In the Provincial Court of Alberta

Citation: Connie v. Sampson, 2009 ABPC 61

Date:20090403
Docket: P0790104182
Registry: Calgary

Between:

Jeffrey Q. Connie and
Wayne C. Hendrickson

Plaintiffs

- and -

Jerry Sampson and
Jennifer McPhillamey

Defendants

Reasons for Judgment of the Honourable Judge B.K. O'Ferrall

Introduction:

[1] This claim arose out of a real estate transaction wherein the Plaintiffs, as purchasers, bought a 1956 home in Thorncliffe in northwest Calgary from the Defendants, as sellers. Within seven days of taking possession, the Plaintiffs experiences serious flooding in the basement . A year earlier, the Defendant-sellers, who had only owned the house for a year, experienced similar flooding in the basement of the home as a result of which they re-contoured their lot and installed a sump pump.

[2] The Plaintiff-purchasers sue for the cost of cleaning up after the flood, fixing the flood damage and "waterproofing" the home's concrete foundation. The Plaintiffs seek these costs on the basis the Defendant-vendors failed to disclose a defect that might render the property potentially dangerous or unfit for habitation. The Plaintiffs' costs exceeded $25,000.00, the limit of this court's jurisdiction; but the Plaintiffs abandoned that part of their claim which exceeded the financial jurisdiction of the court.

Facts:

[3] The circumstances surrounding this real estate transaction were as follows. The purchasers were the two Plaintiffs, Jeffrey Connie and Wayne Hendrickson. Mr. Hendrickson was to live in the basement and the upstairs was to be rented. Although he was one of the purchasers, the Plaintiff Jeffrey Connie lived elsewhere with his wife. Mr. Connie never did see the house being purchased prior to purchase. The Plaintiff Wayne Hendrickson viewed the home once for about thirty to forty minutes, along with Mr. Connie's wife and the Plaintiffs' realtor, prior to making an offer. The viewing took place Friday, February 9, 2007. The next day, Saturday, February 10, 2007, the Plaintiffs offered to purchase the property and their offer was accepted. The transaction was done through realtors. The Plaintiff-purchasers never met nor spoke to the Defendant-sellers prior to making their offer to purchase.

[4] The Plaintiffs' offer was subject to a satisfactory home inspection, but a home inspection was never done. The condition was waived. The Plaintiffs testified that they relied instead on a home inspection report which had been done for the Defendants a year prior and on the Defendants' response to an inquiry they made about what, if any, modifications had been made to the house since that inspection report. It was an express term of the real estate purchase contract that the Defendants would supply a copy of the prior home inspection report to the Plaintiffs. The home inspection report was e-mailed to the Plaintiff Jeffrey Connie several hours after the Defendants accepted the Plaintiffs' offer to purchase the home. The Plaintiff-purchasers had also requested a list of everything the Defendants had done to the house since the inspector's report. That is, on instruction from his clients, the Plaintiffs' realtor asked the Defendants' realtor to have the Defendants identify any work they had done to the home since they purchased the home and any work they had done as a result of what was contained in the home inspection. Along with the prior inspection report, the Plaintiffs did receive a list of things that had been done to the house by the Defendants. The installation of a sump pump in the basement and the re-contouring of the lot were not on that list, notwithstanding that the sump pump had been installed just prior to the house being listed for sale and the re-contouring had taken place the previous summer following the flooding incident.

[5] The home inspection report which the Defendants provided the Plaintiffs pursuant to the real estate purchase contract indicated that the home inspector would and did inspect for signs of abnormal or harmful water penetration into the building. He reported none. Furthermore, the inspection report indicates, in connection with some visible staining of the linoleum in the basement bathroom, that the home inspector employed a moisture meter and that the moisture meter *"did not indicate an active leak"*. The home inspection report was prepared in January of 2006, prior to the Defendants having experienced serious flooding in the Spring of 2006.

[6] Following the walk-through by the Plaintiff-purchasers a year later, possession was given April 28, 2007. During that pre-possession walk-through on April 27, 2007, the Plaintiffs discovered the sump pump under a wardrobe cabinet which the sellers had left behind when they vacated the property. The Plaintiffs had their realtor ask the Defendants' realtor about the presence of a sump pump. The advice they were given was that the Defendants had been advised by a neighbour that it would be a good thing to install. There was still no disclosure of the prior flooding incident. Neither was there any disclosure of the re-contouring of the yard. The Plaintiffs' realtor

asked the Defendants' realtor if there had been a water issue and was told no. The Defendants' realtor could not recall this conversation. However, the Plaintiffs' realtor's recollection of this inquiry was clear and unequivocal and was corroborated by other evidence.

[7] Less that a week after moving in, the Plaintiff Hendrickson noticed water in the basement. According to the Plaintiffs, the water in the basement was up to their ankles. The flooding was so severe the Plaintiffs had to have the water pumped out mechanically; they could not mop it up. Indeed, even repeated use of the Plaintiff Hendrickson's 60-litre shop vac was unable to do the job. A restoration company was called immediately and attended that day to the clean up. Then in early June, when further rain fell, the Plaintiffs experienced another basement flood. Later in June, there was more rain and more flooding.

[8] Within a day or two of the first flood, portions of the drywall were removed. It was at that point that the Plaintiffs discovered what was thought to be mold in their insulation and on the backside of portions of the basement drywall. There was also black staining on some of the perimeter floor plates which comprise a part of the basement development framing. The floor plates are 2x4's or 2x2's laid on the perimeter of the floor of the basement where the walls meet the floors and are a part of the basement development framing.

[9] Ultimately, it was determined that water had leaked into the basement between the concrete footing and the concrete basement wall, as well as through fissures created by rusting snap ties in the concrete wall of the basement. Apparently, when the house was originally constructed and the concrete poured for the basement walls, lengths of steel reinforcement bars were used to hold the wooden forms together. After the forms had been removed and the concrete hardened, the protruding lengths of the reinforcement bars were simply snapped off. The re-bar embedded in the concrete remained, but was exposed to the moisture in the soil. Over time, the re-bar corroded and fissures or conduits were created from outside the basement wall to the inside the basement wall. I was shown a photo of water flowing out of one of these snap tie holes. In today's construction methods, the re-bar is apparently removed and the holes immediately filled with a concrete epoxy.

[10] No one, not even the Plaintiffs, suggests that the Defendants knew their snap ties had corroded. It was only after removing the drywall on the west wall of the developed basement that it become apparent that some of the water had entered the home through one or more of the snap tie holes. Other water came into the house between the walls of the basement and the concrete flooring. Again, there was no evidence that the Defendants knew exactly how the water had entered their house in the Spring, 2006 flooding incident; although they were advised by the foundation expert they hired to install the sump pump that the water may have entered through a "cold joint" in the concrete between one of the basement walls and its footing.

[11] Outside the house, only after the dirt and fill along the entire west wall of the basement had been excavated did it become apparent that there was no weeping tile installed. This was apparently not entirely surprising because weeping tile was not a Building Code requirement in 1956. But the Defendants could not have known that none of their predecessors-in-title had not installed weeping tile.

[12] The Plaintiff spent a great deal of time, effort and expense repairing the flood damage and "waterproofing" the foundation of the house. Waterproofing the foundation included, among other things, completely excavating the fill along the west side of the house to the base of the footings. The snap tie ends were all sealed. The joint between the basement wall and the footing was sealed with a bead of caulking. A layer of tar was applied to the concrete footing and the exterior of the basement wall to ground level. A plastic seal was then installed on that exterior wall. Drainage tile was installed. Drains were installed in all the window wells and tied into the foundation drainage tile. There were other things done as well; but suffice it to say the waterproofing involved a lot of work. The cost of this work was estimated to be roughly $7,000.00.

[13] The interior, where the flood waters caused extensive damage, also underwent significant water extraction, clean-up, demolition and re-construction. Much of the work was done by the Plaintiffs themselves, roughly 1,000 hours of their time between May 3, 2007 and October 6, 2007. At an hourly rate of $20.00 per hour, the Plaintiffs' valued their time at $20,000.00. The Plaintiffs' out of pocket costs for the tools, supplies and materials for the interior work in the basement, as well as a bit of landscaping, totalled another $13,000.00.

[14] The Plaintiff Hendrickson, who had moved his possessions into the basement upon taking possession, testified that he had roughly $6,000.00 worth of furniture, clothes and computer irreparably damaged in the flood. In all, the Plaintiffs gave evidence of anywhere from $35,000.00 to $45,000.00 in damages. They only sued for $25,000.00, the limits of the Provincial Court's jurisdiction.

The Argument:

[15] Much authority was provided to me by the Defendants' counsel on the principle of *caveat emptor* ("Let the buyer beware!") and the distinction between latent and patent defects, latent defects being those which are hidden and patent defects being those visible upon reasonable inspection. Defendants' counsel argued the law which holds that a vendor's duty is to disclose only those latent defects of which he or she is aware and that the purchaser's opportunity to inspect prior to purchase constitutes his or her protection. The Plaintiffs, who were unrepresented, relied primarily on the terms of the residential real estate purchase contract.

The Real Estate Purchase Contract:

[16] Under the heading *"Warranties and Representations"* in the real estate purchase contract, there were the ususal sellers' representations and warranties. The relevant representation and warranty, upon which the Plaintiff relied, was Clause 6.1(h), which stated:

> *"6.1 The Seller represents and warrants to the Buyer that*
> *(h) except as otherwise disclosed, the Seller is not aware of any defects that are not visible and that may render the Property dangerous or potentially dangerous to occupants or unfit for habitation."*

There were no disclosure of the prior flooding incident by the Defendant-sellers.

[17] Under the heading *"Additional Terms"*, in Clause 7.6, there was a covenant by the Defendant-sellers to supply the buyers with a copy of a home inspection report the Defendants had commissioned in January of 2006, a year prior. That report was put in evidence before me, although the home inspector who prepared it was not called to give evidence. As indicated, the home inspector's report stated that the home inspector considered one of his tasks to be to *"report signs of abnormal or harmful water penetration"* into the building's foundation if he found such signs. The home inspector reported none.

[18] Under the heading *"Conditions"* in the real estate purchase contract, there was an inspection condition inserted expressly for the Plaintiff-purchasers' benefit. To quote from Clause 8,

> *"8.1 The Buyer's Conditions are:*
> *(b) Property Inspection Condition*
> *As per attached Property Inspection Schedule, this contract is subject to the Buyer's approval of a property inspection before 9 p.m. on February 16, 2007."*

Clause 8.4 provided that the purchaser contract would be at an end if this condition wasn't met or waived. The condition was waived. The Plaintiff-purchasers did not have a property inspection done, relying instead on the prior home inspection report and the Defendants' answers to their question about work done on the house subsequent to the home inspection report.

Factual Issue: Was there a latent defect which might render the property unfit for habitation?

[19] The factual issue to be resolved is whether the prior flood occurrence was a "defect" which was not visible and might render the property potentially dangerous to occupants or unfit for habitation as contemplated by Clause 6.1 (h) of the real estate purchase contract. If so, the prior flooding incident would need to be disclosed.

[20] Clearly, the presence of water in the basement, if not a defect, is certainly evidence of a defect. A defect is defined as a shortcoming or a failing or as the lack something essential. Water in a basement, absent a ruptured pipe or a spill or some other explanation, is indicative of a defect in the integrity of the building envelope, a lack of something essential, to employ the words of the definition.

[21] Secondly, a prior flooding incident once cleaned up is *"not visible"*, to use the words of Clause 6.1 (h) unless the prior flooding left visible signs of its occurrence. Much was made of the fact that there was a sump pump in the basement when the Plaintiff Hendrickson viewed the house, the implication being that the presence of a sump pump was a visible sign of a previous flooding incident. Two things I would say about that. First, there was some evidence that the Defendants may have concealed the sump pump under a self-standing wardrobe closet. But even if the Defendants were not guilty of concealing the sump pump, the fact that the sump pump could have

been observed upon closer inspection cannot be taken as notice of a prior flooding incident or of a particular vulnerability to flooding. Many home owners have sump pumps installed as a precaution; and in this case, when the sump pump was finally observed by the Plaintiff-purchasers on their pre-possession walk-though, the Defendants' explanation of its presence was simply that. That is, the explanation was that the sump pump was installed as a precaution on the advice of a neighbour. Significantly, the Defendants' explanation of the sump pump's presence did not include disclosure of the prior flooding incident.

[22] Finally, under Clause 6.1(h) of the real estate purchase contract, the defect must be one which *"may render the property dangerous or potentially dangerous to occupants or unfit for habitation"*. Counsel for the Defendants argued that the water damage did not affect the fitness of the property for habitation because the Plaintiff continued to reside in the basement suite while it was being cleaned up and re-developed. According to His Honour Judge Ingram in Sloan v. Black Sea Homes Corp. [2007] A.J. No. 1025, the Ontario courts have extended *"uninhabitability"* to *"any loss of use, occupation or enjoyment of any meaningful portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole"*: see Swayze v. Robertson [2001] O.J. No. 968. Furthermore, a covenant by a lessee to *"put the premises into habitable repair"* has been held to bind the lessee to put the premises into such a state that they may be occupied, not only in safety, but also in reasonable comfort and for the purpose for which the premises were leased: Miller v. McCardell 19 R.I. 304, 33 A 445.

[23] The evidence disclosed that the Plaintiff Hendrickson was forced to move out completely for a couple of weeks. Admittedly, his evidence also disclosed that for most of the three or four months it took the Plaintiffs to restore the basement Mr. Hendrickson resided in the basement, albeit without a kitchen and without what the Rhode Island case cited above characterized as reasonable comfort. Nor did Mr. Hendrickson occupy the premises for the purpose for which they were intended during that time. Instead he occupied them so that he could attend to the required restorations, a live-in renovator, so to speak.

[24] So, as a finding of fact, I find that the basement suite was not fit for habitation as defined by the authorities cited above. With the presence of mold, it may also have even been *"potentially dangerous to occupants"*; but I make no finding in that regard because there was no expert evidence given on whether or not the *"black stuff"* was mold and, if so, whether it was potentially dangerous.

[25] So, what we have evidence of a defect, in the form of water in the basement, which was not visible, in the sense that there was no water in the basement when the Plaintiffs inspected it. We also have a defect, which if it manifested itself in the form of huge volumes of water in the basement, would render the premises unfit for habitation. But was the Defendants' failure to disclose this defect actionable?

Merger:

[26] Defendants' counsel argues that in the context of real estate transactions, the general rule of law is that the closing of the transaction will extinguish contractual rights that existed prior to the closing and the principle of *caveat emptor* applies. She cites His Honour Judge Scott's decision in

Sewak Gill Enterprises v. Brunette [1999] A.J. No. 1165 at Paragraph [16]. In that paragraph, Judge Scott quotes this comment by Chief Justice Howland of Ontario in *Di Cenzo Construction Co. Ltd. V. Glessco and the City of Hamilton* [1978] 90 D.L.R. (3d) 127 at p. 139:

> *"After the closing of the transaction, a purchaser is generally restricted to the covenants, conditions and warranties set forth in the conveyance. Apart from the conveyance, relief can only be obtained in the case of (1) fraud, (2) a mutual mistake resulting in total failure of consideration or a deficiency in the land conveyed amounting to error* in substantialibus, *(3) a contractual condition, or (4) a warranty collateral to the contract which survives the closing....Apart from these exceptional cases,* caveat emptor *applies."*

[27] The contract in this case was the January 2006 "standard" form of Residential Real Estate Purchase Contract prescribed by the Alberta Real Estate Association. It contains contractual provisions which expressly kept alive contractual rights that existed prior to closing and, as we shall see in a moment, some of the provisions of the real estate purchase contract qualify, to some extent, the principle of *caveat emptor*. That is, the sellers expressly warranted that they were not aware of any defects that were not visible which might render the property dangerous or potentially dangerous to occupants or unfit for habitation (Clause 6.1(h)). And the contract expressly provided, in Clause 6.3, that *"the representations and warranties in this Contract may be enforced after the Completion Day, provided that any legal action is commenced within the time limits prescribed by the Limitations Act (Alberta)".*

Patent and Latent Defects:

[28] Defendants' counsel goes on to apply the law of patent and latent defects to the instant fact situation. To the extent that those principles are contained or expressed or agreed to by the parties in Clause 6.1(h) of the real estate purchase contract, I have no quarrel with that application. To the extent that Clause 6.1(h) has not modified that law, I have no quarrel with that application. But it is critical in reviewing that jurisprudence to keep in mind what the Plaintiff-sellers in this case expressly represented and warranted that they were not aware of any defects which were not visible and which might render the property unfit for habitation.

[29] For example, in *Sewak Gill Enterprises v. Brunette*, cited above, there was no mention of there being a clause similar to Clause 6.1(h) in the real estate purchase contract. Nor in *Sloan v. Black Sea Homes Corporation*, cited above, which the Defendants also relied upon. And in *Kapicki v. Bendoritis*, [2005] A.J. N6. 1180 (ABPC), also cited by the Defendants, there was disclosure of the prior flooding incident which arguably makes that case distinguishable. The seller, Tillie Bendoritis, was asked if she was aware of any past or present flooding or drainage problems and her answer was yes. Indeed, she went on to provide a written description of the prior flooding incident as well as a description of the steps she took to avoid further flooding.

Is Silence Actionable?

[30] Having distinguished these cases, I must nevertheless deal with Judge Ingram's comment in both *Kapicki v. Bendoritis* and *Sloan v. Black Sea Homes Corporation*, which the Defendants' counsel relied on, that authorities which have held mere silence to be actionable as fraud have extended liability for economic loss unduly beyond the scope of the law:

> *"In my view, knowledge and non-disclosure, without more, is ... not fraud; knowledge and concealment is."* (Paragraphe [22] of *Kapicki v. Bendoritis*)

[31] My view is that silence (knowledge and non-disclosure) is actionable where one of the parties represents and warrants that he has no knowledge (i.e., that he is not aware of any defect of the type contemplated by Clause 6.1(h) of the real estate purchase contract). And I don't see my view as being in conflict with that of Judge Ingram. Judge Ingram stated that knowledge and non-disclosure, without more, is not fraud. In the case at bar, there is more. There is the express representation and warranty that the vendor is not possessed of the relevant knowledge. When one has a positive obligation to disclose one's knowledge, silence may very well be actionable.

Did the Defendant-sellers have Knowledge of the Defect?

[32] There are therefore two pre-conditions to liability in these types of cases. The first is the presence of a defect of type contemplated and I have already found that there was such a defect present in the form of a substantial amount of unexplained water in the basement indicating a lack of integrity in the building's envelope. The second pre-condition is that the vendors must have knowledge of that defect.

[33] With respect to the second pre-condition, clearly the Defendants were aware of the prior flooding incident. That much was admitted. Could it be said that they had reason to believe that the defect had been rectified? The answer to that question is no because they were advised by the foundation people who installed the sump pump that the sump pump might not prevent further flooding. The advice was that weeping tile might be required if further flooding took place.

[34] Furthermore, the evidence disclosed that the Defendants had asked their realtor whether they should disclose the prior flooding to the Plaintiff-purchasers. They were advised that they need not. Prior to giving that advice, the Defendant's realtor, who was relatively inexperienced, sought the advice of the manager of the brokerage for which she worked. The manager apparently advised her that the prior flooding need not be disclosed. And that is the advice the Defendants' realtor passed along to her clients.

[35] It was explained that the basis for that advice was that the problem had been rectified. But there was no basis for believing the problem had been rectified. Not only did the Defendants and their realtor not know whether the problem had been rectified, they had reason to believe it might not have been rectified. The Defendants' realtors appear to have been of the mistaken view that so long as the defect had been addressed, it need not be disclosed. Addressing a latent defect and hoping it has been rectified is not the same thing as having a good, sound reason to believe that the

defect had been rectified. And, of course in this case, both the Defendants and their realtors knew that the defect may not have been rectified or remedied. They knew that weeping tile might be required to fully address the flooding problem. The Defendants were clearly advised of that possibility by the foundation expert they consulted in October of 2006 in connection with their basement flooding experience.

[36] The Defendants' realtor testified, *"Obviously, if we were asked directly about the flooding, we would have told the truth."* Defendants' counsel argued likewise, suggesting that, absent an inquiry by the prospective purchasers, her clients had no duty to voluntarily disclose past water damage to the Plaintiffs. In my view, Clause 6.1(h) of the real estate purchase contract provides otherwise. When one expressly warrants and represents that one knows of no defects, one cannot take the position that one need only disclose if asked. Besides, I question whether the Plaintiffs would have been told the truth if they inquired, because when the Plaintiffs did inquire, albeit belatedly, upon discovering the sump pump during a pre-possession walk-through, they were still not told that there had been a prior flooding incident. But, whether or not the plaintiffs inquired, the Defendants had a positive obligation to disclose latent or invisible defects of the type contemplated by Clause 6.1(h) prior to making the representation they made in the real estate purchase contract. The Defendants themselves thought they might be obliged to volunteer that information; but they were advised otherwise by their realtor.

Was the Defect a Patent (Discoverable) Defect?

[37] Defendant's counsel argued that the seepage problem was one which could have been easily ascertained upon a proper inspection. In other words, the defect was a patent one. The argument is belied by the fact that, roughly a year earlier, the Defendants and their home inspector did not identify the defect even though that home inspector expressly set out to inspect for signs of abnormal or harmful water penetration into the building envelope. The argument is also belied by the fact that the foundation people hired by the Defendants to install the sump pump just prior to sale were unable to provide any assurance that the sump pump would eliminate further flooding. The argument is further belied by the fact that it wasn't until it rained that the problem manifested itself. And, finally, the argument is belied by the fact that it wasn't until the basement framing and drywall was ripped out that the cause of the problem was discovered. Ripping out drywall is not something a purchaser's home inspector is ordinarily permitted to do prior to closing.

Purchasers' Failure to Have a Home Inspection Done:

[38] Defendants' counsel cites *Franks v. Golunski* [2005] A.J. No. 164 (ABPC) as authority for the proposition that a purchaser's failure to carry out a reasonable inspection of the property can be fatal to a claim against the seller for failure to disclose. In the *Golunski* case, the purchaser, a drywall installer, sued for the cost of repairing what he argued were latent defects in a home purchased from the defendant. There was rot in the walls of a basement shower; and while the purchaser was in the process of replacing that rotten drywall, a basement drain pipe exploded blowing the hatch cover off. Apparently the plumbing was not properly vented either. Assistant Chief Judge Scott, as he then was, dismissed the purchaser's action. He dismissed it on the basis that the purchaser did not carry out a reasonable inspection. But a close reading of the Judge Scott's

reasons show that he was of the view that *"had a thorough inspection been carried out,... the defects would have been detected...."* In the case at bar, I was not of that view for the reasons given above. The failure to secure a professional home inspection is only fatal if that home inspection would have revealed the problem. Secondly, Judge Scott in *Golunski* also held that there was no evidence that the alleged defects were known to the seller or should have been known by her. Again, that makes the *Golunski* case distinguishable from the case at bar. The Defendants were well aware of the basement flooding.

[39] Also, in *Pitt v. Llewellyn* [1992] A.J. No. 186, cited by the Defendants, where the failure to obtain a home inspection was held to be fatal, Provincial Court Judge Moore, as he then was, found that the defect (an improperly vented furnace) was one discoverable upon reasonable inspection. Again, that finding makes the *Llewellyn* case distinguishable.

Duty to Disclose Past, as Opposed to Current, Problems:

[40] As indicated previously, silence (i.e., knowledge and a failure to disclose that knowledge) may indeed constitute concealment where there is a positive contractual obligation to disclose. There was such an obligation in this case. It arose out of the contractual warranty or representation by the sellers that they were not aware of or knew nothing of any defects which were not visible and which might render the property unfit for habitation.

[41] Counsel for the Defendants cited *Curtin v. Blewett* [1999] B.C. J. No. 2469 (BCSC) for the proposition that where the duty to disclose is framed in the present tense, there is no need to disclose past problems; but surely that proposition, if it be one, cannot apply to a warranty that contains phrases such as *"defects... that may render the property...unfit for habitation"* or *"defects...that may render the Property... potentially dangerous to occupants"* (underlining added). In other words, the obligation is to disclose possibilities of which the sellers are aware if those possibilities are potentially dangerous or if they might render the property unfit for habitation. The duty is a lot broader than one of simply having to disclose defects which are currently manifesting themselves. Current awareness of past problems may very well be required. And I do not see this as imposing an impossibly high burden on vendors.

No Knowledge of the Specific Defects:

[42] With respect to the argument that the Defendant-sellers had no knowledge of the specific defects in the west wall of the home (namely, the unplugged gap between the basement wall and the concrete footing and the snap tie fissures), I refer back to my finding that the defect which ought to have been disclosed was the substantial amount of water in the home's basement in the Spring prior to the Plaintiffs' purchase which, in the absence of a pipe break or spill or some other explanation, was clearly indicative of a lack of integrity in the building envelope of the home. And there was evidence that the Defendants were advised of the possibility of a lack of integrity in the "cold joint" between the foundation walls and footings.

Damages:

[43] So, in the result, I find that the Defendants breached Clause 6.1(h) of the real estate purchase contract and thereby made a actionable misrepresentation when they failed to disclose the prior flooding incident. I must now address the question of what damage flowed from that breach. To quote Judge Ingram in *Sloan v. Black Sea Homes Corporation*, cited above:

> *"Damages are problematic as they must be assessed not on the basis that the Plaintiffs are entitled to the cost of obtaining what was bargained for, but on the basis of the difference between the price paid for the premises and its actual value at the time of purchase.... As is usual in cases of this kind, I have no direct evidence of the value of the property at the time of purchase. In these circumstances, courts often, in effect, assume that the value was the price less the cost of putting the house into the condition which the Plaintiffs believe it actually was. On this basis I allow the cost of correction of the water problem...."*

[44] I too had no direct evidence of the value of the home in its leaky state. I did have evidence of the cost of correcting the problem, as well as evidence of the damages which the Plaintiffs suffered as a result of flooding which occurred after closing. But, as counsel for the Defendants in her Brief reminded me, the Defendants were not given the opportunity to address the issue of damages in final argument due to a shortage of time and had asked for that opportunity if liability were found. I have now found liability; so the Defendants will now be given that opportunity.

[45] In this regard, I would point out that I am truly without submissions or authorities on the issue of damages and I do have concerns about what damages ought to be awarded. For example, is the appropriate measure of damages only those which could be said to have been contemplated by the parties at the time of contracting? Or do the principles of reasonable forseeability apply as in the case of damages arising out of a negligent misrepresentation? Finally given the steps the Plaintiffs took to rectify the defects in the house, does the issue of betterment arise? There may, of course, be other issues.

[46] I would therefore propose to give the Defendants 30 days in which to address the issue of damages, with another 30 days for the Plaintiffs to respond. I would also remind the parties that, having found in the Plaintiffs' favour on the issue of liability, settlement of the issue of damages without intervention by the court is always an option open to the parties.

Heard on the 6th day of June, 2008.
Dated at the City of Calgary, Alberta this 3rd day of April, 2009.

B.K. O'Ferrall
A Judge of the Provincial Court of Alberta

Appearances:

Jeffrey Q. Connie
Wayne C. Hendrickson
Plaintiffs

Christa Milne
Counsel for the Defendants