IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Doherty v. Rethman, 2015 NSSM 13

Claim No: SCK 423199

BETWEEN:

Name Joel Sholly Doherty **Claimants**
Denyse Ann Doherty

Name Craig F. Rethman **Defendant**

Editorial Notice: Addresses and phone numbers have been removed from this electronic version of the judgment.

Daniel L. Oulton appeared for the Claimants;

Craig F. Rethman, Self-represented;

DECISION

This claim arises from the discovery of a defective septic system following the purchase of a home by the Claimants, Joel and Denyce Doherty from the Defendant, Craig F. Rethman.

The evidence and submissions were lengthy but, for the most part, the matter can be summed up rather succinctly.

Facts

The Claimants, Joel and Denyce Doherty, purchased the property known as 252 Prospect Road, Morristown, King's County. The parties signed an Agreement of Purchase and Sale dated March 26, 2013. The closing date was set for June 3, 2013. The purchase price was $325,000. The

Defendant signed a Property Condition Disclosure staement indicating he had not had any problems with the septic system.

Mr. Rethman had been living at the property with his family until one of his daughters moved out to attend university and he began a new job in the Halifax Regional Municipality. The property had been listed several times at higher prices but was eventually sold privately.

After the Dohertys moved into the property, they began to experience issues with lack of water flow, particularly from their toilet. There was also evidence of water and septic back up into the basement. There is considerable dispute over the extent to which this occurred and the presence of any previous issues with water flow prior to the execution of the Agreement. The Claimants allege the Defendant is liable in negligent misrepresentation or negligence and seeks damages of $25,000.

Issues

- Is the Defendant liable for negligent misrepresentation for a defective septic system at the property?

- If so, what is the quantum of damages?

The Evidence

I have summarized the parties' evidence below. In doing so, I note that I have reviewed in detail all of the documentary evidence and testimony presented in this hearing, even though some of it may not have been referred to in these reasons.

Property Condition Disclosure Statement

In preparing for the sale of his property, Mr. Rethman prepared and signed the Property Condition Disclosure Statement dated March 26, 2013. In paragraph 4, the form provides the following questions. The answers were supplied by Mr. Rethman:

"A. What kind of sewage disposal system services the property? Answer: Septic

B. Insert problems with the plumbing or sewage disposal system? Answer: No"

The following summarizes the evidence of the various witnesses.

James Kerrigan Weihers testified that he has been working in the drainage and septic business for 30 to 35 years and owned his own business for 10 to 15 years. He worked for the Rethmans doing snowplowing and drainage work between 2011 and 2012. During one visit, he observed the septic tank and found it to be full and malfunctioning. He advised Mr. Rethman of this at the

time. He testified that he told Mr. Doherty the same thing when he viewed the tank more recently. He had viewed the property with a previous owner, Hardy Hutchinson.

He advised Mr. Rethman that a Qualified Person Level II (or QP II) would be needed to install and review a C2 septic system. He later conducted a percolation test on the property, three months prior to the hearing at the direction of Marlene Myles. He observed a white pipe in the ground blocked with roots. He provided a quote of $12,075 to install a new septic system. He advised Mr. Rethman that environmental approval would be required.

Under cross examination, Mr. Weihers testified that he could not determine the extent of any back up until the septic field was broken, i.e. dug up and examined. He confirmed that a large tree could be part of a septic field and might not be required to be removed. He testified to viewing a hole dug at the direction of Craig Rethman. He does not recall doing any snowplowing for him. He indicated in redirect evidence that he does not recall opening the septic with Craig Rethman present. He may have done so for the previous owner.

James ("Jim") Schoonhoven pumps septic tanks and septic fields. Mr. Schoonhoven also does some farming. He lives in Nicollsville approximately 3 km from the Rethmans. He testified to attending to the Rethmans' property to pump his septic tank. The tank was uncovered at the time. He described the liquid in the tank as higher than it is supposed to be, namely above the discharge pipe. He testified that this is usually a problem. He advised Mr. Rethman that it was blocked. He performed work for the Doherty's. He claims to have billed them $450 for three flushes, yet only two invoices were found. He does not recall the specific dates when the tank was pumped.

Anthony ("Tony") Nette is a retired wildlife biologist who lives next to the Doherty's and previously lived next to the Rethmans. Their properties are not immediately adjacent but are separated by a vacant lot. He has lived in his home for 16 years. In hearing his testimony, Mr. Nette struck me as a "do-it-yourselfer"; one who enjoys the intellectual challenge and, presumably, cost savings in solving problems around his property. He testified to installing three septic systems himself. He experienced backup problems due to inadequate leeching in the soil away from the presence of clay and silt.

Mr. Nette spoke with Mr. Rethman when the latter was having difficulties with his septic system. Mr. Nette observed the lawn as wet and green, and containing grey water. He testified to being advised by Rethman that he was quoted $20,000-$30,000 to repair and replace the septic field. Mr. Rethman advised that he did not wish to hire anyone. Mr. Nette showed Mr. Rethman how to dig the property and devised a system involving metal plates that are used in a purpose not related to septic systems. He indicated that Mr. Rethman had attempted to dig the field and bent his grub hoe. The orchard on the property is now gone, as a result of Mr. Doherty and his contractors working at the septic tank. He recalls the previous owner to the Rethman's, Lynn Worrall, as conducting expensive renovations on her property, but not having any work done to the septic system.

Under cross examination by Mr. Rethman, Mr. Nette did not recall a reference to $30,000 being quoted for a roofing job. He recalled one time Mr. Rethman having an issue with the septic tanks. He does not recall the decisions regarding clear stone. He acknowledged that the Doherty's have more people on the property than the Rethmans did, but not many. He described the scenes as family barbecues not unlike those the Rethmans used to host.

Paul Hayward Grimm is a landscaper who runs his own business. He lives and works in Welsford, just outside of Berwick. He was engaged by Mr. Doherty to provide an estimate for the removal and replacement of trees. He testified that it would cost approximately $600 to remove the orchard but to replace the trees would cost approximately $1000 per tree, assuming the exact same types were installed. The ash tree on the property would cost approximately $5000 to remove as it is a much bigger job, it would cost considerably more to replace.

Jason Doherty lives at the property with his wife, Denyse (the co-Claimant) and their two children. He testified that he signed the Agreement of Purchase and Sale on March 26, 2013. Prior to that, he walked the perimeter of the field with Mr. Rethman and was shown the leeching and the repairs. There was no reference by his property inspector to any difficulties with the pump. He retained Mr. Weihers, who indicated that he was aware of the problem with the septic tank overloading and attributed it to a clog.

The Dohertys had been experiencing trouble with their septic since May 2014. He hired Marlene Myles to assess the problem and Jim Schoonhoven to pump the tank. There was considerable groundwater, it was necessary to have the tank pumped in late May 2014 and it was completely clogged in August due to the roots. Mr. Doherty provided photographs showing where the sewer backup occurred in the basement. He paid $300 to Mr. Weihers to dig out the clog. He paid $200 for a maid service to clean the basement. He and Mrs. Doherty cleaned it up one additional time.

He could not find any groundwater and could not do any digging. He testified that the system failed in August, 2014, however, he began experiencing problems in May. He showed the court a short piece of pipe with a root inside of it. There are also photographs of the damaged pipe while in the ground.

He acknowledged that there had been flooding in the spring. Prior to that, the sump pump had worked. Further, there was no pumping done in 2013. It took approximately 6 to 8 weeks to investigate the property with Marlene Myles. He does not recall discussing an upgrade to the septic system.

Mr. Doherty is of the opinion that it is necessary to remove the trees from the orchard and septic field as the roots have clogged the pipe. He indicated that no repairs have been completed as of yet, only consulting type work.. The property was bought through Property Guys who advised him that all renovations were done. The property was purchased due to the condition and its purchase price. (Nobody from Property Guys testified at this hearing.)

Mr. Doherty acknowledged that his father-in-law does visit from time to time. However, he parks a trailer in the Dohertys' yard as his father-in-law lives in Aylesford, several miles from the property. He indicated in redirect evidence that he was told by Mr. Rethman there were renovations done, including electrical work and the plumbing, and the repairs fixed all problems.

Marlene Myles is the owner and operator of Ideal Septic Works. She testified that she is a Certified Qualified Person Level II. She was retained by the Dohertys to work on their septic field by analyzing it to determine what repairs are required. In doing so, she observed a B182 PVC pipe used in the septic system. In her opinion, these pipes were only available for purchase in the last 15 years. She testified that the number of bathrooms in a property would not affect a septic system as much as other factors, such as the number of occupants in the home. It is necessary to conduct a percolation test to determine that the property fulfills the requirements. She believes the pipe was damaged and clogged by a thumb sized root, which affected the outflow. She acknowledged that certain species of trees were acceptable in a septic field. However, certain types such as willow, maple and poplar, had aggressive root systems. She testified that to remove the old septic system and install it in a new place would cost approximately $15,000. If it were to be kept in place, certain changes were required. She tendered into evidence a design for the system. She indicated she charges $994.75 to design a system.

On cross examination, she testified that she did not actually conduct a percolation test. In answer to a question from the court, she testified that she has been in her business for 26 years, having with her father, before taking over.

Hazel Gillian Rethman is married to the Defendant, Craig Rethman, and has lived in the property since she and her husband purchased it in 2005. The Rethman's moved to Canada so he could pursue his career as an accountant with a real estate development company. The Rethmans were attracted to the rural lifestyle the community offered. She described a disagreement with Mr. Weihers regarding snow removal, which ended in Mr. Weihers uttering an expletive. She observed him performing snow removal at their property, but not working on the septic system. She recalls Mr. Schoonhoven visting the property several times but only at the last visit, did he empty the septic tank. She testified that Mr. Nette indicated to her that she will experience a reduced water and septic flow and, consequently he recommended the family undertake water saving measures. This included throwing toilet tissues in a garbage bin rather than flushing them down the toilet and taking fewer showers and baths. This was not their usual practice prior to owning this home and presumably, not since selling it. The septic system was described by the vendor of the property, Ms. Warrell, as old but functioning. Ms. Rethman was told the septic system was the original system. She confirmed that they have two daughters. She works in the home as a seamstress. They have owned properties prior to this one when they lived in New Zealand and England.

Under cross examination, she acknowledged that Mr. Rethman had or borrowed a trailer from Mr. Nette to use while he addressed the grey water at the end of the property.

Craig Field Rethman provided significant documentation into evidence. He testified that when he originally purchased the property, it contained a workshop and a three level barn. The workshop has since been removed. He has done other renovations to the property. He confirmed the back tree on the property was an ash tree.

He testified that Kerrigan Weihers did not do any digging for his septic system. Mr. Rethman described the repair work which he personally conducted to the property as a 3 foot wide by 16 foot long drip line set into clear stone. He included metal pieces to angle it off the solid pipe. This was in response to a 2' x 3' wet area containing grey water. He performed the work four years after he moved in. In 2011, the septic was working fine and there were no problems. He indicated that they took environmentally friendly steps to save water, such as only showering every second day and not taking deep baths. He was advised by Ms. Warrell that the septic system was the original one but she had no idea of its age. He relayed the same information on to the Dohertys. He indicated that he filled it out the Property Condition Disclosure Statement as best he could. He submits that the additional ensuite could increase the water flow and that it affected the septic system. In summary, he states that he made a minor adjustment to the septic system that worked. He acknowledged that he did not contact the Department of Environment, other than to conduct some research into what is required. He tendered into evidence some data which he tabulated showing rainfall to be 10% higher in the area than other years. This evidence, I find of limited assistance. He acknowledged having done other work, but none on the septic system.

Under cross examination he acknowledged that the property had been on the market since 2010 but it was listed at far too high a price. Gradually it was reduced to a listing price of $325,000 in 2012. Three offers were received at that level, the Dohertys' offer being the most acceptable.

Mr. Nette advised him that the problem he was experiencing could be roots or the water table. He followed Mr. Nette's advice for repairs, and maintains were successful. He was shown a copy of his LinkedIn profile where he indicated that he was an expert in property development. He acknowledged having provided some purchasing advice for his employer. When he completed the Property Condition Disclosure Statement, he was very detailed about other deficiencies but provided no additional comments concerning the septic. He testified that he simply had mistakenly forgot to elaborate upon the septic system when he completed the form. He reviewed the photographs in evidence and identified the various trees. He did not install the white pipe but he believes that to have been by an owner prior to him.

The Law

In determining liability for the purchase of real property, there are several issues to consider:

- Is there a defect with the property which was not represented in the contract?
- Is the defect a latent or patent defect?
- Was the defect known to the vendor of the property?
- Did the Defendant's action constitute a breach of contract, negligence, negligent misrepresentation, or fraudulent misrepresentation?

Mr. Oulton has characterized this matter as a case of negligent misrepresentation or negligence. Accordingly, it is appropriate to cite a number of leading cases on that point.

I can do little better than to quote the very extensive analysis of Justice Gregory Warner of the Supreme Court of Nova Scotia found in the case of *Thompson v Schofield* (2005), 230 NSR (2d) 217. However, rather than set out the full text of his analysis, in the interests of brevity, I have broken it down to address the individual findings of fact arising from the case.

Defect Not Identified

His Lordship begins his analysis at p. 221:

[16] Generally transactions involving the sale of real property are subject to the principle of *caveat emptor* with respect to the physical amenities and condition of the property. Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he or she finds it unless the purchaser protects himself or herself by contractual terms. This is set out in several important decisions, some of which were included in the defendant's memorandum, such as *McGrath v. MacLean*, (1979) 22 O.R. (2d) 784 (OCA), and *Edwards v. Boulderwood Development Corporation*, (1984) 64 N.S.R. (2d)395 (NSCA). It is referred to in *Redican v. Nesbitt*, [1924] S.C.R. 135.

[17] In *Edwards*, our Court of Appeal found that the defendant had made an innocent misrepresentation and was not liable to the seller with regards to the condition of a vacant lot of land and further found that the innocent misrepresentation had been made after the contract had been entered into and therefore could not have influenced the entering into of the agreement.

I find without hesitation the Doherty's experienced a lack of proper outflow of water and septic disposal. This culminated in the sewage backing up into the house. This is clearly a defect. This has been proven by the photographs and the evidence of Mr. Doherty which I accept.

Furthermore, I am satisfied on the photographic evidence that the roots have caused a breach in the side of the pipes causing them to fill with roots, rocks and soil. This, in turn, caused the back up to the system. Finally, I accept the evidence of Mr. Nette and Mr. Rethman that the Rethmans had been experiencing these difficulties prior to the execution of the Agreement of Purchase and Sale. I find this triggered his work in the septic field. I do not believe the water saving measures were on their own, evidence of difficulties. I believe this was more naiveté on the Rethmans' part over the expectations of a well and septic system.

Patent vs. Latent Defect

The next question is if the defect is a latent or patent defect. Again I quote Justice Warner:

"[18] A second legal question requiring clarification, for the purposes of this decision, is what is a patent defect and what is a latent defect? A patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection. A latent defect, as it relates to this case, is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. For the purposes of the decision, it is not disputed that whatever the defect was that caused the flooding in the basement, that it was a latent defect, that is, a defect which was not apparent on an ordinary inspection of the property. The defendants claim that because it was latent, they also were not aware of it. My understanding of the defendant's memorandum is that they acknowledge that, because the basement was finished and because neither building inspector nor the plaintiffs had the right, before the closing, to take the basement apart, their ability to determine any defects in the property was limited to those defects which would be apparent without taking apart the walls or the floors or the panelling that covered the cement walls."

The classification of the defect gave me considerable difficulty.

A root located in the pipe running to the septic field from the septic tank would not be visible upon an ordinary inspection of the property. Indeed, the only means by which one can identify such an obstruction is to dig up the pipe to observe it. This extends far beyond any reasonable inspection. On the other hand, the presence of trees on the disposal field can be an obvious cause of problems due to damage caused by roots. Mr. Doherty was shown the disposal field prior to executing the agreement. He described an orchard and the ash tree in his testimony. A reasonable person would know there would be roots extending from those trees throughout the lawn and into the septic field. Thus, the mere presence of roots in the septic system would be obvious and a patent defect. However, there remains the question of whether there were any problems, to which Mr. Rethman answered in the negative. This would have been a latent defect and, thus, subject to a claim for fraudulent or negligent misrepresentation. The reason being that it is incumbent upon the vendor, Mr. Rethman, to disclose any problems with the system of which he was aware.

While Ms. Myles testified that certain trees are more acceptable in a septic field while others are clearly unacceptable (e.g. maple, poplar, etc.), I do not interpret that to mean that trees are recommended to be planted in a septic field. Given that the pipe used is fiberglass pipe and must contend for space in the ground with large wooden roots that continue to grow, I interpret her evidence to mean simply that the possibility of failure of a septic system due to root damage is more prevalent with certain species of trees.

Thus, I find the presence of roots in this case to be a patent defect, and resort must be had to the doctrine of misrepresentation to determine liability.

Misrepresentation

Justice Warner provides an extensive analysis of the law of misrepresentation. For the following reasons, I find Mr. Rethman believed his statements in the Property Condition Disclosure Statement to have been true. Rather, his statement was negligent in that he believed the problem he experienced was in fact, resolved. That is not the case.

Justice Warner's Analysis

[19] A third legal question requiring clarification is what constitutes negligent and fraudulent misrepresentation.

[20] Fraudulent misrepresentation is dealt with, among other cases, by a decision of Saunders, J., as he then was, in *Grant v. March*, (1995) 138 N.S.R. (2d) 385. At paragraph 20 of that decision he says:

With respect to the first allegation, that is, that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in *Charpentier v. Slaunwhite* (1971), 3 N.S.R. (2d) 42. In that case, which involved problems with a well, Jones J. (as he then was) cited [at p. 45 N.S.R.] G.S. Cheshire and C.H.S. Fifoot, *The Law of Contract*, 6th ed. (London: Butterworths, 1964), at page 226:

> "A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year."

And again on page 241, as follows:

> "Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of the common law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind". Influenced by this consideration, the House of Lords has established in the leading case of *Derry v. Peak*, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in *Derry v. Peak*, saying that it meant a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent representation is a false statement which, when made, the representor did not honestly believe to be true."

[21] At paragraph 21, Justice Saunders quotes the *The Law of Vendor and Purchaser*, 3d. ed. by V. DiCastri (Carswell,1988), as saying that to found a claim for false misrepresentation one must do the following:

"In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it…

The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.

[22] On the facts in *Grant v.March*, the trial judge was not satisfied that the defendants knew of the water problems that existed and he further found that any representations that they did make were not made before the contract was entered into.

[23] Another relevant decision cited in the defendants' memorandum is *Jung v. Ip* 1988 CarswellOnt 643 (ODC), where the Court, in finding liability against the vendor for failing to disclose a termite infestation, said at paragraph 18:

It is now clear that the law of Ontario is such that the vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive. In the case before this Court, there was nothing innocent about the withholding of the information. It was done intentionally. This was not an innocent misrepresentation.

[24] In finding liability against the vendor for failing to disclose a sediment problem with the well and sewer system in a property disclosure statement, the Court in *Ward v. Smith* 2001 CarswellBC 2542 (BCSC) discussed the

application of the principles of negligent misrepresentation at paragraphs 33 to 39; quoting from paragraphs 33 to 35 of that decision (not as an authoritative decision but simply as one of the many that set out in summary nature what a negligent misrepresentation is), Gotlib D.C.J. said:

. . . The requirements to establish a claim in negligent misrepresentation were summarized by Mr. Justice Iacobucci in *Queen v. Cognos Inc.*, 1993 CanLII 146 (S.C.C.), [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.), at 643:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentations;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

In their pleadings, the plaintiffs used the expression "reckless misrepresentation" which was understood, during the course of argument, to be negligent misrepresentation. I am satisfied that, in fact, the defendants did negligently misrepresent the quality of the available water by stating that they were not aware of any problems with the quality of the water. . . .

The defendants owed a duty of care to the plaintiffs to not negligently misrepresent either the quality or quantity of the water supply.

The Court went on to make a determination that the defendants negligently misrepresented the state of the water. He was satisfied that they knew the nature of the problem with the well, even though they may not have known the extent of the problem.

[25] The Court's analysis in *Swayze v. Robertson*, 2001 CarswellOnt 818 (OCJ), a case involving a flooding problem caused by a defect in the foundation, is similar.

[26] The plaintiffs rely upon the decision of Wright J. in *Desmond v. McKinlay* 2000 CanLII 2201 (NS S.C.), (2000), 188 N.S.R.(2d) 211, which decision was upheld by our Court of Appeal at 2001 NSCA 24 (CanLII), (2001) 193 N.S.R. (2d) 1. In *Desmond v. McKinlay*, Mr. Justice Wright, like the Court in *Jung v. Ip* found that silence could constitute a negligent misrepresentation. At paragraph 43, he says:

In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment so as to create an actionable misrepresentation at law.

[27] If this court finds that the answers given in the disclosure statement, which was incorporated in the agreement, were either negligent or fraudulent misrepresentations, there is no doubt that (a) they were material, (b) they were made at the time of the entry into the contract or the agreement of sale and were relied upon, and (c) based

on the law as set out in *Desmond v. McKinlay* at paragraphs 48 to 51, they would constitute, in addition to negligent misrepresentations, a breach of a collateral warranty and thereby constitute a breach of the agreement of sale.

In reviewing the facts, I accept Mr. Nette's evidence that Mr. Rethman indicated to him that he was experiencing difficulties with the septic outflow. Mr. Rethman had sought a quote and found it to be expensive. He had a kindred spirit in Mr. Nette, who made several low cost recommendations in hopes to resolve the problem. Unfortunately, Mr. Nette was not an expert in the field of septic disposal systems. If he were, he would have known the impact of making changes on his own accord with the involvement of the Department of Environment. He is an intelligent and well-spoken biologist, who takes an interest in all types of home repair. I accept Mr. Nette's version of events in describing Mr. Rethman's conversations and actions. He befriended both Mr. Rethman and Mr. Doherty. He does not have any stake in this litigation.

I find the Defendant represented to the Claimants that there were no problems with the well and septic system. This was incorrect. He did experience difficulties which he sought to remedy. However, rather than seeking the insight of those with experience, he chose to do it himself. Unbeknownst to Mr. Rethman, the problem proved more complex than he could handle. The end result was a failure of the system. I need not find if his efforts caused the failure or did nothing to prevent it.

That said, I find Mr. Rethman thought he had solved the problem. He believed his statements were true. However, he had no basis in fact for such a belief. He had an obligation to disclose his efforts to the purchasers, he did not do so. I note Mr. Oulton's submissions that his disclosure on other issues was much more detailed. Indeed, several of these issues (e.g. mice, etc.) were not as significant as the difficulties I found with the disposal system.

As noted by Justice Wright and quoted by Justice Warner, I find the vendor occupied a special relationship, the statements were material and intended to be acted upon. The statements were acted upon to the purchasers' detriment. As noted above, they were untrue. He was required to follow the *On Site Sewage Disposal Regulations* in making a minor adjustment such as this. He did not do so. He relied upon his own knowledge and expertise.

I find the statements of the condition of the septic were made negligently. Furthermore, while perhaps unnecessary, I find the statement to have been a collateral warranty. I find Mr. Rethman liable in negligent misrepresentation and breach of contract, and must pay damages to the Dohertys.

Damages

The law respecting damages arising from negligent misrepresentation requires the Defendant to put the wronged party into the position as if the misrepresentation had not occurred. Unlike contractual damages, misrepresentation is concerned with reliance damages. However, in this instance, the difference is negligible and I have found liability on both grounds. The Small Claims Court lacks the jurisdiction to order rescission of this contract. Rather, I am obliged to

consider an award of damages. The Claimants have categorized two separate types of damages, namely replacement costs which may be subject to betterment and replacement costs which are not subject to a betterment reduction. Included in the second category are filing and service fees for this matter. While it is correct that they are not subject to betterment reduction, they are more properly categorized as costs under s. 15 of the *Small Claims Court Forms and Procedures Regulations*. As such, they are within the discretion of the Court and need not be awarded for the full amount sought.

Rather than categorizing the damages as the Dohertys' counsel has done, I prefer to adopt the following:

- Repair of septic field – This would include the analysis to determine the problem, removal of the trees and repair of the septic field.

- Restoration of lawn including trees.

- Expenses incurred as a result of damages, such as cleaning costs.

- Betterment

- Mitigation

- General Damages

- Costs

Repair of Septic Field

All witnesses seem to agree that to repair the septic field, it will be necessary to remove several trees including the ash tree. In considering the estimates, I note the work has not yet been completed. Further, the witnesses, with the exception of the individual parties and Mr. Nette, are contractors. During closing arguments, Mr. Oulton sought to have several of them including Mr. Nette qualified as experts. None of the contractors were present to address their credentials. Mr. Nette is simply not an expert in that field. I decline to consider any of them as such. In any event, such a finding is not crucial to this matter.

Myles Estimate – Ms. Myles prepared a report and analysis of the solution required. She described the current septic system as "not really a system", which I took to mean that it does not conform with current legislation and standards. Ms. Myles report was referenced several times in evidence. She is a QP 2, as required by the regulations. I order and allow the cost of the report, $994.75.

Removal of Trees - Paul Grimm testfied that it would cost $600 to remove the orchard and $5000 to remove the ash tree. The photographs reveal that part of the orchard has been removed and no invoices for that work have been provided. I find Mr. Doherty or someone on his behalf has removed the trees already. I accept Mr. Grimm's evidence that it is necessary to remove the ash tree safely. While I am concerned with the cost of the estimate, there has been nothing by Mr. Rethman to refute this amount. I allow $5000 under this heading.

Repair of Septic Field – Kerrigan Weihers provided an estimate in evidence of $12,075 to dig and install a new septic system. Ms. Myles estimates the average job to be approximately $15,000. I accept Mr. Weihers estimate as reasonable. I order $12,075 under this heading.

Restoration of Lawn including Trees

Mr. Oulton argued vigorously in favour of the Court awarding a sum for the replacement of the trees including the ash tree. However, as I have found the cause of the failure of the system was the presence of roots from the ash tree and possibly other species, it would be unwise to replace the trees in the septic field and unreasonable to award compensation under this heading. I am prepared to award the sum of $500 to restore the lawn after the installation of the septic field.

Expenses Incurred as a Result of Damage

Under this heading, the Claimants are seeking the cost of pumping out the septic tank ($300) and two payments for maid services ($200). I accept these expenses are reasonable and allow $500 under this heading. I disallow the cost of a third pumping for $150.

Betterment

Betterment is the concept which recognizes that restoration will put a party in a superior position than before the breach of contract or misrepresentation.

Justice Wright of the Supreme Court of Nova Scotia dealt with a case of misrepresentation in *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211. In that case, his Lordship found the Defendants liable for misrepresenting the state of the water and septic system. He ordered damages to cover the cost of a new system, less the cost of a water pump which was plainly visible. He then stated the following:

> "[62] Otherwise, I am satisfied that the costs of repairs and/or replacement of the water and sewage disposal systems were reasonably incurred and represent an appropriate measure of damages. However, I also conclude based on the evidence that a betterment allowance should be applied against the damages figure of $17,302.28. This is because the plaintiff now has brand new water supply and sewage disposal systems servicing her property in contrast to what was there before. These modern systems, which are in some respects customed designed for the property, represent a substantial betterment and it would be appropriate, in my view, to make an allowance for that betterment of one-third of the above referenced invoices which I have allowed.
>
> [63] I note that a similar approach was followed by the New Brunswick Court of Queen's Bench in the recent case of *Domokos v. Phillips* [1996] N.B.J. No. 410 where McLellan, J. made a betterment allowance of one-third of the contractor's charges for the cost of repairs to a home. Accordingly, the plaintiff shall be entitled to recover from the defendant Joan McKinlay an adjusted damages figure of $11,534.85. The plaintiff will also be entitled to recover pre-judgment simple interest at an annual rate of 5% calculated from the date of payment of the respective invoices."

This decision was affirmed by the Court of Appeal at (2001), 193 N.S.R. (2d) 1. The Supreme Court has also applied a betterment allowance of 20% in *Dartmouth v. Acres Consulting Ltd.* (1995) 138 N.S.R. (2d) 81 which was applied by Justice LeBlanc in *A.J. Hustins Enterprises Ltd. v. Byrne Architects Inc.* This was confirmed on appeal at 2003 NSCA 21.

The intent of betterment is to place the Claimants in the position they would have been in were it not for the misrepresentation, no better and no worse. In the circumstances, the Dohertys were aware they purchased an older home. I find Mr. Doherty was told by Rethman that the system had not been replaced. I do not accept Mr. Oulton's submission that any part of Mr. Rethman's conduct suggests the system was recently replaced or was new.

The facts of the *Desmond* case are analagous to the case at bar. I apply a betterment allowance of 30% against the full cost of replacing the septic system and removing the trees. The Myles plan is not included in this assessment. Thus, I apply 30% against $17,575 or $5272.50.

Mitigation

The concept of mitigation applies in breach of contract. In the case of negligent misrepresentation, which is a tort, failure to mitigate is more akin to contributory negligence. The concept recognizes that a wronged party is expected to mitigate his/her losses. Furthermore, a failure to mitigate will result in a reduction in damages. However, the Courts have held that any expenditues to mitigate must be reasonable and a party will not be prejudiced by his or her financial inability to takes steps in mitigation. To that end, I quote Saunders, J. as he then was, in *Stoddard v. Atwil Enterprises Ltd.* (1991), 105 NSR (2d) 315:

> "The general principle which underlies the law of mitigation is that a plaintiff must act reasonably to avoid further damage or increased costs against the defendant. This duty to act reasonably is related to the date for assessment of damages, in that the plaintiffs' duty to mitigate does not arise until a reasonable time after the assessment date. Normally the date of assessment is the date the contract is breached. However, there are certain exceptions to the "breach date rule". One of these exceptions is found, as here, in the so-called "repair" cases. The shift began with Dodd Properties v. Canterbury City Council, [1980] 1 W.L.R. 433 (C.A.)., where it was held that the plaintiff was justified in deferring repairs up to the time of trial. This principle was also applied in a case of defective construction, where:
>
> > . . the plaintiffs had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants who had vigorously disclaimed liability right to the door of the court."
>
> MacGregor on Damages, referring to **Cory & Son v. Wingate Investments** (1980), 17 Build. L.R. 104 (C.A.))
>
> This same approach was taken in **Costello v. Cormier Enterprises Ltd.** (1979), 28 N.B.R. (2d) 398 (C.A.), where the New Brunswick Court of Appeal held that the owner of the house was justified in waiting to establish the builder's liability before embarking on a full program of repair.
>
> The Appeal Division of this court, in the case of **Canso Chemicals v. Canadian Westinghouse** (1974), 10 N.S.R. 306, referred to McGregor on Damages (13th edition at p. 229) for eight rules with respect to mitigation including:
>
> "1. a plaintiff need not risk his money too far . . .
>
> 8. a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."

This case was later applied by Justice Wright in *Connolly v. Greater Homes Inc.*, 2011 NSSC 291. While the circumstances of this matter differ from the facts in either of these cases, I find the principle to be applicable in this case. The Dohertys had just purchased the property and incurred considerable debt. In any event, there is nothing in their claim which would have been affected by a failure to mitigate. I order no further deduction in this respect. However, this is not an appropriate case to award prejudgment interest.

General Damages

Having found the Defendant liable in both tort and contract, I find it proper to award general damages for the considerable annoyance, loss of comfort and emotional distress arising from the misrepresentation. The *Small Claims Court Act* limits awards of general damages to $100. I award $100.

Costs

Typically costs follow the event and are at the discretion of the Adjudicator. I award the Claimants their costs for filing and service fees of $400.55.

Summary

In conclusion, I find the Defendant, Craig F. Rethman, liable in negligent misrepresentation and breach of contract. I award damages calculated as follows:

Myles Report	$ 995.00
Install Septic Field	$12,075.00
Removal of Ash Tree	$ 5,000.00
Restoration of Lawn	$ 500.00
(Less: Betterment)	($ 5,272.50)
Cleaning/Pumping Tank	$ 500.00
General Damages	$ 100.00
Costs	$ 400.55
Total Judgment	**$14,298.05**

An order shall issue accordingly.

Dated at Halifax, NS,
on March 6, 2015.

Gregg W. Knudsen, Adjudicator

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