CLAIM NO. 214671
Date: 20040601

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Water Shed Water Conditioning Ltd. v. Pitman, 2004 NSSM 36

BETWEEN:

Name	The Water Shed Water Conditioning Limited	Claimant
Name	Travis and Christine Pitman	Defendants
	-and-	
Name	Robert (Mrs.) McKenzie	

D E C I S I O N

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 22, 2007.

Appearances:

John D. O'Neill, on behalf of the Claimant The Water Shed;
Mrs. Christine Pitman, on behalf of the Defendants the Pitmans;
Mrs. MacKenzie on behalf of the Defendant MacKenzie.

[1] This matter came on before me on May 27, 2004.

[2] It involves a claim for rental charges with respect to the use of a water conditioning unit owned by the Claimant The Water Shed and installed in a premises known as 60 MacKenzie Lane in Mount Uniacke.

[3] The premises had originally been owned by the McKenzies and in September 2001 it was "sold" to the Pitmans. At issue was the rental charges for the water

conditioning unit that had been installed on the premises in August 1999 and was still, as of the date of the hearing, on the premises.

[4] The original rental agreement between the McKenzies and The Water Shed was dated August 23, 1999. Pursuant to the terms of the agreement the rental charge was $25 a month, plus HST.

[5] The customer was to inform The Water Shed in writing if the house was sold and the contract provided that if the new owner wanted to continue with the rental arrangement, there would be a transfer fee of $25. The contract went on to provide that the customer "may cancel at any time, with 30 days notice, after an initial minimum term of six months."

[6] In September 2001 the McKenzies "sold" their house to the Pitmans, on a "lease to purchase" basis.

[7] Mrs. Pitman admitted in evidence that at the time of the transfer she knew that the water conditioning unit was rented from The Water Shed; she knew that the rental charges were in the approximate range of $25 to $28 per month; and she also admitted that she had acknowledged both to the McKenzies and latterly to The Water Shed that she was "responsible" for the unit. She did not call The Water to request the return of the unit, but continued to use it.

[8] Both Mrs. Pitman and Mrs. McKenzie gave evidence, which I accept, that they did call The Water Shed on several occasions to advise them of the transfer in the property and to request that the Pitmans be placed upon the billing records of The Water Shed so the bills could go to the Pitmans rather than to the McKenzies.

[9] Mr. Burke, who gave evidence on behalf of The Water Shed, admitted that the administration in his office was not very good, because there had been several changes in employees, and several problems with some of the employees who were responsible for office administration.

[10] Mrs. McKenzies' evidence was that she received at least two three-month bills from The Water Shed and on each occasion she phoned to complain, pointing out that the bills should be going to the Pitmans. On both occasions nothing changed and she eventually went in to The Water Shed office and physically separated her file (in respect of another house they owned which also had a Water Shed unit) and the Pitman file, instructing them that all further bills with respect to the unit at 60 McKenzie Lane should go to the Pitmans. In her evidence she was a little unclear

as to exactly when this took place, but in her Statement of Defence she mentions the date as June 2002. I also note that the first invoice from The Water Shed made out to the Pitmans is dated August 2002: see Exhibit C2.

[11] Based on this evidence, I am satisfied that as of June 2002 The Water Shed had finally managed to correct its records to show that the Pitmans were the ones who had the unit at 60 McKenzie Lane.

[12] Mrs. Pitman's evidence was that she had not received the August 2002 invoice. She also said that she did not receive a September 30, 2002 invoice (Exhibit C3).

[13] Mrs. Pitman suggested she may not have received the invoices because the postal code was incorrect, since it read "B0M" when it should have read "B0N." I had some concern about Mrs. Pitman's evidence on this point, because it is clear that subsequent invoices, bearing the same erroneous postal code (but otherwise the same in terms of address) were received by her. However, for reasons set out below, it was not necessary for me to decide whether or not she actually received those two invoices.

[14] Mrs. Pitman's evidence was that in February 2003 she received a phone call from The Water Shed. She said that she was told at that time by someone in The Water Shed office that they would waive the charges between September 2001 and February 2002 because of the errors in the office administration. She said that she "accepted" this waiver and agreed to "look at" any bill that was sent to her, although she denied agreeing to start paying monthly rentals at that point. She said, however, that she did not receive the contractual materials that she requested from The Water Shed; and it was not until April 1, 2003 that she received the first paper from The Water Shed, being a statement of account and an invoice: see Exhibit D11.

[15] At this point the account being claimed by The Water Shed was $546: see Exhibit D8.

[16] A dispute rapidly developed between Mrs. Pitman and The Water Shed as to whether or not she would pay the outstanding balance. Eventually, in June 2003, she called The Water Shed and asked to have the unit removed.

[17] Mr. Burke admitted that Mrs. Pitman called and made an arrangement for them to come on June 11, 2003 to remove the unit. He said in evidence that she imposed "unreasonable" conditions, saying that they had to be there by 9:30 a.m.

[18] Mrs. Pitman said, however, that she told them they had to be there between 8:00 a.m. and 1:00 p.m. and on this point I accept Mrs. Pitman's evidence. Mr. Burke, by his own evidence, was not the one generally responsible for administrative matters and his evidence struck me as rather vague in terms of what was actually said or agreed to.

[19] In any event, The Water Shed did not arrive on June 11. Mr. Burke said that they made other arrangements and I find on the evidence of Mr. Burke and Mrs. Pitman that the next suggested date was June 16, which The Water Shed again failed to meet.

[20] At this point the relations between Mr. Burke and Mrs. Pitman appear to have degenerated entirely and no further efforts were made by either side to arrange for a pickup of the unit.

[21] The original claim in this matter was then issued on July 15, 2003. There were various procedural matters, which I need not detail here. In March 2004, however, Mr. Pitman spoke to Mr. Burke and told him that The Water Shed could have the unit back if it agreed to drop its claim. For reasons set out below, I find this conversation significant because it is an assertion of control and dominion over the unit by the Pitmans to the exclusion of The Water Shed.

ISSUES

[22] On this evidence and these findings of fact, the following issues present themselves:

a. who if anyone is "responsible" for charges associated with the use of the unit; and

b. if someone is responsible, what should those charges be and for what period of time.

WHO IS RESPONSIBLE

[23] On the evidence I find that the McKenzies were clearly not responsible for charges associated with the use of the unit after September 2001. They had a contractual right to transfer the unit, they advised The Water Shed of the transfer and The Water Shed accepted the transfer (even if it had trouble recording that transfer in its records). Accordingly, I will dismiss the claim as against the McKenzies.

[24] By the same token, I find that the Pitmans are responsible for charges associated with the unit. They took over the house knowing that there was a rental unit attached to the water system. They used the unit. They knew there was a rental charge associated with the unit (and indeed, had a fairly accurate idea as to what the charge actually was). They never made any effort prior to June 2003 to reject the unit or to require The Water Shed to recover the unit. Indeed, their efforts up until at least early 2003 appear to have been directed to making The Water Shed regularize a contractual relationship with them, asking it to send them a new contract, change their records, and so on.

[25] Accordingly, I am satisfied that the Pitmans were responsible and are liable to pay for the use of the unit. The fact that The Water Shed's administration was hopelessly inept does not relieve the Pitmans of their responsibility to pay for the use of the unit. A creditor is generally entitled to be paid at his place of business, and the Pitmans were under an obligation to do more than simply call for a new contract. They were not entitled to permit rental charges, that they were aware of, escalate while they continued to use the machine without paying for that use.

[26] If the Pitmans were not prepared to use the machine, they ought to have insisted upon its return and there is no evidence of any such insistence until June 2003.

FOR WHAT CHARGES ARE THE PITMANS LIABLE?

[27] The next issue is the determination of the amount of the charge that the Pitmans are liable for.

[28] The Water Shed's own contract indicates that a customer was entitled to have a contract (inasmuch as it refers to a right of transfer).

[29] The Water Shed knew that the transfer of the property had taken place and they knew (or at least the office staff knew) that there were new people at 60 McKenzie Lane. However, The Water Shed utterly failed to follow its own contractual obligation (to its original customers, the McKenzies) to secure and effect the transfer of the contract and, in particular, to secure a new contract with the Pitmans.

[30] This is of some importance, because the written contract does provide that the customer has a right to service as part of the monthly rental. The Water Shed's failure to effect a new contract with the Pitmans means that they are not entitled to charge the **contract price** for the use of the unit, because they did not have a contract with the Pitmans. The failure to obtain a contract was entirely The Water Shed's responsibility.

[31] Accordingly, while The Water Shed is entitled to be paid something for the Pitmans' use of their unit, they are not entitled to insist on the contract price. In other words, they are entitled to a *quantum meruit* claim only.

WHAT IS THE *QUANTUM MERUIT* PRICE

[32] The normal contract price was $25, plus HST. That included regular service fees, which on the evidence were not done on the unit since September 2001.

[33] Taking into account the regular contract price and taking into account the absence of regular service (which presumably has a value to the customer as well as a cost to The Water Shed), I find that $15 a month represents a fair *quantum meruit* assessment of the value of the use of the water conditioner.

FOR HOW LONG

[34] Based on the above evidence, I am satisfied that The Water Shed is entitled to charge on a *quantum meruit* basis for the use of the unit from February 2002 until June 2003; and from March 2004 until May 2004, for a total of 19 months at $15 a month, plus HST.

[35] The period of *quantum meruit* commences on February 2002 because on the evidence which I accept, there was a waiver of any charges up until that time.

[36] Since the Pitmans made no effort to return the unit after February 2002, they are liable to pay for their use of the unit.

[37] That liability stops in June 2003 because on the evidence it is clear that Mrs. Pitman told The Water Shed to remove the unit. I am satisfied on the evidence that The Water Shed was not acting reasonably when it failed to get its employees to the premises on either of the two agreed upon dates in June, especially because in my mind a "window" of 8:00 a.m. to 1:00 p.m. is more than reasonable and more than sufficient to enable employees to get there to remove the unit.

[38] Since The Water Shed wrongfully rejected these two offers as unreasonable, it cannot complain about the Pitmans' use of the unit thereafter because it made no further efforts to recover the unit.

[39] The period of *quantum meruit* rental recommences in March 2004, because it is at that time (as detailed above) that Mr. Pitman asserted control over the unit to the exclusion of The Water Shed. Mr. Pitman was obligated to return the unit or to pay for it use. He was not entitled to offer to return the unit provided that The Water Shed waived its claim and hence his offer at that point must be taken as an exercise of dominion over the unit.

DAMAGES

[40] By my calculation, 19 months at $15 a month works out to $285, plus HST in the amount of $42.75, for a total of $327.75.

RETURN OF THE UNIT

[41] At the conclusion of the hearing on May 27, 2004, I directed the parties to arrange for the recovery of the unit by The Water Shed and I understood that that was going to be done. If there is any problem in this regard I can be spoken to.

Dated at Halifax, Nova Scotia this)
1st day of June 2004) ______________________
) **ADJUDICATOR**
) W. Augustus Richardson

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