Sevidal et al. v. Chopra et al.

Indexed as: Sevidal v. Chopra
(H.C.J.)

64 O.R. (2d) 169
[1987] O.J. No. 732

ONTARIO
High Court of Justice
Oyen J.
July 29, 1987.

Torts -- Deceit -- Vendor of house failing to disclose dangerous latent defect -- Vendor liable for deceit.

Torts -- Deceit -- Vendor of house learning of dangerous latent defect between time of agreement and time of closing -- Vendor liable in deceit for non-disclosure.

Torts -- Negligence -- Misrepresentation -- Prospective purchaser of house inquiring of government agency whether soil contaminated -- Government agency giving misleading response -- Government liable.

Damages -- Misrepresentation -- Consequential damages -- Plaintiff purchasing contaminated land -- Plaintiff unable to resell for three years -- Plaintiff entitled to recover difference between resale price and value of uncontaminated land at date of resale.

Agency -- Real estate agents and brokers -- Negligence -- Agent advising purchaser, for insufficient reason, to waive financing condition -- Purchaser consequently completing unprofitable purchase -- Agent liable.

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The plaintiffs agreed, in April, 1981, to buy a house. The vendors knew, but failed to disclose, that radioactive soil had been found in the vicinity. The agreement was conditional on availability of mortgage financing on certain terms, but, on the advice of the real estate agent who had arranged the transaction, the plaintiffs waived the condition, although mortgage financing was not available on the stated terms, and they had not yet applied for a mortgage. The plaintiffs then contacted the A.E.C.B., a government agency, and were informed that there was no radioactive soil on the property they had purchased, and that contaminated soil in the vicinity would be removed. The plaintiffs accordingly decided to proceed with the sale. In fact, testing of the soil in the area was incomplete, and, a week before closing, contaminated soil was found at the property. The vendors were notified, but the plaintiffs were not informed, and the sale closed. The purchase price in 1981 was $66,000. In 1984 the plaintiffs sold the house for $61,000. The evidence established that the actual value of the house in 1981 was $56,800, and in 1984 the value that it would have had if uncontaminated was $76,000. Houses in the area were not sold between 1981 and 1984. The evidence showed that the contamination was a potential danger to the occupants of the house, though it did not constitute an immediate risk. The plaintiffs brought an action against the vendors, the real estate agent and the A.E.C.B.

Held, all were liable.

The vendors were liable in deceit for failing to disclose a dangerous latent defect: they were bound to disclose what they knew at the time of the agreement, and what they learned between the agreement and the closing. The real estate agent was liable for advising the plaintiffs to waive the financing condition, since, in the absence of the waiver, they would have been able to avoid the transaction. The A.E.C.B. was liable in negligence for misrepresenting the true state of the property. Damages were prima facie, the difference between the price paid and the actual value of the land in 1981, but, in the circumstances, it was not reasonable for the plaintiffs to resell before 1984, and, consequently, they were entitled to $15,000, being the difference between $76,000 and $61,000, by

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way of consequential damages.

Cases referred to

Redican v. Nesbitt, [1924] 1 D.L.R. 536, [1924] S.C.R. 135, [1924] 1 W.W.R. 305, 25 O.W.N. 448; McGrath v. MacLean (1979), 22 O.R. (2d) 784, 95 D.L.R. (3d) 144; [leave to appeal to S.C.C. refused April 25, 1979]; Rowley v. Isley, [1951] 3 D.L.R. 766, 3 W.W.R. (N.S.) 173; Derry v. Peek (1889), 14 App. Cas. 337; C.R.F. Holdings Ltd. v. Fundy Chemical Int'l Ltd., [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263; [leave to appeal to S.C.C. refused 42 N.R. 358n]; Curtis v. Chemical Cleaning & Dyeing Co., [1951] 1 K.B. 805, [1951] 1 All E.R. 631; R. v. Lord Kylsant, [1932] 1 K.B. 442; Tapp v. Lee (1803), 3 Bos. & Pul. 367, 127 E.R. 200; Rivtow Marine Ltd. v. Washington Iron Works (1973), 40 D.L.R. (3d) 530, [1974] S.C.R. 1189, [1973] 6 W.W.R. 692; Scott-Polson v. Hope (1958), 14 D.L.R. (2d) 333, 25 W.W.R. 427; Gronau v. Schlamp Investments Ltd. (1974), 52 D.L.R. (3d) 631, [1975] W.W.D. 47; Ford v. Schmitt (1984), 29 A.C.W.S. (2d) 64; Caleb v. Potts (1986), 2 A.C.W.S. (3d) 2; affd 7 A.C.W.S. (3d) 107; Sorensen v. Kaye Holdings Ltd., [1979] 6 W.W.R. 193, 14 B.C.L.R. 204; [leave to appeal to S.C.C. refused 31 N.R. 445n]; With v. O'Flanagan, [1936] 1 Ch. 575; Abel v. McDonald, [1964] 2 O.R. 256, 45 D.L.R. (2d) 198; revg [1963] 2 O.R. 369, 39 D.L.R. (2d) 456; [leave to appeal to S.C.C. refused June 5, 1964]; Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd., [1963] 2 All E.R. 575; Anns v. Merton London Borough Council, [1978] A.C. 728; Barratt v. District of North Vancouver (1980), 114 D.L.R. (3d) 577, [1980] 2 S.C.R. 418, 27 B.C.L.R. 182, 14 C.C.L.T. 169, 13 M.P.L.R. 116, 8 M.V.R. 294, 33 N.R. 293; Charter-York Ltd. v. Hurst (1978), 2 R.P.R. 272; [appeal to Ontario Court of Appeal dismissed April 1979]; Central Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161, 69 N.R. 321; [application to S.C.C. for rehearing granted 42 D.L.R. (4th) vii]; Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25; Parna v. G. & S. Properties Ltd., [1969] 2 O.R. 346, 5 D.L.R. (3d) 315; revd 15 D.L.R. (3d) 336, [1971] S.C.R. 306; Kienzle v. Stringer (1981), 35 O.R. (2d) 85, 130 D.L.R. (3d) 272, 21 R.P.R. 44; [leave to appeal

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to S.C.C. refused 38 O.R. (2d) 159n, D.L.R. loc. cit., 42 N.R. 352n]; Wroth v. Tyler, [1973] 1 All E.R. 897; Ansdell v. Crowther (1984), 11 D.L.R. (4th) 614, 55 B.C.L.R. 216, 34 R.P.R. 73; Tecoglas Inc. v. Domglas Inc. (No. 2) (1985), 2 W.D.C.P. 203; Jarvis v. Swans Tours Ltd., [1973] 1 Q.B. 233; Rookes v. Barnard, [1964] A.C. 1129; Robitaille v. Vancouver Hockey Club Ltd. (1979), 19 B.C.L.R. 158; [affd 124 D.L.R. (3d) 228, [1981] 3 W.W.R. 481, 30 B.C.L.R. 286, 16 C.C.L.T. 225, 20 C.P.C. 293]

Statutes referred to

Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 8
Judicature Act, R.S.O. 1980, c. 223 (since repealed by s. 187 of, and replaced by Courts of Justice Act, 1984, S.O. 1984, c. 11)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 53.03(2), 53.08

EDITORIAL NOTE: This case was only recently received but was thought to be of sufficient importance and interest to the profession to be reported at this time.

ACTION for damages caused by the purchase of land with contaminated soil.

J.D. Crane, Q.C., and L.R.E. Zubas, for plaintiffs.

S.K. Sanwalka, Q.C., for defendants, Chand Kirshan Chopra and Asha Chopra.

M.H. Flancman, for defendants, Antonietta Antonio and Northgate Realty Ltd.

C.A. Bell, for defendant, Atomic Energy Control Board.

D.H. Lapowich, Q.C., for defendants, Messrs. Clapp & Gibson.

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OYEN J.:-- The plaintiffs, Soliman and Eleanor Sevidal, claim they suffered damages as a result of a series of events which took place at the time of their purchase of a home which had radioactive material in the backyard.

The Sevidals decided to buy their first home in March, 1981. They consulted the defendant, Antonietta Antonio, a real estate agent employed by the defendant, Northgate Realty Ltd. With her help their search led them to 63 McClure Cres. in Scarborough, which was owned by the defendants, Chand Kirshan Chopra and Asha Chopra.

After some negotiations the Sevidals entered into an agreement to purchase with the Chopras in April, 1981. The Chopras did not disclose to the Sevidals that radioactive soil had been found in the McClure Cres. area and that there was a "hot spot" across the street.

Although the agreement was conditional upon mortgage financing, Antonio had the Sevidals waive the condition before they had applied for the mortgage.

Later in the week after they signed the agreement, the Sevidals read a newspaper report about the radioactive contamination. They consulted Stanley G. Clapp, a lawyer with the defendants' firm of Clapp & Gibson. He undertook to see if he could get them out of the transaction. Two days later, impatient with his lack of progress, Mrs. Sevidal decided to call "the government".

She spoke to Bonnie Duff, an employee of the defendant, Atomic Energy Control Board (A.E.C.B.), the government agency responsible for disseminating information to the public about radioactivity. After receiving assurances from Duff that there was no contaminated soil at 63 McClure Cres. and that the radioactive material in the area was of low level and would be removed by the government, the Sevidals decided to proceed with their purchase. They advised Clapp of their decision.

Before the closing, A.E.C.B. found radioactive soil at 63

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McClure Cres. The Chopras were notified of the find about a week before closing. Neither A.E.C.B. nor the Chopras disclosed the information to the Sevidals.

A few days after closing, the Sevidals learned of the find. Although they were concerned, they were led to believe by the A.E.C.B. that the soil would be removed shortly. The soil has never been removed because no disposal site can be found.

In May, 1984, the Sevidals sold the house at a loss. In 1986 the house was sold by the subsequent owners to the Ontario government.

The issues which must be addressed are these:

1. Was the radioactive material, found in the area of and in the soil at 63 McClure Cres., a danger or potential danger to the owners of 63 McClure Cres.?

2. Did the Chopras owe a duty to the Sevidals to disclose the presence of radioactive material in the area before the agreement to purchase was signed or to disclose the discovery of radioactive material in the backyard before the closing?

3. Did A.E.C.B. owe a duty of care to the Sevidals and did they breach that duty?

4. Did Antonio meet an appropriate level of competence expected from a real estate agent for the work which she undertook for the Sevidals?

5. What was Clapp's retainer and did Clapp meet an appropriate level of competence expected from a solicitor for the work which he undertook for the Sevidals?

6. At what time should the house be valued to determine the damages, what is the measure of damages, and did the Sevidals mitigate their damages?

Background

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To understand how this case arose, a review of some of the background is necessary. During the 1940's a former officer of Eldorado Nuclear, Carl French, operated a business in the Toronto area, Radium Luminous Industries. Among the experiments French and his company undertook was the recovery of radium from rags that had been used for luminous dial painting. The rags were collected and taken to a 10-acre plot of land situated in Scarborough, known as the Ivanenko farm.

The rags were burned in a pot-bellied stove in one of two small farm outbuildings to reduce and concentrate the radium in the ashes. The ashes were collected, put in wooden barrels, and shipped to Eldorado Nuclear at Port Hope for further processing.

Small amounts of radioactive material were lost either through the grate in the stove or in the transfer of the ashes to the barrels.

In 1974, a portion of a subdivision in Scarborough, known as the Malvern subdivision, was developed over the original Ivanenko farmhouse and its outbuildings. McClure Cres. was constructed in that subdivision.

In 1975, as a result of the discovery of radioactive contamination in part of a building in downtown Toronto which had been used by Radium Luminous Industries, officials from A.E.C.B. met with French to determine other possible locations of radioactive contamination. One of the locations French described was the Ivanenko farm so A.E.C.B. undertook some testing in the McClure Cres. area. No evidence of contaminated soil was found. The test locations were chosen because they were accessible and convenient.

Dr. Roger Eaton, an expert on the identification and removal of radioactive soil, testified for A.E.C.B. His evidence was that his colleagues at A.E.C.B. did have information as to the location of the outbuildings on the Ivanenko farm and were well aware of the general area where contamination might have been found. Nevertheless, in 1975, the A.E.C.B. did not conduct any tests at the actual locations of the outbuildings. Only one

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test was conducted reasonably close to them.

Eaton testified further that the A.E.C.B. file on this so-called "mystery site" was still open after 1975. Clearly there was ongoing apprehension that something was there. Eaton added that from a scientific point of view, A.E.C.B. had no answer as to why radioactive material around the farm outbuildings had seemed to disappear by 1975.

In 1976, a federal/provincial task force was formed to bring under its control previously uncontrolled radioactive material, to reduce the risk to the public of exposure to radiation, and to arrange for the removal of any loose radioactive matter. A.E.C.B. was the lead agency for the task force and Eaton was its executive secretary from 1976 until it was disbanded in 1984.

Eaton testified that the principle of radiation protection is to determine appropriate levels of radiation so that risk to the public will be minimized. The task force established criteria to determine what remedial action would be required or directed when radioactive material was found which was above internationally acceptable levels. For all levels (herein "Level 1") at or above criterion level established by the task force, the remedial action required would be removal of the contaminated material. For all levels (herein "Level 2") between the background level of radiation which occurs naturally in an area, called the natural background, and Level 1, the remedial action would only be directed but, if directed, would include removal of or other action with respect to the contaminated material.

Even after the task force was formed, A.E.C.B. did not discover any radioactive material in the McClure Cres. area. In mid-November, 1980, students from Ryerson Polytechnical Institute were carrying out tests in the McClure Cres. area, presumably for a school project. Using equipment no better than that available to A.E.C.B., those students found an elevated gamma radiation reading in the backyard of 110 McClure Cres. The "hot spot", as it was called, was immediately south of where the more westerly outbuilding on the Ivanenko farm had

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been located. The backyard of 110 McClure Cres. adjoins the backyard of 60 McClure Cres. Across the road from No. 60 is 63 McClure Cres.

As soon as the hot spot was discovered, A.E.C.B. retained MacLaren Engineers Inc., an engineering consulting firm experienced in radiation work. Eaton instructed them to take borehole samples in the area of the hot spot to ascertain the depth of the contamination. Those tests showed Level 1 radioactive contamination.

Eaton also had tests conducted south of the hot spot to see the extent of the problem. His preliminary conclusion from those tests was that there was a strong possibility that the radioactive contamination went south in the backyards of the townhouses from the hot spot to the end of the first row of townhouses. That would be in the backyards of the even numbered houses between 60 and 48 McClure Cres. As it turned out, there was Level 2 contamination in that area but the contamination extended further south than Eaton concluded originally.

Eaton then reviewed A.E.C.B. material on the area, which included aerial photographs taken by the Department of Highways every five years. In one photograph he could see the outline of roads being developed and a pile of topsoil in the centre of the subdivision roughly in the area where the contamination was found. He formed the hypothesis that the topsoil had been scraped off the farm, stored and then redistributed on the north/south axis of the subdivision. He did not think the soil would have been distributed on the east side of McClure Cres. where No. 63 was located.

Eaton decided on November 20, 1980, that the contaminated material should be removed and that work would continue until there was no contamination left. He also stated at trial that there was "no other acceptable solution".

Eaton then instructed MacLarens to undertake more extensive testing in the yards and houses on McClure Cres. That testing, except for necessary borehole testing, was completed prior to the end of January, 1981. The borehole testing was suspended in

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mid-December, 1980, and resumed in the spring of 1981.

The Chopras admitted that they knew of the discovery of radioactive contamination in the McClure Cres. area in November and December, 1980, because of newspaper reports and because tests had been done in their house and on the surface of their yard in December, 1980. Mr. Chopra testified he telephoned either A.E.C.B. or MacLarens shortly after that initial testing to confirm that there was no contamination at 63 McClure Cres.

The Chopras signed an agreement to purchase a new house on March 15, 1981. They listed their existing house at 63 McClure Cres. for sale on March 17, 1981, at $69,900.

The search and the signing of the agreement

Mr. Sevidal met the defendant realtor, Antonio, casually in a supermarket in 1979. Both were from the Phillipines and spoke the same dialect. They kept in touch periodically. In March of 1981, when the Sevidals decided to purchase a home, they called Antonio.

On Sunday, April 12, 1981, Antonio showed the Sevidals 63 McClure Cres., a four-bedroom, two-storey, semi-detached townhouse. They decided to make an offer at $65,000. After some negotiation, an agreement to purchase dated April 13, 1981, was signed. The price was $66,000 and the closing date was June 30, 1981. The agreement was conditional for five days to allow the Sevidals time to arrange financing.

On April 13th, Antonio called the mortgage officer at the bank she was recommending the Sevidals use for the mortgage. The officer could not arrange an appointment for the Sevidals until the next day but Antonio did have some preliminary discussions on the telephone with the mortgage officer. At that point, she learned the interest rate would be 161/2% and not 16% as specified in the agreement.

Later that day Antonio prepared a waiver of the financing condition and arranged to meet with the Sevidals at 63 McClure Cres. that evening. The Chopras and their real estate agent,

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Eric Mercer, were there.

During that meeting the Sevidals signed the waiver of the condition regarding financing. The Sevidals testified that the effect of the waiver was not explained to them by Antonio. Antonio testified that she told the Sevidals the waiver was to remove the condition and that, because the Sevidals read it and it was a simple form, the Sevidals could understand it easily. I find that Antonio did not explain the waiver to the Sevidals and that they did not understand that if they could not obtain a mortgage on terms suitable to them, they were still bound to purchase the house. Antonio provided no satisfactory explanation as to why she would put her clients at risk by having them sign a waiver of a condition when they had not even applied for the mortgage.

The Chopras did not disclose to the Sevidals nor to Antonio nor even to Mercer, their own real estate agent, at that meeting or at any time before April 13, 1981, that Level 1 and 2 radioactive contamination had been found in the area. It was not on their property, they testified, so they were not concerned.

Discovery by Sevidals -- radioactive soil in the area

On April 14th or 15th, the Sevidals read an article in the Toronto Star about the radioactivity problem in the McClure Cres. area. Mr. Sevidal called Antonio. Antonio reassured him by saying if it were dangerous the government would remove it. Antonio checked with A.E.C.B.'s Mississauga office and Mercer checked with Scarborough officials. Both were told that 63 McClure Cres. was not affected by the radioactive contamination. Antonio also called Mr. Chopra who told her that the radioactive soil was not on his property which was why he did not disclose it. There were several calls between Antonio and the Sevidals at this point. Antonio probably suggested they should consult a lawyer, which they did.

The interview with Clapp

During this period the Sevidals tried unsuccessfully to call

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John Lancaster, one of the residents mentioned in the newspaper article they had read. Then they decided to call Clapp, the lawyer they had chosen to retain. Clapp arranged to see them on the next business day after their call.

The appointment, on Monday, April 20, 1981, lasted three-quarters of an hour to an hour. The Sevidals showed Clapp the agreement of purchase and sale, the waiver and the newspaper article. Clapp testified that the Sevidals were extremely concerned and upset and wanted him to get them out of the transaction.

Based on Clapp's testimony and in part based on the Sevidals' testimony and their subsequent actions, I find that the following occurred during or arose out of the interview:

1. Clapp discussed the signing of the waiver with the Sevidals and expressed concern about the waiver having been signed before the mortgage was applied for. He explained that if the waiver had not been signed, since the mortgage subsequently arranged did not conform to the interest rate in the condition, it would have been a simple matter to terminate the transaction.

2. Clapp told the Sevidals that the next easiest way to get them out of the transaction was to have the Chopras sign a release. Because he was concerned that not all of the contents of the newspaper article might be true and, being aware of the problem of anticipatory breach of contract, he indicated that he would speak informally to the Chopras' solicitor to see if the Chopras would let the Sevidals back out of the transaction.

3. Clapp discussed the basic doctrine of buyer beware but did indicate there were exceptions to the rule.

4. Clapp also discussed what happens if purchasers back out of a transaction without good cause, i.e., they can be sued to perform the contract and for resulting damages.

5. Clapp discussed fees with the Sevidals. In that context, Clapp had gathered from the Sevidals that if the contents of

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the article were true, they wanted to back out of the transaction but, if it were not true or it did not affect their property, they wanted to go through with the transaction. Accordingly, Clapp discussed and made a notation about fees. He also suggested that inquiries be made to determine whether the contents of the article were true. He discussed whether he or the Sevidals would make the inquiries. He indicated that if he were to inquire, there would be additional costs. Clapp did not undertake to make those inquiries.

The telephone call to Duff

Although Clapp had called the Chopras' solicitor, nothing was concluded as of April 22, 1981. On that date, feeling "closed in", Mrs. Sevidal decided to call "the government" to see what they would say. On April 22, 1981, Mrs. Sevidal spoke to Bonnie Duff, an administrative assistant with the task force, whose job it was to be the point of contact between the homeowners, the public and the A.E.C.B. Her duties were to make available historical documentation, to provide information bulletins, to communicate with people, to educate them and to deal with their fears and anxieties with regard to radiation.

Duff had little recollection of Mrs. Sevidal's telephone call. On the other hand, Mrs. Sevidal's evidence was helpful. Although she was a lay person dealing with matters unfamiliar to her, she made notes of the conversation and appeared to have grasped the essence of what Duff said to her. In fact, at trial Duff used Mrs. Sevidal's notes to refresh her memory about the telephone call.

After identifying the property the Sevidals had bought, Duff told Mrs. Sevidal that the backyards of the even numbered houses between 60 and 48 McClure Cres. were the main area of concern regarding contamination. Mrs. Sevidal then wrote down "63 no contaminated soil". I find that Duff said there was no contaminated soil at 63 McClure Cres. At various points in her evidence Duff said she said "no evidence of contaminated soil", as that would be her standard response, or that she said there was "no indication of contaminated soil". She could recall precisely what she said and in that instance I prefer

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the evidence of Mrs. Sevidal.

I make the following additional findings as to what was said during the telephone conversation between Mrs. Sevidal and Duff:

1. Mrs. Sevidal told Duff that she and her husband had signed the agreement to purchase 63 McClure Cres. and then subsequently had heard about radioactivity in the area.

2. Duff told Mrs. Sevidal that A.E.C.B. was going to remove the contaminated material but the problem was to find a disposal site. Duff added that the problem of finding a disposal site would be solved in about two months and that the material they were finding was of very low level.

3. Duff used the word "safe" in her explanation to Mrs. Sevidal about the radioactivity.

4. In response to Mrs. Sevidal asking Duff's opinion, Duff said she would not back out of the transaction if she were the Sevidals because A.E.C.B. was going to remove the soil and because 63 McClure Cres. was not affected.

5. There was no reason for Mrs. Sevidal to call Duff back as a result of anything said during the telephone call.

Duff allayed Mrs. Sevidal's fears and anxieties about the radiation. She also agreed in cross-examination that indirectly she encouraged the Sevidals to complete the transaction. Duff testified she was aware Mrs. Sevidal was relying on her regarding the information given about radiation. Later in her testimony she said that she knew Mrs. Sevidal was relying on her regarding the health aspects.

During that telephone conversation Duff did not tell Mrs. Sevidal that:

1. The testing being done by A.E.C.B. in the area had not been completed.

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2. The MacLaren report on the testing which A.E.C.B. had received was an interim report.

3. 63 McClure Cres. was close to the location where the Ivanenko farm outbuildings had been and where radioactive materials had been stored and reduced in the 1940's.

4. It was the policy of the A.E.C.B. not to deal with anyone but the registered owner of the property when readings above natural background were found, and that if contamination were found in the future, A.E.C.B. would not disclose it to Mrs. Sevidal, but only to the registered owner.

Events leading up to closing

Following her telephone conversation with Duff, Mrs. Sevidal called Clapp to tell him to close the transaction. Clapp proceeded with the transaction in accordance with the usual practice. Nothing alerted him to any problem of radioactive contamination on 63 McClure Cres.

Antonio testified that she became worried because the soil had not been removed. In telephone calls prior to closing, she said she told Mrs. Sevidal that she had an investor who would buy the property and told Mrs. Sevidal that she herself would buy the property. Mrs. Sevidal testified that there was no discussion with Antonio about Antonio or an investor buying the property after the assurances received from A.E.C.B. on April 22, 1981, and before the closing date. Where Antonio's testimony and Mrs. Sevidal's testimony conflict, I prefer the testimony of Mrs. Sevidal. Antonio admitted that after her discovery she read the discoveries of the other witnesses and was now trying to put the pieces together. There were discrepencies between her testimony at trial and at discovery, particularly with regard to the details of the negotiations for and the signing of the agreement to purchase. At trial she insisted that all the negotiations with the Chopras and Mercer, the listing agent, and the signing of the offer took place at the Chopras' home on April 12, 1981. On discovery she said she telephoned the listing agent after the Sevidals signed the offer and she said she asked the Sevidals to meet her at her

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house or the Sevidals' house to review the Chopras' counter-offer. I did not find her a credible witness.

On May 15, 1981, following Eaton's instructions, MacLarens drilled two boreholes in the backyard of 63 McClure Cres. One of the holes showed evidence of above natural background. MacLarens reported to A.E.C.B. that another survey should be done. When MacLarens conducted a further survey during the period June 15th to 18th, evidence of Level 2 radioactive contamination was found in six out of about 18 boreholes drilled. The pocket of contamination which was found was an area about 20 ft. sq. about 20 ft. behind the house at 63 McClure Cres. The contamination was at least two feet below the surface. Once the contaminated material was found, A.E.C.B. included 63 McClure Cres. in the soil removal remedial action plan.

On June 18, 1981, John deJong, MacLaren's field technician in charge of the testing crew, telephoned Mr. Chopra to tell him that the radioactive contamination had been found in his backyard. This conversation was related the next day by deJong to his superior, E.J. Chart, who confirmed it in a memorandum dated June 22, 1981, which read:

> John De Jong [sic] phoned on 19 June re Mr. Chand Chapra [sic] of 63 McClure, 293-8065, with the following points:
>
> Mr. Chapra [sic] has sold his house, closing on 26 June.
>
> He sold the house on a clearance letter issued by A.E.C.B.
>
> Now doesn't know if he should tell prospective buyer of the recent findings of low level contamination in backyard.
>
> The writer phoned R. Eaton on 19 June and informed him of the potential problem.

At trial Mr. Chopra denied mentioning anything about the prospective purchasers in his conversation with deJong but I accept the memorandum as reflecting the conversation accurately. I did not find Mr. Chopra a credible witness. There

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were a number of discrepencies between his testimony at trial and on discovery, including a discrepancy on this point. On his first examination for discovery he did not mention the telephone call. On the second examination he said he was "wondering aloud" whether he should contact the buyers. On cross-examination Mr. Chopra's answers were confused on this point as well. Generally, Mr. Chopra's testimony was evasive and very unsatisfactory.

After Chart received deJong's telephone call on June 19, 1981, he telephone Eaton to report on deJong's conversation with Mr. Chopra. Although Eaton knew then that the Chopras were selling their house June 26, 1981, Eaton did nothing.

I reject the Chopras' contention that between June 18th and the closing they were so busy and preoccupied with their new home that the matter of the radioactive contamination slipped their mind. I also reject their contention as they stated at trial, that, having been reassured the contamination was not a health hazard, they were no longer concerned. I find they deliberately and intentionally failed to disclose to the Sevidals, prior to closing, the existence of the radioactive contamination in the backyard at 63 McClure Cres.

From the closing, to the subsequent revelation, to the resale

Clapp saw his clients the day before the transaction closed. He reviewed the documents, received the funds for closing and closed the transaction.

On July 3, 1981, after the transaction had closed, Mrs. Sevidal learned from deJong when he attended at 63 McClure Cres. to conduct further tests that there was low level (Level 2) radiation on the property. The Sevidals obviously were upset and in Mrs. Sevidal's words "felt powerless because we had already moved in".

In the ensuing months, the Sevidals attended various community meetings called to consider the contamination problem. They signed an agreement with A.E.C.B. dated August 31, 1981, in which they authorized the A.E.C.B. "to do such

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things, as in the opinion of the Board, are necessary to remove or reduce the level of radioactivity thereon to acceptable levels established by The Federal Provincial Task Force on Radioactivity".

Antonio testified that she called the Sevidals a number of times after closing, and after she learned from them of the radioactive contamination on the property, she said she advised them to move out. Antonio added that on those occasions she told them she would rent the property for them or she would buy it and rent it out. While Mrs. Sevidal agreed that Antonio had said she would buy the house, her offers were not taken seriously. None of Antonio's "offers" were ever put in writing nor communicated to Clapp. I find she did not intend to make any offers that were to be taken seriously.

The Sevidals generally avoided their backyard and basement while they owned the house. While the Sevidals suffered some inconvenience in the use of their property due to their concern about the radioactive contamination, I find that the restriction in use was not significant.

Because the A.E.C.B. still had not been able to find a suitable disposal site for the contaminated soil and because they wanted to mitigate their damages, the Sevidals decided to sell their house in the spring of 1984. The Sevidals listed their house at $59,900 in May, 1984. The Sevidals received three offers within a week. One of the offers was for $62,000 which was reduced by $1,000 in order to give the Sevidals an opportunity to consult their lawyer. I find the Sevidals acted reasonably in accepting the lower price.

Radioactive material -- a potential danger

The first and central issue to be addressed is whether the radioactive material found in the area and in the soil at 63 McClure Cres. constituted a danger or potential danger to the owners of 63 McClure Cres.

It was agreed that there was no immediate health risk to the users of the house at 63 McClure Cres. In addition, as long as

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the contaminated material were to remain buried, there is no health risk. Eaton stated that the Level 2 contaminated material in the backyard at 63 McClure Cres. was three times greater than natural background. Eaton added that the backyard at 63 McClure Cres. was as safe as his own backyard in Ottawa, provided the soil was not disturbed.

If that is the case, why would Eaton recommend to the government the spending of hundreds of thousands of taxpayers' dollars to remove tons of the Level 1 and 2 contaminated soil in the McClure Cres. area? The explanation was provided by the A.E.C.B. in a memorandum to residents dated December 16, 1980:

> Although these pockets have not in the past and do not now present any risk to the health of the occupants of the area we cannot predict what new construction might take place in the future and thereby put people at risk. As a result we shall undertake to remove this contamination.

In a news release dated January 9, 1981, the A.E.C.B. stated further:

> Neither deposit presents an immediate hazard to people in the vicinity but localized radiation levels are higher than normal and the material should be removed to correct this. Removing the surface layer would eliminate the higher than normal radiation levels but leaving the sub-surface material would present future problems if it was uncovered.

Radium 226 is a prescribed substance under the Atomic Energy Control Act, R.S.C. 1970, c. A-19, and regulations. A.E.C.B. through Eaton has directed that the Level 1 and Level 2 contaminated material be removed. A.E.C.B. would have removed it if a disposal site could have been found but, in over six years, a disposal site has not been found despite extensive efforts by A.E.C.B. and the federal and provincial governments.

Accordingly, I find that the amount of radioactive material found in the backyard of 63 McClure Cres. and in the area of McClure Cres. was sufficient to be of potential risk and hazard and, therefore, a potential danger to the owners of 63 McClure

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Cres. even though it did not constitute an immediate risk or hazard to the owners.

I turn now to the specific issues which relate to each of the individual defendants.

Liability of the Chopras

The issues with respect to the Chopras relate to disclosure. Did the Chopras owe a duty to the Sevidals to disclose the presence of radioactive material in the McClure Cres. area before the agreement to purchase was signed, or to disclose the discovery of radioactive material in the backyard of 63 McClure Cres. before the closing?

Here we are dealing with a latent defect. Latent defects with respect to the sale of land, have been described succinctly in 42 Hals., 4th ed., p. 47, para. 51: "latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase".

Redican v. Nesbitt, [1924] 1 D.L.R. 536, [1924] S.C.R. 135, [1924] 1 W.W.R. 305, stands for the proposition that the doctrine of caveat emptor does not apply to fraud, error in substantialibus or where there is a warranty, contractual condition or collateral contract.

In reviewing whether a cause of action existed in the case of McGrath v. MacLean (1979), 22 O.R. (2d) 784 at pp. 791-2, 95 D.L.R. (3d) 144 (C.A.), Dubin J.A., quoted favourably from a lecture by Professor Bora Laskin, as he then was, entitled "Defects of Title and Quality: Caveat Emptor and the Vendor's Duty of Disclosure", Special Lectures of the Law Society of Upper Canada (1960), p. 389 at pp. 403-4:

> "Does the vendor have any duty of disclosure in matters of quality and fitness which do not constitute defects of title? Here we deal with the classical notion of caveat emptor as applied to the physical amenities and condition of the property unrelated to any outstanding claims of third parties

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or public authorities such as would impinge on the title. Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms. ...

"I do not propose to dwell on fraud, mistake or misrepresentation save to make a few observations about the way in which, if established, they relieve a purchaser from the binding effect of caveat emptor. Fraud can be a rather elastic conception, and there are cases which show a tendency to find fraud when there has been concealment by the vendor of latent defects. Rowley v. Isley, [1951] 3 D.L.R. 766, a British Columbia decision entitling a purchaser to rescind (even after paying the price and taking possession) where there was a failure to disclose infestation by roaches, illustrates the proposition, and goes quite far in allowing rescission after the transaction had been closed. On the other hand, a latent defect of quality going to fitness for habitation and which is either unknown to the vendor or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity will not support any claim of redress by the purchaser. He must find his protection in warranty."

(Emphasis added.)

At p. 792, Dubin J.A. went on to state with respect to Rowley v. Isley, [1951] 3 D.L.R. 766, 3 W.W.R. (N.S.) 173:

It is to be observed that Coady, J., in the case of Rowley v. Isley et al., [1951] 3 D.L.R. 766 at p. 767, 3 W.W.R. (N.S.) 173, found against the vendor in the following language:

"The failure to disclose to the plaintiff, however, the true condition of the house, as to the infestation by cockroaches and to the prior fumigation, rendered necessary by reason of the prior excessive cockroach infestation, was I think, a fraudulent misrepresentation arising from a suppression of

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> the truth. This condition, under the circumstances, it was the agent's duty to disclose."
>
> (Emphasis added.)

An exception to the general rule of caveat emptor will be found where there is fraud or fraudulent misrepresentation and, where there is such a finding, failure on the part of the vendor to disclose will give rise to a cause of action.

Fraud arises when a statement is made "knowingly, or without belief in its truth, or recklessly, careless whether it be true or false": per Lord Herschell in Derry v. Peek (1889), 14 App. Cas. 337 at p. 374 (H.L.). Fraud can also arise where there is active concealment: Able v. McDonald, infra. Finally, fraud arises where there is failure to disclose a potential danger: Rivtow Marine, McGrath v. MacLean, C.R.F. Holdings, Ford v. Schmitt, all infra.

Counsel for the Sevidals argued that failure to disclose the presence of radioactive contamination both in the area and later on the property itself amounted to a fraudulent misrepresentation, and that the Chopras intended to deceive the Sevidals.

It appears that many of the cases turn on their particular facts. It would be useful, therefore, to review them.

In C.R.F. Holdings Ltd. v. Fundy Chemical Int'l Ltd., [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263 (C.A.), the vendor told the purchaser that certain slag on the property would make excellent fill, when in fact the vendor knew that the slag was radioactive. In reviewing the law with respect to representation only of favourable aspects of a property, Anderson J.A. referred to several cases at p. 420:

> ... where it has been held that to knowingly represent only favourable aspects without disclosing the fact that those favourable aspects are substantially qualified by restrictions and unfavourable aspects, known to the person making the representation, amounts to fraud.

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(See Curtis v. Chemical Cleaning & Dyeing Co., [1951] 1 K.B. 805, [1951] 1 All E.R. 631 (C.A.); R. v. Lord Kylsant, [1932] 1 K.B. 442; also Tapp v. Lee (1803), 3 Bos. & Pul. 367, 127 E.R. 200 at p. 203.)

Anderson J.A. went on to hold at p. 421 that even in the absence of a positive fraudulent misrepresentation, the failure to disclose the inherently dangerous nature of the thorium waste was fraudulent. He cited the judgment of Ritchie J. in Rivtow Marine Ltd. v. Washington Iron Works (1973), 40 D.L.R. (3d) 530 at p. 538, [1974] S.C.R. 1189 at pp. 1201-2, [1973] 6 W.W.R. 692:

> Even from the earliest times articles dangerous in themselves as well as articles which were made dangerous by reason of some defect known to the manufacturer were excepted from this general rule ... based on the fact that the vendor of the article who knew it to be defective was guilty of fraud or deceit and for this reason liable to any one who suffered as a result of an injury ...

In Scott-Polson v. Hope (1958), 14 D.L.R. (2d) 333, 25 W.W.R. 427 (B.C.S.C.), a house was infested with moths. The purchaser claimed this was a latent defect. The court found that the vendor did not know of the infestation and absent fraud or warranty, the purchaser had no remedy.

In Gronau v. Schlamp Investments Ltd. (1974), 52 D.L.R. (3d) 631, [1975] W.W.D. 47 (Man. Q.B.), it was held that active concealment of a latent defect, being serious cracks in the wall of a building, was a material misrepresentation which gave rise to an error in substantialibus. Error in substantialibus is one of the other exceptions to the doctrine of caveat emptor: see Redican v. Nesbitt, supra.

I agree with the approach taken by Judge Kurisko In Ford v. Schmitt (November 30, 1984, Waterloo 11124/82 (Ont. Co. Ct.), unreported [summarized 29 A.C.W.S. (2d) 64]). In that case the purchaser refused to close when she learned that the house was insulated with urea formaldehyde foam insulation (UFFI). Both

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the vendor and the agent independently knew about the UFFI and that it had been banned by the government. The agent told the vendor that he would disclose the type of insulation only if asked. The judge held that the failure to disclose the detrimental facts concerning the insulation was a fraudulent and material misrepresentation upon which the purchaser relied to her detriment. The judge was satisfied that the vendor realized that disclosure of UFFI would adversely affect the price and the chance of a sale. The requisite intention to defraud was therefore imputed to the vendor.

In Caleb v. Potts (November 5, 1986 (Ont. H.C.J.), unreported [summarized 2 A.C.W.S. (3d) 2]), the vendors, one of whom was also the selling agent, represented that an extra storage tank in the basement was a water tank, when in fact it was installed to vent methane gas from the well water. It was held that the presence of methane gas was a material factor, but not so material that it rendered the property or residence unsafe. There was no active concealment on the part of the vendors and since the presence of methane gas did not render the house dangerous or uninhabitable, they were under no duty to disclose this fact. The agent, however, was held liable for failing to make the proper inquiries.

Counsel for the Chopras relied on Sorensen v. Kaye Holdings Ltd., [1979] 6 W.W.R. 193, 14 B.C.L.R. 204 (C.A.), for the proposition that mere silence cannot constitute misrepresentation. That case was easily distinguished by Anderson J.A. at pp. 402-3 in the C.R.F. Holdings case, and it is distinguishable from this case. In the Sorensen case, the court was not dealing with a latent defect, much less one that was potentially dangerous. The state of affairs about the swimming pool which caused the problem in that case was discoverable, and in fact was discovered, through correspondence with the proper authorities.

Although I have left the McGrath case to the last of the series of cases which seem to turn on their facts, I am influenced by the obiter of Dubin J.A. In that case, he uses an example of a situation where a vendor would have a duty to disclose. That example is closer to our fact situation than any

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of the other cases I have cited. At p. 792, after he has quoted from Professor Laskin's lecture, supra, he says:

> I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But, as is pointed out in the lecture above referred to, in such case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him. It is to be observed that that is quite a different case than the one founded on the principle of M'Alister (or Donoghue) v. Stevenson, supra.
>
> Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, e.g., the premises being sold being subject to radioactivity. Again, however, under such circumstances the cause of action is not dependent on the principles enacted in M'Alister (or Donoghue) v. Stevenson.

(Emphasis added.)

On the facts of the McGrath case, Dubin J.A. was unable to find in favour of the purchaser. He noted at pp. 785-6 that the particular claim "did not relate to any latent defect in the lands purchased, but it was alleged that the vendor knew that the lands being purchased were subject to landslides from adjoining property which landslides rendered the purchased premises unsafe for human habitation". The problem of the landslides was pointed out to the purchasers. There was no evidence that the landslide which occurred was as a result of the natural flow, or that the vendor was aware of the potential danger of such a large landslide. In fact there was some evidence that the landslide was actually caused by the tortious conduct of others who dumped dirt and debris at the top of the hill and cleared dirt and debris from the bottom of the hill.

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Dubin J.A. did not comment on whether the cause of action could have succeeded if the evidence had supported a finding that the vendor was aware of the full extent of the danger and that a known danger caused the damage.

To return to the case before me, and dealing first with the issue of whether the Chopras should have disclosed the existence of radioactive material in the area prior to entering into the agreement of purchase and sale, I find, based on the principles enunciated in the cases to which I have referred, that they should have. They knew about the potentially dangerous latent defect prior to the signing of the agreement. The fact that at the time the agreement was signed the latent defect was only known to be on property in the immediate area and not on the property itself, provides no excuse for non-disclosure. The Chopras were guilty of concealment of facts so detrimental to the Sevidals that it amounted to a fraud upon them, and, therefore, the Chopras are liable in deceit.

In considering the second issue of whether the Chopras should have disclosed the discovery of radioactive material on their property prior to closing, the principles enunciated in the cases would apply equally but even more forcefully to them when the discovery was made on their property a week prior to closing but there is one further aspect which must be addressed before I make my finding: whether there is a duty to disclose a change of circumstance after the agreement is signed but before closing.

In the cases already set out, the vendor knew of the latent defect prior to the signing of the agreement. In this case, I have found as well that the Chopras knew of the latent defect in the immediate area prior to the signing of the agreement but I want to deal separately with whether they should have disclosed the latent defect on their property which they knew nothing about when they signed the agreement but which they discovered was there at least a week prior to closing.

The Sevidals' counsel referred me to the case of With v. O'Flanagan, [1936] 1 Ch. 575 (C.A.), for the proposition that where a representation is true at the time when it is made, but

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owing to a change of circumstances becomes untrue before or at the time of completion, it is the vendor's duty to disclose the change of circumstances. That case is distinguishable because the statement made by the vendor about the income of a medical practice, though true when made, became untrue due to the illness of the doctor before the contract was signed. In this case, a change of circumstance occurred after the signing of the agreement and before the closing.

In Abel v. McDonald, [1964] 2 O.R. 256, 45 D.L.R. (2d) 198 (C.A.); reversing [1963] 2 O.R. 369, 39 D.L.R. (2d) 456, when the purchasers moved in they discovered that the basement floor had dropped several inches from the time they had inspected the property before signing the offer. Aylesworth J.A. found fraud through active non-disclosure on the part of the vendors. He indicated that active non-disclosure meant that with the knowledge that the damage to the premises had occurred after the agreement was signed, the vendors actively prevented that knowledge from coming to the notice of the purchasers.

In the case before me, while there may not have been quite the same non-disclosure as in the Abel case, the comments of McFarlane J.A. in Sorensen v. Kaye Holdings, supra, at p. 208 B.C.L.R. apply:

> ... where, as here, the claim is for damages for fraud, it is my opinion that the court must consider the whole of the dealings between the parties from [the first meeting] until their contract was carried through to completion ...

In all the circumstances of this case, I find that the Chopras had a duty to disclose the change of circumstances to the Sevidals prior to closing. Accordingly, with regard to the second issue, I find that the Chopras should have disclosed the discovery of radioactive material on their property, and I find the Chopras were guilty of concealment of facts so detrimental to the Sevidals that it amounted to a fraud upon them. Therefore, the Chopras are liable in deceit.

Liability of A.E.C.B.

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The issues with respect to A.E.C.B. are: whether the A.E.C.B. owed a duty of care to the Sevidals; whether they breached that duty and whether damages resulted from the breach of duty.

There are two approaches in considering the liability of A.E.C.B. The first is whether there was a negligent misrepresentation by A.E.C.B. or its employees, on which the Sevidals relied, which resulted in the loss suffered by the Sevidals. The second is whether A.E.C.B., as a public body, through its employees were in sufficient proximity to give rise to a duty of care which, if breached, would make it liable in negligence.

I will deal first with the duty which may arise as a result of a negligent misrepresentation.

Negligent misrepresentation

In Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd., [1963] 2 All E.R. 575 (H.L.), Lord Reid described the courses open to a reasonable person whose opinion is sought by one whom he knows is relying upon it. At p. 583 he said:

> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

The four prerequisites before damages can be awarded are a duty of care, a negligent misrepresentation, reliance, and resulting damage.

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Duty of Care

Section 8 of the Atomic Energy Control Act, provides that the A.E.C.B. is empowered to disseminate "information relating to atomic energy to such extent and in such manner as the Board may deem to be in the public interest ...".

The A.E.C.B. assumed responsibility for disseminating information about radioactivity in the McClure Cres. area and employed Duff to carry out part of that task. It was in the dissemination of the information by Duff that the problem in this case arose.

The advice and information sought by Mrs. Sevidal, except for the opinion as to whether Mrs. Sevidal should back out of the transaction, was of the usual type sought of and given by Duff and fell within her responsibilities.

In accordance with the test in the Hedley Byrne case, I find Duff accepted a relationship with the inquirer, Mrs. Sevidal, which required her to exercise such care as the circumstances required.

Negligent misrepresentation

In my view, the following evidence indicates that A.E.C.B. through their employee, Duff, failed to exercise the standard of care that reasonably should have been required in the circumstances, and constituted negligent misrepresentations:

1. Duff told Mrs. Sevidal that there was no contaminated soil at 63 McClure Cres.

2. Duff told Mrs. Sevidal without qualification that the problem with respect to the disposal site would be solved in about two months.

3. Duff told Mrs. Sevidal, in explaining the readings to her, that it was safe.

4. Duff failed to tell Mrs. Sevidal that testing had not been

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completed.

5. Duff failed to tell Mrs. Sevidal relevant information about the experiments which had taken place on and the location of the Ivanenko farm in relation to 63 McClure Cres.

6. Duff failed to tell Mrs. Sevidal about the A.E.C.B. policy of non-disclosure of contaminated soil except to owners.

7. Duff failed to warn Mrs. Sevidal that she should continue checking both with the A.E.C.B. and with the vendors because the situation was still developing.

I need not decide whether the opinion given by Duff to Mrs. Sevidal, with regard to backing out of the transaction, was a personal opinion since there is ample evidence to show that Duff made negligent misrepresentations to Mrs. Sevidal which were sufficient in themselves, without the opinion, to reassure Mrs. Sevidal and encourage her to proceed with the transaction. The opinion given, in whatever capacity, simply reinforced the assurances already given to Mrs. Sevidal that there would be a solution to the problem in the area very shortly and that there was no problem with respect to 63 McClure Cres.

Reliance

Mrs. Sevidal sought advice about the radioactivity problem in the McClure Cres. area in order to make a judgment as to whether to back out of the transaction. The inquiry was not solely to determine the health risk. Duff neither qualified the information given nor the use to which it should be put. The circumstances were such that Duff knew that her skill and judgment were being relied upon.

The Sevidals' continued reliance upon the information given by Duff on April 22, 1981, was reasonable. There was nothing in any newspaper reports or elsewhere prior to closing that would have alerted the Sevidals to the fact that no disposal site would be available within a reasonable time of the two-month estimate given by Duff.

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Resulting damage

The Sevidals suffered a loss because of their reliance on the negligent misrepresentations made to them by Duff, an employee of A.E.C.B. If Duff had given complete and accurate information, the Sevidals would have followed a different course of action and in all likelihood would have been able to terminate the transaction with little or no cost at that time. Instead, the Sevidals have been involved in this lawsuit, have suffered economic loss and other consequential damage.

Although my findings with regard to negligent misrepresentation are sufficient to show that A.E.C.B. owed a duty of care to the Sevidals which duty was breached and resulted in damages, it is useful to review the second approach to liability, although the result is the same, because that liability arises not only out of Duff's actions but also out of Eaton's failure to act.

Negligence

There must be a duty of care to the person who is injured for negligence to be actionable. The nature of the duty of a public authority was set out by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728 at pp. 751-2 (H.L.), when he stated:

> Through the trilogy of cases in this House -- Donoghue v. Stevenson [1932] A.C. 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 and Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima

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facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A.C. 1004, per Lord Reid at p. 1027.

Lord Wilberforce at p. 754 delineated the circumstances where a common law private duty would exist:

> Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion." It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

At p. 757 he went on to state:

> ... the accepted principles which are applicable to powers conferred by private Act of Parliament, as laid down in Geddis v. Bann Reservoir Proprietors, 3 App. Cas. 430, cannot automatically be applied to public statutes which confer a large measure of discretion upon public authorities. As regards the latter, for a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion ...

At p. 758 Lord Wilberforce continues:

> ... quite apart from such consequences as may flow from an

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> examination of the duties laid down by the particular statute, there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty of care may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power.

The mere designation of an activity within a policy area therefore does not itself constitute immunity from a common law duty of care.

On the reasoning of the Anns case, where there is an allegation that the defendant public authority failed to act even where there is no statutory provision requiring the defendant to act, a common law duty of care can exist which can be breached by the failure to act.

The Anns case, has the effect of enlarging the potential liability of public authorities, given sufficient proximity because prima facie there will be a duty of care.

There was sufficient relationship of proximity due to A.E.C.B.'s assumption of responsibility to provide information to the public regarding radioactivity in the McClure Cres. area. It was within the contemplation of Duff and Eaton as employees of A.E.C.B. that carelessness on their part would be likely to cause damage to the Sevidals. Accordingly, a prima facie duty of care arose.

Was there any limitation on the scope of the duty as referred to by Lord Wilberforce?

Counsel for the A.E.C.B. has argued that as a public authority, the scope of its duty is limited and it cannot be held liable because it formulates one policy of operation rather than another. In addition, counsel argued that whether the authority in setting its policy has struck a sound balance between the rights of owners, the rights of prospective

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purchasers and the rights of the public is not a question for a court to decide: Barratt v. District of North Vancouver (1980), 114 D.L.R. (3d) 577, [1980] 2 S.C.R. 418, 27 B.C.L.R. 182.

There is no question here that the A.E.C.B. had a right, as a policy matter, to decide to whom information would be disseminated. That is not the issue here.

In this case, Duff as an employee of the A.E.C.B. provided some incomplete and inaccurate positive information to a member of the public without advising that person of the policy of the A.E.C.B. with respect to disseminating negative information. As a result, the employee did not alert that person to the need to make other inquiries and to the danger of relying on the information given without qualification. In addition, Eaton as an employee of the A.E.C.B. failed to act to correct the incomplete and inaccurate information once he became aware of the contaminated soil at 63 McClure Cres. The actions of the A.E.C.B. almost set a trap for the unwary purchasers. Parliament certainly never intended a public authority to exercise its policy-making powers in such a way that non-disclosure of the policy would mislead a member of the public who made an appropriate inquiry.

I find that the A.E.C.B. through its employees, Duff and Eaton, owed a duty of care to the Sevidals and were negligent in the performance of that duty. The Sevidals suffered loss because of this negligence in the same way as they did from the negligent misrepresentation.

Liability of Antonio and Northgate

The issue with respect to Antonio is: did she meet the appropriate level of competence expected from a real estate agent for the work which she undertook for the Sevidals?

Counsel for the Sevidals urged me to find that the appropriate level was not met because Antonio undertook to find the Sevidals a suitable house and failed to do so and because she had the Sevidals sign the waiver of the condition regarding financing before the mortgage had been applied for.

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Dealing with the suitability of the house, I find that the house and property were suitable for the Sevidals except for the radioactivity problem. I find that Antonio did not know of the radioactivity problem until April 14 or 15, 1981, after the agreement was signed. I cannot find that Antonio ought to have known of the problem. I accept that no one from the defendant, Northgate, including Antonio, knew of the radioactive problem on McClure Cres., nor did Clapp, nor the mortgage loan officer, although all of them were experienced in dealing with residential real estate in Scarborough. Nothing would have alerted Antonio to the fact that the McClure Cres. townhouse development was any different from numerous other ones in the Scarborough area.

Having the waiver of the condition signed before the mortgage was applied for is a different situation. In Charter-York Ltd. v. Hurst (1978), 2 R.P.R. 272 (Ont. H.C.J.), Labrosse J. considered the claim of a vendor against his real estate agent based on a breach of the obligations under the listing agreement. At p. 279 with respect to the standard of care required by a real estate agent under the contract, he cited with approval an extract from 22 Hals., 3rd ed., p. 48, para. 80:

> All agents, whether paid or unpaid, skilled or unskilled, are under a legal obligation to exercise due care and skill in performance of the duties which they have undertaken, a greater degree of care being required from a paid than from an unpaid, and from a skilled than from an unskilled, agent. The question in all such cases is whether the act or omission complained of is inconsistent with that reasonable degree of care and skill which persons of ordinary prudence and ability might be expected to show in the situation and profession of the agent.

Labrosse J. also found at p. 280 that the standard of care by the agent and the quantum of damages in the Charter-York case would be the same whether the breach was based in contract or in tort. His reasoning would be applicable to this case and I adopt it.

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The Sevidals were immigrants to Canada. They were purchasing their first home and they were unfamiliar with the laws affecting the purchase. Antonio had immigrated from their homeland and spoke the same dialect. The Sevidals relied on her to a large extent as their real estate agent. Antonio was the Sevidals' agent. The Chopras were represented by another agent. In view of my earlier findings that Antonio failed to explain the waiver and that the Sevidals did not understand it, I find that, in having the Sevidals sign the waiver before the mortgage was applied for, Antonio did not meet the level of competence expected of her.

Having made that finding I must consider whether the Sevidals' loss was foreseeable. Antonio stated that she took the chance of removing the condition because from her experience, having seen the house and talked to the mortgage loan officer about the Sevidals, she did not expect the mortgage would be refused but even if it were, she thought she could arrange other financing.

Nevertheless she knew she was exposing the Sevidals to some risk which, I have found, she failed to explain to them. The uncontraverted testimony of Clapp was that, if the condition had remained, he would have had no difficulty in getting the Sevidals out of the transaction once the radioactivity problem in the area was discovered. By her action, Antonio prevented the Sevidals from using the condition in a manner in which their lawyer testified it could have been used to prevent loss to them. Antonio, therefore, is responsible for the resulting loss.

Antonio was an employee of Northgate, acting within the scope of her duties. Accordingly, I find Northgate responsible for the acts of its employee.

Liability of Clapp

The issues with respect to Clapp are: first, what was his retainer and second, did Clapp meet an appropriate level of competence expected from a solicitor for the work which he

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undertook?

The work which Clapp first undertook for the Sevidals was to attempt to get them out of the transaction. Although the closing would not take place for more than two months after the Sevidals saw Clapp, within two days the Sevidals sought the advice of a government agency on the radioactivity. Based on that advice the Sevidals instructed Clapp to proceed with the transaction which he did.

Counsel for the Sevidals urged me to find that Clapp did not meet the appropriate level of competence expected in the circumstances in that:

1. He did not explore all the potential avenues for getting the Sevidals out of the transaction and he failed to get them out of it;

2. He did not consult counsel expert in contested real estate transactions, and

3. He did not check independently the advice given to them, he did not advise them to get that advice in writing and he made no further inquiry, even of the Sevidals, about the radioactivity problem after he had been instructed to complete the transaction.

Although their counsel complained that Clapp did not consult experts, the Sevidals' counsel chose not to call any solicitor expert in the real estate field to give evidence as to what a reasonably competent solicitor would have done in the circumstances.

LeDain J. describes the standard of care required of a solicitor in Central Trust Co. v. Rafuse (1986), 31 D.L.R. (4th) 481 at p. 523, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, as "that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor".

I have reviewed the advice given by Clapp to the Sevidals in

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their first interview. I have reviewed the steps he took on their behalf in the two days after that interview before their instructions changed. I have considered the care he took to make sure that he did not put them in anticipatory breach of contract. I have reviewed his acceptance of their reliance on the advice given to them by the A.E.C.B., and I have reviewed as well the work done on behalf of the Sevidals in connection with the completion of the transaction. In particular, I have considered Clapp's evidence as to how he conducts a real estate transaction to see if his general approach to real estate transactions meets a reasonably acceptable standard. In my view it does. I have also considered the extent of Clapp's knowledge of the real estate field based on his testimony that most of his practice is in the residential real estate field.

I find that Clapp did consider, to the extent necessary in the two days after he was retained, the avenues open to the Sevidals for backing out of the transaction. I have no doubt that, had the Sevidals not changed their instructions to him, he would have continued to pursue his original retainer in an appropriate fashion and would have continued to advise them when the next appropriate step was contemplated.

Since Clapp himself had substantial experience in the residential real estate field, I do not find it was necessary for Clapp, before his retainer changed, to consult a person more experienced than himself.

I find as well that it was reasonable for Clapp not to make independent inquiries of A.E.C.B. since Mrs. Sevidal had told him she had been advised by a responsible government agency that there was no contamination on the property at 63 McClure Cres.

There was no evidence before me that if Mrs. Sevidal or Clapp had inquired in writing they would have been advised of the A.E.C.B. policy of non-disclosure of contaminated soil except to an owner. The policy was unwritten and was applied internally but not communicated to the public. I am not satisfied that any written inquiry would have elicited any information that would have changed the Sevidals' reliance on

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the information which Mrs. Sevidal was given by Duff on April 22, 1981.

Accordingly, I find that, in acting for the Sevidals, Clapp carried out his duties as a reasonably competent solicitor. In addition, I cannot find Clapp was careless in either the advice he gave the Sevidals or in his representation of them in this matter.

Damages

The final matter to be determined is the question of damages, which will be discussed under the following headings:

1. Measure of damages -- generally

(i) Where deceit

(ii) Consequential loss or damages to 1984

(iii) Where negligence

(iv) Damages as of the date of trial

2. Mitigation

3. Value

(i) Value in 1981 and in 1984

(ii) Value after 1984

4. Damages for mental distress or loss of enjoyment

5. Exemplary or punitive damages

6. Award

Claim for special damages

1. Measure of damages -- generally

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The liability of the defendants lies in tort except for Antonio but, since the quantum of damages would be the same were Antonio's breach based in contract or in tort, I propose to deal only with damages in tort. The general rule for awarding damages was stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 at p. 39 (cited in McGregor on Damages, 14th ed. (1980), p. 10, para. 10):

> ... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

In tort, prima facie, the measure of damages is the difference between the actual value and the price paid. The actual value is the value of the property sold with disclosure of the radioactive contamination.

(i) Where deceit

Craig J. in C.R.F. Holdings, supra, summarized the rule in cases of deceit at pp. 393-4:

> The cases dealing with deceit state that generally the measure of damages is the price paid for the property less the actual value ... I think that the Hepting case and the Zorzi case do not preclude us from holding that consequential loss may be a proper consideration in awarding damages for deceit relating to the sale of land and that, on principle, consequential loss may be a proper consideration in such a case. The most authoritative case on this subject is Doyle v. Olbe (Ironmongers) Ltd., [1969] 2 Q.B. 158, [1969] 2 All E.R. 119, a decision of the English Court of Appeal, a case dealing with deceit in the sale of a business. In the course of his judgment, Lord Denning M.R. referred to the judgment of Collins M.R. in McConnel v. Wright, supra, and referred to the comments of Lord Atkin in the case of Clark v. Urquhart; Stracey v. Urquhart, [1930] A.C. 28 at 67-68, (H.L.), where Lord Atkin said:

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"I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter ... I should have thought it [the measure of damages] would be based on the actual damage directly flowing from a fraudulent inducement. The formula in McConnel v. Wright [supra] may be correct or it may be expressed in too rigid terms."

Lord Denning M.R. (at p. 167) concluded that Collins M.R. had indeed expressed himself "in too rigid terms". He compared the damages assessable in contract and in fraud, and said:

"In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement ...

"All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

I query whether Lord Denning M.R. is right when he suggests, as he apparently does, that foreseeability can never be a factor in considering what damages are recoverable in a case of fraud. I think that in some cases, at least, foreseeability may be a factor in the assessment of damages, particularly on the issue of remoteness.

I think that the authorities support the view that in a deceit action the plaintiff would be placed in the financial position in which he would have been had the representation not been made.

This test has been applied in Ontario in Parna v. G. & S. Properties Ltd., [1969] 2 O.R. 346, 5 D.L.R. (3d) 315 (C.A.). The Court of Appeal found that the proper measure of damages was the difference between the purchase price paid for the property and the actual value of the property at the time of sale. On appeal to the Supreme Court of Canada, 15 D.L.R. (3d)

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336, [1971] S.C.R. 306, the decision was reversed on the question of liability. No reference was made to the proper measure of damages: see also Sorensen v. Kaye Holdings Ltd., supra.

(ii) Consequential loss or damages to 1984

What, then, is the consequential loss of the plaintiffs? Consequential loss would certainly include expenses flowing from a breach, such as moving expenses, legal fees, and the real estate commission. But as Craig J. pondered, I too accept that foreseeability in the case is a factor in assessing the damages.

In terms of the Chopras' liability for deceit, what damages were foreseeable? It was certainly foreseeable that the Sevidals would purchase the property and eventually find out it was contaminated with radioactivity. The Sevidals would then be stuck with the property until they could reasonably dispose of it, that is, subject to their duty to mitigate. For the reasons expressed under the heading of Mitigation, I find that the Sevidals could not reasonably dispose of the property before May, 1984.

(iii) Where negligence

Counsel for A.E.C.B. argues that if there has been a negligent misrepresentation or negligence, the proper measure of damages is the difference between the actual value of the property and the price paid. But as Zuber J.A. stated in Kienzle v. Stringer (1981), 35 O.R. (2d) 85 at p. 89, 130 D.L.R. (3d) 272, 21 R.P.R. 44 (C.A.): "In tort, the measure is reasonable foreseeability."

He then went on to consider what could be considered consequential loss or what was reasonably foreseeable, at p. 90:

> The question that then arises is whether or not this loss is "reasonably foreseeable" and it becomes apparent that this measure is far from precise.

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> It may be helpful to recognize that in using the terms "reasonably foreseeable" or "within the reasonable contemplation of the parties" courts are not often concerned with what the parties in fact foresaw or contemplated ... The governing term is reasonable and what is reasonably foreseen or reasonably contemplated is a matter to be determined by a court. These terms necessarily include more policy than fact as courts attempt to find some fair measure of compensation to be paid to those who suffer damages by those who cause them (See Reiter & Swan, Studies in Contract Law, (1980), p. 61, study 3, Katherine Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?").

In this case then, in the final analysis, the measure of damages because of the foreseeability factor, is the same whether liability is found in deceit or negligence.

(iv) Damages as of the date of trial

Counsel for the Sevidals relied on Wroth v. Tyler, [1973] 1 All E.R. 897 (Ch. D.), to support his submission that damages should be assessed as of the date of trial instead of as of the date of the breach, which is the general rule. Wroth v. Tyler can be distinguished from the case before me because the claim was for specific performance or damages in lieu thereof, and because the vendors knew that the purchasers were without financial resources and could not purchase a new home to mitigate their damages.

In my view the decision in Wroth was properly analyzed by Anderson J.A. in Ansdell v. Crowther (1984), 11 D.L.R. (4th) 614 at p. 620, 55 B.C.L.R. 216, 34 R.P.R. 73 at p. 81 (C.A.), where he stated:

> The judgment of Megarry J. in Wroth v. Tyler, is not authority for the proposition that damages shall always be measured as of the date of trial. It is, however, authority for the proposition that in the circumstances of that case, justice could ony be done by fixing damages as of the date of trial.

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After reviewing the case-law in the area Anderson J.A. concluded, at p. 626 D.L.R., p. 88 R.P.R.: "It follows from the above that only in exceptional circumstances will the vendor [or purchaser] be able to obtain an assessment of damages as of the date of the trial."

All the cases Anderson J.A. reviewed dealt with claims for breach of contract, where specific performance or damages in lieu thereof were being claimed. In this case, the property was sold in 1984. Thereafter specific performance, or more properly, rescission, was no longer available to the Sevidals. They cannot now claim for an increase in value of an asset no longer in their possession nor in the possession of the Chopras.

2. Mitigation

The defendants argued that prior to closing, the Sevidals should have availed themselves of Antonio's offer to purchase the property or have her investor purchase the property, or they should have purchased the property themselves as an investment and rented it out. It was also argued by some defendants that the Sevidals should have made further inquiries of A.E.C.B.

In view of my finding that the Sevidals' reliance on the information given by the A.E.C.B. was reasonable and my finding that there was no discussion between the Sevidals and Antonio prior to closing about Antonio or an investor buying the property, it was reasonable of the Sevidals to have closed the transaction and waited for developments to take their natural course.

The defendants argued that the Sevidals remained in the home for two-and-a-half years without great complaint. While I have found that their restriction in use of their property was not significant, I also find that the Sevidals acted reasonably, trying their best to live a normal life.

The defendants argued that the sale in 1984 was improvident.

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The Sevidals admitted that they put their house on the market at that time in order to mitigate their damages. They had not attempted to sell their house before 1984. The only evidence available indicated that houses on McClure Cres. were not selling between the spring of 1981 and the spring of 1984. I find they acted reasonably.

The defendants argued that the property was listed too low. The Sevidals' selling agent, Carol Williams, testified that he listed it low to encourage bidding, which in fact is what happened. I find the Sevidals acted reasonably in listing their home.

The real issue is the fact that the Sevidals did not buy a new house in 1984. The Sevidals netted only about $750 from the sale of 63 McClure Cres. but in 1984 the Sevidals had a combined income of about $45,000. Mr. Sevidal testified he would not borrow at that point in order to purchase a new home. He did not say they could not. I find no evidence of impecuniosity that would have prevented the Sevidals from buying a new home in 1984.

3. Value

(i) Value in 1981 and in 1984

Counsel for the Sevidals tendered the report dated November 28, 1986, of J.E. Farr, a real estate appraiser called on behalf of the Sevidals. The defendants called no independent evidence as to value.

The Sevidals paid $66,000 for the property in 1981. Farr testified that the market value of the property in 1981 without radioactivity was $71,000 even though the property had been listed by the Chopras at $69,900. and sold for $66,000.

Farr testified further that he found no adequate sales evidence as of April, 1981, to indicate what the Sevidals should have paid if they had known about the radioactivity. By analogy, Farr looked to the difference in value in 1984, when disclosure was made. In 1984 the Sevidals sold their property

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for $61,000. On sales evidence of comparable properties without radioactivity Farr testified that if no radioactive soil were present, the property, on May 10, 1984, would have had a market value of $76,000. The difference between $76,000 and $61,000 is $15,000 or a 20% discount for the presence of radioactivity.

In summary:

1981: Fair Market Value $71,000
less 20%for radioactivity 14,200
Actual value $56,800

Price paid $66,000
Actual value 56,800

Difference $ 9,200

1984: Fair Market Value $76,000
Price received 61,000

Difference $15,000

(ii) Value after 1984

Though I have found that the plaintiffs are not entitled to any increase in value after the property was sold in 1984, I should make a few comments about the evidence tendered by counsel for the Sevidals to establish a value as of the date of trial.

At the opening of trial, counsel for the Sevidals advised that he would be seeking leave to file a further report by Farr as to the value of the property at the date of trial. The second report is dated January 19, 1987, the day the trial began. Farr was called to testify on January 23, 1987.

Counsel for the defendants objected to the second report being admitted. However, the evidence was heard subject to my ruling on the admissibility of the report.

Rule 53.08 of the Rules of Civil Procedure provides that

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where there is failure to serve an expert's report under subrule 53.03(2):

> 53.08 ... leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

In Tecoglas Inc. v. Domglas Inc. (No. 2) (1985), 2 W.D.C.P. 203 (Ont. H.C.J.), a report delivered with insufficient notice was admitted. Rosenberg J. found the wording of rule 53.08 to be mandatory, unless prejudice could not be overcome by an adjournment or costs. He found that admitting the report would cause counsel for the plaintiff a great deal of extra work and inconvenience, but that it could be compensated by costs and an adjournment, if necessary. The report was a technicial report dealing with the effects a certain paint would have had on steel which had rusted.

Since the rule is mandatory, the defendants did not seek an adjournment and, in my view, they can be compensated by an appropriate award of costs, the second report is admitted, as well as Farr's testimony relating to it.

The report took two approaches. First sales were listed of comparable properties between July and December, 1986. Then, using an average price increase factor for all houses sold in an area of Scarborough designated by the Toronto Real Estate Board as E-11, the report brought the price up to December, 1986.

The second approach used the price of $94,000 paid by the Ontario Government for the property in June, 1986. Then using the average increase for all houses sold in E-11, the report brought that value up to December, 1986.

The report is really of very little value. The only figure which might have any meaning is the $94,000 paid by the Government of Ontario in June, 1986, but I accept the opinion of Joseph Strung, an expert appraiser, called by A.E.C.B. to comment upon Farr's second report. He testified that a price

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negotiated in special circumstances like this one is not an appropriate basis for determining market value.

Strung also testified that to use a monthly average increase in price in a certain area had little meaning unless the figures were "smoothed" to account for anomolous rises and falls in prices. He also indicated that using an average price for all houses in the E-11 area would not necessarily reflect the change in price for end-unit townhouses, the type of housing in issue here. I find that I cannot accept any of the figures proposed by Farr in his second report.

Counsel for the Sevidals also called Williams, the agent who acted for the Sevidals on the sale of the property in 1984. Williams was not qualified as an expert. No report of Williams was filed and yet counsel for the Sevidals sought to lead evidence through him of market value for comparable houses in 1984 and in 1986-87. I reserved on the question of the admissibility of Williams' testimony. While I find his evidence is admissible since he had been a real estate agent involved in transactions on McClure Cres. from 1981 onward, I do not accept any of his evidence with respect to values since he was not an expert appraiser. It is of no value.

4. Damages for mental distress or loss of enjoyment

Counsel for the Sevidals made a motion at the opening of trial to amend the statement of claim to set out a claim for aggravated damages and damages for mental distress. The amendment was allowed but I reserved the matter of costs arising from the amendment to the end of the trial.

I accept that in an appropriate case damages are available for inconvenience and disappointment arising out of a breach of contract: Jarvis v. Swans Tours Ltd., [1973] 1 Q.B. 233 (C.A.). Mr. Sevidal testified he yelled at his wife once. Mrs. Sevidal complained of headaches, but the medical reports showed they were caused by an ear infection. The Sevidals suggested that they had no more children because of this problem. That evidence, which was the only evidence before me, is insufficient to support this claim and, therefore, it fails.

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5. Exemplary or punitive damages

The statement of claim was amended to set out a claim for punitive damages against the Chopras and Antonio. Counsel for the defendants objected to the amendments on the ground that there was no evidence to support the claim. While I held that the amendment did not prejudice the defendants I agree with them that there is no evidence to support the claim. This case falls far short of the kind of evil, wanton or grossly fraudulent behaviour required to support a claim for exemplary or punitive damages: Rookes v. Barnard, [1964] A.C. 1129 (H.L.), and Robitaille v. Vancouver Hockey Club Ltd. (1979), 19 B.C.L.R. 158 (S.C.).

6. Award

Claim for special damages

The plaintiffs claim $4,846 for special damages other than their actual loss on the sale of the house. The amounts claimed are made up as follows:

| | | |
|---|---|---|
| Mortgage rate reduction | | $ 2,340.00 |
| Lawyers' fees (purchase & sale) | | 932.00 |
| Improvements: | | |
| Thermal Windows | 926.00 | |
| Storm Door | 99.00 | |
| Paint & Wallpaper | 250.00 | |
| Moving Costs: | | |
| Claim for moving to & from McClure Crescent -- U-Haul | | 99.00 |
| Piano movement | 50.00 | |
| Feeding Workmen | 100.00 | |
| Rental of truck | 50.00 | |

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TOTAL $ 4,846.00

I am satisfied the mortgage rate reduction should be allowed because the purchaser assumed the mortgage, and the lower interest rate would probably have influenced, to some extent, the price the purchaser was prepared to pay for the property. I am satisfied that the Sevidals' improvements to the house would have been reflected to some extent in the price paid on the sale of the house.

On application to the Ontario Municipal Board, the Sevidals had their assessment on 63 McClure Cres. reduced from $4,800 to $100 for the taxation year 1982. I have not allowed a reduction in the special damages because of the reduction in assessment as there was no evidence of the amount of taxes which would have been paid if the assessment had not been reduced or of the date on which the reduction became effective.

The special damages are allowed, therefore, at $4,846.

Summary

In summary, the plaintiffs are allowed:

1. Special damages $ 4,846.00
2. Loss of value plus consequential loss $76,000
less 61,000 15,000.00

Total $19,846.00

3. Prejudgment interest in accordance with the Judicature Act, R.S.O. 1980, c. 223.

Percentages

I would apportion the liability among the defendants as follows:

A.E.C.B. 50%
Chopras 40%

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Antonio 10%

Indemnity

The claim of the A.E.C.B. for indemnity is denied.

Costs

I see no reason why costs should not follow the event in the same proportion as the liability of the defendants. However, counsel are at liberty to forward written argument within 15 days.

Judgment for plaintiffs.

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