Claim No. SCT 254600
Date: 20060921

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
Cite as: Willman v. Durling, 2006 NSSM 21

BETWEEN:

**LAURA MARIE WILLMAN and DAVID MICHAEL WILLMAN**

CLAIMANT

-and -

**JAMES WILLIAM DURLING**

DEFENDANT

**Revised Decision:** The text of the original decision has been revised to remove personal identifying information of the parties on October 20, 2006. This decision replaces the previously distributed decision.

**Date of Decision September 21. 2006**

**Adjudicator David TR Parker**

*Patent and Latent Defects as to Quality; the role of caveat emptor in the purchase of property*

## DECISION AND ORDER

This matter came before the Small Claims Court of Truro and Province of Nova Scotia on the 4th day of July, A.D. 2006.

The pleadings set out the general claim and as is the case in many Small Claims Court actions where Counsel is not involved the pleadings are without legal specificity. The claim is "to recover costs relating to chronic water problems in

basement of home sold [to us] by the Defendants." The Defendant in his response stated "I have no knowledge of a chronic water problem and the history of the house would indicate that there has not been a chronic water problem."

The Defendant also claimed for his costs and lost income.

**Facts:**

The Claimants purchased a home from the Defendants in November 2004.

Five days after the Claimants moved into their home they experience water coming into their basement in the northwest corner of the basement. Water continued to come into the basement throughout the evening and the Claimant estimated they removed in excess of 60 gallons of water.

The Claimants removed wall panelling in the affected area and found wood rot and insulation that showed signs of water damage.

During the winter months there was no further problem or occurrences where water entered the basement area.

In the spring during May month the Claimants experienced more water problems in the basement. Water was coming into the storage room area of the basement and it was also entering the basement through a drain near the back door of the basement.

Water eventually covered the entire basement floor and the Claimants estimated they removed approximately 1500 gallons of water.

Water continued to enter the basement on two other occasions in May of 2005.

The Claimants in conjunction with contractors decided to replace the drain tile around the west and north sides of the house which was done later in the summer. The existing drain tile around the home was found to be in poor condition.

When the walls and flooring was removed the Claimants found rotten wood in the storage room area and other areas in the basement.

The Defendant lived in the home for a short period of time and his daughter had lived in the home previously.

The Defendant's daughter experienced a water problem the previous spring before the sale of the home and she cleared the drain which fixed the problem. The Defendant's daughter lived in the home for two years prior to the Defendant living in the home for four months after which time it was sold.

Position of the Claimant

The Claimant contends this had to be an ongoing problem that was covered up by the Defendant. They said they had the home inspected and any water problem was hidden and could not be observed. The home inspector gave testimony that the problem was not observable but that the wood that was eventually exposed showed signs of rotting over a long period of time.

Position of the Defendant

The Defendant said he only lived in the home a short period of time and his daughter lived in the home for a couple of years and she had experienced a water problem only once when the drain near the back door of the basement became blocked. The Defendant was of the view that drain blockage was the cause of the Claimant's water problem. The Defendant said the home was built by a Mr. Brand who lived in it for 4-5 years and it was then sold to people who renovated the basement during their two to three year tenure. The Defendant said Mr. Brand tried to repurchase the home for his daughter and asked "why would he do that if there was a water problem?" The Defendant said the walls were covered up when he bought the home and there was no way to know there was a water problem without taking the walls off the home. The Defendant suggested it was not a problem with the home; it was a problem with maintaining the drain, keeping it clear. That was it was a maintenance problem and that should not have to be pointed out to the Claimants as it is their responsibility to maintain the home. The Defendant said there was no water problem during his stay in the home.

The Defendant said his daughter solved the maintenance problem "to my knowledge" and "if someone had talked to me I would gladly talked to them about the home" referring to its maintenance.

Analysis by the Court

***Caveat Emptor*** or buyer beware is the starting point in any purchase of a home by a buyer. It is the buyer's responsibility to ensure the condition of the property is in order and if there are problems with the property then the buyer does not have to purchase the property. This is subject to any contractual obligations or restraints put on the property. For example if the buyer enters into a contract with the seller to buy the property "as is" then there are no warranties as to its condition unless the buyers can show there is a collateral contract of some sort. This of course is subject to any legislative warranties imposed on the purchase of a home and I am not aware of any.

In the event there is misrepresentations made out by the seller that are fraudulent or negligent then the caveat emptor rule is circumvented. (See ***McGrath v. MacLean et al.*** **(1979), 22 O.R. (2d) 784**)

In this particular fact situation there was a latent defect. A latent defect has been defined to mean a defect with respect to the home that is not readily apparent to an ordinary purchase during a routine inspection. (See ***Gronau v. Schlamp Investments Ltd.*** **(1974) 52 D.L.R. (3d) 631.)**

In this particular case there was a defect with the home at least as far as the drainage system or back door drain was concerned. The Claimants say that water came up the drain and entered the basement. The Defendant says the drain is a maintenance problem and flooding occurred to the basement only once when the drain was blocked. It seems only logical that if the drain was blocked as the Defendant described then there must have been water heading towards the drain from water leaking into the basement through the foundation. This conclusion is also supported by the fact that there was wood rot throughout a large portion of the basement that according to the inspector was there for sometime.

The Defendant feels this was a normal maintenance problem and he should not be required to mention same unless specifically asked. Further the Defendant is of the view that it was not a chronic problem. It was certainly a chronic problem for the Claimants and based on the analysis by the inspector, after the walls were removed to expose wood rot, it was in fact a long time occurring event, that is, water in the basement.

The question that this Court must answer and examine is: was the Defendant

required in law to disclose what turned out to be a latent defect? I have to be first of all convinced it was a latent defect.

Halsbury's Laws of England (4th Ed.), vol 42, para 51, at page 47 states,

*"…latent defects are such as would not be revealed by an inquiry which a purchaser is in a position to make before entering into the contract for purchase."*

And in ***Thompson v. Schofield*** **[2005] N.S.J. No. 66** at para 18,

*"A latent defect…is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection."*

The person who inspected the home for the Claimants said at the beginning of his testimony there was no evidence of any problems in the basement at the time of the inspection. As it turned out the rotten wood and replaced insulation was in fact hidden behind the basement walls in the furnished basement. On cross examination he was referred to Appendix 4 pictures 3 and 4 he contradicted his earlier testimony and said "yes, it might have been visible" referring to water stains on the outside wood.

However this was not in his report. It would appear it was not noticeable by the home inspector during his first inspection or it did not exist in his first inspection that he completed for the Claimants. In any event I have drawn the conclusion from the evidence that the Claimants on ordinary inspection by themselves would not have observed any water damage in the basement and I conclude therefore that any such defect in the foundation was a hidden defect.

Was the Defendant aware of this defect? It is clear from the testimony of the Defendant that he was aware water had flooded the basement and he was of the view that this was due to a drain blockage.

The next question is was water in the basement a result of a major defect in either the drainage system or in the foundation. As it turned out the water was coming into the basement through the foundation and this was only rectified by replacing the weeping tile around the foundation. I would consider gathering of water in the basement a major defect.

The next question in this analysis should the Defendant made the Claimants aware

of this problem even though he was only aware of it happening on one occasion and he was not aware of the extent of the damage or the problem.

In this case there was no intention to hide or cover up the defect. The Defendant just did not mention anything about a water problem having occurred in the basement. The law in Nova Scotia is moving towards the position that non-disclosure of a major problem of which the Vendor is aware amounts to negligent misrepresentation.

In most cases of negligent misrepresentation there has been some representation made. The case of **Desmond v. McKinlay (2000) 188 N.S.R. (2d) 211**, deals with the notion of partial disclosure and concludes that such can be misleading to the purchase so as to create an actionable misrepresentation at law. In Ontario the courts has suggested that failure to disclose a major latent defect is the equivalent of an intention to deceive (**Jung et al v. Ip et al (1988) 47 R.P.R. 113**)

The question that I ultimately must decide is, have the courts in Nova Scotia moved to the same place as in Ontario, and if not, should they.

To apply the principle espoused in the **Jung et al.** case would eradicate the judicial common law principle of ***caveat emptor***. It is the exact opposite of that principle. This doctrine has been softened considerably in the sale of goods due to legislative intrusion but that has yet to take place with the sale of real property and it should not be up to the court to impose its own warranties.

Justice Wells of the Court of Appeal in **Jenkins v. Foley [2002]N.J. No. 216** a case involving Defects found in a home made the following observations of the Law;

*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+).*

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*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*

The Jenkins case on appeal is very similar to the case at bar and how the court treats a vendor's requirement to disclose a water problem of which the vendor is aware. Justice Wells in commenting on the trial Judges summary of conclusions and his treatment of the law says as follows at page

*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 the sum of $6,500.00 as damages.*

In the case at bar there was no implied or expressed warranty given to the purchaser and the defendant vendor had no knowledge that there was a serious leakage problem through defective weeping tiles around the home. The defendant was not aware of any wood rot concealed behind the walls or that there had been continual leakage through the foundation over the years both before and after he purchased the home.

Absent any sort of fraud or actively trying to conceal a defect or where there is a fundamental difference in what was bargained for by the Claimants, the Claimant will not be successful in their claim.

In the case at bar there was no implied or expressed warranty given to the purchaser and the defendant vendor had no knowledge that there was a serious leakage problem through defective weeping tiles around the home. The defendant was not aware of any wood rot concealed behind the walls or that there had been continual leakage through the foundation over the years both before and after he purchased the home. The Defendant did not know of any damage to the basement wall or the state of the weeping tiles around the outside foundation of the home. There was no attempt by this Defendant to conceal any defect. During the four month period the Defendant actually lived in the home, there was no evidence of water collecting in the basement as was the case when the Claimants owned the home.

It would be contrary to law in this province to impute that non-disclosure places liability at the feet of the seller of real property. If the purchaser/Claimants wanted to protect themselves they could have done so contractually and included that protection in the schedule attached to the Purchase and Sale Agreement. For all these reasons this claim is dismissed.

IT IS THEREFORE ORDERED that the Claim against the Defendant is hereby dismissed.

With respect to the counterclaim there was no requirement to serve by registered mail the Notice of Defence and the other amounts claimed are not supported by evidence. The counterclaim is dismissed

Dated at Truro, this 21 day of September, 2006.

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David T.R. Parker
Small Claims Court Adjudicator