SUPREME COURT OF NOVA SCOTIA
Citation: *Sproule v. Nichols*, 2024 NSSC 26

Date: 20240131
Docket: 511469
Registry: Halifax

Between:

Andrew Sproule and Kelsey Andrews

Plaintiffs

v.

Shawna Nichols and Brian Nichols

Defendants

Decision

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	November 20, 21, 22, 23, 28, 2023, in Halifax, Nova Scotia
Counsel:	John T. Shanks and Calvin DeWolfe, for the Plaintiffs Micaela A. Sheppard, for the Defendants

By the Court:

Introduction

[1] This case deals with the respective obligations of sellers and buyers of buildings. The defendants sold their home to the plaintiffs. The defendants filled out a property disclosure statement (PDS). Subsequently before closing, they discovered a leak resulting in water entering their home. They replaced the drywall where they observed a water-spot in a bedroom ceiling. The defendants did not update the PDS or inform the plaintiffs of the new leak. After purchasing the property, the plaintiffs removed a carpet in a bedroom and discovered rot in the subfloor. Opening a portion of the bedroom wall, the plaintiffs observed water entering the home and damage caused by the water. The plaintiffs claim against the defendants for fraudulent misrepresentation, negligent misrepresentation and breach of collateral warranty and the resultant damages.

[2] Based on the evidence presented, I find the facts are as follows.

[3] The defendants Shawna Nichols and Brian Nichols purchased property at 1116 Highway 1, Lakelands, Hants County, Nova Scotia, from John William Patterson and Anne Marie Patterson in May 2016. This was the first property they purchased. Prior to the purchase they received a property disclosure statement (PDS) and a certificate as to when the roof shingles were replaced in 2012-2014. Ms. Nichols primarily dealt with the purchase and the real estate agent. She did not discuss the roof with the Pattersons, their real estate agent or lawyer. Ms. Nichols recollection is that she visited the property three times before the final walk through on the closing day: the first time with her husband and their real estate agent, the second with her husband and her mother-in-law, who was going to be living with them and third during the property inspection.

[4] Ms. Nichols testified the property inspector did not have any concerns about the roof and did not mention anything about leaks, smells, wood rot or repairs in the bedroom with the blue accent wall (bedroom).

[5] Mr. and Ms. Nichols did not go on the roof or hire anyone to go on the roof before the purchase of the Lakelands property. However, in the inspection report dated April 4, 2016, under the heading Brick Chimney is the following:

- Not all of the chimney liner is visible for inspection. A home inspection is based on a visual observation. Further investigation is required.
- Inspection was hampered by height and lack of access.
- Please consult a chimney expert, and brick mason.

On cross examination Ms. Nichols said she considered the inspector was protecting himself with that statement. Mr. and Ms. Nichols did not have a chimney inspection or make further inquires.

[6] Ms. Nichols agreed the PDS was an important document. It gave information about the property from the sellers to the buyers. She relied on the PDS when she and her husband bought the house.

[7] Mr. Nichols does not recall receiving a PDS when they purchased the Lakelands property. He did not speak to the inspector when they purchased the property.

[8] After closing Mr. and Ms. Nichols, their children and Mr. Nichols's mother moved into the property. Mr. Nichols's mother occupied the bedroom with the blue accent wall.

[9] In either 2017 or 2018, Mr. Nichols's mother noticed a water-spot in the bedroom and told Mr. and Ms. Nichols. The water-spot was about three feet from the blue accent wall and one foot from the angle wall of the blue bedroom. Ms. Nichols called Jim MacDonald who operated the roofing firm which had done the roofing work in 2012-2014. The firm came and nailed the flashing around the chimney and told the Nichols the problem was fixed.

[10] Mr. and Ms. Nichols's family continued to grow, and they were looking for another home. They found what they described as a perfect home on the Wentworth Road in Wentworth Creek. They signed an offer to purchase the Wentworth Road property subject to the sale of the Lakelands property. The Wentworth Road property had five bedrooms and the family needed the increased space.

[11] In October 2019, after making the offer to purchase the Wentworth Road property, the Nichols listed their Lakelands property for sale. The first six weeks the property was listed, the Nichols received only one low ball bid. Their real estate agent, Maita Lavoie, sent a PDS concerning the Lakelands property to Ms.

Nichols telling her to fill it out to the best of her knowledge and sent it back to her. Ms. Nichols had never filled out a PDS before October 16, 2019. She completed it on her phone with an electronic signature. The app zooms in on each question. She did not read the PDS. Ms. Nichols just scrolled to the first question. She did not read the notice in a pink box at the top of the first page of the PDS which stated:

> This Property Disclosure Statement (PDS) is optional and is to be completed by the Seller to the best of their knowledge. If additional space is required for responses, attach a schedule. This PDS must be updated should any property conditions change prior to closing. The Seller is responsible for the accuracy of the information on this PDS.

[12] Mr. Nichols who did not read the PDS signed it on October 16, 2019. Mr. Nichols testified until this litigation commenced he had no knowledge of what he was signing. He received the document on his cell phone and clicked and went to each place where he had to initial or sign the PDS. The completed PDS was returned to Ms. Lavoie.

[13] In November 2019, the water-spot in the bedroom came back in the same location as before. This time the ceiling where the water-spot was located was softer. The Nichols knew the leak was not fixed and decided to investigate themselves. As Mr. Nichols testified, it wasn't going away. Mr. Nichols knew the water-spot had come back a second time. Ms. Nichols called Jim MacDonald's firm because the problem was not fixed.

[14] Ms. Nichols also sent a text message to their real estate agent, Ms. Lavoie, telling her of the leak and suspending viewings in which she stated:

> We won't be able to do viewings. We ripped down the drywall to replace the stuff that was previously damaged and after the rain last night there is still a little leak up there. So we have a roofer coming but probably not until tomorrow.

Ms. Lavoie responded:

> Should we say no showings ya until end of next week?

Ms. Nichols replied:

> That would probably be best

[15] Mr. Nichols cut a hole in the ceiling of the bedroom which was initially approximately two feet by two feet and eventually he enlarged it to approximately

six feet by two feet or a little larger. He looked in the hole he cut. He took pictures which showed the entry point of the water. The water was coming in from the outside. He observed water on the trusses and gable wall. The water was running along cracks in the wood sheathing and then down on the insulation and drywall. Mr. Nichols observed damp drywall and wet insulation. The water would have to travel approximately three feet horizontally to where the water-spot was located. Mr. Nichols did not investigate below the ceiling to determine if there was damage there. He made no further investigation. He removed the wet insulation. Mr. Nichols took photos to show Jim MacDonald what was going on.

[16] Ms. Nichols again called Jim MacDonald's firm and spoke to an employee, Chris Berry, asking the firm to come deal with the leak. Before Mr. Berry arrived, Mr. Nichols replaced the drywall, closing the hole he had made. After he replaced the drywall, Mr. Nichols taped the edges, crack filled it, sanded and painted the drywall. Ms. Nichols testified the water was coming in from the outside, but she did not know how the water got to the water-spot in the bedroom.

[17] In a text message on December 3, 2019 to Ms. Lavoie, Ms. Nichols texted about two showings the next day.

> Yes hopefully they both go well! These other people k ow about the ceiling as well?

[18] Ms. Lavoie responded:

> Yes I just noted it in my confirmation so they both do- unless they don't read the notes ;)

[19] Kelsey Andrews and Andrew Sproule are married. They were looking for a property which would not require a lot of work. Their real estate agent, Grant Sprague, referred the Nichols Lakelands property to them the last week of December 2019. They had a viewing of the property on January 4, 2020. Ms. Andrews read the cut sheet for the property carefully. The items mentioned in the narrative were important to her and her husband. She noted a number of new upgrades. They made an offer to purchase the property on January 5, 2020 in which they required both a PDS and a property inspection. They wanted to know what they might run into. Ms. Andrews's father stressed to her the importance of getting a PDS when purchasing a home. Ms. Andrews and Mr. Sprague reviewed the PDS with their agent Grant Sprague. Ms. Andrews went through the PDS point by point with her lawyer. It was important to Ms. Andrews and Mr. Sproule that they not buy a property with a leaking roof. The PDS alerted them to the fact there had been a leakage problem with the roof that had been corrected.

[20] In reviewing the PDS, Ms. Andrews and Mr. Sproule noted with regard to repairs undertaken the details “previous owners fixed crack in foundation Flashing around chimney fixed as there was a little leakage”. They did not think any repairs were done by Mr. and Ms. Nichols. They thought the details concerned work done by owners of the property prior to Mr. and Ms. Nichols. Ms. Andrews and Mr. Sproule never received an updated PDS or information about the leak discovered in November 2019 from Mr. and Ms. Nichols or the real estate agents involved in the transaction.

[21] Mr. Sproule and Ms. Andrews had a house inspection performed by Alexander Pay, a licensed certified property inspector, who provided a property inspection report dated January 10, 2020. Mr. Pay was unable to inspect the roof as there was snow on it. In his report, the following is under the heading Roof:

> Often roofs are not accessible for safety or other reasons. These may include; the roof is wet, frost or snow covered, or the roof is too steep or too high. Inspections that do not involve walking on the roof surface are not as reliable as those that are performed by other methods and there are limitations to the inspection. Only Visible / Accessible areas of chimneys, flues and caps can be inspected and reported on. The approximate design life stated in this report is only a estimation of remaining shingle life and can be affected by many factors such as weather conditions, etc. No warranty on the shingle design life can be provided. Clients are advised to consult a roofing expert for a professional opinion if they are concerned about these limitations.
>
> **Method of Inspection**
>
> Ground Level
>
> **Unable to Inspect Reasons**
>
> **Unable to Inspect**: 100%
>
> **Observations**:
>
> 2.1. Limited inspection, the roof covered with ice and snow at the time of inspection.

[22] During his inspection, Mr. Pay entered a crawlspace through the closet in the bedroom. Mr. Pay observed there had been some water in the crawlspace area but it looked dried up. Ms. Andrews testified Mr. Pay was not concerned about what he observed in the crawlspace. In his report Mr. Pay stated that he observed evidence of previous repairs in the ceiling of the bedroom. His observation of

evidence of previous repairs in the bedroom is consistent with repairs having been made as noted in the PDS.

[23] Prior to completing the purchase of the Lakelands property, Mr. Sproule and Ms. Andrews visited the property three times: the viewing on January 4, the inspection on January 10 and the preclosing inspection on March 5, 2020. Prior to the closing they did not have direct communications with Mr. or Ms. Nichols or the Nichols's real estate agent. All communications with the sellers were through their lawyer or their real estate agent, Grant Sprague. Neither Ms. Andrews or Mr. Sproule noticed any softness, odour or mustiness when they walked through the property other than an odour coming from the heat pump which they required be cleaned before closing.

[24] Ms. Andrews biggest concern were the cracks in the foundation. She wanted Mr. Pay to come back after a heavy rain and check them. The cracks were one quarter inch or less. In his report Mr. Pay stated "Generally speaking, cracks that are less than ¼" are not commonly regarded as being structurally significant". The cracks were no longer a concern to Ms. Andrews.

[25] The 2019 listing cut which contained various pictures of the house showed the bedroom with a wallpaper edging on the top of the blue accent wall. Ms. Nichols removed the wallpaper around the time Mr. Nichols replaced the drywall in November/December of 2019. During the walk through, Ms. Andrews saw joint compound on the wall. She thought the compound came from the removal of the wallpaper border.

[26] The sale was completed and Mr. Sproule and Ms. Andrews took possession of the property. Between March 5, 2020 and early October 2020, Ms. Andrews did not notice any evidence of leakage or moisture coming into the bedroom. During the pre-purchase visits to the property the floor of the alcove area of the bedroom was covered by an old carpet and two beds. Mr. Sproule and Ms. Andrews did not walk in the alcove while the beds were there. In October 2020, Mr. Sproule's allergies were acting up and Ms. Andrews took up the old carpet in the bedroom. When a toe was put on the wood right up against the blue accent wall, the wood was so soft the toe went through the wood.

[27] Ms. Andrews contacted Roy Moyles, a carpenter who had previously worked for them. She described what she was seeing. Mr. Moyles told her to open the wall above the soft floor and follow the leak. Ms. Andrews cut the wall about

waist height above the darkest part of the floor. The backside of the wall felt wet to her. She observed rotten wood lying on the insulation.

[28] Ms. Andrews asked Mr. Moyles to repair anything that was damaged, how much was needed to do the repairs and where the problem came from. Mr. Moyles because of his work schedule, did not get to her home until shortly before March 16, 2021.

[29] In November or December 2021, Mr. Sproule and Ms. Andrews covered the chimney with a tarp. Prior to covering the chimney with the tarp, they used buckets and fans to deal with the leaks.

[30] Grant Sprague acted as the real estate agent for Ms. Andrews and Mr. Sproule in connection with their purchase of the Lakelands property from Mr. and Ms. Nichols. Mr. Sprague has been a real estate agent for 15 years and has been with the firm Keller Williams in Bedford for 13 years.

[31] Mr. Sprague viewed the property with Ms. Andrews and Mr. Sproule on January 4, 2023. He prepared an offer to purchase the property for Ms. Andrews and Mr. Sproule on January 5, 2020. In the offer a PDS was requested. Mr. Sprague does not recall getting an update to the PDS and no copy of an updated PDS is in his file. Mr. Sprague does not recall any text message or conversation with the sellers' real estate agent, Maita Lavoie, concerning a change to the PDS. If he had been told there was a little leak present he would consider such information to be a red flag. That would be important and he would tell the agent to send him a text so he could forward it to his client.

[32] Maita E. Lavoie has been a real estate agent for 12 years. She was the listing agent for Mr. and Ms. Nichols when they listed the Lakelands property for sale in 2019. She prepared the 2019 listing cut in which the property was not represented as a fixer upper.

[33] Ms. Lavoie deals with property disclosure statements regularly. It is a standard form. Her clients need to understand the document. She expects her clients to notice the requirement to update the PDS if conditions change. Ms. Lavoie testified Ms. Nichols was aware of her obligation as set out in the pink text on the first page of the PDS. Ms. Lavoie testified it was her practice to discuss the form with her clients. She does not recall if she discussed it with Ms. or Mr. Nichols. Although she does not recall what she did, Ms. Lavoie testified she is 100 per cent sure she would have told Mr. Sprague, Mr. Sproule and Ms. Andrews

agent, about the leak. Although she did not look into the hole in the ceiling, Ms. Lavoie testified she understood the leak was a little leak – just a trickle. It was not a huge amount of water and was being repaired by a professional. She considered the leak was being resolved. Ms. Lavoie testified she did not think of updating the PDS. The PDS Ms. Andrews and Mr. Sproule received had not been updated. Ms. Lavoie agreed she should have updated the PDS.

[34] Ms. Lavoie testified she would have reviewed the agreement of purchase and sale with her clients Mr. and Ms. Nichols. Then she added she was uncertain whether she reviewed the agreement with her clients. She was not sure of the details from that long ago.

[35] When responding to Ms. Nichols inquiry as to whether people having a viewing of the property on December 4, 2019, knew about the ceiling, Ms. Lavoie replied:

> Yes I just noted it in my confirmation so they both do – unless they don't read the notes :)

Ms. Lavoie testified she was not making light of the situation but was recognizing the notes may not be read. The email response demonstrates Ms. Lavoie's lack of concern as to whether potential buyers had notice of the leak.

[36] I have no confidence in Ms. Lavoie's evidence and do not accept it.

[37] I find neither the plaintiffs nor Mr. Sprague were given notice of the leak and what Mr. Nichols observed when he cut the hole in the ceiling of the bedroom after seeing the water-spot in November 2019. I accept Mr. Sprague's evidence that he considered such information as a red flag and would ask that it be forwarded to him so he could provide it to his clients. I also accept Ms. Andrews evidence they neither she nor her husband received an updated PDS or an explanation of the leak or what Mr. Nichols observed when he cut the hole in the ceiling in November 2019.

[38] Roy Moyles is a carpenter who was qualified to give opinion evidence on the subject of carpentry specifically as it relates to the construction of residential properties and assessment and remediation of defects in residential properties.

[39] In 2017, Mr. Moyles did work for Mr. Sproule and Ms. Andrews on a trailer they owned at the time. Late in 2020, Ms. Andrews called Mr. Moyles concerning water damage in a bedroom in the Lakelands property. Mr. Moyles told Ms.

Andrews to cut a hole in the wall above the rot on the floor and send him pictures of what she saw. Mr. Moyles dealt with Ms. Andrews; he did not discuss the issue with Mr. Sproule. Ms. Andrews cut a hole as requested and sent pictures to Mr. Moyles. After looking at the photographs, Mr. Moyles concluded water was coming in from somewhere. Ms. Andrews asked Mr. Moyles to give her the cost of repairing the damage. Ms. Andrews did not mention the previous owners of the property. Ms. Andrews did not ask Mr. Moyles to tell her what caused the damage or who might be responsible for it.

[40] Mr. Moyles visited the property shortly before providing Ms. Andrews with an estimate of the cost of repairs dated March 16, 2021. He was unable to visit the property earlier because of his work schedule.

[41] When Mr. Moyles visited the property he opened the wall in the bedroom. He saw plastic packaging pink insulation comes in used as a vapor barrier and pink insulation. He removed the insulation and saw wood missing. No portion of studs was visible. He saw insulation on the floor. Both newer and older drywall was present in the bedroom. He noticed newer drywall in the area where the insulation was on the floor.

[42] In the report he prepared, Mr. Moyles described the structural defects which existed when Mr. Sproule and Ms. Andrews purchased it as follows:

> While investigating Tuesday March 16, 2021, I discovered that the leak Kelsey and Andrew called me about had pre-dated their purchase of the home and had previously been concealed. It had caused further defects in the home (e.g. rot and water damage) were which also concealed.
>
> I discovered this by poking some holes in the ceiling of the upstairs room along with the wall inside the room.
>
> I discovered that the areas of the room with the leak had new drywall added vs the other portion of the room which had much older drywall.
>
> Also, the section of the floor that was rotting from the water damage led to the wall where there was a patched section of drywall covering rotten framing and exterior sheathing. Anyone with any experience in carpentry responsible for putting the patch of drywall on would or should have known it was inadequate as a structural fix. The inside of the wall was crumbling apart in my hand as I reached in and grabbed it.
>
> There was insulation added to the wall where someone had previously found the water damage and for a vapor barrier between the insulation and drywall, they used the bag that

> the insulation comes in. This is not up to code and is inadequate. You would expect proper vapor barrier material (3-4mm of properly taped polyethylene plastic) to be used. Again, anyone with training or experience who saw the insulation I observed would know it was a problem.
>
> The insulation was still pink – and the amount of water damage to the new materials used for covering up this leak was minimal, which both suggest that the cover-up was recent (no more than two years). Also, to put it simply, new insulation was put inside a rotten wall and covered with the insulation bag. So it is clear to me that the person who performed the "fix" was aware of the rot.
>
> On the exterior of the home up around the fascia/flashing metal around the chimney, there was also some patch work done to prevent the leak from continuing. I could observe this from the ground.
>
> The caulking used for sealing around the patch is commonly used and after 1 year being subjected to the sun and weather elements starts to discolor to be cloudier vs clear. This caulking at the time of my inspection appeared less than 1 year old, Still very fresh and clear.
>
> Instead of simply adding new caulking to address the leak, the chimney needed to be repointed and the fascia needed to be removed, with the leak fully investigated.

[43] During cross-examination, Mr. Moyles stated water was coming into the house through the wall near the chimney.

[44] Mr. Moyles also agreed that when he stated in his estimate that repairs were done to hide the leak by previous owners, the owners in question may not be the most recent previous owners. That some of the damage in the wall took a long time, it could have occurred 10 years before his investigation in 2021. The drywall in the blue accent wall was replaced within the last eight years from his investigation and then replaced again. The studs, which he referred to as framing in his estimate, had been decomposing for three or more years. It would take a long time for the floor to rot - more than two years.

[45] Mr. Moyles agreed that replacing drywall is not necessarily done to conceal a leak.

[46] In his report, Mr. Moyles said the caulking used for sealing around the fascia appeared less than one year old whereas in his estimate he stated the caulking was added to the fascia at least a year and a half to two years before his investigation. On cross-examination he testified he misworded what he meant.

[47] In discussing the crawlspace, which is entered through the closet in the bedroom, Mr. Moyles stated that he did not see evidence of wood rot in the photograph of the space. Neither the insulation nor plywood in the photograph look rotten.

[48] The damage Mr. Moyles observed was water damage. The day he conducted his investigation he saw water dripping down the wall.

[49] In considering Mr. Moyles report and evidence as a whole, I do not accept the specific timelines he set out when certain actions where undertaken with regard to the leak. However, I do accept and find that what Mr. Moyles observed were improper repair jobs. I also find placing material such as insulation and drywall over material damaged by water as a result of a leak will not solve the problem, it will only conceal the problem.

Analysis

[50] Mr. Sproule and Ms. Andrews's claim against Mr. and Ms. Nichols is for (a) fraudulent and/or negligent misrepresentation, (b) breach of collateral warranty and (c) damages.

[51] Generally, absent fraud, mistake or misrepresentation, transactions involving the sale of real property are governed by the principle of *caveat emptor*. The buyer takes the property as he or she finds it, unless protected by contractual terms. However, the rule is not absolute.

[52] The law treats patent and lateral defects differently. In *Dennis v. Langille*, 2013 NSSC 42, Murphy J. described the differences between the two types of deflects at paragraphs 20 to 22.

> … In *Cardwell v. Perthen*, 2007 BCCA 313 (B.C. C.A.) (*Cardwell*) the British Columbia Court of Appeal approved the following definition at para. 44:
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> > Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property...in general, there is a fairly high onus on the purchaser to inspect and discover patent defects.
>
> *Halsbury's Laws of England* provides that:
>
> > "[p]atent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and 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." [Halsbury's Laws of England, vol. 42, 4th ed. (London, UK: Butterworths, 1980) at 44, para. 45]

That definition has been applied in a number of cases [See eg *Gesner v. Ernst,* 2007 NSSC 146 (N.S. S.C.) at para. 45, (2007), 254 N.S.R. (2d) 284, [2007] N.S.J. No. 211 (N.S. S.C.); *Willman v. Durling* (2006), 249 N.S.R. (2d) 48, [2006] N.S.J. No. 368 (N.S. Small Cl. Ct.); *Haviland v. Pickering*, 2011 SKPC 144 (Sask. Prov. Ct.) at para. 14].

21 Victor Di Castri, Q.C., defines patent defects somewhat differently in *The Law of Vendor and Purchaser*:

> A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. […] A latent defect, obviously, is one which is not discoverable by mere observation. [Victor Di Castri, The Law of Vendor and Purchaser, vol.1, loose-leaf (consulted on 2 November 2012), (Toronto, ON: Carswell 1988) at s.236]

Di Castri eschews the inquiry requirement and emphasizes visual inspection, and a number of cases have also applied a similar definition. [See eg *Thompson v. Schofield*, 2005 NSSC 38 (N.S. S.C.) at para.18, (2005), 230 N.S.R. (2d) 217 (N.S. S.C.); *Jenkins v. Foley*, 2002 NFCA 46 (Nfld. C.A.) at para.26, (2002), 215 NFLD & P.E.I.R. 257, [2002] N.J. No. 216 (Nfld. C.A.); *Halsbury's Laws of Canada - Misrepresentations and Fraud*, (Markham, ON: LexisNexis Canada, 2008) "*Caveat emptor*", HMP-25]

[22] Nova Scotia case law does not definitively indicate which definition is preferred in this province; however, the British Columbia Court of Appeal effectively reconciled them with the following analysis in *Cardwell* at para. 48:

> ... The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility - and liability - on the vendor to bring those things to his or her attention.

The obligation to make reasonable inquiries arises out of the visual test as a way to ensure that the test is applied objectively; as such a defect is patent if it is objectively discoverable on a reasonable inspection of the property.

[53] However, if the seller actively conceals latent defects or engages in conduct which attempts to conceal a patent defect *caveat emptor* does not apply.

[54] I find the water leaking into the house was a latent defect that is one which is not discoverable by mere observation. The manifestation of the leak, the water-spot in the ceiling of the bedroom was cut out and replaced with new drywall. The water-spot would have made the leak a patent defect that is it would have been visible to the eye or by necessary implication from something visible to the eye. However, the water-spot was removed. The leak was concealed.

[55] Mr. and Ms. Nichols submit the leak was a patent defect as the white joint compound on the blue accent wall and angled wall of the bedroom made the repair of the drywall visible to the eye and therefore a patent defect. In his report, Mr. Pay in commenting on the ceilings in the bedroom stated "Previous repairs Noted". Ms. Andrews testified she thought the white area resulted from the removal of the border of wallpaper from the top of the blue accent wall. The photographs which appeared in the listing cut for the sale of the property by Mr. and Ms. Nichols in 2019 showed a border of wallpaper at the top of the blue accent wall in the bedroom. The photographs with the border did not show the white area shown in later photographs. The wallpaper border was removed by Ms. Nichols, who did not like the wallpaper border, when Mr. Nichols replaced the drywall after the water-spot reappeared in November 2019. I accept Ms. Andrews evidence that she thought the white on the ceiling at the top of the blue accent wall resulted from the removal of the wallpaper border.

[56] The issue of the agency relationship between a real estate agent and the agent's principal is relevant to this case. In *R. v. Levy Brothers Co.*, [1961] S.C.R. 189, in giving the Court's judgment Ritchie J., stated at para. 4:

> … The law governing these circumstances has been stated in Story on Agency, 7th ed., para. 452, in terms which have been approved in this Court on more than one occasion. It is there said:
>
> > …he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

> This language was adopted as applicable to the relationship between master and servant by Lord Macnaghten in *Lloyd v. Grace, Smith & Company*, and by this Court in *Lockhart v. Canadian Pacific Railway Company*, per Duff C.J., *W.W. Sales Limited v. City of Edmonton*, and *The Queen v. Spence*. See also *Percy v. Corporation of the City of Glasgow*, and *United Africa Company Limited v. Saka Owoade*.

See also Canadian Agency Law (3rd ed.) by G.H.L. Fridman at section 8.2.

[57] In *Trequnna v. Gauld*, (Ont. S.C.) No 99-GD-47369, the agency relationship between a real estate agent and his or her principal is described at para. 5:

> The principal is liable for the negligent or fraudulent misstatements of the principal's agent, made to a purchaser of a house by way of inducement to buy, where the agent's scope of authority is general – to sell the house.

[58] What constitutes fraudulent misrepresentation was discussed by Saunders J., as he then was, in *Grant v. March*, (1995) 138 N.S.R. (2d) 385 (N.S. S.C.), at paras. 20-22:

> [20] With respect to the first allegation, that is that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in *Charpentier v. Slauenwhite* (1971), 3 N.S.R. (2d) 42 (T.D.). In that case, which involved problems with a well, Jones, J. (as he then was), cited Cheshire and Fifoot, *The Law of Contract* (6th Ed.), at page 226:
>
> > "A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year."
>
> and again on page 241, as follows:
>
> > "Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of common law 'a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind'. Influenced by this consideration, the House of Lords has established in the leading case of *Derry v. Peek* that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable to deceit, no matter how ill-advised, stupid, credulous or even negligent he may have been. Lord Herschell, indeed, gave a more elaborate definition of fraud in *Derry v. Peek*, saying that it means a false statement 'made knowingly', or 'without belief in its truth, or recklessly, careless whether it be true or false', but, as the learned judge

> himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true."

[21] I also refer to DiCastri's *Canadian Law of Vendor and Purchaser* (3rd Ed. 1988), as accurately describing the basis of any claim for fraudulent misrepresentation:

> "In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) That the representations complained of were made to him by the defendant; (2) That they were false in fact; (3) That when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) That by reason of the complained-of representations the plaintiff was induced to enter into the contract; (5) That within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it." (at pp. 7-2 and 7-3)

[22] The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make and the evidence must be clear and convincing in order to sustain such an allegation.

[59] The onus is on Mr. Sproule and Ms. Andrews to establish fraudulent misrepresentation. Considering all of the evidence including Ms. Nichols's text to Ms. Lavoie asking whether persons coming for a viewing have been made aware of the leak, I am not satisfied the elements of fraudulent misrepresentation have been established.

Negligent Misrepresentation

[60] I will now address the required elements of a claim of negligent misrepresentation.

[61] The required elements for a claim of negligent misstatement were set out by Iacobucci J., in his judgment in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 34:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. …

[62] There is a “special relationship” between Mr. and Ms. Nichols as sellers and Mr. Sproule and Ms. Andrews as buyers of the Lakelands property which gives rise to a duty of care.

[63] Mr. and Ms. Nichols knew the roof shingles were upgraded in 2012-2014. A water-spot appeared in the ceiling of the bedroom in 2017. Mr. and Ms. Nichols contacted Jim MacDonald’s roofing firm to deal with the leak. Mr. MacDonald’s firm had dealt with the roof in 2012-2014. The Nichols were told the leak was fixed and Mr. Nichols painted the ceiling. Mr. and Ms. Nichols completed the PDS for the Lakeland property on October 16, 2019. Ms. Nichols knew a PDS was an important document. In November 2019, a water-spot appeared in the same location of the ceiling of the bedroom as the 2017 water-spot. Mr. Nichols stated the drywall was softer in 2019 than in 2017. It was clear the water-spot was not going away. Mr. Nichols cut a hole in the bedroom ceiling as he wanted to know what was happening. Mr. Nichols saw wet insulation and water. Mr. Nichols did not make an investigation below the ceiling. He made no further investigation. Mr. Nichols removed the wet insulation. Ms. Nichols called Mr. MacDonald’s firm. Before Mr. MacDonald’s firm arrived, Mr. Nichols had replaced the drywall closing the hole he had made. Mr. MacDonald’s employee, Chris Berry, on December 2, 2019, told Ms. Nichols he fixed the problem believing it came from the caulking and fascia. Mr. Nichols said he could not speak about Mr. Berry’s work as he did not see it. Ms. Nichols informed Ms. Lavoie about the leak. The Nichols knew the condition of the property had changed between completing the PDS and entering the agreement of purchase and sale with Ms. Andrews and Mr. Sproule and that the PDS had not been updated. The PDS was not updated and neither Mr. Sprague nor Mr. Sproule or Ms. Andrews were informed of the water leak discovered in November 2019. Mr. Sproule and Ms. Andrews, the purchasers, were left with inaccurate and misleading information concerning the condition of the property.

[64] As principals, Mr. and Ms. Nichols are liable for the actions of Ms. Lavoie acting within the scope of her authority, as here when dealing with the PDS.

[65] Mr. and Ms. Nichols were obligated to disclose any changes to the property condition prior to closing. In not doing so, they acted negligently.

[66] As set out above, Ms. Andrews and Mr. Sproule reasonably relied on the PDS. They thought the property was in good condition as they did not want to do a

lot of work. They required a PDS as a condition of their offer. They reviewed the PDS carefully.

[67] The reliance was detrimental to Mr. Sproule and Ms. Andrews in that they did not have notice of the water leakage problem with the property which has resulted in damage to the property they purchased and their enjoyment of it.

Collateral Warranty

[68] Mr. Sproule and Ms. Andrews also claim that Mr. and Ms. Nichols, by not updating the PDS, breached a collateral warranty, thereby entitling Mr. Sproule and Ms. Andrews to damages for its breach. What constitutes a collateral warrant was set out by Jones J. in *Charpentier v. Slauenwhite*, *supra*, at page 47:

> … In *Attorney General of Canada v. Corrie (supra)* Kelly, J. refers to *Gilmour v. Trustee Co. of Winnipeg* in the following passage at p. 213,
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> > In *Gilmour v. Trustee Co. of Winnipeg* [1923] 3 WWR 177, 33 Man R 351, it was held by our Court of Appeal that:
> >
> > > A contract for the sale and purchase of land may have running with it a separate collateral verbal agreement by way of affirmation or representation by the vendor relative to the extent of land sold and supposed to be covered by the description in the written contract. If the representation is made by the vendor at the time of the negotiations, and antecedent to the written contract, with the intention of inducing the purchaser to execute the contract it amounts to a warranty, and if the purchaser executes the contract on the faith of the warranty and the facts represented are afterwards found to have been innocently misrepresented the purchaser's remedy, where the contract has been fully performed, is an action for damages for breach of warranty ***.

[69] In this case, the offer made by Mr. Sproule and Ms. Andrews to purchase the property from Mr. and Ms. Nichols, required the sellers to provide a PDS. The offer was accepted by Mr. and Ms. Nichols. The PDS provided by Mr. and Ms. Nichols provided "This PDS must be updated should any property conditions change prior to closing". Property conditions changed prior to closing, but the PDS was not updated. The PDS was part of the agreement between the parties. The sellers had to the provide the PDS to the purchasers and if the PDS was not satisfactory to the purchasers they were at liberty to terminate the agreement to purchase the property. Mr. Sproule and Ms. Andrews relied upon the PDS which was incorporated into the Agreement of Purchase and Sale. The statement that

should any property conditions change prior to closing, the PDS would be updated became a collateral warranty.

[70] I find that Mr. and Ms. Nichols are liable to Mr. Sproule and Ms. Andrews for negligent misrepresentation and breach of collateral warranty.

Damages

[71] Mr. Sproule and Ms. Andrews claim special and general damages. They obtained three estimates of the cost of repairs required to deal with the damage caused by the water leak. Other than the interior work they did themselves, the work set out in the estimates has not been undertaken by Mr. Sproule and Ms. Andrews as they do not have the funds to pay for it.

[72] As soon as Ms. Andrews realized there was damage caused to her home by water, Ms. Andrews called Mr. Moyles. The estimate he prepared totaled $49,622.50 including HST. Mr. Moyles stated when pricing the cost of water damage in a wall, the price has to include opening of the whole wall as you have to price where the water could cause damage. His estimate includes the entire exterior wall where the chimney is located and rebuilding effected areas. On cross-examination, Mr. Moyles stated water will spread to the left and right of a leak and go in every direction. He agreed the extent of the damage will not be known for certain until construction starts. Mr. Moyles stated the price of materials are rapidly changing. Since giving his estimate, prices have gone up some 50 per cent, some 300 per cent. I accept there has been inflation in prices of material since March 2021.

[73] Mr. Sproule and Ms. Andrews also obtained an estimate for the cost of repairs from David Schlossen of D.S. Homes dated September 11, 2021, which including HST totalled $52,210.00.

[74] In 2022, Ms. Andrews and Mr. Sproule attempted to have their insurer pay for the repairs. Their insurer had Belfor Property Restoration inspect the property. Robert Hendsbee conducted the inspection. In the report prepared after the inspection, the following comments were made concerning the cause of loss, resulting structural damage, pre-existing damage and repair costs:

> **Cause of Loss**

Ongoing water damage to the upper bedroom wall and exterior sheathing. This is caused by water getting in around the chimney flashing. This has been occurring for quite some time to cause the deterioration. The roof has been replaced prior to the current insured's purchase.

Resulting Structural Damage

The exterior sheathing in the upper bedroom behind the chimney brick is completely deteriorated and non existent. The insured had a section of the wall exposed that I could view partial wall cavity. This most likely extends to the main level wall as well. This could not be viewed or confirmed at this time. They also have the carpet removed. This is how they seen the staining on the sheathing. The carpet I believe was removed for replacement as the insured stated they cleaned it a few times and then removed it. Not due to loss damages. There was a piece of the ceiling removed as well as they were inspecting drywall in comparison to see if recent wall work was complete. There was no damage in the ceiling. The side storage area also showed old water staining. Perhaps this was from the roof as well prior to being replaced. All areas were reading dry standard at the time of my site visit.

Pre-existing Damage That May Affect The Claim

On going deterioration of structural framing in the wall behind the chimney that would have taken quite some time and repetitive water activity to reach this state of rot, also water damage staining in the storage area. The chimney was also wrapped in a tarp on the exterior of the home.

Repair Costs

Mitigation not required. $0.00

Rebuild with removals budget $40,000 as the chimney would have to be removed, siding removed, section of roofing and roof sheathing removed. Wall sheathing, house wrap, and insulation removed. Additional drywall and framing repairs. All materials reinstated.

Ms. Andrews and Mr. Sproule's insurer denied coverage for the claim.

[75] Mr. and Ms. Nichols submit Mr. Sproule and Ms. Andrews failed to mitigate their damages. They say that after discovering the damage in the fall of 2020, it was several months before Mr. Moyles issued his estimate in March 2020 and Mr. Schlosser's quote was issued in September 2021, almost a year after the damage was discovered. During that time, nothing was done to mitigate further damage from accruing. It was not reasonable for them to allow the damage of which they complain to persist before obtaining quotes for repair. Further, they have not

mitigated their damages since the damage was discovered. Therefore, the plaintiffs' quotes for damages should be reduced due to their failure to mitigate.

[76] I do not accept Mr. and Ms. Nichols's position concerning mitigation. Ms. Andrews's evidence which I accept was she and her husband did not have the funds to pay for the necessary repairs. It was not unreasonable for Ms. Andrews and Mr. Sproule to establish Mr. and Ms. Nichols's liability before carrying out the extensive repairs required. These issues were addressed by Saunders J. in *Stoddard v. Atwill Enterprises Ltd.*, (1992) 105 N.S.R. (2d) 315, at paras. 108-110:

> [108] I also find no merit to the defendant's second argument. The general principle which underlies the law of mitigation is that a plaintiff must act reasonably to avoid further damage or increased costs against the defendant. This duty to act reasonably is related to the date for assessment of damages, in that the plaintiffs' duty to mitigate does not arise until a reasonable time after the assessment date. Normally the date of assessment is the date the contract is breached. However, there are certain exceptions to the "breach date rule". One of these exceptions is found, as here, in the so-called "repair" cases. The shift began with *Dodd Properties v. Canterbury City Council*, [1980] 1 W.L.R. 433 (C.A.), where it was held that the plaintiff was justified in deferring repairs up to the time of trial. This principle was also applied in a case of defective construction, where:
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> > "… the plaintiffs had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants who had vigorously disclaimed liability right to the door of the court."
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> *MacGregor on Damages*, referring to *Cory & Son v. Wingate Investments* (1980), 17 Build. L.R. 104 (C.A.)
>
> [109] This same approach was taken in *Costello v. Cormier Enterprises Ltd.* (1979), 28 N.B.R. (2d) 398; 63 A.P.R. 398 (C.A.), where the New Brunswick Court of Appeal held that the owner of the house was justified in waiting to establish the builder's liability before embarking on a full program of repair.
>
> [110] The Appeal Division of this court, in the case of *Canso Chemicals Ltd. v. Canadian Westinghouse Ltd.* (1974), 10 N.S.R. (2d) 306; 2 A.P.R. 306 (C.A.), referred to *McGregor on Damages* (13th edition), at p. 229, for eight rules with respect to mitigation including:
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> > "1. a plaintiff need not risk his money too far …
> >
> > "8. a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."

[77] There is difficulty in establishing the cost of making the necessary repairs. The extent of the water damage will not be determined until the construction is underway. There has been an increase in the cost of materials and inflation generally since Mr. Sproule and Ms. Andrews obtained the cost estimates.

[78] The difficulty in fixing the amount of damages was addressed in *Penvidic Contracting Co. Ltd. v. International Nickel Company of Canada Ltd.*, [1976] 1 S.C.R. 267, where Spence J. in giving the Court's judgment stated at page 279:

> When *Wood v. Grand Valley Railway Company, supra*, reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p. 289:
>
> > It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if *the amount of the verdict is a matter of guess work.*

[79] The average of Mr. Moyles and D.S. Homes estimates of $49,662.50 and $52,210.00 is $50,936.25. There has been inflation since the estimates were made.

[80] The average of the above two estimates of $49,622.50 and $52,210.00 and the repair costs as set out in the Belfor Property Restoration report of $40,000 is $47,290.83. There has been inflation since the estimates and report were obtained. Allowing a 15 percent contingency to account for inflation results in $54,384.45 which rounds out to $54,400.00. Water is insidious. As Mr. Moyles testified, water goes everywhere. It more likely than not the damage caused by this long standing water problem will be extensive. Including the lower Belfor amount in determining the cost of repairs reduces the amount to be awarded under that head of damages. Based on all the evidence, it would be inappropriate to reduce the amount further. Mr. and Ms. Nichols will pay Mr. Sproule and Ms. Andrews the sum of $54,400.00 as damages for the repairs to the interior and exterior of the dwelling.

[81] In September 2022, Mr. Sproule and Ms. Andrews had the top third of their chimney removed and shingles placed on new boards on the roof at a cost of $2,200.00. In addition, Ms. Andrews and Mr. Sproule purchased building supplies

totalling $290.80 which Ms. Andrews used herself to make repairs to the bedroom. Mr. Sproule and Ms. Andrews are to receive the $2,490.80 they expended.

[82] Mr. Sproule and Ms. Andrews are seeking general damages for interference with the enjoyment of their property. Ms. Andrews evidence is that they did not use the bedroom at all as it was exposed which they blocked with vapor barrier. They experienced a lot of stress. Mr. Sproule and Ms. Andrews are entitled to general damages for interference with the enjoyment of their home including stress they experienced in the amount of $2,000.00.

[83] In summary, I award $54,400.00 for repairs to the interior and exterior of the dwelling; $2,490.80 the amount expended for building supplies and work performed; and general damages of $2,000.00 for a total of $58,890.80. Mr. and Ms. Nichols are to pay $58,890.80 to Mr. Sproule and Ms. Andrews.

[84] Although aggravated damages were claimed in the statement of claim, that claim was not pursued.

[85] If the parties are unable to agree, I will hear counsel on the issues of prejudgment interest and costs.

Coughlan, J.