Krawchuk v. Scherbak et al.

[Indexed as: Krawchuk v. Scherbak]

106 O.R. (3d) 598

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Court of Appeal for Ontario,
Rosenberg, Cronk and Epstein JJ.A.
May 6, 2011

Agency -- Real estate agents and brokers -- Real estate agent acting for both vendors and purchaser in sale of house -- Agent having reason [page599] to doubt vendors' representations in Seller Property Information Sheet ("SPIS") as to existence of structural and plumbing defects -- Agent negligent in failing to verify accuracy of vendors' representations or to recommend to purchaser that she get independent inspection before submitting offer or make offer conditional on satisfactory inspection -- Agent also negligent in failing to counsel vendors with respect of implications of their representations in SPIS.

Damages -- Double recovery -- Plaintiff suing vendors successfully for damages for negligent misrepresentation after discovering serious latent defects in house -- Plaintiff not barred from recovering damages from vendors on basis that she had already recovered under title insurance policy -- Private insurance exception applying.

Torts -- Negligent misrepresentation -- Vendors making representations as to structural and plumbing problems in Seller Property Information Sheet ("SPIS") -- Vendors having

special relationship with purchaser that gave rise to duty of care based on SPIS -- Vendors providing incomplete information with respect to structural problems and false information with respect to plumbing problems -- Vendors required to fill out SPIS honestly and accurately -- Purchaser entitled to rely on representations in SPIS -- Vendors liable to purchaser for damages for negligent misrepresentation.

After moving into a house, the purchaser discovered serious latent structural and plumbing defects. The repair costs exceeded the $110,100 she had paid for the property. The vendors had completed a Seller Property Information Sheet ("SPIS") with respect to the property. In response to the question "Are you aware of any structural problems?", they had replied, "NW corner settled" and "No further problems in 17 years". In response to the question "Are you aware of any problems with the plumbing system?", they had replied, "No". In fact, they knew that the foundation of the house was seriously compromised and that there were ongoing plumbing problems. The purchaser had title insurance and recovered $105,742.32 from the insurer. She then sued the vendors, the real estate agent who had acted both for her and for the vendors, and the agent's brokerage. The vendors and the agent cross-claimed against each other for contribution and indemnity. The trial judge found the vendors liable for negligent misrepresentation and awarded the purchaser damages in the amount of $110,742.32. He dismissed her claim and the vendors' cross-claim against the agent. The vendors appealed. The purchaser cross-appealed from the dismissal of her claim against the agent.

Held, the appeal should be dismissed; the cross-appeal should be allowed.

Even though statements made in an SPIS are not warranties, they may still be the basis of liability as representations. The trial judge did not err in finding that the vendors had a special relationship with the purchaser that gave rise to a duty of care based on the SPIS. The information provided by the vendors in the SPIS was incomplete with respect to the structural issues and false in relation to the plumbing problems. Although the completion of an SPIS is not mandatory,

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once a seller decides to fill one out, he or she must do so honestly and accurately and the purchaser is entitled to rely on the representations contained in the SPIS. The trial judge did not err in finding liability notwithstanding his conclusion that the vendors tried to be honest, as a reasonable person in similar circumstances would have disclosed more. The purchaser reasonably relied on the statements in the [page600] SPIS. The warning in the SPIS that "[b]uyers must still make their own enquiries notwithstanding the information contained on this statement" did not absolve the vendors of liability for misstatements. The purchaser was not required to challenge the vendors' honesty and forthrightness. The trial judge did not err in finding that the purchaser had successfully established a claim against the vendors based on negligent misrepresentation.

The purchaser was entitled to recover damages even though she had already recovered under the title insurance policy. The private insurance exception applied to allow double recovery.

The trial judge erred in dismissing the purchaser's claim in negligence against the agent. He erred by holding that he could determine the applicable standard of care without expert assistance. That error was compounded by his failure to identify the standard of care that he thought was applicable and by his failure to address the import of the Real Estate Council of Ontario's Code of Ethics, 1998 in relation to the question of the governing standard of care. The agent had reason to question the veracity of the information provided by the vendors. She knew that the house had a history of settlement problems and accordingly was underpriced. As well, her visual inspection of the property disclosed settlement problems. She should have either verified the vendors' assurances herself or recommended in the strongest terms that the purchaser get an independent inspection before submitting an offer or make the offer conditional on a satisfactory inspection. In failing to do either, she was negligent.

The vendors and the agent were not entitled to full indemnity from each other. Both were negligent in their dealings with the purchaser and contributed to her loss.

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The agent had a duty to counsel the vendors with respect to the implications of the representations they made in the SPIS. Her failure to do so amounted to negligence in her representation of the vendors. That did not entitle the vendors to indemnification because they were also negligent. However, it had to be taken into account in the overall apportionment of fault. While the vendors did not owe the agent a free-standing duty of care, their lack of disclosure and its contribution to the agent's liability for the purchaser's losses also had to be taken into account in the overall apportionment of fault. In the circumstances, it was appropriate to apportion fault at 50 per cent to the vendors and 50 per cent to the agent and her brokerage.

Cases referred to

Cunningham v. Wheeler, [1994] 1 S.C.R. 359, [1994] S.C.J. No. 19, 113 D.L.R. (4th) 1, 164 N.R. 81, [1994] 4 W.W.R. 153, J.E. 94-496, 41 B.C.A.C. 1, 88 B.C.L.R. (2d) 273, 23 C.C.L.I. (2d) 205, 20 C.C.L.T. (2d) 1, 2 C.C.P.B. 217, 46 A.C.W.S. (3d) 863, apld

Alevizos v. Nirula, [2003] M.J. No. 433, 2003 MBCA 148, 234 D.L.R. (4th) 352, [2004] 10 W.W.R. 634, 180 Man. R. (2d) 186, 15 R.P.R. (4th) 167, 127 A.C.W.S. (3d) 563; Kaufmann v. Gibson, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293, 158 A.C.W.S. (3d) 1016 (S.C.J.); Lyle v. Burdess, [2008] Y.J. No. 116, 2008 YKSM 5 (Sm. Cl. Ct.); McQueen v. Kelly, [1999] O.J. No. 2481, 102 O.T.C. 264, 25 R.P.R. (3d) 248, 89 A.C.W.S. (3d) 825 (S.C.J.); Pavenham Development Corp. v. Sladen, [1997] B.C.J. No. 2103, 1997 CanLII 4295 (S.C.); Whaley v. Dennis, [2005] O.J. No. 3174, [2005] O.T.C. 662, 37 R.P.R. (4th) 127, 141 A.C.W.S. (3d) 139 (S.C.J.), consd

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11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd. (1997), 36 O.R. (3d) 328, [1997] O.J. No. 5003, 49 O.T.C. 112, 15 R.P.R. (3d) 201, 76 A.C.W.S. (3d) 207 (Gen. Div.); [page601] Adeshina v. Litwiniuk & Co., [2010] A.J. No. 125, 2010 ABQB 80, [2010] 9 W.W.R. 633, 483 A.R. 81, 24 Alta. L.R. (5th) 67; Ault v. Canada (Attorney General), [2011] O.J. No. 845, 2011 ONCA 147, 274 O.A.C. 200, 87 C.C.P.B. 210, 88 C.C.E.L. (3d) 161; Boarelli v. Flannigan, [1973] 3 O.R. 69, [1973] O.J. No. 1989, 36 D.L.R. (3d) 4 (C.A.); Bond v.

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Richardson, [2007] N.B.J. No. 318, 2007 NBQB 264, 59 R.P.R. (4th) 97, 324 N.B.R. (2d) 64, 160 A.C.W.S. (3d) 205 (Q.B. (T.D.)); Brown v. Fritz, [1993] B.C.J. No. 2182, 43 A.C.W.S. (3d) 1023, 1993 CanLII 1475 (S.C.); Cosway v. Boorman's Investment Co., [2008] B.C.J. No. 2081, 2008 BCSC 1482, 173 A.C.W.S. (3d) 637; Dinevski v. Snowdon, [2010] O.J. No. 2516, 2010 ONSC 2715; Fellowes, McNeil v. Kansa General International Insurance Co., [2000] O.J. No. 3309, 138 O.A.C. 28, 22 C.C.L.I. (3d) 1, 99 A.C.W.S. (3d) 504 (C.A.); Fletcher v. Hand, [1994] A.J. No. 531, 21 Alta. L.R. (3d) 346, 156 A.R. 142, 40 R.P.R. (2d) 52, 48 A.C.W.S. (3d) 1288 (Q.B.); Fullowka v. Pinkerton's of Canada Ltd., [2010] 1 S.C.R. 132, [2010] S.C.J. No. 5, 2010 SCC 5, 315 D.L.R. (4th) 577, EYB 2010-169716, 2010EXP-757, J.E. 2010-416, 398 N.R. 20, 71 C.C.L.T. (3d) 1, [2010] 4 W.W.R. 35, 80 C.C.E.L. (3d) 1, 474 A.R. 1; Gauvreau v. Paci, [1996] O.J. No. 2396 (C.A.); Grunberger v. Iseson, 75 A.D.2d 329 (N.Y. App. Div. 1980); Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 171 N.R. 245, [1994] 9 W.W.R. 609, J.E. 94-1560, 49 B.C.A.C. 1, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1, 50 A.C.W.S. (3d) 469; Hussain v. New Taplow Paper Mills Ltd., [1988] 1 A.C. 514, [1988] 1 All E.R. 541, [1988] 2 W.L.R. 266, [1988] I.C.R. 259, [1988] I.R.L.R. 167 (H.L.); Johnstone v. Dame, [1995] B.C.J. No. 2637, 49 R.P.R. (2d) 279, 59 A.C.W.S. (3d) 1215 (S.C.); Kosanovic v. Wawanesa Mutual Insurance Co. (2004), 70 O.R. (3d) 161, [2004] O.J. No. 1234, 184 O.A.C. 269, 8 C.C.L.I. (4th) 225, 49 M.V.R. (4th) 165, 237 D.L.R. (4th) 441, 129 A.C.W.S. (3d) 1206 (C.A.); L. (H.) v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, J.E. 2005-845, [2005] R.R.A. 275, 262 Sask. R. 1, 24 Admin. L.R. (4th) 1, 29 C.C.L.T. (3d) 1, 8 C.P.C. (6th) 199, 138 A.C.W.S. (3d) 852; Martin v. Mayo, [1997] B.C.J. No. 1926, 11 R.P.R. (3d) 150, 73 A.C.W.S. (3d) 379 (S.C.); Messineo v. Beale (1978), 20 O.R. (2d) 49, [1978] O.J. No. 3386, 86 D.L.R. (3d) 713, 5 C.C.L.T. 235, [1978] 2 A.C.W.S. 275 (C.A.); Ohler v. Pye, [2009] O.J. No. 3434 (Sm. Cl. Ct.); Posthumas v. Garner, [1995] O.J. No. 3362, 48 R.P.R. (2d) 286, 58 A.C.W.S. (3d) 1041 (Gen. Div.); Precision Remodeling

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Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sch. C [as am.]

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Rainaldi, Linda D., Remedies in Tort, vol. 4, looseleaf (Toronto: Carswell, 1987)

Real Estate Council of Ontario, Code of Ethics, 1998

Waddams, S.M., The Law of Damages, 2nd ed., looseleaf (Toronto: Canada Law Book, 2010)

APPEAL by the vendors from the judgment of Gordon J., [2009] O.J. No. 3254, 85 R.P.R. (4th) 262 (S.C.J.) for the purchaser and from the dismissal of a cross-claim against the agent; CROSS-APPEAL by the purchaser from the dismissal of her claim against the agent.

D. Peter Best, for appellants.

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David S. Steinberg, for Zoriana Krawchuk, respondent/appellant by way of cross-appeal.

Amelia M. Leckey, for Wendy Weddell and Re/Max Sudbury Inc., respondents/respondents by way of cross-appeal.

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The judgment of the court was delivered by

EPSTEIN J.A.: --

I. Introduction

[1] This appeal arises out of a sale of a house that, unbeknownst to the purchaser, had serious defects. While the appeal involves an analysis of the nature of the obligations between the various participants in the transaction, the issue of primary importance raised in this appeal is the duty of a real estate agent to verify information provided by the vendor about the property that is the subject of the transaction.

[2] In June of 2004, the respondent, Zoriana Krawchuk, purchased her first home. Shortly after moving in, Ms. Krawchuk discovered serious structural problems. The City of Sudbury issued an order requiring that the problems be rectified. The repair process, during which Ms. Krawchuk was forced to live elsewhere, disclosed plumbing problems as well. The repair costs exceeded the $110,100 she had paid for the property. Ms. Krawchuk recovered almost this amount through her claim under the title insurance policy she had acquired at the time of closing.

[3] Notwithstanding this recovery, Ms. Krawchuk sued the vendors -- the appellants, Timothy Scherbak and Cherese Scherbak -- for breach of contract or, in the alternative, for fraudulent or negligent misrepresentation. She also sued Wendy Weddell, the agent acting for both she and the vendors and the brokerage for which Ms. Weddell worked, Re/Max Sudbury Inc., [page603] (collectively, the "real estate respondents") for fraudulent or negligent misrepresentation and in negligence. [See Note 1 below] The Scherbaks and Ms. Weddell cross-claimed against each other for contribution and indemnity in relation to any damages

for which they may be held liable to Ms. Krawchuk.

[4] The trial judge found the Scherbaks liable for negligent misrepresentation and awarded Ms. Krawchuk damages in the amount of $110,742.32 ($105,742.32 based on the diminution in value of the property by reason of the defects and consequential losses, and $5,000 for mental distress and "loss of health"). He dismissed both Ms. Krawchuk's claim and the Scherbaks' cross-claim against the real estate respondents. He did not address the real estate respondents' cross-claim against the Scherbaks, which in any event was moot given his dismissal of Ms. Krawchuk's claim against them.

[5] On their appeal, the Scherbaks submit that the trial judge erred in his finding of negligent misrepresentation. They put forward three main arguments in support of this position. First, they contend that the trial judge erred in basing liability on a cause of action not pleaded. Second, the Scherbaks submit that the trial judge, in addition to making a number of findings of fact that were not supported by the evidence, erred in concluding that they owed Ms. Krawchuk a duty of care based on information they provided about the property. Third, they argue that the trial judge erred in holding that they owed a duty of care to Ms. Krawchuk in the light of the "entire agreement" clause contained in the agreement of purchase and sale.

[6] The Scherbaks further contend that the trial judge erred in law by allowing Ms. Krawchuk to recover both under her title insurance policy and through damages awarded at trial.

[7] Ms. Krawchuk, on her cross-appeal, argues that the trial judge erred in dismissing her claim against Ms. Weddell. She submits that Ms. Weddell breached her duty to recommend that she seek professional advice regarding the possible structural problems with the house and to advise her of the risks associated with making an offer that was not conditional on a satisfactory home inspection. Ms. Krawchuk further submits that Ms. Weddell was also liable for negligent misrepresentation in conveying to her incomplete and inaccurate information about the house. [page604]

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[8] In their appeal from the dismissal of their cross-claim against the real estate respondents, the Scherbaks contend that the trial judge erred in failing to conclude that Ms. Weddell had a duty to advise them with respect to their obligations arising from the information they provided Ms. Weddell concerning the house and that she breached that duty.

[9] Finally, on this appeal, the real estate respondents continue to advance their claim against the Scherbaks for contribution and indemnity if they are found liable to Ms. Krawchuk. This claim is based on the real estate respondents' argument that any misrepresentations made to Ms. Krawchuk were as a result of the failure of the Scherbaks to disclose the full condition of the property to Ms. Weddell.

[10] For the reasons that follow, I would dismiss the Scherbaks' appeal in relation to the judgment against them in favour of Ms. Krawchuk. I would allow Ms. Krawchuk's cross-appeal from the dismissal of her action against the real estate respondents. I would dismiss the Scherbaks' appeal from the dismissal of their cross-claim against the real estate respondents and dismiss the real estate respondents' cross-claim against the Scherbaks.

II. Factual Background

[11] In March of 2004, the Scherbaks met Ms. Weddell at an open house and hired her as their agent to assist them in finding a new home. Following the signing of an offer to purchase a new property, the Scherbaks retained Ms. Weddell as their listing agent to sell their existing home on Boland Avenue in Sudbury. On April 13, 2004, the Scherbaks and Ms. Weddell signed a listing agreement.

[12] Ms. Weddell assisted the Scherbaks in completing a document known as a Seller Property Information Sheet ("SPIS") with respect to the property. The SPIS is a two-page, pre-printed standard form document prepared by the Ontario Real Estate Association, the stated purpose of which is, in part, to protect sellers by establishing that correct information concerning the property is provided to prospective buyers.

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[13] The SPIS completed by the Scherbaks contains the following instructions at the top of the first page:

> ANSWERS MUST BE COMPLETE AND ACCURATE
>
> This statement is designed in part to protect Sellers by establishing that correct information concerning the property is being provided to buyers. All of the information contained herein is provided by the Sellers to the broker/sales representative. Any person who is in receipt of and utilizes this Statement acknowledges and agrees that the information is being provided for information purposes only and is not a warranty as to the matters recited [page605] hereinafter even if attached to an Agreement of Purchase and Sale. The broker/ sales representative shall not be held responsible for the accuracy of any information contained herein.
>
> BUYERS MUST STILL MAKE THEIR OWN ENQUIRIES
>
> Buyers must still make their own enquiries notwithstanding the information contained on this statement. Each question and answer must be considered and where necessary, keeping in mind that the Seller's knowledge of the property may be incomplete, additional information can be requested from the Sellers or from an independent source such as the municipality. Buyers can hire an independent inspector to examine the property to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified. This statement does not provide information on psychological stigmas that may be associated with a property.

(Emphasis in original)

[14] It also contains the following statement near the bottom of the second page:

> The sellers state that the above information is true based on their current actual knowledge as of the date below. Any important changes to this information known to the sellers will be disclosed by the sellers prior to closing. Sellers

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> are responsible for the accuracy of all answers. Sellers further agree to [indemnify] and hold the broker harmless from any liability incurred as a result of any buyer relying on this information. The sellers hereby authorize that a copy of this seller property information statement be delivered by their agent or representative to prospective buyers or their agents or representatives. The sellers hereby acknowledge receipt of a true copy of the statement.

[15] In furtherance of its objective, the SPIS contains a series of questions for the sellers to answer in relation to the property being sold. The questions fall into three main categories -- (1) general, (2) environmental and (3) improvements and structural.

[16] As completed by the Scherbaks, with the assistance of Ms. Weddell, the SPIS provided the following information germane to this appeal. With respect to the structural integrity of the home, the question was "Are you aware of any structural problems?" The Scherbaks' response was "NW corner settled. See note *". Under "additional comments", they added, "*to the best of our knowledge the house has settled. No further problems in 17 years." Concerning the plumbing, the question was "Are you aware of any problems with the plumbing system?" The Scherbaks answered, "No".

[17] Once the listing arrangements were finalized, Ms. Weddell scheduled an open house for Sunday, April 18, 2004.

[18] Ms. Krawchuk attended the open house. She met Ms. Weddell and agreed to have her act as her agent in submitting an offer to purchase the Scherbaks' home. With the consent of all [page606] parties, Ms. Weddell therefore became a dual agent, acting for both the Scherbaks and Ms. Krawchuk.

[19] Ms. Krawchuk walked through the house on her own and with Ms. Weddell. She also asked two friends to come over and look at the house with her. Ms. Krawchuk admitted to noticing a number of visible defects in the home, including the sloped floors, the foam-filled crack in the northwest corner of the crawl space, and the sloping brick and block work at the

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exterior of the northwest corner of the home. Ms. Krawchuk discussed the significance of these visible defects with Ms. Weddell, who told Ms. Krawchuk that the Scherbaks had advised her that the house had settled, been repaired and that there had been no further problems in 17 years. Ms. Krawchuk and Ms. Weddell discussed the listing documents, including the SPIS, and a confirmation of Ms. Weddell's role as a dual agent. They also discussed terms of a possible offer to purchase, including whether or not it should be conditional on a home inspection.

[20] During the evening of April 18, 2004, Ms. Weddell presented the Scherbaks with Ms. Krawchuk's offer to purchase. The offer was for a price $10,100 above asking and contained no conditions. The Scherbaks accepted the offer with an agreed-upon closing date of June 30, 2004.

[21] The sale was completed as scheduled. On closing, Ms. Krawchuk acquired title insurance through the Stewart Title Guaranty Company ("Stewart Title").

[22] On July 10, 2004, after performing some minor home improvements, Ms. Krawchuk moved into the home. Within days, she noted recurring accumulations of sand near the north wall of the crawlspace under the living room.

[23] Upon investigation, it was discovered that the entire north foundation wall and the northern portion of the east and west foundation walls had settled and were continuing to settle. This settlement resulted in significant weakness in the floor joists and ultimately jeopardized the stability of the building itself. The investigation of the foundation also disclosed plumbing problems.

[24] The City of Sudbury was contacted and it ordered that the structural problems be rectified. Remedying the structural problems required the removal of the house from its foundation, excavation of the cement floor, replacement of the subsoil with engineered fill, installation of new footings, foundation and cement floor and, finally, the replacement of the house on its new foundation. Further repair was required as a result of significant cracking of the interior finish that was caused by

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moving the house to the extent necessary to effect the repairs. [page607] Ms. Krawchuk estimated the total money spent on repairs to be $191,414.94.

[25] Ms. Krawchuk claimed against Stewart Title for her losses. Stewart Title initially rejected the claim on the basis that the City had not issued any work orders or notices of violation that would qualify Ms. Krawchuk for coverage under her policy. Later, after the City issued the order to comply, the insurer agreed that Ms. Krawchuk then qualified for coverage under a provision of her policy that Stewart Title said, in a letter to Ms. Krawchuk, provided coverage in the event that the insured "suffers a loss or damage as a result of being forced to remove [the] existing structure or a portion of it as a result of any portion of the structure being built without a building permit from the proper government office or agency, provided one would have been required at the time and the Municipality is forcing its removal as a result of not obtaining a building permit".

[26] After some negotiation, Stewart Title agreed to settle Ms. Krawchuk's claim for $105,742.32, based on the following calculation:

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

[27] As part of the final settlement agreement, Ms. Krawchuk agreed to indemnify Stewart Title and her lawyer from any claims by third parties. In exchange, Stewart Title agreed to transfer its subrogated interest to Ms. Krawchuk.

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[28] Ms. Krawchuk then commenced this action.

[29] At trial, Ms. Krawchuk submitted a damage claim in the amount of $191,414.94 for the amounts she claimed to have spent or would in the future be spending to place the property in the condition she believed it to be in when she purchased it. She also sought damages for emotional upset and "loss of health", as well as aggravated, punitive and exemplary damages.

III. The Trial Decision

A. Ms. Krawchuk's claim against the Scherbaks

[30] Two defects formed the basis of Ms. Krawchuk's claim -- the instability of the foundation and the faulty plumbing system. With respect to the foundation, the trial judge found that the house was constructed on unsuitable soil, leaving it without [page608] appropriate support. As a result, the foundation walls were settling into the earth to an unacceptable degree. With respect to the plumbing, the trial judge concluded that there was a defect in the plumbing system making the house prone to sewer backups. While the trial judge found that many of the problems, including the sloped floors and cracks, were patent defects that Ms. Krawchuk was obliged to accept, he also found that both the full nature and extent of the structural problems and the existence of the plumbing problem were latent defects.

1. Claim based on contract

[31] The trial judge dismissed Ms. Krawchuk's claim against the Scherbaks in contract. He noted that, in the absence of any warranties or guarantees as to the fitness of the property or home, the starting point for the analysis is the principle of caveat emptor -- "buyer beware".

[32] Ms. Krawchuk argued that there were two reasons why this principle did not apply: (1) the defects were latent and had been deliberately concealed by the vendors; and (2) the defects were such as to render the home uninhabitable, dangerous or potentially dangerous so that they required disclosure by the Scherbaks.

[33] The trial judge rejected both arguments. He was unable

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to find, on the evidence, that the Scherbaks concealed problems for the purpose of misleading prospective purchasers. He also found that the plumbing defects did not render the home uninhabitable, dangerous or potentially dangerous and, with respect to the structural problems, he was unable to conclude that the Scherbaks knew the property to be uninhabitable, dangerous or potentially dangerous, given that they had resided there with their children for 17 years.

2. Claim based on fraudulent or negligent misrepresentation

[34] The trial judge's analysis of Ms. Krawchuk's claim against the Scherbaks based on fraudulent or negligent misrepresentation focused on the SPIS.

[35] He dismissed Ms. Krawchuk's fraudulent misrepresentation claim. While he concluded that the Scherbaks knowingly or recklessly made false representations of fact in the SPIS with respect to the foundation and the plumbing, he was not satisfied that the statements were made for the purpose of misleading Ms. Krawchuk. He accepted that the Scherbaks were attempting to be forthright in their disclosure. [page609]

[36] With respect to the claim of negligent misrepresentation, the trial judge concluded that the Scherbaks intended that the representations they made in the SPIS would be relied upon by prospective purchasers in deciding whether to submit an offer for the property. He thus found a special relationship between the Scherbaks and Ms. Krawchuk that gave rise to a duty of care.

[37] He held that the information provided about the foundation of the house was false in the sense of being incomplete. The Scherbaks knew that the structural problems were not restricted to the northwest corner of the home and were more serious than they had disclosed. In 1991, during their renovation of the family room in the eastern half of the basement, the Scherbaks had discovered a significant sinking of the foundation and its rotation in a northward direction. In dealing with the problem, Mr. Scherbak had carried out "a very perfunctory repair" and drywalled over it without applying for

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a building permit.

[38] The trial judge also held that the Scherbaks' response to the question in the SPIS about the plumbing was false as the Scherbaks had regularly experienced and were continuing to experience sewer backups once or twice per year.

[39] The trial judge, at para. 61, summarized his reasoning behind his conclusion that the Scherbaks were negligent in the manner in which they completed the SPIS, as follows:

> Notwithstanding that they had not experienced any difficulties with the foundation during their period of ownership it was known to them that there had in fact been substantial settling of the entire north wall of the foundation. Although whatever repair had been made had resolved the issue during their period of ownership, it was apparent at least to Mr. Scherbak that the repairs did not accord with good building practices. I would venture to say that this would be obvious to almost anyone viewing the state of the foundation as it existed in the photographs taken by the Scherbaks during their renovation work in 1991/92. Although I accept that the representation was not made to mislead Ms. Krawchuk, certainly it was not full, frank, and accurate disclosure of the structural problems of the house. In my view, a reasonably prudent person in similar circumstances would have disclosed the following: (1) that there had been significant settlement of the entire north wall of the foundation and the northern portion of both the east and west walls of the foundation prior to their becoming owners of the property; (2) that although there had not been further settlement noted during their 17 years of ownership, they are unaware of what repair work was done to address the settlement before they became owners; (3) that in observing the northern portion of the east wall of the foundation, there was reason to believe that the foundation may not have been properly repaired; (4) and buyers should satisfy themselves that the foundation is sound. Obviously, the [Scherbaks'] representation with respect to the structure fell far short. Negligence is established. It is also my view that the Scherbaks were negligent in indicating that there

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were no problems with the plumbing. Reasonably [page610] prudent persons in their circumstances would have disclosed that once or twice per year they experienced a sewer line blockage that prevented water and sewage from discharging into the municipal system.

[40] The trial judge accepted that Ms. Krawchuk reasonably relied upon the truth and accuracy of the Scherbaks' statements in the SPIS, both with respect to the foundation and with respect to the plumbing.

[41] He further accepted Ms. Krawchuk's evidence that she would not have made the offer had she known of the structural or plumbing problems. It followed that based on her reliance on the information provided by the Scherbaks in the SPIS, Ms. Krawchuk purchased a defective property and suffered damages as a result. Thus, the tort of negligent misrepresentation had been made out.

B. Damages

1. Quantum of damages

[42] In addressing the issue of damages, the trial judge identified the general rule that tort damages should, to the extent possible, restore the aggrieved party to the position he or she would have been in had the defendant properly discharged her duty of care.

[43] The trial judge held that Ms. Krawchuk did not act reasonably in spending approximately $190,000 to restore property she had purchased for $110,100. Referencing Messineo v. Beale (1978), 20 O.R. (2d) 49, [1978] O.J. No. 3386 (C.A.), he held that Ms. Krawchuk was entitled to damages calculated on the basis of the difference between the price paid for the property and its fair market value when the duty to mitigate arose.

[44] The trial judge found that Ms. Krawchuk's dealings with Stewart Title, as set out above, provided him with sufficient information to conclude that the appropriate amount of damages in this regard was the value of Ms. Krawchuk's settlement with Stewart Title: $105,742.32.

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[45] The trial judge also accepted that Ms. Krawchuk suffered emotional distress as a result of what transpired surrounding the purchase of the home and that such distress was reasonably foreseeable but held that she may have avoided a considerable amount of that stress if she had mitigated her damages by selling the house. He awarded her $5,000 for "emotional upset and loss of health", bringing the total damages to $110,742.32.

[46] Given his earlier finding that the Scherbaks did not intentionally mislead Ms. Krawchuk, the trial judge dismissed [page611] Ms. Krawchuk's claim for aggravated, punitive and exemplary damages.

2. The issue of double recovery

[47] The trial judge rejected the Scherbaks' argument that since Ms. Krawchuk had been paid close to the full amount of her compensable damages by her title insurer, to make a further award in her favour would amount to double recovery and run afoul of the established tort principle that an aggrieved person should be entitled to nothing more than compensation for the full amount of his or her loss. The trial judge held that the private insurance exception, discussed at length in Cunningham v. Wheeler, [1994] 1 S.C.R. 359, [1994] S.C.J. No. 19; see, also, Kosanovic v. Wawanesa Mutual Insurance Co. (2004), 70 O.R. (3d) 161, [2004] O.J. No. 1234 (C.A.), at paras. 8-9, applied to Ms. Krawchuk to allow the double recovery.

C. Ms. Krawchuk's claim against the real estate respondents

[48] The trial judge rejected Ms. Krawchuk's claim that Ms. Weddell was also liable for her damages based on fraudulent or negligent misrepresentation of the condition of the house and in negligence for failing to take reasonable steps to protect Ms. Krawchuk's interests by properly advising her in relation to the importance of a home inspection.

[49] The trial judge dismissed Ms. Krawchuk's claim of fraudulent or negligent misrepresentation on the basis that Ms. Weddell relayed to Ms. Krawchuk what was told to her by the Scherbaks, that she had no reason to doubt the veracity of

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their representations and that she had no obligation to inquire further about information relevant to the condition of the house.

[50] In terms of the negligence claim, the trial judge rejected the argument that Ms. Weddell breached her duty of care to Ms. Krawchuk by failing to recommend that she seek professional advice regarding the possible structural problems with the house and failing to advise her of the perils of making an offer that was not conditional on a satisfactory home inspection.

[51] He noted that, prior to the open house, Ms. Weddell had prepared the offer to purchase that was ultimately used by the parties. She had included, in Schedule "A", two conditions for the purchaser's benefit: a condition to allow a period of time for the purchaser to obtain financing and a condition that allowed the purchaser an opportunity to obtain a satisfactory home inspection.

[52] Given the amount of interest in the house, Ms. Krawchuk and Ms. Weddell discussed ways to enhance the attractiveness of [page612] Ms. Krawchuk's offer, one of which was to make the offer unconditional -- a "clean offer". The trial judge accepted Ms. Weddell's evidence that Ms. Krawchuk had initially wished to have the inspection clause left in, but that she was instructed to remove it once she advised Ms. Krawchuk that if there were another offer made without conditions, it might be accepted over hers. He further held that Ms. Krawchuk, with an understanding of the value of having a satisfactory inspection completed as a condition of closing, made her own decision to submit a clean offer.

[53] In these circumstances, the trial judge found that Ms. Weddell had not breached her duty of care to Ms. Krawchuk and dismissed Ms. Krawchuk's claim in negligence against the real estate respondents.

D. The Scherbaks' cross-claim against the real estate respondents

[54] The focus of the Scherbaks' cross-claim against the real

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estate respondents was the advice Ms. Weddell gave them concerning the SPIS disclosure requirements. They argued that Ms. Weddell should have warned them about the consequences of completing the SPIS and inquired further of them to ensure that they made full and fair disclosure.

[55] The trial judge held that the Scherbaks understood that they had an obligation to complete the SPIS accurately to the best of their knowledge. They sought Ms. Weddell's advice about how to answer certain questions and composed their answers based on that advice. He found that Ms. Weddell had no reason to question the accuracy of the information the Scherbaks were including in the SPIS as it appeared consistent with her visual inspection of the property.

[56] He concluded that Ms. Weddell met her obligations to the Scherbaks and therefore dismissed the Scherbaks' cross-claim against the real estate respondents.

E. The real estate respondents' cross-claim against the Scherbaks

[57] The trial judge did not address the real estate respondents' cross-claim against the Scherbaks in his reasons or in his order.

IV. The Issues

[58] The Scherbaks' appeal from the judgment awarded against them in favour of Ms. Krawchuk raises the following issues:

(1) Did the trial judge err in finding the Scherbaks liable for negligent misrepresentation? [page613]

(2) Did the trial judge err in granting the judgment he did in favour of Ms. Krawchuk in the light of her recovery from Stewart Title?

[59] Ms. Krawchuk's appeal from the dismissal of her claims against the real estate respondents raises the following issues:

(1) Did the trial judge err in his analysis of the standard of care?

(2) If so, is this court able to determine whether the real estate respondents were negligent in their representation

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of Ms. Krawchuk?
(3) If so, were the real estate respondents negligent in their representation of Ms. Krawchuk?

[60] The Scherbaks' appeal from the dismissal of their crossclaim against the real estate respondents, and the real estate respondents' cross-claim against the Scherbaks raise the following issues:
(1) Was Ms. Weddell negligent in failing to provide adequate guidance to the Scherbaks in their completion of the SPIS?
(2) Were the Scherbaks negligent in their disclosure to Ms. Weddell of information pertaining to the problems associated with the house?
(3) What are the consequences, if any, of a finding of negligence as claimed by the Scherbaks and the real estate respondents against each other?

V. Analysis

A. The Scherbaks' appeal from the judgment awarded against them in favour of Ms. Krawchuk

1. Did the trial judge err in finding the Scherbaks liable for negligent misrepresentation?

[61] Before turning to the Scherbaks' substantive arguments on this issue, I will deal with two preliminary points.

The pleadings

[62] First, I will deal briefly with the Scherbaks' argument that the trial judge erred in finding liability on the basis of a theory of liability not pleaded or dealt with at trial. The Scherbaks submit that this error caused them prejudice.
[page614]

[63] I would dismiss this ground of appeal.

[64] Paragraphs 16, 29 and 30 of the statement of claim refer to Ms. Krawchuk's claim in negligence. Paragraph 30 specifically alleges that the Scherbaks were negligent in the manner of their representations to Ms. Krawchuk through Ms. Weddell. Paragraph 29 details this representation and para. 16 explains that this same statement was made in the SPIS and was

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read by Ms. Krawchuk. The Scherbaks joined issue on this allegation in para. 25 of their statement of defence, where they denied that they negligently misrepresented any aspect of the condition of the house. It would thus appear from the pleadings that the Scherbaks understood that negligent misrepresentation was being alleged by Ms. Krawchuk.

[65] Furthermore, as the trial judge observed when he was asked to consider this issue after the delivery of his reasons, the tort was not only raised in the claim and responded to in the defence, it was also argued, without objection, by Ms. Krawchuk's counsel in closing submissions.

Errors in findings of fact

[66] As will be explained throughout the analysis that follows, the trial judge's findings in relation to facts material to his conclusions concerning the Scherbaks' liability were supported by the evidence. Where the evidence conflicted, he was entitled to choose, on the basis he explained, the version of events he preferred. I would not, therefore, interfere with any of the trial judge's findings of fact relevant to his conclusions concerning the Scherbaks' liability for Ms. Krawchuk's losses.

The tort of negligent misrepresentation

[67] I now turn to whether, given his findings of fact, the trial judge erred in concluding that the tort of negligent misrepresentation was made out against the Scherbaks.

[68] To succeed in her action against the Scherbaks based on negligent misrepresentation, Ms. Krawchuk had to prove that

-- the Scherbaks owed her a duty of care based on a "special relationship";

-- the Scherbaks made statement(s) to her that were untrue, inaccurate or misleading;

-- the Scherbaks acted negligently in making the statement(s);

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-- she reasonably relied on the statement(s); and [page615]

-- she sustained damages as a result.

See Queen v. Cognos Inc., [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, at p. 110 S.C.R.

The Scherbaks' duty of care to Ms. Krawchuk

[69] The Scherbaks advance two arguments in support of their submission that the trial judge erred in finding a special relationship duty of care based on the statements in the SPIS. First, they submit that since the statements were not warranties, they cannot give rise to liability, absent fraudulent misrepresentation or deliberate concealment. Second, they submit that the trial judge erred by ignoring the entire agreement clause contained in the agreement of purchase and sale.

[70] As for the first argument, I agree with Killeen J.'s conclusion in Kaufmann v. Gibson, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293 (S.C.J.) that even though statements made in an SPIS are not warranties, they may still be the basis of liability as representations. After citing the complete first two paragraphs in the SPIS, Killeen J. said, at para. 100:

> As can be seen in the opening words of para. 1, "ANSWERS MUST BE COMPLETE AND ACCURATE". While this paragraph goes on to say that the answers do not constitute warranties, there cannot be any doubt that they can have legal consequences as representations, especially if they were read by the purchasers before submitting their offer, as here, and were then incorporated into the terms and conditions of the agreement.

(Emphasis added)

[71] This takes me to the Scherbaks' second argument that the trial judge erred in finding a duty of care in the face of what is commonly referred to as an "entire agreement" clause, also called an "integration clause", contained in the agreement of purchase and sale.

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[72] The entire agreement clause contains the following wording:

> This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

[73] The clause excludes reliance on representations that are alien to "[t]his Agreement" or "any Schedule attached hereto". In this case, the SPIS was specifically referred to in Schedule "A" to the agreement through the wording: "Included with the offer is the property information statement." Thus, the representations in the SPIS are not alien to the agreement; they have been specifically incorporated into the agreement by the parties and are [page616] available to the parties for the purposes of establishing liability if they are found to be untrue, inaccurate or misleading.

[74] It follows that neither the fact that the statements in the SPIS were not warranties nor the entire agreement clause precludes a finding that the Scherbaks owed a duty of care to Ms. Krawchuk.

[75] The trial judge found that the representations made by the Scherbaks in the SPIS were meant to be disclosed to prospective buyers and that it was reasonable to expect such buyers to rely on those representations. For the reasons discussed above, I agree with his conclusion that these facts are sufficient to establish a special relationship giving rise to a duty of care.

Did the Scherbaks make statements to Ms. Krawchuk that were untrue, inaccurate or misleading?

[76] The trial judge found that the information the Scherbaks provided in the SPIS was incomplete with respect to the structural issues and false in relation to the plumbing situation. These findings are well supported by the evidence.

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The structural problems were not restricted to the northwest corner of the house and they were more serious than disclosed. In contrast to their response that there were "no" plumbing problems of which they were aware, the Scherbaks were experiencing varying degrees of sewer backups once or twice per year on an ongoing basis.

Were the Scherbaks negligent as to the truth of the statements?

[77] Although the completion of an SPIS is not mandatory, once a seller decides to fill one out, he or she must do so honestly and accurately and the purchaser is entitled to rely on the representations contained in the SPIS. In Kaufmann, Killeen J. held, at para. 119, that "once a vendor 'breaks his silence' by signing the SPIS, the doctrine of caveat emptor falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue". See, also, Alevizos v. Nirula, [2003] M.J. No. 433, 180 Man. R. (2d) 186 (C.A.), at para. 38.

[78] The Scherbaks submit that given the trial judge's finding of honest intentions on their part, it was an error in law for him to hold them liable to Ms. Krawchuk for their statements. In support of this argument, the Scherbaks rely on the following statement in Alevizos v. Nirula, at para. 36, adopted by Killeen J. in Kaufmann, at para. 113: "If the vendor answers the PCS honestly and does not deliberately intend to mislead, then [page617] liability will not follow even if the representation turns out to be inaccurate."

[79] For a number of reasons, I do not accept this submission. First, I note that the statement adopted by Killeen J. in Kaufmann is obiter since Alevizos is a case involving fraudulent misrepresentation. Second, I do not interpret the statement as meaning that honest intentions, by themselves, are sufficient to avoid liability for inaccurate representations. Third, if that is what the court meant in Alevizos, I respectfully disagree. The standard of care extends beyond honest intentions. The obligation is to provide, to the extent

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possible, accurate and complete information.

[80] In this case, the trial judge, correctly in my view, found liability notwithstanding his conclusion that the Scherbaks tried to be honest. The key to the basis of the Scherbaks' liability is the trial judge's conclusion, set out at para. 39 above, that a reasonable person in similar circumstances would have disclosed more.

Did Ms. Krawchuk reasonably rely on the statements?

[81] In examining the issue of Ms. Krawchuk's reliance on the statements in the SPIS, the distinction between patent and latent defects must be kept in mind. Latent defects, unlike patent ones that are obvious, are not readily apparent to someone exercising reasonable care in his or her inspection of the property.

[82] I agree with the trial judge's conclusion that many of the defects in the house were patent and thus Ms. Krawchuk was obliged to accept them. However, I also agree with his further conclusion that the more serious underlying structural defects and the extent of those defects, together with the plumbing problems, were latent. There were no obvious manifestations of the undisclosed extent of the structural problems or the plumbing problems.

[83] The trial judge's finding that Ms. Krawchuk relied on the representations the Scherbaks made in the SPIS is unassailable. The evidence supports his findings that prior to entering into the agreement of purchase and sale, Ms. Krawchuk not only reviewed the SPIS, particularly the information relating to the structure, but also specifically asked Ms. Weddell about the sloping floors and seemed content with the answer. The trial judge accepted, as he was entitled to do, Ms. Krawchuk's evidence that she would not have made the offer had she known of the extent of the structural defects and of the plumbing problems. [page618]

[84] But was her reliance reasonable in the light of the wording of the SPIS? I refer to the clause in the SPIS that

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provides that "[b]uyers must still make their own enquiries notwithstanding the information contained on this statement" and urges the buyer to bear in mind that the seller's knowledge of the property may be incomplete. This clause alerts the purchaser to the possibility that the information in the SPIS may be lacking in some way and puts an onus on the purchaser to make reasonable inquiries.

[85] In my view, this warning does not absolve the seller of liability for misstatements.

[86] In McQueen v. Kelly, [1999] O.J. No. 2481, 25 R.P.R. (3d) 248 (S.C.J.), Kurisko J. found that the purchasers of a house could recover against the vendors even though they had failed to adequately inspect the basement and, consequently, had missed patent defects that were concealed by the vendors. He held, at paras. 63-64:

> Ordinarily the [principle of] caveat emptor would have required the Plaintiffs to inspect the basement. If they had done so, the water stains in the Laundry Room would have been discovered. However, I accept the Plaintiffs' explanation for not inspecting before and after signing the Agreement, namely, they relied on the Information Statement and oral assurances of Mr. Kelly [the vendor] there had never been any water problems in the basement. . . .
>
> I agree with Mr. Kelly that a person purchasing a $150,000 house should take appropriate steps to discover defects. The Plaintiffs were foolish not to take advantage of the inspection clause because a vendor is not required to inspect the house as part of the process of completing the Information Statement and may very well be unaware of moisture problems. However, this does not mean a vendor can aver a lack of awareness with impunity. The Defendants' representations coupled with the intentional concealment of the evidence of the water stains vindicate the decision of the Plaintiffs to rely on the Defendants' representations and absolved the Plaintiffs from inspecting the basement for patent evidence of moisture problems.

(Emphasis added; footnote omitted)

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[87] Although McQueen can be distinguished in that it involved patent defects that were actively hidden by the vendors, the decision has been relied upon in other cases that are more similar to the circumstances here. See, for example, Ohler v. Pye, [2009] O.J. No. 3434 (Sm. Cl. Ct.); St. Germain v. Schaffler, [2003] O.J. No. 4514, 37 R.P.R. (4th) 116 (S.C.J.); and Kaufmann, at paras. 123-24.

[88] Furthermore, while the SPIS emphasizes the purchaser's duty to enquire in order to fill in gaps in the vendors' knowledge, such an inquiry does not necessarily include a duty to challenge the vendor's honesty and forthrightness. [page619]

[89] In Lyle v. Burdess, [2008] Y.J. No. 116, 2008 YKSM 5 (Sm. Cl. Ct.), Cozens Terr. Ct. J. considered the purpose of the Yukon Territory's equivalent of the SPIS, the Property Disclosure Statement ("PDS"). He said, at para. 68, that "[t]he 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." He agreed with the comments of Killeen J. in Kaufmann that waiver of a home inspection clause does not waive the right to rely on representations in an SPIS, saying, at para. 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.

(Emphasis added)

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[90] I agree with Quinn J. in Whaley v. Dennis, [2005] O.J. No. 3174, 37 R.P.R. (4th) 127 (S.C.J.), where he rejected, at para. 28, the suggestion that the purchaser is required to investigate the honesty of the vendor:

> If Counsel is suggesting that the plaintiffs should have gone beyond the Seller Property Information Statement (and behind the answer given therein regarding the absence of moisture or water problems in the basement), this is a bold and erroneous suggestion: it means that the plaintiffs should have disbelieved [the vendors].

[91] Thus, there is ample support for the trial judge's finding that, notwithstanding the warning in the SPIS, Ms. Krawchuk was entitled to rely on the representations that the Scherbaks made in that document.

[92] Finally, I note that while the SPIS highlights that the purchaser may wish to make further enquiries considering that the "[s]ellers' knowledge of the property may be incomplete", this is not what happened here. The Scherbaks have not been found liable because their knowledge of the condition of the property was incomplete, but because they failed to disclose their full knowledge of the condition of the house. They knew that there were serious structural problems all along the north wall and in the northwest and northeast corners of the house [page620] and that there were ongoing sewer problems. They did not disclose these facts.

[93] Thus, in my view, Ms. Krawchuk's reliance on the information the Scherbaks provided in the SPIS was reasonable.

Did Ms. Krawchuk sustain damages as a result of the Scherbaks' negligent misrepresentation?

[94] The trial judge accepted that Ms. Krawchuk would not have made the offer to purchase if she had known the full extent of the structural defects or the plumbing problems. Her reliance on the Scherbaks' representations contributed to her decision to offer to purchase and ultimately purchase the

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house. She suffered damages as a result.

Conclusion on negligent misrepresentation

[95] Based on this analysis, I conclude that the trial judge was correct in deciding that Ms. Krawchuk successfully established a claim against the Scherbaks based on negligent misrepresentation.

Contributory negligence

[96] The Scherbaks argue that Ms. Krawchuk admitted negligence on her part when she stated in her statement of claim that Ms. Weddell caused her to "act improvidently in her acquisition of the home". They submit that the trial judge erred by disregarding this "admission" of contributory negligence.

[97] I disagree. Ms. Krawchuk's allegation that Ms. Weddell caused her to "act improvidently", taken in context, was simply a claim that Ms. Weddell's advice was a causal factor in her decision to purchase the house that turned out to have serious defects. I do not see it as an admission of contributory negligence.

2. Should Ms. Krawchuk be able to recover damages at trial even though she already recovered from Stewart Title for her losses?

[98] The Scherbaks and the real estate respondents both argued that Ms. Krawchuk suffered little or no loss given her recovery from Stewart Title and that she should not be allowed to "double recover".

[99] My rejection of this argument lies in the concept of the private insurance exception, often referred to as the Bradburn rule, which provides that "where a plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from damages payable by the [page621] tortfeasor": Hussain v. New Taplow Paper Mills Ltd., [1988] 1 All E.R. 541, [1988] 1 A.C. 514 (H.L.), at pp. 544-45 All E.R.

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[100] In Cunningham v. Wheeler, the Supreme Court re-affirmed that the private insurance exception remains part of Canadian law. According to Cory J., writing for the majority, the basis for the private insurance exception is that the plaintiff has made a sacrifice and planned for possible contingencies by purchasing private insurance and the wrongdoer should not be allowed to benefit from the plaintiff's sacrifice and forethought through a reduction in the amount he or she must pay.

[101] The Scherbaks and the real estate respondents both argue that the exception does not apply to the circumstances of this case. The Scherbaks argue that Ms. Krawchuk did not incur out-of-pocket costs as a result of purchasing the title insurance: she made a small, one-time payment that saved her more than that amount in other expenses relating to her purchase that she would otherwise have incurred without the insurance. The real estate respondents submit that the exception has no application to title insurance as it is not indemnity insurance; it covers a past, rather than a future event.

[102] I do not agree with either submission.

[103] The policy reason behind the application of the private insurance exception is that a wrongdoer should not benefit from the prudent decisions of the person wronged. As Cory J. said in Cunningham, at p. 400 S.C.R., the exception is based on fairness. It is unfair to allow a wrongdoer to benefit from the individual foresight and sacrifice made by the plaintiff, regardless of the nature or extent of the sacrifice. Here, it would be unfair to allow the Scherbaks to benefit from Ms. Krawchuk's decision to make a sacrifice, however small, to protect her from potential losses.

[104] I next turn to the real estate respondents' argument that title insurance is fundamentally different from other types of insurance covering possible future events such as property damage or wage loss. They submit that the latter are forms of indemnity insurance purchased to protect against an

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unforeseen future event, whereas title insurance is purchased to protect against existing defects. They say that this difference precludes the application of the private insurance exception.

[105] In my view, title insurance is a contract of indemnity, designed to compensate for actual loss: see Grunberger v. Iseson, 75 A.D.2d 329 (N.Y. App. Div. 1980), at 331 A.D.2d. While title insurance is different from most insurance products in that it has not traditionally insured against a future event but has been used only to insure against loss from a title defect in existence at [page622] the date of the policy, it is nonetheless designed to respond as well to a future loss. Ms. Krawchuk's loss from the existing defects in the house crystallized when it became necessary for her to spend the money to do the repairs required by the City's order to comply, an event that took place after the policy was in place. In any event, I do not see how the specific nature of the risk covered in title insurance is relevant to the policy reasons that support the application of the private insurance exception. There is no principled reason to exclude title insurance from the private insurance exception.

[106] I add that there is a further reason why Ms. Krawchuk should not be required to deduct her insurance proceeds from her recoverable damages at trial: that is the effect of subrogation. Cory J. held, at pp. 415-16 S.C.R., in Cunningham that while subrogation generally has no relevance in considering the deductibility of benefits found to be in the nature of insurance, when the benefits are not "insurance" then the issue of subrogation will be determinative:

> However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right.

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[107] This idea is echoed by Dubin J.A. in Boarelli v. Flannigan, [1973] 3 O.R. 69, [1973] O.J. No. 1989 (C.A.), at p. 79 O.R.:

> I cannot conclude that there is any equitable principle which should permit a tortfeasor to obtain the advantage of benefits earned by the person who has been injured. It is for the contracting parties to determine whether such benefits are to be subrogated and it is of no concern of the party otherwise liable in damages.

[108] Finally, academic authority also supports this position. As stated by Professor Waddams in The Law of Damages, 2nd ed., looseleaf (Toronto: Canada Law Book, 2010), at para. 15.880:

> If a person who had insured against loss were unable to recover from the wrongdoer, anomalous distinctions would appear. One who burns a building causes a loss whether the building is insured or not. The loss does not disappear because, by prior arrangement, an insurer has agreed to share the loss or to indemnify the owner. If the owner could not recover, justice would require the wrongdoer to be liable to the insurer for the economic loss suffered by the latter. In the case of co-insurance and re-insurance, complex proceedings would be required. The present law, whereby the owner recovers in full from the wrongdoer in a single action and the insurer's rights to subrogation are determined as between insurer and insured, is a convenient way of achieving the appropriate result. If the insurer has not contracted for [page623] the right of subrogation, it might appear that the plaintiff is over-compensated, but that will be because of the terms of the insurance contract, for the benefit of which the plaintiff will have paid in full by premiums. (Emphasis added)

[109] Here, Stewart Title had a contractual subrogation right under Ms. Krawchuk's insurance policy. As quoted above, Cory J. in Cunningham stated that different considerations may apply in a situation where the third party has formally released its

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subrogation right. In my view, Cory J.'s reasoning applies to the facts of this case. Although Stewart Title released its subrogation right, it did so in the course of a negotiated settlement with Ms. Krawchuk in which she released her claim against Stewart Title for any further liability and agreed to indemnify Stewart Title and her lawyer against any future third party claims. It is clear that Stewart Title suffered a loss as a result of the Scherbaks' negligent misrepresentation through the payment to Ms. Krawchuk. Stewart Title's agreement to transfer its subrogated interest to Ms. Krawchuk is a private contractual arrangement between Ms. Krawchuk and Stewart Title that has no effect on the Scherbaks' responsibility to Ms. Krawchuk.

[110] Therefore, under the private insurance exception and by virtue of Ms. Krawchuk's settlement agreement with her insurance company regarding the release of subrogation rights, Ms. Krawchuk should be allowed to collect tort damages without deducting her insurance proceeds.

[111] The Scherbaks advance no other argument in relation to the trial judge's damages award. I would therefore dismiss their appeal on this ground.

3. Conclusion

[112] For these reasons, I would dismiss the Scherbaks' appeal from the judgment against them in favour of Ms. Krawchuk.

B. Ms. Krawchuk's cross-appeal from the dismissal of her claims against the real estate respondents

1. The claims

[113] Ms. Krawchuk submits that the trial judge erred in failing to find that the real estate respondents should be held liable for her losses on two bases: (1) for negligently misrepresenting the fact that there were no structural problems by essentially acting as a conduit to the Scherbaks' assurances that there had been no indication of any such problems within the 17 years prior to the listing of the property; and (2) for failing to recommend that she have a qualified inspector provide an opinion [page624] about material issues affecting the house,

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as well as for failing to explain the risks of not making her offer conditional on a home inspection. [See Note 2 below]

[114] In her claim based on negligent misrepresentation, Ms. Krawchuk argues that, in response to her specific inquiries prompted by her observations of the outward manifestations of structural problems, Ms. Weddell did nothing other than repeat the information provided by the Scherbaks that the house had settled, been repaired and that there had been no further problems. As the trial judge found, this information was false and incomplete.

[115] Ms. Krawchuk submits that Ms. Weddell was negligent in relaying this unverified statement to her: she had a duty to take reasonable steps to ascertain the accuracy and completeness of the statement and failed to do so. As a result, Ms. Krawchuk relied on incorrect information in deciding to purchase the property that turned out to be defective.

[116] In her negligence claim against Ms. Weddell, Ms. Krawchuk submits that, given the obvious signs of foundation problems, Ms. Weddell breached her duty to protect her from the purchase of significantly defective property by failing to recommend that she have an inspector examine the property before considering whether to make an offer or by failing to specifically explain the risks of making an offer that did not contain an inspection condition.

[117] As discussed above, there were patent defects in the house, including sloped floors and multiple cracks in the walls. Ms. Weddell knew the house had a reputation of experiencing settlement problems. She knew the house was being offered at a price that reflected the settlement concerns. She admitted on cross-examination that the sloped floors indicated to her that there could be ongoing structural problems. She specifically asked the Scherbaks about their experience and knowledge concerning settlement.

[118] The opportunity to obtain professional advice to assist in informing a potential purchaser in a real estate transaction generally presents itself on two occasions -- while the

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purchaser is considering whether to submit an offer and as a term of the offer itself. [page625]

[119] Ms. Weddell testified that when Ms. Krawchuk asked her whether there were any problems with the house, she replied, referring to the SPIS, that that was all she knew about the house and that she was not a qualified inspector. Significantly, she did not recommend that Ms. Krawchuk consult someone who was qualified.

[120] The trial judge did not comment on Ms. Weddell's failure to recommend that Ms. Krawchuk obtain a satisfactory inspection before submitting an offer.

[121] As previously summarized, the evidence concerning the circumstances surrounding the submission of the offer is as follows. The draft offer Ms. Weddell prepared on behalf of Ms. Krawchuk included a term making the offer conditional on receiving a satisfactory home inspection. The trial judge found that this was what Ms. Krawchuk initially wanted. Regarding their conversation leading up to the removal of the term, the trial judge accepted the evidence of Ms. Weddell and found that Ms. Krawchuk knew the value of an inspection but was concerned about losing her opportunity to purchase the house. Ms. Krawchuk accepted Ms. Weddell's advice that her offer would be more attractive to the Scherbaks if it was "clean".

[122] In concluding that Ms. Weddell met her obligations to Ms. Krawchuk with respect to the home inspection condition, the trial judge reasoned that Ms. Krawchuk must have known the value of having an inspection since she initially wanted the clause included in the offer and then chose to remove the condition to give her offer a better chance of being accepted. In the light of what Ms. Krawchuk knew about the house from the SPIS, her visual inspection and her discussions with Ms. Weddell, the trial judge held that it was not unreasonable for Ms. Krawchuk to decide to have the condition removed from her offer.

2. Standard of care [See Note 3 below]

[123] In my view, the difficulties associated with the trial

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judge's analysis of Ms. Krawchuk's claims against the real estate respondents started with the issue of the standard of care. His analysis of this issue is, with respect, faulty, for two reasons. First, the trial judge erred by holding that he could determine the standard of care without expert assistance: against this [page626] backdrop he refused to admit the only expert evidence tendered on this issue. Then, he erred by not identifying the standard of care. See Fullowka v. Pinkerton's of Canada Ltd., [2010] 1 S.C.R. 132, [2010] S.C.J. No. 5, at para. 80.

[124] As will be seen, the error of primary importance for the purpose of my analysis is the trial judge's ruling that he could assess the various claims without having the benefit of expert evidence. I start with some general observations.

[125] To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence: see Wong v. 407527 Ontario Ltd., [1999] O.J. No. 3373, 179 D.L.R. (4th) 38 (C.A.), at para. 23; Fellowes, McNeil v. Kansa General International Insurance Co., [2000] O.J. No. 3309, 138 O.A.C. 28 (C.A.), at para. 11. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (Wong, at para. 23; Fellowes, at para. 11). External indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.

[126] In Ontario, real estate brokers and salespersons are required to be registered under the Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sch. C in order to trade in real estate as an agent or broker. At the time of the transaction at issue in this case, the conduct of real estate agents and brokers in Ontario was governed by the Real Estate Council of Ontario's Code of Ethics, 1998 (the "Code").

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[127] Counsel for Ms. Krawchuk tendered the Code into evidence to assist the trial judge in determining the standard of care by which Ms. Weddell's conduct should be measured. While the trial judge accepted this evidence, he refused to admit the expert evidence that Ms. Krawchuk's counsel sought to introduce in order to explain the duties of a real estate broker when acting under a dual agency agreement and the requirements of various documents, including the Code. The main basis for the trial judge's refusal to admit the evidence was his view that he did not need the assistance of an expert to determine whether Ms. Weddell met the requisite standard of care: the Code was before him and he was competent to determine, on his own, whether Ms. Weddell had complied with a particular provision. [page627]

[128] Unfortunately, however, the trial judge did not refer to the Code in his reasons. In fact, he did not address the standard of care that applied to Ms. Weddell's representation of Ms. Krawchuk at all, save for the reference at para. 67 of his reasons where he said that "there was no obligation on Ms. Weddell to inquire further or independently of [the Scherbaks] to discern what if any other structural defects might exist".

[129] In my opinion, in the particular circumstances of this case, the trial judge erred in concluding that he could identify the applicable standard of care without the benefit of expert evidence. This error was compounded by his failure to identify the standard of care that he thought was applicable and by his failure to address the import of the Code in relation to the question of the governing standard of care.

[130] The jurisprudence indicates that, in general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence. See Zink v. Adrian, [2005] B.C.J. No. 295, 37 B.C.L.R. (4th) 389 (C.A.), at para. 43, Southin J.A., concurring; Gauvreau v. Paci, [1996] O.J. No. 2396 (C.A.), at para. 1; Precision Remodeling Ltd. v. Soskin, Soskin & Potasky LLP, [2008] O.J. No. 2560, 2008 CanLII 31411 (S.C.J.), at para. 57; Dinevski v. Snowdon, [2010] O.J. No. 2516, 2010 ONSC 2715,

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at paras. 68-69; Adeshina v. Litwiniuk & Co., [2010] A.J. No. 125, 24 Alta. L.R. (5th) 67 (Q.B.), at paras. 160-75.

[131] In Walls v. Ross, [2001] B.C.J. No. 1641, 2001 BCPC 187, at paras. 66-74, Stansfield A.C.J. offers a lengthy discussion of the circumstances in which expert evidence will be necessary to define the standard of care in the real estate professional context:

> Counsel for the realtors in this case argued I could not find negligence in the absence of expert evidence as to the standard of care the law requires of realtors in circumstances such as those disclosed by the evidence in this case. The claimant did not call any such expert evidence.
>
> In Roberge v. Huberman [(1999), 172 D.L.R. (4th)] it was argued that absent expert evidence there was "no evidence" upon which the court could determine the standard of care in a solicitor's negligence action. Esson J.A., said:
>
> > (at para. 54) the trial judge referred to no authority in support of the proposition that, without expert evidence as to the "appropriate documentation", there was no evidence of breach of the standard of care. In this court, the defendants made no effort to support that conclusion. In my respectable view, it cannot be supported.
> >
> > (and at para. 58) . . . What the court was called upon to do . . . was to consider and assess, with the assistance of counsel's submissions, any evidence that was adduced by the plaintiff which was potentially [page628] relevant to the question whether there had been a breach of duty by the solicitor. That process involves the court applying its experience and knowledge in the way that judges and juries do every day, most often without expert evidence.
>
> It is clear there can be cases in which expert evidence is not required to prove a realtor's failure to meet what the court will determine to be the standard of care expected of realtors in particular circumstances. An example is Brown v. Fritz, [1993] B.C.J. No. 2182 (B.C. S.C.), about which I will

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say more in due course.

It seems that whether expert evidence is or is not required is a question which falls to be determined on the facts (and most especially, one imagines, the egregiousness of the conduct or the very specialized or technical nature of the activity) in the particular case. So, for example, in Shaak v. McIntyre and others, [1991] B.C.J. No. 2607, Sept. 6, 1991, Vancouver No. A852424 (B.C.S.C.) Madam Justice Ryan (then of the trial court) dealt with a case of alleged negligence by a solicitor for failing to advise a plaintiff to obtain a survey certificate where the plaintiff called no evidence of the standards of the profession in that regard. She observed that:

> [T]here may be cases where the defendant has so clearly fallen below the standard required of him or her that expert evidence is not required

although she said on the facts before her that "this is not one of those cases".

In Haag v Marshall (1989), 61 D.L.R. (4th) 371 (B.C.C.A.), Mr. Justice Locke, concurring with two others in the result in a case of alleged solicitor's negligence, said:

> [t]he professional evidence led in this case was unsatisfactory . . . nowhere was it said that what was not done fell short of a professional standard of conduct. In cases of professional negligence above all, with the many difficult and varied situations met, if a plaintiff hopes to succeed on the grounds of lack of competency it must be fairly demonstrated that it has fallen below an established standard or practice in the profession.

To similar effect in Mileos v. Block Bros. Realty Ltd. and others, unreported, September 30, 1994, Vancouver No. C913338, Mr. Justice Thackray, in the context of alleged realtor's negligence, said (at page 8):

> . . . I am of the opinion that the onus is on the plaintiff

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> to show that there was a certain standard of care required by the real estate agent and the agency, that that standard was breached, and that the breach caused damages. No evidence was called to establish the standard.
>
> In Shaak v. McIntyre (supra), Madam Justice Ryan said:
>
> [t]he (selling) broker is under a duty to check information of which he or she is in doubt (or ought to have been in doubt) before passing it on to the purchaser . . . The selling agent must also check the completeness and accuracy of all information which it is usual or customary for brokers to verify. In the case at bar there is no evidence of the usual or customary information which selling agents check. I cannot find that (the selling agent) fell below that standard, whatever it may be. (emphasis added) [page629]

The same difficulty was identified by Mr. Justice Drost in Snijders v. Morgan, unreported, January 27, 1997, Nelson No. 4747 (B.C. S.C.) where he said:

> it is alleged that (the selling realtors) were negligent in failing to properly investigate the nature, identity and extent of the property they advertised for sale. There is no evidence whatsoever of that being a duty or responsibility that the law or the custom or the nature of that business imposes upon persons in that type of business in this province.
>
> Similarly, . . . the allegation that they were negligent in failing to advise the Plaintiffs that a plot plan or survey should be obtained at any time, and more particularly once they became aware that a misdescription of the property was involved, there is no evidence of a standard of care that would impose upon them a duty to so advise the Plaintiffs accordingly.

A review of the cases referred to in these reasons suggests that unless conduct is particularly egregious, the court likely requires expert evidence of the usual or customary

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standard in the real estate industry regarding:

a) the kind of information that must be checked or verified by realtors, where it has not been demonstrated that the realtor had cause to doubt the information;

b) a duty to take positive steps to confirm the nature, identity and extent of the property they advertise, including any duty to recommend a purchaser secure a plot plan or survey; and

c) a duty to recommend that the purchaser secure an inspection regarding the soundness of premises, including any structural defects.

[132] While the authorities discussed above indicate that, as a general rule, it will not be possible to determine professional negligence in a given situation without the benefit of expert evidence, they do indicate two exceptions to this general rule.

[133] The first exception applies to cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence. As explained by Southin J.A., at para. 44 of Zink, this will be the case only where the court is faced with "non-technical matters or those of which an ordinary person may be expected to have knowledge".

[134] This exception is not engaged in this case, a case that involves the determination of obligations arising out of a property with unique issues, an SPIS that contained incorrect representations negligently made and a dual agency relationship -- issues that cannot be said to be of a non-technical nature within the knowledge and experience of the ordinary person.

[135] The second exception applies to cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard: see [page630] Cosway v. Boorman's Investment Co., [2008] B.C.J. No. 2081, 2008 BCSC 1482, at para. 35. As

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can be seen, this second exception involves circumstances where negligence can be determined without first identifying the parameters of the standard of care rather than identifying a standard of care without the assistance of expert evidence.

[136] On the basis of the trial judge's finding that Ms. Weddell had no reason to question the veracity of the information the Scherbaks provided about the foundation of the house, it would seem that this exception is also not available in this case.

[137] However, this observation begs the question of whether the record supports this finding. In my view, it does not.

[138] I appreciate that the trial judge's findings of fact attract considerable deference and ought not to be interfered with absent palpable and overriding error. This standard of review for findings of fact was discussed at length by Fish J., writing for the majority, in L. (H.) v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24. At paras. 53-56, he explains:

> The standard of review for error has been variously described. In recent years, the phrase "palpable and overriding error" resonates throughout the cases. Its application to all findings of fact -- findings as to "what happened" -- has been universally recognized; its applicability has not been made to depend on whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence.
>
> Nor has the standard been said to vary according to whether we are concerned with what Hohfeld long ago described as "evidential" or "constitutive" facts (see W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (1923), at p. 32). Nor, put differently, has the standard been said to vary according to whether our concern is with direct proof of a fact in issue, or indirect proof of facts from which a fact in issue has been inferred.

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"Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In Housen, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence".

[139] In the present case, the trial judge's finding, at para. 67 of his reasons, that Ms. Weddell had no reason to question the veracity of the information provided by the Scherbaks about the [page631] foundation of the house is an inference drawn from the following evidence:

-- upon noticing the sloping floors Ms. Weddell asked the Scherbaks about them;

-- the Scherbaks responded that the house had settled 17 years earlier but had been fixed and there had been no further problems; and

-- the evidence did not support the conclusion that Ms. Weddell had additional information about the foundation.

[140] However, there were other important factors relevant to the assessment of whether it was reasonable for Ms. Weddell to believe the Scherbaks' representations about the house.

[141] First, Ms. Weddell testified that the Scherbaks presented as honest people. However, the problem with taking this into account is that the issue is not whether the

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Scherbaks seemed creditworthy. Rather, it is whether there was any reason to doubt their assurances, something that may be (and in this case was) unrelated to their honesty.

[142] Second, Ms. Weddell testified that she did not notice any signs of recent settlement, such as fresh paint. The problem is that Ms. Weddell also testified that she was no home inspector. It seems somewhat contradictory for Ms. Weddell to suggest that, on the basis of her personal inspection, she had confidence in the Scherbaks' representations notwithstanding the evidence to the contrary, while at the same time acknowledging her limitations in assessing the significance of what she saw and knew.

[143] In my view, Ms. Weddell had plenty of reasons to question the veracity of the Scherbaks' assurances that the settlement problems had long since been resolved. She was a real estate agent with 33 years' experience specializing in residential houses. She knew that the house had a history of settlement problems and accordingly was underpriced. As well, her visual inspection of the property disclosed settlement problems, the manifestation of which was sufficiently significant that it prompted her to further question the Scherbaks. Against this background and Ms. Weddell's admission that she was "no home inspector", it seems to me that she had good reason to look behind the Scherbaks' representations.

[144] In my opinion, therefore, the trial judge's conclusion that Ms. Weddell had no reason to doubt the Scherbaks' representations was "clearly wrong". The only available inference is to the contrary. The circumstances were such that Ms. Weddell should [page632] have verified the accuracy of the Scherbaks' representations about the house and she did not.

3. Were the real estate respondents negligent in their representation of Ms. Krawchuk?

[145] It is most unfortunate that there is no evidence that bears directly on the standard of care the real estate respondents owed to Ms. Krawchuk in protecting her interests in this transaction. In such circumstances, this court would ordinarily have to order a new trial.

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[146] However, I am of the view that, on this record and in the light of my conclusion that the evidence supported a finding that Ms. Weddell was put on her inquiry as to the accuracy of the Scherbaks' representations, this court is in a position to determine whether the real estate respondents were negligent in their representation of Ms. Krawchuk.

[147] First, there is the Code. The due diligence requirements of a real estate agent mandated by the Code, while not dispositive, are of considerable importance in informing what is expected of real estate agents in terms of verifying information about a property listed for sale. I refer to the reasons of Binnie J. in Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, at p. 425 S.C.R., in which he says "the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship". See, also, Ault v. Canada (Attorney General), [2011] O.J. No. 845, 2011 ONCA 147, at para. 86.

[148] The rules in the Code relevant to this analysis are rules 7 and 11.

[149] Rule 7 provides that an agent "shall not discourage the Parties to a Transaction from seeking outside professional advice. A Licensee shall encourage the Parties to a Transaction to seek appropriate outside professional advice when appropriate" (emphasis added).

[150] Rule 11 requires that an agent "discover and verify the pertinent facts relating to the Property and Transaction relevant to the Licensee's client that a reasonably prudent Licensee would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts" (emphasis added).

[151] Then, there are authorities that support the proposition that a purchaser's agent has a duty to verify material facts about a property; interestingly, not only in circumstances where the court has found that the agent has been

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put on his or her inquiry with respect to the accuracy of the vendors' representations, but also in cases where the court has found no such "red flag". [page633]

[152] In Sedgemore v. Block Bros. Realty Ltd., [1985] B.C.J. No. 2872, 39 R.P.R. 38 (S.C.), supp. reasons (1985), 39 R.P.R. 38 (S.C.); Fletcher v. Hand, [1994] A.J. No. 531, 156 A.R. 142 (Q.B.); Martin v. Mayo, [1997] B.C.J. No. 1926, 11 R.P.R. (3d) 150 (S.C.); and Brown v. Fritz, [1993] B.C.J. No. 2182, 1993 CanLII 1475 (S.C.), the court took a reason to doubt the vendor's information into account in concluding that the buyer's agent had a duty to verify the information provided by the seller. Then again, in Johnstone v. Dame, [1995] B.C.J. No. 2637, 49 R.P.R. (2d) 279 (S.C.); Bond v. Richardson, [2007] N.B.J. No. 318, 324 N.B.R.(2d) 64 (Q.B. (T.D.)); Posthumas v. Garner, [1995] O.J. No. 3362, 48 R.P.R. (2d) 286 (Gen. Div.); and 11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd. (1997), 36 O.R. (3d) 328, [1997] O.J. No. 5003 (Gen. Div.) the purchasers' agent's duty to verify the vendor's information about the property was found to exist without reference to the agent's having been put on inquiry.

[153] In my opinion, in the circumstances of this case, given the requirements set out in the Code and the fact that Ms. Weddell had reason to doubt the veracity of the Scherbaks' representations about the house, the authorities that indicate that a real estate agent's duty to his or her client includes a duty to investigate material information about the property are applicable.

[154] Whatever the standard of care, given the obvious defects in this house, Ms. Weddell had to either further verify the assurances herself or recommend, in the strongest terms, that Ms. Krawchuk get an independent inspection either before submitting an offer or by making the offer conditional on a satisfactory inspection. The failure to do either was an egregious lapse.

4. Conclusions regarding Ms. Krawchuk's claims against the real estate respondents

[155] Even without being in a position to identify the

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precise parameters of the standard of care that the real estate respondents owed Ms. Krawchuk, the following considerations support a finding that they did not meet their obligations to their client:

(1) The trial judge found that Ms. Weddell was aware of settling problems. The evidence of this was, in fact, manifest;

(2) there was reason for Ms. Weddell to be on her inquiry as to the veracity of the Scherbaks' representations;

(3) Ms. Weddell made no inquiry at all of the Scherbaks as to what precisely they knew about the settlement problems, including how they believed them to have been fixed; [page634]

(4) Ms. Krawchuk asked for reassurance specifically with respect to the issue of settlement problems; and

Ms. Weddell, on her own admission, had no expertise in addressing the evidence of settlement.

[156] As a consequence of the real estate respondents' failure to meet their obligations to Ms. Krawchuk in this respect, she purchased defective property and suffered a loss.

[157] I would therefore allow Ms. Krawchuk's appeal from the dismissal of her claims against the real estate respondents and award judgment against them in the amount of $110,742.32.

C. The Scherbaks' and the real estate respondents' claims for contribution and indemnity

[158] The Scherbaks cross-claimed against the real estate respondents for contribution and indemnity. They submit that because Ms. Weddell provided them with professional advice regarding the exact wording of their answers in the SPIS, the real estate respondents should indemnify them for any liability for misrepresentation based on that wording. The real estate respondents, in turn, claim contribution and indemnity from the Scherbaks. They submit that the Scherbaks should assume responsibility for any liability they are found to have to Ms. Krawchuk because any misrepresentations made by Ms. Weddell to Ms. Krawchuk were caused by the Scherbaks' failure to accurately disclose the condition of the property.

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[159] I am satisfied that neither party is entitled to full indemnity from the other. Both the Scherbaks and Ms. Weddell were negligent in their dealings with Ms. Krawchuk and contributed to her loss. As emphasized by Linda D. Rainaldi in Remedies in Tort, vol. 4, looseleaf (Toronto: Carswell, 1987), at p. 26-53, s. 61:

> The party asserting the right to indemnity must himself have been without fault in the occasion which caused the damage; otherwise he is not entitled to claim indemnity.

(Emphasis added)

[160] The question that remains, then, is the appropriate apportionment of fault between the Scherbaks and the real estate respondents.

1. The Scherbaks' claim against the real estate respondents

[161] The Scherbaks submit that Ms. Weddell breached her duty of care to them by failing to provide them with adequate advice concerning their obligations to complete the SPIS. They [page635] say that the SPIS was "all Ms. Weddell's idea". They were unfamiliar with it and looked to Ms. Weddell for guidance in how to complete it, particularly with respect to answering the questions about the structure of the house and its plumbing. They relied on her to their detriment.

[162] First, I note that the SPIS emphasizes the importance of completeness and accuracy in statements on the form. This means that, apart from anything Ms. Weddell said to them, the Scherbaks were made aware of their obligation to honestly and accurately disclose all that they knew in response to the specific questions on the form. The SPIS also makes clear that it is solely the vendor who is the source of the information in the form and that the broker is not responsible for the accuracy of the information.

[163] However, in my view, the wording of the SPIS is not determinative of the limits of Ms. Weddell's duty to the Scherbaks.

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[164] I share the views expressed in Lyle v. Burdess, where, in extensive obiter, the trial judge referred with approval to the proposition that a real estate agent has a duty to provide a certain level of guidance when a client is filling out or receiving a property disclosure statement, citing with approval Professor Foster's paper, "Agency Law and Real Estate Brokerage: Current Issues, A Review of the Case Law and Some Industry Practices" (January 2003), Supplementary Paper No. 1 to the Report of the Agency Task Force (Canadian Regulators Group, June 2004). In this paper, Foster endorses the proposition that an agent has a duty to provide specific warnings about the implications of completing an SPIS and, in that context, of the importance of ensuring complete and accurate answers to the questions posed in an SPIS.

[165] These warnings include the fact that sellers who complete an SPIS may be providing information that they are not legally obligated to provide. If they choose to complete an SPIS, the agent should emphasize to his or her client the importance of providing information that is complete and accurate. If the sellers' agent plays a role in the completion of the SPIS, as was found to be the case here, he or she must exercise reasonable care and skill in ensuring its accuracy: see Posthumas, at para. 31; 11 Suntract Holdings Ltd., at p. 341 O.R.

[166] The focus in this case on the SPIS leads me to endorse the concern expressed in a number of cases about the risks associated with the use of the SPIS and similar documents used in other provinces. In Kaufmann, Killeen J. commented, at para. 109, that use of the forms has "[a]lmost inevitably . . . given rise [page636] to litigation over their meaning and reach". In Alevizos, Scott C.J.M commented, at para. 36, that the use of SPIS forms

> . . . 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

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difficulties, exacerbated by the conflicting statements within the form concerning its purpose and effect, should be addressed by lawyers and real estate agents alike.

[167] In his concurring reasons, Kroft J.A. took this warning even further, commenting, at para. 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.

[168] I am again mindful of the fact that there is no expert evidence to inform an identification of the specific standard of care that applies to the Scherbaks' claim against the real estate respondents in this respect. However, for many of the same reasons as I concluded that negligence had been established in the case of the real estate respondents' obligations to Ms. Krawchuk, I am of the view that whatever the standard of care, it is clear that the real estate respondents failed to meet that standard. There were obvious structural defects in this house, Ms. Weddell was put on her inquiry about the settlement problems. The Scherbaks specifically sought Ms. Weddell's advice about answering the question on the SPIS concerning the settlement issues. At the very least, Ms. Weddell had an obligation to question the Scherbaks further about their experience with the settlement issues -- whether they had performed any work on the house that shed light on the state of the foundation of the house and then appropriately counsel them with respect to the implications of the representations they made in the SPIS.

[169] Ms. Weddell's failure to do so represented a cavalier treatment of the settlement issue -- an issue that was on the minds of everyone involved. This failure amounted to an egregious lapse in terms of her duty to the Scherbaks.

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[170] It follows that I am of the view that Ms. Weddell was negligent in her representation not only of Ms. Krawchuk but also of the Scherbaks.

[171] While this does not entitle the Scherbaks to indemnification because, as set out above, they were also negligent, [page637] Ms. Weddell's negligence vis--vis the Scherbaks must be taken into account in the overall apportionment of fault.

2. The real estate respondents' claim against the Scherbaks

[172] The real estate respondents submit that any misrepresentations made to Ms. Krawchuk were as a result of the failure of the Scherbaks to disclose to Ms. Weddell complete and accurate information with respect to the property. They therefore claim that they should be compensated by the Scherbaks for their losses arising from Ms. Weddell's reliance on this information in her efforts to inform Ms. Krawchuk about the property.

[173] The trial judge found that the Scherbaks were negligent in failing to provide accurate and complete information about the property. As I have said, there is ample evidentiary support for this finding. It is clear that the Scherbaks did not disclose to Ms. Weddell the full extent of their knowledge of the structural and plumbing problems. They did tell her about some structural issues in the northwest corner of the house but they did not disclose the problems in the northeast corner of the house, that they discovered during their basement renovations. They did tell her about historical plumbing problems, but failed to indicate that there were any ongoing issues.

[174] The Scherbaks assured Ms. Weddell that the structural problems with the house had been fixed and Ms. Weddell repeated these assurances to Ms. Krawchuk.

[175] Against this background, the real estate respondents submit that the Scherbaks, who were in the best position to

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know the true condition of the house, should bear ultimate responsibility for any liability they are found to have in relation to Ms. Krawchuk, as the representations Ms. Weddell made to her were based on information the Scherbaks provided.

[176] The decision in Pavenham Development Corp. v. Sladen, [1997] B.C.J. No. 2103, 1997 CanLII 4295 (S.C.) dealt with, in addition to a number of other claims comparable to those made in this case, a claim of a listing agent against the vendor for failure to provide the agent with accurate information about the property.

[177] In Pavenham, the vendor owned a property that he rented out. An environmental health officer visited the property and concluded that the septic system was malfunctioning. An order was issued prohibiting the rental of the house as a residence until the system was repaired or replaced. The tenant vacated the property and the vendor listed it for sale. The septic system was never repaired or replaced. [page638]

[178] When listing the property, the vendor completed a disclosure statement similar to an SPIS. One of the questions on the disclosure form asked about septic problems. The vendor, in answering the question, failed to mention the order prohibiting the property from being rented due to septic problems, although he did indicate a "leakage" issue.

[179] The purchaser, to the knowledge of the vendor and his agent, wanted to buy the property for rental purposes. They also knew that the purchaser was not aware of the environmental health order that prohibited the house from being rented. The disclosure statement was never provided to the purchaser.

[180] After purchasing the property, the purchaser rented out the house. When the environmental health officer became aware of this, the tenancy had to be terminated. The purchaser was held liable to the tenants for their damages.

[181] The trial judge held that the manner in which the vendor filled out the disclosure statement represented to potential purchasers that the house could be occupied as a

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residence and that the vendor failed to disclose that an environmental health order precluded the house from being occupied as a residence. The vendor was therefore found liable to the purchaser for fraudulent misrepresentation.

[182] The vendor's agent was also found liable to the purchaser in negligence. The trial judge found that the agent should have delivered the disclosure document to the purchaser's agent. He also should have inquired of the vendor as to the meaning of the entries on the disclosure statement. In failing to do so, he did not satisfy his duties to provide the purchaser with all the information he had about the property and to ensure he had taken reasonable steps in obtaining listing information.

[183] In dealing with the real estate agent's claim against the vendor for contribution and indemnity in relation to the damages for which he was found liable to the purchaser, the trial judge concluded, at para. 51:

> [The vendor] had an obligation to his realtor and its employees to be candid and frank. [The vendor] was selling a house which was not habitable. He should have told them that. He did not. [The vendor] must indemnify [his real estate agents] for the liability which they have incurred as a result of his deception.

[184] The trial judge concluded that the damages arising from the lack of disclosure were two-thirds attributable to the vendor's insufficient disclosure, and one-third attributable to the agent's failure to make inquiries and carelessness in failing to pass on the disclosure form. As a result, the vendor was required to indemnify the agent for two-thirds of the damages. [page639] Indemnification was not available to the agent for the remaining one-third because this portion of the damages was found to have been attributable to the agent's own failings.

[185] While this decision does not support the real estate respondents' argument that the Scherbaks owed them a free-standing duty of care in the circumstances of this case, it

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does support the conclusion that the Scherbaks' lack of disclosure and its contribution to the real estate respondents' liability for Ms. Krawchuk's losses must be taken into account in the overall apportionment of fault.

3. Overall apportionment of fault

[186] I have concluded that both the Scherbaks and the real estate respondents are liable to Ms. Krawchuk in negligence. I have also concluded that Ms. Weddell was negligent in her representation of the Scherbaks, that the Scherbaks failed to satisfy their disclosure obligation to Ms. Weddell and that these actions also contributed to Ms. Krawchuk's losses.

[187] Under s. 4 of the Negligence Act, R.S.O. 1990, c. N.1, if it is "not practicable" to determine the respective degrees of fault as between the parties, the parties shall be deemed to be equally at fault. In this case, I am satisfied that this default is the appropriate apportionment of fault.

[188] Both the Scherbaks' actions and the real estate respondents' actions contributed to Ms. Krawchuk's damages. While the Scherbaks were in the best position to have accurate and complete information about the condition of the property, Ms. Weddell should have done more to protect both of her clients. I am satisfied that they are equally responsible for Ms. Krawchuk's losses.

VI. Conclusion

[189] The Scherbaks knew that the foundation of the house was seriously compromised and that there were ongoing plumbing problems. The Scherbaks made incomplete disclosure about these problems to Ms. Krawchuk. Ms. Weddell took no steps to verify the accuracy of the information supplied by the Scherbaks or to otherwise protect Ms. Krawchuk from the adverse consequences of this inaccurate information. Misinformed by the Scherbaks and badly served by Ms. Weddell, Ms. Krawchuk purchased a house with serious latent defects. She was forced to move out while she repaired her home at considerable expense.

[190] My conclusion that Ms. Weddell is liable in negligence to Ms. Krawchuk renders her a concurrent tortfeasor with the

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[page640] Scherbaks. The Scherbaks and the real estate respondents are therefore jointly and severally liable to Ms. Krawchuk. In the circumstances, I would apportion fault at 50 per cent to the Scherbaks and 50 per cent to the real estate respondents.

VII. Disposition

[191] For the above reasons, I would dismiss the Scherbaks' appeal from the judgment against them in favour of Ms. Krawchuk.

[192] I would allow Ms. Krawchuk's cross-appeal from the dismissal of her claims against the real estate respondents. I would set aside that part of the judgment dismissing the action against the real estate respondents and order that they, along with the Scherbaks, pay Ms. Krawchuk the damages determined by the trial judge in accordance with the true apportionment of fault set out in these reasons.

[193] I would dismiss the Scherbaks' appeal from the dismissal of their cross-claim for contribution and indemnity from the real estate respondents and the real estate respondents' cross-claim for contribution and indemnity from the Scherbaks.

[194] I would award Ms. Krawchuk her costs of the appeal in the amount of $25,000, including disbursements and applicable taxes. I would award Ms. Krawchuk the costs of her cross-appeal against the real estate respondents in the amount of $25,000, including disbursements and applicable taxes. I would not award costs in respect of the competing cross-claims of the Scherbaks and the real estate respondents.

Appeal dismissed; cross-appeal allowed.

Notes

Note 1: It is not disputed that Re/Max Sudbury Inc. is vicariously liable for the acts of Ms. Weddell in this

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transaction.

Note 2: The existence of a fiduciary relationship between Ms. Weddell and her clients was neither pleaded nor argued. Thus, there was no claim for breach of fiduciary duty.

Note 3: These reasons consider the duty of care owed by real estate agents to their clients only. They do not deal with any differences that may exist between the duties a real estate agent owes to a customer as opposed to a client.

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