



Real Estate News

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Sellers Must Follow Through With Their SPIS

In *Usenik v. Sidorowicz*, 2008 CanLII 11373 (ON S.C.) the Buyer obtained a Seller Property Information Statement (“SPIS”) prior to making her offer to purchase. The Sellers had reported that the property was not subject to flooding and that they were not aware of any moisture and/or water problems. Eight years earlier during a record snow fall, the Sellers had experienced some leaking but they subsequently cleaned the eavestroughs and rerouted the eavestroughs after which they experienced no further water problems. Their agent advised them that, since the problem had been fixed, there was no need to mention it in the SPIS. After purchasing the property, the Buyer experienced leaking and mould.

The Sellers argued that since their Agreement included the usual “entire Agreement” clause (“this Agreement including any schedule attached hereto, shall constitute the entire Agreement...there is no representation, warranty, collateral, agreement or condition, which affects this Agreement other than as expressed herein”) the SPIS did not form part of their Agreement with the Buyer. But the Court pointed out that this provision does not apply if the Sellers had made a fraudulent misrepresentation. “A fraudulent statement is a statement of fact which is false, made by a person

knowing it to be false, or made so recklessly that the person does not care whether he is speaking the truth or not”. The Court found that the Sellers answer, “No”, to the question: “Is the property subject to flooding?” was made negligently. Although the Sellers had advised the Buyer to maintain the gutters and the downspout extensions, the Buyer did not realize the significance of their advice. They did not warn her that she would have a wet basement if she did not take their advice. “Having embarked upon answering the questions asked, the vendors should have followed their instincts and disclosed the previous problems, explained the solution to the problem and explain what would happen if the downspouts were not handled properly. Their failure to elaborate in this matter has brought them to grief”. The Court found that the Buyer was a discriminating purchaser who wanted a hassle-free dwelling and would not have purchased the house but for the misrepresentations by the Sellers. The Court awarded damages in favour of the Buyer in the amount of \$33,874.33 plus applicable GST.

Editor’s Comment: The Court also dealt with the argument that is often raised in SPIS cases that, because the Buyer acted upon the report of her building inspector, she had not relied upon the Sellers’ misrepresentations. The Court rejected that argument by holding that the Buyer had indeed re-

lied upon the building report as well but that the statements by the Sellers were important to her and, in the absence of any contrary evidence, she had acted upon them.

Real Estate Agent’s Duty of Due Diligence

Riley v. Langfield [2008] O.J. No. 2028 is another Seller Property Information Statement case in which the Sellers completed the SPIS, which was reviewed by the Buyers prior to signing the Offer, wherein the Sellers said that the chimneys are in working order, that there are no problems with the swimming pool and also that they were aware of some moisture and/or water problems in the basement. During negotiations the Sellers advised the Buyers that they had had water in the basement only on one occasion because the sump pump switch had not started the pump. After installing a sump pump and a trench no more flooding had occurred.

Within a month of completing the Purchase, the Buyers suffered a flood in the basement following a heavy rainstorm, they discovered that one of the two fireplaces was not working properly, that the swimming pool filter was cracked and the pump was not working and later the Buyers discovered cracks in the concrete walls of the swimming pool.

The Ontario Superior Court of Justice quoted *Alevizos v. Nirula*, 2003 MBCA 148 (CanLII) which warned sellers that “once the vendors undertook to complete the [SPIS], they were obliged – indeed they were under a duty in the circumstances – to do so honestly and completely”. The court in that case went on to say “Representations as to the condition of the property [contained in a SPIS] 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..."

More interesting was the Court's criticism of the real estate agents. "The realtors are said to be professional. They received a commission ... on closing of the transaction. There can be no doubt they owed a duty of care... [Both the Buyers' and the Sellers' agents] made reference to the importance of checking for water problems, particularly in older homes. Nevertheless, on the evidence presented it appears neither realtor conducted any due diligence inquiry... Realtors are expected to provide advice and direction to their clients. They are paid to act as professionals. They are not simply tour guides walking through a residence. The cavalier attitude of both realtors with respect to the SPIS is troubling. The purpose of the SPIS is not to protect realtors from liability. They have a due diligence obligation."

When Does Silence Constitute Fraudulent Misrepresentation:

In the *Alevizos* case referred to in the *Riley v. Langfield* case above, the Manitoba Court of Appeal held that sometimes silence amounts to a lie.

The Manitoba Real Estate Association uses a property condition statement which serves the same purposes as the SPISs in Ontario. In answer to the question: "Has there ever been any flooding or leakage affecting any portion of the property?", the Sellers responded that five years earlier an exterior water tap had frozen and broke causing some flooding in the recreation room – all doors, flooring, and carpet and the lower three feet of all walls were replaced in 1998. The

Buyers were concerned about potential difficulties with some of the windows which had shown some blackening and staining around the sills of some of the windows. The Trial Court found that the statement in the property condition statement was not complete and was in fact a fraudulent misrepresentation since it did not provide information with respect to leakage affecting the property from any other cause.

The Manitoba Court of Appeal canvassed the authorities on when silence constitutes falsity including *Halsbury's Laws of England*: "The representor must not merely abstain from positive falsehood; he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true...mere incompleteness is not a factor in misrepresentation; it must always be proved clearly that it rendered what was stated fallacious and false. Where a person has said something to another, a duty may at once arise to say more, and if he fails to discharge his reticence from that point becomes an implied misrepresentation, although complete silence throughout the transaction would not amount to, or have afforded any evidence of, misrepresentation, or even actionable non-disclosure".

The Court held that the Sellers, by confirming that the frozen water tap was the only leakage incident, made a fraudulent misrepresentation since the withholding of the disclosure of the leaking windows makes the statement fraudulent. The Court held that the Buyers "were entitled to rely on the unequivocal representation made by the vendors which can only reasonably be interpreted as meaning that any problem with 'flooding or leakage affecting any portion of the prop-

erty occurred as a result of an exterior water tap having frozen and broken some years beforehand. In such circumstances, the vendor's representation constituted both fraud by silence and by active concealment..."

Editor's Comment: As in the Usenik case (above) if a Seller chooses to make a representation (by, for example, completing a SPIS) then the Seller assumes the duty to make a full and complete disclosure.

Agent Breaches Fiduciary Duty

The facts in *Hamilton v. 1214125 Ont. Ltd.*, 2008 CanLII 27815, are long and complicated. We will review only one aspect of the case.

Ms. Hamilton ("H") was an experienced real estate broker who wished to purchase a building lot in order to have a house built with a basement apartment to help defray her expenses. Mr. Osborne ("O") was a more junior agent in the same brokerage. They were cooperating dual agents: O acting for the Seller and H acting for herself, as the Buyer. O assured H that a basement apartment was permitted knowing that the local by-laws actually prohibited such apartments.

The Court found that H had acted reasonably in relying upon O's misrepresentation but that she could have taken steps to satisfy herself and therefore she was equally negligent with the result that the damages against O were reduced by 50%.

Because the two agents were in a dual agency relationship both parties were required to "make full and fair disclosure of all material circumstances and of everything known to him or her respecting the subject matter of the contract which would be likely to

influence the conduct of the principal". That duty of care "encompasses a duty to disclose all facts which could affect the value of the property as well as anything that affects the property's suitability for the principal's purpose. In a case of dual agency such duties extend both ways".

O was found liable to H for damages for negligent misrepresentation as well as breach of duty of care ("There is no reason why a party can not be found guilty of both negligent misrepresentation and breach of fiduciary duty"). In addition the court awarded punitive damages against O in the amount of \$10,000.00.

Sellers Sold Property Twice – Seek Costs Against the First Buyer

In *Gold Developments Inc. v. Dawe*, [2008] O.J. No. 1565 the Sellers agreed to sell the property to Buyer 1 but then proceeded to sell the same property to Buyer 2 before Buyer 1 became aware of the completed sale to Buyer 2. The Sellers had relied upon their agent, who had acted as the consultant for Buyer 1 and as the agent for the Sellers on both sales! Buyer 1 sued the Sellers for damages and the return of its \$125,000.00 deposit.

During the court proceedings the agent was able to arrange a settlement pursuant to which the Sellers returned the deposit to Buyer 1. Buyer 1 then sought leave to discontinue its actions against the Sellers on a without cost basis, but the Sellers claimed entitlement to their cost on the basis that if a plaintiff elects not to carry on with a claim, the defendant should be entitled to compensation for not having been put to trouble and expense to defend the claim.

The Ontario Superior Court of Justice

applied a "justification action" test: "in order to establish that it [the plaintiff abandoning its claim] ought to be relieved of costs in the court's discretion it is my opinion that, at this early stage of the action, the plaintiff must satisfy the court that the material filed discloses a bona fide cause of action that is not frivolous or vexatious which the plaintiff had some justification to commence, having regard to the conduct of the defendant".

The Court found that the claim by Buyer 1 was bonafide and justified under the circumstances. Buyer 1 had a binding agreement with the Sellers who then proceeded to sell the lands to Buyer 2. The Sellers' defence is, at least in a large part, that they were given some bad advice by their agent.

Building Inspectors Better Call Their Insurers

Everyone agrees that getting a home inspection when buying a home is prudent practice. But exactly what is the inspector supposed to do for you? A Deputy Judge of the Small Claims Court gives a thoughtful analysis in *Cresswell-Jones v. Segouin* [2008] O.J. No. 1110. The Buyers' Purchase Agreement was conditional upon their receiving a satisfactory home inspection. They hired Segouin to prepare a building report on the condition of the five year-old home. Segouin was a Registered Home Inspector with the Ontario Association of Home Inspectors, one of several trade associations in Ontario (home inspectors are not licensed by the government in Ontario). During his inspection, Segouin did not go up on the roof to inspect it but rather looked at it from across the street. When questioned by the Buyers, Segouin explained that he does not go up on roofs because Sellers complained that inspectors damaged roofs. In his written report he con-

firmed that there were no problems with the roof. He may have been influenced by the newness of the house because he advised the Buyers that "given that the house was only 5 years old that there shouldn't be any problems with a roof of that age".

Within two years of purchasing the home, the roof began to leak. The Buyers hired a roofer to install a new roof. Prior to giving an estimate of the cost, the roofer inspected the roof and reported that the roof, including the underlying plywood and shingles, had not been properly constructed or installed. The Buyers had the roof replaced at a cost of \$7,667.00 and sued Segouin for their damages alleging that he had negligently failed to report the true condition of the roof.

Segouin argued that he had satisfied the inspection requirements of the Ontario Association of Home Inspectors, which read, in part, "the roof inspection can be done by binoculars, ladders at eaves, walking on and from ground the inspection may be limited or prevented by certain conditions including weather related such as snow/ice; wet; no access; height; frozen shingles; slope, etc". In addition Segouin pointed out that his report limited his maximum liability to the \$300.00 cost of the inspection and the reports. He also introduced an expert witness who testified that in Ottawa, in 2004, it was normal to inspect roofs visually from the ground.

The Deputy Judge noted that the purpose of an inspection report is to provide Buyers with information in order to make an informed decision on the current condition of the house. It is up to the home inspector to employ a method of inspection that will result in a careful and critical examination of the house; otherwise, the examination would be worthless. It was an im-

plied term of the contract that Segouin would choose an inspection method in order to conduct a careful and critical examination of the house. “Simply put, Segouin was expected to give an expert opinion on the qualitative condition of the roof as of the date of the inspection. It was up to Segouin to determine how he was going to inspect in order to render an expert opinion”. It was he who chose not to go up on the roof. It was he who inequitably and without qualification or explanation assured the Buyers that there were no problems with the roof. He could have, for example, told the Buyers that there were limitations on a \$300.00 report that a more expensive report could reveal if they chose to pay the extra cost.

The Court held that Segouin breached his contractual obligation with the Buyers by failing to report that there were problems with the roof and that the Buyers had relied on the report to their detriment. Accordingly, the Court awarded damages against Segouin in the amount of \$4,145.25 representing the cost of a new roof less some additional installations less 25% (to reflect the fact that the Buyers were obtaining a better roof than the five year roof that they had contracted to buy).

A Qualified Acceptance Fails

Last fall we reported *Pyne v. Footman* in which the Buyer accepted the Seller’s offer, and, at the same time, invited the Seller to amend the newly created agreement. The court found that the Buyer had accepted the Offer to Sell and that the Seller was free to accept or reject the invitation to amend. The Seller maintained that no agreement had been formed and appealed to the Ontario Court of Appeal, [2008] O.J. No. 2256.

The agents for the two parties had spoken by telephone but their evidence conflicted. The Buyer’s agent believed that the Seller’s agent (the husband of the Seller) had agreed to reduce the three year rent free holdover period to one year. The Seller’s agent denied any such agreement.

Within the time for acceptance of the Seller’s Offer to Sell, the Buyer’s agent delivered a letter to the Seller’s agent which read in part “enclosed please find accepted Agreement of Purchase & Sale for your property. As discussed and agreed to yesterday, the period that you will be staying on the property would be for one (1) year after closing. Accordingly, please find Amendment to Agreement for your signature”.

The Court of Appeal held that the Supreme Court’s decision in *Harvey v. Perry* [1953] 1 S.C.R. 233, governed “the whole of the correspondence, interviews and conduct of the parties showed that they had not agreed upon the terms of a contract and that the respondent, up to the conclusion of the negotiations, was still trying to obtain terms more satisfactory to himself”. ■

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