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Sellers statement often results in expensive court proceedings

Back in the spring of 2004, Timothy and Cherese Scherbak signed a listing agreement to sell their property on Boland Ave. in Sudbury, using the services of Wendy Weddell and Re/Max Sudbury Inc. The Sellers Property Information Statement (SPIS), which they signed at the same time, resulted in years of litigation, hundreds of thousands of dollars in legal fees, and damages amounting to twice the value of the house.

Following an open house, Zoriana Krawchuk signed an agreement to purchase the house from the Scherbaks. The offer was not conditional on financing or home inspection, and came in at $10,100 over the $100,000 asking price.

Shortly after closing, Krawchuk discovered that the entire north foundation wall and the northern portions of the east and west foundation walls had settled and were continuing to sink into the ground below. The settling resulted in the failure of proper support for the floor joists and building above.

The city of Sudbury issued a work order requiring the problems to be rectified.

Correcting the foundation problem required lifting the home from its foundations, followed by excavation, removal and replacement of the cement basement floor, foundations and subsoil, and placing the house back on the new foundations.

Moving the home caused significant cracking of the interior finish in many areas, which required further repairs.

Fortunately, Krawchuk had purchased title insurance on the closing of her property, and the title insurer reimbursed her more than $105,000.

Krawchuk was still in the red on the deal. She estimated her total damages to be $191,414.94 and sued the sellers, the agent and Re/Max.

In the lawsuit, she claimed that the sellers were liable to her for breach of contract and misrepresentation. She argued that the problems with the foundation were hidden defects, which made the house uninhabitable, and that the Scherbaks had deliberately camouflaged them by attempting to level out the living and dining room floors back in 1995.

A significant component of the Krawchuk claim was based on the SPIS completed by the sellers. The SPIS is a controversial two-page form in widespread use throughout Ontario for residential transactions.

Its stated purpose is to protect sellers by disclosing correct information about the property to buyers.

On the SPIS form signed by the Scherbaks, the question "Are you aware of any structural problems?" was answered: "NW corner settled to the best of our knowledge the house has settled. No further problems in 17 years."

After an unusually long 12-day trial in June, Justice Robbie Gordon found that this statement was intended to inform prospective purchasers, not to mislead them.

Nevertheless, he accepted that Krawchuk relied on the truth and accuracy of the Scherbaks' statement in the SPIS, and that she would not have made the offer if she had known of the structural problems which existed. In so doing, the judge wrote that Krawchuk suffered damages by relying on the SPIS, and that the Scherbaks were responsible for negligent misrepresentation.

Krawchuk's claims against Weddell and Re/Max were dismissed.

When it came to assessing damages, the judge was critical of Krawchuk for incurring damages of more than $190,000 on a house that she bought for $110,100. The judge ruled that she should have sold the house for fair market value and sued for the difference.

Despite this, and even though Krawchuk had recovered more than $105,000 from her title insurer, on July 30, he awarded her additional damages of more than $110,700 against the Scherbaks, plus 4 1/2 years of interest on that sum, and court costs to be agreed upon, or decided later by the judge.

This litigation is only the latest in a series of court cases resulting from the use of the Sellers Property Information Statement. The form is badly drafted, difficult to interpret, and impossible to fill out properly without legal advice. Too often it results in very expensive court proceedings. It is a gold mine for litigation lawyers.

Sellers who sign the form, and agents who recommend it, are asking for trouble.

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Krawchuk v. Scherbak, 2009 CanLII 40556 (ON S.C.)

Date:	2009-07-30
Docket:	C-9209-05
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Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Decisions cited

- Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee, 1994 CanLII 120 (S.C.C.) [1994] 1 S.C.R. 359 113 D.L.R. (4th) 1 [1994] 4 W.W.R. 153 88 B.C.L.R. (2d) 273
- Toronto Industrial Leaseholds Ltd. v. Posesorski, 1994 CanLII 7199 (ON C.A.) 21 O.R. (3d) 1 119 D.L.R. (4th) 193 75 O.A.C. 263

COURT FILE NO.: C-9209-05

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SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ZORIANA KRAWCHUK	)))	James M. Longstreet, for the Plaintiff
Plaintiff	)	
	)	
- and -	)	
	)	
TIMOTHY SCHERBAK and CHERESE SCHERBAK, THE CITY OF GREATER SUDBURY, TROW ASSOCIATES INC., WENDY WEDDELL, RE/MAX SUDBURY INC., STANLEY MALECKI, FERDINAND NAGEL, DWIGHT ROY COCKBURN AND LINDA JUNE COCKBURN, DANNY GAMBLE and LINA GAMBLE and TARION WARRANTY CORPORATION	)))))))))	D. Peter Best, for the Defendants Timothy Scherbak and Cherese Scherbak Amelia M. Leckey, for the Defendants Wendy Weddell and Re/Max *(the action has been dismissed prior to trial with respect to all other defendants)*
	)	
Defendants	))	
	)	
	)	
	))	**HEARD:** June 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15 and 16, 2009

Robbie D. Gordon, S.C.J.

Introduction

[1] On June 30, 2004 the Plaintiff Zoriana Krawchuk completed the purchase of a home from Timothy and Cherese Scherbak. Both the Purchaser and the Vendors used Wendy Weddell as their real estate agent for the transaction. Wendy Weddell is employed by Re/Max Sudbury Inc.

[2] Unfortunately, the home turned out to have significant structural problems which resulted in Ms. Krawchuk spending considerable sums of money for its repair. This action has ensued to determine whether Ms. Krawchuk suffered damages and if so whether, and to what extent Mr. and Mrs. Scherbak, Wendy Weddell, Re/Max Sudbury Inc., or any of them, is liable to her.

[3] The Plaintiff s claims against The City of Greater Sudbury, Trow Associates Inc., Stanley Malecki, Ferdinand Nagel, Dwight Roy Cockburn, Linda June Cockburn, Danny Gamble, Lina Gamble, and Tarion Warranty Corporation have previously been dismissed.

Background

[4] In or about March of 2004, Mr. and Mrs. Scherbak (hereinafter referred to as the Scherbaks) attended an open house which was being conducted by Wendy Weddell (hereinafter referred to as Ms. Weddell). They were thinking of moving into a larger home. Although they were not fond of the house Ms. Weddell was then showing, they felt comfortable with her and hired her as their agent to assist in finding them a new home. On April 8, 2004 they signed an offer to purchase a property on Eric Court in Sudbury, Ontario, conditional upon completion of a home inspection. On the following day they waived that condition. Having contracted for the purchase of a new home, the Scherbaks went about selling their existing home at 189 Boland Avenue in Sudbury (hereinafter referred to as the Boland Property) and contracted with Ms. Weddell to act as their agent to market it. On April 13, 2004 the Scherbaks and Ms. Weddell met to sign, among other things, a listing agreement and a Sellers Property Information Sheet. Ms. Weddell gave the Scherbaks a list of things to do to make the home more attractive and scheduled an open house for Sunday, April 18.

[5] On that date, Zoriana Krawchuk (hereinafter referred to as Ms. Krawchuk) attended the open house and there met Ms. Weddell. Ms. Krawchuk walked through the house and had discussions with Ms. Weddell that resulted in her signing an agency agreement with Ms. Waddell to have her act as Ms. Krawchuk s agent for the purpose of acquiring the Boland Property. Ms. Weddell became a dual agent, acting for both Ms. Krawchuk and the Scherbaks.

[6] In the evening of April 18, 2004 Ms. Weddell presented the Scherbaks with Ms. Krawchuk s offer to purchase the Boland Property. The offer contained no condition for financing and no condition requiring the completion of a home inspection. The offer was for $10,100.00 more than the list price for the home. The Scherbaks accepted the offer and the parties began looking forward to the closing date of June 30, 2004.

[7] The Agreement of Purchase and Sale so formed was completed as scheduled. On closing, Ms. Krawchuk, through her solicitor, acquired a policy of title insurance through Stewart Title Guaranty Company.

[8] Ms. Krawchuk did not move into the house immediately. She took a few weeks to clean the home and to repaint and wallpaper some of the rooms. She eventually moved into the home on July 10, 2004. Within days of moving in she noted small accumulations of sand in the vicinity of the north wall of the crawlspace of the home, underneath the living room. After sweeping it up, she noted further sand to have accumulated a few days later.

[9] Upon investigation, it was determined that the entire north foundation wall and the northern portion of the east and west foundation walls had settled and was continuing to settle into the earth below causing significant damage to the foundation and failure of proper support for the floor joists and building above. The City of Sudbury was contacted and

it issued an order requiring that the problems be rectified.

[10] While having the foundation issue investigated, it was also determined that there were potential issues with the plumbing. According to Mr. Ed Chiesa P. Eng., the household sewage was emptying into a small pit beneath the floor of the crawlspace and then discharging into the municipal sewer system. The pit was covered over with a metal plate but did not have an airtight seal. Additionally, it is alleged by the Plaintiff that the house was prone to sewer backups.

[11] The correction of the foundation problem was a significant project requiring the removal of the home from the foundation, excavation of the cement floor, foundation, and subsoil, replacement of the subsoil with engineered fill, installation of new footings, foundation, and cement floor and replacement of the house on the new foundation. Moving the home caused significant cracking of the interior finish in many areas which in turn required repair. There remains substantial landscaping to be done to restore the property to the condition it was in prior to the construction beginning. Ms. Krawchuk estimates the total of her damages to be $191,414.94.

[12] She submitted a claim for damages to her title insurer and was eventually paid $105,742.32 by Stewart Title Guaranty Company.

[13] She maintains this action against the Scherbaks, Ms. Weddell, and Re/Max for the full amount of $191,414.94.

The Position of the Plaintiff

[14] Ms. Krawchuk maintains that the Scherbaks are liable to her for breach of contract or in the alternative, for fraudulent or negligent misrepresentation. Her position is that the problems with the foundation and the plumbing were latent defects known to the Scherbaks and that they deliberately camouflaged the defects, thereby committing fraud upon her. She further alleges that the defects rendered the home uninhabitable, dangerous, or potentially dangerous with the result that the Scherbaks were obligated to make disclosure. In the alternative she argues that the Scherbaks made fraudulent or negligent misrepresentations to her in order to induce her to enter into the agreement of purchase and sale.

[15] The Plaintiff also maintains that Weddell and Re/Max are liable to her for making fraudulent or negligent misrepresentations to her concerning the state of the foundation and plumbing, and are liable in negligence for failing to advise her to obtain a home inspection and failing to protect her interests by making the offer to purchase subject to a satisfactory home inspection.

[16] The Plaintiff has claimed damages for health issues which she says arose from the improper construction of the plumbing system. She has also claimed aggravated and punitive damages, urging the court to find that the Scherbaks acted deliberately and intentionally to mislead her.

[17] Ms. Krawchuk takes the position that she is entitled to retain the proceeds of her recovery from the title insurance company and also to collect her full measure of damages from the Defendants. Although this would amount to double recovery, she argues that she is entitled to double recovery under the private insurance exception.

The Position of the Defendants Timothy and Cherese Scherbak

[18] The Scherbaks take the position that this is a situation of caveat emptor and that any defects in the foundation were patent defects or in the alternative were latent defects which were not in any way concealed by the Scherbaks and which did not render the property uninhabitable, dangerous, or potentially dangerous. They argue that they made full and honest disclosure of all defects to the best of their knowledge and that they had experienced no problems with the foundation during their 17 years of ownership. They also argued that they had had no plumbing problems with the property for several years because the problem which had existed was resolved. As a result they did not feel compelled to disclose anything about the plumbing.

[19] In the event they are found liable to the Plaintiff, the Scherbaks are of the view that they should be indemnified by Ms. Weddell because they relied upon her to advise them of what did and did not need to be disclosed to prospective buyers.

[20] Finally, the Scherbaks argue if there is liability to Ms. Krawchuk, the appropriate measure of damages is not the cost of the repairs incurred by her, but the diminution of value of the property. They also argue that she should not be entitled to double recovery under the private insurance exception.

The Position of the Defendants Wendy Weddell and Re/Max Sudbury Inc.

[21] The Defendants Ms. Weddell and Re/Max take the position that Ms. Weddell acted properly at all times in discharging her duties as a dual agent. Ms. Weddell maintains that she relied upon the Scherbaks to make full and accurate disclosure to her and that she relayed all such disclosure to Ms. Krawchuk. If it is determined that the disclosure provided by the Scherbaks was not full and accurate, Ms. Weddell maintains that she had no reason to believe it was not. She further maintains that she advised Ms. Krawchuk fully of her rights and options and that Ms. Krawchuk made her offer of her own free will and with full knowledge of the risks inherent in doing so without a home inspection. In these circumstances, it is her position that she met her obligations to all parties.

[22] With respect to damages, Ms. Weddell and Re/Max join in the positions taken by the Scherbaks with respect to the proper measure of damages and the issue of double recovery.

Analysis

The Defects

[23] The defects of which the Plaintiff complains are two, namely the foundation and the plumbing.

[24] With respect to the foundation, it is has been conclusively established that the house was constructed on unsuitable soil. The footings were placed on subsoil comprised largely of peat, with the result that the footings and foundation walls settled into the earth to a degree far greater than acceptable. This in turn left the building above without suitable support. Significant repair work was required to cure this defect.

[25] With respect to the plumbing, the Plaintiff alleges two deficiencies: first that the sewage from the house emptied into a pit dug below the basement floor; and secondly that the house was prone to sewer backups.

[26] On the evidence before me, I am unable to find that the house sewage flowed constantly into the pit beneath the crawl space. The Plaintiff s allegation in that regard is based entirely on the evidence of Edward Chiesa, the professional engineer who discovered the pit while investigating the structural integrity of the home. He removed the steel plate from the floor of the crawlspace and observed feces and water in a pit thereunder. He asked the Plaintiff to deposit tissue into the upstairs toilet and to flush it. When she did, he observed further water and tissue to appear in the pit. Based upon these observations, he concluded that sewage was directed into this pit before entering the municipal sewer system. He did not undertake any further tests to confirm this conclusion. The representative of the City who testified also did not undertake any further tests to confirm Mr. Chiesa s conclusion. There was no evidence from the plumbing contractor who made repairs to the property that the plumbing system was as alleged by Mr. Chiesa.

[27] The Defendant Timothy Scherbak denied that the pit was a collection pit for raw sewage and suggested that the sewage seen by Ms. Krawchuk and Mr. Chiesa did not run directly into the pit but must have surfaced there as a result of a blockage of the sewer pipe.

[28] Without further and more definitive evidence, I am inclined to accept the evidence of the Defendant on this point. If the pit was serving as a collection area for raw sewage, it seems likely to me that there would be considerable odour not capable of being successfully masked by the use of a household air freshener. It also seems implausible to me that the Scherbaks would have allowed the children to use the crawlspace as a playroom or that they would have stored their personal possessions there if in fact there was raw sewage in this pit on a constant basis. It also seems unlikely to me that the City employees and contractors who worked on the sewerline would have failed to take note of such a defect.

[29] A more likely explanation is that raw sewage would, on occasion, back up into the pit due to a stoppage in the sewer line and that this is what was observed by Ms. Krawchuk and Mr. Chiesa. In this regard, I find that there was a defect in the plumbing system. The evidence of the Scherbaks disclosed that between the time they first acquired the home in 1986 and when they had the sewer line dug up and repaired in 1990, there were several occasions of what they termed sewer backup . I did not take this term to mean that sewage actually backed up into the finished portion of the home. I understood it to mean that there would be a backup of sewage or water into the pit in the crawlspace and that water and sewage would then cease to exit the plumbing fixtures in the home. After undertaking the repair of the sewer lines in 1990, these backups became much less frequent and were not perceived as much of a problem by them. However, their evidence differed on the frequency of the problem after 1990. Mr. Scherbak testified that after the work was done there were 2 to 4 such incidents, the last being some 12 to 18 months before the house was sold to Ms. Krawchuk. Mrs. Scherbak initially testified to the same effect but when presented with certain answers she had given on discovery agreed that the backups occurred Maybe once, twice a year maybe .

[30] I find that the Scherbaks continued to experience varying degrees of stoppages in the sewer line once or twice a year. What might appear to be significant differences in the Scherbaks evidence can, in my view, be explained by the severity of the backups experienced. On the evidence before me, I find that on 2 to 4 occasions after 1990 the severity of the

backups was such that assistance was required from the City to rectify the problem. On the remaining occasions, when backups were experienced, they were of a minor nature that would resolve on their own after a short while. I consider sewer backups of this nature and frequency to be a defect with the plumbing of the home.

The Plaintiff's Claim for Breach of Contract

[31] The agreement of purchase and sale was a standard form agreement used by the Sudbury Real Estate Association. It contained no warranties or guaranties as to the fitness of the property or the home.

[32] In the absence of contractual provisions as to fitness, the starting point for the analysis of the Plaintiff's claim for breach of contract is that as the purchaser it was her obligation to beware . The time tested adage of caveat emptor provides that with few exceptions, a purchaser takes existing property as he or she finds it.

[33] Ms. Krawchuk argues that the facts of this case take it out of the realm of caveat emptor for two reasons: first, the defects in question were latent defects which were deliberately concealed or camouflaged by the Vendors rendering their actions fraudulent; and secondly, that the defects were such as to render the home uninhabitable, dangerous or potentially dangerous and as such required disclosure by the Scherbaks. I will deal with each of these arguments in turn.

[34] Defects in property may be either patent or latent . A defect which is readily apparent to someone exercising reasonable care in their inspection of a property is said to be patent. A defect which is not readily apparent on such an inspection is said to be latent. Patent defects need never be disclosed to purchasers because they are there for the purchasers to see for themselves. Latent defects, however, are treated somewhat differently. Latent defects cannot be concealed by the Vendors so as to prevent their discovery by purchasers. In addition, even if not concealed by the vendor, if a latent defect is known to the vendor and is such that it makes the property uninhabitable, dangerous, or potentially dangerous, it must be disclosed to purchasers (See *McGrath v MacLean* (1979) 22 O.R. (2d) 784).

[35] The Defendants argue that the defects in question were patent. In this regard, they point to the slope in the floors in the upstairs front bedrooms and argue that it would have been obvious to anyone inspecting the property that such a slope in the floors point to a problem with the foundation. They point also to the filled crack on the exterior west wall of the home and the filled crack on the exterior of the east wall of the home as indicators of structural problems that would alert a person inspecting with reasonable care to the possibility of structural issues. They point to the repair work that was visible in the northwest corner of the crawlspace as indicative of structural problems that ought to have resulted in further investigation by the Plaintiff. Lastly, they point to the brick and sloping block work at the exterior of the northwest corner of the house as indicative of a structural problem with the home. With respect to the plumbing, the Defendants take the position that although the sewer backup might be a latent defect, they did nothing to conceal its existence, and that it did not render the home uninhabitable, dangerous, or potentially dangerous.

[36] The Plaintiff admitted to noticing the sloped floors, the foam filled crack in the northwest corner of the home, and the sloping brick and block work at the exterior of the northwest of the home when viewing the it. She did not notice the crack in the exterior of the east wall and believed it did not exist except perhaps as a hairline crack when she looked at the property; she did not notice the filled crack in the exterior of the west wall she testified that there was chalk graffiti all over the wall that made it indiscernible. The defects noted by her were all patent defects which Ms. Krawchuk was perfectly willing to accept as part of her new home. I find that the cracks which she did not notice were also patent defects which she was obliged to accept. To the extent that these patent defects were indicative of an underlying structural problem, I find that she inquired of Ms. Weddell and was advised that the house had settled, been repaired and that there had been no further problems for 17 years. In my view, she was entitled to accept that explanation as true and was not required to continue her inquiry to further determine the cause of those patent defects. The structural defects subsequently found by her to exist must be considered latent.

[37] With respect to the plumbing defect, it is my view that a reasonably careful inspection of the property would not have revealed this defect and as such it too was latent.

[38] Having established the defects to be latent, can it be said that they were concealed by the Scherbaks for the purpose of deceiving prospective purchasers? The Plaintiff points to several actions of the Scherbaks in asking the court to answer this question in the affirmative, namely:

1. In late 1991 and early 1992, the Scherbaks undertook a renovation of the eastern half of the basement of the home. They removed the panelling in the family room and discovered the very significant sinking of the foundation and its rotation in a northward direction. They then did a very perfunctory repair of the crack in the east wall, built a second frame wall over the inside of the foundation, insulated it and drywalled over it. They did not apply for a building permit for this renovation.

2. In 1995 they had hardwood floors installed in the living room and dining room of the home. When the installers arrived they advised that due to the slope of the floor, the new flooring could not be installed unless work was done to first level the sub-floor. The Scherbaks authorized that work with the result that the living room and dining room of the home was made to appear level by virtue of the work done to the sub-floor.

3. When the open house was held, the exterior west wall of the home was substantially covered in chalk graffiti which made it hard to see or appreciate the large filled crack in the brickwork.

4. The Vendors had affixed an air freshener to the underside of the pit cover to mask the odour that would emanate from the pit.

[39] From these factors, the Plaintiff asks that I find that the Scherbaks were aware of the significant structural problems affecting the home and the plumbing problem of the home and that they took steps to conceal those defects so that they would not be discoverable by a reasonably careful inspection. I am not able to accept this argument.

[40] I accept that the Scherbaks, by virtue of their renovation work, were aware that the problems with the foundation were much greater than might be appreciated by observing what was patently wrong with the home. However, I am unable to find that they concealed these problems for the purpose of misleading prospective purchasers. Indeed, I accept the evidence of the Scherbaks that they did not experience any trouble with the foundation from the time they became owners of the property in 1986. I accept their evidence in this regard for the following reasons:

1. There was no evidence of ongoing settlement in the interior finish of the home. In particular, there was no evidence of cracks in the drywall, no displaced trim and no cracked windows.

2. The evidence of Robert Bruce Little, father of Cherese Scherbak, who had helped the Defendants move into the home initially. He had noted the various patent defects in the home but had noted no change in the home over the ensuing 17 years. Mr. Little struck me as a straightforward and honest man.

3. The Scherbaks had undertaken significant renovation work to the property, both on the main floor and in the basement. It does not make sense that they would undertake such renovations if the house was continuing to settle during their ownership. To have done so would risk the ruination of the renovations.

4. The Scherbaks struck me as decent, hardworking and honest people.

[41] When one considers that the renovation work to the family room was done at least 12 years before the home was shown by them for sale, it is a fair assumption that the work was done not to conceal the problem from prospective purchasers, but to improve the insulation and upgrade the interior of the room. Similarly with the work done to level the sub-floor of the living and dining rooms; this was work done several years before the property was listed for sale and cannot reasonably be found to have been done to conceal the foundation problem. Had that been the intention of the Scherbaks, no doubt there would have been a much less expensive floor cover that could have been installed to the same effect. I am content to find that both of these renovations were done with a view to improving the home for the enjoyment of the Scherbaks.

[42] With respect to the exterior west wall of the home, I do not find that the Scherbaks had their 12 year old daughter draw all over the wall with a view to concealing the crack. Although I accept that the crack was concealed somewhat by the graffiti, it had been repaired and there is no evidence that it had worsened or required further repair over the term of their ownership. Given my acceptance that the Scherbaks had no had difficulty with the foundation during their ownership, there was no reason for them to try to conceal this crack.

[43] The issue of the plumbing has given me rather more concern. The explanation provided by the Scherbaks for having located an air freshener beneath the sump pit cover was that it was to assist in reducing the odour of urine from their dog, who spent a good deal of time in the crawlspace and had a bladder problem. I question the logic of this. It makes little sense to have placed the freshener under the cover for a dog which resided above the cover. The more logical inference is that the air freshener was placed under the cover to mask odour coming from the pit. Indeed, Mrs. Scherbak provided this explanation on discovery. Whatever the reason for the location of the air freshener, I am not satisfied that it was placed there with the intention of concealing the defect from Ms. Krawchuk. I accept the evidence of the Scherbaks that they had been placing an air freshener under the cover from time to time for several years in order to eliminate odour that would occur from time to time. I accept that their intention was to freshen the air, and not to conceal the defect.

[44] I should also comment on the evidence of Mrs. Toner-Lindsay who lives directly to the east of the Boland Property. She has lived next door since 1976 and testified that there was often a large crack to the exterior east wall of the Boland Property, regularly being repaired. She said that at one time, the crack was as wide as 10 or 12 inches and had been stuffed with insulation. She related that it was common knowledge in the neighbourhood that the Boland Property and another house to the west of it, were built on a bog and had sunk into the ground. She had no specific recollection of the Scherbaks having undertaken the repair of the east wall, and stated that her recollection was more general of it having to be done every year. She advised that the only time the wall looked fine was immediately after its repair and it would remain repaired until the following spring when the bog shifted and the crack would open anew. She only remembers one occasion when she saw two men working in the vicinity of the crack and assumed that they were repairing it. On other occasions she would go to work in the morning and come home later in the day to find that repair work had been done.

[45] This evidence would seem to be in direct contradiction of the evidence given by the Scherbaks that aside from putting spray foam into the crack shortly after taking ownership they had no repair work done to the crack on the east wall of the foundation. If I were to accept Ms. Toner-Lindsay s evidence, the clear inference would be that the Scherbaks had in fact experienced difficulties with the foundation of the home during their ownership of the property.

[46] I do not doubt that Ms. Toner-Lindsay was stating what she believed to be the truth. I have no doubt that she at some time saw persons working on the east foundation wall of the home making a repair to the crack. Indeed, I accept that for a time, at least, the east foundation wall was requiring repair every spring. One must recall, however, that she was resident next to the Boland Property for some 10 years before the Scherbaks became the owners. During that period of time, it is clear that there had been substantial settling of the house that would have required repair. On the facts, it is likely during this period of time that the cracking was most pronounced. She no doubt formed the impression, from her own observations and from discussions with her neighbours, that the house was built on a bog and that the foundation was unsound. Once that impression was formed, she no doubt also formed the impression that repair would be required every spring and that any activity she noticed at the east side of the house was related to the repair of the crack. Those would be reasonable inferences to draw from her knowledge of the property gleaned over her initial 10 years of ownership of the neighbouring property. However, they are not necessarily accurate inferences and in this case, given the testimony of the Scherbaks and the lack of physical evidence confirming such ongoing repair, her evidence does not persuade me, on a balance of probabilities, that ongoing repairs were made by the Scherbaks.

[47] Let me now deal with the argument made by the Plaintiff that there was an implied contractual duty on the Scherbaks to disclose defects known to them, and which made the property uninhabitable, dangerous, or potentially dangerous. The requirement for liability in these circumstances is proof on a balance of probabilities that the Vendors knew of the defect *and* knew that the defect made the property uninhabitable, dangerous, or potentially dangerous. Given my finding above that the Scherbaks experienced no problems with the foundation over their period of ownership, and given that they resided on the property for over 17 years without incident and raised their children there, it would be incongruous to then find that they knew the property to be uninhabitable, dangerous, or potentially dangerous. Indeed, their actions indicate the opposite. With respect to the plumbing defect, the evidence does not suggest that it rendered the home uninhabitable, dangerous or potentially dangerous.

[48] In the end, I am unable to find that the Scherbaks are liable to Ms. Krawchuk for breach of contract.

The Plaintiff s Claim for Fraudulent Misrepresentation

[49] When the Scherbaks met with Ms. Weddell on April 13, 2004 to sign the listing agreement for the Boland Property, one of the documents they signed was a Seller Property Information Statement (referred to herein as the SPIS). The SPIS is a two page document, the stated purpose of which is to protect sellers by establishing that correct information concerning the property is being provided to buyers. It is made up of a series of questions posed to the sellers, to which they are asked to respond with a yes , no , unknown or not applicable . There are three main categories of questions, the first under the heading of General , the second under the heading of Environmental , and the third under the heading of Improvements and Structural . On each page there is room to insert additional comments should the sellers wish to do so.

[50] The Plaintiff alleges that the SPIS completed by the Scherbaks misrepresented the structural integrity of the home. In particular, she points to question #1 under the heading Improvements and Structural and the answer provided. The question is Are you aware of any structural problems? The answer given was as follows: NW corner settled to the best of our knowledge the house has settled. No further problems in 17 years.

[51] The Plaintiff also alleges that the SPIS misrepresented the condition of the plumbing in the house. In particular, she points to question #11 under the heading Improvements and Structural and the answer provided. The question is Are you aware of any problems with the plumbing system? the answer given was as follows: No.

[52] In order to establish that the Scherbaks made a fraudulent misrepresentation, Ms. Krawchuk must establish the following: *(1)* that they made a false representation of fact*; (2)* that they knew the statement was false or were reckless as to its truth; *(3)* that they made the representation with the intention that it would be acted upon by Ms. Krawchuk; *(4)* that Ms. Krawchuk relied upon the statement; and *(5)* that Ms. Krawchuk suffered damage as a result.

[53] I accept that the representations of fact made by the Scherbaks with respect to the foundation were false in the sense that they were incomplete. Clearly, the structural problems were not restricted to the northwest corner of the home and were much more serious than disclosed. With respect to the plumbing issue, I am similarly satisfied that the misrepresentation was false. On the facts as I have found them, the Scherbaks were experiencing varying degrees of sewer backup once or twice a year. Their indication that there were no plumbing issues with the home was incorrect.

[54] With respect to the second element necessary to establish fraudulent misrepresentation, I am content that the Scherbaks knew their statements with respect to the structure and plumbing were false or were reckless as to their truth. Notwithstanding my finding that Scherbaks had not experienced problems with the foundation during their period of ownership, it had to have been clear to them (given their observations of the foundation during their renovation work) that there were significant problems with the foundation. The photographs speak for themselves in that regard. Clearly, they knew that the structural problems were not limited to the northwest corner of the home and just as clearly, they knew that the repair that had been done to the foundation did not represent good building practise. Indeed, Timothy Scherbak admitted as much on cross-examination. With respect to the plumbing, the Scherbaks knew that on a fairly regular basis, water and sewage failed to drain from their property. Although this may not have been much more than a minor nuisance to them, it was a deficiency in the plumbing of which they were aware.

[55] The third element required to establish fraudulent misrepresentation is that the Scherbaks made the representations with the intention that they would be acted upon by Ms. Krawchuk. This is the element which elevates the misrepresentations to the sphere of fraud, as it requires that the statements be made for the purpose of misleading Ms. Krawchuk. I am not satisfied that this element has been established by the Plaintiff. As previously indicated, I accept the evidence of the Scherbaks that they experienced no difficulties with the foundation during their ownership. When I review the SPIS as a whole, it is apparent that they were attempting to be forthright in their disclosure, indicating as they did the encroachment of the driveway, the defects in the dishwasher, fan, and electrical outlet, and the disclosure of occasional spring run-off in the crawlspace. In all of the circumstances, I accept that the Scherbaks meant for their statement with respect to the foundation to inform prospective purchasers, not to mislead them. With respect to the plumbing, I accept that the defect was not considered serious by them and that the more significant problems that had first existed had been resolved.

[56] Given this finding, there is no liability owing by the Scherbaks to Ms. Krawchuk under her claim of fraudulent misrepresentation.

The Plaintiff s Claim of Negligent Misrepresentation

[57] As an alternative to fraudulent misrepresentation, the Plaintiff claims that the Scherbaks are liable to her for negligent misrepresentation with respect to the representations made in the SPIS relative to the structure and the plumbing.

[58] To establish negligent misrepresentation, the Plaintiff must establish on a balance of probabilities the following elements: *(1)* a duty of care owed to her by the Scherbaks; *(2)* a false statement by the Scherbaks; *(3)* negligence on the part of the Scherbaks as to the truth of the statement; *(4)* reasonable reliance by Ms. Krawchuk in the truth of the statement; and *(5),* Ms. Krawchuk suffering damage as a result.

[59] In the case of *Mariani v Lemstra* [2004] O.J. No. 4283 the Ontario Court of Appeal intimated that where the parties were bound by a standard agreement of purchase and sale that explicitly excluded reliance upon any representations, it would be difficult to see why a duty of care in tort would not be excluded as well. In the case before me, however, there exists more than the standard form agreement of purchase and sale. In particular, there exists the SPIS, which was prepared by the sellers specifically for the purpose of providing correct information to prospective buyers of the property. This SPIS was specifically referred to in Schedule A to the agreement of purchase and sale as follows: Included with the offer is property information statement. Although I accept that by virtue of the wording of the SPIS, its terms do not gain the status of warranties when referred to in the agreement of purchase and sale, it is clear that the Scherbaks in completing the SPIS were making representations about the property that were meant to be disclosed to prospective buyers and that it would be reasonable to expect such buyers to rely upon those representations. In such circumstances, I am content that there existed a special relationship between these sellers and Mr. Krawchuk as buyer such as to give rise to a duty of care.

[60] The second element requires that there be a false statement by the Scherbaks. As outlined in my review of fraudulent misrepresentation, I am satisfied that there were false statements made by the Scherbaks relative to the structure of the home and the plumbing.

[61] The third element requires there to have been negligence on the part of the Scherbaks as to the truth of the statements. This requires consideration of whether the Scherbaks

failed to exercise the standard of care that a reasonably prudent person would have exercised in similar circumstances. In my view, the Scherbaks were negligent in the manner in which they answered the questions relating to structural problems and plumbing. Notwithstanding that they had not experienced any difficulties with the foundation during their period of ownership it was known to them that there had in fact been substantial settling of the entire north wall of the foundation. Although whatever repair had been made had resolved the issue during their period of ownership, it was apparent at least to Mr. Scherbak that the repairs did not accord with good building practices. I would venture to say that this would be obvious to almost anyone viewing the state of the foundation as it existed in the photographs taken by the Scherbaks during their renovation work in 1991/92. Although I accept that the representation was not made to mislead Ms. Krawchuk, certainly it was not full, frank, and accurate disclosure of the structural problems of the house. In my view, a reasonably prudent person in similar circumstances would have disclosed the following: *(1)* that there had been significant settlement of the entire north wall of the foundation and the northern portion of both the east and west walls of the foundation prior to their becoming owners of the property; *(2)* that although there had not been further settlement noted during their 17 years of ownership, they are unaware of what repair work was done to address the settlement before they became owners; *(3)* that in observing the northern portion of the east wall of the foundation, there was reason to believe that the foundation may not have been properly repaired; and *(4)* buyers should satisfy themselves that the foundation is sound. Obviously, the Scherbaks representation with respect to the structure fell far short. Negligence is established. It is also my view that the Scherbaks were negligent in indicating that there were no problems with the plumbing. Reasonably prudent persons in their circumstances would have disclosed that once or twice per year they experienced a sewer line blockage that prevented water and sewage from discharging into the municipal system.

[62] The fourth element requires Ms. Krawchuk to have placed reasonable reliance on the truth of the statement. Her evidence was that upon enquiry of Ms. Weddell about the sloping floors in the bedroom, she was told that the house had settled, been fixed and that there had been no problems in 17 years. She also testified that prior to signing the offer to purchase, Ms. Weddell reviewed the SPIS with her, and that the answer relative to the structural repair was provided to her and that she was able also to read it. Ms. Weddell s evidence was somewhat different in that her recollection was that the SPIS had been given to Ms. Krawchuk to review some time before the offer was ever prepared and that it was reviewed with her again while the offer was being reviewed for signature. Whichever version of the evidence is accepted, it is clear that prior to signing the offer to purchase Ms. Krawchuk had reviewed the SPIS and in particular the information concerning the structure. Ms. Weddell testified that Ms. Krawchuk had inquired about the sloping floors and seemed content with the answer that it was related to the settling of the house. On the evidence, I have no difficulty in accepting that Ms. Krawchuk reasonably relied upon the truth and accuracy of the Scherbak s statement as contained in the SPIS and as related to her by Ms. Weddell. I accept as well that Ms. Krawchuk relied upon the Scherbaks indication that there was no issue with the plumbing. I accept her evidence that she would not have made the offer she did if she new that sewer backups were a problem with this home or had she known of the structural problems which existed.

[63] As a result of her reliance upon the representations of the Scherbaks, Ms. Krawchuk offered to and did buy the house. As we now know, the footings and foundation were of little use and required replacement. There is no doubt that Ms. Krawchuk suffered damages as a result of her reliance on the Scherbak s representation relative to the structure such as to satisfy the fifth element of negligent misrepresentation. On the evidence before me there was substantial plumbing work completed incidental to the replacement of the foundation and floor of the basement. I am content that even had there been no problem with the foundation she would have incurred those expenses in an effort to resolve the plumbing issue. Although I understand that she suffered a further sewer backup after the completion of all of the renovation work I am not satisfied that such backup related to the problem which existed at the date of the sale, nor was I provided with adequate evidence to quantify any loss that was sustained.

[64] Accordingly, I find that the Scherbaks are liable to Ms. Krawchuk for negligent misrepresentation.

The Plaintiff s Claim against Wendy Weddell and Re/Max

[65] Wendy Weddell acted as a dual agent in the transaction under consideration, which is to say that she acted as agent both for the Scherbaks as vendors and for Ms. Krawchuk as the purchaser.

[66] Ms. Krawchuk alleges that Ms. Weddell fraudulently or negligently misrepresented to her the condition of the home s structure and plumbing. She also alleges that Ms. Weddell was negligent in failing to advise her to obtain a home inspection and to make her offer conditional on same.

[67] I am unable to find that Ms. Weddell fraudulently or negligently misrepresented the condition of the house in any respect. Like Ms. Krawchuk, she noticed the sloping of the bedroom floors and made enquiries of the Scherbaks concerning the same. She was advised by them that the house had settled and been repaired and that there had been no further problems for 17 years. I am satisfied that she relayed to Ms. Krawchuk what was told to her by the Scherbaks. In all of the circumstances, there was no reason to doubt the veracity of their representations. Certainly she cannot be said to have had additional information about the foundation that the Scherbaks had not disclosed to her. Given the answer provided by the Scherbaks to her inquiry, there was no obligation on Ms. Weddell to inquire further or independently of them to discern what if any other structural defects might exist. I am not satisfied that she intentionally withheld any information from Ms. Krawchuk with the intention of misleading her. I am not satisfied that she was negligent in providing information to Ms. Weddell.

[68] With respect to the allegation that Ms. Waddell was in breach of her obligations to Ms. Krawchuk in failing to properly advise her concerning the offer to purchase and obtaining a home inspection, it is necessary that factual findings be made as to how the offer and its terms arose.

[69] Ms. Weddell is a licensed real estate broker. She obtained her licence to sell real estate some 33 years ago. She obtained her broker s licence over 20 years ago. She restricts her work to residential real estate and on average, is involved in the completion of over 30 real estate transactions each year.

[70] The testimony offered by Ms. Krawchuk and Ms. Weddell differed in several respects. I do not attribute that to either party attempting to deceive the court or distort the facts purposely. Rather, I attribute it to their respective roles in the transaction and the perception of events that each might reasonably be expected to have. With respect to Ms. Weddell, given the number of clients with whom she deals on an annual basis, I would not necessarily expect precise recall of all of her interactions with Ms. Krawchuk. However, I accept that she has established certain practices in dealing with clients and in having documents explained to and signed by them that were likely followed in this instance. With respect to Ms. Krawchuk, I would expect that she may better recall the specifics of her interaction with Ms. Weddell given that this was her first home purchase and she was quite obviously excited about it. However, I would expect as well that her recollection of events might be affected somewhat by the losses she has suffered. She no doubt feels victimized by the events that have unfolded. It is entirely natural that her perception of what took place would be affected by that.

[71] Ms. Weddell testified that before having Ms. Krawchuk sign the offer to purchase she had her sign, among other things, a document entitled Confirmation of Co-operation and Representation which had her confirm that Ms. Weddell was acting in the role of a dual agent. Ms. Weddell stated that she explained to Ms. Krawchuk that dual agency meant that she would be working for both her and the Scherbaks, that she could not favour one over the other, that she could not disclose confidential information given to her by either of them, that she would act honestly and with fairness, that she would provide as much information about the property as she possessed, that she would be unable to tell her what amount to offer, and that she would be unable to advise the Scherbaks of what amount to accept.

[72] Ms. Krawchuk testified that she was asked to and did sign this document, but that it was not explained to her except to the extent that she was told that Ms. Weddell would be acting as agent for both parties.

[73] Although I accept that Ms. Weddell did not go through this document line by line with the Plaintiff, I find that she explained the dual agency arrangement in broad strokes such that her role was understood by Ms. Krawchuk.

[74] Ms. Weddell had, prior to the open house, assembled the Offer to Purchase document ultimately used. She had included in Schedule A two conditions for the benefit of the Purchaser, namely, a condition to allow a period of time for the purchaser to obtain financing and a condition that allowed the purchaser an opportunity to obtain a satisfactory home inspection. I accept that these are conditions common to most Offers to Purchase and that initially at least, it was not expected that this offer would be any different. However, the open house went extremely well with many people and agents expressing an interest in the property. When it came time to prepare and sign an offer with Ms. Krawchuk, I accept that Ms. Weddell was expecting to receive several offers on the home. I accept that she advised Ms. Krawchuk of this fact and that they discussed how to best ensure that her offer would be accepted.

[75] The first item of discussion was the price to be offered. As a result of her role as dual agent, Ms. Weddell was not able to tell Ms. Krawchuk what amount to offer. However, she was able to advise Ms. Krawchuk of the factors that might impact on the amount she should offer. In this respect, I accept that she advised Ms. Krawchuk that multiple offers were expected, that in such situations the Vendors would be likely to accept one of the offers made without making any counter-offers, and that Ms. Krawchuk should offer to buy for the most she was prepared to pay. I accept that she advised Ms. Krawchuk that it would not be unusual for an offer to exceed the listing price by as much as $10,000.00 in these circumstances and that she should consider a price that was not an even multiple of $1,000.00 so that it would stand out somewhat from most standard offers. Based on this information, Ms. Krawchuk indicated that she would offer the sum of $110,100.00. I see no breach of Ms. Weddell s duty towards Ms. Krawchuk in the manner in which the offer price was determined.

[76] With respect to the conditions, Ms. Krawchuk testified that although Ms. Weddell explained the conditions as contained in Schedule A of the Offer to Purchase, she did not explain how or why the conditions might be of benefit to her. She testified that she was unconcerned about the financing condition as she already had her financing in place. The result was that the financing condition was deleted. She testified that she wanted the inspection condition left in but removed it on the advice of Ms. Weddell who she says advised

her that the Vendors would not accept any conditions.

[77] Ms. Weddell confirms that Ms. Krawchuk wished to have the inspection condition left in the agreement but that she was instructed to remove it when she advised Ms. Krawchuk that if there was another offer made without conditions, the Scherbaks might accept that offer over hers.

[78] I accept the evidence of Ms. Weddell on this issue. I am satisfied that Ms. Krawchuk knew of the value of having an inspection completed. Indeed, had she not known or understood this, it would have made no sense for her to have wanted the condition included initially. I accept that Ms. Krawchuk understood multiple offers were expected and that the Scherbaks were likely to accept the best offer. I also accept that Ms. Krawchuk understood that the best offer would be defined by two factors: the price and the number and nature of the conditions. I find that she was fully and properly advised by Ms. Weddell as to what would make her offer most attractive and she decided to accept Ms. Weddell s advice because she had fallen in love with the house. Given the contents of the SPIS which had been reviewed with her, and the manner in which the house presented, it was not unreasonable for her to have done so.

[79] In all of the circumstances I am not satisfied that Ms. Weddell breached the duty of care she owed to Ms. Krawchuk. As such, no claim against her is made out.

The Cross-claim of Timothy and Cherese Scherbak Against Wendy Weddell and Re/Max Sudbury Inc.

[80] As with Ms. Krawchuk, I am satisfied that Ms. Weddell explained the concept of dual agency to the Scherbaks such that they understood it.

[81] The claim of the Scherbaks against Ms. Weddell is based upon the advice they obtained from her relative to the disclosure contained in the SPIS. It is their position that Ms. Weddell ought to have inquired further of them concerning the structural and plumbing problems or should, through enquiry, have made certain that they were disclosing all of the information that was required.

[82] It is clear that the Scherbaks understood the nature and role of the SPIS. They knew that they were to fill it out accurately to the best of their knowledge. When they were uncertain of how to answer a question they discussed the question with Ms. Weddell and then composed their answer. The answers composed were consistent with what they had disclosed previously to Ms. Waddell and she had no reason to question the accuracy of the information.

[83] I accept that the information recorded in the SPIS was consistent with Ms. Weddell s visual inspection of the property coupled with the information she had obtained from the Scherbaks. I cannot see how she owed them a duty to inquire about issues she could not reasonably be expected to know about.

[84] With respect to the plumbing issue, I accept that it had not been considered an issue to the Scherbaks since corrective measures were taken by the City. I find that they disclosed the original problem to Ms. Weddell and advised her that there had not been problems since. In the circumstances, it was appropriate that they be advised that it was not an item that required disclosure. I am not satisfied that the Scherbaks disclosed the ongoing backups they were experiencing with Ms. Waddell. Had they done so, I have little doubt that she would have insisted on its inclusion in the SPIS.

[85] For these reasons, the cross-claim of the Scherbaks must be dismissed.

Damages

[86] As I have determined that the Scherbaks are liable to Ms. Krawchuk for negligent misrepresentation, it falls to determine the appropriate measure of damages. As with any other tort, the general rule is that damages should, to the extent possible, restore the aggrieved party to the position he or she would have been in had the defendant properly discharged his duty of care.

[87] In the case of *Toronto Industrial Leaseholds Limited v Posesorski* et al 1994 CanLII 7199 (ON C.A.), (1995) 21 O.R. (3d) 1, the Ontario Court of Appeal wrote as follows:

> In order to decide the appropriate measure of damages in a particular case one must keep in mind the basic principle of mitigation. If an injured party can prevent a loss or make it less serious by taking reasonable steps, he, or she is required to take them. Professor Waddams in *The Law of Damages,* 2nd ed. (1991), para. 15.70 puts the same basic principle concisely:
>
> A Plaintiff is not entitled to recover compensation for loss that could, by
>
> taking reasonable action, have been avoided.
>
> On the other hand, however, so long as a party conducts himself or herself reasonably after being wronged, losses flowing from that wrong will be recoverable. The crucial issue is whether or not the injured person has acted reasonably.
>
> If it is reasonable to sell a property at fair market value in order to mitigate losses, then a party is only entitled to recover the difference between the price paid for the property and its fair market value at the time the duty to mitigate arises. This is the appropriate measure of damages in cases where it is reasonable to sell a property. This is the measure of damages applied in *Messineo v. Beale.* A Plaintiff should not be allowed to speculate at the risk of the defendant.

[88] In the case before me, Ms. Krawchuk purchased the property for $110,100. She has spent or will in the future spend over $190,000 to place the property into the condition she believed it to be when she purchased. Having regard to the duty to mitigate as expressed above, she cannot be said to have acted reasonably in so doing. What would have been reasonable is to sell the property at its fair market value in order to mitigate her loss and look then to recover the difference between the price paid for the property and its fair market value when the duty to mitigate arose. In addition, it would be appropriate that she recover those costs which would reasonably be foreseeable in taking that course of action.

[89] The information available in this respect is limited but sufficient for me to make a finding. Ms. Krawchuk, in her claim against Stewart Title Guaranty Company, accepted a settlement of $105,742.32 the premise of which was set out in a letter from Stewart Title Guaranty Company to Ms. Krawchuk dated October 17, 2005 (Tab 55 of Exhibit 1):

> Your Policy amount is $110,100.00, this is what you paid for home. From this amount we subtracted the value of the land itself, without the house on it. The land value was estimated at $41,000.00 by Appraisals North Realty Inc., certified appraisers. Then we added the cost of removing and remediating the soil to allow for building, totalling $29,318.00 and the cost of the Terraprobe report, which cost $4,952.54. Then we added your quote for moving expenses of $2,371.78. Therefore, the calculation is $110,000.00 - $41,000.00 + $29,318.00 + $4,952.54 + $2,371.78 = $105,742.32.

[90] This letter was admitted as evidence at trial for the truth of its contents. I am content to accept this letter as an appropriate summary of damages properly claimable by the Plaintiff against the Scherbaks.

[91] In my view, it was also reasonably foreseeable that Ms. Krawchuk would suffer some stress and emotional upset as a result of what took place. I accept that she felt a great deal of stress and anxiety as a result of this misfortune. However, had she mitigated her damages by selling the property, she may well have avoided a good deal of that stress. In addition, although there was evidence of migraine headaches brought on as a result of the stress, there is also a fairly long history of such headaches before this occurrence. I am not satisfied that any health problems experienced by the Plaintiff resulted from methane gas escaping from the plumbing system. In all of the circumstances, it is appropriate that her damages for emotional upset and loss of health be assessed in the amount of $5,000.

[92] The Plaintiff has also claimed aggravated damages, punitive damages and exemplary damages. Given my finding that the Scherbaks did not intentionally mislead Ms. Krawchuk it is not appropriate that such damages be ordered in this case.

The Issue of Double Recovery

[93] It is a long established principle of tort law that although an aggrieved person should be compensated for the full amount of his or her loss, that person should be entitled to nothing more. It is in this context that the notion of double recovery arises. The Defendants in this case argue that since Ms. Krawchuk has been paid the full amount of her compensable damages by her title insurer, to make a further award in her favour would amount to double recovery and run afoul of this established tort principle.

[94] The Plaintiff asks that I recognize her right to double recovery in this case as an exception to the general rule. In particular, she asks that I look to the rationale of the trilogy of cases decided by the Supreme Court of Canada and reported as *Cunningham v Wheeler,* 1994 CanLII 120 (S.C.C.), [1994] 1 S.C.R. 359 and the private insurance exception espoused therein. In those cases, the Court held that to qualify for the private insurance exception, the plaintiff must show that the benefits received were in the nature of insurance in the sense that some type of consideration was given up by the plaintiff in return for the benefit.

[95] The Plaintiff takes the position that she paid a premium for the policy so that clearly there was consideration given up by her in return for the benefit received. She argues that

the Scherbaks should not be allowed to benefit from her wisdom and aforethought in taking this insurance.

[96] The Defendants argue against the application of the private insurance exception on two grounds. The first is that the consideration for the benefit was not in the nature of that contemplated by the Supreme Court of Canada in the trilogy of cases above referred to; the second is that the policy was not issued to cover a future unforeseen event but to cover an existing defect.

[97] I am not able to give effect to either argument. Although the Supreme Court of Canada in *Cunningham v Wheeler,* supra, does speak of consideration for the benefit as amounting to a private act of forethought and sacrifice (paragraph 83), a requirement of personal prudence and deprivation (paragraph 93) and the benefit being a small reward for the self-denial which the heavy cost of premiums represent for the individual assured (paragraph 110), I do not interpret the judgment as making sacrifice and substantial self-denial a prerequisite for the application of the exception. To the contrary, this issue was considered and resolved by the Court specifically in paragraph 93 where it held as follows:

> The substantive concern is, I think, inextricably linked with the evidentiary requirement. Once the evidentiary requirement is met, the substantive concern for personal prejudice and deprivation will be satisfied. If the Plaintiff can show that he or she has paid for the benefits in the nature of insurance against unemployment akin to private insurance, that same proof will also demonstrate personal prudence and deprivation. Indeed such a deprivation for an employee will often be proportionately very much higher than that of the executive or professional person acquiring personal insurance.

[98] I can see no reason why this principle ought not to be extended to the situation before me. Ms. Krawchuk has met the evidentiary requirement of establishing that she paid for the policy and that payment also satisfies the substantive concern for personal prejudice and deprivation. The Defendants have argued that there was really no cost to her because she realized savings in excess of the policy premium by not having to incur the cost of a new survey and various off title searches. I disagree. Ms. Krawchuk had various options open to her to complete this transaction. She could have had her solicitor certify title to her without title insurance, she could have had her solicitor provide her with a limited opinion on title without title insurance, she could have had her solicitor do either of these with title insurance, or indeed she could have proceeded without any title certification or title insurance whatsoever. She elected to pay money to obtain the protection offered by a title insurance policy. I acknowledge that the policy premium was modest and that as a result her deprivation in having it arranged was also modest. However, I do not see her situation to be much different than a person who arranges private wage replacement insurance, pays a single monthly premium, and is injured the following month as a result of the negligence of another. In such circumstances, surely such a person would not be denied the private insurance exception simply because the loss arose after the payment of only one premium or because the payment amount was modest. In my view, it is the fact of the payment, not its amount, which results in the entitlement of the Plaintiff.

[99] With respect to the second ground put forth by the defence, it was argued that because the Plaintiff s title insurance protected her from a defect which existed at the date the policy was taken out as distinct from some future unforeseen event, the exception should not apply. Whether or not such a distinction ought to have any effect in law, I find that the policy in question here offered a benefit not for an existing defect, but for a future unforeseen event that might arise from that defect, namely the insured being forced to remove part of the structure as a result of a deficiency notice or there not having been a building permit. The existence of a deficiency notice or the lack of a building permit may well constitute a defect which existed on the date the policy is taken out, but the benefit did not arise until the future unforeseen event of the insured being forced to remove part of the structure as a result of that defect. Accordingly, even if the distinction argued by the Defendants is a legitimate one, it does not exist on the facts of this case.

Conclusion

[100] A judgment shall issue in favour of the Plaintiff against the Defendants Timothy Scherbak and Cherese Scherbak for $110,742.32. The Plaintiff s claims against Wendy Weddell and Re/Max Sudbury Inc. are dismissed. The Cross-claim of the Defendants Timothy Scherbak and Cherese Scherbak against Wendy Weddell and Re/Max Sudbury Inc. is dismissed. The Plaintiff shall be entitled to prejudgment interest from the date upon which notice of the claim was provided to the Defendants which I understand to have been January 28, 2005.

[101] If the parties are unable to agree on the issue of costs, they may contact the trial co-ordinator to arrange a date for argument with respect to same.

Robbie D. Gordon

Superior Court Justice

Released: July 30, 2009

COURT FILE NO.: C-9209-05

DATE: 20090730

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ZORIANA KRAWCHUK

Plaintiff

- and

TIMOTHY SCHERBAK and CHERESE SCHERBAK, THE CITY OF GREATER SUDBURY, TROW ASSOCIATES INC., WENDY WEDDELL, RE/MAX SUDBURY INC., STANLEY MALECKI, FERDINAND NAGEL, DWIGHT ROY COCKBURN AND LINDA JUNE COCKBURN, DANNY GAMBLE and LINA GAMBLE and TARION WARRANTY CORPORATION

Defendants

REASONS FOR JUDGMENT

Robbie D. Gordon, S.C.J.

Released: July 30, 2009