IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Dupere v. Evans, 2006 NSSC 4

Date: 20060109
Docket: SH 244158
Registry: Halifax

Between:

Arthur Dupere and Yvelle Dupere

Appellants

v.

Gregory Evans and Joey Evans

Respondents

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: June 28, 2005, in Halifax, Nova Scotia

Counsel: Cory J. Withrow, Esq., for the Appellants
Jason McQuaid, Esq., for the Respondents

By the Court:

[1] This is an appeal from a decision of an adjudicator of the Small Claims Court denying the appellants' claim for the return of a deposit they paid to the respondents in relation to the purchase of a house. The appellants alleged negligent and fraudulent misrepresentation, breach of collateral warranty and a change in the state of repair.

Background

[2] The adjudicator found that the respondents had completed a Property Condition Disclosure Statement in which they indicated (under the heading "Heating System") "oil tank in basement replaced by outside tank over 20 years ago. Outside tank replaced again about 6 years ago. No major leaks or spills." In response to the question of whether there were underground oil tanks they answered "No", as they did to the question "Are you aware of any environmental problems or soil contamination of any kind on the property or in this immediate area such as toxic waste, gasoline, fuel tanks, etc.?" The respondents had informed their real estate agent of two incidents: "(1) the one involved the oil tank in the basement that had a small leak and was replaced; and (2) the oil tank under the front steps was replaced when there was a smell of oil in the area, following a delivery of oil by the supplier." This proposed sale did not take place (paras. 6(2)-(5)).

[3] In September 2003 the respondents re-listed the property for sale. In the second Disclosure Statement, the entry under "Heating System" stated only "New wood boiler in '99." According to the adjudicator, "[t]here was no reference to the

oil tank in the basement being replaced by [an] outside tank and no major leaks or spills as in the previous PCDS completed by the Defendants" (para. 6(6)).

[4] In October 2003 the respondents hired Jacques Whitford Ltd. (Whitford) to do an environmental risk assessment of the property. The adjudicator found that the firm "was told by the Defendants there was one spill in [the] basement plus a smell noticed by the Defendant Joey Evans coming from the tank located under the front steps." The report was completed on February 25, 2004.

[5] The appellants contacted Whitford and "received assurances that there were no environmental problems" (para. 6(7)-(11)). On February 27, 2004, the appellants made an offer to purchase the property, which was rejected, although the parties eventually came to an agreement. The adjudicator found that the appellants received an assurance from Whitford on March 16, 2004, that the property was safe to inhabit. On the same day, the parties entered into an Agreement of Purchase and Sale (paras. 6(12)-(14)). Clause 4(a) of the Agreement stated:

> 4. This agreement is subject to the following terms and conditions.
> (a) vendor is to provide to the buyer when available a certificate from Jacques Whitford stating the Environmental Condition of the property. [decision, para. 6(14).]

[6] The parties agreed to increase the deposit from $1000.00 to $5000.00. The closing was originally scheduled for May 25, 2004, but they agreed to move it up to April 13, 2004. Prior to the closing date, the respondents allowed the appellants access to the property to paint the interior of the home (paras. 6(15)-(18)).

[7] In the meantime, Jacques Whitford Ltd. assessed the property and submitted a “Record of Site Conditions for Domestic Fuel Oil Spills” to the Nova Scotia Department of Environment and Labour. On March 25, 2004 the Department recommended groundwater testing of the site. Test wells were placed on the property between April 1 and April 3, 2004.

[8] On April 14, 2004, Whitford informed the respondents that one well tested at 19 mg per litre of hydrocarbons, just short of the generic threshold of 20 mg per litre. On April 16, 2004, Whitford wrote to the respondents to inform them that “the site had to be accepted by the Department of Environment”, which required further tests (paras. 6(21-22)). The Department responded to the test results on April 28, 2004 in a letter to Whitford stating that if the groundwater testing in two more seasons met the criteria of less than 20 mg of hydrocarbons, the property

would be eligible for a Record of Site Condition. Otherwise, further investigation would be necessary.

[9] The closing did not occur on April 13, 2004. The appellants informed the respondents that they would not complete the purchase on May 17, 2004. According to a letter from the appellants' solicitor to the respondents' solicitor, which was before the adjudicator (Exhibit C-6):

> Our clients take the position that the property is fundamentally different from that which they contracted to purchase. The groundwater beneath the property has, since the execution of the purchase and sale agreement on March 18th, 2004, been determined to contain the hydrocarbons identified in subsequent amendments to the Phase II Environmental Site Assessment Program undertaken on the property by Jacques Whitford Environment Limited. The purchasers are not prepared to extend the closing pending the outcome of the "... minimum of two additional groundwater monitoring events at the site ...." indicated in the correspondence of Jacques Whitford Environment Limited to your clients dated April 14th, 2004.
>
> * * *
>
> It is our clients further position that they executed the purchase and sale agreement in reliance upon the representation of the vendor that there had been only a minor spillage of oil in the basement of the home many years before in the then location of the oil tank....

[10] The respondents retained the $5000.00 deposit.

The Adjudicator's Decision

[11] The appellants contended that the respondents misrepresented the condition of the property with respect to the extent of oil contamination and (more specifically) the number of oil spills that had occurred. Specifically, they claimed that the evidence showed that there had been two spills, not one, and that the respondents knew this.

[12] As to the allegation of fraudulent misrepresentation, the adjudicator said:

> I have not considered the vehemence of the Defendants' convictions, in particular, Gregory Evans; rather, I have considered that as only one factor in determining their credibility. I considered from the Defendants' evidence, the fact that the Defendants kept the Claimants informed about the report even prior to any conclusion being reached by the environmental specialists, and the explanation he gave for changing the PCDS. Even the fact that the Defendants allowed the Claimants access to the property prior to closing, goes to showing the absence of dishonesty. Most people involved in real estate including lawyers would recommend this not take place unless [there] was an agreement about the house closing had taken place, however, this apparently did not occur and the Defendants allowed the Claimants access to their property prior to closing, even while environmental testing was being completed. All of this taken together does not point to dishonesty. [para. 10]

[13] The adjudicator went on to deal with negligent misrepresentation. He found that there was a special relationship between the parties, thus meeting the first requirement (para. 12). As to the second requirement – that the representation was "untrue, inaccurate or misleading" – he wrote:

> 16. The Claimants base this misrepresentation on the following:
>
> (1) The first PCDS speaks to more than one leak or spill and the second PCDS, which was provided to the Claimants makes no mention of spills or leaks
>
> In the first PCDS the Defendants answer the following question: "Have there been any problems with fuel leaks from the lines or tank?" with the following answer:
> "Over 20 years ago. Outside tank replaced again about 6 years ago. No major leaks or spills."
> In the second PCDS given to the claimants while the house was listed, the response to this question was "No".
> The Defendants say there never was a leak with respect to the tank placed under the step. The only leak was the "weeping" leak of the tank in the basement and that never was a problem.
>
> 17. The statement provided in the first PCDS is not very clear in that it could mean there were no major leaks when the tank in the basement began "weeping" oil, or it could mean that there was no major leaks in the basement tank, or in the tank that was replaced under the front steps some six years ago.

18. The Defendants contended that any leaks that they were aware of happened some 25 or so years ago. Mrs. Evans said she could smell oil fumes some six years ago. Mr. Evans said he didn't smell the oil, he just decided it was about time to replace the tank under the steps. He did not see or find any spills. If Mr. Evans did not smell any oil fumes emanating under that steps that night, it is highly unlikely he would be able determine on his own that oil leaked and/or there was a spill from the tank. Mr. Evans, prior to his retirement from the government, was apparently a commercial lawyer, or at least he worked in the civil law area with the Department of Justice. While he was involved in law and an avid fly fisherman, there is no evidence or suggestion he would recognize a leak or a spill around the outside tank unless it was obvious as in the basement where he could see and smell the leak.

19. Other than having one PCDS make one comment and having a subsequent PCDS omitting to say the same thing, what other evidence does the Claimant have, to prove, the Defendant knew there was a leak or spill around the oil tank under the front steps. The answer is the Claimants rely on the Defendants' own words. The first being the letter to Kelly Lynn Greenwood on September 19, 2003. However, a careful reading of that letter does not confirm that there was a leak from the tank under the steps. In the letter, the Claimant Mr. Evans states in part:

> *"With respect to the second tank replacement, I'm not sure the triggering event was anything more than a few drops left from a sloppy delivery. In any event, I dug out the soil under and beside the tank and removed it, not because I considered it contaminated, but because I wanted room to improve the replacement tank.*
> *With respect to the second tank replacement, I confirm my belief that no material contaminated by oil remained on the property after the tank replacement was fully completed. Frankly, I doubt if there was any contamination before I dug it out and certainly not after."* [Italics in original.]

[14] Ms. Greenwood is a lawyer who was acting for Tammy Gamble, a prospective purchaser, at the time. The adjudicator held that the Greenwood letter did not establish there was a leak or oil spill under the tank under the step in the previous six years. He found that "[t]here may have been a sloppy delivery by the oil company or, as indicated during the trial, it could have been a smell of that emanated from the intake pipe which Mr. Evans happened to smell. There is no evidence in this letter or from Mr. Evans' evidence that he saw or smelled any oil at that time" (para. 20).

[15] The adjudicator also discussed a letter of September 19, 2003 directed by Mr. Evans to Ms. Tammy Gamble. Mr. Evans indicated that there were two leaks, one from the basement tank and one from the outside tank:

> I write to provide additional details respecting the two oil leaks that occurred on the property while I have owned it.
>
> With respect to the first leak, I also confirm that any oil that leaked from the tank was contained to the top of the concrete on the basement floor and did not migrate below the floor, for example through a floor drain or any cracks or gaps in the concrete.
>
> With respect to the second leak, I confirm that any and all soil and other material or surfaces contaminated by oil that had escaped from the leaking tank were either removed from the property or properly cleaned and decontaminated before the new tank was installed.
>
> I confirm that I am aware that the purchaser is relying on the assurances contained in this letter and my letter dated September

> 16, 2003, in finalizing her decision to purchase this property and that these assurances shall survive the closing of the sale of the property to the purchaser. [As quoted at para. 21. Emphasis by adjudicator.]

[16] The adjudicator concluded that "this letter would seem to squarely say that there were two leaks", but he observed that this admission must be considered in context with the testimony given by all parties. He went on to discuss a letter to Catherine S. Walker, Q.C., the respondents' solicitor, dated September 16, 2003. In this letter Mr. Evans stated:

> When I purchased the residence in 1978, it had one 200 gallon fuel tank in the basement. Within the first year or two I could smell oil fumes in the area where the tank was located. A careful inspection revealed oil had seeped from the tank onto papers I had stored on the floor around it. I immediately called my oil supplier who installed a magnetic patch on the spot where it was weeping and arranged to replace the tank. The tank was replaced by an outside tank one, under the front steps, ...
>
> Many years later (probably about 15) my wife could smell oil after a fuel delivery. As the fuel oil tank fill pipe and vent are directly beside the driveway where you get out of the car, the tiniest trace is noticeable. I had the tank replaced immediately.... [As quoted at para. 22.]

[17] The adjudicator found that there was only one reference to two leaks, the letter to Ms. Gamble, but he remarked that "the thrust of that letter was to give assurances that the property is not contaminated" (para. 23). He concluded:

> ... There is no clear evidence before me that the Defendant, Mr. Evans, knew the veracity of what he was saying when he said there were two leaks in the September 16, 2003, letter. He never had the ground tested at the time, he never saw oil on the ground and there was no evidence of a hole in the tank that was replaced.
>
> I have some difficulty believing that Mr. Evans knew what he was talking about in the first PCDS and the letter to Ms. Gamble on September 19th, or in regards to what he said to the realtor, Ms. King, with respect to a leak from the tank some fifteen years ago. There is no evidence of a leak in the tank under the stairs except through the mouth of the Defendant who really did not know one way or another. He could have suspected there was a leak because his wife smelled oil after a delivery and he could have suspected the soil he removed when replacing the tank was contaminated, but the simple fact is he did not know one way or the other. [paras. 23-24.]

[18] The adjudicator allowed that the September 19, 2003 letter to a potential buyer, which "confirms there were two leaks", was the most damaging to the respondents (para. 21).

[19] The adjudicator went on to consider the Whitford report. Jacques Whitford Ltd. was advised of the oil spill in the basement and of the replacement of the tank under the front steps. They found no unacceptable level of oil. The adjudicator noted that the testimony of Robert McCullough, who had worked on the assessment, indicated that it would have been difficult for a spill occurring under the front steps to have caused the contamination at the site of the test well where the elevated readings were found. The report did not show that there were two

leaks; as a result, he found, there was no misrepresentation. The respondents had only told the appellants of one leak and this was in conformity with the facts as he found them (paras. 25-27). He summarized:

> The Claimants [contend] that there were two oil spills and the Defendants deny same. Often in cases where there is misrepresentation the Claimants move into the property and they are able to show the defect which is discovered after the move and that the Defendants must have known of the problem as determined by experts or knowledgeable people in the field. In this particular case, the Claimants did not purchase the property and have not proven there is a defect, that is, there was a second oil spill. They rely on the written words of the Defendant, Gregory Evans, and, in fact, the report of Jacques Whitford goes to show there were not two leaks. Therefore, if the Defendants specifically said to the Claimants there was one leak in the basement, then that is true and the second element of both fraudulent and negligent misrepresentation has not been met. That is, the representation that there was one problem with leaks was in fact true, accurate and not false. [para. 28]

[20] The adjudicator also rejected the appellants' argument that there was a change in the state of repair of the property after the Agreement. He stated that the appellants were aware of the environmental analysis by JW and there was "nothing to show the property was different or going to be different than when they could have purchased it and just prior to closing" (para. 32).

Standard of Review

[21] Before this Court can interfere with an adjudicator's decision, there must be a clear error or failure to follow the requirements of natural justice. The appellant must show that the adjudicator misinterpreted documents or other evidence, that there was no evidence to support the conclusion reached, that the adjudicator clearly misapplied the evidence, producing an unjust result or that he failed to apply important legal principles. Only in such instances may I overturn the decision of the adjudicator: see *MacIntyre v. Nichols*, 2004 NSSC 36 (S.C.) at paras. 35-38 and *Desmond v. McKinlay*, 2001 NSCA 24 at para. 5.

[22] I note the following comments by Saunders J. (as he then was) in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.) on the standard of review of a Small Claims Court decision:

> ¶ 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to

> support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration. [Emphasis added.]

[23] This decision involves a consideration of the adjudicator's findings of fact. On this point, the respondents refer to *Davidson v. NSGEU*, 2005 NSCA 51, where the court stated:

> ¶ 61 Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 *per* Iacobucci and Major, JJ. at paras. 10 and 23 to 25.
>
> ¶ 62 The "palpable and overriding error" standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: see *Housen v. Nikolaisen*, *supra*, at paras. 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but "overriding and determinative."

[24] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 the Supreme Court of Canada dealt with the nature of the error that must be made by the trial judge before the Court of Appeal is entitled to intervene and overturn a finding of fact:

¶23 ... [I]t is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion....

¶24 [....] Recent support for deferring to all factual conclusions of the trial judge is found in [*Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114]. McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
> ...
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge.... The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

Positions of the Parties

[25] The appellants state in their Notice of Appeal that the adjudicator erred in law and failed to adhere to the requirements of natural justice by failing to find that the respondents negligently or fraudulently misrepresented the "number of oil spills ... and resulting scope of oil contamination" and in failing to find that they "were entitled, pursuant to clause 11 of the Agreement ... to terminate the Agreement ... on the basis that the property was not fundamentally in the same state of repair as when the Agreement ... was executed." They contend that the evidence demonstrated that they reasonably, and in good faith, concluded that the state of repair was not fundamentally the same as it was when the Agreement was signed. They assert that the question that the adjudicator ought to have addressed was whether this was a change of sufficient material importance to permit them to rescind the Agreement.

[26] The respondents say there was no error in law, and claim that the appellants are actually appealing the adjudicator's findings of fact. They argue that he properly considered all of the evidence in making his findings.

The State of Repair of the Property

[27] At the time of the Agreement of Purchase and Sale, no test wells were on the property. By the date scheduled for closing, there were four test wells and the presence of 19 mg of hydrocarbons had been shown in the groundwater under the driveway, requiring further tests. These two factors, the appellants argue, represented a fundamental change in the state of repair. They say they had "contracted to purchase a property that was certified free from any contaminants, save for those already disclosed by the respondents" and had agreed "to purchase ... property that was not subject to an ongoing [Department of Environment] investigation that required the placement and lengthy presence of four test wells upon the property." The appellants contend that at the time of the Agreement they were aware of a "minor" oil spill in the basement that had occurred "some 27 years prior" (appellants' brief, p. 11). They argue that the discovery of other contamination on the property constituted a change in the state of repair.

[28] The appellants contend that the adjudicator made a mistake in law when he found that "there is nothing to show the property was different or going to be different than when they could have purchased it and just prior to closing" (para. 32). They claim that the evidence established that there was a change in the state of

repair and that he erred by misinterpreting evidence, ignoring evidence, and making a finding that was not supported by the evidence.

[29] The respondents suggest that in order for the property to be in a fundamentally different state of repair, the change – with respect to the level of contamination and the DEL investigation – would have to occur after the date of the Agreement. They claim that for the appellants to succeed, they "must show there was actually some *change* in the property between the point of entering into the ... Agreement and the closing date" (respondents' brief, p. 4, emphasis in original). That is, they must show that new contamination occurred. In fact, the respondents say, the only thing that changed was the appellants' knowledge of the state of repair.

[30] On the question of whether the presence of four test wells on the property constituted a fundamental difference in the state of repair, the respondents argue that it was not the presence of the wells that motivated the appellants to terminate the Agreement, but the level of contamination. They say no evidence regarding the wells was led at the hearing. Additionally, if the wells had triggered the termination, the wells could have been removed from the property.

[31] Finally, the respondents argue that the Agreement does not support the appellants' interpretation. Clause 4, they say, required the Record of Site Condition issued by Jacques Whitford Ltd. at closing; however, it did not require the report to be accepted by the Department.

[32] The respondents argue that the adjudicator made a finding of fact as to whether there was a change in the state of repair, which is not a proper basis of appeal. They maintain that the adjudicator considered all of the evidence, including the documents and the evidence of Ms. King.

[33] In *Coppard Farm Estates Inc. v. Gupta* (1994), 42 R.P.R. (2d) 302 (Ont. C.J.) the Court described the issue as "whether the vendor can convey substantially what the purchasers contracted to get." The Court said:

> In my respectful opinion, the test to be applied in cases of this nature is whether the vendor can convey substantially what the purchaser contracted to get. In this regard, all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchasers' use or enjoyment of the property.
>
> The materiality of the deficiency is to be determined essentially on an objective basis. However, this is not to say that the subjective views of the purchaser are to be ignored. Far from it. There may be instances where a certain purchaser has agreed to buy a piece of

> property for a specific, legitimate and *bona fide* purpose, only to discover that some deficiency in title will render this use impossible. Here, the purchasers' refusal to close is neither arbitrary, capricious nor without real consequence. In this type of case, the court would still be required to look at all of the circumstances but would be entitled, in its overall assessment, to place greater emphasis on the legitimate but frustrated needs of the purchaser.

[34] Clause 11 of the Agreement provides that the buyers would have the right, upon providing notice, to conduct the closing viewing of the property to ensure the property was in the same state of repair as of the date of the agreement (clause 11). The appellants maintain that the post-closing monitoring was a material change affecting their use and enjoyment of the property.

[35] When they inspected the property, prior to making the offer, the buyers were unaware that it would be necessary to have collector wells on the property for three seasons. If they had observed these wells before making an offer to purchase, it is unlikely that they would have made an offer. This was a significant change in the state of repair of the property. The adjudicator held that the buyers had not established a basis to resile from the agreement as “there is nothing to show the property was different or going to be different than when they could have

purchased and just prior to closing" (para. 32). He did not analyze the evidence to determine whether there had been a material change in the state of repair. He failed to address the issue of the additional testing. He failed to address the fact that there were now four wells on the property. He failed to address the fact that there had been no communication of a possible spill outside the basement and simply relied on Mr. McCullough's evidence to conclude that any spill of oil could not have come from a spill under the front steps.

[36] It is apparent the buyers were facing a substantially different property. Assuming that test results from the wells might establish levels of hydrocarbons above the acceptable limits requiring major modification or restoration of the property, it would appear to me that that would be a basis to reject the agreement. The adjudicator dealt with this issue in one sentence. There is insufficient discussion to determine whether the analysis is correct. I cannot accept the respondents' argument that only physical change after the signing of the agreement represents a substantial change in the state of repair. This implies that by keeping the purchaser in the dark, a seller would be permitted to transfer an unacceptable property.

The Alleged Misrepresentation as to the Number of Spills

[37] The appellants contend that the adjudicator erred in finding as a fact that there was no second oil spill and therefore no misrepresentation. They state that they confronted the respondents and asked if there had been any oil spills in addition to the one described in the Whitford report. Mr. Evans denied that there had been another spill. The appellants argue that the evidence showed that there had been another spill, under the front steps, that was never disclosed.

[38] The thrust of the appellants' argument is that the adjudicator's finding on the number of spills does not have a proper factual basis. They submit that for the adjudicator "to find that Mr. Evans, a retired lawyer, was not careful and did not know what he was talking about is ... unreasonable and not [consistent] with the evidence before him, particularly the testimony of Ms. King [real estate agent for a prospective purchaser in September 2003] who testified that Mr. Evans had informed her that a second oil leak had occurred and that he ... had cleaned up the contaminated soil himself prior to the installation of the new oil tank" (appellants' brief, pp. 18-19).

[39] The appellants also point out that the second spill was not disclosed to Jacques Whitford Ltd. as part of the property history for the environmental assessment. They claim that Mr. McCullough admitted in his evidence that the investigation might have been carried out differently had he been informed of a second spill. As such, they contend that the adjudicator improperly placed too much weight on the Whitford report and ignored contradictory evidence. They claim that the adjudicator, "in relying upon the Report to conclude that there was only one oil spill on the Property, and thus no grounds for fraudulent misrepresentation, made an error of law in misinterpreting the evidence and making a conclusion of law that was not based upon the whole of, or a balanced view of the evidence before him" (appellants' brief, p. 20).

[40] The respondents state that the adjudicator's findings on whether there was an oil spill under the front steps are consistent with the Whitford report. The adjudicator accepted the evidence of Mr. McCullough that in order for an oil spill under the front steps to cause the contamination in the driveway, the oil would have had to travel uphill. As such, they claim, he made a factual determination that was supported by the evidence.

[41] I am satisfied that clause 4 of the Agreement cannot support the interpretation suggested by the appellants. It requires the respondents to supply a certificate from Jacques Whitford Ltd. regarding the environmental condition of the property. This is not equivalent to agreeing to purchase the property free from contaminants and free of an ongoing investigation. However, the respondents mistake the issue when they argue that all that was required was the certificate, regardless of the results. Clause 4 suggests that both parties thought, at the time of the Agreement, that the Whitford report would confirm that the property was safe, and that is in fact what the report did represent.

[42] As to negligent or fraudulent misrepresentation, the adjudicator made factual findings which are clearly wrong. I am mindful of the high standard required to override a finding of fact; there would have to be a total misapprehension of the evidence leading to an unjust result. In my view, however, the adjudicator made such an error. He determined that the Whitford report referred to a smell of oil under the front steps. He stated at para. 6 that Jacques Whitford Ltd. “was told by the Defendants there was one spill in basement plus a smell noticed by [Ms. Evans] coming from the tank located under the front steps.” Later, at para. 26, he stated that Whitford “was advised of, one oil spill, that being in the basement; however,

they were also advised of the removal and replacement of the oil tank under the steps as a result of ... Mrs. Evans, smelling oil."

[43] In fact, the February 2004 Whitford report makes no reference to the smell of oil or to the replacement of the tank under the front steps. Although not set out in the decision, the appellants state that Mr. McCullough testified that if Jacques Whitford Ltd. had been informed of these occurrences, they might have conducted the testing in a different manner. The respondents rely on para 26 of the decision (see above) and argue that there was evidence before the court that Whitford was informed. There is no evidentiary foundation for this statement in para 26. Apart from the concerns I have in respect of the letter to Ms. Gamble, the adjudicator had the evidence of Ms. King and Mr. Evans.

[44] The adjudicator's finding regarding Mr. Evans' knowledge of a second spill is clearly wrong and constitutes an error of law. The adjudicator concluded that Mr. Evans did not appreciate the contents of the statement he was making in the letter to Ms. Gamble in which he explicitly acknowledged a second spill. After describing the method he used to clean up soil contaminated by the leaking tank under the front steps, Mr. Evans went on to state that he was aware the sale was

contingent on the assurances in the letter. On the words of this letter, it seems to be unfounded and unsupportable to conclude that the respondent could not have known whether there had been a second leak. This letter was an admission against interest by Mr. Evans. He was obviously aware that such information might prejudice the sale of the property. I believe it is important to understand the purpose of this letter, because it motivates the “buyer” to rethink his interest in the property and, furthermore, if this letter had been disclosed to the appellants, it would likely have discouraged them from proceeding with the purchase.

[45] The Whitford report was an important piece of evidence. It was relied upon by the adjudicator to support the finding that there was no second spill and consequently no misrepresentation. In order to find that was no second spill and therefore no fraudulent misrepresentation it is necessary to find that Mr. Evans did not report that there had been a second spill, in spite of his clear and unambiguous revelation to Ms. Gamble and Ms. King. The Whitford report does not report a second spill. However, Whitford’s knowledge came from Mr. Evans. Had Jacques Whitford been shown the letter to Ms. Gamble, it is likely that they would have done further investigation of the soil near and under the front steps. To the extent

that the adjudicator relied on the Jacques Whitford report to conclude that there was no second spill, this is, in my view, clearly wrong.

[46] The adjudicator explained his conclusion on the two pieces of adverse evidence by stating that Mr. Evans could not have known that there was a possibility of an oil spill. He lends more credence to the letter by Mr. Evans to his own counsel and to Jacques Whitford Ltd. than to the statements made by Mr. Evans to Ms. King and Ms. Gamble. However, the evidence of the Jacques Whitford report and Mr. McCullough are contingent on the evidence of Mr. Evans. If his evidence is unreliable, so is theirs. They relied on Mr. Evans and limited their main investigation to the basement and an area of the front yard. The weight given to each piece of evidence is in the province of the trier of fact. Nonetheless, if such findings of fact are clearly based on erroneous assumptions or lack a reasoned assessment of adverse evidence, such findings would be clearly wrong and affect the outcome of the case.

[47] In some circumstances, silence or nondisclosure is treated as a misrepresentation and as a basis for rescission. In *The Law of Contracts* (2005),

John D. McCamus discusses “Non-Disclosure as Misrepresentation” at pp. 331-332:

> The traditional doctrine concerning contract formation holds that a party negotiating an agreement is not subject to a duty to disclose material facts to the other party. Nonetheless, there are exceptional circumstances in which silence or non-disclosure is treated, in effect, as misrepresentation and provides a basis for rescission of the ultimate agreement. First, misrepresentation has been found in the context of half-truths, that is, partial disclosure of true facts that creates a misleading impression....
>
> A second exception to the traditional rule relates to conduct typically referred to as “active concealment” of the truth....
>
> A third exception imposes a duty to disclose where changing circumstances affect the truth of an earlier statement....

[48] In *Hogar Estates in Trust v. Shebron Holdings Ltd.* (1979), 101 D.L.R. (3d) 509 (Ont. H.C.J.) the parties were involved in a joint land development venture. One party proposed that the arrangement be terminated and that he purchase the other party’s interest. The purchaser indicated that the development had been blocked by planning authorities. Before closing the purchaser learned that one of the impediments to the development would likely be overcome. He failed to disclose this information to the seller, who commenced an action set aside the transaction. The Court held that there was a duty upon the prospective purchaser to disclose the additional information prior to closing.

[49] On the question of the effect of a failure to divulge highly relevant information, I also take note of the decision of Wright J. in *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211 (S.C.) (affirmed at (2001), 193 N.S.R. (2d) 1 (C.A.)). Wright J. held that partial disclosure by a seller, which led the purchaser to believe that a septic system was 14 years old rather than the actual 40 years, amounted to a breach of a collateral warranty and a negligent misstatement.

[50] While there may not have been any fraudulent misrepresentation in this case, I am satisfied that the seller was obliged to disclose the information relating to the additional testing to be carried out on the property. While the respondents did not have this information at the time the Agreement was signed, they were obliged to provide the information when it came to their attention, as it was highly material to the state of repair of the property. In the circumstances of this case, I can see no reason why the purchasers should have been expected to bear the risk of potential contamination that became known after the Agreement was signed.

Conclusion

[51] I allow the appeal and direct that the deposit be returned to the appellants. The appellants shall have costs in accordance with the *Small Claims Court Act* and *Regulations*.

J.