



Bob Aaron bob@aaron.ca

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## Agent's responsibility doesn't end with advice

An Ontario court has found a real estate agent partially liable in damages for failing to review a home inspector's report carefully with his purchaser client. The court found that the agent's duty did not end with the recommendation that the purchaser obtain a home inspection.

Back in 2006, Glenda Halliwell was interested in buying a home on Dufferin St. in Toronto. She retained Joel Lazarus, a long-time friend and agent with Coldwell Banker Terrequity to represent her.

On the recommendation of Lazarus, Halliwell hired Brian Edwards, an experienced home inspector who operates Westbrook Building Inspections.

Except for the furnace, which was replaced by the seller, no other serious problems with the house were noted during the inspection. There was no evidence of water penetration through the foundations of the house prior to closing.

The purchaser waived the inspection condition in the offer and the transaction closed in May, 2006.

But just two months after closing and four months after the home inspection, there were clear indications of moisture, mould, mildew, rot, rust, drywall deterioration and efflorescence in the house.

Halliwell sued the seller, her agent, broker and the home inspector, and several of the defendants wound up suing each other. A 13-day trial was held before Justice Margaret Eberhard in Barrie last November and December.

Evidence at the trial showed that the vendor and his family used the basement, were not aware of any moisture penetration, and did not undertake any cleaning activities that suggested he was concealing a moisture problem. There was no seller disclosure form.

The judge found that Halliwell told the home inspector and her real estate agent that she was particularly concerned about mould because of her allergies, and that she relied on them to protect her from her own lack of knowledge of property issues. This, the judge concluded, they did not do.

Eberhard wrote that the inspection suggested that Edwards did what he always does "without ever ascertaining what (Halliwell) wanted done." Based on the statements of the home inspector and her real estate agent during the inspection, "Halliwell had a reasonable expectation . . . that the home inspection had determined there were no concerns about moisture penetration, the source of potential mould."

Unfortunately, the inspector failed to include in his summary of major defects that there was visible damage to the parging on the exterior wall at the driveway, and the driveway surface was missing an 18-inch swath of asphalt along the exterior wall of the house. These two factors indicated what may have been happening in the foundation wall below grade, and were highly relevant to the potential for moisture penetration.

The court's ruling found that the inspector demonstrated competence and insight, but "failed to communicate adequately the concern for moisture penetration even though no visible signs of penetration were observed."

Eberhard found that Lazarus, the real estate agent, took a "hands-off approach" with respect to the home inspection. "Had he read the report he . . . might well have concluded that the parging and driveway issue raised concerns."

The agent induced the purchaser to rely on the home inspection and then "washed his hands of all responsibility to his client as to what use should be made of the inspector's report. . . . He failed to advise the purchaser of the use to be made of the report . . . (and) fell below the standard of care by failing to review the report with his client before waiving the home inspection condition."

The court found the inspector 50 per cent liable for the damages, and the agent 25 per cent liable. The buyer was also 25 per cent at fault because she did not read the report. The seller was not responsible at all.

Huntsville lawyer David Morin, who represented Halliwell, wrote to me last week to say that both the buyer and the real estate agent have filed appeals of the decision. If the trial ruling is upheld, real estate agents in future will have to become more involved in explaining home inspections to buyers.

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## Halliwell v. Lazarus, 2011 ONSC 390 (CanLII)

Date:	2011-01-18
Docket:	08-0489; 07-1250
URL:	<a href="http://canlii.ca/t/2fb5g">http://canlii.ca/t/2fb5g</a>
Citation:	Halliwell v. Lazarus, 2011 ONSC 390 (CanLII), < <a href="http://canlii.ca/t/2fb5g">http://canlii.ca/t/2fb5g</a> >
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CITATION: Halliwell v. Lazarus, 2011 ONSC 390

BARRIE COURT FILE NO.: 08-0489

DATE: 20110118

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

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sale or, alternatively, propose amendments relating to the deficiencies found or waive the condition and the purchase would proceed.

- [6] On Joel Lazarus's recommendation Brian Edwards was retained to do the home inspection and Brian Edwards even lowered the price because, as an employee, Glenda Halliwell was part of the Coldwell Banker Terrequity Realty family.
- [7] Brian Edwards skilfully discovered a significant danger in the house. The furnace posed a risk. With considerable persuasive effort, Joel Lazarus convinced Bridget Chan, the vendor's unsympathetic real estate agent, that the furnace had to be replaced before closing and this demand was formalized in an amendment to the agreement. Joel Lazarus compassionately urged Mr. Tran to comprehend that his family was in danger in the house.
- [8] These developments demonstrated what should happen when an effective real estate agent negotiates and an experienced home inspector looks for problems. They were serving their client's interests well.
- [9] Glenda Halliwell's express concern was about mould. No mould was observed on the date of inspection.
- [10] The amendment in the agreement to replace the furnace was met, the condition was waived and the transaction closed, two weeks early in fact, on May 1, 2006. All seemed well.
- [11] All was not well. By July 2006, mere months after the March 12, 2006 date of inspection and closing May 1, 2006, clear indications of moisture, mould and mildew had presented problems for the allergic Glenda Halliwell. Her pictures at Tab 15: 1-6 were taken as early as July of 2006 into November of 2006. These pictures demonstrate the presence of mould, rot, rust, drywall deterioration and efflorescence. She tried to determine the cause: complaining to Joel Lazarus, lifting the carpet and sub floor to see what was beneath, having Brian Edwards re-attend, providing a detailed report to Coldwell Banker Terrequity Realty broker of record Andrew Zsolt, lodging complaint to RECO (Real Estate Council of Ontario) and finally consulting legal counsel who retained an expert to opine on cause.
- [12] Simply put, all these manifestations of damage are the result of moisture.
- [13] There had been some water events in the home in 2005 and 2006. There is no evidence of a significant event between March 2006 and July 2006 when the problems were apparent to Glenda Halliwell. There were some drain backups in a localized area in the laundry room, a slowly draining basement toilet in the adjacent bathroom and a leak from the upper floor bathroom such that moisture was physically present in the ceiling of the basement. Glenda Halliwell lifted the carpet and subfloor. Brian Edwards reluctantly returned at Joel Lazarus's insistence, and upon cursory observation concluded from the direction of the water marks he observed that the cause was related to the drain backups. In 2005 there had been a sewer backup but the moisture remained in the drain and did not spew out over the floor of the basement. Mr. Tran had repairs done then. Sewer problems occurred again after Glenda Halliwell moved in but this time on the city property so the city did the work.
- [14] I find that the evidence of sewer back-ups and leaks from the upstairs and slow toilet in the basement fails to persuade that any of these is the cause of the now severe damage caused by moisture.
- [15] Ron Koerth was qualified as an expert by the Plaintiff to give opinion evidence on civil engineering, forensic engineering, residential building science and analysis, including building envelop component failure, and inspections standards of home inspectors in Ontario. He was useful to the court in determining the cause of the condition in Glenda Halliwell's home.
- [16] Mr. Koerth assessed this house which was at least 80 years old, and knew that the foundation would not have been damp proofed. He concluded and I agree that the moisture in the basement was caused by water penetration through the foundation walls which was permitted by lack of surface drainage away from the exterior walls.
- [17] He concluded that the drainage issue did not arise suddenly before the purchase and that, unless the topography has changed, these issues arose long before purchase and not all at once.
- [18] I am not persuaded that his opinion is diluted by the evidence of back-ups, slow toilet and leaks from the upstairs. Problems from such sources dry up. The chronic underground moisture in the home comes from the more consistent source of penetration through foundation walls.
- [19] I find as a fact that the condition of the basement, easily observed as ubiquitous now that it has been exposed by lifting the carpet and floor, and since allowed to flourish unabated by cleaning or any other remedial action, is a result of water penetration. The several sewer drain backups, in 2005 causing Mr. Tran to contact the city and undertake u trap repairs on his side of the sewer line, and the similar backups after closing in 2006 causing Glenda Halliwell to contact the city which undertook repairs on its side of the sewer line, are unrelated to the problem causing extensive damage from rot, mould, rust, efflorescence, dry wall deterioration, and general dampness. The spillage into the basement from those events was localized and dried up.
- [20] Because this is the cause of the problems, and there being no triggering event to explain the sudden and subsequently relentless increase in the damage, the crucial fact questions become: when did problems become apparent?; who knew or could have known?; and was there any concealment?
- [21] The expert Koerth concluded that the vendor of the house most likely was aware of the basement moisture issues as they were ongoing prior to Ms. Halliwell's purchase of the house even if the vendor Tran family had done no renovations in the 5.5 years they resided in the basement.
- [22] In cross-examination the expert was confronted that he was not present on the date of inspection so could not know what it looked like on that day since he did not view the basement until June 22, 2007. He acknowledged he can't say exactly what it looked like on date of inspection but stated he could infer a few things from home inspector's report. His view was that the amount of deterioration he observed was from more than a year particularly having regard to cause.
- [23] Glenda Halliwell's pictures at Tab 15 (with a few exceptions taken later) were taken as early as July of 2006 into November of 2006. These pictures demonstrate the presence of rot, deterioration and efflorescence. Glenda Halliwell asserts that on the day of inspection in March 12, 2006, the conditions were similar. Gus Tsigas also testifies that the conditions were there but less so. Joel Lazarus and Brian Edwards and Mr. Tran all assert that those conditions were not present on the date of inspection. I find each of these witnesses honest in their assertions but I am not assisted because I find that in each case their testimony is coloured by the litigation that developed.
- [24] Glenda Halliwell was a very strong witness, consistent in her evidence, confident in her memory and specific in her focus. She presented as intelligent and obsessive such that her concern about mould rings true. She was unshaken by cross-examination on any material point and both discerning and fair on those few topics strewn in her way to trip her up.
- [25] Glenda Halliwell, and Gus Tsigas in her support, observed the conditions developing over time from very soon after Glenda Halliwell began to reside in the basement in June. They believe that the conditions which became troublesome were already there to be seen on March 12<sup>th</sup>. Glenda Halliwell states that she saw the various concerns but did not mention them because she relied on the professionals to tell her if what she was seeing was a concern. This however is not consistent with her questions about the iron marks on the carpet. As I indicated earlier, Glenda Halliwell is both intelligent and obsessive. I find that she would have asked about these indicators if had she observed them.

- [26] I also find Joel Lazarus' evidence coloured by the dispute. Let me say immediately that I make no finding that Joel Lazarus has betrayed his friendship with Glenda Halliwell whatsoever. I find that he chose Brian Edwards as an inspector because Brian Edwards had demonstrated himself to be a good home inspector. I find that Joel Lazarus expected that Brian Edwards would report the presence of mould if observed because he had done so in the past. I find that Joel Lazarus looked around as he would in any home he was viewing with a client. I find that he had his own experience of damp basements and was not alerted by smell or change in the air to any moisture issues. I find that he has exaggerated the extent of his vigilance for the presence of mould mainly due to the inherent enthusiasm of his language style but, be that as it may, he did not see, smell or feel any signs of moisture. That level of inspection does not persuade me that he would have seen signs of water penetration more subtle than they appear in pages 4-10 at Tab 15.
- [27] Brian Edwards is an experienced home inspector and I accept that he has a history of discovering signs of water penetration and that reporting them to the detriment to the completion of the sale. No doubt that he has developed an intuition. It is apparent that he relies on his own experience to alert him to potential problems. In the present case he ticked off all the boxes in his checklist but I am unable to find that he completed a thorough inspection based on his own evidence. He testifies that he conducted the inspection while with Glenda Halliwell. He describes getting down on his hands and knees and making a 360 degree inspection of the basement. However, it is clear that Glenda Halliwell was late in arriving for the inspection. I accept her evidence that once there she was taken through various parts of the house and shown some concerns by Brian Edwards.
- [28] By the time they got to the basement, the primary concern that dominated the discussion entirely was the dangerous condition of the furnace. While together, Brian Edwards conducted no thorough investigation for signs of water penetration. Therefore either his inspection was entirely cursory in the presence of Glenda Halliwell or it occurred before her arrival and we have no evidence of what might have happened during that period.
- [29] Therefore I am not much assisted by the evidence of these four witnesses as to the extent to which signs of moisture penetration were present on the date of inspection.
- [30] Other evidence assists in making a finding:
- [31] One of the manifestations of moisture penetration that became a problem was a damp floor. In March 2006 there was a sign posted in the house requiring visitors to remove their shoes during showings. No-one reported a damp carpet. I cannot say whether shoes were removed during the inspection but I find it likely that on at least one of the four times when Glenda Halliwell was present with Joel Lazarus they likely had their shoes off.
- [32] All of Glenda Halliwell, Joel Lazarus and Brian Edwards have serious mould allergies. Not one of them had any reaction.
- [33] Finally, I turn to the photographs provided by the expert Koerth: #10 shows some mould in a corner: #11 efflorescence which had resulted in a highly visible substance dropping onto the carpet below and #9 shows deterioration in the wall. These pictures were 15 months after the date of inspection but the expert asserted that a competent home inspector should have been looking for this kind of evidence and reporting it as evidence of a concern for water penetration in the basement.
- [34] These pictures show evidence that it is, much later than the event, very subtle except the substance on the carpet which would not be there after a vacuuming. Discovery of these signs on the date when the pictures were taken would have been impressive but, assuming as Glenda Halliwell's evidence would indicate that things have got worse over time, it would have been positively heroic on March 12, 2006.
- [35] I therefore find it has not been proven that by non-evasive inspection by sight, smell, or touch that mould, rot, rust, or efflorescence was apparent on March 12, 2006, to indicate water penetration had been occurring.
- [36] From the viewpoint of the several defendants, this finding would seem to conclude the matter. However, it does not. The fact question in this case is not whether there was mould. The fact question is whether there was a concern about the condition of the home that would have caused Glenda Halliwell not to waive the inspection condition and purchase this house.
- [37] We know from the evidence that mould and these other conditions are likely to develop if there is moisture. We know from the expert Koerth that the cause of these conditions developing at 1867 Dufferin Street is water penetration through the foundation. I accept Koerth's evidence that this water penetration is chronic, likely existing for many years.
- [38] The expert Walker observed that these problems, mould, rust, rot, efflorescence, can develop quickly.
- [39] The evidence before me does not disclose much about how, when and where problems will develop due to the presence of moisture. I have not been told whether problems such as mould always develop in the presence of moisture, sometimes, sometimes lay dormant, sometimes can be cleaned, sometimes disappear during dry periods, whether once present the effects of the mould would always be present. Similarly the other signs that would be apparent to a resident or home inspector: Can efflorescence be alleviated or cleaned? How long does it take for drywall to deteriorate? Can this process be slowed by cleaning?
- [40] In particular, I have not been told how mould activates allergies. The witnesses all described that they could not smell mould because of the heavy smell of incense permeating the residence because of the religious shrine that was actively used on the main floor of the house. Will smell have any effect whatsoever on the allergenic properties of mould? If areas of mould are cleaned regularly such that they are not apparent to the eye, will they yet trigger allergic reaction?
- [41] I do not know and I was not given evidence to know.
- [42] These unanswered questions predict my findings with respect to Mr. Mr. Tran, whether he knew or must have known that there were problems from water penetration in his basement.
- [43] Mr. Tran and his family lived in the basement for five and a half years while other family members lived upstairs. Pictures he brings from 2003 show not only activity on the floor where a play mat was laid out for the Tran children but more significantly, show that the wall colour and carpet have not been changed. This supports the Trans' assertion that they painted the basement when they moved into the house and have not done any other renovations that suggest that they were addressing a problem with moisture. I find that they were conscientious housekeepers and kept the premises very clean.
- [44] On the evidence before me as to the appearance of mould and other problems, I cannot make a finding that what they were cleaning would suggest any problem with moisture. Using Carpet Fresh for the weekly vacuuming in the basement does not suggest any unclaimed awareness of the smell of mould. If they periodically cleaned creosote stain drippings from the wall in the furnace room, that suggests the modest amount of moisture coming down through the chimney that no-one suggested was the problem in this household and would be quite consistent with a homeowner expectation.
- [45] My assessment of the credibility of Mr. Tran and his wife Ms. Nguyen was complicated by language differences. Mr. Tran communicated well in English but at a necessarily primary level as to word choice which made him appear guileless. Ms. Nguyen was assisted by a translator but it remained difficult to assess whether her failure to identify pictures in her former home of such scenes as under the laundry tub, the back of the furnace room and so on, was contrived or through failure of communication or actually due to an unfamiliarity with the subject as seen.

- [46] I therefore placed little reliance on demeanour. The fact remains, Mr. Tran, as supported by Ms. Nguyen and the evidence of a neighbour concerning sewer repairs he undertook, remain unshaken by any confrontation in cross-examination or argument.
- [47] I am alert to the possibility that former home owners are likely to simply deny knowledge of any problem that presents to new owners. Because I do not have evidence of how the water penetration must have presented itself, and because Mr. Tran has not been shaken in his assertion that he was not aware of moisture difficulties, I cannot find that he was or should have been. That finding of fact does indeed end the matter as regards to Mr. Tran. I dismiss the claim and cross-claims against him. However, that brings me again to consider the liability of those assisting Ms. Halliwell in her purchase.
- [48] *Caveat Emptor*. I find Glenda Halliwell was very aware and took all precautions offered and available.
- [49] It was argued on behalf of Westbrook Building Inspections Service Ltd that Glenda Halliwell must fail based on three points of law that should favour the inspector:
- the contract and exclusions apply
  - no breach of standard of care
  - causation of damages alleged
- [50] It was argued on behalf of Joel Lazarus and Coldwell Banker Terrequity Realty that Glenda Halliwell must fail based on two points of law that should favour the real estate agent:
- Joel Lazarus discharged his duty to client in assisting with purchase
  - having obtained a home inspection, offer conditional to her satisfaction: at law Glenda Halliwell was not relying on Joel Lazarus as to the condition of the property
- [51] It is clear that Glenda Halliwell's concern was mould. Glenda Halliwell would not have waived the condition and purchased the home if mould had been discovered at the inspection. Much evidence was led at trial as to whether mould or evidence of water penetration was present by visual inspection.
- [52] As previously stated, Glenda Halliwell was a very strong witness, consistent in her evidence, confident in her memory and specific in her focus. She was unshaken by cross-examination on any material point and both discerning and fair on those few topics strewn in her way to trip her up.
- [53] By contrast it was only a few minutes into examination in chief that I recognized Brian Edwards's testimony on the issue of exclusion of liability based on contractual limitations on the scope of the inspection did not hold up.
- [54] This is not to say that I do not find Brian Edwards competent. Indeed the evidence, including his own, demonstrates that he is a skilled and intuitive building inspector.
- [55] The aspect of his testimony that has no credibility relates to his interaction with Glenda Halliwell. After a self-serving review of all the limitations on what the home inspection was about and repeatedly emphasizing there was no mould inspection, he asserted that Glenda Halliwell was given time to read and ask questions about the limited scope of the home inspection. This assertion is inconsistent with all evidence as to the time spent at the inspection. The documentation which limited the scope of the inspection was not adequately brought to the attention of Glenda Halliwell and it was inconsistent with the indicated promises made by Joel Lazarus and supported by the building inspector's website.
- [56] The limitations in the inspection were not brought to Ms. Halliwell's attention. On a balance of probabilities I find that the document which contained the written limitations was not presented for her reading and signature until after the inspection walk through. This is based on Glenda Halliwell's and Gus Tsigas' recollection of the day as well as the fact that Mr. Edwards does not carry the binder with the documentation in it during the inspection and testified that he would either leave it in the car or in the house. The place where he met Glenda Halliwell when she arrived is inconsistent with his producing it there and he receives no support for his assertion that he always has the client sign first from Mr. Lazarus who was not relying on memory but only what he sees home inspectors do usually. Joel Lazarus was not attentive during the period when Brian Edwards was going over the documentation after the inspection with Ms. Halliwell.
- [57] Even if she signed before she was taken around the house by Mr. Edwards, Glenda Halliwell's attention was never brought to the issues of limitation whatsoever. Mr. Edwards proudly states that he did not alter his inspection procedure in any way due to the discount price. I accept this. In fact, he did not give any special attention to the much stated concern for mould. He simply goes about his business without needing to know what the client's concerns might be.
- [58] Before moving to the particular purpose of a home inspection it is clear from the evidence that there was a giant gap in the expectations. I am satisfied that Glenda Halliwell, in the general apprehension of a large purchase, was clear in her reliance on Joel Lazarus, her real estate agent and friend and on Brian Edwards, the Westbrook Building Inspection inspector whom Joel Lazarus praised for his thoroughness, to tell her the problems. I find that subjectively she was particularly concerned about mould because of allergies. I find, since her evidence is specific and unshaken, that she expressed this concern to both Joel Lazarus and Brian Edwards. Both confirmed in testimony that they knew that, each adding that they were also allergic to mould.
- [59] Handing Glenda Halliwell a thick document of limiting terms and conditions was an insufficient communication of contractual expectations. Brian Edwards had no interest in Glenda Halliwell's specific purposes or he would have known that her expectations that any mould would be discovered were beyond his contractual limitations upon which he relies.
- [60] The buyer must beware, but she hired Brian Edwards on the specific advice from Joel Lazarus that he would protect her from her own ignorance of property issues. Joel Lazarus did not explain nor did Brian Edwards bother to find out if he could meet her contractual purposes. The whole transaction suggests Brian Edwards doing what he always does in a home inspection without ever ascertaining what she wanted done.
- [61] Both Joel Lazarus and his responsible broker of record, Andrew Zsolt, peppered their testimony about the narrow scope of a real estate agent's responsibilities with phrases like "That's what the home inspector is for", an assertion consistent with what Joel Lazarus promised Glenda Halliwell.
- [62] Having said all that, I agree that the home inspection is limited to non invasive visual, or at least sensual (eyes, ears, nose, touch) inspection.<sup>[1]</sup>
- [63] During the inspection, I find Brian Edwards and Joel Lazarus did utter reassurances relating to moisture. The home inspection report rated the basement with the following notations:
- Evidence of abnormal condensation: none
  - Evidence of moisture seepage: none

(wet areas.stains.mold.efflorescence.rust.peeling paint.wall damage.lifting tiles)  
Anticipated moisture seepage: low

- [64] Joel Lazarus enthused about the dry home.
- [65] I find that Glenda Halliwell had a reasonable expectation created by the utterances of Joel Lazarus and Brian Edwards, that the home inspection had determined there were no concerns about moisture penetration, the source of potential mould.
- [66] On the date of inspection there was visible damage to the parging on the exterior wall at the driveway. The building inspector noted it as a major defect but did not include it in his summary of major defects.
- [67] The driveway surface is quite damaged and was missing an eighteen inch swath of asphalt along the exterior wall of the house.
- [68] Glenda Halliwell did not read the full report.
- [69] The inspector, with the help of Joel Lazarus, purported to explain his findings to Glenda Halliwell orally during the inspection.
- [70] Glenda Halliwell reasonably understood that the driveway parging was not urgent.
- [71] There was no explanation of the potential significance of driveway parging. The breakdown of parging is significant as a sign of what may be occurring in the foundation wall below grade. I find it is highly relevant to the potential for moisture penetration.
- [72] Joel Lazarus recommended Brian Edwards as the building inspector. While there is dispute whether he properly offered alternatives, nothing turns on this as Brian Edwards was competent. Joel Lazarus' experience led him to believe that the summary pages of the building inspector's report which stated "to be fixed prior to closing" were the important amendments to seek on behalf of the client. After a discussion with the unsympathetic Bridget Chan, Joel Lazarus believed that asking for further amendments would be futile. I find as a fact that Glenda Halliwell handed the report in its entirety to Joel Lazarus, that he selected the summary pages to fax to the seller's real estate agent, and thereby did not avert to the other defects noted in the report or offer Glenda Halliwell an informed choice as to whether to seek an amendment, walk away from the deal as she then could or accept the defects.
- [73] Trusted friend and advisor Joel Lazarus, in his capacity of Glenda Halliwell's real estate agent, properly recommended a home inspection. As indicated earlier, his choice of Brian Edwards gives me no trouble because Brian Edwards had demonstrated competence and insight. Brian Edwards impressed me with his competence and insight. However, I find that he did not serve Ms. Halliwell to the necessary standard of care.
- [74] I find that the inspection, whether the walk-through that took place with Glenda Halliwell or any that may have proceeded was very brief having regard to the standards referred to by Mr. Walker and Mr. Koerth. I find that he used the check-list which is standardized in the industry to promote inspection of all significant aspects. I find the check-list is a tool for completeness but a very inadequate method of communication to the client. The significance of the check marks which was somewhat consistently understood by those who commented (an engineer, a senior home inspector, and two real estate agents) has no necessary meaning to a client. Moreover, several boxes are checked off in the form itself as having such general significance that all purchasers should be aware of them. It is apparent from the description of Mr. Edwards ticking off the boxes in the kitchen after the inspection and the manner in which he testified that many of the items were, to him, constants and really had nothing to do with what he saw on the particular premises.
- [75] Mr. Edwards stated that he writes what he says and says what he writes. Indeed, the important components of the written report are the items in which he added narrative. He wrote in the report about the various concerns expressed in absolute terms: the leaning pillar, the knob and tube wiring, the faulty plumbing trap in the upstairs bathroom and the parging along the driveway as well as the driveway itself. By describing all these as major deficiencies, he asserts, in writing, that the cost of remedy for each may be greater than \$1,500.
- [76] However, I find that his verbal commentary to Ms. Halliwell was quite different. Except for the furnace, he conveyed no sense of urgency and the way in which he expressed the concerns did not present a difficulty to Ms. Halliwell. She did not care if the driveway was in good shape because she had no vehicle. She was not concerned about the appearance of the pillar and was not told of any immediate danger. She did not expect to use the fireplace so was not concerned about the limitations there. The trap in the bathroom was expressed as a minor job that Gus Tsigas could fix. All of these examples disclose a discrepancy between the terse written concerns which shield the home inspector, and the communication of applicability to Glenda Halliwell's situation in the conversation between them that would have actually protected the purchaser.
- [77] This failure of communication is supported by Joel Lazarus who admits to surprise at some items written up in the report such as the knob and tube wiring. He describes his conversation with Brian Edwards as to what was important. Both of them wished to save Glenda Halliwell money and so the trap, fireplace, pillar and parging were all mentioned. However, Mr. Lazarus received no sense of urgency from Brian Edwards verbally except in relation to the furnace.
- [78] In this context, I read what is said in the report about the driveway and parging. I am assisted in my interpretation by Mr. Zsolt, who, as responsible broker of record, supervised Mr. Lazarus. In reviewing Glenda Halliwell's complaint, he reviewed the inspection report and concluded that the driveway and parging as described in the home inspection report could indicate water penetration problems. Mr. Zsolt knew that. Mr. Lazarus knew that. Mr. Edwards knew that. Glenda Halliwell did not know that.
- [79] The significance of the condition of the exterior to the likelihood of water penetration was never explained to Glenda Halliwell.
- [80] Mr. Edwards the inspector, Mr. Walker the inspector's expert, Messrs. Lazarus and Zsolt from a real estate perspective, engineer Koerth from an expert perspective, all recognized the significance of the age of the home, the expected lack of protection against water penetration in the foundation, the lack of expectation that these basements would be habitable, the significance of deteriorating parging as a clue that similar water penetration problems might be impacting below grade. All of these significant indicators of the potential for water penetration were known to these individuals.
- [81] Mr. Edwards professed that he didn't like to confuse clients with complication. Here, he expressed his confidence in his report for a low potential for moisture seepage in the basement, an assurance that was given without the insight that he would have expected moisture seepage in the circumstances of this basement but that, to Mr. Edwards' surprise, he did not perceive any indications of the presence of moisture.
- [82] I find that if Glenda Halliwell had been told the basic fundamental insights that all of these individuals knew, she would not have purchased this home.
- [83] I find that the written report was sufficient to trigger response from an insightful purchaser but without the basic knowledge that the professionals all had and Glenda Halliwell did not have, it did not trigger a concern with her. And, she never read it. Rather, she relied on the oral communication.
- [84] I find as a fact that the oral communication did not in any way connect the condition of the exterior wall and driveway with any potential moisture problems. The oral conversation did not alert Glenda Halliwell to concerns that would have, if known, caused her to walk away from the deal.

- [85] I should add that Mr. Edwards' failure to communicate is demonstrated by the way the reporting interaction that took place. He was checking the checkboxes and making comments. Mr. Lazarus was out of the conversation for the most part as he was on the phone trying to communicate the furnace difficulties to Ms. Chan the seller's agent. Mr. Edwards was casual in the communication, engaging at the same time in small talk with Gus Tsigas about his purchase of a Jaguar a year earlier from Mr. Lazarus.
- [86] During argument I asked several times for Mr. Edwards' counsel to explain what value was there in a home inspection that by its terms and conditions purported to remove responsibility for everything except what could be seen visually, where there were no checks or balances for the insight or ability of the inspector to observe and there was no responsibility to explain why something might be significant. While it is obiter and not necessary for my decision, I have not been satisfied that the standards as set out in the standard form documentation handed to the client actually set out standards of care for the industry at all. Rather they appear designed to immunize the inspectors from liability.
- [87] The consumer gains no reassurance from these standards. There are no teeth in the standards and, fundamentally, in the circumstance such as the one I have heard about, there was no meeting of the minds to form a contract.
- [88] I find that the standard of care applicable to the home inspector was to make a visual inspection and communicate concerns relating to the various items in the checklist. Communication in this case fell below standard. The verbal was inconsistent with the written and the written required explanation to be useful. Brian Edwards failed to communicate adequately the concern for moisture penetration even though no visible signs of penetration were observed.
- [89] In summary answer to the arguments raised by Westbrook Building Inspections Service Ltd, I find that the contract exclusions do not apply because the parking and driveway defects could be visually observed but their significance in the potential for moisture penetration was never reported or explained. This failure of communication was a breach of the standard of care. But for that breach, Glenda Halliwell would not have waived the condition, purchased the home and suffered the damages.
- [90] This brings me to Joel Lazarus. Mr. Lazarus, although he has often recommended Brian Edwards and he has had four inspections done for himself by Mr. Edwards, has not read the contractual limitations. Meanwhile, phrases such as "the inspector will tell us of any concerns" or "that's up to the inspector", or "I'm just a real estate agent not a home inspector" fall from his lips continuously. Moreover, they fall from the lips of Mr. Zsolt who is his responsible broker of record. Ms. Halliwell was kept in childlike innocence by Mr. Edwards and she was justified in accepting his advice by the way the nature of his advice was characterized to her by Mr. Lazarus. She was not expected, in the scenario he described to her, to take responsibility herself for the concerns. Joel Lazarus told her "that's what the inspector is for."
- [91] Upon completion of the inspection, Mr. Lazarus took a similar hands-off approach. He did not read the report. He, like Glenda Halliwell, accepted the oral advice of Mr. Edwards. Because of his long association with Mr. Edwards, he knew that the important stuff would be on the last two pages where critical major deficiencies were addressed. He therefore emphasized those matters with Ms. Chan and placed those conditions in the amendment he proposed.
- [92] I do not accept that Ms. Halliwell in any way impeded him from seeing the report in its entirety. I do not accept that she gave informed instructions to him which he simply followed. Rather, he relied on his own experience of how things work, he made recommendations to Glenda who did not know how things worked, and she gave him instructions in accordance with his recommendations. Had he read the report he, like Mr. Zsolt who did so later, might well have concluded that the parking and driveway issue raised concerns. Had he not come to that conclusion he might at least have put the possibility to Ms. Halliwell. In either of those circumstances she would not have bought this home.
- [93] Joel Lazarus induced Glenda Halliwell's reliance on Brian Edwards and then, perhaps due to the line of cases cited before me that shift liability to the home inspector,<sup>[2]</sup> washed his hands of all responsibility to his client as to what use should be made of the inspector's report. He knew the significance in negotiating the agreement of purchase and sale conditional on a home inspection but failed to advise the purchaser of the use to be made of the report. He recognized a duty to discuss concerns with Brian Edwards, but fell below standard of care by failing to review the report with his client before waiving the home inspection condition.
- [94] I said at the outset that Mr. Lazarus did not betray his friendship to Ms. Halliwell. Nor did he depart from what experience has told him will get the interested purchaser what she wants. He is an amiable and enthusiastic gentleman. He would be reassuring, just as Ms. Halliwell has described him to be, in terms of his confidence in the lack of moisture in the basement of the house she proposed to buy. However, he abandoned her when he failed to share the insight he had about older homes and put the comments in the report into context. In so doing, he took from her the opportunity which I find she would have taken to walk away from this home.
- [95] Finally, I turn to Ms. Halliwell herself. While I find her reliance on the oral reassurances and explanations given was reasonable, she must take some responsibility for failing to review the written word. Had she done so, she might well have protected herself from the deal that she entered into so innocently.
- [96] I therefore proportion liability as follows:
- |   |     |
|---|-----|
| Westbrook Inspection Services Limited         | 50% |
| Lazarus and Coldwell Banker Terrequity Realty | 25% |
| Glenda Halliwell                              | 25% |
- [97] If the parties wish to address me on costs, I will accept written submissions of no more than 2 pages, together with cost calculations and any offers, on a 7 day turnaround starting with the plaintiff, then Westbrook Building Inspections Service Ltd, then Joel Lazarus and Coldwell Banker Terrequity Realty, then Mr. Tran. As damages are already agreed, I will require those figures to assess the costs implications any offers.

EBERHARD, J.

Released: January 18, 2011

## Halliwell v. Lazarus, 2011 ONSC 1642 (CanLII)

Date:	2011-03-04
Docket:	08-0489
URL:	<a href="http://canlii.ca/t/fkgmg">http://canlii.ca/t/fkgmg</a>
Citation:	Halliwell v. Lazarus, 2011 ONSC 1642 (CanLII), < <a href="http://canlii.ca/t/fkgmg">http://canlii.ca/t/fkgmg</a> > retrieved on 2012-12-02
Share:	Share





Defendant		D.N. Tran on his own behalf
	)	
	))	<b>HEARD:</b> November 29, 30, December 1, 2, 6, 8, 9, 10, 13, 14, 16, 17 & 20, 2010

**REASONS FOR DECISION ON COSTS**

**BERNHARD J.:**

[1] After trial of the three consolidated actions commenced by simplified rules I found

I therefore proportion liability as follows:

Westbrook Inspection Services Limited	50%
Lazarus and Coldwell Banker Terrequity Realty	25%
Glenda Halliwell	25%

If the parties wish to address me on costs, I will accept written submissions of no more than 2 pages, together with cost calculations and any offers, on a 7 day turnaround starting with the plaintiff, then Westbrook Building Inspections Service Ltd, then Joel Lazarus and Coldwell Banker Terrequity Realty, then Mr. Tran. As damages are already agreed, I will require those figures to assess the costs implications any offers.

- [2] Prior to trial parties agreed that damages were \$90,000. I was not told this figure in my role as Trial Judge on the issue of liability, but I was aware of the simplified procedure parameters. Recovery of damages by the Plaintiff on liability as found is calculated now at \$67,500.
- [3] The trial, involving counsel for three parties and Mr. Tran self represented but with some legal advisor apparently available to him, lasted 13 days.
- [4] It is no surprise that the cost of such a trial was disproportional to the amount in issue but the parties were unable to settle the dispute as to liability, so the only means to resolution was adjudication.
- [5] There is no-one in the administration of justice who does not regret scenarios such as this. Much effort, official and individual, has been expended to study and apply solutions. A large proportion of judicial time is now devoted to dispute resolution. Early in this trial I returned the parties to the second pre-trial judge who had attempted to assist the parties immediately before trial, an earlier pre-trial and a mediation having failed to bring about resolution. I am satisfied that the court gave all parties the opportunity and assistance to assess their litigation risk.
- [6] Settlement recommendations of the mid-trial judge are revealed to me in the written submissions filed. The mid-trial judge was scrupulous in his silence. I decline to consider that information now if for no other reason than such recommendations are made in the face of risk, including the risk of how the Trial Judge will interpret the evidence heard. My consideration of the reasonableness of offers discussed in the submissions must be as they pertain to the result after trial not the recommendations of another judge in the context of settlement discussions.
- [7] The Plaintiff evidences costs of \$219,932.72 being \$190,394.47 for fees/taxes and \$29,538.25 disbursements/taxes. The Plaintiff claims \$144,445.00 plus HST as partial indemnity costs and full indemnity for disbursements from Westbrook Building Inspections Service Ltd and Lazarus/Coldwell Banker Terrequity Realty.
- [8] The Plaintiff submits that Mr. Tran's costs should be borne by the three parties in proportion to liability.
- [9] The Defendant Westbrook Building Inspections Service Ltd submits the costs claimed are disproportional, the Plaintiff must bear a proportion of its costs in accordance with liability found and unnecessary steps and years of experience should not be compensated.
- [10] The Defendant Westbrook Building Inspections Service Ltd argues that the Plaintiff should bear Mr. Tran's costs as their cross claim was not actively pursued and the case led to assist their client against the Plaintiff's claim assisted Mr. Tran in his defence.
- [11] The Defendant Lazarus/Coldwell Banker Terrequity Realty submits costs should be apportioned in accordance with liability, that excess in the Plaintiff's claim is demonstrated by comparison to their own costs of \$89,940 plus tax less than half than the Plaintiff's. Disbursements are disputed for travel and consultant fees not demonstrated as necessary and extra expense of three separate actions.
- [12] The Defendant Lazarus/Coldwell Banker Terrequity Realty also submit that the Plaintiff should bear Mr. Tran's costs as their cross claim did not add to the costs he would already have incurred defending the Plaintiff's claim.
- [13] Mr. Tran requests full indemnity costs of \$27,417.50 plus \$3,077.23 for disbursements but notes figures for substantial indemnity at \$17,770 and partial indemnity at \$14,832.50.
- [14] Mr. Tran submits that there is cost in defending the cross claims whether or not they are aggressively pursued at trial.
- [15] All the fees claimed by Mr. Tran are for legal services. He advances no claim for his own time, expense or informing himself to represent himself at trial.
- [16] Although Mr. Tran was fully successful in his defence, the special factors that elevate a claim for costs to full indemnity are not present. He was required to and did comply with necessary court process. His disbursements are a modest reflection of that. I fix his costs at \$16,000 for fees all in and \$3,000 for disbursements all in for a total of \$19,000.
- [17] The Plaintiff made the allegations against Mr. Tran. The Plaintiff's expert identified cause that was chronic but not evidence of how the water penetration must have presented itself identifiable to the vendor. For their own reasons the Defendant's argued that no such evidence was visible on the date of inspection which assisted Mr. Tran. However, they would have been happy to pursue him for indemnity if the finding of liability had been on a different basis than that which I found. He had to defend against them all.

[18] I fix the contribution to Mr. Tran's costs as follows:

Westbrook Inspection Services Limited	\$6,000
Lazarus and Coldwell Banker Terrequity Realty	\$6,000
Glenda Halliwell	\$7,000

[19] As to the quantum of the Plaintiff's claim for costs, I agree disbursements for travel to a jurisdiction chosen by the Plaintiff and some amount of administrative costs excessive for contribution. I fix the Plaintiff's disbursements all in at \$23,000.

[20] These disbursements were necessary to advance the claim at all. The Plaintiff's claim did establish liability in Westbrook Building Inspections Service Ltd and Lazarus/Coldwell Banker Terrequity Realty. I see no reason to discount these disbursements for her proportional success. They largely represent the cost of procedural compliance to put the matter before the court.

[21] I therefore fix costs for disbursements payable to the Plaintiff at:

Westbrook Inspection Services Limited	\$15,334
Lazarus and Coldwell Banker Terrequity Realty	\$7,667

[22] There can be no doubt that the fees are disproportionate to the highest potential value of the claim. Nevertheless, once advanced, the claim must be proven in accordance with the quality of evidence commensurate with its opposition. After discoveries, mediation, repeated pre-trials and service of an expert report, the Defendants, advised by counsel, must necessarily have evolved in their expected cost should they not succeed in their respective defences.

[23] The offers by the Plaintiff and by the Defendants, from time to time, do not invoke Rule 49. The Plaintiff's early offer was commensurate with result but the case became one of those driven by costs. Later offers in play as trial approached reflect that reality. Settlement had become too expensive.

[24] I fix the Plaintiff's partial indemnity cost, all in, at \$120,000.

[25] However, the Plaintiff was not fully successful. The Plaintiff, advised by counsel, must necessarily have evolved in her expected cost should she not succeed in her claim. The only reasonable measure of the partiality of her success is the liability finding. I therefore fix costs for fees payable at:

Westbrook Inspection Services Limited	\$60,000 for fees all in
Lazarus and Coldwell Banker Terrequity Realty	\$30,000
Glenda Halliwell bearing her own	\$30,000

[26] In summary:

(a) Costs payable to Mr. Tran are:

Westbrook Inspection Services Limited	\$6,000
Lazarus and Coldwell Banker Terrequity Realty	\$6,000
Glenda Halliwell	\$7,000
Total	<u>\$19,000</u>

(b) Costs payable for the Plaintiff's disbursements:

Westbrook Inspection Services Limited	\$15,334
Lazarus and Coldwell Banker Terrequity Realty	\$ 7,667
Total	<u>\$23,000</u>

(c) Costs payable for the Plaintiff's fees:

Westbrook Inspection Services Limited	\$60,000
Lazarus and Coldwell Banker Terrequity Realty	\$30,000
Total	<u>\$90,000</u>

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EBERHARD J.

Released: March 4, 2011

FOR THE APPEAL DECISION, See <http://www.aaron.ca/columns/2012-11-24.htm>