

CANADA / JUDGMENT

Brunning v. Cummings

2020 BCSC 31

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Supreme Court of British Columbia

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2020 BCSC 31 Brunning v. Cummings

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brunning v. Cummings,

2020 BCSC 31

Date: 20200113

Docket: S115473

Registry: Kelowna

Between:

Cheri Colleen Brunning and Joel Donald Brunning

Plaintiffs

And

Robert Stewart Cummings and Benigna Valdez Cummings

Defendants

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:

C. Williams

D. Horvath

Counsel for the Defendants:

J.C. Chandler

Place and Date of Trial/Hearing:

Kelowna, B.C.

October 8-11, 15-18,

November 8, 2019

Place and Date of Judgment:

Kelowna, B.C.

January 13, 2020

Introduction

- [1] The plaintiff purchasers of a house located at 3929 Woodell Road, West Kelowna, British Columbia ("House") allege that the defendant sellers misrepresented its condition when they sold it to them. The House was built in 1974, in the "Glenrosa" subdivision area of West Kelowna. The plaintiffs say that the defendants deliberately failed to disclose significant pre-existing flooding issues in the basement of the House.
- [2] They sue the defendants, claiming fraudulent misrepresentation, negligent misrepresentation, and breach of contract.

Background and Overview

a. The defendants

- [3] The defendants have been married for 26 years. Mr. Cummings is a 50-year-old truck driver. He works three straight 14-hour days and then has four days off. Mrs. Cummings is 52 years old and moved to Canada from the Philippines in 1990. English is her second language. She has been employed as a health care aide for the past 22 years. At all relevant times, the defendants lived on a small farm in the Winfield area north of Kelowna with their children.
- [4] As a hobby and additional source of income, the defendants enjoy buying "fixer-upper" houses, renovating them, adding suites, renting and/or "flipping" them. Prior to purchasing the House, they had previously renovated and sold five to six homes and were involved in one new construction.
- [5] On September 14, 2014, the defendants purchased the House, a definite "fixer-upper", for \$210,000 on a foreclosure sale with the intention of renovating it and selling it. The House required a complete makeover from top to bottom. They started the renovations soon after the sale closed, doing most of the work themselves during the four days Mr. Cummings had off from his truck driving job each week. They lived at the House on those days. As part of the renovation, they built a separate two bedroom suite in the basement, complete with a full kitchen, dining room, bathroom and living room/rec room, new drywall, paint,

baseboards, underlay, linoleum and carpets. During the renovations, they noticed no water or moisture-related issues in the basement. The renovations were completed in July 2015, and the defendants promptly listed the House for sale. The real estate market was slow at the time and there were no offers. The defendants then decided to rent it on a short term basis until the market improved.

- [6] In December 2015, Ms. Trish Matheson, her then partner and children agreed to rent the House for \$1900 per month. Ms. Matheson's niece Tia Hebert, Ms. Hebert's boyfriend Billy, and her infant daughter, sub-let the basement suite (collectively the "Tenants").
- b. The February/March 2016 basement flooding
- [7] All went well until February 21, 2016, when Ms. Hebert noted that the carpet in her bedroom (called "BR2" at trial) was quite wet. Initially, she thought someone had spilt water on the carpet but it did not dry on its own and in fact was getting bigger. She soon noted that the carpet in the recreation room was also wet. Ms. Hebert informed Ms. Matheson of the water problem who immediately informed the defendants. They promptly came out to investigate. The defendants testified that the carpet wet spots in BR2 and the recreation room were quite small, roughly 8" x 10" and 10" x 10", respectively. Ms. Matheson and Ms. Hebert, however, both testified that the water was much worse.
- [8] The defendants brought over fans and a shop vac to suck up the water. Billy was doing his best to keep up with the water by using the defendants' shop vac. The carpets and underlay were pulled back revealing water seeping through various cracks in the concrete basement floor. The extent of the water coming through those cracks differed between the Tenants' evidence and the defendants' evidence. The Tenants testified that it was substantial, the defendants testified it was minimal.
- [9] The defendants arranged to remove the carpets and take them to the garage to dry. The underlay could not be salvaged and was discarded. Ms. Hebert's furniture was initially stacked in the non-affected areas of the basement but when those areas began flooding, her furniture was removed either to the garage or upstairs to Ms. Matheson's suite.
- [10] On February 23, 2016, Mr. Cummings installed a temporary sump-pump at the outside-rear of the House. It ran continuously and, at first, appeared to reduce the water entering the basement.
- [11] Instead of retaining a restoration company, and despite Ms. Matheson's concerns about mould in the basement, the defendants attempted to deal with the flooding themselves during Mr. Cummings' days off work. These attempts included calling a plumbing company known as "Mr. Rooter", whose representative came by the House. The storm drain on the driveway was overflowing. Mr. Cummings wanted the Mr. Rooter representative to "scope" the driveway drain to determine if it was plugged, but was told it would be a waste of money because it was likely draining into a dry rock pit of some kind and that there was simply too much water for the rock pit to handle. While there, the Mr. Rooter representative inspected

the yard and noticed water seepage near where the water line entered the basement foundation wall. He suggested that the basement flooding might be related to a broken water line. If not, he recommended placing drain tile and a sump pump at the rear elevation of the House as a method of removing the ground water.

- [12] Mr. Cummings decided to follow that advice. With the use of a small rented excavator, he determined the water line was intact and, with Billy's help, he dug a four-foot deep sump well ("Sump Well") at the rear foundation wall of the House. The ground water was very high, and Mr. Cummings concluded it was the source of the basement flooding. Mr. Cummings installed a rented temporary submersible pump in the Sump Well and, using a fire hose, pumped the water from the well into a white PVC stand-pipe that he found in the House's backyard that he assumed was a sewer access pipe ("White Pipe"). The White Pipe was able to handle the significant amount of ground water that was being continuously pumped into it.
- [13] Mr. Cummings also hand dug down to the bottom of the House's concrete footings, a depth of approximately 1 to 1-1/2 feet, installed Big-O drainage pipe and drain rock along the entire length of the footings at the back of the House. He attached the Big-O pipe to the Sump Well that in turn pumped the water through a one-foot deep PVC pipe that he buried and connected to the White Pipe below ground. He then replaced the temporary rented sump pump with a sump pump that he purchased and built it into the Sump Well. This remediation work took about one week to complete.
- [14] This remediation system initially seemed to work. The sump pump ran continuously, pumping water into the White Pipe. The defendants took no steps to determine what the White Pipe was or where it led to.
- [15] On February 28, 2016, Ms. Matheson sent this text to Mrs. Cummings:
- We want to set the baby's room back up as you suggested that it was mostly dry. We peeled back the carpet back a bit more to make sure and there was a puddle of water and the underlay is completely saturated. As it stands now the bottom half of the House is completely unusable until everything is dealt with. Unfortunately you guys are going to have to take out all the underlay in all the rooms as every time we peel back further we find more standing water. Nothing will properly dry until the wet underlay is removed. Can you guys arrange to have a restoration company come and deal with this asap?
- [16] The flooding returned in early March 2016, worse than in late February. This time, water started seeping in through a crack in the floor of Ms. Hebert's daughter's bedroom (called "BR1" during the trial) and progressed into the kitchen/dining room area. Water affected Ms. Hebert's furniture and other belongings that had been moved there in February. Attempts to mop it up with a towel did not work and the water began to accumulate. The Tenants continued using the shop vac to suck up the water. Ms. Hebert described the water being "ankle deep" at one point before Billy was able to vacuum it up.

[17] On March 3, 2016, Ms. Matheson sent this text:

The water through the night made it into the kitchen/dining room and is now ruining our belongings we had to move in there from the other rooms.

[18] Mrs. Cummings suggested that they move their belongings into to the garage.

[19] On March 6, 2016, Ms. Matheson sent the following text to the defendants:

Just an update that overnight so much water came in the baby room that it pooled and went under between the wall and the floor into the hall. We are shop vaccing it up right now but wanted you to know.

[20] The entire basement suite was unusable for nearly two months with Ms. Hebert, her partner and daughter moving upstairs with Ms. Matheson and her family.

[21] Eventually the water receded and dried up. New underlay and the carpets that had been removed were re-installed on April 3, 2016, and the basement suite was once again usable.

[22] The defendants say that, as far as they were concerned, the flooding problem was fixed.

c. The listing and Property Disclosure Statement

[23] The same day as the new underlay and carpets were installed, April 3, 2016, the defendants listed the House for sale and so advised Ms. Matheson. As part of the real estate listing, the defendants signed a Property Disclosure Statement ("PDS") in the usual form. They answered "No" to the following question:

3. Are you aware of any moisture and/or water problems in the walls, basement or crawl space?

[24] They added these comments:

There was some seepage recently on basement floor. This was rectified by installing a sump pump and drain tile at back of house.

[25] The PDS also included the following statement:

The seller states that the information provided is true, based on the seller's current actual knowledge as of the date on page 1. Any important changes to this information may be made known to the seller will be disclosed by the seller to the buyer prior to closing.

[26] The defendants also represented that they were not aware of any material latent defects respecting the House, meaning, any material defect that could not be discerned through a reasonable inspection of the House.

- [27] The PDS cautioned the defendants to ensure that the information they provided was not only accurate and complete but that all relevant information known to them was disclosed. In deciding what to disclose, they were urged to consider whether the information would be important to them if they were buying the House. The PDS went on to say that notwithstanding the seller's representations, the buyer must still make the buyer's own inquiries.
- [28] By signing the PDS, the defendants confirmed the information it contained was true based on their actual knowledge as of April 3, 2016, and they agreed to advise the plaintiffs if there were any important changes to the information in the PDS that was made known to them prior to closing.
- [29] Mrs. Cummings asked Ms. Matheson not to disclose or discuss the basement flooding issues to prospective purchasers because, she said, it had been disclosed in the PDS.
- d. The plaintiffs and the contract of purchase and sale
- [30] The plaintiffs are a blended family with four children. They have been married for approximately 4.5 years. Shortly after their marriage they began looking for a home that was large enough to house their blended family. After looking at a few homes, their realtor introduced them to the House and they went to have a look. They felt it was exactly what they were looking for. Their realtor provided them with the PDS which they read and were comforted by. They saw nothing in it that caused them any concern. In particular, they had no concerns that there might be water seepage issues in the basement.
- [31] A few days later they viewed the House for a second time and on May 25, 2016, made an offer to purchase for \$359,000. After a short series of negotiations, the parties agreed to a purchase price of \$371,000 and a binding contract of purchase and sale ("Contract") was entered into. The closing date was set for August 3, 2016. The Contract contained the following term:
- i. Subject to the Buyer(s) on or before May 31, 2016 approving the PDS dated April 3, 2016 with respect to the information that reasonably may adversely affect the use or value of the property. If approved the statement will be incorporated into and for part of this contract. This condition is for the sole benefit of the Buyer(s).
- [32] One of the conditions of the Contract was that the plaintiffs could have the House inspected. The home inspection took place on May 27, 2016, and a detailed report was issued. The home inspector, Mr. Brown of "A Buyers Choice Home Inspections" and a personal acquaintance of Ms. Brunning's, inspected the House and discovered no issues with water infiltration. The plaintiffs did not provide Mr. Brown with a copy of the PDS. Mr. Brown's home inspection report disclosed that the roof needed replacement, and a downspout needed to be extended and a broken window in the garage needed replacement.

- [33] Mr. Brown's report also pointed out concerns he had with the slope of the ground surrounding the House. As a general observation, he noted that it was important that watering next to the home be kept to a minimum and that runoff water should be drained away from the foundation walls to minimize the chance of water leakage into the basement. Cracks in foundation walls, he noted, are common. Specifically dealing with the House, he noted that the ground swale did not have adequate depth or slope for proper drainage and recommended improvements be made to the grade, swale slope and depth to improve water control. He recommended that the ground slope away from the House be at least 1 inch per foot.
- [34] Other than relying on the PDS and Mr. Brown, the plaintiffs took no steps to investigate further. They did not communicate with the Tenants, consult with the City of West Kelowna or consult any experts.
- [35] The plaintiffs approved the PDS, waived and removed the subjects to conditions on May 31, 2016.
- [36] The plaintiffs testified that they relied on the PDS that the "moisture" issue had been rectified and fixed, particularly because the defendants had stated "no" to there being moisture or water issues in the basement.
- [37] On August 2, 2016, one day prior to closing, the plaintiffs did a pre-move walk-through inspection to ensure the House was the same as when they had seen it in May. There were no unexpected issues. Specifically, they noted no water ingress issues.
- [38] The plaintiffs completed the purchase and took possession of the House on August 3, 2016, as agreed.
- e. The July 9, 2016 water event
- [39] On July 9, 2016, just less than one month before the plaintiffs took possession of the House, the Tenants noted water coming up again in the carpets of BR1. The carpet was wet with what appeared to be a "milk jug" amount of water. The underlay was also wet. Ms. Matheson sent a text message to Ms. Cummings stating:

Bad news - basement just flooded again

("July 9, 2016 Event")

- [40] The carpets were lifted and fans used to dry the carpets. Ms. Matheson noted that water was oozing up through the crack in the concrete floor, similar to what had occurred in the February/March timeframe. Towels and a mop were used to clean it up. The defendants arrived five days later. By that time, the Tenants had mopped the water up and the water ingress had substantially subsided, however towels and a blanket were still needed to dry the concrete floor.

- [41] Mr. Cummings testified that there was only a small spot of water on the carpet and on the linoleum leading from the basement kitchen area. He says he lifted a part of the carpet in BR1 and the underlay was dry. He checked the driveway drain and the Sump Pump Well and both were dusty and dry. He noted that the sump pump was unplugged, he suspects by the Tenants.
- [42] The defendants did not disclose the July 9, 2016 Event to the plaintiffs. They dismissed it as a non-event. They concluded that the Tenants were "messaging" with them for reasons they could not explain but suspected had to do with the House being sold and the Tenants having to vacate. The defendants suggest that the Tenants were difficult, and were constantly complaining.
- f. Post-closing water issues
- [43] The spring of 2017 was a significant year for precipitation, run-off and high ground water. The evidence suggests there were flooding issues throughout the Central Okanagan, including in the Glenrosa area. There was water flowing under neighbouring properties and homes.
- [44] On February 16, 2017, the plaintiffs noted water infiltrating the House's basement suite, including into the dining room, kitchen area, hallway and one of the bedrooms. The carpets and underlay were soaking wet and were lifted. Ground water was entering the basement through cracks in the concrete slab. Water was also seeping through the basement door and wall areas.
- [45] As it happens, Ms. Brunning has a background in flood restoration, having worked for restoration companies for approximately 11 years. She is qualified in restoration, mould, fire and smoke and water damage. She obtained some water damage equipment from her employer and the plaintiffs set about to do what they could to remediate the flooding issue. Nothing happened again until March 14, 2017, when the basement suffered significant flooding that continued for approximately six weeks. By early June 2017, the water had dissipated.
- [46] At the same time as the basement flooding, the entire backyard of the House was waterlogged and in some areas up to ankle-deep in water. Inside the House, the water seepage was constant through the walls and through cracks in the concrete floor. The driveway storm drain was also not draining.
- [47] Mr. Brunning installed five sump pumps ("Additional Sump Pumps") in the backyard and other areas to address the standing water and high ground water. He also dug a trench along the rear of the house to the Sump Pump Well to allow the water to run into it and be pumped out into the White Pipe.

- [48] Ultimately, the plaintiffs had to gut the basement to the stud walls and it has not been used since. The plaintiffs attempted remediation by doing what they could to repair the cracked floors, including using a concrete sealer called Xypex. Their efforts did not solve the issue and water has continued to rise through the cracks.
- [49] The plaintiffs' basement furniture, including their children's bedroom furniture, has been placed into a rented storage container. When they removed the drywall, insulation and vapour barrier, they noted a lot of black growth appearing to be mould on the foundation walls, requiring cleaning and containment. The baseboards and drywall were wet, appeared mouldy on the back, and could not be re-used.
- [50] In September 2017, the plaintiffs replaced the main water line feeding the House because it was broken.
- [51] Water seepage into the basement has reoccurred each spring and also in September 2019. The extra sump pumps were not needed or used in 2019. There was no water oozing up through the basement slab cracks; it entered through the back door and back wall areas.

Engineering Reports

- a. Ms. Jennifer Anderson, P. Eng.

- [52] In April 2017, the plaintiffs retained the services of Ms. Jennifer Anderson, a geotechnical engineer with Interior Testing Services Ltd., to help determine where the water was coming from and what could be done to solve the problem. Ms. Anderson authored a report dated April 21, 2017 ("Anderson Report") and also testified. Her opinion is that the House is located in a low area surrounded by high storm water volumes and groundwater levels. In her opinion, the basement flooding was due to the ground around and underneath the basement slab being saturated because of high water levels. She made a series of recommendations which included the installation of a proper perimeter drainage system to remove ground water from the footings. The system would include the installation of drain tile and drain rock. Ground water from the footings would then be piped away into a catch basin, ditch or other water collection area away from the House.
- [53] She testified that that connection between the House's footings and its foundation walls is not water tight. The concrete floor slab is poured on top of fill. If there is ground water and the drainage system at the footings is inadequate, the water will infiltrate cracks in the slab, foundation walls or through the unsealed connection between the footings and the foundation walls.
- [54] In her opinion, the reason the House's basement flooded is that the drainage system at the footings, to the extent there is one, is deficient and does not function properly. She stated that the remediation measures employed by the defendants were inadequate. The drainage tile and sump pump were installed at the rear of the House instead of at the front where the greatest amount of ground water would have been.

- [55] Ms. Anderson recommended upgrading the perimeter drainage, installing a sump pump in the basement, regrading the ground to direct water away from the House, and finding a suitable place for the water to be pumped. If that failed, she recommended raising the entire House one meter and adding more soil volume to assist with water dispersion.
- b. Mr. Remi Allard, P. Eng.
- [56] The defendants retained Mr. Remi Allard, a hydrogeologist and geotechnical engineer to provide an opinion on the causation of the water ingress issues into the House. His report is dated August 6, 2019, and was entered into evidence. He also testified.
- [57] Mr. Allard reviewed and critiqued the Anderson Report. The primary difference between their opinions is in respect of the cause of the 2016 water ingress. Ms. Anderson believes it was high ground water. Mr. Allard believes the water must have been from some other source, such as a broken water pipe somewhere in the neighbourhood. His review of the historical precipitation tables recorded by Environment Canada shows that the spring of 2016 had very low precipitation levels compared to other years, in particular 2017. Therefore, his opinion is that the flooding of the House's basement in 2016 was likely not caused by high ground water tables, but the 2017 flooding likely was.
- [58] He testified that the only way of dealing with the issue is to pump the water out of the area. Perimeter draining will not help unless the water has somewhere to go, such as a storm sewer or drain.
- [59] He explained that the spring time water table in the wetlands surrounding the House is higher than the House and water will have to be hard piped off the property. He did not investigate where the White Pipe goes because it was not part of his scope of work.

Issues

- [60] The issues are:
- Was the PDS incorporated into the contract of purchase and sale?
 - What is the effect of the PDS?
 - Are the defendants guilty of fraudulent misrepresentation?
 - Are the defendants guilty of negligent misrepresentation?
 - Did the defendants breach the contract of purchase and sale?
 - What damages have been proven?
- [61] The determination of these issues revolves around what the defendants knew about the water seepage and ingress issues on April 3, 2016, when they listed the House for sale and signed the PDS, and whether they should have notified the plaintiffs of the July 9, 2016 Event.

Plaintiffs' position

- [62] The plaintiffs claim that the defendants knew the water ingress problem was not properly remediated and fraudulently and/or negligently misrepresented the flooding problem by minimizing the issue and by stating that it had been fixed. They also improperly failed to report the July 9, 2016 Event by brushing it off as a non-event.
- [63] The plaintiffs say that because the lack of disclosure was deliberate, the defendants are guilty of fraudulent misrepresentation and the plaintiffs have suffered damages as a consequence. They claim the diminution of value of the House as a result of the flooding issues, or alternatively, the cost of raising the House by one metre and making the other repairs recommended in the Anderson Report. Their claimed damages are based on the various quotes the plaintiffs have obtained for the cost of implementing Ms. Anderson's recommendations.

Defendants' position

- [64] The defendants respond that they did not misrepresent any fact, fraudulently, negligently or otherwise. They say that the House is over forty years old and that unless they deliberately or negligently failed to disclose something they should have, the doctrine of caveat emptor applies to the Contract: *Nixon v. MacIver*, 2016 BCCA 8 at para. 47. They say that the plaintiffs' claims ought to be dismissed in their entirety. They say that they effectively addressed and resolved the flooding issue by installing a sump pump and drainage system. They say that the statement in the PDS that there was some seepage recently on basement floor and that it had been rectified by the installation of a sump pump and drain tile at back of house was true.
- [65] Respecting the July 9, 2016 Event, they say that the wet carpet must have been caused by a water spill of some kind and not the because of a re-occurrence of water seeping through cracks in the basement floor. They say that the Tenants likely staged the event because they were upset with the defendants and it was not something that they were contractually required to report.

Discussion

- [66] In its simplest form, this case is about what the defendants knew or should have known about the water ingress issue.
- [67] Unless a vendor i) fraudulently misrepresents or conceals; ii) knows of a latent defect rendering the home unfit to inhabit; iii) is reckless as to the truth or falsity of statements about the fitness of the house; or iv) breaches the duty to disclose a dangerous latent defect, the onus remains on the purchaser to satisfy him or herself of the quality of the property being sold: *Cardwell v. Perthen*, 2007 BCCA 313 at para. 48.

- [68] When a latent defect as opposed to a patent defect is in issue, the disclosure obligations of a vendor may be enhanced. See: *Cardwell v. Perthen*, 2006 BCSC 333 [Cardwell SC]; and *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191.
- [69] In considering the distinction between patent and latent defects and the issue of disclosure, Justice Ballance wrote in *Cardwell SC*:
- [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: 44601 B.C. Ltd. v. Ashcroft (Village), [1998] B.C.J. No. 1964 (S.C.) [Ashcroft]; *Bernstein v. James Dobney & Associates*, 2003 BCSC 986 [Bernstein]. 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.
- [70] Also, in *McCluskie* at para. 54, Justice Bennett (as she then was) stated:
- [54] In conclusion, I find that although the law of vendor and purchaser has long relied on the principle of caveat emptor to distribute losses in real estate cases, the rule is not without exception. Two major exceptions are in the case of fraud, and in cases where the vendor is aware of latent defects which he does not disclose. The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist. It is up to the plaintiff to prove this degree of knowledge or recklessness.
- [Emphasis added.]
- [71] As mentioned earlier, the inquiry into whether the representations contained in the PDS were untrue, inaccurate, or misleading, requires an analysis of the circumstances that existed on April 3, 2016, when the PDS was signed. The focus is on the defendants' knowledge of the state of affairs at the time and whether, in all the circumstances, that knowledge reasonably permitted them to make the representations they made.
- [72] Mr. Alan Fillion is the Director of Public Works for the City of West Kelowna. He testified, and I accept, that there have been numerous challenges with ground water in the area of the House for many years, including ground water concerns from residents in the area. There is a series of ditches and road drains that are not "state-of-the-art" that are used for storm drainage.

- [73] The House is located in an older subdivision of West Kelowna with no modern curb and gutter system. The City has no plans to upgrade or install a proper storm drainage system in that area.
- [74] The Tenants also testified. I will state at the outset that I accept the Tenants' evidence without hesitation. Ms. Matheson and Ms. Hebert both were calm, forthright and I find honest in giving their evidence. While they were both aligned more with the plaintiffs than the defendants, that alignment is attributable to their unhappiness with what they considered to be improper and untrue statements made by the defendants respecting the extent of the flooding in February and March 2016.
- [75] The Tenants were both independent and had no stake in this action. Their testimony was not shaken on cross-examination. This finding applies to their evidence about the extent of the flooding that occurred in the February and March 2016 timeframe, and the July 9, 2016 Event. Contrary to the defendants' position, I conclude that they were not "taking sides". Nor were they "Chicken Little - the sky is falling" types of people as Mr. Cummings suggests. The defendants' descriptions of the Tenants do not fit with my assessment of them as witnesses, or with the text messages Ms. Matheson sent to Mrs. Cummings. They were mostly polite and accommodating. The Tenants displayed patience and sympathy for the defendants' situation throughout the February and March flooding, despite the obvious disruption to their own lives.
- [76] Where the Tenants' evidence differs from that of the defendants, I accept the Tenants' evidence.
- [77] The Tenants took photos of the initial water ingress. The defendants did not. The photos are telling and prove there was significant water entering the basement through cracks in the basement floor. The Tenants described the water at one point as "ankle deep" which, although I find to be somewhat of an exaggeration, makes the point, which I accept, that the flooding problem was significant. The problem was much larger than the defendants are prepared to admit. Either they understated the problem or turned a blind eye to the seriousness of it.
- [78] The defendants' evidence about what was going on from February to April 2016, is also inconsistent with the contemporaneous text messages between Ms. Matheson and Mrs. Cummings.
- [79] If the problem was as small as the defendants suggest, there would have been no need for the response and remediation that took place. The problem was obviously much larger that they were prepared to admit to a potential buyer.
- [80] The defendants are handy people. They have purchased, renovated and built numerous houses. Mr. Cummings in particular would have known that a drainage system was required around the perimeter of the House at the footings. His attempt at remediation by hand digging a trench around the foundation walls at the back of the House to below the footings

disclosed that there was no drainage system present. With his background and knowledge, that should, and, I conclude, would have alerted him to the fact that installation of a proper drainage system was necessary. His attempt to solve the water ingress issue by putting in a drainage system that went into a drain that drained to an unknown place was not sufficient. At best it was a band aid solution to what he knew or ought to have known, was a much larger problem.

[81] I conclude that the defendants knew the water ingress issue was far worse than they let on. They attempted to minimize the problem when they signed the PDS and when they testified. The fact that they had to rent two large carpet blower fans for five days, then remove all the carpet and underlay does not reconcile with their evidence of the minimal amount of water that came into the basement.

[82] The ground water ingress issue was a latent defect of which the defendants were aware and had a duty to disclose. Their suggestion that "some seepage recently on basement floor" was "rectified" by installing the sump pump was a deliberate misrepresentation of the true state of affairs, calculated to mislead a potential buyer into thinking it was a minor issue when they knew it was not.

[83] I conclude that they did not disclose the water ingress issue for fear of it compromising the House's potential sale.

a. Was the PDS incorporated into the contract of purchase and sale?

[84] Yes.

[85] The Purchase Contract stated:

Subject to the Buyer(s) on or before May 31, 2016 approving the Property Disclosure Statement dated April 3, 2016 with respect to the information that reasonably may adversely affect the use or value of the property. If approved, such statement will be incorporated into and form part of this contract. This condition is for the sole benefit of the Buyer(s).

[86] The plaintiffs approved the PDS before the deadline and it was therefore incorporated by reference into the terms of the Purchase Contract: *Hanslo v. Barry*, 2011 BCSC 1624 at paras. 85-90.

b. The effect of the PDS

[87] The purpose of the PDS is to identify and put prospective purchasers on notice of any known problems, concerns or latent defects that would not easily be discoverable to a prospective purchaser: *Krawchuck v. Scherbak*, 2011 ONCA 352 at para. 89. Vendors are not required to warrant a certain state of affairs but to identify issues with the property that they know about. In other words, the PDS is a representation as to their knowledge: *Nixon*, at para. 48; *Anderson v. Kibzey*, [1996] B.C.J. No. 3008 at paras. 13-14; *Zaenker v. Kirk*, (1999), 30 R.P.R. (3d) 9 at para. 19; *Kiraly v. Fuchs*, 2009 BCSC 654 at paras. 47, 49; *Roberts v. Hutton*, 2013 BCSC 640 at para. 83.

- [88] The defendants had an obligation to correctly and honestly disclose the ground water and water ingress issues respecting the House's basement. Instead, they represented that they were not "aware of any moisture and/or water problems in the walls, basement or crawl space" and that the water seepage in the basement floor was rectified by installing a sump pump and drain tile at the back of the house. These were representations upon which the plaintiffs not only could, but did rely.
- [89] Mr. Duncan has been the defendants' realtor for about 12 years. He and his wife have been involved in previous property purchases/sales on the defendants' behalf. The defendants attempted to deflect their representations in the PDS to their realtors stating that they wrote on the PDS what the realtors said to write.
- [90] I conclude that the defendants minimized and misrepresented the issue to Mr. Duncan and his wife. Mr. Duncan advised the defendants to seek legal advice respecting the PDS to ensure the water issue was adequately disclosed. The fact that Mr. Duncan recommended the defendants seek legal advice on what disclosure should be made in the PDS is telling. I infer that the water ingress issue was more serious than they were letting on to Mr. Duncan and to the lawyer they spoke to about it. I have already concluded that the defendants wanted to sell the House and did not want to scare away potential purchasers. They knew that if they disclosed the true nature of what happened, the House would probably not be saleable. The fact that they told the Tenants not to mention the flooding issue to any prospective purchasers is also telling.
- [91] It is true that the PDS stated that, notwithstanding the information contained in it, the plaintiffs were to make their own inquiries. It suggests that the sellers' knowledge may be incomplete and alerts prospective purchasers that the information in the PDS may in some way be lacking. They argue that both the PDS and the Home Inspection Report contained "clues" that the plaintiffs should have followed up.
- [92] I disagree. This warning does not absolve the defendants from liability for misrepresentations or misstatements in the PDS. Nor does the PDS create a duty on the purchasers to challenge the vendor's honesty and forthrightness: Krawchuk at paras. 85 and 88.
- [93] Neither the plaintiffs nor the home inspector identified any water ingress or water seepage issues prior to the subject removal on May 31, 2016. A home inspection is not intended to find latent defects. Where a PDS has been prepared, the purchasers are entitled to rely accuracy of the representations contained in it: Krawchuk, at para. 89. They were not required to go behind its representations. Given Ms. Brunning's familiarity with water ingress and water damage issues, had there been anything to see I am satisfied she would have seen it. Likewise, Mr. Brown, who I am satisfied is a qualified home inspector, would also have seen any patent water ingress issues had they been present.
- c. Are the defendants guilty of fraudulent misrepresentation?

[94] Yes.

[95] In the context of a real estate sales transaction, in order for the plaintiffs to prove fraud, they must establish five things:

- a) The defendants made a representation of fact to them;
- b) The representation was false;
- c) The defendants knew that the representation was false when they made it, or that they made it recklessly, not knowing if it was true or false;
- d) The defendants intended the plaintiffs to act on the representation; and
- e) The plaintiffs were induced to enter into the Purchase Contract in reliance on the false representation and suffered a detriment.

See *Wang v. Shao*, 2018 BCSC 377 at para. 196, citing *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25 and *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 42.

[96] An incomplete representation of a material fact may be sufficient to establish the falsehood. In *Wang*, the Court wrote:

[205] An incomplete representation of material facts may amount to an actionable falsehood: *Van Beek* at para. 46.

[206] As *Fenlon J.*, as she then was, stated in *Battrum v. MacKenzie Estate*, 2010 BCSC 1285 at para. 10:

10 . . . In *S.M. Waddams, The Law of Contracts*, 5th ed. (Toronto: Canadian Law Book Inc., 1999), Professor Waddams suggests at para. 436 that an incomplete representation may amount to an actionable falsehood:

. . . An incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations. Almost always something is said to induce the transaction and it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations. [Footnotes omitted.]

[97] It is sufficient that the false representation was "a" material inducement upon which the plaintiffs relied. It does not need to be "the" inducement. If full and accurate disclosure of the water ingress issue would have given the plaintiffs pause to investigate further and perhaps not purchase the House, the fifth element of inducement to enter into the purchase contract is established: *Wang* at para. 214.

[98] The defendants knew the water was a potential issue and that water ingress would be a significant concern to prospective purchasers. They completed and signed the PDS, without honestly believing that the basement flooding issue was fixed.

[99] I accept that the plaintiffs relied on the accuracy of the representations contained in the PDS in deciding to purchase the House. Although Mr. Brown's home inspection report identified potential problems with the slope of the yard, it did not note any specific issues respecting water ingress into the basement. The recent flooding in the basement was not readily apparent to someone conducting a walk-through inspection of the House.

d. Are the defendants guilty of negligent misrepresentation?

[100] I have already concluded that the defendants fraudulently misrepresented the water ingress issue on the PDS. It is therefore not necessary to deal with the plaintiff's negligent misrepresentation arguments to dispose of this matter. However, in the event that I am wrong, I would also find that the defendants negligently misrepresented the water ingress issue on the PDS, based on the following analysis.

[101] To establish that the defendants negligently misrepresented the condition of the House, the plaintiffs must prove on a balance of probabilities that the representations in the PDS were (1) untrue, inaccurate or misleading; and also (2) that they were negligently made. See Hanslo at paras. 108-109.

[102] The standard against which the defendants' representations must be assessed is that of a reasonably objective person having that knowledge. See Zaenker at para. 17.

[103] For the plaintiffs to ground a claim in negligent misrepresentation, they must prove five elements:

1. A duty of care based on a "special relationship" between them and the defendants;
2. The representation must be untrue, inaccurate or misleading;
3. The defendants must have acted negligently in making the representation;
4. They relied on the negligent misrepresentation and that reliance was reasonable in the circumstances; and
5. They relied on the negligent misrepresentation to their detriment.

See *Queen v. Cognos*, [1993] 1 S.C.R. 87 at 110.

[104] Elements one, four and five can be easily disposed of. The PDS itself satisfies the requirement of "special relationship". The fact that the plaintiffs obtained a home inspection does not negate reliance on the PDS. They can rely on the accuracy of the PDS regardless of having a home inspection performed: Hanslo at paras 124-125. They were entitled to rely on it as accurate to the best of the defendants' knowledge: Hanslo at paras. 109 and 127. The plaintiffs had no duty to challenge or question the defendants' honesty and forthrightness for latent defects: Krawchuck at para. 88.

[105] Respecting the second element, I have already found that the representation that the water "seepage" issues were fixed, was false.

[106] Respecting the third element, whether or not the defendants acted negligently in making the representation, the standard against which the defendants' conduct is to be assessed is that of reasonable persons having the knowledge the defendants did. The PDS contained a provision stating that the defendants were responsible for the accuracy of the answers to the questions set out in it. Knowingly making an inaccurate or misleading statement under such condition is, in my view, negligence. Hanslo, at para. 122. Reasonable people in the defendants' shoes, knowing the nature of the ground water and water ingress issues would have sought and obtained advice from a ground water professional, such as a geotechnical engineer, to properly remediate the problem. The solution they chose was, at best, a temporary band-aid that did not "fix" the issue.

[107] Respecting the fourth element, I have concluded that the plaintiffs relied on the statements in the PDS that the defendants were not aware of any moisture or water issues and that the "seepage" issue had been resolved. This was not a "seepage" issue, it was a ground water drainage issue.

[108] The Contract of Purchase and Sale provided for representations and warranties as follows:

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."

[109] The defendants argue that this clause is what is known as "an entire agreement" clause which excludes any ability for the plaintiffs to make a tort claim for negligent misrepresentation: No. 2002 Taurus Ventures Ltd. v. Intrawest Corp., 2007 BCCA 228 at paras. 36-60; Meslin v. Lee, 2011 BCSC 1208 at paras. 102-104.

[110] In my view, those cases are distinguishable to the facts in this case because the PDS was part of the Purchase Contract by incorporation.

[111] Accordingly, I find that the defendants were negligent in making the representations.

e. Did the defendants breach the purchase contract?

[112] Yes.

[113] I have already found that the PDS was incorporated into the Purchase Contract. The defendants misrepresented the state of affairs when they filled out and signed the PDS which was later incorporated into the Purchase Contract. The defendants failed to inform the plaintiffs of the July 9, 2016 Event and by so doing, were in breach of their ongoing disclosure obligations as set out in the PDS and incorporated into the Purchase Contract. Effectively, the defendants turned a blind eye to the water ingress issue in the hope that their makeshift remediation efforts were sufficient.

f. What damages have been proven?

- [114] The fundamental principle when fixing damages for loss of property is *restitutio in integrum*. The aim is to place the injured party in the same position as before the conduct that caused the loss: *Taylor v. King*, 82 B.C.L.R. (2d) 108 at para. 46.
- [115] The plaintiffs say that, to be placed into the same position they would have been in had the representation in the PDS been true, they should recover the diminution in value of the House due to the water issues: *Gordon v. Krieg*, 2013 BCSC 842 at para. 196. They argue that the diminution in value of the House is the correct measure of damages: *Ban v. Keleher*, 2017 BCSC 1132 at paras. 69-71.
- [116] They rely on Mr. Chambers' appraisals valuing the House, if it had no issues, at \$390,000 as at May 31, 2016. Next, relying on Mr. Johnson's quote of \$299,250 to repair the House as recommended by Ms. Anderson, Mr. Chambers values the House "as is" at \$90,000. Mr. Chambers next deducts 10% of the value of the House (\$30,000) for profit leaving an "as is" value of \$60,000.
- [117] The plaintiffs say that they purchased the House for \$371,000, but that the actual value was \$60,000. They seek damages for the difference, \$311,000. They assert that this formula is similar to the assessment of damages accepted in *Gordon* at para. 197, "to take into account the stigma and uncertainties inherent in the purchase of a damaged asset".
- [118] Alternatively, the plaintiffs seek damages for the cost of raising the House by one metre, installation of a perimeter drainage system and the remediation/replacement of the driveway, landscaping and fencing that would be needed afterwards. These measures, they say, were recommended in the Anderson Report.
- [119] The amount claimed by the plaintiffs is based on various quotations they obtained, mostly in 2017, which are now somewhat dated. Quotations for repair costs can be accepted as the cost of repair: *Davies v. City of Calgary*, 2010 ABQB 813 at para. 16.
- [120] The contractors who were asked to give quotations testified. They based their quotations on their site visits and on Ms. Anderson's recommendations.
- [121] Mr. Albert Blackwell of Blackwell Building Movers provided a quote to raise the house by 3-4 feet, which would allow another contractor to increase the foundation walls as recommended by Ms. Anderson, and then place the house on the new foundation walls. His quote, dated May 10, 2017, is for \$13,272 including taxes.
- [122] Mr. Evan Sigalas has been a plumbing and heating contractor since 2005. He has owned King Rooter Plumbing Inc. since 2011. He is also Ms. Brunning's previous partner and father of their son. He continues to pay child support to Ms. Brunning. They are on reasonably good terms and have a relationship that allows for civil communications. Ms. Brunning asked him to quote the cost of remediating the property as recommended by Ms. Anderson. His quote, dated January 14, 2019, is for \$95,000 and includes construction of a retaining wall, excavation and installation of a perimeter foundation drainage system, a sump well, basement sump pump and directing any water collected to either a City of West

Kelowna storm drain system or elsewhere. He was not prepared to give the plaintiffs a "family discount". He expected that his profit on the job would be in the neighbourhood of 15%. Because his quote was only valid for 30 days, it would have to be updated.

[123] Mr. Lance Johnson owns BC Concrete and Basement Repairs. He has 45 years experience in the concrete and basement repair business. On July 12, 2017, he provided a "budget" for lifting the House, raising the foundation walls and restoring the house on the new foundation, including all related work, based on Ms. Anderson's recommendations. The ball park cost for doing the work was \$285,000 plus GST. It was a budget because it was impossible for him to be precise because there were so many unknowns involved in the project. He did the best he could to let the plaintiffs know what the "ball park" cost would be. He stated that it could go up as high as \$400,000 (if pilings were required), but all things considered, knowing what he knows, he feels comfortable that the \$285,000 estimate was close to what the remediation costs would be. The budget included provisions for the plaintiffs to move out of the House, lifting the house, adding one metre to the foundation walls, pouring a new basement slab, setting the house back on the new foundation, installing a new drainage system including drain tile and drain rock, a new block retaining wall at the front of the House, backfilling and restoring the basement to the condition it was before the spring 2017 flooding. It also included landscaping to rough grade sufficient to ensure ground water and rain runs away from the House. It did not include the cost of new sod or replacing the concrete driveway that would be damaged because of the trucks and other heavy equipment that would be required.

[124] A reasonable solution is required. In cases of this sort, the cost of repairs can be an appropriate measure to adopt provided there is well-defined evidence on which to found an award of damages: 514953 B.C. Ltd, dba Gold Key Construction and Chiu v. Leung, 2007 BCCA 114 at para. 24.

[125] I have concluded that installing a perimeter drainage system around the footings that drains into the White Pipe will solve the issue. There is no conclusive evidence that the White Pipe drains into a sewer system, into a rock pit on the property or elsewhere. Where it goes is unclear and unproven. The best evidence before me is that it is capable of handling substantial volumes of water from the Sump Pump that runs during the spring high ground water season.

[126] The evidence suggests that the cost of installing a perimeter drainage system is in the range of \$130,000. In addition, the plaintiffs will incur costs of restoring the basement to the condition it was in before the March 2017 flooding occurred, including the cost of drywall, paint, baseboards and flooring. I have arrived at this amount based on the quotes provided by the plaintiffs for the necessary remediation work. I find the following quotes to be reasonable expenses for remediating the water ingress issue:

a)

Perimeter drainage system (King Rooter Plumbing Inc.):

\$100,000

b)

Fencing removal and reinstallation (Rite-Way Fencing Inc.):

\$1,700

c)

Basement flooring (Nufloors Kelowna):

\$7,600

d)

Drywall, paint, baseboards etc:

\$10,000

e)

Driveway replacement (Security Paving Co.):

\$10,000

f)

Landscaping and re-sloping the property (Soil to Sod):

\$10,000

TOTAL:

\$139,300

[127] Given that quotations are not an exact science, I assess damages at \$140,000.

i. Special damages

[128] The plaintiffs also claim out-of-pocket expenses of \$46,170.13, broken down as follows:

a)

A1 Plumbing and Drain - Camera Inspection:

\$411.98

b)

Interior Testing Services geotechnical report:

\$1,023.75

c)

Vacuum filter and bags:

\$169.38

d)

4 Submersible pumps, floats, hoses, etc:

\$1,143.95

e)

Sledgehammer:

\$47.03

f)

2 sheets of plywood:

\$273.25

g)

Buckets and towels:

\$117.85

h)

Wheelbarrow:

\$89.59

i)

Shop vacuum and boxes:

\$264.37

j)

Hydraclean Disaster Restoration Services:

\$37,949.30

k)

Secure-Rite Storage Services:

\$4,679.68

TOTAL:

\$46,170.13

[129] Save for the Hydraclean claim, I am satisfied that the plaintiffs have proven these special damages.

[130] The Hydraclean claim is what the plaintiffs say they would have been charged had they hired the plaintiffs' restoration services company. They did not in fact incur that expense. The time and effort they spent dealing with the water ingress in 2017 through 2019 will be compensated by way of their non-pecuniary damages claim.

[131] Accordingly, the plaintiffs are awarded special damages of \$8,220.83 (\$46,170.13 - \$37,949.30).

ii. Non-pecuniary damages

[132] The plaintiffs further claim damages of \$20,000 for the inconvenience, stress and loss of use of their basement since 2017, when they moved their family into the upstairs and their basement belongings to the storage container, and loss of use of their backyard.

[133] The plaintiffs are entitled to an award under this head of damages for the time, inconvenience, mental distress, and loss of enjoyment of the House including their inability to use the basement since the spring of 2017: *Khaira v. Nelson & Lidder*, 2002 BCSC 1045 at paras. 63-67; *Mundell v. Wesbild Holdings Ltd.*, 2007 BCSC 1326 at paras. 59-63.

[134] I accept the plaintiffs' submissions and award the plaintiffs \$20,000 under this head.

iii. Punitive damages

[135] The plaintiffs rely on the principles set out in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 to claim punitive damages against the defendants. Despite my finding that the defendants improperly tried to minimize and hide the House's ground water issues, I decline to make an award under this head. The highhanded, callous, deceitful, and egregious conduct that would be required to ground a punitive damages claim is absent in this case.

Summary

[136] The plaintiffs succeed in their claim against the defendants for fraudulent misrepresentation, negligent misrepresentation and breach of contract.

[137] Respecting damages, the plaintiffs have proven the following damages:

a)

Remediation Costs:

\$140,000.00

b)

Special Damages:

\$8,220.83

c)

General Damages:

\$20,000.00

TOTAL DAMAGES:

\$168,220.83

[138] Unless there are matters to which I am unaware, the plaintiffs are entitled to Scale B costs.

"G.P. Weatherill J."

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