CAVEAT EMPTOR - A MYTH IN NEW HOME CONSTRUCTION

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SIMPLE RULE: BUYER BEWARE -- A buyer must examine, judge and test for himself; as a Vendor, he generally has no duty to disclose.

GENERAL RULES:

DEFECTS

PATENT - iscoverable by inspection and ordinary vigilance on the part of Purchaser. Visible to the eye or by implication from what can be seen ',duty on Vendor to disclose-Caveat Emntor.

LATENT -- would not be revealed by any inquiry which a Purchaser is in the position to make before entering into the contract. Generally no duty on '.-endor to disclose.

For cases distinguishing patent and latent defects see 34 Halsbury 212.

There is an obligation on a Vendor to disclose latent **defects of title but not so with defects** as to quality. **Defects of Title not considered herein.**

CONDUCT OF VENDOR:

A. SILENT -- Caveat Emptor

-- Active concealment may constitute fraud and the contract may be voidable.

-- General Rule of Caveat Emptor may be displaced when there is a special relationship between Vendor and Purchaser.

B. INNOCENT MISREPRESENTATION

If substantial.Purchaser may claim recission prior to completion but make no claim for damages except , indemnity for expenses incurred under the voidable contract DORSCH V FREEHOLDERS OIL CO. (1965) S.C.R. 670; 52 D.L.R. **(2nd) 658**.

No claim for damages WHITNEY V MacLEAN (1932) 1WWR 1052 29 D.L.R. 357 (Alta C.A.)

C. NEGLIGENCE If a negligent representation HE')LEY BYRNE CO. V HELLER and PARTNERS LTD. (1964) A.C. 465 may permit a damage claim. See also SMITH V MATTACCHOINS (1971) 13 D.L.R. (3d) 437.

D. FRAUD

Purchaser may recind the contract.

Purchaser may sue for damages.

SUMMARY OF GENERAL RULE:

SCOTT-POLSON AND S70TT-POLSON V HOPE (1958) 14 D.L.R. (2d) 333 B.C.S(at p. 337)

"The law seems clear that in the case of the sale of real property there being no fraud that a latent defect of quality not amounting to a breach of obligation to show a good title is no ground of objection on the purchasers' part unless the vendor expressly or impliedly warranted or promised that the property sold should have the quality in which it is deficient: Williams on Vendor Purchaser, 4th ed. p. 759.

Further the law appears to be clear that there is no implied warranty that a residential property is fit for human habitation: HOSKINS V WOODHAM (1938) 1 All E.P. 692; KLASSEN & DEXTER V GERLITZ & ATHERTON REALTY CO. (1954) 3 D.L.R. 377, Williams on vendor & Purchaser, 4th ed. p. 760."

SPECIAL STATUS OF NEW HOUSE?

In PERRY V SHARON CONSTRUCTION CO. LTD (19 37) 4 All E . R-.

390 (C.A.) MacKinnon, L.J. explained: "There is obviously a difference in kind between contract for the sale of a house which is an existing and complete structure and a contract for the sale of an uncompleted house which has to be completed by the vendor. In the former case, quite clearly there is no implied undertaking by the vendor as to the fitness of the house or its condition. In such circumstances, the maxim caveat em for clearly applied to the full when the purchaser inspects the house by himself, or by his surveyer, and makes up his mind as to its condition and fitness for occupation. The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the **maxim caveat emptor cannot** apply, and the buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly."

The obvious problem is that the Purchase cannot inspect that which has not been completed, but may have the opportunity to

inspect at the various stages of construction.

The new home may not reveal its defects to either the Builder, Vendor or Purchaser until some future date, after completion of sale.

IMPLIED WARRANTY:

There is an implied condition that a house under construct will be fit for human habitation: HENDERSON V RAYMOND MASSEY BUILDER: LTD. (1964) 43 D.L.R. (2d) 45.

The Vendor of a house who sells a completely constructed house gives no implied warranty to the Purchaser that it is safe, even if he is the builder: BOTTOMLY V BANNISTER (1931! All E.R. Rep 99; (1932) 1 K.B. 458 C.A.

DOCTRINE OF MERGER:

The case of APPLEGATE V MOSS (1971) 1 All E.R. 747 (:.A.) raises the point that a limitation period will not be fatal to 3Purchaser where the Vendor through his negligence and fraud constructe a house so badly, problems would later arise which was fraudulently concealed from the Purchaser.

Di Castri, The Law of Vendor and Purchaser 2nd. Ed. at n. 176, throws new light on the d-octr-˙_ne:

"If it is correct that the doctrine of caveat emptor
is of judicial origin, and if the statute law -_s
silent on the subject, then, it may be argued, no
restrictions bind the courts from delimiting the operation
of the doctrine and finding, on the sale by a builder
vendor of a new house, substantially completed or under

construction, an implied warranty of reasonable workmanship and habitability surviving the delivery of the deed. The test of liability would be **reasonableness** and not perfection, and the duration of liability would likewise be determined by the standard of reasonableness."

Survival of the Purchaser's rights and whether or not an oral or written collateral warranty merges in the conveyance depends upon the intentions of the parties at the circumstances surrounding the transaction (For cases see Di Costir p. 176 footnote 97).

The finding of fraud or negligent misrepresentation in the case SMITH V MATTACCHOINE (1971' 13 D.L.R. (3d) 437 gave the plaintiff a cause of action notwithstanding the doctrine of merger.

A few alternative situations:
Purchaser contracts with Vendor -

(a) Closing prior to completion, possession by Purchaser with holdback for Vendor to complete construction; habitable !guy unfinished.

(b) Closing after completion Purchaser inspects at. each stage.

(c) Closing after completion Purchaser does not inspect, except superficially relying on Vendors (i) fine reputation

(ii) oral representation that all is well and no other contractor need inspect.

(iii) written warranty of no structural defects and covenant to repair or indemnify.

To determine the purchaser's position in these situations there are a few general considerations: Express written contract takes precedence. An implied term is to be read into a contract only under the compulsion of some necessity

COURSE OF CONSTRUCTION OR COMPLETE?

"The lisbility of the contractor who sells a house in the course of construction differs from the liability of the vendor of a house that has been completely constructed. In the former case a- implied warranty is inferred that the house has not been constructed negligently and that it is fit and sui.table for habitation. No such warranty is implied in the case of the sale of a completed structure. In the tatter case the principle of caveat emptor applies except as modified by express warranties or where the -e has been a fraudulent misrepresentation.' THOMAS et al V WHITEHOUSE (1979) 95 D.L.R. (3d) 762 N.S.A.D. This case also distinguished between an existing fact and an opinion as in the latter it could only be fraudulent i= the defendant did not believe the opinion at the time it was given.

Whether a house is completed or in a state of erection is a question of fact, BROWN V ?MORTON (1954) 1 I.R. 34.

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SUMMARY:

NEW HOUSE COMPLETED 1,.T CLOSING

Caveat Emptor subject to: express terms of contract; representation of Vendor, innocent or fraudulent; oral or written; and warranties given by Vendor. Builders Negligence.

NEW HOUSE UNCOMPLETED AT CLOSING

Caveat Emptor does not apply. Inspection not possible. What if substantially complete and inspection possible for all but finish work?

Implied Warranty - habitability Builders negligence.

The relationship between Purchaser, Vendor and Builder are important in deciding liability in contract and tort.

*NOTE

Case list can be provided listing cases and particular problems raised.