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Buyers unaware of endangered birds

**Judge ruled that realtor should have come clean
But court still awarded only minor damages**

The Ontario Superior Court in Belleville last month awarded \$2,200 in damages in favour of the purchasers of a parcel of land after their real estate agent failed to advise them of a hidden defect in the condition of the property (see case transcript below).

The defect in the case was the presence of a few nests of an endangered bird species called the loggerhead shrike.

In 2001, the buyers contacted a real estate agent and advised him that they wanted to buy a building lot with a small acreage to construct a new home.

They had seen an advertisement for a property near Blessington Rd. in the Township of Tyendinaga in eastern Ontario. It consisted of about 52 hectares of vacant land. The rear of the property contained wetlands and was zoned EP (environmentally protected). The front portion was zoned rural and advertised as containing two ponds, a stream and a building site in the northwest corner. The asking price was \$34,900.

At first, the agent acted only for the seller, but later agreed to act as agent for the buyers as well, with all the accompanying duties and obligations of a dual agent.

In May 2001, an agreement was drawn up for the sale of the property at \$34,000. In it, the seller and buyers acknowledged that the agent and brokerage would not disclose "confidential information" received from one party to the other.

After closing, one of the buyers inquired at the township offices about building code and zoning requirements for obtaining a building permit, but did not file an application for one. Shortly afterward, a representative of the Ministry of Natural Resources informed him that the property contained the nesting sites of "an endangered bird."

In October 2001, the buyer met with the district ecologist of the ministry and was told for the first time that the property was the habitat of the loggerhead shrike, and for this reason he would not be able to build on the land. (The shrike is a black and white songbird, smaller than a robin, that hunts small insects, mice and smaller birds and impales them on a thorn or barbed wire. In eastern Canada, it's an endangered species facing extinction.)

A few days later, the buyer received a map of the property from the ministry showing the location of shrike nests. An accompanying letter warned him that he could not build anything within a 400-metre radius of each nest, and any attempt to alter the protected habitat could result in charges under the Endangered Species Act.

In a later letter, the ministry insisted that the information being provided about the shrike nesting grounds was "strictly confidential and should not be shared with anyone else."

Interestingly, until sometime in 2003, there was no map available to either the township or the general public showing actual or potential nesting areas of the shrike.

The ministry informed the buyer that there was an alternative location for his proposed house in a far corner of the property away from the birds. That would have required construction of a new road and hydro lines at a cost of more than \$100,000. Understandably, the land is still vacant.

It turns out that the agent knew about the endangered birds from the day the property was listed for sale. He deliberately decided not to disclose it to the buyers because he did not consider it "important enough."

The buyers sued the agent and his brokerage for more than \$55,000 in damages for misrepresentation and for failing to disclose the latent or hidden defect in the property.

A three-day trial took place last September, and the decision was released late last month. The judge ruled that the information the agent had about the birds should have been disclosed to the buyers when they first expressed interest in the property.

He knew that they intended to build a house on the land and they should have been given the opportunity to make their own inquiries and assess the impact of the shrike nests on their construction plans.

The agent was held responsible by the court for "negligent misrepresentation" by failing to disclose the information he had about the endangered birds.

Unfortunately for the plaintiffs, the court ruled that they were only entitled to \$1,000, which was the difference in value between what they paid for the property (\$34,000) and the actual appraised value at the time of the sale (\$33,000).

In addition, the buyers were awarded their legal fees and expenses on the purchase, in the amount of \$1,205.

The total award in favour of the buyers was only \$2,205, plus interest at 3 per cent since 2001.

For real estate buyers everywhere in Ontario, whether they are buying vacant land or land containing any type of building, there does not appear to be any public registry of land to find out if construction is frozen by the Endangered Species Act. Even worse, the Ministry of Natural Resources, in cases like this, regards this type of information as confidential.

What would have happened if the land was purchased for \$340,000 or \$3.4 million instead of \$34,000? The consequences are indeed scary. Who compensates the innocent buyer for the worthless piece of land?

Should Ontario have a public registry of land where development or redevelopment is frozen by the Endangered Species Act? How should Ontario law balance the interests of innocent purchasers of land with the need to protect endangered species? Email your comments or fax me at the number below.

One final note: In a case where both sides paid their lawyers for a three-day trial over damages of about \$2,200, the only winners were the lawyers. And the birds.



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<http://canlii.org/on/cas/onsc/2005/2005onsc14030.html>

BELLEVILLE COURT FILE NO.: 0601/03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
WALLACE HARRY HENNESSY and JUDITH NOREEN KERKHOVEN)	William D. Watson for the Plaintiffs
)	
)	
)	
Plaintiffs)	
)	
- and -)	
)	
)	
JOHN RUSSELL and <u>PRO ALLIANCE REALTY</u> <u>CORPORATION</u>)	Hans Engell for the Defendants
)	
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)	
Defendants)	
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)	HEARD: September 13, 14, 15, 2004

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REASONS FOR JUDGMENT

SEDGWICK J.

Rule 76 (Simplified Procedure):

[1] This action was initiated under Rule 76 (Simplified Procedure). Neither party brought a motion under Rule 76.07 for summary judgment. The parties did not agree to a summary trial by way of affidavit evidence under Rule 76. The pre-trial judge directed that the action proceed to trial in the usual way with oral testimony. Although paragraph 28 of the statement of claim states that the action should be tried at Belleville in the County of Hastings, on consent, the trial took place at Picton in Prince Edward County.

Corporate Defendant:

[2] The corporate defendant is incorrectly named in the pleadings. Its correct corporate name is Pro Alliance Realty Corporation. On consent, the name of the corporate defendant is amended in the title of proceedings to reflect its correct corporate name. In these reasons, Pro Alliance Realty Corporation is referred to as "Royal LePage". The defendant John Russell (Russell) was acting as an agent/broker of Royal LePage. At the opening of trial, counsel for the defendants conceded that Royal LePage is vicariously liable for the actions of Russell; and that the evidence of Russell is binding on Royal LePage.

The Action:

[3] The action concerns the impact of the loggerhead strike, an endangered species protected under the *Endangered Species Act R.S.O. 1990, c. E.15*, and Schedule 1 of the Regulation, on a purchase of land in the County of Hastings.

[4] The case also illustrates the conflicts inherent in the common practice of acting as agent for both the seller and the buyer in a real estate transaction. The focus of this action is on the legal relationship between the buyers and their agent who was also the listing and selling agent for the sellers.

Loggerhead Shrike:

[5] The Loggerhead Shrike (*lanius ludovicianus*) is "a songbird that hunts like a small hawk, preying on insects and other small animals (including other birds)" Canadian Wildlife Service: Hinterland Who's Who (Ex. 27). These birds nest in settled parts of southern Canada and the Prairie Provinces. They are classified as a "threatened" species in western Canada; and as an "endangered" species in eastern Canada. They are migratory birds. They nest in Canada, arriving from their wintering grounds in April (east) and early May (west). In the east, they are facing "immediate extinction"; in the west, they are not yet as close to extinction, but "in trouble". In the east, ornithologists are trying to determine whether "any still nest along the edge of the Laurentian Shield in Ontario and at a few locations in southern Québec, as was the case as late as the 1960s". In physical appearance, the Loggerhead Shrike is slightly smaller than a robin with a grey back, a white chest and belly, black and white wings, a black tail with a white stripe along the sides and a distinctive black "mask" across the eyes and forehead. The species also has a disproportionately large head (hence, "loggerhead") and a heavy hooked beak. Although there are other species of shrike, the loggerhead shrike will be referred to in these reasons as the "Shrike". As will appear, from these reasons, parts of the land purchased by the plaintiffs in this case was identified by the Ontario Ministry of Natural Resources (MNR) as a nesting ground of the Shrike.

Blessington Road Property:

[6] The purchased land is located on the south side of the Blessington Road in the Township of Tyendinaga, in the second lot west of Whalen Road. Its legal description is Part of Lot 24, Concession 3, Township of Tyendinaga (Blessington Road Property), bounded by the Blessington Road to the north and the Melrose Road to the south. The property comprises 129.8 acres "more or less", of vacant rural land. A 400-foot wide Hydro corridor transects the property. The northerly part (about 84 acres) is zoned Rural by the municipality. The southerly part (about 45.8 acres) is traversed by Fisher Creek. There are swampy areas. The wetlands are zoned EP (Environmentally Protected). The southerly part is also traversed by a Canadian Pacific Railway line in active use. The entire property is undeveloped. A study of the topography would indicate, however, the potential for development of the northern part of the property greatly exceeds the potential for the southern part. The habitat of the Shrike is located in the northern part of the property nearest to the Blessington Road.

Buyers:

[7] The plaintiff buyers are spouses who presently live at Thomasburg, Ontario. Prior to moving there, they each owned houses in or near Cobourg, Ontario. At that time, the plaintiff Hennessy (Hennessy) was working as a carpenter, primarily in the Kingston area. He was approaching retirement. The plaintiff Kerkhoven (Kerkhoven) was working at the Sears Warehouse in Belleville. Hennessy and Kerkhoven began looking for a new shared-property arrangement to accommodate Hennessy's work in the Kingston area. In the course of their searches, they found the Thomasburg property, which was purchased in Kerkhoven's name alone, free of any mortgage or other encumbrance (Thomasburg Property).

[8] As Hennessy's planned retirement as a union carpenter approached, he became increasingly engaged in his own business of buying, restoring, renovating and reselling other houses. He considered this business as a second career to be pursued during his retirement. First, he bought a property at 66 Stanley Street, Trenton (Trenton Property). He completed its restoration and put it up for sale. Next, he turned to the Belleville area, because it was closer than Trenton to his Thomasburg residence. He put in an offer to purchase a property in Belleville (Belleville Property) for restoration, renovation and resale. The Belleville Property was a duplex which was on the market under a mortgage power of sale.

Agent:

[9] Hennessy was assisted in his acquisition of the Belleville Property by the defendant Russell, who was also the listing and selling agent. This was their first personal acquaintance. Russell was a broker/agent for the corporate defendant Royal LePage (see para [2] above).

[10] Russell assisted Hennessy in preparing his offer to purchase the Belleville Property. This offer was accepted by the vendor for an amended price and the purchase transaction closed in the Fall of 2000. The renovation of the Belleville Property by Hennessy began. Then, in February 2001, Hennessy, who was having difficulty disposing of the Trenton Property through his existing arrangements, decided to relist the Trenton Property for sale with Russell.

Purchase of the Blessington Road Property: Pre-closing events:

[11] At the same time, Hennessy told Russell that he was also interested in acquiring a building lot on a small acreage for the construction of a new residence for himself and Kerkhoven. In April 2001, Hennessy noticed an advertisement by Russell of a property for sale which interested him. According to the advertisement, the property was described as being located "off Blessington Road" and its legal description was given as Part Lot 24, Concession 3, Township of Tyendinaga. The advertised property consisted of about 129 acres of vacant land, with the rear of the property (fronting the Melrose Sideroad) containing wetlands zoned EP (Environmentally Protected), and the front of the property (fronting the Blessington Sideroad) zoned Rural (Blessington Road Property). The advertisement described the advertised property as also containing two ponds, a stream and a building site which was located "off Blessington Road". The property described in this advertisement is, plainly, the Blessington Road Property. The advertisement appeared in REAL ESTATE today, April 20, 2001, on the same page as other properties listed for sale by Russell, including Hennessy's Trenton Property. The listing price for the Blessington Road Property was \$34,900. (Ex. 1, Tab C-1). Russell testified that his identification of the building site, located on the property and mentioned in the advertisement, was based on an aerial photograph (Ex. 17).

[12] Hennessy called Russell to indicate his interest in the Blessington Road Property, although the acreage of the property was greater than he needed to construct a new residence for himself and Kerkhoven. Hennessy asked for, and was given, directions by Russell to the property and, specifically, to the building site mentioned in the advertisement. According to Russell, the advertised building site was located in the northwest part of the property. During his testimony, Hennessy marked the location of the advertised building site on the aerial photograph (Ex. 17). Both witnesses agreed in their testimony on the approximate location of the advertised site. Hennessy visited the

property and revisited the property with Kerkhoven. Both were impressed by the building site. They decided that Hennessy would submit an offer to purchase the property through Russell as the listing agent for the sellers, Kenneth and Lois McMechan (McMechans). Although the main focus of their interest was the building site, Russell testified that Hennessy told him during their preliminary discussions that he intended to use the property immediately to store job lots of construction materials purchased for his house renovation business, at auctions and building supply stores.

[13] Although Russell acted initially as listing agent for the sellers, he subsequently agreed to act as agent for Hennessy, the buyer, as well. In the transaction which is the subject-matter of this action, the court finds that Russell acted throughout as an agent for both parties: the McMechans, as sellers; and Hennessy, as buyer, with all attendant legal responsibilities.

[14] The McMechans and Hennessy entered into an agreement of purchase and sale of the Blessington Road Property, dated May 9, 2001 (Ex 3) (Agreement). The purchase price was \$34,000. (with a \$500. deposit). The closing date was August 10, 2001. The Agreement was conditional on the sale by Hennessy of the Trenton Property, subject to waiver of this condition by Hennessy. Under the Agreement, the McMechans were permitted to continue to offer the Blessington Road Property for sale so long as this condition had not been waived by Hennessy. Kerkhoven was not a signatory to the Agreement. However, she provided most of the financing for the purchase (see para [16] below) and consequently, is registered as an owner of the Blessington Road Property in joint tenancy with Hennessy (see para. [18] below). In my view, she is entitled to the benefit of the provisions of the Agreement.

[15] The Agreement included the following express provision relating to the disclosure obligations of the defendant Royal LePage in transactions like this one in which Royal LePage and its agent Russell are acting for both the seller and the buyers:

E) Vendor and Purchaser hereby acknowledge that Royal LePage ProAlliance Realty is acting as agent for both parties, and they hereby give their informed consent to that arrangement. Vendor and Purchaser further acknowledge that Royal LePage ProAlliance Realty will not disclose any confidential information received from either party to the other. Such confidential information includes any information that could compromise either party's bargaining position, but does not include information concerning latent (hidden) defects in the property, if any, of which the Vendor or Royal LePage ProAlliance Realty is aware.

[16] Russell pressed Hennessy to waive the condition regarding the prior sale of the Trenton Property, indicating that others potential purchasers were interested in buying the Blessington Road Property, although he produced no other written offers. Hennessy indicated that his funds were tied up in renovating the Belleville Property and that he had to sell the Trenton Property before he would be able to complete the purchase of the Blessington Road Property. Kerkhoven stepped into the breach. She mortgaged the Thomasburg Property, which was registered in her name, to her bank for \$40,000, most of the proceeds of the mortgage loan being use to complete the purchase of the Blessington Road Property, (Thomasburg Mortgage), on condition that the names of both Hennessy and Kerkhoven would appear on the title to the property. The Thomasburg Mortgage remains outstanding and is being paid by Kerkhoven.

[17] Hennessy waived the condition regarding the prior sale of the Trenton Property and the closing date for the purchase of the Blessington Road Property was advanced to July 24, 2001. Meanwhile, an agreement of purchase and sale had been received by Hennessy for the Trenton Property conditional on the purchaser obtaining financing. This condition was waived by the purchaser and the closing date was moved up to August 7, 2001 from August 15, 2001.

[18] The purchase by Hennessy and Kerkhoven as joint tenants of the Blessington Road Property from the McMechans for \$34,000. was completed and a transfer/deed of land dated June 20, 2001 was registered in the land registry office for Hastings (21) Belleville on July 24, 2001 as No. 597063 [Ex 1, Tab 4 (a)]. Prior to completion of this transaction there is no evidence that either Hennessy or the solicitor who represented him on the purchase of the Blessington Road Property made any inquiries as to possible municipal or other restrictions of a legal nature that would or might have an adverse impact on his declared intention to build a residence on the property he was acquiring.

Post-closing events:

[19] After completion of the transaction, Hennessy delivered a 6-ton boiler to the road access at the north end of the Blessington Road Property. He testified that the boiler was for the heating system in the house which he and Kerkhoven were proposing to build as their residence in the north-west part of the property. He also delivered to the same location, some farm implements he had purchased at an auction sale prior to completion of the transaction.

[20] Hennessy also spoke to Chris Boldy, the chief building official for the Township of Tyendinaga, regarding applicable zoning and Building Code requirements for obtaining a building permit for the proposed house and outbuildings on the Blessington Road Property. However, he did not file an application for a building permit. Nor did he file any related specifications or plans.

[21] At this point and time, Hennessy testified that he was contacted by Chris Groom, a biologist representing the MNR, regarding the presence of "an endangered bird" on the Blessington Road Property. Hennessy then spoke to Russell who initially denied any prior knowledge of such a bird. Hennessy testified that he also spoke to Chris Boldy at the Township of Tyendinaga to inquire whether the presence of such a bird would prevent his proposed development of the property.

[22] Hennessy had been told by Groom to contact the office of the MNR in Kingston. On October 16, 2001, he met with Todd Norris (Norris), district ecologist for the MNR, to review his development plans for the Blessington Road Property. It was at this meeting, he testified, that he first heard the name of the "endangered bird": the "Loggerhead Shrike". He also learned that the McMechans' had known about the presence of Shrike on the Blessington Road Property. After this meeting, he was notified by the Ministry by letter dated October 22, 2001 (Ex. 5), that his plans to develop the Blessington Road Property could not be carried forward because the property was a nesting ground for the Shrike.

[23] Norris' letter dated October 22, 2001, indicted that the MNR "has recommended (to the township) against the approval of the building permits there". A map was enclosed on which "recent (Shrike) nests in the area" were marked. The letter continued, "the area protected under the *Endangered Species Act* includes all suitable habitat within a 400 meter radius circle about each nest. All habitat in the area where you indicated you would place your house and workshop is deemed to be suitable habitat and all lies within the 400m protected zones". The letter closed with a threat that any alteration of the current state of the habitat, "could result in perceived destruction of [Shrike] habitat and potential charges for habitat destruction under the *Endangered Species Act*."

[24] Similar threats were repeated by the MNR on later occasions (see, for example, para. [26] below). The defendants make much of the equivocal position of the MNR as to their statutory powers under the *Endangered Species Act*. Section 5 of that Act reads:

5. *No person shall wilfully,*

(A) *Kill, injure, interfere with or take or attempt to kill, injure, interfere with or take any species of fauna or flora; or*

(B) *Destroy or interfere with or attempt to destroy or interfere with the habitat of any species of fauna or flora,*

declared in the regulations to be threatened with extinction.

The Loggerhead Shrike is listed as an endangered species, (item 15 of Schedule 1 of the Regulation made under the Act). On the one hand, officials of the MNR did not hesitate to threaten prosecution. On the other hand, they lacked the statutory power to direct the chief building official of the Township of Tyendinaga to refuse to issue a building permit, they could only "recommend" that one not be issued. Further, until sometime in 2003 there was no map available to the Township, let alone the general public, showing actual or potential areas used or to be used by the Shrike for nesting. For example, in a later letter to Hennessy, the MNR emphasised that the information about the nesting grounds of the Shrike on the Blessington Road Property was being made available to him in strictest confidence (see para. [27] below). Officials of the MNR showed an imperfect understanding of

the rule of law in contrast to the exercise of their perceived administrative discretion. Whatever the merits of the administrative practices of the MNR, however, the issue in this case is the impact of the MNR's threats on the plaintiffs' potential use of the property. Understandably, the plaintiffs were compliant.

[25] Hennessy testified that he then spoke to Russell again about his knowledge of the presence of the Shrike on the Blessington Road Property. According to Hennessy, after first denying any knowledge, Russell acknowledged that he had known about the Shrike since the property was listed for sale by the McMechans. At trial, Russell testified that at the time of listing, he was given a video (Ex. 2) and a brochure (Ex. 27) about the Shrike by the McMechans; who also told him that the Shrike were nesting on the Blessington Road Property. They also gave him Groom's telephone number to obtain further information (See para. [21] above). Russell also testified that when Hennessy expressed interest in buying the Blessington Road Property, he made a deliberate decision not to inform Hennessy about the presence of the Shrike before the purchase of the property had been completed.

[26] On December 4, 2001, Lois Deacon, District Manager of the MNR at Peterborough, sent Hennessy a letter (Ex. 1, Tab C-8) putting him on notice that the *Endangered Species Act* made it "an offence for anyone to willfully destroy or interfere with or attempt to destroy or interfere with the habitat of any endangered species partaking in such activities could result in prosecutions under this Act".

[27] The nub of the MNR's concerns was that the proposed building site for the new Hennessy/Kerkhoven residence on the Blessington Road Property was within the administratively prohibited 400m radius from the known nesting grounds of the Shrike. Later, Hennessy met Norris again on June 28, 2002, to discuss alternative building sites on the property. Following that meeting, Hennessy received a further letter from Lois Deacon of the MNR, dated July 22, 2002, (Ex. 1, Tab C-9) stating that the MNR would not "oppose" construction of a residence near the southern "edge" of the northern "portion" of the Blessington Road Property near the hydro transmission lines, subject to stated restrictions. Although the alternative site was within the prohibited 400m radius from the Shrike nesting grounds, the MNR believed that the alternative site was located in unsuitable Shrike habitat because of the denseness of the surrounding trees. The letter concluded, curiously, "... the Loggerhead Shrike habitation that has been shared with you and the Township of Tyendinaga is considered strictly confidential and should not be shared with anyone else without the express written consent of MNR".

[28] According to the testimony of Hennessy, however, the alternative location which the MNR would not oppose, would have required among other things, extending the existing road access from the Blessington Road and installing hydro at the new building site, at a prohibitive cost to him, which he speculated would be in excess of \$100,000. For financial reasons, he abandoned his plans to build at the alternative building site on the Blessington Road Property.

[29] The plaintiffs continue to own the property, which has not been built upon. There is no evidence that they have tried to sell the property, although Hennessy testified that the plaintiffs had tried unsuccessfully to persuade the defendants to buy the Blessington Road Property back from the plaintiffs for \$34,000, the purchase price they paid for it (see para. [18] above). Nevertheless, on April 5, 2004, (on what both parties anticipated was the eve of trial), the defendant Russell presented an unconditional offer to the plaintiff Hennessy to purchase the Blessington Road Property for \$34,000 (Ex. 23). The offer was not accepted by Hennessy.

[30] In the spring of 2003, in an effort to make some profitable use of the Blessington Road Property, Hennessy bought 16 cattle and grazed them on the Property, incurring associated costs of insuring and maintaining the cattle and protecting the property. They were subsequently disposed of by Hennessy at a loss. He was unable to make effective use of the boiler and farm equipment he had purchased before buying the Property (see para [19] above). The \$40,000 mortgage on the Thomasburg Property, taken out by Kerkhoven mainly, to finance the balance of the purchase price of the Blessington Road Property, remains outstanding. The plaintiffs are responsible for paying property taxes on the property.

Blessington Road Property-Value:

[31] The plaintiffs did not lead any evidence at trial, expert or otherwise, as to the market value of the Blessington Road Property. The only expert witness who testified at trial was John Van Huizen CRA, an experienced appraiser of rural land, who was called by the defendants. He presented an appraisal report dated October 20, 2003 (Ex. 16). He concluded that the market value of the Blessington Road Property as at July 24, 2001, the date of purchase by the plaintiffs, was \$33,000.00; and that the estimated value of the property as at October 6, 2003, was \$36,000.00. The Court accepts his evidence as to the market value of the property. In his testimony, he expressed the opinion that the presence of the Shrike had an impact on the value of the property and was something that an informed purchaser should know about. He concluded that there was limited arable land overall. The south end of the property comprising the 45.8 acres lying to the south of the hydro lines, had no potential for development "because of the low-lying land". The north end of the property, comprising the 84 acres lying to the north of the hydro lines, had restricted development potential due to the presence of the Loggerhead Shrike. Specifically the Shrike habitat situated in the north end of the property restricted development potential, because "no house would be permitted within a 400-meter radius of a nest". In his opinion, the best potential use of the Blessington Road Property would be "to maintain it as pasture land in conjunction with a local farm".

Law: Liability:

[32] The issue between the parties as to liability turns on whether the defendant Russell (for whose acts the defendant Royal LePage accepts legal responsibility) was under a contractual or other obligation under the Agreement (Ex. 3) or otherwise to disclose to his clients the buyers the presence of the Loggerhead Shrike on the Blessington Road Property prior to the closing of the transaction on July 24, 2001.

[33] According to the evidence of Russell, he was aware of the presence of the Shrike from the date on which the Blessington Road Property was listed for sale by the McMechans, his other clients, the sellers on or about October 1, 2000 (Ex.4). He consciously decided not to disclose to the plaintiff buyers the information which he had received from the sellers about the Shrike because he did not consider it "important enough."

[34] By failing to disclose the information about the Shrike, the plaintiffs say that they were deprived of the opportunity to make an informed decision whether to enter into the Agreement (Ex. 3) or to proceed with the purchase of the Blessington Road Property. They say that the defendants were in breach of their contractual duty to disclose confidential information set out in paragraph E) of the Agreement (see para. [15] above) because the undisclosed information about the Shrike concerns a "latent (hidden) defect in the property". They also say that the defendants' failure to disclose was an actionable misrepresentation. In either event, the plaintiffs say that they incurred financial losses which they are entitled to recover from the defendants. They claim damages the aggregate amount of \$55,746.74, as set out in a Summary of Damages included in the Plaintiffs' Document Brief (Ex.1, Tab 70) (see para. [39] below).

[35] On the issue of liability, the defendants deny any contractual or other obligation to disclose the information received by Russell from the McMechans' and in his possession throughout Russell's dealings with the plaintiffs concerning the Blessington Road Property. The defendants also deny that the plaintiffs incurred the amount of financial loss they claim.

[36] In my view, the information in the possession of Russell about the Shrike ought to have been disclosed to the plaintiffs when they first expressed an interest in purchasing the Blessington Road Property. The plaintiffs ought to have been given an opportunity to make their own inquiries and to assess for themselves the potential impact of the presence of Shrike on the property on their plans to build a residence there. From the evidence, it is abundantly clear that from the outset of his dealings with the plaintiffs relating to this property, the defendant Russell was fully aware that the plaintiffs intended to build a residence on the property. He was also aware of the approximate location of the proposed residence. His unilateral decision not to disclose the information about the Shrike to them deprived them of that opportunity.

[37] The failure to disclose the information about the Shrike was a breach of the express provisions of paragraph E) of the Agreement (Ex. 3). In this case, the defendants were representing both the sellers and buyers in the real estate transaction. In my view, the undisclosed information about the presence of the Shrike on the Blessington Road Property falls well within the category of information about a latent defect in the condition of the property, disclosure of which is expressly required under paragraph E), by way of exception from the general contractual prohibition of disclosure by the agent of confidential information received from either party to the other. See *Goldstein v. Davison*, (1994) 39 R.P.R. (2d) 61; [1994] O.J. No. 1018, (a decision of Ground, J. of this court, concerning undisclosed information about an impending designation of a property as a heritage property).

[38] As to the claim of the plaintiffs that non-disclosure by their agent of the information about the presence of the Shrike on the Blessington Road Property amounted to an actionable misrepresentation, the court assumes that this broader claim is advanced because the plaintiff Kerkhoven is not a signatory to the Agreement (Ex.3) (see para. [14] above). In this case, the misrepresentation by non-disclosure by the agent was, in a sense, more than negligent because he testified that he deliberately withheld the information from the buyers. However, in this case, proof of his misrepresentation falls short of the high standard of proof required to establish that it was fraudulent. In my view, the plaintiffs have established the liability of the defendants on the alternative grounds of negligent misrepresentation, *Queen v. Cognos Inc.* 1993 CanLII 146 (S.C.C.), [1993] 1 S.C.R. 87. In my view, the plaintiff Kerkhoven is entitled to assert the same remedies as her husband since she provided most of the financing for the purchase and she is registered as a joint tenant of the Blessington Road Property.

Damages:

[39] The plaintiffs seek payment of the following amounts of damages from the defendants in accordance with the plaintiffs' Summary of Damages (Plaintiffs' Document Brief, Ex. 1, Tab 70).

(A) Property:	\$34,000.00
(B) Purchase Fees/Disbursements:	\$ 1,205.87
(C) Interest on Purchase Financing:	\$ 3,553.95
(D) Property Taxes:	\$ 1,453.21
(E) Costs for Grazing Cattle:	\$10,513.00
(F) Costs for Disposition of Cattle:	\$ 2,800.00
(G) Costs of Cattle Liability Insurance:	\$ 800.00
(H) Costs/Loss for Equipment:	\$ 2,000.00
TOTAL:	\$55,746.74

[40] The major component of damages claimed by the plaintiffs is for the Blessington Road Property itself. The plaintiffs claim the total purchase price of the property: \$34,000. The amount of damages claimed under that head would appear to be based on an assumption by the plaintiffs that as a result of the defendants' breach of contract and negligent misrepresentation, the property is worthless. Although one may speculate that the resale value of the property may have been adversely affected by the presence of Shrike nesting grounds, the plaintiffs have led no evidence as to the extent of such diminution in value. To the contrary, the expert evidence of Van Huizen estimated the value of the Blessington Road Property as at October 6, 2003, at \$36,000.00 (see para. [31] above).

[41] In my view, the appropriate measure of damages in this case is the difference between the purchase price (\$34,000) paid by the plaintiffs for the Blessington Road Property and the actual value of the property at the time of the sale (\$33,000) according to Van Huizen's appraisal as of July 24, 2001), *Parra et al. v. G. & S. Properties Ltd. et al.* (1969) 2 O.R. 346 (Ont. C.A.). In that case, the real estate transaction was tainted by fraudulent misrepresentations. As to their effect on the measure of the plaintiffs' damages, Evans, J.A. (as he then was) concluded,

The plaintiffs are entitled to be put in the same position they would have been in if the representations had not been made, but not to be put in the position they would have been in if the representations had been true. I am of the opinion that the proper measure of damages is the difference between the purchase price paid for the property and the actual value of the property at the time of sale: *Bedard et al. v. Junkin*, [1956] O.W.N. 287; *Hepting et al. v. Schaaf*, [1964] S.C.R. 100, 43 D.L.R. (2d) 168, 46 W.W.R. 161.

[42] According to this measure of damages, the plaintiffs would be entitled to recover \$1,000.00 for the Blessington Road Property. In my view, they would also be entitled to recover any consequential damages that were reasonably foreseeable, including transaction costs and expenses. With reference to the plaintiffs' Summary of Damages (see para. [39] above), these would include Purchase Fees/Disbursements (\$1,205.87).

[43] In my view, however, they would not include the damages claimed under the remaining heads of damages set out in the plaintiffs' Summary of Damages (see para. [39] above). Property Taxes (\$1,453.21) and Interest on Purchase Financing (\$3,553.95) would have been payable by the purchasers as long as they continued to own the property, whether or not the Shrike continued to nest on the property. There is no evidence that the purchasers have tried to put the Blessington Road Property on the market for sale. Costs for Grazing Cattle (\$10,513.00), Disposition of Cattle (\$2,800.00), and Cattle Liability Insurance (\$800.00) were not proven to the satisfaction of the court and, in any event are too remote.

[44] Taking all of these factors into consideration, the plaintiffs are entitled to consequential damages against the defendants in the aggregate amount of \$1,205.87.

Judgment:

[45] In the result, the plaintiffs are entitled to judgment against the defendants in the amount of \$2,205.87.

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Prejudgment/ Postjudgment Interest:

[46] In accordance with sections 127-129 of the *Courts of Justice Act (CJA)*, the plaintiffs are entitled to prejudgment interest on the amount of \$2,205.87, calculated from May 9, 2001 at the annual rate of 3%; and to postjudgment interest calculated in accordance with section 129 of the *CJA*.

Costs:

[47] If the parties are unable to agree as to costs, they may address brief written submissions (and any supporting information) to me at the Ottawa courthouse.

Released: June 24, 2005

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WALLACE HARRY HENNESSY and JUDITH NOREEN
KERKHOVEN

Plaintiffs

- and -

JOHN RUSSELL and ROYAL LEPAGE PRO ALLIANCE REALTY

Defendants

REASONS FOR JUDGMENT

SEDGWICK J.

*Bob Aaron is a Toronto real estate lawyer. www.aaron.ca ©Aaron &
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