

# KEEPING CURRENT

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## Doctrine of buyer beware bars claim for foundation issues raised by home inspection

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The opportunity to have a home inspection may provide buyers with a reasonable opportunity to discover costly deficiencies before completing the purchase of a property. The inspection report must be carefully reviewed, however, as it may reveal potential deficiencies that should be investigated further. After closing, a buyer may not be able to seek compensation from a seller for deficiencies that could have been discovered before closing but weren't actively concealed by the seller.

The decision in *Purdy v Russell*, [2022 ONSC 4692 \(CanLII\)](#) addresses how the doctrine of buyer beware—*caveat emptor*—operates in such circumstances.

In August 2015, the plaintiff purchased a property from the defendant. The property had been in the defendants' family since it was built in 1977.

After signing the Agreement of Purchase and Sale (APS), in April 2015, the plaintiff arranged for a home inspection. The APS had a condition allowing for a satisfactory home inspection to

be completed. The inspection was conducted in May 2015 and the plaintiff met with the home inspector to review his written report.

The inspection report identified several necessary or advisable repairs unrelated to the foundation, including signs of water infiltration. The report also noted as follows concerning the property's foundation:

1. "Overall, the condition of the basement, foundation, moisture and possible mold pose a major concern."
2. "Risk of hidden damage, mold, wood rot. This could be a major expense to repair."

The home inspection report expressly defined a "major concern" to be "a system or component which is considered significantly deficient or unsafe". It states that such deficiencies "need to be corrected" and "are likely to involve significant expense".

Since there were some areas of the

foundation covered with drywall and insulation, the extent of any foundation problem was not obvious, only the signs that there might be a major problem. The home inspector specifically recommended the removal of the drywall and vapour barrier to allow for a full inspection by a wood foundation expert.

After reviewing the home inspection report, the plaintiff had four days to raise any concerns arising from the report. However, the plaintiff did not obtain legal advice or speak to her real estate agent about the report. Instead, she waived the inspection condition in the APS.

Shortly after closing, the plaintiff discovered that the pressure-treated wood foundation was rotting. The plaintiff alleged that she had to replace the foundation at considerable cost because the extent of the subsequently discovered mildew, mold, and rot rendered the home unfit for habitation. The plaintiff then sued the defendant seller for damages.

In 2022, the defendant brought a motion for summary judgment to dismiss the action. The plaintiff asserted in her affidavit that the home inspector told her that she could wait until after the closing to investigate the underlying structure of the foundation. However, the plaintiff did not file any evidence from the home inspector to support her allegations.

When cross-examined, the plaintiff acknowledged that before waiving the condition in the APS, she knew the foundation was a “significant unknown” that could pose a major concern. She explained she took no steps regarding those concerns because nobody could see the underlying structure.

The motion judge referred to the legal test for a seller’s potential liability as set out by the Ontario

Court of Appeal in *McGrath v. McLean*, [1979 CanLII 1691 \(ON CA\)](#) and subsequent cases:

1. A patent defect is one which can be discovered by a reasonable examination and reasonable diligence on the part of the purchaser. The principle of *caveat emptor* applies to defects of this kind.
2. A patent defect is one that “would have been readily discoverable by [the purchaser] had they exercised reasonable diligence in the circumstances”: *Tony’s Broadloom & Floor Covering Ltd. (Trustee of) v. NMC Canada Inc.*, [1996 CanLII 680 \(ON CA\)](#).
3. A vendor is under no obligation to disclose a patent defect since a purchaser should have discovered that defect upon reasonable inspection.
4. Even in circumstances where the vendors are entitled to remain silent, they cannot actively conceal or cover up a patent defect. In those circumstances, the rule of *caveat emptor* no longer applies. The purchaser is entitled, at their option, to rescind the contract or to compensation for damages.
5. A latent defect is a fault not readily discoverable during a routine inspection.
6. In the case of a latent defect, it is incumbent on the purchaser to establish that (a) the defect was known to the vendors and the vendors were guilty of active concealment or (b) the vendors made a false representation about the

defect in reckless disregard for the truth or falsity of that representation.

The extent of a buyer's obligation to inspect and make inquiries will vary. In some cases, a routine inspection will reveal issues that would lead to the discovery by a qualified person of a "patent" defect.

In the case at hand, the motion judge found that the defects to the foundation were readily discoverable by the plaintiff had she exercised reasonable diligence. In failing to heed the advice of her home inspector a discoverable defect was not discovered because of the plaintiff's conscious decision to take a risk. The principle of *caveat emptor* was therefore engaged.

The motion judge also considered the seller's conduct since there are circumstances where sellers may be held responsible for actively concealing defects or for making false or reckless representations. Generally, this requires evidence of "active concealment" by the seller, meaning that they knew of the defect and acted to prevent that knowledge from coming to the notice of the buyer. Such conduct is treated as if it were a false assertion of the absence of such defect, effectively a form of fraud.

Before listing the property for sale, the seller had commissioned a home inspection of the property to ascertain what repairs needed to be done. This inspector's report recommended a number of repairs, all of which were undertaken before the property was listed. The repairs included fixing a leak and reducing heat loss but did not cover up any problems relating to the foundation.

The seller's inspection report also identified moisture penetration and pressure-treated wood discolouration, but opined that there were no major visual defects on the visible portions of the foundation and that, given its age, the foundation appeared to be in "satisfactory condition"

The motion judge noted that this report was in sharp contrast to the dire warning sounded by the plaintiff's home inspector. The seller's report noted that the foundation was in satisfactory condition while the plaintiff's report recommended a consultation with a specialist.

Further, the seller had provided her home inspection report to the listing agent when the property was listed for sale. Her agent could have provided a copy to a potential buyer if requested. In the motion judge's view, that action was inconsistent with an intention to conceal anything and constituted disclosure of what was known about any defects. There was no positive obligation to provide a copy of the report in the absence of any request, particularly when the APS included a home inspection condition for the benefit of the buyer.

The motion judge concluded that there was no evidence that the seller knew about a foundation defect and deliberately concealed it. The plaintiff's action was therefore dismissed.

The case is a cautionary tale about the risks of going ahead with a purchase after having notice of potential issues raised by a home inspection report. Had the buyer raised the potential issues during the conditional period, perhaps steps could have been taken to investigate and negotiate the repair costs involved. The decision shows how the doctrine of *caveat emptor* protects a seller from such claims once a transaction has been completed.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](mailto:jcook@grllp.com), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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