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SPIS information statements dangerous for all

The Ontario Court of Appeal has written what may be the final chapter in a case involving a couple who unknowingly purchased a home requiring extensive repairs to make it comply with the Ontario Building Code.

Before they signed an unconditional offer to buy the house back in April, 2006, Walter and Shelley Cotton reviewed a Seller Property Information Statement (SPIS) provided by the owners, Gary, Laurie and Carey Monahan. The form disclosed that the sellers had made extensive renovations to the house.

A post-closing inspection revealed electrical, structural and plumbing defects which required gutting a significant portion of the house to the tune of about $85,000.

The buyers sued the sellers, claiming that they actively concealed the hidden defects in the house and did not accurately and truthfully answer the questions in the SPIS.

After a 10-day trial, Justice Harrison Arrell dismissed the Cottons' claim. He ruled that the defects in the house were not known to the sellers and there was no evidence that they purposely or knowingly concealed any defects. The judge also ruled that the sellers accurately and truthfully filled out the questions in the SPIS form.

The case came before the Ontario Court of Appeal last November. In a two-page ruling, the court dismissed the buyers' appeal, ruling that the finding at the trial that the sellers were simply unaware of the defective workmanship was fatal to the claim that they concealed the defects. If the buyers wanted a guarantee of good workmanship, the court said, they should have included it in the offer.

Costs of $13,000 for the appeal were awarded against the buyers.

At the heart of the case is the Seller Property Information Statement, a form published and promoted by the Ontario Real Estate Association. Toronto Star columnist Mark Weisleder encourages agents to obtain an SPIS for their own protection. It should be encouraged, he says, so that all potential problems are brought to the attention of the buyer before the agreement is signed.

Weisleder also writes that if sellers accurately, honestly and completely fill out the SPIS, their "chances of being sued virtually disappear."

On that point, we disagree. I have repeatedly stated in this column that in my view the form is toxic. As the source of endless court cases, it is a huge boon to the litigation bar. Between 1997, when the form was introduced, and the end of 2010, more than 200 reported Canadian court cases focussed on the SPIS. Perhaps ten times that number were settled before trial.

Brian Madigan was a lawyer for more than 25 years. He is now a licensed real estate agent in Brampton.

Madigan shares many of my concerns over the SPIS. In a recent blog, he writes that the document is "helpful" to the buyer. If there are any undisclosed defects in the house, he says the SPIS is going to be quoted word for word in the inevitable lawsuit. It is also intended to help the agents. "They can say, the seller signed a SPIS, blame the seller, don't blame me."

But that's not how it works. Madigan cautions that any listing agent advising a vendor on how to complete the document should "get ready for the lawsuit alleging negligence" associated with the advice.

And buyer's agents are also at risk if they fail to obtain a copy of the form, or if they fail to explain it adequately to the purchasers.

"This whole area is fraught with potential lawsuits," Madigan notes.

In a ruling last year, Ontario appeal court Justice Gloria Epstein quoted the chief justice of Manitoba who said that the form "seems to present a ground ripe for litigation."

So here is my question: if the SPIS is dangerous to sellers, listing agents, and selling agents, and doesn't really serve its intended purpose of sheltering agents from litigation, why is the Ontario Real Estate Association so vigorously promoting it? Why not have a public discussion about whether the form is useful or dangerous, and who if anyone is benefitting from its use?

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See http://aaron.ca/columns/2010-06-26.htm

Trial decision:

http://www.canlii.org/en/on/onsc/doc/2010/2010onsc1644/2010onsc1644.html

Appeal decision

Cotton v. Monahan, 2011 ONCA 697 (CanLII)

Date:	2011-11-10
Docket:	C52166
URL:	http://canlii.ca/t/fnr78
Citation:	Cotton v. Monahan, 2011 ONCA 697 (CanLII)
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DATE: 20111110
DOCKET: C52166

COURT OF APPEAL FOR ONTARIO

Sharpe, Armstrong and Lang JJ.A.

BETWEEN

Walter Bradley Cotton and Shelley Anne Cotton

Plaintiffs (Appellants)

and

Gary Joseph Monahan and Laurie Lynn Monahan

Defendants (Respondents)

Paul Amey, for the plaintiffs (appellants)

Gerry Smits, for the defendants (respondents)

Heard: November 3, 2011

On appeal from the judgment of Justice H.S. Arrell of the Superior Court of Justice dated April 30, 2010, with reasons reported at 2010 ONSC 1644 (CanLII), 2010 ONSC 1644, 93 R.P.R. (4th) 212.

ENDORSEMENT

[1] The appellants claim damages measured by the cost of electrical, plumbing and structural repairs to the house they purchased from the respondents. Some of the defects the appellants repaired were the result of home improvements done by the respondents themselves, although the trial judge found that most of the appellants' complaints related to substandard workmanship completed before the respondents purchased the property.

[2] The plaintiffs, who declined to have a pre-purchase building inspection, alleged at trial that the respondents were liable for the cost of the repairs because they concealed latent defects or were wilfully blind with regard to the defects.

[3] The trial judge dismissed the claim by applying the decision of this court in *McGrath v. McLean* (1979), 22 O.R. (2d) 784, which held that to be successful in such a claim, a purchaser must establish that the vendor knew of the latent defects, concealed the latent defects or made representations with reckless disregard for the truth.

[4] The respondent husband was a handyman who had no formal training. He was not fully aware of building codes or standards and did not consult with professionals when undertaking the repairs. The trial judge found that the respondents did not know that any of the workmanship was defective when they covered it with dry-wall in the normal course of completing the improvements. The trial judge found that the respondents lived in the house for several years after the renovations with no problem. The trial judge further found that the respondent husband was a prudent and careful person who would not have knowingly exposed his family to risk.

[5] In our view, the trial judge's finding that the respondents were simply unaware that the workmanship was defective is fatal to the argument that they concealed the defects in order to sell the property or that they were wilfully blind with regard to the defects.

[6] We do not accept the submission that the trial judge erred in failing to find that the actions of the respondents amounted to "concealment" as that term is used in *McGrath v. McLean*. In our view, "concealment" in this context connotes an act done with an intention to hide from view some defect of which the vendor is either aware or wilfully blind. The trial judge did not err in holding that "active concealment" was required as that formulation of the test is well established: see *Gumbmann v. Cornwall* (1986), 44 R.P.R. 114 (Ont. H.C.J.) at para. 63;*Guglielmi v. Russo,* 2010 ONSC 833, 92 R.P.R. (4th) 117 (Ont. Div. Ct); J. Victor Di Castri, *The Law of Vendor and Purchaser,* 3rd ed.,looseleaf (Toronto: Carswell, 1988), vol. 1 at para. 239.

[7] On the facts as found by the trial judge, the respondents merely completed their renovations in the ordinary course without any knowledge or wilful blindness as to any defects in the work. The appellants were aware of the fact that the respondents had done extensive renovations on their own without a permit and without inspection. If the appellants wanted a guarantee that the work had been done to their desired standard, they were obliged to bargain for an express warranty to that effect to replace the presumptive rule of *caveat emptor*.

[8] The appeal is dismissed with costs to the respondents fixed at $13,318.09 inclusive of disbursements and applicable taxes.

"Robert J. Sharpe J.A."
"R.P. Armstrong J.A."
"S. Lang J.A."