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Case dismissed against sellers of house with hidden defects

Back in April, 2006, Walter and Shelley Cotton signed an agreement to buy their dream home in Brantford. After closing, the house turned out to be the worst nightmare they could have imagined, requiring them to spend more than $85,000 to bring it up to building code.

Before the Cottons signed the offer to purchase, they reviewed the Sellers Property Information Statement (SPIS) provided by the sellers, Gary, Laurie and Carey Monahan.

The Cottons and their agent went over each question and answer thoroughly. The form disclosed that extensive renovations had been done to the house by the sellers without any building permit.

Finding themselves in the midst of a hot real estate market, the Cottons instructed their real estate agent to submit an unconditional offer without a home inspection clause despite the agent s advice to the contrary.

It was only after the transaction closed that the buyers conducted a home inspection and an electrical safety inspection, both of which revealed numerous problems.

Eventually, the Cottons had to gut a significant portion of the house so repairs could be done. The house, they said, was in chaos for the next six months.

The Cottons then sued the Monahans for the cost of the repairs, alleging that the Monahans actively concealed the many hidden defects in the house. The defence was that the Monahans did not actively conceal anything that they knew to be a defect, that they honestly answered the questions in the SPIS, and that the buyers failed to exercise due diligence by conducting a home inspection before committing themselves to the purchase.

The trial of the case took 10 days last December and January. My own estimate of the combined legal fees involved for a court case and trial of this length would be well north of $100,000.

Justice Harrison Arrell released his 19-page decision in late April. He began his analysis with the often-quoted words of the late professor (and subsequently Chief Justice) Bora Laskin in a 1960 Law Society lecture, when he said, Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it . . . unless he protects himself by contract terms.

Arrell also quoted a 1979 decision of the Ontario Court of Appeal which stated that a seller who is aware of a hidden (or latent) defect in a resale house has an obligation to disclose it to the purchaser only if it makes the house dangerous or unfit for habitation. Otherwise, a seller is not obligated to disclose either hidden or obvious defects in a house.

To be successful in a lawsuit, purchasers like the Cottons have to prove that there are hidden defects in a property making it dangerous or unliveable, and that the defects were known to the sellers who purposely concealed them or that the sellers recklessly disregarded the truth or falseness of any representations made about known defects.

The judge dismissed the Cottons claim. He ruled that the defects in the house were not known to the sellers and that there was no evidence that the Monahans purposely or knowingly concealed any defects. He also decided that the sellers accurately and truthfully filled out the questions in the SPIS form.

This case is just the latest in a long string of recent cases which would never have gone to court but for the existence of the SPIS form.

In my opinion, the SPIS form, which is published and promoted by the Ontario Real Estate Association, is probably the single most frequent cause of Ontario real estate litigation. It poses huge, unjustified risks to buyers and sellers of real estate.

Two lessons emerge from the Cotton v. Monahan case:

First, unless you enjoy expensive court battles, never sign a Seller Property Information Statement. Agents who encourage their use may not be protecting the best interests of their clients.

And second, buying a house without conducting a professional home inspection is a very risky business indeed.

Cotton v. Monahan et al, 2010 ONSC 1644 (CanLII)

Date: *2010-04-30*
Docket: *CV-07-194*
URL: *http://www.canlii.org/en/on/onsc/doc/2010/2010onsc1644/2010onsc1644.html*
Noteup: *Search for decisions citing this decision*
Reflex Record (related decisions, legislation cited and decisions cited)

Decisions cited

- *Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30 (CanLII) [2006] 2 S.C.R. 3 271 D.L.R. (4th) 1 [2006] 8 W.W.R. 1 53 C.C.E.L. (3d) 1 57 B.C.L.R. (4th) 1*

CITATION: *Cotton v. Monahan et al, 2010 ONSC* **1644**

COURT FILE NO.: *CV-07-194*

DATE: *2010/04/30*

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
WALTER BRADLEY COTTON and SHELLEY ANN COTTON	)	***P. D. Amey, for the Plaintiffs***
Plaintiffs	)	
and	)	***I. G. T. Smits, for the Defendants***
GARY JOSEPH MONAHAN, LAURIE LYNN MONAHAN, CAREY MONAHAN and RON E. STOCKDALE REAL ESTATE BROKER	)	
Defendants	)	
	)	
	)	
	)	
	)	
	)	
	)	***HEARD: December 14, 15, 16, 17, 18, 21, 22, 23, 24, 2009, and Jan. 4, 2010***

THE HON. MR. JUSTICE H.S. ARRELL

INTRODUCTION:

[1] On April 18, 2006 the plaintiffs offer to purchase, what they thought was their dream home, was accepted by the defendants. The plaintiffs allege that in fact the house was their worst nightmare as a result of numerous concealed electrical, plumbing and structural defects. The first six months in their new home were spent making extensive and costly repairs.

[2] The plaintiffs now sue the defendants for the cost of those repairs, some future work to complete the repairs and aggravated damages for the mental distress caused them and their two children. They plead the defendants actively concealed the many latent defects in the home. The defendants argue they did not actively conceal anything that they knew to be a defect and that there was no due diligence on the part of the plaintiffs prior to their offer to purchase.

[3] The claim against the defendants broker was dismissed on consent 1 week before the commencement of the trial. A Mary Carter agreement was entered into between the plaintiffs and the broker for $8,000.00.

FACTS:

[4] The plaintiffs are educated and experienced individuals. They owned 2 homes prior to the purchase of the subject property at 20 Queensway Drive in Brantford. Mr. Cotton, who is 41 and a sergeant with the Brantford Police, was seconded to the Police College in Alymer from August 2003 until August 2005. The plaintiffs purchased a house in Alymer and did some renovations to it. In August 2005 Mr. Cotton started commuting regularly back to Brantford to his old position with the Brantford Police. He and his wife listed the Alymer property for sale and were successful in finding a buyer with a closing date of July 7, 2006.

[5] The plaintiffs called their previous Brantford real estate agent Ms. Webster to find them a house in Brantford. They gave her specific instructions that they wanted a nice neighbourhood, large lot, not a fixer upper and 1 level.

[6] The evidence is clear, and the plaintiffs confirm, that in the spring of 2006 the real estate market in Brantford was hot .

[7] Ms. Webster found the plaintiffs a house on Chatham Street in Brantford which met their requirements. They put in a full price offer in November 2005, conditional on the sale of the Alymer property. There were other competing offers and they were not successful in acquiring the property.

[8] On April 17, 2006 Ms. Webster received the MLS listing of the defendant s property and immediately recognized it had all the features requested by the plaintiffs. Within 5 minutes of viewing the MLS listing the plaintiffs coincidently phoned as they were travelling through Brantford from Hamilton to Alymer. They immediately agreed to meet Ms. Webster at the home. Upon their arrival the defendant s agent, Ms. Monahan, who was also their daughter-in-law, was just getting out of her car to put up the for sale sign.

[9] Ms. Monahan showed the plaintiffs and Ms. Webster through the house. She assured the plaintiffs there were no problems with the home as far as she knew and further indicated that even though there was only 60 AMP service her in laws ran all normal electrical appliances without difficulty and she was not aware of any electrical problems.

[10] I accept the evidence of Ms. Webster, who has 20 years of experience, that this house showed beautifully , it was immaculate and in mint condition, in a very desirable neighbourhood.

[11] The plaintiffs viewed the house for 45-60 minutes and then immediately and privately told Ms. Webster they wished to make an offer. The offer was prepared for the full listing

price of $299,900.00 with no conditions. Despite Ms. Webster s advice the plaintiffs insisted on not having a condition to allow for a home inspection.

[12] I find as a fact that Ms. Webster was extremely thorough with the plaintiffs in going over the offer to purchase and that they fully understood all of its terms and conditions. They were well aware that there had been no building permits. They were also well aware that there were no warranties pursuant to paragraph 24 of the offer.

[13] I accept Ms. Webster s evidence that the house was completely finished other than in the laundry room and nothing could be seen which she would classify as any type of obvious defect which should have raised a red flag for the plaintiffs. The only exceptions were 2 minor electrical issues in the ceiling of the laundry room, the electrical panel which the plaintiffs agreed they would have to upgrade to 100 AMP service and an extension cord coming out from an encased wooden pole to a lamp in the recreation room.

[14] I accept as well that the plaintiff asked if he could move the fridge and stove to look behind but was persuaded not to by the defendant s agent, fearing difficulty in returning it to the same position.

[15] Ms. Webster requested a Sellers Property Information Statement (SPIS) and that was provided in the early evening of April 17 prior to the plaintiffs offer being presented. Ms. Webster went over each question thoroughly with Mrs. Cotton by telephone, including the fact that no building permit was obtained or inspection done regarding the extensive renovations to the home and that the plaintiffs should consider that. Ms. Webster and the plaintiffs knew prior to the offer being presented that the house was over 50 years old and the vast majority of the renovations were done by Mr. Monahan personally.

[16] I accept Ms. Webster s evidence that she advised the plaintiffs to wait a couple of days before presenting an offer so they could do further due diligence, specifically a home inspection which she felt was imperative given the age of the house . The plaintiffs instructed Ms. Webster to present the unconditional offer the evening of April 17 which she did. It was accepted without amendment the next day with a closing date of June 30, 2006.

[17] The plaintiffs were entitled to inspect the property on 2 occasions before closing. They attended approximately 3 weeks after the offer was accepted with their 2 children and took numerous photographs to show family and friends. Furniture was still in place and the house looked identical to what it did on April 17.

[18] Ms. Webster recommended the second viewing by the plaintiffs just before closing. She reminded them to do this viewing but they did not.

[19] The house was virtually empty during the week prior to the closing.

[20] The listing agreement which the plaintiffs reviewed indicates FULLY RENOVATED INTER. INC. REFINISHED HARDWOOD, CERAMICS NEW CARPETS...

[21] Mr. Cotton is very knowledgeable and experienced regarding home renovations. His father owns and runs a construction company where the plaintiff worked for a number of summers. At age 18 he was offered a carpenters apprenticeship and 2 separate electrical apprenticeships. He performed extensive renovations on his first home on Lincoln Ave., an 80 year old structure, as well as less extensive renovations on the Alymer property.

[22] The plaintiffs upon moving into 20 Queensway started to immediately notice some issues with the electrical and plumbing systems. They had a home inspection on July 5. The inspector recommended an Electrical Safety Inspection, which was done on July 10. A total of 17 infractions were found.

[23] The plaintiffs then brought in electrical contractors to give an estimate for repairs but supposedly were advised no such estimate could be done without knowing what was behind the walls in both the kitchen and basement.

[24] The plaintiffs by the 2nd week after closing appear to have come to the conclusion that a significant portion of the house would have to be gutted so repairs could be done. They also appear to have made the decision that all of this work should be done immediately rather than one area at a time.

[25] I accept the plaintiffs evidence that the house was in chaos for 6 months and they lived in approximately 2 rooms without a kitchen for a number of months. I also accept that the children spent time away from home with family while this construction was taking place.

[26] Mr. Cotton and his friends did most of the gutting and carpentry work. Electricians and plumbers repaired those areas.

[27] I accept that the work on the house was not completed until just before Christmas 2006 and that there was a great deal of stress on the plaintiffs during this time. I also accept the children were affected. They and their parents have had counselling although no reports were filed by those counsellors. The counsellor for the children did give evidence but plaintiff s counsel did not seek to qualify her as an expert and therefore she gave no expert evidence as to how the children were effected or why, or their present condition and prognosis, nor whether they received any treatment.

[28] The plaintiffs gave their evidence in a straightforward and credible manner. Mr. Cotton was much more involved in the repairs and he was very knowledgeable. He had a good memory and put together his case like a well trained police officer would with numerous pictures, diagrams, physical exhibits and a well documented damage brief. He was in my view truthful and credible and I accept that this has been a terrible ordeal for he and his family.

[29] Mr. and Mrs. Monahan bought 20 Queensway in September 2001 for $174,000.00 being virtually the full asking price without conditions.

[30] Mr. Monahan is 51 years old and has been an iron worker for 30 years. He and his wife had 4 homes prior to Queensway and had done renovations of various degrees to all of them. He has no training in construction or as a renovator, other than what he has been self taught, learned from carpenters at work or knowledge acquired through friends and sales people at home renovation stores.

[31] Mr. and Mrs. Monahan have 4 children. One son is disabled and confined to a wheelchair. Most of the renovations on the main floor of Queensway done by Mr. Monahan were to accommodate his then teenage son s wheelchair. This included widening doors approximately 3-4 inches, moving a few cabinets to make the kitchen more accessible and renovating the bathroom for the same reason.

[32] Mr. Monahan admitted to doing extensive renovations to 20 Queensway because he and his wife planned this to be their retirement home given its one floor plan, large yard, and very desirable neighbourhood.

[33] It is significant that the vast majority of renovations done by the defendants occurred during their first year of occupancy. They enjoyed those renovations, by all accounts, on a trouble free basis for the balance of their residency at 20 Queensway or for approximately 4 years.

[34] There is no doubt Mr. Monahan did some work to this home that was not according to the building code. Some examples would include splitting wires not in junction boxes; attaching ABS plumbing pipes other than with proper couplings; not putting proper headers above widened door and window frames.

[35] There is also no doubt that the majority of complaints made by the plaintiffs about substandard workmanship was completed by someone prior to the Monahans purchasing the property. Some examples would be the significant number of junction boxes which were not accessible because they were covered by ceilings, walls or the brick fireplace; plumbing stacks not venting through the roof; non accessible natural gas shut off valve; wiring into the fuse panel; construction of the breakfast nook; construction of the deck; notches in beams for wires and plumbing pipes.

[36] There is no evidence before me that Mr. Monahan was anything but conscientious, careful, exacting in his work and concerned about the safety of his family. He, like Mr. Cotton, was a credible and believable witness. He had a surprisingly good memory of the work he did. He admitted quite candidly that given all he has learned from this case his work was not up to the standards of the Building Code and given what he has learned he would clearly do things differently now.

[37] I accept, however, his assertions that at the time he did the renovations to 20 Queensway he felt he was doing them properly and safely. I further accept his evidence that he did not even think of getting a building permit because he did not think one was necessary when doing interior home renovations yourself.

[38] I further accept his evidence that when he redid walls, ceilings and the fireplace that he thought nothing of the wiring set up that he uncovered because for the most part he never touched it, it had been working fine and he didn t know there was anything improper or unsafe about it. My view of this evidence is buttressed by the fact that there is no evidence that the defendants had any problems for almost 4 years after they did these renovations. Further, I find it inconceivable that Mr. Monahan would have knowingly, in any way, placed his family in danger as a result of the work he did. As well, the plaintiffs and Ms. Webster admitted everything was immaculate i.e. no sagging of doorways or windows, no cracks in plaster, doors not closing, no cracks in tile, or problems with flushing, water pressure or electrical lights and switches that they activated.

THE POSITION OF THE PLAINTIFFS:

[39] Counsel for the plaintiffs argues that the defendants are not credible on many issues and their evidence is suspect. I have already found as a fact that both parties are credible and believable.

[40] The plaintiffs further argue that the defects they found were latent and were not discoverable by any pre-closing inspection by them or a professional house inspector. They claim that the defendants either knowingly, through wilful blindness or reckless disregard concealed these latent defects and therefore should be responsible for their damages.

POSITION OF THE DEFENDANTS:

[41] Counsel for the defendants argues that his clients never at anytime attempted to conceal anything they knew to be a defect. They answered all questions on the SPIS in an honest and forthright manner. There was absolutely no intention to mislead the plaintiffs regarding anything about their house. He further argues that the plaintiffs were extremely anxious to buy 20 Queensway and as a result made a conscious and informed decision not to do the due diligence recommended by their real estate agent and they had every opportunity to do so but knowingly elected not to. He argues caveat emptor applies.

THE LAW:

[42] In any discussion regarding the purchase of real estate one must start with the well known legal maxim: caveat emptor, qui ignorare non debuit quod jus alienum emit

(Let the purchaser, who is not to be ignorant of the amount and nature of the interest, exercise proper caution).

[43] The primary obligation is on the purchaser to not be ignorant of the nature of the purchased interest. Defects in Real Estate, Craig R. Carter, 14-1

[44] The starting point on an analysis of property defects would appear to be the often quoted phrase of professor Laskin (as he then was) at the 1960 Law Society Special Lectures:

> Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms .

Laskin, Bora Defects of Title and Quality: Caveat Emptor and the Vendor s Duty of Disclosure in Law Society of Upper Canada Special Lectures: Contracts for the Sale of Land 389 at 403.

[45] As the Laskin excerpt, above, states, in the absence of contractual terms protecting a purchaser, a vendor will be able to successfully assert cavet emptor against a purchaser in a claim by a purchaser arising from the discovery of a physical defect in a resale or commercial property purchase, unless the purchaser can establish fraud or misrepresentation. A vendor who conceals a defect, so that the purchaser could not discover it, will be unable, however, to rely on caveat emptor because the defect was latent and the concealment by the vendor is considered to be misrepresentation or fraud.

Latent Defects: To Disclose or not to Disclose?

Bradley N. McLellan, Nov. 16, 2005, p. 373

Gronau v. Schlamp Investments Ltd. (1974), 52 D.L.R. (3d) 631 (Man. Q.B.)

Grumbmann v. Cornwall (1986), 44 R.P.R. 114 (Ont. H.C.)

[46] The issue still remains as to whether a vendor who is aware of a latent defect in a resale home transaction, but who does not conceal the latent defect, has any obligation to disclose the latent defect to the purchaser.

[47] The Court of Appeal of Ontario stated in obiter that there might be such an obligation in the following two circumstances:

I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But as pointed out in [the Laskin article], in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of a concealment or a reckless disregard of the truth or falsity of any representations made by him...Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, e.g. the premises sold being subject to radioactivity...

McGrath v. MacLean (1979), 95 D.L.R. (3d) 144 (O.C.A.)

[48] In Lunney v. Kuntova, [2009] O.J. No. 742 Powers, J. confirmed the law as stated by Laskin and concluded there was no evidence in that case that the defendants possessed knowledge of a defective foundation when they sold the property to the purchasers.

[49] As a matter of general principle, then, the vendor is not under a duty to disclose either latent or patent defects of quality. It is no doubt for this reason that in his discussion of defects in quality Professor Laskin makes no reference to the distinction between latent and patent defects. To be sure, however, there are obiter dicta in a number of trial decisions suggesting that the vendor is subject to a duty to disclose latent defects of which it is aware. These statements may be harbingers of a brave new world of vendor disclosure duties. For the moment, however, they do not appear to represent good law. Professor McCamus in Caveat Emptor: The Position at Common Law in LSUC Special Lectures 2002.

[50] The onus is on the purchasers to prove on a balance of probabilities that there were latent defects with this property. They must further prove that these defects were known to the vendors and they purposely concealed them in order to sell their house or in the alternative there was reckless disregard of the truth or falsity of any representations made by the vendor regarding any defects known to them.

McGrath v. MacLean, supra. Para 15.

ANALYSIS:

[51] The plaintiffs have established, through their experts, that there were defects to this property including structural, electric and plumbing. These defects were clearly latent.

[52] There is no evidence that the vendors were aware that these were indeed defects, were contrary to the Building Code or might be a safety issue. In fact the evidence of the vendor, which I accept, is to the contrary. He was a handyman, a do it yourselfer, and self taught. He fixed up this house to the best of his ability shortly after purchasing it. He changed virtually none of the wiring and boxes that were already in the walls because he assumed there was nothing wrong with that set up since he had had no problems. He did not think he was doing anything wrong structurally or with the plumbing. Everything worked fine after his renovations and he thought nothing more of them. He and his family lived in the home for 4 years after he finished his renovations, without problems. There is no evidence to the contrary. I accept his evidence as true that he would not have allowed his family, especially his disabled son, to live in the home if he thought for a moment they were in any danger or there were any safety issues.

[53] The plaintiff fails on all three criteria to ground liability:

a) The defects, I find as a fact, were not known to the vendors to be defects;

b) I find as a fact that there is no evidence to establish that the vendors purposely or knowingly concealed any defects;

c) I find as a fact that there was no conduct by the vendors of reckless disregard of the truth of any representations made. The vendors were not home during the initial inspection of the home. The vendors were asked no questions about the home. The vendors filled out accurately and truthfully the SPIS statement indicting no permits or inspections were done regarding any of the renovations. The agent for the vendors stated clearly and truthfully that as far as she knew there were no problems with the house. The vendors would have answered a similar question the same way. There was never any direct communication between the plaintiffs or their agent and the vendors.

[54] The purchasers were fully aware that renovations had been done by the vendor, they were fully aware those renovations were not inspected nor was a permit obtained; they were fully aware the house was 50 years old; they were at liberty to have the home professionally inspected, they made a conscious decision not to; they could have insisted on moving appliances or anything else if they wished a better inspection; they could have insisted on further inspections by electricians, plumbers or engineers if they wished to make those inspections conditional on their offer and through Mr. Cotton s father they had easy access to individuals with such expertise. They elected not to do so because Mr. Cotton had significant experience in renovations and felt confident in what he could see. Moreover, both Mr. and Mrs. Cotton wanted this home and did not want to miss the opportunity

of purchasing it because of a conditional offer. They made a decision to forego their due diligence. There was nothing done by the vendors to entice them into making an offer nor did they do anything to purposely or otherwise to conceal problems with the home nor give any misleading representations about their home. In any event I find as a fact, that the purchasers did not rely on any representations made in the SPIS or by the vendors agent.

[55] It is significant that the home was professionally inspected shortly after closing which then led to the electrical safety inspection and the notation of 17 defects. This of course could have occurred prior to closing as a condition of the offer and as recommended by their agent, however, the plaintiffs made a conscious decision to not proceed on that basis.

[56] For the reasons given I do not feel that the plaintiffs have proven their case on a balance of probabilities and it must be dismissed.

DAMAGES:

[57] The plaintiffs claim damages of $85,403.39 for the work they did on the home to correct all the defects they found and to bring the property up to Building Code standards. It is clear the work was done and the amount claimed for all the work done is not unreasonable.

[58] The issue on damages is two-fold:

a) was all the work done necessary to correct the defects;

b) was there betterment.

[59] In dealing with the first item much work was done taking everything back to the studs or gutting much of the house and starting fresh.

[60] I accept the argument of the defence that not all the work done was necessary. For example the entire tile floor in the kitchen was removed to fix a wire near the wall; entire walls demolished to rewire parts of the house; the entire back deck was removed and apparently used on another property; the entire kitchen cabinets were removed to fix some wiring behind them; counters were moved; windows and walls in the breakfast nook replaced and doors installed; to list but a few examples. Nothing appears to have been saved and re-used, but instead everything was purchased new.

[61] There is little doubt that the plaintiffs had an improved home after spending some $85,000. They had new walls in the basement; they had a new and moved fireplace in the basement; they had new kitchen cupboards, kitchen floor, repositioned and new kitchen counter and sink; they had totally new plumbing and carpet along with several new windows and doors from the kitchen.

[62] There was clearly betterment to this property.

[63] I have also considered the theory of diminution in property value test. That test indicates that the purchaser should recover the diminution in value of the property resulting from the undisclosed or undiscovered defect.

[64] Mr. Larry Emsley, an experienced real estate appraiser, inspected the property on August 15, 2006. His instructions were to appraise the property on the basis that all defects were known when the offer was made and had been corrected. I find his evidence in this regard as somewhat unhelpful as he appears to have simply reduced the value by the approximate cost of the repairs of $80,000.00. He did a further appraisal on June 13, 2008, after virtually all repairs had been completed, and opined that the property at that time was worth $307,000.00. The comparisons he used were certainly not on all fours with the subject property. He felt the plaintiffs likely overpaid by $9,000.00 in April 2006. He further felt the price had likely increased by 10 per cent from his June, 2008 appraisal to the date of trial. This leaves a difference of approximately $39,000.00. This of course takes into account significantly different market conditions between 2006 and late 2009. This evidence is instructive but not determinative on the quantum of damages.

[65] Taking into account what I consider to be excessive renovations not related to any of the defects in question, betterment, and diminution of the property, I would assess the plaintiffs damages at $60,000.

[66] The plaintiffs also claim general damages for mental distress both for themselves and their two children. The evidence indicates this home was a construction site for almost six months. During much of that time the plaintiffs lived out of two rooms. Much of their furnishings were in a sea crate in the back yard. The children stayed with grandparents for a period of time and both had some counselling as did the plaintiffs. There is no doubt they were all under a high degree of stress, however, a lot of that stress was as a result of overreacting and deciding to virtually gut this house and start fresh rather than effecting repairs in a slower and more measured way.

[67] Plaintiffs counsel correctly states that the leading authority on mental distress for breach of contract situations is Honda v. Keays [2008] S.C.J. No. 40. The court states that we must begin any analysis on damages for breach of contract by asking what was contemplated by the parties at the time of the formation of the contract.

[68] The Supreme Court has stated in Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30 (CanLII), [2006] 2 S.C.R. 3 that it is no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract. Instead such damages may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. In order to be successful, a plaintiff must prove his or her loss and the court must be satisfied that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

[69] The issue therefore on the case before me is whether it would have been within the reasonable contemplation of the parties at the time they entered into the agreement of purchase and sale that mental distress would likely flow from a failure by the purchaser to pay the required purchase price or the failure of the vendor to deliver vacant possession. I think not. Neither of the parties were examined on their reasonable contemplations when entering into this contract. The plaintiffs have produced no authorities on mental distress damages to assist the court regarding failed real estate transactions. The usual course of a failed transaction is a suit for either damages or specific performance by the aggrieved party. Here the purchasers elected to keep the house and effect major repairs without even discussing the issue with the defendants. It was the extent and speed with which they elected to turn their house into a total construction site that caused the mental distress. I do not think it would have been objectively contemplated by either party that damages for mental distress would flow from a breach of this contract.

[70] The second issue is whether the degree of mental distress has been proven to be of such a degree as to warrant compensation. I think not.

[71] No medical evidence was led at trial of any mental distress. Certainly a counsellor for the children gave evidence to the effect she saw the children but no report was filed and plaintiffs counsel did not seek to qualify her as an expert. She gave no evidence of why she was seeing the children, any treatment she gave, any cause for the counselling or prognosis. Her evidence, since she was not qualified as an expert, was confined to confirming the dates she saw the children.

[72] The only other evidence led was by the parents indicating their children were very upset, that the son had an episode of continuously saying very dangerous regarding the house and the physical chaos of the construction.

[73] There is no doubt the plaintiffs were significantly inconvenienced by the construction they elected to do. No doubt it was upsetting. Inconvenience and upset are not sufficient to warrant damages for mental distress. It can likely be said that the breach of any contract would cause upset and inconvenience to some degree to the aggrieved party. More is required to prove damages for mental distress sufficient to warrant damages. In Fidler, supra, there was extensive medical evidence documenting the stress and anxiety experienced by the plaintiff. No such evidence is before me and I would make no award under this head of damages.

CONCLUSION:

[74] If the parties are unable to agree on costs they may make written submissions within 30 days, of no more than 3 pages double spaced in addition to any relevant offers and draft bills of costs.

Arrell, J.

Released: April 30, 2010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WALTER BRADLEY COTTON and SHELLEY ANN COTTON

Plaintiffs

and

GARY JOSEPH MONAHAN, LAURIE LYNN MONAHAN, CAREY MONAHAN and RON E. STOCKDALE REAL ESTATE BROKER

Defendants

REASONS FOR JUDGMENT

Arrell, J.

Released: *April 30, 2010*