

SCCH 440448

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Carter v. Savage, 2015 NSSM 51

BETWEEN

**Madeleine Carter**

**CLAIMANT**

**-and-**

**Kevin Jonathan Savage and Lacey Dawn Savage**

**DEFENDANTS**

**Heard: October 7, 2015**

**Decision: December 27, 2015**

**Adjudicator: David TR Parker QC**

**Counsel: The Claimant was self-represented**

**The defendant was represented by Ellen Burke**

**DECISION**

1. This matter came before the Small Claims Court in Halifax, Nova Scotia on October 7, 2015.

**OVERVIEW:**

2. The case involves a dispute arising as a result of a purchase of a new home by the Claimant which purchase was terminated by the Claimant. The Claimant is requesting that her deposit be returned. The deposit is currently being held in trust by the Defendants/Sellers brokerage, Red Door Realty until this matter is resolved by the court.
3. The Defendants take the position that the Claimant should not have terminated the agreement and therefore claims the deposit should be forfeited and the Claimant should pay for all monetary losses resulting from the Claimant's actions.
4. The Defendants counter claimed for the deposit of \$6000.00; \$642.28 for electrical work completed at the Claimant's request; \$169.34 for dormer repair work completed at the Claimant's request; \$1332.50 for cost to stage the Defendants' property; \$3500.00 for loss resulting from the sale of the Defendants' property to another Buyer and costs associated with interest payments on the Defendants' mortgage from May 26, 2015 to July 16, 2015.

#### **THE FACTS:**

5. The Claimants on March 9, 2015 made an offer to purchase the Defendants' home at 6058 William St., Halifax Nova Scotia by way of a Purchase and Sale Agreement and on the same date the Defendants counter offered which counter offer was accepted by the Claimant on March 10, 2015.
6. On March 16, 2015 a property inspection was completed at the request of the Claimant on the home and as a result, an amendment of the Purchase Sale Agreement was executed by the parties on March 17, 2015.
7. The amendment to the Purchase Sale Agreement dealt with three issues raised in the inspector's report. Two involving electrical and the third involving ductwork.
8. By March 18, 2015 all the conditions were met or deemed to be met and the Purchase Sale Agreement was then complete.
9. A Property Condition Disclosure Statement was completed by the Defendants on February 24, 2015 and was received by the Claimant on March 16, 2015.
10. Pursuant to the Agreement of Purchase and Sale the Property Condition Disclosure Statement forms part of the Agreement of Purchase and Sale.
11. In the Property Condition Disclosure Statement under the heading Structure, in article 6C, the question is asked: have any repairs been carried out to

correct leakage or dampness problems in the last five years[or since you owned the property if less than five years]?

12. The Defendants checked off “yes” to the above question and wrote in beside the question “leak from back dormer installed [fixed].”
13. The closing date for the purchase of the defendant’s home was set for May 26, 2015.
14. On May 16, 2015 the Claimant who happens to be walking by the property saw a blue tarp and roofing repair equipment on the property she was about to purchase. As a result the Claimant contacted her agent, Heather Morgan, to inquire about the work being completed on the roof.
15. As a consequence, on May 16, 2015 the Buyer’s agent, Heather Morgan, e-mailed the Seller’s agent, Ian MacIntyre advising him that her client walked by the Defendants’ property and noticed some roof work was being completed and requested an explanation.
16. As a result the Defendants’ agent, Ian MacIntyre, contacted the Defendants about the Buyer’s request and on May 18, 2015 Ian MacIntyre responded to Heather Morgan’s request in an email saying: *“Hi Heather – my client provided the reply below as to the recently completed roof work on the back dormer@Williams Street. This is an enhancement to the initial fix as previously disclosed. He did the work in conjunction with his neighbor Kip. If your client is interested in fixing the porch ceiling she can address it post-closing with her neighbor.”*
17. The above referenced email then transcribed this email remark from the Defendants. *“We had some ice damming over the winter, as I think most people did this winter. So Kip and I had a contractor to take a look at it and add ice and water shield added to better protect where the back dormer meets the roof. The guys that did the siding just used tar to fix when we had a leak last time, and with all of the snow and ice we had this past winter that did not work. We wanted to be 100% sure that it will be well protected in case we have another winter like this again. Also Kip is looking at having the front porch ceiling replaced [the pine boards] and had asked me if I wanted to go halves on it....This is not something that is really affecting the integrity of the house and is more cosmetics, so I think it should be the responsibility of the new owner if she wants to. I am not sure on the costs but Kip was going to get a quote and I can let you know the value.”*
18. Heather Morgan the Claimant’s agent subsequently emailed Ian MacIntyre, the Defendants’ agent on May 18, 2015 and said *“thanks for this. I appreciate that many homes experience ice damming [my own included] this winter as a result of the extreme conditions. How did the current owners*

*know there was an issue? Was there seepage on the inside at Williams as it melted? Could you have your clients please change the PDCS & send a copy of the receipt for the new shingle/ice shield with the other receipts for the home inspection amendment items which were completed? This may seem like overkill but my client is a lawyer and will appreciate an accurate disclosure on paper & receipt. Ultimately, it is great that this work has been done as a preventative measure.”*

19. On May 19, 2015, The Defendants’ agent, Ian MacIntyre e-mailed his clients, and said: *“Kevin – see note received today from the Buyer’s agent in reply to their questions. She is concerned and wants more detail along with support. a] see question below: i.e. did water penetrate the building how did you know it was an issue and to what extent? b.] can you update the Property Condition Disclosure Statement [see attached.. for 6C – perhaps best to make note under point 11 like we did] an initial/date the change. i.e.] Something like rear dormer re-shingled installed ice and water shield etc. May 2015 as precaution or to fix a problem? c.] can you send me the receipt for this work along with the receipt for electrical and duct replacement etc. does seem like overkill to me, however, lets continue to dismay any concerns and see this through to closing. Question please let me know tomorrow. Note she did not comment or mention the porch roof replacement. Thanks. We are almost there.”*
  
20. On May 19, 2015 an email was sent to Heather Morgan, Claimant’s agent from Ian MacIntyre, Defendants’ Agent which stated: *“Hi Heather-find attached an explanation of the source/findings, the repair and an updated Property Condition Disclosure Statement note disclosure. Receipts [including the roof work] will be forthcoming this week. [I will send them to you as I receive them.] Please ask your client and respond whether or not she wants to partake and have a discussion with the neighbor to replace the deck ceiling wood.”*
  
21. Attached to that email was the response from the Defendants to their agent, Ian MacIntyre which was passed on to Heather Morgan. In it the Defendants stated: *“a] when we got back from vacation there were signs of water penetration on the ceiling of our bathroom. Nothing major, some slight bubbling on the ceiling. Kip and Shannon also had some leakage on their side so we hired Yes Levasseur from Archer Construction to take a look at the dormer roof. He recommended putting down a new barrier as the contractor that put new siding on the dormers just reuse the existing barrier. Since we did not want the new Buyer to possibly have any issues this winter we decided that it would be best to have solved now. b.] updated Property Condition Disclosure Statement attached. c.] receipts will be sent when work is complete, roof should be today. HVAC should be this week, and I am just waiting on the receipt from the electrical. d] please have Buyer provide*

*response regarding the porch ceiling as Kip and Shannon would like to have the work started soon. It is the same contractor that is working on the roof.”*

22. The subsequent Property Condition Disclosure Statement was exactly the same as the initial Property Condition Disclosure Statement except for an additional comment, under clause 11 which stated: **“6C, April 2015 dormer/roof leaked into bathroom on second floor. Hired contractor to install ice/water shield to prevent future ice damming.”** Nothing other than that was changed including dates and signatures although it appears that the Defendants initialed the change.
23. On May 21, 2015 Heather Morgan contacted the Defendants’ agent and said: *“Hi Ian, just connected with my client, she apologizes as work is very busy for her this time of year. She would definitely be interested in connecting with her new next-door neighbors to discuss the scope & estimated cost of the porch ceiling replacement work. Are they comfortable passing along their email or phone contact info? Many thanks, Heather”*
24. On May 24, 2015 the Claimant’s agent e-mailed the defenders’ agent and said: *“Hi Ian, as discussed this evening, I wanted to follow up with an email to advise that I have been made aware that my client has instructed her lawyer to draw up a letter of termination for her purchase of 6058 Williams St and this will be sent to Ms. Beyea’s office in the morning. I had picked up the key on Friday, as we had planned, but will return it to your office via courier tomorrow morning. Please confirm your receipt of this email. Regards, Heather.”*
25. The Defendants’ agent responded to the Claimant’s agent as follows: *“I acknowledge receipt of your email. We stand behind the binding agreement of purchase and sale and do not consent to a termination. We have taken all prudent and regular steps in preparation for closing and we have met all requests [as per our contract] in preparation for closing on Tuesday. If a termination is tendered we will liaise directly with our legal representative.”*
26. On May 25, 2015 correspondence was sent from the Claimant’s legal counsel to legal counsel who is handling the transaction for the Defendants. The email conveyed the following message:

“Re: Buyer: Madeleine A. D. Carter  
 Vendors: Kevin Jonathan Savage and Lacey Dawn Savage (nee Fanjoy)  
 Property: 6058 Williams Street, Halifax, NS  
 Closing: May 26, 2015

We are writing this letter as solicitors for the Buyer. We have been advised by the Buyer that she has become aware of water damage (apparently discovered in April, 2015) and subsequent roof repairs (collectively, the "Damage") conducted on the Property in late May, 2015 which were not disclosed by the Vendors. It is our understanding that the Damage was only revealed by the Vendors after specific enquiries were made by the Buyer. An amended Property Condition Disclosure Statement ("Property Condition Disclosure Statement") was then submitted on May 20, 2015 by the Vendors to the Buyer with a revision to Section 11, stating "April 2015, Dormer/roof leaked into bathroom on second floor, hired contractor to install ice/water shield to prevent further damage."

Furthermore, through her own discovery and discussion with the roofing company that conducted the repairs, the Buyer has been advised that other portions of the roof will need to be immediately repaired and may currently be subject to water intrusion. The failure to disclose the Damage, the discovery of serious issues with the Property and the amendment to the Property Condition Disclosure Statement only after the enquiries made by the Buyer has resulted in the Buyer no longer having confidence in the disclosure made in the Property Condition Disclosure Statement.

The failure to disclose the Damage is a breach of Section 3 of Part 1 of the agreement of purchase and sale dated March 9, 2015, as amended (the "Agreement"). As a result, the Buyer has determined that it is in her best interest to terminate the Agreement as of today's date pursuant to the aforementioned Section 3 of Part 1. We would therefore ask that the Vendors immediately return of the deposit of \$6,000.00 (without interest) to the Buyer as is contemplated by the Agreement.

Kindly acknowledge on behalf of the Vendors by signing below and returning a fully executed copy of this correspondence to me at your earliest convenience."

27. The sale between the Claimant and Defendants was not completed and the Defendants listed their property the following week and it was sold on July 16, 2015. The property at 6058 Williams St. sold for \$428,500.00.

**THE ISSUE**

- a. Did the Claimant breached the contract, or was the Claimant in this situation allowed to terminate the agreement pursuant to the terms of the Purchase and Sale Agreement?
- b. If the Claimant could terminate the contract should the Claimant receive back the deposit of \$6000?
- c. If the Claimant was bound by the contract what remedies are available to the Defendants and what damages flow from those remedies?

### ANALYSIS:

28. The Claimant became very uncomfortable when she walked by her future home and saw work being done on the roof. She made immediate inquiries as to what was happening and as a result of these inquiries she was able to determine that when the Defendants came back from vacation they noticed a small discoloration and bubbling in the bathroom indicating a leak in the roof. As a result of that the Claimant's hired a contractor to come in and fix the roof which he did at a cost of \$845.27 plus HST.
29. The Claimant in her pleadings stated that ***“it was incumbent on the Defendants to notify her of any changes that occurred to the Williams Street Property between the date the agreement was concluded and the closing date, and that their failure to do so constitutes a breach of s.3 of the Agreement. Accordingly, the Claimant is entitled to repayment of the deposit should she elect to do so.”***
30. The Defendants failed to notify the Claimant of the repairs to the roof that occurred subsequent to the completion of the Property Condition Disclosure Statement at least on their own accord. However the Defendants did notify the Claimant of the reasons for the roof repair but only after was brought to their attention by the Claimant.
31. Article 3 of the Agreement of Purchase and Sale states in part that the Seller agrees to advise the Buyer of any changes that occur in the condition of the property prior to the closing date. The Property Condition Disclosure Statement also states that the Seller agrees to provide prospective Buyers with a further disclosure of any changes in the condition of the property that have occurred since the completion of this statement.
32. Section 6 entitled Structural, in the Property Condition Disclosure Statement point B stated “are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls? To that question the Defendants

responded: “No”. Under point C the question asked is: have any repairs been carried out to correct leakage or dampness problems in the last five years [or since you owned the property if less than five years]? To that question the Defendants stated: “leak from back dormer installed [fixed].

33. In the revised Property Condition Disclosure Statement which was requested by the Claimant and provided by the Defendants, section 6 was not changed however additional comments under section 11 were made: **“6C, April 2015 dormer/roof leaked into bathroom on second floor. Hired contractor to install ice/water shield to prevent future ice damming.”**
34. The Defendants gave evidence that they never thought to change the Property Condition Disclosure Statement as they got back from vacation, notice water penetration and bubbling of paint around where the dormer is located and had the roofer come in and make what turned out to be a rather small repair.
35. As a result of the Claimant’s insistence and in the Defendants speaking with their realtor they did provide notification to the Claimants as to what was being done and also provided a change in the Property Condition Disclosure Statement.
36. The allegation as set out in the pleadings is that the Defendants failed to notify the Claimant of any changes occurred to the Williams Street Property between the date of the Agreement and the closing date, is incorrect. Notification was given albeit as a result of the Claimant’s discovery that work was being done on the roof of the property they were about to purchase.
37. The question however that was left with this court, to make a determination upon, is reflected in the first issue which has been previously noted. **Was the Claimant in this situation allowed to terminate the agreement pursuant to the terms of the Purchase and Sale Agreement?**
38. The term of the agreement which the Claimant rests her case on remains in the wording and meaning of section 3 of the Purchase and Sale Agreement which states as follows:

*“PCDS*

*3. This agreement is subject to the Seller providing to the Buyer, within 24 hours of the acceptance of this offer a current Property Condition Disclosure Statement [for resale condo includes unit and parking unit including any exclusive use common area storage and/or exclusive use common area parking space], and that statement meeting with the Buyer’s satisfaction. The Buyer shall be deemed to be satisfied with this statement unless the Seller or the Seller’s agent is notified to the contrary, in writing within hours 18 MAR15*



*hours of receipt. The Seller warrants it to be complete and current to the best of his/her knowledge, as of the date of acceptance of this Agreement, and further agrees to advise the Buyer of any changes that occur in the condition of the property prior to the closing date. If notice to the contrary is received, then either party shall be at liberty to terminate this agreement and the deposit shall be returned to the Buyer. Once received and accepted, The Property Condition Disclosure Statement shall form part of this Agreement of Purchase and Sale.”*

39. The Claimant provided the court with the **Nova Scotia Real Property Practice Manual** and referred to the section entitled Interpretation of Contract. In particular the Claimant pointed out paragraphs 4 and 5 which stated: “4. *Interpretation is an objective exercise. Contractual interpretation seeks to give effect to what the parties objectively manifested by the words they used, not by what they subjectively intended. And 5. Commercial contracts are to be interpreted in a manner that promotes commercial efficacy.”*
40. The fundamental foundation of the Real Property manual in respect to interpretation of contract is, it is all about the proper meaning given to the word selected by the parties themselves. This is ironic in that this Agreement of Purchase and Sale like most agreements in Nova Scotia where realtors are involved is standardize wording not developed by the parties themselves for the most part.
41. I was also referred by the Claimant to G.H.L. Fridman’s text, **The Law of Contract in Canada** where page 436 under the heading, the interpretation of express terms it read: “*The fact that all or many of the different aspects and obligations of the contract have been expressly stipulated evidences the importance placed by the parties upon the language which they have used. The contents of any expressed term or terms are basic to a true understanding of the nature, scope and extent of the contractual rights and duties of the parties. What has been spoken or written by them as part of the contract is the prime source of knowledge of their intentions. As Drapeau C.J. said in **Pharmacie Acadienne de Beresford Ltee v. Beresford Shopping Centre Ltd./Ltee**: ‘the object of contractual interpretation is the identification of the true intent of the parties at the time they entered into the contract. The intention must be ascertained by the references to the meanings of the words used by the contracting parties.’”*
42. The wording of section 3 of the Agreement of Purchase and Sale is awkward and does require interpretation. First there are inclusions which have to be completed in that section by the Buyer or their agent. There are so many hours required by the Seller and by the Buyer to notify each other. In this particular case the Seller or the Seller’s agent has decided on their own to not include an hourly timeframe in a part of the paragraph, but instead refer to a specific date[18MAR15] followed by the word hours.

43. The first part of section 3 as outlined in the paragraph provides a timeframe as to when the Buyer must provide written notice that the Buyer is not satisfied with the Property Condition Disclosure Statement. At that point either the Buyer or Seller may terminate The Purchase and Sale Agreement.
44. In the event the Buyer does not notify the Seller in writing within that stipulated timeframe then the Buyer shall be deemed to be satisfied with the Property Condition Disclosure Statement.
45. However Section 3 also considers if there has been a change in any condition of the property prior to the closing date. In the event there is a change in the condition of the property, the Seller agrees to notify the Buyer. The only timeframe that exists here is that it has to occur prior to closing the property transaction.
46. If notice, and it does not have to be in writing, is received by the Seller that the Buyer is not satisfied with the change in the condition of the property, then either party shall be at liberty to terminate The Agreement of Purchase and Sale.
47. It is difficult to imagine that the Buyer or the Seller gave particular thought to this paragraph when they signed the agreement. Nevertheless section 3 stated that the Seller is to provide the Buyer with a current Property Condition Disclosure Statement and subsequent notification, if there were changes that occur in the condition of the property and that meeting with the Buyer's satisfaction.
48. There was some discussion by the Claimant as to what satisfaction means. The Claimant argues there was no qualifier as to what satisfaction means. The Claimant's comments to the court were that there is no industry standard, it is not an objective standard, nor can it be implied therefore it is a subjective standard.
49. The Defendants suggest that there should be a window to make a complaint as time is of the essence in this contract. The closing in this transaction was to be May 26, 2015, May 18, 2015 was when the Claimant had an explanation for the roof work, the Claimant received an updated Property Condition Disclosure Statement on May 19, 2015 and on May 21, 2015 it would appear that the Claimant was intending to go through with the deal and purchase the home as the Claimant indicated she was interested in discussing the cost of renovations with the neighbors.

50. However, there is no timeframe stipulated in the Agreement of Purchase and Sale to notifying the Seller that the Buyer is not satisfied of changes that occur in the condition of the property.
51. There are four issues that I must consider: the meaning of satisfaction; has there been a change in the condition of the property; was notice given to the Seller that the Buyer was not satisfied; and did the Buyer terminate the Agreement of Purchase and Sale.
52. The meaning of satisfaction within the context of the agreement would be whether or not the Claimant/Buyer is content with the conditions of the property as described by the Seller in the Property Condition Disclosure Statement. Those conditions outlined in the statement, if the Buyer is not content or satisfied with the information contained in the statement to the Buyer can notify the Seller of same and either one may terminate the Agreement of Purchase and Sale. That did not happen in this case, the Buyer was deemed to be satisfied or content with this statement.
53. However, the Seller also agrees to advise the Buyer of any further changes that occur in the condition of the property prior to the closing date. This is what happened in this particular case. The Seller notified the Buyer through their realtor and also provided an amended Property Condition Disclosure Statement.
54. The question then becomes did the Buyer notify the Seller that the change that occurred in the condition of the property did not meet the Buyer's satisfaction. There is nothing in the May 24, 2015 email from the Buyer's agent to the Sellers' Agent that stipulated the change in the condition of the property did not meet the Seller's satisfaction.
55. The only notification to the Seller that the buyer was not satisfied with the changes that occurred would be in the letter of the Buyer's solicitor of May 26, 2015. In that letter in the second paragraph Counsel stated: *"the failure to disclose the Damage, the discovery of serious issues with the property and the amendment to the PCDS [Property Condition Disclosure Statement] only after the enquiries made by the Purchaser has resulted in the Purchaser no longer having confidence in the disclosure made in the PCDS."*[Property Condition Disclosure Statement]
56. It is not clear here if the Buyer's Counsel is referring to both the first Property Condition Disclosure Statement and the amended statement or just the amended statement. In either case when Counsel said the purchaser no longer had confidence in the disclosure made in the PCDS, this covers the fact that the Buyer was not content or satisfied with the condition of the property.

57. Once that notification is received by the Seller then either party is at liberty to terminate the agreement. Counsel's letter made it very clear that the Buyer was terminating the agreement as of May 25, 2016 the day prior to closing.
58. The next question that I must consider is whether the roof repairs that were done just prior to closing relate to a condition of the property. While these repairs were very minor they related specifically to a change under Structural as contained in section 6C of the Property Condition Disclosure Statement, as are specifically referred to in the revised Property Condition Disclosure Statement received by the Claimant on May 19, 2015.
59. The Realtors involved in this felt that not being satisfied with what was contained in the Property Condition Disclosure Statement can be dealt with through negotiations and possibly reducing the purchase price or having repairs done on the property. However clause 3 of the Agreement of Purchase and Sale does not say that either party shall be at liberty to negotiate. Rather it clearly says that either party shall be at liberty to terminate the agreement. In many cases, that is in fact what happens, when you have a willing seller and a willing buyer. However that was not to be, in this case.
60. No doubt this was an unfortunate situation for both parties and also costly for the Defendants and the Claimant as well. However clause 3 as worded in the Agreement of Purchase and Sale allows termination of the Agreement to happen. One could imagine that even more disruption could occur were this to happen in piggyback sales and purchases where several transactions are involved on the same closing day.
61. The Claimant therefor shall succeed in her claim, the deposit of \$6000.00 shall be returned to the Claimant and the Defendants' Counterclaim will be dismissed. I shall not be awarding prejudgment interest in this case as the funds were held in trust by the realtor unless the realtor held trust funds in an interest-bearing account in which case the interest should go to the Claimant . The only other costs that were presented would be the court costs of \$199.35 to be awarded to the Claimant. If a formal Order is required I will be glad to receive a draft from the Claimant.

Dated at Halifax December 27, 2015