The Consequences of Active Concealment of Major Defects in the Quality of Title

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The process of home renovation preparatory to sale is one which, by its very expensive and time consuming nature, provides a constant source of temptation for economising and corner-cutting, for the budget-conscious vendor. The discovery of a structural flaw manifesting itself in ways unattractive to a prospective buyer prompts the making of a decision, sometimes as a matter of some urgency, as to an appropriate means of remedy. Does one:

(1) sell the property as it is and suffer the inevitable reduction in the purchase price obtained;
(2) initiate what may become costly remedial work; or
(3) opt for the cheaper, if less ethical alternative of a cunningly wielded paintbrush or precisely positioned artwork to disguise the "symptoms", taking the robust approach that "what the purchaser doesn't know won't harm the vendor, so long as the latter party remains silent throughout".

The few indications able to be gleaned from decided cases in Australia and abroad leave little doubt that the latter practice is legally and, no doubt, morally iniquitous.

In *Anderson v. Daniels*[1] the subject property consisted of land and a dwelling house thereon, located in suburban Epping; soil in the area was substantially of a clay composition with a propensity for marked subsidence subsequent to adverse weather conditions.

The construction method chosen, in which the entire structure sat upon sandstone blocks, which themselves rested upon the (mobile) subsoil, was thus entirely inappropriate, as the extensive cracking of the interior and load-bearing walls soon demonstrated.

The problem was by its nature an ongoing one that could only be solved in one of two *costly* ways,

either underpin the entire "foundation" or control soil moisture levels.

The vendors when they became aware of the true state of affairs in August 1976, chose to do neither of these things. Having been informed by a plasterer (one Thomas) hired to fill the apparently superficial fissures that they were merely symptoms of a more serious unseen problem, the vendors elected simply to plaster the surface cracks themselves on three occasions, between August 1976 and August 1977. It was on the last of these visits by the tradesman that the vendor stated his plans for the property, viz "patch it up and then sell it".

Shortly after this last treatment of the rendering a painter was summoned to completely repaint the interior of the dwelling. In this way any outward indication of the structure's infirmities was rendered (temporarily) invisible to the most painstaking and

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1. (1983) N.S.W. Conv. Rep. Para. 55-144.

diligent observer. In September 1977, the property was listed for auction and so brought to the attention of the (plaintiff) purchasers, who upon three subsequent occasions, inspected the property and thrice spoke to the defendants, twice at the Epping property and once at the purchaser's home. During one of these conversations, the purchasers observed that some cracking was evident on an outside wall; the appearance of a recent repair was obvious. The vendors, of course, possessed knowledge that other unseen and similarly recently repaired defects existed externally. However, the only answer that they made to the inquiry was that "all brick houses have settling cracks". On another occasion a comment concerning the pristine condition of the paintwork was met with a response that the house had not been subject to the rigours of any resident children.

The parties shortly afterward negotiated successfully and exchanged contracts on October 18, 1977, the total consideration for the property being $68,000 and on the last day of that same month, completion was effected. Only a brief interval passed before the internal walls once again began their inevitable crazing and the purchasers, thus alerted, commenced an action claiming damages for deceit. On application before Robson, J. the plaintiffs did not assert that any express verbal representation to the effect that the structure was sound, had been made.

Rather they claimed that a campaign of "active concealment" of the visible flaws had been carried out, with the obvious consequence that the true nature of the foundations, which might otherwise have been detected, remained hidden. Robson, J. found for the plaintiffs and awarded damages of $28,000 from which judgment the defendants appealed.

Appeal – Judgment

Their Honours in the Full Court (Moffitt P., Priestley and Samuels J.J.A.) were in broad agreement that

> "active concealment of a fact *is equivalent to a positive statement that the fact does not exist*. By active concealment is meant *any* act done with intent to prevent a fact from being discovered;"[2]

However, only Mr. Justice Samuels went so far as to express an opinion that the *physical* actions taken by way of concealment could be seen as fraudulent when viewed in isolation. His brethren expressly *refrained* from deciding this point as it was thought that

> ". . . the conversations between the parties provide the element which, *added* to the physical actions, provides proof *otherwise* of fraud on the part of the vendors"[3]

2. *Salmond on Torts*, 17th ed. p. 388, per Samuels J.A. at p. 57055 (emphasis added); see passages of similar effect drawn from *Stonham* and *Williams* (4th ed.) cited at p. 57059, per Priestley J.A.
3. See Moffitt P. at p. 57058 (emphasis added); see also Priestley J.A. at p. 57059.

Samuels J.A. was, in any event, careful to stress that the determination in the Court below in no way depended upon a finding that the renovation work was done with intent to deceive prospective purchasers.[4]

Their Honours preferred to view the vendor's acts which

> ". . . concealed from the purchasers a formerly patent condition indicative of substantial and important defects in the foundations",[5] regardless of the intent with which they were performed and the vendor's knowledge of such hidden faults, as a *background* against which to view the relevant *verbal* exchanges."

On each occasion (it was said) the vendor's replies were designed to dismiss the given inquiry and to discourage further investigation into the matter. The external cracks were ascribed in an off-hand manner to the settlement of the dwelling with the effluxion of time, something the vendors knew perfectly well was not the case. The statement that the paintwork owed its immaculate condition to a lack of infant proximity was one which the court felt

> "carried a clear implication that the wall was a sound one with no likelihood of cracking problems"[6]

Thus, even if the acts of physical concealment were themselves innocent, the defendants had demonstrated an intent to deceive the purchasers in this matter by their failure to correct the latter's misunderstanding when the opportunity was offered. Having by their own acts of concealment deprived the purchasers of the chance for a reasonable inspection of the property, the vendors had an obligation to exploit every avenue at their disposal to make the plaintiffs aware of the truth. They had at every turn knowingly refrained from doing so.

The judgment of Robson J., and his findings as to the quantum of damages (viz. an amount equal to the expected value of the underpinning) was thus affirmed.

Analysis

Although the Full Court in *Anderson* was careful on the facts before it to emphasize the importance of the verbal statements made by the defendants, vendors should not be lulled into the (inaccurate) impression that their silence will give them immunity where they have undertaken with *or* without deceitful intent, to disguise otherwise patent defects in the quality of title to their property. The principle elucidated by *Salmond*, as cited by the Full Court above is a broad one indeed and although evidence of relevant verbal exchanges may be used to provide, for example, evidence of fraudulent intent on the part of the vendor, as they were in *Anderson*, proof of such a conversation is certainly not necessary to show that a misrepresentation has been made. For this, ap-

4. *Ibid.*, at p. 57056.
5. *Ibid.*, at p. 57057.
6. Per Priestley J.A. at p. 57059.

propriate evidence of the physical operations undertaken by the vendor or by tradesmen hired by him, will suffice. Where such action has been taken after the renovator has either been informed of, or has independently discovered structural faults as the root cause of any patent blemish, it seems clear that a case of fraud can be made out if the vendor knows that his acts are purely cosmetic in character.[7]

Examples of Prohibited Conduct

The "papering and painting" cases constitute only a small part of the total spectrum of vendor behaviour which can be said to amount to misrepresentation. Basically, *any* conduct that has the effect of concealing a defect in the quality of title of any property will fit into this category. The Canadian experience in this area provides some colourful examples. In a *Rowley* v. *Isley*[8] the subject property suffered from severe cockroach infestation. Before the date of contract, some attempt at fumigation was made and although this gave the appearance for a time that the house was roachfree, the insects in fact proliferated as before, albeit unseen. Though instructed by the vendors to reveal these facts, the realty estate agent failed to do so and in the circumstances thus made

> ". . . a fraudulent misrepresentation arising from a suppression of the truth."[9]

In the later Manitoba Queen's Bench case of *Gronau* v. *Schlamp Investments*; *Canada Trust Co. Third Party*[10], the vendor of a nine-suite apartment block received advice from a structural engineer that a half-inch crack running from basement to roof on the east wall was due to moisture-induced subsidence. The problem (it was said) would necessitate the filling of the fissure to minimise further complications in the short term, followed by the underpinning of either the wall itself (at a cost of $2,100) or the entire building (estimated cost $15,700). The defendant vendor chose instead to merely hire a bricklayer to patch the wall using matching bricks and simultaneously carried out what Solomon J. referred to as,

> "extensive decoration and landscaping . . . done for the purpose of distracting the attention of prospective purchasers from the serious prob-

7. See *Ridge* v *Crawley* (1959) 173 E.G. 959, where cracks caused by faulty foundations were deliberately disguised by plastering, then papering the subject internal walls and filling external wall cracks. (See further the mysterious case of "the sale of a house in south Audley Square", whose facts were strikingly similar to *Ridge's* case, as narrated by Gibbs J. in *Pickering & Ors* v *Dowson & Ors* (1813) 4 Taunt. 779 at p. 785; 128 E.R. 537 at p. 540; 42 *Halsbury's Laws of England*, 4th ed., at p. 48; Butt, *The Standard Contract for the Sale of Land in New South Wales*, (1985), p. 11; *Williams on Vendor and Purchaser*, 4th ed., Vol. 2, p. 763.
8. (1951) 3 D.L.R. 766, Supreme Court of British Columbia, Coady, J.
9. *Ibid.*, at p. 767.
10. (1975) 52 D.L.R. 3rd 631.

lem hidden beneath the innocent patching, to make it appear that the patching was done in the course of normal maintenance."[11]

The Court found, that despite a lack of verbal or written representations or warranties, the purchaser, induced to contract by the physical concealment, was entitled to rescind the bargain because of a "material misrepresentation" and "an error in substantialibus" (following *Flight v. Booth* (1834) 1 Bing. (N.C.) 370)

An unusual English decision of some interest here is the case of *Small* v. *Attwood*[12] concerning the sale of a mine, in which a serious mining fault was concealed by the accretion of rubbish in the mouth of a side-passage that was the only means of access to the defect. An initial finding of fraud was reversed on appeal on the grounds that fraud had not been proved and that the purchasers had not relied on the representations made.

Vendors should therefore not be tempted to use the device of a rug, portrait or piece of furniture to mask a fault at the critical moment during an inspection. It seems that in view of the cases discussed above, ephemeral forms of concealment are just as objectionable as those affixed to the realty permanently.

In the Absence of Deceitful Intent?

There is as yet no reported decision in which the position of the vendor who innocently conceals flaws in his property by purely physical means, has been considered. A number of propositions can, however, be advanced:

(1) Although a vendor does have a duty to disclose a latent and material defect in the title to his property, where that defect is exclusively within his own knowledge and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions[13], this duty does *not* extend to mere defects in the *quality* of title or subject matter, whether these be patent *or* latent.[14]

(2) At common law, no term is to be implied into contracts for the sale of completed dwellings that they are fit for human habitation[15], and the vendor is not contractually liable to the purchaser even if the defects rendering the property physically dangerous are known to him or have been caused by him[16], although in the latter case he may be liable in negligence.[17]

In view of the foregoing it is clear that the maximum *Caveat Emptor* applies with full force in contracts for the sale of land, but it cannot be over-emphasised that this is *only* so

11. *Ibid.*, p. 637. See also *Alessio* v *Jovica et al,* (1973) 42 D.L.R. 242.
12. (1832) You, 407 at p. 490; 159 E.R. 1051 at p. 1085.
13. *Carlish* v *Salt* (1906) 1 Ch. 335.
14. See Farrand, J.T., *Contract & Conveyance* (4th ed.), (1983), p. 67; Butt, P, *The Standard Contract for Sale of Land in New South Wales,* (1985), pp. 8–9; *Turner* v *Green* (1895) 2 Ch. 205; *Greenhalgh* v *Brindley* (1901) 2 Ch. 324.
15. *Hoskins* v *Woodham* (1938) 1 All E.R. 692 at p. 695.
16. Voumard, *The Law relating to the Sale of Land in Victoria* (3rd ed.) (1978), p. 193, *Otto* v *Bolton* (1936) 2 K.B. 46 at p. 52.
17. E.g. *Hone* v *Benson* (1978) 248 E.G. 1013.

> ". . . in the absence of fraudulent concealment or of misrepresentation or of an express agreement"[18]

The question is therefore begged: How does one characterise the actions of the weekend renovator who *innocently* conceals what would *otherwise* be *patent* structural flaws?

Barnsley[19] cites *Ridge* v. *Crawley*[20] in support of the broad proposition that "words are not necessary for a representation. Conduct will suffice . . . "[21]. Despite the fact that the cases to date in this area focus upon the issue of fraudulent concealment, it is submitted that the absence of deceitful intent does not of itself render the type of *actus interveniens* being discussed any less an actionable misrepresentation, albeit innocent. To accept the contrary view is to import into this area of the law the curious notion that although a misrepresentation may be made by "a nod or a wink, or a shake of the head or a smile,"[22] or indeed by papering over a crack in a wall[23], that in the case of realty contracts this conduct is void of legal effect if not coupled with fraud, even though it conceals flaws that would otherwise be apparent upon reasonable inspection. It is submitted that this would be an intolerable result, especially when one considers the statement of Weigall J. in *Wilson* v. *Union Trustee Co-op of Australia Ltd.*[24]

> "In contracts for the sale of land, and more especially, I would say, of house property, courts of equity have always inclined to the relief of a purchaser who, under a misrepresentation caused by a vendor has bought property with some substantial defect or disadvantage."

In that case his Honour held, following *Lee* v. *Rayson*[25] that the so-called principle in *Flight* v. *Booth*[26], could be applied by a court of equity to give relief to a purchaser *induced to contract by innocent misrepresentations as to quality alone*. On the facts it was decided that a misrepresentation as to the width of a boundary wall concealed "an unusual structural defect seriously affecting the character of the property[27]" of such magnitude as to justify recission. It is submitted that, in principle, so long as the flaw concealed was serious enough (i.e., so material and substantial that but for the misdescription the purchaser might never have entered into the contract at all[28]), there is no reason why innocent physical concealment could not produce the same result when litigated.

A Caution to Vendors

In view of the foregoing discussion, vendors should take heed that with respect to defects in quality, the maxim, "caveat emptor" will

18. Voumard, *op. cit.* at p. 193.
19. *Conveyancing Law & Practice*, (2nd ed.) (1982), p. 598.
20. (1959) 173 E.G. 959, discussed above.
21. Semble, *Emmet on Title* (18th ed.) (1983), p. 108.
22. *Walters* v *Morgan* (1861) 3 DeG & J 718 at p. 723.
23. As in *Anderson* v *Daniels*, supra, *Ridge* v *Crawley*, supra.
24. (1923) 44 A.L.T. 415 at p. 417.
25. (1917) 1 Ch. 613.
26. (1834) 1 Bing N.C. 370.
27. *Op. cit.* at p. 417.
28. *Flight* v *Booth* (1834) 1 Bing N.C. 370, per Tindal C.J. at p. 377.

only be for them of limited protection. There may be no duty upon a vendor to disclose latent defects in quality, but this is predicated upon the assumption that the vendor has not actively *contributed* to their invisibility.

Whatever uncertainty may currently exist in the area of innocent misrepresentation there is at the very least no doubt that a vendor must not knowingly and actively conceal any serious flaw known to him, and any inquiry as to structural soundness or quality of the property should be answered by him in frank and unequivocal terms, delineating each of the flaws known to him and the measures taken by him at the time to remedy the problems, no matter what he believes their effectiveness to have been. In the absence of this effort, the only factor that would defuse an otherwise successful action for fraud would be the decision of the purchaser, whether or not at the vendor's behest, to make an independent structural survey using experts of his own choosing; this would negate the implication of reliance upon the misrepresentation.[29]