SUPREME COURT OF NOVA SCOTIA
Citation: *Patten v. Hants Realty Ltd.*, 2015 NSSC 349

Date: 2015-12-02
Docket: *Halifax*, No. 322089
Registry: Halifax

Between:

Robert Patten and Anita Patten

Plaintiffs

- and -

Hants Realty Limited and Hermiena Murphy

Defendants

- and -

Larry Matthews

Third Party

DECISION

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	November 2, 3, 4, 5, and 10, 2015, in Halifax, Nova Scotia
Written Decision:	December 2, 2015
Counsel:	Tracey Smith (for James MacNeil), for the Plaintiffs Robert H. Pineo, for the Defendant, Hants Realty Limited John Rafferty, Q.C. for the Defendant, Hermiena Murphy

INTRODUCTION:

[1] This case involves the purchase of a residential property which turned out to have an inadequate source of domestic water. The purchasers of the property, Robert Patten and his wife, Anita Patten, have sued the real estate agent, Hermiena Murphy, and the brokerage with which she was associated, Hants Realty Limited, alleging negligence, misrepresentation and breach of contract. The Plaintiffs claim extensive damages (primarily attempts to drill wells and the purchase of water) from the time they moved into the property in 2005, to the present. A period of some ten years.

PROCEDURAL:

[2] In this action the Defendant, Hermiena Murphy, has cross-claimed against the Defendant, Hants Realty Limited, and she has also sued Larry Matthews, the owner of Hants Realty, as a Third Party. The cross-claim of Ms. Murphy and the Third Party action against Mr. Matthews were severed from the Main Action by Consent Order dated November 5, 2015. Those remaining actions are to be heard separately by another judge at a later date, after the Main Action is completed, including any appeals.

BACKGROUND:

[3] In 2005, Robert Patten was being released from the Canadian Armed Forces. The Patten family was living in Alberta at the time. Mr. Patten, his wife, Anita Patten, and their four children were looking to relocate to Nova Scotia. Mr. Patten had a brother and other family in the Enfield/Shubenacadie area of the Province.

[4] Towards the end of 2004, early 2005, the Pattens were searching for properties on the Internet and had alerted Mr. Patten's brother to be on the lookout for them. Mr. Patten's brother had found a property for sale at 26 River Court, Enfield, Nova Scotia. It was a foreclosure and repossession by CIBC ("the Bank"). The listing agent was shown as Hermie (Hermiena) Murphy of Hants Realty Limited. Based on the brother's information, the Pattens were able to find the listing information for the property on the Internet. Mr. Patten's brother was able to arrange for himself to view the property and take some photos for the Pattens.

[5] The Pattens quickly decided to place an offer without having visited the property. They were still in Alberta. It appears that, by this time, they were aware that the property was a Bank foreclosure and they apparently deemed it a "good

buy". Mr. Patten understood that there may be others interested in the property and he wanted to make an offer quickly to avoid losing the opportunity to place the first offer. By this time he had talked with his brother and Ms. Murphy and he had checked the sale listed on the Internet and he was aware the property was being sold "as is, where is".

[6] Mr. Patten sent a basic offer to Ms. Murphy by email on January 19, 2005 at a bid price of $181,000, with a closing at the end of May 2005 (see Exhibit #1 – Tab 8). Ms. Murphy forwarded this email offer to the Bank. The Bank accepted the price of $181,000, but required a closing by April 1, 2005. The Pattens obviously accepted the April 1st closing and Ms. Murphy prepared a Limited Dual Agency Agreement and an Agreement of Purchase and Sale, both dated January 27, 2005, for signing by the Pattens. They signed on that date in Gibbons, Alberta. The Bank's representative signed the acceptance on the Agreement at London, Ontario on January 31, 2005. The Pattens had until February 21, 2005 to confirm financing and until February 27, 2005 to have the property inspection completed and confirmed to be satisfactory.

[7] On or about November 30, 2004, a resident of the neighbourhood where 26 River Court is located, Mr. Troy DeVenne, had telephoned Ms. Murphy with information about the roadway serving the properties along River Court. Mr.

DeVenne followed his telephone conversation with Ms. Murphy by email dated December 1, 2004 (Exhibit #1 – Tab 3). In that email Mr. DeVenne confirmed his earlier phone conversation and attached his concerns about the roadway going through the neighbourhood and he provided a hand drawn sketch of the roadway. The persons or entities to whom the email was sent are noteworthy. Mr. DeVenne copied the email not only to Hants Realty, but to five other persons at the Nova Scotia Real Estate Commission, including the latter's Complaints Department.

[8] On December 2, 2004, Mr. DeVenne sent another email to Ms. Murphy requesting that she pass on to the Bank his request that the Bank contribute $250 for roadway maintenance, although there was no formal association or legal duty to pay any roadway levy.

[9] Ms. Murphy passed both of these emails on to the Bank, her only client at the time. The Bank declined any responsibility for the roadway and proposed that prospective buyers be advised of the situation but that there was no formal agreement or duty to contribute.

[10] The substance of the roadway information provided by Mr. DeVenne was conveyed to the Pattens on the Fax Cover Sheet from Ms. Murphy which attached the Dual Agency and Purchase and Sale Agreements. This information also made

its way into the formal Agreement of Purchase and Sale on page 1, clause 4(E) (see Exhibit #1 – Tab 15).

[11] Ms. Murphy testified that Mr. DeVenne called her at least weekly during the month of December 2004 wanting to know what the Bank was going to do about the roadway situation. Ms. Murphy said it got to the point where she considered the calls as harassment. Mr. DeVenne has denied calling that frequently; however, I accept Ms. Murphy's account of those events. I infer that Mr. DeVenne had a vested interest in having something done about the roadway because it encroached on his property and he was hopeful the Bank would do something about it.

[12] On January 25, 2005, two days before the January 27, 2005 signing of the Agreement of Purchase and Sale, Mr. DeVenne sent a further email to Ms. Murphy, copied to Hants Realty. The "Subject" line of that email read, "26 River Crt. Update …". The email appears to have been drafted "19 Jan 05". Ms. Murphy testified that she did not read that email because she presumed it was further harassment regarding the roadway issue and she simply forwarded the email to the Bank to deal with Mr. DeVenne's issues. No one else at Hants Realty considered the email or its contents.

[13] The contents of this January 25, 2005 email (Exhibit #1 – Tab 9) are at the centre of the controversy and dispute between the Plaintiffs and the Defendants and I will quote the exact text. The Salutation and the first paragraph read as follows:

> Ms. Murphy/Owner of 26 River Crt,
>
> 1. Please be advised that you or the current owner may want to check with the previous owner about the well. Since 26 River Crt was built homes on the same side of the road as 26 River Crt have had to get their wells filled more frequently and there is another home, with well, being built on that side of the road. This may mean even more times with the well being drained and have to pay to get it filled. This point must be confirmed, I state that this is not a hard fact just neighbourhood talk. The problems appears to be with the dug wells vice drilled wells, unfortunately drilled wells in the area need to have water conditioning systems added due to hard water.

[14] The remaining paragraphs 2 and 3 deal with the roadway issues and paragraph 4 goes on to say that, "Please note if the information is confirmed in Para 1 … they must be disclosed." … .

[15] The parties disagree on the precise meaning and message conveyed in paragraph 1. I will have more to say by way of analysis of this text later in this decision.

[16] On January 31, 2005, Ms. Murphy prepared and sent a letter to Mr. DeVenne, the content of which was apparently suggested by the Bank's legal advisers. This letter acknowledged receipt of the emails dated 1 December, 2 December 2004 and 25 January 2005. The emails were not attached to this letter and they were not reviewed by Ms. Murphy.

[17] Mr. and Mrs. Patten and their children planned and made a visit to Nova Scotia around February 18, 2005. Their intent was to view the property and have the inspection provided for in Clause 3(a) of the Purchase and Sale Agreement completed. The Pattens required an inspector to perform the home inspection. The Department of National Defence ("DND") had a list of approved inspectors and the Pattens asked Ms. Murphy to suggest some names. Ms. Murphy suggested two names, one of which was Blaine Swan, who was also on the DND approved list.

[18] The Pattens contacted and arranged directly with Mr. Swan to perform the Home Inspection. This was arranged for February 19, 2005. Ms. Murphy, who had just returned from vacation a day or so before, undertook to be present at 26 River Court for the Inspection, which apparently is her usual practice.

[19] The Home Inspection was conducted during the morning of February 19, 2005. Present were the Inspector, Mr. Swan; Ms. Murphy; Mr. and Mrs. Patten

and at least one of their children, an infant. Mr. Patten and Ms. Murphy accompanied Mr. Swan for most of the inspection. Mrs. Patten stayed mostly in the house with her child. By this time, it was well known by all the parties that the property was serviced by a dug well. This was clear from the listing information and it was apparent at the property.

[20] There was a discussion between Mrs. Patten and Ms. Murphy about the water supply to the house at one point during the inspection. Upon seeing the jacuzzi in the master bathroom Ms. Murphy remarked to Mrs. Patten that they probably would not be able to make much use of the jacuzzi because of being serviced by a dug well. Ms. Murphy also remarked to Mrs. Patten that one had to space the washing of laundry when on a dug well. Mrs. Patten does not recall such a conversation.

[21] At one point during the inspection, Mr. Patten, Ms. Murphy, Mr. Swan and Mrs. Patten were together in the house. Mr. Swan could not draw any water from the various taps in the house because it had been winterized and the water was turned off. There was a conversation about the well and it centered on the issue of water supply from dug wells in the area. Ms. Murphy testified that she, Mr. and Mrs. Patten and the child were in the kitchen. She said Mr. Swan was in the living room by the by the doorway. Ms. Murphy testified she said to the Pattens, “you

are aware this is a dug well and you may need to buy and truck water." Ms. Murphy said Mrs. Patten asked what she meant and Ms. Murphy said she explained what she meant. Ms. Murphy testified that Mr. Patten said that they have in their budget to drill a well and that he was not concerned. Ms. Murphy testified she said the Pattens should check the well first because it may be good. Ms. Murphy says she told the Pattens that one cannot do three loads of laundry in a row or run the water taps excessively.

[22] Ms. Murphy testified that Mr. Swan then joined the conversation and said that many people in the area have water problems where there is no municipal water. Ms. Murphy testified that she suggested Mr. Patten try his well to see its condition but that Mr. Patten said again, "I'm not concerned because I will drill a well." Ms. Murphy says she told Mr. Patten to check his well before he drilled a well.

[23] Ms. Murphy testified that she certainly discussed trucking water with Mr. Patten, but she denied ever telling him he would never run out of water. She said there is no way anyone can say that about a dug well, particularly in an area which is prone to wells needing to truck in water.

[24] On cross-examination, Ms. Murphy said that she was not aware of any water problems on River Court Road until Mr. Patten called her several months after living on the property and after he had had at least two wells drilled which did not result in any usable domestic water. On cross-examination, Ms. Murphy said she even called the Municipality and checked with the Department of Health to see who had dug the well in an effort to see if more information was available, but there was no record. Ms. Murphy also testified that she told Mr. Patten that he should talk to the neighbours to get more information because no information or statement of disclosure was available from the previous owner. She said she even told Mr. Patten where the water filling station was located and that he should contact the school and the post office as well.

[25] On cross-examination, Ms. Murphy again stated that the reason she did not read the January 25th email was because Mr. DeVenne had been calling her at least weekly during December saying that the Bank had no right to sell the property until the Bank fixed the roadway issues. She said she presumed this was more of the same. When Ms. Murphy was asked on cross-examination what she would have done had she read the January 25th email, she said she would have passed along that exact information to the Pattens, but not necessarily the email itself. Ms.

Murphy again stated that she passed along the general information she had about well water problems in the area and that Mr. Patten said he was not concerned.

[26] Ms. Murphy acknowledged that the only reference to water issues in the Agreement of Purchase and Sale is found at clause 4(c):

> (c) This offer is subject to water tests at purchaser's expense and water found to be safe for drinking …" [Emphasis added]

While there is no specific mention of quantity of water, the clause does refer to tests … and water found to be safe.

[27] Ms. Murphy, on rigorous cross-examination, again stated that she never told the Pattens that they would not have water issues with a dug well, but that she informed them they may have to have truck in water.

[28] Mr. Patten vigorously denies any of the water quantity discussions testified to by Ms. Murphy ever took place, and Mrs. Patten says she does not recall such explanatory discussions. Both of them say that the only thing Ms. Murphy said was that she (Ms. Murphy) had been on a dug well at her home and had not experienced any problems. In fact, Mr. Patten stated emphatically that both Ms. Murphy and Mr. Swan were lying about those discussions. In his December 23, 2005 letter to the Nova Scotia Real Estate Commission Mr. Patten called "Ms.

Murphy and her assoc. (meaning Mr. Swan) … blatant LIARS". Mr. Patten then went on to espouse his own trustworthiness and honesty (Exhibit #1 – Tab 26).

[29] The inspector, Mr. Swan, was leaving the country and relocating to the United States before the trial was to commence. Therefore, his testimony was taken by way of Commission Evidence on August 25, 2015. A transcript of that evidence was filed with the Court as Exhibit #3. Mr. Swan has no interest in this property transaction, or with the parties, which would cause anyone to challenge or doubt his impartiality. He was a totally independent "Franchisee", who provided home inspection services for potential buyers. He had all the credentials required of a full-fledged house inspector and, until recently, was the national president of his professional association.

[30] In his Commission Evidence, Mr. Swan recounted his recollection of the events and discussions which took place during his inspection of the house at 26 River Court on February 19, 2005. We also have his Inspection Report which is found at Tab 14 of Exhibit #1.

[31] The pertinent aspects of Mr. Swan's report are found at Tab 14, page 52, which indicates the taps could not be checked (because the house was winterized and the water was turned off); and at page 57, second paragraph, which indicates

that an inspection of the well is beyond the scope of the inspection. More importantly, at page 56 "Comments", are suggestions to the Pattens. The second "bullet" point of those comments states, "Verify well and septic condition, location and last maintenance or inspection. Conduct Water Test." [Emphasis added] At page 27, line 14 of his Commission Evidence, Mr. Swan explained "Well, is an encompassing term. It means water quality and volume supply". On cross-examination, Mr. Swan reaffirmed his explanation of the meaning of "verify well condition" (see Exhibit #3, page 34).

[32] In his Commission Evidence, Mr. Swan confirms most of what Ms. Murphy testified was said to the Pattens regarding dug well water supply in the area. At pages 15 – 18 of that evidence Mr. Swan confirms a three way discussion between he, Mr. Patten and Ms. Murphy regarding possible water supply or quantity at this property. He said they discussed water issues in the corridor area.

[33] He said the following issues were discussed. First, that there are a number of businesses selling water in the corridor area, and that a lot of the wells in the corridor area are dug wells. Mr. Swan said during this discussion that a lot of "them", (I presume residents) are directing downspouts into the well and purchasing water on an ongoing basis.

[34] When Mr. Swan was asked if there was any discussion about information available to Mr. Patten regarding water supply, he said only the advice to have the well tested, that he should verify the location, the condition and have the water tested. When asked what Mr. Patten said, he replied, "I recall a comment that it didn't matter. He was going to drill a well". He understood that to mean that the conditions of the well or the well situation did not matter.

[35] When Mr. Swan was asked if there was any discussion about the change in the number of occupants in the house, he replied that there would have been a verbal conversation that things change with different occupancies and so the usage of water can change. Mr. Swan said he believes Mr. Patten accompanied him outside to the dug well and that Mr. Padden had a look at the well.

[36] During his Commission Evidence, Mr. Swan was shown an email response which he made to Ms. Murphy on July 27, 2005, being five months after the Inspection, regarding his recollection of discussions about the well during the Inspection on February 19, 2005. Page 20, commencing at line 8 of that evidence transcript, provides an excerpt of Mr. Swan's reply to Ms. Murphy and I quote:

> I do remember a lengthy conversation between you and your client about water supply and the well. You informed your client of water deficiency problems in the area as well as the whole corridor area. It is well-known that many property owners have to purchase loads of water at various times of the year. Water supply in the corridor area is a sizeable business and an area concern. I also remember

> you telling the client that the property was a bank repossession and that no information was available from the previous occupants or the bank themselves. It was being offered on an 'as is' basis.
>
> **Q.** Now, is that – that's what you wrote in the email to Ms. Murphy on July 27th of '05?
>
> **A.** Yes.
>
> **Q.** And do you stand by the comments made in that document today?
>
> **A.** I do.

[37] On cross-examination, Mr. Swan confirmed that there was not a specific conversation about the water supply on this very property because there was no such information available.

[38] On cross-examination, Mr. Swan was asked what he meant by the direction "Conduct Water Test" found in the second "bullet" of the "Comments" section of his Inspection Report. He answered, "it means a lot of things. It means the quality. It means the volume supply, drawn-down tests, so on. It's a generic term."

[39] Mr. Swan confirmed that he had not seen any of Mr. DeVenne's emails of December 1, and 2, 2004 and January 25, 2005 and he was not aware of them. Mr. Swan was asked on cross-examination if he had been aware of the above mentioned emails, would he have written something to that effect in the Comment

section of his report. He said, "I wouldn't have included that because that's a neighbor voicing concerns … as Home Inspectors, we can't rely on third hand information". (Page 49 of Exhibit #3). He went on to say, "But we do advise our clients as to what they should do before they proceed". (Page 50 of Exhibit #3). He then said, "I don't judge the well. I advise my client to do the testing, for their review".

[40] In his Commission Evidence, Mr. Swan had the following exchange with counsel at pages 55 and 56 of Exhibit #3:

> **Q.** And how did the issue of water deficiencies arise?
>
> **A.** Because of the dug well and the placement of the property in the corridor area.
>
> **Q.** And do you recall who first raised the issue of water deficiencies? Was it Mr. Patten or Ms. Murphy or you?
>
> **A.** I don't recall.
>
> **Q.** And also the comment that, "It was well-known that many property owners have to purchase loads of water at various times of the year." Do you recall who provided that information to whom?
>
> **A.** That more than likely was my comment.
>
> **Q.** It was your comment? Okay. And did Ms. Murphy, to the best of you knowledge, comment on or add to that comment?
>
> **A.** I believe she did and it might have been a conversation that was direct at – you know, there's no guarantee about the well. A well on one property could be okay and the well on another property may not.

[41] Not long after the Patten family, being six in total, moved into the property, they began to experience water shortages. They began to have to buy water transported by truck to be piped into the well. The well obviously did not recover quickly enough to service the Pattens' needs.

[42] Mr. Patten then had two wells drilled on the property and they also did not produce water to supply the Pattens' use. In desperation, Mr. Patten had a third well drilled on the property and again it did not result in finding sufficient water to service the household.

THE CLAIM:

[43] The Pattens claim extensive damages from the Defendants from 2005 to the present, a period of some ten years. At trial they reduced their claim to the following. They claim some $26,000 for well drilling; some $25,000 for Water Purchases from companies; some $8,000 for their own water purchase and transport; some $6,000 for the cost of a trailer to transport water; $25,000 general damages; and $18,000 for diminished property value. The claim totals approximately $109,000.

THE ISSUES:

(1) Was Ms. Murphy negligent in her dealings with the Pattens?

(2) Has Ms. Murphy breached her contractual obligations to the Pattens pursuant to the Limited Duel Agency Agreement?

(3) If the answer to Issue No. 2 is yes, then is Hants Realty liable by virtue of its relationship with Ms. Murphy and/or by virtue of its duties as the "broker" under which Ms. Murphy carried on her business as a Real Estate Agent?

(4) If the answer to Issues No. 2 and/or No. 3 is yes, then what are the damages which were caused as a result of such negligence or breaches of duty?

THE LEGAL PRINCIPLES:

Negligence

[44] The law of negligence is well established and straight forward. First, there must be a duty of care owed, in this case, by Ms. Murphy and/or Hants Realty, to the Pattens. There is no disagreement or question that, in view of the relationships between the parties, such a duty was present in this case.

[45] Secondly, there must be a breach of that duty of care by the Defendants by falling below the standard of a reasonable real estate agent and/or real estate

brokerage. In this case, because of the relationship between Ms. Murphy and Hants Realty, as the supervising brokerage, any liability on the part of Ms. Murphy may flow to Hants Realty, depending on the circumstances.

[46] Thirdly, the breach of the standard of care must be the legal causation of the damages claimed.

[47] Fourth, the damages claimed must be proven and be the logical and reasonable result of the alleged breach.

[48] With regard to the particular duty of a real estate agent, the Plaintiffs, in their brief, have quite accurately and succinctly summarized this duty and I reproduce paragraphs 27 to 30 of their brief:

> In Nova Scotia, a selling real estate agent may be liable, and expose their companies to liability, if they negligently offer incorrect information to the purchaser.
>
> Where a misleading representation or omission is established which warrants the prospective purchaser's reliance on the agent, a purchaser may be excused from his obligation of inquiry and satisfaction as to what is being purchased to an extent that nullifies the purchaser's own obligation on a particular aspect of the purchase.
>
> A real estate agent has a duty to verify the completeness and accuracy of information provided to prospective purchasers.
>
> When a real estate agent is acting for both vendor and purchaser, she owes legal duties to both parties.

[49] An agent's and a brokerage's contractual duty of disclosure is found at clause 3 b) of the Limited Dual Agency Agreement (Exhibit #1 – Tab 15, page 58):

> 3. The Buyer and the Seller acknowledge and agree that with respect to the purchase and sale of the property the Brokerage and its salespersons will be the agent for both the Buyer and the Seller and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:
>
> …
>
> b) the Brokerage will have a duty of disclosure to both the Buyer and the Seller except that: …

[50] While this clause does not specify the nature of such disclosure, it is obviously any information which is pertinent or relevant and material to the transaction and to the factual understanding of both the Buyer and the Seller.

[51] In this case, it was made clear to the Pattens at the outset that the property was being sold "as is where is" because there was no Property Condition Disclosure Statement since the previous owners had had the property foreclosed and were not part of the sale nor were they available to provide information. (See clause 3(b) of the Agreement of Purchase and Sale, Exhibit #1 – Tab 15, page 59).

[52] The Court has been directed to Article 10 of Part Seven of the By-Law of the Nova Scotia Real Estate Commission entitled, "Conduct and Trade Practices" which is as follows:

> Article 10 The Industry Member has an obligation to discover facts pertaining to every property for which the Industry Member accepts an agency which a reasonably prudent Industry Member would discover in order to fulfil the obligation to avoid error, misrepresentation, or concealment of pertinent facts. The Industry Member shall disclose any known latent defects to his or her clients or other Industry Members involved in a transaction.
>
> [Emphasis added]

Negligent Misrepresentation

[53] With regard to negligent misrepresentation, the Plaintiffs' brief, at paragraph 32, also accurately and succinctly summaries the legal principles required for such a cause of action to succeed and I quote:

> In order to maintain an action for damages for negligent misrepresentation, five elements must to demonstrated. The tort of negligent misrepresentation is made out where:
>
> 1. There was a duty of care based on a "special relationship" between the representor and the representee ;
>
> 2. The representation in question was untrue, inaccurate, or misleading;
>
> 3. The Representor acted negligently in making the misrepresentation;
>
> 4. The representee reasonably relied on the negligent misrepresentation; and,
>
> 5. The reliance was detrimental to the representee in the sense that damages resulted.

Duty of a Brokerage

[54] The duties and responsibilities of a brokerage such as Hants Realty are enumerated at clauses 703 and 704, also in Part Seven of the Real Estate Commission's By-Law.

> Brokerage Supervision
>
> 703
>
> > A Broker or an Associate Broker in a management position, is required to adequately supervise the activities of the Industry Members and other personnel for whom he/she is responsible. In determining the adequacy of the supervision, the Commission will consider the following factors, but will not be limited to making a determination on these factors alone:
> >
> > (a) whether the Broker or Managing Associate Broker was physically available to supervise and actively engaged in the management of the Brokerage;
> >
> > (b) must ensure the business of the Brokerage is carried out competently and in accordance with the Act, the Regulations, the By-law and the Policies and Procedures;
> >
> > (c) whether the Broker or Managing Associate Broker has undertaken all reasonable steps to ensure compliance by all Associate Brokers, Salesperson and other employees;
> >
> > (d) whether the Broker or Managing Associate Broker has established written policies and procedures; and
> >
> > (e) whether the Broker or Managing Associate Broker took corrective and remedial action when a violation by an Associate Broker, Salesperson or other employee was discovered.
>
> Broker Responsibilities
>
> 704

> A Broker or Managing Associate Broker shall be responsible for:
>
> (a) reviewing and acknowledging all real estate agreements, including, but not limited to, those related to agency relationships and offers to purchase;
>
> (b) reviewing all advertising to ensure compliance with the Act, the Regulations, the By-law and the Policies and Procedures;
>
> (c) ensuring there is an adequate level of supervision for Associate Brokers, Salespeople within the Brokerage and for employees who perform duties on behalf of the Brokerage;
>
> (d) ensuring the required Trust Accounts, Trust Account records and transaction files are maintained in accordance with the Act, the Regulations, the By-law and the Policies and Procedures;
>
> (e) ensuring proper management and control of documents or records related to licensing, registrations and related regulatory requirements;
>
> (f) ensuring that the Brokerage utilizes only licensed persons to perform the duties of Industry Members on behalf of the Brokerage; and
>
> (g) providing all Industry Members and personnel with written policies and procedures by which they are expected to operate.

Analysis:

[55] I will deal with the issues of negligence and negligent misrepresentation regarding Ms. Murphy partly together because the facts alleged to support the Plaintiffs' claim in both of those issues are so overlapping and intertwined that it is not feasible to separate them in any meaningful way.

[56] Having said that, the alleged negligence against Ms. Murphy appears to center on two points. The first being that Ms. Murphy did not read the email of

January 25, 2005 and secondly, that Ms. Murphy did not sufficiently investigate the dug well water supply on River Court Road, knowing that the property in question was located in an area known for water quantity problems with dug wells.

[57] I will deal first with the contents of the January 25, 2005 email from Mr. DeVenne. Would it have been more prudent if Ms. Murphy had read that email? Probably. Would it, in all probability have changed anything regarding the decision of the Pattens to buy the property at 26 River Court? If one looks at the wording of that email it provides no information regarding the dug well at 26 River Court. It speaks only to general water quantity with dug wells in the immediate area which may also apply to 26 River Court. Mr. DeVenne advises that Ms. Murphy or the current owner may want to check with the previous owner; however, we know that was not possible in view of the foreclosure and no information was available. Mr. DeVenne makes a point of saying this is not a hard fact, just neighbourhood talk. The email goes to specify that the alleged water quantity problems appear to be with dug wells and not with drilled wells. In fact, Mr. DeVenne did not even know what kind of well serviced 26 River Court.

[58] Is the information contained in paragraph 1 of the January 25, 2005 email materially different than what was told to the Pattens in quite some detail by Ms. Murphy and Mr. Swan? I find that it is not. I accept fully the accounts of the

conversations or discussions regarding water supply from dug wells in the area as testified to by both Ms. Murphy and Mr. Swan. Mr. Patten has vehemently denied any such conversations, but I will have more to say about Mr. Patten's credibility later in this decision.

[59] We also have the testimony of Ms. Murphy that she attempted to find information about the construction of the well from the local Municipality and the Department of Health, but there were no records. I also accept that Ms. Murphy advised Mr. Patten to test the well before going to the expense of drilling a new well. There was no latent water supply defect at 26 River Court known to Ms. Murphy.

[60] I find that the above-noted facts do not establish negligence on the part of Ms. Murphy on a balance of probabilities. She acted as a reasonable real estate agent in attempting to find out any information available about the well and she fulfilled her duty to take reasonable steps to investigate. She cautioned the Pattens, especially Mr. Patten, to have the well investigated before he proceeded to drill a well. Moreover, she passed on to Mr. Patten the known concerns about dug wells in the area. There was no more direct information available about this property and she advised Mr. Patten to do his own checking and verification.

[61] I will now deal with the allegations of negligent misrepresentation on the part of Ms. Murphy.

[62] In their brief, at paragraphs 10, 12 and 13, the Plaintiffs allege that Ms. Murphy told them, "that dug wells like the one at the Property were common place in the area and would be adequate for the Patten family's needs." Further, they state referring to the closing date of April 1, 2005, "At no point prior did Ms. Murphy suggest that the Property's water supply might be inadequate for the family's needs". The brief further states, "subsequent to talking ownership and possession of the property, the Pattens discovered that the Property's well provided an insufficient water supply, contrary to the sale representations." [Emphasis added]

[63] The Plaintiffs further allege at paragraphs 35 and 36 of their brief that, "The Pattens were told by Murphy that they would never run out of water, despite being on a dug well as described in the property cut sheet." And further, "The Pattens asked Murphy outright whether the Property water supply was adequate, to which she replied in the affirmative."

[64] I can say that none of the Plaintiffs' allegations outlined above were proven at trial. Quite the contrary. I have no hesitation in finding that those alleged

representations were not made to the Pattens. The evidence of Ms. Murphy and Mr. Swan is clear that contrary representations were made because it was made clear that no one can guarantee the quantity of water supply from a dug well without very specific and detailed testing. It was made clear this testing was the responsibility of the Pattens.

[65] With regard to credibility, where the evidence of the Pattens contradicts the evidence of Ms. Murphy and Mr. Swan, I accept the evidence of the latter and reject the evidence of the Pattens for the following reasons. Mr. Swan, who is a completely independent and impartial witness, confirms the evidence of Ms. Murphy. Mr. Patten's credibility is seriously undermined by the fact that, after he requested that Ms. Murphy change the dates on the January 27, 2005 Agreement and she refused, he forged an Agreement of Purchase and Sale with different dates in order to obtain travel expense monies from DND. He not only changed the dates and places of signing, but also appears to have forged the acceptance signature of the Bank's representative. While Mr. Patten professes to have "fessed up" to this dishonesty, he has never reimbursed the travel funds which he improperly obtained and he has never notified DND of this misdeed.

[66] In order for any misrepresentation to lead to liability and damages, there must be reasonable reliance on the alleged misrepresentation. Mr. Patten has

testified that, had he received a copy of the January 25, 2005 email, he would not have purchased the property. That is very difficult to accept, particularly since I have found that when concerns were expressed regarding adequate water supply from dug wells in the area, his response was an emphatic, "it does not matter I am going to drill a well". Also, he lived in the home for some ten years and spent some $200,000 in renovations and improvements to the property. I do not accept his assertion in this regard. It is all too convenient an assertion to make since it appears the Pattens have now decided to sell the property, because, as Mr. Patten testified, of the water "nuisance".

[67] I accept that each time Ms. Murphy and/or Mr. Swan raised concerns and issues to be checked regarding the dug well, Mr. Patten made it very clear that he was not concerned about the dug well because he planned to drill a well, which he also made clear was in his budget for the property.

[68] I find that there was absolutely no reliance by the Pattens regarding the discussions about the dug well and, in fact, Mr. Patten did not heed or pay any attention to the cautions voiced by Ms. Murphy and Mr. Swan. He was determined to forge ahead because he had decided to drill a well.

[69] The Pattens would have failed to not only prove any misrepresentation, but they have also failed to prove any reliance and therefore, damages caused by the defendant.

[70] In the result, the claims for Negligence or Negligent Misrepresentations are dismissed against Ms. Murphy and, as a result against Hants Realty.

Contract

[71] The Pattens have claimed against Ms. Murphy and Hants Realty for breach of contract, being the Limited Dual Agency Agreement. As I understand this argument, it is that the Defendants had a duty to forward any emails, letters, or complaints received by them on to the Pattens. In my respectful opinion, that is not what the duty of disclosure means. It means conveying the substance of any material information to the buyers and sellers of a property. There is no obligation to forward to buyers all communications received from someone like Mr. DeVenne, who had an obvious "axe to grind". I find that all material information was provided to the Pattens in the Agreement of Purchase and Sale and in the Inspection Report and Comments/Suggestions prepared by Mr. Swan and in the discussions with Ms. Murphy and Mr. Swan. Even if I were wrong and there had been a duty to forward any and all communications received by a Real Estate

Agent to buyers and sellers, the issue of causation of damages still remains. In this case, the reasons outlined under Negligence and Negligent Misrepresentation would dictate that the failure to forward all communications to the Pattens was not the probable cause of their purchase of this property. It was Mr. Patten's determination to buy the house regardless of concerns about the dug well because had had clearly decided to drill a well. None of the communications sent by Mr. DeVenne indicated that drilled wells were not feasible in the area. There was also no other information or evidence to that effect. Moreover, Mr. DeVenne had no personal knowledge or specific information regarding 26 River Court.

[72] I would therefore dismiss the Plaintiffs' claim for alleged breach of contract as well.

Damages

[73] Although I have found no liability on the part of the Defendants, I feel obliged to comment on the damages claimed by the Pattens. They have now lived in the property in excess of ten years. On any reasonable view, this certainly speaks to a significant failure to mitigate. Plaintiffs cannot simply stay in a property for ten years and allow the alleged damages to accumulate. Moreover, the Plaintiffs spent some $200,000 in improvements to the property. They now not

only claim for water purchases during that period, but also 5% of the diminished present value of the property, being now some $350,000 - $375,000. The purchase price in 2005 was $181,000. The drilled wells were in the plans before the purchase.

[74] In my view the damages to the Pattens, if liability had been found, would have been limited to a 5% reduction in the purchase price of $181,000 being $9,050, plus water purchases for the period, April 2005 to December 31, 2006, some $5,815, for total damages of $14,815.

CONCLUSION:

[75] While one can sympathize with the Pattens' water woes, liability does not follow in this case. I find that the Plaintiffs have failed to prove their claims in Negligence, Negligent Misrepresentation or Breach of Contract, on a balance of probabilities. Their claims are therefore dismissed.

[76] I will hear the parties on the question of costs at a mutually convenient time, if they cannot agree. I strongly urge the parties to make every effort to reach agreement in this regard because I am only available all day December 7th and 8th. After that time I will be out of the Country until April 18, 2016.