

SCCH 297543

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Morrison v. David Canning Heat & Maintenance, 2009 NSSM 61

Between:

STEVEN and SHELLEY MORRISON

CLAIMANT

-and-

**DAVID CANNING, carrying on business as DAVID CANNING HEAT &
MAINTENANCE**

FIRST DEFENDANT

-and-

EDWARD CHARLES CROCKER and CED HOME INSPECTIONS PLUS LIMITED

SECOND DEFENDANT

-and-

BRIAN and JOANN APPLEBY

THIRD DEFENDANT

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: May 6, May 28, June 4, 2009

Decision: November 26 , 2009

Counsel: Lisanne M. Jacklin represented the Claimants.
The First and Second Defendants were self represented.
Byron G. Balcom represented the Third Defendants.

Parties to this Action:

Claimant- Steven and Shelley Morrison ["Morrison"]

First Defendant: David Canning carrying on business as David Canning Heat & Maintenance ["Canning"]

Second Defendant: Edward Charles Crocker and CEC Home Inspections Plus Limited ["CEC"]

Third Defendant: Brian and Joann Appleby ["Appleby"]

The Claim:

The First Defendant David Canning carries on business as David Canning Heat & Maintenance and was hired by the Defendant Appleby to work on their home prior to their selling the home by carrying out renovations including renovations to the heating system.

The Claimants stated in their pleadings that on the Property Condition Disclosure Statement the Defendant Appleby indicated they were not aware of any problems with the heating system and the heating system was new. They also indicated they were not aware of any leakage in the basement or structural problems with the foundation and indicated "new" beside repairs for leakage and dampness problems. The Claimants

stated that since purchasing the property they have learned the furnace system is unfit to be installed or operated and there is dampness and leakage in the basement.

The Claimant stated that the Defendant Appleby knew or ought to have known the heating system was faulty and the basement leaked and they did not disclose this information.

The Claimants stated that the Defendant Canning owed a duty of care to the Claimants and was negligent in the performance of his duties.

The Claimants also claim against the Defendant Crocker is negligent in his inspection of the home and the Defendant Crocker indicated the heating system was satisfactory and the basement showed no evidence of dampness or leakage. This negligent performance of the home inspection resulted in damages to the Claimants.

The Claimants therefore claim the Defendants are guilty of the following:

Fraudulent misrepresentation; or

Negligent misrepresentation; or

Breach of collateral warranty; or

Breach of contract; or

Negligence.

The Claimants in their pleadings claim \$20,000.00 in damages to rectify the heating system and plumbing problems plus interest and costs.

The Defence:

The Defendant Crocker and the Defendant CEC provided a general denial of the allegations made by the Claimants.

In addition to a general denial the Defendant Appleby offered a more particularized defense to the allegations.

Appleby deny any knowledge of problems relating to the heating system, leakage in the basement or structural problems with the foundation, deny the heating system is unfit to be installed or operated, deny there is dampness and leakage, deny the heating system is faulty and if the heating system is faulty or if the basement leaked they did not know or could not have known and therefore could not have disclosed anything.

Appleby state if the claimants did rely on any statement such reliance was not reasonable.

That any defects with the property were patent defects and as such the doctrine of *caveat emptor* applies.

The Claimants hired and relied on a home inspector and not on information provided by the Defendant Morrisons.

Appleby deny any collateral warranty but if it did exist they deny breaching it.

Appleby deny ,breach of contract, fraudulent and negligent misrepresentation or any negligence

Appleby rely on the *Contributory Negligent Act* and the *Joint Tortfeasors Act*.

The Claimants "Morrison" purchased the home from the Defendants "Appleby" after entering into a purchase and sale agreement on July 9, 2007. The closing of the transaction took place on July 31, 2007.

A property condition disclosure statement dated March 29, 2007 was provided to the Claimant on July 19, 2007.

Prior to the closing the Claimant had a home inspection completed on the home. The home inspection was completed by Edward Charles Crocker "Crocker" of CEC Home Inspections Plus Limited "CEC" and they are both named as Second Defendant in this action.

Sharon Woodhill

The Defendant Appleby moved into the home, according to the next door neighbor, and shortly thereafter moved out again and rented the home. Their neighbor Sharon Woodhill said the tenant told her there was mold in the basement and shortly thereafter renovations started and some time shortly thereafter the tenant left. The tenant or tenants did not provide evidence on this particular point. She also said that the home had prior renters, that is, prior to the renovations taking place. Ms. Woodhill was never in the home herself. Ms. Woodhill lived next door to the property in question and said that she never had water issues in the basement of her home but she did say that she had a sump pump which she could hear go on from time to time.

Christopher McKay

Christopher McKay was the second witness called by the Claimants' and for the last 18 years he had been fixing leaky basements. His observations of the said property were that there were water stains in the lowest part of the basement that had been jack hammered out. This was an area where the floor had been removed and replaced and some plumbing done as well. He said there was also a bucket in the cement floor which was encased in newer concrete. He did not know why the bucket was there. He referred to a picture, Number 2 Exhibit, and believed it was in the center of the floor and it showed new concrete over old concrete and it showed signs of hydrostatic pressure. He said that the sub-floor had been ripped up and that staining was around where the new concrete had been put over the old concrete. He did say that it is hard to tell if it was or is a pre-existing condition. His recommendation to the Claimants was to put in an interior drain which will fix the problem. He also said that if new concrete is not bounded properly water will come up. The cost to do this was \$5,250 plus \$682.50 HST. Mr. McKay said he was called in to view all this on April 17, 2009. In his testimony he said I saw the floor in the basement four years after the Defendants bought the property and he could not tell if the stains were subsequent to 2005 or how old the stains were. On cross examination by Mr. Crocker, Mr. McKay said he could not recall any cracks in the wall it seemed pretty good for the age of the home according to Mr. McKay. He also said on cross examine that sewer pipe could allow water to come in.

David Sequin

David Sequin, another witness for the Claimant, was a oil burner mechanic who has owned his own company since 2001 and employs six people. He became a mechanic in

1981 where he earned his designation at trade school. He was called into check the equipment because Scotia fuels said it was an illegal installation and he found that in fact it was illegal. He found that the chimney was not installed correctly and the burner was too small for the boiler which was a commercial boiler. His evidence was that the heating system was not code and you can only install certified equipment. He noted that the chimney was modified. He said the property owners were getting fumes in their window from the chimney. He said he turned off the furnace as it was not safe to run. The cost to do the repairs would be \$4,343.72 plus \$129.88 for the boiler and taps.

Robert Redman

Robert Redman was called in as a witness by the Claimant and was a fuels safety inspector who had been with the Fire Marshall's office for eight years and had instructed at the Nova Scotia Community College for four years. He indicated that the heating system was not code compliant. He contacted Mr. Canning about it but never received any feedback from Mr. Canning. He said the onus is on the trade person to ensure the system is in a safe condition. He said at the present time this is still an open file.

Shelley Maguire Morrison

She said she purchased the home in 2007 and that she saw the property condition disclosure statement after she received the home inspection from Mr. Crocker. She said that Mr. Canning told her there was a one-year warranty on the property and that he was the contractor. According to her evidence, Mr. Canning told her this when she was looking over the property with a friend.

Also according to her evidence she attended the property with Mr. Crocker on his inspection of the property and she was told the chimney was fine and he did not identify any issues with venting or the basement. She stated that he did mention there were little cracks in the basement which is a wait-and-see thing and might want to have a look at. She said he talked about the possibility of a sump pump and that we may need one it was a wait and see thing. She said at the time of the inspection there was water in the bucket but as to the concrete patches she could not see anything. Mrs. Morrison said

that the Applebys said it was a new furnace and we believed it was new because the property condition disclosure statement said it was new.

She said in January 2008 in a matter of seconds I was surrounded with black smoke. It was toxic fumes, it was fuel in the air, so we called David Canning. At that time Mr. Canning said by the way the furnace was not covered under warranty so as a result they had someone look at the furnace. We were told by Scotia fuels and the burner people not to use it. She said that in March and April of 2008 issues started happening with respect to puddles of water which water was coming through the concrete patches. They replaced the chimney at a cost of \$2,423.85. On cross examination Mrs. Morrison confirmed that she did not know the Defendant Appleby and only had conversations with them after the purchase. She said she knew it was a renovated home and they viewed the home two or three times during the time the renovations were almost complete. She said there were no restrictions on viewing the home. She indicated that there were amendments to the purchase sale agreement as there were for four or five things that they required the sellers to do and this was done. She said we asked Mr. Crocker about the furnace and he could not tell us about it but we knew it was a 1993 furnace and that it was not new. Mrs. Morrison said clearly on cross examination we knew it was 1993 and we believed it was not new. She said the furnace worked for the first few months.

She stated on cross examination we believed it, that is the bucket was a working sump pump well. "Other than water in the bucket we are not aware of any other water at the time we get our inspection of the home."

Joann Appleby

Mrs. Appleby said they lived there for 22 years, that is, their two children and her husband. Her son had a bedroom in the basement and then later my daughter and there were no water problems. She said we left the house 2004 and rented it out. She said they had a property manager take care of it while it was being rented and at that time there was a broken pipe in the basement and it was a mess. They decided to renovate the home at a cost of approximately \$100,000 and a hired David Canning who confirmed with them that he was licensed and the trades people were certified to do the work. She said she had no communication with the plaintiff prior to the sale. She said she retained

Mr. Canning to put in a new heating system in the property as they had previously had hot air and now it is hot water which she referred to as a new system. She said in February of 2008 she had a call from the Claimant and that she was shocked by all the things that were told to her that were wrong with the place. Mrs. Appleby said that Mrs. Morrison told her that she knew the furnace was not new but thought it would work. Mrs. Appleby said the house was renovated, we had inspectors in there from HRM and occupancy permit was a condition of closing. She said there was no sump pump in the basement when she lived there.

Edward Charles Crocker

Mr. Crocker said that he told the Claimant that the bucket was put in the basement foundation in case there is water. He said that he told her to speak to the neighbors and decide if she should put in a sump pump. He said he also told the Claimant that the furnace was a used 1993 furnace.

David Louis Canning

He said at no time did HRM inspections point out any deficiencies. He said the tenants that had lived in the home had left windows open in the winter and snow was allowed to come in the house. He said there was a sewer backup basically because the tenants who owned a dog would let the toilet overflow on several occasions as the tenant would put dog litter in the toilet. He said that his employees tried to get back to get access into the home to help with whatever deficiencies the claimants were complaining of but they were never able to get back in the home. He said he never put in the furnace they were never charged for the furnace he said that Fred Chase did the furnace. He said that concrete patches in the basement were to install new plumbing for a new bathroom down in the basement and to be footings. He said he provided the Appleby's with a one-year warranty which was not transferable.

Analysis:

Claim against the Defendant Appleby;

The claim against Appleby as outlined in the pleadings focus on the fact that they did not disclose certain information with respect to the heating system and with respect to the structural problems and leaking in the basement. The claimant would like to have the court draw certain inferences as outlined in their briefs to the court. However the evidence is clear and became clear upon cross examination of the Claimant. The Claimant was well aware that the furnace was not new. The heating system had been changed from a hot air to a hot water heating system and this in itself was a different system from the one previously in the home. In that sense it was new and I see no intention from the evidence that the Defendant Appleby was trying to hide something from the Claimant. In any event it was not a latent defect and if the Claimant had the heating system checked out by someone involved in heating it could have been dealt with prior to the time of purchase. With respect to the leaking basement there is no evidence to conclude that the basement had been leaking in the past other than by inference. Certainly the testimony of the Defendant Appleby was they had lived there for a number of years prior to the renting of the premises in 2004, with her children living in the basement and experiencing no water problems. They did confirm that there were water problems when they had rented the property out because of misuse primarily by the tenant of the bathroom in the basement. This however was dealt with as the whole house was completely renovated. The bucket in the floor did not indicate that there was a water problem as suggested by the Claimants. It could just as easily have indicated that if there were any future sewer or water back up problems to be dealt with through a sump pump being installed. In any event the Claimant had plenty of opportunity to make inquiries with respect to the bucket in the floor of the basement. At the time they viewed the property there was water actually in the bucket. With respect to the other numerous defects outlined by the claimant's witnesses these were dealt with in generalities and there was certainly no quantitative determination by these witnesses as to the value of dealing with the defects. I appreciate defense counsel's submissions in their briefs on behalf of the Defendant Appleby and I agree with what is contained in those submissions.

Claim against David Canning carrying on business as David Canning Keith and maintenance:

David Canning had a contract with the Defendant Appleby to renovate the entire home of Appleby and based on the principle of privity of contract, the Claimant will not succeed on a claim between Appleby and David Canning. In the Claimant's testimony they said that they were told by David Canning that there was a one-year warranty on what he did except for the furnace. David Canning said yes he gave a one-year warranty but it was to the Applebys. This is in line with normal business practice and why he would extend this to a person who is about to or plans to purchase a home is unknown and not conclusive when we have to contradictory pieces of evidence. I also note that it was not David Canning who put in the heating system rather someone other than himself was hired to put in the heating system. I have considered the claim of negligence against David Canning and even accepting the possibility that he falls within the neighbor principle the Claimant still has a problem with respect to damages.

Claim against Edward Charles Crocker and CEC Home Inspections Plus Limited:

This claim should be against the company and not against the individual as the contract was with the company and not the individual. The chimney where it was installed was problematic and Mr. Crocker on reflection realized that, however the report did not reflect it and of course the outdoor stove pipe had to be changed in order that fumes would not blow in the Claimant's window or with a safe distance from the Claimant's window. I've considered the limited liability clauses in the contract between the CEC and the claimants. However, I am not convinced the Claimant understood these clauses which were drafted by the Defendant CEC, nor were they adequately explained. Perhaps if each clause was read to the Claimant and initial as having been understood it might be different. The only other area that CEC could be held responsible for would be the ventilation system and there is conflicting evidence on whether that was done improperly or not and whether or not CEC could even detect that through visual inspection. The cost to deal with the chimney is \$2,423.95 which I shall allow plus part of the costs in the amount of \$212.06.

IT IS THEREFORE ORDERED that:

The claim against Brian and Joann Appleby be dismissed with no order as the costs.

The claim against David Canning be dismissed with no order as the costs.

The Defendant CEC Home Inspections Plus Limited pay the Claimant the following sums:

$$\begin{array}{r} \$2423.95 \\ \underline{\$212.06} \\ \$2636.01 \end{array}$$

Dated at Halifax this 26 day of November, 2009