**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *MacIsaac Estate v. Urquhart*, 2019 NSCA 25

**Date:** 20190404
**Docket:** CA 472370
**Registry:** Halifax

**Between:**

June MacIsaac as Executor of the Estate of Ronald MacIsaac

Appellant

v.

Richard Urquhart and Kerry Urquhart

Respondents

v.

Daniel MacIsaac and DJMI Legal Services Limited

Respondents/Appellants by Cross Appeal

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|---|---|
| **Judge:** | The Honourable Justice Hamilton |
| **Appeal Heard:** | January 15, 2019, in Halifax, Nova Scotia |
| **Subject:** | Oral Agreement of Purchase and Sale of Real Property; Solicitor Negligence |
| **Summary:** | Ronald MacIsaac agreed to sell rural property to Richard Urquhart. Danny MacIsaac acted as solicitor for both. The trial judge found that Ronald breached the terms of the oral agreement by failing to grant Richard ownership of a portion of the driveway necessary for vehicle access to the barn on the property; failing to provide Richard with use of the "garden lot" retained by Ron; failing to remove materials stored on the property and encumbering the property with a water easement. Ronald appealed. Danny cross-appealed. |
| **Issues:** | Did the trial judge err: |

a. in finding the APS was enforceable;
b. in finding Ron breached the APS;
c. by applying due diligence standards of negligence to Ron without a finding of negligence;
d. in dismissing Ron's crossclaim against Danny;
e. in not finding the Urquharts were contributorily negligent;
f. in finding Danny's breaches caused damage to the Urquharts;
g. in finding Ron's breaches caused damage to the Urquharts;
h. in quantifying the amount of damages; or
i. in setting the amount of costs.

**Result:** Appeal dismissed with costs to the appellants.

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.***

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| | |
|---|---|
| **Judges:** | Bourgeois, Hamilton, and Scanlan JJ.A. |
| **Appeal Heard:** | January 15, 2019, in Halifax, Nova Scotia |
| **Held:** | Appeal and cross appeal dismissed, with reasons for judgment of Hamilton, J.A.; Scanlan and Bourgeois, JJ.A. concurring |
| **Counsel:** | Dennis James, Q.C. and Grace MacCormick, for the appellant<br>Bruce MacIntosh, Q.C., for the respondents Richard Urquhart and Kerry Urquhart<br>Augustus Richards, Q.C. for respondents/appellants by cross appeal Daniel MacIsaac and DJMI Legal Services Limited |

**Reasons for judgment:**

[1] This appeal and cross-appeal arise from a handshake agreement of purchase and sale ("APS") entered into in January 2010 between Ronald MacIsaac ("Ron"), one of the vendors, and Richard Urquhart ("Richard"), one of the purchasers, for the "homestead property", consisting of a farmhouse, barn and approximately ten acres of land in rural Antigonish County. Daniel MacIsaac ("Danny") and DJMI Legal Services Limited ("DJMI") acted for the vendors, the purchasers/mortgagors and the mortgagee.

[2] Richard and his wife, Kerry Urquhart ("Kerry"), sued Ron, his wife, June MacIsaac ("June"), Danny and DJMI under *Civil Procedure Rule* 57 (claims under $100,000). They alleged Ron breached the terms of the APS by (1) failing to grant them shared ownership of a portion of the driveway necessary for vehicle access to the barn; (2) failing to provide them with use of the "garden lot" for agricultural purposes; (3) failing to remove material owned by RJ MacIsaac Construction Ltd. (the "Company") that was stored behind the barn and (4) encumbering the "homestead property" with a water easement in favour of a house lot owned by Ron's son, Boyd MacIsaac ("Boyd"). They alleged Danny/DJMI breached their obligations to them as their solicitor.

[3] Ron crossclaimed against Danny/DJMI for indemnity, claiming that if his defence against the Urquharts (contesting his agreement to these terms and alleging Richard knew of the water being supplied to Boyd's house) failed, any damages suffered by the Urquharts were caused solely by Danny/DJMI breaching their duty to Ron, as his solicitor, to properly construct the closing documents to reflect the APS.

[4] By agreement, June was removed as a party prior to trial.

[5] Justice James L. Chipman found in favour of the Urquharts (2017 NSSC 313). He awarded them damages of $80,000 against both Ron and Danny/DJMI on a joint and several basis. The judge's December 12, 2017 Order also dismissed Ron's crossclaim against Danny/DJMI.

[6] Ron appealed and Danny/DJMI cross-appealed. Following Ron's death, June replaced Ron in her capacity as his executrix.

[7] For the reasons that follow, I would dismiss both the appeal and cross-appeal.

**Background**

[8] Intending to immigrate permanently to Canada, the Urquharts and their children moved to Antigonish County from Wales in the Spring of 2009. Richard got a job with the Company, which was started by Ron and eventually owned by Boyd.

[9] Initially they rented but decided they wanted to buy a home. Knowing this, Boyd told Richard that Ron was selling his "homestead property" as he and June were building a retirement home elsewhere.

[10] Ron and June had operated a cattle farm on a large parcel of land since 1952. Their farmhouse and barn were located on this large parcel. A portion of this large parcel had been previously conveyed to the Company. What remained of the large parcel was going to be further subdivided to create smaller lots, including the "homestead property" and the "garden lot". The "garden lot" was bounded on the north by the Company's land, on the west and south by the "homestead property" and on the east by the public road. A driveway provided access from the public road to the farmhouse and then to the barn and "garden lot", before it continued on to the Company's land. The Company also had access to the public road by means of a separate driveway.

[11] Ron and Richard met in late 2009 to discuss the Urquharts buying the "homestead property". At that time, Ron showed Richard a copy of an unapproved subdivision plan of the large parcel of land, dated September 24, 2009, on which Ron had outlined the part of the large parcel, containing the farmhouse and barn, to be sold as the "homestead property".

[12] Ron and Richard met at the "homestead property" again in January 2010. At that time, Richard asked if the lot of land that later became the "garden lot" was included in the purchase. Ron told him it was not as he was keeping it because it contained June's asparagus patch and Boyd wanted to build a well on it to provide water to the Company's adjacent property to the north. Notwithstanding this, Ron agreed that Richard could use the "garden lot" for agriculturally related purposes. Richard also asked about the driveway. He did not want it used by the Company to access its property because of his children and he wanted to ensure he could use it for vehicle access to his barn. Ron agreed the driveway would not be used by the Company's trucks and that he and Richard would have shared ownership of the part of the driveway necessary for the Urquharts to access the barn with vehicles. Richard also asked about the Company's material that was stored on the

"homestead property" behind the barn. Ron agreed to have it removed. Ron and Richard then entered into the APS whereby the Urquharts would purchase the "homestead property" for $150,000 once Ron's retirement home was finished.

[13] Ron did not inform Richard that the well on the "homestead property" provided water to Boyd's house lot on the opposite side of the public road.

[14] Ron had the subdivision plan that he had shown Richard revised. The portion outlined by Ron on the September 2009 plan as the "homestead property" was Lot 6 and part of Lot 4BC. It was now combined into one lot, being Lot 6 on the March 2010 plan. The portion of the former Lot 4BC which had been reserved by Ron as the "garden lot" was now shown as Parcel C. The part of the driveway necessary for the Urquharts to access the barn with vehicles was wholly contained within the "garden lot".

[15] Ron received a copy of the revised plan and arranged for a copy to be provided to Danny. He instructed Danny that the conveyance of the "homestead property" was to be in accordance with the revised plan, which it was. No copy of the revised plan was provided to Richard.

[16] Unbeknownst to the Urquharts, in February 2010 Ron sold the "garden lot" to the Company. No provision was made for the Urquharts to have shared ownership of the necessary part of the driveway. Nor was any provision made to ensure the Urquharts could use the "garden lot" for agricultural purposes. The Urquharts remained unaware of this sale and of its effect on their use of the driveway to access their barn and their use of the "garden lot" until the Fall of 2012.

[17] Also unbeknownst to the Urquharts, on April 22, 2010 Ron signed an unfettered water easement providing Boyd's house lot with the right to use water from the well on the "homestead property".

[18] The judge found that the Urquharts were unaware the well on the "homestead property" was supplying water to Boyd's house lot and of the easement until they came across a reference to the easement in the conveyancing documents at the closing on May 10, 2010. At that time they were upset by this information because they knew there were well problems in that area and planned to operate a farm with animals and grow vegetables on the "homestead property".

[19] Up until the closing, the Urquharts had not had any contact with Danny, having only dealt with his secretary. When they became aware of the water

easement at the closing they asked to speak with Danny. The judge accepted the Urquharts' evidence that Danny's only response to their concern was to say "there's no problem because there's all kinds of water in that well" and that he then "spun on his heels and was gone", providing the Urquharts with "no real opportunity to ask questions". Accordingly, they received no legal advice as to their options and felt they had no alternative but to close the transaction as they had already moved out of their rental accommodation and into the farmhouse and started making repairs.

[20] Ron failed to remove the Company's material stored behind the barn prior to the closing, as he had agreed to do.

[21] Both the deed conveying the "garden lot" to the Company and the water easement were prepared by Danny after the APS was entered into in January 2010 and before the May 10, 2010 closing.

[22] Danny failed to provide a report on the closing to the Urquharts for over two years, only doing so in October 2012.

[23] On August 16, 2011, Richard's employment with the Company was terminated. He was unable to get another job to allow him to maintain his resident immigrant status in Canada. The Urquharts, still unaware that they did not have shared ownership of the necessary part of the driveway to give them vehicle access to the barn or the right to use the "garden lot", put the "homestead property" up for sale in April 2012 for $219,000. They reduced the price to $179,900 and then took it off the market in August 2012 on the advice of their real estate agent because of a dispute with the Company over its continuing storage of material behind the barn.

[24] After Richard involved the Department of the Environment, and with the involvement of lawyers, Boyd finally agreed the Company would remove the material from behind the barn, which it did by August 2013.

[25] In May 2013, the Company began storing equipment and material on the "garden lot", preventing its use by the Urquharts.

[26] On October 15, 2013, Boyd placed a steel beam across the driveway preventing the Urquharts from accessing their barn with vehicles.

[27] The Urquharts relisted the "homestead property" in November 2013 for $179,900 and commenced their lawsuit. After several conditional offers failed to

close, the mortgagee began foreclosure proceedings and the "homestead property" was eventually sold in September 2015 for $120,000. After adjustments, this resulted in no return of equity to the Urquharts.

**Decision**

[28] The judge details the evidence he heard over six days in approximately 30 pages of his 54 page decision. He then makes credibility and reliability findings, clearly preferring the Urquharts' evidence:

> [170] …The Urquharts testimony cannot be reconciled with the testimony of Danny MacIsaac or Anne Marie Kavanagh [Danny's secretary]. Having observed the witnesses and most importantly, scrutinized their evidence, I am of the overwhelming view that the Urquharts were far more credible than Mr. MacIsaac [Danny] and his legal secretary.
>
> …
>
> [173] While on the topic of credibility, I have to say that I found Boyd MacIsaac to be uncredible during large parts of his evidence. He presented as a very feisty witness who, although not a party, was hardly dispassionate. He was prone to overstatement and parts of his evidence were at complete odds with not only the Urquharts but his father, Ron MacIsaac. For example, Boyd MacIsaac told of a critical meeting with his father in the fall of 2009, whereby he was promised portions of the land ultimately conveyed to the Urquharts. Not only did Ron MacIsaac deny such a meeting ever took place, there is not a shred of evidence to back it up. In this regard, no other witness spoke of having heard of such a meeting nor were there any documents whatsoever to support it having occurred.
>
> [174] With respect to Theresa MacIsaac [Boyd's wife], she presented as being a most uncomfortable witness. Indeed, I formed the impression she would rather be anywhere else than giving testimony in court. She appeared to be intent on stating Richard Urquhart told her he was going to shock the well; however, she could not be specific about the circumstances and waivered on whether she was even living at her Dunmore Road property at the material time.
>
> [175] As for Ron MacIsaac, he presented as an honest witness but I have reliability concerns. Mr. MacIsaac's advanced age may well have been a factor; during portions of his cross-examination he seemed prepared to agree to anything put to him. Although June MacIsaac did not provide *viva voce* evidence, I carefully reviewed her transcript (Exhibit 1). Even through the printed page it is clear she (rather like her son Boyd) was a feisty witness. In addition she was unable to remember critical details and overall, I have reliability concerns regarding her evidence.

[29] The judge found the terms of the APS included Ron's agreement to:

(a) ensure the Urquharts could use the "garden lot",

(b) ensure he and the Urquharts shared ownership of that part of the driveway necessary for the Urquharts to access their barn with vehicles, and

(c) remove the Company's material that was stored behind the barn.

[30] The judge found that the APS was enforceable:

> [176] It is my determination that a reasonable objective observer would conclude that Mr. Urquhart and Ron MacIsaac reached an agreement at their January 2010 meeting. Further, I regard their handshake agreement as an enforceable agreement. It is well settled that an agreement need not be in writing to be enforceable (see *United Gulf Development Ltd. v. Iskandar*, 2008 NSCA 71, at paras. 75 – 76; *Jeffrie v. Hendriksen*, 2015 NSCA 49 at para. 17).

[31] The judge found that Ron gave in to Boyd's pressure and breached the APS by granting Boyd the water easement, failing to provide the Urquharts with use of the "garden lot", failing to provide shared ownership of the necessary part of the driveway and failing to have the Company's material removed from the homestead property:

> [177] I find that Ron MacIsaac, as vendor and grantor of the Property, breached his agreement with Mr. Urquhart. He failed to exercise due diligence to verify the agreed upon boundaries of the Property. In particular, Ron MacIsaac breached his agreement with the Urquharts by granting a well easement to the Company. Up until the time of the execution of the well easement in April, 2010, Boyd MacIsaac's water line was with the consent of his parents. This vital information was never provided to the Urquharts. Indeed, I find the Urquharts first found out about the well easement on the closing day when Richard Urquhart reviewed the Deed for the first time.
>
> [178] Ron MacIsaac also breached the handshake agreement by failing to have inserted in the Deed a provision that provided the Urquharts with their promised rights of use and occupancy to the garden lot. Furthermore, rather than ensuring the Deed provided ownership of the driveway between Ron and June MacIsaac and the Urquharts, by conveying the garden lot to the Company, Ron MacIsaac allowed the driveway to be exclusively owned by another party. Finally, not only did he fail to have his son remove the encroaching equipment off the Property, he stood by as the Company added debris and contamination to the Property.
>
> [179] I find that after he made the handshake deal, Ron MacIsaac was pressured by his son, Boyd MacIsaac, to convey the water easement, garden lot and driveway to the Company. Ron MacIsaac carried out his son's wishes, thus breaching the handshake deal with Mr. Urquhart.

> [180] I do not accept Boyd MacIsaac's evidence that he struck a deal with his father in the fall of 2009 to obtain the water easement, garden lot and driveway (along with the upper lot) of the Property. Rather, it is my determination that Boyd MacIsaac became upset with his father when he learned of the handshake deal. I further find that Boyd MacIsaac asserted pressure on his father to convey the water easement, garden lot and driveway to his Company in the lead up to the May 10, 2010, closing. Ron MacIsaac succumbed to this pressure, such that he breached his agreement with Mr. Urquhart.

[32] The judge found Danny favoured Ron, June, Boyd, Theresa and the Company over the Urquharts:

> [188] In all of the circumstances, Danny MacIsaac should not have acted for the Urquharts, who can hardly be said to have received the "best professional assistance". In this regard, the evidence demonstrates that he clearly favoured his longstanding clients, Ron and June MacIsaac, over the Urquharts, whom he treated with inattention and disdain.
>
> …
>
> [197] The Urquharts can hardly be said to have received the best professional assistance. On the contrary, they were let down by counsel whom, whether he realized it or not, through his actions on the transaction, favoured his longstanding clients, Ron and June MacIsaac. I find Danny MacIsaac also favoured Boyd and Theresa MacIsaac as well as the interests of the Company over the Urquharts' interests. This favouritism is all the more obvious when one considers the Urquharts were immigrants, not well versed in the customs of property transactions in Nova Scotia. Indeed, I find Richard and Kerry Urquhart to have been vulnerable at all material times.

[33] The judge concluded that Ron breached the APS and that Danny breached his contract and his fiduciary duty and was guilty of negligence, giving rise to joint and several liability:

> [198] Given my findings that Ron MacIsaac breached the handshake deal, it is my determination he is liable in breach of contract. As for Danny MacIsaac, I have found he was professionally negligent, in breach of contract and in breach of his trust and fiduciary duties to the Plaintiffs. Given my findings of liability against the Defendants, they are jointly and severally liable to the Plaintiffs for damages. […]

[34] In assessing damages, the judge took into consideration the evidence of the real estate agent, Kim Silver, who acted for the Urquharts when they listed their property for sale, as to the concerns prospective buyers had about buying the "homestead property":

> [218] When she listed the property for the second time, Ms. Silver said prospective buyers had several concerns, including:
>
> • lack of road access to the barn
>
> • the well was to be shared with the across the street neighbour
>
> • there was a salvage yard to the right of the home [on the "garden lot"].

[35] He quantified the damages:

> [225] As a starting point it is without debate that the Urquharts invested $30,000 in the Property as a downpayment. By the time they moved back to Wales, the funds were gone. In this regard, we know the Property ultimately sold for $120,000; $30,000 less than what the Urquharts paid for it.
>
> [226] The Property had become devalued on account of the factors addressed by Ms. Silver. The lack of driveway access to the barn and presence of what essentially looked like a junkyard (Company debris stored on the garden lot) next door, would undoubtedly have deterred prospective purchasers and reduced the Property's value.
>
> [227] I find the reduced value of the property to be the aforementioned $30,000. To this amount I would add that the Urquharts are entitled to their monetary "sweat equity" which prompted Ms. Silver to suggest a listing price of $219,000 in the spring of 2013. Once again, I am skeptical of this figure; however, on balance I am of the view that the Urquharts' significant Property improvements and beautification (see the various exhibited photographs) attract an additional damages figure of $45,000.
>
> [228] In the result, I find the Defendants jointly and severally liable to the Plaintiffs for special damages of $75,000 ($30,000 plus $45,000) as a consequence of the decreased market value of the Property. In addition, I permit the claim for $5,000, the amount BCU charged the Urquharts as a repossession fee.

[36] Other than a reference in paragraph 4 of his reasons, the judge did not refer to Ron's crossclaim against Danny:

> [4] … Ronald and June MacIsaac also crossclaimed against Daniel J. MacIsaac, whose Defence to Crossclaim was filed in mid February, 2014, closing the pleadings.

[37] However, as indicated in ¶5 above, in his December 12, 2017 Order, the judge ordered that Ron's crossclaim against Danny/DJMI be dismissed without costs.

**Issues**

[38] Having considered Ron's grounds of appeal and Danny's grounds of cross-appeal, to resolve both we have to determine whether the judge erred:

1. in finding the APS was enforceable;
2. in finding Ron breached the APS;
3. by applying due diligence standards of negligence to Ron without a finding of negligence;
4. in dismissing Ron's crossclaim against Danny;
5. in not finding the Urquharts were contributorily negligent;
6. in finding Danny's breaches caused damage to the Urquharts;
7. in finding Ron's breaches caused damage to the Urquharts;
8. in quantifying the amount of damages; or
9. in setting the amount of costs.

**Standard of review**

[39] With respect to issues 1, 2 and 4, to the extent they engage a question of law, the test is correctness. On issues of fact, or mixed law and fact, it is palpable and overriding error; *Housen v. Nikolaisen*, 2002 SCC 33; *Iannetti v. Poulain*, 2016 NSCA 93 at ¶35.

[40] The standard of review on issue 3 is correctness.

[41] The standard of review on issue 5, contributory negligence, is palpable and overriding error, as fault is a question of fact; *Contributory Negligence Act*, R.S.N.S. 1989, c. 95, s. 5.

[42] With respect to causation raised in issues 6 and 7, a trial judge's identification of the test for causation is reviewed on a correctness standard. However, his or her finding that causation has been established is reviewed on a palpable and overriding standard; *Awalt v. Blanchard*, 2013 NSCA 11, ¶9; *Ediger v. Johnston*, 2013 SCC 18, ¶29; *Iannetti* at ¶33.

[43] With respect to the eighth issue involving the amount of damages, an award of damages made at trial will not be altered unless there was no evidence on which the judge could have reached their conclusion, they proceeded on a mistaken or wrong principle of law or the result is so wholly erroneous that a Court of Appeal is entitled to intervene; *Iannetti* at ¶34.

[44] The standard of review for the discretionary costs, issue 9, involves considerable deference. We will not interfere unless we are convinced the judge erred in principle or caused an obvious injustice; *National Bank Financial Limited v. Barthe Estate*, 2015 NSCA 47 at ¶151.

## Analysis

### 1. Did the Judge Err in Finding the APS was Enforceable?

[45] Ron argues the judge erred in finding the APS was enforceable because it was not in writing as required by the *Statute of Frauds*, R.S.N.S. 1989, c. 442, ("*Act*"). He also says it was not enforceable because the terms of the APS were uncertain and it was no more than an agreement to agree because a subsequent written agreement was anticipated by Ron and Richard.

[46] Dealing first with the *Statute of Frauds* argument, s. 4 of the *Act* provides:

> 4. No interest in land shall be assigned, granted or surrendered except by deed or note in writing signed by the party assigning, granting or surrendering the same, or by his agent thereunto authorized by writing, or by act and operation of law.

[47] I adopt Danny's response to this argument:

> [9] **The *Statute of Frauds* exists to prevent fraud, not to facilitate it** [*Erie Sand and Gravel Ltd v. Seres' Farms Ltd* (2009), 97 OR (3d) 241 (CA), ¶49]**. The doctrine of part performance was created to prevent the use of the statute as an engine of fraud. "A verbal agreement which has been partly performed will be enforced."** [*Hill v. Nova Scotia*, [1997] 1 SCR 69, ¶11]**. Where both parties act in furtherance of their oral agreement, and in particular, where the purchaser has acted to his or her detriment (as, for example, paying for the property), equity will not allow the vendor to hide behind the *Statute of Frauds*** [*Erie Sand and Gravel*, ¶45-46 and 78].
>
> [10] The testimony of Ron and Richard at trial was clear and to the same effect:
>
> a. Ron agreed that Richard would have a right to use the lane to access the barn;
>
> b. Ron agreed to remove the existing encroachment [Company's materials] on the land to be sold; and
>
> c. Ron told Richard that he could use (but not own) the garden lot.
>
> [11] In reliance on that agreement (as well as on overall agreement to purchase and sell the lands for $150,000),

> a. Ron obtained a survey that he thought gave Richard the right to use the lane to access the barn;
>
> b. Richard moved into the house and made extensive renovations thereto *before* closing; and
>
> c. Richard paid Ron $150,000.00 (subject to a rebate of a few thousand dollars for repairs not performed by Ron).
>
> [12] It is accordingly respectfully submitted that the *Statute of Frauds* had no application on the evidence and facts before the Learned Trial Judge. The handshake APS *was* enforceable according to its terms….
>
> [13] Nor is there anything in this Honourable Court's decision in *United Gulf Developments Ltd v. Iskandar*, 2008 NSCA 71, that alters this conclusion. *United Gulf* involved what both the trial judge and this Court considered to be a property development agreement that was, in effect, an agreement to agree. The written document on its face omitted terms and condition that would have been necessary to any agreement involving a large and complex property development. That is not the case here, where the testimony of both parties supported the existence of a complete agreement.
>
> (Emphasis added)

[48] There is also no merit to Ron's arguments that the APS was not enforceable because its terms were uncertain and it was only an agreement to agree.

[49] One of Ron's arguments was that the judge erred in his factual findings that the terms of the APS included Ron's agreement to provide the Urquharts with shared ownership of the driveway to allow vehicle access to the barn and use of the "garden lot". While Ron alleged in his statement of claim and pre-trial brief that he had not agreed to these terms, in his trial testimony he accepted Richard's evidence that these were the terms of the agreement reached with the January handshake. This testimony supports the judge's factual findings of what the terms of the APS were, as set out in paragraph 29 above, and also his finding that the essential terms intended to govern the contractual relationship were agreed upon and certain in January, and that the handshake agreement was intended by Ron and Richard to be the final agreement.

[50] The judge made no error in his factual findings on the terms of the APS or in finding the APS was enforceable.

**2. Did the judge err in finding Ron breached the APS?**

[51] Ron argues the judge erred in finding he breached the APS because he failed to consider the doctrine of *caveat emptor* ("buyer beware"). This argument was

raised for the first time on appeal. He says the application of the doctrine results in Ron not having breached the APS.

[52] The doctrine of *caveat emptor* provides that absent fraud, mistake or misrepresentation, a purchaser takes a property as he or she finds it, unless the purchaser protects him or herself by contractual terms; *Gesner v. Ernst*, 2007 NSSC 146, ¶44.

[53] There are exceptions to this doctrine. One exception is that it does not apply where a vendor is aware of a latent defect of the property and does not disclose it to the purchaser; *McCluskie v. Reynolds* (1998), 65 BCLR (3d) 191 (BCSC), ¶54 and *Torfason v. Booth*, 2017 ABQB 387, ¶81. A latent defect is one that is not readily apparent to a purchaser during an ordinary inspection of the property he or she proposes to buy.

[54] The water line from the well on the "homestead property" to Boyd's house lot was a latent defect, one that was not readily apparent. As such, Ron was bound to bring it to Richard's attention, which he failed to do. The doctrine of *caveat emptor* does not relieve Ron from his liability to the Urquharts for failing to disclose the fact the well on the "homestead property" was supplying water to Boyd's house lot.

[55] Nor does the doctrine of *caveat emptor* apply to relieve Ron from his contractual obligations under the APS to provide for (1) shared ownership of the necessary part of the driveway, (2) the Urquharts' use of the "garden lot" or (3) the removal of the Company's material from behind the barn regardless of who owned it. The judge found these were specific contractual terms of the APS that Ron agreed to, was bound to comply with and failed, breaching the APS.

[56] The judge did not err in finding that Ron breached the APS.

**3. Did the judge err by applying due diligence standards of negligence to Ron without a finding of negligence?**

[57] The judge refers to "due diligence" in paragraph 177 of his reasons:

> [177] I find that Ron MacIsaac, as vendor and grantor of the Property, **breached his agreement** with Mr. Urquhart. He failed to exercise due diligence to verify the agreed upon boundaries of the Property. **In particular**, Ron MacIsaac **breached his agreement** with the Urquharts by granting a well easement to the Company [*sic*].

> (Emphasis added)

[58] Ron argues the judge's reference to due diligence in this paragraph indicates he erred by referring to a standard applicable to negligence when he only found him liable for breach of contract.

[59] I am satisfied the judge did not err by applying due diligence standards of negligence to Ron without a finding of negligence. The reference to "in particular" and "breached his agreement" twice in the same paragraph satisfy me that the judge's reference to due diligence was with respect to breach of contractual commitments, not negligence.

**4. Did the judge err in dismissing Ron's crossclaim against Danny?**

[60] As indicated in paragraphs 36/37 above, the judge failed to deal with Ron's crossclaim against Danny in his reasons, except to note it was filed. He dismissed it in his Order.

[61] Ron argues this indicates the judge failed to consider his crossclaim which amounts to a reversible error.

[62] The judge's failure to discuss Ron's crossclaim in his reasons raises the question of what his obligation is to address live issues pled and argued before him and whether it is an error of law that he failed to do so.

[63] In *R. v. M. (R.E.)*, 2008 SCC 51, at ¶35, the Supreme Court of Canada summarized the functional approach to considering if reasons are sufficient:

> [35] … (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

See also *Awalt v. Blanchard*, *supra* at ¶38 and *McAleer v. Farnell*, 2009 NSCA 14.

[64] It is preferable for a judge to specifically deal with all live issues before him or her in their reasons. However, the above-noted cases indicate that if a judge does not do so, it is not a reversible error unless it renders the outcome unintelligible or incapable of being made out—meaning that there is no logical connection between the outcome and the whole of the reasons given, in the context of the evidence, the submissions of counsel and the trial.

[65] In my view, under this functional test, taking into account the whole of the reasons and the pleadings, evidence and arguments in this case, the judge's dismissal of Ron's crossclaim is intelligible. Further, there is a logical connection between his dismissal of the crossclaim and his reasons. The judge made no reversible error.

[66] As set out in ¶31 above, in his reasons the judge found that, under pressure from Boyd, Ron carried out Boyd's wishes and breached his agreement with Richard:

> [179] I find that after he made the handshake deal, Ron MacIsaac was pressured by his son, Boyd MacIsaac, to convey the water easement, garden lot and driveway to the Company. Ron MacIsaac carried out his son's wishes, thus breaching the handshake deal with Mr. Urquhart.
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> [180] I do not accept Boyd MacIsaac's evidence that he struck a deal with his father in the fall of 2009 to obtain the water easement, garden lot and driveway (along with the upper lot) of the Property. Rather, it is my determination that Boyd MacIsaac became upset with his father when he learned of the handshake deal. I further find that Boyd MacIsaac asserted pressure on his father to convey the water easement, garden lot and driveway to his Company in the lead up to the May 10, 2010, closing. Ron MacIsaac succumbed to this pressure, such that he breached his agreement with Mr. Urquhart.

[67] As set out in ¶32 above, the judge also found that Danny favoured Ron, June, Boyd, Theresa and the Company over the Urquharts:

> [188] In all of the circumstances, Danny MacIsaac should not have acted for the Urquharts, who can hardly be said to have received the "best professional assistance". In this regard, the evidence demonstrates that he clearly favoured his longstanding clients, Ron and June MacIsaac, over the Urquharts, whom he treated with inattention and disdain.
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> …

> [197] The Urquharts can hardly be said to have received the best professional assistance. On the contrary, they were let down by counsel whom, whether he realized it or not, through his actions on the transaction, favoured his longstanding clients, Ron and June MacIsaac. I find Danny MacIsaac also favoured Boyd and Theresa MacIsaac as well as the interests of the Company over the Urquharts' interests. This favouritism is all the more obvious when one considers the Urquharts were immigrants, not well versed in the customs of property transactions in Nova Scotia. Indeed, I find Richard and Kerry Urquhart to have been vulnerable at all material times.

[68] These two key findings about the relationships between the parties—that (1) Ron breached the APS in order to carry out Boyd's wishes and (2) while carrying out Ron's (Boyd's) wishes, Danny favoured Ron over the Urquharts—bear on the crossclaim. First, the judge paints Ron as having an active role in breaching the APS, succumbing to Boyd's pressure. Second, implicit in his finding that Danny favoured Ron over the Urquharts is that Danny gave Ron the deal he wanted on behalf of Boyd, that he acted in such a way as to further Ron's wishes to the detriment of the Urquharts, not that he failed to protect Ron's interests.

[69] These findings no longer make Ron's crossclaim viable. The finding that Ron was not innocent in breaching the APS, but instead carried out his son's wishes, and the finding that Danny favoured the MacIsaacs by completing the transaction as they wished and in their favour, are at odds with Ron's claim for indemnification.

[70] It is also implicit in these findings why the judge awarded damages against Ron and Danny on a joint and several basis. Both Ron and Danny contributed to the Urquharts' loss.

**5. Did the judge err in not finding the Urquharts to be contributorily negligent?**

[71] Both Ron and Danny argue that the judge erred in not finding the Urquharts contributorily negligent. They say the Urquharts were negligent in relying on Ron to instruct Danny of the details of the transaction rather than doing so themselves directly. They say the Urquharts were negligent in closing the transaction after becoming aware of the water easement at the May 10 closing, in failing to ensure the Company's material was removed from behind the barn prior to the closing and in moving into the farmhouse and making repairs to it prior to the closing.

[72] With respect to the argument that the Urquharts were negligent in relying on Ron to instruct Danny, the judge accepted Richard's evidence (not denied by Ron)

that Ron agreed to convey the terms of the APS to Danny. This was so the legal documents could be drawn up accordingly. The judge did not err by not finding Richard contributorily negligent for relying on Ron to do what he agreed to do. This is especially so in light of the judge's findings that Ron breached the APS under pressure from Boyd and Danny's favouring of the MacIsaacs by structuring the transaction as they wished and in their favour.

[73] With respect to the argument that the Urquharts were contributorily negligent for closing the transaction after discovering the existence of the water easement, when the Company's material had not been removed from behind the barn and for moving into the farmhouse early and doing repairs, the judge's findings of Danny's breaches must be considered.

[74] The judge found the Urquharts were vulnerable as they had no prior experience with this type of transaction in Nova Scotia. He made no palpable and overriding error in reaching this conclusion. He found Danny breached his duty to the Urquharts to provide them with competent legal services in many ways, including by failing to meet with them in a timely manner, to provide them with advice on how to protect their interests, and failing to disclose vital information to them that would have affected their decision to proceed with the transaction:

> [192] … In doing so, he came into possession of information which I find, had it been disclosed to the Urquharts in a timely fashion, would have affected their decision to proceed with the transaction. I also find that Mr. MacIsaac did not disclose vital information to the Urquharts such that he was negligent and in breach of fiduciary duty.

[75] Danny did not have any contact with the Urquharts until they asked to see him on becoming aware of the water easement at the May 10 closing. Hence, they did not know what their options were with respect to the Company's material that remained behind the barn. They did not know the risks of moving into the farmhouse and carrying out repairs prior to the closing.

[76] The judge's summary of the Urquharts' evidence about what happened at the closing, which he accepted, indicates Danny's failure to advise the Urquharts of their options with respect to the well easement:

> [70] Mr. Urquhart went through the papers and, "as I got to the back I saw this well easement, I noticed water so I said I am going to read this in-depth". He inquired of Ms. Kavanagh, "what's this?" and she responded, "a well easement". She explained that Ron MacIsaac had signed this over to Boyd and Theresa MacIsaac so they would be able to get water. Mr. Urquhart said he was

> unaware of this and that it was, "not on". He said he found this development, "really concerning" and told Ms. Kavanagh, "I'm not happy with this". At this point, Mr. Urquhart asked to see Danny MacIsaac and Ms. Kavanagh went to get him. Shortly thereafter, Danny MacIsaac appeared, asking the couple, "so, what's the problem?". Mr. Urquhart expressed concern about the well easement, especially given his intention to run a farm with animals. Danny MacIsaac responded, "there's no problem because there is all kinds of water in that well". Mr. Urquhart again expressed his concerns, "I was alarmed" and Mr. Danny MacIsaac responded with, "look, I've told you" and "he spun on his heels and was gone". On cross-examination, he described this as "a short shrift answer". When he was with Danny MacIsaac, he said he was given no "real opportunity to ask questions".
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> …
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> [73] Asked whether Danny MacIsaac provided any legal advice during their brief encounter, Mr. Urquhart replied, "none whatsoever". Questioned about the notion that Mr. MacIsaac may have been present earlier when Ms. Kavanagh presented the documents, Mr. Urquhart replied, "that is a product of pure fantasy".
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> …
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> [86] Ms. Kavanagh left to get Mr. MacIsaac. She returned about two minutes later, letting them know that Danny MacIsaac would be out to see them. After three or four minutes, "Danny came bustling in to ask what our problem was. He had a very abrupt manner. He asked what our problem was. Richard explained we spotted a well easement. We knew there was water issues and were really concerned. Danny's response was very flippant, "there's all sorts of water in that well, its never run dry". Ms. Urquhart continued by saying no legal options were provided and Mr. MacIsaac did not explain the easement. She stated, "he abruptly walked off. We had never met Danny MacIsaac before. He didn't introduce himself. He didn't discuss any other aspect with us. He said absolutely nothing regarding conflicts of interest". Ms. Urquhart also stated that Ms. Kavanagh provided them no information in these areas. She said, "I felt shocked, the rug had been pulled from under my feet. We just knew the well to our perfect home could be used by someone else as they saw fit. We had no alternative as we had given up our rental and had moved in, we had done a lot of work and fallen in love with the property. We had no option but to sign. We were given no legal advice or anything else".

[77] In light of the judge's acceptance of the Urquharts' testimony that Danny failed to provide them with any legal advice or options concerning their purchase before or at the closing, leaving them virtually unrepresented, I am satisfied the judge did not make a palpable and overriding error in not finding that the Urquharts were contributorily negligent as alleged. Danny's failings left the Urquharts unaware of the risks and of their options throughout.

**6. Did the Judge err in finding Danny's breaches caused damage to the Urquharts?**

[78] Danny suggests that the judge failed to address the question of causation. He argues his breaches did not cause damage to the Urquharts because they in fact got what they bargained for. He says they had the right to use the necessary part of the driveway, the right to use the "garden lot" but chose not to and were relying on Ron, not him, to remove the Company's material that was stored behind the barn.

[79] With respect to the use of the driveway, Danny argues that the Urquharts had the right to use it by implied grant, an implied reservation of an easement, or proprietary estoppel. He says they should have commenced a law suit to assert their right to use the driveway when the Company placed a steel beam across it rather than accepting the opinion of Boyd's lawyer that they had no right to use it.

[80] There is no merit to this argument. Ron was obliged to provide the Urquharts with the use of the necessary part of the driveway, not to provide them with the opportunity to commence a law suit to try to prove they had such a right.

[81] I turn to Danny's argument that the Urquharts gave up their use of the "garden lot", as opposed to being prevented from using it. A review of the photo exhibits of the Company's equipment and materials stored on the "garden lot" confirms that the storage of the Company's materials and equipment on the "garden lot" prevented the Urquharts from using it, as promised by Ron, for agricultural purposes. Ron's failure to provide this use to the Urquharts as he agreed to do, allowed the unsightly build-up of materials and equipment adjacent to the farmhouse, devaluing the "homestead property".

[82] Danny's argument that his failure to meet the required standard did not cause any loss to the Urquharts with respect to the Company's materials that were stored behind the barn, because they were relying on Ron, not Danny, to clean up this material also has no merit.

[83] The Urquharts relied on Danny to convey the "homestead property" in accordance with the APS, which included removal of this material. His failure to make himself familiar with the terms of the APS and advise the Urquharts on how to deal with the fact this material was not removed at the time of closing, left them with no knowledge and no options as to how to handle this situation. This caused them to close the transaction without the appropriate protections in place, causing them damage.

[84] The judge did not err in finding Danny's breaches caused damage to the Urquharts.

**7. Did the Judge err in finding Ron's breaches caused damage to the Urquharts?**

[85] Ron argues that it was not his breach of the APS that caused the Urquharts' losses, but rather they were caused by the termination of Richard's employment by the Company, his inability to find another job in Nova Scotia and the subsequent foreclosure. Neither the evidence nor the factual findings of the judge attribute Richard's loss of his job or the foreclosure as a cause of the Urquharts' losses. The foreclosure was nothing more than the crystallization of the losses, which assisted in the determination of the fair market value of the "homestead property" as it was conveyed as opposed to how it would have been conveyed had the terms of the APS been met and without the water easement.

[86] The judge made no error in making a decision that held Ron liable for the Urquharts' losses as a result of Ron's breaches of the APS.

**8. Did the Judge err in quantifying damages?**

[87] Danny argues the judge erred in assessing damages. The judge awarded the Urquharts $30,000 for the reduced value of the "homestead property" resulting from the lack of vehicle access to the barn, the existence of the undisclosed water easement, and the loss of use of the "garden lot" which allowed the Company to store its equipment and materials on it, $45,000 for the Urquharts' lost sweat equity in the improvements they made to the "homestead property" and $5,000 in respect of the mortgage company's foreclosure fee.

[88] With respect to the $30,000 amount, Danny says the Urquharts failed to prove any difference in the price they paid for the homestead property and what it was worth **at the time of purchase** without vehicle access to the barn, use of the "garden lot" that would have prevented the Company from storing its materials there and with the water easement, so they should not have been awarded any more than nominal damages for reduced value of the homestead property, if anything.

[89] While there was no evidence specifically dealing with the value, **at the time of purchase**, of the "homestead property" as conveyed, as opposed to how it would have been conveyed if the terms of the APS had been followed, there was definitive evidence that its value had dropped by $30,000 by September 2015 when

it was finally sold and there was evidence from the real estate agent that these problems with the "homestead property" caused concerns to potential purchasers (¶34 above), making it less marketable. This was sufficient evidence of the drop in the fair market value of the 'homestead property" as a result of the conveyance not being in accordance with the APS for the judge to rely on in quantifying damages, as there was no evidence of any other factors that may have accounted for this decrease.

[90] Danny's posit that the Urquharts were not entitled to the $45,000 and $5,000 amounts of damages was based on the same argument Ron made with respect to causation of damages. Danny argued these losses were caused by Richard losing his job, not by Danny's negligence. Again, there is no merit to this argument as neither the evidence nor the factual findings of the judge attribute the Urquharts' damages to the loss of Richard's job.

[91] The judge made no error in quantifying damages.

**9. Did the Judge err in setting the amount of costs?**

[92] Danny argues the judge erred in his costs award of $60,000 and suggests an appropriate amount would be $31,000 based on an "amount involved" of $80,000. He says this award, in an action capped at $100,000 under *Civil Procedure Rule* 57, is wrong in principle, but provides no authority for this position. He says the division of costs should have been 50/50 rather than 75 percent for Danny and 25 percent for Ron.

[93] Trial judges are given great deference with respect to costs. This Court will not intervene unless we are convinced the judge erred in principle or caused an obvious injustice.

[94] The judge's costs decision (2018 NSSC 36) suggests one reason behind the amount of costs he awarded and his unequal division of those costs – namely, that the conduct of Ron and Danny caused the trial to be approximately two days longer than was required:

> [30] Returning to my "background" comments at paras. 20 to 21, I am of the view that the trial would have been much less protracted had the Defendants acknowledged certain realities; in particular:
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> > 1. Danny MacIsaac and DJMI should have admitted negligence and breach of fiduciary duty (but not causation); and

2. Ronald MacIsaac should not have called Boyd MacIsaac as a witness.

> [31] In the Decision, I determined expert evidence was not required to find that Danny MacIsaac fell below the standard of a competent solicitor and that he breached his fiduciary duties to the Urquharts. At the end of the day, given all of the evidence, these were not difficult findings. This is why I question the failure of Danny MacIsaac and DJMI to make these admissions. In closing argument, Mr. Richardson essentially acknowledged his client's derelictions, but held to the position that there was a lack of causation. Had this approach been adopted prior to the trial, I have no hesitation in expressing my view that the trial would have been much shorter, with the same result, albeit with far less time required for Mr. MacIntosh to advance his clients' case.
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> (Emphasis in original)

[95] In addition, the Urquharts filed a time-sensitive all-inclusive offer to settle in the amount of $106,000 which was not accepted. The ultimate award, inclusive of interest and costs, was $157,579, almost $50,000 more than the offer to settle.

[96] Danny has not satisfied me that the judge erred in his award of costs or its division.

[97] I would dismiss the appeal and cross-appeal with costs to the amount of 40 percent of trial costs, $24,000, including disbursements, payable forthwith equally by Ron and Danny to the Urquharts.

Hamilton, J.A.

Concurred in:

Bourgeois, J.A.

Scanlan, J.A.