SCT 269349
DATE: 20070116

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Lewis v. Hutchinson, 2007 NSSM 4

Between:

MARIE LEWIS

CLAIMANT

-and -

KAREN HUTCHINSON AND TIMOTHY FIELD

DEFENDANTS

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: November 20, 2006

Decision: January 16, 2007

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on January 18, 2007. This decision replaces the previously distributed decision.

Counsel: The Claimant appeared and was self-represented.

The Defendants appeared and were self-represented.

This matter came before the Small Claims Court in Truro, Nova Scotia, on the 20th day of November, 2006.

The pleadings of the Claimant state in part, "*water failed within two days, heating system lacks cold air return, numerous other problems*".

Facts:

- The Claimant made an offer to purchase the Defendants' property pursuant to a Purchase Sale Agreement ("PSA") dated March 13, 2006. This offer was returned as accepted by the Defendants on March 14, 2006.

- Attached to the PSA was a Property Condition Disclosure Statement ("PCDS") completed by the Defendants and dated the same date, March 14, 2006.

- The PSA allowed the Claimant to have the home inspected by an Inspector and the Claimant had this done.

- The PSA stated, "For the guidance of the Purchaser (The Claimant) the Vendor (the Defendants) will complete the attached Property Disclosure Statement (PCDS) as accurately as possible and provide it to the Purchaser concurrently with acceptance of this offer." (This was completed by the Vendors after the offer was submitted for acceptance.)

- The three areas advanced by the Claimant as pertaining to the Claim and found in the PCDS are as follows:

<u>Heating System</u>

(a) **Type of Heating**: oil and wood are checked off as being applicable.

(b) **Have there been any major problems with heating system?** Here the Vendors checked off "No" in response to the question.

(c) **Have any major repairs or upgrading been carried out to the heating system in the last five years?** The Vendors checked off "Yes" and penciled in "change piping system

(d) **Have there been any problems with fuel leaks from the lines or tank?** The answer was "No".

(e) **Were the wood stove/fireplace inserts installed by properly qualified personnel?** The Vendors penciled in "Do not know".

Water Supply

(a) **Source: Drilled well** is checked off by the Vendors.

(b) **Are you aware of any problems with water quality, quantity, taste or water pressure?** The Vendors checked off "No".

Plumbing System

(a) **Are you aware of any problems with the plumbing system?** The Vendors checked off "No".

(b) **Have any major repairs or upgrading been done to the plumbing system in the last five years?** The Vendors checked off "No" as their answer.

Structural

(a) **Are you aware of any major structural problems, unrepaired damage or leakage in the foundation?** The Vendors checked off "No".

(b) **Are you aware of any major structural problems, unrepaired damage, leakage or dampness with the roof or walls?** The Vendors checked off "No".

(c) **Have any repairs been carried out to correct leakage or dampness problems in the last five years?** The Vendors checked off "No".

- The PCDS states at the beginning of the document, ***"The Vendors are responsible for the accuracy of the answers on this disclosure statement and if uncertain should reply "Do Not Know". This Disclosure Statement will form part of the Contract of Purchase and Sale if so agreed in writing by the Vendors and the Purchaser."***

- NOTE: (There is no indication that the PCDS was considered part of the PSA either in writing or through testimony.)

- The Claimant asked the Defendants if the house heated well and the Defendants told the Claimant they had no trouble heating it. The Defendants also told the Claimant they only heated it with wood not oil.

I have outlined the facts as I found them from the evidence. These have primarily been derived from the PSA, PCDS and other documents not challenged by the parties. The remaining facts which involved what the Defendants said with respect to heating their home were agreed as being said by both parties.

I had some difficulty giving much weight to facts about the condition of the defects and their existence, cause, origin and nature as they were only provided in documentation and pictures without the benefit of having the Defendants being able to cross-examine on aspects of those defects or complaints other than the Claimant's testimony, which I have considered. However, notwithstanding the lack of support respecting the exhibits they were not excluded as admissible, their effect only went to weight.

<u>The complaint that the court has been asked to address:</u>

The Claimant has explained there were problems in three areas: (1) the furnace and heating system, (2) the well's foot valve had holes in the piping, and (3) there was wood rot in the subflooring in the kitchen.

ISSUE:

Are the Defendants responsible for the defects that the Claimant alleges after the Claimant purchased the home?

> There are several areas of concern that I must deal with in my analysis in determining whether or not the Defendants are responsible for dealing with the furnace problem as described by the Claimant. I must consider the following:
> (1) the notion of caveat emptor
> (2) the terms of the contract
> (3) whether there has been any representations or misrepresentations made by the Defendants and the notion of disclosure and non-disclosure.
> (4) was the problem with the burner pump and to the burner pump, the well and the floor a latent defects or a patent defects?
> (5) the Doctrine of Merger
> (6) was there a collateral warranty given by the Defendants to the Claimant?

ANALYSIS:

First Phase of Analysis

The starting point in any complaint brought before the court concerning defects that are complained of by a purchaser in a real estate transaction is the notion of *Caveat Emptor*.
or what is known as buyer beware. In the decision ***William v. Durling*** [2006] N.S.J. 368 at paragraphs 18 and 19 it stated:

> **18 *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.**
>
> **19 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).

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. [see *Jenkins v. Foley*, [2002] N.J. No. 216]

Second Phase of Analysis

The second phase of analysis involves what is the agreement between the parties; that is to say, what makes up the Purchase Sale Agreement, considering all addendums, schedules, amendments, and counteroffers. As well, does the PCDS form part of the agreement or is it somehow collateral to the main PSA.

Third Phase of Analysis

This phase of the analysis involves the doctrine of merger and a determination of what are warranties and what are mere representations. Once this is determined, it is necessary to determine if a warranty survives the closing of the contract. Warranties that survive the contract will not be affected by the doctrine of merger and representations will take the Court into a separate legal field of analysis involving misrepresentation. A statement in a contract unless clearly expressed as a warranty may in fact be a mere representation. The distinction between these two terms seems to be lost over the years and what I might consider a mere representation as found in a PCDS are at times referred to as warranties. [*Lang v Knickle* (2006) N.S.J. No. 375] [Also see *Whelan v Gay* (2006) N.S.J. No. 20 where Justice LeBlanc speaks about the distinction existing between a representation and a warranty.] A warranty that is a term of a contract may give rise to a claim in damages and it is here that I consider the doctrine of merger. If a warranty is a term of the contract between the buyer and seller then upon closing the parties' rights are merged in the dead and there are no longer any rights emanating out of the contract. All rights and remedies must now be found in the deed provided to the Purchaser. The exception is that some warranties are terms in a contract that survive closing and therefore provide the Purchaser with a possible remedy. The determination on a warranty's survival is articulated by Anger and Honsberger Law of Real Property, 2d edn. (1985) Vol 2 at pp. 1214-16, "did the parties intend that certain terms should or should not survive closing. It is the intention that governs, not a presumption of merger." In order to determine

intention it is necessary to consider all of the evidence, including the wording of the contract where it often states the warranty survives the closing. Also, the parties may have had particular discussions going back and forth concerning some clause in the contract and the Purchaser may have been satisfied that the warranty was timeless.

Fourth Phase of Analysis

The next phase of analysis is to make a determination on whether the PCDS is part of the Purchase Sale Agreement or whether it is collateral to the main contract. If it was part of the Purchase Sale Agreement then the doctrine of merger subject to any exceptions. In order to determine that, it would be necessary to consider intention of the parties as referred to in Phase 1 of the analysis.

Fifth Phase of Analysis

This phase of the analysis is to determine if there are any collateral warranties. Again, according to Anger & Honsberger at page 1222, it must be shown that a warranty was given in circumstances where it must be said to have been collateral to the main contract and as part consideration thereof. Again, the Trier of fact is required to assess the evidence and the intention of the parties.

Sixth Phase of Analysis

The next phase of analysis is to determine if there have been misrepresentations made to the aggrieved party which are fraudulent or negligent. In going through this process I must determine whether the statements made between the parties and/or in the documents are representations. Normally the PCDS is completed prior to or after the PSA has been executed by the Purchaser. However, again it comes down to the intention of the parties whether a statement in the PCDS is a representation or a warranty or other clear wording in the Statement provided.

Fraudulent and Negligent Misrepresentation has been developed by the courts and I have often referred to the summary outlined in the case *Thompson v.Schofield* [2005]N.S.J. No. 66,wherein Justice Warner stated:

The Law**16** Generally transactions involving the sale of real property are subject to the principle of caveat emptor with respect to the physical amenities and condition of the property. Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he or she finds it unless the purchaser protects himself or herself by contractual terms. This is set out in several important decisions, some of which were included in the defendant's memorandum, such as *McGrath v. MacLean*, (1979) 22 O.R. (2d) 784 (O.C.A.), and *Edwards v. Boulderwood Development Corporation*, (1984) 64 N.S.R. (2d) 395 (N.S.C.A.). It is referred to in *Redican v. Nesbitt*, [1924] S.C.R. 135. **17** In Edwards, our Court of Appeal found that the defendant had made an innocent misrepresentation and was not liable to the seller with regards to the condition of a vacant lot of land and further found that the innocent misrepresentation had been made after the contract had been entered into and therefore could not have influenced the entering into of the agreement.

….what constitutes negligent and fraudulent misrepresentation. **20** Fraudulent misrepresentation is dealt with, among other cases, by a decision of Saunders, J., as he then was, in *Grant v. March*, (1995) 138 N.S.R. (2d) 385. At paragraph 20 of that decision he says:

- With respect to the first allegation, that is, that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in *Charpentier v. Slaunwhite* (1971), 3 N.S.R. (2d) 42. In that case, which involved problems with a well, Jones J. (as he then was) cited [at p. 45 N.S.R.] G.S. Cheshire and C.H.S. Fifoot, **The Law of Contract**, 6th ed. (London: Butterworths, 1964), at page 226:

    - A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year.
    - And again on page 241, as follows:

        - Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of the common law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind". Influenced by this consideration, the House of Lords has established in the leading case of *Derry v. Peak*, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in Derry v. Peak, saying that it meant a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent representation is a false statement which, when made, the representor did not honestly believe to be true.

21 At paragraph 21, Justice Saunders quotes **The Law of Vendor and Purchaser**, 3d

ed. by V. DiCastri (Carswell, 1988), as saying that to found a claim for false misrepresentation one must do the following:

- In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it."

The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.**22** On the facts in Grant v. March, the trial judge was not satisfied that the defendants knew of the water problems that existed and he further found that any representations that they did make were not made before the contract was entered into.**23** Another relevant decision cited in the defendants' memorandum is *Jung v. Ip*, [1988] O.J. No. 1038, 1988 CarswellOnt 643 (O.D.C.), where the Court, in finding liability against the vendor for failing to disclose a termite infestation, said at paragraph 18:

- It is now clear that the law of Ontario is such that the vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive. In the case before this Court, there was nothing innocent about the withholding of the information. It was done intentionally. This was not an innocent misrepresentation.

24 In finding liability against the vendor for failing to disclose a sediment problem with the well and sewer system in a property disclosure statement, the Court in *Ward v. Smith*, [2001] B.C.J. No. 2371, 2001 CarswellBC 2542 (B.C.S.C.) discussed the application of the principles of negligent misrepresentation at paragraphs 33 to 39; quoting from paragraphs 33 to 35 of that decision (not as an authoritative decision but simply as one of the many that set out in summary nature what a negligent misrepresentation is), Gotlib D.C.J. said:

- ... The requirements to establish a claim in negligent misrepresentation were summarized by Mr. Justice Iacobucci in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.), at 643:
    - (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
    - (2) the representation in question must be untrue, inaccurate, or misleading;
    - (3) the representor must have acted negligently in making said misrepresentations;
    - (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
    - (5) the reliance must have been detrimental to the representee in the sense that damages resulted.
- In their pleadings, the plaintiffs used the expression "reckless misrepresentation" which was understood, during the course of argument, to

> be negligent misrepresentation. I am satisfied that, in fact, the defendants did negligently misrepresent the quality of the available water by stating that they were not aware of any problems with the quality of the water ....

- The defendants owed a duty of care to the plaintiffs to not negligently misrepresent either the quality or quantity of the water supply.

The Court went on to make a determination that the defendants negligently misrepresented the state of the water. He was satisfied that they knew the nature of the problem with the well, even though they may not have known the extent of the problem**.25** The Court's analysis in *Swayze v. Robertson*, [2001] O.J. No. 968, 2001 CarswellOnt 818 (O.C.J.), a case involving a flooding problem caused by a defect in the foundation, is similar.**26** The plaintiffs rely upon the decision of Wright J. in *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211, which decision was upheld by our Court of Appeal at (2001) 193 N.S.R. (2d) 1. In *Desmond v. McKinlay*, Mr. Justice Wright, like the Court in Jung v. Ip found that silence could constitute a negligent misrepresentation. At paragraph 43, he says:

- In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment so as to create an actionable misrepresentation at law.

27 If this court finds that the answers given in the disclosure statement, which was incorporated in the agreement, were either negligent or fraudulent misrepresentations, there is no doubt that (a) they were material, (b) they were made at the time of the entry into the contract or the agreement of sale and were relied upon, and (c) based on the law as set out in *Desmond v. McKinlay* at paragraphs 48 to 51, they would constitute, in addition to negligent misrepresentations, a breach of a collateral warranty and thereby constitute a breach of the agreement of sale.The Evidence

Seventh Phase of Analysis

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."

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;

- *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

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…"*

Eighth Phase of Analysis

Once a determination has been made to show there is liability of the Defendants, then the next consideration is whether the Claimant has proven damage and the ensuing damages arising therefrom.

This case involves remedies sought after completion of the contract and, as stated above, once the contract has been executed by delivery of the deed and the transaction has closed, the remedies of the purchaser are limited. It would appear that the Court must look at whether there are certain terms in the contract that specifically state that those terms survive the closing of the real estate transaction and, if not specifically stated, did the parties intend that certain terms should or should not survive closing. Then once that is considered it is necessary to consider

the exceptions to the doctrine of merger, and that would be fraud, a mutual mistake, a collateral warranty and then to consider misrepresentation and finally defects.

I have reviewed the Purchase/Sale Agreement and there is no mention of the heating system well or flooring in same. There is a PCDS attached to the Purchase/Sale Agreement. The Purchase/Sale Agreement does not specifically say that the PCDS forms part of the Purchase/Sale Agreement and shall survive the closing. However, the PCDS does say it forms part contract if it is agreed in writing. This never occurred however the PCDS is attached to the Purchase/Sale Agreement and is required to be completed by the Vendor who is required to provide it to the Purchaser concurrent with the Purchaser's acceptance of the offer. As the statements in the PCDS come after the offer was made then any representations contained therein would not have effected the Claimant's decision to make an offer on the home. If the Statements in the PCDS are not mere representations then they would have to be considered warranties, conditions or covenants and the question becomes, if they are such, with respect to the furnace, well and floor do they survive the closing for if not they would have to be contained in or found in the deed. I have no evidence of any deed and what is contained in the deed. The warranties, conditions or covenants would also survive the doctrine of merger if there was: 1. fraud, 2. a mutual mistake resulting in a total failure of consideration, or a deficiency in the land conveyed amounting to an error in *substantialus*, 3.contractual condition or 4.warranty collateral to the contract, otherwise *caveat emptor* applies.

In this case I would be considering the fourth options as being applicable.

1) **Furnace**

The Claimant said in her testimony she was having problems with the furnace shortly after she moved into the home. The Claimant told the Court the Riello burner in the furnace was cracked and there were no cold air ducts. She provided an invoice from Kelsey's Plumbing and Heating who apparently checked out the Claimant's furnace after she purchased the home. The invoice indicated the "Riello burner pump leaking oil". It also stated in the invoice "Please note: wood and oil furnace has no return air duct work and does not meet installation codes." The Claimant also produced a letter from the same company dated April 26, 2006, subsequent to the company's first invoice dealing with the inspection of the furnace and the replacement

> of the Riello burner pump. This letter was referenced as "Furnace duct work. Wood oil furnace's not installed properly. Hot supply air duct work does not meet installation codes." The letter goes on to specify the work to be done and gives a quoted price of $2,955.00 plus HST.
>
> There was no expressed warranty in the contract respecting the heating system. If there was any sort of warranty it would be a collateral warranty when the Defendants said they had no trouble heating it. This warranty never extended to the oil burning furnace but rather to the wood burning aspect of the furnace and there is no evidence that the home would not heat well, as it were if heated by wood the way the defendants heated the home. The defendants even offered to show the Claimant how they heated the house with wood but that never took place at least to the date of this hearing. It may still take place as the parties to this action are neighbours; I gather the parties live beside each other.

Section 5 of the PCDS deals with the heating system. The Defendant Vendors checked "No" to the questions "Have there been any major problems with heating system?" and "Have there been any problems with fuel leaks from the lines or tank?".

With respect to the questions on whether there have been major repairs or upgrading on the heating system in the last five years, the Defendants answered "Yes". The Defendants also wrote in "Change piping system". There is no warranty in the contract that the system is in good working order or up to code. The Claimant said she asked the Defendants, "*If the house heated well*?" She said, "*They told me they had no trouble heating it. They said they heated it with wood. They said they never heated it by oil*." This mirrors what the Defendants said. The Defendants testified that the house never did have cold air ducts and they had no problem heating the house as the fans used were for the oil furnace and wood furnace. The Claimant was using the oil furnace to heat the house, not relying on wood or using wood as the Defendants did when they owned the home. When the Defendants said they had no trouble heating it, this does not amount to a collateral warranty that the furnace would heat the home without some problems with the furnace or heating it adequately for the Claimant. The defect with the furnace pump and the fact that the air duct did not meet code would in the first instance be a latent defect and in the second instance would probably be a patent defect. But

this is purely speculation on my part as the Claimant brought no evidence forward to determine what kind of defect it was. Even if it was a latent defect, there is no evidence to suggest the Defendants were aware of same or that they did anything to cover it up. If it was a Patent defect then of course Caveat Emptor would apply.

(2) The Well

The Claimant provided an invoice from Kelsey's Plumbing, Heating and Ventilation describing what they did to repair the well. What is described in the invoice would indicate a latent defect. There is no evidence to show me the problem existed when the Defendants owned the home. They said in the PCDS that they were unaware of any problems with water quality, quantity, taste or water pressure. The Claimant brought forward no evidence to show this could not have been the case when they Defendants owned the property.

(3) The Wood Rot and Flooring

The Claimant provided pictures that appeared to show wood rot around the door casing in the door going into the kitchen. There is no evidence to show the Defendants did anything to cover this up. The Defendants did put an expensive floor (according to the Defendants) over the sub floor, but there is no evidence that they would have known or have seen the wood rot around the door casing. The pictures show water stains under the door and along the sub floor. The Claimant claims that some of the sub flooring was cut out in the kitchen due to rot and refers to picture 7 and 8 of Exhibit C-6. The Claimant said "*all this was hidden [by the] new floor that [the Defendants] state they had installed 10 months earlier*." The Defendants deny this and say they would not have undertaken expensive renovations and put new flooring where water was causing damage. It is certainly not possible for me to determine from those pictures if there was wood rot on the sub floor that would have been exposed when the Defendants put in a new floor or if it is just wet from water on the floor that occurred since the Claimant purchased the home.

If there had been some independent evidence of a contractor who fixed the floor that could provide a knowledgeable opinion on this matter, the balance may have dipped in favor of the Claimant. However, this did not occur.

For all these reasons, the case has not been made out that would hold the

Defendants liable to the Claimant.

IT IS HEREBY ORDERED that the Claim against the Defendants be dismissed with no Order as to costs.

Dated at Truro, Nova Scotia, this 16th day of January, A.D., 2007.

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David T.R. Parker
Adjudicator of the Small Claims Court of Nova Scotia