Claim No: 283342

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Moffatt v. Finlay, 2007 NSSM 64

BETWEEN:

TED MOFFATT and SHEILA BARLING

Claimants

- and -

JAMES FREDERICK FINLAY, KELLY LEE-ANN FINLAY, JERRY MURPHY, ANNETTE MURPHY and REMAX NOVA

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 9 and 16, 2007

Decision rendered on October 30, 2007

APPEARANCES

For the Claimants	self-represented
For the Defendants James Frederick Finlay and Kelly Lee-Ann Finlay	Steven Zatzman, counsel
For the Defendants Jerry Murphy, Annette Murphy and Remax Nova	Darlene Wilcott, counsel

BY THE COURT:

[1] This is a claim by the Claimants for damages arising from alleged misrepresentation on the sale of a home in Fall River, Nova Scotia. Specifically, the Claimants allege that the sellers of the home and their real estate agents unlawfully failed to disclose that there was a risk of the water supply pipe freezing during extreme cold weather.

[2] The nub of the case is what was or was not stated in the Property Condition Disclosure Statement (the "PCDS") filled out by the sellers and presented to the buyers at the time of sale.

The Parties and the Facts

[3] The Claimants Ted Moffat and Sheila Barling (hereafter the "Claimants") were retiring to Nova Scotia from out West in early 2005 and were, with the assistance of their own agents, actively looking for a home in the Fall River area. They were eventually introduced to the property owned by the Defendants James Frederick Finlay and Kelly Lee-Ann Finlay ("the Finlays"), who were being represented by the Defendants Jerry Murphy, Annette Murphy and Remax Nova (who will hereafter be collectively referred to as "the agents.")

[4] The Finlays were moving to Ontario and had to sell their home at 39 Newport Drive, which they had built some eight years previously. The transaction came together very quickly. The agents came into the home to take the listing on the evening of the 20th of January 2005. The property never made it onto the MLS system as the agents were already in contact

with the agents for the Claimants, who had made known that they had clients looking on the area. A showing was arranged for the 21st of January.

[5] Over the next few days offers and counter-offers went back and forth and a deal was consummated by the 25th. The final sale price was $510,000, some $15,000 less than the asking price.

[6] The property is a luxury home on a fairly large lot on a cul-de-sac, with water frontage on Third Lake. The house is well set back from the road, with a private driveway of some 260 feet. It is not connected to city sewers but does draw city water, which is hooked up at the street. The water pipe is buried under the gravel driveway for most if not all of its length.

[7] It is an uncontested fact (not known to the Claimants at the time of purchase) that during a cold stretch of weather in February 2003, the supply pipe froze somewhere between the road and the house, with the result that the Finlays lost their water supply. It is of some significance to note that there was no evidence of any other pipes, specifically pipes within the house, freezing or rupturing.

[8] The Finlays had some difficulty finding someone to help with the problem. There was a widespread problem in the Halifax area and people were busy. The Finlays were eventually put in contact with a gentleman, Robert Bell, whose primary business is welding. One of the services he provides is to attach his welding equipment to frozen pipes, which with a sustained electrical charge for hours or even days can cause the pipes to heat up enough to thaw them out. The evidence before me satisfies me that this is

a controversial method that is not recommended by the Halifax Regional Water Commission because it can cause damage to equipment if not done carefully or properly. However, I am also satisfied that it is not an illegal practice, as no one could point to any legislation or regulation that makes it unlawful. I am also satisfied that, notwithstanding the Water Commission's stated opposition to the practice, it is (or has been) used from time to time by the Municipality itself to thaw out some of its underground pipes.

[9] From the perspective of the Finlays, they experienced this problem this one time and had it dealt with by someone who was apparently qualified to do it. If there is or was anything untoward about using the welding method, I cannot find any fault with the Finlays. The cost to them to restore water was $648.75.

[10] There was uncontradicted evidence before me to the effect that this was a particularly cold February with the aggravating factor that there was very little snow to insulate the ground and prevent the frost from reaching lower depths than usual.

[11] There was a conflict in the evidence as to whether the Finlays had previously experienced a similar problem. Mr. Bell testified that he believed he had been out to this property on an earlier occasion, which he described vaguely as "pre-2000." He was unable to back this up with any documents, such as a bill or diary entry, for this alleged earlier visit, despite having reviewed his records at the request of the Claimants. Mr. Finlay testified that the 2003 incident was the only freeze he had ever had, and that the alleged pre-2000 incident and visit by Mr. Bell had simply never occurred. He testified that he had some difficulty even identifying someone

to thaw out his pipe, which would have been at odds with having a pre-existing relationship with Mr. Bell. Given the hundreds or thousands of home visits that Mr. Bell has done over his many years in business, and his inability to locate any documentary trace of this alleged event, I am satisfied that he is most probably mistaken. On the other hand, I found Mr. Finlay to have been truthful and his memory of these events detailed and reliable. On a preponderance of evidence, I find as a fact that the alleged earlier freeze and attendance by Mr. Bell did not occur.

[12] I am also satisfied that the Finlays had no knowledge or belief that the 2003 event represented an inherent problem or betrayed an underlying weakness in their water service. I am satisfied that they believed that this was a flukey occurrence that was best dealt with by making sure to leave a tap running slightly during those rare periods of extreme cold when freezing is a risk.

[13] It was against this backdrop that the Finlays filled out the PCDS two years later.

[14] There are arguably three areas on the PCDS where disclosure of this kind of a problem might be indicated. They are:

1.A. Are you aware of any problems with water quality, quantity, taste or water pressure?

4.A. Are you aware of any problems with the plumbing system?

4.B. Have any repairs or upgradings been done to the plumbing system in the last five years (or since you owned the property if less than five years)?

[15] To each of these questions the Finlays answered “no.” Mr. Finlay testified that while filling out the form he asked one or other of the agents if he should mention anything about the water supply pipe having frozen in 2003, and he was advised that it was not necessary to do so. The agent, Ms. Moffat, could not specifically recall having been asked the question, but stated that had she been asked she would still have suggested answering “no” since, in her opinion, there were no existing problems with the water supply or the plumbing system, notwithstanding that there had been a problem at that earlier time.

[16] It is important also to note that the PCDS contains two paragraphs, one above and one just after the place for the seller’s signature, which state:

> The information contained in this disclosure statement has been provided to the best of my knowledge. I confirm receipt of a copy of the Statement and agree that it may be given to prospective buyer(s). I further agree to provide prospective buyer(s) with a further disclosure of any changes in the condition of the property that have occurred since completion of the statement.
>
> 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. The Brokerage, Sales People and Members of the Association of Realtors assume no responsibility or liability for its accuracy.

[17] Upon purchasing the property in 2005, the Claimants did all of the due diligence that could reasonably have been done, including a home inspection. There is no indication that the inspection considered the condition of the water supply pipe, which would be almost impossible to assess meaningfully without digging up the driveway. The Claimants accordingly took possession of the home with no awareness of the

possibility that the pipe might freeze in the future. And freeze it did during another stretch of cold weather and lack of snow cover in February 2007.

[18] The method of restoring water that was recommended to the Claimants was to excavate and expose a section near the middle of the water pipe and send steam under pressure in both directions to melt the ice clog. This required tearing up a portion of the driveway. The opinion of the contractor who did so was that this pipe was particularly vulnerable to freezing, for several reasons. One was that because the driveway is built up with ditches along the margins, the frost can enter not just from the top but from the sides. The other problem identified is that the pipe appears to be laid in a bed of larger stones rather than fine gravel, resulting in more air spaces and less thermal insulation.

[19] The advice that the Claimants received was that they could expect further problems unless they dug up the whole length of the pipe and inserted material with a better insulating capability, including gravel and Styrofoam. The estimate to perform such a job was $17,650.00, plus HST.

[20] This future cost forms the bulk of the damages claimed in this action.

Issues

[21] The issues as I see them are these:

A. Did the Finlays intentionally or negligently misrepresent the condition of the property by their answers given in the PCDS?

i. If so, what damages flowed from that misrepresentation?

B. Did the agents owe any duty of care to the Claimants to ensure that the information in the PCDS was accurate, rendering them liable for any misrepresentation made by the sellers?

The agents

[22] Dealing first with the latter issue - that of the agents' responsibility - I see no basis for liability. The Notice on the form itself is a clear warning that the information contained is that of the seller, not the agents, and explicitly excludes any reliance upon the agents as makers of any representations. In my view this is a complete defence.

[23] If I am wrong on this point and for some reason the agents cannot rely upon the exclusion, were there to be a proved misrepresentation in the PCDS, I believe that the Claimants would still have at best a very thin basis for a claim against the agents. In a situation such as this, the agents were representatives of the sellers only and owed no special legal duty to the buyers (such as a fiduciary duty). The buyers had their own agents who owed them contractual and fiduciary duties. The sellers' agents would not be expected to have any special knowledge about the property, other than what they might learn from their own clients, and no buyer could reasonably rely on the agents' disclosure or lack thereof.

[24] Had the agents hypothetically known of the sellers' misrepresentation, or (worse) actively counselled it, it might be possible to hold them liable for fraud or a conspiracy to commit fraud. Even so, as indicated, I believe the

form itself protects the agents from any liability, and on the facts I would not have been prepared to find any fraud or conspiracy.

The Finlays

[25] The question of the Finlays' liability resolves down to several questions:

A. Were any of the questions on the PCDS technically answered incorrectly?

B. Was there any misrepresentation, intentional or negligent?

C. What remedies, if any, do the courts recognize in the event that there has been a misrepresentation in the PCDS?

[26] In my opinion, the issue of a freezing water supply pipe would be a water supply or pressure issue, and not a plumbing issue as that would be generally understood. Nor would the thawing out of a frozen pipe be a "repair' that would have to be disclosed, any more than had there been a plugged toilet that required a plumber to unplug with an auger.

[27] As such, the only question to focus on would be:

1.A. Are you aware of any problems with water quality, quantity, taste or water pressure?

[28] I will observe at the outset that the PCDS is at most a modest exception to the principle of *caveat emptor* or "buyer beware" which is alive and well in

this jurisdiction, as observed in the reported cases to which I was referred, including the recent decision of Associate Chief Justice Smith in *Gesner v. Ernst*, 2007 NSSC 146 at paragraph 44:

> [44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. Caveat emptor. (*McGrath v. MacLean et al.* (1979), 95 D.L.R. (3d) 144 (Ont. C.A.)).

[29] Generally, sellers of real property make no warranties as to its condition. It is for buyers to perform their own inspections and, for the most part, take their chances. I believe that most buyers of resale homes appreciate that there may be flaws or imperfections that they will inherit, and they anticipate having to deal with them as and when they arise or as resources permit.

[30] The difficulty with such a system has always been in the area of latent or hidden defects that only the sellers know about and no inspection, no matter how rigorous, could be expected to reveal. Although the PCDS does not restrict itself to questions about latent defects, in my view it is the potential presence of a known latent defect that the statement is designed to address.

[31] Even so, the PCDS form is somewhat limited, being expressly qualified as something only to the *"best of [the seller's] knowledge,"* and quite grudging in what it asks and reveals. For example, the question "*are you aware of any problems with water quality, quantity, taste or water pressure?*" might have been worded quite differently and more helpfully. It might have asked *"are you aware of any problems <u>that have ever manifested</u> with water*

quality, quantity, taste or water pressure, or that might point to such a problem manifesting in the future? In an arguably more perfect system, such a question would be asked.

[32] The limited effect of the PCDS was considered at some length in the *Gesner* case (above). It is worthwhile to quote at some length from the reasons of Smith A.C.J., which I endorse (and which are binding on me):

> [54] 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.)
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> [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."
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> [56] Clause 13(b) of the Agreement of Purchase and Sale relating to this transaction reads as follows:
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> > 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.
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> [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.

[33] Faced with the question that is asked, the Finlays were required to answer to the best of their knowledge whether they were aware <u>in the present tense</u> of any problems with water quantity or pressure. On the evidence, their minds did turn to the fact that the pipe had frozen two winters previously, and their judgment at the time - as apparently counselled by the agents - was that this did not impact on the particular question being asked. On the evidence of Mr. Finlay, which I accept, he had experienced the pipe freeze one time over eight years, and had come to regard that as a fluke occurrence, or an Act of God. At the time his pipe froze there were widespread reports of pipes freezing in the area, and this contributed to the difficulty of finding someone to work on restoring water service. He did not question the welding method used by Mr. Bell, and received no advice as to what to do in the future other than to keep a small stream of water running during periods of extreme cold. There was no evidence that he was told his water pipe was peculiarly at risk of freezing. As far as he

knew, it had been installed correctly when the property was built, and no one suggested to him at the time that he needed to insulate the pipe or retrench with different material. Against the backdrop of this state of knowledge, I accept that his answer to the particular question was one that he honestly believed to be correct.

[34] It is important to emphasize the point made in *Gesner*, that the PCDS is not a warranty of the property. It is a statement of the seller's belief and understanding. The Claimants' only potential cause of action is for negligent or intentional (i.e. fraudulent) misrepresentation. In the case here, I am unable to find either negligence or fraud.

[35] Negligence implies that the statement was not only false, but also made without proper care to insure its accuracy. Given the way the question was worded, coupled with the Finlays' honest belief that there was no existing problem with water quantity or pressure, I am unwilling to conclude that the statement was carelessly made. If it was <u>wrong</u> in the sense that there was a more serious problem, as subsequent events have revealed, that does not mean that it was negligently made.

[36] Even more so, I am satisfied that there was no fraud. Fraud is a very serious charge, and courts do not make such findings lightly or without satisfactory evidence to support it. Here I heard no evidence that came close to satisfying me that the Finlays knew they were making a false statement with the intention of deceiving the Claimants and falsely inducing them to buy the property.

[37] In the result, I am unable to find any viable cause of action against the Finlays and the claim must be dismissed.

Damages

[38] I would be remiss were I not to consider at least briefly what damages would have been appropriate, had I found liability.

[39] In a claim for fraud, damages are more generously awarded and the Claimants might well have been able to recover most if not everything they claim, which (in the end) consisted of the following items (not including costs or prejudgment interest:

General Damages	$100.00
Steam Bill	$360.00
Trenching Bill	$627.00
Future Repair	$17,650.00
HST on Future Repair	$2,471.00
	$21,208.00

[40] In a claim for negligent misrepresentation, damages are more finely tuned. The task is to place the Claimants in the financial position that they would have been in, had the misrepresentation not been made. It is <u>not</u> to place them in a position they would have been in had the statement been true. That is a very important distinction.

[41] Had the Finlays alerted the Claimants to the 2003 freeze, they would have had a number of options. They could have decided not to buy the property. They could have decided to offer less than they ultimately paid. They might have done nothing differently.

[42] The evidence at trial was not directed to any of these scenarios. The Claimants pursued a singular course of attempting to prove what it would cost to resolve the problem once and for all. As stated, that is not the measure of damages for negligent misrepresentation.

[43] Had I been forced to make an assessment of damages based upon the evidence submitted, I would have considered this evidence (there being little else) and would have concluded that there is a significant “betterment” factor to be deducted. In other words, if the Claimants go ahead, retrench and insulate the pipe, they will end up with something better than they contracted for, and they could not expect to recover that entire amount.

[44] In the result, however, for all of the foregoing reasons, the claim is dismissed against all Defendants.

Eric K. Slone, Adjudicator