IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gordon v. Krieg,*
2013 BCSC 842

Date: 20130515
Docket: 42218
Registry: Vernon

Between:

Elizabeth Ann Gordon

Plaintiff

And

**William Krieg, Kathleen Anne Krieg, Wolfram Oscar Krieg,
Norwich Real Estate Services Inc., David Kilby, Craig Rodney Hostland,
R 340 Enterprises Ltd. dba Pillar to Post, R 340 Enterprises Ltd.,
Caire Fillon and A-1 Appraisals Ltd.**

Defendants

And

**David Kilby, Craig Rodney Hostland,
R 340 Enterprises Ltd. dba Pillar to Post, R 340 Enterprises Ltd.,
Wolfram Oscar Krieg and Norwich Real Estate Services Inc.**

Third Parties

And

Interior Testing Services Ltd.

Third Party

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff: R.M. Moffat

Counsel for the Defendants,
W. Krieg and K.A. Krieg: W.C. Shields

Counsel for the Defendants and Third Parties, W.O. Krieg and Norwich Real Estate Services Inc.:	S.G. Cordell
Counsel for the Defendants and Third Parties, D. Kilby, C.R. Hostland, R 340 Enterprises Ltd. dba Pillar to Post and R 340 Enterprises Ltd.	T.H. Pettit
No other appearances	
Place and Date of Trial/Hearing:	Kelowna, B.C. September 10-14, 17-21, 24-28, October 1-5, 9-12, December 10-14, 2012, February 4-5, 7-8, 2013
Place and Date of Judgment:	Vernon, B.C. May 15 2013

Introduction

[1] After 26 years of living on her own in rented accommodation, Ms. Gordon decided to buy a house. With the help of her real estate agent, she found a house that she liked. She made an offer to buy the house. The vendor accepted the offer. Shortly after the vendor accepted her offer, Ms. Gordon hired a house inspector to advise her as to the qualities of the house. Satisfied with the inspector's report, Ms. Gordon completed her purchase. About half a year later, Ms. Gordon learned that the foundation in one corner of the building had settled so that floor joists had pulled away from the sill plate on the foundation's top surface. Dismayed by this development, Ms. Gordon sued William and Kathleen Krieg who sold her the house, the vendors' real estate agent Wolfram Krieg and the brokerage through which he conducted his business, the house inspector Mr. Kilby and his employer, and several other entities who in the past had something to do with the construction and inspection of the house. Ms. Gordon has settled her claims against those other entities and has taken her claims against the vendor, real estate agent, and house inspector to trial.

[2] At trial, the liability issues boiled down to whether William and Kathleen Krieg had negligently misrepresented the condition of the house, whether Wolfram Krieg had owed and breached a duty of care to Ms. Gordon, and, finally, whether the house inspector had breached his contract with Ms. Gordon or had negligently misrepresented its condition to Ms. Gordon. If Mr. Kilby had breached the contract or acted negligently, the question then becomes whether Ms. Gordon was bound by a contractual clause which limits the inspector's liability to the price of the inspection.

[3] In addition to claims relating to the property, Ms. Gordon advanced a claim for emotional distress, loss of income, loss of business assets, and loss of income from room rentals she expected to receive by letting out bedrooms to college students.

[4] The defendants at trial issued third party notices claiming contribution and indemnity from one another and from other named and unnamed entities who they say caused or contributed to Ms. Gordon's loss.

[5] The defendants contested the quantum of Ms. Gordon's claim. The issues there were whether future movement of the foundation would be such that comprehensive and very expensive steps need to be taken to prevent all further movement of the foundation, or whether future movement would be so slight as to permit relatively less expensive repairs. The defendants argued that Ms. Gordon's loss must be the lesser of the diminution of the value of the house due to settlement or the cost of repair. In either case, they say that Ms. Gordon's damages are comfortably less than $100,000. Ms. Gordon, on the other hand, says that her damages are in the $500,000 to $600,000 range.

[6] At all material times, Mr. Kilby was acting in his capacity as a home inspector for R 340 Enterprises Ltd. doing business as Pillar to Post ("PTP"), and at all material times Wolfram Krieg was acting in his capacity as a real estate agent under the direction of Norwich Real Estate Services Inc. Those corporate entities are vicariously liable for any liability that may be found against Messrs. Krieg or Kilby respectively.

The Facts

[7] Some facts in this case are in dispute, others are not. Where there is a conflict in the evidence on a significant point I will resolve that conflict in this section of these reasons.

1990: Construction

[8] The house in question is located in Kelowna B.C. Its address is 1156 Cerise Drive and it is located on Lot 4 of the original subdivision plan. The property developer was Knorr Construction and the house was built in 1989 or 1990.

[9] The house is a rancher-style single-storey dwelling built over a crawl space. The house faces north with its long axis running generally east-west. The living room is in the north-east corner, the dining room is on the eastern most wall, the kitchen and family room are in the northeast corner. A bedroom lies on the south wall between the family room and the master bedroom. The master bedroom has an

ensuite bathroom. The ensuite lies in the southwest corner of the house. A third bedroom is located on the northwest corner of the house. The crawl space extends under the full width and breadth of the habitable portions of the house. The crawl space is approximately four feet high and is unfinished except for a floor of thin concrete. The foundation walls mark the perimeter of the house. The foundation wall is topped by a sill plate. The floor joists were nailed to the sill plate. As originally built, the interior of the house was supported by two east-west load-bearing walls, one under the living room floor and another much longer wall running under the middle of the house's long axis. The builder poured a slab of concrete adjacent to the north-western corner of the house and constructed a two-car garage over the slab. The garage is attached to the house.

[10] In July and December 1989 the soil of Lot 4 was tested for suitability for development. The testing and the subsequent analysis were carried out by the structural engineer Norman Williams of the firm Interior Testing Services Ltd. Mr. Williams advised the property developer that the soil under Lot 4 was significantly looser than the soils of nearby properties. Mr. Williams recommended three options for building a house on Lot 4. The first option was to remove the loose soil and replace it with compacted layers of new soil. The second option was to sink vertical support piles into the soil and to attach the house's foundation to the piles. The third option was to remove fill under the footing walls to a depth of two feet, to replace that fill with compacted layers on which the foundation footings would be placed, and then to use sufficient steel re-enforcing bars in the foundation walls so that the walls would resist significant cracking in the event of loss of soil support. For each construction method Mr. Williams recommended that the soils under the house be protected from water penetration. In that regard, Mr. Williams recommended that the water from the roof drains be directed away to the sides of the lot, that the lot's landscaping be sloped away from the building's walls, and that care be taken to prevent irrigation water from approaching the foundation. Mr. Williams opined that if one of the three site preparation and construction methods he recommended were employed, and the water control precautions were taken, settlement issues under

the house would be limited to an acceptable degree and would not cause significant foundation cracks.

[11] New-house foundations are expected to settle on the order of an inch or so. By making the recommendations that he did, Mr. Williams clearly anticipated that if a house was built on Lot 4, it would settle more than the expected one inch and that its foundation could well crack as a result of such settlement. He also anticipated that if the site was prepared and the house was built in one of the three ways he recommended, the house settlement, while being in excess of one inch, would remain within acceptable limits.

[12] At trial, the geotechnical engineer Mr. Smith testified as to his understanding of the documents concerning the construction of the house which were prepared by Interior Testing and by Mr. Williams. Mr. Smith said that according to those documents, Mr. Williams certified that the soils for the footings had been properly prepared, i.e.: that the soil under the footings had been excavated to a depth of two feet and replaced with compacted fill upon which the footings were placed. In the course of cross-examination, PTP's counsel Mr. Pettit suggested to Mr. Smith that Mr. William's documents indicated that only one foot of soil beneath the foundation had been excavated and compacted. When that proposition was put to Mr. Smith, he agreed that compacting soil one foot below the footings was less optimal than compacting two feet.

[13] Close examination of Mr. Williams' record reveals that it says:

> Contractor was instructed to dig footing an additional 1' and compact base of footing.

I interpret that to mean that the contractor was told to excavate three feet beneath the footing. The premise for Mr. Smith's criticism of the contractor's work is, therefore, without foundation.

[14] Mr. Smith did say that he agreed with the proposition that of the three solutions that Mr. Williams proposed, the property's developer chose the least expensive and highest risk option. Mr. Smith went on to say that while the foundation

walls had been built with reinforcing steel, the walls were obviously not strong enough to resist failure when they lost the support of the soil beneath them.

[15] On the day that the house was finished, the foundation walls were, presumably, level.

1990 – 1994: Mr. Zarr

[16] Mr. Zarr bought the house shortly after it was built. That was in 1990. Mr. Zarr has a background in the house construction industry; he had worked in house framing and construction for a year and a half and then as a drywaller for the next nineteen years. After leaving the drywalling business, Mr. Zarr began his own business delivering water to drilling rigs in Alberta. Mr. Zarr was 82 years old when he testified at trial.

[17] Mr. Zarr said that during the first year or so of ownership, he noticed cracks in the drywall on the walls of the main and the ensuite bathrooms. He also noticed that the kitchen floor had a bow in it. Mr. Zarr testified that after he brought those defects to the builder's attention, the builder had the drywall repaired and that the builder made a sort of bracket out of 2x6s which he placed under the joists of the kitchen floor. According to Mr. Zarr, the kitchen floor was fine after that and no more cracks appeared in the drywall.

[18] Mr. Zarr did some construction work on the property. He built a set of shelves along the western inside wall of the garage and enclosed those shelves with framing and drywall. Mr. Zarr and a friend also built a detached garage on the property. The detached garage is located on the north-eastern corner of the lot. According to Mr. Zarr, it took about two weeks for him and his friend to build the garage. The floor of the detached garage is concrete slab and the building is finished in the same fashion as the exterior of the house proper. Although it is a garage by design, the building has been used primarily as a shop for doing hobbies or for storing surplus items.

[19] Mr. Zarr further testified that he extended the roof downspouts away from the side of the house. There are several downspouts on the house; Mr. Zarr did not specify which spouts he extended. According to the geotechnical engineer Mr. Smith, in July 2007 the downspouts at the east and west sides of the house disappeared into the ground adjacent to the foundation walls. I accept Mr. Smith's evidence concerning those downspouts and I conclude from it that Mr. Zarr did not extend the downspouts that drained into the ground adjacent to the east and west sides of the house.

[20] Mr. Zarr lived in the house until 1994. In February of that year he sold the house to the defendants Mr. and Mrs. Krieg. After selling the house on Cerise Drive, Mr. Zarr went on to act as the general contractor on the construction of a new house in a different neighborhood.

[21] Mr. Zarr denied that he had ever noticed that the floors of the master bedroom and ensuite were sloped. Mr. Zarr also denied that he or someone on his behalf had constructed additional temporary supporting walls in the crawl space or that they applied shims to fill a gap between the floor joists and the foundation sill plate in the southwest corner of the building.

[22] William Krieg testified that shortly after he moved into the house he noticed that temporary supporting walls had been constructed in the crawl space. He and his sister-in-law Ms. Fedoriw told the court that sometime in 1994 they both saw that a support wall had been built in the south-west portion of the crawl space, directly under the ensuite bathroom floor. The bottoms of the 2x4 vertical support beams of this wall where shimmed with wedges of wood. Ms. Fedoriw noticed that one of the beams was nevertheless hanging loose. According to Ms. Fedoriw, the floors of the master bedroom and the ensuite bathroom were sloped. Mr. Krieg acknowledged that Ms. Fedoriw told him that the floors were sloped. He testified that he was not troubled by her advice; the floors in that area of the house seemed fine to him. Wolfram Krieg acted as the realtor when Mr. Zarr sold the house to the Kriegs, and

when he toured the house before listing it, he also noticed that the floor in the master bedroom was definitely slanted.

[23] The state of the house when the Kriegs bought it in 1994 is a point of import in this case. If by then the foundation of the house had already settled to such a degree that a support wall had to be put up in the crawl space and the floors of the master bedroom and ensuite were sloped, an inference could be drawn that some if not most of the foundation settlement had already occurred by the time that the Kriegs bought the house. If that is so, the amount of further settlement might be minimal. If, on the other hand, the house was in perfect condition when the Kriegs bought it, an inference could be drawn that the settlement that it displayed when the plaintiff took possession in 2006 was a recent and ongoing phenomenon. In that case, additional significant settlement might be expected to occur.

[24] I find that on this issue I am persuaded by the evidence of Ms. Fedoriw and Wolfram Krieg. I accept Ms. Fedoriw's testimony that she noticed sloped floors when she first stepped into the master bedroom in 1994 and that she saw the temporary support wall in the crawl space below the ensuite and master bedroom floor. I also accept her evidence that she saw one of the vertical posts in that support wall hanging loose; i.e.: not actually weight bearing. Wolfram Krieg's evidence was likewise clear and uncomplicated. I find William Krieg's evidence on this point less convincing – he was, in my view, a suggestible and not entirely reliable witness.

[25] I do not accept Mr. Zarr's evidence that he was unaware of sloping floors and the support walls in the crawl space. Given Mr. Zarr's previous experience in the construction industry, particularly his having worked as a house framer, I find it is more likely than not that sometime between 1990 and 1994 Mr. Zarr noticed that the floors in the south-west corner of the house were sloping. I find that Mr. Zarr either had Knorr return to the property and build the supporting wall under the ensuite or that he used his own imperfect carpentry skills to shore up the floor by building that temporary support wall himself. Mr. Zarr was likely confused about that wall – he thought that it was put under the kitchen floor, but the evidence showed that no

support wall was constructed there. Mr. Zarr is an elderly man – it is likely that his memory of having this work done has faded. I find that his evidence on this point is unreliable rather than dishonest.

[26] I find additional support for my conclusion that the house settled significantly in its first few years in the evidence of the geotechnical engineer Mr. David Smith. He opined that newly constructed buildings typically experience "immediate" settlement, immediate meaning within the first year or so after completion. He also opined that it was unlikely that the house did not settle at all as he understood Mr. Zarr's story to be.

[27] For these reasons I also find that in addition to the support wall in the crawl space, the various other adjustments and accommodations for settlement present in the house were made in the four years immediately following its construction. Those adjustments included moving baseboards, repositioning striker plates on door jambs, shaving the tops of doors so they would fit into out-of-square openings, and applying patching compound to the interior of a crack in the western foundation wall.

1994 – 2006: William and Kathleen Krieg

[28] During their stay in the house, the Kriegs were not bothered by the sloping floors of the master bedroom and ensuite bathroom. Their lack of concern flowed in part from the fact that they did not actually use those rooms themselves – they saved that part of the house for guests like Ms. Fedoriw – and in part from their simply becoming used to the slope of those floors.

[29] In early 2006 the Kriegs had to make a hard choice about where they were to live for the rest of their lives. That choice was driven by their need to provide care for their disabled daughter. The Kriegs were aging – by then they were in their early 80's – and their daughter, who cannot care for herself, was in her late 40's. The Kriegs knew that as they grew older they would be less and less able to look after their child. No one in their family, all of whom lived in Winnipeg, Manitoba, was willing to come to Kelowna to help them out. In the result, the Kriegs decided to sell

their house on Cerise Drive and to move to Winnipeg. In Winnipeg they would be close to family and their daughter's care would be assured.

[30] At this point it is useful to note that Kathleen Krieg has suffered a severe stroke. She was not able to testify at the trial. The Kriegs' daughter was not able to testify either. In the result, at trial William Krieg spoke for the family. William Krieg's evidence was, as noted earlier, not particularly reliable. He was a suggestible witness. He tended to agree with whatever proposition was put to him in direct and cross-examination. Further, he is elderly and has suffered a stroke himself. His memory has been affected by age and ill-health. For these reasons I am cautious about accepting William Krieg's evidence except where it was corroborated by another's testimony or by documentary evidence.

[31] William Krieg retained Wolfram Krieg to act as the listing agent for the sale of the house on Cerise Drive. In early March William Krieg and his wife and assistant Julie Krieg visited Cerise Drive. Their purpose was to tour the house, to take measurements, and to make observations useful to preparation of the listing. Both Wolfram and Julie Krieg testified that they noticed that the floors in the house were definitely slanted. I accept their testimony. Because the crawl space was not habitable, neither Wolfram nor Julie went down there to look around.

[32] William Krieg stipulated that the house be listed for an asking price of $419,800 and that the listing period be only three months rather than the usual six. William Krieg signed three documents presented to him by Wolfram Krieg. He signed a document entitled "Working with a Realtor". That document specified that Wolfram Krieg was his exclusive agent for the sale of the house during the listing period and that Wolfram Krieg would act for him only. William Krieg signed a listing agreement setting the asking price and listing period. Finally, William Krieg filled out and signed a property disclosure statement (the "P.D.S."). The P.D.S. stipulated, among other things, that William Krieg was not aware of any structural defects in the house. It also stipulated that he had a duty to amend the P.D.S. in the event that he became aware of changes that would render the P.D.S. inaccurate.

[33] During the first two weeks that the house was on the market, no one showed interest in it. Wolfram Krieg met with William Krieg to talk about reducing the price. William Krieg agreed to lower his asking price by $20,000. On March 20, 2006 he signed an amendment to the listing agreement stipulating that the new asking price was $399,800.

[34] After the price was lowered, people started coming to view the house. No one made an offer though. That was because the property suffered from two drawbacks. The first was that it had virtually no back yard. The second was that the floors in the master bedroom and the ensuite were noticeably slanted. Negative comments to that effect were communicated by realtors to Julie Krieg. One of those realtors, Ms. Gurnsey, gave evidence to the effect that she recalls noticing that the floors in the house were sloped. Her practice was to provide feedback of that sort to the listing realtor and that she had no reason to believe that she had not done so in this case.

[35] Around the end of March or the beginning of April 2006, Wolfram Krieg spoke to William Krieg about the difficulties that they were encountering in their effort to sell the house. Wolfram Krieg told William Krieg that people were complaining about the sloping floors. At that point in time, neither Wolfram Krieg nor William Krieg felt that the sloping floors were anything other than a cosmetic defect. That is because, so far as they could tell, the floors did not affect the habitability of the house and they did not present a safety hazard. As noted earlier, Wolfram Krieg saw that the floors were sloped when he listed the house for Mr. Zarr in 1993 and to his eye they were sloped to the same degree when he saw the house again in 2006. Nevertheless, in order to help make the house more attractive to potential purchasers, William Krieg advised Wolfram Krieg that he would contact a contractor to see what could be done to fix the floors.

[36] On April 7, 2006, William Krieg telephoned the Kelowna office of Team Foundation Systems Ltd. I cannot rely too much on William Krieg's evidence relating to his interactions with Team Foundation personnel. I do accept the evidence of

Ms. Brown, Team Foundation's receptionist, Mr. McKinney, Team's estimator, and Mr. Wilson, Team's principal. According to their evidence, and confirmed by the notes that each made in the course of their dealings with William Krieg, on April 7, 2006, he told Ms. Brown that the foundation of his house had cracked and that the house had settled. He wanted Team to come by to give him an estimate of the cost of repair. Mr. McKinney attended at the house and walked around, through, and under the house. Outside, he observed cracks in the foundation. Inside the crawl space he saw two substantial cracks in the foundation. On the main floor he saw that the interior doors were sticking in their jambs and that the floor in the master bedroom had a noticeable and substantial slope to it. Describing the slope, Mr. McKinney said that a tall lamp on a bedside table in the master bedroom was leaning like the Tower of Pisa. William Krieg was about to leave for a two-week stay in Winnipeg, and Mr. McKinney agreed to provide him with an estimate of the work needed to correct the problems with the house after he returned from his trip.

[37] Mr. McKinney visited the house again while the Kriegs were out of town. Mr. Wilson went with him on that occasion. They walked around the exterior of the house but did not go inside. They observed two cracks in the foundation, one of which was approximately ¼ inch wide. It was obvious to both gentlemen that the house had settled substantially.

[38] Mr. McKinney then prepared an estimate for the cost of repairing the house. Mr. Wilson vetted his work to make sure that it would be a good forecast of the cost of fixing the problems. At this point, neither Mr. McKinney nor Mr. Wilson could say why the foundation had cracked and the house settled, but loss of soil support in the southwest corner seemed to them to be a logical suspect cause. They did not know whether the house had reached a steady state or whether the settlement process was ongoing. The estimate that they prepared for the Kriegs contemplated the installation of twelve helical piles driven into the soil adjacent to the existing foundation, raising the foundation with jacks, and attaching the foundation to the piles. Team estimated the cost of the work at $33,829 exclusive of fees for necessary geotechnical and structural engineering advice.

[39] On April 27, 2006, Mr. McKinney and Mr. Wilson met with the Kriegs at the house on Cerise Drive. Mr. Wilson walked through the interior of the house. He saw that the floor in the master bedroom was slanted and that doors were sticking in their jambs. In the crawl space, he saw at least two significant cracks in the foundation walls, one of which was about ¼ inch wide. After touring the house, Mr. McKinney and Mr. Wilson sat down with the Kriegs at their kitchen table and discussed the repair quote. Mr. Wilson explained that the quote did not include the cost of the geotechnical and structural engineers that the Kriegs would have to retain in order to carry out the repair project. A day or so after that meeting, William Krieg telephoned Mr. McKinney and instructed him to go ahead with the project. Several days later, but before Mr. McKinney had taken any substantial steps to initiate the repair project, William Krieg called again, this time instructing Mr. McKinney to not proceed with the repairs.

[40] What happened between William Krieg's instructions to start and then to stop repairs was that he and Wolfram Krieg spoke by telephone and then met in person to discuss the problems with the house. The telephone call happened on April 27. In that call, William Krieg told Wolfram Krieg that the cost of repairing the floors would be $30,000 to $35,000. William Krieg did not tell Wolfram Krieg anything more than that. Wolfram Krieg decided to convene a meeting with the Kriegs to talk about the effect that the Team quote would have on their effort to market the property. They met at the Krieg's house the next day.

[41] Once again, I cannot give much weight to William Krieg's recollection of that meeting. In the course of his testimony he said on the one hand that he told Wolfram Krieg that the foundation of the house was broken and that Wolfram Krieg instructed him to not make the repairs but to reduce the price of the house instead. On the other hand, under cross-examination, William Krieg admitted that he had no real recollection of his conversation with Wolfram Krieg on April 28, of what he said to Wolfram Krieg or what Wolfram Krieg said to him, or what they discussed at all. William Krieg's only clear recollection of that meeting was its outcome; that he would reduce the asking price of the house from $399,800 to $369,000. Given the frailties

of William Krieg's recollection on this and other elements of the case, I find that I am not able to rely on his evidence to make findings of fact about this meeting.

[42] Julie Krieg attended the meeting at the Kriegs' house on April 28 as well. She spent her time conversing with Kathleen Krieg. Because her attention was primarily elsewhere, Julie Krieg could not add to the evidence concerning the conversation between her husband and William Krieg.

[43] For his part, Wolfram Krieg testified that during the meeting on April 28, William Krieg confirmed that he had an estimate of $35,000 to fix the sloping floors. William Krieg did not describe the work that would be done in any detail. At this point in time, William Krieg had already made an offer on, or had actually bought, a house in Winnipeg. I find that he was therefore highly motivated to sell the Cerise Drive house so that he and his family could move ahead with their plan to relocate to Manitoba. He did not want anything to get in the way of getting a buyer for the Kelowna house. For that reason, I find that William Krieg did not tell Wolfram Krieg what work was contemplated in the Team quote. From Wolfram Krieg's perspective, then, he knew that the quote was for work of an unspecified nature which would result in the floors not being sloped any more.

[44] In the course of their conversation at that meeting, Wolfram Krieg suggested to his client that the P.D.S. be updated to reflect the current situation. He suggested that, based on William Krieg's advice that the floors had been in a steady state for the past 10 years, the P.D.S. include a statement to the effect that the southwest corner has a slope in the floor and that it had been like that for the past 10 years, or that it was like that and did not change. William Krieg was reluctant to change the P.D.S. to include that wording. In the face of his client's recalcitrance, Wolfram Krieg telephoned his broker (i.e.: the owner of the real estate franchise through which Wolfram Krieg conducted his business) and asked for advice on whether the P.D.S. needed to be changed given the advent of the repair quote. After talking to his broker, Wolfram Krieg considered the situation. He knew about the sloped floors and he knew that they were an obvious defect in the house. He had received negative

feedback from other persons about the floors, and so he knew that the state of the floor was not hidden from prospective purchasers. Wolfram Krieg did not know why the floors were sloped. He speculated that perhaps they had been built that way, given that they were in substantially the same state when he first saw the house in 1993. He advised William Krieg that because the sloping floors were clearly evident they were not a defect that required mention on the P.D.S. William Krieg was not inclined to amend the P.D.S. in any event, and so no change was made to it. The only change in the marketing of the house flowing from the April 28 meeting was William Krieg's decision to lower his asking price from $399,800 to $369,800, a drop of $30,000.

March – June 2006: Sale to Ms. Gordon

[45] Ms. Gordon is a ceramic artist. Before she bought the house on Cerise Drive she had made a modest living creating wearable ceramics. She manufactured her ceramics in a small workshop that she set up in her rented suite and in a larger studio space she leased at the Rotary Center for the Arts building in downtown Kelowna. She sold her products out of her studio and home workshop and at various craft fairs to which she travelled in B.C. and Alberta. Ms. Gordon's income from her art business varied. She filed tax returns showing that her income in the period 2004 to 2006 was:

Year	Gross Business Income	Net Business Income
2004	$28,918	$7,460
2005	$28,371	$8,199
2006	$30,416	$11,343

[46] In early 2006, Ms. Gordon's landlord of 26 years gave her notice that he was going to sell the house in which her two-bedroom suite was located. Coincidentally, around the same time Ms. Gordon expected to receive two inheritances. With those inheritances and her own savings, Ms. Gordon had $130,000 in cash to put down on a house. She had additional savings of $5,000 for vehicle repairs and another

$25,000 that she had earmarked for renovations to create a studio in whatever house she bought. Ms. Gordon learned that she could borrow up to $230,000 for a house purchase. The most that she was willing to spend on a house without depleting her reserves was, therefore, $360,000. She did not want to buy a house that required a lot of repairs or maintenance.

[47] Ms. Gordon went about looking for a house in a methodical way. She attended a new home buyer seminar hosted by Mr. McJannet. Mr. McJannet is a mortgage broker. She received a binder at the seminar. The binder contained a section having to do with home inspections. That section recommended the Pillar to Post home inspection agency. That section was not authored by PTP. Although Ms. Gordon believes that a PTP promotional brochure was in her binder in 2006, her notes of her conversation with Mr. McJannet in 2007 clearly show that was not the case. Ms. Gordon cannot, therefore, be said to have reasonably relied on any PTP promotional material that she received at the new home buyer seminar.

[48] Ms. Gordon's next step was to interview real estate agents. She settled on Ms. Tremeer. Ms. Gordon retained Ms. Tremeer to act as her agent for the purpose of finding and buying a house. In March and April 2006 Ms. Tremeer took Ms. Gordon to view a number of houses. None of them suited Ms. Gordon.

[49] Then, on or about May 8, 2006, Ms. Tremeer noticed that the asking price for the house on Cerise Drive had been reduced to a point just above Ms. Gordon's maximum spend. She contacted Ms. Gordon with that news. Ms. Gordon was interested in looking at the property. Ms. Tremeer and Ms. Gordon went to Cerise Drive and they visited the house. As they toured the place, Ms. Gordon noticed that the drywall tape in a corner of the ensuite bathroom wall was rippled. Ms. Tremeer noticed and remarked on unevenness of the floor in the dining room. Ms. Tremeer noticed that the floor in the master bedroom was sloping, but did not mention her observation to Ms. Gordon. Ms. Gordon felt that the house would suit her purposes because it had a detached shop and an attached two-car garage which could be suitable as a studio, as well as two bedrooms that she could rent out for extra

income. Ms. Gordon and Ms. Tremeer visited the house again a few days later. On this occasion Ms. Gordon went down into the crawl space. Ms. Tremeer stayed upstairs. The crawl space was full of various items in storage. Ms. Gordon took a look at the furnace but did not make a detailed inspection of the crawl space.

[50] Ms. Gordon was interested enough in the property to instruct Ms. Tremeer to write up an offer of $360,000. Ms. Tremeer drafted the offer on May 8, and Ms. Gordon signed it on May 10.

[51] On Ms. Tremeer's advice, Ms. Gordon made her offer subject to, among other things, being satisfied by the Kriegs' P.D.S. and to her obtaining an inspection report "against any defects whose cumulative cost of repair exceeded $500 and which reasonably may adversely affect the property's use or value". The offer stipulated that the last day on which Ms. Gordon could waive the subject clauses was May 19, 2006.

[52] Ms. Tremeer gave the offer to Wolfram Krieg and he or his wife sent the offer on to the Kriegs in Winnipeg. William Krieg telephoned Wolfram Krieg and instructed him that the Kriegs would accept the offer as presented. The Kriegs signed the offer and returned it to Wolfram Krieg.

[53] Ms. Gordon then set about retaining a house inspector. She selected PTP. PTP is a franchise. The PTP franchisee for the Kelowna area is R 340 Enterprises Ltd. Mr. Hostland is the guiding mind of PTP's operations in Kelowna. Mr. Kilby is an employee of the franchisee. On or around May 10, Ms. Gordon called PTP's office. She spoke to Ms. Janussen. Ms. Janussen asked for some details about the house that Ms. Gordon wanted inspected and the two women discussed appointment times for the inspection. Ms. Gordon rejected that Friday afternoon and instead selected Monday, May 15, at 9 a.m. Ms. Janussen told Ms. Gordon that she would have to sign a contract and pay the inspection fee, and that she would send a copy of the contract to Ms. Gordon via Ms. Tremeer's office. On May 11, Ms. Janussen sent a promotional brochure and a quote for the inspection of $400 plus GST to Ms. Tremeer's office for delivery to Ms. Gordon. Through oversight Ms. Janussen

did not include a copy of PTP's standard contract. Ms. Gordon received the promotional material and the quote from Ms. Tremeer's office later that day or the next.

[54] As PTP's manager and general overseer of operations, it was Mr. Hostland's duty to ensure that PTP's customers signed PTP's standard contract. On May 14, as Mr. Hostland was reviewing PTP's inspection bookings for the coming week, he realized that Ms. Gordon had an appointment for the next day but that she had not yet signed the PTP contract.

[55] Mr. Hostland testified that the notes he made on PTP's contact form indicate to him that he telephoned Ms. Gordon sometime in the afternoon or evening of Sunday, May 14, and that he explained to her that she would have to sign a contract with PTP before she received the results of the home inspection. He testified that only rarely does he have to contact a customer so close to the inspection date and that when he does he invariably goes over the main points of the contract with the customer while on the telephone with them. Mr. Hostland testified that his invariable practice in such situations is to tell the customer that the contract is a limited liability contract and that the limit of liability is to the fee paid for the inspection. He said that it was his practice to also point out to the customer that the inspection does not form a warranty of the home or that the house complies with relevant bylaws. He tells the customer that PTP will do a visual but not a technically thorough inspection. Mr. Hostland's purpose in following that practice is to ensure that the customer, who may not have seen the contract at that point in time, is aware that there are limits to a home inspection. Mr. Hostland's note on the contact information sheet relating to Ms. Gordon says this:

> She was unable to get from Marilyn. I explained the contract terms over the phone – she will sign on site Monday morning.

[56] Mr. Hostland had no present recollection of speaking to Ms. Gordon on May 14, but based upon the notes that he made on the contact sheet, he believes that he followed his usual practice on that day.

[57] Ms. Gordon denies that she had a conversation with Mr. Hostland on Sunday May 14. She denies that he told her that PTP would ask her to sign a limited liability contract or that he told her about the limits to the inspection.

[58] In view of what transpired between Ms. Gordon and Mr. Kilby on May 15, it may not matter whether Mr. Hostland did or did not speak to Ms. Gordon on May 14. For what it may be worth, I am inclined to accept Mr. Hostland's version over Ms. Gordon's. I have come to that conclusion because Mr. Hostland made a note of having had that conversation and he was not challenged by the proposition that he made the note at some other time. There are good business reasons for PTP to insist that its customers sign the PTP contract ahead of a house inspection. Those reasons include PTP's modest fee structure and its legitimate desire to limit its exposure to potentially very large claims. Mr. Hostland was therefore very well motivated to take steps to ensure that Ms. Gordon had some forewarning of the terms of the contract that she would be asked to sign and to give PTP time to call off the inspection in the event that Ms. Gordon was not willing to accept the contract terms as described.

[59] Ms. Gordon, on the other hand, had many things on her mind that day. She had been in to see Ms. Tremeer and had signed a contract with Ms. Tremeer appointing her as Ms. Gordon's exclusive agent for the purchase of the house. This was an important undertaking, yet at trial Ms. Gordon had no recollection of it. It seems to me that if Ms. Gordon did not recall the meeting that actually happened with Ms. Tremeer and signing the agency contract as she no doubt did that day, it is equally likely that she had the conversation with Mr. Hostland as he described but that she simply does not remember it now. Having no memory of the conversation, and it being somewhat in her interest to deny speaking to Mr. Hostland about PTP contracts on May 14, I find that Ms. Gordon has unconsciously converted her lack of recollection into a flat denial.

[60] Mr. Kilby arrived at the house at 9 a.m. on May 15. Ms. Tremeer met him there and let him into the house. Mr. Kilby conducted the exterior portion of his

inspection. In the course of that inspection Mr. Kilby noted, among other things, that the roof shingles were at the end of their life and that there was a large open crack in the foundation wall on the south side of the house. Mr. Kilby made this note about that crack:

> Vertical shrinkage/settlement crack observed mid back. Grout to avoid moisture entry.

[61] Mr. Kilby then went inside the house to complete his notes concerning the exterior inspection. Then he completed his inspection of the inside of the house. In the crawl space he noted that the foundation crack he had seen outside extended all the way through the width of the foundation wall. He could not see the full length of the crack because the upper half of the wall was covered by white styrofoam insulation board. Mr. Kilby made this note concerning that crack:

> Vertical stress/settlement crack mid back. No significant displacement. Grout to Avoid moisture entry. Patch spalled parging, remove where loose.

[62] Mr. Kilby did not see the second foundation crack that both Mr. McKinney and Mr. Wilson had observed when they visited the house in April.

[63] In the master bedroom, Mr. Kilby observed abnormal flooring. He wrote this in his report about the master bedroom floor:

> Furnishings limits viewing to assess all. Uneveness observed in the floor. This may be caused by a number of issues/items that are not apparent in a visual only inspection. Further investigation may be required by others as determined by client.

[64] Mr. Kilby saw the temporary support wall that had been built under the ensuite floor. He attached no significance to that wall. He thought that it may have been built in order to steady or support something heavy like a bathtub on the floor overhead.

[65] Mr. Kilby did not move or dislodge any objects on or in the property as he performed his inspection. He did not notice the other foundation crack or cracks that were present in the crawl space and were seen by Mr. McKinney and Mr. Wilson. Mr. Kilby did not see, or if he saw he did not recognize the import of, the

repositioned striker plates on door jambs, shaved doors, crooked door openings, and gaps that were present between the baseboards and the floors in the southwest corner of the house. All of these features were there to be seen and would not have required Mr. Kilby to move or reposition objects in the house.

[66] While he was conducting his inspection, Mr. Kilby saw that another person had arrived at the house. He testified that he thought that person was doing an appraisal for mortgage financing. That person left the house before Ms. Gordon arrived.

[67] After going through the house, Mr. Kilby retired to write his report at the computer station that he had set up in the kitchen. Ms. Gordon arrived at approximately 11:30 a.m. Mr. Kilby greeted her, they exchanged introductions and pleasantries, and they went into the kitchen. There, Mr. Kilby gave Ms. Gordon the PTP contract to read and, if she agreed to its terms, to sign. Ms. Gordon did not express any surprise at being handed a contract. Neither did she assert that, so far as she was concerned, there was no need to sign a contract because she considered the quote and promotional material she received via Ms. Tremeer's office several days earlier to be the terms of her agreement with PTP (import of this will be discussed later).

[68] Mr. Kilby instructed Ms. Gordon to read the contract. She sat with the document before her for about ten minutes. According to Mr. Kilby, Ms. Gordon appeared to have read and understood the contract. According to Ms. Gordon, she had difficulty reading the contract because parts of it were in small print and she did not have her reading glasses with her. She said that she told Mr. Kilby about her needing her non-prescription reading glasses. Mr. Kilby does not recall her saying that. He went on to testify that he always has his reading glasses with him when he works on his computer and that in the past he has happily lent them to customers who say they have forgotten their glasses. Mr. Kilby testified that he would have made that same loan to Ms. Gordon had she said anything to him about not having her reading glasses.

[69] After Ms. Gordon indicated by word or gesture that she had finished reading the contract, Mr. Kilby went over its salient terms with her. Ms. Gordon recalls that Mr. Kilby told her that he was going to give her the results of a visual inspection only of the house and that the PTP report would be in two parts: the written portion contained in a binder that he would give to her, and an oral part as he and she walked through the house. Ms. Gordon did not recall anything else that Mr. Kilby told her about the contract. Mr. Kilby testified that he has a routine that he follows in every case when he explains the PTP contract to customers. Among other things, he tells the customer that the contract limits PTP's liability for mistakes to the cost of the inspection and that the inspection is a visual inspection only, that is to say he does not have x-ray vision to see through walls. Mr. Kilby remembers that after he told Ms. Gordon about the limited liability term, she said words to the effect of, "Does that mean I can't sue you?"

[70] Mr. Kilby and Ms. Gordon both testified that they understood that if Ms. Gordon did not sign the PTP contract, Mr. Kilby would pack up his equipment and leave. They both knew that Ms. Gordon would not receive the results of the inspection unless and until that contract was signed.

[71] The PTP contract begins with this headline:

> **VISUAL INSPECTION**
> **AGREEMENT**
>
> **PLEASE READ THIS AGREEMENT CAREFULLY**
> **THIS AGREEMENT SUPERSEDES ALL PREVIOUS COMMUNICATIONS**

[72] The contract describes the inspection that PTP will do as follows:

> **2. The Client will receive a written report of Inspector's observations of the accessible features of the Property**. Subject to the terms and conditions stated herein, the inspection includes the visual examination of the home's exterior including roof and chimney, structure, electrical, heating and cooling systems, insulation, plumbing, and interior including floors, walls, ceiling and windows; it is a reasonable effort to disclose the condition of the house based on a visual inspection. Additionally, Inspector will functionally operate major built-in appliances. Conditions beyond the scope of the inspection will not be identified. No engineering services are offered.

> **3. This Inspection Report is based on the condition of the Property existing and apparent as of the time and date of the inspection**. Not all conditions may be apparent on the inspection date due to weather conditions, inoperable systems, inaccessibility of areas of the Property, etc. Without dismantling the house or its systems, there are limitations to the inspection. Throughout any inspection, inferences are drawn which cannot be confirmed by direct observation. Clues and symptoms often do not reveal the extent or severity of problems. Therefore, the inspection and subsequent Inspection Report may help reduce the risk of purchasing the property; however, an inspection does not eliminate such risk nor does the Inspector assume such risk. While some of the less important deficiencies are addressed, an all inclusive list of minor building flaws is not provided. **Inspector is neither responsible nor liable for the non-discovery of any patent or latent defects in materials, workmanship, or other conditions of the Property, or any other problems which may occur or may become evident after the inspection time and date**. Inspector is neither an insurer nor guarantor against defects in the building and improvements, systems or components inspected. Inspector makes no warranty, express or implied, as to the fitness for use or condition of the systems or components inspected. Inspector assumes no responsibility for the cost of repairing or replacing any unreported defects or conditions, nor is Inspector responsible or liable for any future failures or repairs.

[73] The contract's limitation clause says this:

> **4. Inspector and its employees are limited in liability to the fee paid for the inspection services and report** in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, for any breach or claim for breach of this Visual Inspection Agreement or for any other reason or claim.

[74] The emphasized words noted above appear in the original document. The contract is printed in compact but not microscopic print. Except for the headline, which is in larger print, the contract's terms are uniformly presented to the reader. That is to say the limitation clause is not buried, or obscure, or any more or less difficult to read than any other clause.

[75] After signing the contract and paying PTP's fee, Mr. Kilby and Ms. Gordon walked through the house. In the crawl space, Mr. Kilby pointed out the one foundation crack that he saw. That was a crack on the south wall and somewhat west of the wall's midpoint. Mr. Kilby also pointed out the presence of efflorescence in the vicinity of the crack. He explained to Ms. Gordon that the white powdery

efflorescence indicated intrusion of water or water vapour. He told her that the crack needed to be closed by grout.

[76] According to Ms. Gordon, Mr. Kilby went on to tell her that he had not seen any other cracks in the crawl space and so there was no need to worry about the one on the south wall. Ms. Gordon also testified that she asked him whether this was a solid house and that Mr. Kilby answered “yes”. Mr. Kilby denies that he said such things to Ms. Gordon.

[77] Upstairs, in the master bedroom, Mr. Kilby discussed the uneven floor with Ms. Gordon. She says that he told her that she could have someone look into it, to which she replied, “Well, I have someone right here”, meaning Mr. Kilby. Ms. Gordon testified that Mr. Kilby told her that the uneven floor was not related to the foundation. Mr. Kilby does not recall discussing the uneven floor with Ms. Gordon, but says that if he did, he would not have said anything more than that she could get someone else to have a look at it. He testified that he would not have gone beyond that advice because he has no expertise in what could cause a floor to be uneven or in how such a problem might be rectified.

[78] In all, Mr. Kilby and Ms. Gordon spent 15 to 20 minutes going through the house. After their tour was over, Ms. Tremeer arrived. Ms. Gordon testified that Ms. Tremeer asked Mr. Kilby if he had noticed any items that would cost more than $500 to repair and that Mr. Kilby said no. Ms. Tremeer did not recall that conversation. Mr. Kilby testified that he did not recall being asked that question but that if it had been asked he would not have given an answer. That is because he has no expertise in the cost of fixing problems and that, in any event, the roofing was at the end of its life and repairing or replacing it would certainly have cost more than $500.

[79] I have considered the circumstances of the witnesses to the happenings in the house on May 15. For Mr. Kilby, inspecting Cerise Drive was just another inspection – it was not substantially different than the 1,100 or so inspections that he had carried out in his career to that point. There was no reason for it to stand out in

his mind. I note that in his examination for discovery, Mr. Kilby testified that he had no specific recollection of the conversations that he had with Ms. Gordon on that day. At trial, Mr. Kilby testified that after reviewing the documents relating to the case, his memory of his interactions with Ms. Gordon had improved. His memory had most improved when it came to recalling what each said to the other while they walked through the house. I am not persuaded by that explanation. It appears that the only document that Mr. Kilby could have relied upon to recover his memory is the written inspection report. That document was in front of him during the discovery. I cannot believe that he went into the discovery without first having reviewed it. I therefore have reservations about Mr. Kilby's evidence concerning his conversation with Ms. Gordon during the walk through of the house.

[80] I do, however, accept Mr. Kilby's evidence relating to his description of the terms of the contract to Ms. Gordon. That portion of their interaction was governed by Mr. Kilby's usual routine and practice. There was no reason for him to have deviated from that practice on that day.

[81] Ms. Gordon, on the other hand, was experiencing her first house inspection. She was vitally interested in its result and, it being an unusual event for her, it is likely that she would impress memories of the event. For that reason, I find that her recollection of what she and Mr. Kilby said to each other during the walk through is more reliable than his. I find that while they were in the crawl space, Mr. Kilby did tell Ms. Gordon that he had looked for more cracks in the foundation wall but had not found any and that the foundation was, therefore, solid. I find that in the master bedroom, Mr. Kilby did advise Ms. Gordon that she could have someone come to look at the sloping floor. When she indirectly asked him for his opinion about the floor, he replied that he felt that the slope was not related to the foundation. This was, from Mr. Kilby's point of view that day, a reasonable thing to say; after all, after looking at the crawl space he thought that the foundation was solid, so why would the sloping floor be related to the foundation?

[82] As for the cost of repairs, the items on Mr. Kilby's written report that he indicated needed immediate attention were relatively minor: sealing exposed nail heads on roof flashing, installing a protective cover over low wiring, adjusting the door between the garage and house, replacing the furnace air filter, fixing loose brickwork on the exterior fascia, and grouting the one foundation crack that he noticed. The roof did not need immediate replacement. Ms. Gordon's offer to buy the house was subject to defects costing no more than $500 to repair. No person other than Mr. Kilby had gone through the house in detail. Ms. Tremeer and Ms. Gordon needed information on that point in order to assess whether to waive that subject clause. It was therefore not unexpected and entirely reasonable for Ms. Tremeer to have asked Mr. Kilby at the end of the inspection whether he had seen defects the repair of which would cost more than $500. Given the relatively minor defects Mr. Kilby noted in his report, I find that it is more likely than not that Mr. Kilby gave an off-the-cuff reply in the negative.

[83] When the inspection was finished and Mr. Kilby had left the property, Ms. Tremeer and Ms. Gordon considered whether to waive the offer's inspection subject clause. Ms. Gordon felt that the inspection had gone well. She decided to waive the clause.

[84] On May 16 Ms. Gordon met with Ms. Tremeer. They went over the Kriegs' P.D.S. Ms. Tremeer's testified that she understood that the P.D.S. was important. She said:

> Q: Do you recall anything more about your discussion with Miss Gordon about that document or what was on that document?
>
> A: Um, yes we went through it line by line, we read every line.
>
> Q: Why did you choose to do that as a realtor?
>
> A: Because it is what we go by, it is the realtor's bible. Its, that's what the seller says is in the house, that's what the seller warrants the state of the house is in to the new buyer, so it is very important that we be happy with every one of his lines.

[85] Ms. Tremeer did not say that she told Ms. Gordon that the P.D.S. was in fact the Kriegs' warranty as to the state of the house.

[86] For Ms. Gordon's part, when the Kriegs' counsel Mr. Shields pointed out that the P.D.S. indicated that Mr. Krieg was not aware of any structural defects in the house, Ms. Gordon said this:

> Q.: So, in essence where box number H is checked off, you didn't really rely upon that, what the vendor had put in there, did you? You were satisfied, based upon what Mr. Kilby had told you, that information, and that is what you relied upon, you didn't rely upon the property disclosure statement, did you?
>
> A.: I relied on what Mr. Kilby had told me and on the property disclosure statement. Mr. Kilby had told me that there wasn't anything to worry about and this is confirmed here that Mr. and Mrs. Krieg did not know of any structural problems. If they had known of anything they were required to tell me about it. And they didn't.

[87] On May 16, 2006 Ms. Gordon waived all of the subject clauses to her offer to purchase the house. The transaction closed and Ms. Gordon took possession on June 15, 2006.

June 2006 – Present: Ms. Gordon

[88] At first, Ms. Gordon was pleased with her new house. By September 2006 she had found renters for each of the two spare bedrooms in the house. Each renter paid Ms. Gordon $450 per month. However, she soon began to notice that some things were amiss. She saw that the doors in the master bedroom and ensuite were did not sit squarely in their frames. She discovered that the floor of the master bedroom was sloped. She saw that there were gaps between the baseboards and the floors in the master bedroom and the ensuite. There was a ¼" gap between the wall and the floor by the shower stall in the ensuite. These things did not overly concern Ms. Gordon. Ms. Gordon offered no explanation for why it was that she noticed these aspects of the house only after moving in and not before.

[89] In January 2007, however, Ms. Gordon's satisfaction with the house was shaken. That came about when one of her friends came for a visit. Her friend went down into the crawl space and happened to notice light coming in from above the foundation wall. She pulled out a piece of fibreglass insulation that was resting between the ends of the floor joists in the southwest area of the crawl space. With

the insulation removed Ms. Gordon's friend saw that the ends of the floor joists were suspended above the sill plate on the top of the foundation wall. She pointed this out to Ms. Gordon. Ms. Gordon became concerned and unhappy. Ms. Gordon called PTP and had Mr. Kilby and Mr. Hostland over to have a look at the foundation. In the course of their visits, Messrs. Kilby and Hostland removed more of the fibreglass insulation that was packed between the joist ends. They discovered that the southwest corner of the building was not resting on the foundation. It was, in fact, being held up by the walls and roof of the house. How long the joists had been suspended in the air was then and is now not known. However, it was clear that at some point in the past someone had used pieces of lumber and applications of grout in an effort to close the gap between the joists and the sill plate. Mr. Kilby and Mr. Hostland also observed foundation wall cracks in addition to the crack that Mr. Kilby noticed in May 2006. These were the cracks that Messrs. Wilson and McKinney had seen in April 2006. These additional cracks clearly indicated that the southwest corner of the foundation had settled and was lying below its original elevation.

[90] Notwithstanding her knowledge that the house's foundation had cracked and settled, Ms. Gordon decided to press on with her plan to renovate the attached garage. She wanted to turn that space into a studio where she could make her ceramic art pieces. Ms. Gordon's desire for a home-based studio was spurred by the fact that her lease at the Rotary Center for the Arts would expire in September 2007. Ms. Gordon retained Mr. Budd. Mr. Budd operates a renovation contracting business. Mr. Budd had seen the cracked and settled foundation earlier in 2007 but his knowledge of that problem did not prevent him from accepting Ms. Gordon's retainer to do a $22,000 renovation of the attached garage.

[91] Mr. Budd started work on the renovation in March 2007. He did two or three day's work but then became concerned that perhaps the wall of the garage was being affected by settlement as well. He advised Ms. Gordon that if he continued on and completed the job, there was a possibility that some of his work would have to be removed in order to fix what he thought to be a settlement problem in the garage.

Under cross-examination by Mr. Pettit, Ms. Gordon admitted that she could have chosen to rough in a studio in the garage. That would have entailed insulating the street-side wall, bringing in water and drainage, and putting down appropriate flooring. She rejected that notion though, saying that a roughed in studio would not be an appropriate space for her to create her ceramic art. Mr. Budd testified that a studio could have been roughed into the garage space at a cost of several thousand dollars less than the original contract price of $22,000.

[92] When Ms. Gordon's lease at the arts center expired she ousted one of her tenants and moved her studio equipment into the vacated bedroom. She testified that since September 2007, she has been foregoing rent of $500 per month because she had to use that bedroom to store her studio equipment.

[93] In July 2007, on instruction from the plaintiff, Mr. Howard Johnson surveyed the foundation. He did not measure the tops of the foundation walls because they were difficult to access. Instead, Mr. Johnson surveyed various points on the footings on which the foundation walls rested and the corresponding undersides of the floor joists where they intersected the foundation walls. Mr. Johnson assumed that the foundation footings and walls respectively were roughly uniform in height. That assumption was not proven to be true – in fact, Mr. Johnson himself testified that the elevation of the footings could vary by up to one inch and that the elevation of the top of the foundation wall could vary due to trowelling and construction practice. Mr. Johnson testified that some builders are simply not very particular about how level they make their foundation footings.

[94] Subject to whatever variances may have been present in the foundation footings and walls, Mr. Johnson's survey revealed that the southwest corner of the foundation was approximately six inches below level.

[95] Mr. Johnson charged Ms. Gordon $300 for his survey. Mr. Johnson testified that he could have done another survey later. A second survey, separated by one, two, three, or - even better - four years, would have provided empirical evidence of whether the foundation has continued to sink or whether it has reached a steady

state. The evidence was quite clear that Ms. Gordon could have afforded a second survey. She offered no explanation for not ordering one. This is odd, given that a central issue in this case is whether the foundation will be subject to significant further settlement. Evidence that settlement is a present and ongoing process would tend to show that further settlement may be significant. Evidence that settlement is static would tend to show that any further sinking will be minimal.

[96] In November 2008, Ms. Gordon hired Mr. Johnson to shore up the southwest corner of the building. Mr. Johnson and his crew used a jack to lift and level the floors of the master bedroom and ensuite. They then rebuilt the supporting pony wall under those floors. The crew also manufactured long shims which they placed between the sill plate on the top of the foundation wall and the ends of the floor joists. When their work was done, the floors were level and the house's structure was resting as it should on its foundation. Mr. Johnson charged Ms. Gordon $408 for that work.

[97] In August 2007, Ms. Gordon took employment at a machine shop. She worked there until she was laid off in November 2008. Unfortunately, her work at the machine shop caused Ms. Gordon a repetitive strain injury to her wrists. She has not fully recovered from that injury. After the machine shop, Ms. Gordon worked for a short time as a sales clerk at a dress shop. In the spring of 2009, Ms. Gordon started full-time work as a clerk at a bulk food store. Her income from her employment has been uniformly greater than her income from her ceramic art. Counsel asked Ms. Gordon why she took employment in 2007:

> Q.: In 2007 you went out and got paid employment.
>
> A.: Yes
>
> Q.: Why was that?
>
> A.: I knew that this lawsuit was gonna be costing massive amounts of money that I didn't have and I had, um, in order to obtain some more credit so I could borrow some money for paying for the, uh, engineers and legal fees and everything I needed to arrange a large line of credit and in order to do that I needed to have, uh, have a regular source of income.

[98] Ms. Gordon's output of ceramic art has, since 2007, been virtually nil. Despite this, she still keeps her art supplies in one of the house's bedrooms. Ms. Gordon thus foregoes the $500 per month rent that she could get for that room if it were empty and if she kept her supplies elsewhere, such as her attached garage or detached shop.

[99] Ms. Gordon has, in fact, borrowed money to fund her lawsuit against the defendants. Her borrowings to date are on the order of $80,000. The total amount of interest and premiums she has paid for life insurance against her borrowings to December 31, 2011 is $9,890.88. Ms. Gordon has paid an additional $3,600 interest from then to September 1, 2012. Her interest payments continue at about $400 per month.

[100] Ms. Gordon claims special damages as follows:

- Loss of value of building permit for garage to studio conversion: $36.75
- Irrigation Repair: $222.54
- Drainpipe extensions: $14.11 and $2.29
- Renovation fees thrown away paid to Mr. Budd: $2,120.00
- Stabilization fee paid to Mr. Johnson: $408.00
- Prescription and over the counter medications: $500.00

[101] These items were noted in Exhibit 18. The other items in Exhibit 18 (excepting interest payments and bank charges) are litigation disbursements.

[102] Ms. Gordon complains that her emotional wellbeing has been damaged by her experience with the house. In support of her claim for damages for emotional upset, Ms. Gordon submitted two reports from her family physician Dr. Crittenden. Those reports indicate that it was in October 2009 that Ms. Gordon made her first complaint of emotional upset relating to the house. Her complaints since then have

been an amalgam of unhappiness and stress relating to the state of the house itself, litigation over the house, her financial circumstances, and her work environment. Dr. Crittenden diagnosed Ms. Gordon as suffering from a degree of depression and anxiety. He prescribed a course of the tranquillizer Ativan.

[103] At trial, Ms. Gordon presented with a noticeably flat affect. She was clearly unhappy with her situation. Ms. Gordon's primary complaint, though, had to do with her finances. She was very unhappy at having incurred approximately $80,000 of debt in order to fund her litigation. She has been able to pay only the interest on her debt and does not know how, other than through success in this suit, she can pay off the principal of that debt. Ms. Gordon was also manifestly unhappy about her work situation. She testified that she felt frustrated and has been occasionally driven to tears by having to adhere to her employer's schedule whereas in the past her work as an artisan allowed her ample flexibility. For example, on one occasion Ms. Gordon wished to go to a badminton tournament but her employer refused to give her time off from her job. Before taking up wage employment, Ms. Gordon could have simply shuttered her studio for a week or so and attended the tournament. Ms. Gordon's evidence made it clear that she is deeply rankled by the loss of her independence.

Foundation Settlement: Present and Future

[104] Ms. Gordon maintains that she has seen signs in the house that indicate to her that it is still settling. Ms. Gordon also relied on observations by the structural engineer Mr. Frie to support her admittedly lay opinion. Mr. Frie tendered an expert report which addressed, among other things, whether settlement was an ongoing issue. Mr. Frie opined that settlement was ongoing. He based his opinion on a number of observations that he made about the house.

[105] I regret that I cannot rely on Mr. Frie's report. I have come to that conclusion due to a number of flaws that appear in his several reports and because of the way that those reports were generated. As to the latter, under cross-examination Mr. Frie admitted that Ms. Gordon's counsel Mr. Moffat drafted the report for him. Mr. Frie

has basically adopted Mr. Moffat's writing as his own. That the report was produced this way diminished my confidence that Mr. Frie has expressed his own unbiased views. It suggests that Mr. Frie has, instead, unconsciously allowed himself to be an advocate for Ms. Gordon.

[106] As to the errors in his report, on some general matters Mr. Frie was simply wrong. For example, Mr. Frie asserted, incorrectly, that the detached shop was part of the original construction of the house. For another example: in his June 6, 2012 report, Mr. Frie quoted Mr. Smith's April 1, 2011 report as saying "Under the garage (detached garage) a geotextile was placed over the excavated surface and approximately 1.2 m of fill was placed in lifts and compacted". In his report, Mr. Smith had, in fact, attributed the geotextile fabric to the attached garage, not the detached garage. Mr. Frie admitted that he had deliberately added the words "detached garage", thus purposefully misquoting Mr. Smith. The difference matters; Mr. Frie was of the view that the detached shop is more stable than the attached garage. Attributing the geotextile fabric to the detached shop would tend to bolster his opinion. Attributing the fabric to the attached garage would tend to undermine Mr. Frie's opinion that the attached garage is settling along with the house. Mr. Frie could offer no explanation for having made this error.

[107] More specifically, to support his opinion that foundation settlement is a present and ongoing process Mr. Frie relied upon his interpretation of various photographs of the house and on his memory of what he saw and when. Under cross-examination, Mr. Frie admitted that in many cases he was either mistaken or that he had forgotten the state of the house when he first viewed it. For example, based on photographs of a pile of loose bricks by the front door, Mr. Frie asserted that between 2007 and 2011 the front of the house sank. Mr. Frie admitted that a loose pile of bricks by the front door is a poor indicator of anything and that they do not prove anything beyond the fact that they were at the front of the house. Further, Mr. Frie asserted that a crack in the cement slab outside of the detached shop first appeared between 2011 and 2012, thus providing a clear and unequivocal indication that the ground around the detached shop was in the process of moving. On the

strength this observation, Mr. Frie confirmed his opinion that the ground around the house was actively settling. Mr. Frie was, however, forced to admit that very same crack had, in fact, been there in 2007 and that it was not actually proof of recent settlement. Finally, in his 2011 report he stated that the foundation had not moved between 2007 and 2011, but then that it had suddenly started moving between 2011 and 2012. He attributed that movement to the foundation being on “soft ground”. The difficulty with that proposition is that the foundation has always been on soft ground – Mr. Frie had no explanation other than perhaps an earthquake (there was no evidence that a seismic event had happened in that interval) for settlement having been static for four years and then suddenly become active.

[108] Finally, Mr. Frie brought a degree of hubris and inconsistency to his task. As to hubris: Mr. Frie’s testimony was to the effect that when it comes to soil stability, he sees little need for the opinion of a geotechnical engineer. His evidence was that, having been a structural engineer for more than 40 years, he knows what needs to be known about soil conditions. Geotechnical engineers are, in his view, “nice to have” but unnecessary. That was the gist of his evidence at trial. The weight of the other evidence at trial, and in particular the weight of the evidence of the two geotechnical engineers and the one other structural engineer, was to the effect that in cases like this house on this soil, geotechnical advice is not merely “nice to have” but that it is, instead, essential.

[109] As to inconsistency: when he was confronted by an earlier version of his report under cross-examination, Mr. Frie was forced to admit that despite his view that geotechnical advice was not necessary, he had in fact instructed Ms. Gordon’s counsel to retain a geotechnical engineer and, further, that he was not prepared to give a final structural engineering opinion until he after he received the geotechnical report. Mr. Frie was not able to reconcile those two views.

[110] For these reasons I find that it would be unsafe to give much weight to Mr. Frie’s opinions and conclusions.

[111] I do accept that between 2007 and the end of 2012 there has been some additional drywall cracking on the main floor of the house. I find that these are consistent with the geotechnical opinions of Messrs. Smith and Imada. In 2011 those gentlemen independently came to the conclusion that, subject to water infiltration or significant seismic events, if the house's foundation does have more settlement, that movement will be limited to a maximum of 50 millimeters. Mr. Johnson's work in late 2008 put the weight of the house back on its foundation. I find that it is more likely than not that in response to the load going back on the sill plate, the foundation has moved down slightly. That movement would account for the additional drywall cracking about which Ms. Gordon complains. There was, however, no empirical evidence to establish that the movement has been anything other than the movement Messrs. Smith and Imada predicted in their reports.

[112] For these reasons, I find that the foundation has moved slightly since late 2008 but that that movement has been within the parameters predicted by the geotechnical engineers. The evidence at trial was clear that the drain pipes in the southwest corner have now been relocated so that water is no longer passing directly down along the foundation walls.

[113] There was no evidence as to what magnitude of seismic event would be necessary to cause damage to this house that would not also be caused to other residences in the area. There was no evidence at trial as to the frequency of such seismic events. I accept the evidence of the structural engineer Mr. Weilmeier, who said that residences like Ms. Gordon's house do not have to be constructed to guard against damage by earthquake.

[114] I accept the opinions of the structural engineers who testified that further movement by the foundation of up to 50 millimeters would not put an unreasonable stress on the structure of the house. That is because the building has a wooden frame which is both flexible and robust. The engineers felt that it would be prudent to institute a system of monitoring the elevation of the foundation. I agree with that proposition.

[115] In conclusion, I find that the foundation is now in a reasonably steady state. Further, I find that the evidence does not support the proposition that there is a realistic or a substantial possibility that the foundation will settle more than an additional 50 millimeters. Finally, whatever movement the foundation has had in the past I find that that movement never rendered the house uninhabitable or unsafe for ordinary use and occupation.

The Plaintiff's Claims

Against William and Kathleen Krieg

[116] Ms. Gordon's claim against William and Kathleen Krieg is grounded in the tort of negligent misrepresentation. Ms. Gordon asserts that before they accepted her offer to buy the house, William and Kathleen Krieg knew or ought to have known that the foundation of their house had cracked and settled, that the floors of the master bedroom and ensuite were sloped, and that extensive work costing no less than $35,000 was required to repair the problems with the house. Ms. Gordon argues that William and Kathleen Krieg misrepresented their knowledge of the state of the house to her. She says that the misrepresentation was embodied in the P.D.S. that William Krieg completed in March 2006 and which he did not update in April after he had Team Foundation to the house. Ms. Gordon says that William and Kathleen Krieg thus represented to her that the house had no structural defects when, in fact, they were aware that it did have structural defects.

[117] Ms. Gordon maintains that she relied in part upon the Kriegs' P.D.S. when she decided to waive the subject clauses, thus committing herself to buy the house.

[118] Ms. Gordon has not argued, nor was there evidence to support the notion, that the Kriegs committed any misrepresentations other than those allegedly contained in the P.D.S. Ms. Gordon does not take the position that the P.D.S. was anything other than a set of representations concerning the Kriegs' knowledge of the state of the house. More specifically, she does not argue that the P.D.S. amounted to the vendor's warranty as to any particular quality of the building or property. Ms. Gordon's position is congruent with the law: statements made in property

disclosure statements are representations only - they do not in and of themselves, amount to a vendor's warranty: *Kiraly v. Fuchs*, 2009 BCSC 654.

[119] It is important to note that earlier in the proceeding Ms. Gordon`s pleadings asserted that that the Kriegs had committed fraudulent misrepresentation. Ms. Gordon amended her notice of civil claim five times. By the time the case came to trial, Ms. Gordon had abandoned her pleading of fraudulent misrepresentation, thus confining her claim to negligent misrepresentation.

[120] The essential elements of negligent misrepresentation are:

1. There must be a relationship between the person making the representation and the person receiving it.

2. The representation must be untrue, inaccurate or misleading.

3. The person making the representation acted negligently in making it.

4. The person to whom the representation was made relied on it in a reasonable manner.

5. The reliance was detrimental in the sense that damages flowed from the reliance.

(*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87)

[121] Misrepresentation in the context of real estate transactions has recently been examined by this court in the case of *Cardwell v. Perthen*, 2006 BCSC 333, affirmed on appeal, 2007 BCCA 313. In *Cardwell*, Ballance J. held that a vendor will not be responsible for misrepresentations to a purchaser unless he:

a. fraudulently misrepresents or conceals a defect;

b. knows of a latent defect that renders the house unfit for habitation;

c. is reckless as to the truth or falsity of the statements relating to the fitness of the house for habitation; or

d. breaches his duty to disclose a latent defect that renders the premises dangerous.

[122] The first avenue in *Cardwell* that leads to vendor liability does not apply here, because Ms. Gordon has not alleged fraud.

[123] The evidence in the case established beyond question that Mr. Zarr, the Kriegs, and Ms. Gordon successfully lived in the house throughout. No engineer or expert in construction matters testified that the house has ever, for any reason, been uninhabitable or dangerous. Therefore the second and third avenues to vendor's liability do not apply here either.

[124] The fourth avenue does not apply here because even if the defects in the house were latent, the defects have not rendered the house dangerous.

[125] On a straightforward application of the law relating to misrepresentation in the context of real estate transactions, then, Ms. Gordon's claim against William and Kathleen Krieg must fail. I note that this result may have been different had Ms. Gordon persisted with her allegation of fraud by William and Kathleen Krieg.

[126] Before leaving this discussion, I will return for a moment to the question of latent versus patent defects in order to explain my conclusion that the defects in this house were not latent. In *Cardwell*, Ballance J. described the difference between latent and patent thus:

> [122] The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a

> reasonable inspection by a qualified person: ***44601 B.C. Ltd. v. Ashcroft (Village),*** [1998] B.C.J. No. 1964 (S.C.) [***Ashcroft***]; ***Bernstein v. James Dobney & Associates***, 2003 BCSC 986 [***Bernstein***]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example ***Eberts v. Aitchison*** (2000), 4 C.L.R. (3d) 248, 2000 BCSC 1103.

[127] I accept Ms. Gordon's evidence that when Mr. Kilby pointed it out she noticed the slope in the master bedroom floor. I find that Ms. Gordon did not subjectively appreciate what the slope could signify. In my opinion, a reasonable person in Ms. Gordon's position would have been alerted by the sloped floors and would have appreciated that they: a) were not normal, and b) needed to be looked into. That further inquiry could have been performed by Ms. Gordon herself. If she had undertaken that inquiry she would have paid attention to the state of the foundation walls. Ms. Gordon would have seen the numerous cracks evident in the interior and exterior of the foundation walls and she would have learned for herself that the foundation in the southwest corner of the building had subsided. Alternatively, if it was not reasonable for Ms. Gordon to have looked into the state of the foundation herself, the fact that the floors were sloped was an observable defect that triggered an obligation to have that defect inspected by a qualified person. Given the clues present in the building, and given the nearly instantaneous diagnosis Team Foundation's personnel came to, I find that a qualified person would have had no difficulty discovering the cracked and settled foundation.

[128] For these reasons I conclude that the cracked and settled foundation was there to be seen and appreciated by a reasonable prospective purchaser. It was a patent defect. Because it was a patent defect, it cannot be the subject of a claim by Ms. Gordon for negligent misrepresentation.

[129] In the result, the claims against William and Kathleen Krieg must be dismissed.

Against Wolfram Krieg

[130] Before embarking on a discussion of Ms. Gordon's claims against Wolfram Krieg, it is useful to note that Wolfram Krieg made no representations to Ms. Gordon

independent of or in addition to the vendor's representations. For that reason, Ms. Gordon has no claim against Wolfram Krieg for having made negligent misrepresentations to her.

[131] Instead, Ms. Gordon asserts that Wolfram Krieg is liable to her for:

> - Breaching a duty owed to her to independently inspect the Cerise Drive house, inform himself of its defects, and to share that information with her; and
>
> - Breaching a duty owed to her to share with her the knowledge that he gained in his meeting with William Krieg on April 28, 2006. It was in that meeting that William Krieg advised Wolfram Krieg that the repair estimate was $30,000 to $35,000.
>
> (from Ms. Gordon's notice of civil claim)

[132] Ms. Gordon also asserts that Wolfram Krieg learned from William Krieg in their meeting that the house's foundation was actually cracked. For the purposes of this discussion, it does not matter whether Wolfram Krieg knew that the foundation was cracked. The fact that he knew of the $35,000 quote is, in my opinion, sufficient to trigger a discussion of this issue. Adding knowledge of cracks in the foundation to the factual matrix would not alter the calculus of Wolfram Krieg's potential for liability. That addition might have mattered had Ms. Gordon alleged fraud against Wolfram Krieg, but she did not, and so the issue is moot.

[133] Whether Wolfram Krieg owed a duty of care to Ms. Gordon is a matter of law. The principles that govern whether a duty of care exists between a plaintiff and defendant were laid down in the Supreme Court of Canada decision of *Cooper v. Hobart*, 2001 SCC 79. The Court began its discussion by harking back to the genesis of the law of negligence:

> 22 In *Donoghue v. Stevenson* the House of Lords revolutionized the common law by replacing the old categories of tort recovery with a single comprehensive principle – the negligence principle. Henceforward, liability would lie for negligence in circumstances where a reasonable person would

> have viewed the harm as foreseeable. However, foreseeability alone was not enough; there must also be a close and direct relationship of proximity or neighbourhood.

[134] Proximity was the next subject of discussion in *Cooper*. The Court referred to *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.):

> 24 In *Anns*, supra, at pp. 751-52, the House of Lords, per Lord Wilberforce, said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

[135] The Court then observed that the importance of the *Anns* decision was its recognition that policy plays important roles in determining whether a particular relationship gives rise to a duty of care. The Court articulated the test of whether a duty of care exists in this way:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> (emphasis in original)

[136] As to the first stage of the *Anns* process, on the facts of the present case, I have no doubt that Wolfram Krieg could have reasonably foreseen that Ms. Gordon could suffer harm if he failed to inspect the house and if he failed to tell Ms. Gordon of the result of his inspection. Likewise, Wolfram Krieg could reasonably have foreseen that Ms. Gordon would suffer harm if he did not volunteer to tell her what

he knew about the $35,000 quote or, assuming he knew about it, about the cracked foundation. The foreseeability element of the first stage of the *Anns* test is, therefore, made out here.

[137] The second part of the first stage of the *Anns* test presents some difficulty for Ms. Gordon. That second part is: “are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?”

[138] The facts of this case are that Wolfram Krieg was acting solely as the vendor’s agent. Real estate agents who act solely for one side of a transaction provide a valuable service to their clients. Those valuable services are set out in the Working with a Realtor contracts that both Ms. Gordon and the Kriegs made with their respective agents. Among other things, those contracts required the realtor to act solely in the interests of his client. To impose a duty of care of the type that Ms. Gordon advocates would vitiate at least that part of the sole agency contracts. It would have the practical effect of imposing dual agency on parties who have specifically contracted for sole agency.

[139] Further, to impose a duty of care such as Ms. Gordon proposes would be to place Wolfram Krieg in a position of conflict; he would have to choose between exposure to a claim by his client for impairing his client’s interest and exposure to a claim by a purchaser for failing to compromise that same interest. Simply put, there are good policy reasons for preserving the relationship that arises when a realtor agrees to act exclusively for a client. In other words, the duty of care that Ms. Gordon advocates would jeopardize that relationship by setting up a conflict between the realtor and his client.

[140] For these reasons, I find that sufficient policy reasons arise from the relationship between the parties to justify resisting the imposition of a duty of care such as Ms. Gordon advocates. In the result I find that Ms. Gordon has not established that in law Wolfram Krieg owed a duty of care to her.

[141] Ms. Gordon's claims against Wolfram Krieg and his real estate brokerage must be dismissed.

Against PTP, Mr. Kilby, and Mr. Hostland

[142] In the course of the trial, Ms. Gordon admitted that she had not made out a case against Mr. Hostland. She agreed that her claims against Mr. Hostland should be dismissed with costs to be determined.

What Contract?

[143] Before discussing this topic it is important to appreciate that Ms. Gordon's notice of civil claim asserted that the contract she had with PTP was comprised of the materials she received by fax from PTP on May 11. She asserts that the faxed materials comprised PTP's offer to inspect the house for the fee quoted and PTP's warranties that:

a. PTP provided a comprehensive home inspection system;

b. PTP provided a comprehensive reporting system;

c. The Plaintiff could rely on the PTP report "from offer to purchase to resale";

d. PTP provided "...the best system in the industry in a comprehensive way that leaves you anxiety free";

e. PTP would "assess for significant deficiencies";

f. PTP would "fairly and accurately report on the condition of the home";

g. That "nobody is more thorough" than PTP;

h. PTP would provide "a comprehensive cost estimate for repairs";

i. PTP would provide "structural and building envelope reviews by a professional engineer";

j. PTP "was skilled and experienced in the business of home inspections".

[144] Ms. Gordon says that her contract with PTP was made when she accepted PTP's offer when she called PTP on May 12 and made an appointment to inspect the house at 9 a.m. the following Monday.

[145] In its defence, PTP argues that the contract between it and Ms. Gordon comprised the written contract that Ms. Gordon signed on May 15 at the Cerise Drive house.

[146] This issue is not difficult to resolve. Ms. Gordon acknowledged that when she spoke on the telephone to PTP's receptionist Ms. Janussen, she was told that she would have to sign a contract. Ms. Gordon made of note of that fact and that note was entered into evidence in the trial. Ms. Gordon admitted that the note recorded what had been said to her. No reasonable person who had just had that conversation and who then received PTP's promotional material could have mistaken the promotional material for a contract. The PTP brochure was clearly nothing more than an enticement to Ms. Gordon to give PTP her business. I have already found that Mr. Hostland advised Ms. Gordon that she would have to sign a contract on May 15 before she could receive the results of the home inspection, and the evidence is clear that Mr. Kilby presented Ms. Gordon with that contract as soon as she arrived at the house that morning. Ms. Gordon admitted that she understood that if she did not sign that contract Mr. Kilby would not provide her with the results of his inspection.

[147] Given these facts, it is beyond question that Ms. Gordon did not have a contract with PTP until she signed the document that Mr. Kilby presented to her on May 15.

Limited Liability Clause

[148] The next issue to consider is whether Ms. Gordon is bound by the contract's limited liability clause. Ms. Gordon based her resistance to the limited liability clause on two propositions. The first is that she and PTP were not *ad idem* on the terms of

the agreement. The second is that she should not be held to it because the limited liability clause is an unconscionable contractual provision.

Non Est Factum

[149] The general rule is that a party is bound by the terms of the contract he or she executes: *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.). There are exceptions to that basic proposition. One of those exceptions invokes the principle of *non est factum*, i.e.: "it is not my deed". According to *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (C.A.), a party cannot be bound to a contract when the document was signed in circumstances which made it not the party's act. The defence of *non est factum* is a difficult one to make out. In his text *The Law of Contract in Canada*, 6th ed., (Scarborough: Carswell, 2011) at page 280-282, Fridman Q.C. wrote:

> ... It is a difficult matter to invoke the plea successfully. The onus of proof is heavy upon a party raising the plea. What must be proved, as the Ontario Divisional Court stated is that the party relying on *non est factum* was not careless and that the document signed was different from what the party in question thought he or she was signing. Most of the cases in which it has been raised resulted in lack of success for the party seeking to rely on the plea. Various reasons were given for this. In some instances there was no mistake. In others the mistake that was made did not go to the nature of the document that was signed, but either to its contents or its legal consequences, neither of which would suffice to satisfy the test in *Saunders*. In other instances the plea failed because of the carelessness of the party raising the plea (but the defence will operate if the mistake was caused by the other party's fraud or negligence). Where the plea has been successful, it has been because the party signing the document was ignorant of the English language and did not know what was going on; or was of limited education and reading ability and was mistaken as to what the document was; or relied on what she was told by her husband to whom she was subservient in business matters, so she did not know what she was signing.

[150] Ms. Gordon says that she cannot be bound to the terms of the contract because she was not aware of its provisions and because Mr. Kilby applied undue pressure on her to sign it. She says that she was not aware of its provisions because she did not have her reading glasses with her and she could not read the contract without them. Ms. Gordon's evidence-in-chief on that point was this:

> Q: What did that document look like?

A: It looked like there was three pages of very small print.

Q: So he brings out this, this document does he?

A: Yes.

Q: 'K, and then what discussion takes place?

A: He wanted me to read it and sign it. And I looked at it and I had trouble reading it. The print was very tiny, um, long lines of tiny print, um, I said that I didn't have my reading glasses, um, the information that I received had said that the report would be easy to read so I didn't bring my reading glasses. I tried to read the contract and had real difficulty reading it.

Q: What was the difficulty?

A: The difficulty was that the print was really small and detailed and I had trouble actually reading the document, even though I could make out some of the words, by the time that I got to the end of the line it was just difficult to comprehend.

A: Why was it difficult to comprehend?

Q: I couldn't read it continuously, I was struggling to make out the words.

[151] Ms. Gordon's testimony shows that she was aware that she had contractual terms in front of her and that she applied herself to reading them. I have found that Mr. Kilby paraphrased for Ms. Gordon the essential elements of the contract and of the limited liability clause in particular. Mr. Kilby's paraphrasing did not misrepresent the terms of the contract, nor did he suggest to Ms. Gordon that the contract governed some relationship other than the relationship between Ms. Gordon and PTP.

[152] The evidence at trial clearly demonstrated that Ms. Gordon knew that the contract that Mr. Kilby presented to her concerned the home inspection that she wanted PTP to perform. It cannot be said that Ms. Gordon thought that she was signing one thing but that she signed something else entirely.

[153] Ms. Gordon says that Mr. Kilby applied pressure on her to sign the contract in a rush. She says that she needed to have the result of the home inspection from Mr. Kilby and that Mr. Kilby gave her to understand that his schedule would not permit time for her to carefully go through the contract's terms. The theory that underlies Ms. Gordon's position is that her circumstances were such that she had no

choice but to do business with PTP. According to her, she had only that day and that time to obtain a home inspection report.

[154] There are flaws in Ms. Gordon's contention. One of those flaws lies in Ms. Tremeer's evidence that she had in her office business cards from numerous home inspection agencies and that her practice is to allow her client to choose whichever inspector the client wants to do business with. I infer from that evidence that Ms. Gordon was aware that PTP was not the only home inspection agency operating in the Kelowna area. Another flaw in Ms. Gordon's position is the uncontested evidence that Ms. Gordon was able to arrange a home inspection with PTP on relatively short notice. Ms. Gordon adduced no evidence that she would have been unable to arrange an appointment with some other inspection agency in the event that she was unhappy with PTP's terms. Finally, Ms. Gordon had until May 19 to remove the subject clauses in her offer to purchase. Ms. Gordon therefore had four days within which to consider her position. It cannot be said, therefore, that anything Mr. Kilby did applied unreasonable pressure on Ms. Gordon to sign a contract she did not like or did not understand.

[155] In the result I have concluded that the defence of *non est factum* cannot assist Ms. Gordon.

Unconscionable Contract

[156] Ms. Gordon's second line of attack on the limited liability clause is that it is unenforceable because it is unconscionable. PTP correctly points out that, despite having amended her statements and notice of claim five times, Ms. Gordon has never specifically pled that the exclusion clause was unconscionable. In fact, her pleadings do not address the written contract at all - she has maintained throughout that the contract been her and PTP comprised the fee quote and the promotional materials she received by fax via Ms. Tremeer's office. PTP argues that Ms. Gordon should not be heard to argue unconscionability without first having plead it.

[157] Ms. Gordon's pleadings are not perfect and PTP is correct when it says that Ms. Gordon did not put unconscionable contract squarely on the issue board.

However, Ms. Gordon clearly understood and was not prejudiced by PTP's reliance on the exclusion clause, PTP was not taken by surprise by Ms. Gordon's position that she should be excused from its effect, and in the course of the trial the parties adduced evidence relevant to the question. In other words, the parties conducted the trial as if unconscionable contract was a live issue. In these narrow and, I hope, rare circumstances I will consider Ms. Gordon's argument on unconscionable contract notwithstanding the state of her pleadings.

[158] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada established the analytical framework for the consideration of a contractual exclusion clause. Binnie J., wrote:

> [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" ([*Hunter Engineering Co. v. Syncrude Canada Ltd*., [1989] 1 S.C.R. 426], at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[159] The *Tercon* analysis requires a three-stage process: applicability, unconscionability, and overriding public policy. As to the first, applicability, Ms. Gordon's claims sound in breach of contract and the tort of negligence. All have to do with Mr. Kilby's performance during the home inspection. Broadly put, Ms. Gordon complains that Mr. Kilby did not do a proper job of inspecting the house because he missed or misinterpreted signs of settlement and that he failed to warn

her of the condition of the house. Those acts would be breaches of the contract between her and PTP. She complains that Mr. Kilby gave her negligent advice – that the house was solid, that the sloping floors were not associated with the foundation, and that the cost of needful repairs would be less than $500 – and that she acted on that advice to her detriment. If proven, that would be the tort of negligent misrepresentation. The exclusion clause contains these terms:

> **4. Inspector and its employees are limited in liability to the fee paid for the inspection services and report** in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, for any breach or claim for breach of this Visual Inspection Agreement or for any other reason or claim.

[160] The clause clearly provides protection for negligence in performing the inspection or preparing the report and any breach of the agreement. Ms. Gordon's claims fall squarely inside the scope of the exclusion clause. The clause is therefore applicable to the claim and the first stage of the *Tercon* test is met.

[161] In *Loychuk v. Cougar Mountain Adventures Ltd*., 2012 BCCA 122, Frankel J.A., discussed the test for unconscionablity in contract. He wrote:

> [29] The language used to express the test for unconscionability has varied over the years. It was put this way by Mr. Justice Davey, as he then was, in *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713 (B.C.C.A.):
>
> > [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].
>
> [30] That test was recently discussed in *McNeill v. Vandenberg*, 2010 BCCA 583, and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500. In *McNeill*, Madam Justice Garson stated:
>
> > [15] In order to set aside a bargain for unconscionability, a party must establish:

> (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
>
> (b) proof of substantial unfairness in the bargain.
>
> This test was articulated in *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (B.C.C.A) at 173 and reiterated in *Klassen v. Klassen,* 2001 BCCA 445.
>
> [31] In *Roy*, Mr. Justice Tysoe (at para. 29), quoted the following from the judgment of Madam Justice McLachlin, as she then was, in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263 (C.A.):
>
> Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrsion v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).
>
> Mr. Justice Tysoe went on to state (at para. 30), that in *Tercon*, Binnie J. was "not intending to signal a departure from the usual test for unconscionability."

[162] The first question to ask is, as Garson J.A. put it in *McNeill*, was there "inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger"? That test has been recently applied in this court in the retrial of the *Roy* matter. The retrial is reported at *Roy v. 1216393 Ontario Inc*., 2012 BCSC 1752, and on the issue of inequality of the parties' positions, Bruce J, wrote:

> [138] ... To render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne. Typical examples include ignorance of the contract terms due to illiteracy, blindness, and senility of the weaker party. ...

[163] In the present case, none of those typical examples apply to Ms. Gordon. She was not illiterate, blind or senile. She felt that she was in a hurry and had to get the house inspection done that day, but her belief was not reasonable in light of the fact that she had four more days to complete a house inspection. Ms. Gordon may not have had her reading glasses with her that day, but that is no answer because she

could, in fact, make out the words of the contract without the glasses. Ms. Gordon simply did not take the time she needed to carefully read the document. In any event, Ms. Gordon cannot be said to have been ignorant of the essential terms of the contract, including the limitation clause. That is because Mr. Kilby explained those terms to her verbally before she signed it. I do not doubt that Ms. Gordon was careless in signing the contract, and I do not doubt that she now regrets having done so. However, the evidence does not go so far as to show that Mr. Kilby somehow procured her signature by overwhelming ability to act independently.

[164] Because the evidence does not satisfy me that there was the necessary degree of equality of position between Ms. Gordon and PTP, it is not strictly necessary to consider whether the bargain was substantially unfair. For the sake of completeness, however, I will comment on that issue.

[165] The first point to make is that the fact that the presence of a liability limitation clause does not automatically signal substantial unfairness. Instead, the whole of the contract must be taken into account. Here, the contract provided that PTP would provide an inspector who would divide about three hours between, first, inspecting the house and preparing a written report, and, second, conversing with Ms. Gordon. In return, Ms. Gordon paid a fee of $400. That works out to about $133 per hour. That fee had to cover Mr. Kilby's wage and all of PTP's overhead. The contract required PTP to conduct a visual inspection only – neither party expected that PTP would get all forensic on the property by poking holes in walls, tearing up floor boards, or removing insulation. Four hundred dollars does not seem an unreasonable figure for the relatively limited service the contract contemplated. I grant that it might be different if PTP had charged, say, $40,000 for its three hours of time. In that case, it would be difficult to see how such a large fee could be rationally connected to the value of the limited services provided.

[166] As for the role that the limitation clause plays in the assessment of fairness, it is important to note that the asset that was being inspected was a house that was about to sell for $360,000. Absent the limitation clause, PTP would have been open

to claims in the range of tens and hundreds of thousands of dollars. In that case, the fee that PTP charged to Ms. Gordon would have to reflect that risk; it would have been much higher. The limitation clause had the effect, therefore, of moderating the price PTP charged and of bringing that price into a range that was affordable to Ms.Gordon. Rather than being unfair, the limitation clause brought the price Ms. Gordon paid for the inspection down to a point that she could afford.

[167] For these reasons I find that the bargain between Ms. Gordon and PTP was not substantially unfair.

[168] Turning, then, to the final element of the *Tercon* process, the question is whether there is "an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts" (*Tercon,* at para. 123). Put simply, Ms. Gordon did not adduce any evidence that such a public policy exists. This leg of the *Tercon* test does not apply.

[169] It follows that I must conclude that the liability limitation clause is binding on Ms. Gordon. If PTP or Mr. Kilby breached the contract or uttered negligent misrepresentations, Ms. Gordon's damages against them must be limited to $400.

Breach of Contract

[170] The first paragraph of the PTP contract says this:

> ... The inspection is performed in accordance with the Standards of Practice of the American Society of Home Inspectors (ASH I®) and in accordance with any applicable State or Provincial specific standards. ...

[171] For the purposes of this matter, the parties accepted that only the ASHI standards were applicable and that there were no relevant State or Provincial specific standards.

[172] The second paragraph of the contract says this:

> ... Subject to the terms and conditions stated herein, the inspection includes the visual examination of the home's exterior including roof and chimney, structure, electrical, heating and cooling systems, insulation, plumbing, and

> interior including floors, walls, ceiling and windows; it is a reasonable effort to disclose the condition of the house based on a visual inspection. Additionally, Inspector will functionally operate major built-in appliances. Conditions beyond the scope of the inspection will not be identified. No engineering services are offered.

[173] Any reasonable interpretation of the word “structure” in this provision must include the foundation. In my view, then, the PTP contract required Mr. Kilby to perform a visual inspection of, among other things, the foundation of the house and to report to Ms. Gordon problems that he noted in the condition of that foundation.

[174] I have found that when they visited the house in April 2006, Messrs. McKinney and Wilson saw at least two significant cracks in the southwest area of the foundation. They did not have to move anything, peel back insulation, roll away carpets, or dig through dirt to see those cracks. I find that one of the cracks that they saw was the large crack that Mr. Kilby noted in the middle of the south foundation wall. The other was on the west wall near the ladder leading down into the crawl space. Mr. Kilby failed to see that second crack. Had he seen it, Mr. Kilby would have appreciated that the portion of the southwest foundation wall between the two cracks had settled and had broken away from the main structure. He would certainly have reported that observation to Ms. Gordon. Had he appreciated that the southwest portion of the foundation had settled, he would have been less sanguine than he was about the sloping floors in the master bedroom and ensuite.

[175] Further, the gaps in the baseboards, the adjusted striker plates on the doors and the crooked door jambs were all there for Mr. Kilby to see. Common sense dictates that those features were not part of the original design and construction. Mr. Kilby testified that on his inspection the doors, floors and walls were “functional” and therefore not worthy of comment. That may be so, in the sense that the walls were keeping out the weather, the floors could bear weight, and the doors separated the rooms of the house, but the condition of the walls, floors, and doors taken together clearly pointed in the direction of something being wrong with the structure. It was Mr. Kilby’s contractual duty to pay attention to those clues and to at least report them to Ms. Gordon. He failed to do either.

[176] On the issue of the sloping floors, it was not, in my view, good enough for Mr. Kilby to write in his report that "Further investigation may be required by others as determined by client." That was a milquetoast recommendation and nearly useless to a lay person such as Ms. Gordon. At a minimum, Mr. Kilby had a contractual duty to advise Ms. Gordon that because there may be structural problems with the house, she should consult a structural engineer or a renovation contractor.

[177] Although Ms. Gordon adduced expert evidence from the home inspector Mr. Link, I find that his evidence was not necessary to establish that Mr. Kilby breached the terms of PTP's contract with Ms. Gordon. That is because Mr. Kilby's failures speak for themselves.

[178] I find that Mr. Kilby did not do as the contract required him to do, which was to spot faults in the structure of the house that were worthy of note and to report them to Ms. Gordon.

Negligent Misstatement

[179] I have found that Mr. Kilby told Ms. Gordon that he had looked for more cracks in the foundation wall but had not found any and that the foundation was, therefore, solid. I have also found that Mr. Kilby advised Ms. Gordon that she could have someone come to look at the sloping floor but that when she indirectly asked him for his opinion about the floor, he told her that he felt that the slope was not related to the foundation. Finally, I have found that Mr. Kilby said to Ms. Gordon and Ms. Tremeer that repairs to the house would not cost more than $500.

[180] Mr. Kilby had special knowledge concerning house inspection. Ms. Gordon relied on his knowledge and advice and it was reasonable for her to do so. Had Mr. Kilby not told her these things but had, instead, told her that the foundation had cracked and settled and that the sloping floors and other signs of settlement in the house were attributable to that settlement, and had he said that the cost of rectifying the cracked foundation and sloping floors was either more than $500 or was beyond his ability to estimate, I have no doubt that Ms. Gordon would have chosen not to

waive the inspection subject clause in her offer to buy the house. In that case the contract would not have completed or the parties would have negotiated some lower price for the house. As it turned out, Ms. Gordon relied on Mr. Kilby's advice and bought a house that required some work and expense to bring it into a condition where its frame rests on its foundation.

[181] I find that Mr. Kilby did commit the tort of negligent misrepresentation and that Ms. Gordon is entitled to damages thereby.

Contributory Negligence

[182] PTP argues that Ms. Gordon's own negligence contributed to her loss. PTP says that Ms. Gordon was negligent for having failed to heed Mr. Kilby's advice that she should have a qualified person investigate the sloping floor in the master bedroom.

[183] The sloping floor was an obvious defect. Ms. Gordon specifically retained PTP and Mr. Kilby to advise her as to the quality of the house. Ms. Gordon actually received advice from Mr. Kilby recommending investigation of the sloping floor. Ms. Gordon did not act on that advice. Instead, she chose to rely on Mr. Kilby's opinion that the slope was not related to the foundation. On Mr. Kilby's advice, Ms. Gordon assumed that the sloped floor did not have to do with the foundation. But the floor was still sloping, it was still an obvious problem with the house, and even if it was not associated with the foundation, it still needed to be looked into at greater length. Mr. Kilby's negligent advice that the floor was not related to the foundation did not eliminate all possible problems with the structure of the house that would lead to a sloped floor. In short, Mr. Kilby's bad advice did not obviate Ms. Gordon's obligation to take reasonable care for her own financial well-being. I find that Ms. Gordon ought to have taken further steps to look into the sloped floors. Had she done so by hiring someone like Mr. Budd, for example, she would have learned that there was a problem with the house's foundation. By not taking those steps, Ms. Gordon's failure to act reasonably contributed to her loss.

[184] I cannot say with precision to what degree Mr. Kilby's negligence and Ms. Gordon's contributory negligence led to her loss. On the whole, though, I find that Mr. Kilby's behaviour was more blameworthy than Ms. Gordon's behaviour. Had Mr. Kilby been less off-hand in his remarks, Ms. Gordon would have been more likely to take the hint that there was something wrong with the house. She may well have shunned the house entirely. I attribute 75% of Ms. Gordon's loss to Mr. Kilby's negligence and 25% to her own negligence.

Damages

[185] Ms. Gordon claims damages under these heads of loss:

a. Pecuniary damages for depression, anxiety and distress;

b. The cost of repair or replacement of her property;

c. The loss of the opportunity to carry on her work and "capital asset" of her art and craft business;

d. Loss of tenant's rents;

e. The loss of opportunity to maximize income tax benefits from operating her home-based business at a high enough revenue level;

f. The interest costs of borrowing $80,000 to finance investigations and prosecute claims.

Emotional Upset

[186] Ms. Gordon claims non-pecuniary damages of $50,000 under this head of loss. I accept Dr. Crittenden's medical opinion that since buying the house, Ms. Gordon has developed depression. Depression is a genuine psychological disorder – when it can be attributed to a tort or was a foreseeable consequence of breach of contract, it may be compensable. In Ms. Gordon's case, the problems with the house are a contributing factor to her depression. The other factors are stresses

stemming from her finances, her debt load, the fact that she now works for a wage rather than as an artisan, and, finally, the litigation itself.

[187] Ms. Gordon's affliction is not, however, particularly severe and, given its causes, I infer that her depression will abate when the litigation is over and the uncertainty of her life's direction diminishes. In my view, a non-pecuniary award of $10,000 would adequately compensate Ms. Gordon for that part of her psychological upset that was directly caused by PTP's tort and breaches of contract.

Cost of Repair or Diminution of Value

[188] The parties approached the issue of damages relating to the house itself from different perspectives. Ms. Gordon premised her claim for damages on the theory that the risk of future settlement is such that the structure must be stabilized by the installation of helical piles around the building's perimeter. According to the experts on whom Ms. Gordon relied, the total cost of that work would be on the order of $510,000.

[189] The defendants premised their approach to damages on the assumption that the risk of future settlement is low and that what future settlement may occur will in any event be limited to about 50 mm. If the risk of future settlement is that slight, it will cost much less to repair the building. In that case, for example, helical piles will not be necessary; all that will be necessary will be to jack up the wooden structure so that it is level, to secure the newly level building to the foundation, to sheath and seal the walls, and to make some cosmetic repairs to the interior. According to the defence experts, the cost of those repairs would be on the order of $65,000 to $70,000.

[190] There was another difference in the approaches taken by the parties to their assessment of damages. Ms. Gordon presented her claim in 2013 dollars. That is to say, Ms. Gordon took the view that her damages should be fixed at the current price of fixing the house in the way she proposes. The defendants, on the other hand, argued that Ms. Gordon suffered her loss on the day the house changed hands from the Kriegs to her. The defendants say that the proper way to calculate Ms. Gordon's

loss is to postulate how much the house would have been worth in 2006 had there been no settlement issues, subtract from that figure how much it would cost to rectify the settlement issues, and compare that net figure to the price that Ms. Gordon actually paid for the house. The difference, if any, is, so say the defendants, the true measure of Ms. Gordon's loss.

[191] Turning to the first point of disagreement on the damages issue, Ms. Gordon maintains that the task of repairing of her house should be assessed as a future loss. She asserts that as a future loss, the loss is recoverable there is a realistic possibility of it coming to pass as opposed to it being more likely than not that the loss will occur (i.e.: on the balance of probabilities, which is the test for a past or present loss). Ms. Gordon goes on to argue that since the evidence of the geotechnical engineers was to the effect that the building will likely settle to some further degree, the onus lies on the defendants to show that there is zero risk of the house settling more than the maximum 50 mm that those engineers have predicted. Ms. Gordon submits that if the defendants cannot demonstrate that there is no risk of settlement beyond that limit, then there must be a realistic possibility of greater settlement. In that case, she says, the cost of repair to her house must be based on the installation of helical piles around the perimeter of the building and all of the work associated with attaching the foundation to those piles and leveling the whole assembly with jacks, pins, and braces. According to Ms. Gordon's experts, the cost of that effort, including interior and exterior renovations plus a living-out allowance for Ms. Gordon while the work is under way, is as I have noted earlier, on the order of $510,000.

[192] The flaw in Ms. Gordon's position is that the evidence led at trial established that while future settlement is likely, it is likely to be limited to no more than 50 mm. According to the geotechnical engineer's evidence, which I accept, future settlement exceeding 50 mm would be caused by one or both of two events: water flowing down the afflicted portions of the foundation wall or seismic events. The evidence demonstrated that the downspouts have been redirected away from the house and there was no evidence that water would flow down the foundation walls from any

other source. The risk that the building will suffer additional settlement due to water infiltration appears to be minimal.

[193] The geotechnical engineers testified that seismic events will likely happen in the future, but their evidence did not go so far as to indicate whether those seismic events would be likely to be of a magnitude sufficient to cause further settlement. It is, therefore, purely speculative to say that in the future an earthquake will cause the house to settle more than 50 mm. Speculation cannot bottom a finding that the happening of a future event is a realistic or a substantial possibility; that conclusion can only be grounded on evidence, and such evidence does not exist here.

[194] For those reasons I am driven to conclude that there is insufficient evidence on which I can rely to find that helical piles and all of the expense associated with their installation is the proper measure of Ms. Gordon's damages. Instead, the proper measure of damages is the cost of leveling the wooden structure and attaching that structure to the foundation below. I accept the opinion evidence of the quantity surveyor Mr. Artis in that regard. Mr. Artis estimated that the cost of that scope of work would be on the order of $65,000 exclusive of geotechnical engineering fees, a building permit, a week or so of living-out allowance while the work was underway, and HST. Mr. Artis testified that $2,000 would be a reasonable prediction of the geotechnical fees.

[195] In my opinion, a reasonable global assessment of the cost of repairing Ms. Gordon's house in the manner recommended by Mr. Artis is $80,000. This would include an amount for periodic monitoring of the foundation and for any further cosmetic repairs that may be necessary in the future.

[196] The next issue under this head of loss is whether Ms. Gordon's damages for the repair of the house should be fixed at $80,000 *simpliciter* or whether her loss is the difference between what she paid for the house in 2006 and whatever its actual value was given the settlement and the damaged foundation. The law on this point is clear: proper methodology to employ in this case is the latter, i.e.: the diminution of

value due to defect as of the date of loss: *Wiebe v. Gunderson*, 2004 BCCA 456 at para. 24.

[197] Ms. Gordon did not present evidence of the 2006 fair market value of the house with the settlement and the broken foundation. The defendants did adduce such evidence by way of a report by the real estate appraiser Mr. Beatty. In his report, Mr. Beatty opined that absent settlement problems, in 2006 the fair market value of the house would have been $405,000. He testified that a willing purchaser would require that the price of the house be reduced by the cost of remedying the settlement problems and that the same purchaser would require a further discount of 10% to take into account the stigma and uncertainties inherent in the purchase of a damaged asset like this house. I accept that evidence.

[198] I have come to the conclusion, then, that the proper measure of Ms. Gordon's damages relating to the house itself is as follows:

Fair market value in 2006		$405,000
Less cost of repair		$ 80,000
	Sub-total	$325,000
Less 10% for stigma		$ 32,500
	Sub-total	$292,500

The difference between the price that Ms. Gordon paid for the house and its true fair market value is $67,500. Ms. Gordon's loss is, therefore, $67,500.

Loss of Opportunity to Earn Income/Loss of Earning Capacity

[199] Ms. Gordon complains that she has suffered a past loss of opportunity to earn income and a loss of her capacity to earn income in the future as a result of her troubles with the Cerise Drive house. There are two difficulties with those claims. The first difficulty is that since the accident Ms. Gordon has actually earned more money working for a wage than she has ever earned making her ceramic art. Ms. Gordon's income has not diminished, it has increased. Ms. Gordon's true

complaint here appears to be that her disposable income, i.e.: the amount of money available to her to support her lifestyle, has decreased. The reason that her disposable income has decreased is because she has used her savings and has borrowed money to fund this lawsuit and she has to pay interest on those borrowings, thus leaving her with very little left over to buy the necessities of life. Her claim is not, therefore, for loss of income, but for diminution of her lifestyle. To the extent that such a loss is compensable, the award for it lies in non-pecuniary damages.

[200] The second problem with Ms. Gordon`s claims for loss of opportunity and loss of capacity to earn income is that the defendants` showed that Ms. Gordon has not acted reasonably to mitigate her damages. As noted earlier, in March 2007 Ms. Gordon had the money and the desire to convert her attached garage into a studio. She abandoned that project when Mr. Budd advised her that some of the renovations might have to be removed and replaced if it turned out that the garage needed repairs due to settlement. However, a roughed in studio could have been constructed in the garage for several thousand dollars less than a full-on conversion. A roughed in studio would have nevertheless been functional and would have allowed Ms. Gordon to carry on with her art work. A reasonable person in Ms. Gordon`s position, assuming that she was genuine and motivated in her desire to work as an artisan, would have gone ahead with the roughed in renovation. With roughed in studio, Ms. Gordon would have been able to keep up her production. Had Ms. Gordon taken that step and all other things being equal, there is no reason to conclude that she would have earned any less money from her art than she would have had the house not had settlement problems.

[201] There is a third problem with Ms. Gordon`s claim, but that problem applies only to her claim for loss of earning capacity. The problem is that no evidence at trial suggested that for reasons directly attributable to the house Ms. Gordon’s capacity to work as an artisan has been diminished. Aside from her decision to not construct a studio in her garage, the only evidence that went to Ms. Gordon’s capacity to work as an artisan in the future related to repetitive strain injuries she has suffered to her

wrists and forearms since 2006. Ms. Gordon made no claim for those injuries themselves, and, because they are not compensable, no loss consequent to them can be compensable.

Loss of Rents

[202] Ms. Gordon says that she had to move her ceramic supplies and production equipment into her home after her lease at the art centre expired. She stored those materials in the middle bedroom. Ms. Gordon had been renting that bedroom for $500 per month. She lost that rent income when her ceramic supplies moved in and the room's tenant moved out. Ms. Gordon claims $500 per month from September 2007 forward.

[203] Had Ms. Gordon acted reasonably by renovating her garage into a roughed in studio, she would have been free to continue to rent the middle bedroom to tenants. Ms. Gordon's failure to mitigate her loss by building a temporary studio led to her not collecting rent on the middle bedroom.

Loss of Tax Benefits

[204] Ms. Gordon's complaint here is that had she set up her ceramic business in her home as she planned in September 2007 she would have had the benefit of deducting a portion of her housing expenses against her art income. Had Ms. Gordon constructed her studio and carried on with her work as an artisan she would have been able to claim deductions some of her housing expenses. Because Ms. Gordon did not mitigate her loss by carrying on with her business in a roughed in studio, she can have no claim for the loss of the value of those deductions.

Cost of Borrowing

[205] Ms. Gordon claims the interest she has paid on loans she has taken out in order to fund legal fees and disbursements for this litigation and to meet some of her everyday expenses. The difficulty with this claim is, firstly, that Ms. Gordon's living expenses are not items of loss in this case; secondly, as a matter of law Ms. Gordon's legal fees are not recoverable as damages and so neither should

interest incurred on borrowings to pay those fees be recoverable as a head of loss; and, thirdly, it will be for a registrar on an assessment of a bill of costs to determine whether interest on fees or disbursements is recoverable.

Third Party Claims

[206] William and Kathleen Krieg and Wolfram Krieg are not liable to Ms. Gordon. They do not have to pay damages to Ms. Gordon and they do not, therefore, have a need to claim indemnity or contribution from other parties or as between themselves. The third party notices that the Kriegs and Wolfram Krieg and his brokerage issued to other parties must be dismissed. In the event that the parties to those notices are not able to resolve costs between themselves, they may make an application for an order determining costs.

[207] Similarly, third party notices issued by PTP against the Kriegs and Wolfram Krieg and his brokerage must be dismissed. Again, the parties to those notices may apply for an order determining costs between them if they cannot agree on that issue.

[208] PTP issued a third party notice against Interior Testing Services Ltd. seeking contribution, citing failures in Interior Testing's prescription to stabilize the Cerise Drive lot. As I noted earlier, the geotechnical engineer Mr. Smith testified that the three methods proposed by Mr. Williams of Interior Testing were reasonable in light of what was known about the lot at the time. According to Mr. Williams' notes, the area on which the foundation was placed was excavated one foot deeper than Mr. Williams recommended and that in other respects the lot was prepared for construction as he recommended. There was no evidence at trial that Mr. Williams' advice departed from the generally accepted geotechnical engineering standards in effect at the time. I cannot say that Mr. Williams or Interior Testing breached their duty to take reasonable care in prescribing methods by which the foundation of the house could be stabilized. Further, I find that the fact that the house did settle is as consistent with faulty installation of roof drains as with poor soil preparation. For those reasons I cannot give effect to PTP's third party notice to Interior Testing.

[209] PTP also sought declarations that non-parties including Ms. Tremeer, the City of Kelowna, Wyatt Homes, Knorr Homes and Eugene Knorr bear responsibility for Ms. Gordon's loss. I cannot find that Ms. Tremeer is liable to Ms. Gordon for the same reason that Wolfram Krieg is not liable to her: the slope of the floors in the house was a patent defect to which Ms. Gordon simply failed to give heed.

[210] As for the City of Kelowna, there was no evidence at trial that could implicate the City in a claim for negligent issuance of a building permit or inspection. I think that it is more likely than not that the placement of the rain downspouts around the perimeter of the building caused or largely contributed to its settlement, but I have no evidence of who, exactly, it was that installed those downspouts. There is not enough evidence before me to declare that Knorr Homes or Wyatt Homes (if that entity actually built the house) is liable for the placement of the downspouts.

Conclusion

[211] The plaintiff's claims against William and Kathleen, Wolfram Krieg and his broker must be dismissed. Those parties are entitled to their costs against Ms. Gordon on Scale B.

[212] The plaintiff's claim against Mr. Hostland is dismissed. Mr. Hostland is entitled to his costs on Scale B.

[213] The third party claims are dismissed with cost to be agreed or determined upon application.

[214] The plaintiff is entitled to judgment against PTP and Mr. Kirby. The amount of that judgment is limited to 75% of $408 plus court order interest.

[215] Ms. Gordon's recovery is within the monetary jurisdiction of the small claims court. Subject to any application she may make respecting the application of Rule 14-1(10), Ms. Gordon is entitled to recover her disbursements but not her costs from PTP.

[216] Finally, the parties are at liberty to make applications concerning the cost consequences of any pre-trial settlement offers that were made between them.

"P.J. Rogers J."
The Honourable Mr. Justice P.J. Rogers