

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Flood v. Pateman*,  
2023 BCSC 891

Date: 20230530  
Docket: S200335  
Registry: Vancouver

Between:

**Deborah Flood**

Plaintiff

And

**Holly Dawn Pateman and Brian Christopher Gottmers**

Defendants

Before: The Honourable Justice Wilson

## Reasons for Judgment

The Plaintiff on her own behalf:	D. Flood
Counsel for the Plaintiff on April 24 - 25, 2023:	M. Colwell
Counsel for the Plaintiff on April 26, 2023:	T. Hoogstraten
Counsel for the Plaintiff on April 27, 2023:	W. Simek
Counsel for the Plaintiff on April 28, 2023:	J. Trueman
Counsel for the Defendants:	V. Rasidagic P. Onyema
Place and Date of Trial/Hearing:	Vancouver, B.C. April 24 – 28, 2023 May 2, 2023
Place and Date of Judgment:	Vancouver, B.C. May 30, 2023

[1] This case is about whether the sellers of a condominium unit failed to disclose to the purchaser that the unit was infested with silverfish.

**Background**

[2] In early 2018, the plaintiff, Deborah Flood, a lawyer who had moved from Ireland in 2010, wanted to buy her first home. She had saved up approximately \$70,000 for a down payment. She was looking for a larger two-bedroom unit, and while she concluded that she was unable to afford one in some areas of Vancouver, she determined that a suitable purchase could be arranged in the Lonsdale area of North Vancouver.

[3] The defendants owned and resided in a two-bedroom condominium located at #309 – 150 5th Street in North Vancouver. They had lived in their unit for approximately 12 years when they decided to sell and move to a larger home. They had resided in the unit from August 2006 when they listed it for sale in March 2018. Their two children had grown up in the property, and were ages nine and 11 when the family moved.

[4] The defendants listed the unit for sale with a realtor. As part of the process to list the property for sale, the defendants completed a Property Disclosure Statement, known as a PDS, on March 19, 2018. The relevant portions of the PDS for this case were the following:

THE SELLER IS RESPONSIBLE for the accuracy of the answers on this property disclosure statement and where uncertain should reply “Do Not Know”. This property disclosure statement constitutes a representation under any Contract of Purchase and Sale if so agreed, in writing, by the seller and the buyer. “Unit” is defined as the living space, including related limited common property, being purchased. “Common Property” includes buildings or spaces accessible to all owners. “Lands” is defined as the land upon which the Unit, all other strata lots and Common Property are constructed. “Development” is defined as the Lands, the Unit and all other strata lots and Common Property.

. . .

3.1 Are you aware of any infestation or unrepaired damage by insects or rodents?

[5] The defendants answered “No” to the question.

[6] Paragraph 4.B of the PDS states the following:

4.B Are you aware of any material latent defect as defined in Real Estate Council of British Columbia Rule 5-13(1)(a)(i) or Rule 5-13(1)(a)(ii) in respect of the Property or Unit?

[7] The form then goes on to define latent defects as follows:

For the purposes of Clause 4.B of this form, Council Rule 5-13(1)(a)(i) and (ii) is set out below.

**5-13 Disclosure of latent defects**

(1) *For the purposes of this section:*

*Material latent defect means a material defect that cannot be discerned through a reasonable inspection of the property, including any of the following:*

*(a) a defect that renders the real estate*

*(i) dangerous or potentially dangerous to the occupants*

*(ii) unfit for habitation.*

[8] The defendants also answered “No” to this question.

[9] The plaintiff viewed the unit with her realtor. She found it suitable for her needs, and it was within her budget. She made an offer for \$615,000, which offer was countered by the defendants at \$620,000, which the plaintiff accepted. It was the only unit she viewed, and she only viewed it on the one occasion before making her offer to purchase. She did not have the property inspected prior to removing subjects. She did review two years of strata minutes, and her inquiries were answered to her satisfaction.

[10] The PDS was incorporated into the contract of purchase and sale, which was dated April 8, 2018.

[11] The plaintiff moved in on July 1, 2018, and she noted silverfish in the apartment almost immediately. The plaintiff was concerned, and she contacted the building manager, Mr. Mike Britten. She requested that the unit be fumigated, which was done on October 16, 2018. This kept the silverfish away for a brief period, but it

was not long before they returned. The plaintiff requested a second fumigation, which was done in December 2018. Once again, there was a brief respite, but the silverfish returned.

[12] The plaintiff noticed silverfish in various places in the unit: in the kitchen, living room, cupboards, dining room, and bathroom, but most importantly in the master bedroom and on three occasions, in her bed.

[13] When the silverfish returned after the second fumigation, she contacted the seller, Mr. Gottmers, by text. She asked him what he did to get rid of the silverfish. His text response was as follows:

No. unfortunately, silverfish were something we lived with too. Other than doing a complete [fumigation], the one thing I found best was to dust and clean around the baseboards – when we stayed on top of that, we did see a lot less of them. Dust is basically what they eat. The other reality is that they are probably all over the building, especially with the age of the bldg., so fumigating your unit may keep them (and all other bugs) dying for as long as the pesticide lasts but won't be forever. Our house is close to the same age and we've seen a few here too.

[14] The plaintiff requested of the property manager, Mr. Britten, that the entire building be fumigated. From what she was able to ascertain, fumigation of her unit alone would take care of the insects in the immediate vicinity but only for a very brief period. Because they likely existed throughout the entire building, it was only a matter of time before they would return.

[15] The plaintiff's request to have the entire building fumigated was denied. According to the building manager Mr. Britten, no one else was complaining and some people had concerns about spraying toxins around the building.

[16] On February 18 or 19, 2019, the plaintiff found, for the third time, a silverfish in her bed. She went to sleep on the couch but decided that she could no longer tolerate living in the unit. She listed it for sale and moved out in the meantime, staying with friends and then renting, until the unit sold.

[17] Ms. Flood initially listed the unit for a price of \$685,000. There were multiple open houses, and she was able to sell the unit for \$600,000, which was \$20,000 less than she had paid the year before.

[18] The plaintiff's claim is that the defendants were obligated to disclose an infestation of silverfish to her. She argues they were specifically obligated to respond "yes" to question 3.I on the PDS, and also that the infestation constituted a material latent defect, and should have been disclosed as such. She says the contents of the PDS are both a misrepresentation and a breach of the contract of purchase and sale, because the PDS was incorporated into the contract.

[19] As for her damages, the plaintiff claims for the loss she suffered upon sale, and seeks reimbursement of money she spent on the apartment. To make the unit more to her taste and style, she had the unit painted, had some electrical work done, and furnished it. She also claims for moving expenses, rental expenses after she moved out but before she was able to sell, loss of opportunity for her missing out on other real estate purchasing opportunities, and damages for her enjoyment and mental health concerns.

[20] For the reasons that follow, I conclude there was no infestation of silverfish in the unit when the defendants completed the PDS on March 19, 2018; that the defendants answered the questions in the PDS honestly; and that the plaintiff's claim must be dismissed.

### **What are silverfish?**

[21] Silverfish are wingless insects, approximately 12 to 19 millimetres in length, not counting their three bristle-like or tail-like appendages at the rear end of their bodies. They have a carrot-shaped or fish-shaped body and are silver or grey in colour.

[22] Silverfish are nocturnal, and generally hide in tight cracks or crevices during the daytime. They can be found almost anywhere in houses, and will often infest commercial structures such as offices, stores and libraries. They can roam quite

significant distances while searching for food and can survive for weeks without food or water. Silverfish are good climbers. They are routinely found in damp, humid, moist climates, which is why they are so prevalent in the Vancouver area. Although some people believe they come into a home through the drain system, this is not correct. Rather, they will go down a drain to the trap in search of water.

[23] Silverfish do not cause damage to structures, nor do they spread disease.

### **Legal Framework**

[24] The relevant legal principles in this matter are well established. The BC Court of Appeal summarized the law with regard to the purchase of real estate in *Nixon v. MacIver*, 2016 BCCA 8, and confirmed that the doctrine of *caveat emptor*, or buyer beware, remains alive and well in British Columbia.

[25] The Supreme Court of Canada described *caveat emptor* in *Fraser-Reid v. Droumtsekas* (1979), [1980] 1 S.C.R. 720 at 723:

Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. In 1931, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an *uncompleted* house. The breach has since been opened a little wider in some of the states of the United States by extending the warranty to *completed* houses when the seller is the builder and the defect is latent. Otherwise, notwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, *caveat emptor* remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the *laissez-faire* attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

[26] As the Court of Appeal noted at paragraph 33 of *Nixon*, the doctrine continues to apply to real estate transactions in British Columbia, with certain exceptions:

a) fraud;

- b) non-innocent misrepresentation;
- c) implied warranty of habitability for newly-constructed homes; and
- d) a duty to disclose latent defects.

[27] A latent defect has been described as “one that is not discoverable by a purchaser through reasonable inspection inquiries”: *Nixon* at para. 34. By contrast, a patent defect is one that is obvious, and therefore there is no need for a vendor to disclose it because the purchaser can see it.

[28] In *Cardwell v. Perthen*, 2007 BCCA 313, Justice Levine summarized the distinction between latent and patent defects at paragraph 48. The Court noted that a purchaser who has no knowledge of construction matters is expected to make reasonable inquiries because it is possible that they may not appreciate the significance of features that are readily observed. In such cases, there is no obligation on the part of the vendor to educate the purchaser:

[48] The appellants’ interpretation of the trial judge’s articulation of the test for distinguishing patent and latent defects results from taking the phrase in which she refers to “a qualified person” out of context. In the context in which she uses that phrase, there can be no objection. The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser’s obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility – and liability – on the vendor to bring those things to his or her attention.

[29] In *Nixon*, the Court of Appeal summarized the law with respect to *caveat emptor* and the vendor's obligation to disclose:

[47] In summary, the doctrine of *caveat emptor* remains very much alive in the context of real estate transactions in BC: *Fraser-Reid*; *Cardwell CA*; *Wescan CA*. In general, purchasers bear the risk of defects in the quality of a property. Liability for this risk may shift to the vendor where there is established: (i) a breach of contract; (ii) active concealment (i.e., fraud);

(iii) non-innocent misrepresentation; or (iv) an implied warranty of habitability in the case of newly-constructed homes. Liability for this risk may also shift where latent defects are established that render a property dangerous or uninhabitable. In short, a vendor has a common law duty to disclose: (i) a latent defect that is not discoverable through a reasonable inspection or through reasonable inquiries; and (ii) the latent defect renders the property dangerous or unfit for habitation. If a defect does not render a property dangerous or uninhabitable, *caveat emptor* applies regardless of whether the defect in question is patent or latent.

[30] In this case, as was also the case in *Nixon*, there is a property disclosure statement (“PDS”), also formerly referred to as a property condition disclosure statement (“PCDS”). The Court of Appeal summarized the obligations of a vendor who completes a property disclosure statement in *Nixon*:

[48] Information contained in a disclosure statement that is incorporated into a contract of purchase and sale may be a representation upon which a purchaser can rely: *Ward v. Smith*, 2001 BCSC 1366 at para. 31. However, a vendor is only obliged to disclose his or her current actual knowledge of the state of affairs of the property to the extent promised in the disclosure statement and need say “no more than that he or she is or is not aware of problems”: *Arsenault v. Pederson*, [1996] B.C.J. 1026 (QL) (S.C.) at para. 12. In other words, the vendor must correctly and honestly disclose his or her actual knowledge, but that knowledge does not have to be correct. . . .

[31] The Court of Appeal then went on to summarize the limitations on the obligations of a vendor:

[48] . . . A vendor is not required to warrant a certain state of affairs but only to put prospective purchasers on notice of any current known problems. The purpose of a disclosure statement is to identify any problems or concerns with the property, not to give detailed comments in answer to the questions posed. See *Anderson v. Kibzey*, [1996] B.C.J. No. 3008 (QL) (S.C.) at paras. 13–14; *Zaenker v. Kirk* (1999), 30 R.P.R. (3d) 9 (B.C.S.C.) at para. 19; *Kiraly v. Fuchs*, 2009 BCSC 654 at paras. 47, 49; and *Roberts v. Hutton*, 2013 BCSC 640 at para. 83.

[32] Of course, it is always open to purchasers to include additional representations and warranties in their offers. Whether a vendor is prepared to accept those additional terms and conditions would be a matter of negotiation between the parties. Absent any such additional contractual provisions, the vendor's obligations are as set out above at para. 48 of *Nixon*, should a PDS be delivered and incorporated into the contract of purchase and sale.



[33] One final principle that can be taken from *Nixon*, found at paragraph 50, is that by completing a PDS, a vendor is only representing that the information therein is true as of the date of the statement. There is no positive obligation on the part of a vendor to disclose additional information that may be relevant or of interest to a purchaser unless that information is responsive to one of the specific questions in the PDS, provided the additional information does not render the property dangerous or uninhabitable:

[50] Here the PCDS only promised that the information provided is true based on Ms. Maclver's current actual knowledge as of the date of the statement. Given that language, there was no positive obligation on the vendor to disclose information that may be relevant to a purchaser if that information was not directly responsive to one of the specific questions in the PCDS, provided the information did not relate to a latent defect that rendered the property dangerous or unfit for habitation.

[34] I will turn now to the issues to be decided in this case.

### **The issues**

[35] The plaintiff's claim is that the defendants failed to disclose that there was a silverfish infestation in the unit, and that had she been aware of the infestation, she would not have purchased it.

[36] During her opening, the plaintiff referred to two possible misrepresentations by the defendants in the PDS. The first was their answer in the negative to paragraph 3.I: "Are you aware of any infestation or unrepaired damage by insects or rodents?". The second was their answer, also in the negative, to paragraph 4.B, as to whether they were aware of any latent defects.

[37] At the conclusion of the trial, the plaintiff agreed that it was not necessary for her to rely on paragraph 4.B regarding latent defects. This makes sense, because either there was an infestation of silverfish that the defendants were obligated to disclose, or there was not. The plaintiff's only complaint was with regard to silverfish, and if they were not present so as to be an infestation, they could not constitute a latent defect.

[38] There are therefore two issues to be determined on the question of liability:

- a) Was the defendants' representation that they were not aware of an infestation by insects (silverfish) untrue; and
- b) If so, did the defendants make the representation negligently?

[39] In order for the representation to be untrue, the plaintiff would first need to prove that there was in fact an infestation in the unit or in the building. Only if the existence of an infestation has been proven does the question turn to whether the defendants knew of the infestation, or alternatively that they acted negligently when they completed the PDS.

[40] As the Court of Appeal held in *Nixon*, the obligation on the defendants was to answer the question honestly; it is insufficient if it is subsequently determined that they were incorrect, provided that they answered honestly.

[41] The plaintiff's claim is framed in negligent misrepresentation based on the provisions of the PDS. In *R. v. Cognos Inc.*, [1993] 1 S.C.R. 87 [*Cognos*] at 110, the five elements are:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. . . .

[42] In this case, it is not disputed that the relationship between the parties would constitute a "special relationship" as referred to in *Cognos*. Similarly, the plaintiff's incontrovertible evidence is that she relied on the PDS when making her decision to purchase as evidenced by the fact that it was incorporated into the contract of purchase and sale, and that damages resulted. The focus of this case is on items 2 and 3 in the passage quoted above:

- a) whether the defendants made representations that were untrue, inaccurate or misleading; and
- b) whether the defendants made those representations negligently.

[43] The wording of paragraph 3.I of the PDS incorporates both parts two and three of the *Cognos* test for misrepresentation—that is, the representation must be untrue, and the party making the representation must have acted negligently in making it.

[44] The plaintiff's case is in large part circumstantial. The plaintiff says that her experiences with silverfish in the unit are such that it is inconceivable, or at least improbable, that the defendants' experiences could have been much different. The plaintiff's two roommates corroborated the plaintiff's evidence on this point. She also argues that Mr. Gottmers' text message, in which he refers to the defendants having "lived with silverfish", is tantamount to an admission of a problem and that the silverfish issue should therefore have been disclosed to her in advance so that she could make an informed decision as to whether to proceed with her purchase.

[45] Both parties called expert witnesses from the real estate industry with regard to the use of property disclosure statements. The plaintiff called Mr. Tom Garvey, an experienced real estate professional who has significant background in teaching realtors and working on the regulatory side of the real estate industry. The defendants called Mr. Bill Binnie, a managing broker with significant experience in real estate transactions who has previously been qualified as an expert witness. Mr. Binnie provided a rebuttal report.

[46] I did not find the reports from the real estate experts to be helpful in this case. Mr. Garvey's report focused on the expectations and requirements of realtors in the preparation and completion of a PDS. However, the sole issue before the Court was whether the defendants were honest and truthful when they completed their PDS. Neither party made any claims against either of the realtors involved in the transaction, so their advice to their respective clients was irrelevant.

[47] The question of whether the defendants were honest and forthright when completing their PDS is a factual matter that is within the scope of the Court's understanding. As such, expert evidence was not truly required, and the general information about property disclosure statements provided was not especially helpful.

[48] Sellers complete the PDS by providing answers to questions written in plain language. A person completing a PDS is not required to retain and consult lawyers, engineers, trades professionals, or indeed entomologists, in order to acquire some elevated level of knowledge or expertise on every topic covered by a PDS. Under the doctrine of *caveat emptor*, it is incumbent upon the purchaser to make additional inquiries and conduct such additional investigations as they may deem fit in order to satisfy themselves of what they are going to buy, subject to the exceptions summarized in the case law above such as latent defects or active concealment.

[49] I turn now to the issue in this case, which is whether the defendants were acting honestly when they completed the PDS, and specifically when they responded in the negative to question 3.I as to whether they were aware of an infestation by insects.

[50] Several witnesses testified with regard to their experiences with silverfish in the unit, and in the building generally. Before considering the question of what constitutes an infestation and the critical question in this case, which is whether the defendants completed the PDS honestly, I will review the evidence of the various witnesses who spoke to their firsthand knowledge regarding silverfish.

**The evidence regarding silverfish**

**Deborah Flood**

[51] The plaintiff moved in on July 1, 2018, and she noted silverfish in the apartment almost immediately. In early August, she started making notes of the silverfish she saw in the night for the purposes of monitoring the numbers and

seeing where they were coming from. She also took photographs of them. Her notes and her photographs were in evidence.

[52] The notes do not indicate silverfish sightings every day. On some of the days, she saw one, but on other days she saw more than one. Similarly, the photographs show only one silverfish on some days, but more than one on other days. The plaintiff did not make a note of every time she saw a silverfish in the unit. She said she did always have a pen and notepad around to record her sightings, and she did not want to focus on them as focusing on them was making her anxious.

[53] Between July and October 2018, Ms. Flood saw silverfish in every room of the unit, except for the second bedroom which she never entered because it was rented. She saw them on ceilings, on the floors, and even in a fruit bowl with apples. Whenever she saw a silverfish she would kill it.

[54] She found a silverfish in her bed for the third time on February 19, 2019, after there had already been two fumigations of her unit, in October and December 2018. Ms. Flood moved out and took steps to list the unit for sale.

### **Nina Downie**

[55] Ms. Nina Downie rented a room from the plaintiff for approximately six weeks. The two had been friends for some time.

[56] Ms. Downie lived in Squamish but worked for a firm based in North Vancouver. She was in the process of moving and needed a place to live so she could physically attend work in North Vancouver during the week. She moved into the unit in approximately August 2018.

[57] Ms. Downie testified that she saw silverfish in most areas of the house: her bedroom, the hallway, living room, bathroom and kitchen.

[58] She saw silverfish daily, and often observed multiple silverfish in a day. She recalled seeing them from when she moved in, and the frequency of sightings did not change. She sent an email that confirmed her observations after the fact, which

was that she saw between one and five silverfish per day, primarily in the second bedroom and the living and bathroom areas. She disposed of any she saw.

[59] Although she had encountered silverfish in previous residences, she noted that she saw more in the plaintiff's unit than in any of her previous residences.

**Emma Davis**

[60] Ms. Davis was also a roommate of the plaintiff's. Ms. Davis had previously lived with the plaintiff in a home in Kitsilano, where she saw silverfish, but rarely.

[61] Ms. Davis moved in with the plaintiff because the unit was more spacious than her previous residence, and they had previously enjoyed living together. Although Ms. Davis moved some of her belongings into the unit in approximately July 2018, she then went on a three-month trip and did not physically move in until November 2018.

[62] Ms. Davis described seeing silverfish in the apartment, and noted more than in any other apartment she had occupied. She saw multiple silverfish on multiple days of the week. She described seeing two or three silverfish, five days a week. She would see them in the bathroom, kitchen, hallway and both bedrooms. She also found one in her bed in January 2019.

[63] Even though the plaintiff moved out of the unit in February 2019, Ms. Davis chose to remain there until the summer. As such, although the plaintiff considered that the silverfish rendered the unit uninhabitable, Ms. Davis clearly did not.

**Brian Gottmers**

[64] The defendant Brian Gottmers testified that he and his family had no problems with silverfish. He would see them sporadically, never more than two at once. He would kill them when he saw them but he did not see them regularly. He did not see them every day, and perhaps not every month. He testified that he saw silverfish less frequently than other bugs such as daddy long legs and fruit flies.

[65] He described silverfish sightings as insignificant and infrequent. He could not say whether or not the quantities of silverfish fluctuated because he did not see them very often. There were never any pest-control treatments relating to silverfish, either for the building or for their unit.

[66] Mr. Gottmers explained his text message in response to Ms. Flood's inquiry about how he dealt with the silverfish. He said he was trying to be helpful, and that his reference to fumigation was not a recommendation but rather a suggestion of how one might resolve the problem. He himself had never fumigated this apartment, although he had previously lived in an apartment that was fumigated for fleas.

[67] When he said that they “lived with” silverfish, he was referring to the fact that they were around and, like other bugs, presumably lived in the building. He denied that he was conceding that silverfish were a constant presence in the unit.

[68] Further, his suggestions with regard to cleaning related to bugs generally, and silverfish were never more of a problem than any other kind of bug. He was not equating dusting the baseboards with silverfish control.

[69] Mr. Gottmers was on the strata council for the majority of his time residing in the unit, and there were never any resident complaints regarding silverfish.

### **Holly Pateman**

[70] The defendant Holly Pateman recalls no problems with silverfish during the years she lived in the unit. She saw them from time to time, primarily in the bathroom. She did not see one every day nor did she see one every month. Daddy long legs and spiders were at least as frequent as silverfish, and she does not recall ever seeing more than one silverfish at a time.

[71] She would kill the silverfish if she saw them, much as she would with any other bug. There was never any need for a pest treatment. She described herself as someone who does not like bugs in general and could not reside in a property that was infested with bugs.

[72] She did most of the cleaning in the home, and as such does not agree with the contents of Mr. Gottmers' text to Ms. Flood, which says that dusting the baseboards would control the silverfish. She said she did all the cleaning and that silverfish control was never the reason she cleaned around the baseboards. She also would not have used the term "lived with" the silverfish.

[73] She has no knowledge of silverfish having been throughout the building and has no recollection of ever seeing a silverfish in the common areas. She agreed that she would prefer to live in an environment that was free of bugs and silverfish, but this was simply not realistic and bugs are a fact of life, including in older buildings.

[74] She said her sightings of silverfish were limited to occasionally in the bathroom and less frequently in the kitchen. If it were a concern to her, she would never have remained in the unit with her infant children for so many years.

#### **Warren Oneschuk**

[75] A long-time resident of the building, Mr. Warren Oneschuk, testified. His unit is on the same floor but at the opposite end of the building from the subject property. He has lived there for 31 years and has been on the strata council for 24 or 25 years, including in March 2018.

[76] The strata council treated the common areas for silverfish in the late 1990s. Since the defendants moved into the building in 2006, the plaintiff is the only person who has complained about silverfish in the building. Mr. Oneschuk is not aware of any problems with silverfish in the building.

[77] He sees silverfish as a nuisance. He sees one or two silverfish every six to eight weeks and he kills them. There have been other pests in the building such as mice, squirrels, rats and wasps that have required action in more recent times, but not silverfish.



**Brent Hillier**

[78] Mr. Brent Hillier purchased the unit from the plaintiff in August 2019. He had no direct communications with Ms. Flood, and all communications were through the realtors.

[79] He had the property professionally inspected before purchasing. His property inspection looked at everything, including the appliances and the building structure, as well as spending time in the unit. The document referenced looking for infestations of insects and found nothing. The inspection report was not in evidence.

[80] His realtor made an inquiry about silverfish because of the disclosure on the PDS provided by the plaintiff. Although he finds silverfish creepy, he knows they are not a concern.

[81] After he moved in with his wife, they would see a silverfish perhaps once a week. They would squash it and throw it out, and could go a week without seeing any. They have also gone a month or two without seeing silverfish. He considers them a minor nuisance, but no different from a fly or a mosquito. He does not think there was an infestation.

[82] Mr. Hillier and his wife would make each other take turns killing the silverfish whenever they were seen, which gives some credence to the frequency of silverfish sightings. However, it must be kept in mind that because silverfish were disclosed on the PDS, Mr. Hillier would have been alive to the potential issue and therefore more likely to notice silverfish than others might have been.

**Were the defendants obligated to disclose a silverfish infestation on the PDS?**

[83] Both parties called expert witnesses from the pest control industry to testify at the trial. The plaintiff's witness was Mr. Nicholas Holland, the principal of Peregrine Pest Control in Calgary. He was the President of the Canadian Pest Management Association, and has served twice as the President of the Pest Management Association of Alberta. Mr. Holland provided an expert report dated January 23, 2018.

[84] Mr. Holland was qualified as an expert in the description, characteristics and nature of silverfish for the purpose of pest control; the treatment of silverfish in a building for the purpose of pest control; and determinations of when silverfish are an infestation in a property.

[85] The defendants' similarly qualified expert witness was Mr. Robert Stobbe, who operates a pest control business in North Vancouver known as the Pest Maven. Mr. Stobbe provided a rebuttal report to Mr. Holland's report, dated March 7, 2023. Mr. Stobbe was qualified as an expert for the nature of silverfish; the determination of whether silverfish constitute an infestation; and the treatment of silverfish in residential areas for pest control.

[86] Mr. Holland's evidence was that if silverfish are seen in dry, brightly lit areas and return after the unit was treated, this would be indicative of an infestation. For his part, Mr. Stobbe's opinion was that diurnal sightings post-treatment may be associated with the dying process, and that an increase in sightings is therefore not unusual following a treatment with a pesticide. He said it is not possible to determine the severity of a silverfish problem without having been on site.

[87] Mr. Stobbe's view was that silverfish are routinely found in North Vancouver. He describes silverfish as a nuisance pest because they do not generally cause harm and are not a vector for disease.

[88] Although both parties urged that their expert's opinions be preferred over the other, I found that their evidence regarding silverfish did not differ materially.

[89] The presence of silverfish in a dwelling is generally seen as being indicative of a problem, rather than a problem in and of itself. For instance, the presence of silverfish could indicate moisture given that silverfish are attracted to moisture. Silverfish are not inherently dangerous but rather are unsightly and unpleasant to have around from an aesthetic perspective. Both Mr. Holland and Mr. Stobbe were of the view that from a pest control perspective, the question of what constitutes an infestation is largely a subjective one. In his report, Mr. Holland stated the following:

8. **If you are seeing silverfish regularly, could it indicate that silverfish has been present in a unit for months or years?**
- A. In my opinion, When you see silverfish regularly this means you have an infestation. There are a number of parts to this. First what is the threshold limit? Each of us are individuals, one person's threshold limit could be one insect and the next person's threshold limit could be 100 insects. The second part is what is the economic damage? Once either of these two things have been exceeded then you have an infestation. When insects are present even in large numbers while you can presume it's been going on for an extended period of time there is no way of knowing the answer to this. Just because one unit has the most amount of insects in it doesn't mean it is ground zero. The way you would know the answer to this question is by setting up a regular monitoring program and document your findings over the course of months/years.

[90] As such, it would appear from Mr. Holland's report that for one person a single insect may constitute an infestation, whereas for another, even 100 insects may not. Mr. Stobbe's evidence was similar. He stated that silverfish are primarily a nuisance and a client's threshold for the presence of silverfish depends on personal tolerances. He described silverfish as triggering a gamut of emotions in clients, "from one sighting being a traumatic event to several sightings being a nonissue".

[91] What I infer from these opinions on the part of the pest control experts is that pest control companies are called in to provide services when a client has made the personal decision that he or she cannot tolerate the quantity of the particular insect that they are seeing. To those individuals, the number of insects seen, be it large or small, constitutes an infestation.

[92] However, to provide the word with such a subjective interpretation would render it meaningless in the context of a property disclosure statement. A PDS is intended to be provided to a prospective purchaser to enable them to make an informed purchasing decision. The PDS is generally completed by the sellers at the time the property is listed. The purpose of the PDS is to inform a prospective purchaser of certain aspects of the property, but its timing is such that the personal characteristics, preferences and tolerances of the purchaser are unknown as no purchaser has yet been identified. The word infestation must be given an objective interpretation in order for it to be meaningful in the context of the PDS.

[93] In *Lamontagne v. Anderson*, 2005 BCSC 343, Justice Bouck concluded that the defendant's answer on a property condition disclosure statement was not a negligent misrepresentation, and that "infestation" should be given its ordinary dictionary meaning. The Court stated as follows:

[52] Did the defendants negligently misrepresent the structural problems? To prove negligent misrepresentation, the plaintiff must show that the defendants made the comments in the Disclosure Statement carelessly or without reasonable grounds for believing them to be true.

[53] In other words, did the defendants have reasonable grounds to believe that the insects and the water damage to the two log ends in the southeast and northeast corners were affecting the structure of the house? It seems to me they did not. The Shorter Oxford Dictionary at page 1066, defines the word "infest" as:

To trouble (a country or place) with hostile attacks; to visit persistently or in large numbers (or even singly) with evil intent; to swarm in or about, so as to be troublesome.

The word "infestation" means:

The action of infesting: now used esp. of insects which attack plants, grain, etc. usually in large swarms. Also an attack or assault of this kind.

[94] The *Concise Oxford English Dictionary*, 12th Edition, defines "infest" as follows:

Infest v. (of insects or organisms) be present in large numbers, typically so as to cause damage or disease.

[95] I do not accept Mr. Holland's conclusion that there was an infestation when the defendants signed the PDS on March 19, 2018. His opinion employed a subjective interpretation of the term 'infestation'. It was also premised on the assumption that the number of silverfish in the unit in March 2018 was the same as when the plaintiff resided there. However, he admitted that the quantity of silverfish can fluctuate, and it is impossible to determine numbers at any particular time without some sort of ongoing monitoring. Even if there were an infestation during the plaintiff's occupancy, and I make no such finding, it does not necessarily follow that the unit was infested when the PDS was signed.

[96] Mr. Holland was asked to assume that the defendants 'lived with silverfish' from 2006 to 2018, but the phrase was undefined and the fact that his definition of 'infestation' is subjective renders his opinion on the question of little value.

[97] I find that there was no infestation of the unit by silverfish in March 2018. I accept the defendants' evidence that they saw silverfish sporadically, and that they were not a problem for the defendants while they resided in the unit. While silverfish were present from time to time, they were never present in sufficiently large numbers to constitute an infestation.

[98] Of significance in this case is the evidence of Mr. Hillier, who purchased the unit from the plaintiff. Mr. Hillier's reports of silverfish sightings do not materially differ from the defendants' experiences prior to their sale to the plaintiff. I accept the evidence of Mr. Hillier, an independent witness who is not involved in this dispute.

[99] The plaintiff suggests that the reason why the silverfish sightings were less frequent after Mr. Hillier purchased the unit is that he had the benefit of the two pest control treatments in the unit while she lived there. However, that explanation is inconsistent with the evidence.

[100] According to the plaintiff, the silverfish had returned to their pre-treatment levels after the second application within approximately three weeks, which would have been in early January 2019. From the plaintiff's perspective, the problem continued to get worse and she felt she had to move out in February 2019. The evidence of Mr. Stobbe is that the chemical used to treat for silverfish has a half-life of approximately 28 days. As such, the effect of the December 2018 treatment would have worn off long before Mr. Hillier took possession in August 2019. It therefore cannot serve as an explanation for why silverfish numbers were lower when Mr. Hillier moved in.

[101] It is not necessary to make any findings as to why there were more silverfish during the plaintiff's occupation than there were both before and after. However, the evidence of Mr. Holland and Mr. Stobbe provided for a number of possibilities. A

moisture problem can attract silverfish, and if the moisture problem is solved, whether deliberately or by happenstance, the number of silverfish could decline. The removal of any food source can also reduce silverfish numbers, as can reducing humidity. Silverfish are routinely found on papers and cardboard because these are among their common food sources. Accordingly, silverfish may be brought into a property when someone moves in. There may be other explanations.

[102] I accept the plaintiff's evidence with regard to the number of silverfish she saw and I also accept the evidence of her roommates Ms. Downie and Ms. Davis. However, the evidence falls short of establishing that there was an infestation on March 19, 2018, when the defendants signed the PDS. It follows that the plaintiff has failed to prove that the defendants' representation in the PDS was false. Given that it was not false, it could not have been negligently made.

**Disposition**

[103] It follows from my conclusion that there was no infestation of silverfish in the unit and that the defendants were not untruthful when they responded in the negative to question 3.I on the PDS on March 19, 2018, which queried whether they were aware of any infestation by insects or rodents.

[104] The plaintiff's claim is therefore dismissed.

[105] The defendants would ordinarily be entitled to their costs. However, if either party wishes to speak to the issue, they may arrange to do so by contacting Supreme Court Scheduling within 21 days of these reasons.

“Wilson J.”