LET THE BUYER BE WARY :

DOES THE VENDOR HAVE AN OBLIGATION TO DISCLOSE DEFECTS IN HIS PROPERTY?

The question that we will address in this paper is 'How far must the vendor go in disclosing hidden defects of quality in the home or property he is selling?'. We are here concerned with the sale of completed homes. Purchasers of homes under construction are protected by implied obligations of workmanship and fitness for habitation that survive the closing. Purchasers of completed or "used" homes are left to fend for themselves to a much greater degree as we will see.

The traditional statements of the law in this field contain a strong element of caveat emptor. However, the trend seems to be towards greater protection for the purchaser of deficient real property.

In Fraser-Reid v. Droumtsekas (1980), 103 D.L.R. (3d) 385 (S.C.C.) Mr. Justice Dickson, as he then was, had the following to say about the subject of defects generally: [p. 386]

> "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 extends from the laissez faire attitudes of the 18th and 19th 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."

Reiter, Risk and McLellan in Real Estate Law (3rd. Ed.) state the following general rules and then comment on the fact that the operation of the rules have been curtailed: [p. 280]

> "Caveat Emptor philosophy still exerts significant influence in statements of the law applicable to the purchase and sale of used housing. The general propositions in the field suggest that no warranties will be implied and that purchasers must seek their protection through express provisions in their agreements or deeds. Vendors are said to be under no obligation to disclose the existence of defects to purchasers.
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> These 'basic rules' are clear over statements: The law in action provides relief to many purchasers of used housing through a number of techniques ..."

Defects may be either patent or latent. Di Castri in The Law of Vendor and Purchaser (3rd Ed.) defines these terms as follows: [p. 7-19]

> "A patent defect ... 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."

The distinction is important because, as we will see, where a defect is patent in nature, the doctrine of caveat emptor will be applied to protect the vendor. If the defect is latent, however, then the analysis becomes more complex. When a defect is concealed or a vendor lulls a purchaser's concerns with regard to a latent problem, then the full burden of caveat emptor will be lifted and the purchaser will be granted a remedy against the vendor.

The vendor should also be aware that Courts can be very flexible in their interpretation of what constitutes fraud or concealment. A vendor who fails to disclose takes the risk that a sympathetic court will find some incident of misrepresentation or "lulling" sufficient to justify damages or even rescission. Bora Laskin in his article "Defects of Title and Quality" (Lectures of the Law Society of Upper Canada - 1960) calls fraud "a rather elastic conception". He seemed to recognize that often times judges will stretch the concept wide enough to provide relief to the innocent purchaser.

At the risk of over simplification, we will deal with the issue of defect disclosure in four categories:

- Patent Defect;

- Latent Defects of which neither the purchaser nor vendor was aware;

- Latent Defects which the vendor actively misrepresents or takes steps to hide;

- Latent Defects which the vendor does not disclose and the purchaser does not inquire about;

PATENT DEFECTS

As we have said, patent defects are those which are readily discoverable upon ordinary inspection by a purchaser. The law is clear that a purchaser assumes the risk of patent defects. Reiter and Risk have the following to say on this issue: [p. 280]

> "Few difficulties arise in respect of [patent defects]. The law treats purchasers as assuming the risk of patent defects, defects that are discoverable on cursory examination by an unsophisticated purchaser. This is less a rule of law than a quite obviously fair implicit allocation of risk in most cases."

In White and White v. Pellerine (1988), 84 N.S.R. (2d) 330 (Co. Ct.), a patent defect had been overlooked by the purchaser of a property. His Honour Judge Cacchione made the following comments: [p. 340]

> "The evidence is quite clear that the plaintiff had the opportunity of inspecting the basement prior to his purchase and that he did in fact inspect it. His concern, however, was not so much the quality of the basement but the reliability of the tenant living there at the time. I am satisfied, based on all the evidence, that had the plaintiff done a complete inspection of the house before he purchased it, he would have been alerted to the crack in the foundation

> wall and could have protected himself by contract terms."

Where a vendor renders an otherwise patent defect undiscoverable, the purchaser may obtain relief, as we will see later in this discussion.

LATENT DEFECTS OF WHICH NEITHER PARTY WAS AWARE

A latent defect, as we have stated, is one that is not discernible upon an adequate inspection of the property using ordinary and reasonable care. In Scott-Polson v. Hope (1958), 14 D.L.R. (2d) 333 (B.C.S.C.) a purchaser, after taking possession, found his newly purchased home to be uninhabitable because of an infestation of moths in the building's insulation. The court found that the infestation was a latent defect. This was based upon the fact that the moths were not apparent until the walls were opened up. The court made a further finding that neither the vendor nor the purchaser was aware of the problem. After making this conclusion, Mr. Justice MacLean continued as follows: [p. 335]

> "I think that this finding disposes of the plaintiff's case because in the case of a latent defect of quality which I hold this moth infestation to be, the plaintiffs would have to plead and prove breach of warranty or fraud to be entitled to any remedy at all, whether by way of damages or by rescission ... My finding that the defendant did not know of the infestation at the time he sold the house disposes of the question of fraud ... "

Accordingly, the plaintiff's claim was dismissed.

Our Appeal Division had occasion to consider this situation in the case of Edwards v. Boulderwood Developments et al (1984), 64 N.S.R. (2d) 395. In this case, a piece of land which had been sold as a building lot was discovered to be unsuitable for construction. Mr. Justice Pace found that neither the vendor or purchaser could have known that the fill used on the lot was of such poor quality that it could not support a foundation. He stated as follows: [p. 406]

> "I realize that certain particular latent defects which materially interfere with the enjoyment promised in the contract may entitle a purchaser to rescind or provide a defence to an action brought by the vendor for specific performance ... however, that has no bearing on the finding in the present appeal where the trial judge held that the exposing for sale was in itself a misrepresentation. This was not a case of the vendor knowing of the latent defect and failing to disclose such defect to the purchaser, but as the trial judge found, it was a defect which was not apparent to either until the excavation had commenced."

Accordingly, the action against the vendor was dismissed. The Court did, however, allow the purchaser recovery against the project engineer and the foundation contractor. The Edwards case illustrates the possibility of claiming against third parties who can be seen to have contributed to the defect. Recent developments in the law, such as that found in Central Trust v. Rafuse (1986), 31 D.L.R. (4th) 481 (S.C.C.), have broadened the scope for such claims in negligence.

LATENT DEFECTS WHICH ARE ACTIVELY MISREPRESENTED

Fraud, misrepresentation or concealment on the part of the vendor will relieve the purchaser from the full impact of the caveat emptor doctrine.

In Gronau v. Schlamp Investments Limited (1974), 52 D.L.R. (3d) 631 (Man. Q.B.) the plaintiff had purchased a 9-suite apartment building from the defendant. The defendant had been aware for some time of a serious crack in the east wall of the building. A structural engineer had indicated to the defendant that its repair would require substantial expenditures. Instead of repairing the defect, the defendant chose to conceal it by temporarily patching the wall with matching bricks.

Mr. Justice Soloman had the following to say in this regard: [p. 636]

> "... patent defects are those readily discoverable by ordinary inspection. The 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."

Nova Scotian courts are equally clear that the vendor who actively conceals a defect will be open to a claim for damages. Such a case is Unrau v. Gay (1983), 61 N.S.R. (2d) 256 (T.D.) where a vendor was found to have concealed cracks in her foundation with "cosmetic work". She had not acted with fraudulent intent but merely had hoped to raise the value of the premises. Mr. Justice Clarke (as he then was) quoted Halsbury's Laws of England (4th Edition) Volume 42, at Page 48, as follows:

> "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 act of 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."

Mr. Justice Clarke awarded damages " ... equal to the difference between what [the defendants] got and that for which they bargained".

Where misleading statements are made or steps are taken to lull the purchaser's concerns, courts have little difficulty in assisting the purchaser. In King and Bowser v. Kesebi (1985), 68 N.S.R. (2d) 175 (T.D.) the house had defective siding. The vendor was well aware of this fact and took steps

to cover up the problem. Mr. Justice Burchell had the following to say: [p. 177]

> "On the foregoing findings of fact, my conclusion is that the defendant, Oner Kesebi, intentionally concealed latent deterioration of the siding of which he was well aware and, insofar as the condition as the siding had become manifest, he lulled the suspicions of the plaintiffs (1) by eluding to his knowledge and expertise, (2) by representing that the house was of sound construction and (3) by stating that the brown spots were of no importance and were due to normal wear and tear. My view is that such conduct went beyond mere puffery and amounted to fraudulent misrepresentation. Accordingly, it is my conclusion that the plaintiffs are entitled to judgment and an award of damages."

By the time of the hearing, the plaintiff had already sold the property so the only possible remedy was in damages. The Court awarded $5,000 for diminution in the resale value. See further: Ferguson v. Stright (1980), 37 N.S.R. (2d) 41 (T.D.); Murray v. Dixon (1974), 8 N.S.R. (2d) 27 (T.D.); Charpentier v. Slauenwhite (1972), 3 N.S.R. (2d) 42 (T.D.); and Kisil v. John F. Stevens Limited (1980), 42 N.S.R. (2d) 148 (T.D.) all of which involved the misrepresentation of water quality or quantity; and Muise v. Whalen (1990), 96 N.S.R. (2d) 298 (T.D.) where the vendor had misrepresented the quality of the sewage system.

In the latter two cases cited above, rescission was granted to the purchaser. In the first three cases, the purchasers were awarded monetary damages and there is no indication as to whether or not rescission had been requested. The Muise case has a particularly good discussion of when rescission will be granted.

LATENT DEFECTS WHICH ARE NOT ACTIVELY MISREPRESENTED OR HIDDEN

Is there authority which extends a purchaser's remedies into situations where a vendor did not tell the whole story but at the same time did not actively conceal the problem?

Di Castri in the Law of Vendor and Purchaser (3rd. Ed.) at Page 7-23 writes that:

> "It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of land which may be material to the purchaser's judgment. The purchaser must form his own judgment: caveat emptor. This principle, though much criticized, continues to demonstrate a disconcerting durability.
> ....

But at Page 7-24, he continues:

> A vendor has a duty to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to manifest the likelihood of such danger, for example, where the premises being sold are radioactive."

Paul Pernell, in his book Remedies and the Sale of Land, (Toronto: 1988), takes the position that the vendor has a duty to disclose and not simply a duty not to conceal: [p. 89]

> "Silence and half truths that mislead or that imply something other than the truth may amount to misrepresentation. Where there is a duty to disclose, as in the case of latent defects known to the vendor, it is a misrepresentation to fail to disclose the defect." (emphasis added)

In taking this position, Pernell's statement of the law seems to go further than most of the case law decided to date.

In Rowley v. Isley et al, [1951] 3 D.L.R. 766 (B.C.S.C.) it was not revealed to a purchaser that the property was full of cockroaches. Mr. Justice Coady stated that, "The evidence disclosed the house was in such a condition that no one would willingly live in it." He allowed the purchaser's action for rescission, and stated: [p. 767]

> "The failure to disclose to the plaintiff, however, the true condition of the house, as to the infestation by cockroaches and to the prior fumigation, rendered necessary by reason of the prior excessive cockroach infestation, was, I think, a fraudulent misrepresentation arising from a suppression of the truth."

This passage would seem to indicate that something less than an active physical concealment of the defect can result in rescission. The judgment in this case is less than satisfactory in that it does not disclose the circumstances of the plaintiff's inspection of the property. It is apparent from the judgment that the Court accepted the infestation was a latent rather than a patent defect. The court clearly felt that the vendors had an obligation to disclose this defect which made the property unfit for human habitation.

The Rowley case was considered by Mr. Justice Dubin in McGrath v. MacLean et al (1979), 95 D.L.R. (3d) 144 (Ont. C.A.), where he stated: [p. 151]

> "I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But ... in such a case it is incumbent upon the purchaser to establish that the latent defect was known

> to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth of falsity of any representations made by him ... Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such a danger, eg. the premises being sold subject to radioactivity."

Justice Dubin's closing comment in the above-quoted excerpt proved to be prophetic. In Sevidal v. Chopra (1987), 64 O.R. (2d) 169 (H.C.) the vendors became aware that the residential property which was the subject of the sale was contaminated with radioactive materials. They did not tell the purchasers, and the sale was completed. In an action for damages, the purchasers were awarded the difference between the purchase price and the actual value of the property.

Madam Justice Oyen stated that: [p. 188]

> "I find that the Chopras should have disclosed the discovery of radioactive material on their property, and I find the Chopras were guilty of concealment of facts so detrimental to the Sevidals that it amounted to a fraud upon them ..."

In arriving at the above conclusion, she relied upon the passage in McGrath where Mr. Justice Dubin discussed the vendor's obligation when the defect in question is hazardous to human health.

Hartlen v. Falconer (1977), 28 N.S.R. (2d) 54 (T.D.) is a case in which the vendors knew that the well on a property had a

history of going dry during the summer months. Madame Justice Glube found that the vendors made no representations with regard to the well or the water. She further found that the purchaser did not inquire as to the water situation. The purchaser had simply looked in the well and observed it to have lots of water. She found no reliance by the purchaser on any statements made by the vendors. Indeed, the purchaser testified that he had not been induced by anything that the vendors had said.

Justice Glube found that in these circumstances the vendor was not liable when the water was found to be inadequate. The fact that the purchasers had not been mislead or induced into the contract by anything represented by the vendors was very important in her decision. Had the purchaser been able to provide an example of the vendor's lulling their concerns with regard to the water situation, the outcome might have been more favorable for them. While no comment is made respecting the issue of fitness for human habitation, it is clear that Glube was not dealing with a situation where this was in issue.

CONCLUSION

From the foregoing, we can conclude that much of the law surrounding the issue of defect disclosure is settled law. The rule of caveat emptor will protect vendors where the defect was either patent or unknown to either party. If the vendor actively conceals a problem or misrepresents the qualities of his property in some material way, the courts will act to protect the purchaser from the full impact of the caveat emptor doctrine. This protection will come sometimes in the form of rescission but more often in damages. Where the vendor does not actively mislead the purchaser, the

authorities are less clear but it appears that where there is no inducement or representation the vendor may remain silent unless the defect goes to the property's safety or suitability for human habitation.