

CANADA / JUDGMENT

Beacock v. Moreno

2019 BCSC 955

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 955 Beacock v. Moreno

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Beacock v. Moreno,

2019 BCSC 955

Date: 20190612

Docket: S104495

Registry: New Westminster

Between:

Robert Grant Beacock, Denise Susan Donelly, Adelaide Megan

Beacock, an infant, by her Litigation Guardian Robert Grant Beacock,

Fabian Robert Beacock, an infant by his Litigation Guardian Robert Grant

Beacock; and Aidan Reidar Beacock, an infant, by his Litigation Guardian

Robert Grant Beacock

Plaintiffs

And

Fernando Moreno, Janet Moreno, Leo Sabot and

Wheeler Cheam Realty Ltd., Inc. No. BC0571414

Defendants

And

Leo Sabot and Wheeler Cheam Realty Ltd.,

Inc. No. BC0571414

Third Parties

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

The Plaintiff Robert Grant Beacock appearing in person:

R. Beacock

Counsel for the Defendants, Fernando and Janet Moreno:

S. Chern

Appeared as Agent only on

September 4, 2018

Counsel for the Defendants and Third Parties, Leo Sabot and Wheeler Cheam Realty Ltd., Inc. No. BC0571414:

K. Murray

Place and Date of Trial:

New Westminster, B.C.

September 4-7, 2018

Written Submissions:

September 21, 2018

October 5, 2018

Place and Date of Judgment:

New Westminster, B.C.

June 12, 2019

INTRODUCTION

[1] This action arises in the context of the sale of a residential home in Chilliwack, British Columbia (the "Property"). The plaintiff, Robert Beacock, purchased the Property from the defendants, Fernando and Janet Moreno (collectively, the "Morenos"), pursuant to a contract of purchase and sale dated July 13, 2005 (the "Contract").

- [2] Mr. Beacock claims that after moving into the Property, he discovered that it previously had been used as a marijuana grow operation. In broad terms, he says that the Property was riddled with moisture problems, contaminated with mould and required extensive remediation.
- [3] At the material time, the defendant, Leo Sabot, was a licenced realtor with the defendant, Wheeler Cheam Realty Ltd. The defendant, Wheeler Cheam Realty Ltd., ("Wheeler") is a company duly incorporated under the laws of British Columbia under incorporation number BC 0571414, doing business as Royal LePage Wheeler Cheam Realty. Mr. Sabot was the realtor involved with the real estate transaction that anchors this proceeding. I will refer to these defendants collectively as the "realtor defendants".
- [4] Counsel for the Morenos, who had filed a trial brief and appeared at both trial management conferences, attended the commencement of trial. Counsel informed the Court that the last communication they had with their clients was February 2018. Counsel had informed the Court at the July 26, 2018 trial management conference that they could not locate their clients and would be taking steps to withdraw from the record. Counsel also informed this Court at the outset of trial that, despite making efforts to locate their clients, they had been unable to ascertain their current whereabouts. Counsel informed the Court that the Morenos were aware of the trial date. They also confirmed that they were continuing to take steps to withdraw from the record. In all the circumstances, I excused counsel at the outset of trial.
- [5] There is no evidence before the Court of any explanation, adequate or otherwise, for the Morenos' non-appearance at trial. I have determined that this is an occasion on which it is appropriate for this Court to proceed in the absence of one of the parties.

OVERVIEW

- [6] In 2017, the realtor defendants brought a summary trial application seeking an order that the action be dismissed against them. On July 21, 2017, Mr. Justice Riley dismissed the application as it pertained to Mr. Beacock. However, he granted the application in respect of all other plaintiffs. Accordingly, Mr. Beacock is the only plaintiff pursuing a claim against the realtor defendants. Similarly, Mr. Beacock was the only plaintiff who proceeded with a claim against the Morenos.
- [7] In this proceeding, the Court is being asked to determine Mr. Beacock's claim against the realtor defendants as well as his claim against the Morenos. Mr. Beacock seeks damages against the realtor defendants for fraudulent and negligent misrepresentation, negligence, and breach of contract. He seeks judgment against the Morenos for fraudulent misrepresentation and breach of contract.
- [8] The realtor defendants assert that the claim against them should be dismissed. They also seek dismissal of the third party claim issued against them by the Morenos.

- [9] Mr. Sabot was licenced as a realtor in British Columbia in approximately 1997. He practiced as a real estate agent until his retirement in 2012.
- [10] Mr. Beacock was formerly a financial advisor. He has been receiving disability payments from a self-purchased plan since approximately 2000.
- [11] Mr. Beacock and Mr. Sabot were the only witnesses who testified at trial. Their respective accounts of what transpired differs significantly on material points. The fact that the parties were recalling material events more than 13 years after those events occurred has compounded the complexity of this case.
- [12] Although he had been previously represented by counsel, Mr. Beacock appeared in person at trial. While some accommodation for self represented persons may be appropriate, fairness of the trial process is the overarching consideration: *Berezowski v. British Columbia (Residential Tenancy Branch)*, 2014 BCSC 363 at para. 178.
- [13] At the outset of the trial, I provided Mr. Beacock with a written memorandum that summarized what the trial procedure would be, what his obligations were at trial and some important rules of evidence.

EVIDENTIARY MATTERS

- [14] At trial, Mr. Beacock read evidence into the record from Mr. and Mrs. Moreno's respective examinations for discovery.
- [15] Rule 12-5(46) provides as follows:

Persons against whom discovery evidence is admissible

- (46) If otherwise admissible, the evidence given on an examination for discovery by a party or by a person examined under Rule 7-2 (5) to (10) may be tendered in evidence at trial by any party adverse in interest, unless the court otherwise orders, but the evidence is admissible against the following persons only:
- (a) the adverse party who was examined;
 - (b) the adverse party whose status as a party entitled the examining party to conduct the examination under Rule 7-2 (5) to (10);
 - (c) if the person was examined under section 17 of the Class Proceedings Act as a member of a class, the members of that class.
- [16] It is common ground that pursuant to Rule 12-5(46), the evidence given on the examination for discovery of Mr. and Mrs. Moreno is clearly admissible against them.

- [17] Mr. Beacock also tendered into evidence the affidavits of each of Mr. and Mrs. Moreno, sworn November 3, 2009 in response to interrogatories dated August 23, 2009 (the "Answers"). Similarly, pursuant to Rule 12-5(58), the answers to interrogatories are admissible against the Morenos.
- [18] An issue arose at trial because Mr. Beacock asserted that the evidence from the examination for discovery and the Answers should also be admissible against the realtor defendants. The realtor defendants submit that in all the circumstances and in the absence of any opportunity to cross-examine the Morenos at trial, this evidence should not properly be admissible against them. I determined that I would reserve my ruling on the point.
- [19] Mr. Beacock grounds his submissions on Rule 12-5, which was formerly Rule 40(4). His essential submission is that because the Morenos' attendance at trial could not be secured by subpoena, it would be unfair not to allow the Morenos' evidence to be admitted against the realtor defendants.
- [20] Rule 12-5(54) deals with the evidence of witnesses who are otherwise unavailable. It confers discretion to the court in certain prescribed circumstances to allow the transcript of prior evidence given by a witness to be put in evidence. The rule reads:

Use of pre-trial examination of a witness

- (52) A party may tender in evidence at the trial all or part of the examination of a person taken under Rule 7-5
- (a) to contradict or impeach the testimony of the person at trial, or
 - (b) if it is necessary in the interests of justice and
 - (i) the person is dead,
 - (ii) the person is unable to attend and testify because of age, infirmity, sickness or imprisonment,
 - (iii) the person is out of the jurisdiction, or
 - (iv) the person's attendance cannot be secured by subpoena.
- [21] The rule is discretionary in nature. The discretion is not to be exercised arbitrarily. It is to be applied judiciously in the interests of justice dealing fairly with both parties. In determining whether or not to permit the evidence to be submitted, I have considered matters of trial fairness and the relative prejudice to the parties. The paramount consideration is to ensure that there is a fair trial.
- [22] First, there is some merit to defence counsel's submission that Mr. Beacock has not established that the Morenos' attendance could not be secured by subpoena. Their counsel advised the Court that they were unable to reach the Morenos by email, mailing address or by telephone. Their last contact with counsel was in February 2018. Counsel had also conducted searches under the Personal Property Security Act, R.S.B.C. 1996, c. 359, and

Land Title Office searches, without success. Mr. Beacock advised the Court that he had searched the obituaries of the local newspaper and that he conducted Google searches. However, there is no evidence that any other investigative efforts, such as skip tracing, had been made.

- [23] In any event and for completeness, in the analysis that follows I have assumed that the Morenos' attendance at trial could not be compelled by subpoena.
- [24] Mr. Beacock relies on *Beazley v. Suzuki Motor Corporation*, 2009 BCSC 1575. In that case, Mr. Justice Goepel (when he was a member of this Court) considered the former Rule 40(4). He concluded that the evidence given at examinations for discovery of representatives of the defendant, who could not be compelled to attend trial because they lived in the United States, was admissible as against the other parties. In my view, the facts in that case are distinguishable from the facts in this case. Mr. Justice Goepel concluded there would be minimal prejudice to the remaining defendants if the evidence was admitted because there was no reason to believe they would not voluntarily attend the trial if their attendance was requested. Accordingly, the other defendants could call them to explain any admissions they may have made. That is not the case here.
- [25] The evidence that Mr. Beacock seeks to have admissible against the realtor defendants relates to Mr. Sabot's alleged discussion with the Morenos regarding completing the disclosure statement; in particular, how to answer the question about whether there had been a marijuana grow operation at the Property. Mrs. and Mr. Moreno both deposed separately in the Answers that "Mr. Sabot advised us that we were only to be concerned about whether the property had been used as a grow operation while we had owned the Property". This is a matter on which the realtor defendants should have a full and fair opportunity to cross-examine the Morenos.
- [26] In weighing the relative prejudice to the parties, the greater prejudice falls to the realtor defendants in not having any opportunity to cross-examine the Morenos on a material point. That prejudice militates against finding that the affidavit evidence as provided in the Answers and the examination for discovery evidence of the Morenos should be admissible as against the realtor defendants.
- [27] In summary on this issue, I conclude that both the Answers and the examination for discovery evidence of the Morenos tendered by Mr. Beacock at trial are not admissible as against the realtor defendants.

SUMMARY OF FACTS

- [28] Before delineating the issues and addressing each issue on the merits, I will summarize the pertinent facts established on the evidence.

[29] In these Reasons, the summary of facts reflects evidence that was either not in dispute, or, where it was in dispute, the factual findings I have made based on the consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points, or a party has urged that a particular inference be drawn from the evidence.

The Listing

[30] Mr. Sabot met Mr. and Mrs. Moreno on or about June 27, 2005, and then again when he viewed the Property on July 2, 2005. The Morenos agreed that Mr. Sabot would act as their agent in listing the Property for sale, as well as in assisting them in the search and purchase of two other properties.

[31] Mr. Sabot described the Property as having been a beautiful home. He did not observe anything about the condition of the Property that caused him any concern. The evidence, as a whole, supports a finding that, at this time, there was no reasonably visible indication that the Property had been used as a marijuana grow operation in the past.

[32] After doing a comparative market analysis, Mr. Sabot prepared the listing agreement. He met with the Morenos again on July 4, 2005, at which time they signed the listing agreement. On July 4, 2005, Mr. Sabot walked around the Property, taking dimensions of each room. He also gathered other information in order that he could complete the Residential Data Input Form. This document recorded various details of the Property, such as lot size and the square footage of each floor.

[33] The listing price for the Property was \$299,900.00.

[34] The property disclosure statement that Mr. and Mrs. Moreno received when they purchased the Property in 2004, which was admitted at trial pursuant to the agreement of the other parties, disclosed that the Property had been used as a marijuana grow operation (the "Prior PDS"). Based on this objective evidence, the only reasonable and logical inference is that when the Morenos listed the Property for sale in 2005, they knew full well that the Property had been used as a marijuana grow operation.

The Property Disclosure Statement

[35] On July 4, 2005, Mr. Sabot provided the Morenos with a blank copy of a property disclosure statement (the "PDS"). At trial, he specifically recalled that he asked them to review it and, to the best of their knowledge, answer each question truthfully. Mr. Sabot did not observe the vendors completing the PDS. Neither of the Morenos asked him any questions about the PDS. He reviewed the PDS to ensure each question had been answered and that it was appropriately signed.

[36] The Morenos answered no to the following questions in the PDS:

F. Are you aware of any additions or alterations made without a required permit and final inspection? Answer: No

J. Are you aware of any moisture and/or water problems in the walls, basement or crawl space? Answer: No

P. Are you aware if the premises or property have been used as a marijuana grow operation or to manufacture illegal drugs? Answer: No.

[37] Mr. Sabot had no reasonable basis to suspect that any of the answers provided by the vendors in the PDS were untrue in any respect. He had not observed anything about the Property that called into question the answers on the PDS. Neither of the vendors ever told Mr. Sabot that prior to their acquisition of the Property, the Property had been used as a marijuana grow operation. Moreover, there was nothing that he observed at the Property that reasonably ought to have raised any red flags about a prior marijuana grow operation. The evidence does not support a finding that Mr. Sabot ever saw the Prior PDS prior to this litigation.

[38] The Morenos told Mr. Sabot that they had done some work finishing the basement, including putting in a bathroom and a bar.

[39] For completeness, if I am incorrect and the examination for discovery and the Answers are admissible against the realtor defendants, I make the following findings. Mr. Sabot denies that he had any discussion whatsoever with the Morenos regarding the question on the PDS pertaining to the use of the Property as a marijuana grow operation. Given the way the question is framed on the PDS, the Morenos' evidence that Mr. Sabot told them that they were only to be concerned about whether the Property had been used as a grow operation while they owned the Property is implausible.

[40] At trial, Mr. Sabot refuted the Morenos' version of events and stated that he would never make such a statement because he maintains that "once a grow-op, always a grow-op". In cross-examination, Mr. Sabot confirmed that he never instructed vendors on the contents of the PDS nor reviewed the accuracy of the contents because it is the vendors that know the condition of the Property. He emphasized that it is the vendors who are assuming responsibility for the accuracy of the representations in the PDS. I accept Mr. Sabot's evidence on this point. It accords with the preponderance of the probabilities that a reasonable person would recognize in the circumstances of this case.

[41] In any case, the evidence of the Morenos adduced in evidence at trial does not establish that Mr. Sabot knew about the previous use of the Property as a marijuana grow operation. Mr. Moreno admitted on his examination for discovery that, prior to the completion of the sale to Mr. Beacock, he did not tell Mr. Sabot that the Property previously had been used as a marijuana grow operation.

The Offer to Purchase

- [42] On July 12, 2005, Mr. Beacock contacted Mr. Sabot to make inquiries about the Property. Mr. Beacock told Mr. Sabot that he would not bother to come and view the Property unless the vendors were prepared to accept \$290,000.
- [43] Mr. Sabot contacted Mr. Moreno, who indicated that he would accept \$290,000 for the Property. Mr. Sabot then contacted Mr. Beacock to pass on this information and arrangements were made for Mr. Beacock to view the Property.
- [44] On July 13, 2005, Mr. Beacock viewed the Property with Mr. Sabot. Mr. Beacock did not observe anything about the condition of the house that raised any concerns and he confirmed there "was nothing you could see wrong with it". According to Mr. Beacock, the house looked "exceptional" and appeared to be sparklingly clean and in extremely good condition. Mr. Sabot told him at this viewing that the Morenos had renovated the unfinished basement. After the viewing, Mr. Beacock did not raise any concerns or ask any specific questions about the Property.
- [45] After the viewing, Mr. Sabot asked Mr. Beacock if he was interested in buying the Property. Mr. Beacock advised he did want to make an offer of \$290,000 for the Property. Mr. Sabot asked if Mr. Beacock was working with a realtor. When he responded that he did not, Mr. Sabot told him he could draft the offer. Mr. Sabot explained that this would make him a dual agent. He went on to explain to Mr. Beacock what a dual agency was and that Mr. Beacock would have to sign a document confirming their arrangement. Mr. Sabot told Mr. Beacock that he could not advise him on price nor disclose any personal information about one party to the other, including the motivation for purchasing or selling. Mr. Beacock expressed no concerns regarding Mr. Sabot acting for both the vendors and purchaser.
- [46] It is common ground that Mr. Sabot did not provide Mr. Beacock with a history of the Property's past sales or any other comparative MLS listings. However, as I stated earlier when Mr. Beacock first contacted Mr. Sabot about the Property, he indicated that he had already decided what his price would be if he proceeded with making an offer. Mr. Beacock admits that he never asked Mr. Sabot any questions regarding what the Morenos had paid for the Property or about the history of the Property's past sales. Nor did he make any inquiries on whether Mr. Sabot had a relationship with the Morenos beyond the listing of the Property.
- [47] Later the same day, July 13, 2005, Mr. Sabot drafted the contract of purchase and sale. Mr. Sabot faxed the contract of purchase and sale and the limited dual agency agreement to Mr. Beacock on July 14, 2005. Mr. Beacock executed the offer to purchase and faxed it back to Mr. Sabot on July 14, 2005.
- [48] The Contract included the following provision:

18. REPRESENTATIONS AND WARRANTIES. There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[49] The Contract contained a number of condition precedent clauses, including reading and approving the PDS, obtaining financing and obtaining and approving a home inspection report. The condition precedent clause regarding the PDS stated:

SUBJECT TO THE BUYER READING AND APPROVING THE PROPERTY DISCLOSURE STATEMENT ON OR BEFORE JULY 20, 2005, SUCH STATEMENT, IF APPROVED, TO BE INCORPORATED INTO AND FORM PART OF THIS CONTRACT

[50] The limited dual agency agreement executed by Mr. Beacock and the Morenos on July 14, 2005, (the "Agreement") is entitled "Consent to Brokerage Acting for Both Buyer/Tenant and Seller/Landlord and to Limiting the Scope of the Agency Relationship" and includes the following provisions:

3. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that with respect to the purchase and sale or lease of the Property the Brokerage and its Licences (as defined below) will be the agent for both the Buyer/Tenant and the Seller/Landlord and will represent the parties as a limited dual agent with the following changes and limitations to its duties as agent:

A. the Brokerage will deal with the Buyer/Tenant and the Seller/Landlord impartially;

B. the Brokerage will have a duty of disclosure to both the Buyer/Tenant and the Seller/Landlord except that:

(i) the Brokerage will not disclose that the Buyer/Tenant is willing to pay a price or agree to terms other than those contained in the Offer or that the Seller/Landlord is willing to accept a price or terms other than those contained in the Listing;

(ii) the Brokerage will not disclose the motivation of the Buyer/Tenant to buy or lease or the Seller/Landlord to sell or lease unless authorized in writing by the Buyer/Tenant or the Seller/Landlord;

(iii) the Brokerage will not disclose personal information, not otherwise necessarily disclosed in the transaction documentation, about Buyer/Tenant or Seller/Landlord to the other party unless authorized in writing.

C. without limiting Clause 3B, the Brokerage will disclose to the Buyer/Tenant defects about the physical condition of the Property known to the Brokerage.

[51] Mr. Beacock acknowledges that he received the Agreement from Mr. Sabot. I found Mr. Beacock's evidence on cross-examination on whether he read the Agreement to be vague and somewhat evasive. In any case, he signed the offer to purchase and the Agreement and faxed it back to Mr. Sabot on July 14, 2005.

- [52] Mr. Beacock's offer to purchase the Property was accepted by the vendors on July 14, 2005.
- [53] Mr. Beacock paid the deposit by cheque dated July 15, 2005. According to Mr. Sabot, he met with Mr. Beacock at his office on July 15, 2005, and provided him with the fully executed Contract, the Agreement with the signature of all parties, the PDS that had been filled out by the vendors, a title search, and three brochures for property inspection companies. His assertions are supported by the notes in his daytimer that reference a meeting with Mr. Beacock on July 15, 2005, "Re deposit and give him copies of contract etc."
- [54] Mr. Beacock acknowledges that Mr. Sabot provided him with the names of three home inspection firms but denies meeting with Mr. Sabot at his office in July 15, 2005. Mr. Beacock maintains that he gave the deposit cheque to Sergio, another realtor from Mr. Sabot's firm, when he drove to Chilliwack for another viewing of the Property. He did not explain when he would have received the names of the inspection firms from Mr. Sabot.
- [55] Mr. Beacock viewed the Property with the vendors on July 15, 2005. At that time, Mr. Moreno told him that he had finished the basement. When Mr. Beacock viewed the Property, the basement consisted of a media room, a games room, a wet bar, a bathroom and a storage utility room.
- [56] Mr. Beacock maintains that he did not receive and review the PDS until after the inspection on July 19, 2005, which is the date upon which his signature was affixed as having received and read the PDS. According to Mr. Beacock, he had to provide the bank with the paperwork for mortgage approval the next morning and most offices were closed.
- [57] Mr. Sabot credibly explained that his standard practice had been that the purchaser typically executed the PDS (as having received and read it) at the time of the subject removal of the contract of purchase and sale because that is when the purchaser formally approves the PDS. Further, Mr. Sabot's standard practice was to immediately provide all documents in his possession about a property to a buyer upon the offer to purchase being accepted by the vendor. He testified that he did that in this case. I found his explanation on this point persuasive. Furthermore, Mr. Beacock testified at his examination for discovery that he reviewed the PDS "again" after the inspection, which suggests he had reviewed it before the inspection. Notably, Mr. Beacock's statement of claim, filed on May 17, 2007, by his then counsel, states in paragraph 9 that the Morenos provided the PDS to Mr. Beacock on July 13, 2005. The original pleading contains no allegations regarding the late provision of the PDS. The allegation of the late disclosure statement first appeared in the pleadings in the Amended Notice of Civil Claim filed on November 30, 2015.
- [58] Both Mr. Sabot and Mr. Beacock also signed a document entitled "Your Relationship with a Realtor", which is a page from the "Working with a Realtor" brochure acknowledging that a client has read and received the brochure. The brochure explains the obligations of a realtor. The acknowledgement page with their respective signatures is undated. Mr. Beacock maintains he did not receive this document until July 19, 2005. Mr. Sabot candidly admits he cannot be certain when he gave the brochure to Mr. Beacock, but he believes, based on his

usual practice, it would have been when they first met on July 13, 2005. Both the Agreement and the Contract reference the "Working with a Realtor" brochure.

[59] The Morenos signed a separate acknowledgment page on July 2, 2005.

[60] Balancing the evidence as a whole, I find that it is more probable than not that Mr. Sabot provided Mr. Beacock the PDS when they met on July 15, 2005, and that Mr. Sabot gave Mr. Beacock the "Working with a Realtor" brochure on July 13, 2005.

The Home Inspection

[61] Mr. Beacock chose and retained the firm Pillar To Post to conduct an inspection of the Property on July 19, 2005.

[62] On July 19, 2005, sometime in the early afternoon, Mr. Sabot met the inspector in order to permit him access to the Property. Mr. Sabot then left the Property. Mr. Beacock met with the inspector, Ron Parsons, at the Property at the beginning of the inspection and then again upon completion at approximately 4:00 p.m. At that time, Mr. Parsons reviewed the findings in his report (the "Inspection Report") with Mr. Beacock. Mr. Beacock candidly admitted that he recognized that there were limitations to the report because it was based on a visual inspection of the accessible features of the Property.

[63] According to Mr. Beacock, Mr. Parsons told him that he had found what could have been a vent (a board with a hole in it covering what had previously been a window) that was larger than a drier vent, which could have signified that the Property had previously been used as a marijuana grow operation. The inspection report in the section entitled Other notes:

Evidence of past hydroponic activities. These types of situations can result in mould growth in wall components. Not able to determine condition of sealed components.

[64] In his report, the inspector noted under the section entitled Exterior:

FOUNDATION WALL

Parts of foundation walls are not exposed.

Visible foundation cracks are typical from shrinkage.

Monitor cracks for water intrusion and seal as required.

WALL SURFACE

Gaps in exterior walls should be sealed reducing chance of water intrusion into wall components resulting in water damage/rot.

He noted under the section entitled Basement/Structure:

WALL

Basement/structure is finished. Checked perimeter walls every 6'-8' for moisture. No abnormal moisture levels were noted on date of inspection.

[Emphasis added.]

- [65] The inspector was not called as a witness at trial and the Inspection Report was not tendered in accordance with the rules for the admission of expert evidence. Accordingly, it is admissible only for the fact that these statements were made by the inspector and not for the truth of those statements.
- [66] According to Mr. Beacock, the inspector told him that he was "98 percent sure" the Property was safe and that "if I was his son, he would probably feel comfortable with me moving my family into this house". He also told Mr. Beacock that he would have no problem recommending the Property to anyone. I find Mr. Beacock's version of this meeting implausible. It is unlikely that a professional inspector who has prepared an inspection report would make these alleged representations to a prospective purchaser. This would directly contravene the terms of the Visual Inspection Agreement that provides that the inspector "does not offer an opinion as to the advisability or inadvisability of the purchase of a property". Notably, Mr. Beacock did not call the inspector as a witness nor name the inspection firm or the inspectors as defendants in this proceeding.
- [67] A central controversy at trial is what transpired between Mr. Sabot and Mr. Beacock after the inspector left the Property.
- [68] In this paragraph, I summarize Mr. Beacock's version of the allegedly material events. Mr. Beacock maintains that Mr. Sabot was waiting outside for him at the Property. Mr. Beacock told Mr. Sabot about the suspicious vent and the possibility that the Property could have been used as a marijuana grow operation. According to Mr. Beacock, Mr. Sabot told him he would check into it and left the Property for an hour and a half. He then called Mr. Beacock and arranged to meet him back at the Property. Upon returning to the Property, Mr. Sabot told Mr. Beacock that the Property "definitely" had not been used as a marijuana grow operation and that he had nothing to worry about. Mr. Sabot also directed Mr. Beacock's attention to the answer in the PDS, wherein the Morenos had indicated that, to their knowledge, the Property had not been used as a marijuana grow operation. Mr. Beacock apparently asked no questions about how Mr. Sabot made his determination that the Property was not a marijuana grow operation or what investigations he had made when he left the Property.
- [69] For his part, Mr. Sabot denies there was any such discussion with Mr. Beacock on July 19, 2005, or for that matter at any time prior to completion, about the inspector having raised an issue regarding potential hydroponic activity. Mr. Sabot says in the three meetings he had with Mr. Beacock prior to completion, July 13, 15 and 19, 2005, he and Mr. Beacock never discussed the possibility that the Property had been used as a marijuana grow operation.

- [70] Mr. Sabot maintains that he never saw the Inspection Report prior to the completion of the sale of the Property. According to Mr. Sabot, he returned to the Property later in the day on July 19, 2005. When he arrived, Mr. Beacock was reviewing the Inspection Report with the inspector. When they were finished, Mr. Sabot asked him how it went and Mr. Beacock said it went "fine". He then asked Mr. Beacock if he was willing to remove the condition precedent clauses. Mr. Beacock confirmed that he would do so.
- [71] I will return to this discussion between Mr. Sabot and Mr. Beacock later in these Reasons.
- [72] Mr. Beacock maintains that in reliance on the assurances Mr. Sabot had made that the Property had not been used as a marijuana grow operation, the representations in the PDS, and the information he received from the inspector, he decided to proceed with the purchase of the Property.

Subject Removal and Completion of the Sale

- [73] On July 19, 2005, Mr. Sabot delivered the document entitled "Contract of Purchase and Sale Addendum" to Mr. Beacock. The addendum had been executed by the Morenos. Mr. Sabot says that no issues having been raised, Mr. Beacock signed this document after the inspection was completed. By executing this document on July 19, 2005, Mr. Beacock removed the condition precedent or "subject clauses" from the Contract.
- [74] The purchase and sale completed on August 31, 2005.
- [75] Mr. Sabot went away on holidays in August 2005. In his absence, Sergio, another realtor with his firm, met with Mr. Beacock about changing the date for possession of the Property.
- [76] Mr. Beacock took possession of the Property on September 4, 2005. Mr. Sabot was present when Mr. Beacock and his family took possession of the Property. The Property, which had been vacated, appeared to be in the same condition as when he previously had viewed it. Mr. Sabot did not observe any evidence of mould or water ingress, or any other matters that raised concerns about the condition of the Property.

Events that post date Mr. Beacock's possession

- [77] On October 31, 2005, Mr. Beacock was told by a neighbour that the Property had been used as a marijuana grow operation. Two to three months after that, mould began to appear on the walls in the basement of the Property.
- [78] When the mould was discovered, Mr. Beacock contacted two environmental companies regarding testing and remediation. Mr. Beacock also contacted Mr. Moreno and Mr. Sabot. The evidence supports a finding that in February 2006, Mr. Beacock left three telephone messages for Mr. Sabot.

- [79] This paragraph summarizes Mr. Beacock's recollection of the events that followed. According to Mr. Beacock, when Mr. Sabot attended the Property, he walked over the side of the house, looked at the electrical stack, turned to Mr. Beacock and confirmed that "of course it was a grow-op before". Mr. Beacock maintains that Mr. Sabot then suggested that they go to his office, where Mr. Sabot told him that he had not been able to tell him about the use of the Property as a marijuana grow operation because of an "agreement". Mr. Sabot also purportedly told Mr. Beacock that he had never had any problems with the previous marijuana grow operation properties he had sold and then suggested that Mr. Sabot's insurance might cover the costs of remediating the Property. However, thereafter, Mr. Sabot did not return any of Mr. Beacock's calls. Sometime later, Mr. Beacock had a chance encounter with Mr. Sabot at a mall. A day or two after their chance meeting at the mall, Mr. Sabot telephoned Mr. Beacock to inform him that his insurance would not cover any repair costs and he would not be able to do anything for him.
- [80] Mr. Sabot's recollection of events differs significantly from that of Mr. Beacock. Mr. Sabot says:
- (i) Sometime early in 2006, he met Mr. Beacock by chance in the local shopping mall;
 - (ii) At that time Mr. Beacock told him about the mould problem at the Property;
 - (iii) Mr. Sabot did visit the Property and observed the mould;
 - (iv) At that visit, Mr. Beacock told him that the Property had been used as a marijuana grow operation;
 - (v) Mr. Sabot then contacted Mr. Moreno.
- [81] Mr. Moreno attended the Property. Mr. Moreno provided no explanation about the condition of the Property and denied that the Property had been used as a marijuana grow operation. Mr. Sabot does not recall any discussions about water ingress at that time.
- [82] According to Mr. Beacock, at that time, Mr. Moreno agreed to pay for an environmental report to be done on the Property.
- [83] Mr. Sabot denies making any of the statements about the marijuana grow operation attributed to him by Mr. Beacock. Specifically, Mr. Sabot maintains that he never stated that he had observed evidence of the Property having been a former marijuana grow operation. Nor did Mr. Sabot say that he had known that the Property previously had been used as a marijuana grow operation. Prior to this meeting in early 2006, Mr. Sabot had never observed anything at the Property that had raised suspicion or concern that it may have been used as a marijuana grow operation.

Credibility and Reliability

- [84] In this case there were significant disputes in relation to material facts and it is appropriate, therefore, to now comment on the credibility of the parties. My findings on other essential facts are addressed earlier in these Reasons.
- [85] Mr. Sabot was forthright when he could not recall details about any particular event or discussion. I found his imperfect memory to be consistent with events and discussions having transpired some 13 years ago. He did not embellish or exaggerate his evidence. While he relied on the notes in his daytimer and the documentation to refresh his memory on the details of this property purchase transaction, I accept that he had a clear recollection of the key discussions he had with Mr. Beacock. His experience as a realtor and reliance on his usual and customary practice as to some of the details of the transaction enhanced the weight to be accorded to his evidence. I am satisfied that he followed his usual practice in this case.
- [86] Overall, I found him to be a credible witness whose evidence was reliable. I accept his evidence in its entirety.
- [87] With the passage of over thirteen years since the material events, Mr. Beacock may have unconsciously indulged in the human tendency to reconstruct and distort history in a way that favours a desired outcome: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. In any case, I find that overall, Mr. Beacock's evidence lacks probative reliability. Where his evidence conflicts with Mr. Sabot's, Mr. Sabot's must be preferred.
- [88] Balancing the evidence as a whole, I find that prior to completion, Mr. Sabot and Mr. Beacock never discussed the possibility that the Property had been used as a marijuana grow operation. I found Mr. Sabot's version of events to have the ring of truth. I find Mr. Sabot's version of the pertinent events is more reliable and accords with the preponderance of the probabilities a reasonable person would recognize in the circumstances of this case.
- [89] Moreover, I find it implausible that prior to completion, Mr. Sabot would have assured Mr. Beacock that there had been no past hydroponic activity and then subsequent to the sale, attended the Property and quickly confirmed that based on the electrical stack, it clearly had been used as a marijuana grow operation. Crucially, in the Inspector's Report, the inspector had pointed out evidence of past hydroponic activities but noted that he was not able to determine "the condition of sealed components". On Mr. Beacock's own evidence, the inspector had pointed out that what was in the crawl space had been difficult to observe. I find it more likely than not that if the electrical stack had supported a conclusion that there had been past hydroponic activity at the Property, the inspector would have noted that in his report.
- [90] In short, I find that, prior to completion of the purchase of the Property, Mr. Sabot had no knowledge about the Property previously having been used as a marijuana grow operation.

The Property

- [91] It is uncontroversial that problems associated with mould and water ingress developed at the Property.
- [92] After the mould was discovered, Mr. Beacock obtained a copy of an installation permit that was issued by the Safety Authority in 2003 for the repairs to the electrical system on the Property that had been required because of the previous use of the Property as a marijuana grow operation.
- [93] According to Mr. Beacock, after Mr. Moreno was served with these proceedings, he attended at the Property visibly upset and stated that the lawsuit would ruin his retirement. At this time, Mr. Moreno admitted that the Property had been used as a marijuana grow operation.

Subsequent Events

- [94] In order to address the problems associated with toxic mould, Mr. Beacock incurred costs associated with environmental remediation and repair to the Property. According to Mr. Beacock, in approximately January 2007, he took out a \$25,000 loan to pay for repair and remediation expenses. Mr. Beacock also claims that he incurred other expenses related to the Property, including costs for damage to the contents of the Property.
- [95] Mr. Beacock produced no receipts or other documentation related to the repair and remediation costs or other costs he incurred. He says that some of the pertinent documentation was lost in the 2009 fire discussed below.
- [96] Mr. Beacock produced a report entitled Fungal Inspection Report dated February 26, 2007, and prepared by IAQ Mould Experts, which included a quotation of \$16,377.00 for the professional remediation required for the main floor and basement. The report does not meet the admissibility criterion for an expert report and was not properly tendered as an expert opinion. Moreover, the author was not called as a witness and could not be cross-examined by defence counsel. The report was admissible only as evidence showing that Mr. Beacock received the quotation and undertook certain repairs and remediation based upon the contents of the report.
- [97] When Mr. Beacock removed some of the flooring and walls to remediate the mould, he discovered that there were water ingress problems that he attributed to issues with the water table and hydrostatic pressure.
- [98] It bears emphasis that there was no cogent evidence tendered, expert or otherwise, that proved on a balance of probabilities that the water ingress and moisture problems were caused by the past hydroponic activity.
- [99] Unfortunately for all involved, in 2009 the Property was subsequently damaged by fire and was rendered uninhabitable. Mr. Beacock had renewed his insurance for the Property on several occasions by the time the fire occurred, some four years after initial purchase of the

Property. The insurer took the position that the home insurance was voided on the grounds that there had been material non-disclosure by Mr. Beacock of the prior use of the Property as a marijuana grow operation and extensive contamination of mould. Mr. Beacock issued proceedings against the insurer and the insurance brokers in 2010. Mr. Beacock has not taken any steps to advance the litigation in the last several years.

[100] I note that in this action Mr. Beacock claims for the costs of alternate accommodation and the alleged voiding of his insurance when the Property was subsequently damaged by the fire in 2009.

[101] In 2013, Mr. Beacock defaulted on his mortgage payments on the Property and the Property was eventually sold pursuant to foreclosure proceedings. There was a \$60,000 shortfall, for which Mr. Beacock remains liable.

ISSUES

[102] I will analyse the issues under the following headings:

- a) Claim against the realtor defendants:
 - (i) Are the realtor defendants liable in negligence?
 - (ii) Are the realtor defendants liable for negligent misrepresentation?
 - (iii) Has Mr. Beacock established a claim against the realtor defendants for breach of contract?
 - (iv) Are the realtor defendants liable for fraudulent misrepresentation?
- b) Claim against the Morenos
- c) Third Party Claim by the Morenos against the realtor defendants.

ANALYSIS

CLAIM AGAINST THE REALTOR DEFENDANTS

[103] In the original statement of claim filed May 17, 2007, Mr. Beacock, who was then represented by counsel, claimed against the realtor defendants that:

- a) the realtor was aware the Property had been used as a marijuana grow operation in the past but failed to disclose that information to Mr. Beacock;
- b) the knowledge of the Property having been used as a marijuana grow operation in the past was vital information and the realtor had a duty of care or contractual duty to disclose this to Mr. Beacock; and

- c) the principal employees and agents of the defendant, Wheeler Cheam Realty Ltd. knew that the Property had been used as a marijuana grow operation and had an independent duty to disclose that information to potential purchasers of the Property and/or supervise the realtor to ensure disclosure was made.

[104] On December 16, 2015, Mr. Beacock, who by then was acting in person, filed an amended notice of civil claim, expanding his claims against the realtor defendants. The expanded claims include that the realtor defendants were either negligent or fraudulent in that they:

- a) Had a duty to deliver all pertinent information to the plaintiffs with respect to the Property in a timely manner, and failed to deliver pertinent information to the plaintiffs until it became too late for the plaintiffs to act on it, including that the Applicants:
 - (i) Failed to advise the plaintiff there was no site survey for the Property until after subjects were removed.
 - (ii) Failed to provide the plaintiffs with a copy of the brochure "Your Relationship with a Realtor" until after subjects were removed.
 - (iii) Failed to provide the plaintiffs with timely delivery of a copy of the Property Disclosure Statement by waiting until after the house inspection, after most offices were closed when subject removal had to be done and sent to the bank for approval in the morning.
- b) Had a duty to make sure all representations of material facts are accurate and truthful and breached this duty by making a false representation as to the price that the vendors would be willing to accept for the Property, prior to an offer being made, inducing the plaintiffs to come and view the Property.
- c) Had a duty to make sure all representations of material facts are accurate and truthful and breached this duty by making a false representation regarding electrical permits pertaining to the Property.
- d) Acted with self interest in that the [Morenos] wanted to close the sale of two properties to the vendors which were contingent on the sale of the Property to the plaintiffs.

[105] I will address each of the causes of action in turn.

Negligence

[106] In *Brown v. Douglas*, 2010 BCSC 1059 [Brown SC], rev'd on other grounds 2011 BCCA 521, Willcock J. (when he was a member of this Court) summarized the governing principles regarding the duty of care of a real estate agent:

[38] To some extent a common duty of care is implied from the relation of principal and agent and from a basic appreciation of the role of the agent in the market. Expert evidence is not necessary to establish a standard of care based on common experience: *Burbank v. R.T.B.*, 2007 BCCA 215, 279 D.L.R. (4th) 573; and *Summit Staging Ltd. v. 596373 B.C. Ltd.*, 2008 BCSC 198, 68 R.P.R. (4th) 280.

[39] In *Phelan v. Realty World*, [1994] 38 R.P.R. (2d) 128 (S.C.), Baker J. adopted the following description of the duty of care of an agent to his principal set out in *Fridman*, *Studies in Canadian Business Law*, at 334:

An agent who is receiving a reward must not only exercise reasonable care, but he is also deemed to possess reasonable skill, thus as real estate brokers hold themselves out to the public as being experts in property valuation and sale, they must display the qualities which are generally associated with their calling and in offering advice and information must use due care.

[107] It is clear that there is an implied duty of care between a realtor and a client to possess reasonable skill related to property valuation and sales. A realtor is to exercise the skill of a reasonably prudent realtor in the circumstances.

[108] Mr. Justice Willcock also addressed the legal test for establishing a broader duty of care between a real estate agent and a client:

[41] One who seeks to impose a broader duty, for example, a duty to make specific enquiries on behalf of a purchaser or to warn of particular risks of a transaction, bears the evidentiary burden of establishing the nature and extent of that duty. For example, the allegation made by the plaintiff in *Summit Staging Ltd.* that the agent ought to have done a market analysis was dismissed because no evidence was adduced with respect to what was customarily required of the agent: see para. 46 and the cases cited therein, as well as the similar decision in *Phelan*.

[42] Similarly the plaintiffs' case against their realtors in *Perrault v. North Vancouver (District)*, 2010 BCSC 382, was dismissed because the plaintiff's allegation that the realtors had not verified accuracy [sic] the information disclosed by the sellers for completeness was not supported by evidence of the existence of the duty of care alleged. The Court held at para. 19:

The difficulty with this submission of the plaintiffs is that there is no evidence before me as to what information is usual or customary for brokers to verify. Put another way, is searching the Municipal Planning Department or the Public Library for notices or claims issued by a public body over two decades earlier a usual or customary step taken by a reasonable and prudent realtor?

[Emphasis added.]

[109] The authorities establish that in order to succeed in a claim in negligence against the realtor defendants, the plaintiff must prove on a balance of probabilities that:

- a) the realtor defendants were possessed a special skill;
- b) the realtor defendants undertook to apply that skill for the assistance of the plaintiff;
- c) the plaintiff relied upon such skill;
- d) the conduct of the realtor defendants fell below the requisite standard of care of a reasonably prudent brokerage and real estate agent at the material time; and
- e) the plaintiff suffered damage as a result of the breach of the standard of care by the realtor defendants.

Longshaw v. Houghton, (1993), 29 R.P.R. (2d) 190 (B.C.S.C.) at 198-199, citing Shulist v. Hunt (1987), 78 A.R. 188, 51 Alta. L.R. (2d) 69 (Q.B.); Houweling v. Imperial Equestrian Centre Ltd., 2001 BCSC 1551 at para. 30, aff'd 2004 BCCA 119 at para. 5; Brown SC at para. 43.

[110] The overarching submissions of the realtor defendants is that the constituent elements of negligence have not been established.

[111] Mr. Beacock bears the burden of establishing the duty of care he seeks to impose upon the realtor defendants, both as to its nature and its extent. If he establishes that a duty of care exists, he must prove the standard of care and that the realtor defendants breached that duty of care.

[112] The realtor defendants acknowledge that they possessed special skills regarding real property sales and that they undertook to apply that skill for the assistance of Mr. Beacock. However, they submit that they had no special skills regarding the detection of marijuana grow operations. I agree.

Marijuana Grow Operations

[113] Prior to the completion of Mr. Beacock's purchase of the Property, Mr. Sabot had no knowledge that the Property previously had been used as a marijuana grow operation. There are only three ways in which the realtor defendants might have been expected to acquire that information:

- a) from any prior dealings with the Property;
- b) from the Morenos as vendors; and
- c) the presence of any obvious signs the Property was or had been a marijuana grow operation.

[114] On the evidence, Mr. Sabot had no prior dealings with the Property or the Morenos. The Morenos did not tell Mr. Sabot about the previous use of the Property as a marijuana grow operation. There is no evidence the realtor defendants had any information that would or should have led Mr. Sabot to suspect the Property had been a marijuana grow operation. In fact, Mr. Beacock's evidence was that the Property appeared to be in exceptional condition.

[115] Mr. Beacock has not established that the realtor defendants had any special skill respecting the discovery of the marijuana grow operations or that they failed to meet the applicable standard of care in the circumstances.

Mr. Beacock did not rely on Mr. Sabot

[116] Even if Mr. Sabot had possessed a special skill with respect to discovery of marijuana grow operations, Mr. Beacock has failed to prove that he relied upon such special skills.

[117] Mr. Beacock hired an inspector to conduct an inspection of the Property prior to the removal of the condition precedent clauses. Although a potential purchaser may be reliant upon the representations of the vendors or a realtor at an initial stage of the purchasing process, the special skill of an independent inspector may operate to prevent the purchaser from asserting ongoing reliance upon the lesser specialized skills of the vendor and realtor: *Lamontagne v. Andersen*, 2005 BCSC 343 at paras. 60-62; *Liversidge v. Wang*, 2013 BCSC 930 at paras. 34-36.

[118] This proposition, however, is not applicable in all cases. The question of reliance is at its core a question of fact: *Hanslo v. Barry*, 2011 BCSC 1624 at paras. 124-128 [Hanslo]. For example, in *Hanslo*, the alleged defect was with respect to a culvert on the property, not the home itself. The inspector provided an opinion on the condition of the home, not the land. The Court found that in all the circumstances, the inspection would not have discovered the culvert or the past history of the flooding. The Court concluded that the purchaser was entitled to continue to rely on the vendor's representations on the PDS and the plaintiff purchaser was entitled to recover damages against the vendor for negligent misrepresentation.

[119] As I mentioned, Mr. Beacock retained a home inspector who performed the inspection on July 19, 2005. In his examination in chief, Mr. Beacock maintained that given the inspector's experience, which was primarily in construction and boat building, he did not regard him as a very knowledgeable person. He says he accorded more weight to Mr. Sabot's opinion.

[120] In cross-examination, however, Mr. Beacock admitted that he expected that the building inspector had a different skill set than a realtor. He expected that the building inspector would identify visible potential or existing deficiencies. Mr. Beacock admitted that the inspector warned him that the home inspection would not identify any issues that were not visible, such as moisture issues behind the walls. Mr. Beacock met with the home inspector following the inspection and discussed the home inspector's findings, including the comment "evidence of past hydroponic activity". The Inspection Report also noted cracks in the exterior of the home and recommended sealing to reduce the "chance of water infusion into wall components resulting in water damage/rot". Mr. Beacock acknowledges that he relied on the inspector in making his decision to remove the condition precedent clauses in the Contract.

[121] Balancing the evidence as a whole, I find that Mr. Beacock relied upon the home inspector (and for that matter, the PDS), not Mr. Sabot, for determining the condition of the Property. Mr. Beacock decided to remove the condition precedent clauses and complete the purchase despite the disclosure in the Inspection Report.

The realtor defendants provided all relevant information in a timely manner - no negligent failure to apply specialized skill

[122] The defendants submit that there was no evidence regarding the standard of care with respect to the timing of the provision of pertinent documents and information at the material time. The authorities establish that expert evidence is not necessary to establish a standard of care based on common experience: Brown SC at para. 38. If a court is able to say that a breach is egregious and obvious based on the experience of an ordinary person, expert evidence is not required; Cosway v. Boorman's Investment Co. Ltd., 2008 BCSC 1482 at para. 35.

[123] I am not satisfied that the evidence establishes that the manner or timing of the provision of the real estate documents and other information by Mr. Sabot fell below the applicable standard of care of a reasonably prudent real estate agent.

[124] Mr. Beacock's claim fails either because there is no expert evidence on the point or on the grounds that Mr. Beacock has not established that the realtor defendants breached their duty of care based on common experience.

[125] In so far as Mr. Beacock makes any allegation about not being provided with a site survey, there is no evidence that a site survey was available, expected, or relevant to the Property. In any case, I accept Mr. Sabot's evidence, as refreshed by his notes, that, on July 5, 2005, he checked with the City of Chilliwack and there was no site survey on the Property.

[126] Balancing the evidence as a whole, I find that the PDS and the brochure entitled Your Relationship with A Realtor were provided to Mr. Beacock well in advance of the home inspection. The timing of Mr. Sabot's provision of documents relating to the Property, and in particular the PDS and the "Working With a Realtor" brochure was reasonable in all the circumstances. Furthermore, even if these documents were delivered to Mr. Beacock on July 19, 2005 as he alleges, the evidence does not establish that would have materially changed matters.

[127] In so far as Mr. Beacock alleges that he should have been provided with the MLS listings so he could compare room sizes, the evidence establishes that, Mr. Beacock knew prior to making any offer to purchase the Property, that the Morenos had renovated the basement. As for price, as I stated earlier, Mr. Beacock indicated in his first communication with Mr. Sabot that he had formulated a price if he decided to proceed with making an offer.

- [128] To the extent Mr. Beacock advances a claim against the realtor defendants that the Morenos performed renovations to the Property without the requisite permits, I find that Mr. Sabot had no knowledge regarding permits on the Property nor did he make any representations to Mr. Beacock in this regard. Moreover, the evidence does not establish that the Morenos in fact performed renovations without the requisite permits or that updated permits had been required.
- [129] Mr. Beacock also alleges that Mr. Sabot did not have authority from the vendors to accept an offer of \$290,000 at the time Mr. Beacock first viewed the Property. This allegation is of no moment because the vendors ultimately accepted Mr. Beacock's offer to purchase the Property for \$290,000.
- [130] After the completion of the sale of the Property, the Morenos did purchase two townhouses with Mr. Sabot acting as their real estate agent. Mr. Sabot acknowledged that he never told Mr. Beacock that the Morenos had another contract to purchase a different property, which was subject to the sale of the Property. If Mr. Sabot had disclosed that information to Mr. Beacock, this would have constituted a breach of the Agreement, as clause 3B.(ii) states that the dual agent "will not disclose the motivation of the Seller to sell unless authorized in writing".
- [131] In summary, balancing the evidence as a whole, I find that Mr. Beacock has not established that the realtor defendants negligently failed to apply their specialized skills regarding the sale of real property.

Did Mr. Beacock suffer damage as a result of the alleged negligence?

- [132] I have concluded that Mr. Beacock has not established that the realtor defendants negligently failed to apply their specialized skill.
- [133] For completeness, I will nevertheless address the final constituent element in proving a claim in negligence. Has Mr. Beacock established that he suffered damage as a result if the alleged negligence of the realtor defendants? For the reasons that follow, I find that he has not.
- [134] In so far as Mr. Beacock alleges negligence against the realtor defendants regarding the previous use of the Property as a marijuana grow operation, I am not persuaded Mr. Beacock suffered any damage as a result of any alleged failures on the part of the realtor defendants. The plain fact is that Mr. Beacock was informed by the home inspector that there was evidence of past hydroponic activity and yet he chose to remove the condition precedent clauses and complete the purchase of the Property. Put another way and to the same effect, Mr. Beacock has failed to prove on a balance of probabilities that but for Mr. Sabot's alleged negligence, he would not have suffered the loss he claims.

[135] There is no cogent evidence establishing that Mr. Beacock suffered damage as a result of any alleged failures regarding the delivery of documents pertaining to the sale of the Property.

[136] In sum, having not proved its constituent elements, Mr. Beacock's claim in negligence against the realtor defendants cannot succeed.

Negligent Misrepresentation

[137] The legal framework for establishing a claim for negligent misrepresentation was articulated by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87. The Supreme Court of Canada articulated a five-part test for determining liability in a negligent misrepresentation claim. The five constituent elements are:

- (1) there must be a duty of care based on a "special relationship" between the representor and representee;
- (2) the representation must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense they suffered resulting damage.

[138] The test bears some similarity to the test for fraudulent misrepresentation. Crucially, however, there is a key additional requirement of reasonable reliance. In *Hamilton v. Callaway*, 2016 BCCA 189 at para. 51 [Hamilton], Madam Justice MacKenzie explained it this way:

negligent misrepresentation requires the purchaser to have reasonably relied on the misrepresentation, whereas fraudulent misrepresentation requires only that the purchaser was induced to enter the contract in reliance upon the representation.

[Emphasis in original.]

[139] In this case, the first element of the legal test is clearly satisfied. The realtor defendants acknowledge that they undertook to apply a special skill for the benefit of Mr. Beacock regarding the purchase of the Property. It is well-established that a real estate agent is under a legal obligation to exercise due care and skill in the performance of the duties which they have undertaken: see *Charter-York Ltd. v. Hurst*, [1978], 2 R.P.R. 272 (Ont. H.C.), leave to appeal to S.C.C. ref'd (1979), 28 N.R. 616 (note) (S.C.C.). A professional implicitly promises to use reasonable care and skill: *Oliver v. Ellison*, 2001 BCCA 359 at para. 56.

[140] Although a duty of care exists between the parties, I have found earlier in these Reasons that Mr. Sabot made no untrue, inaccurate or misleading representations to Mr. Beacock regarding the prior use of the Property as a marijuana grow operation. Therefore, Mr. Beacock's claim in negligent misrepresentation against the realtor defendants fails at the second stage of the analysis.

Contract

[141] I next address Mr. Beacock's claim in contract. While this point was not developed in his submissions, the claim for breach of contract mirrors the negligence claim. An implied term of a real estate agent's contract is the exercise of reasonable care and skill: *Charter-York Ltd. v. Hurst* (1978) 2 R.P.R. 272 (Ont. H.C.J.); *Phelan v. Realty World* (1994), [1994] B.C.J. No. 752 at para. 50.

[142] Given that the claim in contract mirrors the claim for negligence, it fails for the same reasons set out above. Mr. Beacock has not established that the realtor defendants failed to exercise the skills of a reasonably prudent real estate agent and real estate brokerage firm.

[143] For completeness, I also note that the Agreement, dated July 13, 2005, reads, in part:

3. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that with respect to the purchase and sale or lease of the Property the Brokerage and its Licensees (as defined below) will be the agent for both the Buyer/Tenant and the Seller/Landlord and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:

C. without limiting Clause 3B, the Brokerage will disclose to the Buyer/Tenant defects about the physical condition of the Property known to the Brokerage.

[144] Mr. Sabot did not have knowledge of any defects, whether related to mould, the Moisture Problems as I have defined in para.163, or the previous use of the Property as a marijuana grow operation. Therefore, I am not persuaded that the realtor defendants breached clause 3C of the Agreement.

Fraudulent Misrepresentation

[145] In order to succeed on a claim of fraudulent misrepresentation, the plaintiff must establish the following elements:

- 1) The defendant made a representation of fact to the plaintiff;
- 2) The representation was false in fact;
- 3) The defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
- 4) The defendant intended the plaintiff to act on the representation; and

- 5) The plaintiff was induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

Wang v. Shao, 2018 BCSC 377, rev'd 2019 BCCA 130; Hamilton at para. 25.

[146] I have found earlier in these Reasons that Mr. Sabot made no false representations to Mr. Beacock regarding the prior use of the Property as a marijuana grow operation. Moreover, and in any event, I find that the evidence does not establish that Mr. Sabot made any false representations whatsoever to Mr. Beacock.

[147] It is submitted on behalf of the realtor defendants that Mr. Beacock has failed to establish the constituent elements to succeed a claim for fraudulent misrepresentation. I agree.

[148] Finally, other than with Mr. Sabot and a single limited interaction with another realtor, there is no evidence that Mr. Beacock had any communications with any principals, employees, or agents of the defendant Wheeler. Having not proven any liability on the part of Mr. Sabot, the defendant Wheeler cannot be held vicariously liable in this proceeding.

Summary

[149] For the reasons set out above, Mr. Beacock's claim against the realtor defendants is dismissed.

CLAIM AGAINST THE MORENOS

[150] Mr. Beacock, who did not have the benefit of the assistance of legal counsel at trial, did not refer to the applicable law or otherwise develop his submissions regarding his claim against the Morenos. To compound the challenges, the Court did not have the benefit of any submissions from the Morenos, who, as I indicated earlier, did not attend the trial.

Pleadings

[151] In his amended notice of civil claim filed in December 2015, Mr. Beacock primarily framed his claim against the Morenos as a claim for fraud. His pleadings state in part:

9. On or about July 13th, 2005 the Moreno provided a written Residential Property Disclosure Statement dated July 4th, 2005 to Beacock. In the said Disclosure Statement the Morenos gave the following responses to the following questions in Section 2 of the Disclosure Statement:

"STRUCTURAL

F. Are you aware of any additions or alterations made without a required permit and final inspection? Answer: No

J. Are you aware of any moisture and/or water problems in the walls, basement or crawl space? Answer: No

P. Are you aware if the premises or property have been used as a marijuana grow operation or to manufacture illegal drugs? Answer: No.

10. At all material times the Morenos knew that each one of their negative responses to the aforesaid Questions F., J., K, and P. were false.
11. At all material times, the Morenos knew or ought to have known that the Plaintiff Beacock, in deciding to purchase the Defendants' property was relying upon the truthfulness of the Morenos's responses to the above four questions in the said Disclosure Statement, as well as the remaining answers in the disclosure Statement.
12. At all material times the Morenos knew that any purchaser, in particular the Plaintiff Beacock and his family would likely suffer damages, injury and loss if they acted in reliance upon the answers the Morenos provided to the above four questions.
13. The Morenos also committed fraud upon the Plaintiff when selling their property to the plaintiff Beacock. Particulars of such fraud includes:
 - a. The Morenos were aware that the house had been used as Marijuana Grow Operation and failed to disclose that fact to the plaintiff Beacock;
 - b. The Morenos knew that there were extensive moisture problems in the house particularly in the basement, and failed to disclose that fact to the Plaintiff Beacock;
 - c. The Morenos built a raised wooden floor over the basement concrete floor, which to the knowledge of the Morenos covered up hidden moisture problems underneath that raised wooden floor. Concealed cracks in the basement cement floor from the plaintiff Beacock, which cracks had been temporarily and improperly repaired by the Morenos and which repairs Morenos knew or ought to have known would not prevent moisture from seeping through the basement floor after the Plaintiff moved in.
 - d. The Morenos made temporary repairs to cracks in the basement foundation walls that they knew would not prevent water ingress into the house after the Plaintiffs moved in: or ought to have known would not prevent water ingress into the house through those walls after the Plaintiffs moved in: and the Morenos built walls which concealed those cracks from the view of Beacock.
 - e. The Morenos installed electrical wiring in the house and out to the attached garage without obtaining electrical permits from the City of Chilliwack.
 - f. Fernando Moreno told Beacock before July 13th, 2005 that he had obtained electrical permits from the City of Chilliwack for 220 volt wiring he had installed to the garage and that he had hired a licensed electrician to install the said wiring. The Morenos with their son who was a plumber or is, did plumbing to the house which would require a permit when they installed a wet bar and a washroom in the basement. When they installed the drain from the wet bar it was not hooked up but drained on to the basement floor close to the sump not the sewer system. They had or ought to have known it would cause moisture

problems under the floor they installed.

14. At all material times the Morenos knew that the house was not habitable because of the moisture problems or else they knew that the house eventually would be unfit for habitation and that the Plaintiffs would suffer damages and loss including the costs of removing and replacement damaged floors, walls and other structural and non-structural components in the house.
15. At all material times the Morenos knew that it was likely that all of the electrical wiring installed by the Morenos would have to be replaced by a licensed electrician, with proper permits being taken out for the work from the City of Chilliwack.
16. The Morenos had to have known or ought to have known that the plaintiff's home insurance would be voided if there was ever a need to make a claim. The Contract of Purchase or Sale had included the subject to be able to buy suitable insurance.
17. The Morenos because of their fraudulent representation and disclosure caused the home insurance of the plaintiff to be deemed void and there for responsible for an equal amount of compensation as if their insurance had not been voided.
38. With respect to the house its self, the Plaintiffs have suffered damages including:
 - a. Damage due to past and continuing moisture ingress into the house through the basement through the basement floors and wall; damage from mold to furniture two beds, two dressers and loss of personal effects.
 - b. Damages to drywall and structural components due to the past effects of the Marijuana Grow Operation and/or the past and continuing moisture problems in the house; damages to floors, walls and building envelope.
 - c. Damages to flooring due to the past and continuing moisture problems in the house; loss of use and enjoyment
 - d. Extensive mold growth throughout the house in the walls, ceilings, floors and structural components caused by the past and continuing moisture problems and the former Marijuana Grow Operation; loss of contents due to fire
39. As a result of the extensive mold found to exist throughout the house, the Plaintiffs suffered injury and extensive health problems and continue to suffer injury and health problems all related to the existence of the mold, particulars of which will be provided when known and as requested.

Legal Framework

[152] I next examine the legal principles that inform the analysis of Mr. Beacock's claim against the Morenos.

[153] In the absence of any warranties or guarantees as to the fitness of a property, the starting point in the analysis is the doctrine of caveat emptor, or "buyer beware": *Hanslo* at para. 112.

[154] Although the doctrine of caveat emptor has evolved in the jurisprudence, the doctrine, subject to certain exceptions, continues to apply to real estate transactions in BC. In *Nixon v. MacIver*, 2016 BCCA 8, [Nixon], the Court's distillation of the animating principles, is instructive:

47 In summary, the doctrine of caveat emptor remains very much alive in the context of real estate transactions in BC: *Fraser-Reid*; *Cardwell CA*; *Wescan CA*. In general, purchasers bear the risk of defects in the quality of a property. Liability for this risk may shift to the vendor where there is established: (i) a breach of contract; (ii) active concealment (i.e., fraud); (iii) non-innocent misrepresentation; or (iv) an implied warranty of habitability in the case of newly-constructed homes. Liability for this risk may also shift where latent defects are established that render a property dangerous or uninhabitable. In short, a vendor has a common law duty to disclose: (i) a latent defect that is not discoverable through a reasonable inspection or through reasonable inquiries; and (ii) the latent defect renders the property dangerous or unfit for habitation. If a defect does not render a property dangerous or uninhabitable, caveat emptor applies regardless of whether the defect in question is patent or latent.

[Emphasis added.]

[155] Based upon his pleadings Mr. Beacock seeks to be exempted from the application of caveat emptor due to the Morenos' alleged non-disclosure of two defects: the marijuana grow operation and extensive moisture problems.

Latent or Patent Defect

[156] The distinction between a latent and patent defect is central to the analysis of a vendor's common law obligation of disclosure in a real estate transaction. In *Cardwell v. Perthen*, 2006 BCSC 333, aff'd 2007 BCCA 313 [Cardwell], Madam Justice Ballance explained the difference and the relevance of the distinction to the vendor's obligation to disclose:

122 The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person ... In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example *Eberts v. Aitchison* (2000), 4 C.L.R. (3d) 248, 2000 BCSC 1103.

[Emphasis added.]

- [157] A latent defect is one that is not discoverable by a prospective purchaser through reasonable inspection inquiries: Nixon at para. 34. The distinction between a patent or latent defect is a question of fact, involving the consideration of such issues as the nature of the defect, its importance to the purchaser and the extent of the inspection and inquiry that would be both reasonable in the circumstances and necessary to reveal the defect. The reasonable standard of inspection has been described in the authorities as a fairly high standard of inspection: Sahamis v. Lenz, 2014 BCSC 2305 at para. 34.
- [158] A vendor has an obligation to disclose a latent defect to a prospective buyer if that defect renders a property dangerous or unfit for habitation. If a latent defect does not render a property dangerous or uninhabitable, caveat emptor applies regardless of whether the defect is patent or latent: Nixon at para. 47.
- [159] If defects are not discovered or known by either party, the imposition of liability is not appropriate. However, an absence of fraudulent intent or of negligence does not preclude a finding against a vendor who has knowledge of but fails to disclose such a latent defect in the property: Cresswell Investments Ltd. v. Pavone, 2011 BCSC 1069 at paras. 47, 34 [Cresswell Investments].
- [160] In Gibb v. Sprague, 2008 ABQB 298, a purchaser discovered mould in basement walls after purchasing a home. The home had been subject to a home inspection, which did not detect mould growth or moisture issues. The court found the defect to be latent, and concluded:
- [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.

[Emphasis added.]

- [161] In Coglon v. Ergas, 2009 BCSC 1170, a case involving moisture damage in a crawlspace, Madam Justice Griffin (when she was a member of this Court) stated:
- [125] Not only is the evidence clear that Mr. Ergas did not know about defects in the home before signing the PDS, there is no evidence sufficient to persuade me that Mr. Ergas should have known about any defects before filling out the PDS. With respect to the crawl space moisture, I have concluded that there was nothing occurring in the home that should have

alerted Mr. Ergas to the fact that there was occasionally moisture on the bedrock in the crawl space. Many others who went into that crawl space and who were more qualified than Mr. Ergas to investigate potential problems did not notice any moisture or evidence of past moisture, including the home inspector, the municipal inspector, and the mechanical and heating contractor. The amount of moisture seen by Mr. Coglon was very small. There was no moisture present in the crawl space on the two days when it was viewed by Mr. Schwartz, in February and April 2009.

[162] I turn to address whether the Morenos, as vendors of the Property, had a common law duty to disclose either the Moisture Problem or the previous marijuana grow operation. I will then address the Morenos' obligations regarding the PDS in the following section of these Reasons.

The Moisture Problem

[163] Mr. Beacock's overarching submission is that that the Morenos knew of existing and potential water ingress issues at the Property and "extensive moisture problems in the Property particularly in the basement", which I will refer to collectively as the "Moisture Problem".

[164] In this case, Mr. Beacock hired an inspector prior to the purchase of the Property, who carried out a home inspection. The inspector did not testify and, as noted above, his report was not admitted at trial as an expert report. However, it is common ground that the fact the inspector made those statements to Mr. Beacock was admissible. As I stated earlier, under the heading "Other", the Inspection Report states:

Evidence of past hydroponic activity. These types of situations can result in mold growth in wall components. Not able to determine condition of concealed components.

[165] Under the heading of "Wall", the Inspection Report states:

Basement/structure is finished. Checked perimeter walls every 6'-8' for moisture. No abnormal moisture levels were noted on date of inspection.

[166] Under the headings "Limitations", the Inspection Report states:

Finished Basements - The finishing of the basement prevents visual inspection of foundation walls, floors, mechanical and structural components - Normal moisture readings found at the time of inspection

[167] Although the evidence before the Court is thin, I find that the Moisture Problem is a latent defect. The finished basement rendered it impractical to inspect the state of the foundation walls and floors in the basement. However, there is an insufficient evidentiary basis for finding that at the material time the Moisture Problem rendered the Property dangerous or unfit for habitation. In all the circumstances, I am not persuaded that the Morenos had a common law obligation to disclose the existing or potential Moisture Problem to Mr.

Beacock.

[168] For completeness, I add that even if the Moisture Problem rendered the Property dangerous or unfit for habitation, Mr. Beacock's claim regarding non-disclosure of a latent defect cannot succeed.

[169] As I referenced earlier, non-disclosure of a latent defect that was not known to the vendor will not impose liability upon the vendor: Cresswell Investments at para. 47.

[170] In the Answers, both Mr. and Ms. Moreno deposed as follows:

Q: Did you, or anyone acting on your instructions or with your consent, do any repair work on the cracks in the foundations of the House?

A: No. We didn't know there were any cracks.

Q: Did you, or anyone acting on your instructions or with your approval, do repair work on the foundation walls in the Basement?

A: No. We did not know that any work was necessary.

Q: Did you obtain a permit for the work [done in the basement]?

A: No. We were informed by the City that a permit wasn't required.

Q: [Did you respond] negatively to the question, "Are you aware of any additions or alterations made without a required permit and final inspection?"

A: We were not aware that a permit or inspection was required.

[171] Mr. Beacock's claim is framed as a claim that the Morenos knew about the Moisture Problem and failed to disclose it. He also asserts that they took steps to actively conceal the existing and potential moisture problems. While I accept that the Morenos knew about the former marijuana grow operation, I am not satisfied that they knew about the Moisture Problem. There is an insufficient evidentiary basis for concluding on a balance of probabilities that the Morenos knew about and failed to disclose the Moisture Problem.

[172] In the result Mr. Beacock's claim regarding non-disclosure of a latent defect cannot succeed.

The previous marijuana grow operation

[173] Earlier in these Reasons, I found that the Morenos knew the Property formerly had been used as a marijuana grow operation. The Morenos plainly did not disclose this to Mr. Beacock.

- [174] When a defect is detectable "by conducting a reasonable inspection and making reasonable inquiries about the property", it constitutes a patent defect, rather than a latent defect: Cardwell at para. 122. The vendor is not obliged to disclose a patent defect to a prospective purchaser.
- [175] Although the Inspector's Report was not admitted into evidence for the truth of its contents, Mr. Beacock acknowledged that he was aware there was "evidence of past hydroponic activity", which could result in mould growth. Despite this, Mr. Beacock did not make any further inquiries or investigations. Furthermore, I have found Mr. Sabot provided no assurances to Mr. Beacock that the Property had not been used as a marijuana grow operation.
- [176] Mr. Beacock was put on notice about the possibility that the Property had been used as a grow operation by his inspector. Accordingly, aside from their obligation to truthfully and accurately complete the PDS, the Morenos did not have a duty to disclose that the Property had been a marijuana grow operation, as this was clearly detectable through reasonable inquiries by Mr. Beacock as a prospective purchaser.
- [177] Before I turn to the claim regarding the PDS, I will address Mr. Beacock's claim in contract against the Morenos. His pleadings include a claim that it was an express or implied term of the Contract that the Property would be reasonably fit for habitation.
- [178] There is no such express term in the Contract, nor has Mr. Beacock proven that there was such an implied term. The law imposes on a seller of newly constructed buildings, in favour of a purchaser, that a building will be fit for habitation: *Strata Plan NW 2294 v. Oak Tree Construction Inc.* (1994), 93 B.C.L.R. (2d) 50 (C.A.). As the Property was not newly constructed or under construction at the material time, the law does not impose a common law warranty of habitability. As I stated earlier, a vendor does have an obligation to disclose a latent defect to a prospective buyer if that latent defect is known to the vendor and renders a property dangerous or uninhabitable. I have found that was not the case here.

Property Disclosure Statements ("PDS") / Fraudulent Misrepresentation

- [179] The Morenos had an obligation to accurately and truthfully complete the PDS.
- [180] The representations in a PDS may be incorporated into the contract for purchase and sale by reference: *Liversidge v. Wang*, 2013 BCSC 930 at paras. 32-39. Importantly, however, the representations in a PDS do not become contractual warranties, even though they are incorporated into the contract for purchase and sale. The statements in the PDS are mere representations as to the true state of the knowledge of the vendor: *Hanslo* at para. 96.

- [181] In *Hanslo*, the vendors indicated on a PDS that they were not aware of any moisture problems in the basement or of any water damage, despite the fact that they had experienced several floods while living at the property. At the time of the sale, the vendors were unaware of any existing moisture problems. Mr. Justice Joyce found that the vendors had not failed to disclose the prior flood damage, as it had been repaired. With respect to whether the representations were contractual warranties, Joyce J. stated:
- [196] Based on these authorities, it is my view that in this case, the incorporation of the PDS into the contract did not turn the representations contained in the PDS into contractual warranties. There was no warranty that the circumstances referred to in the questions, which were answered in the negative, did not exist. They are representations as to the true state of knowledge of the vendor and may support a claim in breach of contract if the statement was untrue and did not accord with the vendor's true belief at the time.

[Emphasis in original.]

- [182] This articulation of the governing principles was cited with approval at para. 44 by the Court of Appeal in *Hamilton*.
- [183] In this case, the representations in the PDS were incorporated by reference into the terms of the Contract: *Roberts v. Hutton*, 2013 BCSC 640 at para. 76. In those cases where a representation in a property disclosure statement can properly be characterized as a term of the contract, false representations by vendors in a property disclosure statement can ground a claim for breach of contract: *413255 B.C. Ltd. v. Jesson et al.*, 2006 BCSC 1070 at para. 29.
- [184] However, Mr. Beacock's pleadings do not allege breach of contract regarding the Morenos' allegedly false representations in the PDS. His claim is framed in fraud.
- [185] Accordingly, the legal framework for the analysis of the alleged misrepresentation by the Morenos in the PDS is anchored in the doctrine of fraudulent misrepresentation, which constitutes tortious conduct.

Fraudulent Misrepresentation

- [186] I set out the legal framework for establishing a claim for fraudulent misrepresentation earlier in these Reasons at para. 145.
- [187] In his amended notice of civil claim Mr. Beacock alleges that the Morenos made three representations to Mr. Beacock, which he alleges were false:
1. Are you aware of any additions or alterations made without a required permit and final inspection? Answer: No
 2. Are you aware of any moisture and/or water problems in the walls, basement or crawl space? Answer: No

3. Are you aware if the premises or property have been used as a marijuana grow operation or to manufacture illegal drugs? Answer: No.
- [188] These were representations of the Morenos' state of knowledge, and they did not warrant the truth of the circumstances referred to in the PDS.
- [189] The Morenos each deposed in the Answers that they did not obtain permits for the work they did on the Property because they had been told by the City that a permit was not required. There is no sufficiently reliable evidence proving on a balance of probabilities that the representations of the Morenos, to the effect that they were unaware of any alterations made without the required permits, was knowingly false.
- [190] I have addressed the issue of the Moisture Problem above, and found that the evidence falls short of establishing that the Morenos were aware of those problems when they completed the PDS. In short, Mr. Beacock has not proven that the Morenos knowingly made any false or misleading representations regarding any moisture and water problems.
- [191] I turn next to the representation made by the Morenos that they were not aware that the Property may have been used as a marijuana grow operation. As I stated earlier in these Reasons at para. 34, the irresistible inference is that the Morenos made this statement knowing it was false.
- [192] Balancing the evidence as a whole, I find the Morenos made this false statement with the intention that Mr. Beacock would act on the representation. They had been cautioned by Mr. Sabot to use care in completing the PDS. They must have known that Mr. Beacock would rely on the representation. Therefore, Mr. Beacock has proved on a balance of probabilities that the Morenos made a false representation knowing it was false and that they intended Mr. Beacock to act on the false statement.
- [193] The appellate authorities establish that where intention, materiality, and loss consistent with the plaintiff having acted on the alleged misrepresentation are proven, the burden of proving non-reliance shifts to the defendant: *Sidhu Estate v. Bains*, [1996] 25 B.C.L.R. (3d) 41 (C.A.) [*Sidhu*] at para. 42; *Roy v. Kretschmer*, 2014 BCCA 429 at paras. 58-59, citing *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500.
- [194] Regardless of the law regarding the shifting burden of proof, I am satisfied that Mr. Beacock has established that he was induced to enter into the final Contract in reliance upon the false representation in the PDS and that he thereby suffered a detriment. Balancing the evidence as a whole, I am satisfied that he sustained loss or damage.
- [195] Mr. Beacock is not required to prove that the false statement in the PDS was the sole inducement for entering into the final Contract but only that it was a material factor in his decision: *Sidhu* at para. 36. Nor is he required to show that it was reasonable to rely on the false statement: *Hamilton* at para. 51. While Mr. Beacock relied on the Inspection Report, based upon the totality of the evidence, I am satisfied that he continued to rely on the false statements in the PDS after his receipt of the Inspection Report. In short, the false

statement in the PDS was a material factor in his decision to enter into the final Contract.

[196] In summary on this issue, I conclude that Mr. Beacock has established a claim against the Morenos for their fraudulent misrepresentation regarding the marijuana grow operation.

DAMAGES

[197] Having proven a claim against the Morenos for fraudulent misrepresentation, I turn to the matter of damages.

[198] As fraudulent misrepresentation is tortious conduct, Mr. Beacock is entitled to be put in the same position as he would have been in had there been no fraudulent misrepresentation.

[199] The measure for damages in tort flowing from a fraudulent or negligent misrepresentation is the difference between the price paid and the actual value of the property at the date of the purchase, taking into account the true condition of the property. The Court of Appeal affirmed this principle in *Sorensen v. Kaye Holdings Ltd.* (1979), 14 B.C.L.R. 204 (C.A.) at para. 20:

The error of substance is, however, the failure to apply the correct measure of damages in an action for fraud, inducing a sale, which is the difference between the price paid and the actual value of the property purchased: *Zorzi v. Baker* (1957), 8 D.L.R. (2d) 164 (B.C.C.A.); *Hepting v. Schaaf*, [1964] S.C.R. 100, 46 W.W.R. 161, 43 D.L.R. (2d) 168; and *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, 15 D.L.R. (3d) 336.

[200] Mr. Justice Sheppard in *Zorzi v. Barker*, [1957] B.C.J. No. 127, 8 D.L.R. (2d) 164 (B.C.C.A.) distilled the animating principles as follows:

20 It further appears that in attempting to assess proven damages the plaintiffs have proceeded on the wrong basis, that is, that the damages to be ascertained by taking the value of the property if the representations had been true and the actual value on the basis of the representations being false and that the difference is damage. That may be an appropriate test in certain instances for breach of warranty but it is wholly irrelevant in determining the damage for deceit where the sole question is the difference between the price paid and the actual value. The value on the basis of the representations having been true is wholly irrelevant.

[Emphasis added.]

See also *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1982), 39 B.C.L.R. 42 at para. 11 (S.C.), citing (1981) 33 B.C.L.R. 291 (C.A.).

[201] Mr. Beacock's claim against the Morenos is grounded in fraudulent misrepresentation, not breach of contract. Therefore, the proper measure of damages is equal to the difference between the price actually paid for the Property and the true fair market value of the Property at the date of purchase.

- [202] Importantly, no such evidence was led by Mr. Beacock in his case. There was no expert evidence regarding the fair market value of the Property, taking into account its true condition, at the time of purchase. Furthermore, there was no expert evidence adduced at trial probative of the allegation that the presence of mould and other problems was attributable to a previous marijuana grow operation. Nor was there any properly admissible expert evidence that those issues presented a health hazard. However, there was some evidence of physical damage having been caused to the Property by the former marijuana grow operation, namely a vent covering what had previously been a window.
- [203] In *Brown v. Douglas*, 2011 BCCA 521 [Brown CA], the chambers judge had dismissed the plaintiff purchaser's claim on the basis that there was "no evidence" of "damages" resulting from a possible marijuana grow operation. Madam Justice Newbury stated the following:
- [27] While it is true, then, that there was no expert evidence at trial probative of the allegation that mildew, fungi and spores were present in the house and were attributable to a previous grow operation, there was evidence of what could have been physical damage caused to the house by a grow operation. Accordingly, I find with respect that the trial judge was clearly wrong in deciding that there was "no evidence of causation of [damage]" before the Court and that the chambers judge was also in error in stating that even if Mr. Steinbrunner's evidence was admitted, "There would be before me no evidence with respect to damage to the residence resulting from those acts." (My emphasis.) The case before the Court may not have been a strong one, and did not include medical evidence or evidence as to the costs of repairing the alleged damage to the house, but there is no law of which I am aware that requires expert testimony in an uncomplicated case like this. It is true that in the absence of evidence as to the cost of repairs, the trial judge might have found himself able to make only a nominal award of damages or to grant only a declaration that one or both sellers had made a misrepresentation to the plaintiffs; but the cause of action could have been made out on the evidence.
- [Emphasis added.]
- [204] All things considered I am only able to make a nominal award of damages against the Morenos for their fraudulent misrepresentation. Such an award recognizes in absence of evidence proving quantum, that Mr. Beacock's legal rights were breached.
- [205] If I am incorrect and Mr. Beacock has pleaded and established a claim against the Morenos for breach of contract, Mr. Beacock would be entitled to recover damages for the cost of repairs for remediating damage to the Property from the marijuana grow operation: *Hanslo* at para. 132, citing *Nash v. McMillan* (1997) 222 A.R. 4 (Alta. Q.B.) at paras. 39-45. However, in the absence of sufficiently reliable evidence on the point, I am unable to determine, on a balance of probabilities, the cost of repairs associated with remediating the damage to the Property caused by its previous use as a marijuana grow operation.

- [206] Moreover, on the evidence, the Court is unable to delineate between the damage to the Property attributable to the Moisture Problem for which the Morenos are not liable, and the damage to the Property attributable to the former marijuana grow operation. Therefore, even if he has established a claim in breach of contract against the Morenos, Mr. Beacock would be entitled to nominal damages.
- [207] I have considered all of Mr. Beacock's submissions regarding his claim for damages. I am not persuaded that he is entitled to the damages he claims either because they are not properly recoverable on the law or because there is an insufficient evidentiary basis for awarding the damages sought.
- [208] Mr. Justice Harris, for a unanimous Court of Appeal, made the following observations regarding nominal damages in *Sabo v. Canada (Attorney General)*, 2013 YKCA 2:
- [82] Having said that, I am satisfied the trial judge did err in not awarding nominal damages. Detinue is a cause of action that does not depend on proof of damages: it is actionable per se. Nominal damages are awarded where a plaintiff's legal rights have been breached. That is the case here, as the trial judge found. Nominal damages affirm the infraction of legal rights in the absence of proof of loss caused by the infraction: see *The "Mediana"*, [1900] A.C. 113 (H.L.). I am unable to accept the submission made by the respondents that, on the facts of this case, the declaration of detinue was sufficient to vindicate Mr. Sabo's rights.
- [83] More recent cases do not establish a "going rate" for nominal damages, although the Alberta Court of Appeal has said that an award of \$5,000 could not be said to be nominal: see, *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57 at para. 145. The Ontario Court of Appeal has also suggested that nominal damages should be set at \$1: see *Place Concorde East Limited Partnership et al. v. Shelter Corp. of Canada Ltd. et al.* (2006), 211 O.A.C. 141 at para. 78. The courts in British Columbia have taken a different approach. In *Dawydiuk v. Insurance Corporation of British Columbia*, 2010 BCCA 353, for example, \$1,000 has been awarded as nominal damages. In the circumstances of this case I would award \$1,000 as nominal damages.

[Emphasis added.]

- [209] All things considered I award Mr. Beacock \$1,000 as nominal damages against the Morenos.

THIRD PARTY CLAIM BY THE MORENOS

- [210] Given my findings, the Morenos' third party claim against the realtor defendants for contribution and indemnity, pursuant to s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333, cannot succeed.
- [211] The claim in third party notice is therefore dismissed.

COSTS

- [212] In all the circumstances, it is appropriate to permit the parties to argue the issue of costs after the release of these Reasons.
- [213] Because I retired as a judge of this Court effective December 31, 2018, if the parties wish to make submissions concerning costs, they should contact Supreme Court Scheduling to arrange a hearing date before another judge of this Court.
- [214] Finally, I wish to thank counsel for the defendants who demonstrated courtesy to Mr. Beacock at the hearing and comported herself with professionalism throughout. The resulting efficiency in the trial process benefitted all parties.

"Dardi J."

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