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Disclosure document is an invitation to litigation

The vast majority of residential real estate transactions close as scheduled, without problems or disputes. The chances of any given real estate deal resulting in litigation involving the buyers, sellers and real estate agents increase dramatically when the agents insist that the sellers complete a disclosure document called the Sellers Property Information Statement (SPIS).

The form is published by the Ontario Real Estate Association (OREA).

An increasing tide of court cases from across the country is evidence that the forms provide an endless source of income for litigation lawyers, and a bottomless pit of grief and expense to the parties involved in the transaction.

An Ontario Superior Court decision released earlier this year is yet another example of how dangerous these forms are and why OREA and some of its member boards should bear the blame for promoting them.

Back in 2002, Maria Lunney purchased a 90-year old Ottawa duplex for $180,000 from Jana Kuntova. The listing agent was Masoud Badre, an employee of Re/Max Metro City. The house was described in the sale listing as having a "stone, stucco" exterior with a "stone" foundation.

This type of foundation, with parging on the interior sides, was in common use until about 70 years ago, and is also known as a rubble foundation.

At the time of the listing, Kuntova with the assistance of her agent, Badre completed a Sellers Property Information Statement on the OREA form.

In it she stated that she was not aware of any structural problems in the basement.

Prior to the sale to Lunney, however, Kuntova had accepted an offer to purchase the property from Marque Laflamme. That purchaser had obtained a home inspection report, which indicated advanced crumbling of the rubble foundation under the rear extension of the house. Laflamme backed out of the transaction, although the seller was not told the reason for the cancellation.

At the time of her purchase in 2002, Lunney also commissioned a home inspection, but it did not reveal any defects in the foundation as the interior basement walls had been covered with drywall since the previous inspection.

A subsequent inspection undertaken for Lunney in 2005 revealed that there were serious foundation deficiencies behind the drywall, and that the property would either have to be demolished or raised to permit the construction of a new foundation under it.

The following year, Lunney sued Kuntova, Badre and Re/Max Metro-City for $300,000 in damages for misrepresentation. The co-defendants also sued each other.

The trial took place late last year over the course of five days. As a general guideline, the three lawyers involved probably spent at least another five days each in pre-trial discoveries and in preparation for trial. That comes to a total of a minimum of 30 lawyer-days, and points to a combined legal bill for everyone of something north of $100,000.

In the end, the judge found no evidence that the defendants were aware that the foundation was useless. The judge dismissed the case. Following the trial, Lunney paid court costs to the defendants, but the amounts have not been made public. As well, the losing plaintiff was responsible for her own legal bills and the foundation is still at the end of its useful life.

But for the existence of the SPIS this case may never have gone to court. The form is an invitation to litigation, and in my view agents who promote it are doing themselves and their clients a huge disservice by exposing everyone to needless litigation.

Bob McLean, director of communications at OREA, the publisher and promoter of the SPIS disclosure form, emailed me last week to say that the association had declined my request to interview a spokesperson but would shortly be providing me with a written statement about its position on the SPIS.

Bob Aaron *is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818.* ***Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.***

COURT FILE NO.: 06-CV-034131

DATE: 2009/02/24

ONTARIO

B E T W E E N:	)	
	)	
MARIA LUNNEY	)))	Robert J. De Toni, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
JANA KUNTOVA, MASOUD BADRE and RE/MAX METRO-CITY LTD.	))))))	Mark W. Smith, for the Defendant, Jana Kuntova and Adam Stephens, for the Defendants, Masoud Badre and Re/Max Metro-City Ltd.
	)	
Defendants	))	
	)	
	)	**HEARD:** October 7, 8, 9, 10, and 17, 2008

REASONS FOR DECISION

Power J.

Introduction

[1] In her Amended Statement of Claim the plaintiff seeks damages in the amount of $300,000 against all defendants for fraudulent and/or negligent misrepresentation in connection with her 2002 purchase of a duplex known as 558 Melbourne Avenue, Ottawa, from the defendant Kuntova. In addition, she seeks punitive damages in the amount of $25,000.

[2] The defendant Badre acted as the vendor s real estate agent. Mr. Badre was employed at all relevant times by the third defendant, Re/Max Metro-City Ltd., a real estate broker. Ms. Kuntova has delivered a cross-claim against her co-defendants seeking contribution and indemnity should the plaintiff be successful in her claim against Ms. Kuntova. In addition, Mr. Badre and Re/Max have cross-claimed against Ms. Kuntova.

[3] The plaintiff s claim, in its essence, is that the defendants, at the time of the sale and purchase, were aware that the foundation of the house had deteriorated to such an extent that it was virtually useless. The main building and its foundation appear to have been constructed more than 90 years prior to the property being listed for sale in 2001. The plaintiff alleges that the defendants deliberately concealed the condition of the foundation from her with intent to induce her into purchasing the property.

[4] The foundation had, in fact, reached the end of its useful lifespan by 2001 and, indeed, some time before 2001.

[5] The defendants deny that they were aware of the extent of the deterioration of the foundation and, in particular, deny any attempts to conceal its condition from the plaintiff.

Findings of Fact and Discussion

[6] Ms. Kuntova purchased the Melbourne property in 1993 or 1994. She lived in it until the time of the sale to the plaintiff. Mr. Badre acted as her agent at the time she purchased the property and again at the time it was listed for sale in 2001 and sold in 2002. Mr. Badre is an experienced real estate agent.

[7] Notwithstanding that there are circumstances that give rise to a suspicion of misrepresentations by the defendants, I have concluded that the plaintiff has failed to meet the burden on her to prove misrepresentation and/or concealment. In my opinion, the inferences from the facts which the plaintiff wants me to make are not warranted by the evidence. I have not been persuaded on a balance of probabilities that any or all defendants knew that the foundation had become useless or that they were guilty of concealment or reckless disregard for the truth or falsity of any representations. Neither Ms. Kuntova nor Mr. Badre was shaken in the giving of their testimony. I accept as credible Ms. Kuntova s testimony that she listed and sold the property for financial reasons and that she was not aware of nor did she misrepresent the condition of the foundation. Similarly, I find that Mr. Badre was not aware of the condition of the foundation and that he too did nothing to misrepresent its condition nor did he in any way

attempt to conceal it from the plaintiff.

[8] In other words, I have not been satisfied beyond a reasonable doubt that the plaintiff has made out a case of misrepresentation against Ms. Kuntova or Mr. Badre. In the light of this conclusion, it goes without saying that the plaintiff has not met the higher burden on her to prove misrepresentation by fraud. There is no reason to suggest any liability on behalf of Re/Max because the validity of the claim against it depends on the validity of the claim against Mr. Badre.

[9] The Melbourne property was listed by Ms. Kuntova through Mr. Badre in 2001. The information supplied through the Ottawa Real Estate Board to prospective purchasers described the property as having a stone, stucco exterior with a stone foundation. The house is a 2-storey home of wood framed construction with a brick veneer covering the stucco. The foundation was, and still is, known as a rubble foundation with some parging on its interior sides. The evidence establishes that a rubble foundation is also known as a stone foundation. This type of foundation is commonly found in homes of more than 70 years of age. The lifespan of such foundations is lengthy and depends on several factors. I find that by 2001 this rubble or stone foundation would, most likely, have required some attention but that the need for such attention would not necessarily be obvious to the average homeowner unless there was some sort of structural failure that was obvious. I find that none of the defendants were aware of any structural failure attributable to the foundation. There is no negligent or deliberate misrepresentation in the above-mentioned Ottawa Real Estate Board information.

[10] The experts do not seriously disagree that, as a result of evidence that became available approximately three years after the completion of the real estate transaction, the foundation had come to the end of its useful life. In particular, I accept the evidence of Mr. Bottriell P. Eng. RHI that this foundation has reached the end of its lifespan and has actually failed in a few locations and that this failure has caused the parging and brick to come off the wall which is unsupported and starting to collapse. I also accept Mr. Bottriell s conclusion that this house needs immediate structural repair.

[11] It is important to note that there is an old addition at the back of the main building. This addition was constructed by partially enclosing a wooden porch at the rear of the main building. This addition has no foundation as such *i.e.* other than the original porch supporting posts. When the property was listed there was a crawl space under this addition which was accessible through a small access door on the side of the skirt wall that surrounded the addition.

[12] I accept as truthful Ms. Kuntova s testimony wherein she said that, just prior to listing her property, she personally inspected the outside of the house and observed some cracks on the outside walls and that she repaired them herself. I accept her testimony that this was not an attempt to cover up any foundation problems. As aforesaid, she was not aware of the foundation problems even though she was aware that the foundation was very old. Age alone does not justify a conclusion that the foundation had failed completely.

[13] At the time Ms. Kuntova listed the property for sale through the defendants she, with Mr. Badre s assistance, completed a Seller Property Information Statement. I will hereinafter refer to this document as an Information Statement. This Information Statement is a form prepared by the Ontario Real Estate Association for use throughout Ontario. It was a relevantly new device in 2001. While Mr. Badre could not specifically recall doing so on this particular occasion, I accept his testimony that his usual practice was to tell the vendor that, when the Information Statement was completed, it was necessary for the vendor to be honest and that a copy would be supplied to prospective purchasers.

[14] The Information Statement form contains the following noteworthy provisions beginning with the following which appears at the top of the first page:

ANSWERS MUST BE COMPLETE AND ACCURATE. This Statement is designed in part to protect Sellers by establishing that correct information concerning the property is being provided to buyers. All of the information contained herein is provided by the Sellers to the broker/sales representative. Any person who is in receipt of and utilizes this Statement acknowledges and agrees that the information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter. The broker/sales representative shall not be held responsible for the accuracy of any information contained herein.

BUYERS MUST STILL MAKE THEIR OWN ENQUIRIES. Buyers must still make their own enquiries notwithstanding the information contained on this statement. Each question and answer must be considered and where necessary, keeping in mind the Sellers knowledge of the property may be incomplete, additional information can be requested from the Sellers or from an independent source such as the municipality. Buyers can hire an independent inspector to examine the property to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified.

[15] Below the two above quoted paragraphs there is a series of questions. The following are quotes of some of the relevant questions:

	SELLER(S) TO INITIAL EACH APPLICABLE BOX			
	YES	**NO**	**UNK (unknown)**	**N/A**
GENERAL:				
15. Do you know the approximate age of the building(s)? Age Any additions: Age			√	
WATER SUPPLY AND WASTE DISPOSAL: (there is nothing of relevance under this heading				
ENVIRONMENTAL: (again, there is nothing of relevance here)				
PAGE 2				
STRUCTURAL:				
1. Are you aware of any structural problems?		√		
2. (a) Have you made any renovations, additions or improvements to the property?		√		
(b) Was a building permit obtained?				√
(c) Has the final building inspection been approved or has a final occupancy permit been obtained?				√
7. Are you aware of any moisture and/or water problems in the basement or crawl space?		√		
16. Is there a home inspection report available? Date of Report .		√		

CONDOMINIUM: (not applicable)				
RENTAL INFORMATION: (not applicable)				

[16] Following the questions and answers portion the form provides a space for ADDITIONAL COMMENTS . The following appears:

THE SELLERS STATE THAT THE ABOVE INFORMATION IS TRUE, BASED ON THEIR CURRENT ACTUAL KNOWLEDGE AS OF THE DATE BELOW. ANY IMPORTANT CHANGES TO THIS INFORMATION KNOWN TO THE SELLERS WILL BE DISCLOSED BY THE SELLERS PRIOR TO CLOSING. THE SELLERS HEREBY AUTHORIZE THAT A COPY OF THIS SELLER PROPERTY INFORMATION STATEMENT BE DELIVERED BY THEIR AGENT OR REPRESENTATIVE TO PROSPECTIVE BUYERS OR THEIR AGENTS OR REPRESENTATIVES. THE SELLERS HEREBY ACKNOWLEDGE RECEIPT OF A TRUE COPY OF THIS STATEMENT.

NOTE: SELLERS ARE RESPONSIBLE FOR THE ACCURACY OF ALL ANSWERS.

[17] Ms. Kuntova signed this document.

[18] I pause to note that Information Statements are not mandated by law.

[19] In October 2001 Ms. Kuntova accepted an offer to purchase the property from Mr. Marque Laflamme. The agreement was conditional on an inspection. The inspector retained by Mr. Laflamme, David Glennie, noted in his report and advised Mr. Laflamme that the basement walls (in the main building, not the addition), were all covered on the interior (meaning that they could not be seen). He made the following relevant comments at pp. 9, 12, and 22 of his report and advised Mr. Laflamme of these during the inspection: (Note: the underlining is substituted for circling that was done on the report format employed by Mr. Glennie)

Age: the main building was constructed about 1920 s, with one/two/no old additions/renovations rear

Class: Substandard Economy Average Custom Luxury

Limitations:

√ basement walls are all / mostly / partly covered on the interior

√ interior finish has been recently painted: basement / first floor / second floor / third floor

SUMMARY

IV) This SUMMARY CHART OF DEFICIENCIES is to be used as a guide only and should not be considered as fully inclusive of all repair items. Description of the systems and detailed notes are on the following report sheets.

SYSTEM	Col. *1	*2	*3	
1.0 General Exterior (not relevant)				
2.0 Structural				
main foundation	X	X	X	advanced crumbling of rubble-stone material noted under rear extension (above grade)
				- walls are completely covered in the basement
				removal of drywall required for better determination
rear extension	X	X	X	bowing of skirt wall and no structural piers found

*Column 1: Major Deficiency

*Column 2: More Info Req d

*Column 3: Monitor

STRUCTURAL SYSTEM

DESCRIPTION	PROCEDURE - DEFICIENCIES	SUMMARY ITEM
2.1 Foundation	√ Foundation walls visually checked where visible (closed space)	√ Major √ MR √ Monitor
√ Stone/rubble (F) main	significant crumbling and weakness of foundation wall at rear crumbling, scaling, bowing, old	
Details √ exterior parging	exterior parging loose, cracks (other than the handwritten comment about significant crumbling, the other comments relate to the addition at the rear)	
2.2 Basement Moisture Considerations	√ Visually Inspected, Limitations as per 2.1	
Details	√ Moisture Readings taken on finish materials	√ MR √ Monitor
√ Interior wall finish 100%	√ Not accessible	
	seepage - occurring near window (sides)	

[20] Mr. Glennie advised Mr. Laflamme that to be thorough he would have to perform a much more detailed inspection than the type contracted for in order to give a detailed report on the foundation. He also pointed out other deficiencies which he ranked as major. However, the main deficiency was the foundation.

[21] Mr. Glennie did not have any personal recollection of the inspection. His testimony was based on his written report. He testified that, notwithstanding that in the interior the walls were covered with drywall, they were able to see part of the foundation walls from a crawlspace area. Mr. Glennie also recalls seeing some evidence of leakage near the basement windows where there was evidence of water penetrating from the exterior. He concluded that the house was at least 80 years old and that rubble/stone foundations, such as the one here, have a lifespan of 55 to 100 years. He said it would be reasonable to assume that the foundation was nearing the end of its useful life. Mr. Laflamme backed out of the transaction.

[22] It is not clear from the evidence just what information was passed on by Mr. Laflamme to his agent or by his agent to the vendor. Notwithstanding this uncertainty, I find that neither Ms. Kuntova nor Mr. Badre was told that the reason for Mr. Laflamme s backing out of the transaction was the state of the old rubble foundation.

[23] It is important to note that the Melbourne property was the only real estate ever owned by Ms. Kuntova. During her plus or minus 7 years occupancy of the premises she was married for a short period of time. Her husband was knowledgeable about construction and made a number of repairs; however, she was/is not sophisticated in real property or construction issues. Her husband constructed the drywall in the basement during 1996 or 1997. The purpose of putting up the drywall, according to Ms. Kuntova, was to improve the look of the basement and to keep down the dirt. Ms. Kuntova described the basement as dark and dusty. I accept Ms. Kuntova s testimony that she never saw any water on the basement floor at any time during her habitation of the premises. Indeed, she painted the floors and ceilings in the basement around the time of the drywall installation. As I found earlier, Ms. Kuntova did not intend to hide the defective foundation behind the drywall.

[24] Ms. Kuntova testified, and I accept her testimony as truthful, that, during her habitation, there were no smells in the basement emanating from water or dampness. She found an old sump pump in the basement; however, she threw it out because it was not working and it was not needed. She said that no water had accumulated in the sump pump hole and that she was never advised by anyone of any problems with her foundation prior to completing the transaction of purchase and sale with Ms. Lunney.

[25] Ms. Kuntova also testified that she had no specific recollection of completing the Information Statement; however, she acknowledged completing it. She also said that she did not know that she had an option with respect to completing the document but that she understood it was the usual practice to complete such a statement. She could not recall Mr. Badre telling her what he intended to do with the questionnaire. However, she insisted that she would have answered the questions honestly. It will be observed that none of the questions in the Information Statement relates specifically to a foundation .

[26] Mr. Laflamme, whose testimony I accept as credible, testified that he was present during the inspection and was advised by Mr. Glennie that the foundation was in very bad shape and would cost a lot of money to fix. As a result, Mr. Laflamme decided forthwith not to complete the purchase of the property. Neither Ms. Kuntova nor Mr. Badre was present at the inspection. I should add, as well, that the foundation walls were not visible, or were just barely visible, from the exterior of the building. At no time did Mr. Laflamme, his wife, or Mr. Glennie speak with Ms. Kuntova or Mr. Badre about what they had seen and discussed between themselves. However, they, or one of them, did discuss what they saw with their real estate agent who was with them during the inspection. That real estate agent did not give evidence at trial. This is significant. Mr. Laflamme testified that he personally saw some crumbling in the walls in the basement. However, he could not recall which wall it was. He did, however, recall Mr. Glennie pulling stones or earth from the foundation walls while in the basement.

[27] Following the notification to Mr. Badre by Mr. Laflamme s agent that the transaction would not be completed, Mr. Badre advised Ms. Kuntova that there was a problem in the exterior back wall near the kitchen and pointed out to her some areas where stucco was peeling. He advised her to fix it which she did. All of the work done by her flowing from this conversation was done to the addition, not the main building. I pause to observe that, because of the passage of time, all witnesses at trial suffered from memory loss.

[28] Notwithstanding that I do have some concerns with the reasonableness of the testimony of both Ms. Kuntova and Mr. Badre, the evidence at trial, taken as a whole, is such that I cannot and do not reject the testimony of either of them as being untruthful. Notwithstanding the efforts of Mr. De Toni, counsel for the plaintiff, he was not able to shake or seriously question their veracity.

[29] It was Ms. Kuntova s testimony that Mr. Badre told her that Mr. Laflamme had backed out of the transaction because of the peeling stucco at the rear of the premises. While Mr. Badre could not recall this, I accept, as aforesaid, Ms. Kuntova s evidence as credible.

[30] Mr. De Toni, in his cross-examination and during argument, raised a number of questions about the veracity of the testimony of the defendants. I am left with a request by the plaintiff to draw inferences in the face of evidence to the contrary that appears to be credible. Ms. Kuntova s evidence about the work she did following the collapse of the Laflamme agreement is corroborated by the contractor which she hired to effect some repairs to the addition, Mr. Heafy.

[31] During his repair work, which was prior to Ms. Lunney agreeing to purchase the property, Mr. Heafy closed off the earlier mentioned hatch at the side of the addition. His testimony was that it was his idea to do so and that he was not instructed to do so by Ms. Kuntova. I observe that if Ms. Kuntova s intent was to have Mr. Heafy cover-up the foundation, it would have been unwise to continue to show the property to prospective purchasers, which she did, while Mr. Heafy carried out his work. Therefore, this is strong evidence in favour of the defendants in contradiction of the allegation that, by closing the hatch, their intent was to make it impossible to view the interior of the foundation from the rear of the property. Mr. Heafy testified that, when working at the site, he did not see the main foundation wall and saw nothing abnormal.

[32] While I did not agree with the substance of all of Mr. Heafy s testimony, there is no justification for rejecting his testimony as incredible. In my opinion, the nature of the information received by the defendants following the Laflamme/Glennie inspection, was not such as to convey that the foundation was useless. Therefore, I conclude that there was no reason compelling the defendants to complete a revised, or new, Information Statement. Indeed, when Ms. Kuntova became aware of what she understood to be some concerns about the addition, she undertook to remedy those concerns, not hide them. After the Laflamme deal fell through, according to Ms. Kuntova, Mr. Badre spoke with her and told her there was a problem in the back of the house i.e., in the kitchen area. He took her outside and showed her places on the back wall where stucco was peeling off and told her that it should be fixed. Ms. Kuntova acknowledged that she did indeed see stucco crumbling or peeling off. There was one large spot in particular. She testified that she assumed that this was the reason Mr. Laflamme had backed out of the transaction and, indeed, her recollection was that Mr. Badre told her that that was the reason. Mr. Badre does not recall these events.

[33] Ms. Lunney, a 45 year old teacher, began her search for a house in the Westboro area of Ottawa, the area in question, in 2001. She had never before owned a home. She was looking for an older home. In early January of 2002 she came across the listing for the subject property whereupon she contacted her uncle, Pat Smith, a real estate agent. She asked him to accompany her on a site visit which he did. After the first visit she returned again with Mr. Smith and her parents for a second visit. After those two visits she had no real concerns with what she observed. Indeed, her few concerns about which she testified at trial were related to minor items of d cor.

[34] With the assistance of Mr. Smith an offer to purchase was prepared with a house inspection clause. Ms. Lunney knew that, because she was buying an old house, there would be wear and tear issues. The inspection clause reads as follows:

> This Offer is conditional upon the inspection of the subject property by a home inspector at the Buyer s own expense, and the obtaining of a report satisfactory to the Buyer in the Buyer s sole and absolute discretion. Unless the Buyer gives notice in writing delivered to the Seller not later than 11:59 p.m. on the 18th day of January, 2002, that this condition is fulfilled, this Offer shall be null and void and the deposit shall be returned to the Buyer in full without deduction. The Seller agrees to co-operate in providing access to the property for the purpose of this inspection. This condition is included for the benefit of the Buyer and may be waived at the Buyer s sole option by notice in writing to the Seller within the time period stated herein.

[35] The agreed upon purchase price was $180,000. Neither Ms. Lunney nor Mr. Smith had any contact with Messrs Laflamme and Glennie nor did they see Mr. Glennie s report. There was no evidence given at trial regarding whether Ms. Lunney even knew about Mr. Laflamme s offer and his withdrawal from the transaction.

[36] Prior to the expiration of the time limit for compliance with conditions in the agreement, Ms. Lunney was, through Mr. Smith, provided with a copy of the aforementioned Information Statement. A new statement was not prepared notwithstanding the above-described repairs. Mr. Badre could not recall why a new statement was not prepared.

[37] I pause here to note that I have no concerns with the credibility of either Ms. Lunney or Mr. Smith. Indeed, Ms. Lunney did not at any time overstate her case in any significant respect. On a couple of occasions Ms. Lunney did contradict the answers she gave on her examination for discovery; however, in my opinion, these contradictions were not significant. In the end, I am satisfied that she received a copy of the Information Statement prior to the expiry of the conditions and that she read it and relied on it. I observe, however, that the contents of the Information Statement quoted earlier in these reasons contain a warning that it should not be relied on as a warranty.

[38] Mr. Chalmers, the inspector retained by Ms. Lunney, provided her with a copy of his inspection on the spot. Under the heading History of Home Improvements Mr. Chalmers made the following observation: Foundation parging loose, missing behind the surface in some areas. He then checked the blocks or boxes opposite the following pre-typed language: Remove loose parging. Install parging where missing or removed in future caulk around openings as required. These comments related to the exterior of the building. Item D1 of his report is entitled Foundation Walls. At the bottom of the first page under section D1, Mr. Chalmers wrote Other not able to view, completely finished, covered. Under section D2 entitled Foundation Walls General he checked the following pre-printed language Normal condition (humidity) and added No action required. He again noted on this page that the foundation walls were completely covered. In D3 he described the basement floor as being in normal condition with no action required.

[39] Under the heading E3 entitled Insulation General he made the following comment concerning the basement walls: none visible behind dry wall.

[40] Mr. Chalmers possesses considerable experience with house inspections and was a credible witness. He stressed that an inspector cannot comment on things he/she cannot see and that an inspector is precluded from damaging the premises to gain access to things that are not visible to the naked eye. As his report indicates, he was not able to observe the foundation wall at all because it was completely covered with drywall. He said that, therefore, he could not comment on the foundation s condition and did not comment. However, he did say that he was not alerted by any problems with the foundation when in the basement. He did not observe any unusual dampness, humidity, or water in connection with the walls and floor. He was not sure what type of foundation was in/under the house. He said that he saw nothing unusual that would suggest foundation issues *i.e.* there were no flags even though he was well aware that the house was an old one.

[41] His testimony was that, because he observed no problems, he did not specifically tell Ms. Lunney to pursue further inquiries about the foundation. For the record, I observe that it is not my function to make findings concerning the competence or scope of the advice given to Ms. Lunney by Mr. Chalmers. My task is to make findings concerning the allegations of misrepresentation by the defendants. I do, however, find it strange that Mr. Chalmers would not have, at least, warned Ms. Lunney of possible dangers given the age of the house. On the other hand, there was compelling professional opinion evidence given at the trial regarding the scope of duty owed to a client by an inspector under a contract such as existed between Mr. Chalmers and Ms. Lunney that might explain or answer my query. In his testimony, when asked why he did not say something about the possibility of problems with the foundation he said, if there was a foundation problems, there would be something to suggest them and there wasn t. (This is a paraphrase rather than a direct quote). He also said, I have been surprised to find out there was a problem. On the evidence before me, I cannot, and do not reach a finding that Mr. Chalmers acted negligently.

[42] He added that he usually looks for mold, smells of mold, and staining, but found none of these in the basement.

[43] Ms. Lunney testified that, as a result of the Chalmers inspection, she was inclined (getting ready) to waive the inspection condition in the agreement of purchase and sale. Before doing so, Mr. Smith received a copy of the Information Statement from Mr. Badre and gave it to Ms. Lunney. She went through the Information Statement, observed that there was information in it to the effect that there were no renovations, additions or improvements. She said that, and I believe her, she, therefore, decided to go ahead with the purchase she relied on the Information Statement in reaching her decision to waive the condition.

[44] Ms. Lunney did not discover the serious problem with the foundation until 2005 even though she resided in the property for several months following the closing of the purchase and sale transaction in early 2002. She travelled abroad from August 2002 until some time in 2005 when she returned. During that period of time the premises were leased to a tenant through a property manager. The evidence discloses that the tenant encountered no relevant problems during her tenure. In the spring of 2002 there was some water seepage in the basement; however, there is evidence to indicate that it followed a major rainstorm. Ms. Lunney removed the water with rags and a pail the area covered was not large.

[45] Mr. Bottriell was retained in September 2005 to inspect the property. By this time part of the drywall had been removed in the basement. He, at that time, discovered the serious foundation deficiencies. Mr. Bottriell advised Ms. Lunney that the property would either have to be demolished or raised to permit the construction of a new foundation under it *i.e.* that an entirely new foundation would have to be installed. Ms. Lunney testified that she did not have sufficient financial resources available to do either and, therefore, has continued to reside in the house pending the outcome of this litigation.

[46] Ms. Lunney testified that had she known of the substance of the Glennie report or the work done by Mr. Heafy she would not have completed the transaction.

[47] During the inspection carried out by Ms. Lunney and later by Mr. Chalmers prior to closing, neither was denied access to the house other than, of course, to those areas in the basement behind the drywall. Ms. Lunney, at no time, spoke to any of the defendants regarding the condition of the property nor did anyone else on her behalf. She knew the house was an old one but had no concerns about its age.

[48] The agreement of purchase and sale contains the usual entire agreement clause. It reads as follows:

> AGREEMENT IN WRITING: if there is conflict or discrepancy between any provision added to this Agreement (including any Schedule attached hereto) and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. For the purposes of this Agreement, Seller means vendor and Buyer means purchaser. This Agreement shall be read with all changes of gender or number required by the context.

[49] It is clear from the wording of the Information Statement that it is not a warranty upon which reliance can be placed. Ms. Lunney did, however, rely on it. Schedule A to the agreement contains a clause that says that the Seller agrees to provide, at the Seller s own expense, upon acceptance, a Seller Property Information Statement among other things. I do not accept as compelling the plaintiff s argument that the effect of Schedule A is to incorporate the Information Statement as an integral part of the agreement of purchase and sale. In my opinion, there is nothing in the Information Statement that can be classified as a fraudulent misrepresentation nor is there anything that constitutes a negligent misrepresentation. In other words, I can find no fraudulent or negligent misrepresentations in the Information Statement that could be considered as an attempt by the defendants to hide information that they knew might lead Ms. Lunney to walk away from the transaction. It is also noteworthy that, in cross-examination by Mr. Smith, Ms. Lunney specifically stated that she was not misled by the answer concerning renovations, additions or improvements.

[50] There is no evidence before the Court to indicate that any of the defendants has specific knowledge of the reasons why Mr. Laflamme did not complete his agreement of purchase and sale or upon which I should infer knowledge on the defendants part. If they knew anything, they knew only that he was not satisfied with the premises. In particular, there is no evidence to warrant a finding that the defendants were aware of the serious issues with the foundation. Counsel for the plaintiff urges me to draw an inference. As aforesaid, I cannot do that in the circumstances.

[51] Mr. Bottriell who, as aforesaid, testified on behalf of the plaintiff, estimated the normal lifespan of a rubble and stone foundation to be between 80 and 100 years. When he examined the premises in 2005 he noticed that there was some rot at the bottom of the basement studs to which the drywall was attached. He concluded that the rot was the result of water. However, I do not consider this as evidence of a cover-up. He concluded that the foundation had probably ended its useful life at least 3 years before his inspection and probably 20 years before. He said that this was one of the worse I ve ever seen and concluded by saying that nothing could be done to extend the life of the foundation. Mr. Bottriell agreed on cross-examination that it was possible that the water penetration he noticed in 2005 could have been a problem for as little as 2 or 3 years prior to that time.

[52] The evidence at trial was that a series of listing agreements were entered into between the defendants. In my opinion, the fact that a new Information Statement was not completed on each of these occasions is an irrelevant fact in determining liability in this case. I also consider as irrelevant the uncertainty and changes that took place with respect to the cost of Mr. Heafy s work to repair the addition. As well, and as mentioned earlier, I consider irrelevant Ms. Kuntova s failure to deliver a new Information Statement because the work done by Mr. Heafy was not, in my opinion, material. The work has nothing to do with the foundation issue with which we are concerned in this action and, in any event, the work done by Mr. Heafy benefited the property even though Mr. Bottriell was somewhat critical of Mr. Heafy s work. While I can understand Ms. Lunney s reliance on the Information Statement, I cannot understand her position that Mr. Heafy s work would have caused her to abandon the agreement. As aforesaid, Mr. Heafy s work had nothing to do with the foundation issue.

[53] The relevant law concerning the purchase and sale of real estate begins with the proposition that, generally speaking, a purchaser of real estate takes the property as he/she finds it. However, where there is proven fraudulent or other misrepresentation, the general rule ceases to apply. Material defects known to the vendor cannot be concealed nor can the vendor remain silent about them they must be disclosed. In this regard see V. DiCastri (Carswell, 1998, The Law of Vendor and Purchaser).

[54] As aforesaid, the defendants did not act fraudulently. As well, there is no negligent misrepresentation as that term has been defined in our law.

[55] Professor Bora Laskin, as he then was, in a 1960 Law Society of Upper Canada Special Lectures paper entitled *Caveat Emptor* and the Vendor s Duty of Disclosure had the following to say: A latent defect of quality going to fitness for habitation and which is either unknown to the Vendor or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity will not support any claim of redress by the Purchaser. He must find his protection in warranty. There is no evidence in this case, as I have already stated, whereby the defendants can be held to possess knowledge of the defective foundation. Therefore, without such knowledge, they cannot be held liable to the plaintiff for a negligent misrepresentation. A vendor, prior to selling real estate, is not obliged to perform a detailed inspection of his/her property. In addition, there is no warranty upon which the plaintiff can support her claim. Notwithstanding that the plaintiff may have relied on the Information Statement, it does not constitute a warranty.

[56] An Entire Agreement provision such as was used in this matter is enforceable. In this case, it is not vitiated by any misrepresentation or other wrongful conduct on the part of the defendants and, therefore, they are entitled to rely on the provision especially, in this case, given the forceful and highlighted limitations spelled out in the Information Statement. See, among other cases, *1261687 Ontario Inc. v. DiVincenzo*, [2005] O.J. No. 1057 (S.C.).

[57] The defendants rely on the decision of R. Smith J. in *Gallagher v. Pettinger*, [2003] O.J. No. 409 (S.C.) for the proposition that where a home inspection report is relied on by a purchaser any reliance he or she may have had on representations by the vendor disappears. Smith J. quoted from *Hoy v. Lozanovski* (1987), 43 R.P.R. 296 (Ontario District Court) as follows:

> However, if the purchaser chooses to not rely on the vendor and requests inspections, including professional inspectors (i.e. Home Inspection Service) then reliance for completion of the deal (the waver [*sic*, waiver] in this case) is shifted to the inspector whom the purchaser has chosen. The purchaser has relied on the inspection [*sic,* inspector s] report not, the vendor s silence, to formulate his decision whether or not to complete the deal.
>
> Of course, as stated, if the vendor made representations to the purchaser or the purchaser s inspection [*sic*, inspector] that were fraudulent, then the responsibility for disclosing the latent defect would remain with the vendor.

[58] Smith J. went on to add: Absent fraudulent representations or concealment, when a professional home inspector s report is obtained then reliance has shifted to the home inspector.

[59] While these principles appear to apply in this case, I wish to make it clear that I rely on them only as an alternative reason for dismissing the plaintiff s claim.

[60] Fraud is a serious complaint. The evidence required to sustain such an allegation must be clear and convincing. Here, it is not clear and convincing.

Damages

[61] Regardless of the fact that I have found no liability on the part of the defendants to compensate the plaintiff for her misfortune, I did hear considerable evidence on the issue of damages. Therefore, I believe that it is appropriate for me to express an opinion on damages.

[62] I agree with counsel for the defendants that the usual measure of damages in cases like this is the diminution in property value test. For example, in *Wood v. Hungerford*, 2004 CarswellOnt 4432 (S.C.) (varied on appeal but approved as to damages) a purchaser brought a tort action against a vendor of a property and others in respect of an unsound foundation. The Court found for the plaintiff and awarded damages based upon the difference between what was paid for the property and what it was worth at the time. Hackland J. held as follows:

> Clearly, the general rule is that a purchaser should recover the diminution in value of the property resulting from the undisclosed or undiscovered defect. As Doherty J.A. observed in Toronto Industrial Leaseholds at p. 23-24 (O.R.):
>
> In accepting the approach in Messineo as the norm, I do not mean to suggest that the Messineo formula provides the only method of assessing

damages in cases where clients have entered into real estate transactions as a result of negligent advice from their solicitors. As the English cases demonstrate, there will be instances where other approaches more effectively achieve a full restoration: County Personnel Ltd. v. Alan R. Pulver & Co., [1987] 1 All E.R. 289 at p. 297, [1987] 1 W.L.R. 916 (C.A.); Hayes v. James & Charles Dodd, [1990] 2 All E.R. 815 (C.A.) at p. 819. These cases, however, establish that the measure of damages used in Messineo is the appropriate one absent some basis in the evidence for holding that some other means more effectively restores the wronged party to the position he or she would have been in but for the solicitor's error.

As predictability in the assessment of damages fosters early and fair settlements of claims, I see great value in promoting that certainty. The Messineo approach to damages has been widely accepted as a proper measure of damages in cases like this one and should be applied unless the party promoting a different approach can demonstrate that the alternative approach more effectively achieves the restitutionary goal underlying the law of damages.

[63] It is clear that, even without the house on the property, the lands have a substantial market value because of the location of the property. Indeed, the parties are in agreement that the market value of the land at the time of the trial was $275,000. There was no evidence led concerning the value of the land in 2002. Therefore, I find that its market value at that time was the amount of $180,000, which sum was the sum of the arms-length negotiations between the parties on the assumption that the foundation was a good one. There is no evidence upon which I should find that, when she purchased the property in 2002, Ms. Lunney actually paid more than it was worth.

[64] The expert evidence of Mr. Bottriell establishes that to fix the foundation, the house would have to be raised and a foundation built under it. The cost of doing this would be approximately $275,000.

[65] The plaintiff s appraiser, Mr. Beauregard, whose evidence I accept, testified that the property with the house on it would, at the time of trial, have a market value of $340,000. He opined that, as a vacant lot, the land had a value of $275,000. My understanding of his evidence was that, in arriving at this figure, he assumed that the foundation would be a good one. In my opinion, the betterment principle does not apply in these circumstances because both Ms. Lunney and the vendor thought that she was purchasing a property with a good foundation.

[66] Damages must be assessed on a reasonable basis. In the circumstances of this case, in my opinion, it would make no sense whatsoever to spend approximately $275,000 to fix the foundation. That would be, quite simply, a waste of money.

[67] Therefore, it seems to me that, had liability been found, the proper assessment of damages would be the difference between $275,000, the land value, and $340,000, the land and house value. While the defendants expert opined that the building has no value makes sense from a valuation point, it does not, in my opinion, make sense from an assessment of damages point. The fact of the matter is that Ms. Lunney lived in the house, and still lives in the house and, therefore, it has a value to her. Therefore, I would assess her damages at $65,000 plus her proven out-of-pocket expenses which I will not detail in these reasons. Given my findings of fact, no case has been made out to justify an award of punitive damages.

Result

[68] In the result, therefore, the plaintiff s claim is dismissed as are the cross-claims between the defendants.

Costs

[69] In the event that within 60 days following the release of these Reasons for Decision the parties cannot conclude an agreement with respect to legal costs, they may make brief written submissions to me. The defendants submissions should initiate the process following which the plaintiff shall have 21 days to respond. Following the plaintiff s response, the defendants may, if they wish, file further submissions within 10 days.

Power J.

Released: February 24, 2009

COURT FILE NO.: 06-CV-034131

DATE: 2009/02/24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARIA LUNNEY

Plaintiff

- and

JANA KUNTOVA, MASOUD BADRE and RE/MAX METRO-CITY LTD.

Defendants

REASONS FOR DECISION

Power J.

Released: February 24, 2009