Citation: *Lyle et al v. Burdess et al*, 2008 YKSM 5 Date: 20081218
Docket: 08-S0004
Registry: Whitehorse

**IN THE SMALL CLAIMS COURT OF YUKON**
Before: His Honour Judge Cozens

Lyle et al

Plaintiffs

v.

Burdess et al

Defendants

Appearances:
Kerry Lyle — Appearing for the plaintiffs
Gary Burdess — Appearing for the defendants

## REASONS FOR DECISION

### Overview

[1] The Defendants, Gary and Trudy Burgess, sold a residential rental property at 4 Firth Rd., Whitehorse, Yukon (the "Property"), to the Plaintiffs, Kerry Lyle and Glenda Bowers. Subsequent to the sale, the Plaintiffs discovered that there was a moisture problem in the walls and ceilings of the upstairs rental unit (the "Suite"). The moisture problem was caused by snow and ice buildup causing an ice dam buildup at a point where the peaked metal roof (the "Metal Roof") meets an adjoining exterior lower roof. During the spring thaw, this ice dam melts and the resultant water enters into the roof cavity and subsequently drips into the insulated ceiling space, causing water and/or moisture damage to the walls and ceiling (the "Water Damage"). The Plaintiffs claim $10,818.15, inclusive of GST, as the estimated cost of repairing the Water Damage and correcting the underlying problems that are the cause.

[2] On June 20, 2007, the Defendants completed a Property Disclosure Statement ("PDS"). In the PDS, they denied that they were aware of the Property having any water or moisture problems.

[3] By the end of the trial, it became apparent that there was little in dispute between the parties as to the cause of the Water Damage. It was also undisputed that the Defendants had been aware on two prior occasions in 2006 and 2007 of a water and/or moisture problem in the suite (the "Moisture Problem").

[4] The Plaintiff, Kerry Lyle, is a real estate agent employed with RE/MAX Action Realty in Whitehorse ("RE/MAX"). The real estate agent for the Defendants at the time of the sale was Dean Philpott, also employed with RE/MAX. Both Mr. Lyle and Mr. Philpott received commission on the sale of the Property.

**Issues**

[5] The only issue in this case is whether the Defendants are liable to the Plaintiffs for damages arising from a contractual breach as a result of not having disclosed the Moisture Problem to the Plaintiffs at the time of the sale of the Property.

[6] The Plaintiffs and the Defendants were not represented by counsel. Other issues arose during the trial, that, while perhaps not bearing on the ultimate issue to be resolved, were of interest or concern to the parties. For the purpose of providing some assistance to the parties in understanding my decision, I will address some of these issues within these reasons.

**Evidence**

[7] This trial was heard over approximately two and one half days. The Plaintiff, Kerry Lyle, testified for the Plaintiffs, as did two contractors, Carl Nadeau and Robin Wheeler, and a prior tenant of the Property, Alexandro Ospina.

[8] Both Defendants testified on their own behalf. The Defendants also called as witnesses Mr. Philpott and Darryl Weigand, the latter being a real estate agent and an owner of RE/MAX.

[9] This is a case where there is no real dispute between the parties on the critical facts. I find all the witnesses to have given credible evidence and generally accept this evidence, some exceptions being where there are differences as to dates and times of certain occurrences, however, none of these differences impact in any way on my findings.

*Contract of Purchase and Sale* (the "Contract")

[10] The Plaintiffs' offer to purchase the Property was signed June 5, 2007 and the Defendants accepted this offer on June 28, 2007. There were some minor amendments made to the Contract after June 28th. The Contract included the following clause:

> The Property Disclosure Statement dated June 20, 2007 is incorporated into and forms part of this Contract of Purchase and Sale.

*Property Disclosure Statement*

[11] The PDS is essentially a document prepared by the seller that informs the buyer of problems or defects known to the seller that may not be readily apparent. It provides the buyer some level of comfort that he or she will not be faced with certain "unwanted surprises" after completion of the sale. The PDS is copyrighted by the British Columbia Real Estate Association and is utilized regularly in real estate transactions in the Yukon.

[12] The PDS contains 13 "**General**" and 17 "**Structural**" questions regarding the Property. The PDS allows a seller to answer "Yes" or "No", to all 30 questions. On 13 of the questions the seller can also answer "Do Not Know" and on 14 of the questions, the seller can also answer "Does Not Apply".

[13] The PDS contained the following:

> **THE SELLER IS RESPONSIBLE for the accuracy of the answers on this property disclosure statement and where uncertain should reply "Do Not Know". This property disclosure statement constitutes a**

**representation under any Contract of Purchase and Sale if so agreed, in writing, by the seller and the buyer.**

**.....**

**3. ADDITIONAL COMMMENT AND/OR EXPLANATIONS: (Use additional pages if necessary).**

**……**

The seller states that the information provided is true, based on the seller's current actual knowledge as of the date on page 1. Any important changes to this information made known to the seller will be disclosed by the seller to the buyer prior to closing. The seller acknowledges receipt of a copy of the property disclosure statement and agrees that a copy may be given to a prospective buyer.

.....

The buyer acknowledges that the buyer has received, read and understood a signed copy of this property disclosure statement from the seller or the seller's brokerage on the *25th* of *June* yr. *2007*. The prudent buyer will use this property disclosure statement as the starting point for the buyer's own inquiries. **The buyer is urged to carefully inspect the property and, if desired, to have the property inspected by an inspection service of the buyer's choice.** (Italics represent date signed by Plaintiff, K. Lyle).

.....

The seller and the buyer understand that neither the listing nor selling brokerages or their managing brokers, associate brokers or representatives warrant or guarantee the information provided about the property.

[14] The PDS also states:

**PLEASE READ INFORMATION ON THE REVERSE SIDE OF THIS FORM.**

[15] However, on the copy of the PDS filed by both the Plaintiffs and an earlier similar Property Disclosure Statement from July 4, 2005 filed by the Defendants, there was no such reverse side. I note that the June 20, 2007 PDS was two pages, with each page marked as being "PAGE 1 of 2 PAGES" and "PAGE 2 of 2 PAGES" respectively. The July 4, 2005 PDS only had the first page

completed, and it also stated “PAGE 1 of 2 PAGES”. As neither party provided any evidence with respect to the apparent existence or contents of a “reverse side” page, I am proceeding only on the basis of the known content of pages one and two.

[16] The Defendants answered “No” to the following questions, for which the only answers allowed were “Yes” and “No”:

> **2. Structural**
> **J.** Are you aware of any moisture and/or water problems in the walls, basement or crawl space?
> **K.** Are you aware of any damage due to wind, fire or water?
> **M.** Are you aware of any roof leakage or unrepaired roof damage? (Age of roof if known:_____ years)

[17] During the trial, there was testimony that the limitations on some questions, including **Structural** “J”, “K” and “M”, to “Yes” and “No” answers, was that only “Yes” and “No” answers are appropriate to some questions. Clause 3 allows for additional comments to be made in cases where further explanation may be required.

[18] All of the questions in the PDS that require only a “Yes” or “No” answer, with the exception of two, are prefaced with “Are you aware...”. Strictly speaking, it appears that being able to answer only “Yes” or “No” to all these questions is acceptable, as the seller should be in a position to know what he or she is or is not aware of, and the remaining two are worded such that only “Yes” or “No” answers would also appear to be appropriate.

*Kerry Lyle*

[19] Mr. Lyle disclosed to the Defendants in writing that he was a real estate agent in compliance with s. 28 of the *Real Estate Agents Act*, R.S.Y. 2002, c. 188.

[20] After receiving the PDS, the Plaintiffs had a home inspection completed by Kevin Woods. Mr. Woods did not enter the roof space as he felt he was unable to access it. The home inspection did not result in the Plaintiffs having any concerns about the physical state of the Property. The Plaintiffs signed a Home

Inspection Clause Removal document on July 6, 2007, and took possession of the Property on August 1, 2007.

[21] Mr. Lyle was first alerted to the possibility of the Moisture Problem in the Suite by a neighbour shortly after the Plaintiffs had purchased the Property. As a result, he spoke to the previous tenant, Mr. Ospina, who confirmed that there had been a moisture issue when he and his family had been residing there. The information provided by Mr. Ospina was that in the spring of 2007, water had come through the ceiling at or near the light fixture in the master bedroom, the light switch in the bathroom and the kitchen, and the wall between the kitchen and the living room.

[22] Mr. Lyle then arranged for a local contractor, Carl Nadeau, to look into the matter. Mr. Nadeau looked into the attic and noted that the Metal Roof had been installed over the original flat roof (the “Flat Roof”), some portions of which had been removed.

[23] As there was no current evidence of the Moisture Problem, Mr. Lyle decided not to take any further action at that time, other than writing a letter to the Defendants’ real estate lawyer on November 21, 2007. In the letter, the Defendants were put on notice that the Plaintiffs considered them to be liable for any necessary repairs, based upon the Defendants’ failure to disclose the Moisture Problem in the PDS. Mr. Lyle wanted to see if there was a recurrence of the Moisture Problem in the following spring.

[24] On January 16, 2008, the temperature rose to four and one half degrees Celsius and water leaked through the master bedroom light. On March 3, 2008, temperatures again rose above freezing and water was noticed coming through the master bedroom light fixture, the bathroom fan and light switch and the kitchen wall.

[25] On March 10, 2008, a local roofing contractor, Robin Wheeler, removed a portion of the Metal Roof and entered into the roof cavity between the Flat Roof and the Metal Roof (the “Attic Space”). Mr. Wheeler took a number of photos, filed as Exhibits in this proceeding, which show pools of ice and water on the Flat Roof, and approximately 60 sq. ft. of area where the Flat Roof had been

removed. The water is shown to have come from the ice dam buildup at the edge of the Metal Roof, that entered the Attic Space when melting, pooled on the Flat Roof, and eventually dripped through the insulation onto the vapour barrier, before dripping through holes in the vapour barrier into the living area of the Suite.

[26] Mr. Lyle also took photographs of the interior of the Suite which clearly show water and moisture damage in the bedroom, bathroom and kitchen locations where water had been observed leaking. Of note is that one of the pictures of the master bedroom shows a paint roller mark in the light fixture area that is different enough in finish to be clearly visible and indicative of “spot painting”.

[27] Mr. Lyle testified that when the Plaintiffs decided to buy the Property, they expected to be able to rely on the integrity of the Defendants and the PDS. If the Plaintiffs had known of the Moisture Problem in the Suite, they would not have purchased the Property at current market value.

*Carl Nadeau*

[28] Mr. Nadeau is a local contractor with 28 years experience in the construction trade. He testified that he attended the Property in September, 2007. He unscrewed the exterior attic vent and looked into the Attic Space. He stated that he saw lots of standing water on the Flat Roof and observed the open areas. His explanation for the water and moisture in the Suite was that water would enter through the Metal Roof at the point that it meets the exterior lower roof, by working its way above the metal flashing and dripping onto the Flat Roof. This water would accumulate on the Flat Roof in the summer and freeze up in winter. It would then melt in spring, and combined with more water coming through the metal flashing, drip through holes in the Flat Roof and leak into the Suite through holes in the vapour barrier. The existing ventilation system was not sufficient to evaporate the standing water during the summer.

[29] Mr. Nadeau provided two quotes for repairs. The first quote was dated September 28, 2007 and was for the amount of $12,720.00. This quote was to

temporarily remove the Metal Roof, tear out the Flat Roof and insulation and then rebuild the Metal Roof. The second quote was dated March 13, 2008 and was for the amount of $5,281.00. This quote was for removal of the Flat Roof and wet insulation, repair of the vapour barrier, reinstallation of insulation and improvements to the attic ventilation. Due to an inability to determine the extent of the damage to the insulation, the estimates may not be completely accurate. There would also be costs associated with removal of the debris resulting from the repairs.

*Robin Wheeler*

[30] Mr. Wheeler, an experienced roofing contractor, confirmed Mr. Nadeau's evidence with respect to the cause of the Water Damage.

[31] Mr. Wheeler provided a quote dated March 14, 2008 of $4,955.00 for the replacement of the Metal Roof, addition of closing strips and improved counter flashing. He also stated there would be additional costs for painting and new insulation. He provided an estimate of $200.00 - $300.00 for removal and disposal costs. Mr. Wheeler did not consider it necessary to remove the entire underlying Flat Roof, although enough would need to be removed to ensure that all the damaged insulation was replaced.

*Alejandro Ospina*

[32] Mr. Ospina and his wife were tenants in the Suite from May, 2006 until August 2007. He confirmed telling Mr. Lyle, after the Plaintiffs had purchased the Property, about the water leaking and resultant Water Damage. He testified that the leaking occurred in perhaps April, 2007 and lasted for about a month. He informed Ms. Burdess of the leakage and she brought in a dehumidifier. She and Mr. Burdess also cleaned and painted the areas affected by the water leakage. He testified that there was some lesser moisture spotting afterwards. He confirmed that the Property was "kind of humid" when he lived there and that it was airtight and well-sealed. He denied having hung clothing to dry in the Suite. He also stated that his wife's grandmother lived with them for approximately two

months in July and August and his brother-in-law for approximately three months in possibly the winter.

*Gary and Tracy Burdess*

[33] The Defendants purchased the Property on January 16, 2005 as a rental property. They learned that the prior owner of the Property had not obtained the required occupancy permit from the City of Whitehorse. They obtained an Engineer's Report and a Structural Assessment as part of their pre-purchase investigation. The Defendants obtained all the required permits and made all the necessary renovations to bring the Property up to the required Building Code standards and to further improve the Property.

[34] When purchasing the Property, the Defendants received a Property Disclosure Statement from the seller of the Property which was similar to the one the Defendants provided to the Plaintiff. The seller answered "No" to the same questions as "J", "K", and "M" above.

[35] There was nothing at the time the Defendants purchased the Property that would have alerted them to the Moisture Problem, or any problems with the roof structure. With respect to the roof structure, on October 27, 1988 a renovation permit had been obtained for the installation of the Metal Roof over the Flat Roof and a final inspection was passed on December 5, 1988.

[36] The Property was managed for the Defendants by Kayelle Management. The downstairs unit of the Property was rented out March 1, 2005 and the upstairs Suite on May 1, 2005. The Defendants were not aware of any occurrence of the Moisture Problem in the spring of 2005.

[37] In February, 2006, the Defendants observed a small amount of water staining in and around the light fixture in the master bedroom of the Suite. This appeared to be only a few drops of water that had occurred over perhaps one day. The tenants moved out on February 28th. On March 4, 2006, the Defendants obtained the assistance of a carpenter, Keith Brooks, who entered into the Attic Space. He did not advise the Defendants of anything of concern, although he did mention there was some frost buildup. Based upon the

information Mr. Brooks provided them, the Defendants felt that the Moisture Problem resulted from condensation in the Suite from the renovations, the sealed windows and use of the Suite by the tenant. The Suite was thoroughly cleaned by the Defendants and was shown to prospective tenants throughout the remainder of March. The Defendants did not observe any further occurrence of the Moisture Problem during that time. The Suite was subsequently rented to Mr. Ospina.

[38] In spring 2007, Mr. Ospina advised the Defendants of the water and/or moisture problem. The Defendants observed water staining in the master bedroom around the light fixture, at the bathroom light switch and on the kitchen ceiling. They also observed mold in the bathroom. They again obtained the assistance of Mr. Brooks and he advised them that the issue was condensation within the Suite. E-mail correspondence from Mr. Brooks to the Defendants dated September 4, 2008, states that he went into the Attic Space and saw:

> …no sign of roof leakage or water damage on the new roof system. This attic is well ventilated with 2 roof vents, and two roof top whirly bird vents but there was frost around the old roof above the master bedroom. I opened up the old roof to see if there was any water damage to the insulation and discovered there was not….It was my conclusion at the time that the suite was very humid & the water drops were most likely caused by too much condensation in the suite – tenants not using the exhaust fan in the kitchen and the bathroom. After discussion with Gary and Trudy [the Defendants] we concluded that a dehumidifier and more use of the exhaust fans would rectify this problem.

[39] Mr. Brooks entered into the Attic Space on each occasion in 2006 and 2007 through an exterior roof vent. The Defendants did not pay Mr. Brooks for his services, stating that he was an acquaintance who performed “a fairly quick inspection” on each occasion.

[40] In cross-examination, Mr. Burdess agreed that it was reasonable to predict that when the frost in the roof space melted it would turn into water. Mr. Burdess stated that he was aware in 2006 and 2007 that water from above had melted and somehow made its way into the ceiling, with the amount of water being minor in 2006 and more significant in 2007.

[41] After Mr. Ospina moved out in May, 2007, the Defendants repainted the Suite. Mr. Burdess testified that even after the dehumidifier had been used in the Property and the Defendants had thought the problem was solved, there was some further moisture staining in the master bedroom near the light fixture. This stained area was painted over and this spot repainting can be seen in one of the photographs provided by the Plaintiffs.

[42] The Defendants never considered the possibility of there being a roof problem.

[43] When the Defendants completed the PDS with Mr. Philpott, they hesitated at question "J". They mentioned to Mr. Philpott that there had been a moisture problem in 2007, without providing any of the specific details of the problem. They told him that they believed it to be a result of condensation and that it had been fixed by the use of the dehumidifier. In response, Mr. Philpott asked them whether it was fixed and, when they said they believed so, he advised them to include the following in the Clause 3. "ADDITIONAL COMMENTS AND/OR EXPLANATIONS" section of the PDS:

> Owners have never lived in the house. It was a rental property.

[44] Mr. Burdess testified that Mr. Philpott did not advise them to answer "No" to question "J". Mr. Burdess also stated that he hadn't really given any thought to the PDS, including its purpose and who it was intended for. Ms. Burdess testified that the Defendants were not provided any information with respect to the PDS, but were simply told to fill it out. The Defendants testified that they had never been informed by Mr. Philpott that completion of the PDS was optional and not mandatory.

*Dean Philpott*

[45] Mr. Philpott has been a real estate agent for approximately seven years and has been involved in the completion of approximately 200 PDSs. He testified that it is a general practice of RE/MAX to have a PDS completed on every sale and incorporated into the Contract of Purchase and Sale, with certain exceptions made in sales which include an "As is, where is" statement in the

Contract of Purchase and Sale. He does not inform sellers that the PDS is an optional document, because of the RE/MAX practice to obtain them in almost every sale of property.

[46] He confirmed that he had been advised by the Defendants of a condensation issue in 2007 that had been rectified, and that he had suggested they include the additional comment about the Defendants not having lived in the rental Property, because he knows that in certain cases the seller cannot necessarily know everything that happens. He testified that he did not ask the Defendants any other questions about the condensation issue or ask them to expand further on it, because he was satisfied that the problem was fixed, based on what the Defendants said to him.

[47] The Defendants sent Mr. Philpott a letter on April 22, 2008 in which they requested he answer the following questions:

1. Could you please give us in writing, your recollection of our discussion regarding the conversation we had regarding line J. *Are you aware of any moisture and/or water problems in the walls, Basement or crawl space?* [sic] of the Property disclosure statement dated June 20.07?
2. Could you please give us, in writing a brief history of your experience in real estate particularly related to disclosure statements?

[48] Mr. Philpott responded by letter on April 29, 2007 as follows:

> My recollection of line "j" is that you told me that there had been some condensation in the upper unit but that it had been remedied by the use of a dehumidifier and the use of the bathroom fan.
>
> It has been my consistent habit to have the owner or owners who are making the declaration on the property disclosure statement, read it and answer the questions to the best of their knowledge by placing their initials in the appropriate box. Further, if the owner has not lived in the property I often tell them they can disclose this fact in section 3.

[49] Mr. Philpott testified that if he had not been satisfied that the problem identified by the Defendants was fixed he would have "taken it to the next level", which I take from the whole of his evidence to mean he would have made further inquiries. In cross-examination he stated that if he had known about the tenant's complaints about water leaking and that it was still a problem, he would have advised the Defendants to disclose this on the PDS. It is his opinion that the

Defendants appeared to be telling him the truth when they stated that the Moisture Problem had been fixed.

[50] He testified that his practice is not to advise sellers to disclose the existence of a prior problem on a PDS, if the problem has been fixed.

[51] It is his practice to only follow up on an answer on a PDS with the seller if there are questions from the purchaser. In this case he did not discuss the PDS with Mr. Lyle.

*Darryl Weigand*

[52] Darryl Weigand has been a real estate agent for approximately 28 years. He was not involved in the sale of the Property. He confirmed the RE/MAX policy of having every seller fill out a PDS, except on occasion where special circumstances make that impractical. RE/MAX real estate agents are not instructed to advise sellers of the fact that completion of the PDS is optional. RE/MAX would usually only complete the sale of a property without a PDS if the seller absolutely refused to execute one and it had been discussed with the seller. He testified that a “red flag” would certainly be raised for him in such a circumstance.

[53] He stated that every listing held by RE/MAX is contractually owned by them. As such, every real estate agent employed by RE/MAX has an agency relationship to the seller. RE/MAX agents are to provide the maximum professional service in a simple, honest, clean and transparent manner. The purpose of incorporating the PDS into the Contract for Purchase and Sale is part of the process of ensuring the transparency and transfer of knowledge, as well as to provide a contractual remedy for a misrepresentation on the PDS.

[54] He stated that while all the real estate agents within RE/MAX will know about offers taking place, it is highly improbable that they will know the fine details of matters in which they are not directly involved.

[55] He testified that a real estate agent has an obligation to a seller not to disclose a material fact limiting the potential for maximum sale price, or which would put the vendor at a disadvantage, without the consent of the seller. That

said, if a real estate agent has knowledge of a material latent defect, the agent is bound with the same disclosure obligation as the seller.

**Law**

*Disclosure obligation*

[56] It is clear in law that a seller completing a PDS or similar document is required to disclose any latent defect in the property being sold in response to a question that addresses the latent defect. A failure to disclose such a latent defect can result in either a finding of non-contractual fraudulent or negligent misrepresentation, or a breach of the contract for purchase and sale if the PDS has been incorporated into the contract.

[57] A failure to disclose a patent defect will not necessarily constitute a misrepresentation or breach of contract giving rise to liability, as such a defect should normally be visible to the buyer. As such, the buyer would not necessarily have been misled by the disclosure statement. As the PDS forms part of the Contract in this case, I will not discuss the concepts of fraudulent or negligent misrepresentation in these reasons.

*Breach of Contract*

[58] The circumstances in ***Kaufmann*** v. ***Gibson***, [2007] O.J. No. 2711 (Sup. Ct. Jus.) were somewhat similar to the present case. This was an action, however, brought by the plaintiff sellers against the defendant buyers for breach of an agreement of purchase and sale as a result of the defendants' refusal to close. The defendants counterclaimed for rescission based upon an allegation of a failure by the sellers to comply with their contractual disclosure obligations. Killeen J. found for the defendants on the basis of the plaintiffs failure to comply with their disclosure obligations under a Seller Property Information Statement ("SPIS") that they had completed.

[59] The sellers, Mr. and Mrs. Kaufmann, had owned their home for approximately 23 years. In February, 2004, they discovered water damage in several areas of their home. In cross-examination, Mr. Kaufmann conceded a

prior occasion in 1997 in which water had leaked into a master bedroom and resulted in the installation of a new roof and membrane to protect against ice damming.

[60] A contractor determined that the source of the problem was ice damming resulting from particularly bad snow and ice conditions in the winter of 2003 and 2004. Melting of the ice dam buildup resulted in water finding its way into the house and causing damage. The contractor did emergency drying, cleanup and control work and completed the necessary repair and restoration work. The sellers, at the suggestion of the insurer and on-site senior estimator and project manager, Mr. Scott, also had the contractors install additional baffles on the roof and ventilation holes at the sides of two bay windows. Mr. Scott pointed out to the vendors that their particular roof design structure made the home prone to ice damming. He advised them that, notwithstanding some optional constructions such as water membrane barriers under the shingles, the best solution was to shovel the roof diligently through the winter months.

[61] When the sellers listed their home for sale shortly afterwards, for reasons unrelated to the water issue, they signed the SPIS. The SPIS is an optional disclosure statement routinely provided under the practice of the London Real Estate Board and equivalent to the PDS in the present case. It contained the following three questions:

> 7. Are you aware of any moisture and/or water problems?
> 8. Are you aware of any damage due to wind, fire, water, insects, termites, rodents, pets or wood rot?
> 9. Are you aware of any roof leakage or unrepaired damage? Age of roof covering if known.

[62] The vendors answered “No” to each of these questions. Mr. Kaufmann testified that when he was completing the SPIS with his real estate agent, Ms. Siskind, he thought that he should include information about the February water damage. He had brought a brief note to that effect with him. He stated that he was dissuaded from doing so by Ms. Siskind for two reasons: firstly because the language of the questions was in the present tense and, secondly, because there was not a water problem at the time of the signing of the statement. Mr.

Kaufmann considered the water problem to have been an isolated incident that had been corrected and the home restored to its prior condition. Ms. Siskind confirmed that Mr. Kaufmann had shown her the note and told her about the ice damming, but that they had no detailed discussion beyond that. She advised the defendants to fill out the SPIS "as it is at the date of listing". She thought that the questions on the SPIS were "for information purposes only" and that "these questions speak to the moment" of the listing and did not reach into the past.

[63] The SPIS was incorporated into the Agreement for Purchase and Sale as forming part of the agreement which, in Killeen J.'s words:

> …greatly strengthens the position of the defendants because they were relying on the SPIS, not as an outside document containing representations, but, rather, as a specific contractual commitment within the four corners of the agreement itself (para. 116).

[64] Prior to closing the sale, the defendants learned about the extent of the water damage to the home and the underlying cause. The defendants then advised the plaintiffs, through counsel, that they were withdrawing from the Agreement of Purchase and Sale.

[65] Killeen J. rejected the "present-tense" or "current" interpretation with respect to the questions in the SPIS, finding that, in consideration of the spirit and general purpose of the SPIS, "…it is not unreasonable to infer that the questions should be given a plain, common-sense reading rather than a narrow or tortured one" (paras. 101-108).

[66] In addition, he stated that once a seller signs a SPIS, the "doctrine of caveat emptor falls away as a defense mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue here" (para. 119). (See also ***Gibb*** v. ***Sprague***, 2008 ABQB 298, paras. 16, 19).

**Conclusion on Liability**

[67] Here, at the time that they signed the PDS, the Defendants were aware of the existence of the Moisture Problem in the Suite in 2006 and 2007. The Moisture Problem was latent and should have been disclosed to the Plaintiffs by

the Defendants. I concur with Killeen J. that a “present tense” or “current” interpretation of the questions asked in the PDS should be rejected. While the questions in the PDS are not as clearly worded as they could be, they are not ambiguous to the point where they would have of necessarily misled the Defendants.

[68] The primary purpose of the PDS is to disclose latent defects that would not be easily discoverable to a prospective purchaser in the time frame generally associated with completing a purchase and sale transaction. A prospective purchaser should be able to rely on the questions and answers in the PDS to inform him or her about past, as well as present, issues. In the absence of wording that narrows the time frame to the present, such as “Are you aware of any present water and/or moisture problems….”, then a broad interpretation that is in accord with the purpose of the PDS should be given to the questions.

[69] It is important to remember that, if necessary, the seller has the ability to elaborate on the answers given in the Additional Comments section. In this case, the Defendants only additional comment as to having never lived in the rental property was inadequate. At most, this comment could have triggered the Plaintiffs to a possibility that the Defendants may not have been in the best situation to observe any issues or problems, as compared to someone who actually lived in the Property. While such a comment may have value to a buyer in certain circumstances, in this case, given what the Defendants knew and what they wrote in the PDS, it fell far short of what is required.

[70] It would have been very simple for the Defendants to have answered questions “J” and “K” with “Yes”, or even with “No”, and, in either case, to provide in the Additional Comments section the details of the Moisture Problem in 2006 and 2007, the conclusions reached, and the steps taken to eliminate the problem and repair the damage. Although I consider that a “No” answer would have been incorrect, the suggested additional comments would have nonetheless alerted the Plaintiffs to a water and/or moisture issue which they could have then looked into more carefully, had they chosen to do so. The way these questions were

answered, for all practical purposes, foreclosed such a further investigation by the Plaintiffs.

[71] The wording in the PDS that “The seller states that the information provided is true, based on the seller’s current actual knowledge as of the date on page 1**”** does not impact upon the Defendants’ liability. It is what the Defendants were aware of on June 20, 2007 that mattered, and the Defendants knew on that date, at a minimum, of the prior existence of the Moisture Problem. In any event, there is also some foundation in the evidence that the Defendants were or should have been aware on June 20, 2007 that there remained a present problem due to the reappearance of water and/or moisture staining in the master bedroom, after the dehumidifier had been used.

[72] In conclusion on the issue of liability, I find that the Defendants are liable to the Plaintiffs for breach of contract as a result of failing to disclose to the Plaintiffs in questions “J” and “K” of the PDS the existence of the Moisture Problem. I do not consider that the answer to question “M” was incorrect or misleading. The Defendants were not aware of any roof leakage or an unrepaired roof problem and their answer of “No” was correct to this question.

**Damages**

[73] Mr. Lyle testified that the Plaintiffs would not have paid current market value for the Property had they known of the Water Damage, the Moisture Problem and the underlying cause. For the breach of contract, therefore, the Plaintiffs shall be awarded damages that cover the costs associated with fixing the Water Damage and the underlying cause of the Moisture Problem, thus effectively putting the Plaintiffs in a position similar to what they would have been in at the time of the sale of the Property, had they purchased it at a price that was reduced in order to allow for the necessary repairs.

[74] A remediation plan has been put forward by the Plaintiffs based upon the recommendations and respective expertise of the contractors. I am satisfied upon the evidence that this plan is as reasonable and accurate as can be expected in the circumstances. The Plaintiffs are awarded $10,818.15, inclusive

of GST. The Plaintiffs are also awarded post-judgment interest in accordance with the *Judicature Act*, R.S.Y. 2002, c. 128. In the circumstances, I decline to make an order for pre-judgment interest.

**Other Issues:**

*Waiver of Home Inspection Condition*

[75] Although the issue was not specifically argued by the Defendants, I concur with the comments of Killeen J. in ***Kaufmann*** regarding the effect of the waiver by the Plaintiffs of the home inspection condition. This waiver in no way means that:

> …the purchasers waived their right to rely on the untrue answers in the SPIS form, as incorporated in the agreement. It is a matter of obvious fact that home inspections may not discover things that are not visible to the naked eye". (paras. 123, 124).

[76] A home inspection should reveal any patent defects and, if disclosed to the buyer, allow for a more thorough investigation into any latent defect in order to determine the nature of the defect. A home inspection is not intended to find latent defects. In circumstances where there is no PDS prepared, a prudent purchaser would be expected to contract for a more thorough home inspection if the buyer wished to avoid future costly surprises. Where a PDS has been prepared, however, the buyer should be able to rely on the truthfulness and accuracy of the representations in the PDS in deciding the extent to which a contractor will be instructed to conduct a home inspection.

*Dual Agency*

[77] A dual agency relationship existed in these circumstances as both Mr. Philpott and Mr. Lyle worked for the same brokerage. There was not a dual agency agreement executed, contrary to what appears to have occurred in a number of the cases I have reviewed. (See ***Hamilton*** v. ***1214125 Ontario Ltd.***, [2008] O.J. No. 2270 (S.C.J.) at paras. 40, 41). I have no direct evidence that the Defendants were, or were not, aware of the fact that Mr. Lyle and Mr. Philpott

both worked for RE/MAX, although neither Defendant testified that they were unaware of this fact or had any concern over it.

[78] There exists a rebuttable presumption that information in the possession of one real estate agent is also in the possession of other real estate agents employed by the same firm. (For a discussion on Dual Agency Relationships in real estate transactions see *Agency Law and Real Estate Brokerage: Current Issues, A review of the Case Law and some Industry Practices*, *January 2003*, written by Professor Foster, Faculty of Law McGill University, Chapters 4.3 - 4.3.4, located on the website for the Nova Scotia Real Estate Commission www.nsrec.ns.ca).

[79] I find on the evidence that Mr. Lyle was not told of the 2007 moisture or condensation issue or did not otherwise learn of it through his employment at RE/MAX. I find that the Plaintiffs have rebutted the presumption that Mr. Lyle knew what the Defendants told Mr. Philpott.

[80] Although I have some concerns about the degree of the disclosure of the dual agency relationship in this case, I am satisfied that in the circumstances, this issue does not bear on the liability of the Defendants to the Plaintiffs.

*Use of Property Disclosure Statement*

[81] I agree with the following comments by Scott C.J.M. and Kroft J.A. concurring in ***Alevizos*** v. ***Nirula***, 2003 MBCA 148, paras. 36, 47 and 48:

> 36. Based upon the experience of those provinces that have employed the PCS [Property Condition Statement], 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 is [sic] 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.
>
> 47. This judgment should, in my view, be taken as a warning about the routine use of the PCS. The purchase and sale of a home is for many people the most significant business transaction they will ever enter into. Representations as to the condition of the property are inevitably going to be requested and given. I do not believe that these concerns are ever

> going to be safely dealt with by filling in the blanks on a short form carried in the real estate agent's briefcase with his or her other supplies.
>
> 48. It is my concern that the use of the PCS is likely to increase the number of disputes in circumstances similar to those which existed here. That view causes me to emphasize the suggestion of Chief Justice Scott that the continued use of the PCS "should be addressed by lawyers and real estate agents alike." A more careful and traditional way of making important representations about the condition of property is surely better than incurring the risk of costly and uncertain litigation.

[82] The PDS is a legal minefield, given the consequences that can arise for both a seller and a buyer, and the apparent lack of actual legal advice accompanying their preparation and receipt. Killeen J. stated in ***Kaufmann*** the following:

> 109. It seems that, in the past 10 years or so, similar voluntary disclosure statements to the one employed here have been adopted by real estate boards across Canada. Almost inevitably, they have given rise to litigation over their meaning and reach.

*Role of the Real Estate Agent in the PDS*

[83] As Ms. Burdess testified, the Defendants were not particularly experienced in selling and purchasing homes. She stated that she trusted Mr. Philpott to give her and her husband advice in the sale of their home, including the completion of the PDS. She testified that she did not feel that she was well represented in that regard.

[84] Mr. Philpott is not a defendant in this proceeding. As such, it cannot be said that I have before me all the evidence that would perhaps have been relevant had he been named as a Defendant. Therefore, I am not required, nor am I able, to make findings with respect to any potential liability resulting from his actions in the sale of the Property. In the circumstances of this case, however, some observations about the general role of real estate agents, and Mr. Philpott's role in particular, are worth making.

[85] When providing information and advice, a real estate agent has a duty to exercise care and skill. This is true whether speaking of the listing agent for the

seller or the listing agent for the purchaser. In ***Neill*** v. ***Trenholme***, [2000] N.B.J. No. 497 (Q.B. T.D.), at para. 28, Glennie J. referred to the decision of Lysyk J. in ***Sedgemore*** v. ***Block Brothers Realty Ltd.*** (1985), 39 R.P.R. 38 (B.C.S.C.) at para. 49, where he stated:

> In some circumstances, a real estate agent is entitled to rely on representations of fact made by the vendor…In Foster, Real Estate Agency Law (1984), the duty to exercise care and skill is described in the following terms (at p. 243):
>
> > It is now well established that real estate brokers who elect to provide information and advice to third parties with whom they have dealings must exercise reasonable care and skill in the performance of their undertaking in ensuring the completeness and accuracy of such information and advice….A broker must at least check the completeness and accuracy, both of all information which it is usual or customary for brokers to verify, and of all other information as to the completeness and accuracy of which he is in doubt. However, authority exists to support the contention that the obligation of, at least, a listing broker is somewhat broader in that he must ascertain and verify all pertinent facts concerning the property placed in his hands for disposal.

[86] In Professor Foster's paper, referred to earlier, under the heading of Duty of Disclosure and Property Disclosure Statements (Chapter 6.3), he discussed the real estate agent's role when acting for either the seller or the buyer when a Property Disclosure Statement is utilized.

[87] In Chapter 6.3.1 "**PDSs and buyers' brokers"**, he noted that:

> …a buyers' brokers' obligations to their clients are not discharged by delivering the statements to their clients. The case law suggests that they should advise their clients of:
>
> - the continued relevance of the doctrine of caveat emptor;
> - the limited utility of these statements as contractual documents;
> - the limited utility of these documents as they attest only to sellers' current knowledge about their properties and not necessarily about the actual state of the properties;
> - the fact that there may be defects about which the sellers may be unaware;
> - any apparently incorrect or questionable responses by sellers;
> - the need for further inspection and inquiry by the buyer or appropriate experts;

- the need for brokers to personally verify certain information to ensure the statement's accuracy when a reasonable broker would do so;
- the need for insertion of appropriate warranties if particular attributes of the property are of concern to the client.

[88] In Chapter 6.3.2 "**PDSs and sellers' brokers"**, Professor Foster noted that seller's brokers:

> …who request their clients to complete PDSs, may do so for one or both of two purposes:
>
> - to determine for themselves the condition of their client's property and other relevant matters so that they are in a position to respond, if they choose, appropriately to inquiries by potential customers; and/or
> - to provide the statements to potential customers or their brokers

[89] Professor Foster notes that Property Disclosure Statements are "…clearly drawn in a manner offering more protection to [seller] than to a purchaser…" and notes that the use of the Property Disclosure Statement:

> …poses potential problems if only because the statements do not sufficiently clearly, if at all, advise clients:
>
> - of the continued relevance of caveat emptor;
> - that they are not legally obliged to disclose patent defects;
> - that they are only legally obligated to disclose material latent defects;
> - what constitutes material latent defects
> - of the importance of accuracy and completeness if they chose to complete the statement;
> - that, even though the statements are not necessarily contractual documents, they nevertheless constitute representations and may be used by buyers as a basis for action for negligent misrepresentation;
> - that completion of the statement does not relieve clients from their duty of disclosure to buyer-customers.
>
> While a number of these issues have not yet been considered by a court, it is suggested that it is only a matter of time before they are. For in requiring sellers to complete PDSs without an awareness of the full implications of these statements, it is difficult to see how it can be said that brokers are acting in the best interests of their clients….for seller's brokers to provide these statements to buyers, is to:
>
> - ask sellers to volunteer information to buyers, much of which information sellers are not legally obliged to volunteer; and

- place buyers in an advantageous bargaining position being armed as they are with a list of all known defects, patent and latent.

[90] Professor Foster adds in Chapter 6.3.4 "**PDSs – Some general issues**" that "…the case law also suggests that brokers, whether representing sellers or buyers, must:

- if they play a role in the completion of the statements, exercise reasonable care and skill in ensuring their accuracy;
- be alert for changes in, or new, information and ensure that PDSs reflect current knowledge concerning the property;
- investigate certain responses to questions in the statement, if there is some evidence that would put a reasonable broker on notice that the response provided is not reasonable.

[91] I agree with the observations of Professor Foster. While some of the warnings or cautions as to the limitations of the PDS are incorporated into the document in the present case, these warnings or cautions are minimal and by no means sufficiently comprehensive. It appears from my review of the case law that similar property disclosure or information documents used in other jurisdictions may also incorporate some of these warnings or cautions, but certainly not all of them.

[92] I also note that Professor Foster's comments are not exhaustive in their contemplation of what advice a real estate agent should perhaps provide his or her client. For example, in the present case, the PDS was incorporated as a term of the Contract of Purchase and Sale, thus altering somewhat the potential legal consequences of the PDS as compared to a warranty or representation existing outside of the terms of the Contract for Purchase and Sale.

[93] What the duty of care is on a real estate agent will depend upon the factual circumstances of each case. In the ***Neill*** case, the seller/defendants had advised their real estate agent of a prior water problem that had been rectified. The defendants' real estate agent then provided this information to the real estate agent for the plaintiffs, who in turn advised the plaintiffs. The plaintiffs, at their request, received further confirmation from the defendants that the problem had been fixed. The court found for the plaintiffs for negligent misrepresentation by the defendants of the nature and status of the water problems in the

basement of the property. The court found that the defendants knew the water problems remained ongoing.

[94] The real estate agent for the defendants was brought into the action as a third party by the defendants, as were the plaintiff's real estate agent and the real estate broker that employed them both. The defendants claimed that they relied on the professional advice or acquiescence of both real estate agents in deciding to answer "No" to two questions on the Property Condition Disclosure Statement that dealt with "water" or "moisture" problems in the property. The real estate agent for the defendants did not discuss with them the questions to be answered on the Property Condition Disclosure Statement.

[95] In finding that the defendants' real estate agent did not breach his duty of care, the trial judge held that he had met his obligation to the defendants by telling them to "fill it [the Property Condition Disclosure Statement] out to the best of your knowledge" and to "be truthful because it is a legal document". The real estate agent for the plaintiffs had no reason to believe that the information provided to him by the defendants was incorrect. The court also found that the defendants had not provided the real estate agent any information that ought to have alerted him to inquire further of the defendants as to the water problem. The action was dismissed as against the defendants' real estate agent and the brokerage. The defendants discontinued their claim against the plaintiffs' real estate agent at the conclusion of the trial.

[96] While the court found in ***Neill*** that a real estate agent has discharged his or her duty of care by simply telling a seller to fill out the Property Condition Disclosure Statement truthfully to the best of the sellers' knowledge, this may not be sufficient in a different set of circumstances, or necessarily be found to be the case in different jurisdictions. (See ***Agius*** v. ***Anderson***, 2008 MBQB 189, paras. 97-136).

[97] I am not suggesting that compliance with everything Professor Foster has listed as duties of a real estate agent for the buyer or the seller may necessarily be required in order for a real estate agent to discharge the duty of care required. This is not an issue I am required or able to decide in this case.

[98] That said, should the issue regarding a real estate agent's duty of care arise in future, an argument could be advanced that the completion of a PDS by a seller, or receipt of one by a buyer, would require greater guidance from the real estate agent involved than simply telling the seller to complete the form truthfully to the best of the seller's knowledge, or to accept it as a purchaser, without understanding the potential legal consequences attached to it. Whether such an argument succeeds is, of course, dependent upon the specific circumstances of a particular case.

[99] The required level of guidance from a real estate agent may be limited to explaining that: 1) there are significant legal consequences attached to a PDS, 2) the agent is not in a position to provide legal advice, and 3) the seller or buyer may first wish to discuss these consequences with a lawyer to fully appreciate them. I am not finding this to be the required standard, as I am not in a position to do so in this case, but am rather suggesting that some consideration needs to be given to the issue by real estate agents and real estate companies.

[100] The completion of the PDS is not mandatory and the seller is thus consenting to complete one. Although the consequences that flow from the concept of consent in the civil arena differ from consent in the criminal arena, if consent gives rise to potential legal consequences, the consenting party should be as fully informed as possible.

*Mr. Philpott's actions*

[101] In the present case, Mr. Philpott was provided very limited information by the Defendants as to the nature of the Moisture Problem. He was told that the problem had been fixed and he specifically asked the Defendants if they were sure it was fixed. He received their assurances that it had been. He stated that if he was not satisfied that the problem had been fixed he would have "taken it to the next level" which I consider on the whole of the evidence to mean he would have made further inquiry of the Defendants.

[102] Mr. Philpott did not tell the Defendants to answer "No" to questions **Structural** "J" and "K", although it is logical on the evidence to infer that he did

not dissuade them from doing so and may well have been perceived by the Defendants as indicating to them that a “No” answer would be appropriate. He did, however, advise the Defendants to make a somewhat innocuous comment as to being only renters of the Property, when it would have been just as easy to suggest that the Defendants note that there had been a past water and/or moisture problem that was now fixed.

[103] I have found that it is incorrect to believe that past water and/or moisture problems now fixed do not need to be disclosed in a PDS. Mr. Philpott testified, however, that he did not believe that such past problems needed to be disclosed. If Mr. Philpott had understood that the PDS required that past problems also be disclosed, he may perhaps have given the Defendants advice to disclose the Moisture Problem. There is no evidence before me, however, that his erroneous belief was communicated to the Defendants or that it may have directly contributed to the Defendants answering questions “J” and “K” incorrectly.

[104] As stated earlier, Mr. Philpott is not a Defendant in these proceedings. On the limited evidence I do have, it cannot be said that Mr. Philpott acted in a way that differed from the usual practice in the Yukon in regard to the completion and the use of PDSs. It may well be that Mr. Philpott acted in this case in a manner consistent with how other real estate agents in the Yukon handle the PDS in residential real estate transactions. As such it would be unfair for anyone to view my comments as putting his actions in a negative light.

*Recommendations*

[105] I would recommend that a comprehensive review be undertaken by real estate agencies and lawyers with respect to the use of the PDS in the Yukon. Such a review should work towards ensuring that both sellers and buyers are made fully aware of the potential legal implications that may flow from the preparation and disclosure of the PDS. For example, to the degree that there is any apparent or potential ambiguity in the questions in the PDS, some consideration could perhaps be given to simple wording changes that make it clear that “past” and “present” problems are to de disclosed in the PDS.

[106] I say this keeping in mind that real estate agents are not lawyers and should not be expected to provide legal advice. The practical reality, however, is that many individuals in real estate transactions likely rely on their real estate agent for legal advice more than they should and real estate agents should be aware of this fact.

[107] While there may be a concern among real estate agents that a PDS with numerous warnings and cautions may have the effect of delaying or possibly even preventing the completion of a purchase and sale, thus potentially becoming a “deal-breaker”, any such concern is far outweighed by the potential legal issues that could arise in cases such as the one before me.

Cozens T.C.J.