reduced purchase price to reflect the expenses that the buyer may be faced with. Nevertheless, a buyer may decide in good faith that the inspection has revealed deficiencies that they are not willing to accept, and the transaction may be terminated.

41 The Defendant’s position is that the problem with the septic was minor and reparable. The Claimants suggest otherwise. I am in no position to say who is right, on the scant evidence provided. However, given my findings about the termination because of the easement, I consider this an academic issue only.

The counterclaim

42 The Defendant has counterclaimed for $25,000.00, on the basis that he lost the benefit of this transaction. Specifically, he expects to now sell at a lower price. He also says that he has lost the benefit of a deal that he made with a bank to settle an outstanding loan at a reduced amount, in exchange for a quick payment that he was unable to make because this deal did not close.

43 Had the Claimants not been successful in their claim, the counterclaim would have had partial merit. The usual measure of damages for failing to complete a purchase is the sale price lost as compared to the likely resale to a

third party. But it is not a recoverable ground where the counterclaiming party says that they could have settled a debt with a bank, had they only had the benefit of the closing funds. That is simply not an allowable head of damage. It is a longstanding judicial policy that prejudgment interest is the mechanism whereby a party is compensated for the loss of use of money. Any other measure is typically not foreseeable, and the risk of an exaggerated loss is not something that the other party can be said to have taken on.

44 As such, the counterclaim might have succeeded to the tune of $15,000.00, had there been some further proof that the sale to a third party was that much lower. All the Defendant could say was that in October 2016, he had a competing offer for $15,000.00 lower than the Claimants were offering. There was no evidence before me as to the Defendant's effort at mitigation. For all I know, he may be able to get his price from someone else, in which case his damages would be limited to interest on the money that was denied to him from the Claimants.

Conclusion

45 In conclusion, the Claimants succeed in their claim. I find that they validly terminated the agreement following their lawyer withholding his approval under clause 13 of the Agreement of Purchase and Sale. As such, they are entitled to the return of their deposit without deduction or interest. I understand that the deposit is held by Remax Nova, which is a stakeholder only and hopefully appreciates that its obligation is to turn the money over to the Claimants via the proper channels.

46 The counterclaim is dismissed.

47 The Claimants are entitled to their cost of $199.35 for issuing the claim. There was a claim halfheartedly advanced for some additional costs, including rent that the Claimants have had to pay because they were obliged to find temporary accommodation when this deal fell through. In my view, such costs are not recoverable - either as damages, or as costs. As damages, they are too remote. As costs, they simply do not arise from the litigation *per se*, and would not be recoverable.

48 The judgment will be against the Defendant for $5,199.35.

Eric K. Slone, Adjudicator