SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Lowe v. Widly*, 2024 NSSM 6

Date: 20240229
Docket: 23-524876
Registry: Halifax

Between:

Janice M. Lowe

v.

Ursula Wildly

Adjudicator:	Dale Darling, KC
Heard:	October 23 and 24, 2023 in Halifax, Nova Scotia
Decision:	February 29, 2024
Counsel:	The Plaintiff was self-represented Joseph R. Tracey, for the Defendant

By the Court:

Introduction:

[1] This matter came before me on October 23 and 24th, 2023, via telephone conference call. The Plaintiff Ms. Lowe was self represented while the Defendant Ms. Lively was represented by Joseph R Tracy.

[2] The dispute between the parties is in relation to the purchase of a residential property by Ms. Lowe from Ms. Wildly, with a closing on or about October 27, 2022. It involves an intricate interplay between Property Disclosure Statements, the role of real estate agents and home inspectors, and at what point, if any, "buyer beware" gives way to a positive duty on the part of the Seller to disclose certain deficiencies of a property.

[3] An initial Offer was made by an Agreement of Purchase and Sale on September 10, 2022. The property was inspected for Ms. Lowe by Tony Wilcox, a registered Home Inspector, and he produced a 56 page Property Inspection Report for the property in question based on a site visit conducted September 15, 2022 (the "Wilcox Report"). After the inspection, an Amendment to the

Agreement of Purchase and Sale was made September 17, 2022, and it contained the following requirements:

> The Seller, at the Seller's expense will complete the following items using the services of certified professionals and provide receipts and warranties to the Buyer's agent and lawyer by October 25th, 2022, should the Seller not complete all of the items below by October 25th, a hold back of $19,000, nineteen thousand dollars. will be taken by the buyer's lawyer for the buyer to complete.

1. Replace and install the garage door and opener with new comparable models by a certified professional.
2. Mold to be remediated by a certified professional with documentation confirming all mold has been remediated.
3. Sub panel in the garage requires to be inspected and repaired. Replaced by a certified electrician.
4. GFI to be installed at the main panel for the jet tub by a certified electrician.
5. Vent pipe on roof to be sealed and properly attached by a certified professional.
6. Water heater to be replaced with a new Rheem comparable model of the same size.
7. Remove moss from roof shingles on the home, remove overgrown tree branches from roof area and remove broken tree at mid driveway.

8. Repair missing mortar in fireplace, firebox, replace missing damper, handle, add cap to flu that is not in use.

9. Enlarge two basement windows, (2 windows on left hand side of basement) to conform to egress requirements. Repair and paint interior drywall and trim.

[4] Ms. Wildly provided a Property Disclosure Statement that predated all of these events, dated June 22, 2022 (the "Lively PDS").

[5] The Lively PDS is the crux of Ms. Lowe's argument. She says that in her execution of the PDS, Ms. Lively committed negligent misrepresentation, negligence, breach of contract and fraudulent misrepresentation. She says that the deficiencies to the property that were not disclosed were so significant that she either would not have purchased the property or would have required those deficiencies to be addressed by the Seller Ms. Wildly. While she says that Ms. Wildly "may" have provided an earlier inspection report, she did not rely upon it and produced her own report. She further claims that the principle of "caveat venditor" ("seller beware") applies and has replaced caveat emptor.

[6] She says that after her purchase, her insurer has refused to cover repairs she is making as they are "pre-existing", and if disclosure had been properly made she could have walked away from the property or insisted on a lower price to effect repairs.

[7] Mr. Tracey on behalf of Ms. Wildly denies these claims, and states that if there were defects in the property they were “patent” as opposed to “latent”. Those which were “latent” were properly disclosed in the Wildly PDS and the Home Inspection Report that was provided to the Claimant prior to the sale. He further claims the principle of caveat emptor (“buyer beware”) applies.

[8] I will enlarge upon the legal arguments being made by the parties at a later point in this judgment, however, there is one issue I will address at the outside, and that is, the probative value of a previous Inspection Report which, in their Pleadings, the Defendant said had been provided to Ms. Lowe’s agent. The Defendant provided the Executive Summary of this report to the Claimant in Document Exchange prior to the hearing on September 18, 2023, and that excerpt notes that “wood rot’ was noted at the right and back of the garage, which the inspector recommended be examined.

[9] The first time that the Defendant was asked to provide this entire report to Ms. Lowe, was near the close of the hearing before me.

[10] In submissions leading up to the hearing before me, Ms. Lowe said that she might have seen the Report, but retained her own Property Inspector, Mr. Wilcox. The evidence at the hearing before me from Ms. Wildly on cross

examination was that the Report was given to Ms. Lowe's realtor by Ms. Wildly's realtor, who wanted to have it when the Wilcox Inspection was carried out. Ms. Wildly first saw that previous report after this claim was filed in September of 2023.

[11] Further to an exchange between the parties at the hearing before me, a copy of the Report was provided by Mr. Tracey to Ms. Lowe. What followed was significant email submissions from Ms. Lowe, the gist of which was that Ms. Wildly misrepresented her PDS because she did not include information gathered from the previous report. This developed into an email back and forth with Mr. Tracey, with copies to me, regarding the probity of that report. Post hearing submissions are a danger of online proceedings, and I allowed a certain amount given that Ms. Lowe was self represented, and I advised the parties that I would make a decision on what use I would make of the materials submitted.

[12] I was provided with a copy of that entire previous report as well as the "back and forth". While the rules of admissibility in Small Claims Court as liberal, evidence still requires relevance and reliability to be given weight.

[13] Based upon everything before me, I am not prepared to engage in an after-hearing assessment of the content of that report. No one was examined on that

previous report at the hearing. I did not hear evidence from either real estate agent, or from the previous inspector in this matter. Ms. Wildly's position is that she only saw it in September of 2023, well after this litigation commenced. That she saw it earlier, cannot be substantiated by the evidence I have. Ms. Lowe cannot remember whether she saw it or not. Ms. Lowe, I believe, at a late stage saw the Report in some particulars as a "smoking gun" with respect to how Ms. Lively should have filled out a property disclosure statement, but on the evidence this cannot be so, as Ms. Wildly's uncontradicted evidence is that she did not see it before the sale, and no one testified to its content.

Damages Claimed

[14] The amounts claimed are largely based upon estimates provided by Ms. Lowe for the work that she says must be done:

1. Cleanliness of House upon Closing - $2000.00
2. Septic Doctor 2-year transferable warranty - $833.75
3. Glass Doors on Shower - $1500.00 plus tax
4. Drainage of Backyard - $43,665.50
5. Chimney repointing - $8000-$9000.00

6. Garage Renovations - $10,500

7. Attic Insulation - $9,821.00

The entire claim is therefore in the area of $80,000, reduced to a maximum of $25,000 by section 9 of the *Small Claims Court Act*, c. 430, RSNS 1989.

The Law Relating to the Purchase of "Second hand" homes:

[15] Both parties provided me with a number of authorities at the hearing related to a seller's liability regarding "second" (and beyond) hand homes. I have reviewed all of these authorities. The Claimant's primary authorities are *Doherty v. Rethman, 2015 NSSM 13 (Canlii), Skinner v. Crow 2010 NSSM 66 (Canlii), Brisbin v. Gilby, 2007 NSSM 66 (Canlii) and Boychuk v. Butler, 2007 NSSM 10 (CanLii)*, and from the Defendant, *Dennis v. Langille, 2013 NSSC 42*, and *Forbes v. Woodroffe, 2022 NSSM 18*.

[16] There are two legal issues which inform much of the reasoning in this case. One is what constitutes a "patent" as opposed to "latent" defect, and the other the law as it relates to negligent or fraudulent misstatement in the context of Property Disclosure Statements, and more generally in negotiations for sale of a property.

[17] The most succinct and recent statement provided of the principles of "latent" and "patent" defect is found in *Forbes v. Woodroofe*, 2022 NSSM 18, paras. 82 85, in which Adjudicator Richardson said:

> [82] The law with respect to the purchase of second-hand (that is, not new) homes is well established. Such sales are subject to the rule of *caveat emptor*. Absent fraud, mistake or misrepresentation a purchaser takes an existing property as he or she finds it, "whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms:" Prof Laskin (as he then was), cited in *Nixon v. MacIver*, 2016 BCCA 8, approved in *Apogee Properties Inc v Livingstone* 2018 NSSC 143 at para.36; *Thompson & Martin v. Schofield & White* 2005 NSSC 38 at para.16. The rule means that an agreement of purchase and sale for a second-hand house does not carry with it any statutory express or implied warranties, such as those created under the *Sale of Goods Act* or the *Consumer Protection Act*. If a purchaser wants a warranty of some kind he or she must make it an express condition of the APS.
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> [83] However, *caveat emptor* applies only to patent defects. It does not apply to latent defects, which are defects not discoverable by a purchaser through reasonable inspection. Even here the law is rather strict. A seller must disclose a latent defect "only if it is dangerous in some way, or if asked directly whether a particular defect is known by the seller to exist:" *Black v Honsberger* 2021 NSSM 55 at para.16. If the seller fails to disclose a latent defect that is dangerous; or responds to questions regarding the existence of latent defects in a fraudulent or negligent manner; or if they have intentionally covered

> over such defects and thereby made them difficult to spot, he or she will become liable: *Apogee* at para.37; *Thompson* at para.18.
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> [84] I emphasize here that the duty to disclose latent defects applies only to *dangerous* defects. There is a suggestion to the contrary in *MacIsaac v. Urquhart* 2019 NSCA 25 at para.53: "One exception [to the rule of *caveat emptor*] 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." However, a review of the two authorities cited in support—*McCluskie v. Reynolds* (1998) 1998 CanLII 5384 (BC SC), 65 BCLR (3d) 191 (BCSC) at para. 54 and *Torfason v. Booth* 2017 ABQB 387 at para.81—does not reveal support for such an extension of the rule. *Torfason* was a case involving defects *in title*, not physical defects in the property. And a review of the discussion in *McCluskie* at paras.46-53, which led up to para.54, make clear that the reference was to latent defects that render a house unfit for human habitation or render it dangerous.

[18] In *Dennis v. Langille,* 2013 NSSC 42, Justice Murphy conducted an appeal of a decision of a small claims adjudicator, who has found that shoreline erosion was a "major and substantial latent defect, not apparent on reasonable observation of the property (para 3)". Justice Wright disagreed, saying that the property's "adjacency to the water", made the threat of erosion patent (para. 31). He reviewed the law as it related to the distinction between "patent" and "latent" as follows:

> 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** [cited at *Cardwell v. Perthen* 2007 BCCA 313) at para.48:
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> ... 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.
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> 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.

[19] Justice Murphy found that there was no allegation of misrepresentation made in the above case. Case law makes clear that the increasing use of Property Disclosure Statements (in some instances in the stead of home inspections), create

an additional nuance in the analysis, in that if a seller makes a negligent or fraudulent representations with respect to even patent defects, the above case law makes clear that liability may follow based upon misrepresentation.

[20] *Doherty v. Rethman*, 2015 NSSM 13 (Canlii), a decision of Adjudicator Knudsen at para 23 canvasses the concepts of what constitutes negligent misrepresentation, and cites the standard requirements established in *Queen v. Cognos Inc.*, [1993] 99 D.L.R. (4th) 626 (S.C.C.) at page 643:

1. There must be a duty of care based on a special relationship between the representor and the representative;
2. The representation in question must be untrue, inaccurate or misleading;
3. The representor must have acted negligently in making said misrepresentation;
4. The representative must have relied, in a reasonable manner, on said negligent representation;
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

[21] Adjudicator O'Hara in *Brisbin v. Gilby*, 2007 NSSM 66, a case involving failure to disclose flooding issues in a basement, at para 62 cites Justice Wright's decision in *Desmond v. Kinlay* (2000) Canlii 2201 (NSSC) for the proposition that "the vendors misrepresentation in the property disclosure

statement constituted a collateral warranty, the breach of which entitled the plaintiff to damages".

[22] Adjudicator O'Hara also comments on the difficulty of quantifying damages in such cases, because on occasion, repairs being made will put the homeowner in an even better position than they would have been. He notes at paras 67 to 70:

> [67] In the law of torts, the measure of damages is normally said to be that which would put the innocent party in the position they would have been in but for the tort, in this case, the negligent misrepresentation.
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> [68] In considering those principles with regard to this case, it is to be noted that had the water leakage problem been properly disclosed. Ms. Brisbane could have potentially walked away from the deal, attempted to renegotiate the price or get an allowance from the vendor, or possibly do nothing and proceed through to the closing. It would be an exercise in speculation to attempt to determine what would have happened in that case.
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> [69] A further principle to bear in mind is that the innocent party should not be put in a better position than they would have been in if there had been no breach.
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> [70] In a number of cases similar to this, the courts have applied what has been referred to as a "betterment allowance". To address this concern in *Desmond v. McKinley*, Justice Wright applied a betterment allowance of one third off of the invoices. Likewise, in *Thomson v. Schofield*, Justice Warner also applied a better mid allowance of

1/3, recognizing there would be an enhancement of the value of the property as a result of the report required repairs.

[23] In his decision, Adjudicator O'Hara reduced his award by a one third betterment allowance. In *Boychuk v. Butler*, 2007 NSSM 10, a decision of Adjudicator Patrick Casey, a fifty percent betterment allowance was applied against an award for a faulty septic system.

[24] I will note that the concept of "caveat venditor" which Ms. Lowe argues has replaced "caveat emptor", seems to be based upon a one-page blog post from a lawyer in India. Ms. Lowe has done a very credible job of research in preparation for this case, but the case law above does not support a shift of such seismic dimensions in Canadian law. The concept of "buyer beware" continues, but for the obligations created by a PDS regarding negligent or fraudulent misrepresentation, and the required disclosure of dangerous latent defects.

The Claims Being Made:

[25] There are multiple claims being made by the Claimant. I will assess each separately below for ease of reference.

The Cleanliness of the Property - $2000.00

[26] This portion of the Claim is dismissed. Cleanliness was neither patent or latent, but a known condition built into the Agreement of Purchase and Sale and its Amendment, and the time to raise an objection as to the cleanliness of the property, was to assert the terms of that contract prior to closing.

[27] The Agreement of Purchase and Sale dated September 9th, 2023 had at clause 7, "Additional Conditions":

> The Seller, at the seller's expense, will remove all garbage and debris from the home, garage and yard, remove and dispose the hot tub and empty and clean the chicken coupe [sic] prior to preclosing walk through".

[28] Ms. Lowe in her evidence says that the property was "filthy" upon her move in November 1, 2022, and that there continued to be debris in the yard. Ms. Lively disagrees, and provides a receipt for 5 hours of cleaning performed on the property on October 26, 2022. The walk-through of the property took place on October 27, 2022. Ms. Lowe says that she was out of town for the walk through, and her real estate agent performed it in her place. One of the essential purposes of a final walk through, is to ensure that all required conditions have been met. The time to issue any final objection to cleanliness was after the walk through, at which time the buyer can refuse to finalize the sale if non-performance of conditions is alleged. There is no evidence (and the agent did

not testify in this proceeding) that the agent raised any objection to the state of the property in regards to Clause 7 of the Agreement of Purchase and Sale. Acting as Ms. Lowe's agent, the real estate agent accepted the property as presented, and the sale of the property followed, and that acceptance is not subject to re-litigation in this proceeding.

Septic Doctor 2 year Transferable warranty - $833.75

[29] Ms. Lowe testified that she was given a letter during the negotiations from the Septic Doctor to Ms. Wildly, dated June 28, 2022, in which the new system was described as having a "two year transferrable warranty". In early 2023, she began to have problems with the septic pump, with the alarm going off repeatedly. When she contacted the Septic Doctor, whom she understood by the Lively PDS had installed a new system in June of 2022, she learned on June 6, 2023 that the company was unprepared to honour their two year warranty on the work, as there was an amount owing from Ms. Lively of $833.75.

[30] Ms. Wildly in her evidence says that the additional amount was a finance charge involving interest on equipment used in the project, and since she had not agreed to it, she did not pay it.

[31] An exchange between lawyers for the parties occurred June 8, 2023 in which Ms. Lively's lawyer states "There is nothing in the agreement of purchase and sale relating to the septic or any possible transfer of a warranty from the installer. My client has therefore performed all of her obligations owing to your client pursuant to the Agreement".

[32] While that may be so with respect to the Agreement, Ms. Wildley also filled out that PDS, which states:

7.2 Q. If applicable, what date was this system last pumped and by whom?

Answer: Brand new June 28th, 2022.

7.5 Q. Is there a septic certificate available?

Answer; Yes. If yes, will a copy be provided to the buyer? Answer yes.

7.6 Q Are you aware of any repairs or upgrades to the sewage disposal system?

Answer; Yes. New septic 2022.

Q. Will supporting documentation of the repairs or upgrades be provided to the buyer? Answer yes.

[33] Clause 11.9 of the PDS asks “Are there warranties”, and also asks” If yes, are the warranties transferable and will documentation be provided”? Ms. Lively answered “no” to the question of whether there were warranties. I find on the evidence that the answer to this question should have been “yes”. The evidence before me confirms that Ms. Lowe was clearly told that a transferrable warranty was available via certificate, which was provided to her. I find it is not open to Ms. Wildly to claim there was no warranty and void it by refusing to pay the outstanding balance, and I therefore award the amount of $833.75 to Ms. Lively, so that she can activate the remainder of the warranty, or use it to defray some of the costs associated with her repairs to date.

Glass Doors on Shower - $1500.00 plus tax

[34] Ms. Lowe testified that the glass shower door in the master ensuite was off the rails at first inspection, and “jerry rigged” thereafter, and that every time the door opened, it came off the rails. She says that on a later occasion when she tried to put the shower door back on the rails, “it was like a bomb went off”, and the shower door “exploded in my hands”.

[35] I dismiss this portion of the claim. No issue with the shower door was identified in the Wilcox Report. Upon purchase, Ms. Lowe knew the door had

a patent defect – it came off the rails, and she did not effect a repair after purchase of the home. While the fact that the glass broke might be broadly described as a latent defect, there is no evidence that that consequence that could have been foreseeable to anyone.

Drainage of Backyard - $43,665.50

[36] I dismiss this portion of the claim.

[37] Ms. Lowe provided an estimate from Jamesway Services dated August 21,2023 for $43,665.50 for "Evacuation and Trucking, Demolition, Landscape and Property Services". Roughly $10,000 of that total relates to equipment, with another $10,000 for "French drain material" and almost $8,000 for "landscaping reinstatement".

[38] Ms. Lowe says that her yard "floods", and that Ms. Lively did not disclose that the yard flooded. She says that Ms. Lively should not have answered "no" to 11.1 under General, "Are you aware of any damage or hazards due to wind, fire, water/flooding, erosion, wood rot, pests, rodents or insects?"

[39] The Wilcox Report says this about "Grading and Surface Drainage" at page 12:

> Lot grading and drainage have a significant impact on the building, simply because of the direct and indirect damage that moisture can have on the foundation. It is very important, therefore, that surface runoff water be adequately diverted away from the home. Lot grading should slope away and fall a minimum of one inch every foot for a distance of 6 feet around the perimeter of the building. Observations:
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> The exterior drainage is generally away from the foundation. Good.

[40] Ms. Lowe in her evidence says that she had chickens the entire time she lived in the house, and went to the coop two to three times a day, and "would have noticed" if the yard was wet. She says she mowed the lawn every week without issue.

[41] There are photos and videos which are date stamped August 18, 2023 submitted by Ms. Lowe. They appear to be taken in the back yard of the property, and Ms. Lowe (whom I take to be the person holding the cellphone used) has water over her feet and sometimes up to her ankles. There is water running in a stream at the bottom of the property and away from the property. The summer of 2023 is notable in Nova Scotia for wildfires followed by floods, and unusual amount of rainfall.

[42] By way of contrast, there was no water visible during the Wilcox Inspection in September of 2022, and the only reference to the issue is to note that the grade from the house is “good” with respect to drainage.

[43] The evidence supports that assessment. Leaving aside the living room ceiling, and the garage, which I will deal with in another section of this decision, there is no evidence that the water is running into the basement of the house, or that water continued to run anywhere but away from the property once it stopped raining, as it was doing when the photos and videos were taken. There is no evidence to show erosion.

[44] There is insufficient evidence that the water in the backyard was a defect that met the standard of patent, or latent defect for that matter, and there is nothing indicated to generate a positive response to the to clause 11.1 of the PDS, which asks whether there is knowledge of “damage or hazards” caused by “water/flooding”. It appears from the evidence that when it rains, there is no question that the yard gets very wet. Then it drys up. That is far from an usual phenomenon in Nova Scotia.

[45] If I am wrong in this conclusion, there is insufficient evidence that the remediation suggested by the contractor would resolve this, including what

exactly what was being done, why it was necessary to spend so much, and what would be the results of not making these changes.

Chimney repointing - $8000-$9000.00

[46] This estimate is based upon an email string between Ms. Lowe and Good Fellas Stoves and Chimneys Ltd, between August 12, 2023 and August 15, 2023. Ms. Lowe was seeking an estimate from the company because they had cleaned her chimney and done some mortar work and had "mentioned that the chimney needed to be repointed".

[47] I did not hear evidence from anyone at Good Fellas Stove, and I note that the Wilcox Inspection Report, page 20, has clear photos of the chimney that do not show the need for repointing, nor was it identified by Mr. Wilcox, who clearly examined the chimney for his report. A comment in an email does not make a claim. I am dismissing this claim, for two reasons: chimney repointing is a patent defect clearly discernible on visual inspection, and also, there is in any event not sufficient evidence to support that the work on the chimney needs to be done.

Garage Renovations - $10,500

[48] Ms. Lively is claiming the above amount based upon an estimate provided by Coast to Coast Abatements, dated August 21st, 2023 for what is described as a “garage renovation”. The details are not very specific, but it seems to be for removing the framing and sheathing, replacing it, and adding in some siding.

[49] This part of the claim brings us squarely to the assessment of what constitutes a patent, as opposed to a latent defect. Ms. Wildly’s evidence on the garage is clear – she says “everyone knew” about the wood rot on the garage walls, at the bottom and that the garage was made of “chipboard”. She did not report it on her PDS because she “did not think the garage was part of that equation”.

[50] The Wilcox Report does not spend a lot of time on the garage, but does mention that there are “signs of mold like bio growth present on the sheathing in several areas. The underlying cause is excess moisture or dampness. Recommend contractor removal.” The report further states that “there is cracking on the concrete garage floor, which would benefit from being sealed.”

[51] In her evidence, Ms. Lowe says that the inspector told her that he thought the cause of the mold was plants growing upstairs in the garage. The report summary mentions “review exterior garage for repairs to stairs”, and “repair

exterior garage door rollers". The garage door repairs are included in the holdback in the Amendment to the Agreement of Purchase and Sale.

[52] Looking at the photos available of the garage provided in the Wilcox Report, it is clear that it is a relatively basic building that is essentially a workshop without a lot of finishing. The pictures do not show the ground level holes in walls described by Ms. Lively.

[53] However, under 1.1 "Are you aware of any structural problems, unrepaired damage, dampness or leakage", there is no question that her answer should have been "yes", given her evidence at the hearing before me.

[54] Ms. Lively assumed that anyone looking at the garage would have no doubts about its condition, but I cannot see it from the inspection photos provided. Sellers who chose to fill out a PDS are bound both by what they say, and what they leave out. The omission of the state of the garage therefore constitutes a negligent misstatement, which I conclude Ms. Lowe relied upon to her detriment.

[55] Taking into account issues of betterment, and the lack of specificity as to what repairs are required, I award $5000.00 for repairs to the garage.

Attic Insulation - $9,821.00

[56] Ms. Lowe says that the disclosure that Ms. Lively made in the PDS was insufficient in that there were leakage issues and "cold spots" in the living room. Ms. Lively says that she did not go to the attic (which is a crawl space), but relied upon what she was told. It is notable that she continued to assert that she did not see the previous inspection report discussed above, but that clause 8.3 was based on what she had been told.

[57] PDS Clause 8.3 disclosed "mould on the underside of the roof, this condition due to improper ventilation in the attic. Spaces and additional ventilation were installed when the roof covering was replaced, this should prevent further staining due to increased ventilation."

The evidence reveals that remediation followed the Wilcox inspection on both the roof and attic. I do not accept Ms. Lowe's assertion that Ms. Lively should have "known" that the attic still had issues and that the roof has (accordingly to a later contractor) a defective ridge vent. She is not required to climb onto the roof or into the attic, and by late September and October of 2022, as she is on the point of vacating the property, work is being done on both.

[58] With respect to the attic, the Wilcox Report states in the summary at page 2: "Have contractor remove staining on attic sheathing on main home. Mold test currently underway." The attic mold issue was also included in the Amendment to the Agreement of Purchase and Sale, and mold abatement was carried out.

[59] Mr. Cameron Cole, who testified for the Claimant, works for Therawise Quality Assurance, who perform residential energy assessments. He did assessment "from the attic roof hatch", and states that the insulation in the attic was a "mess", and that ventilation was an issue. Ms. Lowe provided a quote for $9,821.00 for insulating the attic.

[60] Mr. Tracey in his arguments points out that the attic, and the roof for that matter was, at the time of the sale, already a source of negotiation between the parties, and indeed the mold remediation consumed over $6000.00 of the $19,000 holdback. It is clear that roof repairs were identified in the holdback.

[61] I have no doubt that the issues which Ms. Lively was finding in the living room with a leakage did occur, but I agree with Mr. Tracey's argument. Remediation was occurring between September and October of 2022. The attic and the roof were known, and therefore patent, areas of concern. There is no evidence before me that Ms. Lively would have had any special knowledge of

any issues with the attic, especially in the face of remediations having been asked for and provided.

[62] Ms. Lively identified the issues she knew of. The defects described by Mr. Cole, should have been patent upon visual inspection, and Ms. Lively is not required to stand in the shoes of, and have the expertise of, Ms. Lowe's Property Inspector. This portion of the claim is dismissed.

Conclusion

[63] I thank both parties for their submissions in this matter. For all of the reasons above, I award to Ms. Lowe the amounts described for the garage and septic system, for a total of $5833.75 plus 4% interest (June 22/23-October 23/24 = $307.44), for a total of $6141.19 to the Claimant. As success was divided in this matter, costs will not be awarded.

Dale Darling, KC, Small Claims Court Adjudicator