

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Beaton v. Huestis*, 2020 NSSM 34

Date: 20201221

Docket: Sydney, No.486903

Registry: Halifax

Between:

Dawn Beaton

Claimant

v.

Craig Huestis, Blaise Poirier, John MacNeil
and Cape Inspection Service Limited

Defendant

Adjudicator: Patricia Fricker-Bates

Heard: March 10th and October 21, 2020

Decision: December 21st, 2020

Appearances: The Claimant Dawn Beaton was self-represented.

The Defendant Craig Huestis was represented by
Kelly O'Brien, Solicitor, Sampson McPhee;
The Defendant Blaise Poirier was self-represented;
The Defendant John MacNeil was self-represented;
The Defendant Cape Inspection Service Limited was
represented by Blaise Poirier and Brendon McQuaid.

BY THE COURT:

1. On February 10, 2020, the Honourable Justice Frank Edwards heard the Claimant Dawn Beaton's appeal from the decision of Adjudicator Tuma Young dated September 16, 2019 dismissing the Notice of Claim. Justice Edwards delivered reasons for decision dated February 20, 2020 and an Order followed on February 24, 2020. That Order states:

The appeal herein be allowed and the matter referred back to the Small Claims Court of Nova Scotia for a new hearing before a different adjudicator.

Accordingly, the matter came before me for re-hearing.

2. In her Notice of Claim issued on April 5, 2019, the Claimant seeks the following: \$9000.00 plus tax. The reason for the Claim is as follows:

Asbestos was discovered, tested and confirmed after the sale of my house without disclosure of said defect to me or through the building inspection.

The Claimant named the three defendants: the seller, Craig Huestis; one of two property inspectors, Blaise Poirier, of Cape Inspection Service Limited; and brokerage representative, John MacNeil, of ReMax Park Place Inc.
3. Defendant Craig Huestis filed a Defence and Counterclaim through his legal counsel Kelly O'Brien on May 6, 2019. In the 20-paragraph Statement of Defence, then articulated clerk Kelly O'Brien maintained that the "Defendant did not have knowledge of the presence of asbestos at the Property [366 Whitney Avenue, Sydney, NS] ... until the Plaintiff communicated these allegations to the Defendant at some point after May 2017." Further, the Defendant Huestis "did not make any written or verbal warranties or representations to the Plaintiff with respect to the condition of the Property." Ms. O'Brien also maintains in the Statement of Claim that the "Plaintiff's claim is statute-barred from proceeding based on the *Limitations of Actions Act*, SNS 2014, c. 35." Further, "the Defendant pleads and relies upon the provisions of the *Contributory Negligence Act* ... and the *Tortfeasors Act* ..." On behalf of her client, Ms. O'Brien requests that the Notice of Claim be dismissed.
4. Defendant John MacNeil filed a Defence on June 24, 2019, stating the following:
 - 1.) Everything required by law was adhered to.
 - 2.) Claimant was responsible for arranging inspection
 - 3.) No disclosure was filed by the Vendor nor was required by Purchaser.

5. Defendant Blaise Poirier filed a Defence with the Small Claims Court on June 21, 2019, via email, stating: “Was not able to inspect main Attic space and did not see vermiculite in dwelling.” At the request of Defendant Poirier, and in the absence of any opposition from the Claimant or the other Defendants, the style of cause will be amended to add Cape Inspection Service Limited as a Defendant. It is clear from the evidence that the Claimant hired Cape Inspection Service Limited to do the property inspection and not the Defendant Poirier or witness Brandon McQuaid independently of that business.

Review of the Facts

6. On September 8, 2015, the Claimant entered into an Agreement of Purchase and Sale with Defendant Huestis to purchase the house at 366 Whitney Avenue, Sydney, NS for \$134,000.00. Defendant MacNeil was the brokerage representative for ReMax Park Place Inc., the brokerage firm, and, in signing the Agreement of Purchase and Sale, the “Buyer and Seller acknowledge[d] that upon signing this Agreement they will have consented to a Transaction Brokerage relationship with ReMax Park Place Inc” and Brokerage Representative “John MacNeil”. That Transaction Brokerage relationship was effective September 8, 2015.
7. Defendant MacNeil also was the brokerage representative for brokerage firm ReMax Park Place Inc., 602 George St., Sydney, NS, when ReMax Park Place Inc. entered into a Seller Brokerage Agreement with Claimant Huestis to list and sell the property at 366 Whitney Avenue, Sydney, NS, for the period July 24, 2015 to October 24, 2015.
8. The Claimant retained the services of Cape Inspection Service Limited to do an inspection on the house at 366 Whitney Avenue, Sydney, NS. In a report dated September 10, 2015, Cape Inspection Services reported its findings (see Exhibit No. 1). There is no reference in the Cape Service Inspection

Report to vermiculite or asbestos being found in the residence. However, I note the following notations relative to the attic of the residence:

13) If additional insulation is to be installed in the attic space—suggest a true ventilation system to be installed at soffit areas at both side of attic space for increased air flow and to prevent insulation from being in contact with roof sheathing.

14) Attic – two gable end vents at front and rear of attic space plywood to be cut to full size of existing vents for proper cross ventilation of attic space.

This Inspection is a visual inspection. Any Deficiencies that can not be seen are not the Legal responsibility of CAPE INSPECTION SERVICES LIMITED. Or the Inspector.

Defendant Poirier was one of the Inspectors who undertook the inspection at 366 Whitney Avenue, Sydney, NS. The other inspector was Brendon McQuaid.

9. The cover letter to that Cape Inspection Service Limited report was introduced into evidence by Defendant Poirier (see Exhibit #18). That letter states in part:

We have completed our visual inspection at 366 Whitney Avenue, Sydney, Nova Scotia and have found this dwelling to be structurally sound.

...

Owning a home is a great responsibility and although we did an extensive inspection of your property we cannot inspect what we cannot see.

If you have any questions regarding our inspection please do not hesitate to call Cape Inspection Services Ltd.

Sincerely,

Brendon McQuaid C.R.B.O

Blaise Poirier C.R.B.O.

10. The Claimant subsequently bought the property and took possession on September 22, 2015.

- 11.** In May 2017, the Claimant contacted MJM Building Performance Contractors (hereinafter MJM) to have the attic of her home at 366 Whitney Avenue, Sydney, NS, insulated. However, the MJM crew discovered the presence of vermiculite and refused to do further work until the vermiculite had been tested for asbestos. The Claimant then hired Maxxam, A Bureau Veritas Group Company (hereinafter 'Maxxam') with an office location in Sydney, to test the material from the attic at 366 Whitney Avenue, Sydney, NS.
- 12.** On June 1, 2017, Maxxam analyzed material it had received on May 26, 2017 from the Claimant (see Certificate of Analysis at Exhibit #7). No one from Maxxam was called to give evidence concerning the report and the interpretation of the findings therein.
- 13.** The Claimant retained legal counsel in 2018 and, on April 13, 2018 the Claimant's legal counsel sent individual "Without Prejudice" letters to each of the named Defendants herein. In the letter to Defendant Huestis, counsel for the Claimant maintained that the Claimant suffered damages because of Defendant Huestis' misrepresentation and/or non-disclosure of information concerning asbestos in the attic insulation. In the letter to Defendant MacNeil, counsel for the Claimant maintained that Defendant MacNeil breached his professional standard of care by acting as both the real estate agent and listing agent for Defendant Huestis; and the Brokerage Representative for the Transaction Brokerage relationship for both parties. In the letter to Defendant Poirier, counsel for the Claimant maintained that Defendant Poirier, who had completed the property inspection for Cape Inspection Service Limited, had been negligent in his inspection in that his report failed to identify the insulation material in the attic. In all three instances, counsel for the Claimant sought \$9000.00 plus tax in lieu of court action. The Claimant received no response from any of the Defendants to these letters. (See letters at Exhibits # 12, 13 and 14).
- 14.** In her testimony, the Claimant referred to a letter from Steve Archibald, Operations Manager, MJM, dated September 5, 2018, that "showcases the

timeline and a third party to the situation observing the material [in the attic] shortly after entering the attic and questioning the material” (see Exhibit # 5).

- 15.** The Claimant pointed out that the house at 366 Whitney Avenue, Sydney, NS was built in 1958 (see Exhibit #15, Habitational Insurance Application, Section 9). However, in cross-examination, the Claimant acknowledged that she didn’t know the age of the home until after purchasing it and seeking insurance. She stated that before she finalized the purchase of the home, she got a look in the attic, saw insulation but wasn’t familiar with types of insulation and “was relying on the experts she hired.” She testified that she was referred to Cape Inspection Service Limited before she hired them. The Claimant testified that “they looking in the attic and said gable vents had to be fixed and up the insulation.” It was her recollection that there was no mention of asbestos or vermiculite; or that she undertake testing for asbestos. She testified that Defendant Poirier and his colleague Brendon McQuaid went through the house with her.
- 16.** Referencing the Certificate of Analysis from Maxxam of June 1, 2017, the Claimant testified that tremolite was found in the sample of the material taken from her attic (see Exhibit #7 at pg. 3). Relying on a Health Canada Study from 2008, the Claimant argued tremolite, one of the types of asbestos found in the sample analyzed by Maxxam, is, according to that study, an amphibole asbestos that “is considered more carcinogenic ... meaning it may take less exposure to cause a related disease” (see Exhibit #16, Health Canada Study).
- 17.** The Claimant also relied on a CUPE Fact Sheet on asbestos to argue (1) that the Canadian Government was committed to banning asbestos and asbestos-containing products by 2018; (2) that asbestos fibers can be released into the air by disturbing or removing insulation that contains asbestos including vermiculite insulation; (3) that there is no evidence of a safe level of exposure to asbestos; and (4) wherever a fibrous material is used

in a building and testing has not been performed, “workers should *automatically suspect* that asbestos may be present”: (see Exhibit #16, pp. 1, 2, 3, and 4 (emphasis in the original)). According to the Claimant, she was not advised to test for asbestos by any of the Defendants; and that the pre-purchase inspection by Cape Inspection Service Limited failed to raise the issue of testing for asbestos.

18. Under cross-examination, the Claimant was directed to a Technical Bulletin issued by Bureau Veritas (formerly Maxxam) entitled “Asbestos Sources, Exposure Risks and Analytical Methods” (see Exhibit #17, Tab 3). Specifically, the Claimant was directed to the following section:

Regulated Substance

Asbestos is defined as a hazardous material under provincial and territorial laws. As such, provincial regulations exist for the production, handling and safe disposal of asbestos to protect the health of humans and the environment.

Testing

Inspection by the naked eye is insufficient to determine if a material contains asbestos. Samples suspected of containing asbestos should be sent to a laboratory that is accredited for testing asbestos.

The Claimant agreed that MJM saw something suspicious in the attic but couldn’t confirm it was asbestos. She indicated that MJM mentioned the word vermiculite and bagged it for her to take down to Maxxam. The Claimant testified that the vermiculite looked like a shale rock of sorts—but the contents did not look like cellulose insulation. The Claimant testified that the fluffy material in the attic, as seen in Exhibit #11, is the cellulose material blown in on top of the vermiculite by contractor Jeff Ellis. She stated that the insulation visible in the attic as shown in Exhibit #11 was the insulation in the attic at the time of the building inspection and that it hadn’t changed.

19. The Claimant maintained that MJM did not tell her where in the attic the vermiculite was found nor how much of it was located there. Rather, they

saw the substance and put it in a bag; but they did not give her any idea of how much of the substance was there.

20. When questioned about the testing process relative to the material from the attic, the Claimant testified that Maxxam sent the material to Calgary for testing and emailed her the results. She testified that there was nothing in the email from Maxxam to explain the results, so she went to MJM. The Claimant testified that MJM is a contractor and they install insulation. She did not know if anyone at MJM was qualified to interpret the test results from Maxxam. When questioned, the Claimant agreed that there was no covering letter from Maxxam telling her that she shouldn't live in the house until remediation was complete.

21. The Claimant was questioned as to whether anyone had recommended further testing of the material from the attic. The Claimant was directed in cross-examination to the following line from Maxxam's Certificate of Analysis under the section entitled "General Comments" (see Exhibit #7):

200 Point Count by PLM: Vermiculite originating from Libby, Montana is known to be contaminated with regulated (tremolite and actinolite) and unregulated (primarily winchite and richterite) asbestiform fibres. TEM analysis is recommended for a more accurate characterization of these particles.

She testified that no further testing had been done, that asbestos had been confirmed by Maxxam and MJM. She testified that regardless of the level of asbestos, she wants her house remediated. She pointed out that she is legally required to disclose the presence of asbestos if she tries to sell her home. She agreed that MJM told her that abatement had to take place before they could do any work on her attic.

22. Defendant Poirier directed the Claimant's attention to the picture of the attic hatch (see Exhibit #11b) and challenged the Claimant by maintaining that that was not the hatch used by Cape Inspection Service Limited. He said that

he has been doing inspections for 40 years, that “we check every attic we see” but that “we couldn’t physically get into the attic.” He stated that “if they had seen vermiculite, they would have put it in the report.”

- 23.** Defendant MacNeil stated to the court that “if the seller hasn’t lived in the house, the seller can’t give a disclosure statement”. He was referring to the Property Condition Disclosure Statement and the Lawyer’s Approval statement crossed out in the Agreement of Purchase and Sale. Defendant MacNeil said that he “is sure he must have said that when she [the Claimant] signed the Agreement of Purchase and Sale”. In her testimony, the Claimant maintained that Defendant MacNeil advised her that the Property Condition Disclosure Statement wasn’t necessary for the Agreement of Purchase and Sale.
- 24.** Defendant Huestis testified that he is a heavy equipment operator. He bought 366 Whitney Avenue, Sydney, NS in 2015. He stated that he did a walk through before purchasing the home but did not live in the house. At the time of the purchase, he was working for CBRM fulltime. He maintained that he was not in the attic of the home, nor did he see insulation. He recounted the renovations that had been done to the home’s roof, windows, siding, and door trims along with landscaping. He maintained that he hired Jeff Ellis Enterprises to do the renovations including insulating the attic. He acknowledged that his initials are on the Agreement of Purchase and Sale, but that he did not fill out the Property Condition Disclosure Statement as he had not lived in the house at 366 Whitney Avenue, Sydney, NS. He stated that he was not aware of a possible asbestos issue with the home prior to selling it to the Claimant, but was made aware of the issue after the Claimant texted the contractor Jeff Ellis to ask about the presence of vermiculite in the attic (see text messages at Exhibit #8).
- 25.** Contractor Jeff Ellis was called as a witness by Defendant Huestis. Mr. Ellis testified that he is general contractor and his work includes new home builds, renovation and excavation. He stated that if he notes anything at a

residence, such as asbestos, “we get the material tested”. Mr. Ellis testified that he has employees with asbestos-awareness training and abatement.

- 26.** Mr. Ellis testified that he was hired by Defendant Huestis to renovate 366 Whitney Avenue, Sydney, NS. He maintained that he looked in the attic and noticed batt insulation above the bathroom but the remainder of the attic had nothing. He testified that he had no concerns over asbestos, that he had several employees working on the renovation job at 366 Whitney Avenue, Sydney, NS, but that no one raised concerns about asbestos.
- 27.** Mr. Ellis testified that he added cellulose to the attic—it’s a fluffy product that looks like ripped newspaper. He referred to the picture of the attic in Exhibit 11 as illustrative of cellulose insulation but noted that it appeared from that picture that the cellulose insulation had been “dug through”. Mr. Ellis testified that he bought the cellulose insulation at Central Building Supplies. He pointed out that cellulose does not contain asbestos as asbestos is a banned substance. He testified that he found out about the asbestos issue at 366 Whitney Avenue, Sydney, NS when the Claimant contacted him in May 2017. He agreed that it is possible to blow in insulation over vermiculite.
- 28.** In cross-examination, Mr. Ellis testified that he accessed the attic either through the gable vent or through the hatch—he couldn’t recall which access method was used. He explained that cellulose insulation comes in compressed form and then is shot up and into an attic. He noted that there were layers of foam in the basement of the house but “nothing to talk about”. He testified that there was a chimney but that older homes usually don’t have insulation, that foam in the walls is not insulation.
- 29.** Brendon McQuaid of Cape Inspection—who along with Defendant Poirier completed the house inspection—testified that he is not familiar with the attic hatch found in Exhibit 11b. He testified that there was an addition to

the main house and it is from the attic space in the addition that he viewed the main attic through a vent hole in the addition attic space. He indicated that he could stand up in the peak area. He saw new insulation that looked to be evenly distributed, unlike the insulation in the photo marked Exhibit 11b. He testified that he didn't see exposed flooring in the attic.

DECISION OF THE COURT

30. As Adjudicator David T.R. Parker noted in *Young v. Clahane*, 2008 NSSM 16 at para. 19, “[t]he starting point in any complaint brought before the court concerning defects that are complained of by a purchaser in a real estate transaction is the notion of *Caveat Emptor* or what is known as buyer beware.” He continues (at para. 19):

In the decision *William v. Durling*, 2006 NSSM 21 (CanLII), [2006] N.S.J. No. 368 at paragraphs 18 and 19 it stated:

“ 18 ***Caveat Emptor*** or buyer beware is the starting point in any purchase of a home by a buyer. It is the buyer's responsibility to ensure the condition of the property is in order and if there are problems with the property then the buyer does not have to purchase the property. This is subject to any contractual obligations or restraints put on the property. For example if the buyer enters into a contract with the seller to buy the property "as is" then there are no warranties as to its condition unless the buyers can show there is a collateral contract of some sort. This of course is subject to any legislative warranties imposed on the purchase of a home and I am not aware of any.

" 19 In the event there is misrepresentations made out by the seller that are fraudulent or negligent then the ***caveat emptor*** rule is circumvented. (See *McGrath v. MacLean et al.* (1979), 1979 CanLII 1691 (ON CA), 22 O.R. (2d) 784).

" ...

" 34 ... This doctrine has been softened considerably in the sale of goods due to legislative intrusion but that has yet to take place with the sale of real property and it should not be up to the court to impose its own warranties. [see *Jenkins v. Foley*, 2002 NFCA 46 (CanLII), [2002] N.J. No.

See also *Atwood v. Fullerton*, 2020 NSSM 22 where Adjudicator Andrew Nickerson, QC, after exploring the doctrine of *caveat emptor* writes (at para. 33): “The doctrine [of *caveat emptor*] continues to apply to real estate transactions in this province, subject to certain exceptions: fraud, non-innocent misrepresentation, an implied warranty of habitability for newly-constructed homes, and a duty to disclose latent defects.”

31. Relative to a real estate transaction, a latent defect “is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection” whereas a “patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection”: *Kelly v. Wiseman*, 2018 NSSM 67 at para. 18.

30. In *Curran v. Grant*, 2010 NSSM 29, Adjudicator Michael J. O’Hara dealt with purchasers claiming defects in a real estate transaction and the impact of the Property Condition Disclosure Statement in the Agreement of Purchase and Sale:

[3] As a very general statement, I start with the basic proposition that on the sale of a used home, the vendor does not warrant the fitness of the structure. The basis proposition is captured in the Latin phrase *caveat emptor* - “let the buyer beware”.

[4] This general principle of law has been modified to some extent by the now common practice of including a property condition disclosure statements as part of the standard Agreement of Purchase and Sale in Nova Scotia. Under this regime, the seller is legally obliged to truthfully and accurately respond to the various items in the property condition disclosure statement (“PCDS”).

[5] If a purchaser subsequently alleges that the seller has not accurately answered one or more questions on the PCDS and proceeds with a legal claim, the purchaser must prove what it alleges on a balance of probabilities. As with any civil case, the claimant bears the burden of proof throughout.

[6] In the recent Nova Scotia Supreme Court case of **Gesner v. Ernst et al** (2007), N.S.S.C. 146, Associate Chief Justice Smith made the following comment about a PCDS (para 54):

[54] A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document, the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property...

[7] In **Moffatt v. Findlay**, 2007 NSSM 64 (CanLII), Adjudicator Slone, makes the following comment about PCDS's, which I adopt:

[28] I will observe at the outset that the PCDS is at most a modest exception to the principle of caveat emptor or "buyer beware" which is alive and well in this jurisdiction, as observed in the reported cases to which I was referred, including the recent decision of Associate Chief Justice Smith in Gesner v. Ernst,...at paragraph 44:

[44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. Caveat emptor. (McGrath v. MacLean et al. (1979), 1979 CanLII 1691 (ON CA), 95 D.L.R. (3d) 144 (Ont. C.A.)).

[29] Generally, sellers of real property make no warranties as to its condition. It is for buyers to perform their own inspections and, for the most part, take their chances. I believe that most buyers of resale homes appreciate that there may be flaws or imperfections that they will inherit, and they anticipate having to deal with them as and when they arise or as resources permit.

[30] The difficulty with such a system has always been in the area of latent or hidden defects that only the sellers know about and no inspection, no matter how rigorous, could be expected to reveal. Although the PCDS does not restrict itself to questions about latent defects, in my view it is the potential presence of a known latent defect that the statement is designed to address.

[8] In ***Desmond v. McKinlay*** (2000), 2000 CanLII 2201 (NS SC), 188 N.S.R. (2d) 211 (S.C.) Justice Wright pointed out that the applicable legal bases for an inaccurate or incomplete PCDS are collateral warranty and negligent misrepresentation. With respect to the latter, he states (para52):

[52] While it may be unnecessary, in light of the foregoing findings, I have concluded that liability can be ascribed to the defendant vendor in a parallel way under the tort doctrine of negligent misstatement. The general principles of this doctrine were recently referred to by Cromwell, J.A. in Barrett v. Reynolds et al... (1998) 1998 CanLII 2122 (NS CA), 170 N.S.R. (2d) 201 who began his review of the law as follows (at p. 224):

*In **Queen (D.J.) v. Cognos Inc.**, 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87; 147 N.R. 169; 60 O.A.C. 1; 99 D.L.R. (4th) 626, at p. 110, Iacobucci, J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 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 the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.*

[9] Most of the recent case law follows the negligent misrepresentation approach of ***Cognos*** ...

[Italics in the original]

The Claimant is alleging that Defendant Huestis failed to disclose a latent defect—the presence of vermiculite in the attic. She also alleges that the Defendant Poirier was negligent in the conduct of the property inspection as he failed to identify the vermiculite in the attic. Finally, she alleges that Defendant MacNeil was negligent in that he advised that the Property Condition Disclosure Statement in the Agreement of Purchase and Sale was not necessary.

- 33.** The Defendant is seeking \$9000.00 plus tax in damages. She alleges that “[a]sbestos was discovered, tested and confirmed AFTER the sale of my house without disclosure of said defect to me or through the building inspection.”
- 34.** The evidence establishes that the Claimant bought the home at 366 Whitney Avenue, Sydney, NS, from Defendant Huestis in September 2015. The evidence establishes that Defendant Huestis did not live in the home—he bought it as an investment. He hired a contractor, Jeff Ellis Enterprises Limited, to renovate the property prior to selling it to the Claimant. As part of those renovations, Mr. Ellis testified that cellulose insulation was blown into the attic. He maintained that he didn’t see any vermiculite or otherwise have any concerns about asbestos; nor did his workmen on site raise concerns about asbestos. He agreed that it is possible to blow in insulation over vermiculite.
- 35.** The Claimant hired Cape Inspection Service Limited to inspect the property prior to finalizing the purchase. Brendon McQuaid and Defendant Poirier of Cape Inspection conducted the inspection on September 10, 2015. Brendon McQuaid and Defendant Poirier did a “sight inspection” of the property at 366 Whitney Avenue, Sydney, NS. The cover letter to their inspection report states: “Owning a home is a great responsibility and although we did an extensive inspection of your property we cannot inspect what we cannot see.” The inspection report, itself, maintains the following: “This Inspection is a visual inspection. Any Deficiencies that can not be seen are not the Legal responsibility of CAPE INSPECTION SERVICES LIMITED. Or the Inspector.”

There was some dispute over how the attic was viewed for inspection purposes—through a main hatch as maintained by the Claimant; or through a vent hole in an attic space in the rear addition to the home as maintained by witness Brendon McQuaid. What is significant, however, is Mr. McQuaid’s testimony that what he saw appeared to be “new insulation with an R20 insulation value.” This would coincide with the evidence of Jeff Ellis that he had blown cellulose into the attic as part of his renovations to the home. It also reflects the texts exchanged between the Claimant and Mr. Ellis on April 1 and May 26, 2017 wherein the Claimant refers to “looking to bump up the attic insulation” and Mr. Ellis replies: “I think it’s near R20 now up there? Maybe take it up to closer to R50?” (see Exhibit #8). The following text exchange also occurred between the Claimant and Jeff Ellis (see Exhibit #8):

“Hey Jeff. It’s Dawn at 366. Quick question. Would you have added an insulation to the attic or just found it as is? And if so did you ever test it for asbestos at all? Thanks.

“I don’t think there was any at all and we blew in what was there.”

I note that in his testimony, Mr. Ellis explained that the “‘R’ value refers to the amount of insulation, what keeps the heat in.”

- 36.** Defendant MacNeil held dual roles in the real estate action between the Claimant and Defendant Huestis: the real estate agent and listing agent for Defendant Huestis; and the Brokerage Representative for the Transaction Brokerage relationship for both parties. Whatever the ethics of occupying that dual role—and there is nothing before me from any professional body pertaining to the professional standards applicable in such a situation—it was Defendant MacNeil’s testimony that “if the seller hasn’t lived in the house, the seller can’t give a disclosure statement.” Hence, the Property Condition Disclosure Statement was scratched out on the Agreement of Purchase and Sale. There is no evidence before me to suggest that the scratching out of the Property Condition Disclosure Statement was motivated by undisclosed knowledge on the part of either Defendant Huestis or Defendant MacNeil concerning the presence of vermiculite or asbestos in the home at 366 Whitney Avenue, Sydney, NS.

- 37.** The sale of 366 Whitney Avenue, Sydney, NS, was finalized in September 2015 and the Claimant took possession on September 22, 2015. All was well until May 2017 when she engaged MJM to have the attic of her home insulated further. However, the MJM crew discovered the presence of vermiculite and refused to do further work until the vermiculite had been tested for asbestos. The Claimant then hired Maxxam to test the material from the attic at 366 Whitney Avenue, Sydney, NS.
- 38.** As I indicated earlier, it would have been helpful to have someone from Maxxam testify as to the meaning of their report; and of the TEM analysis “recommended for a more accurate characterization of these particles.” The Claimant acknowledged that she did not get the TEM analysis because, from her perspective, she wants her house abated whatever the level of asbestos.
- 39.** Based on the evidence before me, I find that the Claimant did not become aware of the presence of vermiculite in the attic until May 2017.
- 40.** Further, I am unable to conclude on a balance of probabilities that any of the Defendants were aware of the presence of vermiculite or asbestos in the attic at 366 Whitney Avenue, Sydney, NS, at the time of the sale in September 2015. There is no evidence of any representations made by Defendant Huestis to the Claimant concerning the presence or absence of vermiculite or asbestos. He had hired contractor Jeff Ellis to renovate the property. As part of those renovations, cellulose insulation was blown into the attic. Under cross-examination, Mr. Ellis agreed that it is possible to blow in insulation over vermiculite. There is no evidence before me that Contractor Ellis or his workmen saw or alerted anyone to the presence of vermiculite or asbestos in the attic of the home. Defendant MacNeil acted for both parties but there is no evidence before me to suggest that the scratching out of the Property Condition Disclosure Statement or the Lawyers’ Approval Statement in the Agreement of Purchase and Sale were done in concert with Defendant Huestis with intent to mislead the Claimant concerning the latent defect in the home, i.e., the vermiculite in the attic.

Defendant Poirier and witness Brandon McQuaid of Cape Inspection Service Limited did a visual inspection of the home at 366 Whitney Avenue, Sydney, NS, and, as explored in paragraph 33 of this decision, did not see vermiculite or asbestos in the attic.

41. I have found that the Claimant did not know about the vermiculite in the attic at 366 Whitney Avenue, Sydney, NS until May 2017 when she engaged MJM to insulate the attic. Therefore, the *Limitation of Actions Act*, SNS 2014, c. 35, does not come into play.
42. In the end result, however, I find that based on the evidence before me, the doctrine of *caveat emptor* prevails. I am, therefore, dismissing the Notice of Claim.
43. No costs will be awarded in this action.

Patricia Fricker-Bates
Adjudicator
December 21, 2020