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A little info, a lot of trouble

Vendors often create problems for themselves by signing SPIS forms

A Superior Court decision released last fall emphasizes once again how dangerous it is for Ontario vendors to sign Seller Property Information Statements, and how the use of the forms serves to promote needless litigation.

John and Suzanne Kaufmann are both retired medical doctors in their 80s, living in London, Ont. In early 2004, they discovered signs of water penetration and damage in two large bay windows in their living room, in the floor of the master bedroom, and in the closet of an adjacent bedroom. More damage was evident in a crawl space and small basement room below the master bedroom.

The home insurers were notified and a restoration company came to do drying, cleanup and repair work to the tune of about $12,500. An insurance estimator attributed the cause to ice damming, resulting from heavy winter conditions in London in the winter of 2003-04.

Ice damming is caused when snow and ice buildups occur on roofs, followed by melting. After the melt, water finds its way into the house under the eaves, and causes serious internal damage.

The estimator recommended installation of additional baffles on the roof and ventilation holes beside the bay windows, and this was done by the Kauffmans at their own expense.

Later that year, the Kaufmanns decided to sell the house and listed it with a local real estate agent for $495,000. As part of the listing arrangement, the owners signed a Seller Property Information Statement (SPIS). These documents are apparently routinely provided by London Real Estate Board agents, although they are not mandatory.

Three questions on the form asked: "Are you aware of ..." any moisture or water problems, water damage or roof leakage? Although John was inclined to disclose the water damage from earlier that year, his real estate agent persuaded him to answer "no" on the basis that the questions were in the present tense, and there was no water problem at the time of signing the statement.

It turns out that the advice was wrong.

Within a few days, the Kaufmanns had accepted an offer to purchase the house for $485,000 from Michael Gibson and Nancy Pettigrew. The SPIS was attached to the agreement. At the top of the form is a caution that the questions were answered for information purposes only and that the SPIS is not a warranty. Buyers are encouraged by the form to make their own inquiries.

Prior to closing, the purchasers discovered that water damage had occurred earlier in 2004, and were "flabbergasted" by the extent of the repairs done.

The purchasers were told by the restoration company that there was no guarantee that the water penetration would not recur.

In light of the new information, the purchasers terminated the transaction. The Kaufmanns eventually re-sold the property to other buyers for $380,000 a reduction of $105,000 from the earlier price.

It wasn't long before the Kaufmanns sued Gibson and Pettigrew for their losses, and the would-be buyers counterclaimed for return of their $5,000 deposit.

The matter was heard in a three-day trial in London last February before Justice Gordon Killeen. In his ruling released in July, the judge dismissed the Kaufmanns' action, and declared that the purchase agreement had been rescinded.

"Since the SPIS form was incorporated in the agreement," Killeen wrote, "the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission."

On the plain wording of the questions, the judge said that the answers could not be restricted to the present-tense basis, but full disclosure of the past repairs was required.

Gibson and Pettigrew were awarded costs of $48,000 plus GST to be applied against their total legal bill of $75,010. The plaintiffs, in turn, received a very expensive lesson in English grammar.

I have repeatedly stated in this column that although the SPIS form appears to be designed to avoid problems, it clearly leads to more and more expensive litigation.

If you're listing your property for sale, and your agent insists on getting an SPIS completed and signed, my advice is either to get another agent, or hire a good litigation lawyer. If you sign the form, you could end up in court.

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Kaufmann v. Gibson, 2007 CanLII 26609 (ON S.C.)

PDF Format

Date: 2007-07-10

Docket: 47261

URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii26609/2007canlii26609.html

Reflex Record (noteup and cited decisions)

Related decisions

- **Superior Court of Justice**

  Kaufmann v. Gibson, 2007 CanLII 33982 (ON S.C.)

Noteup

[Search for decisions citing this decision]

Decisions cited

- Alevizos v. Nirula, 2003 MBCA 148 (CanLII) (2003), 234 D.L.R. (4th) 352 (2003), [2004] 10 W.W.R. 634 (2003), 180 Man. R. (2d) 186
- Taschereau c. Fuller, 2002 MBQB 183 (CanLII) (2002), 165 Man. R. (2d) 202
- Ward v. Smith, 2001 BCSC 1366 (CanLII)

Court File No. 47261

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOHN KAUFMANN and SUZANNE KAUFMANN	)	**Paul Ledroit and Alyson Brody,** for the plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
MICHAEL GIBSON and NANCY PETTIGREW	)	**Thomas Corbett**, for the defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** February 5-6 and 28,
	)	2007, at London

KILLEEN J.:

[1] The plaintiffs sue the defendants for damages for breach of an agreement of purchase and sale arising from the defendants refusal to close. The defendants counterclaim for rescission on the basis that the plaintiffs breached their contractual obligation to provide full and complete information about the true condition of the premises under sale.

The Background

[2] The plaintiffs, John and Suzanne Kaufmann, are husband and wife and are retired medical doctors living in London. He is now 82 and she is 86.

[3] In 1981, they bought a large and comfortable one-storey home at 1619 Gloucester Road in north London. The house was built in the 1950s and backs on a ravine in an attractive setting.

[4] By 2004, both had long since retired and they were each having some health problems. Mr. Kaufmann had problems with his legs and his wife suffered from macular degeneration and was almost blind. They had been thinking for some time that the house was too much for them and thought of moving to a condominium unit.

[5] Then, on or about February 13, 2004, they discovered water damage problems in several locations throughout their house. First, there were signs of water penetration and damage at the fronts of two large bay windows in the living room. Water had leaked down through the ceiling near each of the windows and had badly stained the flooring and some of the walls. Second, water had come in under the eaves at either side of the master bedroom and caused warping of some of the diagonal floor boards. Third, there was damage through a wall of the master bedroom into the closet area of a contiguous bedroom, known as the children s room. Finally, there was more such damage in both the crawl space and small basement room below the master bedroom.

[6] Ex. 5 is a floor plan of the house indicating the areas where water damage occurred. Ex. 1, Tab 26, contains several photographs taken by Mr. Kaufmann shortly after emergency work had been started, which helpfully highlight damage areas in the master bedroom, the closet and the living room, near the bay windows.

[7] Mr. Kaufmann quickly notified his insurer, Aviva, and Aviva, in turn, sent out Hickman Mount Reconstruction Company (Hickman Mount) to assess the damage claim.

[8] Hickman Mount sent a team of workers to the site on February 13, 2004, led by its senior estimator and project manager, Philip Scott. He was called as a witness by the plaintiffs.

[9] The Hickman Mount team did emergency drying, cleanup and control work between February 13-16 and, then, with the agreement of the insurer and Mr. Kaufmann,

proceeded to do the actual repair and restoration work. The entire job was finished by about the end of March and the Kaufmanns were happy with the restoration work.

[10] Ex. 1, Tab 32 contains a detailed itemization of the required emergency work with a cost figure of $5954.08. Ex. 1, Tab 29 shows the cost estimate for the second-stage renovation work at a figure of $10,706.54. There are literally dozens of emergency and restoration items mentioned in these two documents ranging from new flooring and drywall replacement to painting and staining and it cannot be doubted that the Hickman Mount work was extensive and exacting.

[11] The final adjusted cost of all the repairs at the home is set out in a letter from Aviva to the Kaufmanns dated June 10, 2004, at a figure of $12,566.37 (Ex. 1, Tab 37).

[12] Mr. Scott, a very experienced insurance-claim estimator, was in no doubt as to the cause of the water damage at the Kaufmann home. He explained that their problem was caused by ice-damming occasioned by bad snow and ice conditions in the winter of 2003-4 in London and throughout southwestern Ontario.

[13] The ice-damming is caused when snow and ice buildups occur on roofs, followed by melting. After the melt, water would find its way into some houses under the eaves and, of course, such water penetration could lead to serious water-related damage inside a house.

[14] He pointed out that the roof of the Kaufmann house was relatively flattish in contour, and this would accentuate the problem. In his words, the design of this and similar roofs in the area make them prone to ice-damming. He felt that, notwithstanding some optional construction solutions such as water membrane barriers under the shingles, the best method of deterrence is to shovel the roof diligently through the winter months.

[15] Mr. Scott acknowledged that, while he was at the site, he spoke to Mr. Kaufmann about future possible problems. He told Mr. Kaufmann that the two bay windows in the living room could be vulnerable to future water problems because they lacked adequate ventilation. He recommended to Mr. Kaufmann a relatively inexpensive solution in the form of additional baffles on the roof and ventilation holes at the sides of the windows. Mr. Hoffmann agreed to have this work done at his own expense, and Mr. Scott and his workers came back to the house in August to do this work.

[16] Mr. and Mrs. Kaufmann seem to have decided to list their house for sale in the late spring of 2004. Mr. Kaufmann insisted in his evidence that this decision was not influenced at all by the water damage in February. As he put it, the water damage was an isolated incident, and he thought the damage had been corrected to his satisfaction. The decision to sell had been discussed between them for a considerable time period.

[17] The listing agreement was made with a London real estate agent, Judy Siskind, on July 8, and the listing price was $495,000.

[18] As part of the listing arrangement on July 8, Mr. and Mrs. Kaufmann signed a Seller Property Information Statement (SPIS). Apparently, such disclosure statements are routinely provided under the practice of the London Real Estate Board, although they are not mandatory.

[19] Here, the Kaufmanns met with Ms. Siskind and signed the SPIS. Mr. Kaufmann recalled that he prepared some handwritten notes for this meeting with Ms. Siskind (Ex. 1, Tab 12). These notes include background data, such as repairs and renovations through the years, and a reference to the water damage in February as follows:

> Ice buildup winter 2003-04 with complete restoration by
>
> Hickman Mount

[20] In his direct examination, he discussed three key questions in the SPIS questions 7 to 9 which addressed, directly or indirectly, the issue of water problems or damage. These clauses read this way:

> 7. Are you aware of any moisture and/or water problems?
>
> 8. Are you aware of any damage due to wind, fire, water, insects,
>
> termites, rodents, pets or wood rot?
>
> 9. Are you aware of any roof leakage or unrepaired damage?
>
> Age of roof covering if known?

[21] Each of these questions required yes or no answers in appropriate boxes, and Mr. Kaufmann ultimately checked each of them off with a No . He candidly admitted in direct examination that, on reading these questions, he thought he should include information about the water damage sustained in February. However, he said that Ms. Siskind dissuaded him from this disclosure by making two points: first, the language of the questions was in the present tense and second, there was no water problem at the time of the signing of the statement. The result was that, following her advice, he answered the questions in the negative.

[22] In cross-examination, he was pressed further on this issue and conceded that he wished now that he had disclosed the prior water damage. However, he insisted that he still felt the three questions were phrased in the present tense and that his negative answers were justified because the repair work had restored the house to its prior condition.

[23] After the listing and some showings over the next several days, the defendants, Michael Gibson and Nancy Pettigrew, put in a cash offer of $475,000 with a closing date of September 30. The parties quickly negotiated an agreement at an adjusted cash price of $485,000 on July 18, 2004 (Ex. 1, Tab 14). Mr. and Mrs. Kaufmann s lawyer was Paul Siskind, the husband of their agent, Judy Siskind. The defendants had retained Jan Lesser as their realtor and their lawyer was Stewart Thomson.

[24] It is important to note that the defendants included Schedules A and B in the agreement, which were accepted by the Kaufmanns. These schedules were expressly stated to form part of the agreement at p. 1.

[25] Schedule A contains a set of conditions which relate to such matters as to how the closing balance was to be paid, a home inspection entitlement for the defendants and an acknowledgment by them that they had received and read the SPIS before they made their offer. This latter condition reads in full as follows:

> The Buyer acknowledges that the Buyer has received a completed
>
> Seller Property Information Statement from the Seller, attached hereto
>
> as Schedule B and forming part of this Agreement of Purchase and Sale
>
> and has had an opportunity to read the information provided by the
>
> Seller on the Seller Property Information Statement prior to submitting
>
> this offer.

[26] Schedule B is the SPIS. It contains two parts described respectively as Schedule B-1 and Schedule B-2, and these contain many questions relating to the property.

[27] At the top of Schedule B-1 are two general clauses which clearly apply to the <u>whole</u> of Schedule B. They constitute a sort of warning to both the vendor and purchaser of the importance of and limitations in the questions and answers which follow:

> <u>ANSWERS MUST BE COMPLETE AND ACCURATE</u> 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 Seller 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 even if attached to an Agreement of Purchase and Sale. 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 that the Seller s 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.

This statement does not provide information on psychological stigmas that may be associated with a property.

For the purpose of this Seller Property Information Statement, a Seller includes a landlord and a buyer includes a tenant, or a prospective tenant.

[28] Schedule B-2 contains, in part, a set of 16 questions which relate broadly and specifically to structural concerns about the property for sale. It is acknowledged by counsel that the salient questions for this case are included at questions 7 to 9 which are reproduced above at para. 20 of these reasons.

[29] All three of these questions were, as noted, answered with a check in the No box at the end of the relevant question. There is a space available for Additional Comments below the questions but nothing was added here.

[30] In August, 2004, an event occurred which undoubtedly contributed to the collapse of this real estate transaction. It has an irony all of its own.

[31] As will be recalled, Mr. Kaufmann had been told about the need for better ventilation at the bay windows by Mr. Scott. He called back Hickman Mount in mid-August to do the required remedial or corrective work which would apparently either discourage or prevent future moisture or water problems with these bay windows.

[32] Mrs. Kaufmann claimed that she had a clear memory of what happened that day. She said that, while the Hickman Mount workers were doing their work, the defendants and their agent, Jan Lesser, came to the house. She said that she sat on a couch in the living room with Ms. Lesser while the defendants went through the house and she proceeded to tell Ms. Lesser that the workers were doing ventilation holes and baffles as a follow-up to ice-damming and repairs done earlier in the winter. She noted that Ms. Lesser did not seem interested or surprised by this information.

[33] Mrs. Kaufmann was later recalled as a reply witness and she largely repeated what she said earlier although she was unsure if Ms. Pettigrew was there with her husband. She did add that Ms. Lesser was not at the home on July 22 when the house inspector did his inspection for the defendants.

[34] Mr. Kaufmann also testified that he saw Ms. Lesser at the house on the day the Hickman Mount workers were there and that his wife was talking to Ms. Lesser.

[35] Ms. Lesser and Mr. Gibson provide strongly different versions of what happened that day.

[36] Ms. Lesser says that the Kaufmanns are quite mistaken about the day she was there. She says that she attended the house with the home inspector, Mr. Hiemstra, on July 22 and sat with Mrs. Kaufmann on the couch chatting casually and innocuously. She says no Hickman Mount truck was outside that day and they most definitely did not talk about the ice-damming incident in February.

[37] She says she was also at the house on July 24, along with Judy Siskind, when the waiver had been signed regarding the home inspection condition in the agreement.

[38] Her final point was this: she only learned about the water problem issue much later in September after Mr. Gibson had called her to discuss a letter of September 24 written by Mr. Siskind, the lawyer for the plaintiffs.

[39] Mr. Gibson s testimony about this incident is quite different from the Kaufmanns as well. He recalled that, earlier, his father had told him there was a problem with the Kaufmann home; he had been given some information by a friend a neighbour in the Kaufmann area.

[40] Mr. Gibson said he was driving by the Kaufmann home on August 18 and saw the Hickman Mount truck outside. He saw some kind of painted sign on the truck indicating emergency services and became concerned. This led him to call back his father for more details and he learned of the water damage in the winter. Mr. Gibson was clear that he had not gone to the house on August 18 for a visit with his wife or anyone else and was sure of the date August 18 because that was his wedding anniversary.

[41] I have concluded, on this conflict in the evidence, that Mr. and Mrs. Kaufmann are mistaken in their memory of the events at their home when the Hickman Mount truck was there. To me, the evidence of Mr. Gibson and Ms. Lesser was much more believable considered within the framework of internal and external consistency.

[42] Ms. Lesser is a very senior real estate agent of 31 years experience and her recollections of when she was at the home made sense. She simply had no reason to be there on August 18 but she did on July 22 and 24. I am satisfied that if she had been told what Mrs. Kaufmann claims she told her, bells and whistles would have gone off for her and she would have immediately told her clients what she had learned from Mrs. Kaufmann. Mr. Gibson s recollection also struck me as credible and consistent with his later conduct. I conclude he was not there on a pre-planned visit that day with his wife or anyone else. He had some vague earlier information from his father and, when he saw the truck outside, he got a bit more information from his father and in fact called the Hickman Mount office to find out why the truck was there. This is confirmed in the evidence of Mr. Scott who specifically recalled that Mr. Gibson had later called him and that he had eventually been given permission by Mr. Kaufmann to tell Mr. Gibson about the ice-damming and repairs his firm had done.

[43] In short, I do not believe that the alleged conversation about the ice-damming incident between Mrs. Kaufmann and Ms. Lesser ever took place and constitutes wishful thinking on her part.

[44] What is clear is that, by early September, Mr. Gibson saw his lawyer, Mr. Thomson. Mr. Thomson prepared a draft letter, dated September 8th, mentioning concern that there had been a water damage problem in the winter and saying that this should have been disclosed in the vendor disclosure statement.

[45] This letter did not get sent out but was slightly re-drafted and sent out on September 15 to Mr. Siskind (Ex. 1, Tab 2). The new letter demanded full disclosure and

information with respect to the water damage issues.

[46] Eventually, on September 24, Mr. Siskind replied to the following effect:

> They have advised us that your client s agent, Jan Lesser was well aware of the fact that Hickman Mount had been retained regarding water penetration that was caused by ice on the roof last winter. The said firm had indicated that while there was adequate insulation in the roof, the problem occurred because there was lack of ventilation. They indicated that the problem could not be rectified until the summer.
>
> In fact, Ms. Lesser was present when Hickman Mount returned, after the Agreement of Purchase and Sale was signed to rectify the problem. Dr. Kaufmann has indicated that the matter has now been totally corrected and you are free to contact Hickman Mount for confirmation thereof.
>
> Your client had the property inspected by a home inspector. The condition regarding a satisfactory report was waived on July 24, 2004, prior to your letter of September 15, 2004.

[47] The reference to Jan Lesser in Mr. Siskind s letter is presumably tied to Mrs. Kaufmann s evidence that she mentioned the ice damming to Ms. Lesser on August 18. As noted, Ms. Lesser had denied ever receiving such information from Mrs. Kaufmann or anyone else up to this time, and she said the same thing in a phone conversation with Mr. Gibson in September after the September 24 letter was received.

[48] There is evidence that Mr. Kaufmann authorized Hickman Mount to release its repair documents to Mr. Gibson after the correspondence between the lawyers. On September 27, a faxed set of the repair estimate documentation was sent out to Mr. Gibson through Mr. Thomson.

[49] Mr. Gibson testified that he was flabbergasted by the scope or extent of the repairs mentioned by the 11-page set of documents he received. As he put it, he now knew that extensive repairs had been done, but he had no real assurance on the cause or causes of the water damage.

[50] He remembered that he called Mr. Scott in this period for a better explanation, and Mr. Scott told him there could be no guarantee that the water penetration would not re-occur. He recalls Mr. Scott saying that flattish-style roofs were prone to ice damming and that the best method of prevention was to shovel the roof regularly in winter months, as required by snow or ice-buildups.

[51] By this time, Mr. Gibson said he had lost trust in the Kaufmanns disclosure, or lack of it, and was concerned whether the water problems were the tip of an iceberg , as he metaphorically put his point. The result was that Mr. Gibson told Mr. Thomson to advise the Kaufmann s lawyer that he and his wife were withdrawing from the transaction because of the Kaufmann s misrepresentations under the vendor disclosure statement: see letter of September 28 from Mr. Thomson to Mr. Siskind at Ex. 1, Tab 4.

[52] It is to be noted, that, notwithstanding the defendants withdrawal from the agreement under rescission principles, they continued to show an interest in the property in the fall of 2004. In late November, Mr. Gibson consulted an architect and two experienced building experts and went to the property on three separate occasions to determine whether he should try to re-instate the transaction. He says that the three outside experts were unanimous in advising him not to go ahead because they claimed the house now had environmental and other problems arising from the water problem.

[53] There was evidence in the record from the plaintiffs side that the defendants had an ulterior motive for not closing the transaction on September 30, namely, that they did not have sufficient funds to close at that time. This is reflected in Mr. Thomson s letter of September 30 (Ex. 1, Tab 8) where he said at p.2:

> We speculate that the purchasers unwillingness to complete this transaction has absolutely nothing to do with the matter raised in your letter of September 28, 2004 but is the result of their inability to have sold their present residence between the time of the signing of the Agreement of Purchase and Sale herein and the scheduled time of closing. Indeed they recently, through their agent, asked for an extension of the time for closing which was denied by the vendors. Such a request would not have been made by purchasers who were truly concerned with the matters raised in your letter of September 28th.

[54] The defendants compellingly addressed this issue in their evidence. They said that they had arranged for the funds to close through their own $200,000 in savings and bridge financing through Mr. Gibson s father. Further, they stated that their lawyer had the funds on September 30 so that he could produce a certified cheque on that date and thereby show that they could have closed but for the alleged material misrepresentations.

[55] After the aborted closing, the Kaufmanns re-listed the property in October and amended the vendor disclosure statement by adding a comment in the Additional Comments section near the bottom of this document as follows:

> Ice buildup in the winter of 2004 repaired by Hickman Mount in February 2004. Add ventilation in August 2004 and floor repaired in 2004.

[56] There were three offers ranging from $410,000 to $300,000 in the fall of 2004. On January 12, 2005, the Kaufmanns reduced the price to $425,000. Finally, a cash offer came in on March 22, 2005 for $380,000 and the Kaufmanns bit their tongues and took it.

[57] The new agreement with Eileen Brooks and Mike Manion closed out on April 25, 2005.

[58] Ms. Brooks was called as a witness by the plaintiffs. She and her husband were in the process of moving to London from Vancouver and knew the home had been listed for sale for a long time. Their agent had told them about the water repair issue and the lawsuit which had been started by the Kaufmanns.

[59] As with the agreement with the defendants, theirs, too, had a home inspection condition and also incorporated the SPIS form which, as noted above, had been amended by Mr. Kaufmann on the re-listing in October, 2004.

[60] She explained that they went ahead with the agreement on the advice of their real estate agent at the greatly reduced price of $380,000.

[61] In the winter of 2005-2006, she said they found water on the floor near a bay window but it did not damage anything. Also, she remembered another incident in the fall of 2006 when they had another minor leak at the second bay window. In response to these problems they had put an electrical wiring system into the roof.

[62] The only other witness called by the plaintiffs was their agent, Judy Siskind. Ms. Siskind was an experienced agent like Ms. Lesser for the defendants.

[63] She acknowledged that when the listing and voluntary disclosure statement were signed by the Kaufmanns on July 8, Mr. Kaufman showed her his notes (Ex. 1, Tab 12) and mentioned that he had ice damming in the past winter. She said there was no detailed discussion beyond what was in his notes.

[64] She could not remember him saying to her something to the effect that he should mention the ice buildup in the SPIS.

[65] What she recalled was that she asked him if he had had any further problems and he had said no, everything had been repaired. She says she told him to fill out the answers to questions 7 to 9 as it is at the date of listing . She emphasized that she never saw any of the repair records from Hickman Mount, or the photographs, and was not told about the planned ventilation work later in the summer.

[66] Ms. Siskind was strongly pressed in cross-examination on her position that the questions were directed only to the condition of the property at the time of signing the listing.

[67] She agreed that the purpose of the SPIS was to answer questions that a serious and diligent purchaser would usually ask but added that she thought the questions were for information purposes only and insisted that these questions speak to the moment of the listing and did not reach into the past.

[68] The defendants called two other agents, Richard Houston and Mary Pellerin, along with Ms. Lesser, and all three addressed the issue of the reach of the language of questions 7 to 9.

[69] Ms. Lesser, in chief, thought that the answers all in the negative were not correct technically, as she put it, and felt that any prospective purchaser would want the information about the water damage and thereby have an opportunity for a more thorough inspection and, perhaps, get at the causes from Hickman Mount.

[70] On being pressed in cross-examination she still felt that questions 7 and 8 had not been answered correctly although question 9 about roof leakage or unrepaired damage had been answered correctly.

[71] Richard Houston, who was Ms. Lesser s co-agent for the purchasers, stated that he first learned of the water problem in late August from Mr. Gibson who had told him about seeing the Hickman Mount truck and then learning some of the details of the water damage. He was adamant that this water problem should have been disclosed in the Statement and that it was a big concern because of the possibility of continuing problems.

[72] He also strongly disagreed with a passage in Mr. Siskind s letter of September 30 claiming that roof shoveling was a standard preventative maintenance practice in London. He said that in his many years as an agent, he had never heard of shoveling snow on roofs as a standard practice.

[73] The fourth agent to testify, Mary Pellerin, was also called by the defendants. She worked for the same real estate firm Royal Lepage Triland where Ms. Siskind worked but became involved in the Kaufmann property in early July, 2004 when her clients, Gerald and Beverly Stewart, put in an offer before the defendants offer. She noted that Mr. Stewart was a contractor and did not ask for the SPIS form because of his own experience; however, she was quite familiar with the form and its purposes.

[74] She gave it as her opinion that something should have been said in the answers to questions 7 to 9 or the Additional Comments section disclosing the water problem and repairs.

[75] As she made her point, this is the right thing to do and I would tell my clients to do the same. She thought that in a case of significant damage, as in this case, there clearly should have been disclosure and felt Ms. Siskind was wrong to advise otherwise.

[76] Although I am not, of course, bound to follow any particular opinion by any of the agents who testified about questions 7 to 9, and must provide my own contextual interpretation of the language of the SPIS form, I feel bound to state that I considered Ms. Pellerin to be a very credible, open and thoughtful witness whose balanced opinion is entitled to some considerable weight on the proper approach to questions 7 to 9.

[77] The Kaufmanns claim damages of $105,000 for the shortfall on the second sale ($485,000 $380,000) as well as carrying costs for the period September 30, 2004 to April 25, 2005. These latter items are as follows:

(1)	Property tax adjustments	$3,449.54
(2)	Union Energy Water Heater	138.72
(3)	Union Gas	1,320.03
(4)	London Hydro	1,179.26
(5)	K.J.Stub Appraisal	374.50
(6)	Forest City Pool	225.07
(7)	Greg Robertson, gardener	450.00
(8)	ADT prorated yearly (Alarm)	217.44
(9)	Centas Insurance	377.14
(10)	HAP Mechanical	254.13
(11)	Siskind account for real estate deal	650.59
(12)	Snow plowing	105.00
		8,741.42

The Arguments of Counsel

[78] Mr. Ledroit made three central points in his argument: first, there was no misrepresentation on the part of his clients justifying the withdrawal of the defendants from the agreement of purchase and sale; second, if there was a misrepresentation it was not material; (3) third, the defendants had waived any possible right of reliance on the alleged misrepresentation because they signed a waiver of the home inspection condition in the agreement on July 24, 2004, after the home inspection was done on July 22.

[79] Mr. Ledroit referred to the SPIS document and its implications for this case. He argued that, while some earlier questions in the Structural section, from questions 1 through 6 speak about the past, nevertheless the critical questions questions 7 to 9 all speak in the present tense and called for answers about the condition of the home only as of July 8 when the Statement was signed. This was Ms. Siskind s view of the meaning of these questions and while Ms. Lesser may have disagreed with her interpretation, she could not say flat-out that Ms. Siskind was wrong.

[80] Mr. Ledroit pointed out that the Kaufmanns had lived in this home since 1981 and the water damage event of early February, 2004, amounted to a once-in-twenty-four year-event occasioned by an exceptional winter. As he put this point, ice-damming in an exceptional winter does not make this home a water-problem house. Thus, the negative answers cannot constitute a misrepresentation.

[81] This case, he argued, is significantly different from the many reported cases where fraud and attempts to conceal or cover up were at play. Here, Mr. Kaufmann came to the meeting on July 8 when the SPIS was signed with some concerns about the ice damming but took advice from Ms. Siskind and answered as he did in good faith.

[82] Mr. Ledroit went on to point out that there was no acceptable evidence from the defendants that they had relied on the SPIS in any event. He pointed to inconsistencies in Mr. Gibson s positions, as asserted on discovery and at trial. On discovery, for example, Mr. Gibson had claimed that the reason he decided not to close was a loss of trust occasioned by the non-disclosure of the water damage problem. Later, at the trial, Mr. Gibson seemed to be more concerned about advice he received from Mr. Scott of Hickman Mount that the house was prone to ice damming and he would have to shovel the roof a lot in winters to control the problem. Also, here, he referred to a letter written by Mr. Gibson s lawyer, Stewart Thomson which seems to raise an inconsistent concern. The letter of September 15 (Ex. 1, Tab 2) says that the Gibsons specific concern is with respect to the extent of the damage . He submits that this alleged concern was more than answered by the release of the full Hickman Mount documentation showing the repair work was complete and that the ultimate co-purchaser, Ms. Brooks gave evidence showing there was nothing of significance wrong with the property.

[83] Finally, Mr. Ledroit referred to the questionable evidence put forward by the defendants about their ability to close this transaction on September 30. They scrambled at the last minute to show that they could close but the fact is they probably were not in a position to close earlier and made up reasons why they did not want to close toward the end of September.

[84] As to damages for breach of contract, Mr. Ledroit outlined his claims as follows:

(1)	Price differential between the Gibson and Brooks-Manion	
	sale prices (485,000 380,000)	105,000.00
(2)	Maintenance and upkeep costs	8,741.42
	Overall total	113,741.42

[85] Mr. Corbett, for the defendants, started by emphasizing a factual factor going back to 1997. He pointed out that Mr. Kaufmann had admitted, somewhat reluctantly, that he had had a water leak in the master bedroom in 1997 which had to be repaired. He also conceded that a new roof was put on in 1998 and that the installer had put in a 2 foot membrane along the roof edge to protect against ice damming and water infiltration.

[86] Then, there occurs the ice damming in early February, 2004, and Mr. Scott told Mr. Kaufmann, during the course of the repair work, that the low-sloped roof was, in fact, prone to ice damming and there was no guarantee that it could not happen again. Mr. Scott had also added that diligent snow-shoveling might be the best method of deterring further damage of this kind, although not fool-proof.

[87] Beyond these points of awareness, Mr. and Mrs. Kaufmann were also told by Mr. Scott that further leakage problems might develop around the two bay windows (where serious water damage had occurred to ceilings, walls and flooring) if they did not improve the ventilation around the windows and on the roof.

[88] Yet armed with all this knowledge of damage and risks to his home, including major damage and repairs in February-March, 2004, the Kaufmanns elected to disclose nothing about these concerning issues in the voluntary disclosure statement they signed when they listed the property for sale on July 8, 2004.

[89] Mr. Corbett went on to argue that Schedule A to the agreement made the SPIS central to the agreement by specifically saying that it formed part of this Agreement of Purchase and Sale.

[90] The vendors could have elected not to sign the SPIS and say caveat emptor to any prospective purchasers. However, by signing it, they have, in effect, broken their silence and must, in this case, be responsible for improper disclosure, tantamount to misrepresentation and concealment.

[91] Mr. Corbett argues that questions 7 to 9 in the SPIS cannot, on any rational interpretation, be interpreted as being limited to problems which were current only on July 8, 2004. Indeed, almost all of the questions in the Structural section of the SPIS (16 in all) ask the vendors if they are aware of problems and nowhere in these questions does the SPIS use such terms as current or present so as to limit the questions to conditions prevailing precisely on July 8.

[92] He argues that Mr. Kaufmann came to the meeting with Ms. Siskind on July 8 with written notes showing that he wanted to disclose the ice damming incident and that his answers to the three questions were false in context and constituted serious misrepresentations which justified the defendants to resile from the contract on rescission principles.

Conclusions

[93] In my view, this case must be resolved within the specific context of the SPIS form and its impact on the agreement of purchase and sale.

[94] There is no dispute about the fact that Mr. and Mrs. Kaufmann agreed to sign the SPIS at the time they met with their agent, Ms. Siskind, on July 8 to sign the listing for their home.

[95] In going to this meeting, Mr. Kaufmann was obviously conscious of what had happened in February at his home. In his notes for the meeting (Ex. 1, Tab 12) he took the trouble to record the following: Ice build up winter 2003-4 with complete restoration by Hickman-Mount.

[96] At several points in his evidence he took pains to acknowledge he thought he should have mentioned the ice damming incident and repairs in the SPIS but ended up not doing so as a result of Ms. Siskind s view that questions 7 to 9 spoke in the present tense and only required disclosure of water and related problems he was actually having on July 8.

[97] The matter continued to trouble him because he admitted he met Mr. Gibson at a garage sale and did not mention the 1997 and 2004 incidents because they might have thrown cold water on the sale. Also, at another point, in cross-examination, he candidly admitted that he wished he had added the language of the amended SPIS to the original one, adding It was incomplete disclosure before.

[98] Notwithstanding Mr. Ledroit s argument to the contrary, I cannot see how a rational argument can be made for a present-tense or current interpretation of questions 7 to 9 in the SPIS.

[99] The spirit and general purpose of the SPIS form is well stated in two introductory paragraphs of the form reading as follows:

> 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
>
> Seller 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 even if attached to an Agreement of Purchase and Sale. 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 that the Seller s 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. This statement does not provide information on psychological stigmas that may be associated with a property.

For the purpose of this Seller Property Information Statement, a Seller includes a landlord and a buyer includes a tenant, or a prospective tenant.

[100] As can be seen in the opening words of para. 1, ANSWERS MUST BE COMPLETE AND ACCURATE . While this paragraph goes on to say that the answers do not constitute warranties, there cannot be any doubt that they can have legal consequences as representations, especially if they were read by the purchasers before submitting their offer, as here, and were then incorporated into the terms and conditions of the agreement. One finds the following clause in Schedule A to the agreement confirming incorporation:

> The Buyer acknowledges that the Buyer has received a completed Seller Property Information Statement from the Seller, attached hereto as Schedule B and forming part of this Agreement of Purchase and Sale and has had an opportunity to read the information provided by the Seller on the Seller Property Information Statement prior to submitting this offer.

[101] There is nothing within the preliminary two paragraphs of the SPIS suggesting that the various questions should be given any special or narrow reading and since paragraph 1 leads off with an admonition to vendors that their answers should be complete and accurate it is not unreasonable to infer that the questions should be given a plain, common-sense reading rather than a narrow or tortured one.

[102] The 16 questions in the key Structural section of the form are all open and plain questions which, as it seems to me, call for open and plain answers.

[103] Many of the questions start with the broad phrase are you aware of and then go on to mention problems of a variety of kinds.

[104] For example, question 1 asks Are you aware of any structural problems? This is broad language and cannot be realistically limited to structural problems on the day the form was signed.

[105] The three questions in issue questions 7 to 9 -- are similarly framed and cannot, in their plain terms, be said to only call for answers on a current or so-called present-tense basis.

[106] Question 7 asks about awareness of moisture or water problems; question 8 about damage due to water or other things; question 9 about roof leakage or unrepaired damage.

In other words, there are no suggestions in any of these questions about exact current conditions alone and they all speak of concerns about water problems in one way or another.

[107] To me it is patently impossible to give the narrow reading to these questions which the plaintiffs argument presents.

[108] What if the plaintiffs had had a flood in their basement through a cracked basement wall one month before July 8 and had had the entire basement repaired and cleaned up so that the damage problem was corrected? On the plaintiffs approach, disclosure would not be needed. The mere asking of such a question, or a similar one, shows how wrong-headed the interpretive approach of the plaintiffs is.

[109] It seems that, in the past 10 years or so, similar voluntary disclosure statements to the one employed here have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach.

[110] One of the leading cases is *Alevizos v. Nirula*, 2003 MBCA 148 (CanLII), [2003] M.J. No. 433, 2003 MBCA 148 (Man. C.A.), a decision of the Manitoba Court of Appeal written by Chief Justice Scott.

[111] In *Alevizo*, the purchasers had noticed a gap in a window while going through the house during the negotiation stage of offers and had concerns about possible water problems such that they asked for a seller s property condition statement (PCS), which was Manitoba s equivalent of the SPIS form in this case.

[112] The vendors signed the PCS and emphatically denied that there had been any leakage at the windows. The purchaser bought the property and later sued for damages involved in later repairing the windows. The trial judge concluded that the male vendor s PCS denial of prior water damage was false because it did not contain complete information about leakage at the windows.

[113] Chief Justice Scott upheld the trial judge and, in the course of his judgment, laid down five useful rules for consideration in cases where such voluntary disclosure statements are used [para. 36]:

1. Declarations made in a PCS are representations as opposed to

terms of the contract. See Fridman s Law of Contract, ibid, (at p. 474):

> A representation has been defined as a statement or assertion made by one party to the other before or at any time of the contract of some matter or circumstances relating to it. Such statements may indeed be, or become terms of the contract, in which event they will have effect as such. However, if a representation is not and never becomes a term, its legal character and consequences are different.
>
> Terms are contractual and the failure to fulfill the promise contained in a term gives rise to an action for breach of contract. Representations are non-contractual. If they are not true the appropriate remedy is not an action for breach of contract, but the avoidance or rescission of a contract entered into in consequence of the representation, and, possibly, a tort action for damages.

Damages are the remedy sought in this action.

2. Such statements do not constitute a warranty, rather the purpose of a PCS is to put purchasers on notice, to make purchasers aware of a problem if there is one. See Zaenker v. Kirk (1999), 30 R.P.R. (3d) 9 (BG.C,S.C.) its main purpose is to put purchasers on notice with respect to known problems (at para. 19), Anderson v. Kibzey, [1996] B.C.JH. No. 3008 (S.C.) at para. 13, the purpose of the disclosure statement is to raise questions and concerns rather than give detailed answers to the disclosures made, and Ward v. Smith (2001), 45 R.P.R. (3d) 154, 2001 BCSC 1366 (CanLII), 2001 BCSC 1366.

3. Since the purpose of the PCS is to give the purchasers a heads up with respect to potential problems, liability will ordinarily be disallowed when the problem in question is obvious. See Davis v. Stinka, [1995] B.C.J. No. 1256 (S.C.). This is because purchasers in such circumstances should not have been misled by the disclosure statement. To put it another way, in such circumstances it cannot be said that the misrepresentation actually caused the person to act upon it. See Fridman s Law of Contract, ibid. at p. 309.

4. If the vendor answers the PCS honestly and does not deliberately intend to mislead, then liability will not follow even if the representation turns out to be inaccurate. Taschereau et al. v. Fuller et al. (2002), 165 Man.R. (2d) 202, 2002 MBQB 183 (CanLII), 2002 MBQB 183.

5. Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal fill in the blank form which can have such serious legal consequences when problems subsequently develop in a real estate transaction. The wisdom of maintaining in use a form

> fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.

[114] Chief Justice Scott went on, at para. 38, to make this additional comment about the omissions in the PCS answer:

> In the end, I have concluded that the trial judge s decision that fraud had been demonstrated should be sustained. The vendors were found to have deliberately omitted to provide the purchasers with a full and honest answer respecting flooding and leakage in the home. Their response was not merely a half truth it was a positive falsehood. Once the vendors voluntarily undertook to complete the PCS, they were obliged indeed they were under a duty in the circumstances to do so honestly and completely. This they did not do. [Emphasis added.]

[115] It is important to emphasize that, unlike the situation in *Alevizos* case, the defendant purchasers in this case took the trouble to incorporate the SPIS document directly into the terms and conditions of the agreement.

[116] In my view, this greatly strengthens the position of the defendants because they were relying on the SPIS, not as an outside document containing representations, but, rather, as a specific contractual commitment within the four corners of the agreement itself.

[117] I find as a fact that the SPIS answers in this case were clearly untrue on Mr. Kaufmann s part and he knew them to be untrue when he answered No to all three questions and declined even to add some comments in the Additional Comments lines below the questions.

[118] With respect, Mr. Kaufmann cannot hide behind the back of his agent, Ms. Siskind, and evade legal responsibility by saying that he answered the questions as he did because of her advice. He must be answerable, in short, for his calculated non-answers.

[119] I agree with Mr. Corbett s point that, once a vendor breaks his silence by signing the SPIS, the doctrine of caveat emptor falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue here. In this case, the called-for truthful answers were an integral part of the contractual terms and the failure to provide truthful answers fully justified the defendants in refusing to close and asking for rescission of the agreement.

[120] Mr. Ledroit in argument, raised two points about the defendants conduct after the agreement had been signed which he said prevented their counterclaim from succeeding.

[121] First, he argued that the waiver of the home inspection condition prevented rescission from being available to the defendants.

[122] The home inspection was, of course, conducted by Mr. Hiemstra on July 22 and Mr. Gibson was present with him as he examined the home. His inspection report (Ex. 1, Tab 39) disclosed nothing of consequence with the result that the purchasers signed a waiver of the condition two days later on July 24 (Ex. 1, Tab 16).

[123] I cannot accept Mr. Ledroit s submission that this waiver of the home inspection condition somehow means, at the same time, that the purchasers waived their right to rely on the untrue answers in the SPIS form, as incorporated in the agreement.

[124] It is a matter of obvious fact that home inspections may not discover things that are not visible to the naked eye and, in this home, the home inspection could not realistically discover what had happened in February and the repairs which had been done then. In fact, the Hickman Mount repair work had covered up what had happened.

[125] In short, there is simply no support for an argument that the limited waiver as to the home inspection should embrace the SPIS misrepresentations and eviscerate them.

[126] Mr. Ledroit also submitted that the defendants may have had a bad-faith ulterior motive for deciding to refuse to close in late September. His point here was that the defendants did not have funds of their own to close in September and that, in effect, they were finding excuses not to close.

[127] I thought this submission was completely answered by the straightforward and credible evidence of the defendants.

[128] Mr. Gibson explained they had $200,000 in savings and had arranged for bridge-financing with his father for the balance needed as early as mid-July or so. He explained that they had not listed their prior home in Ilderton until late July and were not relying on any sale proceeds from it to close out the Gloucester home purchase.

[129] I have concluded that Mr. Gibson had an entirely good-faith reason for withdrawing from this transaction as he did. In late August he discovered, almost by accident, that serious water damage had happened at the Kaufmann home in the winter and he and his wife had not been told about this by the Kaufmanns; nor had the Kaufmanns told them about the planned ventilation work at the windows, to be done in mid-August. When he finally got the full set of Hickman Mount documents in late September, he was shocked at the scope of the damage and repairs and felt that he lost trust in the Kaufmanns and, as he said at one point, he was facing the tip of an iceberg , in terms of problems with the home.

[130] He was, I thought, candid in saying that he still had an interest in the home in November when he went back to look at it with Messrs. Nicholson and Taylor and he then satisfied himself that he was right in deciding against going ahead earlier because of their additional concerns about the condition of the house.

[131] In sum, I conclude that the plaintiffs deliberately withheld information from the purchasers in the answers to questions 7 to 9 of the SPIS, information that was strongly relevant to the purchasers in deciding whether to sign the agreement. Since the SPIS form was incorporated in the agreement, the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission.

[132] An order will go dismissing the plaintiffs action, and an order will issue under the counterclaim declaring that the agreement is rescinded.

[133] In the event this case goes further, I would assess the plaintiffs damages at a figure of $113,741.42, less the deposit of $5,000, if it has been withheld.

[134] Assuming for the purpose of this assessment that the plaintiffs had succeeded in their claim, I did not think, as Mr. Corbett argued, that his clients would have been entitled to any discount off the price differential.

[135] If counsel cannot agree on costs, I would ask for short submissions on costs within the next two weeks.

DATED this 10th day

of July, 2007

Mr. Justice G.P. Killeen

The Honourable Mr. Justice Gordon Killeen

ONTARIO **SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOHN KAUFMANN and
SUZANNE KAUFMANN

Plaintiffs

- and

MICHAEL GIBSON and
NANCY PETTIGREW

Defendants

REASONS FOR JUDGMENT

Killeen , J.

Released July 10, 2007

Kaufmann v. Gibson, 2007 CanLII 33982 (ON S.C.)

PDF Format
Date: 2007-08-20
Docket: 47261
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii33982/2007canlii33982.html
Reflex Record (noteup and cited decisions)

Related decisions

- **Superior Court of Justice**

  Kaufmann v. Gibson, 2007 CanLII 26609 (ON S.C.)

Noteup

[Search for decisions citing this decision]

Court File No, 47261

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: **KAUFMANN V. GIBSON AND PETTIGREW**

BEFORE: **MR. JUSTICE GORDON KILLEEN (Now retired)**

COUNSEL: **PAUL LEDROIT and ALYSON BRODY, for the Plaintiffs**

THOMAS CORBETT, for the Defendants

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ENDORSEMENT ON COSTS

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[1] This endorsement relates to the costs to be awarded under my trial judgment released on July 10 last. In my judgment, I found in favour of the defendants and dismissed the plaintiffs action.

[2] In the action, the plaintiffs had sought damages for breach of contract arising from the defendants refusal to close a real estate transaction.

[3] The trial lasted three full days and was efficiently conducted by the experienced counsel on both sides.

[4] Mr. Corbett, for the successful defendants, asks for a total costs award of $75,010.32 on a substantial indemnity basis. This sum is broken down as follows:

(1)	Fees	67,904.00
(2)	Disbursements	3,032.08
(3)	GST	4,074.25
		75,010.33

-

[5] Notwithstanding Mr. Corbett s able argument in favour of an award of substantial indemnity costs for the defendants, I am not persuaded that this case should attract costs on the higher scale.

[6] This was an interesting but relatively straightforward real estate contract case with the parties adopting differing interpretations of the facts and the contract itself.

[7] When offers to settle have been made, the rules for costs awards, as reflected in R.49.10, do not mandate substantial indemnity costs to a defendant simply because he or she has been successful in the action. In fact, R.49.10(2), which addresses defendants offers only says that if the plaintiff obtains an unfavourable result measured against the defendant s offer, the defendant is to receive partial indemnity costs from the date of the offer.

[8] I have noticed, with concern, a trend among recent cases whereby some trial judges seem disposed to award substantial indemnity costs to a successful defendant, despite the fact that R.49.10 does not authorize such a result. Of course, the ordinary rule for costs in litigation is that the successful party should receive his or her costs on a partial indemnity basis.

[9] In this case, there was no misconduct on the plaintiffs part (or their counsel) which would justify substantial indemnity costs and I emphatically reject such a costs scale for this case.

[10] Mr. Corbett is a senior counsel with over 25 years experience at the bar. According to my calculations, Mr. Corbett has logged some 138 or so hours, which works out roughly to four 35-hour work weeks spent on this case. He has also included about 65 hours of clerical time.

[11] Mr. Ledroit says that Mr. Corbett s hours are excessive but, in his written submission, he has not provided any details of the hours spent by himself and his junior, Ms. Brody, on the case. At the very least, it seems to me that a counsel who says that his opponent s logged hours are excessive, should show what his own hours were by way of contrast.

[12] While Mr. Corbett s hours seem somewhat high, I really cannot say they are clearly beyond the pale , as the Irish would say.

[13] I propose to allow Mr. Corbett $275 per hour for his work and allow his clerks $100 per hour.

[14] The allowances are as follows:

(1) Initial work, including Pleadings

1. Mr. Corbett - 4.4 hours 1210
2. Clerks - 7.3 hours 730

1940

(2) Discovery work

1. Mr. Corbett - 19.2 hours 5,280
2. Clerks - 20 hours 2,000

7,280

(3) Undertakings

1. Mr. Corbett - .2 hours 55
2. Clerks - 8.2 hours 820

875

(4) Trial Preparation

1. Mr. Corbett - 58.8 hours 16,170
2. Mr. Castillo - 1.1 hours 220
3. Clerks - 28.1 hours 2,810

19,200

(5) Trial

1. Mr. Corbett s counsel fee at trial for 3 days at $2700 per day 8,100
2. Mr. Thompson 0.3 hours @ 250 per hour 75

3.	Clerks	2.5 hours	250
			8,425

(6) Summary

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1.	Total Fees	45,000.00
2.	Total disbursements	3,032.08

-

48,032.08

-

[15] In the result, the defendants will have their costs, fixed at $48,032.08 together with applicable GST, to be calculated by counsel.

[16] I make no separate allowance for costs on this assessment because of the divided success.

DATED this 20th day of August, 2007

_____ Justice G.P. Killeen _____

The Honourable Gordon Killeen

Bob Aaron *is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.*