Claim No: SCT 472715

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Fiddes v. Beattie, 2018 NSSM 21

BETWEEN:

DAVID FIDDES and RAYLEEN TURNBULL

Claimants

- and -

HOLLIS BEATTIE and DARLENE BEATTIE

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Truro, Nova Scotia on April 9, 2018

Decision rendered on April 17, 2018

APPEARANCES

For the Claimants	Michelle Lahey Burchell MacDougall LLP
For the Defendants	Peter Lederman QC Archibald Lederman

BY THE COURT:

[1] This is another in a long line of decisions that tests the value of a Property Condition Disclosure Statement ("PCDS") in a real estate transaction, in terms of its ability to protect a purchaser from defects that surface after the property changes hands.

[2] The Claimants purchased a Lower Truro home from the Defendants in 2017 and relied on representations made by the Defendants concerning the quality and quantity of water being supplied to the home by the drilled well on the property.

[3] Within a few days of taking possession of the property in May 2017, they experienced extremely low water pressure, which was worse when any more than one water source was being used, such as when a shower was running at the same time as a toilet was flushed, a tap turned on or the washer was being run. On some occasions, the water pressure would go so low that the pump would turn off and the water would stop running. Pumps turn off when there is no available water, to avoid burning out.

[4] The Claimants had someone in to look at the well and pump, and on his recommendation replaced the pressure tank, and the well flow restrictor valve, at a cost of $508.05. Those efforts did not solve the problem. The Claimants have since had two estimates for a new well, which they contend is the only option that promises a healthy water flow. The two estimates are for $6,476.00 plus HST and $7,300.00 plus HST.

[5] The fact that there was a flow restrictor valve on the pump was not something specifically disclosed to the Claimants. According to well driller Dale Baird, flow restrictors are not usual for residential wells. Their purpose is to prevent the pump from depleting the water before it has a chance to regenerate, by suppressing the rate of flow. Of course, what this means is that, by placing such a valve, one is restricting the rate of flow at all times and building in a lesser amount of water pressure than would otherwise be the case.

[6] Mr. Baird testified that he tested the water pressure and was only able to get 20 pounds per square inch (PSI) of pressure, even with only one tap running, which is considerably less than ideal.

[7] He testified that the existing well cannot be improved because the casing only extends about 40 feet down, at which point it appears to hit hard sandstone. Ideally the depth of the well casing would be greater than that, creating a deeper column of available water.

[8] Mr. Baird researched the public records and discovered a report by the Department of Environment that had been done when the well was initially drilled in July 2010, as well as an Inspection Report dated December 13, 2010 done by the same department. Both documents confirm that the original total depth of the well was 110 feet. Mr. Baird explained that the rock below the casing can become eroded which reduces the capacity of the well to fill up with and regenerate water.

[9] The reason for the second inspection was explained by the Defendant, Mr. Beattie, who testified that shortly after the well was drilled, in late 2010, they had

trouble with cloudy water. The Inspection Report was based upon a video inspection, which noted that there were several large fractures/voids at a depth of between 60 and 70 feet below ground, which was theorized as a possible source of silty (cloudy) water. The report makes no reference to water pressure.

[10] The Defendants' well supplier, Gregory Hennigar (who was not called as a witness) suggested the flow control valve as well as the sand filter system, which Mr. Beattie said cleared up the problem. He claimed that, at the time, the well was yielding 20 gallons per minute, which is a far cry from what it has been producing lately.

[11] Mr. Beattie testified that the available water was adequate to serve his household, which was four people in 2010 but only two people by 2017 as family members moved out. He testified that the pressure "was not town pressure" but was adequate, even with two sources running.

[12] Mr. Beattie admitted that he probably should have disclosed that work had been done to address the sand issue in 2010, but he insisted that he and his wife were truthful in the documents they signed. Mr. Beattie said that he had not been aware of the existence of the December 2010 written report, until the Claimants' expert located it in the records of the Department.

[13] In mid-2016 when the Defendants were listing the property, they signed a PCDS in the form approved by the Nova Scotia Real Estate Commission, and last updated in early 2016, that contained the following relevant parts:

> **This disclosure statement is optional and is to be completed by the Seller to the best of their knowledge. ..... The Seller(s) are responsible for the accuracy of the answers on this disclosure statement. This disclosure statement will form part of the Agreement of Purchase and Sale.**

Later in the body of the document:

6. Water Supply - **drilled well**

b. Are you aware if any problems with water quality, quantity, taste, odour, colour or water pressure? **No**

c. Is there a water conditioner or treatment system attached to the water supply? **Yes** ..... **sand filter**

[14] In addition to the statements in the PCDS, the Defendants executed a Schedule "A" which provided the following warranty:

> 4. The Seller warrants, which warranty will survive the closing, that to the best of their knowledge, acting as a prudent and knowledgeable property owner (a) that during their ownership there has been an adequate supply of water for the normal household needs of a family of 4.

[15] In addition, Mr. Beattie admitted that during one of the Claimants' visits to the property while the sale was being negotiated, Mr. Fiddes directly asked him if there was an adequate supply of water, to which he replied that there was.

The Law

[16] There are dozens of recent reported cases involving claims on the PCDS. It is not surprising that many of them are from the Small Claims Court, as the money value of typical defects very often falls within this court's monetary jurisdiction.

[17] It is well understood that in the PCDS the seller is only warranting the state of their knowledge. It is not a warranty as to the actual state of the property. A seller cannot be held legally responsible for what they do not know, or ought not reasonably to know. But there must be good faith. Sellers cannot profit from being wilfully blind to the state of affairs that would be obvious to a reasonable person.

[18] The Schedule “A” warranty is an additional element that is not seen in all cases, but still appears to focus on what the sellers know. Nevertheless, it arguably imposes a higher standard than the PCDS alone, making clear that any representations made by the sellers must be as a “prudent and knowledgeable” property owner. This would appear to import an objective element, rendering the seller liable for what a prudent and knowledgeable property owner ought to have known.

[19] Nor do many of the cases have a direct verbal assurance such as that offered by Mr. Beattie to Mr. Fiddes, in the meeting before the transaction was concluded. This can only strengthen the Claimants’ case, though probably not by much as the representation was implicitly still limited to the seller’s knowledge.

[20] In the leading PCDS case of *Gesner v. Ernst*, 2007 NSSC 146 (CanLII), Smith ACJ stated the basic legal test, and this has not changed in the ensuing decade:

> [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 (see for example: *Arsenault v. Pedersen et al.*, [1996] B.C.J. No. 1026 and *Davis v. Kelly*, [2001] P.E.I.J. No. 123.)
>
> [55] Support for this conclusion is found in the Disclosure Statement itself. While the top of the document indicates that the seller is responsible for the accuracy of the answers given in the Disclosure Statement, just above the signature line for the seller is the following statement "..... information contained in this disclosure statement has been provided to the best of my knowledge.....". Further, after the seller's signature is the following "NOTICE: THE INFORMATION CONTAINED IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT HAS BEEN PROVIDED BY THE SELLER OF THE PROPERTY AND IS BELIEVED TO BE ACCURATE, HOWEVER, IT MAY BE INCORRECT. IT IS THE RESPONSIBILITY OF THE BUYER TO VERIFY THE ACCURACY OF THIS INFORMATION ....." [Emphasis in the original]. Finally, above the purchaser's signature line is the following statement "Buyers are urged to carefully examine the property and have it inspected by an independent party or parties to verify the above information."

[21] Courts have recognized that it is very difficult to prove that a seller wilfully misrepresented the state of their own knowledge. Only they know their own minds directly. But there are cases where knowledge can be imputed, based upon the evidence as a whole.

[22] A good example of that principle is the case of *Crann v. Hiscock*, 2012 NSSM 9 (CanLII), which was a case involving an inadequate well which was heard before this Adjudicator in 2012. I will quote extensively from that decision, which has a lot in common with the case at hand. The basic facts were set out at the beginning of the decision:

> 1 The Claimant bought a home from the Defendants. She performed considerable due diligence, which included a home inspection and a water test. The water test disclosed high levels of arsenic, which necessitated

> the installation of a reverse osmosis purification system, at the Defendants' expense. One thing the Claimant did not do was a test to determine how much water the well produced, namely a flow test. It is conceded that she could have done so. It is also a fact that she could have inserted a condition in the agreement, to the effect that the well produced a minimum amount of water. Instead, she relied on the statement in the Property Condition Disclosure Statement (PCDS) to the effect that the Defendants were not aware of any issues with the quantity of water being produced by the well.
>
> 2 On the evening of the date of closing on August 11, 2011, the well essentially went dry. Over the next several days, the ability of the well to recover (i.e. produce water) proved to be extremely limited. All other possible explanations, such as problems with the pump or other mechanical issues, were eliminated. A flow test done by professionals confirmed that the well only produced water at a rate that would be insufficient to sustain one person living in the house, let alone a family of two (such as the Defendants) or three (the Claimant and her family).
>
> 3 In the result, the Claimant had to have a new well drilled and spent the first ten days of her ownership of this home without water, at least most of the time.

[23] The evidence of the Defendants had been that the well was adequate for their own needs:

> 7 They both testified that they lived a "normal" life, each showering daily and doing things such as washing dishes and clothing. They claimed that on two occasions over the past twenty five years in which they have lived in the house, the well had gone dry during a party or large gathering when there were as many as fifteen people using the toilets and running water. They were adamant that at all other times the water supply was adequate.
>
> 8 The Defendants came across as decent people. Their testimony was given in a straightforward manner. There was nothing in their demeanor which would have led to a belief that they were lying, although I must take note that the cross-examination to which they were subjected was far from rigorous. The Claimant did a good job generally presenting her case, but she is not a lawyer.

[24] This is similar to what I heard from the Defendant, Mr. Beattie. Ms. Beattie did not testify.

[25] In *Crann*, I went on consider the inherent probability that something happened immediately after closing:

> 9 How can the version of the facts presented by the Defendants be reconciled with the fact that the well ran dry the day of closing? It is theoretically possible that something happened on that day which fundamentally changed the amount of water flow. But I have to regard that prospect as extremely improbable.
>
> 10 This case demonstrates the difficulty with assessing credibility purely on the basis of demeanor and apparent internal consistency. Certainly, in some cases that is all that the court has to go on. But here, the problem with the credibility of the Defendants' evidence is its inconsistency with the incontrovertible fact that the well was barely producing any water within hours of their ceding possession. The Defendants had to have known. It is unlikely in the extreme that they did not know. As such, the statement in the PCDS was misleading.
>
> 11 The most credit I can give the Defendants is to theorize that they had lived with this well for so long, that they developed the ability to ration water carefully and always leave time for the well to recover. There were certain statements made by Mr. Hiscock that suggested to me that he knew he had a stingy well. He spoke about how you have to remember always that you are on a well, and that it is not the same with city water. He specifically said “being on a well, people have to learn how to conserve water.”

[26] I note that this was very similar to what Mr. Beattie stated when he said that the water pressure was “not town pressure.”

[27] In *Crann*, I commented on the law:

> 13 There is no need to cite the well known case law. The PCDS is not a warranty. And buyer beware is still an underlying principle in the law.

> 14 However, if the PCDS is to have any purpose at all, it must be given effect when a statement turns out to have been untrue, under circumstances where it is more probable than not that the person making the statement knew or ought to have known that the statement was misleading and that the person receiving the statement would be actively misled. It is no answer to say that the Claimant might have asked for a flow test or a warranty. She didn't. If the law is going to excuse breaches of the PCDS on the basis that there are more stringent terms that can be extracted, we might as well stop using the PCDS.

[28] I went on to award damages for a new well, with a reduction for "betterment."

[29] I have looked at the other cases cited by the Claimants, which do not really add much to the analysis.

Applying the law to the facts here

[30] I find that the Defendants knew that they had a well that yielded very little water. The very existence of the flow control restrictor valve was to address the fact that the well could not be drawn on without risk of the pump overtaking the amount of water available. Mr. Beattie's statement that the pressure was "not town pressure" is a glimpse into his mind.

[31] I believe it is highly improbable that the well could have yielded enough water for a family of 4, as warranted, and fall short of even meeting the needs of two people just two weeks after closing.

[32] I believe there is enough here that was, or ought to have been known to the Defendants, that further disclosure was called for. The difficulties with the well in 2010 ought to have been disclosed, and the fact of there being a restrictor valve ought to have been disclosed. Mr. Beattie's knowledge that the

pressure was “not town pressure” ought to have been disclosed. In sum I find that there was a misrepresentation as to the adequacy of the water supply, even if not intentional, giving rise to a claim for damages.

[33] It is easy to speculate on what would have happened if further and better disclosure of water flow issues had been made. Most likely, the Claimants would have subjected the water supply to more rigorous testing, and the problem would have been addressed by an abatement on the purchase price, or by the drilling of a new well before closing. It is also possible that the transaction might have been aborted.

[34] Of course, one cannot turn back the clock to determine what the Claimants would have done with full disclosure. Damage awards are used to put the Claimants in a position as close as possible to where they would have been if the statement in the PCDS had been accurate.

[35] The Claimants seek recovery of two items:

a. $508.05 for the remedial work that they did in late 2017, and’

b. $6,476.00 plus HST ($7,447.40), being the lesser of the two quotes for a new well.

[36] These amounts are generally reasonable and consistent with what other courts have awarded.

[37] The question of betterment must be considered. Wells do not last forever. The subject well is more than 7 years old, and if the Claimants drill a new well

they can expect to have a well that lasts that much longer than what they had reason to expect buying the house with its existing well. Although I did not receive any submissions on the subject, I believe that a reduction in the compensation for the new well should be included in the amount of 20%. I note that in *Crann* the abatement allowed was 1/3, but the evidence was that the well was much older than the one here.

[38] I will accordingly allow damages as follows:

a. $508.05 for the remedial work;

b. $7,447.40, less 20% for the new well = $5,957.92.

[39] The total of these numbers is $6,465.97.

[40] The Claimants are also entitled to their costs of $199.35 to issue the claim and $211.60 to serve it.

Eric K. Slone, Adjudicator