

2019

SCC NO. 494963

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Citation: *O'Shea v. Calder*, 2020 NSSM 33**

**BETWEEN:**

**RYAN O'SHEA**

**CLAIMANT**

and

**JOHN CALDER and HEATHER CALDER**

**DEFENDANTS**

**REASONS FOR DECISION**

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

**DATE OF HEARING:** Hearing held By Conference Call from Sydney,  
Nova Scotia on Tuesday, July 7, 2020

**DECISION RENDERED:** November 3, 2020

**APPEARANCES:**

**For the Claimant:** Self-Represented – Ryan O'Shea

**Witness:** Ryan Jenkins

**For the Defendant:** Self-Represented – Heather Calder and John Calder

**Witnesses:** None

**BY THE COURT:**

[1] This claim was commenced by a Notice of Claim filed with the Court on December 19, 2019, and originally scheduled to be heard on May 13, 2020. As a result of Covid-19 and the corresponding disruption in court services the matter was re-set for hearing on July 7<sup>th</sup>, 2020 by way of telephone in accordance with protocols issued by the Department of Justice for the Province of Nova Scotia. The Court file materials confirm that the claim included the standard Form 1 together with a written statement setting forth 11 points associated with the claim. The Court file materials further confirm the claim had been properly served upon the Defendants. The matter was re-scheduled to be heard on July 7, 2020. A written Defence was filed by the Defendants on July 3, 2020 which included the standard form together with a four-page summary of the Defendants' position/response to the claim.

[2] On July 7, 2020 the parties convened by telephone. It was determined that the parties had not fully exchanged certain documents that were intended to be exhibited to the Court. It was agreed that the exchange of information would occur immediately and the matter was put over for hearing the following week, July 14, 2020.

[3] This is a claim arising out of a written contract between the parties relating to the Claimant's purchase of the home owned by the Defendants situate at 668 Upper Prince Street, Sydney, NS. A copy of the standard form real estate contract relating to the purchase transaction was exhibited by the Defendants as D-4 ("Agreement"). Both parties also exhibited to the Court related documents arising from the principal agreement such as the listing cut (see exhibit D-2) and Property

Disclosure Statement (see exhibit D-3 and C-2 – same document). Other exhibits tendered will be referred to in this decision when relevant. The evidence confirmed that both parties were represented by independent real estate agents. The Agreement set forth the closing date as May 27, 2019 and the evidence confirmed the transaction was closed on this date. The Claimant's evidence, and the basis of his claim was that three (3) days after closing, during or following heavy rains, he experienced water in the basement of the home. His written claim seeks the amount of \$1627.25 for repairing the crack in the foundation beneath the basement stairs. The Claimant advances the position that the Defendants intentionally or negligently misrepresented to the Claimant, through their completion of the Property Disclosure Statement, that there were no water problems in the basement. The Defendants maintain the position that they completed the Disclosure Statement based on their knowledge at the time prior to closing and it was true to the best of their knowledge. The Defence further stated that the evidence in support of this claim tendered by the Claimant during the hearing included costs for repairs which extended beyond the one crack in the foundation beneath the stairway which was principally the source of complaint as set forth in the written claim (Form 1) and notably included the purchase and installation of a sump pump and the repair of a second crack in the foundation.

[4] At the outset the Court reviewed the general procedure to be employed in hearing the 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 further that, at the end of the evidence, each would be afforded a chance to sum up their positions based on all the evidence presented. The Court initially confirmed that everyone had

before them the same documents that were intended to be exhibited by each party. The parties were not represented by counsel. The Claimant presented his position and Mrs. Calder presented the Defendants' position. The Court was then called to order and both parties were affirmed over the phone by the Court and matters proceeded. Each were advised that any comments made by them at any time throughout the proceeding would be considered information given "under oath".

[5] The Court is appreciative to both parties for the organized, patient and respectful manner in which they presented their position, including the documents presented to the Court. The only documents referenced were those attached to each of their Claim/Defence originally filed with the Court as well as subsequently exchanged between the parties. The Court verified that each party had before them a copy of all relevant documents.

[6] Based on the pleadings of the parties and accompanying documents together with the evidence received by the Court, this matter can clearly be identified as a "claim" arising from a written contract between the parties. The evidence confirmed that each party was represented by independent real estate agents, however, notably from the same Brokerage, Remax. The Claimant's agent was Ryan O'Donnell and the Defendants' agent was Jesslyn Chisholm and Valerie Sampson. There is nothing unusual about the standard form contract used nor the contents. As with most contracts of this nature, it provided for a condition, for the benefit of the buyer (O'Shea), that the Seller provide a "Property Disclosure Statement" (see exhibit D-4, para. 4 of the Agreement - Buyer's Conditions"). Both parties exhibited a completed Property Disclosure Statement (see exhibits D-3 and C-2) signed by both parties. The Claimant's position was that the

Seller/Defendant misrepresented to the Buyer by responding to the following question on the disclosure form as follows:

Question #1

Q. Are you aware of any structural problems, unrepaired damage, dampness or leakage?

A. No.

Question #2

Q. Are you aware of any repairs to correct structural damage, leakage or dampness problems?

A. Yes - crack in basement wall fixed fall 2018 - Wise Cracks.

**CLAIMANT'S EVIDENCE**

[7] The evidence from the hearing confirmed that there was never any direct conversation between the Seller and Buyer at any point leading up to entering into the contract for sale or to the closing date. The contract initially had a provision/condition for benefit of buyer (O'Shea) to have a home inspection but in concluding the contract portion of the transaction this was deleted by the Claimant. The Claimant's evidence confirmed he had viewed the property several times before closing. He confirmed that he had both his step-father who was a skilled tradesman as well as a friend, Adam Gardiner, who was a journeyman, view the property with him and therefore felt he did not need any type of formal home inspection. He stated that he knew there were some general problems that he was prepared to accept. However, he stated that he had made it clear to his agent that he

did not want a home with water in the basement and that his agent reported back to him that there were no water problems in the basement. He confirmed that he had visited the home three times before closing and had been in the basement and never saw any presence of water. He noted that on each occasion it had not been raining out. He described the basement as “generally unfinished, half the floor was concrete, part of it was tiled”. His evidence was that approximately three days after closing there was heavy rain and he discovered noticeable water leaking into the basement mainly from a crack in the foundation situate underneath the staircase leading to the basement. He stated that he called his lawyer who advised him to get it repaired. He confirmed that on June 6, 2019 a representative from Wise Cracks attended at the residence to assess and complete repairs.

[8] The Claimant testified that the water travelled across the basement floor and was very visible to see. The Claimant exhibited a number of photographs (exhibits C-A to G) showing pictures of the crack in the foundation and the pathway across the floor where the water ran. He testified he had mopped up several buckets of water. The Claimant further stated that he had seen the crack during one of his inspections but there was no presence of water. He confirmed that this was the reason why “he had asked his agent whether there were any water problems and was assured there was not”.

[9] The Claimant testified that immediately following closing he had the driveway of the home paved (which had previously been gravel). He further reported that the downspouts from the rain gutter on the home were removed or re-routed after he paved. The location of the crack and resulting water problem was beneath the side door on the driveway side of the home. He confirmed that the

driveway is sloped towards the road which can be seen from the photos of the home (Exhibits D-5 and D-6). The Claimant confirmed in his testimony that his claim was for the repair cost of two cracks and the purchase and installation of a sump pump.

[10] On cross-examination the Claimant re-confirmed that he had been told by his agent that for as long as the Calders owned the home there were no water problems. When asked the Claimant confirmed that he did not feel it necessary to have a formal home inspection because both his step-father and friend were experienced and they inspected the home. He further testified that he noticed the crack in the foundation beneath the step but there was no dampness at the time. He confirmed on cross-examination that he also noticed that some of the wood around the step/crack was rotten and concluded that it was likely from some time ago as he was aware that some repair work had been carried out in the basement foundation. He testified that it was this crack that prompted him to confirm with his agent about whether there were any water problems and subsequently was assured there was none.

[11] Ryan Jenkins, franchise owner of Wise Cracks, was affirmed and gave evidence for the Claimant. He confirmed that he acquired this company in 2016 and prior to that he had worked for the previous owner for six years. He confirmed that he has dealt with more than 1000 homes dealing with basement water problems and foundation cracks. He stated that at the request of the Claimant he visited the home in early June 2019. He confirmed that he had been at this home before and completed a repair to a crack in the foundation. He attended this home in June and first inspected that crack he previously repaired and determined there was no water coming from that area. He confirmed much of the Claimant's

evidence that the source of the water was coming from underneath the stairs. He provided general evidence as it relates to hydro-static pressure which is generally the root cause of cracks forming in foundations and allowing water to enter. He noted that typically a weeping tile set up is designed to relieve such pressure but often in older homes they may not exist or over time fail to serve their purpose. He testified that he had been in this basement back in 2018 and was directed to deal with a different crack on a different side of the basement. He said he did not recall seeing the crack beneath the basement stairs nor would there have been any water coming from that particular area when he had been present back in 2018 as he believed he would have likely noticed it. He confirmed that he was engaged to complete one repair of one crack and completed that work. It had been his understanding that the crack he repaired was the only source of the problem at that time. Mr. Jenkins confirmed that in June 2019, when he was asked by the Claimant to inspect the basement, he confirmed water appeared to be entering through this crack underneath the steps. He also reviewed his estimate (\$1627.25), exhibit C-1 confirming the repairs that were required as well as the installation of a sump pump to safeguard against further water infiltration.

[12] The Defendant cross-examined Mr. Jenkins. She asked about whether, in his opinion paving the driveway may have affected water flow. His response was simply that it would increase speed of run off. She also asked whether some foundation cracks might not leak and he confirmed yes. She also asked whether the repair of one crack may lead to another crack starting to leak. On this front, Mr. Jenkins testified that if it was close by, possibly. However he testified that the original crack he repaired back in 2018 was on a different wall away from the steps.



## **DEFENDANTS' EVIDENCE**

[13] The Defendants' evidence was that they had completed the Property Disclosure Statement (Exhibit D-3) honestly and based on the knowledge they had of the property at the time. Specifically, she testified that at no time were they aware of any further water leakage into the basement other than the leak which had been reported to them from a tenant in 2018 which they immediately had repaired. She testified that prior to the closing she had swept the basement floor and saw no evidence of any water seepage into the basement. She further testified that she and her husband had owned this home since 2011. They themselves resided in it for five (5) years and two different tenants since 2016. Her evidence was that in late 2018 the tenant had advised them of some water entering the basement. They immediately contacted Wise Cracks requesting that they inspect and repair. Neither of the Calders were present to meet with the Wise Cracks representative at the time nor did they ever attend at the home to view the situation prior to the repair being carried out. She stated it was their understanding that the required repairs were carried out and they were invoiced and paid for the repair work to the foundation. There were no further complaints of any water in basement. She confirmed that sometime in April 2019 the tenant moved and they decided to list and sell the home.

[14] Mrs. Calder tendered several exhibits. Exhibit D-1 included a letter from her real estate agent(s) confirming that initially Ms. Chisholm had shown the Buyer/Claimant the property and that before any formal offer was advanced, he

chose to be represented by an independent agent. This letter further confirmed that when they received the written offer on the home, the inspection clause was deleted by the Buyer/Claimant. This letter further confirms that they had no further communication directly with the buyer after he became represented by another agent. Exhibit D-2 represented the listing cut of the property. Exhibit D-5 represented a photo of the property before closing, noting the gravel driveway and eavestrough/drainage pipe. Exhibit D-6 represents another photo of the home which shows the paved driveway and evidence of removal of eavestrough downspout. Finally, Mrs. Calder noted that the claim presented to them related to one crack in the foundation underneath the stairs. However, she noted that the evidence presented, notably the invoice confirming the damage claim relates to two cracks and a sump pump, neither of which are referenced in the written claim before the Court.

[15] On cross-examination, Mrs. Calder confirmed that they had not carried out any structural repairs to the home during their period of ownership. She further confirmed that they had not viewed any water coming into the basement nor witness any water issue. She testified that when the problem had been brought to their attention back in 2018, they simply engaged Wise Cracks to investigate, determine the problem and carry out the required repairs. She confirmed that to the best of their knowledge the problem was resolved. She confirmed that during the time she and her husband resided in the home they were not aware of any water problems in their basement.

### **BY THE COURT**

[16] The issue here is squarely whether the Defendant breached the Agreement with the Claimant by virtue of misrepresenting a term of the original contract. As with many contract situations, often there are collateral documents which are incorporated by reference. Clearly, it was a term of the principal Agreement (Exhibit D-4) that the Seller would provide a Property Disclosure Statement. This type of provision is quite standard and its purpose is to impose upon the Vendor/Seller an obligation to disclose relating to a host of basic information associated with the sale of one's property. However, as is often the case, particularly when selling a home which the Seller did not themselves construct, it is set up to obtain information based on "to the best of the seller's knowledge" at the time it is completed. It is not intended to be presented as any form of "warranty" so to speak, but rather an information sheet, disclosing to a perspective buyer, based solely on the knowledge of the seller, the details of various aspects of the home, some of which could only be known by the seller. The document allows the person completing it to provide a yes/no answer to many of the questions or in some instances, depending on their answer, to provide further narrative/details or otherwise indicate that they don't know. The document identifies the parties, references the location of the property, is dated, each page initialed and is signed off by both parties. Therefore, clearly it is intended to have some legal effect and consequence on those who enter into it.

[17] As a matter of note, the Defendant pointed out the fact that at the conclusion of the document it contained a statement above where the buyer is to sign stating that the buyer is urged to carefully examine the property and have it inspected by an independent party to verify the information. I find the principal purpose of this statement is twofold. First, it serves as a means of indemnifying the

brokerage/agents for the buyer and, second, it places the buyer on notice that this disclosure is not intended to substitute for a meaningful inspection of the property. This document, both at the outset at the top of the page as well as immediately above the seller's sign off, explicitly notes that the information represents the seller's "best knowledge". Nowhere does it purport to guarantee or warrant anything.

[18] Therefore, it begs the question, does this type of disclosure have any legal purpose and if so, how can one breach such a document? As with any contract document, it is intended that the parties should be bound by its terms unless stated otherwise. It has to have some meaning and with that the ability of a contracting party to rely, to whatever extent they may choose, on the statements set forth. Therefore, if a party chooses to rely on "to the best of my knowledge" information, then that will remain the depth of their reliance. If a person provides disclosure which truly represents "the best of their knowledge" then they have given nothing more than that. A breach can arise if one can prove that a party misrepresented information which they had "within their knowledge". Such a breach may arise innocently, negligently or grossly negligently where the information provided would be tantamount to fraud. The bottom line, fundamental to any disclosure statement, is that the information given is based on an honest belief to the best of the knowledge of the person providing the information. Therefore, logic suggests that if there is to be determined that someone breached a disclosure statement, it must be proved that the person who disclosed the information knew otherwise and therefore was not honest.

[19] There is little dispute from the evidence given that the Buyer discovered water in the basement following the closing and that it was coming in from a crack in the foundation underneath the basement staircase. The evidence also confirms that the presence of the water was noticeable. I find nothing turns on the fact that the Buyer/Claimant did not secure a formal home inspection. Often persons buying a home rely on their own knowledge or that of friends and family, as was the case here, to assist in completing an inspection. In fact, in this instance the Buyer's inspection highlighted to him this crack beneath the staircase which prompted him to turn to his own agent for reassurance as to whether the basement was dry. That agent did not testify nor did anyone else for purposes of confirming where this information was obtained, which in turn led the Buyer's own agent to provide the reassurance the Claimant sought. The Defendants' evidence was that she could not recall whether this issue was brought to her prior to closing but stated with certainty that if it had she would have answered the same as she stated on her Disclosure Statement, "to the best of her knowledge there was no water problems in the basement".

[20] From my review of the evidence I cannot find anything which suggests that the Defendants would have had any prior knowledge of the area of the home foundation which was confirmed to be leaking. The evidence of the Seller/Defendants was that they themselves were not living in the home for several years leading up to the sale. Further, the evidence is clear that less than one year prior to the sale, while the home was still rented, the Sellers were made aware of a leak and immediately took steps to correct the situation. Logic would suggest that in taking such course of action, it would make little sense to have one leak fixed and not any others that were known to them or Wise Cracks. In addition, Mr.

Jenkins' evidence was that he had attended the basement of this home back in the fall of 2018 and while he had been directed to one particular crack in the foundation where he carried out a repair, again logic would suggest that had he noticed any signs of any other leaks at that time surely, he would have reported his findings to the Sellers. There were none. Further, while the Sellers believed there were no water problems, in their Disclosure Statement they openly disclosed the fact that repairs were carried out in 2018 and therefore this, in itself, would heighten one's attention to the possibility of a potential problem and prompt one to want to carry out a detailed inspection. I believe the Buyer/Claimant did this and was left to rely on whatever information "his" agent gave him. The evidence confirms that the position of the Sellers remained the same...."to the best of their knowledge there were no leaks".

[21] Finally, based on the evidence, the Court assessed whether it was reasonable for the Sellers/Defendants to form such a belief, that being that there was no water entering their basement. In this regard, if I am being asked to accept that it was reasonable that Mr. Jenkins saw no obvious evidence of water coming from this area during his attendance in the basement several months earlier and if, as the Claimant honestly testified, he and others visited the home/basement on three occasions before closing and at no time did they witness any evidence of water coming from this area and further inspected the rotten wood beneath the stairs and concluded that it was simply old and likely damaged from years ago, then I find it is equally reasonable to find that the Sellers reasonably believed that there was no water problem in their basement and therefore, they disclosed what they honestly believed.

[22] There had been extensive evidence of work having been carried out by the Claimant immediately after closing, notably both paving the driveway and re-aligning his eavestrough system. There is simply insufficient evidence for this court to draw any conclusions that suggest this work may have contributed to this new-found water entering on the driveway side of the home. However, for the purposes of this decision, to find for the Claimant I must be satisfied, on balance, that the Defendants in some form misrepresented information to the Claimant and knew otherwise. The evidence simply does not support such a finding and therefore I dismiss this claim.

**DATED** at Sydney, Nova Scotia this 3rd day of November, 2020.

**A. ROBERT SAMPSON, Q.C.**

**Adjudicator**