

---

CANADA / JUDGMENT

## McIntosh v. Papoutsis

2009 BCSC 174

---

COURT

Supreme Court of British Columbia

DECIDED

13 February 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

---

2009 BCSC 174 McIntosh v. Papoutsis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIntosh v. Papoutsis,

2009 BCSC 174

Date: 20090213

Docket: S083886

Registry: Vancouver

Between:

William McIntosh and Sussex Realty

Appellants

And

Constantine Papoutsis and Vassiliki Papoutsis,

Janet Lacroix and Estate of J. Lacroix

Respondents

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Appellants

K.A. Murray

Counsel for Respondent, Janet Lacroix

J. H. Bryant

Appearing on their own behalf

C. Papoutsis and V. Papoutsis

Date and Place of Trial/Hearing:

August 11, 2008

Vancouver, B.C.

## INTRODUCTION

- [1] Mr. and Ms. Papoutsis purchased the residence at 347 Burns Road in Gibsons, British Columbia (the "property"), from the seller, Ms. Lacroix.
- [2] In the Provincial Court of British Columbia, the Papoutsis alleged negligence and negligent misrepresentation against the seller, Ms. Lacroix; the seller's agent, Mr. McIntosh; their agent, Mr. Goodwin; and each agent's employer, Sussex Realty and Remax Top 20 Realty, respectively. The claim is premised on a lack of disclosure respecting water ingress problems with the property.
- [3] In her reasons for judgment dated April 21, 2008 (the "Reasons"), Baird Ellan P.C.J. found Ms. Lacroix, Mr. McIntosh, and Sussex Realty liable for damages. Mr McIntosh and Sussex Realty appeal the decision.

## STANDARD OF REVIEW

- [4] The standard of review for Small Claims Court appeals was set out in *Perfect Auto Repairs Ltd. v. Westway Roofing Ltd.*, 2005 BCSC 1627 at ¶5, [2006] B.C.W.L.D. 582:

On an appeal from a judgment of the Provincial Court, I must approach the matter the same way the Court of Appeal would an appeal from the judgment of this Court. That means that if the appeal is based on a question of law, I am free to consider whether the trial judge was correct. However, where the appeal is based on questions of fact, I cannot reverse the decision of the trial judge unless there is a "palpable and overriding error": *Legrady v. Custom House Currency Exchange Ltd.*, 2005 BCSC 802; *King v. Holker*, 2000 BCSC 64; *Serko v. Berg*, 2004 BCSC 1152.

- [5] Further clarification was provided by *Absolute Bailiffs Inc. v. Warbrick*, 2001 BCSC 362 at ¶17: "the 'palpable and overriding error' test is used interchangeably with the 'clearly wrong' test for appellate review on questions of fact."

## RELEVANT FACTS

- [6] In early August 2004, Mr. and Ms. Papoutsis attended a viewing with their realtor, Mr. Goodwin, at the property. They did not view the crawl space.

[7] The Papoutsis made an offer on the property, which was rejected. They removed the inspection clause that they had included in the original offer to encourage acceptance. The final offer, which was accepted, was without subject clauses and contingent upon receipt of a completed Property Disclosure Statement (the "PDS") that was to be incorporated into the Contract of Purchase and Sale (the "contract").

[8] The PDS form contains the following:

Are you aware of any structural problems with the premises or other buildings on the property?

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

The seller is responsible for the accuracy of the answers on this disclosure statement and where uncertain should reply, 'Do Not Know.' This disclosure statement constitutes a representation under any Contract of Purchase of Sale if so agreed, in writing, by the seller and the buyer.

The buyer is urged to get the property inspected.

The prudent buyer will use this disclosure statement as the starting point for the buyer's own inquiries.

[9] Mr. McIntosh reviewed the PDS with Ms. Lacroix and he explained its importance to her. Ms. Lacroix completed the PDS form by answering "no" to the first two questions.

[10] Mr. Papoutsis alleged that when he signed the contract he had the impression that he would be able to view the property prior to the closing date, which was just nine days later.

[11] Just before the closing date, Mr. Papoutsis met a friend who described some problems with the property. As a result of that conversation, Mr. Papoutsis attempted to view the property prior to closing; however, he was ultimately not able to do so. At Mr. Goodwin's suggestion, Mr. Papoutsis sought legal advice prior to the closing date. After obtaining this advice Mr. Papoutsis followed through with the contract.

[12] Mr. and Ms. Papoutsis viewed the property again after the contract was complete. Mr. Goodwin, Ms. Lacroix, and Mr. McIntosh were all present for this viewing. They entered into the crawl space and found that standing water was present, as were two sump pumps.

[13] After that viewing, Mr. McIntosh obtained a statement from Ms. Lacroix in which she stated: the previous owners had disclosed to her that there was a problem with water in the basement that they had fixed with a sump pump, that every house on the street had a sump pump, that she had never had any water problems after the pump was installed although the pump had stopped working at one point and she had an electrician repair it: Reasons, ¶31.

[14] Ms. Lacroix confirmed that statement in her evidence. She said the first time she saw water in the crawl space was the day of the viewing.

- [15] Mr. Dale Allenback of Pacific Drainage gave evidence that he performed work for Mr. and Ms. Papoutsis in the crawl space to attempt to repair the water leaks. He concluded the pump was not installed properly and that a trench was required to take water away from the house. Mr. Allenback did not consider that there was a perimeter drainage problem. He did not work on or oversee the later installation of a new sump pump or the perimeter work on the property; however, he did observe it after the fact and agreed that the problem remained.

## FINDINGS OF FACT

### The PDS

- [16] Baird Ellan P.C.J. holds at ¶42 of her Reasons that the PDS is inaccurate. She found that Mr. Allenback's testimony and report established that the underlying problem causing water ingress into the crawlspace was present at the time of sale. Further, Ms. Lacroix was aware of the problem; she was both told by the previous owners and had seen the sump pump for herself. She paid a price considerably below the listing price.
- [17] There was a conflict in the evidence as to whether Ms. Lacroix disclosed the presence of the sump pump to her agents, Mr. McIntosh and his assistant, Carol Hautala. Ms. Lacroix stated she asked the agents whether she was required to disclose the pump to the buyers and that they each stated she was not. Each agent denied having had such a conversation.
- [18] Baird Ellan P.C.J. states at ¶46 of her Reasons that Ms. Lacroix's statement, which was provided at Mr. McIntosh's request after the viewing of the crawl space, appears to presume Mr. McIntosh's prior knowledge of the pump's existence.

- [19] She finds at ¶47-49 as follows:

the evidence supports a conclusion that both Lacroix and Mr. McIntosh believed the pump was a non-issue I accept Ms. Lacroix's evidence that she did tell Mr. McIntosh and Ms. Hautala about the presence of the pump.

I note as well that Mr. McIntosh was aware there was a crawl space and declined to view it or measure it for the listing. It was certainly open to him to inspect the crawl space for himself, or to make further inquiries of Ms. Lacroix than he says he did. It may also have been open to him to view documentation from the prior sale and learn in that fashion that there had been disclosure in the previous sale.

### The Inspection Clause

- [20] Baird Ellan P.C.J. finds at ¶50 of her Reasons that the original inspection clause was a term of the original offer at Mr. Goodwin's suggestion. Further, she holds at ¶51 that it is "more probable that the clause was removed at Mr. Goodwin's suggestion than at the Papoutsises' insistence." It would be reasonable for Mr. Goodwin to expect that any substantial defects, such as drainage issues, would be disclosed in the PDS so as to protect the buyer from

something that would otherwise be detected by an inspection. Further, she holds at ¶53 that he was "good-naturedly, pushing for the sale and for that reason was not as inclined to insist on the inspection clause being kept in."

### Reliance on the PDS

[21] At ¶55 of her reasons, Baird Ellan P.C.J. finds that it was more probable than not that Mr. Goodwin told the Papoutsis that if they found any major defects that were not disclosed on the PDS, they would be entitled to renege on the contract or, at the very least, would have recourse based upon the PDS. Further, she states, "[i]ndeed, I find this is what Mr. Goodwin himself quite reasonably believed." As such, direct reliance was placed by the buyers on the accuracy of the PDS.

### Inability to Discover the Defect

[22] The insertion of the inspection clause in the original offer is consistent with a cursory first viewing. Despite the removal of the inspection clause, there is clear evidence the Papoutsis expected to have another viewing of the property prior to closing. There is evidence that they wished specifically to confirm the condition of the crawl space. Mr. Goodwin attempted to facilitate such a viewing; however, his efforts were ineffective.

[23] Baird Ellan P.C.J. notes at ¶59 that Mr. Goodwin, having knowledge of his clients' concerns, did not intercede to postpone the closing. She states, however, that his failure to do so was not collusion; rather, she finds it is consistent with a belief that the PDS could be relied upon. Mr. Goodwin suggested to the Papoutsis that they seek legal counsel regarding their obligations under the Contract. It was following the receipt of that advice that they proceeded with completion.

### OUTLINE OF THE LEARNED TRIAL JUDGE'S REASONS

[24] The learned Provincial Court Judge enumerates the issues as arising from the findings of fact. I refer only to those that are the subject of this appeal, namely:

- (a) Whether the presence of a sump pump was a defect that should have been disclosed;
- (b) Whether Ms. Lacroix's failure to disclose the sump pump or what was told to her by the previous owners on the PDS was a negligent misrepresentation;
- (c) Whether the failure by Mr. McIntosh to require or advise the seller to disclose the existence of a sump pump constituted a breach of a duty to the buyer;
- (d) Whether any established representations or negligence caused the buyers to act to their detriment; and
- (e) Whether the buyers suffered any damages.

[25] The trial judge analyzes these issues under subheadings. I will follow the same format in summarizing her Reasons.

Was the Sump Pump a Defect?

[26] Baird Ellan P.C.J. holds at ¶63 that, "[t]he defect was not the pump itself, rather the improper drainage and structural issues in the crawl space of the house that necessitated the installation of a pump to keep the basement dry" were the defects. She cites *Armstrong v. Egl*, [1995] B.C.J. No. 2814 at ¶70, which states:

It is essential to recognize that the "defect" if there be one, is not the presence of water in the back yard, nor water in the crawl space, nor in due course a sump pump in the crawl space, but rather the existence of hydrogeological factors for which adequate provision had not been made in the preparation of the site and in the construction of the home.

[27] The learned trial judge concludes at ¶65: "Here, the defect was the ingress of water into the crawl space, that had to be controlled by the installation of a sump pump" and "[t]here was clearly a defect of the type addressed by the PDS; 'problems with water in the crawl space.'"

Was there a Misrepresentation by the Seller?

[28] Baird Ellan P.C.J. holds at ¶66 that the PDS was inaccurate as it failed to disclose a defect. She states the wording of the PDS and of the contract make it clear that the buyer was intended to rely upon the PDS as an accurate statement regarding the condition of the property.

[29] To exclude the sump pump from the PDS and to affirm that she was unaware of any structural problems or water issues, was clearly misleading and failed to alert the Papoutsis to the need to make further inspection. Thus, Baird Ellan P.C.J. finds at ¶68 of her Reasons that there was a clear misrepresentation made by Ms. Lacroix.

Was Lacroix Negligent?

[30] The learned trial judge accepts that Ms. Lacroix told Mr. McIntosh and Ms. Hautala about the existence of the sump pump, and that they told her she did not need to disclose it if she had not had any problems with it and if it was in plain view.

[31] Baird Ellan P.C.J. states the first issue as whether Ms. Lacroix's reliance on her agents' advice negates negligence on her part. In deciding this issue, she relies on the following facts:

- (a) When Ms. Lacroix was interested in purchasing the property, she was provided with a PDS from the previous owners disclosing the existence of the sump pump;
- (b) Ms. Lacroix was alerted by that disclosure of the need to inspect the crawl space, which she did;
- (c) Ms. Lacroix paid significantly less than the asking price for the property;

- (d) Ms. Lacroix did not tell either Mr. McIntosh or Ms. Hautala that she had been told there were water problems in the crawl space before she moved in, necessitating the installation of the sump pump;
- (e) Ms. Lacroix did not tell either Mr. McIntosh or Ms. Hautala that the pump had been disclosed to her; she simply asked, according to her evidence, whether she needed to disclose it;
- (f) Ms. Lacroix knew more about the history of the property than did Mr. McIntosh;
- (g) Ms. Lacroix signed a statement affirming that she was not aware of any water issues;
- (h) Ms. Lacroix had the pump serviced at least once and she was aware that if it malfunctioned, the water issues would return; and
- (i) Ms. Lacroix relied upon a repairman to advise her that the crawl space was dry and did not inspect it herself before signing the PDS or assuring her agent that the pump was working perfectly.

[32] Ultimately, at ¶76, Baird Ellan P.C.J. states:

although I find that there was some reliance on the advice she received from Mr. McIntosh and Ms. Hautala, this reliance does not negate negligence on Ms. Lacroix's part. She did not take sufficient steps to ensure that the crawl space was dry before signifying that there were no water issues and the pump was working. She did not tell her agent that she had been told the pump was there because of water problems. Her state of knowledge required her to do more to alert the buyer, particularly when she was aware, before the closing, that they wished to see it before the closing and declined to make it available to them.

[33] The learned trial court judge holds at ¶77 that, "[w]hile her misrepresentation may not have been fraudulent, it was clearly negligent "

[34] The second issue is whether Ms. Lacroix is entitled to be indemnified by her agent. Baird Ellan P.C.J. states at ¶77 that, as follows from the finding of negligent misrepresentation, she is not.

Was there a Misrepresentation by the Seller's Agent?

[35] Baird Ellan P.C.J. states at ¶78 that whether there was a misrepresentation by the seller's agent turns on whether Mr. McIntosh knew that the PDS was inaccurate, or whether he was negligent to its accuracy.

[36] The learned trial judge maintains at ¶79: "[h]aving been advised there was a sump pump, Mr. McIntosh should have concluded that its presence could well signify a structural problem or a defect that should be disclosed." She continues at ¶80 that, "[w]hile he was not obliged to have it inspected himself, he improperly advised the seller it need not be disclosed."

[37] Baird Ellan P.C.J. holds at ¶80 that Mr. McIntosh contributed to and was a party to the false statements made by Ms. Lacroix in the PDS.

Was Mr. McIntosh Negligent?

[38] Mr. McIntosh and Sussex Realty argued that there was no duty on a selling agent to ascertain the truth of statements made in a PDS. They stated that such an agent's duty extends only to disclosing latent defects of which he is made aware by the seller - otherwise, caveat emptor applies. They further took the position that a claim against a listing agent, who has no contractual duty to a buyer (as in the case here), must be established in negligence or misrepresentation.

[39] The learned trial court judge cites the following authority for the duty of a listing realtor at ¶82:

A realtor has a duty to disclose all material facts known to him or her which could affect a reasonable purchaser's willingness to enter into an agreement of purchase and sale. The listing realtor's duty is normally satisfied, however, by making inquiries of the seller and of other sources readily available to him or her (as, for example, by making reference to information available in the realty office concerning previous transactions involving the same property). In the absence of some reason to doubt the accuracy of the information thus obtained, however, it is not incumbent upon the realtor to inspect the premises or independently verify what he or she has been told: *Garnot v. City of Prince George*, BCPC, unreported, October 18, 2002, Prince George Registry No. SM14693, p. 12, per Blake PCJ.

[40] Baird Ellan P.C.J. states the existence of such a duty of care has been found to exist for a listing agent in relation to a buyer, citing *Walls v. Ross*, 2001 BCPC 187, *Stansfield P.C.J.*, following *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15, 38 C.C.L.T. 51.

[41] Although she does not state a specific standard for such a duty, Baird Ellan P.C.J. quotes the "Vancouver Island Real Estate Code of Ethics" cited at ¶22 in *Gilchrist v. City Centre Real Estate Inc.*, 2003 BCPC 356:

A REALTOR has an obligation to discover facts pertaining to every property for which the REALTOR accepts an agency which a reasonably prudent REALTOR would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of facts.

[42] Baird Ellan P.C.J. states at ¶85:

Whether that excerpt from the Code of Ethics applies to realtors in *Gibsons*, it is a reasonable statement of the duty one would expect from a listing agent, in my view, and it was not met here. I note that documentation from past sales of the property was an avenue of inquiry specifically included within the realm of 'readily available sources' referred to in *Garnot*.

[43] The learned trial judge found that the PDS related to the previous sale would have indicated a water issue or, at least, the presence of a sump pump.

### Reliance - Was the Water Problem Discoverable?

[44] The learned trial judge refers to *Cardwell v. Perthen*, 2006 BCSC 333, 41 R.P.R. (4th) 118, where Ballance J. states at ¶122:

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

[Internal citations omitted.]

[45] The learned trial judge found that the PDS was missing information that would have alerted the buyer to a need for inspection precisely in relation to the defect that existed and further that the statements on the PDS obviated any apparent need for further inspection of the crawl space. She states, at ¶89, "[h]ad at least the presence of the pump been included in the PDS, they no doubt would have re-inserted the inspection clause."

[46] At ¶90 of her Reasons, citing ¶143 of *Cardwell*, Baird Ellan P.C.J. states:

Where representations discourage a buyer from performing an inspection or induce him to enter into the contract without one, the fact that a defect may have been discoverable had he performed one is not relevant.

[47] The learned trial judge finds that "the buyers were dissuaded by the state of the PDS from making prudent inquiries or performing an inspection, and the defect was in the circumstances not reasonably discoverable by them."

### Damages

[48] Baird Ellan P.C.J. states at ¶99 that "the proper measure of damages is the difference in the value of the property, had the defect been disclosed: *Khaira v. Nelson*, [2002] B.C.J. No. 1620 (S.C.)."

[49] Baird Ellan P.C.J. states at ¶102 that, "[o]n any view of the facts, however, there is ample support for a conclusion that the difference between market value without disclosure, and market value with disclosure, is over the jurisdictional limit of the court." She states that Ms. Lacroix's purchase price, the reassessment performed in 2005 (reflecting a reduction of almost \$50,000 from the original assessment), and the amount of expenditures the Papoutsis have made in attempting to rectify the problems support such a conclusion.

## Disposition

- [50] Judgment was granted at ¶103 in favour of the Papoutsis in the amount of \$25,000 against the defendants Ms. Lacroix, Mr. McIntosh, and Sussex Realty, jointly and severally.
- [51] The case against Mr. J. Lacroix, Mr. Goodwin, and Remax Top 20 Realty was dismissed at ¶104.

## ISSUES ON APPEAL

- [52] Mr. McIntosh and Sussex Realty appeal from Baird Ellan P.C.J.'s decision on the following grounds:
- (a) The learned Provincial Court Judge erred in finding that the existence of a patent condition needed to be disclosed by a listing realtor to a potential buyer;
  - (b) The learned Provincial Court Judge erred in finding that the appellants, as listing realtor and listing brokerage, should have concluded that the presence of a sump pump could signify a structural problem or a defect and needed to be disclosed;
  - (c) The learned Provincial Court Judge erred in finding, without any evidence of standard of care, that a listing realtor has an obligation to review documents from past sales of a property;
  - (d) The learned Provincial Court Judge erred in finding that the existence of a PDS obviated a buyer's duty to conduct a proper inspection of a property and, therefore, impacted the applicability of the doctrine of caveat emptor;
  - (e) The learned Provincial Court Judge erred in finding there was a duty on a listing realtor to grant a buyer access to property not owned or controlled by the listing realtor; and
  - (f) The learned Provincial Court Judge erred in determining the existence of damages without any evidence of recoverable loss.
- [53] To summarize, the appellants disagree with the learned Provincial Court Judge respecting her finding of liability and assessment of damages as against them. They assert that Baird Ellan P.C.J. made a fatal error in finding that there need be disclosure of a patent condition by a listing realtor to a potential buyer.

## DECISION

### Legal Authorities

- [54] In addressing this appeal, two issues must be canvassed:
- (a) Does a listing realtor owe a general duty of care to a potential purchaser? If such a duty is owed, what is the standard of care?

- (b) Does a listing realtor owe a specific duty of care to a potential purchaser to disclose a patent defect?

Does a listing realtor owe a general duty of care to a potential purchaser?

If such a duty is owed, what is the standard of care?

- [55] It is trite law that real estate agents owe their principals a duty to exercise reasonable skill and care: *Charter-York Ltd. v. Hurst* (1978), 2 R.P.R. 272 (Ont. H.C.), leave to appeal to S.C.C. refused (1979), 28 N.R. 616 (note) (S.C.C.).
- [56] In an appropriate set of circumstances, the duty established in *Charter-York* may be extended such that an agent may owe a duty and be liable in tort to third parties.
- [57] In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at ¶34, 99 D.L.R. (4th) 626, the court outlined the elements that must be established to maintain a cause of action in tort for negligent misrepresentation:
- (a) There must be a special relationship between the parties giving rise to a duty of care;
  - (b) There must be a misrepresentation which is untrue, inaccurate, or misleading;
  - (c) The representor must have acted negligently in making the said representation;
  - (d) There must be reasonable reliance placed on the negligent misrepresentation; and
  - (e) The reliance must have been detrimental to the plaintiff in the sense that damages resulted.
- [58] It follows that such a cause of action may be available to a person who relies on an agent, regardless of whether the agent is acting for that person, specifically.
- [59] Real estate agents have been found liable to purchasers for representations made regarding the property being purchased. An agent may be liable to a purchaser where he is aware or should be aware of a problem or defect with a property and fails to reveal it to the purchasers: *Underwood v. Ocean City Realty Ltd.* (1985), 34 C.C.L.T. 128 (B.C.S.C.), *aff'd* (1987), 12 B.C.L.R. (2d) 199 (C.A.); *Fletcher v. Hand* (1994), 40 R.P.R. (2d) 52 (Alta. Q.B.). The listing agent has a duty to exercise reasonable care and skill to ensure the information is complete and accurate; and the selling agent has a duty to make enquiries and to validate any material representations: *Grisack v. Smith* (1985), 59 A.R. 238 (Q.B.) at 243.

Does a listing realtor owe a specific duty of care to a potential purchaser to disclose a patent defect?

- [60] The learned trial judge referred to *Cardwell v. Perthen*, 2006 BCSC 333, *aff'd* 2007 BCCA 313. The Cardwells entered into a contract of purchase and sale of a home that was not subject to an inspection clause. Accordingly, no inspection was carried out before the transaction closed. The disclosure statement contained nothing remarkable and thus the purchasers' agent did not incorporate it into the contract.

[61] Soon after the Cardwells took possession, they discovered several defects with the residence. The Cardwells never did move into the property. Six-and-a-half months later they sold the residence at a loss of nearly \$700,000. The Cardwells, as purchasers, sued the vendors for negligence (including negligent misrepresentation); fraud; and breach of contract.

[62] In holding that there was no misrepresentation made by Mr. Perthen upon which the Cardwells could be said to have reasonably relied in choosing not to bother with an inspection or otherwise inducing them to enter the contract of purchase and sale, Ballance J. embarked on a review of the doctrine of caveat emptor ("let the buyer beware"). She states at ¶119-127, as far as is relevant, as follows:

119 The doctrine of caveat emptor continues to endure with validity and effect in allocating responsibility between a vendor and purchaser in the context of the purchase and sale of real property

120 the vendor need not do anything to inform himself about the state of the property being sold or the existence of any defects: that burden falls to the purchaser the law has put the onus on the purchaser to determine the state and quality of the property being sold.

121 the doctrine has been attenuated by a number of exceptions. Circumstances where caveat emptor will not operate to deny a plaintiff recovery were summarized by Bennett J. in *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191, 19 R.P.R. (3d) 218 at para. 53 (S.C.):

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.

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. 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

127 Latent defects - being ones which are not discoverable by observation and reasonable inquiry - are treated differently. A vendor who is aware of and fails to disclose and/or conceals or makes non-innocent misrepresentations with regard to a latent defect may well become liable to the purchaser for damages suffered as a result of that latent defect. This principle is sound because, unlike a patent defect, a latent defect is not discoverable by a purchaser on appropriate inquiries and inspection and thus, as a matter of fairness in the commercial transaction, the obligation to disclose and to not misrepresent will rest with the party who knows about the deficiency.

[Underlining added.]

[63] Levine J.A. dismissed the appeal, holding that Ballance J. did not err in articulating and applying the legal test for distinguishing patent and latent defects. She states at ¶35: " she applied the proper test in determining which defects and deficiencies the appellants complained of were undisclosed dangerous latent defects for which the respondent was liable, and awarded damages for those."

[64] To summarize, the doctrine of caveat emptor strictly applies in the case of patent defects and thus the law has put the onus on the purchaser to determine the state and quality of the property being sold. In general, there is no duty on the part of a vendor to disclose patent defects to the purchaser; rather, there is a fairly high onus on the purchaser to inspect and discover patent defects by conducting a reasonable inspection of the premises and by making reasonable inquiries into its qualities.

[65] There are circumstances where caveat emptor will not operate to deny a plaintiff recovery, which are summarized in McCluskie. The exceptions do not apply to this case.

Was the learned trial judge clearly wrong in her conclusion the sump pump was a defect?

[66] The learned trial judge concluded that the defect was the ingress of water into the crawl space, which had to be controlled by the installation of a sump pump, after quoting from ¶70 of Armstrong. With respect, the conclusion contradicts that quote, which states that the defect is not the ingress of the water into the crawl space, or the existence of a sump pump. The defect is " the existence of hydrogeological factors for which adequate provision had not been made in the preparation of the site and in the construction of the home", which ultimately resulted in water ingress.

[67] I disagree with the learned trial judge in her conclusion that the presence of a sump pump is a defect. The trial judge does not comment on the hydrogeological factors; rather, she relies on the evidence of Mr. Allenback, who did not consider that there was a problem with perimeter drainage. Additionally, the replacement of the sump pump did not rectify the problem. With that evidence, the learned trial judge was clearly wrong in her conclusion that the sump pump was a defect. If it was, its replacement would have removed the problem.

Was the learned trial judge clearly wrong in her application of the doctrine of caveat emptor?

[68] The evidence before the learned trial judge was that the sump pump and any water ingress issues in the crawl space of the property would have been readily discoverable by Mr. and Mrs. Papoutsis had they exercised reasonable vigilance in the circumstances. A reasonable inspection of the property would have put them on notice of the existence of the sump pump.

[69] Although Mr. and Mrs. Papoutsis attempted to view the property a second time prior to closing, the inspection clause had been waived. They completed the contract. Without an inspection clause, Ms. Lacroix was not obliged to provide them an opportunity to view the property. Although the trial judge found that the inspection clause was removed on the recommendation of Mr. Goodwin, it was the purchasers who took the risk of removing the clause.

[70] The learned trial judge reasons that the statement on the PDS was missing information that would have alerted Mr. and Mrs. Papoutsis of the need for an inspection. She states, "[h]ad at least the presence of the pump been included in the PDS, they no doubt would have re-inserted the inspection clause."

[71] At ¶90 of her Reasons, Baird Ellan P.C.J. states:

Where representations discourage a buyer from performing an inspection or induce him to enter into the contract without one, the fact that a defect may have been discoverable had he performed one is not relevant.

[72] This statement is crucial to the case at hand. Baird Ellan P.C.J.'s authority for this statement is cited as ¶143 of Cardwell, which states as follows:

Mrs. Cardwell's evidence fell short of demonstrating that the inaccurate contents of the Disclosure Statement induced the Cardwells to enter into the contract or that they relied on it in reaching the decision to do without a proper inspection. And their conduct suggests otherwise. Neither she nor her real estate agent asked for a copy of it at the second meeting and more importantly, although it was open to them to do so, the Cardwells did not incorporate the Disclosure Statement into the terms of the contract of purchase and sale even though they were foregoing an inspection.

[73] In my respectful view, Baird Ellan P.C.J.'s interpretation of Ballance J.'s comments in Cardwell goes further than substantiated. Her statement essentially transforms the application of the doctrine of caveat emptor from a distinction between patent and latent defects, to one where the lack of an inspection makes a distinction irrelevant. Such a conclusion is clearly wrong.

[74] In Cardwell, the court concluded that, despite there being misrepresentations made by the vendor, there was no misrepresentation made upon which the purchasers could be said to have reasonably relied in choosing not to bother with an inspection or otherwise inducing them to enter the contract for purchase and sale. She also determined that the vendor was liable for recklessly failing to disclose latent defects of which he was aware. In that case, the disclosure statement, in which misrepresentations were made, was not included as a term of the contract. Further, Cardwell was decided in the context of a vendor's liability rather than a listing agent's liability. Thus, Cardwell differs somewhat from the case at hand.

[75] Baird Ellan P.C.J. did not find evidence of fraudulent intention or recklessness on the part of the appellants; additionally, the alleged defect or misrepresentations do not render the house dangerous or unfit for human habitation. Thus, the evidence is insufficient to meet the test laid down in McCluskie. As the exceptions to the rule are not met, the doctrine of caveat emptor applies.

Was the trial judge clearly wrong in finding that Mr. McIntosh or Sussex Realty made misrepresentations upon which the Papoutsis reasonably relied in choosing not to include the inspection clause or in otherwise inducing them to enter the contract?

[76] Mr. and Mrs. Papoutsis were aware, prior to closing, of the possibility of water ingress and structural foundation issues with the property. Upon their agent's suggestion, they sought the advice of legal counsel directly on this point. They closed the contract knowing of the potential for such problems and cognisant that they had waived their inspection privileges. However, the fact that the Papoutsis may have relied on the misrepresentations in the PDS, their decision to accept their agent's advice to waive the inspection clause, must be considered. Regardless, this would likely go to Mr. Goodwin's liability, which is not at issue on appeal.

[77] Even if it is held that the purchasers relied on the misrepresentations made in the PDS and that such reliance was reasonable, the characterization of the water ingress problems remains at issue. As the alleged defects are likely patent defects discoverable by conducting a reasonable inspection and making reasonable inquiries about the property, I do not consider that the listing agent and the agent's employer are liable under all the circumstances as a result of the doctrine of caveat emptor.

[78] The refusal of access was at the hands of the vendor - not the listing agent. Mr. McIntosh and his brokerage are not accountable for the purchasers' inability to discover the patent defect. The learned trial judge erred in her finding of liability against the appellants.

## CONCLUSION

[79] The learned trial judge erred in finding that the sump pump was a defect and misapplied the doctrine of caveat emptor. Further, she erred in finding that the vendor's agent was liable for the purchasers' inability to inspect the property before closing. Finally, Mr. McIntosh and Sussex Realty are not liable for the advice they gave Ms. Lacroix concerning her completion of the PDS.

[80] Ms. Lacroix did not file a notice of appeal in this matter. I reach no conclusion on whether my holdings would affect the liability of the vendor and make no order in that respect.

[81] The appeal is allowed. The action against Mr. McIntosh and Sussex Realty is dismissed.

[82] Unless there are matters of which I am not aware, the appellants are entitled to their costs, both of this appeal and of the action below.

"Gropper J."

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**        <https://www.bccourts.ca/jdb-txt/SC/09/01/2009BCSC0174.htm>

**CASE PAGE**                <https://chat.esheria.ai/case-law/canada/mcintosh-v-papoutsis-2009>

Prepared on 29 October 2026 · Esheria