

CANADA / JUDGMENT

Gundersen v. Savoy

2012 BCSC 1047

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1047 Gundersen v. Savoy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gundersen v. Savoy,

2012 BCSC 1047

Date: 20120716

Docket: 18188

Registry: Cranbrook

Between:

Wendy Gundersen and Levi Gravelle

Plaintiffs

And

Wilfred Joseph Savoy, Yvonne Mary Savoy, Richard Lightburn

and Elk Valley Realty Ltd.

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Plaintiffs:

R. Buddenhagen

Counsel for Yvonne Mary Savory and Yvonne Mary Savoy as litigation guardian of Wilfred Joseph Savoy:

Counsel for Richard Lightburn and Elk Valley Realty Ltd.:

S. Smaill, Q.C.

P. Guy

Place and Date of Hearing:

Cranbrook, B.C.

May 8 to 11 and May 14 to 17, 2012

Place and Date of Judgment:

Cranbrook, B.C.

July 16, 2012

- [1] The plaintiffs purchased a home from the defendants Savoy. Several months after taking possession, they discovered certain defects, the principal one being that the structure was infected with mould and mildew. They claim that they cannot occupy the home as a consequence of the mould problem and that this constitutes a fundamental breach of their contract with the Savoys.
- [2] The defendant, Richard Lightburn ("Mr. Lightburn"), was the realtor who introduced them to the property. He was also the Savoys' listing agent. The plaintiffs claim that Mr. Lightburn deceived them by not only failing to alert them to a potential problem with the home, when he knew that it had had a mould or mildew problem, but that he deliberately discouraged them from engaging a home inspector so that they would not discover it. They also claim in deceit against the Savoys, saying that they covered up the evidence of mould and mildew.
- [3] The plaintiffs' claim against the defendant Elk Valley Realty Ltd. ("Elk Valley") is in its capacity as Mr. Lightburn's employer. They claim that Elk Valley had knowledge of the mould both through it being imputed to them from Mr. Lightburn and from a prior employee, realtor Maxine Wolfe ("Ms. Wolfe"), who became aware of the problem earlier.
- [4] The defendants say the maxim caveat emptor applies, that they in no way deceived the plaintiffs, and that the plaintiffs have not mitigated their damages in any event (which the defendants say are unsubstantiated).

I. RULINGS DURING TRIAL:

- [5] At the commencement of this trial the defendant, Wilfred Joseph Savoy ("Mr. Savoy"), was not represented by a litigation guardian. As a consequence of an application brought by counsel for Elk Valley and Mr. Lightburn to have Mr. Savoy's evidence from his examination for discovery used as evidence at trial, I became aware that he had a problem with dementia. At that point, neither Mr. Savoy nor his wife, the defendant Yvonne Mary Savoy ("Ms. Savoy"), were represented by counsel. I indicated that it was necessary, if indeed Mr. Savoy was not competent to represent himself (he was not present in court), that he should

be represented by a litigation guardian who, under the applicable legislation, was required to be represented by counsel. Fortunately, Ms. Sandra Smaill Q.C., who had acted for the Savoy's previously, agreed to represent both Ms. Savoy personally and Ms. Savoy as litigation guardian of Mr. Savoy (an appointment I also made). On behalf of her clients, Ms. Smaill agreed that the trial could continue as little of substance respecting the claims against the defendants had transpired up to that point.

- [6] With respect to the application that Mr. Savoy's evidence be used as evidence at trial, the Savoy's joined in that application. However, although I found Mr. Savoy's evidence to be necessary in all the circumstances, I was not convinced that his evidence on discovery was reliable due to certain evidence that his dementia was probably already affecting him at that time.

II. BACKGROUND:

- [7] The plaintiffs, Wendy Gundersen ("Ms. Gundersen") and Levi Gravelle ("Mr. Gravelle") cohabit as man and wife. Ms. Gundersen has two daughters from a prior marriage. Ms. Gundersen works at a lumber mill at Elko near Jaffray. Mr. Gravelle is a truck driver.
- [8] In January 2006, the plaintiffs became aware that the Savoy's home at 465 Jaffray Baynes Lake Road was for sale. Ms. Gundersen contacted Mr. Lightburn, the listing realtor. She had known Mr. Lightburn since she had been a young child, having grown up with one of his daughters. She regarded him as a friend.
- [9] Mr. Lightburn took the plaintiffs onto the Savoy property in January 2006. At that time they did not enter the home. The plaintiffs liked the property and followed up with a more detailed showing which included a view of the interior of the home. Mr. and Ms. Savoy were present during this showing.
- [10] During the course of the showing, Mr. Lightburn complimented Mr. Savoy, in the presence of the plaintiffs, on what a fine job he had done in constructing the home. Mr. Savoy was a contractor with many years of experience in the building trade. In the case of this home, Mr. Savoy had approximately doubled the size of a single-wide mobile home by constructing an addition to one side and, to some extent, moving walls and services to create a new master bedroom, master bath arrangement.
- [11] The plaintiffs were taken to the bottom of the stairs to the basement under the addition. The earth floors of the crawl space under the original mobile home and the fully excavated basement under the addition were observed to be covered in plastic material as was the area under the floor joists of the addition. The sides of the basement under the addition were of poured concrete.
- [12] The Savoy's had originally listed the property at \$179,900 in 2003 but re-listed at \$219,000 in June 2004. Thereafter, they progressively lowered the price to \$179,000 effective December 30, 2005. The Savoy's do not appear to have had much action on their home throughout the close to three years it had been listed for sale. In February 2005, Ms. Wolfe, then a realtor

with Elk Valley, showed the property to Cherie Souther (then Bruinsma) ("Ms. Souther"). Ms. Souther put in an offer subject to the home being inspected. The inspector reported the presence of some mildew in the basement under the addition. As a consequence, Ms. Souther revoked her offer. Ms. Wolfe had not seen the inspection report dated March 7, 2005, carried out by Mr. Robert Langfield ("Mr. Langfield") of Industrial Civil Installations Ltd. operating as HomeGauge. At para. 19.4 of his report, Mr. Langfield had observed:

IS THERE A VAPOR BARRIER ON DIRT FLOOR OF CRAWLSPACE

Comments: REPAIRS REQUIRED

Large areas of the exposed earth need a 6 mil vapor barrier installed and sealed at all joints to minimize moisture infiltration from ground into crawl space area. Minor mildew spots were noted throughout the crawl space area indicating an excessive moisture level. Recommend treating all areas with a solution to kill the mildew after vapor barrier over exposed earth is completed.

- [13] At the time of the offer by Ms. Souther, Mr. Lightburn was away on vacation. He had given his consent to Ms. Wolfe to present the offer of Ms. Souther to the Savoyes. When the prospective sale collapsed, Ms. Wolfe says that she reported to Mr. Lightburn that the inspector had reported mould in the home, thus the purchasers had revoked their offer.
- [14] Mr. Lightburn says that he was not told about mould by Ms. Wolfe - only that the property had not passed inspection to the satisfaction of Ms. Souther. In any event, he says, the inspection report detailed minor mildew, not mould. The report had also pointed out that the furnace, designed for a single-wide mobile home, was not of adequate size for the present structure.
- [15] Ms. Savoy made enquiries after the collapse of the sale to Ms. Souther to determine what deficiencies had been reported. As a consequence, she says, she learned that there were minor repairs required because of the mildew under the addition and the under-size furnace.
- [16] Mr. Savoy then brushed onto the affected areas a solution Ms. Savoy prepared composed of bleach, water and a powder she said had a name with three letters. He then insulated under the crawl space floor (that was already present under the mobile home portion) and sheeted under the floor with vapour barrier. He covered the earth floors of the addition basement and the crawl space with a form of plastic or "poly" sheeting to prevent moisture from entering the underside of the home. He did these things because of what the Savoyes understood from Mr. Langfield were the steps they should take to get rid of the existing mildew and to prevent its future occurrence. Mr. Lightburn was aware of this work having been carried out by Mr. Savoy prior to dealing with the plaintiffs. He was also aware that the furnace was too small for the house.

- [17] Ms. Gundersen said that she and Mr. Gravelle indicated to Mr. Lightburn that they felt that they should make their offer subject to getting a home inspection done. According to Ms. Gundersen, Mr. Lightburn told her that one had already been done and that all was fine except the size of the furnace which was too small and a door to the basement which opened in rather than out. She said that Mr. Lightburn made no mention to her of mould or mildew. He never showed them the home inspection he had referred to.
- [18] Mr. Gravelle gave no evidence in direct respecting what Mr. Lightburn may have said about the prior inspection report and he was not cross-examined.
- [19] However, Mr. Lightburn's evidence as to what he told the plaintiffs about the state of the house differs markedly from Ms. Gundersen's evidence. He says that when he showed them the basement of the home he discussed with Mr. Gravelle and Ms. Gundersen the reason for the black poly on the floor. He said that he told them that it was there because in the earlier inspection the inspector had noticed mildew on the underside of the addition. He told the plaintiffs what he said Mr. Savoy had told him, namely that Mr. Savoy had been advised to spray underneath the floor with a solution, the identity of which Mr. Lightburn did not know, insulate and cover with vapour barrier. He said that he told them that he had been advised that the mildew condition had apparently been remediated by the Savoy's on instructions from the inspector. He also told them, he said, that the furnace was too small. It was then decided, he said, that a home inspection would not be pursued.
- [20] Mr. Lightburn added that, in 2005 when Mr. Savoy showed him the improvements he had made in the basement, there was nothing to indicate to him that what Mr. Savoy told him about what he had done to deal with the mildew was untrue.
- [21] Ms. Gundersen flatly denied that Mr. Lightburn had given them the information respecting mildew being present in the home although, at one point in her evidence, she indicated that they had been told by Mr. Lightburn that the installation of the poly was to protect against moisture. She insisted that the only deficiency about which they were informed was the size of the furnace.
- [22] The plaintiffs offered to purchase the Savoy's home on January 28, 2006, for \$178,000. The Savoy's accepted the offer the next day. The plaintiffs took possession on March 1, 2006.
- [23] When they had earlier listed their property for sale, the Savoy's had completed a property disclosure statement. Or rather, Ms. Savoy had provided answers to Mr. Lightburn who filled it in for them. Some of those answers were from her own knowledge and some were from enquiries she made of Mr. Savoy who was present when it was completed. Both signed the document. On January 29, 2006, on the day the plaintiffs' offer was accepted (and, of course, after Mr. Savoy had carried out the work on the house resulting from the Savoy's enquiry of Mr. Langfield), the form was updated. On both versions the Savoy's certified that they were not aware of any moisture and/or water problems in the walls, basement or crawl space.

- [24] As counsel for the plaintiffs noted in his closing submission, the plaintiffs' joy with their new home was short-lived. Mr. Gravelle removed the washer and dryer that the Savoy's had left in the home only to discover that the floor beneath them had rotted from moisture. He also observed that a new stick-on tile had been applied over the old tile in that area and that the Savoy's washer and dryer had been supported on 1 x 6 boards. This discovery led Mr. Gravelle to the adjoining bedroom where he had to remove the walls between the bedroom and the adjoining bathroom as well as between that bathroom and the laundry nook. Behind one wall he discovered black mould.
- [25] Walls that had been originally wallboard from the mobile home had been "mudded over" to look like Gyproc. As well, water-stained ceiling tiles in the bathroom had been similarly treated.
- [26] When one of Ms. Gundersen's daughters used the shower, in one of the bathrooms, Mr. Gravelle heard water falling onto the poly sheeting covering the crawl space. Upon inspection, he found that the drain pipe from the bathtub into which the shower flowed had not been connected to the outflow pipe. Instead, water from the tub just drained into the crawl space. Mr. Gravelle immediately corrected this by completing the plumbing connections.
- [27] Ms. Savoy insisted that she had no knowledge of a pipe draining onto the earthen floor. That was not the case when they lived there, she said. She added that there were no problems with the plumbing system when they were there and that she had not been aware of any water or moisture problems. With respect to the washing machine, she said that while they lived in the home they had had two washing machines and that neither had leaked.
- [28] It was Mr. Savoy who fixed things in their homes, she said, but nothing went wrong with this one that she recalled. She did say that Mr. Savoy had replaced the flooring under the washer and dryer. She had not been aware that the dryer vented into the basement. This was another problem discovered by Mr. Gravelle. Warm, moist air was venting into the basement from the dryer. He routed the venting to the exterior of the home.
- [29] When Mr. Gravelle moved the hot water tank as part of the renovations he undertook, he did not get one of the pipes secured adequately. Some water leaked into the crawl space. When one of Ms. Gundersen's daughters found the leak, he repaired it. When Ms. Gundersen cut a hole in the poly covering on the floor of the basement so that the water that had flowed down from the hot water tank could drain into the earth beneath, she discovered mould under the poly. She then looked further, including removing some of the strapping, vapour barrier and insulation from the floor joists. She discovered more mould. Everywhere she checked she saw mould.

- [30] When she operated the fan on the furnace, she smelled what she described as a horrible smell. She stopped using the fan. A musty smell came from the area from which she would pull the hose out to rinse the soaker tub in the bathroom. When she took up some of the carpet she found more mould as well as one-half inch to one inch of dirt.
- [31] By October of 2006, one of her daughters who was living with them began to be "very nasal", her "nose plugged". Her daughter was also sleeping a lot. Concerned for their health, the plaintiffs and Ms. Gundersen's one daughter who was then living with them moved out of the house in October 2006. They have not returned.
- [32] Since vacating the home the plaintiffs and one or both of Ms. Gundersen's daughters who have lived with them from time to time have lived, first until 2010, in a borrowed mobile home on nearby property and at times in a camper in a campground. When the plaintiffs occupied the camper, the girls would sleep in a tent.
- [33] In 2010, they were given an old mobile home which they erected on the property they had purchased from the Savoy's and diverted the water and sewage facilities to this residence. The home purchased from the Savoy's remains vacant except for items stored in it. Ms. Gundersen refuses to move back in as she insists that no inspector or expert they have engaged can guarantee that the mould problem can be totally resolved.
- [34] The plaintiffs have had a number of experts inspect the home and provide them with advice on treating the mould problem.
- [35] The first they hired was in October 2006. Two technicians from Home-Aid identified a number of potential deficiencies in the construction of the home which they recommended be checked to ensure compliance with the B.C. Building Code. They reported that the hot water tank had been leaking for an extended time (one to two years) creating damage to the structure in that area. They noted that all areas between the floor joists had a "heavy presence of mold (sic)". They also noted that: "Insulation and vapour barrier was installed after mold (sic) situation as the insulation is clean". In the opinion of Home-Aid, the mould constituted a serious health hazard. The mould "could only have been created due to long term infiltration of moisture such as improper dryer venting, plumbing leak or grow operation" in their opinion.
- [36] The plaintiff next engaged Ambient Indoor Remediation Services ("Ambient"). On August 15, 2007, they proposed to remove all contaminated insulation in the basement (this implies that by then either the insulation had become contaminated since the Home-Aid report or that Ambient had simply assumed that it was contaminated), remove all contaminated carpet, drywall and subflooring and remove and replace contaminated vapour barrier. As well, the structure would be vacuumed and disinfected. Their quotes, \$4,814.40 in total, did not include replacing the carpet, drywall, subflooring or insulation. It did include a fogging device and a "one year supply of healthy spaces and benefect", a form of treatment intended to inhibit the re-occurrence of the mould. This last suggestion put off Ms. Gundersen. She wanted the mould gone for good. She did not want to have to "fog" their home each year to

prevent its coming back. To her, it was not a permanent solution.

- [37] Later, in July 2009, the same firm (now also called Indoor Air Solutions Ltd.) provided an opinion that in 2007 they had identified black mould in the upstairs bedroom walls, bedroom insulation, bathroom walls and ceiling. Mr. Patrick Carr ("Mr. Carr") of that firm described that type of mould as highly toxic and able to affect a person "both physically and mentally".
- [38] Mr. Carr described mould on the windows, in the attic and the basement along the "2 x 10 floor beams". There was a form of mould in the garage overhang.
- [39] However, it was Mr. Carr's opinion that the house, in 2007, would have been completely treatable for a cost of \$18,000. But Mr. Carr said that the mould would not be removed. He said they would "safely kill all spores and mold (sic) and inhibit the mold (sic) from returning for up to four years". Again, this estimate did not include reconstruction.
- [40] Notably, the July 2009 letter from Ambient was requested by the defendants Mr. Lightburn and Elk Valley. How Ambient's price had risen from just below \$5,000 to \$18,000 for apparently the same work was not explained.
- [41] Mr. Carr was cross-examined by counsel for the plaintiffs. He said that, on his inspection in 2007, he found the house to be in pretty bad shape. However, in cross-examination by counsel for the Savoyes, he said that, had the problem been taken care of within the time they had reported it would have been "ok" as it was not that bad a job.
- [42] In April 2009, Andre Madden ("Mr. Madden") of Western Site Technologies Inc. ("WST") inspected the home. He, too, identified the presence of mould in certain areas of the home. He also observed the poly covering the soil floor to have been removed in some locations and pulled back in others. The same applied to the vapour barrier on the underside of the floor joists. He, too, made a number of recommendations. While it is clear that WST determined that mould was present in the home in 2009, the extent of the then infestation and the reliability of its results are difficult to appreciate with any certainty because WST purported to apply a Calgary Health Region standard that really applies to homes that have been grow operations, but Mr. Madden did not take the number of samples required for applying that standard. In that respect, the WST report is of limited assistance to me.
- [43] The plaintiffs subsequently called in Pacific Environmental Consulting & Occupational Hygiene Services ("PEC"). They provided a report dated February 19, 2010, that was later revised on June 14, 2010. Although to some extent PEC relied on the prior reports, including those of WST, it carried out its own testing and a thorough inspection of the home. With respect to its investigation, PEC observed in its report:

During our site visit on January 11, 2010 water damage and suspected fungal growth was visually identified in several areas of the home. Generally, the areas impacted were the flooring, ceilings and the entire south wall (long side of the trailer). The damage was suspected to have been associated with water ingress due to ongoing building envelope deficiencies. There were existing cut-outs which allowed inspection of building materials within wall and ceiling cavities...

[44] It's conclusions and recommendations were extensive:

Conclusions and Recommendations

A visual inspection of the home identified several areas of suspected fungal contamination and water damage. Previous spore trap sampling (Western Site Technologies Inc.) identified elevated airborne concentrations of fungal spores within the areas sampled. Both our investigation and the investigation conducted by Western Site Technologies identified the presence of fungal contamination and water staining.

Note that as water staining indicates the present of water ingress and the potential for fungal growth, as a precaution we have recommended that all water stained finishing materials, such as drywall be removed and replaced. Note however, that if cut-outs are made in the areas of water stained materials and no fungal contamination is identified on the backside of the drywall or within the wall cavities, then no work would be required in these areas.

Based on our observations and the history of the house, we would recommended (sic) that a detailed building envelope assessment be conducted to ensure that all sources of water ingress are identified and repaired as required.

To prevent workers and future occupants from exposure to elevated concentrations of fungal spores and to remediate the identified fungal contamination at the above referenced site, we recommend the following:

- 1) prior to conducting remediation, any asbestos containing materials, such as drywall joint compound and floor tile, must be identified, removed and disposed of as per the applicable WorkSafeBC regulations;
- 2) within the kitchen, rotted flooring and subfloor behind the fridge and around the vents should be removed and properly disposed of. The ceiling in the closet should be removed and properly disposed of. The cabinet under the sink should be removed to expose wall cavity behind sink. If fungal contamination is identified on drywall behind the sink cabinet, the drywall should be removed 2ft from the fringe of the identified contamination;
- 3) within the living room, all carpeting should be removed; and disposed of. Drywall on the east wall (adjacent to the kitchen) should be removed 2 feet beyond the water damaged area. The Sub-floor which is stained should be sanded or wire brushed to remove the fungal staining.

- 4) within the laundry room, the exposed wood studs on the south wall should be sanded or wire brushed to remove all fungal staining. All wood that is rotten should be removed and disposed of. The strip ceiling tiles should be removed 2 feet beyond water staining;
- 5) Within the master bedroom, the exposed wood studs or sub-floor with fungal staining should be cleaned by sanding or wire brushing to remove any fungal staining. All any rotten wood should be removed and disposed of.
- 6) Within the SE bedroom the exposed wood studs and sheathing with fungal staining should be cleaned by sanding or wire brushing to remove any fungal staining. Any rotten wood should be removed and disposed of, and then replaced;
- 7) Within the crawlspace, all insulation and vapour barrier should be removed and properly disposed of. All fungal staining on the floor joists and underside of floor boards should be thoroughly cleaned by sanding or wire brushing to remove any fungal staining.
- 8) all areas of the house should be HEPA vacuumed following the completion of all fungal remediation work;
- 9) following completion of the above work, the exposed structures should be inspected for the presence of fungal contamination. If fungal contamination is identified, an additional two feet of drywall beyond the fringe of identified fungal contamination should be removed;
- 10) all exposed wood structures that appear to be in good condition should be examined for the presence of fungal staining. If staining is present, it the area should be HEPA vacuumed and then lightly sanded or wire brushed to remove the fungal staining;
- 11) exposed wood structures that are rotted or in poor condition should be removed and disposed of,
- 12) all insulation exposed by this removal work should be disposed of;
- 13) all exposed non-porous surfaces, such as concrete, brick or metal framing, with fungal staining should be thoroughly cleaned with a foaming agent such as trisodium phosphate (TSP). Following this cleaning, these surfaces should be decontaminated with a weak biocide (e.g.: 10% bleach);
- 14) the above remediation work should be conducted following appropriate work procedures. These procedures should include worker use of personal protective equipment such as half-face respirators equipped with P100/chemical cartridges, disposable coveralls with integral head and foot coverings, eye protection and work gloves. Overhead remediation work in the crawlspace should be conducted using a full face respirator.

To ensure that adjacent areas are not adversely affected by fungal contamination, the work areas should be isolated from adjacent areas through the construction of polyethylene (plastic) critical barriers. To control airborne contaminants, the work area should be maintained under a negative pressure with HEPA filter equipped negative air units. All fixtures and contents not removed from the work area should be sealed with polyethylene sheeting and tape. Return and supply grilles should be sealed;

- 15) the above remediation work should be conducted by an experienced and reputable contractor familiar with fungal remediation work procedures;
- 16) following the completion of the above remediation work, the furnace system and all its associated ductwork should be inspected and decontaminated;
- 17) following the completion of remediation work, all exposed surfaces within the work areas, should be thoroughly cleaned with a HEPA filter equipped vacuum, and;
- 18) following the completion of the above, a visual inspection and fungal clearance sampling should be conducted to ensure that the areas are safe for occupancy by unprotected individuals.

Note that the above recommendations have not included for the removal of any materials that are slightly water stained where the staining and/or water damage did not appear to impact the integrity of the material. In addition, there is a potential for hidden materials, such as unexposed exterior siding to be water or fungal damaged and these areas have not been addressed.

- [45] I have reproduced the above quote to illustrate the extensive remediation work that is required of this home in the opinion of PEC.
- [46] Jennifer Blair ("Ms. Blair"), manager of industrial hygiene with PEC, was cross-examined by counsel for Mr. Lightburn and Elk Valley. She agreed that the costs for mould remediation increased between 2006 and 2010 when her firm viewed the house. She was asked whether, if the house had been closed up, the mould infestation would get worse. She replied that it may or may not, depending on temperature, climate and conditions. Later, she said that with higher activity in the home, mould levels would increase.
- [47] She did qualify the report by saying PEC had not been asked to write an "expert report"; rather they had prepared a "standard mould report". But, she said, PEC stood behind its report.
- [48] She further noted that the degree of remediation PEC had recommended had a relation to the degree of deconstruction carried out by the plaintiffs by the time of PEC's inspection. She said that PEC had not been provided with the 2007 quotes for remediation nor had they been asked to give an estimate of the cost of remediation in 2006.
- [49] Ms. Blair said that, as far as she was aware, the home had never been declared unfit for human habitation.

- [50] It was PEC's estimate that costs of remediation would be \$13,800. As I understood it, that did not include the cost of reconstruction, i.e. the cost of "putting the house back together".
- [51] Finally, the plaintiffs put forward the estimate of Quantum Murray ("QM") of Calgary. The author of QM's report, Jason Kruczko, inspected the home in May 2010 with a view to providing an estimate for the cost of carrying out the mould remediation work recommended by PEC. This includes both remediation and restoration (except sheet-flooring replacement in the kitchen). QM estimated \$55,380 for mould remediation and \$20,750 for restoration. Both estimates included a substantial amount for living out allowances and travel time (\$11,330 for the remediation and \$3,200 for the reconstruction).
- [52] The plaintiffs and Ms. Gundersen's daughters (to a degree when they have been living at home) have endured much inconvenience in their lives since vacating the home in October 2006. Ms. Gundersen, in particular, has suffered ill health in the form of depression for which she was treated between March 2010 and July 2011. Initially, Ms. Gundersen advanced a claim in respect of her health issues but withdrew that claim at trial.
- [53] On the other hand, the defendants say that most of the time the plaintiffs have spent out of the house has been unnecessary as, to the extent the mould was found to exist in 2006, the plaintiffs could well have attended to the problem then with much less expense than they are now claiming and with much less inconvenience than they have put themselves through.

III. DISCUSSION:

1. Liability

A. Fundamental Breach of Contract

[54] The plaintiffs seek damages against the Savoy's for "fundamental breach of contract".

[55] In *Pavlis v. HSBC Bank Canada*, 2009 BCSC 498, Madam Justice Dorgan noted at para. 50:

For a breach to qualify as fundamental, it must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his or her contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract, thereby entitling the innocent party to be relieved from future performance: *Poole v. Tomenson Saunders Whitehead Ltd.*, [1987] 6 W.W.R. 273 (B.C.C.A.), at 282. The basic question is whether the breach strikes at the heart of the agreement in a manner that evinces an intention not to be bound by the contract any longer.

[56] And in *McVie v. Summit Steel Cladding Inc.*, 2010 BCSC 1025, Madam Justice Ker stated:

[169] The plaintiffs allege that the defendant committed a fundamental breach of the contract between them. Their argument is founded on the leaks the roof experiences, leaks which they allege are linked to the fact that the metal clad roof system installed by the defendant is wholly unsuitable for the low slope of their residence's roof structure, and that the roof was not installed in a proper and workmanlike manner. Additionally, the plaintiffs allege that the defendant abandoned the contract.

[170] The approach for determining whether a fundamental breach has occurred was stated by Madam Justice Wilson in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499-500; 35 B.C.L.R. (2d) 145:

The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), at p. 849. A fundamental breach occurs "[w]here the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract". This is a restrictive definition and rightly so, I believe ... Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 840). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

[171] Recently, the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4; [2010] S.C.J. No. 4, laid to rest the doctrine of fundamental breach in relation to the enforcement of exclusion of liability clauses in contractual disputes. Subsequent case law, however, has continued to apply the test in breach of contract cases where the question is whether the innocent party was justified in terminating the contract: see *BP Global Special Products (America) Inc. v. Conros Corp.*, 2010 ONSC 1094, [2010] O.J. No. 814.

[172] The focus of the analysis for breach of contract and whether the innocent party was justified in terminating the contract was stated by Wallace J.A., for the Court of Appeal in *Poole v. Tomenson Saunders Whitehead Ltd.*, [1987] B.C.J. No. 1664; 16 B.C.L.R. (2d) 349 (C.A.) at 358:

The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract - thereby entitling the innocent party to be relieved from future performance.

- [173] Whether a fundamental breach of the contract occurred is a question of fact, and the analysis is an objective one, focused on the terms of the contract and the circumstances of the case: see *Lau v. 1755 Holdings Ltd.*, [1995] B.C.J. No 1663; 46 R.P.R. (2d) 249 (S.C.), aff'd [1996] B.C.J. No. 2441; 83 B.C.A.C. 198 (C.A.).
- [57] In this case, the plaintiffs do not seek the termination of the contract of purchase and sale. Rather they seek damages for having been sold a home that has defects that, they claim, renders the home unfit for habitation. But the contract of purchase and sale makes no warranty as to the fitness of the home. It says (in part):
8. VIEWED: The Property and all included items will be in substantially the same condition at Possession Date as when viewed by the Buyer on Jan. 14/06.
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 this sale.
- [58] The Property Disclosure Statement, which forms part of the contract of purchase and sale, indicates that the Savoy's held out (among other things) that they were not aware "of any moisture and/or water problems in the walls, basement or crawl space".
- [59] In that fundamental breach of contract is an exceptional remedy, can it be said to apply in these circumstances? That is, have the Savoy's conveyed to the plaintiffs a home that is fundamentally not what the plaintiffs purchased? I think not.
- [60] While it is true that the plaintiffs have refused to live in the home since October 2006, no objective opinion was put into evidence to suggest that the home could not be remediated and repaired to make it habitable. Undoubtedly that will cost money and the liability of the Savoy's for the damages claimed to be suffered by the plaintiffs will depend on if they can demonstrate a basis for establishing that liability. But, in my respectful opinion, the remedy of fundamental breach is not engaged on the facts of this case. The evidence does not support the conclusion that the home contains so many defects or is so affected by mould or mildew that it cannot be remediated, or cannot be remediated except at a cost out of all proportion to the value of the home.

B. Deceit

- [61] The plaintiffs say that they are excepted from the principle of caveat emptor (that is, "buyer beware", or the buyer takes the responsibility to investigate the condition of what he is buying) because the Savoy's misled them by not disclosing certain defects in the home of which they were aware or respecting which they were reckless as to their existence. As to the realtor, Mr. Lightburn, they say he deceived them by discouraging them from having a home inspection done when he knew of the existence or prior existence of a mould or mildew problem.

(i) The Savoy's

- [62] The Savoy's became aware of the problem with mildew in their basement from speaking with Mr. Langfield. There is no evidence to suggest that they were aware of any mould or mildew problem in any other part of the home other than the basement or crawl space. They took Mr. Langfield's advice on how to deal with the mildew and how to prevent moisture from penetrating the basement and crawl space from the earthen floors.
- [63] Mr. Lightburn's advice to them may or may not have been correct. At the time, Mr. Lightburn had no particular qualifications other than experience. There is nothing to indicate that Mr. Savoy, in applying the solution he did to the floor joists, did so in a manner other than as he may have understood his instructions from Mr. Lightburn. He then placed insulation between the floor joists and covered them with vapour barrier.
- [64] I have no doubt that, as far as the Savoy's were aware, the work carried out by Mr. Savoy had dealt with the mildew problem identified by Mr. Lightburn.
- [65] At the time Ms. Souther and Mr. Lightburn inspected the property, the mildew was evident on the floor joists. Thus, it was then a "patent defect". But by the time the plaintiffs viewed the property, the mildew and mould had been covered up by the work Mr. Savoy had done. It was then a "latent defect". He did not cover the mildew to hide it. He no doubt thought that he had treated it and gotten rid of it. He installed the insulation, the vapour barrier and the poly to prevent a re-occurrence of the problem, not to hide it. Nor can it be said that the Savoy's treated the possibility of there still being mildew present with reckless disregard. They had received advice on how to deal with the problem from an apparently reputable source. There is no evidence to suggest that they were wantonly blind or reckless about the possibility of the continued existence of mildew or the growth of mildew or mould.
- [66] The water damage in the area of the washer and dryer and in the walls adjoining the bedroom and bathroom were latent defects but, in my view, the Savoy's were either probably not aware of this damage (in the case of the walls of the bedroom and bathroom) or were not aware of the extent of the damage (in the case of the washer and dryer nook) and Mr. Savoy probably believed he had repaired the damage by laying new floor tiles.
- [67] In *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191, Madam Justice Bennett noted the following exceptions to caveat emptor:
1. where the vendor fraudulently misrepresents or conceals;
 2. where the vendor knows of a latent defect rendering the house unfit for human habitation;
 3. where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
 4. where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.

(summary from Cardwell et al v. Perthen et al, 2006 BCSC 333 at para. 121)

[68] The mildew and mould were latent defects in January 2006. But the drain pipe that led from the shower and bathtub and drained into the crawl space floor, the venting of the dryer into the basement and crawl space, and certain crooked pylons in the foundation were patent defects when the plaintiffs viewed the property in January 2006. Although the plaintiffs did not see these defects, I conclude that they were discoverable upon reasonable inspection. Thus, the Savoy's are entitled to rely on the defence of caveat emptor with respect to those defects.

[69] In the result, I conclude that the Savoy's are not liable to the plaintiffs in deceit.

(ii) Mr. Lightburn and Elk Valley

[70] I accept the version of Ms. Gundersen as to what was said to them by Mr. Lightburn respecting the prior inspection. I also accept the evidence of Ms. Wolfe that she told Mr. Lightburn that the offer from Ms. Souther had collapsed because the inspection she undertook had found mould in the house. In fact, the inspection had found mildew but I find that Ms. Wolfe mistakenly reported that it was mould.

[71] I do not accept the version Mr. Lightburn gave me of what he told the plaintiffs. I conclude, on a balance of probabilities, that Mr. Lightburn alerted Ms. Gundersen to the fact that there had been an inspection carried out but that he edited for the plaintiffs what he knew of that report's findings. He mentioned only the undersized furnace. He did not mention the mildew (or mould) issue because, I have no doubt, he knew that would raise a red flag with purchasers who had suggested they have a home inspection carried out. He told the plaintiffs one was not necessary when, given his knowledge of a history of mildew being in the home, he surely knew that it would be prudent and in the best interests of the plaintiffs, to check the current situation with the mildew.

[72] Mr. Lightburn said that he believed that the Savoy's had taken care of the problem. If he was confident they had, then he should have told the plaintiffs about all of the findings of Mr. Langfield, not edited the report to exclude from their consideration what might well be the most worrying factor for them.

[73] If in fact I had accepted Mr. Lightburn's version of what he told the plaintiffs and rejected that of Ms. Gundersen, then I would have concluded that the plaintiffs' decision not to engage a home inspector was fatal to their claim in deceit. But they were persuaded, by the half-truths of what Mr. Lightburn did say, to not do so. Ms. Gundersen trusted Mr. Lightburn not just as her real estate agent, but as an old family acquaintance.

- [74] This was a case of Mr. Lightburn being in a position where his desire to sell a property that had been on the market a long time and his duty to the vendors to do his best to do so conflicted with his duty to the plaintiffs as purchasers. In the result, what he said, and what he didn't say, to the plaintiffs was deceitful. He had a conflict of interest and he resolved that situation to the detriment of the plaintiffs.
- [75] In *C.R.F. Holdings Ltd. v. Fundy, etc.* (1980), 21 B.C.L.R. 345 (S.C.), varied (1981), 33 B.C.L.R. 291 (C.A.), Mr. Justice Taylor made the following observations with respect to "half-truths" at p. 352:

The law with respect to deceit by half-truth has its foundation in the colourful dictum of *Chambre J.* in *Tapp v. Lee* (1803), 3 Bos. & P. 367, 127 E.R. 200 at 203:

An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the Defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

In *Peek v. Gurney* (1873), L.R. 6 H.L. 377 (H.L.), Lord Chelmsford observes (at p. 391) that while mere concealment will not suffice to give rise to a right of action in deceit, so that there must be "something actively done to deceive [the other party] and draw him in to deal with the person withholding the truth from him", this may well be accomplished by a half-truth. He observes (at p. 392) that half a truth will sometimes amount to a "real falsehood", and may contain "a positive misrepresentation". The law is summarized in *Spencer Bower on Actionable Misrepresentation*, 3rd (Turner) ed. (1974), at p. 94, in this passage:

To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a 'lie', and one of the most dangerous and insidious forms of lie.

- [76] That is what happened here. By giving only part of the findings of the report of Mr. Langfield, Mr. Lightburn was probably more effective in dissuading the plaintiffs from having an inspection done than if he had said nothing at all about the prior inspection.
- [77] It was suggested that, as inspectors cannot "take things apart", an inspector engaged by the plaintiffs was not likely to have discovered the mould and mildew anyway. I cannot conclude that that was inevitably so. An inspection may well have found indicia that would have led him or her to undertake a more extensive search or to caution the plaintiffs against purchasing the home without one.
- [78] In the result, I conclude that Mr. Lightburn is liable to the plaintiffs in deceit. Elk Valley is also liable because his knowledge is imputed to it, as was Ms. Wolfe's knowledge, she then being employed by Elk Valley.

IV. DAMAGES:

[79] The plaintiffs submitted that the proper measure of their damages was the approximately \$70,000 QM estimated would now be required to remediate and reconstruct the home. They also submitted that, in all the circumstances, I should assess \$20,000 in aggravated damages. The plaintiffs did not advance a claim for special damages.

[80] Mr. Lightburn and Elk Valley submitted firstly that, on what they suggested was the proper measure of damages, there should be none as there are none. That proper measure, said these defendants, is the difference between the price the plaintiffs paid and the actual fair market value of the property if full disclosure had been made. While claimants in the position of the plaintiffs might be entitled to consequential losses as well, these plaintiffs, by not claiming special damages, are not entitled to such consequential damages. Alternatively, they suggested something in the range of \$4,750 to \$18,000 on the basis that the remediation required could have been carried out in 2007 for something in that range. They argued that the plaintiffs had failed to mitigate their damages by not dealing with the remediation by at least 2007 when the cost of doing so would have been less and the infestation of mould and mildew arguably less extensive.

1. General Damages

[81] The only evidence of an historical appraisal I have is that of Rocky Mountain Appraisal ("RMA") provided by Mr. Lightburn and Elk Valley. RMA estimated that the value of the home and property as of February 28, 2006, to be \$189,000 given that a prospective buyer was aware of the following factors:

- The address and legal [of the subject property].
- The effective date of the report as February 28, 2006.
- At that date the buildings appeared to be habitable; water damage issues were latent defects and not visible upon ordinary non-destructive inspection.
- The water damage was not caused by a grow-op.
- Costs to cure water damage, related moisture problems and mold, based on estimate date obtained in 2006 and 2007 to be between \$4,759.40 and \$18,000.
- The above facts were assumed to be known to a prospective buyer, and fair market value was determined based on the facts above and using the damage estimates.
- This historic appraisal opinion is the report writers opinion and not biased or an advocate for any party associated with the legal proceedings.

[82] The evidence in this case was that this property had been exposed to the market for close to three years. The only previous offer had been revoked because of the discovery of a problem with mildew. The Savoy's had been steadily reducing the price, through \$189,000 to, ultimately, \$179,000. The offer made by the plaintiffs, in the absence of any knowledge of the

mould or mildew, was \$178,000. In my view, that is more reliable evidence of the true market value of this property than the appraisal of RMA. I do not accept that appraisal as reasonably representing what a purchaser would have paid for this property with knowledge of the mould and mildew and water damage problems.

- [83] That leaves me with only the various estimates to remediate (and in the case of one, reconstruct). While I agree that the applicable yardstick for measuring damages here is the difference (if any) between the price paid by the plaintiffs and the actual fair market value with full disclosure of the defects, in the absence of an appraisal that I accept, I conclude that I can use the estimates of remediation and reconstruction to determine if the actual market value (with disclosure) would have been less than what the plaintiffs paid.
- [84] In my view, the true test of the market for the Savoy's home was the price paid by the plaintiffs with knowledge only of the undersized furnace. Would the market value for this home have been the same with knowledge of the water damage and the mildew and mould? I conclude that it would not.
- [85] Any reasonable purchaser, with knowledge of the defects that were not known to the plaintiffs (in this I do not include those problems I have classified as patent defects) would surely have wished to have the offering price reduced by the amount it would cost to remediate and reconstruct the premises. In that regard, the amount of \$18,000 estimated by Mr. Carr for the labour and materials for total mould remediation in 2007 strikes me as the most reliable. But that, of course, was only for the remediation. QM quoted \$20,750 plus tax for restoration. That included \$3,200 for living out allowances, hotels and travel time. That strikes me as probably excessive given that the evidence suggests that there are contractors closer than Calgary available. But some travel time and expense would be anticipated in this rural location. I would reduce this part of the estimate by \$2,000 for a net restoration cost of \$18,750 plus tax. That reflects the cost of restoration at the time of the QM estimate in May 2010. In 2007, it is probable that the cost would have been somewhat less, say \$18,000.
- [86] Thus, I conclude that, in 2007, the total cost of remediation of the mould and mildew and reconstruction of the water damaged and mould and mildew affected areas of the house would have been \$36,000 plus the tax then applicable (GST of 6%) or \$38,160.
- [87] If anyone would have been prepared to buy this home with knowledge of its defects and have been prepared to remediate and renovate, so as to have the advantage of the size of the property, the location of the property, and the home in a reasonable state of repair (with the observable patent defects of the defective drain, dryer venting and crooked house supports) it is probable that it would not have been for more than something in the approximate amount of \$179,000 less about \$38,160. But, recognizing that bargaining over the price of a home is not exactly a scientific process, the plaintiffs or others may have been prepared to pay somewhat more than this difference to get the property or perhaps less so as to provide a buffer against unknown expenses for remediation and restoration.

[88] Recognizing these factors, I conclude that the home and property was probably worth about \$141,000 in 2006 to a person with knowledge of the latent defects. Thus I would assess the plaintiffs' general damages at \$37,000.

2. Aggravated Damages

[89] The plaintiffs seek aggravated damages. Aggravated damages are not punitive in nature. In *Fidler v. Sun Life Assurance Co. of Canada*, 2004 BCCA 273, Chief Justice Finch stated, at para. 44-45:

[44] Although not an insurance case, this court recently confirmed the general principles upon which aggravated damages can be awarded in *T.W.N.A. v. Clarke* (2003), 22 B.C.L.R. (4th), 2003 BCCA 670 para. 101. Smith J.A. explained:

Aggravated damages are awarded to compensate for intangible emotional injury: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 paras. 188-189 and *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.), where this Court said, at 299:

aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses, and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's highhanded conduct.

[45] An award of damages which "takes full account of the intangible injuries, such as distress and humiliation" is not one which is determined solely according to whether the insured has suffered adverse financial consequences as a result of the insurer's breach. It is reasonably foreseeable that intangible injuries and mental distress may flow from the insurer's wrongful refusal to pay benefits, even where the insured suffers no immediate financial hardship. An insured in such situations relies on such payments not only to satisfy his or her immediate needs, but also, and perhaps more importantly, to provide a predictable stream of income as long as the disability may persist. Aggravated damages are appropriate where the deprivation of certainty and "peace of mind" causes mental distress and not just immediate financial hardship.

[90] The plaintiffs claim to be entitled to an award of aggravated damage because:

1. They have been constructively dispossessed of their home since October 2006;

2. They have been living in borrowed or alternate accommodation since then, although still paying the mortgage on the home which they cannot occupy;
3. Ms. Gundersen has suffered from depression as a consequence of the ongoing stress of the situation.

[91] Are the consequences to the plaintiffs of Mr. Lightburn's deceit such as to merit an award of aggravated damages?

[92] Firstly, I do not accept that the plaintiffs have of necessity been living out of the home since October 2006. As noted earlier in these reasons, the plaintiffs could have mitigated their situation by sooner dealing with the remediation of the mould and mildew. In other words, while I accept that they had good reason to vacate the home upon discovery of the mould and mildew in October 2006, they could well have had it dealt with by sometime in 2007, making such a lengthy absence unnecessary. I appreciate that Ms. Gundersen appears to have her mind made up that the home is not one that she will now inhabit nor permit her family to inhabit. But that position is not supported by even the plaintiffs' own expert evidence. Thus, to a large extent, Mr. Lightburn and Elk Valley are not responsible for such a lengthy disruption to the lives of the plaintiffs and their family although certainly they have a measure of responsibility.

[93] As to Ms. Gundersen's health problems, I find that the breakdown of her health due to depression was reasonably foreseeable in all the circumstances. Again, however, I note that she first began treatment for depression in 2010. If the plaintiffs had undertaken the remediation in 2007 that may well have had a positive effect on her health in the sense of avoiding some of the health consequences she ultimately experienced. But, again, I accept that the deceit, which led to the purchase of the home, has led to the foreseeable consequences of Ms. Gundersen's ill health.

[94] In the result, I conclude that this is an appropriate case in which to award aggravated damages to compensate the plaintiffs, particularly Ms. Gundersen, for the inconvenience to their lives and the health challenges Ms. Gundersen has experienced. While I find that these problems would not have been so severe if the plaintiffs had sooner remediated the mould and mildew problem, I conclude that in any event they would have suffered them to a certain extent. Thus, I award aggravated damages of \$10,000 against Mr. Lightburn and Elk Valley.

3. Costs

[95] Unless there is some reason that I have not been made aware of that requires costs to be spoken to, the plaintiffs are entitled to their costs on Scale B against Mr. Lightburn and Elk Valley. The Savoy's are entitled to their costs on Scale B as well as against the plaintiffs. However, in these circumstances, the costs of the Savoy's that would otherwise be borne by the plaintiffs who were unsuccessful against them, should be paid by Mr. Lightburn and Elk Valley. The plaintiffs' joining of the Savoy's as defendants was reasonable and logical in all

the circumstances and, although they were unsuccessful against them, the plaintiffs should not bear the costs of that lack of success given that it was Mr. Lightburn's deceit that effectively precipitated this whole situation.

- [96] Where an unsuccessful defendant is made responsible for the costs of a successful defendant, the Court has two mechanisms by which this can be achieved. Under a Bullock order, the successful defendant can recover its costs either from the plaintiff or from the unsuccessful defendant, and in the former case the plaintiff can then seek reimbursement from the unsuccessful defendant. Under a Sanderson order, the successful defendant may only recover its costs from the unsuccessful defendant. The difference is in which party bears the risk of difficulty collecting from the unsuccessful defendant. These two orders were discussed by our Court of Appeal in *Times Square Holdings Ltd. v. Shimizu*, 2001 BCCA 667, where the Court stated:

9 The leading authority in this area of costs is *Robertson v. North Island College Technical and Vocational Institute and Wing* (1980), 26 B.C.L.R. 225 (C.A.). There, Mr. Justice Lambert, in the judgment most often quoted in later cases, decided that the only general rule applying to Sanderson and Bullock orders is that for either of them to be considered, a threshold test must first be met: it must have been reasonable for the plaintiff to have joined the successful defendant in the action. If the plaintiff can meet this threshold, it is left to the judge to exercise his or her discretion in deciding what distribution of costs would be just. This discretion may be exercised without being trammelled by a set of legal principles or burdened by precedent: see pp. 227-8.

- [97] The Court went on to state at para. 10 that a plaintiff should generally "bear the primary risk of meeting the costs of parties against whom it is eventually unsuccessful" and that therefore a Bullock order would typically be more appropriate absent some special circumstance such as a legal relationship between the two defendants.

- [98] In the present situation the Savoy's are in no way legally related to Mr. Lightburn or Elk Valley and have been found to be blameless. Accordingly, I make a Bullock order that they may recover their costs from either the plaintiffs or Mr. Lightburn and Elk Valley, and if they choose the former option, the plaintiffs may obtain reimbursement from Mr. Lightburn and Elk Valley.

V. SUMMARY OF CONCLUSIONS:

- [99] The plaintiffs' claim against the Savoy's is dismissed.
- [100] The plaintiffs are awarded judgment against Mr. Lightburn and Elk Valley for general damages of \$37,000 and aggravated damages of \$10,000.
- [101] The plaintiffs are entitled to their costs against Mr. Lightburn and Elk Valley as noted above.
- [102] The Savoy's are entitled to their costs against the plaintiffs which shall be paid by Mr. Lightburn and Elk Valley as noted above.

"Melnick J."

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