# KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 163**

Date: **2024 09 11**
File No.: QBG-SA-01002-2015
Judicial Centre: Saskatoon



BETWEEN:

BRADLEY CATTELL AND KELLY CATTELL

PLAINTIFFS

- and -

JACQUELINE LAZAR

DEFENDANT

**Counsel:**

| | |
|---|---|
| Jay D. Watson, K.C., and Jared B. Aumiller | for the plaintiffs |
| Curtis J. Onishenko, K.C., and Cole J. Wilson | for the defendant |

JUDGMENT
September 11, 2024

CURRIE J.

[1] Bradley Cattell and Kelly Cattell sue Jacqueline Lazar in connection with the aborted sale of their property to Ms. Lazar. They say that Ms. Lazar failed to complete her purchase of the property, and they ask judgment for $184,259.68, an amount mostly comprised of the funds that Ms. Lazar had paid toward the purchase.

[2] Ms. Lazar points to her discovery of water intrusion in the basement of the house on the closing date, and she says that the water intrusion constituted a breach of the sale contract. She alleges, as well, that in relation to water intrusion the Cattells fraudulently misrepresented the condition of the property, entitling her to rescind the contract. She counterclaims for a return of the funds that she had paid towards the purchase, being $179,259.68.

**Circumstances**

[3] The Cattells owned a property in Cedar Villa Estates in Corman Park, a rural municipality that abuts the City of Saskatoon. The property included a house and surrounding land. In 2014 the Cattells listed the property for sale through Brenda Peterson, a Saskatoon real estate agent.

[4] Ms. Lazar was introduced to the property through her real estate agent, Loretta Flaman. Ms. Lazar viewed the house and surrounding land, and she made an offer to purchase the property. The parties entered into a contract for the sale of the property (the Purchase and Sale Agreement), with conditions, on May 9, 2014.

[5] Within days of that date Ms. Lazar received from the Cattells, through the realtors, a Property Condition Disclosure Statement. The pertinent parts of the disclosure statement are clauses 3(g) and 3(h). The following sets out each of those printed questions on the disclosure statement form, with the answer that had been indicated by the Cattells by way of initialling a box labelled “yes” or “no”:

> 3(g) Are you aware of any roof leaks or moisture or water problems or unrepaired water damage in the dwellings/improvements? No.
>
> 3(h) Are you aware of any past or present flooding or drainage problems on the property? Yes.

[6] Attached to the disclosure statement was an addendum that had been prepared by Mr. Cattell. That addendum provides:

> Water issues in Cedar Villa started for some residents about 6 years ago due to the sheer volume of rain and proximity to the Chappell Marsh. The water on the left as you come in was a dry alkali bed 25 years ago. The water table has risen to the point that [it] became necessary to install a sump about 5 years ago for those backing Chappell Marsh. We had Machibroda Engineering out for a consultation to address the water table issue with our home. Our home and most others are in a very sandy soil which we knew when we built and was the reason for not installing weeping tile due to it plugging. We did find out there is a clay seam about 14 feet down

> and it creates a perched water table from the surface water penetrating downward. This water sits on the clay seam and rises creating the water table issue. To resolve any issues with the water getting into the building we installed 3 sumps. 2 run approx 7 months of the year and 1 rarely ever. The 2 that run most often and the eaves trough on the front of the building are tied into a 24" exterior sump that we had hydrovaced all the way down to the clay seam. This sump discharges to the ditch any accumulated because of its depth as well as all other water discharged into it by the interior sumps. The sumps were shut down at the end of October last year and [turned] on again at the end of begginning [sic] of April this year. As a note, those that do have weeping tile which will ultimately drain into the septic mound are overloading the mounds capacity causing premature failure. This type of system is far more efficient and moves the water away from the property. Since installation of this system we have had no further water table issues.



[7] After Ms. Lazar had received the disclosure statement and addendum, the Cattells suggested that she meet with them on the property for a walk-through. This walk-through took place in mid-May, 2014. Mr. Cattell led the walk-through of the house and of the surrounding grounds. Ms. Cattell was present for part of it. Ms. Lazar was accompanied by her life partner, Shaun Simonson.

[8] Ms. Lazar testified at trial that she had remained uncertain, having read the disclosure statement and the addendum, as to whether there had been past water intrusion in the house (as opposed to only onto the surrounding land). It was not clear to her whether the references in the addendum to "issues" were anticipated issues that were being forestalled, or issues of actual water intrusion in the house. The prospect of water intrusion, she explained in testifying, was important to her because she had concerns about air quality and potential mold.

[9] She explained that she has health issues relating to mold. When snow mold is revealed as snow melts, her throat is irritated so that she is constantly clearing her throat. The mold readily gives her infections and sometimes migraine headaches, she said. For these reasons, she testified, she was concerned about past water intrusion in the house.

[10] It was for this reason, she said at trial, that on three occasions during the walk-through she asked Mr. Cattell whether there ever had been water in the basement.

[11] On each occasion, she said, he told her that there had not ever been water in the basement. An example of such discussion occurred while they were in the basement and Mr. Cattell was pointing out the locations of the two sump pumps that were located there. Ms. Lazar testified that she thought it unusual to have more than one pump on the same level, so she asked if the Cattells ever had had water in the basement.

[12] Mr. Cattell's denial of any prior water intrusion in the house, says Ms. Lazar, satisfied her as to the condition of the house and its history, and on May 18, 2014 she signed a document removing all conditions of the sale.

[13] Closing of the sale had been scheduled for June 24, 2014, but there was a delay in connection with Ms. Lazar's mortgage financing and so the parties agreed to move the closing date to June 25, 2014.

[14] Ms. Lazar had paid a $10,000 deposit initially. On June 25, 2014 her lawyer provided to the Cattells' lawyer cash to close in the amount of $169,259.68. The balance of the purchase price was to be paid by mortgage funding – funding that would be provided on title transferring to Ms. Lazar and the mortgage security being registered against title to the property.

[15] On June 25, 2014, in the late afternoon, through her realtor Ms. Lazar received an access code for the front door of the house, and she went to the house accompanied by her daughter, Amanda. Ms. Lazar testified that on entering the house they were struck by a musty odour. They discovered, on entering the basement, that water had entered the basement. Water was underneath the flooring, as evidenced by the pressure of their feet on the flooring causing water to rise up to the surface. It

appeared also that water had wicked up drywall to a height of about one foot.

[16] There followed a series of phone calls. Those calls included Ms. Lazar reporting the situation to her lawyer and to her lender. One result of those calls was that the documentation that had been submitted to effect the transfer of title to Ms. Lazar was pulled back by her lawyer. Since title was not placed in her name, the mortgage was not registered and the mortgage funds were not advanced.

[17] In the ensuing days various steps were taken to examine the basement and to assess what had caused the water intrusion and what must be done to deal with it. Also, within a day or two of June 25, 2014, the Cattells changed the access code to the front door, so that Ms. Lazar no longer had access to the house.

[18] In the end, no resolution of the situation was reached between the parties, and the sale did not proceed. The Cattells continue to hold the $10,000 deposit, and the Cattells' lawyer continues to hold in his trust account the $169,259.68 cash to close. The Cattells relisted the property in August 2014, and they sold it to other parties in 2015.

[19] Ms. Lazar says that the water damage that she encountered on June 25, 2014 was substantial, within the meaning of clause 5.3 of the sale contract:

> If the property, prior to the Completion Date, suffers substantial damage that is not repaired to substantially the same condition the property was in prior to the damage occurring, unless otherwise agreed to by the Buyer and Seller, this contract shall be terminated and the deposit shall be forthwith returned to the Buyer.

[20] Ms. Lazar further says that in the disclosure statement and addendum, and in the discussions during the mid-May walk-through, the Cattells fraudulently misrepresented the condition of the house, because the Cattells knew that there had been water intrusion in the basement in 2000 and in 2008.

[21] The Cattells say that the water intrusion encountered by Ms. Lazar on June 25, 2014 was not substantial within the meaning of clause 5.3. They insist, as well, that the information that they provided in the disclosure statement and the addendum was accurate, and that Mr. Cattell did not provide any incorrect or misleading information to Ms. Lazar during the walk-through.

[22] Thus, say the Cattells, the sale contract was not terminated under clause 5.3, and Ms. Lazar had no basis for rescission of the contract – and so her failure to complete the sale constituted a breach of the contract for sale of the property – a breach for which she is liable to compensate them.

**Issues**

[23] The issues to be determined are:

1. On June 25, 2014 had the property suffered substantial damage that resulted in termination of the contract under clause 5.3?

2. Did the Cattells fraudulently misrepresent the condition of the property, entitling Ms. Lazar to rescind the contract?

3. What are the appropriate damages?

**Clause 5.3 and substantial damage: law**

[24] As I have said, the provision of the sale contract that is relied on by Ms. Lazar is clause 5.3:

> If the property, prior to the Completion Date, suffers substantial damage that is not repaired to substantially the same condition the property was in prior to the damage occurring, unless otherwise agreed to by the Buyer and Seller, this contract shall be terminated and the deposit shall be forthwith returned to the Buyer.

[25] There is no dispute that, prior to the "Completion Date" of June 25, 2014,

damage had been done to the house by virtue of the water intrusion, and the damage had not been repaired "to substantially the same condition the property was in prior to the damage occurring".



[26] The question relating to clause 5.3 is whether the damage was substantial. Both sides of this dispute cite one court decision, being that of Justice Scurfield in *Caisse v Bazilewich*, 2007 MBQB 277, 222 Man R (2d) 49. As to what constitutes "substantial damage" in the context of such a clause, Justice Scurfield said at paras. 11 and 17-20:

> **11** I also could find no authority directly on point. However, in *Kemp v. Leshchyshyn*, [1997] M.J. No. 180 (Q.B.) (QL), Hamilton J., as she then was, made some general observations with respect to this clause:
>
> > para. 7 ... [T]he form of offer includes the clause that the property is at the risk and responsibility of the vendor until the date of possession. This means a buyer is entitled to purchase a home in the same condition the home was at the time of making the offer, subject, of course, to reasonable wear and tear from the date of the offer to the date of possession. Any changes to the home that are not caused by ordinary use and that occur prior to possession are the responsibility of the vendor.
>
> ...
>
> **17** Where a property has been totally destroyed or the monetary value of the damage constitutes a high percentage of its worth, that evidence alone will ordinarily prove that the damage is substantial. However, I am satisfied that the phrase "substantial damage" is not restricted to a definition based solely on the cost of repair. The quality, character and consequences of the damage must also be considered.
>
> **18** Minor damage that is consistent with abnormal wear and tear will usually not be substantial. Similarly, even significant damage that does not affect the ability of the purchaser to enjoy the basic benefits of the property while it is being repaired will ordinarily not qualify as substantial.
>
> **19** In contrast, however, there may be situations where the damage can ultimately be repaired for a small fraction of the total value of the property but, in the interim, the damage prevents the purchaser from occupying the property or using it for its intended purpose. When the damage will deprive the purchaser for a significant period of time of one or more of the essential benefits of ownership, then it may be fair to characterize that damage as substantial.

> **20** Although it is on the edge of the spectrum, I find that this is a case where that occurred. The absence of working doors has a different character than a broken window. The damage was not merely cosmetic or irritating. Rather, it made half of this duplex uninhabitable. Thus, it had a substantial impact on an important element of ownership - the right to use or occupy a significant portion of the property for its intended purpose. Moreover, the plaintiffs promised only to attempt to repair the unit within two weeks. That left the defendant in an uncertain and difficult position. Before closing, he had to rely on the plaintiffs' estimate of damages.



[27] I agree with Justice Scurfield's summary of the law. In considering whether the damage here was substantial, I take into account not only the cost of repair, but also the quality, character and consequences of the damage.

**Clause 5.3 and substantial damage in this case**

[28] A description of the damage in this case begins with the discovery of water intrusion on June 21, 2024. That morning Mr. Cattell entered the basement of the house and discovered that some water had entered the house. He noticed dampness on the north wall. He observed that water had reached the carpet, and that the first foot of the carpet was damp.

[29] The Cattells had had intrusions of water in the basement of the house in 2000 and in 2008. The 2008 intrusion led to their installing sumps and sump pumps in two locations in the basement. Mr. Cattell testified that there had been no more water intrusion in the house after that, until June 2014.

[30] Because the water intrusion of June 21, 2014 was the first instance of intrusion since the 2008 installation of the sumps, Mr. Cattell suspected that the intrusion was related to electrical work that had just been done by an electrician, specifically the replacement of an outdoor electrical plug that provided power to one of the sump pumps. Checking that pump, Mr. Cattell found that the plug had tripped its breaker. He turned the breaker back on, started the pump, and the water in the sump

pumped out. Mr. Cattell then proceeded to vacuum the water in the basement and to operate fans to dry the carpets. He also placed a telephone call to Ms. Peterson, as discussed below.

[31] On June 22, 2014, Mr. Cattell entered the basement and observed about the same amount of water intrusion as he had observed the day before. He found that the outside plug had tripped again, causing him to conclude that the plug was too weak. His view was that, while the pump operated at a lower voltage, when it started up it drew at a higher voltage, and the higher voltage was tripping the breaker. Again, he turned the breaker back on and got the sump emptying. He then changed the plug so as to solve the problem, in his view.

[32] On June 23, 2014, the parties still were anticipating a June 24 closing. The Cattells moved out on June 23. Mr. Cattell considered the water intrusion event of the previous two days both to have been minor and to have been resolved by the steps that he had taken. He said that the basement carpet still had some dampness on the surface that he could feel with his hand, but that he did not consider that this residual dampness needed to be addressed. He left the house, and Ms. Cattell oversaw the removal of their property by movers. She conducted a final check of the house before departing, and she observed no indication of water intrusion before she left. She did not notice any unusual smell in the house.

[33] The next visit to the house was by Ms. Lazar and her daughter on June 25, 2014. That day, and on the following two days, several people attended at the house and made observations. The evidence of many of them is before me. These people included Roger Bell, who was qualified at trial to give his expert opinion as to inspection, repair and construction of residential properties, and included Frank Browne, who was qualified at trial to give his expert opinion as to inspection and repair of residential properties, including identification and remediation of air quality, mold,

and water damage.

[34] On June 25, 2014:

(a) Ms. Lazar detected a mildew, musty, moldy odour. Her feet got wet when she stepped onto the basement carpet. The bottoms of her jeans, she said, got wet from her walking on the carpet. She walked across the main basement room, which was carpeted, and found that the carpet was wet all the way across. The drywall and baseboards were wet about 12 inches up the wall. She saw that the drywall tape on one wall was wet and peeling off the wall. When she walked on the gym room floor and the office floor, she observed pools of water emerging between the seams of the flooring.

(b) Mr. Simonson's observations, when he arrived in response to Ms. Lazar's phone call, were much the same. He detected heavy humidity and a musty smell. In the basement he felt his socks getting wet on walking two to three feet in. There was standing water on the vinyl planking in the office. As he stepped on that floor, water came up through the seams of the flooring. He also noticed rust spots on the carpet where the Cattells' pinball machine had been, wet carpet underlay, and rust on the tack strips under the carpet in the northwest corner of the basement.

(c) Mr. Cattell (who attended on either June 25 or June 26) observed that there was more water present in the basement than had been present on June 21 and 22, 2014. In questioning he confirmed that water was under the floor, and that walking on the floor caused water to penetrate the flooring seams and remain on the floor surface. He further confirmed that walls were wet up to 12 inches from the floor. At no time did he detect an unusual odour in the house.

[35] On June 26, 2014:

(a) Loretta Flaman detected a humid smell. In the basement she found that all floors were saturated to the walls.

(b) Mr. Bell, who attended at the request of Ms. Lazar and Mr. Simonson, observed a musty, mold/mildew smell in the house. His feet got wet from walking on the basement carpet. Water was pooling on top of the flooring in the exercise room. There was water under and above the office flooring, coming through the seams when the flooring was pressed. The carpet outside the office was saturated, as far as nine feet from the closest exterior wall. Along the north wall, by the location of the entertainment centre, carpets were saturated and there was moisture damage to the drywall.

(c) Mr. Browne, who attended at the request of Ms. Lazar and Mr. Simonson, observed a musky, heavy smell in the house. He opined that the smell probably was caused by water reacting with building products. There was water visible in the basement. Water was oozing from the office room flooring. Drywall was wet 12 inches up from the floor, indicating that water had wicked up the drywall.

[36] On June 27, 2014:

(a) Chris Enns, who attended as the representative of the Cattells' insurer, observed moisture on the floor of the basement. The carpet appeared damp. He did not notice any unusual smell.

(b) Carey Knihniski, who attended on behalf of Ms. Lazar's insurer, observed "water on the perimeter portion of the basement on the east walls and flooring and on the south walls and floor and on the south west corner

> running up the west wall approx. 20’”. He noted that the carpet and hard flooring were wet in those areas, although the carpet in the centre of the main room was dry. He observed that the bottom portion of drywall had water damage.

[37] With the exception of the mid-May walk-through discussions that I review below, there was no substantial conflict in the evidence of the witnesses at this trial. I find that the above summary of evidence, as to the condition of the house on June 25, 2014 and the ensuing two days, is accurate. That condition includes the presence of a musty odour. I accept that the odour was present on the basis that it was detected and reported by two independent witnesses, whose expertise includes detecting and identifying such an odour, Mr. Bell and Mr. Browne.

[38] As I have said in reviewing the law, the possible application of clause 5.3 to a circumstance of damage must take into account the cost of repair and the quality, character and consequences of the damage. Those factors must be taken into account in the context of the situation that faced the purchaser on the closing date.

[39] On the closing date, June 25, 2014, Ms. Lazar was faced with a problem. On the one hand, she wanted to purchase and own the house. She and Mr. Simonson intended to do some work in it before moving in, particularly some painting, and then it was to be their home. On the other hand, Ms. Lazar knew that – unlike the situation when she had seen the house previously – there now was water in the basement. There was enough water that the steps of a person walking there caused water to seep up above the surface of the carpeting or hard flooring. Water had wicked up drywall. There was humidity in the house, with an odour of mustiness.

[40] Complicating the problem for Ms. Lazar were her concerns about air quality and potential mold. The presence of water on and under the flooring, and the odour in the house, raised an alarm for her in that regard. Furthermore, it was not known

at the time either what was the cause of the water intrusion or what would be the cost and time frame of repairing the damage and dealing with the cause.

[41] In short, on June 25, 2014, Ms. Lazar was faced with accepting a house that was substantially different from the house that she had contracted to purchase. The house now carried with it significant uncertainty. Ms. Lazar did not know whether it even would be safe, in terms of health, to enter the house to engage in painting and other work on the upper floor. If there were airborne mold, that mold may have made its way throughout the house. Ms. Lazar did not know whether she would have normal and full use of the house in a matter of days, or whether weeks or months would pass before reaching that point.

[42] From Ms. Lazar's perspective on June 25, 2014, the cost of repair was unknown but potentially considerable. The quality and character of the water damage could not yet be fully measured, but it included the obvious soaking of carpet and underlay, as well as of hard surface flooring, wicking of drywall, and humidity and mustiness in the house. The immediate consequence of the damage was an inability to use the basement of the house and, unless and until the safety of the air throughout could be established, an inability to use the upper level of the house as well. The longer-term consequences were simply unknown, but prolonged inconvenience and loss of use of the house was a possibility that could not be eliminated.

[43] By way of cross-examination, the Cattells suggested to Mr. Simonson that, on perceiving the situation of water intrusion on June 25, 2014, he and Ms. Lazar could have tried to mitigate the water damage, to clean it up and dry it out rather than leaving it. In a response that I find to be reasonable, Mr. Simonson said that at that point they did not know whether they could or should do anything with the house. They did not know whether they were in a position to start pulling up carpets and engaging in some kind of remedial work. He added that on June 25, 2014, they had expected to take

possession of their “forever home”, only to find that it was “overrun with water”. The situation left them overwhelmed and stressed, he said, and his thinking at the time was that they needed to get people to the house to point them in the right direction.

[44] On June 25, 2014, the property was not the property that Ms. Lazar had seen earlier, and that she had agreed to purchase. On June 25, 2014, the house on the property bore a risk of health concerns and it bore other complications including delay in occupying the house, delay in fully using the house, and potential unquantified expense. In these circumstances I find that the damage that was caused by the water intrusion was substantial within the meaning of clause 5.3.

[45] In reaching this finding I have reviewed the application of clause 5.3 on the basis of the circumstances as they existed on June 25, 2014. I have before me, as well, evidence as to the condition of the house on the next two days, as summarized above. In addition, there is in evidence the expert opinions of Roger Bell and Frank Browne. They were called by Ms. Lazar to provide their views as to the cause and extent of the damage, and as to what must be done to address it. In partial response, the Cattells rely on the steps that in fact were taken by them and by ServiceMaster, the business that engaged in remedial work on behalf of their insurer.

[46] In providing their opinions, Mr. Bell and Mr. Browne identified several concerns about damage to components of the basement, some of which could be related to mold. For safety and certainty they both recommended substantial work to investigate and remedy the damage, work costing in the tens of thousands of dollars. As to identifying and remedying the cause of the water intrusion, they both said that what must be done would depend on more intensive investigation, but the eventual work in that regard could involve tens of thousands of dollars, or more.

[47] The Cattells argue that I should have reservations about the independence of Mr. Bell and Mr. Browne as witnesses generally and as expert witnesses specifically.

In so arguing the Cattells point out that Mr. Simonson called Mr. Bell and Mr. Browne on June 25, 2014 because he was acquainted with them in business contexts. That circumstance, however, does not cause me any concern as to the independence of either of these witnesses. The evidence does not establish that there was a relationship between either of them and either of Mr. Simonson or Ms. Lazar that would give rise to a suggestion of bias or partiality. I am satisfied that neither Mr. Bell nor Mr. Browne has permitted his being familiar with Mr. Simonson to affect his observations, conclusions or opinions in this matter.

[48] Furthermore, I find the opinion of each of Mr. Bell and Mr. Browne to be logical, reasonable, based on his expertise and consistent with the evidence of the condition of the house, including photographic evidence. I accept the opinions of Mr. Bell and of Mr. Browne.

[49] The Cattells presented evidence establishing that what in fact was done following June 25, 2014 involved far less extensive work than the work that was suggested by Mr. Bell and Mr. Browne. At the behest of the Cattells' insurer, ServiceMaster attended and, as set out in the agreed statement of facts, "provided extraction, minor demolition, debris removal, and structural drying services. These services included removing the baseboards in the Property's basement, cutting holes in the drywall, and operating 5 fans and 1 dehumidifier for 5 consecutive days." The cost of this work was $2,165.08.

[50] No representative of ServiceMaster testified at the trial. Ms. Lazar argues that I should draw an adverse inference from the Cattells' failure to call someone from ServiceMaster. She suggests that such a representative would have testified that, in the course of its work, ServiceMaster found mold or identified the cause of water damage. I do not accept this argument. There is no reason, in the evidence, to think that ServiceMaster found mold or identified the cause of the water damage. Typically an

adverse inference such as Ms. Lazar suggests arises in a circumstance like that described in *Murray v City of Saskatoon*, [1952] 2 DLR 499 (Sask CA), where a key eyewitness was not called by the party who would be expected to have called that witness. In this case ServiceMaster is not in that category.

[51] The Cattells point to the work that was done by ServiceMaster (at the behest of the Cattells' insurer) as evidence that the water damage was not substantial. Furthermore, they say that there has not been an instance of water intrusion in the house since June 2014. They sold the house to other persons in 2015 and they say that they have not received any reports of water intrusion from the new owners since then.

[52] Those new owners did not testify at the trial. Ms. Lazar argues that I should draw an adverse inference from the Cattells' failure to call those new owners. I do not accept that argument. Those owners are not in the category that was identified in *Murray v City of Saskatoon*.

[53] Mr. Bell's and Mr. Browne's evidence of the circumstances of the house after June 25, 2014, is consistent with the circumstances on June 25, 2014. I consider this subsequent period (in addition to June 25, 2014 alone) because, although the sale did not close on June 25, 2014, it appears from the correspondence between the parties' real estate lawyers in the days and weeks following June 25, 2014, that the parties were exploring the possibility of salvaging the sale. The additional information that came to Ms. Lazar during that period principally was in the form of the opinions of Mr. Bell and of Mr. Browne. As I have said, those opinions emphasized the uncertainty of the situation until further investigation could be conducted, and they described that the cost of repair could be substantial.

[54] ServiceMaster charged just over $2,000 for a clean-up that the Cattells believed was sufficient, but in light of the opinions of Mr. Bell and Mr. Browne I find that the ServiceMaster repair, combined with the lack of reports of subsequent water

intrusion (even from the subsequent owners), establishes only that the visible water damage had been dealt with. With reference to the opinions of Mr. Bell and Mr. Browne, I consider that there may remain a latent complication from the June 2014 water intrusion, such as the development of mold – a complication that has not yet come to light.

[55] I have set out my conclusion that, based on the circumstances as they existed on June 25, 2014, the damage that was caused by the water intrusion was substantial within the meaning of clause 5.3. I reach the same conclusion when I consider also the information that came to light in the days following that date.

[56] The damage that was caused by the water intrusion was substantial within the meaning of clause 5.3. The damage was not repaired as described in clause 5.3. The parties did not "otherwise agree" under clause 5.3, and so by operation of clause 5.3 the sale contract was terminated. Return of the deposit was specified in clause 5.3, and since the contract was terminated the Cattells have no right to retain the cash to close, so that those funds must be returned to Ms. Lazar.

**Fraudulent misrepresentation: law**

[57] Ms. Lazar asserts that the Cattells fraudulently misrepresented the condition of the property, entitling her to rescission of the contract. She points to the disclosure statement and the addendum not having disclosed the previous incidents of water intrusion in the house, in 2000 and in 2008. She points, as well, to the discussion of past water intrusion during the mid-May walk-through, and to the Cattells' failure to update the disclosure statement by disclosing the June 21 and 22 water intrusion.

[58] There is no dispute as to the applicable law regarding fraudulent misrepresentation. As Justice M-E.R. Wright observed in *Schira v Karpinski*, 2009 SKQB 394 at para 139, 342 Sask R 235, the elements of negligent representation and

of fraudulent representation are the same, except that fraudulent representation requires "that the false representations must be knowingly or recklessly made. Again, silence or half-truths as to known latent defects, or active concealment of patent defects can amount to fraud. (*Alevizos v Nirula*, (2003) 180 Man R (2d) 186), 2003 MBCA 148 at para. 24). A finding of fraudulent misrepresentation may result in recision of the contract, ...".

[59] In *Britt v Klimczak*, 2010 SKQB 407 at para 41, 365 Sask R 52, Justice Ball set out the elements of negligent misrepresentation. I have adapted those elements to reflect the requirement that, for fraudulent misrepresentation, the false representation must be knowingly or recklessly made. The elements of fraudulent misrepresentation are:

(i) there must be a duty of care based on a "special relationship" between the representor and the representee;
(ii) the representation in question must be untrue, inaccurate, or misleading;
(iii) the representor must have made the misrepresentation knowingly or recklessly;
(iv) silence may constitute misrepresentation where what is left unsaid distorts the truth about a material fact;
(v) the representee must have relied, in a reasonable manner, on the misrepresentation; and
(vi) the reliance must have been detrimental to the representee in the sense that damages resulted.

**Fraudulent misrepresentation and the disclosure statement**

[60] Ms. Lazar's claim of fraudulent misrepresentation is focused first on the disclosure statement and the addendum, starting with the Cattells' answer to question 3(g) on that statement. That answer was knowingly false, she says, in that the

Cattells knowingly or recklessly failed to disclose in the addendum to the disclosure statement the 2000 and the 2008 water problems.

[61] The relevant parts of the disclosure statement are clauses 3(g) and 3(h):

> 3(g) Are you aware of any roof leaks or moisture or water problems or unrepaired water damage in the dwellings/improvements? No.
>
> 3(h) Are you aware of any past or present flooding or drainage problems on the property? Yes.

[62] The addendum provides:

> Water issues in Cedar Villa started for some residents about 6 years ago due to the sheer volume of rain and proximity to the Chappell Marsh. The water on the left as you come in was a dry alkali bed 25 years ago. The water table has risen to the point that [it] became necessary to install a sump about 5 years ago for those backing Chappell Marsh. We had Machibroda Engineering out for a consultation to address the water table issue with our home. Our home and most others are in a very sandy soil which we knew when we built and was the reason for not installing weeping tile due to it plugging. We did find out there is a clay seam about 14 feet down and it creates a perched water table from the surface water penetrating downward. This water sits on the clay seam and rises creating the water table issue. To resolve any issues with the water getting into the building we installed 3 sumps. 2 run approx 7 months of the year and 1 rarely ever. The 2 that run most often and the eaves trough on the front of the building are tied into a 24" exterior sump that we had hydrovaced all the way down to the clay seam. This sump discharges to the ditch any accumulated because of its depth as well as all other water discharged into it by the interior sumps. The sumps were shut down at the end of October last year and [turned] on again at the end of begginning [sic] of April this year. As a note, those that do have weeping tile which will ultimately drain into the septic mound are overloading the mounds capacity causing premature failure. This type of system is far more efficient and moves the water away from the property. Since installation of this system we have had no further water table issues.

[63] Ms. Lazar says that clause 3(g) must be read to require disclosure of past or present moisture or water problems. She refers to court decisions that she says have interpreted such clauses in this way, but the clauses under interpretation in those

decisions are not the same as the clauses here.

[64] As to Ms. Lazar's suggested interpretation, I note that clause 3(h) specifies "past or present" whereas clause 3(g) does not. The specific inclusion of "past" in clause 3(h) suggests that past instances are not contemplated in clause 3(g). In any event, the combination of clauses 3(g) and 3(h) obliged the Cattells to disclose the past water intrusions in the house, since those intrusions reasonably would fall under the description of "flooding or drainage problems" referred to in clause 3(h).

[65] The Cattells did proceed to refer to past water intrusion on the property, in the addendum. Mr. Cattell testified that he read clause 3(g) as contemplating only present circumstances, such as whether currently there was a water problem or whether currently there was unrepaired water damage. Since there had been no such problem since 2008, he said, they answered "no".

[66] Brenda Peterson, the Cattells' realtor in the transaction, testified that her view was that clause 3(g) referred to anything that was unrepaired, and she said that she would have told the Cattells so. That is, the Cattells would have been reassured in their interpretation of clause 3(g) by the advice that they received from their realtor.

[67] On this basis, I do not find a fraudulent misrepresentation in the Cattells' response in clause 3(g), even if it ought to be read as including past instances. I find no fraudulent misrepresentation because the Cattells did not provide the response knowingly or reckless as to it being untrue, inaccurate or misleading. They believed that it was true, and the advice that they received from their realtor removed the circumstance from that of recklessness.

[68] The next aspect of the disclosure statement and the addendum relates to what the Cattells disclosed in the addendum. As I have said, by virtue of clause 3(h) they were obliged to disclose the past water intrusions in the house. The addendum set

out a lot of detail, but it did not clearly say whether there had been any past water intrusion in the house. Ms. Lazar reasonably was left uncertain on that point after reading the addendum.

[69] In the addendum the Cattells said that there were no current problems, although there had been water intrusion on the property in the past. No distinction was made, in the use of "the property", between the land and the house. There was reference to "the water table issue with our home", but it is not clear whether that "issue" was one of intrusion or just one of potential intrusion. Similarly, "To resolve any issues with the water getting into the building" may suggest that there had been water getting into the building, or it may say only that the issue of potential intrusion was identified and was resolved, to prevent there ever being intrusion.

[70] The uncertainty arising from the vagueness of the wording used in the addendum may have rendered the addendum a misrepresentation. Again, though, I do not find the knowledge or recklessness that is required for a finding of fraudulent misrepresentation. As with the matter of clause 3(g), the Cattells did not provide the response knowingly or recklessly as to it being untrue, inaccurate or misleading. They believed that it was true and accurate, particularly because they believed at the time that what really mattered to a potential purchaser was the state of the property currently – and they believed that the matter of water intrusion in the house had been eliminated in 2008. This belief, again, was bolstered by the advice that they had received from their realtor, advice that led them to believe that the relevant information related to the present.

[71] Subject to my review of the effect of the June 21 and 22, 2014 water intrusion, I conclude that in the disclosure statement and the addendum the Cattells did not fraudulently misrepresent the condition of the property.

**Fraudulent misrepresentation and the mid-May walk-through**

[72] The only area of significant conflict in the evidence of the parties relates to the discussions during the mid-May walk-through. These were the discussions involving Mr. Cattell, Ms. Lazar and Mr. Simonson as to whether there ever had been water in the basement of the house.

[73] When they were testifying at trial, all indications were that each of Mr. Cattell, Ms. Lazar and Mr. Simonson (and Ms. Cattell) was testifying with every effort to be truthful and accurate. I have no reason to doubt the credibility of any of them. Being satisfied with the credibility of each of these witnesses, I turn to a consideration of their reliability. A witness sometimes may testify as to what he or she honestly believes, but he or she may be mistaken – perhaps through a failure of memory. While credible, the evidence of such a witness may not be reliable.

[74] In this regard, I find guidance in two factors. The first is the circumstance that both Ms. Lazar and Mr. Simonson had definite recollections of the discussions, during the mid-May walk-through, as to whether there ever had been water in the basement. Ms. Lazar explained that the subject was important to her because of her health concerns relating to possible mold. She also explained that the disclosure statement and the addendum were not clear to her. Specifically, it was not clear whether the steps that the Cattells had taken – as described in the addendum – were all preventive or whether the steps had been taken because there had been water intrusion in the house.

[75] So it was that Ms. Lazar was motivated to get clarification from Mr. Cattell, especially when she saw for herself the water-control measures that had been put in place on the property, and when she saw for herself some standing water on the land. Mr. Simonson, for his part, knew of Ms. Lazar's concerns and so he had reason to pay attention to those discussions and to recall them.

[76] Mr. Cattell, in contrast, has no recollection of the subject being discussed during the walk-through. He simply is not in a position to say whether the subject was discussed or, if it was, what was said. He can only say what he thinks he would have said.

[77] This first factor leaves me finding the recollection of the discussions by Ms. Lazar and Mr. Simonson to be reliable, because they had reason to remember the discussions.

[78] The second factor is Mr. Cattell's response, at questioning and at trial, to questions about the discussions. At questioning this exchange took place (page 50, lines 3-8):

> Q And do you recall Jackie asking you if you've ever had water in the basement?
>
> A If she ever asked, have you ever had water in the basement, the answer would have been no. I don't recall her asking that specific question.

[79] An answer of "no" to such a question from Ms. Lazar would have been inaccurate. Mr. Cattell knew that there had been water intrusion in the basement in 2000 and in 2008. His answer does not establish that he answered "no" to such questions, but his positing this patently wrong answer causes me hesitation in accepting the reliability of his evidence.

[80] At trial Mr. Cattell was asked whether he recalled ever being asked by Ms. Lazar or by Mr. Simonson whether there ever had been water in the basement. He replied that he did not specifically remember such a question. He added that the Cattells did not have water in the basement after the sumps had been installed in 2008 (these are the sumps referred to in the addendum to the disclosure statement). So, he said, it depends on how that question was phrased.

[81] In short, Mr. Cattell has no recollection of the discussions, whereas Ms. Lazar and Mr. Simonson have strong, clear recollection, and I find them to be credible witnesses. Again, I am confident in the credibility and reliability of Ms. Lazar and Mr. Simonson and I lack confidence in the reliability of Mr. Cattell's evidence.

[82] Ms. Lazar suggests, as a third factor, a conflict between the evidence of Mr. Cattell and that of Ms. Peterson, who was the Cattells' real estate agent in the transaction. Ms. Peterson, I found, testified in a straightforward and frank manner. I conclude that she made every effort to answer questions truthfully and accurately, and I conclude that she did answer questions truthfully and accurately.

[83] Mr. Cattell testified at trial that, on discovering water in the basement on June 21, 2014, he took steps to deal with the water intrusion, and he also telephoned Ms. Peterson. In that call, he said, he told her that the pump had failed, because the plug had tripped the breaker, and that water had entered the house.

[84] Ms. Peterson testified that she recalled vividly the phone call that she received from Mr. Cattell. She said that she remembered virtually word for word what he said. The gist was that he had had an electrician in to finish some tasks before the possession date, including upgrading of exterior receptacles. As a result of the work, the draw on power of the pumps when they started up was just enough to trip the plug's breaker. Mr. Cattell switched back to the regular plug-ins because he did not want water in the basement. The incident registered with Ms. Peterson as a mechanical problem, not as a water problem. She made notes of this conversation (and other events concerning the sale) and, although the notes are not in evidence before me, there is no dispute that her notes reflect her recollection.

[85] The first reference in Ms. Peterson's notes to water intrusion in the house appears in her notes of June 26, 2014. She was asked at trial whether June 26, 2014 was the first day on which she had heard of water being in the house, and she replied that

she was not sure.

[86] Ms. Lazar invites me to find that Ms. Peterson's recollection contradicts Mr. Cattell's evidence that he told her, before June 25, 2014, about water having entered the basement. It is not clear, though, that Mr. Cattell did not tell her about water having entered the basement in the call that she described. Mr. Cattell clearly believed that this was a minor complication, with no serious intrusion of water. For that reason, he may have mentioned the water intrusion almost in passing and Ms. Peterson may not have picked up on it, focusing instead on Mr. Cattell's emphasis that he had identified and remedied the electrical problem.

[87] Too, Ms. Peterson was driving in her vehicle when they had the conversation. The concentration required for driving inevitably draws some attention away from the driver's focus on a conversation. Furthermore, Ms. Peterson frankly saying that she is not sure that June 26, 2014 was the first day on which she had heard of water being in the house leaves open the possibility that Mr. Cattell may have mentioned it but she simply did not pick up on it.

[88] Therefore, I do not adopt the suggestion that I find in this evidence a third factor regarding the reliability of Mr. Cattell's evidence.

[89] With reference to the other factors that I have discussed, though, I am confident in the reliability of the evidence of Ms. Lazar and of Mr. Simonson, and I lack confidence in the reliability of the evidence of Mr. Cattell. Therefore, I prefer the evidence of Ms. Lazar and of Mr. Simonson over that of Mr. Cattell. For this reason, I conclude that during the mid-May walk-through Mr. Cattell told Ms. Lazar that there never had been water in the basement of the house.

[90] With respect to that statement I return to the legal elements of fraudulent misrepresentation:

(i) There is no dispute that there was a duty of care based on a "special relationship" between the Cattells and Ms. Lazar.

(ii) The representation, that there never had been water in the basement of the house, was untrue, inaccurate, and misleading.

(iii) Mr. Cattell knew that there had been water in the basement in 2000 and in 2008. Therefore, he made the misrepresentation knowingly. Even if he made the statement because his mind was focused on his belief that he had fixed the problem in 2008, the statement still was incorrect and he made the misrepresentation recklessly. He made it recklessly because it no longer was available to him to think that any water intrusion was too minor, or too historic, to be of any concern to Ms. Lazar. By virtue of Ms. Lazar's focus on the topic during the walk-through, he knew that the topic was of considerable concern to her.

(iv) Silence is not a factor in this instance.

(v) Ms. Lazar relied, in a reasonable manner, on the misrepresentation. The question was of high importance to her, and it led to her deciding to remove all conditions and proceed with closing – in the course of which she maintained her payment of the $10,000 deposit and she paid an additional $169,259.68.

(vi) The reliance was detrimental to Ms. Lazar in that she did not obtain the property for which she had contracted, and she has not had a return of the $179,259.68 that she paid.

[91] The statements during the mid-May walk-through constituted fraudulent misrepresentation, entitling Ms. Lazar to rescission of the sale contract.

**Fraudulent misrepresentation and the June 2014 water intrusion**

[92] Ms. Lazar further asserts that the Cattells were obliged to update the disclosure statement to disclose to her the water intrusion that began June 21, 2014. She points out that the disclosure statement itself includes the following clause 8:

> SELLERS are not required to disclose defects which are obvious on a simple visual inspection of the property by a BUYER. The SELLERS state that the above information is true as of the above date and that the SELLERS will disclose to any BUYER any changes to this information prior to the signing of any Contract of Purchase and Sale in which this Disclosure Statement is incorporated. Any important changes to this information made known to the SELLERS will be disclosed by the SELLERS to the BUYERS prior to closing. …
>
> [Emphasis added]

[93] The Cattells did not update the disclosure statement, and they did not disclose to Ms. Lazar the water intrusion that they observed on June 21 and 22, 2014. Their explanation is that the water intrusion was not serious enough to require disclosing to Ms. Lazar, since Mr. Cattell was of the view that it had been a minor water intrusion, that he had cleaned it up with his vacuuming and use of fans, and that he had fixed the cause of the water intrusion by changing the electrical plug.

[94] As I have discussed, Ms. Lazar placed considerable reliance on the representations of the Cattells on the topic of water intrusion in the house. Furthermore, Mr. Cattell knew no later than mid-May that she had a heightened concern about water intrusion in the house. It was not available to the Cattells to think that the June 2014 water intrusion was too minor to be of any concern to Ms. Lazar. By then, they knew that the topic was of considerable concern to her.

[95] Furthermore, clauses 3(g) and 3(h) of the disclosure statement do not require disclosure of water, flooding or drainage problems except minor ones. Those clauses require disclosure of any such circumstances.

[96] I accept that the Cattells believed that it was not necessary to advise Ms. Lazar of the June 21 and 22, 2014 water intrusion, but their belief was mistaken. Their silence as to that change in conditions of the house prior to the closing date constituted a fraudulent misrepresentation. They knew that water had entered the house, but they let Ms. Lazar continue to believe that water had not entered the house. At best, the Cattells recklessly let Ms. Lazar continue to believe that there had not been water intrusion in the house.

[97] Returning again to the legal elements of fraudulent misrepresentation, with respect to the Cattells' failure to disclose to Ms. Lazar the water intrusion of June 21 and 22, 2014:

(i) There is no dispute that there was a duty of care based on a "special relationship" between the Cattells and Ms. Lazar.

(ii) The representation, that there never had been water in the basement of the house, again had become untrue, inaccurate, and misleading.

(iii) The Cattells knew that there had been a water intrusion on June 21 and 22, 2014. They recklessly let Ms. Lazar continue to believe that there had not been water intrusion in the house.

(iv) It was by their silence that the Cattells let Ms. Lazar continue to believe that there had not been water intrusion in the house.

(v) Ms. Lazar relied, in a reasonable manner, on the misrepresentation. She proceeded to the closing of the sale, which involved her making payment of the additional $169,259.68. The parties' recognition of the relevance of such reliance is demonstrated by the inclusion, in clause 8 of the disclosure statement, of the seller's obligation to disclose any changes that occur before closing.

(vi) The reliance was detrimental to Ms. Lazar in that she did not obtain the property for which she had contracted, and she has not had a return of the $179,259.68 that she paid.

[98] The Cattells' failure to disclose to Ms. Lazar the water intrusion of June 21 and 22, 2014 constituted fraudulent misrepresentation, entitling Ms. Lazar to rescission of the sale contract.

**Damages and interest**

[99] Whether by operation of clause 5.3 of the sale contract or on the basis of fraudulent misrepresentation, Ms. Lazar is entitled to a return of the funds that she has paid, totalling $179,259.68.

[100] She claims interest on that amount under clause 4.1 of the sale contract:

> 4.1 The Buyer agrees to pay to the Seller interest at the Bank of Canada Overnight Rate Target at the Completion Day plus 4% per annum, on any portion of the Purchase Price, less mortgages or other encumbrances assumed, not received by the Seller, his/her solicitor or his/her Brokerage as at the Completion Day, the interest to be calculated from the Completion Day, until monies are received by the Seller or his/her solicitor. ...

[101] Ms. Lazar argues that clause 4.1 expresses the parties' intention that any party not paying what should be paid must pay interest at this rate. I do not accept that argument. If that had been the parties' intention the contract readily could have said so. Instead, in clause 4.1 the parties specified only the circumstance of payment by the buyer to the seller. Clause 4.1 does not apply here.

[102] *The Pre-judgment Interest Act*, SS 1984-85-86, c P-22.2, does apply, since Ms. Lazar has been without the use of her money since June 25, 2014. She will have interest on $179,259.68, under that Act, from June 25, 2014 to the date of judgment.

**Costs**

[103] Ms. Lazar has been successful in this action and so she will have the taxable costs of the action. This matter is not among the least complex of actions (column 1), and it is not among the most complex (column 3). Therefore, Ms. Lazar will have costs under column 2.

**Conclusion**

[104] At trial, Mr. Cattell testified that his full name is Colin Bradley Cattell. At the request of Ms. Lazar, I direct that the judgment in this matter will reflect his full name.

[105] Judgment is granted in favour of Ms. Lazar against Colin Bradley Cattell, aka Brad Cattell, and against Kelly Cattell for:

(a) $179,259.68;

(b) Interest on that amount under *The Pre-judgment Interest Act* from June 25, 2014 to the date of judgment; and

(c) Costs of the action under column 2.

J.
G.M. CURRIE