SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Delaney v. McIntyre*, 2021 NSSM 65

Date: 20210426
Docket: Sydney, No. 501561
Registry: Halifax

Between:

Nicole Delaney

Claimant

v.

Ewen MacIntyre

Defendant

Adjudicator:	**Patricia Fricker-Bates**
Heard:	**February 24th, 2021**
Decision:	**April 26, 2021**
Appearances:	**Steve Jamael, Vince A. Gillis Law Inc., for the Claimant; Kelly O'Brien, Sampson McPhee Lawyers, for the Defendant.**

BY THE COURT:

1. On November 2, 2020, the Claimant Nicole Delaney filed a Notice of Claim with the Court alleging the following:

> Defendant sold home to claimant and did not disclose a "known" latent defect (major basement flooding)

She is claiming payment of money; general damages; and costs totaling $25,000.00.

2. On December 3, 2020, the Defendant Ewen MacIntyre filed a Defence with the Court that states (in part):

> 2. On or about November 19, 2018, the Claimant, Nicole Delaney, and the Defendant, Ewen MacIntyre, entered into an Agreement of Purchase and Sale, whereby the Defendant agreed to sell, and the Claimant agreed to purchase, a property located at 628 Cottage Road in Sydney, Nova Scotia (the "Property").
>
> 3. The Defendant provided the Claimant with a Property Disclosure Statement, dated November 27, 2018.
>
> 4. In the Property Disclosure Statement, the Defendant disclosed that the Property had flooded during the Thanksgiving weekend of 2016, when the Sydney area experienced significant flooding (the "Thanksgiving Flood"), and that the flooding had damaged the gyproc and the carpet in the basement of the Property.
>
> 5. The Defendant further disclosed that the lower 18 inches of gyproc and the carpet in the basement had been removed as a result of the Thanksgiving Flood. The lower 18 inches of Gyproc and the carpet were not replaced before the sale of the property.
>
> 6. The Defendant took no steps to conceal the fact that 18 inches of Gyproc and the carpet in the basement had been removed. The state of the basement was open for the Claimant to see while viewing the Property.
>
> 7. The Claimant took possession of the Property on December 6, 2018.
>
> 8. The Defendant did not have any knowledge of any flooding at the Property, other than the Thanksgiving Flood, which was disclosed to

the Claimant through the Property Condition Disclosure Statement dated November 27, 2018.

…

The Defendant pleads and relies upon the provisions of the *Contributory Negligence Act*, RSNS 1989, c. 95 and the *Tortfeasors Act*, RSNS 1989, c. 197; and regulations made thereto.

3. The Defendant is seeking dismissal of the claim, costs of the action, and any other relief this Honourable Court may deem fit.

REVIEW OF THE EVIDENCE

4. In keeping with Covid-19 protocols for Small Claims Court, the hearing was held via telephone. There was a total of eleven (11) exhibits before the court and two witnesses—the Claimant and the Defendant.

5. The Claimant testified that she is 29 years old, the single parent of a seven-year-old daughter and a first-time home buyer. The Claimant paid $150,000 for the home at 628 Cottage Road, Sydney, NS. (see Exhibit No. 9, Tab 7, Agreement of Purchase and Sale dated November 18, 2018). The Property Disclosure Statement dated November 20, 2018, contained the following information (see Exhibit No. 1):

1. **Structural**

1.1 Are you aware of any structural problems, unrepaired damage, dampness or leakage? √ Yes □No *Thanksgiving Flood 2016.*

If yes, provide details: *abnormal flooding in Sydney—minimal gyproc damage – carpet.*

1.2 Are you aware of any repairs to correct structural damage, leakage or damage? √ Yes □No

If yes, provide details: *lower 18" of gyproc removed as well as carpet.*

The following comment was written in the margin of document to the left of Section 1 "Structural": "*The only time I experienced water problem at this home: 2016 Thanksgiving Day."*

6. The Claimant testified that when she read the handwritten notes under Sections 1 to 1.2 "Structural" of the Property Disclosure Statement, she thought the Defendant had repaired the damage and that was the end of the matter. She indicated

that she wasn't concerned about the Thanksgiving Flood as her realtor told her that a lot of people had flooding during that event.

7. The Claimant confirmed that she had the property inspected by Cape Inspection Service Limited (see Exhibit No. 7). It was the Claimant's recollection that one of the inspectors told her that the drain in the floor of the basement (see Exhibit No. 2) was a city drain and she was not to open it. The Claimant testified that she was with the inspector when he lifted up the board covering the drain in the basement but, contrary to Exhibit No. 2, there was no printing on the underside of the drain's plywood cover.

8. The Claimant testified that she wanted a useable basement so that her cousin, Cheryl, also a single parent of one child, could move in and help with expenses. In cross-examination she testified that she viewed the property in person in the company of her realtor and her cousin Cheryl. The Claimant recalled that on the day of the inspection, it was not raining. She did try to do another walk through the house with her father, but that request was not accommodated. The Claimant made the request to her realtor, not the Defendant. She was unable to say with certainty if the realtor spoke with the Defendant concerning her request for a walk through with her father, but she did find it odd that her request was denied. The Claimant recalls that the day she sought to do a walk-through with her father, it was raining. The Claimant testified in cross-examination that she never met the Defendant or talked to him on the phone, that she did not reach out to him after the December 22, 2018, flooding in the basement, nor had she made a claim. Instead, she testified that she reached out to her realtor who told her to contact a lawyer; and she had to save up money in order to hire a lawyer.

9. In cross-examination, the Claimant maintained that it was clear from her walk through of the property that the carpet and lower gyproc had been damaged, but she related that flood damage to the Thanksgiving Flood of 2016. She testified that she had no knowledge of any flooding occurring between the Thanksgiving Flood and her purchase of the property. She believed that the flooding and the evidence of same in the basement occurred as a result of the Thanksgiving Flood in 2016. In cross-examination, the Claimant confirmed that at the time of purchase, she thought the basement was a finished, dry basement with no water problems.

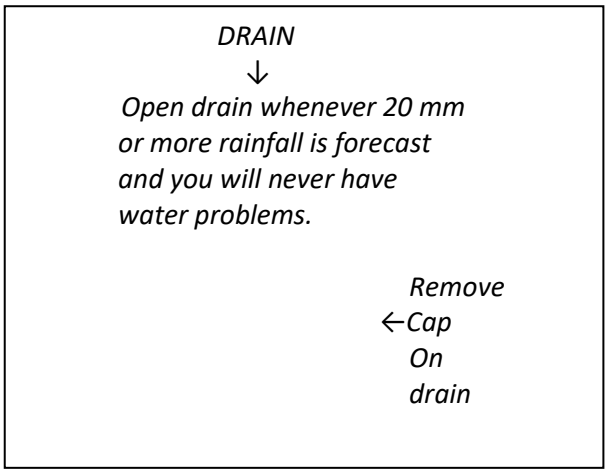
10. In cross-examination, the Claimant was referred to the Inspection Report completed by Cape Inspection Service Limited on November 19, 2018 (see Exhibit No. 7). She was directed to the Foundation Section of the Report, item "Cracks in Wall" with the response "Yes"; and item "Floor Drain Basement Floor or Sump

Pump" with the response "No". The Claimant agreed that the basement was not leaking water at the time of the inspection. The Claimant testified that concerning the drain, her understanding from the inspector was that the drain's purpose is to prevent city water from backflowing into the house. She confirmed in cross-examination that the property inspector told her that the purpose of the drain was not for drainage but to prevent backflow.

11. When referred to the Lot Condition Section of the Property Inspection Report, item "Drainage Away from Dwelling", with the response, "No", the Claimant indicated that she did not know what that meant. She agreed that it could mean that there was no drainage system to take water away from the property. However, the Claimant asserted that she was not looking for a drainage system, but to have the foundation fixed.

12. The Claimant does not contest that she took possession of the property on December 6, 2018. In cross-examination, the Claimant indicated that the property inspector had discussed the cracks in the concrete. She testified that the Inspector told her that there were no signs of mold and she agreed that neither she nor the inspector saw mold or signs of mold. The Claimant spent about $2000 finishing the basement with laminate flooring and gyproc. It was after she had made those renovations, the water issue occurred and the basement wall turned moldy. She referred to the wall in Exhibit No. 4 as one of the places where the water comes in. In cross-examination, the Claimant maintained that it did not rain between December 10, 2018 and December 22, 2018.

13. The Claimant testified that on December 22, 2018, she first noticed the printing on the underside of the plywood cover over the drain and around the drain, itself (see Exhibits No. 2 and 8):



Around the mouth of the drain in the floor were printed the words "*Drain*" on two sides with arrows pointing to the drain, itself (see Exhibits No. 2 and No. 8). The Claimant was adamant that the printing was not there when the home inspection was completed on November 19, 2018. According to meteorological data, it rained on December 22, 2018 (see Exhibit No.11)—29.1 mm—and the Complainant testified that she took a video showing how she opened the drain and let the water run out (see Exhibit No. 3 (video)). As this was the first time that the Claimant allegedly saw the printed note on the underside of the covering over the drain, she took it to mean that every time it rained, she would have to open the drain. The Claimant acknowledged in cross-examination that since filing her claim, she has not documented episodes of flooding but just goes down, opens the drain and then closes it once the flood waters run out.

14. The Claimant testified that since the date of purchase, the basement floods more in the summer and spring and at least a couple of times a month. She testified in cross-examination that she had items on the floor of the basement propped up off the floor so as to avoid damage from flooding.

15. The Claimant provided two repair estimates: one from Boudreau Contracting dated January 12, 2021, for $35,650.00 (see Exhibit No. 5); and one from LGJ Construction dated February 11, 2021 for $34,126.25 (see Exhibit No. 6). In cross-examination, the Claimant indicated that she had no money in December 2018 to reach out to a contractor, that she got those repair quotes at the suggestion of her lawyer, that she just didn't have the money to either hire a lawyer or secure those quotes prior to 2021. She testified in cross-examination that she asked the contractors to give her a quote on "a dry basement". She maintained that if she is unable to hire a contractor, she will have to sell the house.

16. Under cross-examination, the Claimant testified that the inspector told her not to use the drain but that she has no other option as she doesn't have the funds to correct the problem. She explained that after the basement flooded on December 22, 2018 for the first time, her cousin had to move out just prior to New Year's Eve. The Claimant, herself, was working but then got laid off. She explained that the plan had been for she and her cousin to share expenses. The Claimant indicated that she started another job in 2019 but recently was laid off in 2021.

17. At the conclusion of the Claimant's testimony, legal counsel for the Defendant made a motion for summary judgement[1] on the basis that there was no evidence before the court other than what was in the Property Disclosure Statement. In *Clarke*

[1] I understood this to be equivalent to a motion for non-suit.

Estate v. *Frenken*, 2009 NSSM 11, Adjudicator David Parker discussed the law surrounding a motion for non-suit and stated:

> The case *Knox v. Maple Leaf Homes* [2002] N.S.J. No. 555, Justice LeBlanc of the Supreme Court of Nova Scotia discusses the parameters of a non-suit motion.
>
> At paragraph 18, Justice LeBlanc referencing other cases stated,
>
> 18 The test on a non-suit motion is whether the plaintiff has established a prima facie case, or, as it is sometimes described, "whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff": MacDonell v. M & M Developments Ltd. 1998 CanLII 4675 (NS C.A.), (1998), 1998 NSCA 49 (CanLII), 165 N.S.R. (2d) 115 (C.A.). A trial judge considering whether to grant a non-suit must consider the sufficiency of the evidence, not weigh it or evaluate its believability. The question is whether the inference the plaintiff suggests could be drawn from the evidence if the trier of fact so chose: Sopinka et al., The Law of Evidence in Canada (2d edn.)(Butterworth's, 1999) at para. 5.4. The decision depends "on all the circumstances of the case, including the issues of fact and law raised by the pleadings": J.W. Cowie Engineering Ltd. v. Allen, [1982] N.S.J. No. 39 (S.C.A.D.) at para. 15.
> …
> The case of *Colford vs. Randell et al.* (1975) 20 N.S.R. (2d) 195 (S.C.T.D.) sets out the test for a non-suit motion and has been accepted by the Supreme Court of Nova Scotia in *Pino v. Wal-Mart Canada Inc.* [1999] N.S.R. No. 514 at page 1 where Justice Robertson stated:
>
> > The defendant has moved for dismissal of the case, pursuant to Rule 30.08, on the ground that upon the facts and the law no case has been made out. The case of Colford & Randall et al (1975), 20 N.S.R. (2d) 195 (S.C.T.D.) sets forth the test:
> >
> > > "In my opinion the changes in this rule were made merely to clarify the right of defence counsel to move for dismissal at the end of the plaintiff's case without electing whether or not to call evidence. I do not believe there was any intention to change the grounds for the motion and I interpret the rule to mean that the motion ... will only be granted if there was no

> evidence upon which a jury properly instructed could find for the plaintiff. If a prima facie case has been made out then the weight of the evidence is for the Court."

The case of *Allied Signal Canada Inc. (c.o.b.) Allied Aerospace Canada v. Atlantic Electronics Ltd.* [1998] N.S.J. No. 423. (N.S.S.C.) summarized the law on motions for non-suit when it references Sopinka and Lederman's views in their test The Laws of Evidence in Civil Cases (Toronto Butterworths, 1974) at pages 521-522 as follows:

> If a plaintiff fails to lead sufficient material evidence, he may be faced at the close of his case by a motion for a non-suit by the defendant. If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence...

I am satisfied upon the test outlined above that the Claimant established a prima facie case particularly given the alleged contradiction between the Property Disclosure Statement and the handwritten notation on the underside of the plywood cover over the drain.

18. The Defendant proceeded to testify. He indicated that he is a Conservation Officer with the Nova Scotia Department of the Environment and, in cross-examination, agreed that he is well-educated. He testified that he owned the property at 628 Cottage Road, Sydney, NS, for approximately 11 years. It was his testimony that during his ownership of the property, it had only ever flooded during the Thanksgiving Flood of 2016. He indicated that he was surprised when the property

flooded in 2016 as it had not flooded before or after. The Defendant maintained that he had made no insurance claims while the property's owner. In cross-examination, the Defendant testified that he didn't use the basement except for laundry and that it was his intention to fix the basement on his own rather than make an insurance claim.

19. The Defendant testified that as a result of the 2016 Thanksgiving Flood, five inches of water flowed over the carpet in the basement. He maintains that his first thought that day was that there had to be a drain somewhere. He found the drain after ripping up linoleum near the water pipes coming into the basement from the city. He indicated that once he lifted the plywood covering the drain, "there was a backwater valve and the water started leaving the basement." As a result of the flood, he ripped out the carpet and approximately 18 inches of gyproc; and removed the insulation so as to avoid mold. The Defendant testified that he did not use the drain again after the Thanksgiving Flood.

20. The Defendant testified that he did not restore the basement because he didn't use it. He noted that when he decided to sell the house, his realtor advised him to replace the gyproc and the flooring so as to get the best price, but he decided not to. In cross-examination he maintained that his realtor convinced him to fix the basement but that he didn't get around to it.

21. The Defendant testified that the information in the Property Disclosure Statement found under Sections 1 "Structural" and 11.1 "General" is a full disclosure of the flooding he experienced.

22. Referring to the picture of a portion of the basement wall in Exhibit No. 4, the Defendant testified that the photo shows a section of the gyproc he cut out of the basement wall, subfloor and interior basement wall; and that the black stuff is not mold but sealant. He indicated that he assumed the sealant was used during initial work on the house; and that the sealant only became visible when he removed the gyproc. He testified that when he sold the house, there were no wet areas or mold in the basement.

23. Concerning the printed message on the underside of the plywood covering the drain, the Defendant testified that he wrote the message on the board on the last day he was in the house after the sale:

DRAIN
↓
Open drain whenever 20 mm
or more rainfall is forecast

and you will never have
water problems
↓

Remove
←C*ap*
On
Drain

see paragraph 13 herein; and Exhibits 2 and 8. The Defendant testified that when he went through the house for the final time, he thought that if he had had that information during the 2016 Thanksgiving Flood, it would have helped. He maintains that he took the number "20 mm" out of thin air. He maintains that he wanted the homeowner to know there was a drain. He left the board up against the wall so that it could be seen. In cross-examination, the Defendant testified that he "didn't know where the drain went so it shouldn't be open all the time".

24. The Defendant was asked why, if he wanted the new owner to know there was a drain, did he not disclose it in the Property Disclosure Statement? The Defendant replied: "I don't know why I didn't mention it." When cross-examined on his failure not to disclose the drain, the Defendant maintained that he couldn't recall why he did not. He testified that he lived in the house for 11 years but only just discovered the drain at the time of the Thanksgiving Flood of 2016. He testified that a heavy workbench was over the drain and it was covered by cushion floor over plywood. He again confirmed that he thought the drain would be there because of a water pipe coming in from the city of Sydney.

25. The Defendant testified in cross-examination that he was unaware that the Claimant had had a walk through with the property inspector.

26. When asked again in cross-examination why he wrote the note on the drain cover and not disclose it, the Defendant replied: "It would have been nice had I known when I purchased the house where the drain was." And when asked again how he came to pick the number "20mm", he testified in cross-examination that he "just came up with the number" but had no reason why.

27. At the conclusion of evidence, Kelly O'Brien for the Defendant asked if she could submit evidence to the court of rainfall amounts for December 22, 2018. Steve Jamael for the Defendant had no objection. I directed both parties to submit to the Clerk of the Small Claims Court meteorological information for the period

December 21-23, 2018. I indicated that I would consider that information, upon receipt, in my reasons for decision.

28. According to the meteorological records files by the parties (see Exhibits 10 and 11), 29.1 mm of rain fell on December 22, 2018.

DECISION OF THE COURT

29. The issue before the Court is whether there was sufficient disclosure or inaccurate disclosure on the Property Disclosure Statement completed by the Defendant on November 20, 2018 (see Exhibit No. 1 and Exhibit No. 9, Tab 1) of a latent defect, i.e., major basement flooding. Indeed, I must first determine if the flooding of the basement could be considered a latent defect.

30. As Adjudicator David T.R. Parker noted in *Young* v. *Clahane*, 2008 NSSM 16 "[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:

> 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, at para. 11, where Adjudicator Andrew Nickerson quotes with approval the following passage from *Apogee Properties Inc.* v. *Livingston***,** 2018 NSSC 143: "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. 48.

32. 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 (at paras 3-9):

> [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]

Again, when it comes to the sale of a used home, the starting point is the doctrine of *caveat emptor* absent fraud, mistake or misrepresentation be it fraudulent, negligent or non-innocent.

33. In *Fiddes* v. *Beattie*, 2018 NSSM 21, Adjudicator Eric Slone, speaking of the nature of Property Condition Disclosure Statements, wrote (at paras 17):

> [17] It is well understood that in the PCDS the seller is only warranting the state of their knowledge. It is not a warranty as to the

> actual state of the property. A seller cannot be held legally responsible for what they do not know, or ought not reasonably to know. But there must be good faith. Sellers cannot profit from being wilfully blind to the state of affairs that would be obvious to a reasonable person.

The *Fiddes* case involved a well that proved inadequate to supply the home with water. Adjudicator Slone noted (at paras 21 and 27-28):

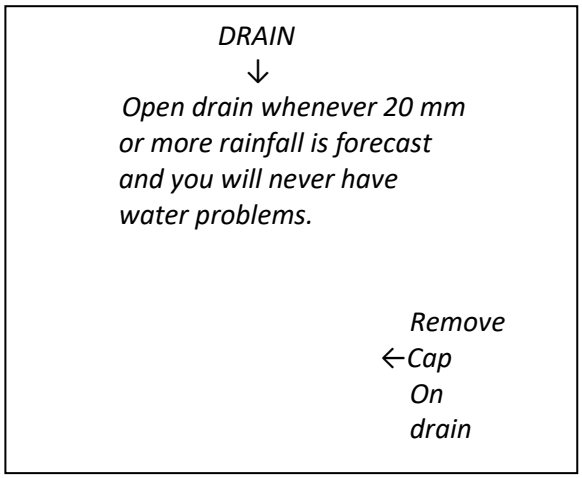
> [21] Courts have recognized that it is very difficult to prove that a seller wilfully misrepresented the state of their own knowledge. Only they know their own minds directly. But there are cases where knowledge can be imputed, based upon the evidence as a whole.
>
> …
>
> [27] In *Crann* [*Crann* v. *Hiscock*, 2012 NSSM 9], I commented on the law:
>
> > 13 There is no need to cite the well known case law. The PCDS is not a warranty. And buyer beware is still an underlying principle in the law.
> >
> > 14 However, if the PCDS is to have any purpose at all, it must be given effect when a statement turns out to have been untrue, under circumstances where it is more probable than not that the person making the statement knew or ought to have known that the statement was misleading and that the person receiving the statement would be actively misled. It is no answer to say that the Claimant might have asked for a flow test or a warranty. She didn't. If the law is going to excuse breaches of the PCDS on the basis that there are more stringent terms that can be extracted, we might as well stop using the PCDS.
>
> [28] I went on to award damages for a new well, with a reduction for "betterment."

In *Fiddes*, Ajudicator Slone considered the fact that within a few days of the Claimant's taking possession of the property, they experienced extremely low water pressure, a fact that informed his belief that it was "highly improbable that the well could have yielded enough water for a family of four, as warranted, and fall short of even meeting the needs of two people just two weeks after closing": see para. 31. He went on to address the issue of betterment (at paras 37-38) and levied a reduction in the compensation for a new well by 20% of the total estimate.

34. In the case at bar, the Defendant stated the following in the Property Disclosure Statement:

> **1. Structural**
>
> 1.1 Are you aware of any structural problems, unrepaired damage, dampness or leakage? √ Yes □No Thanksgiving Flood 2016.
>
> If yes, provide details: *abnormal flooding in Sydney—minimal gyproc damage – carpet.*
>
> 1.2 Are you aware of any repairs to correct structural damage, leakage or damage? √ Yes □No
>
> If yes, provide details: *lower 18" of gyproc removed as well as carpet.*
>
> [The following comment was written in the margin of document to the left of Sections 1 to 1.2 "Structural": "*The only time I experienced water problem at this home: 2016 Thanksgiving Day."*]
> …
>
> **Section 11. General**
>
> 11.1 Are you aware of any damage or hazards due to wind, water/flooding, erosion, wood rot, rodents or insects √ *Yes* □ No.
>
> If yes, provide details. *2016 Thanksgiving Day minimal damage to gyproc and carpet.*

However, in justaposition to those statements in the Property Disclosure Statement is the note handwritten by the Defendant on the inside of the plywood covering over the drain in the basement:



In addition, around the mouth of the drain in the floor were handprinted the words "*Drain*" on two sides with arrows pointing to the drain, itself (see Exhibit No. 8). I note that the printed note found in the margin adjacent to Sections 1 – 1.2 of the Property Disclosure Statement found in Exhibit No. 1 is not found in Exhibit No. 9, Tab 7. Legal Counsel for the Claimant clarified the content as the tops of some of the letters in the first line did not photocopy clearly. However, no objection was raised by the Defendant to this clarification or its attribution to the Defendant.

35. As Adjudicator Slone noted in *Fiddes*, supra:

> [I]f the PCDS is to have any purpose at all, it must be given effect when a statement turns out to have been untrue, under circumstances where it is more probable than not that the person making the statement knew or ought to have known that the statement was misleading and that the person receiving the statement would be actively misled.

The Claimant testified that when she read the handwritten notes under Sections 1 to 1.2 "Structural" of the Property Disclosure Statement, she thought the Defendant had repaired the damage and that was the end of the matter. She indicated that she wasn't concerned about the Thanksgiving Flood as her realtor told her that a lot of people had flooding during that event. In cross-examination, the Claimant maintained that it was clear from her walk through of the property that the carpet and lower gyproc had been damaged, but she related that flood damage to the Thanksgiving Flood of 2016. Once she took possession of the property, she proceeded to finish the basement with laminate flooring and gyproc at a cost of approximately $2000 so that her cousin and child could move in and help with expenses. Unfortunately, on December 22, 2018—just weeks after buying the home—29.1 mm of rain fell in the Sydney area and the basement flooded.

Further, in the case at bar, the Claimant had a property inspection completed and, in the section of the Inspection Report entitled "Comments," the following notation is found:

> [12] Hair line cracks in basement concrete foundation walls are non structural problem and not leaking water at the time of inspection but owner stated they did have one water leak and as discussed there were no signs of mold in basement at time of inspection.

It is unclear from the evidence where the property inspector got his information concerning the Defendant's statement that he had only one water leak, but it is consistent with the Property Disclosure Statement.

36. I accept that the Defendant did not have flooding in his basement prior to the 2016 Thanksgiving Day rainstorm that was a notorious and well-known rain event in Cape Breton if not in the entire Province of Nova Scotia. The Defendant had lived in the house for a total of 11 years, nine of which occurred prior to 2016. According to the Defendant, the basement was gyprocked, carpeted and a heavy workbench plus cushion floor and plywood was over the area of the drain at the time of the Thanksgiving Flood. He testified that "his common sense said there had to be a drain" and "he thought it might be there because of a water pipe coming in from Sydney." He proceeded to tear up the cushion floor and lift the plywood to reveal the drain. Five inches of water flooded the basement during the Thanksgiving Storm and he tore up the carpet and 18 inches of gyprock.

37. I cannot, however, accept the Defendant's evidence that he experienced no subsequent flooding. The note he wrote on the underside of the plywood cover over the drain on his last day in the home at 628 Cottage Road, Sydney, Nova Scotia, is evidence of knowledge on his part that the basement floods when a certain amount of rain falls. He wrote: "Open the drain whenever 20 mm or more of rainfall is forecast and you will never have water problems." This is direct contrast to his Property Disclosure Statement where he wrote:

> 1. **Structural**
>
> 1.1 Are you aware of any structural problems, unrepaired damage, dampness or leakage? √ Yes □No *Thanksgiving Flood 2016.*

If yes, provide details: *abnormal flooding in Sydney—minimal gyproc damage – carpet.*

1.2 Are you aware of any repairs to correct structural damage, leakage or damage? √ Yes □No

If yes, provide details: *lower 18" of gyproc removed as well as carpet.*

The following comment was written in the margin of the document to the left of Section 1 "Structural": "*The only time I experienced water problem at this home: 2016 Thanksgiving Day."*

The Defendant testified that he took the number 20mm out of thin air, that he just came up with the number. However, true to his projection, on December 22, 2018, when 29.1 mm of rain fell, the basement flooded. According to the meteorological data for December 2018, rainfall in excess of 20mm occurred only on December 22, 2018. In addition, he left the basement unfinished despite the urgings of his realtor to re-gyprock and carpet the basement so as to maximize the home's sale value. Unfortunately, when the Complainant did so after taking possession of the home, she lost her $2000 investment in gyprocing and laminating the basement to the flood waters on December 22, 2018. Based on all of the evidence before me, I find, on a balance of probabilities, that the Defendant did not truthfully and accurately respond to the questions in Sections 1.1, 1.2 and 11.1 of the Property Disclosure Statement concerning water/flooding in the basement.

38. I also find that the periodic flooding of the basement post-Thanksgiving Day 2016 was a latent defect that was not discoverable upon inspection. Further, the inconsistency between the Defendant's statements in the Property Disclosure Statement and the note he printed on the underside of the plywood covering of the drain belies his assertion that the only flood of which he was aware was the 2016 Thanksgiving Flood. I find that the Defendant made misrepresentations in the Property Disclosure Statement that turned out to be untrue in circumstances where it was more probable than not that the Defendant knew or ought to have known that the statement was misleading and that the Complainant would be actively misled by the statement.

39. In *Lawlor* v. *Currie*, 2007 NSSM 60, Adjudicator Michael O'Hara discussed the concept of betterment (at paras 54-56):

[54] In ***Thomson et al v. Schofield***, [2005] N.S.S.C. 38, Justice Warner allowed a deduction for betterment in respect of repairs to a basement. At paragraph 55 he states:

> *...Where there will be an enhancement of the value of the property as a result of the required repairs it is recognized that a deduction for that betterment should, in many instances, be allowed.*

[55] As I understand it, this approach is consistent with the general theory of damages which, to the extent money can, is intended to put the aggrieved party in the position they would have been in but for the breach of contract or the breach of the duty of care in negligence. A damage award should not put the aggrieved party in a better position than they would have been in but for the breach.

[56] Thus, where some part of a dwelling is replaced with a brand new and improved system as compared to what was there, a deduction can be made for the resulting betterment.

See also *Doherty* v. *Rethman*, 2015 NSSM 13.

40. In the case at bar, the Complainant asserted throughout her evidence that she asked the contractors from whom she sought repair quotes to give her a dry basement. It is clear from the quotes that in attaining a dry basement, the Claimant also will be acquiring a re-asphalted driveway, a new front and back deck, and grass sodding in addition to trenchwork and repairs to the foundation. The Claimant accepted that she was buying a home that needed some repairs in the basement as per her testimony. However, if all were to be done as outlined in the estimates, the value of the property will be enhanced and the Claimant will be in a better position than she would have been but for the Defendant's negligence.

41. Based on an average estimate repair of $35,000.00, I am applying a betterment cost of 50% against the full cost of repairs for a final award of $17,500.00.

42. I also am awarding court costs in the amount of $199.35.

43. Judgement for the Claimant as follows: Damages of $17,500 plus court costs of $199.35 for a total of $17,699.35.

Adjudicator
Patricia Fricker-Bates

April 26, 2021