IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Badawi v. Stachowiak, 2015 NSSM 60

Claim No: SCCH 433702

BETWEEN:

Name	Iman Badawi	**Claimant**
Address	c/o David A. Grant 63 Tacoma Drive Suite B101 Dartmouth, NS B2W 3E7	
Phone	(902) 463.6300	

Name	Michal Stachowiak Iwona Stachowiak	**Defendants**
Address	c/o Mark T. Knox, QC 6051 Cunard Street Halifax, NS B3K 1E6	
Phone	(902) 422-0456	

Date of Hearing: April 8 and 9, 2015;

Date of Final Submissions: April 30, 2015;

David A. Grant appeared for the Claimant;

Mark T. Knox, QC, appeared for the Defendants;

DECISION

This Claim arose as the result of the purchase of a vacant lot by the Claimant from the Defendants. The lot turned out to be less than expected as it was allegedly filled with poor quality ground and soil.

This decision has been filed beyond the sixty days prescribed by the *Small Claims Court Act*. That particular time line has been held to be directory rather than mandatory, as noted most

recently by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260. Nevertheless, the parties and their counsel have doubtlessly been anticipating this decision. Their patience is greatly appreciated.

The evidence in this matter has been quite detailed and well presented by two experienced members of the Nova Scotia Bar. In preparing this decision, I have read each exhibit and considered all of the evidence. While there may be certain exhibits not specifically referenced, both parties can be assured that I have given each exhibit and point raised in *viva voce* evidence due consideration.

The Facts

Most of the facts are not seriously in dispute. The Claimant, Iman Badawi purchased a vacant lot from the Defendants, Michal and Iwona Stachowiak, for the purposes of building what she intended to be her family home. The parties signed an Agreement of Purchase and Sale dated May 29, 2007 for the purchase of Lot 8, Oceanview Drive, Halifax, Nova Scotia. The purchase price was $103,000 with a deposit of $1000 required. The closing of the transaction was set for July 11, 2007. The agreement was amended twice to extend certain deadlines. The first amendment took place on June 5, 2007 to extend the date for acceptance to June 15 and the deadline to obtain municipal approvals including the approval to install on-site septic systems and have the property inspected to June 30, 2007. In addition, the Defendants were given the opportunity to review the offer with their lawyer by June 15. By further agreement dated June 30, 2007, a time limit to obtain permission to install a driveway was extended from June 30 to July 2, 2007. The closing date was extended to July 7.

The transaction was concluded on July 11, 2007. However, no construction took place until seven years later. At the time construction was to commence, Ms. Badawi and her husband, Zia Khan, began looking at options to construct their home. Ms. Badawi and Mr. Khan commenced construction in the spring of 2014 and discovered poor soil and considerable debris buried in the lot. While there is discrepancy as to whether the vendors knew of the presence of the debris, it is not seriously disputed that there is in fact considerable debris used as fill on the lot. The couple hired several contractors to excavate the lot and to truck in replacement fill. Ms. Badawi alleges that this was a breach of contract and/or negligent misrepresentation, resulting in liability. The total claim was far in excess of the limits imposed by the *Small Claims Court Act.* They have reduced their claim to the maximum allowed, namely, $25,000.

During the hearing of the matter, I inquired of counsel if the matter was within or outside of the purview of the *Limitations of Actions Act*. The parties mutually acknowledged that the details of this claim were only discovered within the six years prescribed by that *Act*. Thus, there is no need for this court to consider a limitations defence or question of jurisdiction on that basis.

The Issues

Are the Defendants, Michal Stachowiak and Iwona Stachowiak, liable in breach of contract or misrepresentation as a result of the condition of the property?

The Evidence

The court heard from four witnesses and two experts. I shall review the evidence of the parties and contractors, followed by the engineers.

Iman Badawi

The Claimant, Iman Badawi testified that she and her husband planned to build a house on the lot that they purchased. She identified in evidence the Agreement of Purchase and Sale entered into between her and the Defendants. Through her counsel, she also tendered a listing cut, which represented the MLS listing for the property. She identified specifically the phrase that the property is "ready to go". After the property was purchased, she held onto it for several years and had even listed the property for sale as she did not feel that she and Mr. Khan could afford to build upon it. She testified that she prepared her own description of the property herself with the assistance of her real estate agent. After several attempts at selling the property, she and her husband decided to build.

Ms. Badawi and Mr. Khan sought the services of Thomas Giovannetti as a consulting engineer. Specifically, they wanted his advice on how to place and size the septic tank. Mr. Giovannetti advised against building a home with a basement, recommending a slab instead. In assessing the property, Mr. Giovannetti determined that it had poor back fill. As a result, they retained the services of Maritime Testing to determine what was necessary to make the lands capable. She was quoted $25,000 which included the cost of removing the poor fill, backfilling and replacing the septic tank. She retained the services of Abel Engineering to design the basement. She provided a series of receipts substantiating a claim in excess of $54,000. For the purposes of bringing this action within the limits of the Small Claims Court, she is seeking $25,000.

Under cross examination by Mr. Knox, Ms. Badawi acknowledged that she did not hire Mr. Giovannetti but merely called him for advice. He recommended a septic mound of 6-7’ and indicated the set-back would be tricky. Mr. Giovannetti advised the well and septic would need to be moved based on the original plan. She was advised by the Halifax Regional Municipality that the well was not possible. The septic was previously approved but would need to be relocated.

Ms. Badawi testified that all discussions respecting the Agreement of Purchase and Sale were made through a real estate agent, Rick Foster. Mr. Foster advised Ms. Badawi that the Defendants were not going to build a large house and the lot was “ready to go”. Consequently, she did not conduct the investigations noted in the Agreement. She did not discuss the discovery of sub-standard soil with Mr. Foster. She acknowledged reviewing the agreement with counsel as noted in paragraph 16. She testified that she did not see the need to investigate it any further as,

according to her, the lot was described as ready to build. She assumed from that the sellers knew the condition of the soil when describing the septic as ready to go. She acknowledged there were test pits on the property and the parties must have known they were present. She did not hire an inspector as prescribed in paragraph 12 of the Agreement. She believes she satisfied her investigation requirements under paragraph 11 by calling the City regarding zoning and approval. She did not hire an inspector but had their friend Jim look at it who said it was satisfactory. She acknowledged the cost of backfilling and moving the septic tanks was $3826.80.

Neither her friend, Jim, nor the real estate agent, Rick Foster, were called to testify.

In spite of my findings on liability discussed later in this decision, it is important to point out that I was genuinely impressed with the evidence of Ms. Badawi. Her recollection of events was comprehensive. She was careful in answering questions from both counsel and when referring to her notes, she took care to not answer until she found the relevant reference.

Charles White

Charles ("Charlie") White is in the excavation and heavy equipment business and employed by Glen Stone Excavation and Trucking. He has been excavating for approximately twenty years. He is familiar with Lot 8 and has met Ms. Badawi. He attended to the lot in the summer of 2014 to prepare a hole and install the footings for a house. When he excavated the site, he discovered the lot was filled with unsuitable material which he termed "garbage". He identified the debris in the photographs marked as Exhibit 6 as the same debris he saw. He described the material as old asphalt and brick. He testified that the fill was sifted and the better material used for backfill. He estimates approximately 30-40 loads of the material on the site should not have been there. The last of the photos shows the gravel and in-fill which was ultimately used to complete the excavation. He described the debris as typical of certain unserviced lots in that area since in earlier years, it was common to dump "anything, anywhere".

He located the septic tank and determined that the well was supposed to be at least 50 feet from a septic tank. It was necessary to move the well to a different spot, some 55 feet away. The original well and new well were identified in evidence. When he excavated, he discovered the septic tank was braced by bedrock on one side but more debris on the other. Thus, it was necessary to build a new and more stable pad which required 35-40 loads of clean rock. The pad was examined by Maritime Testing who approved the construction.

Under cross examination, Mr. White acknowledged that he did not take the photos or recalled them being taken. He confirmed that the debris under the tank started at approximately two feet below it.

Naved Malim

Naved Malim is the project supervisor for CivTech Construction. He is a friend of Ms. Badawi and her husband, Mr. Khan. He was involved with the construction and excavation which took place on the lot. Specifically, Mr. Khan called him to seek a quote for the excavation of Lot 8. When he attended there, he observed asphalt, concrete blocks, metal and bricks all in the ground on the lot. He identified photographs which he took that are marked as Exhibit 6. These photographs depict debris on the ground. He believed it unsuitable to build on the lot and removed the fill. He estimates approximately 40 loads that were removed. He described the job as requiring the removal of the ground disposing of it and bringing fill. Thereafter his company built the basement. He testified that the well needed to be 50 feet away from each septic tank and 20 feet away from the street.

Under cross examination by Mr. Knox, Mr. Malim testified that he did not know the weight of the loads that were taken away. Only that he estimates it was approximately 40 loads. He did not know when the septic design was approved by the Municipality; only that the septic system was too close for a well to be built.

Zia Khan

Zia Khan is married to the Claimant, Iman Badawi. He works as a prison chaplain for those of the Muslim faith in the prisons in Atlantic Canada. He is the Imam of the Islamic Centre in Halifax. He testified that his only source of income comes from his work as the prison chaplain. It is custom for the Imam to perform all of the services of that position gratuitously.

Mr. Khan testified that he assisted his wife in deciding to purchase Lot 8, Oceanview Drive. He was provided a copy of the listing cut when they looked at the lot. He felt this was appropriate as he and his wife were looking for a larger piece of property in a country-like setting. They had intended to buy land sometime in the future. He was able to finance the purchase through shares from Islamic Housing and he knew builders who would help him build their new house. He deferred to his wife on the decision to purchase the lot. For Mr. Khan, he felt the property was in a great location and believed it was "ready to go". He and his wife checked the zoning for the property but they were unable to build due to financial reasons. They did not pursue all of the conditions in the agreement of purchase and sale. They were told by the real estate agent, Rick Foster, all that was needed was a well and the previous owner felt the house proposed for the lot was too big to build.

In 2007, the couple decided to purchase the lot without any further construction. They had requisitioned architectural drawings. They paid property taxes. They hired a Mr. Falkenham to excavate the property. The estimate given to them verbally was between $6000 and $7000. Mr. Falkenham advised them it was only good for a crawlspace. They were told it would be approximately $90,000 to remedy the excavation. The couple had sold their previous home and began living with Mr. Khan’s father-in-law on May 25th, 2014. There was garbage and fill to remove from the lot. He testified that an excavation company, presumably CivTech, advised them it would cost approximately $25,000 plus tax to remove it. He reviewed the cost estimates

entered as Exhibit 12 and confirmed that he did indeed agree with the estimate. In addition, he estimated there would be additional costs for drywall and extra plumbing that were not originally contemplated in the construction.

When asked by Mr. Grant if he had spoken with the Defendants, Mr. Khan indicated that Mr. Stachowiak stopped by and asked why excavation had been halted. Mr. Khan testified that he did not wish to confront him at the moment indicating simply that there were some issues. He also described a subsequent incident when the Defendant came by yelling and ranting at him.

Under cross examination by Mr. Knox, Mr. Khan acknowledged that this was his first purchase of a vacant lot. Further, he indicated that it was the project manager and excavators who kept referring to the fill as garbage. He recognizes now that for a lot to be ready to build, a building permit was required. The couple did not have an approved drawing for their plans but were told that a house design was available. He acknowledged reviewing clause 16 of the agreement of purchase and sale with his lawyer, but did not pursue any of the investigations or conditions set out therein. When referred to clause 11(i) regarding soil conditions. He was advised by a contractor that " it should be fine". He felt that he was duped, the Defendants' deception regarding the garbage on the land was disingenuous and the conduct of the Defendants was fraudulent. Neither he nor Ms. Badawi contacted Mr. Foster as they did not sign a dual agency agreement. He took the words "septic is in place and ready to go" found in the listing cut to mean that everything was fine and ready to go. They did not see the design before the home was purchased. They have not spoken with Mr. Foster since uncovering the problem.

Iwona Stachowiak

Iwona Stachowiak is married to the co-defendant, Michal Stachowiak. She testified with the assistance of an interpreter as the Stachowiaks' first language is Polish. She and her husband have two sons, age 42 and 39, who both live in England. She does not work outside the home.

Ms. Stachowiak testified that she and her husband, Michal, purchased both Lot 8 and Lot 10, Oceanview Drive in 2002. She hired Thomas Giovannetti to assess Lot 10. As it was determined Lot 10 required a new sewage system, they altered and installed a septic system on Lot 8 as it was cheaper to do the two at once. At the time they were thinking of building on Lot 8, however her husband got sick and lost his job. She acknowledged signing the Agreement of Purchase and Sale marked as Exhibit 11. She did not know that there were problems with the soil when the lot was sold. At the time she had not met Ms. Badawi nor had any communication from her.

Under cross examination by Mr. Grant, Ms. Stachowiak acknowledged thinking about building a home on Lot 8 and did so with the assistance and advice of Mr. Giovannetti. Ms. Stachowiak was not sure when the plans were prepared. She noted that septic fields were drawn on both plans for Lots 8 and 10. She was not certain what her husband and Mr. Giovannetti discussed with respect to where the lot was located. There was no indication during the purchase of Lot 8

that there was bad infill or that there was any reference to not do anything about it. She did not tell Ms. Badawi or Mr. Khan that there were plans available, nor did she tell that to Mr. Foster.

In redirect evidence, she testified that she did not see Mr. Foster showing the property to others.

Michal Stachowiak did not give evidence.

The Engineers' Evidence

Each party introduced evidence from a professional engineer. Both engineers were qualified and found by this court to be expert witnesses in their respective fields. Each submitted a report which was acknowledged and each gave evidence in this proceeding. While their evidence is outside the order from which the witnesses were called, I felt it appropriate to conclude this section of my reasons by summarizing the respective positions of both experts.

Scott Alexander Simms

Scott Simms is a principal of LVM/Maritime Testing. He reviewed his extensive resume and experience to this Court. On motion of Mr. Knox, I found Mr. Simms to qualify as an expert witness for the purposes of giving evidence on geotechnical engineering for the quality and suitability of soils and ground at construction sites.

He was retained by the Claimant to attend and review the site. Mr. Simms noted in evidence that his reports referred to "Lot 9, Oceanview Drive", however, that reference was a typographical error throughout. In reading the reports, it is clear it was Lot 8 which was the subject of his evidence. I accept his explanation and find both reports and his testimony relate to Lot 8.

Mr. Simms attended the lot on June 26, 2014. He testified that the purpose for his attendance is to test the competence of the soil for construction. In layperson's terms, soil competence means simply that the soil itself is suitable for structures. Generally, this includes suitable in-fill to a depth of 8 to 10 feet. This is determined through the drilling of several test pits to the required depth. Mr. Simms noted debris within the fill.

In a letter to Mr. Malim dated June 26, 2014, Mr. Simms noted the following:

"Generally, poor subsurface conditions have been encountered at the site. The site has been infilled for depths up to 10 feet at the test pit locations. The fill material encountered at the site and test pits consisted primarily of a mix of soil with roots, cobbles, boulders, concrete, asphalt, bricks, etc. The fill was dark grey-brown, wet, and in a loose state. Undisturbed site-native soil and bedrock was encountered in test pits at depths ranging from 8 feet to 10 feet below ground surface. Groundwater was encountered at two of the test pits at 8 feet below ground surface. High inflow of groundwater was observed at these pits."

In his oral evidence and his letter to Mr. Malim, he recommended the infill be removed and replaced with "approved structural fill, since most of the on-site soils are not considered suitable for re-use as structural fill." The fill was intended to be compacted to create a suitable base for the construction of a slab foundation. Mr. Simms recommended a slab foundation as the soil and water was not appropriate for a regular foundation as unmediated or uncontrolled shifting in the structure could cause damage. He reviewed the photographs admitted as Exhibit 6 and indicated that the debris depicted in the photos is consistent with the debris found at the site.

He drilled two test pits for the septic system and found approximately 0.3m of poor in-fill and debris. He described the site as not ready for building at the time of the test.

He returned to the site for a further view and completed a report to Mr. Malim on September 8. In that report, he noted the unsuitable soil had been removed and new fill installed and compacted. He corroborated his findings with the documentation that was completed. There were concerns raised with respect to the groundwater. However, Mr. Simms was satisfied with the efforts performed to correct the lot. He recommended suitable backfilling and an under-slab base consistent with the fill currently in place.

Under cross-examination, Mr. Simms testified that the designs found on the Giovannetti plan are consistent with his own. Mr. Knox referred him to the following, note 6, on Exhibit 4:

"Building design by others and to conform with building code geotechnical report required on subsurface soil beneath proposed dwelling for building foundation design and footing drainage."

He described this note is not typical in most reports. He confirmed that it is the client who determines where the subsurface investigation and further evaluation of the location is required. He indicated that it was the homeowners' recommendation to construct a slab foundation rather than the basement. It was cheaper to construct the fill to be suitable for a full basement. He does not recall seeing the area where the septic was installed. He acknowledged that it is acceptable for some backfill and other material to be present. He became aware of the problems with the lot in 2014, the same year he had discussed it with Ms. Badawi.

In redirect evidence, he clarified that a walled basement was not recommended due to the state of the soil and yard works. Ultimately, he recommended placing the slab on the grade, and for the crawl space to have 4 foot cross walls.

Thomas Giovannetti

Thomas Giovannetti is an engineer and surveyor. He is the President and CEO of CivTech Engineering & Land Surveying Ltd. He has been employed with that company in increasingly responsible positions for 27 years.

In preparation for this hearing, Mr. Giovannetti prepared a report based on his observations and recommendations for the property at the time of the inspection..

Mr. Giovannetti was retained by the Defendants to assess both Lots 8 and 10 to determine the most suitable location for their respective dwellings, wells and septic fields. With respect to Lot 8, he assessed the building design to ensure the proper grade and state of the property.

He testified that he has been a "qualified person" pursuant to the Nova Scotia *Environment Act* and its regulations since 1988. This means he is eligible under that legislation to design and certify septic disposal systems for properties. He estimates having designed in excess of 200 systems since obtaining that qualification. He noted the report indicated where a well should be located, which is denoted by a capital "W". He indicated that when it is time to drill the well, it is the well driller's decision to determine the most suitable location to ensure there is adequate room for the septic field and the well. The reason the builder does not install it is the size and style of the building may be different. While not stated by Mr. Giovannetti, based on some of his comments, I suspect some of the reasoning included that many builders were neither licensed to install wells nor septic systems. Before giving the final approval, they perform an inspection. They issue a Certificate of Installation. The engineer is certifying that it meets the requirements prescribed by the Nova Scotia Department of Environment. The certificate is then available to the building inspector if requested. He indicated this practice has been in place since 2006.

Mr. Giovannetti testified that he met with the Stachowiaks and advised a building on the property could have a basement, but with no storm sewers in place, they should expect drainage problems. Lee Smith was the installer hired by the Defendants who established the boundaries and tolerances.

He dug the test pits and found rubble and in-fill typical of other lots in the area and of those of that vintage. He indicated that there was no regulation during the 1960s-80s on what could be used as fill, although neither Mr. Giovannetti nor Mr. Knox cited any timeline for the change in regulation.

He reviewed the plan he prepared which is marked as Exhibit 4 along with the sketch and notes. The purpose for the plan and notes was to provide indications that a prudent engineer should provide to a builder. Specifically, he noted certain building design considerations and on-site sewage considerations. He believes the building design provided by Stachowiak would have worked.

Under cross-examination by Mr. Grant, he confirmed he first met with Mr. Stachowiak in 2008 to discuss the installation of a septic system for Lot 8. Mr. Stachowiak met with Mr. Giovannetti regarding the house on Lot 10. He was told by Mr. Stachowiak that his intent was to sell Lot 10 and build on Lot 8. He contacted the builder to look at the parameters for both Lot 8 and Lot 10. He determined the septic was in place on Lot 10 when he was originally consulted. He does note that Lot 10 is uphill from Lot 8, but does not recall there being a sewage runoff to Lot 8. He

reviewed the diagram in Exhibit 4. He noted the three-foot boulder retaining wall adjacent to Lot 10. The purpose of the lot was to retain the soil from lot 10 and also assists in the grading of lot 8. He noted the system clearances of 51 feet or 16 m between the lots. Lot 8 had clearances of 25+ meters on lot 10. The sketch does not show the exact distance because according to Mr. Giovannetti it was only required that he certify the distance exceeds 25 feet. The Certificate of Installation relates only to the proposed distances for Lot 8.

Mr. Giovannetti was periodically on-site for the installation of the septic tank on Lot 8. Specifically, he measured the tank and viewed the layout of the septic field. He must ensure that the setback distances are met. If not, even though they are approved, the builder must apply again to obtain permission to move the tanks. Once the inspection was conducted, the contractor was notified so he could backfill and shape the property. The subsurface on the lot was viewed via two test pits which contained some in-fill. The two test pits were originally drilled under where the septic field is now located.

He reiterated that for lots that have been in existence since 1960, it is necessary to modify some of them to accommodate for unknown debris beneath the surface of the soil. It would be possible to have similar infill as Lot 10, although he did not testify to any description of Lot 10. He noted the building is in the low part of the property. He reviewed the architectural plans when consulted. He did not undertake geotechnical testing because it was not required when there was no building permit issued. He described the rubble and debris as fairly standard. He agreed that a person should have a geotechnical survey to see what is under the footprint of the home.

He was given the plans by the home designer on behalf of the Stachowiaks and determined that they met the intent of the grading plan. The system could be connected to the sewer. He was advised by the Stachowiaks that the house planned for the property was "too much house for them". He discussed the architectural drawings with the Stachowiaks and presumed that they had copies. He indicated that it matches the grade. At the time he was satisfied that the septic field could be constructed and fit within the bounds of Lot 8 as required.

Mr. Giovannetti acknowledged that he did not inspect the retaining wall. He did note the plans call for a slab and he had recommended a slab foundation on the grade. He confirmed that a wall foundation is not recommended as there was no storm sewer system on the property at the time. He did not have any knowledge of the infill at the time to the extent that it was, otherwise he would have made some suggestions to rectify it.

Mr. Giovannetti recalled speaking with Ms. Badawi after she purchased the property. She requested a copy of the plans and he discussed that as well as his fees. Ms. Badawi did not pick up the plans until six months thereafter. The price for the copies was $150 plus HST. He also quoted her a fee of $1000 to have an initial consultation regarding design and construction.

Mr. Grant referred him to note 6 on his sketch contained in exhibit 4. He acknowledged there was no reference to infill. He recommended that all clients investigate the subsurface soil

conditions for a building foundation and footing drainage. Specifically, a geotechnical report was recommended. He indicated that with or without a geotechnical report, he knew the possibility that rubble would be present. He described note 6, as being necessary for the protection of the public. The property had sat years and not been built on. He confirmed that there had been rubble in the back and therefore, there could also have been rubble in the front. Finally, he acknowledged that only Ms. Badawi called him.

The Law and Findings

Liability

The parties' counsel have provided written and oral submissions and cited several relevant cases. I would like to thank both Mr. Knox and Mr. Grant for their very thorough and straightforward efforts which provided great clarity and context in this matter.

There are many decisions of the Supreme Court of Nova Scotia which summarize the law relating to the state of property, the terms of a contract and representations during its purchase and sale. Mr. Knox, on behalf of the Defendants has referred me to the case of *Gesner v. Ernst, et al.* (2007), 254 N.S.R. (2d) 284, a decision of Associate Chief Justice Deborah K. Smith. I quote her decision at paras. 44-50:

"[44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. *Caveat emptor*. (**McGrath v. MacLean et al.**(1979), 95 D.L.R. (3d) 144 (Ont. C.A.)).
[45] In **Gronau v. Schlamp Investments Ltd.** (1974), 52 D.L.R. (3d) 631 Solomon, J. of the Manitoba Court of Queen's Bench discussed the doctrine of *caveat emptor* at p. 636 and stated:

> I think the law relating to the rule of *caveat emptor* has been stated and restated on many occasions. Halsbury's Laws of England, 3rd ed., vol. 34, p. 211, para. 353, succinctly states the law as follows:
>
> > 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; 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.
> >
> > As regards patent defects, the vendor is not bound to call attention to them; the rule is *caveat emptor*; a purchaser should make inspection and inquiry as to that which 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; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.
>
> In other words, patent defects are those readily discoverable by ordinary inspection. Vendor is under no duty to draw attention to patent defects which can readily be observed by the purchaser if he pays ordinary attention during inspection. If the purchaser fails to observe patent defects on inspection he cannot be heard to complain about such defects

later and the rule of *caveat emptor* applies. On the other hand, latent defects are those not readily apparent to the purchaser during ordinary inspection of the property he proposes to buy. If latent defects are actively concealed by the vendor, the rule of *caveat emptor* does not apply and the purchaser can, at his option, ask for rescission of contract and/or compensation for damages resulting therefrom. Halsbury, *supra*, in para. 354, at p. 212, dealing with concealment by vendor, states:

> ... 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 thereby. Any conduct calculated to mislead a purchaser or lull his suspicions with regard to a defect known to the vendor has the same effect.

[46] In the case at Bar, the Plaintiff has alleged deliberate misrepresentation (which I take to mean fraudulent misrepresentation) against the Defendant Ernst as well as breach of contract.

[47] In **Charpentier v. Slauenwhite**(1971), 3 N.S.R. (2d) 42 (T.D.) the Court reviewed what is necessary to establish fraudulent misrepresentation. Jones, J. (as he then was) stated at pp. 44-46:

.....The meaning of representation is discussed in the Sixth Edition of Cheshire and Fifoot on the Law of Contract at p. 226. The authors state,

> 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.

In referring to fraudulent misrepresentation in the same work at p. 241, the authors state,

> 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 of 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. Peek 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 HERSCHELL, indeed, gave a more elaborate definition of fraud in Derry v. Peek, saying that it means 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 misrepresentation is a false statement which, when made, the representor did not honestly believe to be true.

The leading case on deceit is *Derry v. Peek* (1889), 14 App. Cas. 337. The law was stated by Lord Herschell at p. 374,

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of

> the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.
>
> The basis for establishing such a claim is set out in the text, Canadian Law of Vendor and Purchaser by DiCastri at p. 201,
>
> > In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) That the representations 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; (5) That within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudicated [sic] it.
> >
> > The burden of proof in establishing fraud is clearly on the plaintiffs. I refer in this regard to *Parna v. G. & S. Properties Limited*, 1971 S.C.R. 306.

[48] In **Grant v. March** (1995), 138 N.S.R. (2d) 385 (S.C.) Saunders, J. (as he then was) quoted from **Charpentier v. Slauenwhite**, *supra,* and stated at ¶24:

> In order for me to find for the plaintiffs I would have to conclude that there was convincing evidence of the defendant's fraud. In other words, that he knew his answer to the purchaser's question was false.....

[49] Later in that same decision, Saunders, J. referred to the Court of Appeal decision in **Morash v. Stevens**(1973), 4 N.S.R. (2d) 780 (C.A.) and stated at ¶34:

> .....I do not read the decision of Chief Justice McKinnon as importing any kind of lessened or objective standard to the requirement that the purchaser must prove dishonesty, in other words a deliberately deceitful, or reckless fraud by the person said to have made the misrepresentation.....

[50] While the burden is on the Plaintiff to prove a deliberate, deceitful or reckless misrepresentation (reckless as to whether it is true or false), the burden remains the ordinary civil burden of proof on the balance of probabilities.

Description of Defect

In general, all sales of real property are subject to the principle of *caveat emptor*. In other words, absent fraudulent or negligent misrepresentation or a breach of specific condition of the contract, the sale of real property is "let the buyer beware". The law makes an exception for certain types of defects.

I find as a fact that Lot 8 contained various forms of debris in the ground and soil which rendered it unsuitable for the installation of a septic system and the construction of the foundation without remedial efforts to remove and replace it. I accept the Claimant's submission that it was in that state at the time of the purchase of the property. Accordingly, the next question is to determine the type of defect.

Patent vs. Latent Defect

The next question to answer is if the defect is a latent or patent defect. It is clear that a typical purchaser of property would not undertake to view the subsurface of a vacant lot. In that case, the defect would be latent. However, in this case, the Agreement of Purchase and Sale provided both the opportunity and expectation on the part of the Claimant to undertake a thorough inspection. In other words, one of the parties, the sellers, protected themselves contractually as described in the passage from *Halsbury's* quoted by ACJ Smith.

For example, paragraph 11 of the agreement of purchase and sale identifies several inspections, which are the responsibility of the Claimant prior to the closing. Examples of these would include (a) residential zoning, (b) the ability of the buyer to receive from the municipality, a building permit for a single family dwelling, (c) a permit to install an onsite sewage disposal system, (e) the ability of a well to be installed on the property to provide water of a sufficient quality and quantity to the buyer, (f) final municipal lot approval, (g) "soil conditions on the Lot are acceptable for intended purposes, and that this lot contains no environmental hazards, failing which, this offer will become null and void", (h) the verification of the position and size of the lot.

Finally, the agreement of purchase and sale was subject to a review by both the buyer and sellers' respective lawyers.

I find as a fact that the Claimant undertook none of the inspections pertaining to the soil conditions, the suitability of the well to be installed or the septic system until long after the time limits prescribed in the agreement. The Claimant chose not to undertake those preconditions. Ultimately, she must accept the lot as she found it, at least as it relates to the suitability for a foundation.

<u>Misrepresentation</u>

The Claimant alleges in her Notice of Claim as follows:

"The Claimant states that the Defendants, Michal Stachowiak and Iwona Stachowiak sold lot 8, Oceanview Dr., Halifax, Nova Scotia PID (00269712) to herself and her husband on the third day of July 2007. Upon the representation that the property (which had a septic system in place which was installed by the defendants) was in a ready to build condition."

Later in paragraph 4 of her pleadings, it states:

"The Claimant states that the Defendants must have known of the fill problem because they installed a septic system for this lot. The Claimant had no knowledge of the problem until excavation had started. The Defendants at no time informed the Claimant of the defect."

As noted above, the Defendants sought and retained the services of Mr. Giovannetti to determine the suitability of the property for construction of a home and installation of a septic system. I

accept Mr. Giovannetti's testimony that the septic system was installed and that he certified to that fact when preparing the Certificate of Installation. Mr. Stachowiak was entitled to rely upon this report and did so. As a result, he had the opinion of his consulting engineer that the septic system had been installed correctly. Mr. Giovannetti testified that it was incumbent upon him to let his clients know if there were difficulties or deficiencies with the soil. He did not do so because he was of the view that there were no serious problems with it. A reasonable seller in that instance would not have been under any obligation to disclose such difficulties because he did not believe they existed. There is no evidence before me to suggest that there were any such difficulties in the construction of their home on Lot 10. Thus, I am unable to find as a fact that there was any knowledge actually or implicitly possessed by the Defendants with regard to the state of the soil. Thus, there is no evidence whatsoever of deliberate concealment. Mr. Grant submitted that the knowledge of Mr. Giovannetti can and should be imputed to the Stachowiaks. With respect, I find that to be stretching the inference too far.

"Ready to Go"

Considerable testimony was dedicated to the issue of the lot allegedly described as "ready to build". However, it is necessary to review the documentary evidence more closely. Specifically, I refer to the listing cut, which was tendered into evidence as exhibit number 10. In the listing cut, the following statements appear:

" Septic in place. House design available."

" Great building lot. Close to downtown Halifax. Just 2 min. from the Nova Scotia Yacht Squadron. Level lot with nice bordering trees. Septic is in place and ready to go. Opportunity to build on a quiet lot in an area of nice homes." (emphasis mine)

It is clear from the wording of the listing cut that the seller is warranting that the septic is "ready to go". They are making no representation with respect to the lot as a whole. Indeed, as I have previously found, the condition of the lots was addressed by way of the Agreement of Purchase and Sale.

The question to determine is whether the septic was at the date of closing, "ready to go".

The Septic System

In several cases in Nova Scotia, the courts have held a listing cut to be evidence of representations made by the seller to the buyer in the course of a real estate transaction, for example, *MacIntryre v. Nichols*, 2004 NSSC 036. A reasonable person reviewing the listing cut in the case at bar would not conclude that the representation "ready to go" relates to the property. Such a person would determine that "ready to go" means the septic system has been installed according to Provincial regulations, and can be certified as proper for the circumstances. As noted previously, the Stachowiak's had in their possession a certification from Mr. Giovannetti.

There is nothing in the Certificate of Installation or other documentation to suggest there was anything potentially erroneous in that view. However, I also find that the phrase implies that it is not limited to a specific housing design.

The agreement of purchase and sale provides the following in paragraph 11(c):

"This agreement is subject to the buyer obtaining from the relevant authority a permit to install an on-site sewage disposal system on terms satisfactory to the buyer the permit will be deemed to have been obtained unless the seller or seller's agent is notified to the contrary in writing within ___ days of acceptance of this offer. If notice to the contrary is received than either party shall be at liberty to terminate this contract."

The date to fulfill this condition was originally June 15, 2007 but, as noted, it was changed to June 30 by an Amending Agreement.

In reviewing the facts, I am satisfied that the terms "ready to go" were intended to apply to the septic system of a home constructed on the property. The only reasonable inference to be drawn was that Ms. Badawi had sought additional time to perform the various investigations contained in the Agreement. She chose not to perform those investigations. Accordingly, this aspect of the Claim must also fail.

Damages

Had I found in favour of the Claimant, I would have only awarded damages sufficient to relocate the septic system as I do not find there was any reference to the entire property being "ready to go". That description applies only to the septic system. The law of damages requires that the parties to a contract be put in the position they would have been in had a breach not occurred. In this case, that means the cost to reinstall the septic system. I have reviewed the extensive invoices pertaining to this matter filed by the claimant and her counsel. In her evidence, Ms. Badawi testified that it cost $3826.80 to relocate the system. I find this reasonable and I would have allowed it. Further, I would have allowed $500 in engineering fees. I would have fixed prejudgment interest at 4% for one year only. Thus,

Amount of claim:	$4326.80
Prejudgment Interest (4%)	$ 173.02
Total	$4999.82

However, this would have been payable had Ms. Badawi been successful in proving her claim.

Summary

In summary, I find the Claimant has not proven her claim in breach of contract or misrepresentation against the Defendants. The claim is dismissed.

The subject of costs has given me considerable difficulty. This has not been a frivolous case. I have consistently considered throughout that both Ms. Badawi and Mr. Khan believed the Defendants' representation was that the lot was "ready to go". Their moving forward with this litigation made sense on that level. On the other hand, the Defendants were successful and expended additional funds for Mr. Giovannetti's evidence. While costs normally follow the event, I am satisfied that this is an appropriate case for each party to bear their own costs.

Order accordingly.

Dated at Halifax, NS,
on August 24, 2015;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)