

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation:** *Waisman v. Adams*, 2019 NSSM 53

2019

Claim No. SCK485238

**BETWEEN:**

**DAVID M. WAISMAN**

**Claimant**

-and -

**GARY STEPHEN ADAMS and  
JACQUELIN MARIE ADAMS**

**Defendants**

**Hearing Dates:** June 19 and July 10, 2019

**Appearances:**

**Claimant:** Michael MacKenzie, Barrister & Solicitor

**Defendants:** Self Represented

**DECISION and ORDER**

- [1] This is a claim arising from the sale of a used residential property from the Defendants to the Claimant. The property is in the Belmont area of Hants County, Nova Scotia. The closing took place on July 16, 2018.
- [2] The claim arises from the presence of Kitec piping, which, following the closing, was discovered by the Claimant. As appears to be acknowledged, this product is well known to be prone to failure and is no longer sold in Canada or the United States. It has been the subject and continues to be the subject of class action law suits in both countries. To quote and paraphrase one of the witnesses, it is not a matter if Kitec will fail but a matter of when.

- [3] The issue in this case is whether or not the Defendants are legally responsible to the Claimant for the replacement cost of the piping, approximately \$8,000 because of not disclosing the presence of the Kitec piping on the Property Disclosure Statement.
- [4] The Claimant's Notice of Claim alleges in paragraph 8 that the Adams knew or ought to have known that their home had Kitec piping as they had engaged Mr. Adams' father to install the same in their home.
- [5] It is further alleged that the Defendants were negligent in the preparation of the Property Disclosure Statement. In concluding submissions, counsel for the Claimant argued that the fact of the existence of the Kitec was a fact that reasonably should have been known by the Defendants. I will return to that submission later in these reasons.
- [6] In their written Defence, the Defendants deny having any knowledge of the presence of Kitec piping or any knowledge of the nature of Kitec pipe and its defective issues. They state that they only became aware of it only after it was raised following the closing, approximately two months later.

## **Facts**

- [7] The home in question was built in 2004. The Agreement of Purchase and Sale between the parties was signed on June 30, 2018, and the closing took place on July 16, 2018. A Property Disclosure Statement ("PDS") was signed by the Defendants on August 14, 2017, and provided to the Claimant/Purchaser in June 2018. Under the section dealing with plumbing system, in response to the question, "Are you aware of any problems and/or malfunctions with the plumbing system?" the Defendants ticked the "No" box.

- [8] Mr. Adams' father did in fact install the plumbing and heating systems at the premises when it was built in 2004. He was and is a plumber. His Affidavit dated April 20, 2019, was filed. In it, he confirms that he installed the plumbing and heating at his son's former home. He confirms that he did install Kitec pipe which was supplied to him by TTL Pipe in Dartmouth. He states in paragraph 9 of the affidavit that:

*I had never thought at any time that the pipe in my son's house was a problem and I did not realize it until the issue came up due to the sale of the house. It had been a few years since I had used Kitec pipe because I changed suppliers and was using another product and the problems in the industry with Kitec never came up.*

- [9] In addition to the Affidavit evidence just referred to, the following witnesses gave evidence:

**Donna Conrad** – Real estate agent for the Vendors on the sale;  
**Richard Matheson** – Real estate agent who represented the Purchaser;  
**Dennis Levy** – A plumber from Avonport who did the work for the Claimant and replaced the piping;  
**David Waisman** – The Claimant;  
**Gary Adams** – One of the Defendants.

- [10] From the *viva voce* evidence and the exhibits tendered, the following relevant points emerge.

- [11] First, the Kitec piping was not hidden but was clearly observable in the utility room. Having said that, it does not have the words "Kitec" on it but does have the words "Ipex," which I understand to be the manufacturer. There are also other numbers which presumably are product codes. It is orange in colour and very visible.

- [12] There were two previous agreements of sale on the subject premises neither of which closed because, apparently, of inability to obtain financing. However, noteworthy to this case, in each case there apparently was an inspection done by an independent inspector. While we did not have copies of those inspection reports, there was no indication from any of the witnesses that those inspectors had detected the presence of Kitec piping.
- [13] The Purchaser here had the right to have his own independent inspection done prior to the closing and it was a condition thereof. He elected to not do so. Whether or not such an inspector would have noted the presence of Kitec piping is an open question.
- [14] Mr. Levy, who was initially hired to do other plumbing work by the Claimant, did not immediately detect the presence of the Kitec piping. Rather, he had to note down the markings and then go back to his office to check some reference material to confirm that it was indeed Kitec piping.
- [15] The agent or other representative of the Claimant's insurance company did immediately detect that it was Kitec piping when he or she did the home inspection as part of the Claimant's application for insurance. This apparently did not take place until following the closing and, in fact, it was the insurer's refusal to place insurance because of the Kitec piping that lead to the issue being raised at all.
- [16] Mr. Adams testified in his evidence that he had no information whatsoever about the presence of the Kitec piping or even knew that it was an issue. He stated that his father never disclosed that to him.

## **Findings and Analysis**

[17] Firstly, with no hesitation, I find that neither of the Defendants knew that they had Kitec piping or, had any appreciation that Kitec piping was an issue. Indeed, Kitec piping was not known to be an issue when it was installed.

[18] The subject of Property Condition Disclosure Statements or Property Disclosure Statements as they are now referred has been the subject of a number of cases in the Nova Scotia Courts. In what is considered to be one of the leading cases, Associate Chief Justice Smith (as she then was) stated:

*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...*

*(Gesner v. Ernst et al (2007),  
N.S.S.C. 146, at para. 54)*

[19] A purchaser who alleges that a seller has not accurately answered one or more questions on the PDS has the burden of proof and must therefore prove, on a balance of probabilities, that this is the case.

[20] To prove that a person had, at the relevant period of time, knowledge of a certain state of affairs requires proof of other facts which tend to show that the person would have had such knowledge. Obviously, we cannot peer into an individual's mind to see what knowledge they had at a particular point in time. However, if the other facts are compelling, courts will make a reasoned inference of a person's state of mind or knowledge of the state of affairs.

[21] For example, many cases in this area deal with leakage in basements. In such cases if there is evidence of pre-existing conditions and/or evidence of

significant leakage within a very short time of the closing, then the court will make an inference that the vendor must have known of that state of affairs (see for example, *Brisbin v. Gilby*, 2007 NSSM 66). There are other such examples in the case law.

[22] Here, there is no such evidence. And, I will say that Mr. Adams presented as a very forthright and earnest individual. I believed him without qualification when he stated he had no knowledge whatsoever.

[23] On the traditional analysis, that would be the end of the inquiry since the evidence fails to show that the Defendants would have known of the existence of Kitec piping and the implications of that.

[24] Here, however, counsel has added somewhat of a twist to this by suggesting that the Defendants were negligent in preparing the PDS. In oral argument he stated that the existence of the Kitec piping was a fact that reasonably should have been known by the Defendants. And in making that suggestion he referred to Mr. Adams' own evidence that he had good knowledge of the systems in his house and had engaged in a meticulous process of planning before building it.

[25] No authority was offered for this proposition and I am aware of none. If I understand what is being suggested, this would open a door to much greater potential liability of vendors of real property that has not, to my knowledge, existed up to the present point. As I understand the law, it must be shown that the vendor had actual knowledge of the fact in question.

[26] The principle of *caveat emptor* still does have application in the common law. As to the question of how robust the principle remains in the modern days I leave to the academics.

[27] I would note that there are exceptions to *caveat emptor* and this was alluded to by counsel for the Claimant.

[28] In *MacIsaac Estate v. Erquhart*, (2019), N.S.C.A. 25, Hamilton, J.A., stated as follows:

*[52] The doctrine of caveat emptor provides that absent fraud, mistake or misrepresentation, a purchaser takes a property as he or she finds it, unless the purchaser protects him or herself by contractual terms; Gesner v. Ernst, 2007 NSSC 146 (CanLII), ¶44.*

*[53] There are exceptions to this doctrine. One exception is that it does not apply where a vendor is aware of a latent defect of the property and does not disclose it to the purchaser; McCluskie v. Reynolds (1998), 1998 CanLII 5384 (BC SC), 65 BCLR (3d) 191 (BCSC), ¶54 and Torfason v. Booth, 2017 ABQB 387 (CanLII), ¶81. A latent defect is one that is not readily apparent to a purchaser during an ordinary inspection of the property he or she proposes to buy.*

[29] Of note here is the statement in paragraph 53 that there is an exception to the doctrine of *caveat emptor* where a vendor is aware of a latent defect.

[30] Is the presence of Kitec piping a latent defect? That is a question that can be left for another day since it is only relevant if the vendor is aware of it. I have already found that the Defendants had no knowledge of the existence of the Kitec or the implications of it being Kitec. (Reference may be made to the case of ***Dennis v. Langille***, 2013 N.S.S.C. 42, where Murphy, J. discussed the distinction between patent defects and latent defects, at paras 20-22).

[31] For the above reasons this claim must be dismissed.

## ORDER

[32] It is hereby ordered that within claim be and is hereby dismissed without costs to either party.

**DATED** at Halifax, Nova Scotia, this 16th day of September, 2019.

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**MICHAEL J. O'HARA**  
**ADJUDICATOR**