

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Feldman v. The Water Shed Conditioning Limited*, 2017 NSSM 33

SCCH No.462873

BETWEEN:

Alick Feldman

Claimant

– and –

The Water Shed Water Conditioning Limited

Defendant

Adjudicator: Augustus Richardson, QC

Heard: August 17, 2017

Decision: August 29th, 2017

Appearances: Alick Feldman, claimant, for himself
John O’Neill, for the defendant

DECISION

[1] The Claimant and his wife purchased a home. They allege they did so based on the agreement by the seller to install a water system supplied by the defendant (“Water Shed”). The system was supposed to improve the quantity of water for the well-based home. Mr Feldman says that the system failed to deliver on its promise, and had to be removed when (he alleges) it began to cause water quality issues. The defendant denies any privity of contract between it and Mr Feldman. It also denies any representation, negligent or otherwise, made by it to the claimant. It seeks the dismissal of Mr Feldman’s claim.

[2] On behalf of the claimant I heard the testimony of Mr Feldman; Mr Mark Fainshtein, the claimant’s real estate agent; and Mr Steve Horne, a renovation contractor and a home inspector who had inspected the home prior to its purchase by the claimant.

[3] On behalf of the defendant I heard the testimony of Mr Steve Burke, the owner of the Water Shed.

[4] A number of documents were also entered into evidence.

[5] Based on all of the above I am satisfied that the following facts have been established on a balance of probabilities.

[6] On September 13, 2016 Mr Feldman and his wife Natalia Feldman made an offer to purchase 41 Cree Street in Hammonds Plains (the “home”) from Ms Debbie Totten for \$279,000.00: Ex D2. The offer was conditional, amongst other things, on a house inspection and a water test for quantity and quality. Only one person lived in the home at the time. The home was on a well. The Feldmans, on the other hand, had two children, making for a family unit of four.

[7] An agreement of purchase and sale (“APS”) was eventually entered into. The water testing was conducted for the Feldmans by Atlantic Water Investigations (1993) Limited. Mr Den Walker conducted the test. He supplied a report dated September 21, 2016: Ex. D3. The test found that the flow rate of water supplied by the well and pump system in the home was 6.7 litres per minute. That rate did not meet the new well construction flow rate requirements of 13.8 litres per minute. It reported that there appeared to be “possible early indicators of water quantity and quality problems with the well.” Possible solutions to the inadequate supply was the installation of a water storage collection system.

[8] Mr Walker’s report was supplied to the seller and her agent. They in turn provided the report to Mr Burke at the Water Shed. On September 23, 2016 Mr Burke emailed Kim Fox, who was the seller’s real estate agent. He took some issue with Mr Burke’s investigation and conclusions. He suggested that “the only real issue is that the well does not have enough to satisfy a peak demand for 4 people in a short period of time:” Ex. D6. He added that the current owners (being only one) “would not likely have ever experienced an issue, and this report [Mr Walker’s] is somewhat of a shock.”

[9] Mr Burke went on to supply “two options.”

[10] The first was to lower the existing well and redo the test, noting that it was “somewhat of a risk of a few bucks, and it may not satisfy the buyer after seeing the report ... \$450.”

[11] The second was to “install a storage system, 200 gallon, complete with restrictor and float to shut off well, jet pump and tank to re pressurize to house ... \$2,800:” Ex. D6.

[12] Mr Feldman and Mr Fainshtein both testified that a meeting then took place between themselves, Ms Fox (the seller's agent) and a representative of the Water Shed. They did not know or could not recall the representative's name. They agreed, however, that the representative assured them that the water storage system proposed by Mr Burke would meet the Feldmans' water quantity needs.

[13] Mr Burke testified that he was not aware of any such meeting; and that the first he had heard of it was at the hearing before me. There was evidence that the Water Shed had more than one employee at the relevant time. As well, there is a note on Ex. D6 (introduced by the defendant) that makes a reference to a meeting to be held with, at the least, Kim Fox, at the home: see Ex. D6. Given the context—a concern about water quantity, and Mr Burke's email to the seller—I was satisfied that a meeting with a Water Shed representative did take place. I am also satisfied that the Water Shed representative did suggest that the water storage system proposed by Mr Burke in his email would meet the needs of the Feldmans.

[14] The Feldmans then exercised their rights under the APS by proposing an amendment. The amendment included a term that "the Seller, at Seller's expense, will install a storage system, 200 gallon, complete with restrictor and float to shut off well, jet pump and tank to re pressurize to house, on or before closing day and the warranties shall be irrevocably assigned to the Buyers:" Ex. D5.

[15] The amendment was accepted by the seller. Water Shed installed the proposed water storage system. The purchase closed on October 13, 2016. The Feldmans moved into the home.

[16] The Feldmans began to experience water quantity/supply problems almost immediately. Water would run for a few minutes and then stop. As Mr Feldman testified, "the water would disappear from the taps." Mr Feldman called the Water Shed a number of times. Service technicians from the Water Shed came out to the home several times. By mid November the problem with the flow appeared to have been corrected. There had apparently been a poor connection between the existing pump/filtration system in the home and the Water Shed's storage system. However, shortly thereafter a new problem developed, this time with the quality of the water. It became yellow in colour. A mud-like substance also appeared in the bottom of the toilet tanks. Water Shed was called and someone attended. The Water Shed's position at this time was that the problem lay in the existing system, not in the one they had installed.

[17] Mr Feldman then sought the advice of two other companies, Diamond Water and Evolution Water. The consensus was that the well water had a high iron content. The fact that

water was being stored (in order to build up the water quantity/flow) allowed the iron to oxidize, leading to the yellow discolouration in the water. Moreover, the fact that water was being stored could lead to a build up of bacteria in the system. An ultraviolet light system was suggested as a way to deal with that potential problem.

[18] These cascading problems concerned the Feldmans. They resolved that concern by asking the Water Shed to remove the system it had installed. This was done in late November or early December. The Feldmans were then left with the system that had existed in the home at the time they had made their original offer to purchase. The water quality problem disappeared. But the water quantity problem remained. If one person has a bath, the next person has to wait some time for the water to build up in the system before running their bath. They can't install a dishwasher because of the demand it would make on the water system.

[19] The Feldmans claim \$4,140.00 from the Water Shed. Mr Feldman testified that that was the price of the Water Shed system that had been installed. This was based on a copy of the invoice that he apparently received from the seller: see document 3 in Ex. C1, email dated November 11, 2016 to Water Shed. He stated that they wished to install a replacement system to deal with the water quantity issue, but that he did not know what such a replacement system would cost.

[20] Mr O'Neill submitted that there was no privity of contract between Water Shed and the claimant. I agree.

[21] Mr O'Neill also submitted that no misrepresentation, negligent or otherwise, had been made to the claimant by the Water Shed. He suggested too that the claimants had opted for the "Cadillac" solution (option 2) in Mr Burke's email; that they were just trying to squeeze some money out of Water Shed; and that they were putting forth Mr Walker as an expert without actually presenting him to give evidence and be cross examined.

[22] I did not find these submissions persuasive. It was clear on the evidence that there was a water quantity issue with the home. Mr Burke in his testimony attempted to soft-peddle the issue by saying that over the course of a day the water supply could come close to, or indeed perhaps even, meet the recommended flow of 13.8 litres per minute. However, what counts is not an average calculated over the length of an entire day (over periods, for example, when no one was using the system). What counts is a supply during a given moment—for example, during the morning, when four people are using water to flush toilets, have showers or baths, brush their

teeth or make breakfast. And by Mr Burke's own admission in his email that "the well does not have enough to satisfy a peak demand for 4 people in a short period of time."

[23] It is also clear that Water Shed, and in particular Mr Burke, was well aware that the offer to purchase the home was conditional on a solution to the water quantity issue. Regardless of what he might think about Mr Walker's report, the fact remains that the Feldmans were basing their decision to purchase on a solution to the problems outlined in the report. It is also clear that Mr Burke provided the seller with two options that were designed to address that problem.

[24] On those facts it cannot be doubted that Water Shed was aware that a buyer (that is, the Feldmans) would be basing an important decision (whether to proceed with the purchase of the home) on recommendations made by him to the seller. Nor can it be doubted that the Feldmans were relying on Mr Burke's recommendations, inasmuch as they incorporated it into the APS. I am also satisfied that they acted reasonably in so relying. After all, Water Shed had Mr Walker's report. Water Shed was in the business of drilling wells and supplying water systems based on wells.

[25] Water Shed owed a duty of care to the Feldmans on these facts. It breached that duty when it supplied a system that failed to work with the existing system or, perhaps better, interfaced in such a way as to create problems with the water quality that had not existing before. The result in any event was the same—the Feldmans ended up with something they had not intended to purchase, a home that could not supply the water quantity needs of a family of four.

[26] I turn now to the question of damages. It is clear that the Feldmans did suffer a diminution in the value of the home they had paid for. What they had paid for was a home that included a water system (installed by Water Shed) that would meet the water quantity needs of a family of four. They did not get what they had purchased. I am also satisfied that there is a difference in the fair market value of a home whose water supply can meet the needs of only one person, as opposed to a family of four (or indeed more). The question though is how to value that diminution in value.

[27] Mr Feldman says that the price paid by the seller to install the Water Shed system (\$4,140.00) should be "the starting point" for his damages claim. The difficulty of course is that this was not what Mr Feldman paid. He in fact paid nothing for the system. On the other hand, I am satisfied on the evidence that the Feldmans would not have proceeded with the purchase without the condition they had attached to their offer. The condition they attached to their offer did not reference any price. It simply picked up the wording of the system proposed by Mr Burke

to the seller's agent. On the evidence that in order to satisfy an offer to purchase the home for \$279,000.00 the seller had to spend the amount she paid to the Water Shed. I am prepared then to accept the price paid to the Water Shed by the seller as evidence of the diminution in value of the home. I will make an order to that effect.

DATED at Halifax, Nova Scotia
this 29th day of August, 2017.

Augustus Richardson, QC
Adjudicator