

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *MacFadgen v. George Rudderham Well Drilling Ltd.*, 2018 NSSM 53

SCC SN No. 469757

BETWEEN:

DONALD MacFADGEN

CLAIMANT

and

GEORGE RUDDERHAM WELL DRILLING LTD

DEFENDANT

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

REASONS FOR DECISION

BEFORE: A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING: Hearing held at Sydney, Nova Scotia on July 27, 2018

DECISION RENDERED: August 21, 2018

APPEARANCES:

For the Claimant: Self-Represented – Donald MacFadgen

For the Defendant: Self Represented – Paul Rudderham

Witnesses:

For the Claimant:
Donald MacFadgen
Linda MacIntyre

For the Defendant:
Paul Rudderham
Bill Handley

BY THE COURT:

1. This is a claim arising out of a contractual arrangement between the parties for the provision for labor and materials by the Defendant (Rudderham) to assess and replace certain parts to the Claimant's existing well water system which was used to supply household water to the Claimant's residence. The Court received four (4) documents from the Claimant, each of which were formally identified and exhibited through the evidence under oath from the Claimant.
2. At the outset the Court reviewed the general procedure to be employed in hearing this claim, the role of each party and how evidence was to be received, including the opportunity of both parties to provide their "side of the story", that each would be afforded a chance to question the other and any witnesses and that at the end of the evidence each would be afforded a chance to sum up their positions based on all the evidence presented. Both parties were placed under oath at the outset as is the practice of this Court when dealing with self-represented parties and each were advised that any comments made by them at any time throughout the proceeding would be considered information given "under oath".
3. The Court is appreciative to both parties and the witnesses for the organized and cordial manner in which their evidence was presented to the Court. In addition to the court file materials which included the pleadings of the Claimant (including a one-page summary setting out 16 points), there were four exhibits in total tendered by the Claimant to the Court. These will be referenced in more detail throughout this decision. I note from my review of the court file materials that no formal written Defence and/or Counterclaim appears to have been filed by the Defendant.
4. From the Court's introductory summary of this matter, based on the pleadings of the Claimant and the evidence and exhibits received by the Court, this matter can clearly be identified as a "contract dispute". The evidence from both sides remains undisputed that the Claimant sought to engage the Defendant for purposes of attending at the Claimant's residence and to carry out certain work to the Claimant's well system, principally to replace/upgrade certain existing parts. Although there is no evidence as to what the costs were anticipated to be in connection with the work contracted for, clearly the Claimant would have known that it would involve some component of labor costs as well

as the retail costs associated with replacing the existing foot valve and the initial request to install a new submersible (in-well) pump. As the evidence unfolds the simplicity of the initial contract for services turns into something quite different than either party originally intended and with that the host of issues relating to this claim arose.

5. Being satisfied that a contract for labor and materials was entered into between the parties, it then becomes necessary for the Court to assess through the evidence presented the scope of this arrangement and the corresponding duties/obligations each party accepted either through documents, verbal discussions or, as well accepted in law, implied. As for the latter, in every contract of this nature where goods and services are to be provided, both the common law as well as Statute (*Sale of Goods Act*, R.S., c. 408, *Consumer Protection Act*, R.S. c. 92) impose implied obligations such as: goods supplied shall be fit for the purpose intended and work carried out shall be in a workmanship like manner and so forth. In addition, issues of negligence can arise if it is found that work performed fell outside an accepted standard and may have caused unnecessary damage.

6. It is also worthy of note at the outset that often work carried out under a contract is not and indeed cannot be an “exact science” or estimated with absolute certainty as there may be “unknowns” associated with some aspect of the work contracted for. In such cases, there is a reasonable expectation that one can rely on the experience of the contractor to use their experience and judgement in providing (or not providing) certain aspects of the services contracted for. Dealing with disputes of this nature is anything but simply black or white. While many aspects of the evidence of both sides remains undisputed and/or confirmed by a document, in the end the Court is called upon to assess issues of credibility of each party not only as it relates to the actual evidence that each has presented to the Court but must also assess their ability (or willingness at times) to recall with accuracy what may have taken place, when, where and what, if anything, may have been said. As for the case before me I am called upon to assess the evidence to determine the scope of a contract entered into between the parties, whether the Defendant breached their obligations and/or through the work performed were negligent and if so, what, if any damages flowed from their actions.

SUMMARY OF EVIDENCE OF CLAIMANT

7. The claim as set forth in the Notice of Claim (Form 1) is for \$2100.00 plus costs. In addition, as set forth in the attached detailed statement to the Claim, the Claimant further claims that he should not have to pay the Defendant's invoice in the amount of \$1174.65 (see exhibit #2) on the basis that the work provided worsened his situation and was of no benefit (see #16 of statement). Exhibit 2 represents an invoice from the Defendant to the Claimant dated October 6, 2016 for an unpaid account which the Defendant rendered to the Claimant arising from certain materials and labor provided on or about September 2016 for the Claimant's residential well system. Exhibit #4, tendered by the Claimant, was provided to support his stated claim in the amount of \$2200.00. It contains a summary page breaking out the labor costs he incurred, including supporting invoices as well as a series of bank statements used to identify the purchase cost of various replacement parts associated with the well water system.
8. The principal evidence for the Claimant was given by Mr. Donald MacFadgen, the owner of the residence situate at [address removed]. He stated that in September 2016, he determined the need to replace his foot valve in his existing well that serviced water to his residence. He indicated that his well pump (located in his residence) had been coming on and off from time to time without any water being called for and he determined from this the need to replace his foot valve at the bottom of his well which was located outside (near) his home. He noted that recently he himself had been required to fix his foot valve for the same reasons and so he was able to determine it required replacing.
9. He described his well as being the original installed at his home. It was a bored well. Although no exact date was provided, reference was made to it having been in use at least 20 years prior (see exhibit #3 - email) and at no time had they ever experienced any loss or reduction in water supply or quality. He confirmed that he believed the well was approximately 20 feet deep. He described the well head to be located inside a crock set up. The crock itself was approximately six feet deep and dry. The piping from his

home was located underground and surfaced inside this crock set up where it entered at a 45-degree angle into the top of the well head. His evidence was that the PVC pipe entering the top of his well extended upwards approximately 1 - 2 feet and to best of his recollection that was always the way it had been set up. The existing pump used to draw water from the well was in his basement along with an air pressure tank and water softener, all used in connection with his household water system. His evidence was that prior to entering into this contract arrangement there were no problems with water supply or quality and that his intentions were strictly from a preventative maintenance point of view to replace the foot valve and upgrade certain components of his system.

10. Mr. MacFadgen confirmed that he contacted the Defendant for purposes of engaging them to attend at his residence and replace the foot valve. He also noted that while having this work carried out he would seize the opportunity to change out his pump set up and to have installed a new submersible pump which would be located inside his well and thus eliminate having the pump and noise associated with it located in his basement.
11. He confirmed that representatives from the Defendant attended at his residence on Thursday, September 22, 2016. He was not present at the time but his partner, Linda MacIntyre, was at home. Sometime after their work started, one of the representatives spoke with Ms. MacIntyre and in turn Mr. MacFadgen by phone. He said he was advised that they had experienced a problem getting the PVC pipe out of the well and further that he should stay the course insofar as maintaining the pump in the basement as there did not appear to be "much water in the well". With that he confirmed his request for them to replace the foot valve and to replace the existing pump with a new jet pump which would continue to be located in basement. It was his understanding that they then proceeded to complete this installation. That same day, shortly after they completed their work and left the property, his partner called him to advise that there was no tap water coming into the home.
12. The following day the Claimant stated he phoned the Defendant and spoke to a lady who appeared familiar with the work that had been carried out to his well the previous day. She advised him that his well was likely dry and he needed new well. Exhibit #1 represents a letter/quote the Defendant sent to the Claimant immediately following their

discussion setting forth the estimated costs for replacement well, hook up, etc. and totaling \$5790.25.

13. The Claimant's evidence was that he found this situation and particularly the suggestion that his well was dry strange as they had not had any water shortage problems in the past and, directly before this work was carried out there had been no shortage of water. With that the Claimant stated that the following day (Saturday) he and a close friend of his, who at times had carried out various maintenance work, proceeded to investigate the well situation. He confirmed that they had taken off the top of the well and measured its depth using a weight and string. It measured 20 feet deep. They measured the length of the PVC piping that had been installed from the point where it entered the well head with new foot valve at bottom and found that, according to the length of the pipe as compared against the depth of the well, the foot valve would have been placed at the very bottom of the depth of the well and therefore, essentially in the ground which resulted in it sucking up mud and dirt. He stated that they removed the pipe, cleaned the foot valve which was full of mud and replaced the pipe/valve back into the well. He confirmed that they replaced the pipe into the well based on the same distance it had been in the past, extending 1 – 2 feet above the actual head of the well. He noted that according to their measurements the bottom of the pipe/foot valve would then be a few feet above the bottom of the well.
14. The Claimant stated that they then proceeded to assess the new pump located inside the home and found it too was full of dirt and mud. They disconnected it and reinstalled the old pump, primed the pump and the system began to work again. He acknowledged that they continued to get dirty water for several days but eventually it cleared itself and restored back to good/clear water. He further stated that because of the extent of the dirt and minerals initially drawn into the home after both the new well pump was installed and the restart of old system, he was required to replace a number of parts such as shower heads, taps, toilet leads. He stated some of this blockage showed up initially and some in the days following.
15. The Claimant presented exhibit #4 which set forth his position on the out-of-pocket expenses he had incurred which he maintains were associated with the problems caused by the Defendant's faulty workmanship and which total \$2270.06. Reference was also made by the Claimant, through his exhibit #3 which represents an email he had

sent to the Defendant dated October 22, 2016 where he outlines what had occurred, some of the costs he had incurred at that point in time and notably the fact that he had “clean water” at that point in time.

16. The Claimant stated that the following Monday (September 26, 2016) he again contacted the Defendant and advised them of what he had found and what he had done to correct the problem which led to his water being restored and he advised them that he did not require a new well. The evidence does not suggest the Claimant demanded anything from the Defendant at this point. The Claimant stated that a few weeks later he received an invoice (exhibit 2) from the Defendant for \$1174.65 for the cost of the labor and materials that had been provided when they attended the Claimant’s residence on September 22, 2016. It was in response to this invoice the Claimant sent his email (exhibit 3) reviewing what had taken place and stating that he would not be paying the invoice as he believed that the work carried out by the Defendant was of no value and in fact had triggered a host of additional work and expenses for the Claimant. He notes that the new jet pump had been disconnected and was full of mud, but he would return it once he was compensated for the costs he was required to incur because of their faulty work. The total compensation claimed at that point in time for out-of-pockets was \$591.00.
17. The Claimant stated that he did not receive any response to his email and essentially the matter went silent until he was contacted by a collection agency approximately one year later. The Claimant’s evidence was that he had been prepared to simply absorb his costs arising from this incident and assumed the Defendant was of the same position as they had not responded to his email nor made any further contact, either by phone, follow-up invoices, reminders, etc. In addition, because of the period of silence that passed, the Claimant confirmed that he had thrown out the new jet pump that had been provided to him by the Defendant with the heavy garbage collection carried out by the Municipality each spring.
18. Mr. Rudderham on cross-examination asked how long it took for water to clear after they had worked on the well. Mr. MacFadgen responded that it had been approximately 1 - 2 weeks.

19. Linda MacIntyre was sworn in to provide evidence on behalf of the Claimant. She confirmed she has resided full time with the Claimant at [address removed] for the past 16 years. She confirmed that they had never experienced any water shortage or problems with the quality of their water during this period. She recalled the day the Defendant's workers (2 men) showed up to complete the work on the water/well system. She confirmed that before commencement of any work her water volume and quality was the same as it always was. She recalled after they commenced work they came to the door and she in turn had them speak directly with Mr. MacFadgen by phone. She recalls they then went back to the job but shortly afterwards indicated to her that they had to leave to get something. She recalled that they returned after lunch and sometime afterwards came to the house and confirmed to her that there was "no water - need a new well". She confirmed that they apologized for this outcome/news and fact that they were leaving her in this position. They suggested she should "give the well a rest" and not try to run the water. She confirmed Mr. MacFadgen's evidence about the history of their use of the well and confirmed that they had never experienced any problems with water volume or quality. She gave evidence about what they experienced after the well was fixed regarding dirt/mud and having to replace the various items and resulting costs.
20. Mr. Rudderham on cross-examination inquired as to how long his men were present on the job site. Ms. MacIntyre responded that she recalled them coming around 10 am, later left around noon and returned in early afternoon for approximately an hour before they told her they were out of water.

SUMMARY OF EVIDENCE OF DEFENDANT

21. The principal evidence of the Defendant was provided by Mr. Bill Hardley who was employed by the Defendant and was one of the two men who attended at the Claimant's residence to complete the work. As noted in the Court's initial summary, there was no significant difference in the evidence of both sides as it relates to what had been requested associated with the original contract and scope of work. Both readily acknowledged the request to supply a new jet pump to be installed inside the residence to replace the existing pump once it was realized (upon the advice of the Defendant) that a submersible pump application would not be recommended. The Claimant accepted

their advice in this regard. Otherwise the Defendant was left to replace the foot valve which would have necessitated them entering the well head to remove the existing pipe/foot valve.

22. Mr. Handley was experienced in carrying out such work. He was a licensed pump installer certified by the Province of Nova Scotia. He was accompanied by Stanley Lewis who is a licensed well driller certified by the Province of Nova Scotia and was also experienced with well set-ups.
23. Mr. Handley testified that upon arrival at site they went to the crock where the well head was located. He confirmed the PVC/water pipe came straight out of the top of the well head. He confirmed they pulled the pipe from the well, measured the well for both depth of well and water level. He noted part of the seal from the top of the well head was missing but noted this was not uncommon. He noted that by their measurement the depth of the water was approximately five feet which he estimated would produce 2 1/2 gallons per minute. Based on this he determined a submersible pump set-up would not work because it pumps upwards of 10 gallons per minute. He confirmed they spoke with Mr. MacFadgen and explained the situation regarding the pump option. Mr. MacFadgen requested they replace the foot valve and put a new jet pump in the basement to replace the existing one. He confirmed they proceeded to install a new pump in the basement and then returned to the well to replace the foot valve. They pulled the pipe out and replaced the foot valve but when they proceeded to put the pipe back into the well it would not go down and it appeared to them that something was blocking the well. The diameter of the well itself was an older one being 4 inches wide. The pipe entering the well in which water would be drawn through would be "in range of" 1 inch.
24. Mr. Handley confirmed that the pipe would only go down approximately 11-12 feet and that the well, by his analysis, was approximately 17-18 feet deep. He confirmed that he estimated the original length of the pipe removed from the well was approximately 20 feet. He confirmed that they felt it was necessary to cut off approximately 4 – 5 feet of the existing water pipe. He confirmed that they tried "pounding" a steel pipe into the well in an effort to remove whatever may have been blocking the well and preventing the pipe from going back down to the distance it previous had been. They had no success and after these attempts they determined the need to cut the length of the pipe, replace the

foot valve and insert it back into the well. He confirmed that he did not save the length of pipe that was cut off. When questioned, he stated that he felt certain that they had not been pounding on the bottom of the existing well but that he had no idea what may have been causing any blockage. His best guess was that it could have been the piece of the well head top that he found to have been missing when he first attended at the well head. He noted that when he first attended the well head was loosely placed on top and he did not have to unscrew it. The evidence suggests from the brief phone conversation between Mr. MacFadgen and him after first removing the pipe to inspect the situation, that there had been some difficulty "removing" the pipe in the first instance to retrieve and inspect the original foot valve. This would have occurred after the well head had been removed.

25. The evidence of Mr. Handley confirms that after failed efforts to remove whatever may have been blocking the well, they re-installed the pipe with a new foot valve, chlorinated the well, placed a new seal on the well head and capped it. They then proceeded to prime the new pump. He confirmed that he had placed the water softener on by-pass because of the volume of water required while attempting to get the system up and running. He confirmed that after priming the new pump, which would draw approximately five gallons per minute, it would run for 3 – 4 minutes and then lose its prime. They tried this several times. He stated that the loss of prime was likely the result of it lowering the well water level to a point below the foot valve at which time it would then begin sucking/pulling air from bottom of well. With this they determined that there was simply not enough water and that the only resolution to this would be to replace the well. It was at that point they spoke with Ms. MacIntyre and indicated there was insufficient water, they would likely need a new well, suggested that she give the well a rest and then they left.
26. Mr. Handley offered his opinion as to what normally transpires regarding water quality after this type of work is completed. He confirmed that after they tried to start the new pump the initial water was dirty and milky which was normal. He felt most dirt particles are often minerals. He confirmed that iron can often mimic mud. He stated that normally it may take 2-3 days for a well to clear itself and re-produce clear water. He stated that regardless of well type, after working inside a well, most all require time to clear and there is no exact time frame. He also noted that there are strainers on the end of a foot

- valve to assist in preventing heavy mud, sediment, etc., from being sucked into the system.
27. On cross-examination, Mr. Handley acknowledged that when he first attended at the well head inside the crock, the line into the well extended several feet upwards before it was connected to a 45-degree where water then flowed through PVC through the crock and into the home. He confirmed that the normal set-up is such that the water pipe where it connected to a 45-degree into the top of a well does not normally stick out very much above the well head. When questioned by the Court, Mr. Handley confirmed that they intended and attempted to place the pipe back into the well where it would no longer protrude as far from top of the well head.
 28. It was only through cross examination that the Court learned from Mr. Handley the extent of their “pounding” into the well in effort to clear what they believed to have been a blockage. He explained the well head set-up and described the four plates that normally exist which seal the well (along with a seal itself). There was no evidence that suggested that any other methods had been employed to determine if in fact there was a blockage and if so whether it could be remedied. Nor was there any evidence from the Defendant that further water measurements had been taken to determine depth of water after the pipe and foot valve had been re-installed.
 29. In summation, Mr. MacFadgen’s position was simply that before the work they had clean and sufficient water, after the work there was none and that after he and his helper expended additional labour the water was restored to where it was before the Defendant attended at their residence. His position was that as a result of the faulty work he suffered extensive damage to other parts of his residence such as taps, shower heads, water softener and so forth and that he should be reimbursed for these costs.
 30. Mr. Rudderham’s summation was simply that Mr. MacFadgen got his water back. He acknowledged that he could not speak to the condition of the shower heads, taps, etc., and whether they needed replacing and for what reason. He noted that he has to believe some form of substance was drawn into the home water system, but they were not present to wrap up the job. He further stated he cannot speak to costs incurred and concluded by stating that “Bill had done his best to remove obstruction”. He further noted that the new jet pump had a three-year warranty on it and could have easily been

cleaned. Finally, he noted that there had been no response to Mr. MacFadgen's email and that the invoice was sent to a collection agency because they felt this matter would ultimately end up with a Small Claims Court action by Mr. MacFadgen. There was no explanation for the length of time (approx. one year) that expired before the Defendant chose to take action.

REASONS FOR DECISION

31. I have taken considerable time to set forth a summary of the evidence presented. I wish to note that the foregoing is intended as a summary only and does not necessarily include everything that was said under oath or presented as or within any of the exhibits. I confirm that I took detailed notes and have read all exhibits, including the initial claim filed by the Claimant. From this evidence, the Court's task is to determine what the relevant issues are and to determine, based on the evidence presented and the law, what the outcome should be. To that end I have determined the issues required to be addressed by the Court as follows:
- (i) Was there a contract between the Claimant and Defendant and if so what, both generally and specifically, was its terms?
 - (ii) If a contract is found to exist, was it breached by the Defendant?
 - (iii) If a breach of contract is found, what are the appropriate remedies/damages?
32. This case, like so many others, is somewhat like a jig-saw puzzle. In addition to reviewing and assessing the evidence given, including the various documents, the Court will be called upon to assess issues of credibility of the respective witnesses, notably the parties to this action. In providing my decision, I will attempt to explain the reasons for any conclusions I have made, however, in some instances, it may simply be based on who I find to be more credible after having had the opportunity to have heard each witness firsthand. It is important for me to note that in assessing issues of credibility, it is not always the case as to who is believable but rather who may have, in my opinion, the best recollection of certain facts or indeed would have been in the best position to know the facts with certainty. One of the problems that often occurs in situations such as this is the sheer passage of time. In this instance, the evidence given by all witnesses was some 21 months after the initial work was carried out. However, by the Defendant's own

admission, Mr. Rudderham stated that after they received Mr. MacFadgen's email dated October 22nd (exhibit #3), which then was only approximately 30 days after the work was carried out, they suspected there may be some form of action commenced by the Claimant (no reason given) and therefore they would have had plenty of time, near in time to the events at issue, to make notes and gather any relevant evidence as to the work they had completed and the information they had gathered to support their invoice and to defend any claim of the Claimant if they felt such was unwarranted. I find the contents of this email clearly set out, from Mr. MacFadgen's position, what had occurred, what he had done and at least the damages he was claiming at that point in time. Had the Defendant not sat idle and instead responded to this email or, at a minimum, continued to advance its claim for payment of their outstanding invoice as would be the normal case, then clearly the , parties would have been able to determine their positions much earlier which in turn would have prevented the happening of subsequent events such as Mr. MacFadgen discarding the new jet pump which was one of the most significant invoice costs.

33. I found the evidence given by all to be honest and forthright based on each witness' best recollection of what had occurred back in September 2016. There remains somewhat of a mystery as to what actually caused the Claimant to have lost his water immediately following the Defendant attending at his property and having carried out certain work.

WAS THERE A CONTRACT?

34. I find based on the evidence that there was a verbal contract between the parties for the supply of goods and services by the Defendant for the benefit of the Claimant. I further find that the terms had been amended by agreement whereby the Claimant initially sought to purchase and have installed a submersible pump in addition to replacement of foot valve but, upon the advice of the Defendant, agreed to change out this type of pump for the purchase and installation of a new jet pump.
35. I further find that the Claimant, in entering into this contract, is entitled to rely upon and indeed expect a certain level of expertise and standards for the labour and materials to be supplied, having regard to the expertise the Defendant holds out to the public in dealing with wells, pumps, ground water and so forth. I further find that in entering into

this contract arrangement there would exist a duty upon the Defendant to have the required knowledge to carry out the work intended to an acceptable standard in keeping with the industry in which it operates.

WAS THERE A BREACH OF CONTRACT AND IF SO BY WHOM?

36. I accept the evidence of the Claimant that prior to the work being carried out he enjoyed a normal supply of water with good quality and had not previously experienced any problems in this regard, other than what he believed to have been a tired foot valve needing replacement. I also accept the evidence of the Claimant that after he himself assessed the well situation immediately after the Defendant carried out their work, he was able to resolve the problem mainly through re-adjusting the depth of the pipe going into the well and by making sure the bottom of this pipe/foot valve was not placed into the bottom of the well and so was able to draw clear water. This also included replacing out the new jet pump with the old one however I do find that this was not the main part of the fix but rather a symptom of whatever caused the original problem/loss of water which clearly took place at the well head and inside the well itself. Accepting the evidence that the well operation, but for problems with the foot valve, was intact immediately before the Defendant attended on site, in determining whether there was a breach on the part of the Defendant one needs to find that, on the balance of probabilities, the Defendant did something in error or failed to do something which caused the new jet pump to draw into the household water system extensive dirt and materials which are alleged to have caused damage to a number of parts associated with the Claimants household water system (i.e.: taps, water lines, etc.).
37. I accept the evidence of the Defendant that when they first approached the well located inside this six-foot dry crock they found that a piece of the top of the well head appeared to be missing. The Defendant's evidence through Mr. Handley was that to best of his knowledge nothing fell into the well when they first removed the well head top. At the same time Mr. Handley's evidence confirmed that one of the first things they did was measure the depth of the well and water level using some form of device which they normally used for such purposes. From that it was determined that the depth of the water was approximately five feet as he recalled and that it was largely this information

which allowed him to determine that a submersible pump set-up would not likely work based on the gallons per minute this water depth would produce. Later in his evidence he referenced his recollection that the depth of the well, from the well head, was around 17-18 feet. He later confirmed that the original well pipe was 20 feet long. Based on the foregoing and using simple math this would lead one to conclude that the original water/PVC pipe extended beyond the top of the well head by at least 2 - 3 feet, reasonably assuming the foot valve would be some minimum distance away from the bottom of the well. Mr. Handley further testified that when they attempted to put the pipe back into the well after replacing the foot valve it would not go beyond 11 - 12 feet. The evidence suggests there had been some difficulty experienced when the pipe was first removed but no details were provided as to what extent.

38. The Defendant's evidence was that after unsuccessfully attempting to free whatever may have been blocking the well, they cut off approximately 4 – 5 feet of the existing pipe and re-installed it into the well. At this point, based on their evidence we would be dealing with a length of pipe 15-16 feet long. The Defendant provided no evidence as to any subsequent measurements having been taken or on what basis they believed this shorter pipe, which one can only assume extended no more than to the point of the blockage (11-12 feet), was sufficiently deep enough to allow water to be drawn. One needs to recall the Defendant's evidence that their initial measurements showed five feet of water with a well depth of 17-18 feet. Assuming this is accurate, and assuming there would have been no reason for the water level to have changed over the few hours they carried out this work, at the blockage point (11-12 feet) one would think there would be no water at all. The Defendant's evidence then goes on to conclude that they replaced the well head with a new seal, hooked up the new jet pump, by-passed the water softener and primed the pump, which only ran for 3-4 minutes before losing its prime.
39. In contrast to the above facts stated by the Defendant, the Claimant's evidence was that two days later he and a helper took the well head off and measured the well depth somewhat in an old-fashioned way - with a string on a rock. He confirmed that the depth measured out to be 20 feet. He further confirmed that he did not experience any blockage in completing his measurement. At this point, e he had not had any detailed discussions with the Defendant's workmen and therefore would not have known about the pipe being cut, the blockage at 11-12 feet depth or the water or well depths they had

measured. The evidence confirms that when the men could not get the new pump primed, they spoke briefly with Ms. MacIntyre and told her there was no water and they needed a new well.

40. The Defendant's evidence on cross-examination confirmed that they had "pounded" a great deal to try to free what they believed was a blockage. Could this have been the bottom of the well? I note this having regard to the evidence that it appears a great deal of moving dirt sediment ultimately got sucked into the water system. The Defendant's evidence was that when they re-installed the well pipe, they made the adjustment to the top such that it was no longer protruding upwards beyond the well head to the extent that it had been. The Claimant's evidence confirmed this measured approximately two feet above the well head. As such if the Defendant cut off 4–5 feet of a 20-foot pipe but placed the pipe approximately two feet further into the well the net difference in length would be approximately 17 feet (20 feet less 4 – 5 foot cut off = 15 feet plus 2 feet less extension beyond well head = 17). Either way, whether the line continued to protrude above the well head or was pushed downward to normal level, at 17 feet it would have been impossible, based on the Defendant's evidence, to have pushed the pipe beyond the blockage (at 11-12 feet) without driving into something. That appears to explain the reason for the new foot valve screen being full of mud, etc., when the Claimant hauled it up to inspect.
41. In fairness, if I am being asked to accept the accuracy of the Defendant's recollection and in turn various measurements they had determined, blockages and so forth, I feel I must accept all or none. The problem is, in accepting all, the simple math does not add up. Again, by the Defendant's own evidence it would appear that they attempted to place back into the well a 15-foot pipe when in fact there was a blockage at 11-12 feet. Therefore, one way or another, the bottom of the pipe and/or foot valve had to be seated into any blockage or, as previously noted, the bottom of the well itself. Either way, the Defendant's workers chose to re-set the pipe in this manner knowing by their own admission that there "appeared" to be a problem and immediately thereafter, they attempted to prime and run the new pump system. The evidence is that even when they left, they suggested to Ms. MacIntyre to let the well rest, which leads me to believe that the new pump remained set up and would continue to bring water in if the prime held. Otherwise there would have been no reason for them to have said this. Alternatively, if

the Defendant workers knew there was a blockage but did not know what it was, they chose to try to draw water which ultimately lead to drawing in substances which I find was well beyond what one would normally expect. The Claimant's evidence was that he cleaned "mud" from the foot valve and further that the new pump, when he inspected it, had also been clogged with a mud substance which necessitated putting the old pump back into use.

42. From the evidence presented one may never be able to determine with absolute certainty what went on inside the Claimant's well on the day the Defendant attended. What is certain is that everything was fine before, and everything appears to have been made fine after they left once the well pipe was re-adjusted to its original position and the foot valve and pump cleaned. This subsequent work to get things back in order was carried out by someone with far less experience than the Defendant's workers. Therefore, based on all of the evidence, the only reasonable conclusion, on balance, is that the Defendants either did something in error or failed to do something that caused the resulting problems experienced by the Claimant. For certain, if the Defendant, as they testified, felt a new well was required and that there was "no water" then they ought not have attempted to draw from essentially a dry well which resulted in the major portion of the Claimant's subsequent problems and damages. I find the Defendant failed to meet the implied standard of workmanship and care normally imposed upon them and as a result the Claimant suffered damages.

ASSEMENT OF DAMAGES AND AWARD

43. The Claimant has presented his claim on two fronts. First, he claims against the Defendant for his out-of-pocket direct expenses which he believes arose directly as a result of the actions of the Defendant. Secondly, he claims that he should not be responsible to pay any part of the Defendant's invoice for the goods and materials that were provided because they were of no value to him.
44. Exhibit 4 sets forth the supporting details of the Claimant's claim for payment in the amount of \$2270.06. The Defendant did not offer any evidence in response to the items claimed nor did he explore with the Claimant on cross-examination any of the facts

surrounding the nature of this part of his claim. However, that in itself does not provide a free pass so to speak and it remains incumbent upon the court to assess these items claimed. Overall, I have no issues with any of the supporting materials provided. However, I do have some issue with some of the items claimed for replacement as a direct result of this incident. In particular, two items set forth in exhibit 4 are item #9 (replacement of pressure tank in May/2017) and item #10 (replacement of water softener). Both these items appear to have been replaced some 7-8 months after this event. Also, the evidence of the Defendant was that he had by-passed the water softener at the time they set up the new pump and attempted to prime the system. By the Claimant's own evidence, some two days later once they were able to re-set the water line into the well and get the system up and running, he would have readily known there were foreign materials in the water system that needed to clear. The Claimant testified on cross-examination as well as stated in his October email, that the water cleared after 2-3 days and has been clear ever since. Therefore, since the Claimant chose to tackle this problem himself, in doing so he must accept the responsibility of employing whatever normal protocol would be required. This likely included continuing to bypass the water softener until the well settled and water was clear. As for the pressure tank replacement, while I fully appreciate that the water that enters into the bottom of these tanks is directly from the well, so too is the water that flows from the tank back into the water system. Had any water entered into the tank containing sediment it would have been this water in part that subsequently entered the residence water system and clogged shower heads, taps, toilet lines and so forth. I accept that each of these items was required to be replaced but not the water softener or the pressure tank, nor the resulting labour claimed.

45. As for the Claimant's position regarding the Defendant's invoice, as the old saying goes one can't have it both ways. This invoice is set forth in exhibit #2. It includes both labour and parts. I am satisfied that the Defendant shall not be entitled to their labour charges having regard to my findings on liability. However, the Claimant did receive and has retained the benefit of some of the materials that had been supplied such as the new foot valve and well seal. There are a host of miscellaneous items on this invoice such as fittings, clamps, gauge, brass plugs, etc., I have not received any evidence from the Defendant about what part of the work that was carried out that these items relate to. It would appear many of the parts relate to the installation of the new pump, but I simply do

not know. It was incumbent upon the Defendant to defend this claim which included, in part, seeking as part of this order a determination as to what, if any amount, the Claimant may owe to the Defendant. They have not done that and therefore the court is left to extract from the evidence it received what parts it can determine with certainty remained for the benefit of the Claimant. Clearly, in addition to the new foot valve and well seal, the biggest item is the new jet pump itself.

46. Exhibit #2 sets the value of the jet pump at \$595.00. There is no question that the supply of this unit formed part of the contract between the parties. I also accept the evidence that upon the Claimant working to resolve his water problems, part of that solution required this newly installed pump to be removed because of the dirt and grit that was allowed to enter into it by the Defendants themselves. However, the court notes the Claimant's own comments as set forth in his October 16th email wherein he acknowledges his intention to not use the pump and that he will return it once the Defendant compensates him for the amount of loss he had sustained at that point in time. The evidence confirms that there was silence after this communication between the parties for upwards of one year at which time the Claimant was contacted by collection agency. The Claimant's evidence was that it was because of that action that he initiated this Small Claims Court action. As previously noted, the Claimant testified that he had thought, based on the silence, that this matter was at end and as a result he had thrown the new pump out with the heavy garbage collection. There was no specific evidence as to what year this occurred but having regard to the fact that this Claim was initially filed back in October 2017, it is reasonable to conclude that it would have been discarded in the spring of 2017. Otherwise, to have discarded it in the spring of 2018 in the face of these court proceedings a few months away would be most inappropriate as this item clearly ought to have formed part of the evidence. Therefore, the issue I must assess is whether such action, at such time was reasonable on the part of the Claimant. The Defendant confirmed that there had been a three-year warranty on the pump and the Claimant himself clearly recognized this item as having some value as a returnable item to the Defendant upon the happening of a certain event. Therefore, the issue becomes whether it was reasonable for the Claimant, approximately seven months later (taking note that municipal heavy garbage is in spring of the year) and with no resolution to this issue, to have simply thrown this item away. In dealing with any claim there always remains a duty upon each party to mitigate their loss.

47. On this pump issue the court is also mindful of the fact that the Defendant purposely chose to not respond to the Claimant's October 2016 email which would have allowed the Claimant to better assess the Defendant's position/response. In addition, the Defendant, for whatever reason, chose to not send any follow up statement or contact the Claimant by any means which would have contributed to the Claimant's formation of the belief that this matter had "gone away". The Defendant does not have clean hands so to speak in my assessment of this specific issue. Therefore, I need to assess some fairness and sharing of the blame as it relates to the complete loss of the value of this new jet pump. To that end, the Claimant's actions to have simply thrown out the pump in the spring of 2017, I find that within such time frame it would not have been reasonable for him to assume this matter was at end. At a minimum, he could have retained it for a longer period of time or provided notice to the Defendant to come pick it up. As best I can gather from the evidence, the pump only required a good cleaning. If I am wrong with my determination that the pump was thrown away in the spring of 2017 then the only alternative time frame could have been the spring of 2018. If that was the actual time in which the pump was thrown away, then I further find that it would have been equally unreasonable to have discarded this item in the face of these court proceedings. Either way I am ordering that the Claimant shall be responsible for 50% of the value of the pump as set forth on the invoice. I am dealing with the principal cost of the pump only as I am unable to determine what the other miscellaneous parts were directly associated with.
48. Therefore, based on my findings noted above, I hereby order that the Claimant shall be entitled to the following payment from the Defendant:

(i)	Accounts from R. MacVicar Construction (items 1, 2, 3 - Exhibit #4) totaling	\$350.75
(ii)	Purchases (items 1,2,3,4,5,6,7,8 - Exhibit #4) totaling	\$813.15

(note: pressure tank and water softener not included)

LESS goods supplied as per Defendant invoice (Exhibit #2):

(i)	50% of cost of jet pump (\$595.00/2)	-\$297.50
(ii)	Foot valve	-\$19.50
(iii)	Well seal	<u>-\$40.00</u>

Net Claim Awarded	\$806.90
Court Costs	<u>+\$99.70</u>
Total Award to Claimant	\$906.60

Dated this 21st day of August 2018.

A. ROBERT SAMPSON, Q.C.

Adjudicator