



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *McLean v. Brenton*, 2025 NLSC 131

Date: October 6, 2025

Docket: 202406G0043

BETWEEN:

CASSANDRA MCLEAN

PLAINTIFF

AND:

MATTHEW J. BRENTON

DEFENDANT

Before: Justice David G. Conway
Edited Transcript of Oral Reasons for Judgment

Place of Hearing: Grand Bank, Newfoundland and Labrador

Dates of Hearing: July 9 and 16, 2025

Date of Oral Judgment: July 28, 2025

Summary:

The parties entered into an agreement of purchase and sale for a residential property. An issue arose about an undisclosed second driveway on the property. The Defendant requested that the Plaintiff provide an easement from the adjoining property owners for the second driveway. The Plaintiff was unable to provide the easement and the Defendant declined to complete the agreement of purchase and sale.

Held: This matter is appropriate for summary judgment. The Defendant did not have a valid basis for refusing to complete the agreement of purchase and sale. Summary judgment is granted in favour of the Plaintiff. Damages will be assessed subsequently, as needed.

Appearances:

Jennifer A. McCarthy	Appearing on behalf of the Plaintiff
Joshua L. Hancott	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Hryniak v. Mauldin*, 2014 SCC 7; *Noton Enterprises Limited v. Philpott’s Realty Co. Limited*, 2022 NLCA 38; *Tse v. Sood*, 2015 ONSC 755; *Stefanovska v. Kok*, 73 O.R. (2d) 368, 1990 CanLII 6848 (ON SC); *Himidan v. Farquharson*, 2019 ONCA 575; *Smyth v. Greene*, 251 Nfld. & P.E.I.R. 132, 2005 CanLII 51781 (NL Prov. Ct.); *O’Connor v. Nolan*, 2024 NLSC 5; *Barton v. Raine*, 29 O.R. (2d) 685, 1980 CanLII 1932 (ON CA)

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT**CONWAY, J.:****INTRODUCTION**

[1] This matter involves the Plaintiff, Cassandra McLean, and the Defendant, Matthew J. Brenton.

[2] Ms. McLean issued an Originating Application in May 2024. Mr. Brenton filed a Reply to the Originating Application in December 2024.

[3] In December 2024, Mr. Brenton also filed an Interlocutory Application (the “Application”) pursuant to Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”) requesting a summary trial.

[4] Mr. Brenton seeks an order pursuant to Rule 17A of the *Rules* granting summary judgment and dismissing Ms. McLean's action, with costs to him.

ISSUES

[5] There are three interrelated issues involved in this summary judgment Application.

[6] The first issue is whether this matter is appropriate for summary judgment under Rule 17A of the *Rules*.

[7] The parties agree that this matter is appropriate for summary judgment. At the hearing of the Application I agreed that this matter is appropriate for summary judgment. I reserved my reasons for that decision, which are now being provided.

[8] The second issue is what the result should be on the merits of the Application. That is, the second issue is whether Ms. McLean’s action should be dismissed or allowed.

[9] If summary judgment is granted in Ms. McLean's favour then the third issue is what the appropriate damages should be. The parties have agreed to defer this

potential third issue of damages, as needed, until after I have rendered my decisions on the first two issues.

BACKGROUND

[10] The background facts are generally not in dispute between the parties.

[11] Ms. McLean listed a property for sale at 49 Freshwater Crescent in Placentia, Newfoundland and Labrador (the “Property”). The listing for the Property indicated that the lot size was 438.504 square metres and that it included one gravel driveway. The listing also noted that “landscaping is all that’s left to make this property perfect”.

[12] Ms. McLean and Mr. Brenton entered into an Agreement of Purchase and Sale for the Property on April 4, 2024. The agreed purchase price was \$150,000.00. The Agreement of Purchase and Sale, among other things, contained a paragraph which stated:

Provided the title is good and free from all encumbrances except as aforesaid, and except as to any restrictions or covenants that run with the land.

[13] The Agreement of Purchase and Sale also stated:

Purchaser is offering to purchase the property as is, sight unseen and assumes any and all risks by doing so.

[14] The Agreement of Purchase and Sale included a copy of the original 2008 survey for the Property that Ms. McLean obtained when she purchased the Property. The original survey showed the size of the Property along with an area for one driveway.

[15] An updated survey and real property report was ordered and it was received on April 30, 2024. The updated survey showed a second gravel driveway on the Property. That second gravel driveway, which is the driveway in dispute, partly extends onto a neighbouring property.

[16] The area of the Property and the width of the boundaries in the original survey and in the updated survey did not change.

[17] On May 1, 2024, the lawyer for Mr. Brenton asked the lawyer for Ms. McLean to seek a boundary agreement from the neighbouring property owners.

[18] The lawyer for Ms. McLean then reached out to the neighbouring property owners. The neighbouring property owners were asked if they would sign a boundary agreement allowing for the use of a portion of their property as part of the second gravel driveway (the “Boundary Agreement”).

[19] The draft Boundary Agreement that was presented to the neighbouring property owners was introduced into evidence. What was sought in the Boundary Agreement was for Mr. Brenton to be granted an easement over the neighbouring property owners’ land for the portion of the second gravel driveway that extended onto their property.

[20] The neighbouring property owners declined to agree to the Boundary Agreement. That is, they were not willing to grant an easement over their property. Mr. Brenton's lawyer was informed of this.

[21] The second gravel driveway can still be used as a single car driveway, even without access to the neighbouring property owners’ portion of the second gravel driveway. The dimensions of the second gravel driveway allow for this and there would still be the first driveway on the Property.

[22] The original closing date for the transaction was May 2, 2024, which was extended to May 3, 2024, and further extended to May 6, 2024, with the agreement of the parties.

[23] Mr. Brenton first viewed the Property on May 6, 2024, during a final walkthrough. Mr. Brenton had not viewed the Property prior to this time.

[24] In an email on May 6, 2024, at 2:48 p.m., a paralegal with Mr. Brenton's law firm indicated to Ms. McLean's lawyer that they could not close the transaction without the Boundary Agreement.

[25] In a reply email on May 6, 2024, at 4:31 p.m., the lawyer for Ms. McLean noted that Ms. McLean could not do anything to ensure an easement over the neighbouring property owners' land.

[26] Mr. Brenton's lawyer then sent an email on May 6, 2024, at 4:44 p.m., to the lawyer for Ms. McLean. Mr. Brenton's lawyer indicated that Mr. Brenton was "not prepared to close on the purchase without an agreement allowing him to use the full driveway". Mr. Brenton's lawyer indicated that the deal was terminated because Ms. McLean was not able to provide the Boundary Agreement.

[27] Ms. McLean's lawyer further replied on May 6, 2024, at 5:22 p.m., and indicated that Ms. McLean was still willing to close the transaction. Ms. McLean's lawyer mentioned the "as is, sight unseen" clause in the Agreement of Purchase and Sale. She also mentioned that Mr. Brenton would have access to the square footage of the lot, as per the survey. Ms. McLean's lawyer also noted her opinion that the access to a portion of the second driveway was not a reasonable ground for cancelling the transaction.

LAW AND ANALYSIS

Summary Judgment

[28] I will first outline the law concerning applications for summary judgment and provide my analysis and decision.

[29] The Supreme Court of Canada stated the criteria for granting a summary judgment in *Hryniak v. Mauldin*, 2014 SCC 7, at paragraphs 47 to 50.

[30] Rule 17A of the *Rules* sets out when and how an application for summary judgment can be granted.

[31] In paragraph 49 of *Noton Enterprises Limited v Philpott's Realty Co. Limited*, 2022 NLCA 38, the Court of Appeal referenced two threshold questions that are involved in an application for summary judgment. The first threshold question, paraphrased, is as follows:

- (i) Has the applicant complied with the formal requirements of Rule 17A of the *Rules* and put forward an evidentiary basis for their position which will potentially establish all or part of the claim?

[32] In paragraph 51 of *Noton*, the second threshold question is stated as follows:

- [(ii)] Is there any apparent reason... evident at this stage making it inappropriate to deal with some or all of the issues by Summary Trial?

[33] In paragraph 52 of *Noton*, the Court of Appeal then further discusses the basis for a summary trial.

[34] In this case, I find that the parties have provided an evidentiary basis for the assertions that they have made. The parties themselves agree that this matter is appropriate for summary judgment. This meets the first threshold requirement.

[35] Having reviewed all of the information, I also find that the nature of this case is such that it is capable of being dealt with in the attenuated manner contemplated by a summary trial. This meets the second threshold requirement.

[36] There are no factual issues requiring a regular trial. A fair and just determination on the merits can be made based upon summary judgment. The summary judgment process:

- will allow for the necessary findings of fact to be made;
- will allow for the application of the law to the facts; and
- is a proportionate, more expeditious and less expensive means to achieve a just result.

[37] For all of these reasons, I find that this matter is appropriate for summary judgment. The Application filed by Mr. Brenton under Rule 17A of the *Rules* passes the threshold stage.

Merits

[38] I will now turn to the law and analysis on the second issue, which is the decision on the merits of the action.

[39] This case involves the repudiation of a real estate agreement, which is the Agreement of Purchase and Sale for the Property.

[40] The four scenarios when a purchaser can refuse to close a real estate transaction are outlined, generally speaking, in paragraphs 8 to 23 in *Tse v. Sood*, 2015 ONSC 755. Paragraph 9 of *Sood* states these four scenarios as follows:

First, a purchaser may refuse to close because of the non-satisfaction of a condition precedent that the purchaser will not waive and that cannot be unilaterally waived by the vendor. Second, a purchaser may refuse to close if the vendor has breached a fundamental promise in the agreement of purchase and sale, a term classified as a condition as opposed to a warranty. Third, a purchaser may refuse to close if the vendor cannot perform his or her promise to convey the quality of title prescribed by the agreement of purchase and sale. Fourth, a purchaser may refuse to close if the vendor has made a false representation and the other elements of a claim for the equitable remedy of rescission are satisfied.

[41] The first scenario in *Sood* is not involved in this case. That is, there was nothing involving a condition precedent that would not be waived by Mr. Brenton.

[42] There was no mention in the Agreement of Purchase and Sale of a second gravel driveway or the need for a Boundary Agreement with the neighbouring property owners. The request for a Boundary Agreement only arose after the Agreement of Purchase and Sale had been agreed upon.

[43] This case also does not involve the second scenario in *Sood*, which is a breach of a fundamental promise in the Agreement of Purchase and Sale.

[44] There was no fundamental promise in the Agreement of Purchase and Sale for an easement to be granted by the neighbouring property owners. Again, this request arose after the Agreement of Purchase and Sale had been agreed upon.

[45] This case turns on the third scenario in *Sood*, which is the quality of the title to a property. This case also involves the fourth scenario in *Sood*, which is false representation in terms of a property.

[46] I will start with the third scenario, which is whether Ms. McLean provided “good title” to the Property as required in the Agreement of Purchase and Sale.

[47] I agree with the comments under the heading “The Law” in *Stefanovska v. Kok*, 73 O.R. (2d) 368, 1990 CanLII 6848 (ON SC) in terms of providing good title. That part of that decision states, in part, that:

... the test to be applied in cases of this nature is whether the vendor can convey substantially what the purchaser contracted to get. In this regard, all of the surrounding circumstances must be considered to determine if the alleged impediment to title would, in any significant way, affect the purchasers' use or enjoyment of the property.

The materiality of the deficiency is to be determined essentially on an objective basis. However, this is not to say that the subjective views of the purchaser are to be ignored. Far from it. There may be instances where a certain purchaser has agreed to buy a piece of property for a specific, legitimate and bona fide purpose, only to discover that some deficiency in title will render this use impossible. Here, the purchasers' refusal to close is neither arbitrary, capricious nor without real consequence. In this type of case, the court would still be required to look at all of the circumstances but would be entitled, in its overall assessment, to place greater emphasis on the legitimate but frustrated needs of the purchaser.

In other cases, the court, in carrying out its objective assessment, will give less weight to the subjective views of the purchaser if the needs alleged are more or less commonplace, not out of the ordinary and of little or no consequential effect to the use or enjoyment of the property as a whole.

At the other extreme, the court will give no weight to the subjective views of the purchaser if it is felt that the so-called needs are capricious or arbitrary and contrived to avoid contractual obligations.

[48] I would also cite and rely upon the comments of the Ontario Court of Appeal in paragraph 16 of *Himidan v. Farquharson*, 2019 ONCA 575:

The physical and visual appearance of the property at the time of the contract were objective facts known to the parties, which are particularly useful in interpreting the meaning of the description of the property in an agreement to purchase a home. As this court noted in *LeMesurier v. Andrus* (1986), 1986 CanLII 2623 (ON CA), 54 O.R. (2d) 1 (C.A.), leave to appeal ref'd, [1986] 2 S.C.R. v, at p. 4:

A reasonable person entering into the contract would assume that the purchase of “9 Dinnick Crescent...with private drive to the West” would include everything which to the eye appeared part of the driveway[.]

[49] In this case, Ms. McLean contracted to provide good title to the Property as set out in the original survey. That is what she did. The boundaries of the Property did not change between the original survey and the updated survey. It was the same lot boundaries and the same lot size before and after the updated survey.

[50] What changed between the original survey and the updated survey is that the second gravel driveway was not noted in the original survey. This second gravel driveway did not impact upon any issue related to the title of the Property as described in the original survey or in the updated survey.

[51] Mr. Brenton, for reasons that have not been put into evidence, wanted an agreement from the neighbouring property owners to use “the full driveway”, which would involve an easement over their property. Those neighbouring property owners refused to provide a Boundary Agreement to allow for this easement over their property.

[52] The second driveway can be and is still a single car gravel driveway without the use of the neighbouring property owners' land. I accept and rely upon the information contained in paragraph 16 of Ms. McLean's Affidavit in terms of this.

[53] The second driveway is still 2.65 metres wide without the portion on the neighbouring property. A pickup truck such as a Ford F-150 or regular car such as a Toyota Corolla could still park in that single driveway.

[54] The extra land associated with the second driveway to make it bigger than a single car gravel driveway belongs to the neighbouring property owners. Those neighbouring property owners were not willing to provide an easement to Mr. Brenton “to use the whole driveway”, as his lawyer put it.

[55] The Property is not described in the listing as being landscaped. In fact, the opposite is stated; that the Property needs to be landscaped. For the casual observer there would be no way of knowing that the driveway in dispute partly encroaches on the neighbouring property.

[56] What is interesting and, in fact, a key point in this case is that Mr. Brenton agreed to purchase the Property sight unseen. He never viewed the Property until the final agreed-upon closing date of May 6, 2024.

[57] Mr. Brenton did not and could not have formed any expectations about the boundaries and use of this disputed second driveway at the time of the Agreement of Purchase and Sale. He did not know that the second gravel driveway existed until the updated survey was provided and, even then, he had not yet viewed the Property.

[58] As such, and using the words from the case law, the physical and visual appearance of the Property at the time of the contract were not objective facts known to Mr. Brenton. That being said, I agree with the submissions on behalf of Mr. Brenton that “sight unseen” does not mean that good title does not have to be provided. The Agreement of Purchase and Sale specified that good title would be provided, free from all encumbrances.

[59] Mr. Brenton submits that the second driveway and its boundaries raise the reasonable prospect of litigation. I disagree, based upon the evidence presented. The

neighbouring property owners were unwilling to grant an easement over their property. There is no evidentiary basis to conclude that those neighbouring property owners feel that they are entitled to the use of any of the land of the Property.

[60] The neighbouring property owners were not asked to agree to their property boundaries as noted in the original survey or in the updated survey. If they had been and had refused to acknowledge the existing property boundaries then that could have indicated the possibility of future litigation. Here, the neighbouring property owners simply refused to grant an easement over their property. That indicates that they expect the existing property boundaries to be respected.

[61] The reason provided on behalf of Mr. Brenton for the Boundary Agreement was so that he could use part of the neighbouring property, not protect the boundaries of the Property which he intended to purchase.

[62] Again, if Mr. Brenton had sought assurances from the neighbouring property owners that they would not use or encroach on the Property and they refused, that could lead to a reasonable prospect of litigation or title issues. But, in fact, what occurred was the opposite. He sought a legal agreement for him to use part of their property and they refused.

[63] Having regard to all of the surrounding circumstances, it cannot be said that Ms. McLean was unable to convey substantially what Mr. Brenton contracted to get. There was no impediment to the title of the Property as described in the original survey or in the updated survey. The only impediment, if one can call it that, is that Mr. Brenton was unable to get a legal assurance for property that Ms. McLean did not own and could not convey.

[64] For all of these reasons, I find that there was no basis for repudiating the real estate transaction based upon a “lack of good or marketable title” for the Property.

[65] I would add that I have not considered the after-the-fact evidence of the sale of the Property as evidencing good and marketable title. Individuals can buy a property with unmarketable or bad title at their own risk.

[66] I have decided that Ms. McLean did have and was able to convey good title to the Property, as described in both the original survey and in the updated survey and the Agreement of Purchase and Sale. She could not grant what she did not own in terms of the extended boundaries of the second driveway.

[67] Given this, and based upon the third scenario in *Sood*, I find that Ms. McLean provided good title to the Property as indicated in the Agreement of Purchase and Sale.

[68] This leaves the fourth scenario in *Sood* to be determined, which is whether there was false representation in terms of the Property or whether there was fraud.

[69] Mr. Brenton submits that Ms. McLean incorrectly made warranties and representations that she had good title to the Property and that it was free from all encumbrances. He further states that he reasonably relied upon these warranties and representations in entering into the Agreement of Purchase and Sale.

[70] I rely upon the judgment of Judge Hyslop in *Smyth v. Greene (2005)*, which is a judgment of the Provincial Court of Newfoundland and Labrador, 251 Nfld. & P.E.I.R. 132, 2005 CanLII 51781 (NL Prov. Ct.). In that case, Judge Hyslop did not find fraudulent misrepresentation on the defendants' part related to an electrical panel. He stated, in part, at page 6 of the decision that:

I am not of the view that the defendants made a fraudulent misrepresentation. For example I do not believe that the upgrading the panel [sic] was a deliberate falsity intending to lull a gullible purchaser into thinking that he or she was buying a 125 ampere service." It was a simple panel upgrade that was disclosed to the purchaser.

[71] Similarly, I do not find that Ms. McLean made a fraudulent misrepresentation that the whole of the second driveway could be used. The first that Mr. Brenton knew of the second driveway was when the updated survey was provided. That updated survey noted the second driveway but it also clearly noted that the second driveway was partly on the neighbouring property owners' land.

[72] Ms. McLean did represent that there was just one driveway on the Property, when in fact there were two driveways, but Mr. Brenton did not rely upon this representation to his detriment.

[73] Justice Handrigan of this Court set out the test for negligent misrepresentation at paragraph 20 in *O'Connor v. Nolan*, 2024 NLSC 5. Justice Handrigan listed five elements of negligent misrepresentation. Even if one presumes that the first four elements are present in this matter, the fifth element is lacking. That is, there is no evidence that Mr. Brenton relied to his detriment on there being only one driveway on the Property, such that damages resulted.

[74] Ms. McLean did not represent in the Agreement of Purchase and Sale that a second driveway existed and that it could be used by Mr. Brenton. I accept and rely upon paragraphs 13 to 15 of Ms. McLean's Affidavit in terms of this. Given this, and the lack of any detrimental reliance by Mr. Brenton, I find that there was no fraudulent misrepresentation on the part of Ms. McLean.

[75] The second driveway was not noted in the original survey. Mr. Brenton could not have had any expectations of using the second driveway because he had not even seen the Property. Mr. Brenton entered into the Agreement of Purchase and Sale "sight unseen", as stated in the Agreement of Purchase and Sale.

[76] I would distinguish this case from that of *Barton v. Raine* (1980), 29 O.R. (2d) 685, 1980 CanLII 1932 (ON CA). In *Barton*, there was a shared driveway that became a point of dispute when a neighbouring property was sold. An implied reservation of an easement was found to exist, allowing the neighbouring property owner to use the shared driveway to access a garage.

[77] Here, the neighbouring property owners have not asserted a right to use the second driveway on the Property. They have disagreed with Mr. Benton having an easement over their property to use the full width of the second driveway, which is a different scenario.

[78] In all, I find that the fourth scenario in *Sood* is not present in this case.

[79] Overall, I have found that Mr. Brenton did not have a legal basis to refuse to conclude the Agreement of Purchase and Sale. This makes Mr. Brenton liable for damages. The Property was subsequently sold at a lower price, so a quantification of damages must occur.

DAMAGES

[80] As previously noted, the parties have agreed to defer the quantification of damages. Damages will be determined by the Court, as needed, in a subsequent hearing.

CONCLUSION

[81] In conclusion, I find that this matter is appropriate for summary judgment. I also find that summary judgment in favour of Ms. McLean should be granted.

[82] Mr. Brenton is liable for damages resulting from the breach of the Agreement of Purchase and Sale for the Property.

[83] The parties have leave to address the issue of damages at a subsequent hearing.

COSTS

[84] Ms. McLean has been successful in this matter. I see no reason to deviate from the regular cost consequences that follow.

[85] Mr. Brenton is ordered to pay the costs of Ms. McLean as per column 3 of the Scale of Costs, as outlined in the *Rules*.

[86] Judgment accordingly.

DAVID G. CONWAY
Justice