SCCH No.275422

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Reeves v. Sherwood, 2007 NSSM 62

BETWEEN:

TONY REEVES and MAXINE REEVES

Claimants

- and -

RONALD KEITH SHERWOOD and LOUISE A. SHERWOOD

Defendants

DECISION

Adjudicator:David T.R. Parker

HEARD: Halifax April 25, April 30 June 6, 2007
Submissions June 23, July 18 and July 29, 2007.
DECISION: October 19, 2007

Counsel: Counsel: Donald Presse represented the Claimants
Steven Scott represented the Defendants

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Parker: - This matter came before the Small Claims Court in Halifax on April 25, April 30 June 6 and Submissions were provided on June 23, July 18 and July 29, 2007.

1. <u>Pleadings</u>:

a.] The Claim.

The claimant stated that on July 2006 the entered into an agreement of purchase and sale respecting the home of the defendants and that the transaction closed on October 6, 2006.

Following the closing the claimant's experience problems with the Jacuzzi, hot water tank, and HRV motor.

The claimant stated they were provided with a property condition disclosure statement in July 2006; however the defendants did not disclose these problems. The claimants said they relied on the defendants' property condition disclosure statement to their detriment. And that they claim for damages resulting from the nondisclosure and negligence and or fraudulent misrepresentation.

b.] The Defense.

The defendants make a general denial of all allegations put forward by the claimants.

In this particular case both counsel for their respective sides provided excellent briefs to this Court. I must commend counsel, not only for their excellent presentation and advocacy for their respective sides during the court hearings and also for their excellent briefs, parts of which I will include with this decision. Their priests vary in their approach and that Mr. press they deals with the issues as

he sees it before this Court and how the evidence supports his client's position. In Mr. Scott's case he is laid of the evidence as he understands it from each of the witnesses. He then makes reference to the law and follows the law up with his arguments.

The defendant's counsel frames the issues within the context of the claimant's pleadings. The issues as seen by Mr. Scott are reflected in his overview outlined in his submissions and they are as follows:

"This small claims action arises out of the sale of a home located at 32 Madison Drive in Bedford, Nova Scotia. The Plaintiff in this matter claims that the following deficiencies were apparent shortly after the sale of the property on October 6, 2007: a faulty hot water tank, a burnt out motor in the heat recovery ventilation system (HRV) and leakage from a Jacuzzi tub. The Plaintiff says that the Defendant did not disclose the deficiencies when the Property Condition Disclosure Statement (PCDS) was completed. The Plaintiff claims that the failure by the Defendant to disclose these deficiencies constituted fraudulent misrepresentation and alternatively negligent misrepresentation. The Plaintiff seeks damages of $13,084.96."

The issues as framed by the claimants counsel Mr.Presse are somewhat different in that he speaks of a warranty contained in the contract of purchase and sale. The other issues that are raised in counsel's submissions are similar to those raised by the defendant noted above. The warranty issue was raised at trial, and one of the

benefits of the Small Claims Court model is that an adjudicator can consider issues not raised specifically in the pleadings. This is contrary to the position taken in the Supreme Court of Nova Scotia, where the court will not consider matters not pleaded. As the monetary jurisdiction of this court increases and as more and more counsel is involved in matters which involve the increased monetary jurisdiction of this court, the court's flexibility may decrease. In any event, I have considered the warranty issue as expressed by the plaintiff.

As indicated earlier, I propose outlining the submissions, at least in part, as presented by counsel as not only do they reflect the evidence is certainly in areas where they agree and they outline the matters nicely that or before this Court.

2. Submissions by Counsel

a.] Claimants' Submissions

The following are the submissions all of the Claimants Counsel:

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b.] Defendants' Submissions

The submissions all of the defendants counsel is as follows:

"The Evidence

The following witnesses provided evidence at this proceeding:

Mr. Wayne Kristensen

Mr. K. Fortis

Mr. Christopher Reeves

Mr. Tony Reeves

Ms. Paula Pulling

Mr. Jim Lawrence

Mr. Donald Pentz, and

Mr. Keith Sherwood

Mr. Wayne Kristensen

Mr. Kristensen gave evidence for the Plaintiff, Mr. Reeves. Mr. Kristensen is a sixty year old retired gentleman who now operates a company which performs small scale construction and renovation projects. He was requested by the Plaintiff to provide an Insurance quotation relative to certain water damage which the Plaintiff had sustained at his residence (P-1 Tab 6).

Mr. Kristensen reviewed documentation contained within (Tab 6) as well as documentation contained in (P-1 Tab 1). Mr. Kristensen reviewed photos contained in (P-1 Tab 1) and noted in particular water stains which were visible in (P-1 Tab 1 Photos 8 and 10). In cross examination, Mr. Kristensen stated that he could not determine when the water stains would have occurred. He agreed that the water stains could have resulted from the Property Inspector doing his test on the Jacuzzi or from Mr. Reeves taking a bath in the Jacuzzi. He could not determine when these water stains would have occurred.

In cross examination, Mr. Kristensen stated that he did not consult with a plumber when giving his quote in order to determine whether the Jacuzzi tub could be saved. He had done a check to determine if there was a Jacuzzi dealer in the HRM and he determine that a Jacuzzi dealer did not exist and hence his belief that the tub could not be re-used.

Mr. Kristensen also gave evidence in cross examination about the linen closet next to the main bathroom where the word "cut" was scrolled on the wall (P-1 Tab 1 Photos 3 and 4). He made mentioned that the nails were present in the word work, had not been puttied or painted and it appeared to be a quick or hasty job. He agreed that the closet contained hardwood and it would have been necessary to remove the trim to install hardwood in that area. He also agreed that it was possible that the nails were exposed because it was at the back of the closet and not readily noticeable.

Mr. K. Fortis

Mr. K. Fortis is semi-retired gentleman of Greek descent age seventy one.. His son-in-law and the Plaintiff, Mr. Reeves work together as policemen. He was asked to come to the Reeves house to look at the Jacuzzi. He talked about looking at the Jacuzzi and identified a number of photos (P-1 Tab 1Photos 1, 5, 6, 7, 8, 9, 10, and 11). He spoke about filling the tub and running the Jacuzzi, looking inside the closet through (photos 5 and 6) and seeing a leak near the couplings (photos 10 and 11) and observing a leak in one of the plastic pipes. He advised that he could not reach in through the access door and touch the pipe which had the leak suggesting his arms were not long enough. He could not attempt a repair to the leaking pipe because his arms were not long enough.

He stated in direct examination and in cross examination that the tub was "like new" and that the tile job done in the main bathroom was "first class". He further stated in direct and cross examination that if nobody used the Jacuzzi as a Jacuzzi that they would not know there was a leak. If the tub was used only as a shower or a tub, one would not be aware that there was a leak.

Mr. Christopher Reeves

Mr. Christopher Reeves (brother of the Plaintiff, Mr. Tony Reeves) gave evidence on behalf of the Plaintiffs. Mr. C. Reeves stated that he is 52 years of age and works as a Refrigeration Technician.

He advised in direct evidence that he was called to the Reeves household at 32 Madison Drive in Bedford by his brother as there appeared to be a problem with the hot water heater on October 6th or 7th. Mr. C. Reeves went to the basement and put an amp meter and ohms meter on the two heating elements in the hot water tank. He determined that one of the elements was burned out and that he advised his brother that he would have to get a plumber in to fix the problem..

While at the house, Mr. C. Reeves advised that he was asked by Mrs. Reeves to check for a rumbling noise which was resonating up through the main floor. He went to the HRV unit which was strapped to the rafters in the basement (P-1 Tab 1 Photos 22 and 23) and opened the HRV and found that one of the motors was not in its cradle or holding unit and had apparently fallen out. The motor was hot suggesting to him that the motor had burned itself out. Mr. C. Reeves gave evidence of purchasing a replacement motor and installing it. He identified an invoice (P-1 Tab 9) relative to his purchase of the replacement motor.

In cross examination, Mr. C. Reeves agreed that a water heater and an HRV motor could fail at any time regardless of age.

He also gave evidence about the leak from the Jacuzzi. When this was brought to his attention, he reached through the access door (photos 5 and 6) and was able to hand tighten a loose coupling (photos 10 and 11) near where the leak was observed. He did not attempt any repairs to the leaking pipe.

Mr. Tony Reeves

The Plaintiff, Mr. Tony Reeves gave evidence on behalf of his case. Mr. Reeves is forty three years of age. He is a member of the Halifax Regional Police (HRP) and has been employed with HRP for some twenty-one years. Mr. Reeves is married and has two children; ages 17 and 14.

The Plaintiff stated that he and his wife attended 32 Madison Drive in Bedford on or about July

16, 2006 with their Real Estate agent. They made an offer to purchase the property on July 17, 2006. In cross examination, described the condition of 32 Madison Drive as being clean and orderly.

The Plaintiff attended the house at 32 Madison on July 19, 2006 when the inspection was conducted by Bob Carter of Flagstone Inspection (P-1 Tab 11).. He gave evidence relative to the inspection. Mr. Reeves believed the hot water tank was new as stipulated in the PCDS, however, Mr. Carter informed him it was a 2002 model. That was the first that he learned that it was a 2002 model. Mr. Carter did not test the hot water tank. In cross examination, Mr. Reeves stated he knew it was a 2002 model on July 19th. He initialled the PCDS (p-1 Tab 4) on July 20, 2006 knowing that the hot water heater was a 2002 model and not new..

The Plaintiff was present for the HRV inspection. He said Mr. Carter pressed the button and the HRV appeared to be working well. There was no rumbling and no noise from the unit. Mr. Carter opened the unit. He said everything was fine.

The Plaintiff stated he was present when the Jacuzzi was filled with water and then turned on. The Jacuzzi was on for three seconds. That was the extent of the test.

The Plaintiff reviewed certain contractual clauses in the Purchase and Sale Agreement (P-1 Tab 2 clause 13 and clause 10 in the Schedule "B" of the PSA). He described these clauses as providing a "warm and fuzzy" feeling relative to the transaction. In cross examination, he stated that there were no discussions with counsel to extend these clauses beyond the scope of this agreement. He stated that no collateral agreement was drafted to allow these clauses to survive the closing.

In cross examination, the Plaintiff reviewed Schedule "B" of the Purchase and Sale Agreement (P-1 Tab 2). Schedule "B" stipulated that a) the seller was to provide the buyer with a $ 1,000 allowance to replace carpet at closing, b) seller to give buyer a $ 1,000 cashback to go towards repair of the concrete step in front of the house, and c) seller to provide documentation from a W.E.T.T. certified tradesman that chimney and woodstove are in good working order and that the crack in back of stove is not an issue for safety or normal everyday usage. Documentation to be provided before July 25/06 and buyers to be satisfied with said documentation July 25/06 midnight or offer will become null and void and deposit returned to buyer without

In cross examination, the defendant was referred to the Flagstone Home Inspection Report (P-1 Tab 11). Mr. Reeves reviewed clause 5.1 relative to the plumbing supply system "No Concerns"; clause 5.3 relative to a water heater and noted "Age: 2002; clause 5.5 relative to plumbing "Plumbing appeared adequate & operational; clause 7.1 relative ceilings and walls "no apparent concerns".

As a result of this inspection, an addendum was attached to the Purchase and Sale Agreement (P-1 Tab 3) on July 22, 2006. This addendum included a) the levelling of the deck and replacement of upright posts (which had rotted), b) to have ropes replaced and bricks in back of

stove replaced, c) sellers acknowledge that the crack in foundation in rec room has been repaired by a qualified tradesperson and that there has been no water seepage since owning the house, and d) sellers to have wasp nest exterminated.

All of the work required by the Addendum was completed to his satisfaction prior to the closing. Carpeting on the stairs was re-done at a cost of $ 600. The front step had not been repaired as of April 30th, 2007 when Mr. Reeves gave his evidence.

The Plaintiff stated that he requested access to the Sherwood home twice between the time that the conditions on the PSA were fulfilled and the closing. Once was for a bank appraisal and once was for his children to visit the house.

The Plaintiff's conducted their final inspection earlier than expected on October 5th, 2006 when the cleaning lady was still present. Mr. Reeves found difficulties with a few windows upstairs. As a result, Mr. Reeves contacted his lawyer and had him send a letter to counsel for the Sherwoods demanding that $ 500 be held back until the windows in order to fix the windows. Eventually, $ 250 was agreed upon. The repairs to the windows had not occurred at the time that Mr. Reeves gave his evidence.

The house closed mid-day on October 6th.

The Plaintiffs did not stay in the house at 32 Madison on the night of October 6th. On October 7th, the move was completed. Mr. Reeves decided to take a bath and relax. He found the water to be cool. He called his brother (Chris Reeves) to come to the house as there appeared to be a problem with the hot water heater. Mr. C. Reeves came to the house and checked on the water heater and found that it was burned out. Mr. T. Reeves was told to contact a plumber in to fix the problem.

While at the house, the Plaintiff advised that Mr. C. Reeves was asked by Mrs. Reeves to check for a rumbling noise which was resonating up through the main floor. Mr. C. Reeves checked the HRV unit (P-1 Tab 1 Photos 22 and 23) and found that one of the motors was not in its cradle or holding unit and had apparently fallen out. The motor was hot and had burned itself out.

The Plaintiff gave evidence of seeing something on the ceiling while he was eating lunch. He touched the ceiling and noticed it was damp that water was on the ceiling. His wife was cleaning and running the jacuzzi at the time (a third time) when the water was noticed on the ceiling between the kitchen and family room. It was at this time that he determined that the ceiling had been repaired. The Plaintiff also gave evidence about the leak from the jacuzzi. The Plaintiff reviewed various photographs in explaining his evidence (P-1 Tab 1).

The Plaintiff reported this problem to his lawyer who in turn sent correspondence to the Defendants lawyer in order to meet and discuss the problem. There was no response from the Defendants.

The Plaintiff gave evidence about his dealings with the insurance company and attempting to get quotes from contractors to repair the damage (P-1 Tab 6 and 7). He was questioned about a quote from Mr. Kristensen (P-1 Tab 6) wherein he stated that it was difficult to get a quote from a contractor for Small Claims Court. In cross examination, this issue was raised with the Plaintiff as subterfuge in his dealings with Mr. Kristensen. The Plaintiff couldn't recall whether he had mentioned Small Claims Court to Mr. Kristensen. Mr. Reeves agreed that he wanted the quote for Small Claims.

The Plaintiff filed in Small Claims Court on December 20th, 2006 and served the Defendants former counsel on December 21st, 2006.

Ms. Paula Pulling

Ms. Paula Pulling-Simm gave evidence on behalf of the Defendants. Ms. Pulling resides at 40 Eastwood Terrace in Bedford and has been employed a Real Estate agent for the past fourteen years. She presently works for Royal Lepage Real Estate.

She stated she listed the Sherwoods residence in March of 2006. She also assisted the Sherwoods in completing the Property Condition Disclosure Statement (PCDS). There were no difficulties in filling out this document. She presented a Purchase and Sale agreement in July 2006 to the Defendants.

She advised there was some work done to the house in order to get it to sell. She recalled the carpet in the Master Bedroom ensuite was replaced with ceramic tile. In cross examination, she advised that this was replaced due to feedback from other realtors and not in relation to any identified problems.

She was asked about water damage being apparent on the ceilings between the family room and the kitchen in the Sherwood property. She stated she did not observe any such damage.

Ms Pulling arranged for the house to be "staged". She explained to the court the process of staging a house for the purposes of a sale. She advised that she had ordered the "staging" and it had made a considerable difference.

Ms. Pulling was asked about the Sherwoods as clients. She stated she had no concerns with them and would have no reservations in purchasing a house from them.
She used the term "sight unseen" in purchasing a property from them.
In cross examination, counsel for the Plaintiffs questioned Ms. Pulling as to her relationship with the Sherwoods. She advised that she had met Louise Sherwood briefly about fourteen years ago. Louise Sherwood had called her to list the property. She stated she would not consider herself good friends but only a casual acquaintance.

In cross examination, counsel for the Plaintiffs reviewed the prices which this house had been

listed; $ 321,000 as the original price, $ 317,000 as a reduced sale price and $ 309,900 as a further reduced price. Ms. Pulling was cross examined as to whether the Sherwoods had purchased another property. She advised that they had but there were no pressures on her to sell quickly.

Ms. Pulling was questioned about the Sherwoods not allowing the Reeves' children to visit the house prior to the closing. She stated at the time, the response that she received from the Sherwoods was that it was not a good time; that it was a very stressful time for them.

Counsel for the Plaintiffs suggested that the stress in the Sherwoods lives was due to the price reductions. Ms. Pulling responded that selling a house is very stressful. She is experiencing that presently as she is selling her own property. In re-direct, Ms. Pulling stated that Mr. Sherwood's MS could be a contributor to the family stress.

Counsel for the Plaintiffs also questioned Ms. Pulling concerning asking questions of the Reeves Real Estate agent as whether the Reeves had purchased two homes in 2006 to which she stated that she had.

Counsel for the Plaintiffs also questioned Ms. Pulling about a crack in the foundation. In re-direct, she advised that there was no evidence of water damage from this crack..

Mr. Jim Lawrence

Mr. Jim Lawrence gave evidence on behalf of the Defendants. Mr. Lawrence resides at 246 Moirs Mill Road in Bedford. Mr. Lawrence is a steel framer working in the construction industry presently doing interior work on condominium projects. He stated he knew the Sherwoods as he had worked on the condominium that they had purchased and through a Bedford Restaurant that they both frequented.

He stated that Louise Sherwood contacted him to do a small repair to the ceiling in their house. In cross examination, he advised that he believed Mrs. Sherwood had asked him to do this work because he was involved in construction.

He described the crack that the Sherwoods wanted repaired. It was on the ceiling between the kitchen and the family room. It was about four inches long and about one eight of a millimeter wide. He described the work to repair the crack. After final sanding, he painted the portion of the ceiling that he had repaired and then waited for it to dry. The paint matched and he left the residence.

He was questioned about whether there was any evidence of water damage or seepage from this crack. He advised there was no such evidence and had there been it would have been indicative of a greater problem, which he didn't think he was capable of repairing.

Mr. Donald Pentz

Mr. Donald Pentz was called as a witness for the Defendants. Mr. Pentz resides at 24 Torrington Drive in Halifax. He is presently employed at Chapters Book Store and was previously employed by Eaton's for some thirty five years. He met Louise Sherwood through work and some fourteen years ago. He was a regular acquaintance of the Sherwoods. Mr. Pentz regularly visited the Sherwood household and would consider himself a very close friend of the Sherwoods.

Mr. Pentz painted the majority of the Sherwood residence in 2001. As Mr. Sherwood's MS progressed, Mr. Pentz has taken over the household maintenance such as lawn moving, gardening and snow shoveling. He also used to assist the Defendant in maintaining the HRV. He described the process of vacuuming the filters and then washing them, taking out the HRV motors from their housing, oiling them and then strapping them back into their housings. He advised that he and Mr. Sherwood used to do this maintenance together but he had done it alone since 2005 when Mr. Sherwood could not longer get down the stairs. He last did this maintenance in March 2006.

He was questioned about his knowledge of the crack between the family room and the kitchen. He stated he was familiar with the crack. He described the crack as a settling crack which occurred when the house would shift. Mr. Pentz stated that in 2001 when he painted the house, he recalled the crack and at that time, he rolled paint into the crack which covered it up. In cross examination, he stated that the crack eventually re-appeared. In direct examination, Mr. Pentz was asked about whether he has ever seen any water seepage and/or water damage emanating from this crack to which he answered "no".

He also stated that he was present during the staging and helped to move and arrange furniture.

In cross examination, Mr. Pentz was asked as to whether he had ever stayed over at the Sherwood house. He stated he had when their daughter was home alone when the Sherwoods were traveling. He was asked if he ever used the jacuzzi. He stated he has used the tub only as a tub as he didn't know how to use the jacuzzi function.

Mr. Keith Sherwood

Mr. Keith Sherwood, the Defendant in this action gave evidence in this proceeding. Mr. Sherwood resides at 112-94 Bedros Lane in Halifax. Mr. Sherwood advised that he is currently 54 years of age and is retired. Prior to retirement, he was the Officer in Charge of the RCMP's Financial Crime unit for which he was responsible for some forty employees in areas dealing with Fraud, Commercial Crime and Proceeds of Crime. Mr. Sherwood advised he took his retirement from the RCMP at 34 years of service due to onset of his Multiple Sclerosis. With his early retirement, he decided to take advantage of a retirement move which had been afforded to him through a special submission to Treasury Board. Another reason which precipitated his move was the fact a two storey house made it difficult for him to get around in the residence.

The Defendants purchased a pre-construction condominium which they were able to design and modify to better meet his physical needs.

On March 30 of 2006, Ms. Paula Pulling was contacted to list the property at 32 Madison Drive in Bedford. She did a walk through and upon completing that, he with Ms. Pulling's assistance proceeded to fill out the PCDS.

The Defendant reviewed the PCDS (P-1 Tab 4 Clause 4 A.) "Are you aware of any problems with the plumbing system". Mr. Sherwood advised Ms. Pulling that he had installed "new hot water tank" approximately five years ago.. Ms. Pulling advised him to write that in so he wrote the phrase "new hot water tank". He also advised that he had replaced all the sinks and a pop-up stopper in the main bath tub (or Jacuzzi).

The Defendant was questioned concerning the usage of the Jacuzzi. He stated that the tub was rarely used a Jacuzzi as he for one had difficulty getting into and out of the bath tub. He mostly used it as a shower for a period and then had to use the ensuite shower as his MS progressed. His family did not use the bath tub as a jacuzzi. In cross examination, the Defendant stated his wife and daughter used the tub but not as a Jacuzzi.

The Defendant reviewed Clause seven of the PCDC "Have there been any problems with pumps, purifiers, air conditioning systems, garburators, built-in appliances, etc.?". He answered "no".. He was questioned about the HRV. He stated it was the same unit that was in the house when they bought the house. He further advised that there had been no problems with the unit in the time that he owned the house. Maintenance was done on the unit in the Spring and the Fall.

The Defendant was questioned concerning the overall condition of the house when it was listed. He stated that the front step had dropped and needed repair, the roof need to be re-shingled and a crack between the family room and kitchen was in need of attention. At the time of listing, they decided not to do any of these repairs and to list the house "as is".

The Defendant was directed to the defence exhibit (D-2). D-2 was an appraisal conducted by Kempton Appraisals Limited in behalf of Royal Lepage Relocation and in relation to his move. Mr. Philip Kempton attended 32 Madison Drive on April 21, 2006. Mr. Sherwood was referred to page two of D-2. Mr. Kempton conducted a review of the residence which took approximately one and one half hours. He was asked to read how the condition of the walls and ceiling were evaluated "Average". Mr. Sherwood noted that Mr. Kempton made no mention of any water damage to the ceilings and or walls in the residence.

Mr. Kempton also made notations (on page three) that the water heater had a 40 gallon capacity and that an HRV was in the residence. There were no comments made about these units.

The Defendant was referred back to the PCDS (P-1 Tab 4 Clause 6 C) "Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the Property if less than five years)?".. He advised there has been no leakage in the house.

The Defendant was directed to Clause 10 C of the PCDS "Are you aware of any damage due to wind, fire, water, wood rot, pests, rodents or insects? If yes, give details". Mr. Sherwood answered "no" to this question.

The Defendant then reviewed notes as when certain other things occurred at the house. These notes were all sourced to documentation: on June 12th the roof was re-shingled; on June 15th carpet in ensuite was replaced with ceramic tile; on June 15th, the crack between the family room and the kitchen was repaired; on June 19th staging occurred; July 16th an open house was held; and, July 17th an Offer or Purchase and Sale was received from the Plaintiffs.

The Defendants had Mr. Jim Lawrence attend their residence to fix a crack in the ceiling which Mr. Sherwood described as approximately six inches long and minimal in width. In cross examination, the Defendant stated that Mr. Lawrence was paid $ 100 even though he had refused any money.

The Defendant was asked whether or not any water had seeped from the crack between the family room and the kitchen. He stated "no". In cross examination, the Defendant stated that there had never been any seepage in the house.

The Purchase and Sale Agreement was reviewed (P-1 Tab 2). The Purchase and Sale Agreement stipulated in Schedule "B" that a) the seller was to provide the buyer with a $ 1,000 allowance to replace carpet at closing, b) seller to give buyer a $ 1,000 cashback to go towards repair of the concrete step in front of the house, and c) seller to provide documentation from a W.E.T.T. certified tradesman that chimney and woodstove are in good working order and that the crack in back of stove is not an issue for safety or normal everyday usage. Documentation to be provided before July 25/06 and buyers to be satisfied with said documentation July 25/06 midnight or offer will become null and void and deposit returned to buyer without penalty.

The Defendant was referred to the Flagstone Home Inspection Report (P-1 Tab 11). Mr. Sherwood reviewed clause 5.1 relative to the plumbing supply system "No Concerns"; clause 5.3 relative to a water heater and noted "Age: 2002; clause 5.5 relative to plumbing "Plumbing appeared adequate & operational; clause 7.1 relative ceilings and walls "no apparent concerns".

As a result of this inspection, an addendum was attached to the Purchase and Sale Agreement (P-1 Tab 3) on July 22, 2006. This addendum included a) the levelling of the deck and replacement of upright posts (which had rotted), b) to have ropes replaced and bricks in back of stove replaced, c) sellers acknowledge that the crack in foundation in rec room has been repaired by a qualified tradesperson and that there has been no water seepage since owning the house, and d) sellers to have wasp nest exterminated. In cross examination, the Defendant re-iterated that there was no seepage from the crack in the basement.

The Defendant was perturbed by clause b) of the Addendum because of his actions relative to Clause c) of Schedule "B: (P-1 Tab 2) caused some concerns to the Plaintiffs. The Defendant provided documentation as requested by the Plaintiffs but insisted on the Brick being replaced in

the woodstove. The Defendant balked at this requirement. The Defendant stated this work was done but he did not pay for it.

The Defendant was questioned about the visits which the Plaintiffs requested. When asked for a second set of appraisers to attend, the Defendant expressed some concern over this Sale given that a second bank was looking at the residence. Mr. Sherwood questioned the need and that was the last he heard about the issue. With respect to the visit to the house by the Reeves' children, Mr. Sherwood had agreed to this early on but it appears that Ms. Pulling forgot to convey this invitation to the Reeves and the visit never occurred. A subsequent request was made wherein the Defendant did not feel it was a good idea at that time given the stress in the Sherwood household and the fact that its takes a lot of planning to move him for an outing. Mrs. Sherwood also had all her china laid out on the dining room floor and was concerned that it might be damaged during such a visit. The negative response was conveyed to Ms. Pulling for these reasons.

The Defendant reviewed the photographs (P-1 Tab 1). He reviewed photos 3 and 4. He stated he has never taken notice of this word. He reviewed photos 5 and 6. He has never had the access door off during the time that lived in the house. Mr. Sherwood stated he was not aware of the shoddy work which Mr. Kristensen pointed out in these photos.

The Defendant was questioned whether he was aware of any problems involving the HRV when he left the property on or about October 5, 2006. He said he was not. In cross examination, the Defendant stated that he was not aware of any rumbling or malfunctioning involving the HRV.

The Defendant was questioned whether he was aware of any problems involving the hot water heater when he left the property on or about October 5, 2006. He said he was not.

The Defendant was questioned whether he was aware of any problems involving the jacuzzi when he left the property on or about October 5, 2006. He said he was not.

The Defendant gave evidence that he had contacted a plumber concerning the problem involving the Jacuzzi after the Reeves had launched this court action. He sated it took him twenty minutes to find a plumber who deals with jacuzzi(s) and as well as a dealer being the Eddy Group. He also stated that he learned there was a maintenance regimen that he was not aware for a Jacuzzi. The plumber also indicated to him that a hot water heater could go on the day it is installed.

The Defendant reviewed certain contractual clauses in the Purchase and Sale Agreement (P-1 Tab 2 clause 13 and clause 10 in the Schedule "B" of the PSA). He stated that there were no discussions to extend these clauses beyond the scope of this agreement. He stated that no collateral agreement was drafted to allow these clauses to survive the closing."

3. <u>The Issues:</u>

After listening to the evidence and reading submissions of Counsel. The issues as I see it that I have to deal with is the following:

1. The role of caveat emptor.

2. Merger of contract.

3. Breach of contract.

4. Non-disclosure.

5. Fraudulent misrepresentation.

6. Negligent misrepresentation.

4. <u>Summary of Relevant Facts:</u>

1. The claimant and defendants entered into a purchase sale agreement on July 17, 2006.

2. The defendant completed a property condition disclosure statement on March 30, 2006 and the statement contained the claimant's initials and was dated July 20, 2006. The claimant's however received and reviewed the property condition disclosure statement prior to the home inspection being completed on July 19, 2006

3. The claimant's head the home inspected by Flagstone Home Inspections. On July 19, 2006

4. an addendum to the purchase sale agreement, Scheduled A stated at paragraph 10 ----" the seller warrants that during their occupancy there has been no week each or sea beach of water from any source through any part of the building[except as noted in the property condition disclosure statement]. Warranty to survive closing.

5. Clause 13 of the purchase and sale agreement stated the following: "all warrantees and representations contained in this agreement shall survive the closing unless otherwise stated in this agreement."

6. In the property condition disclosure statement under the heading Plumbing System. The defendants checked off "No" to the question," Re: aware of any problems with the plumbing system?"

7. Defendants checked off" Yes" to the question "have any repairers or upgrades been done in the plumbing system. In the last five years[or since you owned the home is less than five years?]" the defendants road in the sides of this question "New Hot Water Tank"

8. the claimant was present when the building inspector did his inspection of the property

9. The inspector opened the HRV system and it appeared to be operating.

10. The inspector and the claimant went to the Jacuzzi filled the top,

turned on the Jets for 30 seconds.

11. The inspector also inspected the hot water tank, and it was pointed out to the claimant of the tank was installed on July 19, 2002

12. .The second day after the closing the Jacuzzi was clean and the water was above the Jets as well the water remained in the tub four hours. The claimant husband was downstairs when the tub was being cleaned. When the claimant looked up he noticed water in the ceiling and went upstairs and turned the Jets off. On further investigation, he noticed a panel in the adjacent bedroom, removed it and he could see the tub and motor. The floor was wet, and the water appears to be coming out of the motor. When the Jets were turned on.

13. It was determined a couple days after the closing the house transaction that one of the elements in the hot water tank was not working.

14. It was also a couple days after the claimant's moved in to their new home that they heard the HRV vibrating. The motor was discovered to be out of the housing and would not run.

5. The Law:

Several of the Issues dealt with in this case were dealt with in two recent decisions where I reviewed the current state of the law and which I will now draw from in part. The decisions that I am referring to are:- ***Lewis v. Hutchinson*** [2007] N.S.J. No23and ***Allen v. Thorne*** [2007] N.S.J. No. 310

Caveat Emptor

The starting point in any complaint brought before the court concerning defects that are complained of by a purchaser in a real estate transaction is the notion of Caveat Emptor or what is known as buyer beware. In the decision *William v. Durling* [2006] N.S.J. No. 368 at paragraphs 18 and 19 it stated:

- 18 *Caveat Emptor* or buyer beware is the starting point in any purchase of a home by a buyer. It is the buyer's responsibility to ensure the condition of the property is in order and if there are problems with the property then the buyer does not have to purchase the property. This is subject to any contractual obligations or restraints put on the property. For example if the buyer enters into a contract with the seller to buy the property "as is" then there are no warranties as to its condition unless the buyers can show there is a collateral contract of some sort. This of course is subject to any legislative warranties imposed on the purchase of a home and I am not aware of any.
- 19 In the event there is misrepresentations made out by the seller that are fraudulent or negligent then the *caveat emptor* rule is circumvented. (See *McGrath v. MacLean et al.* (1979), 22 O.R. (2d) 784).

Fraudulent and Negligent Misrepresentation:

- 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 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] O.J. No. 1038, 1988 CarswellOnt 643 (O.D.C.),

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] B.C.J. No. 2371, 2001 CarswellBC 2542 (B.C.S.C.) 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] 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] O.J. No. 968, 2001 CarswellOnt 818 (O.C.J.), 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), 188 N.S.R. (2d) 211, which decision was upheld by our Court of Appeal at (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.

The Doctrine of Merger:

This phase of the analysis involves the doctrine of merger and a determination of what are warranties and what are mere representations. Once this is determined, it is necessary to determine if a warranty survives the closing of the contract. Warranties that survive the contract will not be affected by the doctrine of merger and representations will take the Court into a separate legal field of analysis involving misrepresentation. A statement in a contract unless clearly expressed as a warranty may in fact be a mere representation. The distinction between these two terms seems to be lost over the years and what I might consider a mere representation as found in a PCDS are at times referred to as warranties. [*Lang v. Knickle* [2006] N.S.J. No. 375][Also see *Whelan v. Gay* [2006] N.S.J. No. 20 where Justice LeBlanc speaks about the distinction existing between a representation and a

warranty.] A warranty that is a term of a contract may give rise to a claim in damages and it is here that I consider the doctrine of merger. If a warranty is a term of the contract between the buyer and seller then upon closing the parties' rights are merged in the dead and there are no longer any rights emanating out of the contract. All rights and remedies must now be found in the deed provided to the Purchaser. The exception is that some warranties are terms in a contract that survive closing and therefore provide the Purchaser with a possible remedy. The determination on a warranty's survival is articulated by Anger and Honsberger Law of Real Property, 2d edn. (1985) Vol 2 at pp. 1214-16, "did the parties intend that certain terms should or should not survive closing. It is the intention that governs, not a presumption of merger." In order to determine intention it is necessary to consider all of the evidence, including the wording of the contract where it often states the warranty survives the closing. Also, the parties may have had particular discussions going back and forth concerning some clause in the contract and the Purchaser may have been satisfied that the warranty was timeless.

Property Condition Disclosure Statements:

Smith A.C.J. in a recent decision ***Gesner v. Ernst*** [2007] N.S.J. No. 211 determined that Property Condition Disclosure Statements attached to Purchase Sale Agreements were representations not warranties on the condition of the property. The statements contained therein and within the framework of the sentence are to the best of the seller's knowledge. The seller must disclose truthfully what the seller has in fact responded to in the Property Condition Disclosure Statement. Justice Smith in that case stated the following:

- **"A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property (see for example: *Arsenault v. Pedersen et al.*, [1996] B.C.J. No. 1026 and *Davis v. Kelly*, [2001] P.E.I.J. No. 123.)**

- **55 Support for this conclusion is found in the Disclosure Statement itself. While the top of the document indicates that the seller is responsible for the accuracy of the answers given in the Disclosure Statement, just above the signature line for the seller is the following statement: "... information contained in this disclosure statement has been provided to the best of my knowledge ..." Further, after the seller's signature is the following "NOTICE: THE INFORMATION CONTAINED IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT HAS BEEN PROVIDED BY THE SELLER OF THE PROPERTY AND IS BELIEVED TO BE ACCURATE, HOWEVER, IT MAY BE INCORRECT. IT IS THE RESPONSIBILITY OF THE BUYER TO VERIFY THE ACCURACY OF THIS INFORMATION ..." [Emphasis in the original]. Finally, above the purchaser's signature line is the following statement "Buyers are urged to carefully examine the property and have it inspected by an independent party or parties to verify the above information."**

- **56 Clause 13(b) of the Agreement of Purchase and Sale relating to this transaction reads as follows:**

    - **13(b) This agreement is subject to the Seller providing to the Buyer, within 24 hours of the acceptance of this offer, a current Property Condition Disclosure Statement, and that statement meeting with the Buyers satisfaction. The Buyer shall be deemed to be satisfied with this statement unless the Seller of [sic] Seller's agent is notified to the contrary, in writing, on or before SEE ATTACHED. The seller warrants it to be complete and current, to the best of their knowledge, as of the date of acceptance of this agreement, and further agrees to advise the Buyer of any changes that occur in the condition of the property prior to closing. If notice to the contrary is received, then either party shall be at liberty to terminate this contract. Once received and accepted, the Property Condition Disclosure Statement shall form part of this Agreement of Purchase and Sale.**

- **57 By way of this clause, Ms. Ernst warranted that the Property Condition Disclosure Statement was complete and current to the best of her knowledge. She did not warrant the condition of the property.**

- **58 During the trial the issue arose as to whether a vendor completing this document is being called upon to disclose her present knowledge of the property or her past and present knowledge. The answer to this question is found in the wording of the document itself. In my view, when a question begins with the words "Are you aware" (present tense) the vendor is being asked about her knowledge of the present state of the property. Questions that begin with words such as "Have there been any problems with ..." or "Have any repairs been carried out ... in the last five years" refer to the past state of the property.**"

28 In the case before this Court, the claimant has stated in the pleadings that he was presented with a property condition disclosure statement, which indicated there was no damage due to water on the property, and he relied on that statement. His evidence is that within two months, water was coming into his basement.

29 The first part of Justice Smith's analysis is that the seller has an obligation to truthfully disclose to the seller's knowledge the state of the premises being sold.

30 The second part of Justice Smith analysis pertains to whether the statement made in the property condition disclosure statement pertains to the seller's present knowledge of the property or to seller's pass knowledge of the property. To determine the answer to this question is necessary to look at the wording of the question being asked of the seller. Justice Smith uses specific examples: "'are you aware' [present tense] the vendor is being asked about her knowledge of the present state of the property. Questions that begin with words such as 'have there been any problems with'... or 'have any repairs been carried out... in the last five years' referred to the past state of the property."

Latent and Patent Defects:

In the Scholfield case, Justice Warner succinctly defines latent and patent defects at paragraph 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."

27 Reference here is also made to the case *Jenkins v. Foley*, [2002] N.J. No. 216 a case involving Defects found in a home Chief Justice Wells of the Newfoundland Court of Appeal made the following observations of the Law:

- (b)

  As to liability of a vendor to a purchaser on discovery of a defect subsequent to completion of the sale

- 25 The common law, in England, as to the duty and potential liability of a vendor in a contract for the sale of land can be conveniently summarized by quoting the following excerpts from Halsbury's Laws of England, Vol. 42, 4th ed., (London: Butterworths, 1983).

  - 47. Avoidance of contract. In certain cases a contract may be avoided on the ground that the consent of one of the parties was given in ignorance of material facts which were within the knowledge of the other party. A contract for the sale of land is not a contract of the utmost good faith in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has full knowledge, but the contract may be avoided on the ground of misrepresentation, fraud or mistake in the same way as any other contract, and also on the ground of non-disclosure of latent defects of title.
    - 51. Patent defects of quality. Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.

  - The vendor is not bound to call attention to patent defects; the rule is "*caveat emptor*". Therefore a purchaser should make inspection and inquiry as to what he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware

if he had taken ordinary steps to ascertain its physical condition ...

- 52.
  Concealment by the vendor. A representation as to the property which is contradicted by its obvious physical condition does not enable the purchaser to repudiate the contract or obtain compensation, unless, in reliance on the representation, he abstains from inspecting it. However, any active concealment by the vendor of defects which would otherwise be patent is treated as fraudulent, and the contract is voidable by the purchaser if he has been deceived by it. Any conduct calculated to mislead a purchaser or lull his suspicions with regard to a defect known to the vendor has the same effect.

- 54.
  Latent defects of quality. Prima facie the rule "*caveat emptor*" applies also to latent defects of quality or other matters (not being defects of title) which affect the value of the property sold, and the vendor, even if he is aware of any such matters, is under no general obligation to disclose them. There is no implied warranty that land agreed to be sold is of any particular quality or suitable for any particular purpose. The vendor of a house who sells it after it has been completed gives no implied warranty to the purchaser that it is safe, even if he is also its builder; but a vendor, and a builder, owes a duty of care in negligence with regard to defects created by him ...

- 56.
  Disclosure by the vendor. In special circumstances it may be the duty of the vendor to disclose matters which are known to himself, but which the purchaser has no means of discovering, such as a defect which will render the property useless to the purchaser for the purpose for which, to the vendor's knowledge, he wishes to acquire it; or a notice served in respect of the property, knowledge of which is essential to enable a purchaser to estimate the value. If the vendor fails to make disclosure, he cannot obtain specific performance and may be ordered to return the deposit.

- 57.
  Misdescription or misrepresentation as to quality. The vendor is

> bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it ...

- 26 The law in the common law provinces of Canada is substantially the same, as that set out above. It can be conveniently summarized by quoting the following excerpts from Di Castri, The Law of Vendor and Purchaser, 2nd ed. (Toronto: Carswell, 1988+).

- s. 236 Patent and Latent Defects as to Quality

- A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye ...

- A latent defect, obviously, is one which is not discoverable by mere observation.

- In the case of a patent defect, as distinguished from a latent defect as to quality or condition, and where the means of knowledge are equally open to both parties and no concealment is made or attempted, a prudent purchaser will inspect and exercise ordinary care: *caveat emptor*. However, while inspection by a purchaser bars him from complaint as to matters patent, the mere means of knowledge, or the opportunity to inspect when he has relied solely upon a representation by the vendor, does not have this result. Neither is a purchaser who is unqualified to make an effective inspection, and where, in any event, an inspection could not be conclusive, necessarily barred from relief ...

- But a purchaser may still be without a remedy as, on a sale of land, there is, generally speaking, no implied warranty as to its use for any particular purpose. The onus is on the purchaser to protect himself by an express warranty that the premises are fit for his purposes, whether that fitness depends upon the state of their structure, the state of the law or on any other relevant circumstances. In the case of a vacant lot, a purchaser takes its quality as he finds it, or he seeks his protection in the terms of the contract.

- So, it has been held that a plaintiff cannot complain where he has ample opportunity and in fact does cross-examine the defendant's agent on a certain matter which, subsequently, the plaintiff alleges as the subject matter of a misrepresentation. But, of course, a purchaser can escape specific performance where there is an actionable misrepresentation as to use.

- It would seem that in the case of a latent defect of quality, at any rate where unknown to the vendor, and not resulting in his purchaser being compelled to take something substantially different from what he contracted for, a purchaser has no remedy either in damages or by way of rescission, unless he pleads and proves fraud or breach of warranty. The conduct of the vendor in concealing the true nature of a patent defect will be treated as fraudulent where it has the effect of lulling the suspicions of the purchaser. Thus, damages are recoverable in the same way as though there were a fraudulent misrepresentation ...

- Apart from contract or statute, in the case of an existing completed unfurnished house there is prima facie no implied warranty on the part of a vendor as to the habitability of the house; ...

- 27 This area of the law received some, but not a definitive, consideration by the Supreme Court of Canada in Fraser-Reid v. Droumtsekas, [1980] 1 S.C.R. 720. There, the Court was dealing primarily with differences between the law applicable to the sale by a builder of an incomplete house and the law applicable to the sale by a vendor of a completed house. However, the Court did not interfere with the trial judge's finding that it was a completed house and so had to deal with the question, of whether or not there was liability, on the basis of whether there existed an implied warranty or an express warranty. At page 723 Dickson J., as he then was, observed:

  - Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. In 1931, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an uncompleted house. The breach has since been opened a little wider in some of the states of the United States by extending the warranty to completed houses when the seller is the builder and the defect is latent. Otherwise, notwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, *caveat emptor* remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent

examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

- 28 Dickson J. then commented on the efforts by American courts to extend the implied warranty as to fitness, in contracts for sale by a builder of an uncompleted house, to completed houses. At page 728-29 he wrote:

    - The American case law upon which the appellants must rely, however, is far from consistent, even ten years after the decision in Schipper v. Levitt & Sons Inc. [207 A. 2d 314 (1965)], (S.C. of New Jersey). There is, however, a distinct trend toward convergence of traditional products liability principles and those applying to new homes. The shift countenanced in the American courts has been to take the English principles applicable to a home under construction and to extend those principles to completed houses, but only where the seller of the house is also the developer or builder and the house is a new unoccupied house: Carpenter v. Donohoe [388 P. 2d 399 [1964] (S.C. of Col.); Loraso v. Custom Built Homes, Inc. [144 So. 2d 459 (1962)] (C.A. of La.); Bethlahmy v. Bechtel [415 P. 2d 698 (1966)], (S.C. of Idaho); Rothberg v. Olenik [262 A. 2d 461 (1970)], (S.C. of Vermont). It has specifically not been extended to the case of an unoccupied home sold by one owner to a new owner.

- 29 Of more significance to the decision this Court has to make, in the matter before us, is his comment that change in this area of the law is best left to the legislature and ought not to be undertaken by courts. At page 730-31 he wrote:

    - The only real question for debate in the present case is whether removal of the irrational distinction between completed and incomplete houses is better left to legislative intervention. One can argue that *caveat emptor* was a judicial creation and what the courts created, the courts can delimit. But the complexities of the problem, the difficulties of spelling out the ambit of a court-imposed warranty, the major cost impact upon the construction industry and, in due course, upon consumers through increased house prices, all counsel judicial restraint.

        - I would be inclined to reject the proposition advanced on behalf of the appellants for an extended implied warranty. It appears to me at this time that if the sale of a completed house by a vendor-builder is to carry a non-contractual warranty, it should be of statutory origin, and spelled out in detail ...

    - 30 Thus, in the sale of a previously occupied completed house, the common law, in Canada, does not recognize an implied warranty as to fitness or suitability of the premises for the purpose intended by the purchaser. Absent fraud (including acts of concealment), or fundamental difference between that which was bargained for and that

obtained, (such as premises later discovered to be dangerous), a purchaser is not entitled to claim against the vendor either for rescission or damages

28 Justice Wells in commenting on the trial Judges summary of conclusions and his treatment of the law says as follows at paragraph 42:

- "While the trial judge specifically found that the respondents

	--	did not know the extent of the damage to their concrete basement walls prior to the sale of their home to the appellants,	
	--	there was never any attempt on the part of the respondents to conceal any defect,	
	--	nothing was covered or hidden by the painting of walls as alleged by the appellants, and	
	--	there was a latent defect in the basement walls which further deteriorated after the plaintiffs' purchase,	

- he nevertheless explicitly found that,

    - Although this defect was not concealed I am of the opinion the [respondents] ought to have told the [appellants] they were experiencing some water problems -- however slight these problems may have been -- at the time of sale.

    - It would appear that he came to that conclusion solely on the basis of his inferring that the respondents "knew or ought to have known that some water was leaking into their basement after heavy rainfalls" and that the respondents "knew their property had a potential water problem". It is difficult to challenge his proposition as an ethical standard or as reflecting the expectation of any purchaser. However, its appropriateness as an ethical standard is not, alone, a basis for applying it as a legal duty, the breach of which will result in liability for damages.

- 43 Unfortunately that is what the trial judge did. He referred to no law and cited no authorities for his conclusion. He simply stated that:

    - Failure to [tell the appellants that they were experiencing water problems], although not a fraudulent misrepresentation as legally defined, is a form of non-disclosure which places some liability on the defendants for the plaintiffs' damages.

- 44 That conclusion of the trial judge, that such non-disclosure results in liability, is contrary to the principles quoted above from Halsbury's and from Di Castri, and contrary to the views expressed by the Supreme Court of Canada in Fraser-Reid. It must, therefore, be held to be error in law.

- 45 I understand the trial judge's inclination to conclude that the respondents, having the knowledge with respect to water problems after heavy rains which he imputed to them, ought to have told the appellants. That, however, does not permit me to approve of the trial judge's imposition of a legal duty to disclose that knowledge, the breach of which "places some liability on the [respondents] for the [appellants'] damages". In concluding that it imposed such a duty, resulting in liability for damages, the trial judge effectively found that the contract of sale contained an implied warranty by the respondents that the premises did not have any water penetration problems. That would amount to a judicial change of the law, which Dickson J., in Fraser-Reid, specifically determines ought to be left to the legislature.
- 46 For the foregoing reasons I am of the view that the trial judge made an error in law when he concluded that failure by the respondents to disclose potential water problems after a heavy rain storm, knowledge of which the trial judge imputed to the respondents, "is a form of non-disclosure which places some liability" on the respondents for the appellants' damages. As a result he erred in finding that the respondents were liable to pay to the appellants..."

6. Analysis

Warranty and the Doctrine of Merger and the Jacuzzi

The first part of the analysis shall deal with the Warranty as expressed in the purchase and sale agreement and the doctrine of merger.

There is no evidence of any collateral agreement between the parties. The parties did not meet with each other during the time they were negotiating or intending to enter into an agreement for the sale and purchase of the home. There was no agreement entered into following the execution of the purchase and sale agreement. They Property Condition Disclosure Statement while dated after the Purchase Sale Agreement was part of the Purchase Sale Agreement and further there is evidence to show that the Property Condition Disclosure Statement was viewed by the Claimant's prior to the date on the Property Condition Disclosure Statement. I conclude that the Property Conditioned Disclosure Statement was part and parcel of the Purchase Sale Agreement and not collateral to it, although nothing turns on

that in any event.

The warranty provided in the Purchase Sale Agreement with respect to water seepage stands on its own and is not modified or watered down as it were by anything in the Property Conditioned Disclosure Statement. In this respect I have considered the comments of Justice LeBlanc in the case, ***Whelan v. Gay*** [2006] N.S.J. No. 20. The Property Condition Disclosure Statement does not modify or change the leakage warranty in the Purchase Sales Agreement. I have assessed the evidence and testimony provided by the principal parties to the agreement and statement and there is no evidence to suggest the statement respecting the leakage was a mere representation. I've concluded it is a warranty.

This warranty provided in the Purchase Sale Agreement with respect to water seepage or leakage does not merge with the deed on the closing of the transaction. The wording in the contract specifically provides that this warranty survives the closing of the transaction. Counsel for the Claimants suggest the warranty is an absolute guarantee that water did not leak from any source through any part of the building, during the Defendants occupancy. What evidence is before this Court to support the Claimants Counsel's contention? There is no question the Jacuzzi leaked after the Claimants moved into the premises. When the Jacuzzi was examined by Mr. Fortis, a plumber at the request of the Claimants, he said it was leaking out of the jet motor area, which was concealed under the Jacuzzi tub itself. He said when the Jets were started it began to leak. He also said when the water was above the Jets in the tub it leaked. The crack in the ceiling in the room below the Jacuzzi had to be fixed twice and once just before the closing of the transaction.

Counsel for the Claimants argued that while the Defendant Mr. Sherwood did not take baths, but rather showers due to his physical health condition, his daughter and wife would on occasions take baths and water must have come above the Jets and water would leak due to the defect in this particular Jacuzzi. Counsel for the Claimants argues it is not necessary that the Defendants were aware of the leak; there is sufficient evidence to show it must have leaked and as they provided an absolute guarantee that there was no leakage, they must be held responsible for the foreseeable resulting costs incurred from the leakage. Mr. Kristenson was also called upon by the claimant to provide evidence on what he observed. Kristenson is an architecture technologist and prior to and in retirement he is completed small renovation jobs in homes. He told the court, the ceiling below the Jacuzzi has been painted previously. He said this led him to believe it had leaked before. "If the entire ceiling had been painted, it would be different.

Continuing on this line of analysis, what would tip the scales in the other direction?

The defendant Mr. Sherwood took only showers, and the Jacuzzi was not used certainly on a regular basis by the family. Mr. Fortis who gave evidence for the Claimant said if the Jacuzzi was only used as a shower there would be no problem. Neither Mr. Fortis nor Mr. Kristenson could say for certain how long the Jacuzzi had been leaking. The property Inspector filled the Jacuzzi with water and turn it on for 30 seconds and there was no noticeable leak at that time. Mr. Jim Lawrence was asked by Mr. Sherwood to repair the crack in the ceiling between the kitchen and family room. This was the crack that was referred to as in the ceiling below the Jacuzzi. His evidence was it was a small crack, and as the paint he had

matched he did not bother to paint the entire ceiling. This repair was done, just prior to the defendants selling their home. Previously, Mr. Donald Pentz fixed the crack in 2001, in the ceiling between the family room and kitchen and he believed this to be a settling crack.

In the final analysis, there are various opinions or more accurately put, beliefs that various witnesses held. While certainty is not a requirement, I could just as reasonably infer there was leakage before or after the defendants purchased a home. Based on the balance of probabilities standard, I cannot conclude there was leakage occurring during the time the Defendants owned the home. When the claimant's discovered the leak from the Jacuzzi jets, it was pulsating underneath the tub. Certainly it was leaking to the extent that it was noticeably coming into the room down below. Surely this would have happened at some point, if the Jacuzzi had not been operating properly and leaking had occurred during the years of that the Defendants owned the home. I've assess the credibility of the defendant, Mr. Sherwood, not on the basis of his strong convictions of the basis of all the evidence that I have before me. I find that Mr. Sherwood to be very credible, and there was no cover-up as to any leakage having occurred while he owned the home.

Hot water Tank

The Property Conditioned Disclosure Statement clearly states it is a new hot water tank. The evidence discloses that the hot water tank was installed in early 2001. The evidence disclosed that the Defendants considered this a new hot water tank. This statement is a representation not a warranty. as to the water tanks condition.

There is no evidence that there was fraudulent or negligent misrepresentation based on the standard and factors enumerated by the Supreme Court of Canada. I would also note that the claimant was well aware of the age of the water tank prior to closing of the deal and he could have dealt with the matter at that time. I have no evidence that there was a non-disclosure of a heating element problem, and the only evidence I have is that the problem was a burnt out element that could happen at any time.

HRV Motor

This motor, which was part of the air ventilation system, was functioning when the inspector inspected the motor for the Claimants prior to closing. There is no evidence that was not functioning prior to the sale or that the defendants were aware of any problem.

It is not necessary to go into latent and patent defects, other than to say that the problems that did occur would have fallen under the heading of latent defects. Based on the evidence of all the parties which have gone through, I cannot conclude the defendants were aware of any defect. If it did exist, which I have already concluded on the leakage issue there is insufficient proof to show based on the civil standard that there was any the leakage during the time the defendants owned the home.

For all these reasons the claim against the defendants is dismissed with no order as the costs.

I would also like to make a comment about Counsel in this case. Counsel for the Claimants, Mr. Donald L. Presse and Counsel for the Defendants, Mr. Stephen Scott both are to be commended for their excellent advocacy on behalf of the parties they represented. I include with this, the excellent submissions, which they provided to this court. There is no question that a significant amount of preparation and effort and expertise was required and put forward by legal Counsel in this case.