

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: *Brisbin v. Gilby*, 2007 NSSM 66

2007

Claim No. 282701

Date: 20071115

BETWEEN:

Name: **Virginia Brisbin**

Claimant

- and -

Name: **Elizabeth Gilby**

Defendant

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on November 20, 2007. This decision replaces the original decision.

Appearances:

Claimant: Blair MacKinnon

Defendant: John Filliter, Q.C.

DECISION

[1] This is a claim arising from a sale of real property and an alleged failure to disclose water problems in the basement. The claim is for \$18,700.08, which the Claimant says was incurred to rectify the water problem.

[2] The Defendant states that she did disclose that there had been a water problem in the basement in the past under extreme rain but that she had had no recent problems with leakage and therefore denied liability for the claim.

[3] The hearing took place on September 5, 2007, at the Dartmouth Court, and was concluded that evening. Both parties were represented by counsel.

Evidence

- [4] Virginia Brisbin is the Claimant. She purchased the property at 38 John Cross Drive from the Defendant, Elizabeth Gilby. The agreement of purchase and sale was dated March 20, 2006, and had attached to it a property condition disclosure statement signed March 18, 2006, by the seller. The closing took place on June 2, 2006.
- [5] Ms. Brisbin testified that she physically moved into the house on June 9, 2006. On June 15, 2006, she had what she described as her first “flood” over half the floor of the basement. Then, on June 26, 2006, she had the second flood over the entire basement floor.
- [6] Exhibit C1 tendered through Ms. Brisbin contained a number of documents including the agreement of purchase and sale, the property condition disclosure statement, a “Service Request Detail” from Halifax Regional Municipality, photographs, and documents relating to expenses in remedying the basement. The Service Request Detail report from HRM relates to an underground services report from February 2003 and contains the following statement relating to a call from Elizabeth Gilby, the Defendant herein:

Date: 05/02/2003 10:22 Taken by Zinck D.

Comments: Caller reports basement flooding every time it rains. Brook runs behind house and she feels that somehow this is causing her problems as there is a pipe that runs from her house to the brook which has been there since the house was built as she is the original owner. She would like someone from the City to take a look at it. DZ

- [7] A series of photographs entered through Exhibit C1 showed what purports to be rot at the bottom of moulding, flooding in the basement, and photographs of work undertaken by various of the contractors that the Claimant engaged to remedy the situation in the basement.

- [8] The summation of the expenses totaling \$18,700.08 is also part of C1. This amount constitutes the claim to remedy the basement.
- [9] Ms. Brisbin indicated that she has an office in her basement and the first time there was the flood the water started coming up on the floor and she cleaned it up. A week later the same thing happened although this time it was worse. She had Matty MacKay come in to examine the situation and he suggested and she engaged him to do some trenching under the footings. This took place in late June 2006. As part of the work that he was doing, his firm cut a hole in the basement floor and that immediately filled with water. Also, in late June 2006 she had the driveway redone to redirect water and had a walkway redone to redirect water.
- [10] In October 2006 Ms. Brisbin has D&H Construction dig a french drain in the backyard.
- [11] Then in April 2007 she hired Wise Cracks to install what is referred to as a “pressure release system” around the interior basement floor.
- [12] Ms. Brisbin testified that when she inspected the home the basement cement floor had been freshly painted. She stated that there was very little in the basement - a washer, dryer, oil tank and some furniture in one room but not much else. This would have been in March 2006. When the final inspection was done in early June, she and her real estate agent, Anita Wintzer, noticed that in one of the bigger rooms in the basement there was a shopvac, a squeegee and a bucket and a small amount of water on the floor. She indicated that she took some note of this.
- [13] After moving in and having the first flood she called the Defendant who told her that she had only had a “trickle of water” as opposed to what Ms. Brisbin described as water right across the floor.

[14] After the second flood she called her solicitor and then Permacrete took a look but that was too expensive and she engaged Matty MacKay and he suggested trenching. She also contacted the City of Halifax and was provided on June 27th with a copy of the report previously referred to. In that report there was a recommendation to obtain a sump pump but Ms. Brisbin never saw a sump pump.

[15] She indicated that after Mr. MacKay did his trenching work in June 2006, things were fine until the water table would rise following a rain. 80% or so of the basement was okay except for her office and by the driveway side of the basement.

[16] She referred to Tab 6 of Exhibit C1 and confirmed that the table showing the various expenses was a true and accurate summary of expenses incurred in remedying the problems.

[17] On cross-examination the Claimant indicated that she did have her own inspection done and that she had discussions with the inspector regarding the seepage issue. He told her that with the new paint he could not tell. She also confirmed that she had seen a copy of the plot plan which was entered as part of Exhibit D3 but this did not occur until a couple of weeks after the signing of the agreement of purchase and sale.

[18] She was questioned with respect to the inspection report that she had done by the Canadian Residential Inspection Services Reporting System. On this document, the inspector in many of the items either circles “no” or “yes”. Ms. Brisbin was directed to the following items:

91	<i>Exterior foundation wall have: visible cracks ?</i>	<i>Yes</i>
95	<i>Small hairline cracks?</i>	<i>Yes</i>
97	<i>Apparent deterioration of</i>	

	<i>foundation?</i>	<i>Yes</i>
128	<i>Is there a musty/mildew smell in the basement?</i>	<i>Yes</i>
129	<i>Are there any signs of water problems past or present?</i>	<i>Yes</i>
130	<i>Is there mold or mildew visible at time of inspection? If "yes", clean area with Javex or disinfectant. If concerned, consult environmental expert.</i>	<i>Yes</i>
131	<i>Are there any cracks visible on the inside of the foundation wall?</i>	<i>Yes</i>

[19] In response to a question from opposing counsel, Ms. Brisbin acknowledged that there was disclosure regarding leakage in the basement and that the issue really was the adequacy of the disclosure. In regards to the inspection report she stated that the inspector did not really stress anything to worry about and that she did not recall him saying she should get further help.

[20] **Anita Wintzer**, the Claimant's real estate agent on the transaction gave evidence. She works for Royal LePage and has been a real estate agent for approximately three years. She confirmed that she did review the property disclosure statement with the Claimant. She recalls that she did raise with the seller's agent issues with respect to the one small room. She indicated that they pointed this out to the buyer's inspector and he thought it was due to deterioration in the driveway. He also said though that because the basement had been freshly painted he could not tell whether there was leakage and they did not seem significant issues.

[21] She did the pre-closing inspection with her client and again they noticed the basement was clean and freshly painted. She believes the pre-closing inspection was done the morning of the closing and that they saw the shopvac, bucket and squeegee and just a bit of wetness

in the room. She saw Ms. Brisbin after the first flooding and she acknowledged that it did look like a flood; she would not call it a trickle.

[22] On cross-examination she was directed to the building inspection report which she believes was done on the 24th of March before the amendment to the agreement. She stated that there was just a little bit of water at the pre-closing inspection so it did not really cause any concern.

[23] **Matthew (Matty) MacKay** gave evidence under subpoena. He is a contractor and does a lot of work with foundations and excavations and has 27 or 28 years experience in the business. He only knows the Claimant from doing this job. He is not exactly sure but believes it was around June 2006. He confirmed that the basement was wide open and the floor was freshly painted. There was the wicking of three to four inches at the bottom of the walls. He said that the brook which runs beside the house is four to five feet below grade. His opinion was that there was a lot of hydro-static pressure which he defined in simple terms to be the water table coming up from below the house. He stated that the little room to the left in the basement was two to three inches higher than the other part of the basement. He indicated that there was evidence that there had previously been a subfloor because there were holes that were not filled.

[24] When they first did their work and cut the hole in the basement he stated that they could not keep up with the water and that was when they decided to have the sump pump. In his opinion he thought that this problem would have been present for at least a few years. He stated that you could see the silt in the gravel underneath the concrete flooring and this was an indication that the problem of hydro-static pressure was not just recent. He stated that they dug a trench to the brook and installed a sump pump and had another trench going out as well to the brook. He believes that hydro-static pressure was the main culprit causing the problems. He did not see any leaks coming from the cracks, they seemed to be coming up between the floor and the wall.

- [25] **Chris Mackey** works for Wise Cracks and has approximately 20 or so years in the business of leaky basements and foundations. His company installed the inside trenches in April of 2007. They removed the paneling and dug the trenches and installed three inch or four inch drain tile which exited into the sewer with a p-trap. He confirmed that the ground water was silted up pretty bad and that this indicated that the drain tiles were backed up.
- [26] When questioned of how long this had been a problem he indicated that it was a hard question to answer but stated that he “had his doubts that it just happened after she moved in”. He stated that in general terms outside drains can last for a range of 30-50 years. He stated that the amount of silt under the floor indicated that the flood had been happening for some time. He confirmed that the primary problem was hydro-static pressure. He stated that the longest he had seen drainage tile work before needing replacement was perhaps up to 50 years in the Dartmouth area. He also stated on cross-examination that if anything happened to add water to the water table that would worsen the problem. He stated that the fact that the subfloor had been ripped up raises the question of why it was ripped up. In response to a question from the Court he indicated that the amount of rainfall between 2005 and 2006 was pretty constant although he was not entirely sure.
- [27] **Delores Carlson** was the real estate agent representing the seller. She recalls going into the home in late 2005 and took the listing in March 2006. With respect to the property disclosure statement she stated that she told the seller to fill in the details to confirm that the inspection done by the purchaser was provided at the same time as the amendment in March. She stated that when she originally entered the house in late 2005 she recalled that there were some things in the backroom in the basement and in the adjacent room which was set up like a family room. She stated that there was no subfloor. She stated that there was paneling but it was not painted and Ms. Gilby asked whether it should be painted. Ms. Carlson said to not do it. Ms. Carlson stated that she did not notice any signs or smells of water. She recalled that it was older paneling which she thought was the typical brown

type with the spaces made to look like wood. She does not recall receiving any complaints at the time of the sale.

[28] On cross-examination she stated that she did recall receiving an inquiry from Anita Wintzer regarding additional comment. She was told that it related to the driveway side and did not understand it to be a flood although she also did not recall that the word “trickle” was used. At the time of listing she just did not recall there being any subfloor in the basement and both the paneling and the floor had been painted.

[29] **Elizabeth Gilby**, the Defendant, gave evidence. She purchased the home in 1972 and lived there with her two sons and her mother. In 1978 her older son moved out and in 1982 her mother passed away. In the early 70's she had a rumpus room built and a bedroom put in by a contractor for her older son who slept in the bedroom. She was asked about water problems in the basement. She stated that not long after purchasing the house there was a crack on the brookside and she had the original contractor who built the home, McCurdy Brothers, come back and do some patching. She indicated that in 1978 she had a man pave the driveway and he noticed there was a crack in the foundation on the driveway side, that was on the outside. She said that every once and a while she would have a little water by her furnace, a puddle, as she described it, not very deep and she would just swish it down into the drain. She stated that she would also get this by the oil tank in the basement. She stated that every once and awhile if it rained hard she got water by the furnace and the oil tank.

[30] With respect to the complaint in 2003 with HRM she recalled that her son had gone to work and she saw an oil tank in the brook. A man from HRM came out and he asked her whether she got water and she responded “by times”. He mentioned to her that there was a pipe on the side of the hill to the brook and she told him that she didn’t know about it, she had never seen it.

[31] Ms. Gilby stated that at one time when she was at work her mother called her and told her there was a flood in the basement, that was in or around 1977 or 1978.

[32] At the time of sale she stated that there were a number of pieces of furniture but before the closing that most of the stuff was sold at yard sales. She said that there were never signs of water and she never smelled anything. Her and her son, her sister and another woman painted the paneling and the floors. She said that when the floor was taken up it left little dents which they patched. She said there was no rust in the metal and she stated that between March 26th and June 2nd that there was no water damage.

[33] On cross-examination she confirmed that the painting of the floor took place in February 2006. She also stated that the stairway was all freshly painted.

[34] Her neighbour behind her was a man named Mr. Steven and in May 2006 he was doing some trenching in his yard. She noticed this when she was out back getting things for the yard sale she was doing. He apparently yelled over to her and said he was putting trenches in with a little caterpillar machine and said he was doing it for the water in his yard. He said it may help her too with respect to the way that the corner of her yard. She confirmed that in that area the property towards one of the back corners she had had dampness problems to the extent that she had to take the hedges out and plant some other types of plants.

[35] She was asked why she removed the subfloor in the rumpus room a year or two before the sale and responded that she was going to put laminate floor there. As to why she did not consider putting the laminate on the subfloor, she stated that she did not know that she could do that. She stated the subfloor was 35 years old.

[36] The other room had a subfloor up to 2006. As to when the last time that she had a crack repaired in the basement she stated that she would say 1973. She was asked about the shopvac which was in the basement at the time of the closing inspection and said that they

had spilled something there and she washed it up. She said that she had left it there for someone else to pick up. She stated that the shopvac was not for water but had been there from 1996 when her dog had broken its leg and would stay down the basement and she would use the vacuum to clean up his waste. She confirmed that in property condition disclosure statement she stated in the section dealing with structure under “A”, “yes” to the question “are you aware of any structural problems, unrepaired damage or leakage in the foundation”. She circled the word “leakage” and then added “see additional comments” and in paragraph 11 inserted the following comment:

There was water seepage some years ago under extreme rain approximately 1 ½ to 2 years. There was water seepage on the driveway side of house, no water since.

- [37] She was asked as to what she meant by “water seepage some years ago” and stated that she would say ten years. She said that she did tell the real estate agent that there was a puddle by times by the oil tank and furnace. With respect to the HRM report she stated that the man that came from the City said that more than likely a pipe was there when the house was built. She does not know why there was no reference to the oil drum in the report. She denied that she ever said to the HRM representative over the phone that “basement flooding every time it rains”.
- [38] **Susan Myers** has a cleaning and painting company and has done painting for the Claimant over the last 20 years or so. She stated that she never saw any signs of water problems in the house. Most recently she was there in February 2006 and painted wall paneling and helped with the floors. She stated that she didn’t see any rot but with respect to the photo at Tab 4 of Exhibit C1 she believe that there was dark wood there that was painted over with white and not rot as suggested by the Claimant.
- [39] She stated that she took a lot of boxes, movies and a chair. They were all in good shape. She confirmed that the subfloor had been taken up and that she saw the dimples where the nails had been. She stated that she did not notice any water damage on the panels. On

cross-examination she confirmed that she didn't see any water marks and that she didn't see any rot.

[40] **Dorothy Lynch** had known Ms. Gilby since about 1978 and was familiar with her former home. She stated that she was in the basement in May 2006 and helped her to pack and bought an area rug plus a couple pieces of wicker. When she took the rug she rolled it up and saw the cement underneath. She saw no stains and noticed no smells. She stated that there were no signs of water damage and no smells of water damage in the basement.

[41] She stated that she helped Ms. Gilby with two yard sales at or around the end of May 2006 and that she also noticed the neighbour building trenches next door. She still had a couple pieces of wicker furniture which were shown to the Court and appear to show no indication of rot or water damage.

[42] On cross-examination she confirmed that she was not sure where these items were stored before she got them and she was not sure when the subfloor came up.

[43] **Ronald Beard** is Ms. Gilby's brother-in-law and formerly worked with DND as safety equipment technician for over 45 years. At various times he had done work on the house including putting the strapping down for the subfloor. He was often at the house particularly in the early days when he was there 2 - 3 times a week. He confirmed that he did not often go into the basement.

Issues

[44] The issues in this case can be stated as follows:

1. Whether there was insufficient disclosure or inaccurate disclosure on the property condition disclosure statement such that liability attaches to the Defendant;
2. If there is liability, what is the appropriate measure and quantum of damages?

Analysis

[45] This is yet another case dealing with an alleged failure to disclose under a property condition disclosure statement. It appears that there has been an ever increasing frequency of these cases coming before the Courts in this Province, both the Supreme Court and the Small Claims Court.

[46] In the Small Claims Court there have been the following cases over the last few years:

Boychuk v. Butler (Casey, Adjudicator, February 27, 2007);

Reeves v. Sherwood (Parker, Adjudicator, October 19, 2007);

Moffatt et al v. Finlay et al (Slone, Adjudicator, October 30, 2007);

Lewis v. Hutchinson et al (Parker, Adjudicator, January 16, 2007);

Lawlor v. Currie (O'Hara, Adjudicator, September 26, 2007);

Allen v. Thorne (Parker, Adjudicator, July 14, 2007);

Pettipas et al v. Dorion (O'Hara, Adjudicator, January 30, 2006);

Cooper v. Wilkins (Casey, Adjudicator, March 30, 2007)

[47] The most recent Supreme Court authority in this area is *Gesner v. Ernst et al* (2007), N.S.S.C. 146, in which Associate Chief Justice Smith stated as follows (paras 54-58):

[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 David v. Kelly, [2001] P.E.I.J., No. 123.)*

[55] *Support for this conclusion is found in the Disclosure Statement itself. While the top of the document indicates that the seller is responsible for the accuracy of the answers given in the Disclosure Statement, just above the signature line for the sell is the following statement ".....information contained in this*

disclosure statement has been provided to the best of my knowledge.....”. Further, after the seller’s signature is the following: “NOTICE: THE INFORMATION CONTAINED IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT HAS BEEN PROVIDED BY THE SELLER OF THE PROPERTY AND IS BELIEVED TO BE ACCURATE, HOWEVER, IT MAY BE INCORRECT. IT IS THE RESPONSIBILITY OF THE BUYER TO VERIFY THE ACCURACY OF THIS INFORMATION.....” [Emphasis in the original]. Finally, above the purchaser’s signature line is the following statement “Buyers are urged to carefully examine the property and have it inspected by an independent party or parties to verify the above information.

[56] *Clause 3(b) of the Agreement of Purchase and Sale relating to this transaction reads as follows:*

3(b) This agreement is subject to the Seller providing to the Buyer, within 24 hours of the acceptance of this offer, a current Property Condition Disclosure Statement, and that statement meeting with the Buyers satisfaction. The Buyer shall be deemed to be satisfied with this statement unless the Seller of [sic] Seller’s agent is notified to the contrary, in writing, on or before SEE ATTACHED. The seller warrants it to be complete and current, to the best of their knowledge, as of the date of acceptance of this agreement, and further agrees to advise the Buyer of any changes that occur in the condition of the property prior to closing. If notice to the contrary is received, then either party shall be at liberty to terminate this contract. Once received and accepted, the Property Condition Disclosure Statement shall form part of this Agreement of Purchase and Sale.

[57] *By way of this clause, Ms. Ernst warranted that the Property Condition Disclosure Statement was complete and current to the best of her knowledge. She did not warrant the condition of the property.*

[58] *During the trial the issue arose as to whether a vendor completing this document is being called upon to disclose her present knowledge of the property or her past and present knowledge. The answer to this question is found in the wording of the document itself. In my view, when a question begins with the words “Are you aware” (present tense) the vendor is being asked about her knowledge of the present state of the property. Questions that begin with words such as “Have there been any problems with....” or “Have any repairs been carried out ...in the last five years” refer to the past state of the property.*

[48] I would also refer to the following Supreme Court cases which, *inter alia*, analyze and apply the principles relating to property condition disclosure statements:

Desmond v. McKinlay (2000), 188 N.S.R. (2d) 211 (S.C.);

Dupair v. Evans (2006), 242 N.S.R. (2d) (S.C.);

Lang v. Knickle (2006), (unreported July 21, 2006, S550/25);

Thompson et al v. Schofield et al (2005), 230 N.S.R. (2d) 217 (S.C.);

Gay v. Whelan (2006), 240 N.S.R. (2d) 156 (S.C.)

[49] I turn now to what I consider to be the most significant pieces of the evidence.

[50] First, I was struck by the fact that within less than a week of physically moving into the house (June 9, 2006) , Ms. Brisbin experienced the first flood (June 15, 2006), over half of the floor of the basement. Then, on June 26th, a little more than a week later, she had the second flood over the entire basement floor.

[51] And, given the evidence of Ms. Brisbin, the photographic evidence tendered in the exhibits, and the evidence given by Matty MacKay, the use of the term “flood” is hardly an exaggeration. Mr. MacKay indicated that when he first cut a hole in the basement floor, his workmen could barely keep up with the water that was coming up through that hole. Both he and Mr. Mackey, both of whom have significant experience in such matters, were of the view that there was significant hydrostatic pressure under the house. In simple terms, Mr. MacKay described this to be where the water table is coming up and applying pressure from underneath a house.

[52] I think the evidence is quite compelling that the Claimant experienced a very serious leakage problem in the basement.

[53] Then, there is the condition of the basement when it was examined by the Claimant and her agent. The cement floor had been freshly painted. There was very little in the basement -

according to Ms. Brisbin, a washer, dryer, oil tank and some furniture in one room but not much else. And, when the final inspection was done it was noted that in one of the basement rooms there was a shopvac, a squeegee, and a bucket and a small amount of water on the floor. Then there is the statement in the HRM service report referred to above. While no one testified from HRM, in particular the person that apparently took the note, no objection was taken to the tendering of this exhibit. Further, it would arguably be admissible as a business record. I believe it is to be given some weight. It reads:

Date: 05/02/2003 10:22 Taken by Zinck D.

Comments: Caller reports basement flooding every time it rains. Brook runs behind house and she feels that somehow this is causing her problems as there is a pipe that runs from her house to the brook which has been there since the house was built as she is the original owner. She would like someone from the City to take a look at it. DZ

[54] Referring again to the evidence of Matthew MacKay, it was his opinion that the problem with the leakage would have been present “for at least a few years”.

[55] To similar effect, Chris Mackey, indicated that he had his doubts that the problems had just happened after Ms. Brisbin moved in. This evidence of Mr. Mackey is somewhat less compelling than what he stated in his letter of April 25, 2007, where he states:

Gathering information for approximately 20 years in this industry and having repairs literally thousands of basements the same way as this, it appears to me without any doubt that this has been a serious problem for many years in this property prior to your buying it.

[56] There is also the evidence, non-contested, that the subfloor had been ripped out within the last couple of years.

[57] In light of this evidence, I would have great difficulty in concluding that this significant problem just manifested itself when the Claimant took possession in June 2007. I think the evidence well establishes on a balance of probabilities that the significant leakage problems had existed prior to the closing of the transaction and clearly when the Defendant owned and occupied the property.

[58] I note in this regard reference to the work that was being done by the adjacent neighbour and the suggestion that this may possibly have exacerbated the problem. I think it is clear that this suggestion was merely that, a suggestion, and did not approach the level of certainty that would be required to dislodge the finding I have made in the previous paragraph.

[59] The comment in the property condition disclosure statement reads:

There was water seepage some years ago under extreme rain approximately 1 ½ to 2 years. There was water seepage on the driveway side of house, no water since.

[60] With respect, it is my view that given the finding I made above, this statement does not accurately represent what must have been the situation as I have found. And, what it would have done is give some comfort to the reader that there had been no water seepage problems since at least one and a half to two years previous to this statement. I cannot accept that this comment in the property condition disclosure statement was accurate.

[61] I think the law which I have referred to above makes it clear that if there is an inaccurate representation on a property condition disclosure statement that liability attaches and I would so find against the Defendant.

[62] In *Desmond v. McKinlay*, Justice Wright found that the vendors misrepresentation in the property condition disclosure statement constituted a collateral warranty, the breach of which entitled the plaintiff to damages.

[63] In that same case, Justice Wright went on (at para. 52 *et seq*) to consider liability under the parallel route through the tort of negligent misrepresentation. In doing so, he made reference to the Supreme Court of Canada Case of *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, and reviewed the facts as against the five elements of that tort.

[64] I do not intend to review each of those elements apart from saying that it is my view that all of those have been met here to result in a finding of negligence against the Defendant. I would specifically comment on the fourth element which is that the Claimant must have relied in reasonable matter on the negligent misrepresentation. In this regard, the Claimant's own building report is of some relevance as that indicated that there were some signs of water problems past or present as noted earlier in the review of the evidence. While that report may have raised some question, it seems to me that the reasonable person in the position of Ms. Brisbin would have had any such concerns put to rest by the comment in the property condition disclosure statement which, she was entitled to rely on and did, I find, rely on to her detriment.

Damages

[65] As noted above, the claim for breach of a property condition disclosure statement can be seen to fall under either breach of collateral warranty or negligent misrepresentation.

[66] It seems to me that this area of law is not yet fully developed and one area where this becomes particularly apparent is with respect to the measure of damages. In a breach of contract (including a breach of collateral warranty) the measure of damages is normally that which would put the aggrieved party in the position they would have been in if the contract had been properly performed. I would refer here to the comments of Justice

Wright in the *Desmond v. McKinlay* case at paragraph 49 and the reference to *Gilmour v. Trustee Company of Winnipeg et al*, [1923] 4 D.L.R. 344.

[67] In the law of torts, the measure of damages is normally said to be that which will put the innocent party in the position they would have been in but for the tort, in this case, the negligent misrepresentation.

[68] In considering those principles with respect to this case, it is to be noted that had the water leakage problem been properly disclosed, Ms. Brisbin could have potentially walked away from the deal, attempt to renegotiate the price or get an allowance from the vendor, or possibly do nothing and proceed through to the closing. It would be an exercise in speculation to attempt to determine what would have happened in that case.

[69] A further principle to bear in mind is that the innocent party should not be put into a better position than they would have been in if there had been no breach.

[70] In a number of cases similar to this, the Courts have applied what has been referred to as a “betterment allowance” to address this concern. In *Desmond v. McKinlay*, Justice Wright applied a betterment allowance of one-third off of the invoices. Likewise, in *Thomson v. Schofield*, Justice Warner also applied a betterment allowance of one-third, recognizing there would be an enhancement of the value of the property as a result of the required repairs.

[71] I think there should be a similar betterment allowance in this case.

[72] There is then the question of damages actually incurred. The damages that the Court allows are those that relate to the breach in question. The Claimant continues to have the burden to show on a balance of probabilities that the claimed damages are directly related to the breach in question. Tab 6 of Exhibit C1 contains the outline of the various items claimed by the Claimant. The Defendant did not question that these amounts were spent

and the actual receipts were not provided. There was very little evidence about a number of these expenditures and questions may legitimately be raised about certain of these matters being done, to what extent were done to rectify the leakage problem, and to what extent that was successful and whether they were reasonable expenditures for that purpose. I set out this Exhibit behind Tab 6 of Exhibit C1 in full as follows:

Matthew McKay	Two trenches under footing of house	\$	2,921.40
	Sump pump & accessories installed by M. McKay	\$	223.75
Carlo Colley	Replace walkway to redirect water flow	\$	1,200.00
Simmons Paving	Replace driveway to redirect water flow	\$	2,707.10
D&H Construction	Trench in backyard to redirect water	\$	2,321.50
Wise Cracks	Install Wise Dry Pressure Relief System	\$	2,321.50
Shell	To drain, relocate, remove back & drain oil tank - approx	\$	318.06
Home Depot	Materials to rebuild 2 rooms in basement after Wise Cracks needed to remove panelling, baseboards & studding on walls to jackhammer floors	\$	1,434.38
	More miscellaneous materials to rebuild 2 rooms	\$	12.48
	More miscellaneous materials to rebuild 2 rooms	\$	29.14
	More miscellaneous materials to rebuild 2 rooms	\$	10.25
	More miscellaneous materials to rebuild 2 rooms	\$	115.78
	Rental of gun to attach studs to concrete floor	\$	41.24
Labour by father	April 27, 28, 29, 30, May 1, 12, 13, 14, 15 9 days @14 hours per day x \$20	\$	2,520.00
		\$	18,700.08

[73] Referring to the above items, I do not think that there is any question that the work of Matthew MacKay and Wise Cracks were necessary, reasonable and appropriate in the circumstances.

[74] I would question the work of Carlo Colley and Simmons Paving to replace the walkway and replace the driveway to redirect water flow. While it appears that these were matters recommended by Matthew MacKay, there was no examination of whether or not these

were reasonable efforts to rectify the leakage issue and, perhaps more significant, whether they had any corrective effect. There is simply no evidence in that regard.

[75] With respect to the materials to rebuild the two rooms, it seems to me a reasonable question arises whether or not the rooms that were rebuilt are the same as what were there or whether they are an improvement and done in a manner more to the specifications of the current owner. Then there is the labour by father in the amount of \$2,520.00. This amount was not questioned. As I have stated above, the Claimant bears the burden to prove the damages and prove that they relate to the breach by the Defendant.

[76] I do not think the Claimant has met her burden with respect to the walkway and driveway and I am disallowing those amounts.

[77] I will allow the other amounts subject to a one-third deduction in respect of betterment allowance as outlined in the case law. The calculation therefore is as follows:

Total Claim Amount:	\$ 18,700.08
Less Replacing Walkway	- 1,200.00
Less Replacing Driveway	- <u>2,707.10</u>
	\$ 14,792.98
Less Betterment Allowance	- 4,932.66
Cost Amount	<u>180.00</u>
	\$ 10,040.32

Disposition and Order

[78] It is hereby ordered that the Defendant pay to the Claimant as follows:

Debt:	\$ 9,860.32
Costs:	<u>180.00</u>
Total:	\$10,040.32

DATED at Halifax, Halifax Regional Municipality, Nova Scotia, this 15th day of November, 2007.

Michael J. O'Hara
Adjudicator

Original	Court File
Copy	Claimant(s)
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