IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as; Schaffhauser v. Alcorn, 2007 NSSM 14

2007 Claim No. 276679
Date: 20070507

BETWEEN:

Name: **Martin Schaffhauser & Krista Haney** **Claimant**

- and -

Name: **James Alexander Alcorn & Wendy Crawford** **Defendants**

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on May 8, 2007. This decision replaces the previously distributed decision.

Appearances:
Claimant: Self Represented
Defendants: Self Represented

O R D E R

[1] This matter came before the Small Claims Court in Halifax on March 13, 2007. It is a claim for the cost of a septic field installed by the Claimants at the property they purchased from the Defendants. The claim amount of $15,853.98 was amended at the hearing to account for a payment of $11,058.00, which had been made subsequent to the filing of the Notice of Claim. The amended claim amount was $4,795.98, being the difference between $15,853.98 and $11,058.00.

[2] Neither of the parties were represented at the hearing. Wendy Crawford was not present and I was advised by Mr. Alcorn that she had notice of the hearing and that she had indicated to him to deal with it on her behalf. At the hearing I indicated that I was

prepared to proceed but requested the Claimants to provide me with some proof that Ms. Crawford had notice of the hearing . Subsequently I received a copy of a letter dated March 1, 2007, from Kent Rogers, solicitor for Jamie Alcorn and Wendy Crawford, to Walter Thompson, solicitor for Martin Schaffhauser and Krista Haney, advising that he had endorsed acceptance on behalf of both Mr. Alcorn and Ms. Crawford. Based on this I am satisfied that Ms. Crawford had notice of the hearing.

[3] As noted, this claim arises from a property transaction whereby the Defendants sold a property at 553 Brookside Road to the Claimants. The closing took place on September 18, 2006. One of the terms of the agreement of purchase and sale was as follows:

> *The Seller will carry out all necessary upgrades/repairs to the septic system prior to closing. All work will be carried out by individuals/ companies that have been approved for such work by the NS Department of the Environment. All work shall meet and have the approval of the same department. The Seller will provide all documentation to the Buyer, and all/any warranties shall be to the Buyer. All work shall be at the expense of the Seller.*

[4] The Sellers were not in a position to arrange for this work to be done themselves so it was agreed that monies would be held back at the time of closing to cover the cost of the new septic system and engineering work. An estimate was obtained by Mr. Alcorn from Alvin MacDonald Trucking & Excavating Limited in the amount of $17,000.00 plus taxes. As well, Mr. Alcorn obtained an estimate from Mac Williams Engineering in respect of the engineering and plans that would be required. That estimate was for $1,750.00, plus HST and Department of Environment application fee of $53.25. These quotes were apparently used in agreeing on a holdback amount of $23,000.00.

[5] This holdback amount was confirmed in a letter of September 19, 2006, from Walter Thompson, lawyer for the purchasers (Claimants herein), to Kent Rogers, lawyer for the vendors (Defendants herein). In that letter Mr. Thompson states:

> *I confirm my direction to you to hold back the sum of $23,000.00 for the replacement of the septic system. I checked with MacDonald's excavating. They advised that they cannot give a firm price until they get the plans, which I guess are quite detailed, from the engineering firm.* ***I have asked my clients to deal with the engineers and MacDonald's directly****.* [Emphasis Supplied]

[6] I would also refer to a letter dated September 15, 2006, from Mr. Rogers to Mr. Thompson in which in a "P.S." he states:

> *P.S. The excavator is Alvin MacDonald, 65 Brookside Road, Hatchett Lake, NS., Phone 852-2799 and fax 852-5247.*

[7] Following the closing it appears that Mac Williams Engineering did carry out its work and was paid directly from Mr. Roger's trust account without incident or complaint. Based on the plans prepared by MacWilliams, Alvin MacDonald proceeded with the work which was done for a complete price of $15,853.98, including HST. This invoice from Alvin MacDonald dated January 3, 2007, was sent by the Claimants' lawyer to the Defendants' lawyer to release the funds. At that point it became apparent to the Claimants that Mr. Alcorn was contesting the payment of this amount on the basis of his contention that he could of had the job done cheaper.

[8] At the hearing an estimate from a company called Laurdon Contracting Limited was tendered which showed a price to install of $9,700.00, plus HST, which is $11,058.00. No one from Laurdon Construction testified. This is the amount that Mr. Alcorn authorized Kent Rogers to release and which, on the evidence, has now been paid to the account of Alvin MacDonald Contracting.

[9] Mr. Alcorn further contended at the hearing that as the original agreement stated that it was the sellers who were to have the septic installed, it was he, as seller, who was to engage the contractor to do the septic work. He stated that the engineer was supposed to

contact him and that until he received the plans he could not get quotes from other installers.

Analysis

[10] The basic issue here is who, as between the respective parties, was to handle the dealing with the contractor in installing the septic system. A further, or perhaps sub-issue, is whether or not it was a contractual term that further quotes beyond that from Alvin MacDonald were to be obtained.

[11] Before analyzing the evidence I wish to make a comment about the post-hearing material that was submitted. This included copies of letters of September, 2006, from Mr. Rogers to Mr. Thompson. I have no problem in accepting these documents as they were prepared contemporaneous to the closing in question. However, there were comments in the emails from both Mr. Rogers (March 14, 2007), and a response to that from Mr. Thompson (March 23, 2007) which purport to indicate what the respective solicitors understood the agreement was at the time of the closing. I doubt whether such comments as to a party's solicitor's subjective belief of the intention or meaning of an agreement would or should be admissible, even under the more relaxed rules of admissibility of this Court. Even if I am wrong on that, given that they were not made in open court (and subject to potential cross-examination), I think it appropriate that I not consider those comments and I shall not.

[12] As stated above, the issue really is what were the terms of the contract with respect to the installation of a new septic system. The most significant evidence of that is contained in the letter of September 19, 2006, from Mr. Thompson to Mr. Rogers which is quoted above. For convenience, I repeat it here:

> *I confirm my direction to you to hold back the sum of $23,000.00 for the replacement of the septic system. I checked with MacDonald's excavating. They advised that they cannot give a firm price until they get the plans, which I guess are quite*

> *detailed, from the engineering firm.* ***I have asked my clients to deal with the engineers and MacDonald's directly****.* [Emphasis Supplied]

[13] This letter went to Mr. Rogers and that has been confirmed.

[14] In law, Mr. Rogers is the agent for his principals, the vendors, and Defendants herein. As a general proposition, the law of agency holds that the principal is deemed to have the knowledge of his or her agent. Accordingly, the law treats Mr. Alcorn and Ms. Crawford as if they had directly received the latter of September 19th.

[15] On any objective view the terms of this letter make it clear that the purchasers were going to deal directly with and hire the engineers and MacDonald and the costs for this were to the account of Mr. Alcorn and Ms. Crawford to be paid from the holdback monies. I would infer from the earlier letter from Mr. Rogers that includes Mr. MacDonald's phone number and fax number to be a request or a suggestion from Mr. Rogers on behalf of his clients, to Mr. Thompson on behalf of his clients, that the purchasers proceed to have the work done, and, further, to have it done by Mr. Alvin MacDonald.

[16] I might add that it would have made perfect sense to have the purchasers deal with the engineers and excavating company since at that point - post closing - they were the owners and in possession of the property. The original terms of the agreement which Mr. Alcorn seeks to rely on as requiring the seller to carry out the septic work contemplated, indeed, explicitly stated, that the septic work would be done **prior** to the closing. This also made perfect sense at that time, but as noted above that did not happen since the sellers were not in a position financially to have the work done. The revised agreement which was, as I have found, confirmed in the lawyers letters was to have a holdback and have the purchasers handle the agreed-to septic upgrades.

[17] Even if I was prepared to ignore the fact that Mr. Alcorn and Ms. Crawford are deemed to have knowledge of their agent at the time of the closing, I would then question what active steps did Mr. Alcorn take to have the septic system work done. I recognize that in his evidence he stated that he was following up with Mr. Williams and that he could not get quotes until he had the plans. Apart from his bald statement of this, there is nothing to verify what steps he actually took during an approximate three month period of October - December inclusive. The evidence does make it clear that Mr. Williams was paid directly from Mr. Rogers' trust account, which is evidence that Mr. Alcorn authorized this release of funds and knew therefore that Mr. Williams had completed his work. What further steps Mr. Alcorn took to engage himself in the process I am left doubtful of.

[18] Further, Mr. Alcorn's position assumes that there was some obligation on the party dealing with the contractor (whether it was to be the purchasers or the vendors), to obtain further quotes. The letters however, between the solicitors at the time of the closing, lead to the conclusion that it was to be MacDonald's who did the excavating work. The hold back amount was based on the estimate from MacDonald's and clearly Mr. Alcorn agreed to the hold back. In response to this issue, he now states at the hearing that he only agreed to the MacDonald's estimate (which he obtained) to be used to calculate a hold back but not for the ultimate work to be done. While that might have been his thinking at the time, I have no evidence to show that such was communicated at any time to the purchasers. In fact, the communications, as I have already indicated above, were to the contrary. That is, the communications in the lawyers' letters confirm that MacDonald was to be the excavator to do the work.

[19] For the above reasons I find in favour of the Claimant and allow the claim in the amended amount together with costs of $160.00.

Order

[20] IT IS HEREBY ORDERED that the Defendants pay to the Claimants the following:

Debt:	$ 4,795.98
Costs:	160.00
Total:	$ 4,955.98

DATED at Halifax, Nova Scotia, this 7th day of May, 2007.

Michael J. O'Hara
Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)