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Two plots and one man's case of mistaken identity

One of my all-time favourite court cases deals with the Edmonton family who were well into building their dream home when they discovered that they didn t own the lot where their new house was under construction.

The story began back in 1981, when Tom Broumas told his real estate agent, Al Batik, that he wanted to buy a lot to build a new house for his family.

Batik checked the listings on the local multiple listing service and decided to show Broumas and his wife lot 37 which was incorrectly described as the only vacant lot on south side of street.

On the day Broumas physically inspected the lot, his agent directed him to lot 27 on 10th Ave. instead of lot 37. The two lots were separated by nine completed houses. Lot 27 was owned by the city of Edmonton and lot 37 by private owners.

Without ever being shown a survey or the subdivision plan by the agent, Broumas eventually signed an agreement to buy lot 37 and the deal closed successfully. Unfortunately, he was under the impression that he had purchased lot 27.

About a year later, Broumas hired an architect who designed a 3,700-square-foot house.

Construction began on Sept. 20, 1982 and completion was estimated for Dec. 1 the same year.

Despite a local bylaw requiring anyone building a home to apply for a development permit before work started, the owner s architect did not file the paperwork until one month after construction began. By this time, the house being constructed on the wrong lot was well into the framing stage, with part of the roughed-in plumbing and electrical work already completed.

Broumas did not discover that he was building a house on a lot he didn t own until he received a phone call from a developer asking if he wanted to sell his vacant lot, number 37. When Broumas told him that he was well into construction, the developer replied that he must be building on the wrong lot.

Construction of the house continued even after the mistake was discovered, but there were significant delays due to the inability to place mortgage financing on the lot Broumas didn t own.

Eventually, an agreement was reached with the City of Edmonton to exchange titles of the two lots for an administrative fee of only $250. Three months later, Broumas owned both the house and the lot underneath it.

Broumas sued his real estate agent and the agent s brokerage, Royal Trust, for damages for delay in the construction of the house, inconvenience, embarrassment, pain and suffering, and out-of-pocket expenses resulting from extra fees and the construction delay.

Strangely, he did not sue his lawyer, who could have discovered the error before closing by showing his client the plan of subdivision.

In the end, Justice Ernest Hutchinson ruled that the real estate agent had a duty to verify the information published in the multiple listing service. As a result, he was held liable for not ensuring that the proper lot was examined by the buyers in the first place.

Total damages, in 1982 dollars, were set at $3,135.34, plus costs.

Ontario landowners who might find themselves caught in a similar situation can resort to a remedy found in the Conveyancing and Law of Property Act. Section 37 of the law says that where a person makes lasting improvements on land under the belief that he or she owns it, that person is entitled to a lien on the land for the value of the improvements.

In addition, the lawful owner may be forced to accept compensation for the land and transfer ownership if a judge is of the opinion that this alternative is appropriate. Alberta has a similar provision in its laws.

Of course, situations like this could be avoided altogether if landowners always referred to a land survey or plan of subdivision, or both, before building any house, garage, fence or retaining wall.

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Broumas v. Royal Trust Corporation of Canada, 1987 CanLII 3356 (AB Q.B.)

Decisions cited

- Abbott v. Kasza, reflex [1976] 4 W.W.R. 20
- Avery v. Salie and Boychuk Real Estate Ltd., reflex [1972] 3 W.W.R. 759
- Bango v. Holt, reflex [1971] 5 W.W.R. 522
- Bedford Auto Supplies Ltd. v. Central Trust Co. et al., reflex 73 N.S.R. (2d) 162
- Grisack v. Smith and Lyle Real Estate, reflex 59 A.R. 238
- Komarniski (Komarnicki) v. Marien, reflex [1979] 4 W.W.R. 267
- School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Company Limited, reflex [1971] 4 W.W.R. 746
- Windsor Motors Ltd. v. Powell River (City), reflex 68 W.W.R. (N.S.) 173

Alberta Court of Queen s Bench

Broumas v. Royal Trust Corporation of Canada

Date: 1987-04-14

M. Moreau, for plaintiffs.

D. L. Bulmer, for Royal Trust Corporation of Canada and Royal Trust Company.

D. Benkendorf, for defendant Batiuk.

(Edmonton No. 8303-2954)

April 14, 1987.

[1] HUTCHINSON J.:- This is a case which involves the purchase by the plaintiffs of what turned out to be the wrong lot in the Millwoods subdivision in Edmonton in September 1981. The lot shown to them by the defendant real estate agent, Al Batiuk ("Batiuk"), was lot 27 in block 34, plan 762 1269 (Edmonton) ("lot 27") rather than lot 37 in the same block and plan, which latter lot was in fact the lot available for sale. They subsequently became the owners of lot 37 and approximately one year later they commenced the construction of a house on lot 27. A month following the start of construction the plaintiffs discovered that they were building their home on the wrong lot. The plaintiffs have sued the defendant realtor and his employer, now known as Royal LePage Real Estate Services Limited, for general damages in the amount of $40,000 which they claim to have suffered as a result of their having purchased the wrong lot. Such damages include the following:

(a) delay in the construction of a house on lot 27, due to the unwillingness of the mortgage company to advance funds until exchange of lots with the city of Edmonton was finalized;

(b) inconvenience caused to the plaintiffs in relocating their residence pending completion of construction of the house on lot 27;

(c) pain and suffering caused to the plaintiff Tom Broumas in the form of a severe ulcer condition precipitated by the misrepresentation of the defendants, and each of them, in reliance upon which the plaintiffs commenced construction on the land shown to them by the defendants;

(d) inconvenience and embarrassment occasioned to the plaintiffs in attempting to maintain a trust relationship with the construction subcontractors pending completion of negotiations with the city of Edmonton for an exchange of the said lots; and,

(e) inconvenience and suffering caused to the plaintiffs as a result of loss of items of memorabilia, including photographs and portraits ruined in storage due to construction delays.

[2] As a result of the negligent misrepresentation on the part of the defendants, the plaintiffs also claim to have incurred the following special damages as amended at the commencement of the trial as follows.

(a)	Legal fees	$1,258.50
(b)	City of Edmonton administration fee charged for the lot exchange	250.00
(c)	Payment for extra heating due to construction delays	850.20
(d)	Payment for extra three months' rental of on-site garbage bin due to construction delays	613.41
(e)	Reduction in size of lot from that shown on listing agreement	2,266.00
(f)	Reduction in value of lot 27 exchanged by city of Edmonton for lot 37	1.300.00
	TOTAL	$6,538.11

[3] For the reasons expressed below I find that Batiuk was responsible for negligently misrepresenting the location of the property actually purchased by the plaintiffs, namely lot 37, and consequently the defendants are liable for the payment of damages in an amount quantified by me later in this judgment.

[4] I find the facts to be as follows: Batiuk became known to the plaintiff Tom Broumas ("Broumas") as a customer of the Windmill Restaurant and Lounge located in the Millbourne Shopping Center in Edmonton. Broumas was a part owner of the restaurant. After Broumas became acquainted with Batiuk, Broumas let Batiuk know that he and his wife

were interested in purchasing a larger home for themselves and for their four children or, alternatively, they wanted to purchase a lot on which to construct a new house. The Broumas family wanted to be located in the Millwoods area close to the restaurant, and preferably, on a quiet crescent. The house that they were looking for was in the neighbourhood of 1,500 to 2,000 square feet and the lot on which they might alternatively build a home was to be approximately 50 feet by 150 feet. Batiuk showed them a number of houses but none were found to be suitable. Batiuk also showed the plaintiffs a number of lots taken from the listings maintained by his office from the multiple listing service. The lot in question, lot 37, was listed by Cowley & Keith. On the listing were the words, "only vacant lot on south side of street". No sketch of the lot was shown on the listing and the property address was shown as 10th Avenue and 68th Street. I accept Mr. Batiuk's testimony that he took Mrs. Broumas to see the lot first and that they approached the lot from the west, travelling east on 10th Avenue. Mr. Batiuk had not seen the lot before. He passed a vacant lot on 10th Avenue, in reality lot 37, and slowed down. There was no for sale sign on the lot. They then proceeded farther east past nine houses to a vacant lot with a Cowley & Keith for sale sign on the lot. This was in fact lot 27, which was owned by the city of Edmonton. Lot 27 was located between a fully constructed house to the east with a chain-link fence running from the front of the house to the rear of the lot. The house to the west was under construction. Mr. Broumas viewed lot 27 later that day with Mr. Batiuk and walked over the property with him. The listing showed the lot to be 16.6 metres by 45.2 metres, which Batiuk had calculated to be 55 feet by 150 feet. In fact lot 27 was 55 feet by 140 feet, the same size as lot 37 down the street. There was a survey pin at the rear of lot 27 on the west side. The neighbour's fence to the east gave an indication of the eastern boundary. Mrs. Broumas remained in the car, not wanting to get her shoes dirty. The plaintiffs decided to make an offer to purchase the lot which resulted in a counter-offer which was accepted. The offer to purchase and interim agreement is dated 2nd June 1981 and refers to property municipally known as vacant lot 10th Avenue and 68th Street, legally described as lot 37, block 34, plan 762 1269.

[5] Prior to showing the lot, Batiuk had attempted to find a plan of the area in the plan book maintained in the real estate office but he was unable to find a plan of the area. Upon presenting the first offer to the sales representative at Cowley & Keith, he inquired as to why the words "only vacant lot on south side of street" were contained in the listing when there appeared to be two vacant lots on the street. He could not recall the explanation given to him but stated that he must have been satisfied with it. The plaintiffs engaged solicitors to complete the purchase of the lot and to place a mortgage on the title to assist them in their purchase. They cannot recall seeing a plan of survey in the solicitors' office nor do they believe that a copy of any such plan was sent to them with the closing documents. It is not possible to tell from the registered plan of survey where 10th Avenue becomes 68th Street as it bends to the north. There is a cul-de-sac located diagonally across from lot 27, set in a northeasterly direction, which is also called 10th Avenue. The reporting letter from the solicitors relating to the purchase of lot 37 does not enclose a copy of the survey plan of the area.

[6] After holding title for approximately one year the plaintiffs were ready to commence the construction of a house on their lot. They had engaged the services of an architect, Ted Powell, who had drawn house plans for them. The house comprised approximately 3,400 square feet excluding the garage. The plaintiffs had ordered materials such as clay tiles, roof trusses, mahogany doors, patio doors and windows, and they estimated that the total cost of the house and lot would be approximately $150,000. They commenced construction of the house on 20th September 1982 and anticipated that the house would be ready for occupancy on 1st December 1982.

[7] Their architect friend, Ted Powell, told them that it was not necessary to engage a surveyor to locate the house on the lot but that they could use the adjoining properties as a guide for the required front yard and side yards and for the elevation. The plaintiffs were not present when the excavation commenced initiating the construction. Tom Broumas testified that Powell was to make the development application and obtain the building permit although he was not paid for such services, payment to Powell being limited to the production of the house plans. Powell was not called as a witness. The city of Edmonton Land Use By-law provides that, prior to the commencement of construction, an application for development permit is required to be made, and evidence was heard from a city of Edmonton development officer to the effect that, once the development application is reviewed, it is then sent to the addressing clerk for the assignment of a municipal address. If the address shown on the application is incorrect, this would trigger an investigation and the applicant would be notified. If no address is given then the correct address is inserted in the application and the development permit forwarded to the applicant. In the present instance, the legal description would govern, as is usually the case, and the address shown of 10th Avenue and 68th Street would be changed to show the actual designated municipal address. In the present instance, the address shown would have related to lot 37 and would have been obviously out of order in comparison to the neighbour's addresses.

[8] The application for development was not made by Powell until after 20th October, the date by which the plaintiff Tom Broumas had discovered the error regarding the location of lot 37. By this time the house being constructed on lot 27 was well into the framing stage with part of the roughed in plumbing and electrical work completed. The application for development permit related to lot 27. The cashier's stamp is dated 12th November, the application is dated 17th November and notification date is 18th November 1982. The application contains the following statement: "(Building already under construction due to mix-up in lots)". The building permit issued following the circulation of the development application and is stamped with the date 10th January 1983. It shows the contractor to be Ted Powell. In fact the plaintiff Tom Broumas gave evidence that he, not Ted Powell, was the general contractor and that Powell only assisted in recommending the use of certain materials and some subtrades.

[9] The error concerning the location of lot 37 was discovered when a developer telephoned Tom Broumas, on or about 20th October 1982, to inquire whether he wanted to sell lot 37. The developer was told that the plaintiffs were already building a house on the lot, which the developer said was not correct. Broumas then attended at the city hall and discovered the error and contacted the solicitor who had acted on the purchase of the lot. The result was that by 12th November 1982 a city committee had recommended to city council that the city exchange lot 27 for lot 37 with the plaintiffs in return for an administration fee of $250. This is the same date as the development application was received relating to lot 27 and I conclude it to be the date on which the plaintiffs knew that the mistake would be rectified. The recommendation was later adopted by city council on 14th December 1982 and title to lot 27 issued to the plaintiffs on 7th January 1983.

[10] In the meantime the plaintiffs were experiencing some difficulty in finishing their house within the time originally planned. The completion date was initially scheduled for 1st December 1982 and they had hoped to be settled in their new home by Christmastime. In fact, they did not move into the new house until 5th May 1983. It is difficult to determine how much of the delay was caused by the mix-up between the two lots. This was to be a custom-designed home of approximately 3,400 square feet. The walls were unusually thick, causing some difficulty with the supply of window casements and patio doors. The plaintiff Tom Broumas was not an experienced house builder and changes were made during the course of construction. A verbal mortgage commitment for $100,000 had been made by the Bank of Montreal, although no formal documents had been signed by 20th October 1982. In the meantime mortgage inspection reports were being conducted by the Bank of Montreal. One report dated 25th November 1982 indicates that it is the third inspection with the work approximately 50 per cent complete. Another inspection report dated 5th January 1983 shows the work to be 65 per cent complete. Mortgage proceeds did not become available until 19th January 1983, following the transfer of title to lot 27 into the names of the plaintiffs. The plaintiffs continued with the construction of the house even after they learned that the house was located on the wrong lot. The plaintiffs claim that the project was delayed beyond 1st December 1982 because they were unable to pay all of their subtrades and that the subtrades began to abandon the job. The plaintiffs were able to raise some money, a total of $39,000 from their parents and from their restaurant business, to assist with the interim financing. They gave up possession of their old house to the purchaser, who was Tom Broumas' brother, several months after the promised possession date of 1st December 1982 and the plaintiffs lived with Mrs. Broumas' parents for 2 1/2 to 3 months until their new house was ready for occupancy. Their surplus furniture and effects were stored in the basement of the house under construction. Some of the personal effects were damaged as a result of humidity. Mrs. Broumas had to drive one of her children to the new school located near the new house under construction while she resided with her parents.

[11] Mr. Broumas claims that his health began to deteriorate towards the end of December 1982 and the beginning of January 1983. He complained of abdominal pain and cramps. His family doctor testified that Mr. Broumas had first been seen by him in January 1982 regarding a flu complaint. In August 1982 Broumas again attended at his family doctor's complaining of abdominal pain which the doctor attributed to a viral gastroenteritis. Broumas was also suffering from muscular aches and a sore throat. In September 1982 Broumas consulted the doctor regarding a twisted ankle and in December 1982 for headache, pain in the abdomen, loose bowel and other symptoms again attributed to flu. In January 1983, when Broumas complained of having suffered abdominal discomfort for several weeks, the family doctor then began to suspect peptic ulcer disease and prescribed antacid medication. Some X-rays were taken which proved to be normal and Broumas was referred to a gastroenterologist. The specialist conducted tests on Mr. Broumas in June 1983 and prescribed anti-spasmodic drugs. The X-rays of the colon were normal. On 13th August 1983 the plaintiff Tom Broumas was admitted to the Charles Camsell Emergency Department suffering from progressive abdominal pain. Tests were again conducted and no abnormalities were found until a gastroscopy was performed under general anesthetic and several inflamed areas were observed in the patient's duodenum diagnosed as duodenitis. The specialist in gastroenteritis had been told on referral that Mr. Broumas had a high pressure job. No other areas of his life were discussed other than his smoking habit and drinking habits. The specialist and family doctor could not say conclusively that stress was the cause of peptic ulcer disease. It was suggested that physical and emotional stress can play a part in any disease and that peptic ulcer disease can be aggravated by smoking and drinking and medications such as aspirins.

[12] The defendants deny liability on the ground that the plaintiffs' solicitor should have caught the error at the time of transfer and therefore there would not have been any damage. They say that his lack of care is a novus actus interveniens.

[13] Normally a defendant is absolved of liability where the defendant has done a negligent act but an unforeseen event actually causes the damage. For example, in *Bradford v. Kanellos,* [1971] 2 O.R. 393, 18 D.L.R. (3d) 60 (C.A.), the plaintiff was injured in a stampede of restaurant patrons after another patron had shouted that gas was escaping and that there was a danger of an explosion. The owners of the restaurant were absolved of liability because the damage was caused by the patron who caused the stampede. Mr. Justice Schroeder in reversing the trial judge states at pp. 394-95:

. . . the *causa proximo* of the plaintiffs injuries was the unauthorized and unforeseeable act of the patron who made the exclamation referred to and the disorderly exit made by the other customers who took to sudden flight. This affords a clear example of a *novus actus interveniens.*

[14] In the present case the defendants were not entitled to rely on the plaintiffs' solicitor discovering that the defendants had made a mistake in showing the plaintiffs the

wrong property. It was the defendants' initial error that resulted in the damage being done and not any intervening act on the part of the plaintiffs' solicitor.

[15] In the case of *Goodyear Tire & Rubber Co. of Can. Ltd. v. MacDonald* (1974), 51 D.L.R. (3d) 623, 9 N.S.R. (2d) 114 (C.A.), a sign fell off the defendant's truck, causing a collision and damage to the plaintiffs vehicle. The plaintiff's driver was unable to stop the vehicle in time to avoid the accident because a 15-foot strip of tar had recently been placed on the road. The defendant argued that the tar was a novus actus interveniens and therefore he was not liable. In dealing with the trial judge's reasons, Cooper J.A. at p. 626 states:

He found that the collision between the two vehicles was due "not to the *causa sine qua non* of the improperly attended sign falling from the defendant's truck, but to the *causa causans* of the fresh and slippery tar, *i.e.,* the *novus actus interveniens".* He found that the fresh tar was "so independent and so efficient in its own effect in bringing about the collision, that it must be regarded as having relegated the fall of the sign to an event of merely historical significance".

[16] In overturning this conclusion, Cooper J.A. at pp. 626-27 states:

This brings me to the question of whether the fresh and slippery tar was a *novus actus interveniens* absolving the respondent from liability as found by the trial Judge. I am, with respect, of the opinion that the trial Judge was in error in this finding. A *novus actus interveniens,* as I understand it, is a conscious act of human origin intervening between a negligent act or omission of a defendant and the occurrence by which the plaintiff suffers damage see 11 Hals., 3rd ed., p. 281, para. 466. There was no such intervening act here between the falling of the sign on the highway and the rear-end collision.

The most that can be said is that the fresh and slippery tar was a "cause" of the accident in the sense that if it had not been present on the highway the operator of the Goodyear vehicle would have been able to bring his vehicle to a stop in time to avoid colliding with the rear end of the MacKay vehicle.

In the present case, the solicitor was not the novus actus interveniens. He did not cause the damage; he merely failed to catch the defendant's negligence which ultimately caused the damage.

[17] The actions of the real estate agent, Batiuk, fall within the principle of *Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 (H.L.). Numerous cases have already held that a real estate agent owes a duty of care to the vendor but also to the purchaser. In *Avery v. Salie,* reflex, [1972] 3 W.W.R. 759, 25 D.L.R. (3d) 495 (Sask. Q.B.), a real estate agent was held liable for damages because he failed to ensure that the type of mortgage requested by the purchaser was the type on the property. In finding a duty, MacPherson J. found that a real estate agent is in the situation of a gratuitous agent to the potential purchaser. At p. 761, he concludes that his duty is the same duty as that of a contractual agent. In *Komarniski (Komarnicki) v. Marien,* reflex, [1979] 4 W.W.R. 267, 8 R.P.R. 229, 100 D.L.R. (3d) 81 (Sask. Q.B.), a real estate agent was held liable to a purchaser for representing that a lot was 4.8 acres when in fact it was 2.6 acres. After discussing the Hedley Byrne principle, the learned judge states at p. 238:

The principle has been applied to the relationship between a real estate salesman and the purchaser of property where it was shown that the real estate agent was negligent in making improper statements to the purchaser upon which that purchaser relied: *Bango v. Holt,* reflex, [1971] 5 W.W.R. 522, 21 D.L.R. (2d) 66 (B.C.S.C.). In *Windsor Motors Ltd. v. Powell River* reflex, (1969), 68 W.W.R. 173, 4 D.L.R. (3d) 155, Branca J.A., of the British Columbia Court of Appeal, described the duty in the following terms at p. 177 [W.W.R.]:

"In the *Hedley Byrne & Co.* case it was held that, quite apart from a contractual or fiduciary relationship, a negligent though honest misrepresentation, whether verbal or in writing, might form the basis of an action for damages for financial loss, as the law implies a duty of care when and where a party seeking information from one possessed of special skills trusted that person to exercise due care and the party who makes the representations knew or should have known that reliance was being placed on his skill and his judgment."

This statement was adopted in the *Bango* case, supra.

[18] These decisions are supported by Patterson J., of this court, in *Creyke v. Royal Trust Corp. of Can.* (1980), 17 R.P.R. 298. In *Creyke* a real estate agent was found liable for giving information which he received from a multiple listing service which turned out to be incorrect. Recently Justice Prowse in *Grisack v. Smith* reflex, (1985), 59 A.R. 238 (Q.B.), found a real estate agent liable for misrepresenting that the proposed street lighting would not affect the property in question. At p. 243, Justice Prowse states:

The position of real estate agents in showing properties to prospective purchasers is difficult, to say the least, in that they are the agent of the vendor from whom they will earn their commission and as such are anxious to conclude a sale. They know, or ought to know, that most information sought by a potential purchaser on such occasions is relevant to the purchaser and will be relied on by the purchaser in making a decision whether or not to purchase the property. I am satisfied that a competent real estate agent has that basic understanding and, therefore, the standard of care required of such an agent in performing his duty to a potential purchaser is to be not only honest in expressing an opinion but also to have some valid factual basis for any opinion expressed. If the agent has no valid factual basis for expressing an opinion, then the agent ought to state that fact or qualify the opinion expressed so that the purchaser knows what reliance can be given to the opinion or at least be warned not to rely solely on the same. In my opinion, this duty corresponds to and is the factual basis upon which *Hedley v. Byrne* (supra) applies.

[19] Having established a duty, I must determine whether Batiuk breached this duty. In the pleadings, the plaintiffs allege that the defendants breached their duty of care by providing the plaintiff with the wrong description of the lot which he wanted to buy, misrepresenting the dimensions of the lot and the condition of the lot.

[20] In defence of Mr. Batiuk it is submitted that he relied upon the information contained on the listing from Cowley & Keith and that he made inquiries from their sales representative as to why the words "only vacant lot on south side of street" were contained in the listing, when there appeared to be two vacant lots on the street. He does not remember the explanation given but believed that he must have been satisfied with the answer.

[21] The above quoted cases demonstrate that the real estate agent's duty goes further than merely asking the listing agent if the information is correct.

[22] I conclude that the defendant Batiuk was liable for not ensuring that the proper lot was examined by the plaintiffs in the first place.

[23] In dealing with the claim for misrepresenting the dimensions of the lot and the conditions of the lot I must first point out that no argument was advanced at trial as to the misrepresentation as to the condition of the lot. Therefore, this allegation will not be dealt with since for all intents and purposes lot 37 was the same as lot 27 except that it was ten lots further down the street. In dealing with the misrepresentation as to the dimensions of the lot, I find the present case similar to *Hatlelid v. Sawyer,* [1977] 5 W.W.R. 481, where the Saskatchewan Court of Queen's Bench found that there was no reliance placed on the misrepresentation. In that case the plaintiff had inspected the house himself and concluded that he wanted to purchase that lot. It did not matter to him what size the lot was as he had already made his own measurements to see if the lot would fit his purpose.

[24] In this case Mr. Broumas walked over the property. The survey pin at rear west side of the lot was visible to assist in determining that boundary and the neighbour's fence on the east side outlined the eastern boundary. I find that Broumas was content to purchase that particular lot regardless of the fact that he may not have realized that it was ten feet shorter than shown in the listing agreement. On a square footage basis, the lot was in fact 200 square feet larger than the approximate size of 150 feet x 50 feet originally specified. Mr. Broumas was satisfied with the lot and later commenced the construction of a house on the lot without objection as to the size. Therefore, I find that no damages occasioned as a result of the listing agreement improperly describing the measurements of the lot.

[25] I now turn to the question of damages.

[26] The plaintiffs expected to be in their home by the early part of December 1982. They did not move in until 5th May 1983. They claim that had the right lot been originally purchased they would have moved in in the early part of December as they had anticipated. I find this to be unrealistic. The error was discovered on 20th October 1982 and by 14th December 1982 Mr. Broumas knew that the matter would be rectified. The most I find that the mistake delayed the construction is two months. Therefore, dealing with the special damages I will allow only two-fifths of items (c) (extra heating costs) and (d) (rental of garbage bin). The legal account in the amount of $1,258.50 includes $458 disbursements and covers the cost of discharging the prior mortgage, transferring the land and remortgaging the same. I find that the greater part of the $800 fee is represented by normal mortgage fees which would approximate $500. Having reviewed the solicitor's bill I apportion $300 towards the cost of exchanging lot 37 for lot 27.

[27] The plaintiff claims special damages for the reduction in the size of the lot from that shown on the listing agreement and reduction in the value of lot 27 exchanged for lot 37. I find that no damages were suffered by the plaintiff in either regard. The plaintiff actually ended up with the lot he initially inspected and paid the amount he was willing to pay. The lot he ended up with is similar in most respects to the lot described in the listing agreement. I find this case to be similar to the situation in *Bedford Auto Supplies Ltd. v. Central Trust Co.* reflex, (1986), 73 N.S.R. (2d) 162, 176 A.P.R. 162 (T.D.).

[28] The claim for $250 that Broumas paid to the city for administration fees relating to the transfer of lots is clearly recoverable.

[29] Accordingly I allow special damages in the amount of $1,135.44.

[30] The plaintiff also claims $40,000 as general damages. Evidence was led on behalf of the plaintiff that as a result of the delay in finishing the house, they had to spend several months living with Mrs. Broumas' parents until they could occupy their new home. This caused extra hardship on the family. Mrs. Broumas had to make numerous extra trips to drive her children to the school near the new home. I am sure that there were many similar inconveniences that were caused by having to live in her parents' house. As I have

found that two months of the delay was attributable to the defendants' negligence, I fix $2,000 compensation for the nuisance and inconvenience caused by the defendants' negligence in regard to such delay.

[31] Much effort was spent at the trial in an attempt to prove that the peptic ulcer disease suffered by Tom Broumas was caused by the defendants' negligence in showing the plaintiffs the wrong lot and the consequences which flowed from it. In order for Broumas to recover he must not only prove that his peptic ulcer disease was caused by the defendants' negligence, he must also establish that such deterioration in his health was reasonably foreseeable as a consequence of the defendants' negligence. I find that the plaintiff has failed to prove both requirements.

[32] The medical evidence demonstrated that there was no certainty that the peptic ulcer disease suffered by Broumas was caused by stress resulting from the defendants' negligence. The doctors called could not state definitely that stress does cause peptic ulcer disease, although stress may contribute to it together with other factors such as smoking, drinking and certain medications. In addition was the stress caused by Broumas' job as part owner of a restaurant.

[33] Even if it could have been established that Tom Broumas' peptic ulcer disease was the direct consequence of the defendants' negligence, it could be not be said that this type of damage was reasonably foreseeable as a consequence of the defendants' negligence. I take the law to be that not only must the defendant reasonably foresee damage to the plaintiff but he must also reasonably foresee the general type of damage caused. In *Abbott v. Kasza,* reflex, [1976] 4 W.W.R. 20 at 29-30, 71 D.L.R. (3d) 581 (Alta.), Clement J.A. for the Appellate Division stated:

The scope of the concept of foreseeability of damage came under extensive consideration in England in the trilogy of cases *Overseas Tankship (U.K.) v. Morts Dock & Engineering Co. (The Wagon Mound),* [1961] A.C. 388, [1961] 1 All E.R. 404; *Hughes v. Lord Advocate,* [1963] A.C. 837, [1963] 1 All E.R. 705; and *Overseas Tankship (U.K.) v. Miller SS. Co. Property,* [1967] 1 A.C. 617, [1966] 2 All E.R. 709. These and other later cases were considered by Dickson J.A. (as he then was) in *School Division of Assiniboine South v. Greater Winnipeg Gas Co.,* reflex, [1971] 4 W.W.R. 746 (Man. C.A.), from whose judgment McDonald J. extracted the following principle [p. 172]:

"It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable."

The subject came for consideration later by the Supreme Court of Canada in *Kalogeroupoulos v. Cote* (1975), 3 N.R. 341, in which the main issue was the duty of care owed by the Minister of Highways of Ontario to motorists in respect of a large icy patch on a highway which played a part in a three-car collision. There Dickson J. speaking for himself, Laskin C.J.C. and Spence J. said at p. 348:

". . . It is not necessary that one foresee the 'precise concatenation of events'; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred: *Overseas Tankship (U.K) v. Miller SS. Co. Property* [supra]; *School Division of Assiniboine South v. Hoffer* (1971), 21 D.L.R. (3d) 608, appeal to this Court dismissed."

In this case, one could not foresee physical damage to persons caused by the defendants' negligence. Such damage is too remote to be considered in the circumstances here.

[34] Mr. Broumas claims that he was embarrassed in front of his subcontractors because of the delay in construction and the increased inconvenience in dealing with the subcontractors because of this delay. I find that any embarrassment was minimal, with little inconvenience in dealing with the subcontractors. Mortgage inspections did not appear to be delayed. The plaintiffs quite properly obtained at least partial interim financing elsewhere and any problems with subcontractors appeared to be over the quality and suitability of materials or workmanship.

[35] Lastly, the plaintiffs' loss of photographs and portraits ruined in storage due to construction delay cannot be attributable to the defendant. I find such damages to be too remote. The plaintiffs should have stored their portraits and photographs in a safer place.

[36] In the end result there will be damages in the total amount of $3,135.44 awarded to the plaintiff together with costs on the appropriate scale but not including disbursements for the expert witnesses.

Judgmenent for plaintiffs.
