thestar.com

Bob Aaron bob@aaron.ca

January 5, 2013

Disclosure statement meant buyers recovered damages, but listing agent escaped liability

A Saskatoon real estate agent and his brokerage have escaped liability to the purchasers of a home with a wet basement in a misrepresentation lawsuit. Although they recovered their damages from the sellers, the unhappy buyers were ordered to pay the agent's costs out of their own pocket.

Back in 2007, Carol and Donald Jacobucci bought a house in an upscale Saskatoon neighbourhood from Marleen and Patrick Prediger. The agreement of purchase and sale made it a condition of the deal that the sellers complete and deliver a Property Condition Disclosure Statement (PCDS), known in Ontario as a Seller Property Information Statement (SPIS).

The Predigers purchased the house in 2000 and lived in it until its sale to the Jacobuccis in 2007. The Saskatoon real estate market was very active when the property was listed for sale; the sellers' real estate agent described it as "chaotic," and one where offers above asking price were common.

At the time the house was listed, the Predigers signed a PCDS at the request of their agent. It was a standard form in use at the time, although it was revised the following year. Unlike in Ontario, the form was mandatory for real estate agents to use.

One question on the form was, "Are you aware of any roof leaks or moisture or water problems or unrepaired water damage in the dwellings ...?"

The Predigers answered no to this question.

Another crucial question was, "Are you aware of any past or present flooding or drainage problems on the property?"

To this the sellers answered yes, and added a comment reading, "July 2005 storm, slight seepage installed 2nd sump pump no trouble since."

When the Iacobuccis took possession of the house in November 2007, they hired a carpet cleaner who discovered water problems and a bad smell. Water was found underneath the carpet in most of the basement, and some of the adjacent walls were wet, mouldy and smelly. It was clear that water was entering the basement through the concrete floor.

Eventually the basement carpet and all of the interior walls of the basement were removed. The wallboard, vapour barrier, insulation and some of the electrical installations had to be discarded. Due to the mould, the buyers moved out until the property was remediated.

The buyers sued the sellers and the listing agent last year, and the court's decision was released in August.

Based largely on the evidence of the sellers' real estate agent, Justice J. Duane Koch concluded that the water issue had to be treated in law as a hidden, or latent, defect. During that agent's inspections of the property, he did not notice any water problems in the basement, but, the judge noted, "it was not his job to be a wet basement detective. He was entitled to take the Predigers' PCDS at face value."

The judge concluded that the Predigers had made conscious efforts to conceal or at least minimize the extent of the damage "to the point of wilful deception." They used at least one air freshener, without which the basement had a very strong smell.

Justice Koch was unable to accept Patrick Prediger's testimony that there was no evidence of moisture when he moved out.

The court found the Predigers liable to the Jacobuccis for several specific misrepresentations and ordered them to pay damages to the Jacobuccis of $92,162 plus costs. The Jacobuccis, however, were ordered to pay costs of the sellers' real estate agents, as there was "no reasonable basis to proceed against them."

This case seems to establish a low threshold for an agent's duty to purchasers when using the disclosure form, at least in Saskatchewan.

In reaching his decision, Justice Koch also quoted a 2003 decision of the chief justice of Manitoba, who wrote, "Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation."

The judge was correct. Without the presence of the disclosure form in this case, there would likely not have been a lawsuit.

Jacobucci v Prediger, 2012 SKQB 319 (CanLII)

Date:	2012-08-08
Docket:	Q.B. No. 1200 of 2008
URL:	http://canlii.ca/t/fshp0
Citation:	Jacobucci v Prediger, 2012 SKQB 319 (CanLII), <http://canlii.ca/t/fshp0> retrieved on 2013-01-05
Share:	Share

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2012 SKQB 319

Date: 2012 08 08
Docket: Q.B. No. 1200 of 2008
Judicial Centre: Saskatoon

BETWEEN:

DONALD JACOBUCCI and CAROL JACOBUCCI

PLAINTIFFS

- and -

PATRICK PREDIGER, MARLEEN PREDIGER, DARRELL BARTKO, and REALTY EXECUTIVES SASKATOON

DEFENDANTS

Counsel:

John D. Hillson	for Donald Jacobucci and Carol Jacobucci
Grant A. Richards	for Patrick Prediger and Marleen Prediger
Deryk J. Kendall	for Darrell Bartko and Realty Executives Saskatoon

JUDGMENT
August 8, 2012

KOCH J.

Background

[1] In 2007 the plaintiffs, Donald Jacobucci and Carol Jacobucci ("the Jacobuccis"), bought a house in an upscale Saskatoon neighbourhood from the defendants Patrick Prediger and Marleen Prediger ("the Predigers"). The sellers' realtor was the defendant Darrell Bartko who had been working as a realtor in Saskatoon for about 13 years. He was licensed under the defendant Realty Executives Saskatoon, but at the relevant time was an independent contractor. He did not have any dealings with the Jacobuccis prior to closing. All of his dealings were with their realtor, Mario Jacobucci, who is the father of the plaintiff Donald Jacobucci. Mario Jacobucci has worked as a realtor in Saskatoon for many years. He was not named as a defendant and did not testify at the trial.

Plaintiffs' Claim

[2] The plaintiffs are seeking to recover a substantial amount of money that they have spent and more that they expect to spend in the future to rectify serious water problems in the basement. The Jacobuccis claim that the Predigers had to have known about the water issues because they had lived in the house for several years. The Jacobuccis contend that the Predigers did not adequately disclose the existence of or the seriousness of the water problems in the Property Condition Disclosure Statement ("PCDS"). The completion and delivery of a PCDS was a condition of the offer. In the statement of claim, which was not prepared by the plaintiffs' present solicitor, the Jacobuccis claim damages against the Predigers for breach of contract, deceit and fraudulent misrepresentation and seek rescission, special damages, and general and aggravated damages. In the alternative, they seek damages for breach of contract, deceit and fraudulent misrepresentation, including punitive damages and pre-judgment interest. They also claim against the defendants Bartko and Realty Executives for fraudulent misrepresentation, deceit and breach of fiduciary duty. The plaintiffs' case, presented more precisely at trial, is based on the following:

1. The Defendants owed a duty of care to the Plaintiffs;
2. The representations made by the Defendants were inaccurate and misleading;
3. The Defendants were, at a minimum, negligent in making those representations;
4. The Plaintiffs relied on the representations;
5. The Plaintiffs suffered damages as a result.

Defendants' Positions

[3] The Predigers contend that they did not have knowledge of property defects, in particular the extent of the water problems in the basement, and deny that they concealed or attempted to conceal anything about those water problems from the plaintiffs. They further contend that the plaintiffs relied on their own inspection of the premises and not on the PCDS.

[4] The defendants Bartko and Realty Executives deny that Bartko knew or ought to have known of any moisture problems or defects, deny that they in any way assisted the Predigers to conceal alleged defects and had no knowledge that anything in the PCDS was inaccurate. They further contend that the plaintiffs expressly acknowledged in writing that Realty Executives as broker and Darrell Bartko as representative of Realty Executives did not warrant, guarantee or represent the accuracy of any of the sellers' disclosure information. The Jacobuccis executed an express undertaking to release Realty Executives, as broker, as well as the buyers' broker, and their respective representatives, from all responsibility and liability for loss or damage sustained by reason of the inaccuracy of any information contained in the sellers' disclosure statement. The defendants Bartko and Realty Executives deny that any fiduciary duty exists in law. They expressly deny any fraudulent misrepresentations or deceit or breach of any fiduciary duty that may have existed.

The Sale

[5] The Predigers bought the house in 2000 and used it as their personal residence until the sale to the Jacobuccis in 2007. When their son

Dean, who had been living with them moved out, they decided to sell the property.

[6] As Darrell Bartko testified, the residential real estate market in Saskatoon in the summer of 2007 was very active. He described the situation as chaotic. He referred to there being a shortage of product and a circumstance of buyers' panic. It was apparently customary at that time to delay the presentation of offers for a few days after the listing to give prospective buyers a reasonable chance to view the property. It was also common at the time, as occurred in the present case, for offers to come in higher than the listing price.

[7] When the Predigers decided to sell, they contacted the defendant Bartko. He was the realtor who sold them the property in 2000. Bartko recalls being in the house on a social occasion about a year before the 2007 listing. The property was listed on or about August 8, 2007. A week or so before, Bartko walked through the house as part of his comparative market analysis to help the Predigers come up with a listing price. Bartko did not pick up on any evidence on that occasion which led him to suspect that there were water problems in the basement.

[8] On August 8, 2007, probably concurrently with the listing, the Predigers signed a standard form document wherein they instructed Realty Executives Saskatoon as listing broker that there was to be no presentation of offers until 7:00 p.m. on August 17, 2007. At or about the time of the listing, the Predigers signed the PCDS document. It is dated August 10, 2007. This is a standard form document that was in use by Saskatoon realtors at the time. It was an important part of the process that led to the accepted offer. It was completed by the defendant Patrick Prediger but the defendant Marleen Prediger also signed it. There are two provisions that are of particular relevance now:

> Question 3(g):
>
> g) Are you aware of any roof leaks or moisture or water problems or unrepaired water damage in the dwellings/improvements?
>
> The answer given is no.
>
> Question 3(h):
>
> h) Are you aware of any past or present flooding or drainage problems on the property?
>
> The answer given is yes with the following comment by way of explanation:
>
> 3H - July 2005 storm, slight seepage installed 2nd sump pump no trouble since.

[9] Arising out of these provisions the plaintiffs advance two contentions:

1) There were actually two sump pumps installed in or about 2005, a second one in the basement near the one that was already in existence in the east part of the basement, and another outside near the edge of the deck about 12 feet from the east wall of the house. The plaintiffs contend that a true answer to the question 3(h) would have been that there were two additional sump pumps installed, not one.

2) Given the compelling circumstantial evidence that came to the attention of the Jacobuccis immediately after they took possession on closing on November 1, 2007, it is impossible for the Predigers not to have been aware of serious water problems in the basement, such that the statement "no trouble since" was blatantly untrue. As well, it is clear from the testimony of the defendant Patrick Prediger that the basement water problems in the 2005 storm were much beyond "slight seepage" so as to make that description untrue. Arising out of work Patrick Prediger did in the basement after 2005, his "no trouble since" comment could not possibly have been true in August 2007.

[10] Carol Jacobucci is now a licensed realtor, but when the present transaction took place in 2007, she had very limited experience with real estate. Neither did her husband, Donald Jacobucci. They had bought and sold one property before. They obviously had confidence in and relied on Donald Jacobucci's father Mario Jacobucci because of his extensive real estate experience. Indeed it was on the initiative of Mario Jacobucci, probably without input from the plaintiffs, that the PCDS condition in the offer was withdrawn to cause the sale to occur and the process of closing to be engaged.

[11] Carol Jacobucci went to see the Prediger house for the first time on her lunch break from work on August 16, 2007. She says she was on the property for 35 to 40 minutes. She was very impressed with the home. She found it to be clean, the location to be positive, and the yard and basement to be very nice. She noted however that there was a strong perfume odour from air fresheners - she believes two in the upstairs of the house and one in the basement. She specifically recalls that because she is particularly sensitive to such odours. Because she was there for such a short time, Carol Jacobucci spent little or no time in the basement. Obviously she was more interested in the main floor. She was also interested in the yard. Other evidence, the testimony of the defendant Bartko in particular, indicates that there was a storage area under the basement stairs occupied by boxes and luggage.

[12] With the encouragement of their realtor Mario Jacobucci, the Jacobuccis were anxious to make an offer. The offer purports to have been made at 5:00 p.m. on August 16, 2007, open for acceptance until 8:00 p.m. on August 17, 2007. The offer included two stipulations under the heading "conditions":

> 1. Conditional to viewing & approving PCDS within 2 HR opon [*sic*] acceptance of offer
>
> 2. The Vendors acknowledge that the purchasers are related to selling agent

[13] Carol Jacobucci candidly admits that at the time of the offer, she did not know what a PCDS was and that she is not sure whether she saw the Prediger PCDS before the sale was completed. In any event, the Predigers accepted the offer at 7:55 p.m. on August 17, 2007. Within the two-hour period, Mario Jacobucci, acting on behalf of the plaintiffs, contacted Darrell Bartko to advise that the purchasers had approved the PCDS, that the condition with regard to it was removed accordingly and that he would follow up with the confirming paperwork when he returned to Saskatoon the following day. That is what happened. As mentioned, Carol Jacobucci is not sure that she saw the PCDS before the condition was withdrawn. Clearly the plaintiffs were relying on Mario in that regard. In 2007 it was mandatory for Saskatoon realtors to use a form referred to as an ancillary services report. The full title is "Ancillary Services in the Purchase of Residential Real Estate". The use of that document was imposed on the realtors by the Saskatchewan Real Estate Commission. According to Mr. Bartko the purpose of it was to assist buyers by specifically bringing to their attention a full spectrum of reports that could be available to them, for example, appraisal, electrical inspection, engineer's report, environmental report and so on. That form was signed by or on behalf of both the Jacobuccis and the Predigers. The date is unclear. The document is dated August 8, but that is obviously when the sellers signed it. The Jacobuccis could not have been involved by then. In any case the only item noted affirmatively on the ancillary report is that the sellers were to proceed with a PCDS. It is clear on its face that the ancillary report was not intended to become a term of the sale contract or that the PCDS was to be incorporated into the sale contract or give rise to any sellers' warranty to the buyers.

The Basement Water Problems

[14] Before the offer, the acceptance of the offer and the withdrawal of the PCDS condition, Carol Jacobucci had viewed the property only on

the brief occasion on August 16 previously referred to. Donald Jacobucci and Mario Jacobucci attended at the property on the same occasion. Carol met them there. Obviously the plaintiffs were relying on Mario Jacobucci's experience and expertise as to the inspection of the property. Between the withdrawal of the condition and the possession date of November 1, 2007, some two and one-half months later, the only attendance of the Jacobuccis at the property was when Carol, on an unspecified date, attended briefly to do some measuring for appliances and draperies.

[15] It is clear from all of the evidence that the weather in Saskatoon in the fall of 2007 was dry. There is no indication that there was significant rainfall or snowfall that would have caused or contributed to or aggravated basement seepage problems.

[16] When the Jacobuccis took possession on November 1, 2007, they hired a carpet cleaner. As soon as the cleaning commenced in the basement area, the cleaner brought to Carol Jacobucci's attention that there was a bad smell in the area underneath the basement stairs. The carpet or underlay in that area was crunchy underfoot. When some of the carpet was pulled back, there was water under it. Some gyproc wallboard had been removed from the wall at that location. The two-by-four wall framing was wet where it was in contact with the concrete floor; nails were rusty; most of the carpet underlay and the concrete beneath it was wet, mouldy and smelly. It was abundantly clear that water was entering the basement through the concrete floor. Eventually much more carpeting was removed and it was determined that there was water, mould and mildew underneath most of it. It had a very strong smell, supposedly attributed to mould and mildew.

[17] Carol Jacobucci called Mario Jacobucci on November 1 about the problem. The defendant Darrell Bartko came over with a fan. On that occasion Patrick Prediger disclosed to him on the phone that there was another sump pump in the back yard. However it could not be found because it was hidden under a false rock. Eventually a City of Saskatoon employee found it. It was not determined at that point if the outdoor sump had any relationship to the wet basement. The obvious purpose of the outside sump and pump was to move pooling water out of the yard into the adjacent park in rainy times or when snow was melting.

[18] Eventually all or most of the basement carpet was removed and discarded. It was wet and rotten. The odour became stronger and stronger and there was concern about the air quality. The entire interior walls of the basement had to be removed. The wallboard, the vapour barrier, the insulation, and some of the electrical installations had to be discarded. As expected, most of the damage was in the first four inches above the basement floor surface. Water continued to come up through the concrete basement floor in November and December.

[19] Because Carol Jacobucci was unwell as a result of the basement moisture issues, the Jacobuccis moved back into the condo they had vacated, which they were trying to sell. They were not able to move back into the Prediger house until December 24, 2007. By that time the interior walls of the basement had been entirely gutted and the mould removed. At all times it was evident that the worst problems with the incoming water were along the east wall and in the southeast area. Photographs filed as exhibits confirm the overall state of the basement when the Jacobuccis took possession on November 1 and shortly thereafter.

Plaintiffs' Expert Evidence

[20] Kelly Pardoski, a civil engineer with extensive experience in ground water, testified for the plaintiffs as an expert in civil engineering, particularly with respect to below grade water issues. He has been doing that kind of work for most of the time since he graduated from university in 1995. He has experience in obtaining soil samples to determine strength of soils and ground water circulation. Mr. Pardoski first attended at the site in August 2009. His initial opinion was that there was a need to alleviate water from migrating through the basement concrete slab which could be done by a sub-floor drainage system installed in areas prone to water accumulation. He recommended weeping tile set in gravel-filled trenches below the underside of the floor slab. In 2011 he returned to the site, supposedly to conduct a more detailed investigation in preparation for this trial. Various test holes were drilled under his supervision, both within and outside of the residence. As a result of this work, Mr. Pardoski determined that the ground water table was as much as 1.6 metres higher than the basement floor slab on July 15, 2011. This led him to conclude that the high ground water table was the main cause of the water infiltration into the basement. Mr. Pardoski opines that it is likely that the high ground water conditions have existed for an extended time, probably years, and would not have been isolated to the subject property but would likely encompass neighbouring properties. The ground water level is variable. In a test hole dated February 2012, the ground water level was only about a foot above the basement floor. Variables in the ground water level can depend on rainfall events, on snow melt or on leaky water or sewer lines. The City of Saskatoon has made all reasonable examinations of water and sewer lines with nothing irregular discovered. The essential issue for Mr. Pardoski is that the house is in a natural low-lying area; therefore high ground water levels were to be expected unless granular material had been installed below the basement floor before the house is built. The only way to make up for that deficiency after the house has been built is to remove all or part of the basement floor, remove 500 millimetres of material beneath it and replace the latter with clean granular fill on weeping tile. By this means the water can be diverted away before it comes up through the floor. Mr. Pardoski believes the price quotations for the necessary work obtained by the plaintiffs and submitted at the trial are reasonable. In that regard I find the testimony of Neil Pelk, a contractor with many years of experience working on solutions to wet basement problems, to be credible.

Defendants' Evidence

[21] Patrick Prediger states that in 2004, considerable work was done to the furnace, water heater, carpet and fireplace. He noted at that time that the concrete floor was pitted and he found that it was necessary to "float" the flooring. He states that he did not notice any mould. He testifies that the statement in the PCDS that what the Predigers encountered in 2005 was slight seepage on the east wall, and a little seepage on the south wall and north bedroom wall accurately describes the situation. He says that in 2005 there was standing water as much as two inches deep, that the carpet was all wet and that on the advice of a plumber, he installed a second sump pump to convey water into the first sump and from there to the sewer. He says that the carpet had to be rolled back, lifted and propped up to be dried and that it took about a month to dry. He says that when the second sump pump was installed, everything dried up nicely. He says anything that was wet was replaced. He also comments on the use by his wife Marleen of air fresheners in their previous residence, their present residence, their trailer at the lake and the subject residence. He insists that he was not aware of any black mouldy spots in the basement and that if any were present, they were covered by panelling, insulation and wainscotting. He acknowledges that the concrete floor was chipped and scaly, and that it was white in places.

[22] Patrick Prediger insists that when the Predigers moved out in 2007, the Christmas decorations in boxes and the suitcases stored under the basement stairs were dry and not stained and that prior to vacating on October 31, 2007, he vacuumed the basement, including under the stairs while wearing just socks.

[23] Patrick Prediger comments on the exterior sump pump which was also installed in 2005. He says it was about 10 to 12 feet from the foundation, that it was intended to deal with summer and spring run-off, and that the pump was taken out in the wintertime.

[24] Dean Prediger, son of Patrick and Marleen Prediger, now aged 29, lived with his parents at the residence from 2000 until he moved away in June or July 2007. He occupied the basement bedroom, and essentially the whole basement. He recalls moving out in 2005 due to the wet carpets. He does not recall moisture in the basement before that, nor does he recall any moisture problems after the new sump pump was installed following the 2005 moisture event. He does not recall any scaly or chipped concrete or crunchiness under the carpet afterwards. He does not recall any smells in the basement after 2005 but he says there were always air fresheners in the basement. He does not recall having any of his things under the stairwell when he moved out.

[25] The defendant Darrell Bartko is 51 years old. He has been a realtor since 1993, always working with the defendant Realty Executives. At times relevant to this case, he worked as an independent contractor under the broker's licence of Realty Executives. Obviously he has had a great deal of experience selling houses in Saskatoon and, incidental to that, some knowledge of wet basements, sumps and sump pumps.

[26] As previously noted, Darrell Bartko walked through the residence a week or so before the listing as part of his responsibility to the sellers to help them identify a proper listing price. He did not encounter any evidence on that occasion that led him to suspect that there was a water problem in the basement. He also walked through the house on November 1, 2007, just before possession was turned over to the purchasers. He did not encounter any evidence of water problems then either, although he did not on that occasion look under the basement stairs. It appears that he was not aware until after the sale was closed that there was a third sump in the backyard. He says an exterior sump was comparatively rare in his experience. Neither has he found it

common for there to be more than one sump in a basement.

[27] When he went into the basement again after learning of Carol Jacobucci's concerns, Mr. Bartko noticed that the carpet was wet and smelled badly, but at that point he thought it was caused by the carpet cleaning.

[28] As is clear from Mr. Bartko's testimony, he was involved with the PCDS. By 2007 that was a mandatory form for realtors to use. As listing agent, it was up to Mr. Bartko to complete the form or see to its completion. Later in the process, he was involved as the sellers' agent in communications with Mario Jacobucci as the buyers' agent as to the removal of the PCDS condition, so that the deal could proceed. As I understand from Mr. Bartko's testimony, it was his responsibility to have the PCDS form completed by the sellers and to provide any advice or assistance they needed to complete it. It was not however his responsibility to check on the information, particularly as to the possibility of latent defects. Discussion of the disclosures with the buyers and withdrawal of the disclosure condition were the buyers' realtor's responsibility. Not surprisingly, Darrell Bartko had no contact with the purchasers until Carol Jacobucci complained about the basement problem after the deal had closed and the Jacobuccis had taken possession.

The Law

[29] Counsel for the parties have cited many precedent cases. Individually they are of limited assistance because they are essentially fact-specific. I will refer to some that I find of particular assistance. The plaintiffs cite the case of *Thomas v. Blackwell*,1999 SKQB 168 (CanLII), 1999 SKQB 168, [1999] S.J. No. 769 (QL). In that case, the issue was non-disclosure or concealment of serious latent defects by the sellers who did not disclose them to the realtor, although they claimed that they did. The decision focusses on the distinction between latent defects which are not readily apparent during a purchaser's ordinary inspection and patent defects which are readily apparent. If there is active concealment of latent defects, the ordinary rule of *caveat emptor* does not apply, and the purchaser is entitled to either rescind the sale contract or to be compensated for resulting damages. The critical issue is whether the seller made representations that were calculated to mislead the buyer or to lull the buyer's suspicions.

[30] I find assistance in the decision of M-E. Wright J. in the case of *Snider v. Karpinski*, 2009 SKQB 394 (CanLII), 2009 SKQB 394, 342 Sask. R. 235. In that case Wright J. held that once a vendor has responded to questions posed in a disclosure statement and signed the statement, the doctrine of *caveat emptor* falls away as a defence. The vendors' obligation is to disclose truthfully and completely, insofar as they are aware of latent defects. The sellers were held liable for breach of contract for failing to disclose. Because deliberately withholding amounts to a false representation, the otherwise overriding principle of *caveat emptor* is not applicable. The sellers were also held liable in tort for negligent and fraudulent misrepresentation for failing to disclose the existence of latent defects. I am mindful of the fact that an appeal from the decision of Wright J. remains pending in the Court of Appeal, although not as to the specific aspects to which I have alluded.

[31] I have also derived assistance from the case of *Johnstone v. Dame* (1995), 49 R.P.R. (2d) 279, [1995] B.C.J. No. 2637 (S.C.) (QL). In that case the circumstances were very similar to the present. The sellers were held liable in tort for fraudulent misrepresentation and in contract for breach of warranty. The realtor was held liable for negligent misrepresentation. Of particular note is the comment of Cashman J. at para. 29 concerning the failure of the plaintiff purchasers to present testimony from their realtor, Bruce Thompson, as follows:

> 29 There is a well-recognized rule that the failure of a party or witness to give evidence which it was in the power of the party or witness to give by which the facts might have been elucidated justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure is attributed. The party against whom the inference operates may explain it away by showing circumstances which prevented the production of the witness. Even the absence of a witness from the jurisdiction is not a valid explanation because of the availability of evidence by way of commission or letters rogatory.

[32] This is very much equivalent to the point that arises in this case as to the failure of the defendant Marleen Prediger to testify as to the condition of the basement, in particular with respect to the use of air fresheners in the home at a time when it was being shown by the realtor to prospective purchasers and when by any reasonable inference there must have been a musty smell in the basement caused by or resulting from dampness.

[33] The case of *Alevizos v. Nirula*, 2003 MBCA 148 (CanLII), 2003 MBCA 148, 234 D.L.R. (4th) 352 is especially helpful. Scott C.J.M. comments in detail about the legal implications of sellers' statements in a property condition statement (the then Manitoba equivalent of the PCDS in the present case) at para. 36:

> [36] While, as we have seen, the PCS is a relatively new phenomenon in Winnipeg, at least three provinces (British Columbia, Saskatchewan and Prince Edward Island) have utilized PCS's for some time. From a review of decisions from those jurisdictions, and the one reported Manitoba decision to date (of which more later), the following general statements can be made:
>
> 1. Declarations made in a PCS are representations as opposed to terms of the contract. See Fridman's *Law of Contract*, *ibid.* (at p. 474):
>
>> A representation has been defined as "a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it." Such statements may indeed be, or become terms of the contract, in which event they will have effect as such. However, if a representation is not and never becomes a term, its legal character and consequences are different.
>>
>> Terms are contractual and the failure to fulfil the promise contained in a term gives rise to an action for breach of contract. Representations are non-contractual. If they are not true the appropriate remedy is not an action for breach of contract, but the avoidance or rescission of a contract entered into in consequence of the representation, and, possibly, a tort action for damages.
>
> Damages are the remedy sought in this action.
>
> 2. Such statements do not constitute a warranty, rather the purpose of a PCS is to put purchasers on notice, to make purchasers aware of a problem if there is one. See *Zaenker v. Kirk* (1999), 30 R.P.R. (3d) 9 (B.C.S.C.), "[i]ts main purpose is to put purchasers on notice with respect to known problems" (at para. 19), *Anderson v. Kibzey*, [1996] B.C.J. No. 3008 (QL) (S.C.) [summarized 66 A.C.W.S. (3d) 374], at para. 13, "[t]he purpose of the disclosure statement is to raise questions and concerns rather than give detailed answers as to the disclosures made", and *Ward v. Smith* 2001 BCSC 1366 (CanLII), (2001), 45 R.P.R. (3d) 154, 2001 BCSC 1366.
>
> 3. Since the purpose of the PCS is to give the purchasers a "heads up" with respect to potential problems, liability will ordinarily be disallowed when the problem in question is obvious. See *Davis v. Stinka*, [1995] B.C.J. No. 1256 (QL) (S.C.) [summarized 56 A.C.W.S. (3d) 216]. This is because purchasers in such circumstances should not have been misled by the disclosure statement. To put it another way, in such circumstances it cannot be said that the misrepresentation actually caused the person to act upon it. See Fridman's *Law of Contract*, *ibid.* at p. 309.
>
> 4. If the vendor answers the PCS honestly and does not deliberately intend to mislead, then liability will not follow even if the representation turns out to be inaccurate.*Taschereau v. Fuller* 2002 MBQB 183 (CanLII), (2002), 165 Man. R. (2d) 202, 2002 MBQB 183.
>
> 5. Based on the experience of those provinces that have employed the PCS, it seems to present a ripe ground for litigation. Doubtless this is due in no small measure to the problems inherent in an informal "fill in the blank" form which can have such serious legal consequences when problems subsequently develop in a real estate transaction. The wisdom of maintaining in use a form fraught with such inherent difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.

[34] Notably the foregoing passage from the *Alevizos* case was adopted with approval in subsequent cases, in particular in Ontario in the case of*Kaufmann v. Gibson* (2007), 59 R.P.R. (4th) 293, [2007] O.J. No. 2711 (Sup. Ct.) (QL). The *Kaufmann* case involved a water issue which had been addressed but not resolved, quite similar to the situation in the present case. Of consequence is the statement of Killeen J. in para. 131 as follows:

131 In sum, I conclude that the plaintiffs deliberately withheld information from the purchasers in the answers to questions 7 to 9 of the SPIS, information that was strongly relevant to the purchasers in deciding whether to sign the agreement. Since the SPIS form was incorporated in the agreement, the non-disclosure was tantamount to false representations as to the condition of the home and justifies rescission.

[35] The *Kaufmann v. Gibson* case alludes to several other principles which are applicable in the present case:

1. Where there is a disclosure statement, the doctrine of *caveat emptor* falls away as a defence and the vendor must disclose truthfully and completely about matters raised in unambiguous questions or risk rescission of the contract or damages. See*Thomas v. Blackwell*, *supra*, and *Snider v. Karpinski*, *supra*.

2. Waiver or acceptance by the purchaser of the disclosure statement does not necessarily mean that the purchaser has waived the right to rely on untrue answers or information.

3. Waiver by the purchaser of a right to have experts inspect the property does not embrace misrepresentations in the disclosure statement and eviscerate them.

[36] The Prediger defendants rely on the Provincial Court decision in *Weiman v. Ediger*, 2008 SKPC 109 (CanLII), 2008 SKPC 109, 326 Sask. R. 70. In that case the defendant seller was not held responsible for inaccurate disclosures because the defects involved were clearly patent and the purchaser neglected to follow up on them. These defendants also rely on the decision of Gunn J. in *Hanson v. Dumont*, 2005 SKQB 158 (CanLII), 2005 SKQB 158, 260 Sask. R. 161. This case involves essentially the same factual matrix as the*Weiman* case and essentially follows the *Thomas v. Blackwell* decision, *supra*. Essentially the *Hanson* case holds that vendors are not liable for latent defects they did not know about and thus could not have actively concealed or knowingly misrepresented. As in *Thomas*, it is clear that there is no absolute warranty with respect to existing defects. I do not find the case of *Chrun v. Rimmer,*2011 SKPC 157 (CanLII), 2011 SKPC 157, 386 Sask. R. 207, to be of assistance. Assuming it was correctly decided, it is clearly distinguishable on the facts.

[37] Counsel for the defendants Bartko and Realty Executives have also submitted case authorities. The case of *Stann v. Lukan*, 2007 SKQB 366 (CanLII), 2007 SKQB 366, 308 Sask. R. 81, involves a fact situation very close to the present. The buyers sought damages from the sellers for negligent misrepresentation and breach of contract. Essentially the sellers in that case represented that there had been a drainage problem but that it had to the best of the sellers' knowledge been repaired. The plaintiffs' claims in contract and for negligent representation failed because there was no act of concealment of a latent defect. In the disclosure statement, the sellers disclosed that they were aware of past flooding and drainage problems but that they were not aware of any present problems or unrepaired water damage. The plaintiffs' case also failed because there was evidence that the problems the plaintiffs were complaining about had been identified by their inspector before closing. As Dawson J. noted (in para. 100):

> [100] ... a vendor has an obligation to disclose those latent defects of property of which he is aware. However, this argument is an argument based on the law of fraudulent misrepresentation, as the act of concealment of a latent defect can amount to a fraudulent misrepresentation. Victor Di Castri's *Law of Vendor and Purchaser*, 3d (Carswell: Toronto, Looseleaf, 2007 - Rel. 5), is instructive with respect to the issue of patent and latent defect:
>
> "**§236 Patent and Latent Defects as to Quality**
>
> A patent defect ... arises either to the eye, or by necessary implication from something which is visible to the eye.
>
> ...
>
> A latent defect, obviously, is one which is not discoverable by mere observation.
>
> In the case of a patent defect, as distinguished from a latent defect as to quality or condition, and where the means of knowledge are equally open to both parties and no concealment is made or attempted, a prudent purchaser will inspect and exercise ordinary care: caveat emptor. However, while inspection by a purchaser bars him from complaint as to matters patent, the mere means of knowledge, or the opportunity to inspect when he has relied solely upon a representation by the vendor, does not have this result. Neither is a purchaser who is unqualified to make an effective inspection and where, in any event, an inspection could not be conclusive, necessarily barred from relief.
>
> ...
>
> *... The conduct of the vendor in concealing the true nature of a latent defect will be treated as fraudulent where it has the effect of lulling the suspicions of the purchaser. Thus, damages are recoverable in the same way as though there was a fraudulent misrepresentation.*" (Emphasis added)

[38] Dawson J. went on to hold that the evidence was clear that the seller did nothing to conceal any latent defect, nor was it established that the sellers'representations after the purchasers' inspector's report operated to induce the purchasers to enter into the contract.

[39] The realtor defendants also cite the case of *Moffatt v. Finlay*, 2007 NSSM 64 (CanLII), 2007 NSSM 64, [2007] N.S.J. No. 439 (QL), a decision in the Nova Scotia Small Claims court. In that case the sellers did not disclose that there was a risk of a water supply pipe freezing in extremely cold weather. The court held in effect that failure to disclose this potential problem was in accordance with advice from the realtor and because of its nature it did not render the sellers or the realtor liable. There was no satisfactory evidence to support an allegation of fraud, that is that the sellers knew they were making a false statement with the intention of deceiving the buyers.

Issues

[40] The first issue that has to be determined is whether the Predigers have incurred any liability to the Jacobuccis because of fraudulent or negligent misrepresentation in the PCDS. I am satisfied based primarily on the evidence of Kelly Pardoski that the water problems in the basement had existed for a long time before they became apparent to the Jacobuccis' carpet cleaner on November 1, 2007. In all likelihood, those problems arose years before, likely before 2005, even though the 2005 rainfall event made it clear to the Predigers not only that there was a problem but that it was a very serious problem. The testimony of Patrick Prediger as to taking up and drying out the basement carpets after the 2005 storm makes it abundantly clear that the description of "light seepage" in the PCDS resulting from the 2005 storm was inaccurate, a deliberate understatement of the magnitude of the problem, calculated to mislead the reader into thinking it did not amount to much, when in fact it was very significant. Based on the evidence as a whole, I cannot accept that the installation of the second sump in the basement resolved the issue. The Predigers did not turn the problem over to professionals to resolve. They dealt with it themselves with the advice of one or more knowledgeable people they consulted. As the consequence of this hands-on approach, it must be inferred that the Predigers knew that the problem was serious, even though in their own minds they may have minimized it.

Discussion and Conclusions

[41] I am satisfied that in applying the case authorities, this water issue must be treated as a latent rather than a patent defect. I reach this determination mostly on the basis of the testimony of Darrell Bartko whom I found to be a candid and credible witness. In his tours of the premises, at the time of the listing and at the time of possession some two and one-half months later, he did not note evidence of water problems. However, it was not his job to be a wet basement detective. He was entitled to take the Predigers' PCDS at face value. There is no reason to suspect that he was wilfully blind to the issue, although he did find it unusual that there was more than one sump in the basement.

[42] On the whole of the evidence, therefore I find that not only was the defect latent, but the Predigers made conscious efforts to conceal it or at least minimize to the point of wilful deception the extent of it. They used at least one air freshener in the basement when the property was being shown to prospective purchasers. Without the use of air fresheners, the basement had a very strong smell. I refer to the testimony of Darrell Bartko and also to a notation on the Kennys Flooring & Hardwood Ltd. invoice (Tab 5 of Exhibit P-1).

[43] The especially wet area under the basement stairs was obviously not a suitable place to store luggage and boxes of Christmas decorations. The only reasonable inference is that the Predigers were trying to divert the attention of prospective purchasers from the dampness or wetness (and perhaps the odours) that existed or emanated from that area.

[44] I hasten to add though that I do not find in reaching my conclusions about the Predigers' knowledge of the basement problems that the non-disclosure of the outdoor sump supports the plaintiffs' thesis. The outdoor sump was 10 or 12 feet away from the house. It was intended to remove water at or close to the surface, away from the house, not to lower the underground water level. There is no reason to believe that the installation of the outdoor sump was an integral part of the corrective measures taken with respect to the basement problems in 2005, or thereafter. Neither do I find anything sinister nor unusual in the fact that the outdoor sump was, probably for cosmetic or safety reasons, concealed by a decorative cover that was intended to look like a rock.

[45] In arriving at these conclusions, I am unable to accept the testimony of Patrick Prediger that the existence of mould was a total shock to him and that he did not after the 2005 occurrence encounter any damage to the gyproc even though he had observed then that the wooden framing was wet. Because there was uncontroverted evidence that the weather was dry in the fall of 2007, the dampness may have been less than previously, but I still find that I am unable to accept Patrick Prediger's evidence that there was no evidence of moisture when the Predigers moved out on October 31 and that there was no dampness issue with respect to the things stored under the basement stairs. I also find that Dean Prediger was either unaware of the magnitude of the problem or seriously understated it in his testimony. I note that he did not refer to anything being stored under the basement stairs when the Predigers vacated, probably because storing anything there was impractical and unusual.

[46] On the basis of my foregoing analysis of the applicable evidence and the law as I have determined it to be, I am satisfied that the Predigers as sellers are liable to the Jacobuccis as buyers for the following specific misrepresentations:

1) That the moisture problems in the basement were confined to the storm in 2005;

2) That the 2005 damage was limited to slight seepage;

3) That the installation of the second sump in the basement ended the moisture problems;

4) The use of air fresheners at the time of the realtor showings was intended to conceal or minimize the musty or mouldy smell emanating from the walls or carpets or both;

5) The moisture condition of the wall and carpet under the basement stairs was such that it could not reasonably have been appropriate to store luggage and boxes of Christmas decorations there; therefore the placing of those items in that location was calculated to conceal the problem or divest attention from it.

[47] I turn now to the situation with regard to the defendants Darrell Bartko and Realty Executives Saskatoon. I find it unnecessary to address in detail the duty that either of those defendants owed to the plaintiff, if indeed they owed any duty whatsoever. I am satisfied that Darrell Bartko is truthful when he says he did not encounter any evidence of a water problem at the time of the listing or at the time of the delivery of possession. Given that he had been selling real estate in Saskatoon for more than a decade and that the evidence of Kelly Pardoski indicates that the moisture problem very likely extended to other properties in the neighbourhood, one might wonder whether the inspections of Darrell Bartko were as critical as they might have been. On the other hand, there is no recognizable duty imposed on him at law in the circumstances. It is not necessary to decide whether he should have noticed something about the wet basement issue if his testimony that he did not notice anything is accepted as truthful. Given that finding, there is no other basis on which to assess any liability against the defendant Realty Executives Saskatoon. There is no evidence other than the activities and conduct of Darrell Bartko to establish any liability on the part of Realty Executives Saskatoon. Accordingly, the plaintiffs' case against both the defendant Darrell Bartko and the defendant Realty Executives Saskatoon is dismissed.

Damages

[48] Having determined that the Predigers are liable to the plaintiffs for misrepresentation, either by deliberately concealing the basement water problems or by deliberately or negligently understating them, I turn to the question of damages.

[49] The plaintiffs claim damages as follows:

Expenses to date	$47,452.21
Projected expenses	$49,949.00
Total	$97,401.21

I am unable to reconcile these compilations with the evidence. I have compiled the expenses to date in accordance with Tab 4 of Exhibit P1 as follows:

Expenses to date (Exhibit P1 Tab 4)		$39,834.95
Deleted and disallowed items:		
Roto-Rooter		($ 65.72)
City utility expense		($ 284.67)
Saskatoon Chimney Sweeps		($ 90.00)
Net allowed	$39,394.56	$39,394.56
Projected Expenses (Exhibit P1 Tab 5)		$49,822.80

	Adjust arithmetic error		$ 900.00
	GST on $40,900.00		$ 2,045.00
Net allowed		$52,767.80	$52,767.80
Total Allowed			$92,162.36

[50] In arriving at the foregoing, I have not allowed the additional $2,000.00 in miscellaneous expenses referred to in the testimony of Carol Jacobucci. I find that this part of the claim has not been properly proven.

[51] I have allowed the claim for $11,800.00 for the payment to Basement Systems for remedial work that appears not to have been effective. The law is clear that in circumstances such as the present, the plaintiffs have an obligation to attempt to mitigate damages. In this case that meant to identify and proceed with a solution as quickly as possible to prevent or minimize the damage. If the plaintiffs have acted reasonably in taking steps to mitigate loss and the plaintiffs have incurred expenses or further losses, they may recover such expenses and further losses from the defendants, even if the resulting damage is greater than it would have been had the mitigation steps not been taken. If the plaintiffs have acted reasonably, the defendants will be considered to be the cause of what happened. If the plaintiffs acted unreasonably, what occurred will be regarded as being beyond the foresight of the defendants and is not something which the defendants' negligent act or omission has caused. See *Conway v. Thunder Creek School Division No. 78* 1999 CanLII 12504 (SK QB), (1999), 175 Sask. R. 105, [1999] S.J. No. 55 (Q.B.) (QL); *Gallop v. Abdoulah*, 2006 SKQB 466 (CanLII), 2006 SKQB 466, [2006] 12 W.W.R. 474. I find that in incurring the cost of the work done by Basement Systems, the plaintiffs were acting reasonably in furtherance of their obligation to mitigate. Therefore, the cost to the Jacobuccis of the work done by Basement Systems, even though it was ineffective, is to be included in the damages recoverable from the defendant Predigers.

[52] The plaintiffs did not press the issue of pre-judgment interest at trial.

Costs

[53] The plaintiffs, having succeeded against the defendant Patrick Prediger and the defendant Marlene Prediger, are entitled to recover their costs from those defendants in the usual way in accordance with the tariff.

[54] I find that there was no reasonable basis for the plaintiffs to proceed against the defendants Darrell Bartko and Realty Executives Saskatoon. Therefore, those defendants will be entitled to recover their costs from the plaintiffs. I do not believe the plaintiffs have met the usual criteria for a *Bullock* order; nor is a *Sanderson* order appropriate in the circumstances. Therefore, the plaintiffs are not entitled to recover the costs payable by them to the defendants Bartko and Realty Executives from the defendants Patrick Prediger and Marleen Prediger. I point out that the decision to pursue the plaintiffs' unsuccessful claim against the defendants Bartko and Realty Executives was not initiated by the plaintiffs' present solicitors.

_____ J.

J.D. KOCH