No. SCCH 283438
Date: 20080320

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Young v. Clahane, 2008 NSSM 16

BETWEEN:

CAROL YOUNG

Claimant

- and -

PETER CLAHANE and KARISSA CLAHANE

Defendant

DECISION

Adjudicator: David T.R. Parker

Heard: October 24, October 30 and December 17, 2007

Decision: March 20, 2008

Counsel:

The Claimant was self-represented.
Peter and Karissa Clahane were represented by Counsel Donn Fraser

Parker:-This case came before the Small Claims Court on October 24, 2007, October 30, 2007 and December 17, 2007, with further submissions by the Defendant filed on December 19, 2007 and the Claimant on December 20, 2007.

Following the last hearing date of December 17, 2007, Counsel Donn Fraser made a motion for a non-suit at the conclusion of the case for the Claimant.

Pleadings

The Claim

The Claimant claims $25,000.00 for damages. The reason for the claim is -"claim for damages-house sale - disclosure statement did not disclose a history of repeated flooding." The Claimant went on to plead the following facts: the Defendants stated there was damage to the chimney base, which was under repair and the heavy rain would cause seepage in the furnace room. The Claimant said this was a minor problem and the Defendants did not disclose that the place had flooded in the past.

The Claimant stated the basement had flooded on at least one occasion. The Claimant stated that 12 years ago the Defendants rented the house and the tenants had a flood. Later the Defendants moved back in and the Defendants burned out his shop vac cleaning up water in the basement and asked to borrow the neighbours' shop vac.

The Claimant stated renovations were started and she discovered mould and or rot throughout the basement including the storeroom which was on the opposite side of the house from the chimney and has a floor 6 inches higher than the furnace room.

The Claimant stated that the bottom of the studs and the sill in the back[store] room were rotted on all four sides of the room and had to be replaced. The floor in the room is approximately 6 inches higher than the floor in the furnace room. Seepage from the chimney does not explain water on the other side of the house at least 6 inches higher. Later when it rained, we discovered water was coming in at the corner where the two cement walls meet at the other end of the house where the chimney is.

The Claimant stated that when the stairs to the main floor was removed the bottom of the stringers were rotted and the sub floor around the stairs was rotted and there was mould. New wood had been nailed onto the rotted wood.

Each section of the floor and sub floor that was lifted the Claimant found mould.

When the baseboards were removed mould was found growing on the gyproc. The mould was on two different walls neither of which was the furnace room wall. Some of the mould was on the west wall of the recreation room and the other mould on the gyproc was on the south wall beneath the windows. There were watermarks coming down the cement wall behind the gyproc below the windows. We discovered a buried cistern there.

The entire basement had to be gutted, and disinfected and rebuilt.

The Claimant had permacrete company seal the cracks discovered in the walls and the joint where the two cement walls leaked. Wells were built outside the basement windows to prevent the melting of built up snow causing possible leaks at the windows

During the rebuilding process there was a small flood. Water was coming through under the exterior door, approximately 1 to 2 inches deep and 7 feet in diameter. When the basement door was installed sometime in the past, the new concrete poured under the door did not bond with the original concrete and was not sealed

The cost of removing rock and mould, rebuilding and preventative measures was an extra $13,862.00 over and above the cost of the planned renovations.

On April 12, 2007 the downstairs apartment was flooding. Approximately 2 inches of water covered the entire basement. It also flooded in what had been the storeroom which was about 6 inches higher than the rest of the basement. Again the water/flood damage had to be repaired. The insurance company will pay for the flood cleanup and repairs to the inside, minus the deductible.

The Claimant stated the water and damage materials were removed and the basement flooded again two weeks later. The basement flooded twice in the fall and twice in the spring. Since owning the home at the end of September the basement has flooded on a six month schedule.

The Claimant stated that she had the foundation dug up for repairs and discovered there was a buried cistern, partly under the south east corner of the house and extending outwards to the east. The cistern was a concrete tank in the ground; it's similar to a small swimming pool, used for collecting rain prior to municipal water service. The cistern was partly filled in with earth by the Defendants and it was still acting like a cistern filling up with rainwater and melting snow. There was nowhere for the water to go except against the foundation, there were no weeping tiles and when holes were drilled in the cistern water came gushing out. The Claimant stated the Defendants owned the property from June 27, 1992 September 29, 2006 had partially filled the cistern in with rocks and soil and they were familiar with it. The Defendants started filling the cistern in after the cover of the cistern started to cave in. This was not mentioned in the disclosure statement. The Claimant stated that digging up the foundation to find and correct the problem cost another $11,400.00. The Claimant stated that in addition to the extra costs there was a loss of rent for one month for both apartments. The Claimant stated the apartment units

were advertised and she had to keep putting off the interested parties because of the extra repairs and the flooding in October-November. The rent for the upstairs was $950.00 in the downstairs was $600.00.

The Defence

In addition to denying each and every allegation the Defendants offer a plethora of defences. The Defendants deny any non-disclosure, misinformation or misrepresentation. The Defendants stated they disclosed their knowledge of the relevant condition of the property to the Claimant and/or their real estate agent. The Defendant stated the real estate agent of the Claimant was aware of the condition of the property prior to the purchase. The Defendant pleads the doctrine of caveat emptor and rely upon the law of agency. In the alternative the Defendants stated that if any information relayed should be proven inaccurate or incomplete or that any non-disclosure should be proven, then the Defendants deny that the Claimant relied upon any such information so conveyed or any impression formed on account [of] any alleged non-disclosure or that the Claimant was induced to purchase the property by virtue of any such information.

The Defendant further stated that any opinion held by the Claimant on the property was formed independently of the Defendant. Further the Defendants stated the Claimant did not suffer any damage due to any non-disclosure, misinformation or misrepresentation, nor is any damage casually connected to any act or omission of the Defendants. The Defendants claim it was the negligence of the Claimant that resulted in damage and the Defendants plead the Contributory Negligence Act, R.S.N.S. 1989 c.95. The Defendants also claim that the Claimants failed to mitigate any losses and that any damages in any event are too remote to the compensable in law.

Motion for non suit:

The Defendants brought a motion to this Court for non-suit and argued that the Claimant did not make out her claim as evidence of the necessary elements to prove the claims are not present.

The law related to non-suit of a person's claim has been dealt with in an earlier decision of this Court and I shall provide the relevant portions of that case here and which I shall rely upon.

Following the last hearing and the motion for non-suit the Defendants provided what they termed as a clarification on one point in their submissions to the Court. The correspondence dated December 19, 2007, really focused on a review of the evidence I have received at trial on the matters they raised and I do not believe adds any new arguments already provided at the hearing.

The Claimant also provided the Court with post-hearing submissions dated December 20, 2007, advising the Court she would like to clarify a point.

The point of this letter from the Claimant is that she expected both sides to state their case and to defend their position. The Claimant said in her letter,

"I was shocked that the case could be dismissed before both sides have testified. If that happens I do not get a chance to cross-examine the Defendants or their witnesses."

The Court asked if that was all my evidence. That was all of my witnesses and all of the evidence related to their testimony. I had no further evidence to give on their testimony. The remaining evidence was related to the Defendants' upcoming testimony. It was in the possession of both the counsel for the defense and myself. It was obtained from their counsel in requests for disclosure. I wasn't deliberately withholding evidence. They had it to start with. Apparently I was very mistaken in thinking that the evidence would be presented when the appropriate witness was on the stand to testify to it.

I admit that I don't understand the workings of the court. The information booklet provided by the court indicates that when both parties appear in court, they each have their say and are cross examined. It does not say anything about the possibility of non suit motions. I was told that if I didn't subpoena my witnesses and they failed to show for any reason, my case could be dismissed. There was no mention of circumstances in which a Defendant can avoid testifying once the hearings have started.

I realize that the motion Mr. Fraser is asking for is legal.

I realize that the court sittings entail considerable legal expenses for the Clahanes. They have the right to retain legal counsel, or not, as they choose.

It is my observations that the "People's Court", although following all of the legal guidelines, is straying from the purpose it was intended for. The common person is not operating on a level playing field when facing an opposing counsel with vast experience and a law degree. Many of us have no experience with the courts because we have abided by the law. It is ironic, but that

works against us when we need the courts.

I am asking that I will be given the same right to question the Defendants in court, as they had the right to question me."

The Small Claims Court is a court of law and the principles of law are part of the make up that is imposed upon the litigants and those that hear the case. I fully understand that the Claimant as she acknowledges does not have legal training and I agree with her statement, at least seemingly that "the common person is not operating on a level playing ground when facing an opposing counsel with vast experience and a law degree."

Counsel can have an advantage in that they have knowledge of elements that are necessary in order for a person to prove a claim in a court of law or what elements are missing from a person's claim. A person judging the proceedings in my view should not be involved in the conflict itself. There is a fine balance between an adversarial process and an inquisitional process that raises itself often in Small Claims Court proceedings. In my view it is necessary to allow the parties to present all the facts that can be proven in a court of law. Prior to the proceedings beginning both sides are asked if they have any questions about the proceedings and even if they do not they are told the way the court proceeds, what the Claimant must prove in general terms and what the Defendant must do if they so choose. It is not the function of the decision maker to tell the litigants who they should call as a witness or whether they should provide evidence or not, to support their case.

The Law Relating to the Motion of a Non-Suit;

This area was dealt with in a previous decision which I shall refer to and being cited as

Gulf Trading Inc. v. Irving Oil [2007] N.S.J. No. 3.paragraphs 12 through 21:

"The Law

12 I will first layout the law on non-suit motions.

13 The case of ***Walker v. Scotia Career Academy Ltd.*** 177 N.S.R. (2d) 316 was submitted by Counsel which I thank him for, and deals with a Small Claims Court matter that was appealed to the Supreme Court wherein the Small Claims Court refused a motion for non-suit. The motion for non-suit would succeed only if the evidence before the Small Claims Court would show there was a fundamental breach of contract that would lead to a total lack of consideration on the part of the Appellant. The Supreme Court looked at the facts as determined by the Small Claims Court and said those facts did not amount to a fundamental breach and since it had to exist in order for the Respondent (Claimant) to succeed the motion for non-suit should have been granted.

14 The case ***Knox v. Maple Leaf Homes*** [2002] N.S.J. No. 555, Justice LeBlanc of the Supreme Court of Nova Scotia discusses the parameters of a non-suit motion.

15 At paragraph 18, Justice LeBlanc referencing other cases stated,

" 18 The test on a non-suit motion is whether the plaintiff has established a prima facie case, or, as it is sometimes described, "whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff": ***MacDonell v. M & M Developments Ltd.*** (1998), 165 N.S.R. (2d) 115 (C.A.). A trial judge considering whether to grant a non-suit must consider the sufficiency of the evidence, not weigh it or evaluate its believability. The question is whether the inference the plaintiff suggests could be drawn from the evidence if the trier of fact so chose: **Sopinka et al., The Law of Evidence in Canad**a (2d edn.)(Butterworth's, 1999) at para. 5.4. The decision depends "on all the circumstances of the case, including the issues of fact and law raised by the pleadings": ***J.W. Cowie Engineering Ltd. v. Allen***, [1982] N.S.J. No. 39 (S.C.A.D.) at para. 15.

16 I also refer to Justice Nathanson's decision ***David v. Halifax (Regional Municipality)*** [2003] N.S.J. No. 10 where he refers to Cross on evidence (4th Edition), para 66:

" "... questions of the sufficiency of evidence are usually raised on a submission that there is no case to answer made by the opponent of the issue. When ruling on such a submission, the judge assumes that the proponent's witnesses are telling the truth in cross-examination, as well as in their evidence-in-chief, and on matters which are unfavourable to the proponent, as well as those which are in his favour. He may rule in favour of the submissions either because the proponent's evidence discloses no case as a matter of law or else because of the weakness of the proponent's evidence." [emphasis added]

17 The case of ***Colford v. Randell et al.*** (1975) 20 N.S.R. (2d) 195 (S.C.T.D.) sets out the test for a non-suit motion and has been accepted by the Supreme Court of Nova Scotia in ***Pino v. Wal-Mart Canada Inc.*** [1999] N.S.J. No. 514 at page 1 where Justice Robertson stated:

" The Defendant has moved for dismissal of the case, pursuant to Rule 30.08, on the ground that upon the facts and the law no case has been made out. The case of ***Colford & Randall et al*** (1975), 20 N.S.R. (2d) 195 (S.C.T.D.) sets forth the test:

" "In my opinion the changes in this rule were made merely to clarify the right of defence counsel to move for dismissal at the end of the plaintiff's case without electing whether or not to call evidence. I do not believe there was any intention to change the grounds for the motion and I interpret the rule to mean that the motion ... will only be granted if there was no evidence upon which a jury properly instructed could find for the plaintiff. If a prima facie case has been made out then the weight of the evidence is for the Court."

18 The case of ***Allied Signal Canada Inc. (c.o.b.) Allied Aerospace Canada v. Atlantic Electronics Ltd.*** [1998] N.S.J. No. 423. (N.S.S.C.) summarized the law on motions for non-suit when it references Sopinka and Lederman's views in their test **The Laws of Evidence in Civil Cases** (Toronto Butterworths, 1974) at pages 521-522 as follows:

" If a plaintiff fails to lead sufficient material evidence, he may be faced at the close of his case by a motion for a non-suit by the Defendant. If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which

liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence ...

19 I have spent some time on this issue as to the law on a motion for non-suit as the Court is thought by some as the "people's court" and it often involves self-represented litigants. Often a case involves substantial monetary claims, such as is the case here and my sense is that Claimants are more and more being faced with such motions, particularly by Defendants who are represented by Counsel, as is the case here. I did come across one case where the judge decided not to grant the motion it would appear simply because the Claimant was self-represented and allowed the matter to proceed. However I am more comfortable with the law as outlined above.

20 The Court of Appeal in this Province has said:

" "We must therefore in addressing the issues keep in mind whether having regard to the law and the facts which were induced in evidence, the judge was correct in concluding there was insufficient evidence, if believed, to satisfy a reasonable person that the case could be resolved in the appellant's favour." - ***Turner-Lienaux v. Nova Scotia (Attorney General)*** [1993] N.S.J. No. 201.

21 This coupled with the notion that the facts induced in evidence which the Court of Appeal refers to is based on the premise that the Claimant's witnesses are telling the truth. It is not my role at this stage to make a determination of the weight of the evidence but rather has a prima facie case been made out. That is has there been a sufficiency of evidence to show a case in law exists or is the evidence insufficient and discloses no case in law. Further is the evidence just too weak to disclose any case upon which a decision can be made."

Without detracting or limiting in any way the above referenced law it is necessary for this Court to consider the law related to the Claimant's case and determine whether there is a sufficiency of evidence without weighing the evidence or evaluating its believability to see if the Claimant has proven or provided the court was sufficient evidence to show they have a case which is recognized by the law.

Notwithstanding the pleadings which seemed to state the Defendants have breached its contract with the Claimant by misrepresentation in the Property Condition Disclosure Statement there is also the allegation of negligent misrepresentation.

I would deal with the law in this area and then consider the facts that I have before this Court.

A recent case of the Supreme Court of Nova Scotia deals with statements in the PCDS which are made by the sellers of a home which in this case are the Defendants.

Associate Chief Justice Smith in the case of ***Gesner v. Ernst*** [2007] N.S.J. no 211 made the following comments on PCDS:

" A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property (see for example: ***Arsenault v. Pedersen et al.***, [1996] B.C.J. No. 1026 and ***Davis v. Kelly,*** [2001] P.E.I.J. No. 123.)

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 seller 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 13(b) of the Agreement of Purchase and Sale relating to this transaction reads as follows:

" 13(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."

I refer now to the case ***Lewis v. Hutchinson*** [2007] N.S.J. No. 23 as it relates to the law concerning the concept of ***Caveat Emptor***, disclosure, misrepresentation and latent and patent defects

First Phase of Analysis

19 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. No. 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).

" ...

" 34 ... 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

20 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

21 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

22 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

23 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

24 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.

25 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

26 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."

27 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:

" (b)

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

28 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

29 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.

30 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.

31 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

The Evidence before this Court

1. There was evidence that the basement suffered water problems which caused damage to the basement.

The Claimant in her testimony said she noticed the flooding first when she ripped up a substantial part of the basement and when a layer of gyproc and wood paneling was ripped away.

The Claimant said that" it was in black and white, there was seepage in the furnace room. The Claimant believed this to be mould.

After purchasing the home the basement was gutted by the Claimant. The Claimant gave testimony that she discovered rot and mould behind the walls and the stairs showed signs of rot at the bottom where new wood was nailed onto the rotted wood. There was sufficient pictorial evidence showing signs of water damage to the inside walls and on the sub floor and stair stringers. The Claimants said the black and white stuff looked like mould but it was never tested to confirm it was mould.

2. There was evidence that the water problem in the basement was an on going problem.

Wayne Tucker who had 17 years experience in doing renovations and who was employed to do work on the Claimant's basement told the court that "as we removed the panels [from the basement walls] we would find rot." In his view" there was a long standing water and mold problems consistent with water over several years, eight to 10 years.

Mr. Tucker stated the stairs were rotted and new lumber was attached to the rotten lumber of the stair stringers. In Mr. Tucker's view the rot could not have happened between the time the Claimant purchased the home and the time when he saw the stairs.

Anthony Ledrew was a neighbour on the north of the Claimant's home and had been a neighbour for nine years. He said there was a rainstorm in the past and he was told by the Defendant he had water in the furnace room area and he needed a vacuum as the Defendant vacuum had burnt out. He said there was quite a bit of rain at that time and my neighbour and I were checking out the area as there was a lot of rain in a short time. He said he had no knowledge of the Defendant having any other water problems.

The home inspector, Gregory Ryno said it took him 10 minutes to discover water had been in the basement when he went into the basement to do his inspection. In reviewing the pictures of the basement once it had been gutted he opined that the moisture damage occurred over a long period of time

Leon Eisner has a franchise business with permacrete and has run the same for 18 years. He said the cracks in the foundation were not new and were in his view more than 15 years old. Mr. Eisner did not see the basement when the paneling and the walls were in place. Mr. Eisner stated "I would say there was water in their from time to time. I would say if you were in the basement at all you would notice it"

Another neighbor Mr. Grant Meder resided across the corner from the Claimant's property and had been living there since 1986. He said the property to the north side of the Defendant's property had water problems ongoing for 10 to 15 years and they put in a trench. He also said the Defendant's daughter told him there were always water problems.[The statement was objected to by counsel on the basis of hearsay and I will comment on hearsay both specifically and generally in my analysis]

3. There was evidence that the Defendants were aware a cistern was located next to the foundation of the house.

Roderick Macdonald live next door to the Claimant's home since 1968 and said he knew there was a cistern behind the house which was more than 10 years old he said the Defendants moved into the house around 1990.

Grant Meder said he was also aware of the cistern and the crew had dug it up and he spoke to the Defendant the day that was done.

4. Evidence that the cistern did not cause damage or leakage into the basement.

Brent Keyes is a residential builder and contractor and had been incorporated since 1988. In June of 2007 needed excavation to the bottom of the footings and he drilled holes in the cistern to allow water to escape. He told the court he did not see any damage from the cistern.

5. The Claimant was made aware of water problems in the basement.

This PCDS was executed by the Defendants on February 5, 2006, and by the Claimant on September 9, 2006. The closing of the transaction occurred on September 29, 2006.

The PCDS indicated under the Heading 'Structural' the following question was asked: "A. Are you aware of any structural problems, unrepaired damage or leakage in the foundation?" The response in the PCDS was "Yes."

The PCDS indicated under the Heading "Additional Comments; "heavy rain can cause seepage in furnace room and city has repaired and replaced water piping post-Juan. Seepage in furnace room believed to be caused by chimney base."

The Claimant obtained the services of a home inspector and part of the written inspection was submitted into evidence by the Defendants. Under the Heading Basement Area and Structure and beside the subheadings Floors and Walls the inspector wrote in the following comments:

"some signs of water stains. Check with present owner if previous water in basement was a problem"

The home inspector Gregory Ryno, said the Claimant was with him when he did the home inspection for the Claimant. He told the court when he did the inspection he would have discussed with the Claimant the water stains and told her to check it out. He said there was mildew in the crawl space and he would have discussed this with the Claimant.

The Claimant planned to do renovations to the basement and after "ripping up a substantial part of the basement" she noticed flooding in the basement for the first time. Cracks in the foundation were discovered and mould was discovered or what appeared to be mould.

Analysis

The role of hearsay evidence in the small claims court is the first matter I shall deal with in reference to testimony by one of the neighbours' that the daughter of the Defendant gave him information that there were always water problems.

I refer to two cases one from this court and one from the Supreme Court of Nova Scotia.

Whalen v. Towle [2003] N.S.J. No. 528 [NSSCTD]

In keeping with the Act's stated purpose of being informal, the hearsay rule is rendered inapplicable with the issues of relevancy and efficiency being the only barriers to the admission of evidence. I refer to s. 28(1) of the Act which provides:

" (1)

An adjudicator may admit as evidence at a hearing, whether or not given or proven under oath or

affirmation or admissible as evidence in a court,

" (a)

any oral testimony; and

" (b)

any document or other thing,

" relevant to the subject-matter of the proceedings and may act on such evidence, but the adjudicator may exclude anything unduly repetitious.

" (2)

Nothing is admissible in evidence at a hearing that

" (a)

would be inadmissible in a court by reason of any privilege under the law of evidence; or

" (b)

is inadmissible by any statute.

Lombard Insurance Co. v. Stock Transportation [2007] N.S.J. No. 540 [SCCNS]

" Counsel in his submissions stated the following:

" "The statement in question is clearly hearsay evidence and accordingly, would be admissible only under an exception to the hearsay rule. The Supreme Court of Canada has recently set out the guidelines for determining the admissibility of hearsay statement sunder the principled case-by-case exception to the hearsay rule based on necessity and reliability. In ***R. v. Khelawon*** (2006), 215 C.C.C. (3d) 161 (SCC) Justice Charon, J.J. rendered a decision on the hearsay rule described as a "tour de force" in the annotation.

11 The circumstances in **Khelawon** were similarly to those in the case at Bar, in that the issue was the admissibility of an unsworn but recorded statement of a deceased witness. The witness was the alleged victim who gave a videotaped statement to police that had been admitted into evidence by the trial judge. On appeal, the court found that the tapes should not have been admitted, stating that although the threshold test of necessity was met due to the death of the witness, the videotaped statement was not sufficiently trustworthy to meet the threshold of reliability.

12 On appeal to the Supreme Court of Canada, the decision of the Ontario Court of Appeal was upheld. Charon, J.J., speaking unanimously for the Court, stated that:

" 105 The fact remains however that the absence of any opportunity to cross-examine Mr.

Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

13 The Court went on to state that there were no adequate substitutes present, such as the availability of a sworn transcript from another proceeding considering the same issues. The crown could only rely on the "inherent trustworthiness of the statement." In that regard Charon, J.J. stated that "the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross examination." (para. 107) For those reasons, the statement was excluded from evidence."1

Admissibility of Deceased Person's Statement

14 "Section 28 of the **Small Claims Court Act**, R.S.N.S. 1989, c. 430 states that an adjudicator may admit as evidence at a hearing, whether or not given under oath or affirmation or admissible as evidence in a court, any oral testimony and any document or thing, subject to relevance, undue repetition, privilege and statutory restrictions. Therefore the Stock Defendants submit that the Adjudicator has the discretion to admit Wyatt's statement. The Court is not bound by the formal rules of evidence, including the rules relating to hearsay.

15 In ***Morris v. Cameron***, [2006] N.S.J. No. 19 (S.C.), Justice LeBlanc, in considering an appeal from a Small Claims Court decision, considered the application of the hearsay rule in the Small Claims Court contest, specifically, whether the principles of hearsay are relevant when documents are produced in a Small Claims Court proceeding. (para. 24)

16 The Court stated that 'the principled approach must apply, in relaxed form, in order to determine whether hearsay evidence that a party seeks to adduce before an adjudicator meets the threshold requirement of reliability, and whether it is necessary to admit the evidence in order to prove a fact in issue.' (para. 24)

17 In the Morris decision, Justice LeBlanc stated as follows: 'Hearsay evidence will continue to be admissible in most cases. An analysis of necessity and reliability will only be required where the evidence, on its face, does not appear to meet these basic requirements.' The weight to be given to hearsay evidence is in the Adjudicator's discretion to determine.2"

The statement made by the daughter that "there were always water problems" is admissible. However the statement in and of itself is not of great assistance. Was the daughter referring to a small amount of water in one area of the basement? Was the daughter referring to water over the entire basement? Was the daughter referring to water that they could hear leaking into the basement? There is no exact determination on what the daughter meant by such a statement. Therefore while the statement is admissible for purposes of this Court, the indefiniteness of the statement does not allow me to place much weight and thereby concluding that the Defendants knew there were water problems to the extent that was revealed once the interior walls and flooring were removed.

The Claimant planned to do renovations to the basement and after "ripping up a substantial part of the basement" she noticed flooding in the basement for the first time. Cracks in the foundation were discovered and mould was discovered or what appeared to be mould.

In this particular case the Claimant had notification both in the PCDS and from the home inspector that there were leakage problems in the basement and further the inspection report said she should make inquiries. The Claimant said she accepted the PCDS at face value and she interpreted it to mean the problem was around the chimney. Once the walls and floor were removed there was indication of leakage and mould. There was no clear evidence when leakage occurred and how much and there was no sign of what was found until after the walls were removed. There was no evidence from any of the witnesses that the Defendants knew of water leakage to the extent that was seen once the walls and floor were removed. The Claimant suggests that the Defendants must have known, however there is no evidence that draws that conclusion prior to the walls and floor being removed except for what the PCDS disclosed. There certainly was some water signs however not to the extent that was seen when the walls and floor were removed.

The Claimant has stated in correspondence to the court that she is not on a level playing field when lawyers are involved, which is the case here. The Claimant made the following statement which I referred to earlier;

"I was shocked that the case could be dismissed before both sides have testified. If that happens I do not get a chance to cross-examine the Defendants or their witnesses."

The Defendant is not obligated to give any testimony or provide any evidence whatsoever. The burden of proving the claim pursuant to the civil standard being on a balance of probability lies with the Claimant. It is role of the plaintiff or Claimant to bring forth facts that will allow the Trier of facts to take those facts in conjunction with the law that exists to determine whether the Claimant has a valid claim against the Defendant. If at the end of the day there is no claim in law the Defendant has no obligation to anyone. If there is a valid claim, then the Defendant must step up to the plate as there may in fact be a defence at which point the Defendant can raise same, through testimony and evidence provided by the Defendant or their witnesses.

In this case the Defendants have decided and taken the position that there is no case against them. My job as an adjudicator is to determine if there is a prima facie case against the Defendants. I must do this pursuant to the law that I have outlined above with the understanding that the Claimant's case has been completed and there may in fact be no more evidence put forward.

At the end of the day I have evidence that the cracks in the wall, the mould if that's what it was

and the rotten wood were not visible. In other words it was a latent defect. What evidence is there that this was visible to the defendants during the time they occupied the home? What evidence is there that there was continual leakage in the basement of which the defendants were aware? What evidence do I have the defendants did repairs to the home during their occupancy to cover up wood rot? The short answer is there is none.

If there was on the other hand leakage in the basement, then did the defendants fail to disclose same or skirt around the issue in some way. The defendants completed a PC DS which provided a representation that they were aware of structural problems, unrepaired damage or leakage to the basement. In addition the PC DS stated that there was leakage in the furnace room. This goes beyond the situation outlined by Justice Wells of the Court of Appeal in Newfoundland which was referred to earlier. There is no implied warranty that the defendants did not have any water penetration problems or that the Claimant would never have any water penetration problems. In fact there is no evidence of non-disclosure and in the case at bar, the opposite is the case. Even if there was no acknowledgment of any leakage whatsoever in the PC DS, the disclosure statement highlights that the information contained in it as provided by the seller is believed to be accurate, however it may in fact be incorrect. It states that it is the responsibility of the buyer to verify the accuracy of the information in the PC DS. In this case the Claimant made no inquiry about the statement made by the Defendants of structural problems or unrepaired damage or leakage in the foundation. To conclude there is no evidence of misrepresentation

There is evidence that the Defendants were aware that there was a cistern and did not disclose this to the Claimant but there is no evidence to conclude that the cistern was causing a problem.

There is no warranty, collateral or otherwise, in this agreement that provides the Claimant comfort that there was no leakage, or would be no leakage.

For all these reasons the motion will succeed and the claim against the Defendants fails.

Dated at Halifax, this 20 day of March, 2008.

_____

David T.R. Parker
Small Claims Court Adjudicator