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Known dangerous defects must be disclosed by vendor

Does the doctrine of "buyer beware" allow a seller to conceal the mere possibility that there is a potentially dangerous condition in a house? That was the issue in a case heard earlier this year in Edmonton.

In April 2005, George and Lisa Gibb bought a house in Leduc County, Alta., from Earl and Sherry Sprague. Prior to signing the purchase agreement, the buyers inspected the house three times, and found nothing wrong except some issues with the electrical panel.

Upon taking possession after closing, the purchasers discovered that there was an infestation of carpenter ants in the ceiling of a bedroom and in the roof of the house. As a result, they had to remove the entire roof of the house and replace it with a metal roof.

In the fall of 2005, the owners' son became ill with a headache and cold-like symptoms. The family pediatrician suggested that the symptoms might be due to mould in his basement bedroom.

On inspecting the basement drywall, the owners discovered mould to a height of three feet on the exterior walls, and rust on the bottom of the metal basement support posts.

At about the same time, the Gibbs found that the basement wiring did not comply with the building code, and that the circuits were overloaded.

Unhappy with the condition of the home, the Gibbs sued the Spragues for repair costs alleging that the sellers knew about the defects and fraudulently misrepresented their existence.

In law, whether or not a vendor is responsible for repairing defects in a home depends, to some extent, on whether the defects are found in law to be patent or obvious, or latent meaning hidden.

The case was tried before Justice Donald Manderscheid in Edmonton last April.

In his written decision, the judge ruled that the electrical defects were patent defects, and the doctrine of *caveat emptor* buyer beware applied.

The judge ruled that the buyers failed to take reasonable steps to determine the full extent of the electrical problems. As a result, they had to bear the cost of the repairs.

Based on the evidence at trial, the judge was satisfied that the basement leaks and roof infestation were hidden defects because it was unlikely that they could have been discovered on a simple visual inspection of the house without removing portions of the roof and basement drywall.

"I believe," wrote the judge, "that the (sellers) were neither subjectively aware as to the existence of the roof defect, nor did they act in a reckless manner in regards to the roof defect." As a result, he dismissed the buyers' claim for replacement of the roof.

On the issue of the mould in the basement, the judge ruled that the active concealment by the vendors of the mould and a false statement by Sherry Sprague about previous water in the basement amounted to the making of a fraudulent misrepresentation.

The judge wrote that when sellers have experienced a flood in their basement, "it is ... reasonable to expect (them) to advise potential purchasers of the property as to the circumstances (of the flood) ... The Defendants' failure to fulfill this expectation and to advise the Plaintiffs as to the existence of the basement defect amounts to a reckless disregard for the safety of the Plaintiffs and their family."

As a result, the Spragues were found responsible for their "reckless behaviour" relating to the history of flooding in the basement and the resulting possibility of the presence of mould. They owed a duty to the buyers to disclose the defect and they did not. Despite the caveat emptor doctrine, the sellers were ordered to pay the buyers damages of $12,186.45 for repairing the drywall.

It's clear from the ruling in Gibb v. Sprague that there is a duty on a vendor to disclose a known but hidden defect which makes a home dangerous, and to disclose any known circumstances which are likely to result in danger.

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Gibb v. Sprague, 2008 ABQB 298 (CanLII)

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Noteup: Search for decisions citing this decision

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Decisions cited

- Brown v. Atlantic Insurance Company Ltd., 1996 CanLII 6603 (NL S.C.T.D.) [1996] 142 Nfld. & P.E.I.R. 259
- Cardwell et al v. Perthen et al, 2006 BCSC 333 (CanLII)
- Franks v. Golunski, 2005 ABPC 109 (CanLII)
- Graham v. Johnston, 2003 MBQB 299 (CanLII)
- Hadubiak v. Wiebe, 2003 SKPC 141 (CanLII) (2003), 246 Sask. R. 5
- Jenkins v. Foley, 2002 NFCA 46 (CanLII) [2002] 215 Nfld. & P.E.I.R. 257
- Palmer v. Van Keulen, 2005 ABQB 239 (CanLII)
- Temple v. Thomas, 2007 ABQB 316 (CanLII) (2007), 76 Alta. L.R. (4th) 128

- Thomas v. Blackwell, 1999 SKQB 168 (CanLII)
- Turner v. Visscher Holdings Inc., 1996 CanLII 1436 (BC C.A.) (1996), 23 B.C.L.R. (3d) 303
- Volk v. Stenstrom, 2003 SKPC 48 (CanLII)
- Warriner v. Kiamil, reflex (1998), 132 Man. R. (2d) 190

Court of Queen s Bench of Alberta

Citation: Gibb v. Sprague, 2008 ABQB 298

Date: 20050521

Docket: 0603 08450

Registry: Edmonton

Between:

George William Bradley Gibb and Lisa Allen Gibb

Plaintiffs

- and -

Earl L.H. Sprague and Sherry L. Sprague

Defendants

Memorandum of Decision

of the

Honourable Mr. Justice Don J. Manderscheid

Introduction

[1] The Plaintiffs purchased from the Defendants the House that is the subject of this action. On and after the possession date the Plaintiffs discovered several significant and material defects (the Defects) in the condition of the House. In order to remedy the Defects, the Plaintiffs were required to expend money and perform work to the House. The Plaintiffs now bring this action against the Defendants for recovery of the moneys expended and the value of the work carried out by the Plaintiffs to remedy the Defects. The Plaintiffs allege that the Defects are all latent defects and that the Defendants fraudulently misrepresented the state of the House in regards to the Defects. In defence, the Defendants maintain that the Plaintiffs claim is barred by certain provisions of the relevant Rural Real Estate Purchase Contract and that the Defects are all patent or latent defects which by virtue of the principle of *caveat emptor*, the Defendants are not liable to the Plaintiffs.

Facts

[2] The following is a brief summary of the facts. On April 13, 2005 the Plaintiffs entered into a Rural Real Estate Purchase Contract (the Purchase Agreement) with the Defendants for the purchase of the land together with the buildings thereon and being located in the municipality of Leduc County, in the Province of Alberta and legally described as:

Plan 7820680

Lot 7

Excepting thereout all mines and minerals

(the House).

[3] Prior to entering into the Purchase Agreement with the Defendants, in April of 2005, the Plaintiffs inspected the House to determine whether there were any defects or other problems with the condition of the House. At the time of this inspection, the Defendants were not present. The Plaintiffs personal inspection of the House did not reveal any significant and/or material defects in the condition of the House.

[4] The husband Plaintiff returned again in April of 2005 with his father-in-law and his friend, David Bendick. At the time of this inspection, the Defendants were present. The husband Plaintiff brought David Bendick on the inspection as he was an electrical designer with 27 years electrical experience and the husband Plaintiff wanted him to view the electrical system of the House. The inspection by the husband Plaintiff and David Bendick of the electrical system of the House involved in particular, the basement electrical panel of the House. This inspection revealed that the panel directory was not in good order and 2 sub panels had been added without adequate labelling but otherwise the inspection did not reveal any significant and/or material defects in such electrical system. At this time, the husband Plaintiff also inspected the roof of the House and determined that it would not need replacement for 5 to 7 years.

[5] After the second inspection, the Plaintiffs submitted an offer to the Defendants to purchase the House for $500,000. At this time, the Plaintiffs expressed their desire to the Defendants realtor that they wished to obtain a Home Inspection Report for the House. The Defendants realtor advised the Plaintiffs that in February of 2005 a previous interested buyer had obtained a Home Inspection Report for the House and the Plaintiffs were provided with a copy of such Home Inspection Report. From a review by the Plaintiffs of the Home Inspection Report, the Plaintiffs determined that it did not reveal any significant and/or material defects in the condition of the House and that from their inspection of the House, the Defendants had rectified the matters requiring rectification as identified in the Home Inspection Report.

[6] The Defendants then submitted a counter-offer to the Plaintiffs to sell the House for $525,000, which counter-offer was accepted by the Plaintiffs and which counter-offer resulted in the entering into of the Purchase Agreement.

[7] Subsequent to signing the Purchase Agreement, the Plaintiffs, together with their children and their realtor went to view the House. At this time, the Defendants were present and the husband Plaintiff questioned the husband Defendant about the state of the House s hot tub. Apparently, the husband Plaintiff was satisfied with the advice given by the husband Defendant. Further, the wife Plaintiff noticed Glade plug-in deodorizers in the basement of the House. She also asked the wife Defendant have you ever had water in the basement? , to which the wife Defendant apparently shook her head indicating a no response.

[8] On July 15, 2005, the possession date, the husband Plaintiff, together with his realtor and their associates, went to do the final inspection of the House. At this time, the Defendants were present. During this inspection, the husband Plaintiff noticed what appeared to be a small pile of debris in one of the bedrooms of the House. Subsequent to such inspection, the transaction for the purchase and sale of the House closed. On the same date of the closing, the husband Plaintiff noticed that the pile of debris in one of the bedrooms had grown significantly. Upon further inspection it was determined that the debris was caused by carpenter ants in the ceiling of the House (the Roof Defect). The husband Plaintiff also noticed ant powder in the hot tub room of the House, in the shrubs surrounding the House and two containers of ant powder in the garage. When questioned, the Defendants advised that although they had an ant problem outside of the House, they had never had an ant problem inside the House.

[9] The husband Plaintiff then contacted a pest control company named Eco Pest to deal with the Roof Defect. As a result of the Roof Defect, the inside of the House was sprayed with an insecticide by Eco Pest. The husband Plaintiff then removed the roof of the House which disclosed an infestation by carpenter ants. These ants were then sprayed by Eco Pest. The Plaintiffs then replaced the original roof of the House with a metal roof.

[10] In the Fall of 2005, the Plaintiffs son, who had his bedroom in the basement of the House, became ill with a headache and cold-like symptoms. The wife Plaintiff then took her son to the son s paediatrician who asked her to check for mould in the House. Following this advice, the wife Plaintiff removed the base boards in her son s bedroom and in the basement bathroom, which removal disclosed the presence of mould (the Basement Defect). The drywall on the exterior walls was also inspected and mould was found to a height of three feet on the drywall. After removing the inside walls of the basement, the Plaintiffs also noticed that the telepost supports were rusted 2 to 3 inches from the floor. The Plaintiffs then sealed off the basement and relocated the son to the up-stairs of the House. Shortly thereafter, the Plaintiffs son became well. In order to remedy the Basement Defect, the Plaintiffs removed the majority of the interior improvements to the basement, cleaned the basement and removed any mould and reconstructed the basement improvements.

[11] After a few months from the possession date, the Plaintiffs noticed that when certain electrical appliances were used, the breaker switches in the House would blow. The husband Plaintiff and his friend David Bendick then inspected the basement wiring. From such inspection, they observed that the electrical wiring of the basement of the House was done improperly and the already existing circuits were overloaded and in contravention of the building codes (the Electrical Defect). The husband Plaintiff and his friend David Bendick then rectified the Electrical Defect. Apparently, no permit or approval had been obtained by the Defendants for the basement wiring.

[12] In order to repair and rectify the Defects the Plaintiffs were required to carry out work and incurred out‑of‑pocket expenses. The work carried out by the Plaintiffs and the out‑of‑pocket expenses incurred by the Plaintiffs included, but were not limited to the following:

(a) With regards to the Roof Defect, costs for the extermination of the carpenter ant infestation and for the repair and replacement of the roof of the House.

(b) The costs for the repair of the leaking hot tub and the re‑construction of the hot tub enclosure and clean‑up of the mould problem (the Hot Tub Defect).

(c) With regards to the Basement Defect, costs for the clean‑up of the mould problem and repair and replacement of the walls.

(d) With regards to the Electrical Defect, costs for the repair and replacement of basement subpanels, rewiring to comply with building codes and the creation of new circuits to feed the previously overloaded circuits.

[13] The Plaintiffs allege that the Defendants knew about the Defects and fraudulently misrepresented the existence of the Defects prior to the execution of the Purchase Agreement. Furthermore, the Plaintiffs allege that they relied upon the representations and/or lack of representations made by the Defendants when they entered into the Purchase Agreement with the Defendants, and as a result of the fraudulent misrepresentations by the Defendants and the reliance by the Plaintiffs on the misrepresentations, the Plaintiffs were induced to enter into the Purchase Agreement with the Defendants.

[14] At the conclusion of the trial, counsel for the Plaintiffs advised the Court that the Plaintiffs were not advancing their claim in regards to the costs associated with the Hot Tub Defect. Accordingly, for the purposes of this Decision, reference to the term Defects shall not include the Hot Tub Defect, and the Court will not rule in regards to the Plaintiffs claim for the costs associated with the Hot Tub Defect.

Issues

[15] From these facts, the following issues arise:

(a) Will the principle of *caveat emptor* bar the Plaintiffs claim?

(b) Are the Defects patent or latent?

(c) Did the Defendants have knowledge as to those Defects that were latent, or were they reckless as to the existence of the latent defects?

(d) Did the Defendants make a fraudulent misrepresentation to the Plaintiffs as to the existence of those Defects that were latent?

(e) Did the Plaintiffs rely upon the Defendants fraudulent misrepresentation as to the existence of those Defects that were latent?

(f) Did those Defects that were latent make the House unfit for habitation or take away from the Plaintiffs use, occupation or enjoyment of the House as a whole?

(g) Does the Purchase Agreement exclude the Plaintiffs claims based in tort?

(h) What is the quantum of damages?

Analysis

Will the principle of *caveat emptor* bar the Plaintiffs claim?

[16] In the context of real estate transactions the general rule of law is that the closing of the transaction will effectively extinguish contractual rights that existed prior to closing and the principle of *caveat emptor* or let the buyer beware applies. Accordingly, this principle will bar recovery of a claim concerning defects that are complained of by a purchaser subsequent to the closing of the transaction. The supportive reasoning for the principle of *caveat emptor* relative to real estate transactions was aptly stated by Lefever J., in ***Beaulne v. Ellenor***, 274 A.R. 286 at para. 22 as follows:

> *Alessio v. Jovica* (1973), [1974] 2 W.W.R. 126 (Alta. C.A.) (herein "*Allessio*") set forth the long-standing general rule of law which applies to the purchase and sale of real estate is that of *caveat emptor*, or "let the buyer beware". The underlying theory of this rule is that the purchaser is able to address through warranties and conditions those special matters that are relevant to the purchaser and are essential matters of fact or quality which underly the purchaser's willingness to acquire the property. Put from the vendor's perspective, it is seen as unreasonable for the vendor to become in effect a guarantor or insurer to the purchaser for things which were not made known by the purchaser to the vendor at the time of negotiation and consummation of an agreement of purchase and sale.

[17] Despite the pragmatic reasoning for the continued application of the principle of *caveat emptor*, over time exceptions to its operation have developed. Circumstances where *caveat emptor* will not operate to deny a plaintiff recovery were summarized by Sullivan J. in ***Temple v. Thomas***, 2007 ABQB 316 (CanLII), 2007 ABQB 316 at para. 39:

> In the context of real estate transactions it generally is accepted that the closing of the transaction extinguishes contractual rights which may exist prior to closing and the principle of caveat emptor applies. There are however limited exceptions to this rule: *Di Cenzo Construction Co. v. Glassco* (1978), 21 O.R. (2d) 186 (Ont. C.A.) leave to appeal to the S.C.C. refused [1978] 1 S.C.R. vii (note) (S.C.C.) at 199:
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> > After the closing of the transaction, a purchaser is generally restricted to the covenants, conditions and warranties set forth in the conveyance. Apart from the conveyance, relief can only be obtained in the case of (1) fraud, (2) a mutual mistake resulting in a total failure of consideration or a deficiency in the land conveyed amounting to error in substantialibus, (3) a contractual condition, or (4) a warranty collateral to the contract which survives the closing:

[18] In the instant case, the Plaintiffs allege that the Defects are latent defects and the Defendants in failing to alert the Plaintiffs to such Defects are guilty of a fraudulent misrepresentation. Consequently, they argue that given that fraud is an exception to the operation of *caveat emptor*, the Defendants are responsible for the costs incurred by the Plaintiffs in rectifying the Defects. It is therefore crucial to a determination of such allegation to ascertain if the Defects are patent or latent.

Are the Defects patent or latent?

[19] The distinction between what constitutes a patent or a latent defect is a prerequisite to determining the extent of a vendor s obligation of disclosure under the principle of *caveat emptor*. Patent defects are those that can be discovered by conducting a reasonable inspection of the property and making reasonable inquiries into its qualities. The vendor is not obliged to call patent defects to the purchaser s attention. In the case of patent defects, the purchaser must rely upon their own personal inspection. Accordingly, absent concealment of such defects by the vendor, the purchaser cannot complain of such defects and *caveat emptor* will apply. On the other hand, a latent defect is one that could not have been identified by a purchaser upon a reasonable inspection of the property. For that reason, a latent defect known to a vendor must be disclosed to the purchaser. Should a vendor fail to disclose to a purchaser a known latent defect, *caveat emptor* will not bar a purchaser s claim for damages resulting from such failure to disclose.

[20] The extent of the purchaser s obligation to inspect and make inquiries as to the state of the property is, in some respects, the determining factor in defining whether a defect is patent or latent. In the instant case, we have the Basement Defect, the Roof Defect and the Electrical Defect. Are these patent or latent?

[21] With respect to the Basement Defect, it is highly unlikely that an ordinary purchaser such as the Plaintiffs, could during the course of a reasonable inspection of the House, have uncovered the mould which gives rise to the Basement Defect. In this sense, although the husband Plaintiff affirmed during cross examination, that on the initial inspection of the basement, he thought the basement smelled musty , and that the wife Plaintiff testified that on such inspection, she observed an undeterminable smell in the basement, this in itself is not sufficient to warrant a finding that the Basement Defect was a patent defect. More is required and short of removing the baseboards and dry wall in the basement of the House, there was virtually no way that the Plaintiffs could have, through a reasonable visual inspection, ascertain the presence of mould in the basement. The Basement Defect was therefore a latent defect.

[22] As to the Roof Defect, the Plaintiffs, either together or accompanied by their realtor, family or friends, had inspected the House no less than three times prior to taking possession of the House. During these inspections, the Plaintiffs or their accompanying persons failed to notice the presence of the carpenter ants which constitutes the basis for the Roof Defect. In this respect, the husband Plaintiff testified that on the possession date, after discovering the carpenter ants, he found very few ant carcasses present in the House. He further testified that on the day following the possession date, other piles of ant debris had been created in the bedroom by the carpenter ants. I am satisfied from the evidence provided that the Roof Defect could not have been ascertained on a visual inspection of the House and could only have been discovered by the Plaintiffs removing portions of the roof of the House. The Roof Defect was therefore a latent defect.

[23] In regards to the Electrical Defect, the husband Plaintiff testified that on his second visit to inspect the House in April of 2005, the husband Plaintiff was accompanied by his father-in-law and his friend, David Bendick. The husband Plaintiff further testified that he had brought David Bendick on the inspection as he was an electrical designer with 27 years electrical experience and the husband Plaintiff wanted him to view the electrical system of the House. David Bendick testified that as a result of the personal inspection carried out by himself and the husband Plaintiff of the electrical system of the House, it was revealed that the basement s electrical panel directory was not in good order and 2 sub panels had been added without adequate labelling. Otherwise, David Bendick testified that the inspection did not reveal any significant and/or material defects in the electrical system of the House. David Bendick further testified that after the possession date the Plaintiffs noticed that when certain electrical appliances were used the breaker switches in the House would blow. He was then requested by the Plaintiffs to further inspect the electrical system of the House. David Bendick testified that when, at this time, he inspected the basement wiring of the House, he observed that the electrical wiring of the basement was done improperly and the already existing circuits were overloaded and in contravention of the relevant building codes. The husband Plaintiff testified that to his knowledge, no permit or approval had been obtained by the Defendants for the basement wiring.

[24] In ***Calder v. Martin***, 2007 A.J. 1410, O Ferral J., in dealing with a similar electrical fact situation held that certain electrical deficiencies in a house were patent defects as the purchaser was alerted to their presence by their own independent home inspector s report. In this respect, O Ferrall J. noted at para. 37:

> . . . The report by the home inspector pointed out certain facts which, Defendants' counsel argued, ought to have alerted the purchasers to the electrical system deficiencies. For example, the Plaintiff's home inspector specifically noted that the home's electrical panel was located in the newly constructed basement bathroom. According to the testimony of the Plaintiff's own electrical expert, the presence of an electrical panel in the bathroom is a blatant Code violation. Other Building Code violations found by the Plaintiff's electrician included the absence of bathroom exhaust fan and a smoke detector, an inadequate number of receptacles in the walls in the basement, the absence of a threeIway switch at the top and bottom of the basement stairs. All these Building Code violations were patent in the sense that they could have been easily observed by someone with specialized knowledge. But the Plaintiff's electrical expert testified that without that specialized knowledge, your average home inspector might not have picked it up; and in fairness to the Plaintiff's home inspector, his report indicates that his electrical inspection was limited: . . .

[25] Furthermore, in ***Franks v. Golunski***, 2005 ABPC 109 (CanLII), 2005 ABPC 109, Scott J., was also faced with a fact situation where the purchaser had taken a friend who was a journeyman plumber along on an inspection of the house s plumbing and subsequent to the closing defects in the house s plumbing manifested themselves. In concluding that the purchaser could have, on a reasonable inspection, discovered the plumbing defects and in holding that they were patent defects, Scott J., at paras. 11-12 stated:

> Mr. Squires was asked by the plaintiff to examine the plumbing in the premises prior to possession date. He did so and found nothing amiss. He admitted, however, he could not remember examining the bathroom or lifting the drain cover which is obvious in the photos. Had he done so, he and through him, the plaintiff would have been aware that the kitchen drain was improperly connected. Further, the plaintiff admitted washing his paint brushes in the kitchen sink prior to the explosion. The evidence of Mr. Kitchen was that washing paint brushes is a sink not properly vented is dangerous. In my view, the plaintiff should have been aware of the improper plumbing connection, on proper inspection, and had he been so, he would have been aware that paint fumes accumulation at the drain could be dangerous. It must be remembered that these renovations had been carried out some 20 years ago and there was no evidence that would indicate any previous problems.
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> In my view, caveat emptor still applies when all these facts are taken into account.

[26] In the instant case, two things must be noted in regards to the Electrical Defect. Firstly, in his testimony David Bendick confirmed that although he is not a certified journeyman electrician, he is an electrical designer with 27 years electrical experience and that the husband Plaintiff brought him on the second inspection for the primary purpose of inspecting the electrical system of the House. Secondly, during the second inspection, when it was determined by David Bendick that the basement s electrical panel directory was not in good order and 2 sub panels had been added without adequate labelling, the Plaintiffs were placed on notice as to the existence of defects in the House s electrical system. Despite this notice, the Plaintiffs failed to take steps to ascertain for themselves the precise state of the House s electrical system either through further investigation or inquiry of the Defendants as to the reason for the known electrical defects. Given that such further steps would have disclosed the Electrical Defect, such defects are to be considered as patent defects and *caveat emptor* will bar recovery by the Plaintiffs of their claim in this regard. I therefore dismiss the Plaintiffs claim in regards to the Electrical Defect.

Did the Defendants have knowledge as to the Defects that were latent, or were they reckless as to the existence of the latent defects?

[27] With respect to both the Roof Defect and the Basement Defect, I have concluded that both were latent defects. I would further conclude that the Defendants lacked actual knowledge as to their existence. In particular, I would note from the husband Plaintiff s testimony, that subsequent to the initial discovery of the carpenter ants in the House, the piles of ant debris would appear to have multiplied within a very short period of time. Although coincidental, the fact that the speed in which the ant presence became known to the husband Plaintiff would support the Defendants contention that they had no actual knowledge as to the Roof Defect. However, can less than actual knowledge as to the existence of a latent defect negate the vendor s defence of *caveat emptor*? In ***Cardwell v. Perthen***, 2006 BCSC 333 (CanLII), 2006 BCSC 333, Ballance J., at para. 129, answered this question as follows:

> It is clear that subjective knowledge of an undisclosed latent defect which may be dangerous or make the property uninhabitable is sufficient to negate a vendor's defence of caveat emptor. In *McCluskie* at para. 54, Bennett J. suggests that something less than actual knowledge may be sufficient to ground liability:
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> > In conclusion, I find that although the law of vendor and purchaser has long relied on the principal of caveat emptor to distribute losses in real estate cases, the rule is not without exception. Two major exceptions are in the case of fraud, and in cases where the vendor is aware of latent defects which he does not disclose. The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist. It is up to the plaintiff to prove this degree of knowledge or recklessness.

[28] With respect to the Roof Defect and any aspect of knowledge on the part of the Defendants in that regard, is the testimony of the husband Plaintiff to the effect that on the possession date, he noticed ant powder in the hot tub room of the House, in the shrubs surrounding the House and two containers of ant powder in the garage. During the husband Defendant s testimony, he stated that he was allergic to bees and it was therefore crucial to his health that any presence of bees in the House be eliminated immediately. He further testified that on several past occasions they had required the services of a pest control company to deal with a bee infestation in the roof of the House, and that at no time was he or his wife advised by such pest control company as to the presence of ants in the roof of the House. As to the ant powder, during his testimony, the husband Defendant stated that he was aware of ants on the grounds surrounding the House and he placed the ant powder around the House and adjacent landscaping as a means of preventing ants from entering the House. I believe that the Defendants were neither subjectively aware as to the existence of the Roof Defect, nor did they act in a reckless manner in regards to the Roof Defect. I therefore dismiss the Plaintiffs claim in regards to the Roof Defect.

[29] With respect to the Basement Defect, the Defendants admitted during their testimony that prior to entering into the Purchase Agreement with the Plaintiffs, the basement of the House had in 1998, been flooded by 2 to 3 inches of water. The wife Defendant further testified that at that time she had a company that specialized in flood damage attend at the House and dry the basement and she had the basement carpet cleaned. In their respective testimony, both Defendants denied having any knowledge of clues that would indicate to them that, as a result of the flooding of the basement, mould was now present in the basement of the House. Accordingly, although the Defendants were not subjectively aware of the Basement Defect, were they reckless as to the existence of the Basement Defect?

[30] In this respect, from the evidence provided it can be concluded that when the basement of the House flooded, the Defendants took immediate steps to deal with the flood situation. Further, the wife Defendant did state in her testimony that she had advised both her realtor and a previous interested buyer that the basement had flooded because such persons had asked her if such flooding had taken place.

[31] The Defendants knew that the Plaintiffs had children who it can be assumed would be occupying the basement of the House. It is also common knowledge that the presence of a sufficient quantity of mould in a house can impair the health of the occupants of the house. This is especially so where one particular individual spends a large part of their time in close proximity to the mould. In such a situation, it is reasonable to assume that the ill effects of the mould on that individual will manifest themselves first and to a greater degree than other occupants who spend less time where the mould is present. This is precisely what took place in the instant case. As stated previously, in the Fall of 2005, the Plaintiffs son, who had his bedroom in the basement of the House, became ill with a headache and cold-like symptoms. The advice of the son s paediatrician was that mould could be the cause of the son s illness. After the mould was detected by the wife Plaintiff in the basement of the House and the son relocated to the up-stairs of the House, the Plaintiffs son became well. As a result of the mould in the basement of the House, it caused a member of the Plaintiffs family to become ill. Had the cause of such illness not have been detected by the Plaintiffs it is a sad thought to speculate the harm that could have been caused.

[32] Based upon the evidence provided, I believe that it is reasonable to expect that individuals such as the Defendants who have their basement flooded, and albeit dried, would subsequent to the flooding, inspect the basement for signs of the presence of mould. In ***Cardwell v. Perthen***, Ballance J., at para. 132, in coming to much the same conclusion stated:

> . . . I conclude that from time to time Mr. Perthen experienced, at a minimum, leaks in the roof at a skylight area and between the living and family rooms. They were problematic, persistent leaks. He knew or was reckless about whether these leaks would bring mold into the premises. . . .

[33] It is furthermore reasonable to expect such individuals to advise potential purchasers of the property as to the circumstances surrounding a flood situation of one s home. The Defendants failure to fulfill this expectation and to advise the Plaintiffs as to the existence of the Basement Defect amounts to a reckless disregard for the safety of the Plaintiffs and their family.

[34] In ***Temple v. Thomas***, Sullivan J., in discussing the repercussions to a defendant who acts in a reckless manner towards the plaintiff in regards to a latent defect stated at para. 47:

> Having reviewed these cases and the principles upon which they rely, I find that there is ample support for the proposition that a vendor who has knowledge of, or who is unaware of latent defects on his property but for his own recklessness, has a duty to disclose them during the sale of that property. The cases also indicate that silence as to the existence of those defects amounts to a misrepresentation such that the principle of *caveat emptor* will not apply.

[35] Given the Defendants reckless behaviour in regards to the flooding of the basement and the resulting possibility of the presence of mould, it can be concluded that the Defendants owed a duty to disclose to the Plaintiffs the previous flooding of the basement and the resulting Basement Defect.

Did the Defendants make a fraudulent misrepresentation to the Plaintiffs as to the existence of those Defects that were latent?

[36] The Plaintiffs allege that the Defendants are guilty of a fraudulent misrepresentation in regards to the Defects. I have already dismissed the Plaintiffs claim in regards to the Electrical Defect and the Roof Defect. That leaves only the Basement Defect to consider in regards to a fraudulent misrepresentation. In ***Graham v. Johnston***, 2003 MBQB 299 (CanLII), 2003 MBQB 299, Schulman J., at para. 4, in discussing what constitutes a fraudulent misrepresentation stated:

> In the case of *Warriner v. Kiamil* reflex, (1998), 132 Man. R. (2d) 190 (Man. Q.B.), Beard J. reviewed Manitoba law touching on the circumstances in which a purchaser might recover damages from a vendor for problems discovered after closing. Of the possible bases referred to in the judgment, the purchasers in this case allege fraud. Fraud, in this context, was defined in *Peek v. Derry* (1889), 14 A.C. 337 (U.K. H.L.) as a false representation of fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false. In dealing with an allegation of fraud in a civil action, one should keep in mind that the fraud must be proved on a balance of probabilities commensurate with the seriousness of the allegation and nothing short of that will suffice. In this case, the purchasers allege that the fraud was committed in two ways: firstly, by concealment; and secondly, by deliberate misstatement.

[37] With respect to the Basement Defect, the Plaintiffs allege that the Defendants both concealed and made a false statement as to the presence of the Basement Defect.

[38] The aspect of concealment relates to the change in the circumstance of the smell of the basement from one point in time to another. As stated previously, the husband Plaintiff confirmed during cross examination, that on the initial inspection of the basement, he thought that the basement smelled musty and that the wife Plaintiff testified that on such inspection, she observed an undeterminable smell in the basement. Later we are told by the wife Plaintiff in her testimony that on a later inspection, the wife Plaintiff noticed Glade plug-in deodorizers in virtually every outlet in the basement of the House. The wife Defendant s explanation for the presence of the Glade plug-in deodorizers was to mask the smell of her smoking which she stated was offensive to her husband. It is to be recognized that it is not uncommon in the sale of real property, during an inspection or open house, to use deodorizers as a means of eliminating unwanted odours. See ***Beaulne v. Ellenor***, at para. 4, where candles were noticed by the purchaser burning in the house during an inspection which resulted in a fairly strong and not unnecessarily unpleasant smell and the explanation given by the vendor was that she had been advised by a realtor that the presence of scented candles made selling the property easier. However, in the instant case, the noticeable change in the circumstance of the smell of the basement from one point in time to another raises an element of suspicion and begs the question as to why such deodorizers were not present during the husband Plaintiff s initial inspection of the House. If the wife Defendant s explanation were to be accepted then, as is the case with most individuals who smoke, even periodically, use by the Defendants of the Glade plug-ins would have been continuous and not sporadic. In my opinion, the evidence supports the conclusion that the Defendants either knew or were suspicious as to the presence of mould in the basement of the House. The use by the Defendants of the Glade plug-ins was for the purpose of misleading or allaying the Plaintiffs suspicions as to the presence of the smell of such mould. This conduct on the part of the Defendants amounts to active concealment by them of the Basement Defect and is sufficient evidence for me to find fraudulent misrepresentation. This conclusion is much the same as that reached by Andrekson J., in ***Nash v. McMillan***, 1997 A.J. 892 at para. 35:

> In my view, on a balance of probabilities, the Defendant's representations as to the condition of the roof were false and the Defendant did not honestly believe them to be true. Although I believe that the evidence supports active concealment by the Defendant, meaning that her misrepresentations were indeed knowing and deliberate, even if such active concealment were not proved, the evidence is, in my opinion, still sufficient to prove that the Defendant must have had strong suspicions that problems existed with the roof and, accordingly, her conduct with the Plaintiffs was calculated to mislead them or to lull their suspicions. This, according to *Derry v. Peek (supra)* and its progeny, is enough for me to find fraudulent misrepresentation.

[39] The second part of the allegation of fraud relates to a conversation concerning whether the basement of the House had been flooded. The wife Defendant stated in her testimony that she had advised both her realtor and a previous interested buyer that the Defendants had previous water in the basement, because such persons had asked her if such event had taken place. She further testified that she never told or was asked by either of the Plaintiffs if the Defendants ever had water in the basement. On the other hand, the wife Plaintiff testified that on one inspection of the House, she asked the wife Defendant have you ever had water in the basement? , and in answer, the wife Defendant apparently shook her head indicating a no response. The allegation is that the answer was false and that the wife Defendant either knew that it was false or was wilfully blind to the fact. The Court has had the benefit of the respective testimonies of the wife Plaintiff and the wife Defendant in regards to this conversation. This then is a matter of credibility. I believe that given that both the Defendants realtor and a previous interested buyer had questioned her as to whether the Defendants ever had water in the basement, the wife Defendant knew that an affirmative answer may adversely effect the marketability of the House. It is therefore logical to assume that she would either choose not to disclose to a potential buyer such as the Plaintiffs as to previous water in the basement or deny the fact altogether.

[40] In ***Temple v. Thomas***, Sullivan J., in discussing the silence or misstatement by a vendor to a purchaser of a latent defect stated at para. 55:

> The Defendant's conduct in selling the property displayed a similar pattern of willful blindness to the condition of the property and his own responsibilities in the

transaction. He advertised the property as 'newly renovated' and sold it using his agent in such a way that he never had contact with potential purchasers. The authorities above make it clear that silence or failure to disclose the existence of a latent defect can amount to a misrepresentation. Despite the absence of evidence that he intended to misrepresent the property, his failure to disclose the circumstances of the renovation and condition of the property take him outside of any protection offered by the principle of *caveat emptor*.

[41] I prefer the evidence of the wife Plaintiff to that of the wife Defendant as to the conversation that transpired relative to the previous water in the basement of the House. I believe that the Plaintiffs have proven, to the extent required in a civil fraud claim, that the statement of fact alleged was made or stated at a time when the wife Defendant knew it was false.

[42] Accordingly, the active concealment by the Defendants of the mould and the false statement by the wife Defendant as to the previous water in the basement amounts to the making of a fraudulent misrepresentation.

Did the Plaintiffs rely upon the Defendants fraudulent misrepresentation as to the existence of those Defects that were latent?

[43] From the evidence provided, it can be reasonably assumed that the Plaintiffs, upon inspecting the House prior to the purchase, relied on the condition of the basement to be as they were. In other words, as there were no patent indicia of water damage, the Plaintiffs reasonably assumed that there was no mould present in the basement of the House. In my view, any reasonable person in the position of the Defendants would have relied on the appearance of the basement for being as it appeared: a basement that had seen no water damage from flooding and therefore no possible presence of mould. Furthermore, that they relied on the Defendants fraudulent misrepresentation as to the state of the basement is self evident in that the Plaintiffs entered into the Purchase Agreement.

Did those Defects that were latent make the House unfit for habitation or take away from the Purchasers use, occupation or enjoyment of the House as a whole?

[44] The leading case of ***McGrath v. MacLean*** (1979), 95 D.L.R. (3d) 144 (C.A.) has long stood for the proposition that in order to succeed on a claim for fraudulent misrepresentation, relative to a latent defect, a purchaser must establish the following:

(a) that the defect could not have been identified by reasonable observation;

(b) the vendor knew of the defect or was guilty of concealment; and

(c) the defect must render the premises unfit for habitation.

[45] The first of the two criteria as set down in ***McGrath v. MacLean*** have, in regards to the Basement Defect, been met in this case. This leaves us with the question as to whether the presence of the Basement Defect caused the House to be unfit for habitation ?

[46] From the evidence provided, it has been disclosed that in order for the Plaintiffs to confine the effects of the mould on the Plaintiffs and their family, the Plaintiffs were required to seal off the basement from the rest of the House until the Basement Defect was rectified. The presence of the mould in the basement therefore made a portion of the House uninhabitable. However, is a determination that a portion of the House rendered uninhabitable by the presence of the Basement Defect sufficient to meet the unfit for habitation criteria set down in ***McGrath v. MacLean***?

[47] In ***Palmer v. Van Keulen***, 2005 ABQB 239 (CanLII), 2005 ABQB 239, Marceau J., in discussing the unfit for habitation criteria as set down in ***McGrath v. MacLean***, stated at paras. 28 to 31:

> Counsel for Mr. Van Keulen referred me to the case of *Biegler v. Stacey* (1995), 172 A.R. 57 (Alta. Prov. Ct.) as authority for the proposition that in order for a purchaser of a residential property to have a cause of action for fraudulent concealment against a vendor, the concealed defect must go to the fitness of the home for habitation. In *Biegler v. Stacey*, Judge Scott quoted, at para. 12, from the decision in *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 (Ont. C.A.) where at 792 Dubin J.A. stated:
>
> > I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation . . . . . Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect, which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, e.g., the premises being sold being subject to radioactivity. . .
>
> This quote from Dubin J.A. has resulted in a significant amount of debate among jurists. The debate centres around whether the classification that residences are "unfit for habitation" or "dangerous" is a necessary prerequisite to finding a vendor liable for non-disclosure of a latent defect. There is a line of authorities which treat the classification as a prerequisite: *Palermo v. Graham (In trust)*, 1992 CarswellOnt 2528 (Ont. Gen. Div.), *Jenkins v. Foley* 2002 NFCA 46 (CanLII), (2002), 215 Nfld. & P.E.I.R. 257, 2002 NFCA 46 (Nfld. C.A.), and *Germain v. Schaffler*, [2003] O.J. No. 4514 (Ont. S.C.J.). Conversely, there are a number of decisions, which have not required a finding that a residence be unfit for habitation or dangerous: *Thomas v. Blackwell*, 1999 SKQB 168 (CanLII), 1999 SKQB 168 (Sask. Q.B.) , *Swayze v. Robertson , supra, Moore v. Page*, [2002] O.J. No. 2256 (Ont. S.C.J.), and *Alevizos v. Nirula , supra.*

In *Swayze v. Robertson*, Justice LaForme after reviewing the relevant authorities, noted as follows, at paras. 30 32:

> I do not take issue with any of those decisions other than to note that habitability in connection with a latent defect seems to have disappeared as a principle for analysis . . . . . Furthermore, I am of the opinion that the term "premises unfit for habitation" does not mean that the defect must be such that the entire residence must be rendered uninhabitable. Rather, in cases such as this I am of the view that application of the principle can, and must mean something more qualified. I take the position that any decisions regarding habitability of the premises must be made on a common sense and reasoned approach based on the facts of each case. It seems to me that the correct approach must be to *consider it in the context of whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole* . . . (Emphasis added)

In my view, the approach of Justice LaForme is preferable to the narrower approach outlined in *McGrath v. MacLean*. However, for the purposes of this appeal, the distinction between the approaches is moot as the narrower test under the *McGrath* principles has been satisfied.

[48] Further, in ***Hadubiak v. Wiebe***, 2003 SKPC 141 (CanLII), 2003 SKPC 141, Matsalla J. at para. 13., in coming to a similar conclusion to that of Marceau J., in ***Palmer v. Van Keulen*** relative to the unfit for habitation criteria set down in ***McGrath v. MacLean***, stated:

> Subsequent cases in Ontario have held that the phrase "render the premises unfit for habitation" can mean a condition that could cause "any loss of use, occupation and enjoyment of many meaningful or material portions of the premises or residence that results in the loss of the enjoyment of the premises or residence as a whole", *Moore v. Page* [2002] O.J. No. 2256, Power J. (Ont. Sup. Ct. of Justice) paragraph 32. I followed this line of cases in the recent case of *Volk et al v. Stenstrom et al*, 2003 SKPC 48 (CanLII), [2003] S.J. No. 237, 2003 SKPC 48 (April 1, 2003). I believe that the same principles of law apply to this case.

[49] In my opinion, the fact that the presence of the Basement Defect caused a significant portion of the House to be unuseable and potentially dangerous to a person s health, is sufficient to meet the unfit for habitation criteria set down in ***McGrath v. MacLean***.

Does the Purchase Agreement exclude the Plaintiffs claims based in tort?

[50] In the instant case, the Defendants claim that in any event, the Plaintiffs are barred from bringing a claim against them in regards to the Defects, based on any misrepresentation in light of the insertion in the Purchase Agreement of an exclusionary clause which reads as follows:

> 10.3 The Seller and the Buyer each acknowledge that, except as otherwise described in this Contract, there are no other warranties, other party, the Seller s brokerage and the Buyer s brokerage about the Property, any neighbouring lands, and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements of the Land and Buildings or the existence or non-existence of any environmental condition or problem.

[51] It is trite law that the finding of a fraudulent misrepresentation on the part of a vendor of real property, will vitiate any exclusionary clause in the applicable sale agreement. This conclusion was succinctly confirmed by Burnyeat J., in ***444601 B.C. Ltd. v. Ashcroft (Village)***, [1998] B.C.J. No. 1964 at para. 61 as:

> It is clear that an exclusionary clause such as "representations, warranties, guaranties, promises or agreements" will not bar a claim for fraudulent misrepresentation: *Davis v. Moranis*, [1949] 4 D.L.R. 433 (Ont. C.A.), *Domokos v. Phillips* (1996), 5 R.P.R. (3d) 33 (N.B. Q.B.), *Rawson v. Hammer* (1982), 23 R.P.R. 239 (Alta. Q.B.), *Pearce v. Chacon* (January 10, 1997), Doc. Vancouver C956467 (B.C. S.C.) and *Turner v. Visscher Holdings Inc.* 1996 CanLII 1436 (BC C.A.), (1996), 23 B.C.L.R. (3d) 303 (B.C. C.A.); *Turner v. Visscher Holdings Inc.* May 7, 1996, Vancouver CA017834, Finch J.A. [reported 1996 CanLII 1436 (BC C.A.), (1996), 23 B.C.L.R. (3d) 303 (B.C. C.A.)].

[52] Furthermore, in ***Belzil v. Bain***, 2001 ABQB 890, Kenny J. at paras. 38 to 40, in discussing the protection afforded a vendor of real property under an exclusionary clause, in the face of a proven fraudulent misrepresentation stated:

> The following standard clause appears in the Contract between Mr. and Mrs. Bain and Mr. and Mrs. Belzil:
>
> (4.5) The Seller [Mr. and Mrs. Bain] and the Buyer [Mr. and Mrs. Belzil] each acknowledge that, except as otherwise described in this Contract, there are no other warranties, representations or collateral agreements made by or with the other party, the Seller's Agent, the Buyer's Agent and their sales people about the Property, any neighbouring lands and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements of the Land and buildings or the existence or non lexistence of any environmental condition or problem.
>
> In light of this clause, Mr. and Mrs. Belzil cannot claim a mere misrepresentation. The contract excludes liability on the part of Mr. and Mrs. Bain for such representations: caveat emptor applies.
>
> However, this does not end the matter. Although the contractual provision excludes liability for negligent misrepresentations, any fraud on the part of Mr. and Mrs. Bain vitiates the contract. Therefore, the claim of Mr. and Mrs. Belzil must rest upon the alleged fraudulent conduct of Mr. and Mrs. Bain. The law as it relates

> to this area is succinctly stated in *Lerke v. Brear* (1990), 112 A.R. 1 (Alta. Q.B.), at 10: "It is clear that *caveat emptor* does not apply to fraud, and fraud can arise where there is an active concealment or silence about a known major latent defect."

[53] As the Plaintiffs have proven that the Defendants were guilty of making a fraudulent misrepresentation relative to the Basement Defect, the exclusionary clause is without effect to bar the Plaintiffs claim for costs associated with remedying the Basement Defect.

What is the quantum of damages?

[54] I have already ruled that the Plaintiffs are not entitled to succeed on their claims for costs incurred in relation to the Electrical Defect and the Roof Defect, and are entitled to succeed on their claim for costs associated with the Basement Defect.

[55] The starting point in the assessment of the quantum of damages is the method of calculation. In ***Nash v. McMillan***, Andrekson J., at para. 45, confirmed that the object of damages in tort is to put the plaintiff into the position, so far as money can do so, in which he would have been if the tort had not been committed. In this respect, Andrekson J., had this to say:

> It is clear from these rulings that the correct measure of damages in this case is the amount of money it has taken or will take for the Plaintiffs to be put into the position they would have been had the representations by the Defendant not been false. This would require repair and reshingling of the roof as well as repair of all latent and concealed defects consequential, and causally related, to the roof insofar as the Defendant's representations led the Plaintiffs to believe such defects would not be there. . .

[56] Furthermore, the assessment of the quantum of damages will be determined on the particular circumstances of the case. In this respect, the Plaintiffs have based their claim for costs associated with remedying the Basement Defect in part on a charge for their own personal time and labour. The Defendants are opposed to the payment of costs quantified on such basis. In ***Drake v. R***. 1999, 548 A.P.R. 335, Barry J., in citing judicial authority for accepting a calculation of costs based upon a plaintiff s own personal time and labour stated at para. 22:

> In *Jones v. Stroud District Council*, (1986), [1988] 1 All E.R. 5 (Eng . C.A.), the Court held that where the plaintiff has proven damage to property and the court is satisfied the property would be, or had been, repaired, it is irrelevant whether the plaintiff paid for the repairs himself. Neither should plaintiffs be penalized because they do the work personally. See *Brown v. Atlantic Insurance Co.* 1996 CanLII 6603 (NL S.C.T.D.), (1996), 142 Nfld. & P.E.I.R. 259 (Nfld. T.D.).

[57] In the instant case, the husband Plaintiff testified that although he had at one time maintained a ledger setting out the hours expended by himself, members of his family and friends, in carrying out the works required to rectify the Basement Defect, he had lost such ledger. However, both he and his wife during their respective testimony, recalled fairly accurately the amount of personal non-contractual time expended in rectifying the Basement Defect. With respect to the personal labour and materials purchased to rectify the Basement Defect the Plaintiffs have provided a Breakdown of Damages. Based upon the calculations stated in this Breakdown of Damages, the Plaintiffs total claim for labour and materials in regards to the Basement Defect, is the sum of $12,186.45. I accept this calculation and there will therefore be an award of damages to the Plaintiffs as against the Defendants in the sum of $12,186.45.

[58] If the parties cannot agree on costs, they can be spoken to within 30 days of the date of this Decision.

Heard on the 28th day of April, 2008.

Dated at the City of Edmonton, Alberta this 21st day of May, 2008.

Don J. Manderscheid

J.C.Q.B.A.

Appearances:

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