SUPREME COURT OF NOVA SCOTIA
Citation: *Apogee Properties Inc. v. Livingston*, 2018 NSSC 143

Date: 2018 06 14
Docket: Hfx No. 460371
Registry: Halifax

Between:

Apogee Properties Inc.

Appellant

v.

James D. Livingston and Sharon A. Livingston

Respondents

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	September 18, 2017, in Halifax, Nova Scotia
Counsel:	Matthew Conrad and Patrick Connors, for the Appellant Alex Embree, for the Respondents

By the Court:

Background

[1] This is an appeal from an order made in the Small Claims Court, arising out of the purchase of a home by the respondents from Apogee.

[2] On July 13, 2015, the respondents, James Livingston and Sharon Livingston, initiated a proceeding against Apogee Properties Inc. and Rick Findlay, their own real estate agent. The respondents settled their claim against Mr. Findlay. Their claim against Apogee proceeded. That claim was heard on July 21, September 27, and December 16, 2016.

[3] On January 9, 2017, Adjudicator Augustus Richardson ordered Apogee to pay the respondents damages of $6,934.66. Apogee appealed.

[4] For the reasons that follow, the appeal is dismissed.

The Adjudicator's Decision

[5] Apogee bought a house on Edgewood Avenue in Halifax in February 2012. After renovating the house, Apogee listed it for sale in early 2013. Two "listing cuts" issued by Apogee included the following comments:

> Beautiful custom West End transformation! No expense spared on your new fully finished 3 level, 4 bedroom, 3 ½ bath home with extensive high end finishes… the lower level has a family room, fourth bedroom, full custom bath, and utility room with a door to the back yard.
>
> …
>
> West End delight. Tired of looking at older homes that require a lot of work? This home is walk in & move in. Gleaming hardwood floors… totally finished basement, flat level backyard with outside entry…

[6] After viewing the house, the Livingstons retained an agent, Mr. Findlay, and made an offer of $487,500.00 for the house on May 22, 2013. The offer was accepted and a closing date was set for June 27, 2013. Prior to the closing date, the Livingstons obtained a home inspection report, dated May 28, 2013. The inspector noted various issues with the house and the laminate flooring in the basement:

> Moisture damage noted at the laminate flooring in the basement utility room. Only a theory but the inspector suspects the water is breaching at the rear wall due to the negative grading and no drain was installed at the exterior of the basement door. Suggest client grade the area at the wall away from the foundation and install an adequate drain outside the basement door.

[7] After receiving the inspection report, the Livingstons requested an amendment to the Agreement of Purchase and Sale as a condition of closing, including the following:

> Remove the damaged laminate flooring in utility room, replacement not required. Install transition strip in threshold between the laminate and concrete floor and complete any other finishing required once laminate flooring is removed.

[8] In an email dated June 3, 2013, Mr. Findlay informed the Livingstons that Apogee's agent had given the following explanation:

> The basement flooring was installed in such a way that there is the concrete then a half inch water membrane then the subfloor then the laminate. This was built this way to ensure that if water penetrated through the foundation it would be kept to the concrete floor and there is a drain under that membrane to eliminate any water that could possibly get through the foundation. The water that currently came into the house would have been from snow and ice that was built up against the door and when the snow melted it came through the door jam [sic] and got on top of the membrane and subfloor thereby getting the floor wet. The outside drain will eliminate that from happening in the future. He does not want to take the flooring in that room [up] because of the current system and the fact that it would require him to remove all the components of the floor system, the water heater, the back stairs, and the baseboards and this is not the reason the water damaged the flooring. To remove the flooring system would create a 3" drop so a transition wouldn't be able to be installed. They built the flooring system correctly to eliminate any possibility of water damage via the foundation, they just didn't account for standing water on the grade level sill for the door.

[9] The Livingstons accepted Apogee's refusal to remove the laminate floor. However, in an email dated June 4, 2013, they said they would not close without rectification of the damaged flooring by Apogee, due to their concern about the effect of the defective floor on any eventual re-sale of the house. The Livingstons wanted a price reduction, failing which, they indicated, the agreement might fall through. Their agent, Mr. Findlay, told them in an email dated June 5 that he would "take care of the replacement of the damaged floor boards", in order to ensure the deal proceeded.

[10] On June 26, the day before closing, Mr. Findlay advised the Livingstons that the floor boards had not been fixed, but assured them this repair would be done after closing. Therefore, the deal closed on June 27 with the floor not fixed. After repeated refusals to honour his promise, Mr. Findlay ultimately refused to fix the floor. The Livingstons complained to his brokerage. In response, the brokerage sent Zak Miller to deal with the floor. Mr. Miller pulled up the damaged laminate boards and saw black discolouration. He believed this was mould, but was not certain.

[11] The floor itself consisted of three layers: first, a layer of dimpled black plastic sheeting laid on the concrete; second, a layer of plywood-type sub-flooring; and third, laminate floor boards. The discolouration was under the laminate, on top of the sub-floor. In some areas, the discolouration was under the subfloor, on top of the plastic.

[12] In November 2013, the Livingstons retained Indoor Energy Solutions to assist with this issue. Indoor Energy Systems sent Mike Dawe to investigate. Mr. Dawe removed the laminate in the small room adjacent to the outside door. He was attempting to locate the source of the moisture and discolouration, as well as what the adjudicator described as a "noisome smell" in the basement:

> [22] In or about November 2013 Livingstons retained Indoor Energy Solutions, an indoor heating and ventilation business in Halifax. Mr Dawe was at that time an employee of Indoor Energy (He no longer was an employee of the business when he swore the affidavit-and was cross-examined thereon-in these proceedings.) Mr Dawe removed the laminate floor in the small room adjacent to the door (and stairs) to the outside in an attempt to locate the source of the dampness, water moisture and black discolouration. Because of the nature of the tongue-and-groove fitting of the laminate flooring it was not possible to remove one board without removing all. When he got to the threshold to the family room area in the basement's main living area he still had not located the source. Given the concerns of the Livingstons (which at this point included a noisome smell) he recommended-and they agreed-removal of all of the flooring in that area.

[13] Mr. Dawe could not remove one board without removing all of them, due to the tongue-in-groove design. Ultimately, he removed all of the flooring in the family room area of the basement. He found a patch of discolouration and dampness on the plastic membrane. The concrete underneath was dry.

[14] The removal of the floor boards also revealed a large hole, four feet by one foot in diameter, immediately around the main water intake, at the edge of the

concrete floor and the foundation wall. The hole had not been filled with concrete, though there was some gravel in it. The plywood subfloor had been cut around the pipe. The exposed area was damp, with salamanders in it. As found as fact by the adjudicator, the hole was allowing entry of the bad odours that the respondents had previously noticed:

> [39] The facts are clear that during the course of its renovation Apogee covered up and hid two serious defects: the large area open to the ground around the water intake; and the large crack in the foundation wall near a basement window. The first was a clear defect. Apogee's own witness (Mr Dawe) testified that leaving such a hole was not good practice because it permitted the entry of moisture and bad odours. And indeed such odours had been detected. Wall studs that dangle without the support of a floor plate is not good building practice.

[15] Two wall studs in the area were not nailed to a floor plate, but dangled unsupported in the air. Mr. Dawe testified that leaving such a gap in the foundation allowed for the entrance of dampness and odours from the damp earth below and outside the foundation wall and the floor. He also found that the water intake pipe was half inch in diameter, while the current building code requirement was for three-quarters of an inch.

[16] Mr. Dawe determined that drywall was missing near a basement window. upon removing the drywall, he discovered a large crack in the foundation wall. The crack and the area around it appeared dry, but Mr. Dawe testified that the crack was large enough that it would have been prudent to fill it when finishing the basement, to prevent future water seepage.

[17] Mr. Dawe believed that water began entering the floor as the result of rain or melting snow seeping through the door and puddling on the laminate, then seeping down between the edges of the laminate to the subfloor, then under it. The water then migrated along the top of the plastic membrane to the lowest point of the flooring system and pooled near the water intake pipe. Mr. Dawe did not believe the water came from below because the lowest level, the concrete, was dry.

[18] The Livingstons decided to install a perimeter drain system in the basement. They constructed a trench system in the floor inside the foundation wall perimeter, which would direct water to a sump pump.

[19] A plumber retained to look at the water pipe found a crimp in it, after which the Livingstons replaced the pipe. This involved trenching and filling a ditch in the front yard to connect the new intake pipe to the city's main supply line.

[20] The adjudicator noted that all of the repairs (past and future) would require painting the new drywall around the crack and installing new flooring to replace the old flooring system.

[21] The cost of these repairs formed the basis of the Livingstons' claim.

The adjudicator's findings

[22] The adjudicator made the following findings as to how the damage occurred to the basement floor:

> [32] Water entered the outside basement door and puddled on the floor at the bottom of the steps. It then seeped between the floor board joints into the space between the top of the dimpled floor lining and the bottom of the floor boards. The water then moved, seeking the lowest point over the top of the dimpled floor lining until it reached the … family room area. There it remained, trapped between the floor boards and the dimpled lining, until its discovery by Mr. Dawe.

[23] The adjudicator found Apogee liable to the Livingstons based on his finding that Apogee concealed two defects:

> [39] The facts are clear that during the course of its renovation Apogee covered up and hid two serious defects: the large area open to the ground around the water intake; and the large crack in the foundation wall near a basement window. The first was a clear defect. Apogee's own witness (Mr. Dawe) testified that leaving such a hole was not good practice because it permitted the entry of moisture and bad odours. And indeed such odours had been detected. Wall studs that dangle without the support of a floor plate is not good building practice.
>
> [40] As far as the wall crack is concerned, I agree with Mr. Dawe that leaving such a crack unfilled was not proper practice. The fact that no water appeared to have entered at the time of its discovery does not mean it might not do so in the future.
>
> [41] I am also satisfied that both these defects would have generated concern on the part of a potential [purchaser] had they not been covered up by Apogee's renovation work. The defendant's decision to cover them without fixing them does in my opinion constitute either or both negligence or breach of contract. Its own-and only-witness (Mr. Dawe) testified that the failure to remedy either was not good building practice. Apogee's decision not to give evidence of its own leaves me with nothing to counterbalance the inference that it had consciously decided to cover – rather than remedy – such defects to hide them from a potential buyer.

[24] The adjudicator broke down the damages as follows, at paras. 43-54 (paraphrased):

> (1) Mould Remediation and Floor Removal: $1998.16 (assessing the loss at half the amount claimed, being $3,996.25);
>
> (2) Cracks in Foundation: $402.50 (this amount "relates to the cracks in the foundation wall that were hidden during the course of the renovations but which should have been repaired prior to being hidden by drywall": para. 45);
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> (3) Drywalling: $509.00 (the adjudicator held that the cost of replacing the drywall was "an integral part of the damage flowing from" Apogee's "apparent decision to hide those defects for which it is liable": para. 47);
>
> (4) Replacing the floor and trim: $4,025 (the adjudicator allowed half the amount claimed, finding that the evidence as to the actual costs was uncertain, but that Apogee was liable for part of the cost: paras. 49-50).

[25] The adjudicator held that Apogee was not liable for the costs of installing the perimeter drain ($5,451.00), waterproof spray to seal the concrete floor ($764.75), painting walls ($2,300), replacing the damaged water supply pipe ($3,450), or lawn and soil work for the water supply pipe ($193).

The appeal

[26] This appeal is brought under s. 32(1) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, which states:

> 32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
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> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[27] The standard of review of an adjudicator's decision has been considered in various decisions. Questions of law are subject to a standard of correctness: *Dennis v. Langille*, 2013 NSSC 42, [2013] N.S.J. No. 62, at para. 19. More broadly, in *MacDonald v. Barbour*, 2012 NSSC 102, [2012] N.S.J. No. 142, Robertson J. said:

> 9 The standard of review as it relates to the appeal from the Small Claims Court is well-established in *Lacombe v. Sutherland*, 2008 NSSC 391, Justice Beveridge cites the decision of Justice Saunders in *Brett Motors Leasing Ltd. v. Welsford*

> (1999), 181 N.S.R. (2d) 76, regarding the standard of review of a Small Claims Court decision, and goes on to state at para. 28:
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> > 28 It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing *de novo*, the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice. Even in an ordinary civil case an appellate court can only intervene if the trial court made an error of law or an error of fact that amounts to a clear and palpable error.
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> 10 There are no transcripts of the proceeding of Small Claims Court. The adjudicator's findings with respect to reliability and credibility are made and reported in both the decision and summary report, as is the evidentiary basis for making the decision. The decision can only be set aside for an error in law or breach of natural justice. Accordingly the threshold for overturning the adjudicator's decision is high.

[28] Apogee raises several grounds of appeal in argument, not all of which were specifically pleaded as grounds of appeal. Apogee asserts the following: (1) The adjudicator failed to follow the requirements of natural justice by finding Apogee liable for causes of action not pleaded and by denying Apogee the chance to defend the non-pleaded causes of action. (2) The adjudicator erred in law by holding that a statement in a real estate "cut sheet" was a term of the contract and that Apogee breached it. (3) The adjudicator erred in law in holding that Apogee, as vendor, owed a duty of care to the Livingstons, as purchasers, or (alternatively) in holding that Apogee breached its duty of care. (4) The adjudicator erred in law in allowing opinion evidence where there was no evidence that the witness was a qualified expert. (5) The adjudicator erred in law and fact in awarding damages for the removal and replacement of the floor despite finding that Apogee was not liable for the damage to the floor.

[29] I will first address the second and third grounds together, as they affect the other grounds.

Breach of Contract and negligence

Breach of contract

[30] The appellant submits that the adjudicator erred in law in finding a breach of contract. Apogee says the alleged breach did not relate to a term of the Agreement

of Purchase and Sale, but to representations in the realtor's cut sheet. It says a cut sheet is not part of the contract, and that the issue should have been framed as negligent or fraudulent misrepresentation.

[31] The Livingstons submit that it is not an error of law to consider representations in a cut sheet as part of a contract. In *Badawi v. Stachowiak*, 2015 NSSM 60, [2015] N.S.J. No. 597, for instance, the cut sheet said the septic system on the property was "ready to go." The adjudicator said:

> 69 In several cases in Nova Scotia, the courts have held a listing cut to be evidence of representations made by the seller to the buyer in the course of a real estate transaction… A reasonable person reviewing the listing cut in the case at bar would not conclude that the representation "ready to go" relates to the property. Such a person would determine that "ready to go" means the septic system has been installed according to Provincial regulations, and can be certified as proper for the circumstances…

[32] Cases where this court has considered issues relating to listing cut statements include *Nichols v. MacIntyre*, 2004 NSSC 36, [2004] N.S.J. No. 68 (*sub. nom. MacIntyre v. Nichols*) and *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211, [2000] N.S.J. No. 195, affirmed at 2001 NSCA 24.

[33] While the adjudicator's reasons in the instant case could have been clearer in specifying how he was using these statements, I am satisfied that it was open to him to consider the statements in the cut sheet, whether as misrepresentations or as contractual terms. I am not satisfied that he erred in law in doing so. However, even if the adjudicator had erred in finding breach of contract, I am satisfied (for the reasons below) that he was not in error with respect to negligence and *caveat emptor* respecting latent defects.

Negligence

[34] Apogee submits that the adjudicator erred in law by finding liability in negligence, arguing that the doctrine of *caveat emptor* removes any duty of care owed to a purchaser to ensure the condition of a property, since it was not newly-constructed. The adjudicator did not specifically use the term *caveat emptor*. Alternatively, Apogee argues, the adjudicator failed to set out the standard of care to which a seller must adhere. Apogee says the adjudicator simply adopted Mr. Dawe's opinion that not fixing the crack in the foundation was not good building practice, without Mr. Dawe being qualified as an expert.

[35] The Livingstons maintain that there was a special relationship between them and Apogee which gave rise to a duty of care, because Apogee had renovated the house, but did not fix the crack in the foundation or the hole in the basement floor. They cite *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211, [2000] N.S.J. No. 195 (S.C.), affirmed at 2001 NSCA 24, and *Thompson v. Schofield*, 2005 NSSC 38, [2005] N.S.J. No. 66, for this proposition.

[36] In general, the *caveat emptor* rule applies to real estate transactions and a buyer will take the property "as is" (subject to certain exceptions). The British Columbia Court of Appeal said, in *Nixon v. MacIver*, 2016 BCCA 8, [2016] B.C.J. No. 22:

> 31 The doctrine of *caveat emptor* was colourfully summarized by Professor Laskin (as he then was) in "Defects of Title and Quality: Caveat Emptor and the Vendor's Duty of Disclosure" in Law Society of Upper Canada, *Contracts for the sale of land* (Toronto: De Boo, 1960) at 403:
>
> > Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms.
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> 32 The leading decision on the maxim is *Fraser-Reid v. Droumtsekas* (1979), [1980] 1 S.C.R. 720 at 723, in which Mr. Justice Dickson (as he then was) recognized the continuing application of the doctrine of caveat emptor to the sale of land:
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> > Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. In 1931, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an uncompleted house. The breach has since been opened a little wider in some of the states of the United States by extending the warranty to completed houses when the seller is the builder and the defect is latent. Otherwise, notwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, *caveat emptor* remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or

> in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.
>
> 33 The doctrine continues to apply to real estate transactions in this province, subject to certain exceptions: fraud, non-innocent misrepresentation, an implied warranty of habitability for newly-constructed homes, and a duty to disclose latent defects.
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> 34 A vendor has an obligation to disclose a material latent defect to prospective buyers if the defect renders a property dangerous or unfit for habitation. A latent defect is one that is not discoverable by a purchaser through reasonable inspection inquiries... [Emphasis in original.]

[37] Therefore, where there are defects that could have been discovered during a routine inspection by an ordinary purchaser (patent defects), the *caveat emptor* rule of "buyer beware" will apply. However, *caveat emptor* will not shield vendors who have made fraudulent or negligent misrepresentations with respect to latent defects. A latent defect is one that is not discoverable by a purchaser through reasonable inspection. Warner J. distinguished between patent and latent defects in *Thompson v. Schofield*, 2005 NSSC 38, [2005] N.S.J. No. 66:

> 18 A second legal question requiring clarification, for the purposes of this decision, is, what is a patent defect and what is a latent defect? A patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection. A latent defect, as it relates to this case, is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. For the purposes of the decision, it is not disputed that whatever the defect was that caused the flooding in the basement, that it was a latent defect, that is, a defect which was not apparent on an ordinary inspection of the property. The defendants claim that because it was latent, they also were not aware of it. My understanding of the defendant's memorandum is that they acknowledge that, because the basement was finished and because neither building inspector nor the plaintiffs had the right, before the closing, to take the basement apart, their ability to determine any defects in the property was limited to those defects which would be apparent without taking apart the walls or the floors or the panelling that covered the cement walls.

[38] See also *Gesner v. Ernst*, 2007 NSSC 146, [2007] N.S.J. No. 211, at para 44, and *MacDonald v. Barbour*, 2012 NSSC 102, [2012] N.S.J. No. 142, at para. 26.

[39] The elements of negligent misrepresentation were set out in *Queen v. Cognos*, [1993] 1 S.C.R. 87. Cromwell J.A. (as he then was) summarized these elements in concurring reasons in *Barrett v. Reynolds* (1998), 170 N.S.R. (2d) 201, [1998] N.S.J. No. 344, leave to appeal refused, [1998] S.C.C.A. No. 501:

> 137 In *Queen v Cognos*, [1993] 1 S.C.R. 87 at 110, Iacobucci J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 1. there must be a duty of care based on a "special relationship" between the representor and the representee; 2. the representation in question must be untrue, inaccurate or misleading; 3. the representor must have acted negligently in making the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.

[40] LeBlanc J. summarized the elements of fraudulent misrepresentation in *MacIntyre*:

> 13 The test for fraudulent misrepresentation was set out by Palmeter C.J. Co. Ct. in *Webster v. Steeves*, [1987] N.S.J. No. 211. There must be proof of the following elements:
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> > 1. That the representations complained of were made by the defendant to the plaintiff;
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> > 2. That the representations made were false in fact;
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> > 3. That when made they were known by the representor or to be false, or recklessly made, without knowing if they were false or true; and
> >
> > 4. That by reason of the representations, the plaintiff was induced to enter the contract.

[41] In *Badawi*, a purchaser bought a lot. The purchaser later complained that they had discovered the subsurface of the lot contained garbage backfill and other materials. The adjudicator said:

> 57 In general, all sales of real property are subject to the principle of *caveat emptor*. In other words, absent fraudulent or negligent misrepresentation or a breach of specific condition of the contract, the sale of real property is "let the buyer beware". The law makes an exception for certain types of defects.
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> …
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> 59 The next question to answer is if the defect is a latent or patent defect. It is clear that a typical purchaser of property would not undertake to view the subsurface of a vacant lot. In that case, the defect would be latent. However, in this case, the Agreement of Purchase and Sale provided both the opportunity and expectation on the part of the Claimant to undertake a thorough inspection. In other words, one of the parties, the sellers, protected themselves contractually as described in the passage from *Halsbury's* quoted by ACJ Smith.

[42] In *Badawi*, the vendor did not make a misrepresentation as to any latent defects about the lot. The purchaser simply failed to conduct proper inspections, which might have allowed her to discover the poor quality of the subsurface. With respect to the vendor there was "no evidence whatsoever of deliberate concealment" and the vendor was not liable for the defects in the lot (para. 65).

[43] In *Desmond v. McKinlay*, the plaintiff purchased a home from the defendant vendor. Shortly after moving into the home, the plaintiff discovered issues with the well. Wright J. held that the five requirements for negligent misrepresentation had been met:

> 54 First, in applying the analysis made by Iacobucci J. in *Queen (D.J.) v. Cognos Inc.*, (which centered on a misrepresentation made by an employer in a hiring interview), I similarly conclude in the present case that a special relationship existed between the defendant vendor and the plaintiff purchaser so as to create a duty of care. I note that such a special relationship was readily found by Gruchy J. to exist between the vendor and purchaser of real property in the context of a misrepresentation over the validity of a right-of-way in Keirstead v. Piggott (1999) 177 N.S.R. (2d) 1.
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> 55 Secondly, as I have already found, the representation of the age of the property mislead the plaintiff into believing that the water supply and sewage disposal systems were only 14 years old.
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> 56 Thirdly, in representing that the property was 14 years old without further disclosing that the associated water supply and sewer disposal systems were in excess of 40 years old by an indeterminate length of time, the defendant vendor did not, in my opinion, measure up to the standard of care required in the circumstances. Iacobucci J. referred to this standard in *Queen, supra*, at p. 121 as follows:
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> > The applicable standard of care should be the one used in every negligence case, namely, the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading.
>
> 57 The defendant vendor clearly knew that the existing water and sewage disposal systems had been in existence on the property for some period of time in excess of 40 years. She conceded this to be relevant information to a prospective purchaser but nonetheless listed the property for sale simply as being 14 years old. As Iacobucci J. said in *Queen, supra*, (at p. 123), "...failure to divulge highly relevant information is a pertinent consideration in determining whether a negligent misrepresentation was made." I so find that a negligent

misrepresentation was made by the defendant vendor on the facts of the present case.

58 Finally, the last two elements are satisfied by my earlier findings that the plaintiff relied, in a reasonable manner, on the negligent misrepresentation and that her reliance was detrimental in the sense that damages resulted.

59 The main thrust of the defence was that no misrepresentation had been made by the defendant vendor to the plaintiff purchaser and hence the defendants were entitled to rely on the doctrine of caveat emptor. It is clear from the legal authorities, however, that once a finding of misrepresentation has been made, whether characterized as a collateral warranty or as a negligent misstatement, the defence of *caveat emptor* is no longer available.

[44] In *Dennis v. Langille*, 2013 NSSC 42, [2013] N.S.J. No. 62, Murphy J. held that coastal erosion was a patent defect, not a latent defect, and thus *caveat emptor* applied. He discussed competing descriptions of what constitutes a patent defect:

20 Before assessing whether the learned Adjudicator erred, it is necessary to recognize how the law distinguishes patent and latent defects. In *Cardwell v. Perthen* 2007 BCCA 313 (Cardwell) the British Columbia Court of Appeal approved the following definition at para. 44:

> 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.

Halsbury's Laws of England provides that:

> "[p]atent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase." [Halsbury's Laws of England, vol.42, 4th ed. (London, UK: Butterworths, 1980) at 44, para. 45]

That definition has been applied in a number of cases [See eg *Gesner v. Ernst*, 2007 NSSC 146 at para. 45, 254 N.S.R. (2d) 284, [2007] N.S.J. No. 211 (QL); *Willman v. Durling*, 249 N.S.R. (2d) 48, [2006] N.S.J. No. 368 (QL); *Haviland v. Pickering*, 2011 SKPC 144 at para. 14].

21 Victor Di Castri, Q.C., defines patent defects somewhat differently in *The Law of Vendor and Purchaser*:

> A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. [...] A latent defect, obviously, is one which is not discoverable by mere observation. [Victor Di Castri, *The Law of*

> *Vendor and Purchaser*, vol.1, loose-leaf (consulted on 2 November 2012), (Toronto, ON: Carswell 1988) at s. 236]
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> Di Castri eschews the inquiry requirement and emphasizes visual inspection, and a number of cases have also applied a similar definition. [See eg *Thompson v. Schofield*, 2005 NSSC 38 at para. 18, 230 N.S.R. (2d) 217; *Jenkins v. Foley*, 2002 NFCA 46 at para. 26, 215 Nfld. & P.E.I.R. 257, [2002] N.J. No. 216 (QL); *Halsbury's Laws of Canada - Misrepresentations and Fraud*, (Markham, ON: LexisNexis Canada, 2008) "Caveat emptor", HMP-25]
>
> 22 Nova Scotia case law does not definitively indicate which definition is preferred in this province; however, the British Columbia Court of Appeal effectively reconciled them with the following analysis in *Cardwell* at para. 48:
>
> > ... The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility - and liability - on the vendor to bring those things to his or her attention.
>
> The obligation to make reasonable inquiries arises out of the visual test as a way to ensure that the test is applied objectively; as such a defect is patent if it is objectively discoverable on a reasonable inspection of the property.

[45] To determine whether a defect is patent or latent, consideration must be given as to whether it would be discoverable by the ordinary purchaser during a routine inspection. This implies an objective standard as noted by Murphy J.:

> 27 I agree with the Appellant that the learned Adjudicator erred by finding that coastal erosion was not observable upon a visual inspection and therefore a latent defect. Application of the proper test to distinguish types of defect reveals that it is patent in this case. The learned Adjudicator's finding of fact that no effects of coastal erosion on the property were visible to the eye is not challenged, but the reality of erosion is necessarily implied by the property's adjacency to the bay, and that is visible to the eye. The Respondent cannot escape that result just because he did not know about erosion and did not understand the implications of a property being on the bay; as the Appellant has correctly submitted, the test is objective. Therefore, even under the milder *Di Castro* test, which does not explicitly require reasonable inquiry, the susceptibility of the property to coastal erosion is a patent defect and the Adjudicator erred by finding otherwise.

> 28 That conclusion is only strengthened when one applies a test that also requires reasonable inquiry as suggested in *Cardwell*. At the very least an obligation to make reasonable inquiry should include asking Mr. Dennis, and it would not be unreasonable to expect an inquiry to neighbours. In this case, Mr. Langille did not ask anyone prior to completing the purchase.

[46] The authorities cited by Apogee and the Livingstons are consistent in their approach towards the application of *caveat emptor*.

[47] Although the term *caveat emptor* was not specifically mentioned, the adjudicator in the instant case applied the principles of *caveat emptor*. He stated:

> [39] The facts are clear that during the course of its renovation Apogee covered up and hid two serious defects: the large area open to the ground around the water intake; and the large crack in the foundation wall near a basement window. The first was a clear defect. Apogee's own witness (Mr. Dawe) testified that leaving such a hole was not good practice because it permitted the entry of moisture and bad odours. And indeed such odours had been detected. Wall studs that dangle without the support of a floor plate is not good building practice.
>
> [40] As far as the wall crack is concerned, I agree with Mr. Dawe that leaving such a crack unfilled was not proper practice. The fact that no water appeared to have entered at the time of its discovery does not mean it might not do so in the future.
>
> [41] I am also satisfied that both these defects would have generated concern on the part of a potential purchaser had they not been covered up by Apogee's renovation work. The defendant's decision to cover them without fixing them does in my opinion constitute either or both negligence or breach of contract. Its own-and only-witness (Mr Dawe) testified that the failure to remedy either was not good building practice. Apogee's decision not to give evidence of its own leaves me with nothing to counterbalance the inference that it had consciously decided to cover – rather than remedy – such defects to hide them from a potential buyer. [Emphasis added.]

[48] Similarly, the adjudicator stated in his summary report:

> [4] I was satisfied that a vendor who sells a house that is represented to be [a] "new fully finished" house with a "totally finished basement" commits a breach of that contract when it has covered up serious defects in the basement foundation (the open hole by the water intake and the large crack on the basement wall), thereby making it impossible for a potential purchaser to view such defects.
>
> [5] I was satisfied that a vendor who represents that it has renovated a house so as to be [a] "new fully finished" house with a "totally finished basement" owes a duty of care to a potential purchaser not to cover up serious defects in the

> basement foundation, when such defects will cause damage to the use and enjoyment of the house.

[49] The foregoing paragraphs in the adjudicator's reasons suggest that he considered the doctrine of *caveat emptor* but concluded that the doctrine did not apply. The substance of the adjudicator's reasoning is that the crack in the foundation and the hole in the floor were both latent defects. He held that Apogee misrepresented the condition of the basement by describing it as "totally finished" while covering up serious defects and making it impossible for a potential purchaser to see them. I am satisfied that the adjudicator's findings support a finding of negligent misrepresentation. The defence of *caveat emptor* is not available where there are latent defects and a vendor misrepresents these defects. The adjudicator did not use the term *caveat emptor*, but I am satisfied that he turned his mind to the substance of the doctrine.

[50] I note that the adjudicator's reasons are not precise as to when the respondents first detected the odours entering through the hole. I infer that he did not conclude that the odour should have alerted the respondents to the existence of a defect before closing, given that he does not refer to them being detected until after closing. Otherwise, the hole would have been categorized as a patent, not latent, defect.

[51] I disagree with Apogee's suggestion that the adjudicator's focus was on whether Apogee should have remedied the defect, not on whether the defects were discoverable. The adjudicator did find that the failure to remediate such defects was not "good practice." However, the adjudicator's conclusion rested on his findings that the defects were not discoverable, and that the condition of the basement was misrepresented.

[52] In *MacIntyre*, the plaintiffs alleged negligent misrepresentation by virtue of a listing cut and a disclosure statement indicating that the house had a full basement. After closing the transaction, the plaintiffs discovered that there was not a full foundation. LeBlanc J. found that there was sufficient evidence before the adjudicator to have made a finding that the requirements for negligent misrepresentation had been satisfied. Accordingly, there was no basis to apply *caveat emptor*. As Leblanc J. noted:

> 39 The adjudicator found little or no difference between Mr. MacIntyre's lack of accuracy and that of Mr. McKinley in *Desmond, supra*. She found that the type of foundation is obviously material to the house transaction. The representation

> made by the appellants is contained in the listing cut. She found that Mr. MacIntyre knew that two sections of the three had a pier type foundation. He also knew that he described the foundation as being concrete in full yet he did not disclose what he knew about the additions to the property, in particular the 1970 addition and the 1995 laundry room and rear porch addition. She claims the information was well within his possession given the nature of his employment, and therefore he should have understood the importance of accuracy.
>
> 40 The adjudicator found that silence on the condition of the whole of the foundation amounted to an assertion that a full concrete basement existed.
>
> 41 I conclude that there was no misunderstanding of the evidence, no misunderstanding of the documents, and no improper conclusion reached on the evidence.

[53] Similarly, the adjudicator in this case did not err in law in rejecting the defence of *caveat emptor*. There was evidence before the adjudicator, as set out in his reasons, on which he could find that the hole in the floor and the crack in the foundation were latent defects that could not have been discovered on inspection. These are findings of fact.

[54] Apogee pointed to remarks in the inspection report (exhibit C-19) which referred to cracks in the foundation and symptoms of water seepage, as well as claiming there was evidence that they were aware of the hole, based on a photograph in Exhibit C-1. I have no basis from these discrete items to find a palpable and overriding error, in the face of the adjudicator's clear findings about the latent defects and their concealment. Even if there are circumstances where an adjudicator's misapprehension of the evidence might allow findings to be set aside, these are not those circumstances.

Damages for floor removal and replacement

[55] The damage to the floor in the basement was a patent defect. A patent defect "is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection": *Thompson* at para 18. The damage to the basement flooring was readily apparent to the Livingstons. The adjudicator noted that their inspector's pre-closing report identified problems with the basement flooring:

> [12] The Livingstons obtained a home inspection report. The inspector prepared a report dated May 28, 2013. He noted a number of issues with the house. In particular, he made the following observation with respect to the laminate flooring in the finished basement:

> "Moisture damage noted at the laminate flooring in the basement utility room. Only a theory but the inspector suspects the water is breaching at the rear wall due to the negative grading and no drain was installed at the exterior of the basement door. Suggest client grade the area at the wall away from the foundation and install an adequate drain outside the basement door."

[56] The adjudicator found that the Livingstons were aware of the damage to the floor and nonetheless elected to proceed with the purchase of the home, stating:

> [34] The difficulty for the Livingstons is that I have found that the water damage was caused by an event they had notice of prior to agreeing to complete the purchase of the house. They saw the water damage to the floor boards. They understood that water had leaked from the outside onto the floor. They initially demanded as a condition of closing that the damage be repaired. Apogee to their knowledge refused. Had the damage been repaired prior to closing I am satisfied that they (and the defendant) would have discovered what was later revealed – that the water that had damaged the surface of the floor boards had migrated through the flooring system into the family room area.
>
> [35] The evidence is clear that the defendant was not prepared to repair the floor as a condition of closing (because it would of necessity required [sic] much of the floor to be replaced). It is equally clear that the claimants would not have closed the purchase absent the promise by Mr Findlay that he would repair the floor boards. Had he done so prior to closing the problem would have been discovered… It is clear then that the source of the claimants' problem, so far as the discovery of the water damage is concerned, was their decision to rely on Mr. Findlay's promise to repair the floor – and Mr. Findlay's failure to carry through with that promise prior to closing.
>
> …
>
> [37] The onus of establishing either negligence or breach of contract lies with the claimants. None of the above facts support a conclusion that Apogee was negligent, or in breach of contract, in the design or installation of the flooring system. It did not hide the fact that there was damage. It was not wrong in its conclusion that the visible damage was caused by water entering from the outside. The Livingstons were aware of the damage and nevertheless elected (albeit on the basis of Mr. Findlay's promises) to proceed with the purchase. And there was no evidence that Apogee – or indeed anyone – was aware that the apparent water damage to the floor might presage more serious issues hidden away beneath the flooring.

[57] While the problem with the flooring was a patent defect, the hole under the floor was a latent defect, hidden by the recent renovations. The adjudicator did not believe that Apogee should be responsible for the entire cost of replacing the floor

because the flooring problem itself was a patent defect. However, the adjudicator's reasons suggest that Apogee should be liable for part of the cost of replacing the floor because the hole, a latent defect, was discovered during the process of repairing the floor. There was no other way to repair the latent defect then by removing the floor. The subsequent discovery of a latent defect beneath the damaged floor does not change the fact that the Livingstons purchased the home knowing the floor was damaged and needed replacement:

> [43] As discussed at length above, the floor removal commenced as a result of damage that the Livingstons were aware of – and negotiated over – prior to closing the purchase of the house. It would not ordinarily be damage for which Apogee was liable. However, the floor removal revealed the hole around the water intake pipe that had been hidden by Apogee when it installed the floor. In my view it does not matter how the Livingstons discovered that defect. What matters is that it existed; it was hidden by Apogee; and it was a defect that caused damage (by letting moisture and foul odours into the basement).

[58] The adjudicator explained how he came to apportioning damages in relation to the floor repair:

> **Mould Remediation and Floor Removal - $3,996.25**
>
> [43] As discussed at length above, the floor removal commenced as a result of damage that the Livingstons were aware of-and negotiated over-prior to closing the purchase of the house. It would not ordinarily be damage for which Apogee was liable. However, the floor removal revealed the hole around the water intake pipe that had been hidden by Apogee when it installed the floor. In my view it does not matter how the Livingstons discovered that defect. What matters is that it existed; it was hidden by Apogee; and it was a defect that caused damage (by letting moisture and foul odours into the basement).
>
> [44] How do I calculate the value of that damage? The nature of the connection system of the laminate flooring system was such that one or two boards in a room could not be removed. All of the boards in a room had to be removed and replaced. The Livingstons' claim is for the removal of all the floorboards in the utility and family room, not just the family room. The best that I can do is assess the loss at one half the amount claimed, being $1,998.16.
>
> …
>
> **Replace Floor and Trim - $8,050.00**
>
> [49] Mr Dawe in his affidavit, and during cross examination, suggested that the figure here had been exaggerated by his employer. He testified that in preparing his initial draft report after his investigation he had put in a lower figure which was then increased by his employer. He did not, however, know what his

> employer's overhead was, what allowance was being made for necessary profit, and so on. I also note in any event that Mr Dawe did deliver the final revised report to the Livingstons. If he had thought the quote was fraudulently high at the time then he ought not to have delivered it.
>
> [50] Having said that, it remains the case that Apogee can be liable for only part of the cost of replacing the floor. Using the same approach as employed in the claim for the floor's removal, I assess this part of the claim at $4,025.00.

[59] The Livingstons assert that in dealing with the flooring, the adjudicator apportioned the damage, between water damage (for which Apogee was not liable) and damage for hiding the hole (for which Apogee was found liable). Again, the adjudicator did not find that concealing the hole damaged the floor. The damage to the floor was caused by an event known to the Livingstons. This was a patent defect. But that does not end the analysis. The adjudicator found that the respondents had detected odours emanating from the hole, and that this was one of their complaints when they opted to have the entire floor taken up. His findings do not indicate that the odour should have led the Livingstons to investigate its cause before completing the purchase. There is no indication in the adjudicator's findings that the hole was a patent defect miscategorised by him as a latent defect. As such, I am satisfied that the adjudicator did not err in awarding damages for the floor removal and replacement.

Natural Justice

[60] Apogee submits that the adjudicator erred by considering claims that were not pleaded by the Livingstons. As mentioned above, the adjudicator considered (although he did not explicitly refer to) the principle of *caveat emptor* and the exceptions to that doctrine for misrepresentations or concealment of latent defects. The Livingstons' pleadings include claims of misrepresentation, and a failure to disclose a latent defect. Therefore, I am not satisfied that the adjudicator considered claims that were not raised in the pleadings. In addition, I agree with the adjudicator that a Small Claims Court adjudicator is not bound by the stricter pleading rules of the Supreme Court: see, for instance, *Reeves v. Sherwood*, 2007 NSSM 62, [2007] N.S.J. No. 435, where Adjudicator Parker said, "one of the benefits of the Small Claims Court model is that an adjudicator can consider issues not raised specifically in the pleadings" (para. 9). See also *Mercier v. BMO Investments Inc.*, 2014 NSSM 9, [2014] N.S.J. No. 127, at paras 13-15. As the adjudicator correctly noted in his Summary Report:

> [7] During submissions at the end of the trial counsel for the appellant did object to counsel for the respondents' submissions regarding breach of contract and negligence on the grounds that they were not expressly or particularly pleaded in the Notice of Claim. I was of the view that the practice with respect to "pleadings" in the Small Claims Court is not the same as that in the Supreme Court: *Mercier v. BMO Investments Inc* 2014 NSSM 9 at paras. 13-15. The central issue-one vigorously and tenaciously opposed by the appellant at trial-was that the basement was defective, and that the defects were attributable to the actions and work of the appellant. That issue put into play the agreement of purchase and sale-and the duties of the vendor renovator. I was not satisfied that the appellant defendant had been prejudiced in any way by anything in-or not in-the claimants' Notice of Claim.

Opinion evidence

[61] Finally, Apogee submits that the adjudicator erred in allegedly basing his decision on Mr. Dawe's opinion. The adjudicator states in his Summary Report that he did rely on Mr. Dawe's opinion, but also notes that Mr. Dawe's opinion was supported by the evidence of the Livingstons:

> [6] The evidence was that of the appellant's own witness. Mr Dawe's experience and work included the investigation and remediation of basement water issues. His opinion that the appellant's covering over of the open hole around the water intake pipe was not good or proper building practice (set out at para.39 of my decision) was supported by the evidence of the respondents (paras.22,39). Adjudicators may admit and act on evidence relevant to the subject matter of the proceeding, regardless of whether it would be admissible as evidence in the Supreme Court: s.28(1), *Small Claims Court Act.*

[62] More significantly, as stated above, I conclude that the adjudicator's decision was not based on Mr. Dawe's opinion as to building practice, but was based on the fact that Apogee covered up defects, making it impossible for a potential viewer to see these defects, and thus *caveat emptor* would not apply to these defects. Mr. Dawe's opinion was irrelevant as to whether the defects were patent or latent, or to any of the other issues.

Conclusion

[63] Apogee hid serious defects from the Livingstons. The adjudicator properly held Apogee liable for the damages relating to repairing the hidden crack in the foundation. While Apogee was responsible for the hidden hole in the floor, the damage to the flooring itself was a patent defect to which *caveat emptor* applies.

Therefore, the adjudicator properly apportioned part of the damages relating to repairing the flooring over the hole between the Livingstons and Apogee.

[64] The appeal is dismissed.

Arnold, J.