

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Black v. Honsberger 2021 NSSM 55

SCCH 505768

Between:

Terry Burgess Black

Claimant

— and —

Matthew Honsberger

Defendant

Adjudicator: Augustus M. Richardson, QC
For the Claimant: Terry Black, claimant
For the Defendant: Matthew Gough, counsel
Heard: October 15, 2021 (by Zoom)
Decision: December 10, 2021

DECISION

Introduction

[1] This claim arises out of statements contained in the defendant vendor’s Property Condition Disclosure Statement (“PCDS”). The claimant purchaser says that the statements misrepresented the existence of insulation in the walls of the house, and the existence of water leakage in the basement. (During the hearing the claimant abandoned the latter allegation.)

The Hearing

[2] On behalf of the claimant I heard the testimony of
a. The claimant, and

- b. Curtis Sangster, the claimants contractor, who had discovered during the course of some renovation work that there was no insulation in the walls of the house.

[3] On behalf of the defendant I heard the testimony of

- a. Matthew Heller, a tenant of the defendant when the latter had owned the house, and
- b. The defendant.

[4] The parties also introduced some exhibits.

The Facts

[5] The claimant purchased house from the defendant in 2010. At the time of the sale the house had a downstairs and upstairs apartment. The defendant lived in the downstairs apartment.

[6] The agreement of purchase and sale (“APS”) had attached to it a PCDS. There were two statements on the PCDS that the claimant says were incorrect. Each of these statements on the form could be answered “Yes,” “No,” “Do Not Know” or “Does Not Apply:”

- a. 6 (Structural)
 - i. Is there insulation in the exterior walls? **Yes**. Type: ??
 - ii. Is there insulation in the ceiling? **Yes**. Type: **Fibreglass**

[7] The claimant says that he relied on this statement. He was purchasing the house for \$329,000.00 as an investment property, and so was concerned about the cost of running it as such. The cost of heating would be a factor in that cost, and hence the status of the building’s insulation, if any, was an important consideration.

[8] The defendant, who filled out the PCDS, testified as to the foundation for his answers. He said that he had purchased the house at a foreclosure sale, and moved into it, in 2007. At the time of his purchase he had a house inspector go through the building. He said that the inspector went

into the attic and told him that he had found fibreglass insulation in the ceiling. He added that the inspector “would have said that it was typical of houses of that age that there would probably be insulation in the walls.” The defendant did not obtain a written report from the inspector so was relying on his memory in giving his evidence.

[9] The defendant moved into the house after its purchase in 2007. At some point thereafter he had some renovation done, mostly in terms of replacing a few windows and a door. His contractor at the time did not mention anything about the presence or absence of insulation in the walls. The defendant continued to live in one of the apartments in the house until he sold it to the claimant in 2010.

[10] Mr Heller was one of the defendant’s tenants in the period 2007-2010. He testified that the temperature in his apartment “seem pretty normal, if anything it ran hot.”

[11] After the claimant purchased the house he rented the apartments to tenants. He did not live there himself. In 2019 he decided to have some renovations done in order to convert the apartments in the house. Mr Sangster did the renovations. The work started in early June 2019. The work required the opening of some walls. At some point after the work commenced Mr Sangster noted that there was no insulation in the downstairs walls. He advised the claimant of that, and the claimant decided to have insulation installed at an added cost to the agreed-upon cost for the renovations.

[12] The claimant then filed the within claim against the defendant on April 23, 2021. He claimed \$25,000.00, the maximum allowable in this court. The claim is composed of

- a. The extra cost of adding insulation to the walls,
- b. A portion of the cost of painting the walls, with these two amounts being the range of \$8,500.00, tax included, plus
- c. The extra cost of utilities (paid for by him as landlord over roughly 10 years) which he estimated on the basis of tax records were greater than they would have been had there been insulation in the exterior walls.

[13] He estimated the total extras of all three types of loss in the range of \$30,000.00, which he elected down to the financial limit in this court of \$25,000.00.

Analysis and Decision

[14] There are three issues before me:

- a. Was there a limitation defence?
- b. If not, was the defendant's statement in the PCDS that there was insulation in the walls negligently or fraudulently made? and
- c. If so, what is the measure of damage?

A: Is There a Limitation Defence?

[15] Actions must be commenced within two years of the claimant's discovery of the damage complained of. Here the lack of insulation was discovered in the early summer of 2019. The claim was filed in April 2021. I am satisfied that it was commenced in time.

B: Was The Defendant's Answer to the Question Regarding Insulation Being in the Walls Negligent or Fraudulent?

[16] The general rule regarding the purchase of an old house is "buyer beware." A seller owes no duty to disclose patent defects. He or she must disclose latent defects only if the defect is dangerous in some way, or if asked directly whether a particular defect is known by the seller to exist. A PCDS is in large part an expression of that rule. It is not a warranty. It is simply a statement setting out the vendor's knowledge relating to the questions set out therein. The vendor is obligated to answer the questions honestly, but those answers are not warranties: *Gesner v. Ernst* 2007 NSSC 146 at paras. 44, 54. PCDS (or Property Disclosure Statements as they are now known) are simply statements "by the vendor of his or her knowledge as to the condition of the property:" *Zafiris v. Surette* 2019 NSSM 18 at para.25 (emphasis in original). As a result, claims based on statements contained in a PCDS are couched in terms of misrepresentation, either fraudulent or negligent: *Paterson v. Murray* 2011 NSSM 34 at para.16.

[17] The case of *Curran v. Grant* 2010 NSSN 29 arose from the sale of a house that proved to have a leaking window in the master bedroom. There were a number of defects in the house. The court there analysed the issue in terms of whether the vendor had been negligent in completing

the PCDS with respect to those issues; whether the vendor knew about the defects; and whether the purchaser reasonably relied on the PCDS representations. The court found with respect to one of those defects that it was latent but that the vendor knew about it, and hence for that one issue was found negligent. The other claims failed on the facts.

[18] In *MacLean v. LeBlanc* 2014 NSSM 77 the problem was a leak in the roof that developed two years after the purchase of the house. The cause of the leaks, which only occurred during certain types of wind-driven rain, was not determined. The claim against the defendant vendor was dismissed since there was nothing to suggest that they had known of the problem (which the court found to be a latent defect).

[19] In *Paterson v. Murray* 2011 NSSM 34 problems with the sewer and plumbing system developed shortly after closing. The court found that the problems were such that they could not have developed prior to closing. Had they, it would have been impossible for the vendors to ignore or hide them. The court accordingly concluded as a fact that the problem had developed after closing. The finding in this decision can be contrasted with those in *Crann v. Hiscock* 2012 NSSM 9 and *Fiddes v. Beattie* 2018 NSSM 21, where the court found that the problem (inadequate water supply by a well) was such that the vendors must have know of the problem beforehand, thereby making their statements either negligent or fraudulent (thereby attracting liability).

[20] In *Zafiris v. Surette* 2019 NSSM 18 the basement experienced serious flooding after a rain storm. The vendor had disclosed dampness in the PCS, but not flooding (which is what happened). One of the complicating factors was that the defendant vendors had rented the house and there had been no complaints from the tenants. As well, the dampness had been disclosed and had even been remarked upon by the purchaser's house inspector. In the end the court was not persuaded that the evidence supported a finding that the defendants knew not just that the basement was damp, but that it was subject to serious flooding during rain storms. The claim was dismissed.

[21] In the case before me the statement that there was insulation in the walls was clearly incorrect. The wall cavities were empty. There was no insulation. But that does not end the enquiry. The question is whether the statement was negligent or fraudulent. I was not persuaded that it was fraudulent. There was no evidence of any knowing attempt to mislead the claimant.

[22] However, I was also satisfied on a balance of probabilities that the statement was negligently made.

[23] The defendant was relying on his memory of a conversation with the house inspector that took place roughly three years before. The inspector told him that there was insulation in the ceiling. That appears to have been the case and, in any event, as I understood the defendant's testimony, the inspector had told him that he had actually seen insulation in the ceiling. But the inspector did not tell the defendant that he had seen insulation in the walls. I was not persuaded that the defendant's memory that the inspector "would have said that it was typical of houses of that age that there would probably be insulation in the walls" was sufficiently reliable to justify answering "yes" to the question "Is there insulation in the exterior walls?" The inspector had said "probably" which is an opinion, not an observation of a direct fact. The fact that the defendant answered the next question (what type of insulation") with "???" underlines the point that he did not actually know whether there was insulation in the walls. He also had the option of answering "Do Not Know" which, based on the information he had, was the more accurate answer. This conclusion is compounded by the fact that the defendant was himself a licensed real estate agent and so knew and understood the importance of PCDS disclosure statements.

[24] I am accordingly satisfied on the evidence before me that the defendant was negligent in answering the question about insulation in the walls as he did. I am also satisfied that the claimant reasonably relied upon that statement. I turn now to the question of damages.

C: What Is the Measure of Damages?

[25] I was not persuaded that the claimant's analysis of the issue was the appropriate one on the facts before me for three reasons.

[26] First, the claimant's attempt to reconstruct the cost of utilities, and then attempt to attribute some part of those costs to the lack of insulation, fell short of the mark. The claimant's analysis of his loss was based on the idea that there would have been a difference between the cost of utilities with insulation present compared to the cost without. But, not surprisingly, there was no evidence to establish the former. Even had there been, there are such factors as variations in tenant use and in winter weather conditions, as well as fluctuations in the cost of those utilities. All of these would have had to be taken into account to arrive at a realistic assessment of what impact the lack of insulation in the walls had on the cost of those utilities. None of that

factored into the claimant's analysis. His assessment was based on assumptions that had no grounding in the evidence.

[27] Second, there is the question of betterment. Adding insulation to the exterior walls of the house certainly added a cost. But it was not a cost that was thrown away. It was the type of cost that added value to the house. The claimant could now assert with certainty that the house was insulated, an assertion that would maintain if not increase the market value otherwise attributable to the house. The value of that betterment would have to be a credit to the defendant.

[28] This brings me to the third reason. I was not persuaded that the claimant would have backed out of the purchase had he been told by the defendant that he "did not know" whether there was insulation in the walls. It strikes me on the evidence as far more likely that that information would have become a factor in negotiation over price. It is common in cases where defects are uncovered during the course of an inspection for a purchaser to seek to lower the price rather than simply walk away, unless of course the defect is so serious as to make the purchase impossible. The possible lack of insulation in the exterior walls did not strike me as such a serious impediment to the sale. There was nothing in the evidence, other than the claimant's bald assertion, to suggest that the claimant would have walked away from the deal. This is especially true given that the cost of utilities can sometimes be passed on to tenants rather than shouldered by the landlord. I think it more likely then that the claimant would have negotiated a lower price, and that the defendant would have accepted some reduction to allow for that uncertainty.

[29] Given the price of the purchase, and its intended use, and doing the best that I can, I find that the sale price in 2010 would have been re-negotiated down by \$5,000.00 to allow for the uncertainty as to the status of insulation in the walls. I will make an order to that effect.

DATED at Halifax, Nova Scotia
this 10th day of December, 2021

Augustus M. Richardson, QC
Adjudicator