SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Cooper v. MacLellan*, 2022 NSSM 54

Date: 20221106
Docket: SCCH 513554
Registry: Halifax

Between:

Randy D. Cooper and Sheena L. Cooper

Claimants

- and -

Brian Joseph MacLellan

Defendant

REASONS FOR JUDGMENT AND ORDER

Adjudicator: Eric K. Slone

Heard: September 8 and 15, 2022, in Halifax, Nova Scotia

Appearances: For the Claimants,
Paul B. Miller, counsel

For the Defendant,
Katie O'Keefe, articled clerk

BY THE COURT:

Introduction

[1] This case tests once again the limits of what a buyer of real property can expect from a Property Disclosure Statement (PDS), sometimes referred to as a Property Condition Disclosure Statement (PCDS).

[2] The PDS may fairly be characterized as a modest relaxation of the principle of *caveat emptor* or "buyer beware," which is alive and well in this jurisdiction, as observed in by Associate Chief Justice Smith (as she then was) 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.)).

[3] Justice Smith goes on to observe:

> [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.)

[4] In a nutshell, a PDS reflects the state of the vendor's knowledge of the property, not the state of the property itself.

[5] PDS's are generally offered in residential real estate transactions, except on those relatively rare occasions when the vendor has not been residing in the property and has limited knowledge of the condition of the property, such as in an estate or bankruptcy sale, or where the property has been a rental property. While there is no legal obligation in Nova Scotia to provide a PDS, I believe it is fair to say that most buyers of residential real estate expect a PDS and would be suspicious if one was not offered. And

they expect the vendor to be honest - candid even.

[6] A PDS would be of little value if the vendor does not make an effort to disclose all he knows, or if he can get away with being willfully blind to facts that he should be aware of.

The Claim

[7] The case concerns water entering the basement of the Claimants' home.

[8] The Claimants are a husband and wife who bought their home in Fall River from the Defendant (and his wife) with a closing on May 16, 2019. The price paid was $293,000.00. They had the property professionally inspected. And they had in hand a PDS signed by the Defendant, who was the title holder.

[9] The Claimants knew that the basement had a sump pump, as such was flagged by the home inspector who made the following observations:

> The inspection of the sump pump and associated equipment is limited to a "visual inspection" only (based on a one-time visit). As such, it would not be possible to know how well the sump pump will function under heavy rain or spring thaw conditions, recommend regular monitoring during extreme weather events, plus client should consider adding a 'back-up' warning device that will signal water build-up in the event of a sump pump malfunction (i.e. power outage, clogged or misaligned, etc.).

[10] The inspection also disclosed that there were negative slopes on the sides and rear of the property that appear to be directed toward the foundation. He recommended monitoring for possible drainage problems during excessive rainfall or spring thaw.

[11] The inspector also noted that although the basement seemed dry, it might be necessary to run a de-humidifier.

[12] There are several clauses in the PDS that could potentially apply to this case. To each of these questions, the Defendant answered "no":

> 1.1 Are you aware if any structural problems, unrepaired damage, dampness or leakage?
>
> 1.2 Are you aware of any repairs to correct structural damage, leakage or

dampness problems?

11.1 Are you aware of any damage or hazards due to wind, fire, water/flooding, erosion, wood rot, pests, rodents or insects?

11.8 Is there any ongoing financial or other obligations related to the Property that the buyer will be responsible for?

[13] The Claimants viewed the property with their agent in early April 2019, which included looking at the basement. Ms. Cooper testified that they did not see any water in the basement or pooling of water in the yard. They made an offer which was accepted on April 7, 2019. As noted, an inspection was done on April 15, 2019. The inspection disclosed some unrelated deficiencies which were addressed in amendments to the agreement. The transaction closed on May 17, 2019.

[14] It was almost a year later, on April 2, 2020, that the Claimants first experienced a significant problem with water entering the house. They set up a second sump pump outside in an area next to an external staircase, which was where the water was entering, and also used two utility pumps to lower the water level.

[15] This strategy worked, to an extent, in that it kept the water penetration to a minimum. They also used a shop vac on occasion to pump out more water.

[16] There was no evidence suggesting that this coincided with unusual amounts of rain. I take note of the fact that this is the time of year when spring thaw may contribute to higher levels of groundwater.

[17] Over the next few months this type of water pooling and flooding occurred a few more times, which convinced the Claimants that they had a more serious problem.

[18] The first thing they tried was to put in a new weeping tile system on one side of the house. Photos in evidence show a fairly significant effort. The Claimants paid approximately $7,000.00 for this work, which they were at pains to point out was <u>not</u> part of their claim against the Defendant.

[19] They also extended the crushed stone near the threshold of the door to the basement and added a pipe which enabled them to use additional sump pumps when necessary.

[20] The new weeping tile system and these other measures did not solve the problem. On a number of occasions in 2021 and into early 2022, the Claimants had multiple sump pumps running 24 hours per day trying to keep the water from infiltrating the house.

[21] The Claimants decided to engage an engineering firm - Talisman Technical Solutions - to assess the situation and make recommendations. Essentially, they concluded that the problem is that the house is situated below the elevation of the roads on which they front, which roads are serviced by open ditches that lead to storm services. The natural drainage patterns of the land, and its elevation, place the basement below the level of the water table during certain times of the year and under certain conditions. This causes water to enter the basement, where it is handled (more or less) by sump pumps. They have recommended a solution that raises the level of the house by five feet, allowing the basement also to be raised by that amount. The engineer considered another option, but that would have required major regrading of lands owned by the municipality, which realistically would not happen.

[22] This is an expensive solution that the Claimants have already embarked upon at a cost, to date, of over $100,000.00.

The question - were the Claimants misled?

[23] Another way of asking this question is to ask: what did the Defendant know when he filled out the PDS?

[24] The Defendant's own evidence is that he was honest and did not believe he had anything to disclose.

[25] The Claimants have sought to look into the Defendant's mind by the only way possible. They sought out evidence to show what are the objective facts that the Defendant must have known, and also what the Defendant has said to other people.

Steven Hill

[26] This gentleman is a neighbour who lives next door to the subject property. He recounted a conversation with Ashley Maclellan, the Defendant's wife, in the spring or summer of 2016. In his affidavit he describes the encounter:

> 6. In the spring or summer of 2016 I was outdoors looking after my

> children and met with Ashley Maclellan who was also outdoors with her children. Ashley Maclellan asked me if we had any problems with storm water flooding our basement. I indicated to her that we had never had any problem with our basement flooding or water pooling in our yard. Ashley then replied that they had a problem with water pooling behind their property and coming into their basement.

[27] Mr. Hill was cross-examined and confirmed his evidence.

[28] Ashley Maclellan was not called as a witness to provide any different version of this conversation.

James Malone

[29] This gentleman also filed an affidavit in which he states that he has lived in the neighbourhood since the mid-80's. He has known most of the owners of the house that the Defendant sold to the Claimants.

[30] Mr. Malone was a firefighter working in the department that services this area. He described how in 1995 he attended as a member of the fire department to pump out the basement at the subject property, which had been flooded by stormwater. Sometime thereafter the fire department stopped providing this service to local homes.

[31] Mr. Malone also described conversations with a more recent owner who advised him that the basement flooded “a couple of times a year” after heavy rains.

Halifax Water

[32] The Claimant learned that the Defendant has been in contact with Halifax Water on several occasions in 2016 to discuss water issues concerning his property.

[33] Some important background is that the Defendant and his wife had purchased the property in March 2016 from RBC in a bankruptcy sale. Within a few months the Defendant was lobbying Halifax Water to upgrade the ditches and a culvert that border his property. Apparently, someone from Halifax Water had promised that work would be done, but another inspector had later visited the property and indicated that no such work needed to be done.

[34] The Defendant was evidently frustrated and made several calls to protest

and advocate for himself. The Claimant was able to obtain both documents (file notes) and an audio recording of a telephone conversation between staff of Halifax Water and the Defendant himself, which took place on September 26, 2016.

[35] I set out below some of the exchanges between the Defendant and the Halifax Water representative:

> **Halifax Water: Good afternoon, Customer Service, Melissa speaking.**
>
> **Mr. MacLellan: Hi, I called a while ago to have my culvert looked at and (inaudible) replaced because of all the water that runs off the road, runs right down the driveway into my house. ....**
>
> **... the biggest thing is all the water from the street coming down into my house ... it's going right towards my house, I'm on a well, right, the water comes off the road down towards my well and my septic ... I'm paying a ditch tax to manage the water coming off the road, but it's going (inaudible) into my house ...**
>
> **So who do I talk to about all the water that's coming off the road down my driveway to my house?**
>
> **Every time it rains, there's puddles outside my house; I've got a sump pump in my basement ...**
>
> **Halifax Water: You have to pump the basement?**
>
> **Mr. MacLellan: Yes, there's a sump pump in the basement. Because the water's just coming down the driveway; you can watch it.**
>
> **Halifax Water: What I can do is just basically put it through again and make it more clear that water is running into your property and into your home, which causes concern because of flooding - so basically we'll just put it forward again and hopefully it brings more attention to the issue ....**
>
> **So we'll put in an appeal, so basically the water is flowing onto your property rather than from your property ...**
>
> **So basically your concern is that the water runoff is running into your property and not the other way around.**

[36] In the end no appeal was necessary because Halifax water did eventually take some action.

The Defendant's evidence

[37] The Defendant gave evidence on his own behalf. His wife was not called as a witness. The Defendant had bought the property in 2016 and described it as in poor condition. Some upgrades were done after he bought it.

[38] He described the basement as already finished.

[39] He stated that he called Halifax Water to dispute the ditch tax that he was paying. He wanted them to replace the culvert near his property, and also to install a speed bump or curb that would divert the water. He says he kept calling because they were giving him conflicting information.

[40] He stated that Halifax Water did eventually replace the culvert and placed some type of curb on the road that had the effect of diverting water away from his property.

[41] He testified that he never had any issues after that and believed that his answers on the PDS were correct and were given in good faith. He says that he felt no obligation to disclose his contacts with Halifax Water, nor the fact that there had been a problem that prompted these contacts.

[42] The only documentary evidence that the Defendant produced was from his house insurance company confirming that he never made any claims on his insurance.

[43] The Defendant downplayed the extent of the problem, suggesting that water from outside was not really causing a problem in the basement, because the sump pump was handling it. But his statements to Halifax Water and his persistence with them, satisfy me that the problem was more significant than he would now have us believe.

Discussion

[44] The evidence satisfies me that this house had a long history of wet basements. It is quite possible that the Defendant did not know that the fire department used to pump it out, as a public service.

[45] The statement attributed to the Defendant's wife is hearsay, but is reliable enough to be factored into the conclusion. Mr. Hill has no obvious motive to lie or exaggerate. It is inconceivable that Ms. Maclellan would have been aware of something that her husband was not. The fact is that they had storm water entering their basement, and wanted to know if this was a common experience in the neighbourhood.

[46] The Defendant may well have believed that the problem was that of water running down his driveway, and then entering the basement to be dealt with via the sump pump. But he clearly considered it a significant enough problem to keep pressuring Halifax Water to do something about it.

[47] He may well have believed that the problem had been remedied.

[48] However, I do not believe it was enough to answer the questions in the PDS as if there had never been a problem. In particular, the question "1.2 Are you aware of any repairs to correct structural damage, leakage or dampness problems?" invites disclosure of a historical problem that the owner may well believe has been rectified.

[49] A correct response would have said something to the effect that "water used to run off the street, pool outside our house, and enter the basement, but repairs to the culvert and street appear to have alleviated that." This type of an answer would have alerted the Claimants to an issue that deserved further investigation.

[50] The honest response to 11.1 - Are you aware of any damage or hazards due to wind, fire, water/flooding, erosion, wood rot, pests, rodents or insects?" - would have been that there was, or had been, a hazard of flooding that had been alleviated.

[51] It is the Claimants' position that they would not have bought the house if they had known of the problems that they were inheriting. Given the major expenses that they are incurring, this is easy enough to accept. But as they say, hindsight is 20-20. What is less clear is whether the disclosure of what the Defendant knew or ought to have known, would necessarily have persuaded the Claimants to back out of the transaction. However, I am satisfied that they would have at least done further investigation which more than likely would have caused them either to negotiate a reduction in price, or abandon the deal altogether.

[52] I conclude that the Defendant negligently or intentionally misled the Claimants and must answer for damages.

Damages

[53] The fact that damages are limited to $25,000.00 somewhat relieves the court of any obligation to fine tune the damage claim down to the last dollar. If damages were assessed at $25,000.00 or $100,000.00, the result would be the same.

[54] The Claimants have claimed for the costs that they have incurred to date, plus the amount that they estimate they will have to spend, to complete the process of raising the house in accordance with the engineer's recommendation.

[55] However, with respect, this approach is incorrect. The measure of damages for misrepresentation is not the cost to bring the property up to the standard of what the Claimants expected. That would be the measure of damages had there been an express warranty: i.e., providing the Claimants with the benefit of their bargain. Damages for negligent misrepresentation (even in the context of a contractual relationship) are tort damages, not contract damages.

[56] In some cases, the result may be the same, while in others there is a substantial difference.

[57] The Nova Scotia Court of Appeal case of *Barrow v. 1874000 Nova Scotia Limited*, 1997 NSCA 66 (CanLII) provides a good summary of the law, as endorsed by well-recognized text authorities. The case concerned negligently prepared financial statements that were relied upon by the purchaser of a business. The trial judge found that had the real financial state of the company been known, the deal would never have taken place. He awarded damages measured as if the statements in the financial statement had been accurate. The Court of Appeal (at p.7-8) reduced the damage award considerably:

> Collins Barrow says that the trial judge's approach was erroneous. It was an approach designed to put Shannon in the position in which he would be had the financial statements correctly stated ABM's financial condition - the test for measuring damages for breach of a contractual warranty. The test to be applied for damages in tort is the amount of the overpayment, that is, the difference between the price paid and the market value of the shares at the time of the purchase.
>
> G. H. Treitel, *The Law of Contract*, Ninth Edition, states the position:

> Liability for misrepresentation may arise in tort (where the representation is made fraudulently or negligently) or in contract (where the representation has contractual force). This distinction affects the assessment of damages in the most common case of misrepresentation: namely, where a seller represents that the subject-matter of a contract has a quality which in fact it lacks. The general principle is that in tort the plaintiff is entitled to such damages as will put him into the position in which he would have been if the tort had not been committed; while in contract he is entitled to be put into the position in which he would have been if the contract had been performed. It is thought to follow that in tort the plaintiff is entitled to be put into the position in which he would have been if the representation had not been made, while in contract he is entitled to be put into the position in which he would have been if the representation had been true. If the representation induces the plaintiff to buy something which, but for the misrepresentation, he would not have bought at all, it follows that the damages in tort are *prima facie* the amount by which the actual value of the thing bought is less than the price paid for it. In contract, on the other hand, the damages are *prima facie* the amount by which the actual value of the thing bought is less than the value which it would have had if the representation had been true.
> (Emphasis added)

[58] Applying this principle to the PDS scenario, it is not appropriate just to total up everything that the Claimants have spent trying to mitigate the water issue. I must consider what they most likely would have done had the PDS been more accurately stated.

[59] In other words, where would the Claimants be (financially speaking) had they been given a more accurate PDS?

[60] As I have stated, the Claimants would have been faced with a choice: either abandon the purchase altogether or elect to continue with or without a reduction in price.

[61] Damages would be measured by the difference between the price paid ($293,000.00) and (a) the true value of the property, or (b) the amount that they most likely would have paid had the disclosures been made. For all practical

purposes, (a) and (b) are the same.

[62] I do not believe that the disclosure would necessarily have foreshadowed the extent of the remedy that the Claimants have embarked upon. Given what was known at the time, I believe it is more likely that they would have explored less drastic options such as additional drainage and stronger or more sump pumps.

[63] Assessing damages in this scenario is far from a precise science. In the absence of any expert evidence of value, and engaging in a permissible exercise of speculation, I believe the most likely scenario is that a reduction in price of about 5% would have been arrived at. I will round this up to $15,000.00.

Costs

[64] Most of the claimed costs are non-controversial, but one large ticket item claimed is the cost of the engineering report from Talisman Technical Solutions in the amount of $6,210.00.

[65] The cost of expert opinions may be recoverable. However, in the case here I am not allowing it - for two reasons. First of all, I do not believe its primary purpose was for use in court. I believe it was commissioned to give the Claimants some much needed advice on what to do with their property. Secondly, I believe the amount is disproportionate to its value as expert evidence.

[66] The costs that I will allow are:

cost to issue claim	$199.35
Cost to serve claim	$152.95
FOIPOP request	$5.00
cost of preparing exhibit books	$371.48
	$728.78

[67] The Claimants will accordingly be entitled to a judgment for $15,728.78.

ORDER

[68] The court orders that the Defendant pay to the Claimants the sum of $15,000.00 in damages plus costs of $728.78, for a total of $15,728.78.

Eric K. Slone, Adjudicator