

Case Comment:

Property Condition Disclosure Statements - *Gesner v. Ernst et al.* (2007), 2007 NSSC 146, 254 N.S.R. (2d) 284 (S.C.)

By Mike O'Hara

The sale of used housing has always been a fertile source of litigation. While the introduction and routine use of property condition disclosure statements was presumably intended to reduce disputes, there seems to be an increasing number of cases where these statements have actually resulted in litigation¹.

In the recent Nova Scotia case of *Gesner v. Ernst*, released May 18, 2007, Associate Chief Justice Deborah K. Smith dealt with a claim by a purchaser against the vendor and the property- inspector, as well as a third party claim against the previous owner. The case engaged a number of issues, including property condition disclosure statements (also known as property condition statements), fraudulent misrepresentation, negligent misrepresentation, urea formaldehyde foam insulation ("UFFI") warranties, personal/corporate liability issues, and contractual exclusion of liability. While the case should be recommended reading for any real estate practitioner or litigator involved with such issues, I will deal here primarily with the claim against the vendor.

The facts in *Gesner v. Ernst* were not unusual - the defendant, Ernst, sold a home in the Town of Lunenburg to the plaintiff, Gesner. The transaction closed on September 8, 2002. Within weeks of moving in, the plaintiff discovered a number of defects including water damage around the ceiling in the living room and UFFI in one area of the home. There was also a suggestion from an engineer hired by the plaintiff that the house was not structurally sound. Eight weeks after purchasing the property the plaintiff decided she could no longer live there due to the number of problems. She moved out and did not reside in the property between then and the time of the trial in June, 2007.

The Court begins the legal analysis by reference to the traditional common law rule of *caveat emptor* (para. 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.

The decision then turns to a consideration of deliberate or fraudulent misrepresentation, and after reviewing the leading Nova Scotia caselaw on fraudulent misrepresentation from **Charpentier v. Slauenwhite** (1971), 3 N.S.R. (2d) 42 (T.D.), **Grant v. March** (1995), 138 N.S.R. (2d) 385 (S.C.) and **Morash v. Stevens** (1973), 4 N.S.R. (2d) 780 (C.A), Smith, A.C.J, dismisses that part of the claim.

She then goes on to make some general comments about the nature of property condition disclosure statements (para. 54):

A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property...

[Emphasis supplied]

As support for this proposition, Associate Chief Justice Smith relies on the cases of **Arsenault v. Pedersen et al**, [1996] B.C.J. No. 1026, and **Davis v. Kelly**, [2001] P.E.I.J. No. 123. Further on in the decision, she again refers to the **Davis** decision and states (para. 100):

In Davis v. Kelly, [2001] P.E.I.J. No. 123 DesRoches, C.J.T.D. (as he then was) stated at para. 32:

I take the law concerning Property Condition Disclosure Statements to be as stated by Loo J. of the British Columbia Supreme Court in Lind v. MacLeod, [1977] B.C.J. No. 3134, 1997 Carswell B.C. 3046 (B.C.S.C.). Madam Justice Loo held that such statements do not require vendors to warrant properties but rather to state problems of which they are aware. Upon sufficient disclosure the maxim of buyer beware applies as the purpose of the Property Condition Disclosure Statement is to raise questions and concerns rather than to give detailed answers.

[Emphasis supplied]

While not referenced in the *Gesner* case, a similar approach was taken by the Manitoba Court of Appeal in the case of *Alevizos v. Nirula*, [2003] M.J. No. 433, where Scott, C.J.M. provides a very useful summary of the law relating to property condition statements (para. 36):

While, as we have seen, the PCS is a relatively new phenomena in Winnipeg, at least three provinces (British Columbia, Saskatchewan, and Prince Edward Island) have utilized PCS's for some time. From a review of decisions from those jurisdictions, and the one reported in Manitoba decision to date (of which more later), the following general statements can be made:

- 1. Declarations made in a PCS are representations as opposed to terms of the contract...*
- 2. Such statements do not constitute a warranty, rather the purpose of a PCS is to put purchasers on notice, to make purchasers aware of a problem if there is one...*
- 3. Since the purpose of the PCS is to give the purchasers a "heads up" with respect to potential problems, liability will ordinarily be disallowed when the problem in question is obvious...*
- 4. If the Vendor answers the PCS honestly and does not deliberately intend to mislead then liability will not follow even if the representation turns out to be inaccurate...*
- 5. Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal "fill in the blank" form which can have such serious legal consequences when problems subsequently develop in a real estate transaction. The wisdom of maintaining in use a form fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.*

The Nova Scotia Court in *Gesner* then considers the relevant time frame to be applied to the answers provided in the property condition disclosure statement. Smith, A.C.J. states (para. 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 the 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.***

[Emphasis supplied]

This is a significant finding which heretofore may have been unclear to practitioners and realtors involved in real estate conveyancing. In the *Gesner* case, this distinction took on particular importance with respect to the evidence that work had in fact been done in the past on the roof, around the flashing, and the chimney. Smith, A.C.J., notes that in Section 6 of the property condition disclosure statement, Ms. Ernst answered “no” to the question in 6(B), “Are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls?” And in question 6(C), she answered “yes” to the question, “Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the property if less than five years)?” and added the words, “new roof”. The Court states (para. 80):

*In my view, question 6(B) of this form (“Are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls?”) was asking Ms. Ernst **for her knowledge of the present state of the property as of the date that she signed the document (November 26, 2001).** Pursuant to Clause 13(b) of the Agreement of Purchase and Sale she warranted that the information given in the Property Condition Disclosure Statement was complete and current to the best of her knowledge, **as of the date of acceptance of the agreement (July of 2002).** In relation to Question 6(B) she was therefore confirming that **as of July of 2002**, she was unaware of any existing structural problems, unrepaired damage, leakage or dampness with the roof or walls. Further, Ms. Ernst agreed to advise Ms. Gesner of any changes that occurred in the condition of the property between the date of the acceptance of the agreement and the closing. **In my view, Ms. Ernst was not required, when answering question 6(B), to disclose past or repaired problems with leakage or dampness. Past problems were dealt with in question 6(C).***

[Emphasis supplied]

Smith, A.C.J. continues (para. 99):

It is important to note that Ms. Ernst answered “yes” to question 6(C) of the Property Condition Disclosure Statement. She put Ms. Gesner on notice that repairs had been carried out over the past five years to correct leakage or dampness problems. Despite being put on notice, Ms. Gesner did not make any inquiries of Ms. Ernst concerning the answer to question 6(C) of the Disclosure Statement. In my view, she cannot now complain that further details were not provided to her.

The Court then goes on to apply this approach to all of the complained of matters arising from the property condition disclosure statement and dismisses each in turn. And, while the legal analysis cannot be doubted, the concern remains whether the nature of property condition disclosure statements makes it more likely, not less likely, that misunderstandings will arise and litigation will ensue. This type of concern was raised by the Manitoba Court of Appeal in the *Alevizos* case and I

end this piece by again quoting from that decision, and the following concurring comments of Kroft, J.A. (paras 45-48):

My purpose in writing these brief separate reasons is to emphasize an aspect of this case which should be of particular interest to members of the public who are buyers or sellers of homes and to the agents and lawyers who represent them. I am referring to the risks, well demonstrated here, which are inherent in the recently introduced “form” document described as a property condition statement or PCS.

The Chief Justice, in para. 36 of his judgment, sets forth five “general statements” which describe the nature of the PCS. He explains both the intent and the difficulties related to its use. In his fifth statement, he observes that based on the experience of other provinces, the form creates “a ripe ground for litigation”. He attributes at least part of the problem as being due to the frailties of a practice which encourages important representations about the condition of real property to be asked and answered on a short pre-printed form comprised of standard questions and answers which are given by filling in boxes and blanks.

*This judgment should, in my view, be taken as warning about the routine use of the PCS. The purchase and sale of a home is for many people the most significant business transaction they will ever enter into. Representations as to the condition of the property are inevitably going to be requested and given. **I do not believe that these concerns are ever going to be safely dealt with by filling in the blanks on a short form carried in the real estate agent’s briefcase with his or her other supplies.***

***It is my concern that the use of the PCS is likely to increase the number of disputes in circumstances similar to those which existed here.** That view causes me to emphasize the suggestion of Chief Justice Scott that the continued use of the PCS “should be addressed by lawyers and real estate agents alike.” A more careful and traditional way of making important representations about the condition of property is surely better than incurring the risk of costly and uncertain litigation.*

[Emphasis supplied]

It is this writer’s observation that property condition disclosure statements have indeed increased the number of disputes ending up in court. Perhaps, those who are regularly involved in real estate conveyancing should address these issues, as has been suggested by Justices Scott and Kroft.

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1. Recent Nova Scotia Supreme Court cases which have considered property condition disclosure statements include: *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211 (S.C.), aff’d at

(2001), 2001 NSCA 24, 193 N.S.R. (2d) 1 (C.A.); **Dupere v. Evans** (2006), 2006 NSSC 4, 242 N.S.R. (2d) 52 (S.C.); **Lang v. Knickle** (2006), 2006 NSSC 177, (unreported July 21, 2006, S550/25); **Thompson et al. v. Schofield et al.** (2005), 2005 NSSC 38, 230 N.S.R. (2d) 217 (S.C.); **Gay v. Whelan** (2006), 2006 NSSC 10, 240 N.S.R. (2d) 156 (S.C.). As well (perhaps due to the increased monetary jurisdiction of \$25,000) there have been a number of such claims in the Small Claims Court including: **Boychuk v. Butler** (February 27, 2007), 2007 NSSM 10; **Reeves v. Sherwood** (October 19, 2007), 2007 NSSM 62; **Moffatt et al v. Finlay et al** (October 30, 2007), 2007 NSSM 64; **Lewis v. Hutchinson et al.** (January 16, 2007), 2007 NSSM 4; **Lawlor v. Currie** (September 26, 2007), 2007 NSSM 60; **Allen v. Thorne** (July 14, 2007), 2007 NSSM 31; **Pettipas et al. v. Dorion** (January 30, 2006), 2006 NSSM 35; **Cooper v. Wilkins** (March 30, 2007), 2007 NSSM 43; **Brisbin v. Gilby** (November 15, 2007), 2007 NSSM 66.