C.A. No. 100157

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Housing) v. Langille, 1994 NSCA 173
Freeman, Hart, and Jones, JJ.A.

BETWEEN:

THE MINISTER OF HOUSING Appellant - and - RODERICK LANGILLE AND EVA ROBERTS Respondents	Alex M. Cameron for the Appellant Bradford G. Yuill for the Respondents Appeal Heard: September 15, 1994 Judgment Delivered: September 22, 1994

THE COURT: The appeal is dismissed and the cross appeal is allowed with costs, increasing general damages from $3,000.00 to $6,000.00 as per reasons for judgment of Freeman, J.A.; Hart and Jones, JJ.A. concurring.

FREEMAN, J.A.:

This appeal is from a Supreme Court judgment holding the Minister of Housing responsible for damages for repairs to a house with major deficiencies purchased by the respondents in reliance on their understanding that it was to be inspected by the department for the mutual benefit of the parties.

The respondents, Roderick Langille and Eva Roberts, since married, successfully applied in 1988 to the Nova Scotia Department of Housing for a mortgage under the Family Modest Housing Program, a scheme intended to help young couples with low incomes buy their first home.

Mr. Langille, then 25, was seasonally employed on road construction by the Department of Transportation with an annual income of less than $20,000. He had completed grade 11 in high school and a vocational course as an equipment operator.

He pointed out to the Department of Housing representative, David Chadwick, that the house they intended to buy was described in the real estate "cut" as built upon a concrete slab. He asked if it would qualify.

Mr. Langille testified that Mr. Chadwick told him that it would be acceptable if properly built; the department would send its own inspectors to inspect the home "for the mutual interest of both parties." He said Mr. Chadwick realized that he was not in a financial position to buy a "fixer-upper", a house requiring extensive repairs.

Mr. Chadwick, who was responsible for 100 to 200 files, said he had no specific recollection of his interviews with Mr. Langille but doubted he would have suggested the inspection was for the mutual interest of both parties.

The trial judge, Justice Scanlan, made the following finding:

> "I am satisfied that Mr. Langille was to a large extent relying on the Nova Scotia Department of Housing. He

> relied on the expertise they had as regards their inspectors and the extensive knowledge they would have with regard to building inspection. I am satisfied that Mr. Chadwick did in fact indicate words more or less similar to the understanding that Mr. Langille expressed in court. Mr. Chadwick did indicate that the property would be inspected so as to protect the mutual interest of both parties."

Mr. Langille made an offer for the property "subject to mortgage approval by the Department of Housing" and "conditional upon inspection and appraisal by the Department of Housing." The offer was accepted, the mortgage was approved, and the house was purchased. The house was not built on a slab but over open ground with a crawl space beneath it, supported by concrete along its perimeters. Apparently the department's inspectors assumed the foundation was a frost wall, which is required under the National Building Code to rest on footings four feet underground, below the level reached by frost. The inspectors required Mr. Langille to place a vapour barrier in the crawl space and cover it with sand or washed gravel. Funds for doing so were included in the mortgage loan.

The first winter Mr. Langille and Ms. Roberts resided in the house the doors and windows began to stick or pop open and cracks appeared in the walls. It became apparent that instead of frost walls the foundation rested on footings at ground level, which may have been the "slab" referred to in the real estate cut. With freezing and thawing the ground heaved or receded under the house, throwing it out of shape. The inspections, on which Mr. Langille and Ms. Roberts had relied in purchasing the house, had failed to disclose this major deficiency, which resulted from non-compliance with building code standards.

The trial judge held:

> Upon Mr. Chadwick making the representations to Mr. Langille the department owed Mr. Langille a duty of care. The inspections that were carried out could have and should have revealed the defects in the footings and as such there is a breach in the duty owed to the Langilles. The Department was negligent in holding out that they had or would carry out a proper inspection

> so as to protect the interest of Mr. Langille. The inspection as I noted, while adequate for normal departmental usage, was substandard for the purpose of protecting the Langilles' interest. The Langilles relied on the negligent misrepresentation by the department and have suffered substantial losses as a result of that reliance.

Mr. Langille brought the problem to the attention of the department in a timely manner but no action was taken. He carried out some repairs, to a value of $1,370, and then, both from frustration and lack of funds, stopped making payments on his mortgage. The department brought a foreclosure action and the respondents counterclaimed for damages for negligent misrepresentation. A preliminary order of Justice Hall in 1991 requires that mortgage payments be made but held in trust, and Justice Scanlan's judgment relieved the respondents of mortgage interest during the period since that order.

Justice Scanlan applied the principles of negligent misrepresentation set out in **Hedley Byrne & Co. v. Heller and Partners Ltd.,** [1963] 2 All E.R. 575; [1964] A.C.465 (H.L.). He found the respondents liable for their arrears on the mortgage, stayed the foreclosure action and held the department liable for damages, which were to be set off against the arrears after they were assessed at a later hearing. Special damages totalling about $24,000 were allowed for the necessary repairs and incidentals, including the cost of moving the house while a proper foundation was prepared, together with general damages of $3,000. Against this was to be set off mortgage and tax arrears of about $12,500.

The appellant Minister of Housing has appealed from the liability finding, arguing that the department was protected by a disclaimer and that the respondents had been remiss in not having their own lawyer for the mortgage transaction, as they had been advised to do. A lawyer might have advised them not to rely on the department's inspections because of the disclaimer in the mortgage application form.

That disclaimer, which appears aimed at borrowers building their homes rather than purchasers of existing homes, states:

> "The Nova Scotia Department of Housing advises all contractual arrangements will be between yourself and the contractor of your choice. The Department of Housing does not give any undertaking or warranty as to the acceptability of materials or quality of workmanship. Inspections may be carried out to ensure the work performed has been completed."

Justice Scanlan stated:

> " . . . even with the rather vague disclaimer, Mr. Chadwick went on to indicate that there would be an inspection done for the mutual interest of both parties and as such the disclaimer, even if it were held to be enforceable I find that it is on the facts of this case overridden by the representations made by Mr. Chadwick."

I agree. The respondents had no legal duty to engage counsel for this transaction, and it is speculative to consider that legal advice would have gone beyond making the offer to purchase subject to the department's inspection, which was done. A lawyer could not have controlled the quality of the inspection.

A careful review of the evidence, exhibits, and transcripts, makes it clear that the findings of fact made by Justice Scanlan in his thorough judgment, which is reported as **N.S. (Minister of Housing) v. Langille and Roberts** (1994), 125 N.S.R. (2d) 272, had a proper evidentiary foundation. The Langilles were entitled to rely on representations made on behalf of the department, as found by Justice Scanlan, particularly so because they were members of a low income group identified by the department for special assistance. We have not been persuaded that the trial judge was in error, either with respect to the facts or the law he applied to those facts, in finding the appellant liable. The appeal is dismissed with costs.

The respondents cross-appealed from the assessment of damages with respect to pre-judgment interest, the amount of the general damages award, and the level of the award of costs. Pre-judgment interest on the $1,370 spent by the Langilles on repairs was awarded from the date of the counterclaim. It should have been

awarded from the date the cause of action arose; the first ground of the cross appeal is allowed and the judgment is varied accordingly.

Costs are discretionary, and the trial judge exercised no wrong principle in awarding them on Scale 4 under Tariff A, an increased scale, on an "amount involved" fixed at the level of damages awarded on the counterclaim. The cross appeal is dismissed with respect to this issue. The Langilles argue that the trial judge was wrong in holding that the test for general damages is: "What do cases of similar nature award for general damages?" He awarded the general damages allowed in **Stoddard v. Atwill Enterprises Ltd.** 105 N.S.R. (2d) 315 which he considered to be a similar case.

Negligent misrepresentation can give rise to damages in either tort or contract, although the present context is contractual. In **V. K. Mason Construction v. Bank of Nova Scotia**, [1985] 1 S.C.R. 271, which dealt with negligent misrepresentation, Wilson J. stated at p. 285:

> "While I tend to the view that there is a conceptual difference between damages in contract and in tort, I believe that in many instances the same quantum will be arrived at, albeit by somewhat different routes."

In the **Stoddard** case Justice Saunders stated:

> . . . I am satisfied that Mr. and Mrs. Stoddard have suffered mental distress by virtue of the defendant's negligence and breach of contract. This anxiety was first occasioned by continuous leakage from the time they moved in and was aggravated when their experts disclosed how dangerous their house was.
>
> These damages are compensable. I need not repeat my analysis in the case of **Gourlay v. Osmond** (1991), 104 N.S.R. (2d) 155; 283 A.P.R. 155 (T.D.). Damages in this case for mental distress lie both in negligence and breach of contract. While the Stoddards' stress could not be compared to the acute depression suffered by Mrs. Eileen Gourlay (which necessitated medication and professional therapy) it was real and continuous nevertheless. I award the plaintiffs $3,000 nonpecuniary damages for mental suffering.

The Langilles' situation must be considered on its own merits. Justice Scanlan found the evidence was not specific enough to support an award for special damages for excessive heating costs, but it is nevertheless clear the deficiencies in the building were a source of expense, discomfort, inconvenience and distress. The Langilles innocently purchased what in his words they considered "the future for them and their family. They thought it was a good home that fulfilled their dreams." Their lives have

been disrupted ever since. Lack of finances has limited their options and the nightmare of financial disaster has hovered over them for six years. We consider that the award of $3,000 general damages is inordinately low and does not represent full compensation for their loss. The cross appeal is allowed with respect to general damages, which are increased from $3,000 to $6,000.

Taking all circumstances into account, I would fix the Langille's costs on the appeal and cross appeal at $3,000.

J.A.

Concurred in:

Hart, J.A.

Jones, J.A.