2001 SC No.: 114505
Date: 20020727

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Labor v. Boudreau, 2002 NSSM 3

BETWEEN:

PETER LABOR and **SANDRA LABOR**

Claimants

- and -

TIM BOUDREAU, **JAMES M. INCH, JR.**
and **LI ENGINEERING LIMITED**

Defendants

DECISION

Counsel / Representatives:

Peter Labor and Sandra Labor were represented by Peter Labor;
Tim Boudreau was represented by Ivo R. Winter, LL.B.;
James M. Inch Jr. was represented by John G. Khattar, LL.B.
LI Engineering Limited was represented by John G. Khattar, LL.B.

This matter came before Douglas J. Lloy, Small Claims Court Adjudicator sitting in Sydney on multiple hearing dates, the last being May 17, 2002, who reserved rendering an order until a written decision could be prepared.

[1] This case concerns the quality of a property inspection performed by the Defendant James M. Inch, Jr., or the company he claimed to be working for at the time, namely the Defendant LI Engineering Limited. The Defendant LI Engineering Limited ("LI") was added as a Defendant to this proceeding by a decision and order of this court on April 10, 2002 following written and/or oral submissions of the parties- see *Labor and Labor v. Boudreau and Inch*, [2002] N.S.J. No. 338. The Claimants' case against the home owner, Mr. Tim Boudreau, was dismissed by an oral order of this court on May 17, 2002 after trial and closing submissions of the parties. The principle of *caveat emptor* ("buyer beware") was central to the dismissal of this portion of the Claimants' action.

[2] The issue then for determination is whether one or none of the remaining Defendants are liable to the Claimants for an alleged negligently performed property inspection. The burden is upon the Claimants to prove upon a preponderance of the evidence that one of the two remaining Defendants performed a negligent inspection of the property that resulted in foreseeable damages to the Claimant.

[3] The evidence as to the property's pre-purchase state and subsequently discovered defects was given by the Claimants' spokesman, Mr. Peter Labor. His evidence is accepted by the court as accurate and can be stated as follows:

History of the property's inspection and subsequent defects found in the quality of the home subsequent to purchase

[4] The property in question is 2475 Kings Road, Sydney Forks, Cape Breton Regional Municipality, Nova Scotia. The property was advertized for sale as indicated in Claimants' binder marked as *Exhibit One* at *Tab One*. Mr. and Mrs. Labor bought the house in July 2000 after seeing this advertizement. Mr. Labor pointed out that the advertizement described the home's basement as containing a recreation room and a laundry room. Before the property was purchased, the Labors retained the services of the Defendant Mr. Inch to inspect the property to determine its soundness. They had confidence in Mr. Inch as he successfully pointed out structural problems in another, previously-inspected property the Labors were thinking of buying. On the basis of his advice, they declined to buy this other property. The Claimants thus hired Mr. Inch again to inspect 2475 Kings Road to see if he could detect any defects.

[5] Mr. Inch performed the home inspection on June 20, 2000. Subsequently, Mr. Inch produced the report found in *Exhibit One, Tab Three*. It is important to note that this inspection involved non-invasive testing as opposed to destructive testing, meaning that the inspection was confined to visual inspection only as opposed to removing paneling, uprooting sub-floors, etc. The report at p. 5 stated that no signs of water infiltration could be found in the basement. With no alarming discoveries evident in this report, the purchase proceeded, and the Labors moved into their new home.

[6] The day after the home was purchased, a board in the laundry room's sub-floor collapsed while Mr. Labor was walking on it. The wood was rotten through water leakage. At first it was thought by the Claimants that it was localized leakage that caused the wood to collapse, but once Mr. Labor removed the floor covering to replace the board, the entire laundry sub-floor was found to be rotten. The bottoms of the supporting posts for the staircase and exterior wall studs were in very poor condition, and indeed similar leakage and rotten wood were found throughout the basement, with the block foundation walls also found to be water damaged. All had been subject to long-term water infiltration.

[7] Mr. Labor then tried to seek rectification of this situation by writing letters to both Mr. Boudreau and Mr. Inch as found in the preamble to *Exhibit One*. While this was underway, Mr. Labor got transferred to Halifax for his employment, making sale of his house in Sydney Forks imperative. This sale was hampered by the fact that the basement's deteriorated condition was now very apparent to all prospective buyers.

[8] Three estimates from different companies for the repair of the home were received by the Labors. Two of these estimates appear as *Exhibit One, Tab Four*. The first estimate is from MacLean Concrete Construction Ltd. and consists of two separate estimates both dated on October 10, 2000. The first of the MacLean estimates shows that the costs of replacing the block wall with 8" solid concrete, removing the walls in the process while supporting the house, excavation and damp-proofing was $11,247.00. The second MacLean estimate is for $2,967.00 was for jackhammering out the existing basement floor and the insertion of a new finished cement floor.

[9] The second independent estimate is from Knottled Roofing and General Carpentry Limited and is undated. This company estimated that it would cost $10,350.00 to repair the basement. The third estimate, from a company called “Scotia” was not produced into evidence as the company could not guarantee results, so it was not relied upon by the Labors. The cost of this estimate was $12,155.

[10] As the cost of repairing the home was daunting, and due to the change in the locale of Mr. Labor’s employment necessitating a move out of the area, the Claimants did not make these extensive repairs. The Claimants sold house for $68,000 in mid-2001. When they purchased it, they bought it for $77,500 but afterwards made $4,200 worth of improvements to the home, including $2,800 in refinishing floors and upgrading the electrical wiring of the home, increasing this sum to $81,700. The Claimants claim the $13,700 difference between what they paid for the home and what they sold it for (capped at the maximum $10,000 monetary limit for Small Claims Court) plus $725 for certain disbursements for a total of $10,725. The claimed disbursements are:

1. $100 in pre-trial costs incurred in attempts to settle the case, including telephoning Mr. Inch in Iqaluit, sending faxes, Express Posts and regular mail charges to both Mr. Inch and Mr. Boudreau (the costs incurred in contact expenses to Mr. Boudreau were not segregated, so this sum will be reduced to $75, as most of these costs relate to the long-distance charges to contact Mr. Inch in the extreme North;
2. $250 incurred for Mr. Douglas Rigby’s fees for his building inspection (see *Exhibit One, Tab Four* for his invoice);
3. $250, the cost of Mr. Inch’s inspection (*Exhibit Five*); and
4. $150 Small Claims Court Claim filing costs.

[11] The questions for the court to determine are: (a) whether a negligent home inspection was performed by the Defendant Mr. Inch, (b) if a negligent home inspection was performed, who is liable and (c) what are the Claimants’ damages.

Was a negligent home inspection performed by Mr. Inch?

[12] The standard of care to which Mr. Inch must be held is that of a reasonable man. In other words, would a reasonable building inspector standing in the place of Mr. Inch, privy to the same information and site conditions as Mr. Inch, and bound by the same contractual terms as Mr. Inch, have discovered the water infiltration in the basement?

[13] The starting point for this inquiry is an analysis of the contract between the parties. The Defendants claim it was reduced to writing in part via the Home Inspection Report. This Report is exhibited in *Exhibit One, Tab Three*. The scope of any possible liability for a defective inspection is limited by the terms of this contract, in particular Clause 2.0, first paragraph. To summarize this Clause, the home inspection conducted was to be a visual inspection only, and was not meant to be technically exhaustive. Areas of the home that were obstructed from the inspector’s view were not included in the report. The purpose of the report was to provide the client with a better general understanding of the property and to raise concerns “*visible*” to the inspector.

[14] The contract goes on to say that the findings in the report are valid for a period of 30 days after the date of inspection, but this exemption does not apply here as the water infiltration was discovered by Mr. Labor the day after purchase, which the court finds on the basis of Mr. Labor's uncontradicted testimony to be within 30 days of the inspection.

[15] So then would a reasonable building inspector, bound by this contract, and given the existing site and inspection limitations, have discovered the water infiltration problem? Mr. Inch in his report did not discover this problem, as is very apparent in the report prepared by Mr. Inch (*Exhibit One, Tab Three*). Mr. Inch's inspection regarding the basement as contained within Clause 4.6 failed to detect the presence of water infiltration. Mr. Labor submitted that the pertinent portion of Clause 4.6 to reads as follows: "The basement shows no signs of water infiltration".

[16] Mr. Inch's counsel was quick to point out the sentence in Clause 4.6 which immediately precedes that statement in mitigation: "Due to the nature of the construction, neither the interior of the foundation nor the condition of the framing was visible to the inspector". This statement would also include the lack of water staining around the base of the walls, flooring etc. The question is, were there sufficiently cogent indicia of water infiltration other than the absence of water staining, existing at the time of the inspection that should have been discovered by the inspector through a reasonable inspection?

[17] Mr. Labor argues such indicia were indeed present and should have discovered by Mr. Inch. These indicia can be summarized as follows:

a. Mr. Inch should have been sensitized to the risk of water infiltration as the home was over 45 years old (according to the advertizement, at least), and had a sump pump in the basement. These two facts should have been enough to make Mr. Inch vigilant in his efforts to determine if a water problem in the basement existed;

b. There were also cracks in the foundation wall and cement block displacement in the basement, as depicted on one wall shown in a photograph labeled "Block Displacement" in *Exhibit One, Tab Eight*. These facts, Mr. Labor argued, should have alerted Mr. Inch that water seepage in the basement was likely.

   This evidence was repeated in the evidence of Mr. Douglas Rigby, a building inspector since 1978 whose C.V. was entered as an exhibit. Mr. Rigby in his report generated by his inspection of the premises on July 17, 2001 (*Exhibit One, Tab Five*) states that masonry foundation of the home was in very poor condition with cracks present. The block units are bulged and cracked on the interior walls, according to Mr. Rigby's report. Graphic evidence of this condition can be seen in the photos contained in *Exhibit One, Tab Eight*. Mr. Rigby testified that this was something that Mr. Inch should have been able to see without destructive testing; and

c. Mr. Labor in his evidence candidly admitted that the majority of the basement's surfaces (other than the bulging and cracked block walls) were covered with finishing, and it was only when the finishing was ripped up (destructive testing) that the extensive water damage could be seen. However, one area in the basement was not covered by finishing and was easily accessible to Mr. Inch during his inspection. This area was a small storage area which lay behind a door underneath the basement steps. This area showed an advanced degree of water damage and could have been detected by Mr. Inch, thereby warning the Labors of the problem and avoiding their subsequent problems. A fairly illustrative photo of this area can be found in *Exhibit One, Tab Six*, page two (bottom photo).

[18] I have listened to the oral evidence of Mr. James Inch Sr., an engineer of repute and have read the two affidavits of the Defendant, James M. Inch Jr. (*Exhibits Two* and *Four*) and have listened to the submissions of counsel. Based on the totality of the evidence, the court finds that a reasonable inspector, spurred on by the protruding and cracked blocks situated in a basement with a sump pump in a 45+ year old house, would have conducted a more thorough inspection than done by the Defendant Inch. In coming to this conclusion, the court keeps in mind the "visual only" language of the Defendant's agreement with the Labors, and also that the Defendant is not held to a standard of perfection. However, with all of these indicia present at the time of the Inch inspection, a reasonable inspector should have been looking for a way to examine more closely the walls and floor of the basement, sheathed as they were with finishing. Such an opportunity was extant in the small nook underneath the stairs, which was not sheathed in finishing and which would have indicated the presence of water infiltration into the home's basement.

[19] The court therefore finds that a defective inspection of the home occurred. The next inquiry is who is liable to the Claimants- Mr. Inch or LI?

Who is Liable?

[20] As aptly pointed out by Mr. Khattar, counsel for both Mr. Inch and LI, only one of the Defendants can be liable to the Claimants. If Mr. Inch was an employee of LI, then his employer (LI) is vicariously liable to the Claimants and not Mr. Inch. If Mr. Inch was acting in his own capacity, then he is responsible for his own actions and LI cannot be held accountable for him.

[21] The evidence on this issue emanates from three sources:

a. Mr. Labor: He testified that he sought out Mr. Inch personally, received an invoice from Mr. Inch on his personal stationery (*Exhibit Five*) and made the cheque out to pay Mr. Inch in Mr. Inch's name (*Exhibit Three*, which is a cancelled cheque of very faint legibility). Although Mr. Labor made a successful motion to the court to add LI as a Defendant, it is clear that the Claimants thought they were dealing with Mr. Inch in his personal capacity.

b. Mr. James Inch, Sr.: The father of the Defendant James M. Inch, Jr. and corporate officer of LI. He testified that his son was employed by the company at the time of the Labor house inspection. He also pointed out that Clause 1.0 of the Home Inspection Report clearly states that LI was retained to perform the inspection, with the inspector being Mr. James M. Inch. The Report also bears the insignia of LI on the front cover in bold letters. He could not explain why his son presented a bill on the Defendant's personal letterhead, nor why payment was tendered directly to the Defendant. LI's financial records were not tendered into evidence to confirm LI's receipt of the Labor funds.

c. Mr. James M. Inch. Jr.: The Defendant. The court was advised that Mr. Inch was in Iqaluit, and therefore could not attend court, but he did provide two affidavits instead. They have to be treated carefully by the court, as of course Mr. Inch's absence deprives the Claimants of the right of cross-examination. In the October 3, 2001 affidavit, Mr. Inch states at paragraph three that "in connection with" his employment duties with LI, he carried out the inspection on the Sydney Forks home.

[22] The court finds that the invoice bearing the Defendant's name and personal address, combined with the Labors' cheque being tendered in the name of the Defendant indicates that the Defendant was personally engaged in this inspection. Clause 1.0 of the Report and the insignia on the cover are compelling, but when the compensation for the inspection goes to the Defendant's personal account with the concurrence of the Defendant, then this conclusively determines that it was the Defendant in his personal capacity who was doing the work. Therefore, it is the Defendant who bears the liability for the faulty inspection.

What are the Claimants' Damages?

[23] There are two competing assessments of damages in this case. The Claimants claim the sum of $10,725. This sum, arrived at as noted above, constitutes the difference between $81,700, which is what the Claimants paid for the home in June 2000 ($77,500) plus improvements the Labors made on the home ($4,200), minus what they sold the home for in mid-2001 ($68,000) to equal $13,700, capped at the $10,000 monetary limit for Small Claims Court plus $725 in pre-trial disbursements. The Defendant concentrated all of its energy in attacking the $10,000 component of this claim. The disbursements as calculated in paragraph ten above are reasonable, and the court therefore awards the Claimants the sum of $725 in costs. The more troublesome question is the $10,000 component of the Claimants' claim.

[24] The legal principle that applies is foreseeability; could a person standing in Mr. Inch's stead know that if a defective inspection would lead to his liability for the difference between the purchase price in 2000 and the reduced sale price in 2001?

[25] Foreseeability, as expressed by Flinn, J.A. of the Nova Scotia Court of Appeal in *Roose v. Hollett et al.* (1996), 154 N.S.R. (2d) 161 at p. 192, adopted the application of this concept as expressed by Dickson, J. of the Supreme Court of Canada in *R. v. Cote* (1974), 51 D.L.R. (3d) 244 at p. 252:

> It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred.

This application of the doctrine of foreseeability binds this court and must be employed in this case. If the class or character of the injury which occurred is too remote to be foreseen in a general way, then liability will not attach to the Defendant.

[26] The court heard extensive evidence from Mr. Gary Ross, a Claimants' witness and their real estate agent on the 2001 sale as to the value of the property and the impact the basement's water infiltration problem had on the ability to sell the home. Extensive evidence was also led by Mr. Peter Martin, another real estate agent and Defendants' witness as to the alleged poor sales strategy employed by the Claimants in selling their home in 2001and the minimal to non-existent impact water seepage in the basement would have on the purchase price.

[27] While the court listened with attention to these witnesses and examined the exhibits they entered into evidence, the fundamental determination this court makes is that the Claimants' method of damage calculation is too remote to admit recovery on that basis. The class or character of the damage as formulated by the Claimants is too remote to have been foreseen in a general way by Mr. Inch.

[28] The evidence indicates that Mr. Inch did not know that a resale would be occurring within a year from the Claimants' purchase date of the property. In fact, the Claimants did not know in 2000 that they would be moving in 2001. It may be argued that if Mr. Inch knew that the property was going to be exposed to the market within a short period of time then the damages the Claimants are seeking may indeed be foreseeable. The facts in this case are that neither Mr. Inch nor the Claimants knew that the property would be sold in a year's time. Further, the variability of the property market in Cape Breton makes a reliable computation of damages via this method too speculative. Therefore the court holds that the Claimants' proposed calculation of damages is too remote to admit recovery on that basis.

[29] The court did hear evidence from Mr. Labor that the Claimants spent $4,200 in improvements on the home, which was orally broken down by him to comprise some $2,800 in upgrading the electrical wiring and refinishing the basement floors. Mr. Labor testified that the basement floors, especially in the furnace room, were "springy" due to water-induced rot and had to be replaced. He did not embark on the full-scale repairs suggested by the various contractors he consulted upon the home's foundation as his wife was pregnant and, by the time he was ready to tackle the home's water infiltration problem in earnest, he was transferred out of the area.

[30] The court accepts the damage estimate given by Mr. Labor as being accurate. He was an honest and forthcoming witness. His brevity on the amount of money that he did spend on the basement was prompted out of his focus on his proposed method of calculating the Claimants' damages and not out of an attempt to hide information from the court. Unfortunately, the court is left with no breakdown of how much, out of the $2,800 amount, was spent on the basement work and what was spent on upgrading the electrical wiring. The electrical wiring work forms no part of the Claimants' claim, but the basement work does. The fact that such repairs might have to be effected by the Claimants was of a class and character which could be, in a general way, foreseeable by the Defendant. This direct, out-of-pocket loss was caused directly by the Defendant's oversight in detecting the water leakage. If he did detect it, he could have saved the Claimants the expense of repairing the basement as the Claimants would have had the informed option of declining to purchase the house.

[31] Mr. Inch is also concurrently liable in contract law as well for not discharging his duties in a workmanlike manner.

[32] Therefore, it is ordered that the Claimants shall have judgment against the Defendant James M. Inch Jr. in the amount of $1,400, being half the amount of $2,800. The Claimants are also awarded their costs of $725 for a total judgment of $2,125. The Claimants' claim against LI is dismissed.

[33] In closing, the court wishes to thank the parties for their concise and organized presentations, and their professional conduct throughout.

[34] Order accordingly.

Dated at Sydney, Nova Scotia this 27th day of July, 2002.

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Douglas J. Lloy
Small Claims Court Adjudicator.