Claim No. SCT 279379

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Oijen v. Hanlon, 2007 NSSM 81

BETWEEN:

AMANDA OIJEN and TODD PATRIQUIN

Claimant

- and -

MURRAY AND MONA HANLON

Defendant

- and

PRUDENTIAL WOODS REALTY LTD.

Defendant

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: June 18, 2007, and July 3, 2007

Decision: September 10, 2007

Counsel:

The Claimants were self-represented.
The Defendants Murray and Mona Hanlon were self-represented
The Defendant Prudential Woods Realty was represented by Counsel, Ross H. Haynes, Q.C.

Pleadings

a. The Claim

The claim is for repairs to the Claimants newly purchased home of latent defects "that were known or should have been known to the defendants and were no disclosed to us [the Claimants] at the time of sale." There was also a misrepresentation in the listing. Because of the undisclosed laten[t] defects, and misrepresentations we [the Claimants] purchased a home that needed extensive repair, at a higher price if these were known to us."

b. Defence of Hanlon

The Defendants stated they sold their 80 year old home with the help of their real estate agent. They stated the Claimants "hired a home inspector found a few things wrong, so we [the Defendants Hanlon] fixed them. Mr. Patriquin [the Claimant] looked these things over and agreed they were fixed and signed the paper that everything was completed. Also there was$1,500.00 cash back for any structural damage and electrical to be done. We cannot be responsible for what is behind walls or cement structures."

c. Defence of Prudential Woods Realty Ltd. ("Prudential")

The Defendant provided a general denial, stated its real estate agent made no misrepresentations while acting for the Defendant Hanlon's and if any damage occurred it was due to the Defendant Hanlon's own negligence in not having been forthright in their disclosure in the Property Condition Disclosure Statement.

Facts

The Defendants Hanlon listed their home at 376 Brunswick Street with the Defendant Prudential.

Alan Fleury was the acting agent for Prudential.

In doing renovations the claimants discovered wood rot in one corner of the house which resulted in extensive repairs. These repairs were not observed by the Claimants or their home inspector prior to closing.

There was a 30 amp fuse panel connected to a 100 amp breaker panel. These panels were not covered or hidden at the time of purchase.

The Property Condition Disclosure Statement ("PCDS") stated 2 – 60 amps beside the question what is the amperage of the [electrical] system.

Under the structural section of the PCDS above question "A" which stated, "Are you aware of any structural problems, unrepaired damage or leakage in the foundation?" was the following statement "seepage only during heavy rain."

Also beside question "B" which stated, "Are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls" is the statement "Reshingled 2003 – 2 sides"

And under question "C" which stated, "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)?" there is written "As above".

The Law

I refer to an earlier decision of this court with respect to the current law concerning latent defects which is in Issue in this case. In .**Lewisv.Hutchinson** [2007] N.S.J. No. 23 at paragraph 26 it stated:

This phase of analysis involves patent and **latent defects** as that will determine whether there is a remedy available to the Claimant. Again 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..."

Analysis

Wood Rot Damage

There was a considerable amount of evidence of the damage to the property as a result of wood rot in one corner of the house. The evidence showed this was latent and the Claimants argued that it was latent and they did not discover it until renovations were undertaken. There is no evidence before me that the Defendant's had any idea that there was wood rot in this area.

Electrical

The panel which turned out not to be to code was not hidden and an inspection by a qualified person may have discovered some, although the electrician that was called in to work on the electrical did not notice this problem until after he started working on the electrical system. I have no evidence that the Defendant Hanlon had any knowledge the electrical was not up to code and as noted earlier in Justice Smith's decision, the statements in the PCDS does not warrant the condition of the property.

With respect to Alan Fleury there is no evidence that there was any misrepresentation made with respect to the home listed by the Defendant Prudential.

The Claimant shall not succeed in their claim and the action against the Defendants is dismissed.

IT IS THEREFORE ORDERED THAT the Claim against the Defendants be dismissed with no order as to costs.

Dated at Truro, this 10 day of September, 2007.

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David T.R. Parker
Small Claims Court Adjudicator