

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Brown v. Groom, 2005 NSSM 30

BETWEEN:

Name	George and Dolly Brown	Claimants
Name	Billie Groom	Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on March 16, 2007.

D E C I S I O N

Appearances:
Blair Mitchell on behalf of the Claimants;
Wayne Francis, on behalf of the Defendant.

1. This Claim and Counterclaim came on before me on July 5, 2005. They arise out of an Agreement of Purchase and Sale that had been entered into between the Claimants as Vendors, and the Defendant as Purchaser, on December 11, 2003. The Agreement called for a closing on February 27, 2004. The Agreement failed to close when the Defendant took the position that the Vendors had failed to deliver vacant possession on the closing date, and elected to rescind the Agreement.
2. As a consequence, the Vendors were not able to close their own purchase of another house on the same date. The Claimants later re-sold their house for a lesser price than they would have received from the Defendant. The Claimants accordingly claimed the costs and associated expenses with the abortive sale; and the difference between the original and new sale prices. The Defendant counterclaimed for her own costs and expenses she says arose out of the Claimant's failure to deliver vacant possession on February 27, 2004.
3. I heard the evidence of the Claimants, George and Dolly Brown; Mr. Stephen Piggott, their solicitor on the abortive sale; and Eunice Nicholle, the Claimant's agent on their own purchase. I also heard the evidence of the Defendant, Billy Groom; Dawn Fox, her agent; Darrell DeBaie; and Myrtle Homans. At the end of the Hearing I requested written submissions concerning, *inter alia*, the meaning of "vacant possession". Those submissions were received August 4, 2005.

The Background Facts

4. In 2003 the Claimants, George and Dolly Brown owned a house at 20 Lower Lakeview Road. The Defendant, Billy Groom, was then living in Ontario, but wanted to move to Nova Scotia.
5. The parties entered into an Agreement of Purchase and Sale with respect to 20 Lower Lakeview Road (the Lakeview property) on December 11, 2003. The closing date was originally specified to be March 1, 2004.
6. Pursuant to paragraph 2 of the Agreement of Purchase and Sale, the parties agreed as follows:

“Upon completion [of the Agreement] vacant possession of the property shall be given to the buyer [Billy Groom] unless otherwise provided as follows: vacant possession by noon.”
7. Pursuant to paragraph 4(b) of the Agreement, the parties also agreed as follows:

“Sellers will remove both the new and the old dishwasher by date of closing, any and all debris, paint cans, etc., wood and framing in backyard, staging for laundry hanging, all contents from household and garage other than those included in this agreement, and/or those considered to be permanent fixtures and equipment attached to the property”.
8. The Agreement was amended a number of times. With respect to the closing date, on January 23, 2004, the Claimant’s requested an amendment to the closing date, moving it to February 27th. They also requested the right to remain in possession until March 1st, notwithstanding a closing of February 27th. The final inspection was to occur after the Claimants as Vendors vacated the property. In exchange for this proposed amendment, the Claimants as Vendors offered to credit \$500.00 towards the purchase price.
9. There was no reference to the time of closing contained in the proposed amendment.
10. On January 24th, the Defendant as Purchaser agreed to the amendment, subject to a right to have the amendment approved by counsel by January 26th at 7:00 p.m. It appears that the Defendant, after consultation with her lawyer (Cyril Randall) decided that the extended possession was not appropriate. The final amendment resulted in a change of the date of closing to February 27th, with a \$500.00 credit: see letter dated February 12, 2004, from Stephen Piggot to Cyril Randall.

The Closing on February 27, 2004

11. In his evidence, Mr. Brown said that on February 27 Ms. Broom and her agent, Dawn Fox, showed up at the Lakeview Road property some time around noon. Ms. Broom stayed in her car at the street. Mr. Fox came up onto the property, and entered the house. Mr. Brown asked him whether he (Mr. Brown) could leave with his truck (which was full of personal property to be moved) and then return later “and get the last load”. He says that Mr. Fox said that he saw no problem with Mr. Brown leaving stuff in the garage, because they wanted to inspect the house and not the garage. However, Mr. Brown stated that Mr. Fox said he would speak to Ms. Broom “and be back”. Mr. Brown says he watched Mr. Fox go down to the street and

speak to Ms. Broom. He did not hear what was said, but saw Ms. Broom waiving her hands in agitation. Mr. Fox and Ms. Broom then drove off, with neither answering Mr. Brown's question about whether he could leave things in the garage.

12. Mr. Brown then went back to moving materials into his truck. He put a few more things in the garage, and then left with the truck.
13. Mr. Brown stated that he went first to his brother's place to await word that the Lakeview Road property had been inspected and the deal closed. Not hearing anything from anyone, he decided to proceed to the house in Minasville which he had purchased with a closing date of February 27th.
14. Mr. Brown arrived at the Minasville property, but before he could unload his truck, his real estate agent (Ms. Nicholle) arrived to tell him that the Lakeview Road property transaction had not closed, so that he was not able to close his Minasville purchase either.
15. Mr. Fox's and Ms. Bloom's evidence was slightly different.
16. Their evidence was that they met at the Lakeview Road property about 1:00 p.m. to find the Claimant's truck still there. Mr. Fox went into the house. He says that the house was mostly empty. His principle concern was a waterbed, that was in a bedroom. It was in the process of being drained. He advised Ms. Broom (who was waiting in her car on the street) not to close prior to the bed's removal, since problems with leaks and floods could develop prior to its removal.
17. Mr. Fox indicated that with respect to the garage, he noted that it was full of material that would require a couple of hours for a couple of men to clear. The yard was also full of more debris and material than he would have found acceptable if he were buying the house himself. It would also appear that Mr. Brown did ask him about using the garage to store his property for a short period, but he told Mr. Brown that he could not speak for his client on that point.
18. Ms. Broom did not see the house or step on the property. She relied on Mr. Fox.
19. Ms. Broom's and Mr. Fox's evidence was that since the property was not vacant and hence not ready for inspection, they decided to wait for the completion of Mr. Brown's move. They left the property. They went to a house a few blocks away where the Defendant was staying. Ms. Broom says that she was awaiting word from either her lawyer or Mr. Brown's agent that the move had been completed.
20. No word ever came.
21. About an hour after their initial visit, Mr. Fox drove by the property. He did not go onto it. He said the U-Haul truck was still on the property and concluded that the move had not been completed. He returned to report his observations to Ms. Broom.
22. Mr. Fox eventually had to leave to attend another meeting. He drove by the Lakeview Road property at approximately 3:45 p.m. and his evidence was that the truck was still on the property.

23. Ms. Broom remained at home by her phone, awaiting a call that the property had been vacated. The call never came. She consulted with her lawyer, and elected to rescind the agreement on the ground that vacant possession had not been delivered on February 27th.
24. In response, the Claimants drafted a letter dated March 3, 2004, apologizing for
“not being able to be completely out of the property at 20 Lower Sackville Road in Lake Charlotte, by 1:00 p.m. on Friday, February 27 as requested. Our lawyer and our real estate agent had made it clear to us that we had to be out of the house by noon on Friday in order that you could do your pre-closing inspection along with your agent. We knew that we had to be moved out by then and we fully intended to be completely out as we needed to buy our new house on that same day.”

The Issues

25. On this evidence several issues arise, as follows:
 - (a) what was the time and date of closing?
 - (b) what is “vacant possession”? and
 - (c) was vacant possession delivered, and if so, when?

Issue 1 - Time and Date of Closing

26. As already noted, the parties originally agreed on December 11, 2003, that the closing was to be March 1, 2004, with “vacant possession by noon”.
27. The date of closing was subsequently changed to February 27, 2004.
28. The question is whether the change in the date of closing changed or removed the condition that the closing take place at noon.
29. The Claimant submitted that the change of date removed the condition regarding the time of delivery. The Defendant submitted that it did not.
30. On balance, I am convinced on the evidence that the change in date did not change the time set for closing.
31. I come to this conclusion for a number of reasons.
32. First, as I understand the law, a vendor who agrees to deliver vacant possession on a certain date fulfills that condition if he delivers vacant possession “at any time before that day actually expires” De Castri, *The Law of Vendor and Purchase (2005 edition, looseleaf)* at p. 13-4. Accordingly, the requirement in the original Agreement that vacant possession be delivered by noon represented a material change to the obligations that would otherwise have normally existed upon a vendor where an agreement specifies only a date for closing. The original Agreement of Purchase and Sale in effect created two terms or conditions regarding the time of closing:

- (a) it had to occur on a specific date; and
 - (b) it had to occur by noon on that date.
21. In my opinion, an agreement to amend one of those terms (that is, by changing the date from March 1st to February 27th) is not sufficient to change the other term, at least without an express or implied agreement to do so.
22. This conclusion is strengthened by the conduct of the parties, which suggests that they themselves understood that the closing would occur at noon (or at least within a reasonably short period of time thereafter).
23. For example, the Defendant, Ms. Broom, according to her evidence showed up to perform the closing inspection at 1:00 p.m. Mr. Brown's evidence, which was that he was almost finished his move by that time, supports a conclusion that he, himself, understood that he was obligated to be off the property by noon. Indeed, in the letter that he and his wife drafted on March 3, 2004, as set out above, he admitted that he knew that "we had to be out of the house by noon on Friday in order that you could do your pre-closing inspection along with your agent".

Issue 2 - What is Vacant Possession?

24. Vacant possession has been defined to mean "not only the ejection of tenants and trespassers, but also, subject to the rule *de minimus*, the removal of goods:" 34 Hals, 3d, p. 259, cited in *Burke v. Campbell* (1978) 20 O.R. 2nd, 300 H.C.J. A vendor who either abandons significant debris on the property; or who leaves his personal property with the intention of returning at some later date to remove it, does not give vacant possession: *Cumberland Consolidated Holdings v. Ireland* [1946] 1 K.B. 264 (C.A.) at pp. 270-71.
25. In the first case, the vendor is either attempting to use the property as a dump for his garbage, or is interfering with the purchaser's own use of the property. In either event such use is inconsistent with the vendor's obligation to give vacant possession to the purchaser. In the second case, the vendor is using the property as a storage facility, a use which is, again, inconsistent with his obligation to give vacant possession to the purchase: *Cumberland Consolidated, ibid.*
26. In short, a vendor who agrees to give vacant possession on a property on a certain date must in ordinary case leave the property:
- (a) free and empty of personal chattels over which he or she intends to exercise any ownership interest; and
 - (b) free and clear of any personal chattels and debris which he or she intends to abandon.

Issue 3 - Was Vacant Possession Delivered, and if so, When?

27. Based on the evidence presented at the Hearing, and based on my understanding of the term "vacant possession", I am satisfied that the Claimant did not provide vacant possession of the property at any point in time on February 27, 2004; and that indeed, the earliest time they delivered vacant possession, if at all, was some time on Sunday, February 29th.
28. First, it was clear from the evidence of Mr. Brown himself that even if the house was empty by some time in the early or late afternoon of February 27th, the garage was still full of material. He admitted that the garage was full of material, and indeed it was that fact that caused him to ask Mr. Fox for permission to so use the garage. Mr. Brown did not give any evidence as to when, if ever, he returned to empty the garage.
29. Mr. Debaie, a contractor who had been hired by Ms. Broom, gave evidence that he attended the house on Sunday, February 29th. He had earlier been asked to do so by Ms. Broom, because she was considering some renovations to the property. Her evidence was that she forgot to tell Mr. Debaie that the closing had not gone through, which lead to him showing up on the Sunday.
30. His evidence was that he found Mr. Brown with another man in the garage loading a truck. He helped them load a storm window.
31. Mr. Brown gave evidence to the effect that this meeting took place on Friday, February 27th rather than the 29th. On this point, I accept Mr. Debaie's evidence over that of Mr. Brown's. Mr. Debaie struck me as an independent witness who gave his evidence in a straightforward fashion.
32. As well, Mr. Debaie's evidence was that Mr. Brown was emptying the garage at the time of his visit. If the visit had taken place on February 27th, and if the garage was being emptied, then there would have been no reason for Mr. Brown to ask for permission to use the garage to store property.
33. Finally, there was the evidence of a neighbour, Myrtle Homans. Her evidence was that she saw a U-Haul moving truck on the property on Saturday, February 28th, which supports the conclusion that there was still property of Mr. and Mrs. Brown's at the Lakeview Road property after the 27th; which in turn supports a finding that the meeting between Mr. Brown and Mr. Debaie took place on February 29th.
34. In my opinion, the occupation by Mr. Brown of the garage was more than *de minumous*. Something that would have required a couple of men a couple of hours to empty does not bespeak a minimal occupation of the garage. Accordingly, I conclude that the Claimants did not deliver vacant possession within the meaning of the law at any time on February 27th, because they continued to use and occupy the garage until at least February 29th.
35. A vendor's breach of the obligation to deliver vacant possession is material, and does entitle the purchaser to rescind the agreement: *De Castri, The Law of Vendor and Purchaser, supra*, p. 13 - 4.
36. I accordingly dismiss the Claimant's claim.

The Counterclaim

37. Having dismissed the Claimant's claim, I now turn to the Defendant's counterclaim.
38. In my opinion, the Defendant did not act in a reasonable manner to mitigate the damages flowing from the Claimant's breach of their obligation to deliver vacant possession on February 27, 2004. The Defendant could have mitigated any loss associated with the breach by agreeing to proceed with the transaction. The Claimants were certainly willing to do so, as indicated in their letter of March 3, 2004. On the evidence it was unreasonable for Ms. Broom to have refused to go ahead with the purchase on the sole ground (as she said in evidence) that she was not happy with the Claimant's continual changing of the Agreement of Purchase and Sale.
39. I, accordingly, dismiss Ms. Broom's Counterclaim, on the ground that in acting as she did, she failed to mitigate her losses in a reasonable way.

Dated at Halifax
this day of August, 2005

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ADJUDICATOR
W. Augustus Richardson

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Court File
Claimant(s)
Defendant(s)