CITATION: Lippa v. Colletta, 2017 ONSC 1122
COURT FILE NO.: CV-10-0100548-SR
DATE: 20170217

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PATRICIA LIPPA Plaintiff	Appearing in Person
– and –	
FABIO COLLETTA, LINA COLLETTA, HAL LATIMER, ROYAL LEPAGE YOUR COMMUNITY REALTY and MARK DELLAMATTIA c.o.b. as TREASURE HOME INSPECTION Defendants	Lori Goldberg for Fabio and Lina Colletta Joseph Juda for Hal Latimer and Royal LePage Your Community Realty Hans Klohn for Mark Dellamattia
	HEARD: November 25 and 28, 2016 and December 2, 5 and 8, 2016

REASONS FOR JUDGMENT

BOSWELL J.

INTRODUCTION

[1] Patricia Lippa bought a little house in W[…]. Her initial attraction to the home faded significantly when she discovered, not long after taking possession, that it had a leaky basement.

[2] Ms. Lippa sues the vendors of the home on the basis that the leaking cracks in the foundation were latent defects, known to them, which she says they had an obligation to disclose to her. In the alternative, she says the vendors actively concealed the cracks. She sues Mark Dellamattia, a professional home inspector, for representing to her that the house was free of any significant defects. Finally, she sues her real estate agent for indicating to her that the home was

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about ten years old, and failing to alert her to the fact that she may have had recourse to the Tarion warranty program for newly constructed homes[1].

SYNOPSIS OF THE TRIAL

[3] This lawsuit began when Ms. Lippa issued a Statement of Claim on August 19, 2010. She was initially represented by counsel. That changed in about December 2012. She represented herself at trial. Each of the three defendants was represented by counsel.

[4] Ms. Lippa's decision to represent herself may have been the result of a lack of any other viable option. It was unfortunate, however, because this was not a simple case as a matter of law. She sued the vendors in contract. The law is tricky in terms of what defects vendors must disclose in real estate transactions. Ms. Lippa demonstrated some appreciation for the difference between patent and latent defects, but less appreciation for the evidence necessary to make out a claim based on concealed latent defects. She sued her real estate agent and home inspector in both contract and tort. She alleged negligence, but had little appreciation for the concepts of duty of care and standard of care, nor for the evidence required to establish either.

[5] The court provided what assistance it reasonably could to Ms. Lippa, mindful of the need to remain an impartial arbiter.

[6] The trial proceeded over four days. On the morning of the second day, Ms. Lippa brought a motion seeking to make extensive amendments to her claim. The motion was dismissed for reasons given orally that day. Ms. Lippa's evidence concluded early on the third day of the trial. Defence evidence, combined, took about a day. Submissions followed. Just prior to submissions being made, Ms. Lippa moved for a second time to amend her pleadings. The motion was again dismissed for reasons given orally, save for one request that proceeded on consent. In particular, Ms. Lippa was permitted to add particulars regarding out-of-pocket expenses she incurred to complete repairs to her home. Those claimed expenses total $35,662.64.

BRIEF CHRONOLOGY

[7] Fabio and Lina Colletta were the owners of a semi-detached, two storey residence in Vaughan, Ontario. The municipal address of the property is T[…] Road ("T[…]"). They listed it for sale on October 26, 2009 at a list price of $379,000. The listing agreement described the property as a "Beautiful & Well Kept Builder's Home With Upgrades Throughout".

[8] Patricia Lippa was looking for a new home in the fall of 2009. She hired a real estate agent, Hal Latimer, to assist her in her search. Mr. Latimer provided her with numerous listings

[1] Throughout this decision I refer to the Tarion warranty. The warranty in issue was one arising under the *Ontario New Home Warranty Plan Act*, R.S.O. 1990, c. O.31. Tarion Warranty Corporation is tasked by the provincial government with administering the plan. The warranty program was referred throughout the trial as the Tarion warranty. I am continuing that convention throughout this decision.

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to consider and she looked at a large number of homes. She settled on T[…] as one she wished to make an offer on.

[9] Ms. Lippa testified that she looked at T[…] for the first time on October 29, 2009, along with maybe ten to twelve other homes that day. She liked the look of it. She was looking to downsize into a maintenance-free property. She was attracted to the fact that the property was a "builder's home" according to the listing. She said Mr. Latimer told her the property was about 10 years old.

[10] On October 30, 2009 she met Mr. Latimer in his office and they completed a Buyer's Representation Agreement and an Agency Agreement, then put together an Offer to Purchase. The offer was initially for $365,000. It was signed back at $375,000 and ultimately agreed to at $370,000. It was conditional on financing and a home inspection. Both conditions were subsequently waived.

[11] The home inspection was conducted by Mark Dellamattia on November 2, 2009. Ms. Lippa was referred to Mr. Dellamattia by Mr. Latimer. Before the inspection began, Ms. Lippa executed Mr. Dellamattia's standard form Inspection Agreement.

[12] Mr. Dellamatia did not identify any significant structural issues with the residence in his report. Ms. Lippa proceeded to complete the purchase transaction on the strength of that report. She moved into the property on January 29, 2010.

[13] On February 15, 2010 she noticed a large water mark on the wall and on the basement floor under the stairs. Two days later she experienced a problem with some of the lights in her home and went to the basement to check the electrical panel. She found that there was a substantial water puddle on the floor below the panel. She contacted Mr. Dellamattia. He came over that evening. Together they observed the water on the floor, water actively leaking in the area that Ms. Lippa had identified on February 15, 2010 and a further substantial crack underneath a window. They checked the outside of the building and discovered that there were cracks visible outside as well. In total, she found what she described as five significant cracks.

[14] Ms. Lippa sought legal assistance on March 25, 2010. She was of the view that the Collettas were being unresponsive to her requests for action on their part. On April 29, 2010, the Collettas conveyed through their counsel that there may be a possibility of coverage through the Tarion new home warranty program. They provided the name of the builder.

[15] Ms. Lippa subsequently made a claim to Tarion and was advised that any Tarion coverage expired, coincidentally, on April 29, 2010.

[16] In October 2010 Ms. Lippa hired a contractor to repair two of the more significant cracks, including the one under the electrical panel. She did not have sufficient money to repair all of the cracks in the foundation wall. The initial repairs cost her $7,900.

[17] Notwithstanding the repairs in the fall of 2010, water was still seeping into Ms. Lippa's basement through other cracks that had yet to be repaired. She hired a second contractor in

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August 2011 to come in to complete the necessary repairs. The subsequent repairs cost her $15,599.

LIVE ISSUES

[18] The pleadings, evidentiary record and the positions advanced by the parties raise the following issues for determination:

A. With respect to the claim against the realtor:

   (i) What standard of care was the realtor required to meet and was it met?

   (ii) If a breach has been made out, has the plaintiff established that the breach caused her damages?

B. With respect to the claim against the vendors:

   (i) Did the vendors have an obligation to advise the plaintiff about the existence of the Tarion warranty program?

   (ii) Does the defence of caveat emptor apply to Ms. Lippa's purchase of T[…]?

   (iii) Did the vendors know of the water seepage problem in the basement?

   (iv) Did the vendors actively conceal the water seepage problem?

C. With respect to the claim against the home inspector:

   (i) Does the court have jurisdiction to hear the claim against the inspector in light of a binding arbitration clause in their contract?

   (ii) What standard of care applies to the services of the inspector and was it met?

   (iii) Did the inspector breach the terms of the inspection contract?

   (iv) Were the plaintiff's damages caused by a breach of the standard of care or the inspection contract?

   (v) Is the inspector's liability limited under the Inspection Agreement?

[19] I will review and analyse the plaintiff's claims against each of the defendants in turn.

DISCUSSION

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The Claim Against The Realtor

[20] The claim against Mr. Latimer and the brokerage employing him is framed in the tort of negligence. Paragraphs 25 and 26 of the claim provide as follows:

> 25. Latimer negligently advised Patricia that the house was more than 10 years old, implying that the Tarion warranty would have expired. As Patricia's real estate agent, Latimer owed a duty of care to Patricia to provide her with accurate information with respect to the properties that he was showing to her.
>
> 26. Latimer was a very experienced agent. Patricia was advised by Latimer that he owned several rental properties and had been in the real estate business for over 10 years. Patricia relied on the information Latimer provided to her with respect to the age of the Property to her detriment.

[21] Ms. Lippa had some difficulty at trial focusing her position within the framework of the claim, which led to a number of objections by Mr. Latimer's counsel. She sought to question Mr. Latimer about his failure to provide her with a 2005 listing of T[…], which described it somewhat differently than the 2009 listing; about the fact that he did not tell her that T[…] had previously been listed for a lengthy period of time without selling; and about the poor way he treated her after problems arose with the home.

[22] Her claim, as drafted, however, centres on Mr. Latimer's failure to alert her to the possibility of a Tarion warranty claim. She asserts that he had an obligation to do so as her realtor and claims that if he had, she would have filed a warranty claim which ought, in her view, to have had a significant chance of success.

[23] Mr. Latimer's position, as expressed by his counsel, is that Ms. Lippa has failed to establish the applicable standard of care and, in any event, is unable to prove that any negligence on the part of the realtor caused her damages.

[24] Though the statement of claim alleges that Mr. Latimer told Ms. Lippa that T[…] was ten years old, thereby implying that there was no Tarion warranty coverage left, that is not how the claim was framed at trial. Ms. Lippa's claim is not that she was misled by Mr. Latimer, but that he failed to advise her at all about the new home warranty program, thereby depriving her of the opportunity to make a claim.

[25] Under cross-examination, Ms. Lippa confirmed that she was not concerned about the age of the home. She said that so long as the home was not a "fixer-upper" she was fine. She only became concerned about the age of the house after closing and in relation to the Tarion warranty issue.

[26] She confirmed that she had no idea the Tarion warranty program existed. In the result, any suggestion that she didn't make a claim because she thought she was out of time is not a fair one. She didn't make a claim to the program because she did not know that the program existed.

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In other words, she didn't rely on Mr. Latimer's advice about the age of the home to her detriment.

[27] In paragraph 28 of the Statement of Claim, Ms. Lippa asserted that she would have made a claim to Tarion in February 2010 had she known of the existence of coverage. She testified that she only learned of the program on April 30, 2010 when her lawyer brought to her attention a letter from the Colletta's counsel, dated April 29, 2010, which mentioned the possibility of warranty coverage.

[28] If I give the allegation its most generous reading, it suggests that Mr. Latimer had a duty to advise Ms. Lippa of the existence of the Tarion warranty program and the possibility that T[…] may have some warranty coverage. To succeed on this claim, Ms. Lippa must establish that, on a balance of probabilities:

(a) Mr. Latimer owed her a duty to disclose to her the existence of the Tarion warranty program;

(b) Mr. Latimer breached that duty; and,

(c) The breach of that duty caused Ms. Lippa damage.

[29] I will, for the sake of argument, assume that a duty of care arose between Mr. Latimer and Ms. Lippa as a result of their professional relationship. That said, the question remains as to what standard of care Mr. Latimer was required to meet.

(i) <u>The Standard of Care Issue</u>

[30] The general standard of care applicable to real estate agents is a legal question. It does not vary from case to case. Simply put, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. As the Court of Appeal has held, however, the translation of that general standard to a particular factual matrix is a question of fact: *Krawchuk v. Scherbak*, 2011 ONCA 352 at para 125.

[31] The question for determination in this case is whether a reasonable and prudent real estate agent in Mr. Latimer's position would have advised Ms. Lippa of the possible existence of Tarion warranty coverage.

[32] There is scant evidence in the record upon which the court could make the determination. Evidence will often be presented of trade custom or practice. Sometimes there is a statutory standard that must be met. The Court of Appeal has directed, however, that, in general, it is inappropriate for a trial judge to determine the standard of care in the context of an allegation of professional negligence in the absence of expert evidence: *Krawchuk*, as above, at para. 130. There are two identified exceptions to this general requirement:

(a) Where the standard of care may reliably be determined in the absence of expert evidence, such as where the case is about non-technical matters that an ordinary person may be expected to have knowledge about; and,

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(b) Where the conduct of the defendant is so egregious that it obviously falls below the standard of care.

See *Krawchuk*, as above, at paras. 132-135.

[33] In my view, neither of the two identified exceptions applies in this instance.

[34] Ms. Lippa filed, as Exhibit 33, a document she obtained online entitled "Working with a Realtor." It is apparently a standard form document created by the Ontario Real Estate Association. Mr. Latimer agreed that it is a document referenced by the agency agreement between him and Ms. Lippa. The form marked Exhibit 33 is one currently in use, but Mr. Latimer agreed that the form in use in January 2010 would have been substantially the same.

[35] The form provides, amongst other things that,

> …the brokerage must also make reasonable efforts to determine any material facts relating to the transaction that would be of interest to the client and must inform the client of those facts.

[36] Ms. Lippa relies on the content of Exhibit 33 to establish the standard of care applicable in the circumstances. While I applaud her efforts, I find that they fall short. Without expert evidence on the point, or even evidence of trade custom, I am unable to determine if Tarion warranty coverage is a fact relating to the transaction, or, more importantly, whether it is the sort of fact that a realtor is compelled to look into and inform his or her client about.

[37] I am unable, on the record before me, to determine what the applicable standard of care was and whether Mr. Latimer breached it. In the result, the claim against Mr. Latimer fails. I will briefly address the causation issue in any event, given that it was raised and argued.

(ii) The Causation Issue

[38] Even if I had concluded that Mr. Latimer breached an obligation to inquire about warranty coverage and inform Ms. Lippa about it in a timely way, I would not be satisfied that causation has been made out.

[39] The regulations to the *Ontario New Home Warranties Plan Act* provide for only a 2 year warranty against water penetration into basements of newly constructed homes: *Administration of the Plan*, R.R.O. 1990, Reg. 892. This warranty expired long before Ms. Lippa acquired T[…].

[40] A seven year warranty applies with respect to major structural defects. A major crack in a basement wall *may* be a major structural defect if it results in a failure of a load-bearing portion of the building, or materially and adversely affects the use of the building for the purpose for which it was intended. No evidence was presented that would enable me to conclude that any of the cracks in Ms. Lippa's basement are major structural defects. This absence of evidence is a further, fatal flaw in the case against Mr. Latimer.

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[41] I pause here to note that Ms. Lippa's claim against the realtor could have been framed as a breach of contract, on the basis that the terms of the "Working with a Realtor" document were incorporated by reference into the agency agreement. That said, even if the claim were interpreted that way and even if a breach had been found, the plaintiff remains unable to establish that her damages were caused by the breach, whether that breach was contractual or of an applicable standard of care.

[42] I will move on to the claim against the vendors.

The Claim Against the Vendors

[43] The basis for the claim against the vendors, Mr. and Mrs. Colletta, is set out in three paragraphs in the statement of claim:

> 20. The Collettas knew or ought to have known of the water issues that resided in the basement and intentionally failed to disclose same to Patricia.
>
> 21. Alternatively, the Collettas took steps to hide and conceal the water defects.
>
> 22. The Collettas also failed to advise Patricia of potential Tarion New Home Warranty coverage. Despite having purchased the Property from the developer in 2005 and knowing that the coverage existed at the time they sold the Property, at no time did the Colletta advise Patricia of the continual Tarion coverage. It was only upon discussion of the structural defects with the Collettas' lawyer in May 2010, that the issue of potential coverage by Tarion became known.

[44] The draftsmanship of the claim is poor. It is difficult to discern the legal basis on which liability is said to rest. I am proceeding on the basis that paras. 20 and 21 of the claim are rooted in principles of contract law, while para. 22 alleges a breach of duty of care and is rooted in negligence, though arguably it may be interpreted as a claim to a further breach of contract.

[45] Much of Ms. Lippa's efforts at trial were directed towards establishing that the Collettas were unresponsive to her numerous communications following the discovery of the water problem. She is particularly troubled by their failure to advise her of the possibility of Tarion warranty coverage in a timely way.

[46] The Collettas' position is that Ms. Lippa has failed to establish that they knew of and concealed the cracks in the foundation and has otherwise failed to establish any breach of the agreement of purchase and sale. They rely, as I indicated, on the maxim, *caveat emptor,* which is commonly, though not entirely accurately, translated as "buyer beware".

(i) <u>The Tarion Warranty Issue</u>

[47] I can dispose of the allegations with respect to the Tarion warranty quickly.

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[48] There was no provision in the parties' agreement of purchase and sale that required the vendors to advise the purchaser about any potential remaining Tarion coverage. It follows that any failure on the vendors' part to advise Ms. Lippa about warranty coverage is not a breach of contract.

[49] I am also not aware of any duty of care owed by a vendor of a property to put the purchaser on notice about any unexpired portions of any new home warranty. Ms. Lippa tendered no evidence to support such a duty of care and I am not prepared to find that there was one. In any event, Ms. Lippa could have easily inquired about the date of construction and satisfied herself about coverage by taking a look at the regulations passed under the *Ontario New Home Warranty Plan Act*.

(ii) Water Seepage – The Rule of Caveat Emptor

[50] There is no doubt that Ms. Lippa had a problem with water seepage through cracks in the foundation wall. I am satisfied that the cracks and the water seepage problem existed for some time prior to Ms. Lippa's purchase of the property. Nevertheless, proving the existence of a problem still leaves almost all of Ms. Lippa's work ahead of her in terms of establishing liability.

[51] *Caveat emptor* continues to be the presumptive rule in real estate transactions, as Arrell J. observed in *Cotton v. Monahan*, 2010 ONSC 1644, *aff'd* 2011 ONCA 697. Justice Arrell cited a well-known quote from Professor Bora Laskin, long before he became Chief Justice of Canada, referred to in the 1960 Law Society Special Lectures, where he said,

> Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he finds it, whether it be dilapidated, bug infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contractual terms.

[52] Inherent in the quote from then-Professor Laskin is a limitation on the defence of *caveat emptor*. In particular, it ceases to be an effective defence in cases of fraud or misrepresentation. A vendor who conceals a defect, so that the purchaser will not discover it, can no longer rely on *caveat emptor* as a defence because the defect was latent and concealment is considered to be misrepresentation: *Cotton v. Monahan*, as above, at para. 45. See also *Lunney v. Kuntova*, [2009] O.J. No 742 (S.C.J.) and *Antorisa Investments Ltd. v. 172965 Canada Ltd*. (2006), 82 O.R. (3d) 437 (S.C.J.).

[53] *Caveat emptor* otherwise remains a viable defence with respect to both patent and latent defects, so long as there is no attempt at concealment.

[54] There is generally no obligation on the part of a vendor to bring known, *non-concealed* defects to the attention of a purchaser. That said, a failure to bring to the attention of a purchaser a known, non-concealed, latent defect may arguably still give rise to a viable claim in two situations:

(i) Where the latent defect renders the property unfit for habitation; or,

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(ii) Where the latent defect renders the premises dangerous.

McGrath v. MacLean (1979), 95 D.L.R. (3d) 144 (C.A.)

[55] Neither of these two situations is present on the facts of this case. In the result, the vendors had no independent obligation to make Ms. Lippa aware of any cracks in the foundation walls. To succeed on her claim against the vendors, Ms. Lippa must establish that the Collettas knew of the seeping cracks and actively concealed them. Otherwise the claim against the vendors will fail due to the operation of the rule of *caveat emptor*.

(iii) Water Seepage – The Issue of Knowledge

[56] Both of the Collettas testified that they were not aware of any leakage, moisture or pooling of water in the basement. While I would not disparage the Collettas as generally untrustworthy witnesses, I do not accept their evidence that they knew nothing about water seepage in their basement. That evidence is, in my view, very much at odds with the probabilities of the case on the whole.

[57] There was substantial water seepage into the basement within weeks of Ms. Lippa taking possession. While it is possible that the first water seepage into the basement occurred within a month of the closing date, it is extremely unlikely. There were visible water marks and mould in the basement that suggest water seepage had been going on for some time. The Collettas had owned the property for a number of years. They stored food in the basement and accessed it regularly. I find that, in all likelihood, the Collettas knew they had water seepage in their basement from time to time.

(iv) Water Seepage – The Issue of Concealment

[58] I am unable to find, however, that the Collettas actively concealed the cracks in the wall. The evidentiary record is simply not sufficient to support a finding of active concealment. Some of the interior cracks *may* have been partially behind some boxes, or they may not have. At the same time, some of the cracks were visible from the outside and were entirely unconcealed.

[59] The evidence regarding the contents of the basement is thin and certainly not conclusive of active concealment.

[60] Ms. Lippa testified that she looked at the property for the first time on October 29, 2009. She went with Mr. Latimer. She had an opportunity to look through the entire home, including the basement, but she described the viewing as a "whistle stop". She was looking through a number of other homes on the same day. When they went into the basement, she noticed that there was a couch and a Bow-Flex exercise machine, but can't remember what else was down there. The basement was unfinished.

[61] She viewed the property a second time on the same day. The second time she was with her mother. She said they did not go past the basement steps. Under cross-examination, however, Ms. Lippa confirmed that during her examination for discovery she said she probably

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walked through the basement again just like she had when she saw the basement with Mr. Latimer. She explained that she cannot remember what happened six years ago.

[62] On neither occasion did she notice any moisture, water stains or cracks, or smell any dampness or mould in the basement.

[63] Ms. Lippa attended again during the home inspection conducted by Mr. Dellamatia on November 2, 2009. She said she did not follow him around on that day.

[64] Mr. Dellamatia testified that he did not notice any water seepage on November 2, 2009, nor were there any visible cracks on the foundation walls. He said that there were objects in the basement that impeded his visual inspection. There were two exterior walls – the rear and the side. They both had insulation approximately four feet down from the top. He did not remove the insulation to look behind it. There was also furniture, boxes, shelving – standard basement material – and his practice was not to move stored items.

[65] Ms. Lippa did a further inspection of the home on December 18, 2009. Accompanying her that day were her mother, Mr. Latimer, her sister-in-law and her former roommate. Though they went to the basement they didn't spend much time down there. She said it was now filling up with boxes. The basement, she said, was not something she paid attention to. She could not recall anything obstructing the walls.

[66] Ms. Lippa's friend, Bruce Davenport, testified on her behalf. He was with her on the date she moved into T[…] – January 29, 2010. He was the first person to go down to the basement that day. He said that there was "stuff" all over; a lot of it was against the walls. There were some tiles under the basement stairs and a small red carpet covering a water stain. He conceded that he had not been at the house prior to the closing date and could not therefore comment on the condition of the basement prior to the closing date.

[67] Mr. Davenport was also at T[…] on February 18, 2010. He saw water marks and saw cracks in the walls, both inside and outside. He testified under cross-examination that while he saw numerous items in the basement on February 18, 2010 he would not be able to say what belongings were Ms. Lippa's and what may have been left there by the Collettas.

[68] Mrs. Colletta testified that the basement was unfinished and she rarely went down there, save to get food. There were two shelves, she said, up against one wall that held food. There were some boxes (maybe 10), a freezer, some Christmas tree ornaments and a Bow-Flex exercise machine. She said any of these items could be moved. Her estimate was that between 80 and 85% of the wall space could be seen. During cross-examination, Ms. Lippa suggested to Mrs. Colletta that a kitchen fan had been propped up against a wall hiding a crack. She disagreed. There is no evidence to the contrary.

[69] Mr. Colletta testified that he and his wife used the basement for storage. His evidence as to what was stored in the basement by them was consistent with his wife's testimony. He said there were 10-15 boxes stored in the basement, all of which were readily moveable by one person. He said most were in the corner up against the interior wall.

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[70] Ms. Lippa adduced evidence at trial aimed at establishing that some prior repair work had been done to the exterior wall below grade. She focussed on a black membrane that covered the foundation wall, the edge of which could be seen just above grade. The presence of this membrane does not strongly support prior repair work in my view. It is not possible to determine whether the membrane was applied at the time the property was constructed or whether it was added at some later time. The Collettas both testified that they did not do any repair work to the home. In any event, the fact that a prior repair was attempted, if that indeed occurred, may offer circumstantial evidence of knowledge of a defect, but it does not amount to active concealment.

[71] The evidence, in my view, is not fulsome in terms of the contents of the basement at the time Ms. Lippa viewed the home and/or at the time of the inspection. It is not clear to me where any boxes or other items were in relation to the cracks in the foundation walls. It is Ms. Lippa's onus to establish active concealment on the part of the vendors. Her evidence that the basement was not something she paid much attention to is far from persuasive. It is not shored up to any significant degree by the evidence of any of the other witnesses.

[72] The plaintiff has failed to satisfy the court, on a balance of probabilities, that the vendors actively concealed the cracks in the basement. In the result, the rule of *caveat emptor* applies and her claim against them fails and is dismissed.

The Claim Against the Home Inspector

[73] Mr. Dellamattia's alleged liability is framed at paragraphs 16 and 17 of the statement of claim:

> 16. Dellamattia failed to report serious structural damage in the basement foundation of the Property. Had Patricia known of the defects in the foundation and its susceptibility to leakage, she would not have proceeded with the purchase of the Property. Patricia was not looking for a house that "could be fixed". At the time, Patricia had been residing in a home she had lived in for 20 years.
>
> 17. Dellamattia breached his duty of care owed to Patricia by performing a negligent inspection and providing her with a deficient report.

[74] Paragraph 17 of the claim is clearly framed in negligence. Paragraph 16 is arguably a part of the negligence claim or it is an allegation of breach of contract, or both.

[75] Ms. Lippa's position at trial was straightforward. She asserted that she hired Mr. Dellamattia to report to her on the condition of the home she was about to purchase. His report disclosed no defects of any significance and, on the strength of that report, she completed the purchase transaction. It was later discovered, unfortunately, that there were five significant cracks in the foundation wall. These were defects that ought to be have been noticed and reported on. Mr. Dellamattia's failure to do so was, she argued, both a breach of the Inspection Agreement and professional negligence.

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[76] Mr. Dellamattia took a similar position to that of Mr. Latimer in terms of the evidentiary record. In other words, that Ms. Lippa failed to present any expert evidence regarding the standard of care applicable to his work. He further asserted that the plaintiff failed to establish that any of the basement cracks were visible on the date of inspection and failed to make out any breach of contract. In any event, he submitted that his liability is limited to the amount of the contract, namely $325, by virtue of an exclusion clause found in paragraph 4 of the Inspection Agreement.

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(i) The Jurisdiction Issue

[77] Paragraph 23 of the statement of defence references a provision in the Inspection Agreement that provides for binding arbitration. That provision is an addendum to the agreement and provides as follows:

> Any dispute, controversy, interpretations, or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation arising out of, from or related to, this contract or arising out of, from or related to the inspection or inspection report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services Inc. The decision of the Arbitrator appointed thereunder shall be the final and binding judgment on (*sic*) the Award may be entered in any Court of competent jurisdiction.

[78] On its plain and ordinary reading, the arbitration clause would appear to oust the jurisdiction of the court. That said, Mr. Dellamattia not only filed a statement of defence to the action, but he also participated in discoveries, a pre-trial conference and ultimately the trial without raising the arbitration provision as a bar to this court proceeding.

[79] In my view, if either of Ms. Lippa and Mr. Dellamattia had the right to insist on an arbitration as the dispute resolution mechanism in this case, they waived that right by proceeding to a trial in this action without complaint: see *Lansens v. Onbelay Automotive Coatings Corp*., 2006 CarswellOnt 8814 (S.C.J.) and *Engels v. Merit Insurance Brokers Inc*., 2008 CarswellOnt 894 (S.C.J.). Both parties attorned to the jurisdiction of this court.

(ii) The Standard of Care Issue

[80] Once again, the standard of care of a home inspector is a legal question. It does not vary from case to case. It has been referred to in somewhat different language in different cases over the last twenty years or so, but it amounts to this: a home inspector must meet the standard of care that would be expected of an ordinary, reasonable and prudent home inspector in the same circumstances: *Rimmer v. Lahey*, [2013] O.J. No. 4076 (S.C.J.); *Biggs v. Harris*, [1999] O.J. No.

4831 (S.C.J.). Again, the way in which that general standard of care translates to any particular factual matrix is a question of fact.

[81] As part of the assessment of the standard of care owed by an inspector in any given circumstances, the court may take into account the standards of any relevant professional association. In this case, the Standards of Practice of the American Society of Home Inspectors (the "Standards") were expressly incorporated by reference in the Inspection Agreement. In addition, the court may take into account the cost of the inspection and the level of expertise of the inspector: *Biggs v. Harris*, as above, at para. 33.

[82] In *Biggs v. Harris*, Gillese J., as she then was, described a home inspection as "general in nature" and "performed by a visual inspection". The concept of the typical home inspection was aptly described by B.C. Provincial Court (Small Claims Court) Judge Stanfield in *Brownjohn v. Ramsay*, [2003] B.C.J. No. 43, at paras. 16-17 as follows:

> …There are limits on what one reasonably can expect from a relatively brief visual inspection undertaken by someone who has no right to interfere with (and by that I mean no right to dismantle, nor to effect any permanent change in) the property which one must remember is not owned by the person requesting the inspection. As well, as a matter of common sense one has to recognize that a service performed for a fee of $240.00 cannot be expected to be exhaustive.
>
> The broad purpose of securing a residential home inspection is to provide to a lay purchaser expert advice about any substantial deficiencies in the property which can be discerned upon a visual inspection, and which are of a type or magnitude that reasonably can be expected to have some bearing upon the purchaser's decision-making regarding whether they wish to purchase the property at all, or whether there is some basis upon which they should negotiate a variation in price. Broadly speaking, it is a risk-assessment tool.

[83] I completely agree with Judge Stanfield's description and indeed, Ms. Lippa did not portray the inspection process as anything other than a risk-assessment tool. She described her lack of expertise in construction and mechanical systems. She hired the inspector to go through the property to give her some idea of what she was getting into. She wanted a property that would be low maintenance.

[84] As I set out above, the Court of Appeal has held that it is generally inappropriate for a trial judge to determine the standard of care in the context of an allegation of professional negligence in the absence of expert evidence: *Krawchuk*, as above, at para. 130. I also mentioned two identified, though non-exhaustive, exceptions to the general rule. In my view, this is a case where I can readily identify a breach of the general standard of care without the need for expert evidence.

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[85] The breach in this instance is both a negligent breach of the standard of care to be exhibited by a reasonable and prudent home inspector and a breach of contract.

(iii) The Breach Issue

[86] The Inspection Agreement was executed by Ms. Lippa and Mr. Dellamattia on November 2, 2009 immediately before the inspection began.

[87] Pursuant to para. 2 of the Inspection Agreement, Mr. Dellamattia was to do the following:

> The Inspector will perform a visual inspection and prepare a written report of the apparent condition of the readily installed systems and components of the property existing at the time of the inspection. Latent and concealed defects and deficiencies are excluded from the inspection.

[88] Paragraph 3 of the agreement incorporated the Standards. The Standards require the home inspector to, amongst other things, inspect readily accessible, visually observable, installed systems and components, including the foundation.

[89] The Standards expressly provide that the inspector is not required to move any personal property, furniture, equipment, plants, soil, snow, ice or debris. The inspector is further not required to dismantle any system or component. In other words, and in accordance with common sense, the inspection is to be non-invasive.

[90] Mr. Dellamattia testified that the cracks in the foundation wall were not visible on his inspection of the basement on November 2, 2009. I have already found that it is highly improbable that the cracks all formed some time immediately after Ms. Lippa acquired the property. I find that the cracks were present on the date of the inspection, but I accept that Mr. Dellamattia did not see them.

[91] Mr. Dellamattia offered in evidence an explanation for why he did not see any cracks. He said there were shelves and boxes in the basement that prevented his access to much of the wall space. He referenced the provision of the Standards that provide that he is not required to move any personal property.

[92] I accept that Mr. Dellamattia was not required to move personal property. But he was also there to perform a job and to report on the structure of the home. He was undoubtedly aware that moisture issues in basements is a common problem. Mr. Colletta testified that any boxes in the basement were readily moveable by one person.

[93] Whether Mr. Dellamattia could have or should have moved some boxes is, in my view, a live issue. But it is a live issue that I am not able to resolve on this evidentiary record. First, I have insufficient evidence as to precisely what was in the basement and where. Second, on this issue I would require expert evidence on the steps a reasonable and prudent inspector would take in terms of accessing the foundation for inspection.

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[94] Having said that, the issue of whether Mr. Dellamattia could or should have moved boxes around is far from determinative. I find he breached the Inspection Agreement in two readily identifiable respects:

(a) He failed to inspect the foundation from the outside. I find that, had he done so, he would have noticed cracks that (1) he ought to have reported to Ms. Lippa; and (2) would have put him on notice to inspect the inside of the foundation more closely; and,

(b) He failed to report to Ms. Lippa that he was unable to properly inspect the foundation walls in the basement due to the presence of shelves and boxes, as he was required to do by section 2.2(C)(4) of the Standards. On page 16 of the Inspection Report prepared by Mr. Dellamattia, there is a pre-printed diagram where the inspector is meant to identify where the foundation wall was not visible due to obstruction(s). The diagram is blank.

[95] I find that the failure to inspect the visible exterior portion of the foundation was not only a breach of contract, but it was also an obvious breach of the standard of care applicable to inspectors. The cracks were readily apparent on a basic visual inspection of the exterior of the home, as testified to by the plaintiff's friend, Palozzil Ezio Cocezio. Mr. Cocezio was at the property at the request of the plaintiff's mother in the winter of 2010. He could not remember the specific date and said it could have been January or February, 2010. He went to look at the home in response to the issues the plaintiff was experiencing in terms of water penetration, so I find that it was likely in the latter part of February 2010 that he attended. In my view, the cracks would not have been materially different in February 2010 from the way they appeared on November 2, 2009.

[96] I do not require an expert to tell me that any reasonable and prudent inspector would have visually inspected the foundation in this location, would have seen the obvious cracks, and would have reported them to the prospective purchaser. Cracks of this nature would reasonably be expected to materially affect the purchaser's decision as to whether to complete the transaction.

[97] I conclude that the inspection was conducted negligently and in breach of the terms of the Inspection Agreement.

[98] Though the claim was not framed as a case of negligent misstatement in tort, Mr. Dellamattia's counsel argued it as such. To be clear, I also conclude that Mr. Dellamattia's representation, by way of his report, that there were no significant issues with the foundation at T[…], was a negligent misstatement.

[99] The requisite elements of negligent misstatement were discussed by the Supreme Court in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87. There are five essential elements, each of which is made out in this case:

(i) There must be a duty of care based on a special relationship between the parties. In my view, that duty of care arose in this case based on the Inspection Agreement;

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(ii) The representation must be untrue, inaccurate, or misleading. The inspection report failed to identify cracks in the foundation. That was inaccurate. The failure to identify where obstructions made inspection impossible in the basement was misleading;

(iii) The representor must have acted negligently. I have described the negligence above;

(iv) The representee must have relied, in a reasonable manner, on the negligent misstatement. I find that Ms. Lippa relied on the inspection report when she waived the inspection condition in the agreement of purchase and sale with the Collettas. Her reliance was objectively reasonable; and,

(v) The reliance must have been detrimental. I find that had Ms. Lippa known of the presence of the cracks and water seepage, she would not have waived the inspection condition. Instead she purchased the property and was almost immediately in a position where she had to incur significant repair costs.

[100] Having found liability on the part of Mr. Dellamattia, both in contract and tort, it is necessary to assess damages.

(iv) Damages – The Causation Issue

[101] A negligent party is only liable for damages caused by his or her negligence.

[102] The test to establish causation is a common sense one. I am satisfied that, but for the negligence of the inspector, the plaintiff would not have suffered the damages she suffered: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 13-14. Ms. Lippa gave evidence that she would not have waived the inspection report and completed the transaction had she known that the property had a leaking basement. I accept that evidence.

[103] Even if I were to treat this case as a breach of a duty to disclose and apply a modified objective test to the causation issue (see *Bollmon v. Soenen*, 2014 ONCA 36 for instance), I not only accept Ms. Lippa's subjective evidence that she would not have completed the transaction, but I find that it was entirely objectively reasonable in the circumstances. In my view, common sense dictates that she would not have completed the transaction knowing she would be immediately put to significant repair costs.

(v) Damages – The Exclusion Clause Issue

[104] The next issue to contend with in terms of the assessment of damages is an exclusion clause contained in the Inspection Agreement. It may be more accurately characterized as a limitation of liability clause, but nothing turns on the label hung on it. I will refer to it as an exclusion clause throughout the balance of this decision.

[105] Paragraph 4 of the Agreement provides as follows:

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> The parties understand and agree that the Inspector and its employees and its agents assume no liability or responsibility for the costs of repairing or replacing any unreported defects or deficiencies either current or arising in the future or any property damage, consequential damage or bodily injury of any nature. If repairs or replacement is done without giving the Inspector the required notice, the Inspector will have no liability to the Client. The client further agrees that the Inspector is liable only up to the cost of the inspection.

[106] It will come as no surprise that there was virtually no debate about the interpretation, enforceability or limit to the exclusion clause when the parties made their final submissions. Mr. Dellamattia's counsel naturally raised it in defence, but little attention was otherwise paid to it.

[107] The leading word on exclusion clauses in Canadian law is the Supreme Court's relatively recent decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 S.C.J. No. 4. The majority decision was written by Cromwell J. But in terms of the analytical approach to be taken to the enforceability of an exclusion clause, he agreed with the approach set out in the minority decision of Binnie J.

[108] Justice Binnie held that a series of inquiries must be addressed when a plaintiff seeks to avoid the effect of an exclusion clause: paras. 121-123.

[109] First, the court must assess, as a matter of interpretation whether the exclusion clause applies in the circumstances.

[110] Second, if the exclusion clause applies, the court should assess whether it should be vitiated due to unconscionable circumstances existing at the time of contract formation, such as the taking advantage of an inequality of bargaining power.

[111] Finally, if the court concludes that the clause is valid and applicable, following the first two inquiries, it may consider whether it should nevertheless refuse to enforce the clause because of the existence of an overriding public policy. The proof here falls on the plaintiff to demonstrate the application of a policy that outweighs the strong public interest in the enforcement of contracts.

[112] With respect to this third inquiry, Binnie J. expressed the applicable principle in strong language, when he observed, at para. 82:

> …The principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties.

[113] I will engage the analytical framework suggested by Justice Binnie, beginning first with the interpretation of the clause in issue.

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[114] The basic rule of contractual interpretation is that the court is to consider the clause in issue in the context of the contract as a whole and in light of its purposes and commercial context: *Tercon*, para. 64.

[115] The Court of Appeal addressed the basic principles of contract interpretation in *Ventas, Inc. et.al. v. Sunrise Senior Living Real Estate Investment Trust et. al.*, (2007), 85 O.R. (3d) 254, at page 10. There, it was directed that the modern, contextual approach to contract interpretation involves an application of following principles:

(a) The contract must be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) The intentions of the parties must be determined in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended to say what they have said;

(c) The court may have regard to objective evidence of the factual matrix underlying the negotiation of the contract, but should not consider evidence of the subjective intention of the parties; and,

(d) At all times, the contract must be assessed in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

[116] It is important to note that the Inspection Contract was a pre-printed form, delivered by Mr. Dellamattia to Ms. Lippa for her signature. I have no evidence about who actually drafted the form, but it is apparently the standard contract utilized by Mr. Dellamattia in his business. He testified that he delivered it by email to Ms. Lippa on November 1, 2009. He said he received no reply to the email, but said that Ms. Lippa signed his standard agreement at the time of the inspection which, as I noted, took place on November 2, 2009.

[117] Ms. Lippa testified that she asked Mr. Dellamattia for a copy of his standard agreement by email, but she did not believe she ever received one through that medium. She agrees that Mr. Dellamattia had a copy of the agreement with him the next day when he attended to do the inspection. There is little evidence in the record about what, if any, discussions Ms. Lippa and Mr. Dellamattia had about the content of the agreement. She agreed that she signed it.

[118] All of this is to say that the contract was on a pre-printed form and there was little or no negotiation of its terms. This is important because clauses which limit the potential liability of one of the contracting parties tend to be given close scrutiny by courts. Ambiguities are generally construed against the party who drafted, or at least proffered, the agreement: see *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.) at paras. 8-9.

[119] To interpret the exclusion clause of the Inspection Agreement, I have considered the following contextual factors:

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(a) Neither of the parties to the contract were particularly commercially sophisticated in my view. That said, the inspector obviously understood his business better than Ms. Lippa and he understood the content of the standard agreement he utilized;

(b) The inspection was intended to be a visual inspection only. Obviously it was to be non-invasive. The general intent was to bring to Ms. Lippa's attention any significant negative features about the structure that might not otherwise be apparent to a layperson unfamiliar with construction;

(c) The cost of the inspection was $325. That price obviously puts the detail and depth of the anticipated inspection into perspective. It was intended to be something more than a cursory view, but something significantly less than a structural engineering report;

(d) The inspection was to take place in the context of a real estate transaction. Ms. Lippa's offer to purchase was conditional on a satisfactory inspection. Mr. Dellamattia denied, under cross-examination, that he knew that Ms. Lippa's purchase of T[…] was conditional on the outcome of his inspection report. I do not believe him. He knew the referral to his firm came from Mr. Latimer. He sent thank you notes to both the buying and selling agents after the inspection was completed. He knows where his business comes from and he knows why;

(e) The inspection was a process that invited reliance. If Ms. Lippa had been able to personally assess the structural and mechanical soundness of the home, she would not have needed to retain a professional inspector. She was relying on Mr. Dellamattia's advice. He was aware of that.

[120] In this case, it is apparent that the exclusion clause is an attempt to limit the inspector's liability to the cost of the inspection, namely $325. It is also apparent that it intends to limit liability for *unreported defects*.

[121] There are certain ambiguities present in the clause. First, it includes the following odd sentence: "If repairs or replacement is (*sic*) done without giving the Inspector the required notice, the Inspector will have no liability to the Client". I have not been able to find any notice provision regarding repairs or replacement anywhere else in the contract. It is not clear, in the circumstances, what this sentence refers to. It does appear to envision a situation in which liability on the part of the inspector may arise. Then again, the sentence immediately following it, limits any liability to a maximum of $325.

[122] Second, the clause is arguably not clear as to whether it operates to exclude damages for negligence. That said, it is not strictly necessary to utilize the word "negligence". It is enough if the words actually used make it clear that damages arising from the acts or omissions of the inspector are excluded, or at least limited.

[123] I confess that my personal preference would be to not enforce the exclusion clause. Ms. Lippa relied on the inspection report. She suffered significant, easily identifiable losses in the result. Mr. Dellamattia let her down in a substantial way. But the outcome of this claim does not

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turn on my sympathy for Ms. Lippa. Ultimately, it is impossible to ignore the clear wording of the first sentence of clause 4. Clearly liability is excluded for the cost of repairing unreported defects. This case focuses entirely on the cost of repairing unreported defects in the foundation. It would appear to me that the wording is broad enough to capture negligent non-reporting, as well as non-reporting in breach of the contract.

[124] The ambiguous aspects of the exclusion clause do not, in my view, detract significantly from its unambiguous intention.

[125] As I noted, the inspection process is one that undoubtedly invites reliance. But it is conducted at a very modest cost. I can appreciate that an inspector would not be keen on assuming any significant risk in exchange for that level of fee. In the result, the inspector has included a provision in the contract that significantly impacts on the degree of reliance that may be placed on his report.

[126] If the inspection process is appropriately characterized as a risk assessment tool, then the exclusion provision is designed to ensure that none of the risk passes to the inspector. One may legitimately question the real value of the inspection report if the inspector does not stand behind it. That question is neither here nor there, however, in terms of the enforceability issue. Interpreting the provision as a valid and applicable limitation of liability may produce a disappointing result from the plaintiff's point of view, but it does not, in my view, rise to the level of a concern about commercial absurdity.

[127] I am confident that Ms. Lippa did not understand what she bargained for. I frankly am not clear on whether she actually read any of the terms of the Inspection Agreement. But this is the bargain she struck. Her signature appears no more than 7 cm below the exclusion clause. Had she read the clause with some care, she would have understood that she could place only limited reliance on the inspection report.

[128] Having concluded that, contextually interpreted, the exclusion clause applies, I move on to the next inquiry: whether there were any circumstances present at the time of the formation of the contract that may vitiate it? I am unable to conclude that there were, on the evidentiary record before me.

[129] There may have been some modest differential in bargaining power between the parties, but I cannot say that Mr. Dellamattia took unconscionable advantage of it. This is a case, in my view, where Ms. Lippa did not review the content of the agreement carefully enough, if at all.

[130] Finally, I must consider whether there are any public policy reasons to refuse to enforce the contract. Here, the onus is clearly on the plaintiff to demonstrate the strong public policy interest that over-rides the public interest in enforcing contracts freely entered into. Ms. Lippa did not argue or advance any such public interest, nor is one readily apparent.

[131] In the result, while I have found that the inspector breached the contract and conducted a negligent inspection, I find that I am limited in the damages that may be assessed against him to $325.

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Conclusion

[132] In summary, and for the reasons expressed above, I order as follows:

(a) The claim against Mr. Latimer and the brokerage is dismissed;

(b) The claim against the Collettas is dismissed; and,

(c) I find that Mr. Dellamattia breached the inspection contract and was negligent in the manner in which he completed his inspection. Damages are assessed, in light of the exclusion clause at para. 4 of the Inspection Agreement, in the amount of $325.

[133] The parties may agree upon the issue of costs. If they are unable to agree, they may address me in writing. The defendants shall each have until March 15, 2017 to serve and file any costs submissions. Ms. Lippa shall have until March 31, 2017 to serve and file any responding submissions on costs. The defendants shall have until April 7, 2017 to file any reply submissions.

[134] Cost submissions shall not exceed three pages in length. They should be filed through my assistant, Diane Massey, at the Newmarket courthouse. They may be filed electronically through her at Diane.massey@ontario.ca.

Boswell J.

Released: February 17, 2017

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