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CASE COMMENT: Thompson et al. v. Schofield et al., 2005 NSSC 38 (CanLII)

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"This case involves a common situation..." observes the Honourable Justice Warner as he begins his decision. A family buys a home and within days significant problems are discovered which were not disclosed during negotiations, in the contract or after the contract was signed.

In 2001, Lynwood Thompson and Sherry Martin purchased a home in New Minas, Nova Scotia (the plaintiffs). Since flooding is a common problem in the subdivision where the home is located, Mr. Thompson and Ms. Martin carefully reviewed the Property Condition Disclosure Statement with respect to water problems. They also conducted an inspection of the property, but the inspector was unable to assess the basement as it was 90 percent covered in drywall and where drywalled, the view was further impeded by the defendant's belongings.

Fred Schofield and Karen White (the defendants), completed the standard property condition disclosure statement, which was incorporated into the Agreement of Purchase and Sale. The defendants denied knowledge of water problems with respect to the home and claimed no repairs were affected to the plumbing system in the previous five years.

Despite their careful review of the property and the contractual assurances, the plaintiffs experienced significant and recurring water problems in their basement, beginning within two days of closing. The first incident involved the couple's daughter awaking in her basement bedroom to find herself covered with thousands of earwigs. When the walls were torn away, water damage was noted in the walls and floor. A large crack was also discovered in the basement wall when the plaintiffs cleaned after yet another flood. The basement was equipped with a sump pump, but the plaintiffs added two more pumps in the basement to attempt to reduce the flow of water. Unfortunately, the water problems persisted.

The learned trial judge addressed these issues: breach of contract, specifically breach of collateral warranty and misrepresentation – negligent misrepresentation or alternatively, fraudulent misrepresentation. As to whether the structural defect was patent or latent, the parties agreed it was a latent defect. Indeed, the defendants argued the latent nature of the defect to support their claims that the water problems were unknown to them.

The learned trial judge ruled the defendants were liable to the plaintiffs both for negligent misrepresentation and breach of contract. With respect to the evidence, the learned trial judge preferred the testimony of the plaintiffs' witnesses over the evidence of the defendants' in virtually every area.

Justice Warner penned a decision that providesa summary of the law with respect to breach of contract and isrepresentation in real property transactions.

To prove negligent misrepresentation a plaintiff must prove five elements (see paragraph 24):

1. There must be a duty of care between the parties;
2. the representation must be untrue, inaccurate, or misleading;
3. the person making the representation must have acted negligently when they made the misrepresentations;
4. there must be reliance upon the representations by the person; and
5. the person who relied on these representations must have been harmed, i.e., there must be damages arising.

With respect to breach of contract, the statements in the property condition disclosure statement were incorporated into the Agreement of Purchase and Sale. The statements in the contract amount to a collateral warranty. If the statements made by the defendants in the property condition disclosure statement are found to be negligent or fraudulent, are made prior to entering into the contract, are material to the contract, and are relied upon by the plaintiffs, then this constitutes a breach of the contract. Justice Warner had no difficulty in this case finding there was indeed a breach of contract. In reaching that conclusion he referred to the defendants' testimony at paragraph 45:

> The defendants were obliged to disclose any plumbing repairs and upgradings they were aware of. By his own admission, Mr. Schofield did not disclose the repairs to the …pipes,…nor did he disclose the replacement of the sump pump. …By his own admission Mr. Schofield said he was aware of the crack….

The surprising feature in this decision is the fact that despite Justice Warner's careful analysis of the law of fraudulent misrepresentation (paragraphs 20 to 23) and his findings of fact with respect to the veracity of the defendant's knowledge of water problems prior to signing the contract, he did not find the defendants liable to the plaintiffs for fraudulent misrepresentation. In reading this decision it seemed Justice Warner totally disbelieved the defendants' evidence but ultimately, he was not prepared to rule that Mr. Schofield intentionally lied to the plaintiffs. At paragraph 46 the learned trial judge says:

> Even if this court accepted that the defendants thought that the basement water problems were caused by leaking pipes and that Mr. Schofield did not intentionally, or therefore fraudulently, misrepresent the condition of the basement wall which had a crack, it was, at a minimum, negligent to ignore the advice of Mr. MacLeod and not disclose their awareness of the crack, and to fail to disclose the repairs they carried out to the pipes that they say were the cause of the flooding and dampness. The Court has no difficulty finding that the defendants were at least negligent in misrepresenting their lack of knowledge of a structural problem that resulted in leakages almost immediately after the plaintiffs bought the Residence.

Caveat Emptor, or buyer beware, does not apply if fraud, mistake or misrepresentation are proven. Additionally a buyer may protect their interests by contract. Another important point to remember is that "…silence could constitute negligent misrepresentation." (paragraph 26)

The plaintiffs were wholly successful in their claim but without the finding of fraudulent misrepresentation, one wonders if the damages and costs award was sufficient to allow this couple to actually repair their home. The learned trial judge refers to the "impecuniosity" of the plaintiffs at paragraph 51. Nevertheless, the decision confirms that vendors have the duty to disclose all known defects or problems, no matter how trivial they may appear at first blush, and silence on material matters will not serve to negate the vendor's duty to the purchasers.