CITATION: Gemeinhardt v. Babic, 2016 ONSC 4707
COURT FILE NO.: CV-09-1585-A1
DATE: 20160720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CHERYL GEMEINHARDT Plaintiff	)	P. Daffern and M. Ross, for the Plaintiff
– and –	)	
LEOPOLD BABIC, APOLONIJA BABIC and STEWART TITLE GUARANTY COMPANY	)	O. Bremer, for the Defendants Leopold Babic and Apolonija Babic
Defendant	)	D. Dooley and S. Lucenti, for Defendant Stewart Title Guaranty Company
	)	**HEARD:** November 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 2014, December 1, 2, 3, 4, 5, 2014, May 19, 20, 21, 22, 25, 26, 27, 28, 2015, December 30, 2015

REASONS FOR JUDGMENT

DiTOMASO J.

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INTRODUCTION

[1] Cheryl Gemeinhardt (Ms. Gemeinhardt) purchased a farm property from Leopold and Apolonija Babic (the Babics) located in the Township of Oro-Medonte near Barrie, Ontario. They entered into an agreement of purchase and sale on August 14/17, 2007 and the transaction was completed on December 5, 2007. After closing, Ms. Gemeinhardt discovered latent defects in the home and property which she had purchased. She commenced an action claiming damages against the Babics for the breach of the agreement of purchase and sale and for certain alleged tortious acts. Further, Ms. Gemeinhardt and the Babics argued over chattels which should have remained on the farm or were removed by Mr. Babic and his alleged trespass. Ms. Gemeinhardt and the Babics commenced competing claims in the Barrie Small Claims Court over the chattels, trespass and other issues.

[2] Ms. Gemeinhardt had purchased title insurance from the defendant Stewart Title Guaranty Company (Stewart Title) through her solicitor Leon Carter as part of her farm purchase. After learning of latent defects and other problems, she advanced a claim against Stewart Title based on her insurance contract with Stewart Title. Her claim was denied by Stewart Title. She brought an action against Stewart Title claiming damages for breach of contract and bad faith. In that action, Stewart Title third partied the Babics for contribution and indemnity.

[3] All actions were consolidated and tried by court orders.

OVERVIEW

[4] In 2007, Ms. Gemeinhardt and her husband separated after being married for 42 years. They lived on a rural property in Midhurst, Ontario with their three adult children Natasha, Stefan and Erik. The Midhurst property was sold in July 2007 with a closing date later that year.

[5] Natasha suffered from cerebral palsy and was permanently disabled. Ms. Gemeinhardt had suffered concussions in a number of prior motor vehicle accidents and could no longer work as a registered nurse.

[6] In July 2007, Ms. Gemeinhardt began her search to buy a farm property preferably within a six-mile radius of Barrie, Ontario. By chance, during her search, she met the Babics. She bought their farm located at 2109 20/21 Sideroad, R.R. #2, Shanty Bay, Oro-Medonte Township near Barrie, Ontario for a purchase price of $950,000 (the subject property or the farm).

[7] An agreement of purchase and sale was signed on August 14/17, 2007. The purchase was completed on December 5, 2007.

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[8] After Ms. Gemeinhardt took possession of the farm, she discovered flooding in the basement and the furnace had failed to work. She discovered alleged latent and major structural defects. The Babics bought the farm in 1986, extensively renovated the house and garage and added three additions to the house allegedly without building permits. Further problems with the septic system were discovered. The garage was found unsafe by the Township of Oro-Medonte and required demolition.

[9] Issues arose regarding the cost of remediation of the house, additions and the garage, replacement of the septic system, repairs to the basement due to flooding, replacement of underground wiring to the house, barn and garage. There were mould and contamination issues.

[10] Ms. Gemeinhardt raised issues over the loss of rental income from her family members who lived in the house for a time but left allegedly due to health issues. Ms. Gemeinhardt and Natasha were left in the house with no running water or heat but resided in a trailer next to the house for two years. They also alleged health issues.

[11] Ms. Gemeinhardt commenced an action against the Babics claiming breach of the agreement of purchase and sale for failure to disclose all latent defects in the premises, for their fraudulent, reckless and/or negligent misrepresentations made by them to induce her to enter into the agreement of purchase and sale and for the Babics' failure to disclose environmental contamination to the farm due to a lack of a proper sewage disposal system.

[12] Ms. Gemeinhardt further claimed damages due to trespass after the completion of the agreement of purchase and sale and for the improper removal and conversion of her goods allegedly removed from the farm by Leopold Babic after the agreement of purchase and sale was completed.

[13] Ms. Gemeinhardt also claimed general damages as a result of exposure to environmental contamination and for severe emotional upset after she learned that she had been deceived by the Babics about the defects to the property and buildings. She alleges her injuries have been made worse by Mr. Babic's repeated trespass and conversion of her goods after the completion of the agreement of purchase and sale.

[14] Ms. Gemeinhardt also claims punitive damages against the Babics for deceit and for the trespass to her property.

[15] A dispute arose between Ms. Gemeinhardt and the Babics about what chattels should have remained at the farm after closing and what chattels were removed from the property by Mr. Babic. Ms. Gemeinhardt and the Babics commenced competing claims in the Barrie Small Claims Court.

[16] As for the purchase and sale of the farm transaction, Ms. Gemeinhardt's solicitor, Leon Carter, purchased title insurance from Stewart Title. Ms. Gemeinhardt advanced a claim for compensation based on the Stewart Title policy of insurance. Her claim for coverage

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was denied. A dispute arose concerning coverage exclusion and the interpretation of the policy. Ms. Gemeinhardt commenced an action against Stewart Title in which Stewart Title third partied the Babics for contribution and indemnity. Ms. Gemeinhardt has claimed damages for bad faith against Stewart Title based upon the denial of coverage as well as for full indemnity and all costs required to prove her claims against the Babics and for Stewart Title's failure to adjust her claims in a reasonable and prompt manner.

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THE PROCEEDINGS

[17] By my orders of November 17, 2014 and February 23, 2016, on consent, all claims as well as defences pleaded to the five proceedings being Barrie Superior Court files 09-1584, 09-1585, and 09-1585-A1 and Barrie Small Claims Court file 0299-08 (both the Gemeinhardt and Babics' claims) were consolidated.

[18] Further, this court ordered, on consent, that the issues to be determined included liability for Ms. Gemeinhardt's claims against the Babics and Stewart Title in the original actions, liability for the Babics' claims against Ms. Gemeinhardt in the Babics' Small Claims Court claim, apportionment of liability and whether liability should be joint and several, whether a set-off should be granted against any award of damages, Stewart Title's claim for contribution and/or indemnity from the Babics, if Stewart Title were to be found liable for any of Ms. Gemeinhardt's claims, quantum of damages, entitlement to pre and/or post-judgment interest and costs.

THE TRIAL

[19] The trial of the consolidated actions was heard at Barrie over 24 days during two civil sittings. In all, 17 witnesses testified for the plaintiff and defendants.

[20] During the trial, the parties called the following witnesses:

Plaintiff

1. Cheryl Gemeinhardt
2. Stefan Gemeinhardt
3. Erik Gemeinhardt
4. Bobbi-Jo King (Chief Building Office Township of Oro-Medonte)
5. Tammy Woods (MPAC)
6. Leon Carter (Solicitor)
7. Steven Adema (Engineer)
8. Scott Laking (Engineer)
9. Joseph Emmons (Quantity Surveyor)
10. Robert Carruthers (Real Estate Appraiser)

Defendants Babic

1. Apolonija Babic

2. Wayne Gethons (Septic Tank Pumper)
3. John Hipwell (Insurance Agent)
4. Leopold Babic
5. Thomas Pepper (Engineer)

Defendant Stewart Title

1. Robin Jones (Real Estate Appraiser)
2. Alan Quaile (Engineer)

[21] The trial was long. Ms. Gemeinhardt and the Babics testified over multiple days. A number of engineers testified about structural deficiencies, steps and costs to remediate and *Building Code* requirements. Evidence was heard from a quantity surveyor and real estate appraisers offering evidence as to the value of the property based on various scenarios addressing the issue of damages. There was conflicting evidence between Ms. Gemeinhardt and the Babics, between Ms. Gemeinhardt and Stewart Title and between many of the experts called on a variety of issues including the remediation work required and the cost of that work.

[22] Further, there was the issue of mitigation of damages. What, if anything, did Ms. Gemeinhardt do to mitigate or attempt to mitigate her loss.

[23] The collateral issues which arose at the very outset and poisoned the relationship between Ms. Gemeinhardt and the Babics gave rise to the Small Claims Court actions and added to the length of the trial.

[24] Certainly not to be overlooked in the overall was the dispute between Ms. Gemeinhardt and Stewart Title over the denial of coverage and interpretation of the title insurance policy. Stewart Title steadfastly denied all of the Ms. Gemeinhardt's claims on Stewart Title's interpretation of its own policy. As a result, she had received no compensation from Stewart Title to the date of trial and after. Through all of these events and issues starting almost upon taking possession after December 5, 2007, Ms. Gemeinhardt testified about her struggles to cope and to care for herself and Natasha.

[25] In many instances, the evidence was not neatly compartmentalized or followed any thematic progression. Rather, different witnesses not only gave evidence which overlapped different topics and issues but also contradicted the evidence of other witnesses. This added to the complexity and depth of diversity of the trial itself.

[26] Most assuredly, the issue of credibility between Ms. Gemeinhardt and the Babics featured prominently in the trial. Like everything else in this trial, there were instances when the credibility of each party was scrutinized and was brought into question depending on the subject at hand.

[27] For example, at times Ms. Gemeinhardt testified in a clear, forthright manner having an excellent command of events. Other times, she appeared intent on only recounting her

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version of events and was unresponsive to questions asked of her. Unfortunately, questions needed to be repeated, sometimes more than once adding to the length of her testimony. Sometimes she had poor recall or gave an incomplete answer.

[28] This having been said, I find Ms. Gemeinhardt's evidence, for the most part, to be credible and reliable particularly when considered and supported by all of the other evidence. To the extent that her evidence conflicts with the evidence of the Babics, I find her evidence to be preferable.

[29] I cannot say the same for the evidence of Mr. and Mrs. Babic. I find their evidence not credible and unreliable on critical fundamental subjects. Their evidence defies common sense in some instances. Intrinsically, their evidence was inconsistent. Extrinsically, the same can be said when considered in the light of other evidence. In either case, their evidence was implausible and generally not accepted over the evidence of Ms. Gemeinhardt. I will provide specific examples to support my general finding that Ms. Gemeinhardt's evidence is more credible and preferable in certain key instances to the evidence of the Babics.

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THE ISSUES

[30] The issues to be determined are in four parts as follows:

1. Claims between Ms. Gemeinhardt and the Babics;
2. Small Claims Court claims;
3. Claims between Ms. Gemeinhardt and Stewart Title; and
4. Claims between Stewart Title and the Babics.

[31] The positions of the parties regarding the issues will be analyzed within the context of those various claims.

I. CLAIMS BETWEEN MS. GEMEINHARDT AND THE BABICS

A. LIABILITY

Factual Background

[32] In 1986, the Babics purchased approximately 87 rural acres in the Township of Oro-Medonte which they worked as a farm until they sold the farm to Ms. Gemeinhardt in August 2007 by agreement of purchase and sale. The purchase closed on December 5, 2007. On the property was located a century farm house fully renovated with three additions added by the Babics, a double detached garage, a barn and several smaller outbuildings or sheds. Ms. Gemeinhardt purchased the farm for the purchase price of $950,000, which she negotiated with the Babics.

[33] Disagreement began almost immediately after the deal closed. The basement flooded. The furnace failed to work. There was an issue about Mr. Babic removing certain chattels from the property after closing and his alleged trespass. This led to competing claims brought by the parties in the Barrie Small Claims court.

[34] However, more importantly, Ms. Gemeinhardt commenced an action in the Superior Court of Justice after learning there were many latent defects in the farm buildings and property known to the Babics or ought to have been reasonably known to them but not disclosed to Ms. Gemeinhardt before she purchased the property.

[35] Some of the latent defects are described as follows:

(a) There was no septic system for the house or the barn and raw sewage was disposed of on the farm without being treated. The farm and the house were therefore contaminated with raw sewage.

(b) The farm house had a lengthy history of flooding that was concealed by the Babics with cosmetic improvements to conceal this defect.

(c) The house and all other buildings on the farm were built without building permits and/or septic system use permits.

(d) The buildings on the property were not built in accordance with the provisions of the *Ontario Building Code*.

(e) The buildings were not properly constructed and the Babics did not use proper materials in the construction of these buildings.

[36] Ms. Gemeinhardt claims the house and other buildings were not fit for human habitation. In addition, the farm is contaminated by sewage and structures on the land should be demolished or replaced.

[37] Ms. Gemeinhardt claims she was induced by the Babics to enter into the agreement of purchase and sale as a result of their misrepresentations and/or omissions. The Babics allegedly failed to disclose latent defects, the environmental contamination, the improper construction of the house and buildings with inferior materials, the improper construction of chimneys and fireplaces in the farm house, the improper construction of the plumbing and electrical systems. The construction work and renovations carried out by the Babics were done without obtaining the property building permits from the Township of Oro-Medonte. She claims damages for the breach of the agreement of purchase and sale and for the Babics' alleged tortious acts. She claims damages for emotional shock as a result of the Babics' deceit and also claims punitive damages.

[38] The Babics assert that given the age of the home and the other buildings, these structures were built prior to the enactment of *Ontario Building Code*. They deny having any knowledge of OBC deficiencies. Further, they assert Ms. Gemeinhardt was familiar with

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the construction, knew she was purchasing a century farm and failed to obtain a property inspection report. The Babics maintained they were approached by Ms. Gemeinhardt to sell and that she was eager to purchase the property. To contrary, they made no representations whatsoever to induce Ms. Gemeinhardt to enter into the agreement of purchase and sale.

[39] The Babics denied having any problems with the septic system or basement flooding. There were no problems with the fireplaces and chimneys. There were no difficulties with the plumbing and electrical systems and the Babics were unaware of any deficiencies in the septic system on the property. On closing, the Babics had no reason to believe that these systems were not in good working order.

[40] The Babics state they acted in good faith at all material times. They made no representations and gave no warranties. They deny Ms. Gemeinhardt is entitled to damages of any kind and that Ms. Gemeinhardt has failed to mitigate her damages, if any.

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The Latent Defects

[41] For the following reasons, I find there existed latent defects in the farm house and garage regarding which the Babics knew or ought to have reasonably known and for which they ought to have disclosed to Ms. Gemeinhardt prior to her purchase of the property.

Evidence and Findings

Evidence of Cheryl Gemeinhardt

[42] Ms. Gemeinhardt attended the Babics' home and property at least seven times prior to executing the agreement of purchase and sale either alone, with either of her two sons Stefan or Erik or with her father, Thomas Proctor.

Visit #1

[43] Ms. Gemeinhardt testified the first visit was in early July 2007. She was searching for a farm property in the vicinity of the Babics' farm and stopped in their driveway to ask for directions. At the time, she was interested in a local farm owed by MacDonald.

Visit #2

[44] Although the farm was not for sale at the time, Ms. Gemeinhardt received a telephone call from Mr. Babic at the end of July/early August inviting her to visit his farm. Ms. Gemeinhardt accepted the invitation and walked the whole property with Mr. Babic. At that time, Mr. Babic told Ms. Gemeinhardt that he was not well and his wife did not like living on the farm. He compared his farm to the MacDonald farm where Ms. Gemeinhardt saw water in the farm house basement. The MacDonald farm was located at a lower elevation. Ms. Gemeinhardt testified that Mr. Babic reported no problems with his farm. The land was better and there were trees. They went into the house which was

clean and spotless. Mr. Babic pointed out new features of the house. There was no discussion regarding sale then.

Visit #3

[45] Approximately a week later, Ms. Gemeinhardt attended the Babics' farm uninvited and looked at all the farm outbuildings. She spoke to the Babics who were now inclined to sell the farm to her.

Visit #4

[46] On the fourth visit, Ms. Gemeinhardt called Mr. Babic and asked if she could attend with her son Erik. Ms. Gemeinhardt and Erik went through the house and the farm outbuildings. Mr. Babic showed them the fireplace. Regarding the septic system, Ms. Gemeinhardt asked Mr. Babic if the septic system worked. Mr. Babic responded "here, I'll show you" and he proceeded to flush the toilet. Ms. Gemeinhardt, Erik and Babics went to the basement. The fieldstone walls were white washed. The floor was painted blue. The basement looked dry. Ms. Babic said she used the basement to store vegetables.

[47] They inspected the garage. Ms. Gemeinhardt saw a lovely bedroom in the garage which was panelled along with a fancy ceilings, draperies and bedroom furniture. The garage had a woodstove for heat. There was a rug on the floor. There was a high cathedral ceiling sheathed in chipboard. Everything was enclosed.

[48] Ms. Gemeinhardt and Erik were shown the barn which had a new addition. Mr. Babic told them he had building permits on the wall in the barn.

[49] There was plastic sheathing around the barn and house foundation. They were only able to access the main basement but not that part of the basement under the new additions which the Babics had built.

[50] Ms. Gemeinhardt left the meeting thinking the Babics were going to sell to her and would probably call her as she indicated her interest in buying.

Visit #5

[51] This visit took place during the first or second week of August 2007. She attended with Erik and her father, Thomas Proctor. They walked the property and inspected the land, house and buildings.

Visit #6

[52] On this occasion, Ms. Gemeinhardt attended with her father. They sat at the kitchen table and had serious discussions with the Babics about purchasing the property.

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[53] Ms. Gemeinhardt testified that she was never told by the Babics at any point in time that the construction work at the house or the farm was done without building permits. Her evidence at trial was adamant as to whether she was informed by the Babics about their obtaining building permits:

> "Never. I would never have bought the place. Never. I wouldn't be able to get a mortgage with no permits. I wouldn't be able to get insurance with no permits. No. Never. Never."

[54] She was never told by the Babics that the basement was occasionally wet when water came in during a thaw. She first heard of this when her lawyer contacted the Babics' lawyer after closing: letter dated February 4, 2008 from Klaus Jacoby to Leon Carter, Exhibit 27, page 23. Ms. Gemeinhardt testified there was nothing that would cause her any concern about buying the property. She was not told exactly when the Babics built the additions or renovated the house. They told her that they did all of the house – the whole house.

Visit #7

[55] Ms. Gemeinhardt received a call from Mr. Babic to visit on the following day, August 13, 2007. She attended with Erik. The purchase price was negotiated at $950,000…$850,000 for the farm and house, $100,000 for the chattels: Agreement of purchase and sale Exhibit 2, Tab 1, page 4. Schedule "A" of the agreement of purchase and sale related to the sale of the farm machinery and equipment.

[56] Ms. Gemeinhardt agreed to allow the Babics to stay at the farm house after closing for a few days while their Barrie house was being renovated. In return, the Babics agreed to pump out the septic tank and give Ms. Gemeinhardt septic papers and also fill the oil tank.

[57] After Ms. Gemeinhardt took possession on December 11, 2007, she never received a septic use permit from the Babics after the pump out. She understood that there existed a septic tank with two chambers. A week or a few days after closing, the furnace did not work despite Mr. Babic and an electrician trying to fix it.

[58] A dispute arose about the late night visit where Mr. Babic and his son attended the farm to remove chattels and chickens.

[59] Soon afterwards, the basement flooded. Sump pumps and the furnace needed replacement and Ms. Gemeinhardt discovered the oil tank had not been filled prior to closing. It was only half full. All of these issues culminated in Ms. Gemeinhardt commencing her small claims court action. The relationship between Ms. Gemeinhardt and the Babics had soured forever and would soon explode into full-blown litigation once the issue of latent defects and no building permits came to light. Ms. Gemeinhardt had financed the purchase of the chattels from the Babics by giving them a vendor take-back

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mortgage. She testified that she refinanced this mortgage and paid off the Babics so that she would not have anything more to do with them.

[60] She testified that in July 2009 she first learned that there was a problem with the septic system. There was no septic system. There was no septic bed. There were no headers to distribute sewage. All that existed was a two-chamber holding tank described as septic #2 on the east side of the house with a square tank lid. There was a back-up of sewage through the toilets and sinks. There was more water in the basement.

[61] However, Ms. Gemeinhardt discovered that it was not just a water problem. Erik and Stefan rented an industrial snake and "snaked out" septic #2. Photographic evidence was referred to. The tank was full of raw sewage which then dumped inside the ground. Contaminated water from the tank entered the basement from the wall closest to the septic tank. The Township of Oro-Medonte issued an Order to Remedy Unsafe Sewage System dated July 30, 2009 which required: Pump septic tank; Seal/cap outlet line from septic tank; and, Obtain required sewage septic permits to repair or replace failed sewage system: Exhibit 7, Tab 28.

[62] The Township of Oro-Medonte had previously issued an Order to Remedy Unsafe Building and Garage dated April 24, 2009: Exhibit 2, Tab 17.

[63] With the septic tank being capped, Ms. Gemeinhardt and her family could no longer live in the house. She and Natasha moved to the adjacent trailer in which they lived for two years. Her father moved out. So did Erik and his girlfriend, Stefan and her partner and their baby. There was evidence of health issues which I will review later. She no longer was able to collect rent from them to help pay the expenses of living in the farm house.

[64] Ms. Gemeinhardt and Natasha moved to Pembroke where Cheryl believed they could afford to live modestly. However, Natasha missed her father so the Pembroke house was sold. The Pembroke house was mortgaged. After paying expenses and the mortgage, Ms. Gemeinhardt testified she made only $3,000 on the sale of the Pembroke house.

[65] She used the $3,000 as a down payment on the house she purchased on the Berczy Street in Barrie where she and Natasha were going to live. The Berczy Street house was also mortgaged secured by way of collateral mortgage against the farm property. Her ex-husband and brother Todd came to live in the Berczy Street house and pay the expenses in order to help Ms. Gemeinhardt financially. She testified she could not afford to renovate and sell the Berczy Street house at a loss.

[66] At the time of trial, Ms. Gemeinhardt resided in a rented house on Steele Street in Barrie with her father, Natasha, Erik and his girlfriend.

[67] Ms. Gemeinhardt's father attended the farm two times and never saw any deficiencies. She stated he was an experienced builder who thoroughly inspected the property. I find Mr. Proctor was as experienced as any home inspector to inspect and discover defects in the farm house and garage given his work background. The Babics have alleged that a

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home inspection by a home inspector would have revealed defects that Ms. Gemeinhardt and/or her father failed to observe. They further allege that Ms. Gemeinhardt failed to carry out reasonable due diligence before closing and/or making an offer to purchase and she has no one but herself to blame for failure to observe defects.

[68] I disagree with the Babics' position. There was no evidence led to establish that a professional home inspector would have discovered defects that were not observed by Ms. Gemeinhardt, her sons and/or by her father, an experienced builder and project supervisor.

[69] There is also evidence from at least three engineers and a building inspector who all agreed that the major structural defects could not have been observed without destructive testing because those defects were covered. I agree and find there were latent defects that could not be discovered because they were covered over.

[70] The evidence of Erik and Stefan Gemeinhardt support the evidence of Ms. Gemeinhardt.

Evidence of Erik Gemeinhardt

[71] Erik testified that there was a finished room in the garage set up as a bedroom by the Babics when he inspected the garage before closing. He described how when he went to inspect the farm house, everything looked new. The basement was very clean, the walls were not stained and there was no discoloration. All the support structures of the garage and farm house were concealed when he inspected the farm house and garage.

[72] He attended the farm house two times with his mother. On the second visit, about a week after the first visit, Mr. Babic decided to sell the farm and the Babics met with Ms. Gemeinhardt at the kitchen table to discuss the terms of the deal. Both his mother and the Babics made notes of their conversation.

[73] Erik recalled after closing and after helping the Babics move, that he attended the house to turn the furnace on. It did not appear to work.

[74] He recalled the basement flooding after closing but could not recall exactly when. He recalled seeing mould in the basement after closing and that he and his brother Stefan installed flagstone on top of the existing concrete basement floor to raise the floor in an attempt to stop the flooding. He confirmed Stefan's testimony about the industrial "snake" and how it came to an end of a pipe (the outlet from the rectangular septic tank #2) and went nowhere. There was no header or septic tile bed.

Evidence of Stefan Gemeinhardt

[75] Stefan Gemeinhardt identified photographs taken of the septic tanks (the old disused tank septic #1 and the new in-use tank, septic #2). There were photographs identified showing water and mould in the basement and the work he and Erik did to raise the basement floor with flagstone. He also gave evidence about rust on the furnace.

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[76] Stefan testified that he and his girlfriend had a baby. They lived in the farm house for about eight months after closing before they moved out. During the time they were living in the house, they used disposable diapers for their baby and that no one ever flushed a diaper down the toilet to block or clog the septic system. I find the Babics' allegation that the septic system failed due to there being a diaper flushed down the toilet was not based on any fact or evidence. I reject their evidence in this regard.

[77] Stefan testified that he had experience in using an industrial snake before July 2009 when he had used one to try and clean the drain so that the toilets would not back up. He dug a hole where the end of the snake stopped underground. He observed that the pipe from the septic tank #2 ended and that there was no header or distribution bed. I accept the evidence of Ms. Gemeinhardt, Erik and Stefan about the basement flooding and the failure of the septic system. I reject the evidence of the Babics, particularly Mr. Babic who testified about a small amount of water entering the basement from a window where snow had accumulated and then melted during a thaw. Mr. Babic testified that he told Ms. Gemeinhardt about this condition and that snow needed to be kept clear of that window. I accept Ms. Gemeinhardt's evidence that she knew nothing about the basement flooding until Klaus Jacoby, the Babics' solicitor, wrote to Mr. Carter after closing.

Evidence of Leon Carter

[78] I accept the evidence of Leon Carter, Ms. Gemeinhardt's solicitor. He was an experienced and longtime practitioner of real estate law. He gave his evidence in a credible and reliable manner. He demonstrated his knowledge and expertise regarding the purchase of the farm property and title insurance.

[79] I accept Leon Carter's evidence that Ms. Gemeinhardt took possession of the property on December 11, 2007. The furnace was not working and Ms. Gemeinhardt paid a heating contractor $241.90 on December 12, 2007 to try and repair the furnace.

[80] On December 31, 2007, the furnace had been replaced and Ms. Gemeinhardt paid the sum of $7,869.75 to replace the furnace, install the life-breath device, replace the fuel tank and install a chimney liner. It later turned out that the chimney liner was not installed and a credit of $1,000 was allowed in respect of this bill. Ms. Gemeinhardt paid for further electrical work and plumbing work in the basement. Mr. Carter testified the plumbers did more work in early April 2008 to install a second sump pump pit and a second pump for $525. This was due to the new existing sump pump (installed in early January 2008) being unable to keep up with flooding of the basement.

[81] Also, in early January 2008, Ms. Gemeinhardt obtained an estimate for excavating around the foundation wall of the farm house to waterproof the exterior. If she had done the work, this would have cost Ms. Gemeinhardt the sum of $9,591.75.

[82] Mr. Carter testified that Ms. Gemeinhardt also paid to raise up the basement floor by installing flagstone overtop of the existing concrete floor. The labour was done by her sons.

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[83] Mr. Carter testified that none of the issues relating to the furnace being defective, the basement flooding and/or electrical and plumbing issues were disclosed to him by the Babics' lawyer. He did not receive any written disclosure of the defects at any time prior to closing.

[84] Mr. Carter further testified that there was a "four corners" clause in the agreement of purchase and sale. This clause is found at para. 24 of the agreement: Exhibit 2, Tab 1. Mr. Carter's evidence was also that if the Babics wanted to give notice of a latent defect to Ms. Gemeinhardt, it should have been in writing before closing and this did not occur.

[85] On January 4, 2008, Mr. Carter wrote to Mr. Jacoby demanding compensation for the cost of three-quarters of a tank of fuel oil as well as for the cost of replacing the furnace and the furnace oil tank. Ms. Gemeinhardt paid the sum of $846.95 for a full tank of oil on closing: Exhibit 27, page 56, Mr. Carter's reporting letter to Ms. Gemeinhardt dated December 11, 2007. The cost of refilling the oil tank was $635.21.

[86] The Babics disclosed the fact that the basement had a history of flooding after closing in a letter Mr. Jacoby wrote to Mr. Carter on February 4, 2008. Mr. Jacoby wrote:

> With respect to the basement leakage, my clients advise that only in times of a big thaw that a slight leak occurs in the corner of the basement under the stairway of which Ms. Gemeinhardt was fully apprised.

[87] I find that there were no oral representations made by the Babics to Ms. Gemeinhardt or to Mr. Carter about the basement flooding at any time. What Mr. Jacoby wrote after closing did not accord with the reality of the basement flooding as disclosed by Ms. Gemeinhardt, Erik and Stefan in their evidence supported by their photographs of flooding in January and April of 2008 and even later in the supposedly drier summer months when one would not expect any water in the basement.

[88] The water in the basement was not a "slight leak" as claimed by Mr. Jacoby on behalf of the Babics. There was so much water in the basement that the sump pumps could not keep up with pumping the water out. The sump pumps wore out and needed to be replaced numerous times. This is inconsistent with a "small leak". Further, contrary to the evidence of Mr. Babic, the leak did not occur in the corner of the basement under the stairs. This was a supposedly dry area where Mrs. Babic stored her vegetables to keep them away from the window on the far wall where the water allegedly entered the basement after a thaw.

[89] I accept the evidence of Ms. Gemeinhardt, her sons and Mr. Carter about the latent defects of the basement flooding, the defective furnace and septic system (such as it was) supported by the photographic evidence. I further find that the alleged oral representations to Ms. Gemeinhardt by the Babics never occurred. Also, the agreement of purchase and sale provides in para. 24 that the agreement is in writing and that there are no representations that affect the agreement other than written ones. In addition, the

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Statute of Frauds, R.S.O. 1990 c. S. 19, requires that agreements for the sale of land be in writing.

[90] I find based on compelling and credible evidence that the basement flooding and defective furnace were latent defects that the Babics knew or ought to have reasonably known existed. They were obliged to disclose these latent defects to Ms. Gemeinhardt. Instead, walls were painted white and the floor was painted blue to give the basement a fresh, clean appearance in the months prior to closing on December 5, 2007. Mr. Babic's "spring thaw" story is incredible and inconsistent with the overwhelming facts that the basement flooding was a latent defect which the Babics ought to have disclosed.

[91] As for the furnace, no amount of tinkering by Mr. Babic or the electrician he brought with him a second time could revive the rusty failed furnace. He knew or ought to have reasonably known the furnace was defective and required replacement. Instead of making disclosure of the latent defect, he washed his hands of the entire affair and simply declared to Ms. Gemeinhardt "that's life" and the matter ended.

[92] His declaration did not end the matter. Rather, it not only signaled the beginning of the toxic relations between the Babics and Ms. Gemeinhardt but also the beginning of the discovery of **other** latent defects found by the engineers. [Emphasis mine.]

[93] Unfortunately, it also signaled the beginning of the long and difficult journey by the parties to trial.

The Engineering Evidence and Findings

[94] The engineering evidence at trial also addressed the other latent defects – unseen structural defects which were only made obvious upon destructive testing.

Evidence of Steve Adema

[95] Mr. Adema is a civil and consulting engineer. He was qualified to give expert opinion evidence in the field of structural engineering: CV, Exhibit 28. I find that Mr. Adema was a credible witness. He testified in a forthright manner and was knowledgeable in his field of engineering. I found his evidence to be reliable and of assistance to the court.

[96] Mr. Adema is the director of engineering with Tacoma Engineering (Tacoma). A number of engineering reports were prepared through his firm regarding the property purchased by Ms. Gemeinhardt:

1. Report dated February 9, 2009, Exhibit 30.

2. Report dated March 27, 2009, Exhibit 31.

3. Report dated December 8, 2011, Exhibit 32.

4. Report dated August 2, 2012, Exhibit 33.

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5. Report dated September 24, 2013 re Trailer.

[97] Tacoma was retained by Ms. Gemeinhardt to review deficiencies regarding the house and garage.

[98] As for the garage, after the first inspection by Scott Thompson of Tacoma on January 19, 2009, Tacoma had serious concerns about the structural integrity of the garage. All the structural elements were completely covered. Also of concern was that the garage was built without a building permit and without meeting code requirements. The municipal permit list attached to the first report dated February 9, 2009 showed no building permit for work done on the garage.

[99] Mr. Adema testified that it did not matter if work was done before 1986, no significant change to the *Ontario Building Code Act* regarding the structural system had been made since the inception of the Act. It made no difference if the structure dated back to 1971.

[100] He was shown a photograph (Exhibit 1, Tab 15) of two men carrying a barbequed lamb with the south wall of the garage in the background. Changes made to the south wall of the garage appearing in the photograph required a building permit.

[101] The version of the *Code* that would apply to changes made after 1986 would be the version when the application for permit was made, consistent with the evidence of Ms. Bobbi-Jo King, the chief building official of the Township of Oro-Medonte. Mr. Adema testified that if the size of the garage doors changed, a permit would be required. Structural changes would require a permit.

[102] Mr. Adema testified that the entire garage roof was not structurally adequate. Tacoma's second report dated March 27, 2009 (Exhibit 31) speaks to a complete structural review of the garage built without a building permit. The conclusions are found at pages 2 and 3 of the report.

[103] Mr. Adema testified that Tacoma found the garage to be unsafe. His evidence and report accord regarding the structural inadequacy of the entire roof. There were noticeable deflections in the roof and some "kick out" in the walls.

[104] Further, the garage was built directly on a concrete slab on grade with no foundation. The framed walls were built on a concrete slab of varying thickness that was not a structural slab. Tacoma concluded that the foundation of the garage was inadequate. Mr. Adema testified that the garage was unsafe to use and the best option would be to demolish the garage and start fresh.

[105] He further testified that Scott Thompson of Tacoma prepared the third report dated December 8, 2011 (Exhibit 32) regarding the farm house with its multiple additions. The report is a thorough review of observations made of the original farm house and additions with photographs and layout sketch attached.

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[106] He testified that the opening of the original farm house between the original house and the additions was not properly supported by beams and posts. New posts had been installed to support the roof and second floor of the original farm house. The framing was wholly inadequate. The beam installed was overstressed by over 200% and was not adequate to support the loading in accordance with the 2006 *Ontario Building Code*. A steel beam would be required in that location. There was no building permit for this construction which did not meet the *Building Code* requirements. Posts were not properly fastened to the beams so the structural elements did not function properly in addition to being undersized. Mr. Quail, an engineer called by Stewart Title, agreed.

[107] Mr. Adema testified about the roof framing of the addition (Exhibit 32, page 6) which was undersized and spaced too far apart. The entire roof was structurally inadequate.

[108] The part of the interior ceiling and wall finishes were removed over a window (location C in the report). Mr. Adema testified that moisture had accumulated in the attic space allowing the growth of mould. Insulation was installed tight to the exterior wall and roof sheathing which blocked any ventilation to the attic space from the soffits contrary to the *Building Code*. He was shown a photograph of a ceiling fan (Exhibit 34) with the attic above it. Moisture had accumulated in that location allowing mould to grow.

[109] Mr. Adema testified that in location D (Exhibit 32) exterior aluminum siding was pulled back to show the complete lack of air barrier and insulation. At location E (Exhibit 32), the existing siding was pulled back near the west wall of the kitchen to reveal that Styrofoam was used as insulation. He testified this product is not appropriate insulation. It is extremely flammable and is a fire hazard.

[110] Mr. Adema testified that the building materials used in the additions were not proper materials for framing support. Much of the materials were recycled and cut down. He testified that replacing the additions in their entirety was the most cost effective method of dealing with these deficiencies and improper construction (Exhibit 33, comments at page 3). He recommended the removal of all interior finishes throughout the original house. In his opinion, that would lead to more work having to be done to the house once all the interior finishes were removed. Exterior finishes to the house would also have to be removed as well – to check air barrier and insulation and to make sure these were done properly.

[111] Interior finishes both on the first and second floors should all be removed because of the methods and materials used in construction.

[112] Mr. Babic admitted that his method of installing air barriers in the house (after he took down all interior walls and insulated them) was the same method he used in the garage above the ceiling and the finished walls. Mr. Adema testified Mr. Babic packed the insulation in (no ventilation) and he used the insulation packaging (plastic bags) as a vapour barrier – this was not a proper method for creating an air barrier and is likely the cause of the moisture and mould problems in the wall and ceiling cavities.

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- The main (original) chimney was in very poor repair (see exhibit 35)

- The chimney likely required complete reconstruction

- Brick shield wall in the summer kitchen (behind wood burning cooking stove) – built on top of a wood framed floor – was not permitted by the *Ontario Building Code Act* and must be removed.

[113] Mr. Adema recommended that the entire structure of the original farm house be exposed. The likely probability was to remove all the interior finishes and part of the exterior finishes back to the "stick framing". It was his opinion that the scope of this work could not be done for $70,000. This was not a reasonable estimate. Given the magnitude of the nature and scope of the work, I agree with his opinion.

[114] Although not a quantitative surveyor, Mr. Adema knew residential construction ran in the range of $150 - $200 per square foot which would suggest a reconstruction cost of $460,000 plus HST. Based on the house being 2,300 square feet, renovations of the farm house is an option but renovations of the additions, is not.

[115] He testified it was likely the deck could be deconstructed and some materials saved for a rebuild. However, it was unlikely that all of the deck materials could be saved.

[116] Consensus among engineers was that the chimney in the addition was inadequate and must be replaced. However, Mr. Quaile**,** an engineer for Stewart Title did not comment on the original chimney.

[117] Mr. Adema testified about the Tacoma sketches marked as Exhibit 36. He testified that it would be too difficult to reinforce the floor joists in the additions. It would be far simpler to remove the entire floor which needed to be replaced. As there was no access from the basement, the floor could not be reinforced from underneath. It was his opinion that the entire floor be removed and reconstructed. His ultimate opinion was to take down the entire additions considering all of the problems associated with them.

[118] While this work was being done, Mr. Adema testified that he would not want to attempt to live in the house.

[119] He disagreed with Mr. Quaile's opinion that the garage could be rebuilt for $43,000 and that the farm house with additions could be remedied for $110,000. He believed both figures were too low. He recommended obtaining quotes from a contractor or quantitative surveyor.

[120] Mr. Adema read Thomas Pepper's report. Mr. Pepper was an engineer called by the Babics. He disagreed with Mr. Pepper that the 1986 *Building Code* would apply. He testified the version of the *Code* when a building permit is applied for is the version that must be followed. He also testified that there would be environmentally hazardous materials to be disposed of. Hazardous materials like such as lead paint and asbestos

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cannot be taken to the landfill and would require special handling and dispersal which is very expensive. Mr. Quaile agreed with Mr. Adema's conclusion that the entire garage must be replaced. Mr. Pepper agreed the garage roof was completely inadequate and needs replacing. As for the garage floor, it also needs reinforcing. Mr. Quaile and Mr. Adema are structural engineers. They agree the concrete slab is not a proper foundation and needs to be replaced; it cannot be reinforced.

[121] Mr. Adema adopted the contents of all the Tacoma reports as being accurate. He testified the quality of the workmanship in the additions was very poor and all most certainly was completed with used and salvaged materials. In his opinion, the house was not structurally adequate as constructed and should not be occupied (Exhibit 33, page 3). He also testified much of the electrical and plumbing systems would have to be reviewed for conformity with the *Ontario Building Code Act* requirements if the decision was to salvage the existing structure.

[122] In cross-examination, Mr. Adema's evidence and opinions expressed in-chief remained unchanged. The entire south and east walls of the garage were not simply framed in as suggested by counsel for the Babics. When the siding was peeled off by engineer Mr. Scott Laking it was clear the entire south wall and east wall of the garage were framed at the same time – the openings were not framed in. Rather, the entire wall was replaced.

[123] I find the garage is not an agricultural building. The age of the garage is not relevant because no permit was ever taken out. To comply with the Township of Oro-Medonte's order to remedy, building permits must be taken out and comply with current code provisions.

[124] There was no evidence to establish the garage was built prior to 1975, the year the first version of the *Ontario Building Code Act* came into effect. Mr. Laking gave reply evidence to prove that the concrete floor in the garage was poured no earlier than the early 1990's after the Babics became the owners of the farm.

[125] Mr. Adema repeated that there was a ventilation and mould problem in the house. He repeated that the house was unsafe to occupy. The post and beams at the interface between the house and additions could not be supported. He believed the house posed a risk to the health and safety of its inhabitants.

[126] Mr. Adema disagreed that the house could be occupied during repairs. Again, he stated that the house should not be occupied because the house was unsafe. Mr. Adema and Ms. King both believe it was not reasonable for someone to occupy the house while repairs were being done. There would be no safe access to the house. The additions were all to come down. The interior and some exterior finishes needed to be removed. The result would be no kitchen, no bathroom, and therefore no place to cook or wash. Further, the septic system was unsafe to use and would have to be replaced as well.

[127] Mr. Adema did not agree with Mr. Quaile's opinion that someone could live in the house while exterior renovations were being done. Mr. Adema did agree that if a person was

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willing to put up with the inconvenience of living in a house under renovation, they could live there if life and safety issues were addressed. He would require all the exterior siding be removed in order to remove all the Styrofoam insulation.

[128] I find the evidence of Mr. Adema clearly establishes that all additions must be removed as well as the garage. He raised serious concerns about the original house, about Styrofoam insulation being used as it is a fire hazard. He also raised concerns about mould in the house and a lack of proper vapor barrier and insulation. I find that there was a mould problem that developed in the basement as well. Mr. Adema's concerns were proved to be valid by Mr. Laking's observations and by admissions made by Mr. Babic about how he insulated and installed vapor barrier to the original house after he gutted it.

[129] I accept Mr. Adema's evidence that there are no reasonable grounds to believe that any remedial measures other than extensive demolition and new building would provide a reasonable solution. Given all his evidence, the only realistic option is complete demolition of both the house and garage in order to build entirely new buildings. I find Mr. Adema's evidence further confirms that most of the defects in the construction could never be observed without destructive testing being done. Ms. Gemeinhardt could not have possibly discovered these latent defects by having a home inspector attend to inspect before closing.

Evidence of Scott Laking

[130] Mr. Laking is a professional engineer who attended on site several times and arranged for inspection of the property by other experts. He was qualified to give expert opinion evidence regarding the age of the structures and materials used regarding the garage, house and additions. He also made his own observations and took numerous photographs and measurements. He obtained aerial photographs of the farm, both before and after the Babics' purchase of the farm and sale to Ms. Gemeinhardt.

[131] Mr. Laking carefully examined other photographs in evidence and he arranged for destructive testing of the house and the garage. He provided information about where certain building materials were used in the house and garage were manufactured. From his evidence, the date of when the garage was enlarged and closed in was determined. In his report dated December 5, 2013 (Exhibit 38), Mr. Laking detailed all of his attendances at the property along with his observations. He attended on his own or with representatives of Tacoma Engineering and Joseph Emmons, a quantity surveyor.

[132] On his visit of September 29, 2011, he noted and photographed the wet basement below the original part of the house. The walls were discoloured by water seeping in. The moisture was very high and mould formed on the walls of the basement. His concerns were itemized on page 3 of his report. Generally, they included building deficiencies, constructs without building permits, and building code non-compliance regarding the original house and additions. He called for destructive testing and further inspections by Tacoma. He noted Mr. Quaile's conclusion differed from that of Tacoma as Mr. Quaile held it would be cheaper to reconstruct the additions than to demolish and rebuild them.

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[133] Mr. Laking delivered his report dated July 30, 2014 (Exhibit 40) on the age of modifications to the house and garage. He concluded that from all of the materials observed and dated, the garage had most of its renovations done after the beginning of 1990. The aerial photographs of the farm dated 1983 showed the original house with no additions and with a shed and barn. The shed in the photograph was of a different dimension than the present shed (Exhibit 41, aerial photos). He concluded that after 1983, the size of the garage increased to today's date by six feet in width.

[134] Mr. Laking further testified about his visit to the farm property on April 11, 2015. His report is dated April 15, 2015 (Exhibit 87). At page 1 of his report is Ms. Lacking's summary:

> This is a summary of the Gemeinhardt farm visit April11 2015.
>
> Summary
>
> The interior and exterior of 2 or the garage walls were removed. The wall was fabricated from materials that showed no sign of the door frame or opening present in trial Exhibit 1, Tab 15 page 2 photo. The window and door present today were framed in at the same time as the wall was fabricated as all the materials were cut and fit to suit and all of the same type and colour. All the materials in the walls on the side and the rear wall have the same material in the studs, sills and headers. The walls were fabricated at the time the window and door were installed. The windows and doors as mentioned in previous reports were made in 1989 and 1990. The structural modifications were made after the photo Trial Exhibit 1, Tab 15 page 2 and before Cheryl Gemeinhardt purchased the farm. No building permits were issued for this building for this structural modification. The wiring in the cement pad was manufactured prior to 1991.

[135] Mr. Laking also learned that a further structure on the property (what had been a woodshed) was too large to be built or renovated without a building permit. This structure was built at about the same time that the garage/accessory building was built because the methods used in pouring the concrete floor was very similar if not identical as to the materials used (wood expansion strips between the concrete slabs) and the methods of construction.

[136] Mr. Laking removed the windows and much of the siding and determined that the framing of the garage and accessory building stands on the poured concrete floor in the garage/accessory building. This indicates that the walls of the building were all built at the same time after the slab was poured. There was no infill construction on the south wall.

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[137] Mr. Laking also took down part of the interior wall and the ceiling in the accessory building/garage to determine that the electrical wire to the garage from the house was imbedded in the concrete slab. Therefore the slab could not be .older than the later 1980's or early 1990's after the Babics had acquired the farm on September 3rd, 1986.

[138] Mr. Laking further used two separate methods to determine that the original garage, depicted in a photograph where a BBQ'd lamb is being carried by Mr. Babic in the foreground with the assistance of another man. This photograph is evidence of what the garage looked like in 1986.

[139] Mr. Babic had admitted he enclosed the south wall of the garage after he and his wife acquired the farm. He also admitted that he changed the garage doors, enclosed the interior walls and ceilings, put up partition walls to create an office/work space and he added electrical wiring and a wood stove and chimney. He further admits he put new siding and a new roof on the building.

[140] However, Mr. Babic denied that he altered the size of the building or poured the concrete floor. I find Mr. Laking's evidence refutes Mr. Babic's denials. I accept Mr. Laking's evidence.

[141] Mr. Laking gave evidence that the aerial photographs showed that the garage was a much smaller structure in 1983 before the Babic's purchased the farm.

[142] Mr. Laking located a 1983 photograph taken for forestry purposes in the Archives of Ontario (Exhibit 41).

[143] Mr. Laking used computer software to magnify the image of the farm in the aerial photograph.

[144] He then measured the size of the house and the barn, Mr. Laking was able to confirm that these measurements matched the known size of the original farm house and the original or larger barn. He was therefore able to verify the accuracy of the measurements.

[145] Mr. Laking then measured the garage and concluded based on the software measurement that in 1983 the garage was 6-8 feet narrower than the farm house (24' wide). The garage was therefore between 16'-18' wide in 1983.

[146] The garage was increased to 24' wide sometime after 1983 and before Ms. Gemeinhardt purchased the farm.

[147] Mr. Laking used a second method to measure the size of the garage. He used a photograph of the garage, showing a pail in the garage doorway before it was enlarged. The same photograph showed Mr. Babic carrying the BBQ'd lamb on a spit in the foreground. Mr. Laking used the known dimensions of the pail to create a scale to measure the size of the garage. The conclusion was the same. When the photo was

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taken, the garage was still much smaller than it was by the time Ms. Gemeinhardt bought the farm. The findings were consistent with the conclusions reached from the other method of examining the aerial photograph and using computer software to measure. I find these independent methods of measuring the garage clearly indicate that the garage was enlarged after the Babics purchased the farm in 1986.

[148] Mr. Laking further gave evidence that the electrical wire from the house to the garage that was embedded in the concrete slab of the garage was manufactured in 1991: Exhibit 87, page 2.

[149] I find the garage could not have been enlarged before 1991 long after Mr. Babic applied for the first building permit for the barn in 1990. Mr. Babic poured the slab in the garage the year after the latest date that he knew or ought to have known that he needed a permit for any new construction work, including an addition to the barn.

[150] Mr. Laking further observed that the garage doors were manufactured in 1990. One of the doors had a delivery tag dated 10/09/1990. This door therefore could not have been installed before that date.

[151] Mr. Laking also concluded that the garage doors he inspected were larger than the original garage doors in the photograph of the BBQ'd lamb. The original doors were approximately 6 feet wide, the replacement doors were 8 feet wide (Exhibit 1, Tab 15, Page 2). I accept Mr. Laking's evidence as credible and reliable.

[152] I find that the garage was built in 1991 or later and that the area of the garage was increased from 18' x 32' to 24' x 32' which is approximately a 33% increase in the size of the original garage. A concrete slab was poured on the ground and walls were built on top of the slab. This construction was stick framed exterior walls with the roof placed on top of the framed walls. There were no posts or beams left from a pole barn that was long gone by the time the farm was sold to Ms. Gemeinhardt. Mr. Babic alleged he did not expand the size of the garage. He testified the window to the north wall of the garage was the original window. His counsel made the point that there was an old asphalt coated wire in the south wall indicating an earlier date of construction. However, Mr. Babic clearly used recycled and salvaged building materials in the construction of the garage, in renovating the house and building the additions. I find that the older window and wire were likely salvaged material used in the construction of the enlarged garage in 1991 or later.

[153] Mr. Babic did numerous jobs without permits, including running an electrical cable from the garage to the barn under a creek. Mr. Babic's evidence has been inaccurate and unreliable on many issues. The evidence of the date of manufacture of the new wire bringing power to the garage is one more instance of Mr. Babic's unbelievable and unreliable evidence. Mr. Babic's conduct is yet another example of failing to obtain a building permit when he knew or ought to have known he should have obtained one – for the new garage, for the house and additions, for the electrical cable and for the Pan Abode that was moved to his property after donation by his sister-in-law in 1993.

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[154] He only obtained a building permit from the Township of Oro-Medonte when he was caught by the Township and found not to have a building permit for the moved Pan Abode.

[155] Further, Mrs. Babic had been living on the farm fulltime since 1988, certainly before 1991. She was living on the farm when the old garage was taken down and replaced with the current structure in 1991. I find she had actual knowledge that work was being done without permits. She also knew that even an addition to the barn required a permit.

[156] I find the Babics also built a structure that was an accessory building and not just a garage. A finished room was constructed within the new building. The new building was more than just a garage.

[157] Ms. King from the Township testified that if the finished room was used as a bedroom, then this would require an increase in the size of the septic system which was approved for a three-bedroom home with one bathroom. After the accessory building was constructed there were five bedrooms (four in the house and one in the accessory building) and two bathrooms. All were illegally constructed without permits.

[158] I find the Babics used the furnished room in the accessory building as a bedroom. I accept the evidence of Ms. Gemeinhardt and Erik in this regard. The Babics did not use it for storage or as a work space – not in this manner as it was furnished and heated. The bedroom in the accessory building was set up as a bedroom with a bed and other bedroom furniture. Mr. Babic had slept in that bedroom.

[159] The accessory building was finished to the point where Ms. Gemeinhardt believed when she bought the farm that one of her sons could sleep in the finished room. It was her belief that this was a suitable use because it had already been used as a bedroom.

[160] As the Babics' evidence about the work on the garage was unreliable, there is good reason to doubt their evidence about the furnished room and how it was used before they sold the farm, i.e., not as a bedroom.

[161] The use of the garage as an accessory building is important because it affects the quantum of damages being claimed. A garage without finished space is much less expensive to replace than an accessory building with some space partially finished for the use as a bedroom. I will have more to say about quantum later in my reasons.

Evidence of Thomas Pepper

[162] Mr. Pepper was called by the Babics as an expert witness. He is not a structural engineer. Rather, he is an electrical engineer who has formally worked as a building inspector. Counsel for the Babics advised the court that Mr. Pepper was called to testify whether or not some work required building permits. Further, Mr. Pepper was not disputing the essential findings of Tacoma regarding structural inadequacies of the additions. The

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issue for Mr. Pepper to address was whether or not everything needed to be demolished or the deficiencies ought to be remedied.

[163] Mr. Pepper authored two reports, dated May 21, 2014 (Exhibit 75) and April 17, 2015 (Exhibit 76).

[164] Mr. Pepper gave his opinion that only the roof of the garage had to be replaced. He suggested the concrete floor could remain. Mr. Quaile and Mr. Adema, both experienced structural engineers, disagreed with Mr. Pepper. I reject Mr. Pepper's opinion and prefer the opinions from Mr. Quaile and Mr. Adema that the garage ought to be demolished based on their evidence which I accept on this point and which I previously discussed.

[165] Mr. Pepper gave opinion evidence that the garage could be so old that it pre-dated the enactment of the *Ontario Building Code Act* in 1975. He suggested the structure may have been a barn at one point.

[166] I find Mr. Pepper failed to understand that the garage was an accessory building since it had a bedroom in it. He failed to appreciate Mr. Laking's evidence that showed the accessory building was enlarged sometime after 1983, most likely around 1991 or thereafter, and could not have been built prior to 1975.

[167] Mr. Pepper also erroneously believed that the additions to the house were built in accordance with the plan prepared by Maria Cvenkel, Mr. Babic's sister-in-law. Ms. Cvenkel worked for the City of Barrie's Building Department. Further, I do not accept Mr. Pepper's opinion about salvaging part of the garage. This opinion, in light of all the evidence, is not preferred over the evidence of Mr. Adema and Mr. Quaile.

[168] At page five of his report dated May 21, 2014, Mr. Pepper stated that alterations to the house structure indicated by Tacoma and Mr. Quaile were completed without the required building permits and, consequently, had adversely affected the structural integrity of the building. He agrees with the Quaile report that the Tacoma reports were "unnecessarily alarmist" and that it would be much more cost effective to renovate the existing house than to completely demolish the existing structure and rebuild it. I do not agree with Mr. Pepper's opinion on this point. I reject the characterization that the Tacoma reports were "unnecessarily alarmist". To the contrary, I accept those reports and the evidence of Mr. Adema that there were far too many structural deficiencies with the original house and additions from roof to basement to repair as opposed to demolish and replace. The structural defects included poor workmanship, non-compliance with the *Building Code*, moisture and ventilation problems giving rise to the presence of mould, faulty insulation and/or ventilation issues, problems with overstressed beams and faulty floor joists not accessible for repair from an inaccessible basement under the additions. The list goes on. I further reject any opinion that the house structure should or could be occupied during the conduct of any remedial work due to health and safety concerns.

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[169] Mr. Pepper was not aware that when Ms. Gemeinhardt purchased the property, the front porch existed. The roof later collapsed and it was not rebuilt. She had purchased an enclosed room.

[170] In cross-examination, his Mr. Pepper's opinion about what was more cost effective was tested regarding his recommendation to replace the masonry chimney for the woodstove in the summer kitchen with a steel stovepipe. He agreed that he should have recommended replacement of what was there, something Ms. Gemeinhardt purchase and not something less to save his client money. He agreed the scope of work was insufficient regarding both the chimney and front porch. He was not aware of the mould problem. He was not aware of what the life-breath appliance was for. He took basement photographs not attached to his report. He did not take measurements of the shed next to the garage. He could not give the kind of evidence that Mr. Laking did about the age of the white wiring in the garage pre-dating 1991. He could not say if the concrete floor in the garage was poured in 1991 or earlier. He did not know how power ran to the garage.

[171] He agreed that to do a thorough investigation required destructive testing. He did not know if electrical permits were obtained for all the re-wiring in the house. He was unaware that there was plumbing in the additions without a permit. He was unaware that there was a new bathroom installed. He was unaware there were no baffles in the soffits or no vents in the roof. He was unaware that the existing structures were seriously deficient so as to cause mould. He never interviewed the Babics nor any witness in this case. He could neither confirm nor dispute Mr. Laking's conclusions. Mr. Pepper's report of April 17, 2015 (Exhibit 76) did not add much to his evidence.

[172] Mr. Pepper was not qualified to give construction cost estimates. Therefore, there was not costing evidence that came directly from any expert called by the Babics. I find Mr. Pepper's reports in evidence were unreliable. He was neither as knowledgeable nor as well-prepared in the opinions he gave as opposed to Mr. Adema. The evidence of Mr. Adema, and to some extent regarding the garage the evidence of Mr. Quaile, is preferred over the evidence of Mr. Pepper. The Tacoma evidence rather than being "unnecessarily alarmist" was cogent and compelling in addressing the structural issues with a detailed analysis accepted by this court – unlike the evidence of Mr. Pepper which was largely unhelpful.

Evidence of Allan Quaile

[173] Mr. Quaile is a structural engineer. He was called to give evidence on behalf of the defendant Stewart title. He was qualified to give expert opinion evidence regarding structural deficiencies, remedial work and costing for the residence and garage located at Ms. Gemeinhardt.

[174] He reviewed all of the four Tacoma engineering reports and three reports from Steenhof cost estimates (existing garage structure, existing house and additions, and existing additions).

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[175] Mr. Quaile prepared three reports dated November 4, 2013 (Exhibit 83), October 8, 2013 (Exhibit 84), and March 17, 2015 (Exhibit 86). He attended the site once on September 26, 2013. In his report dated November 4, 2013, Mr. Quaile agreed with many of Tacoma's findings. In his summary and recommendations found at page 7 of Exhibit 83, Mr. Quaile was of the opinion that the garage structure should be demolished and rebuilt. This course of action would be less expensive than *in situ* repairs and reinforcement. His recommendation is in agreement with the recommendation of Tacoma Engineering.

[176] However, Mr. Quaile's opinion regarding the house and its additions differs from that of Tacoma Engineering. While Tacoma is of the opinion that the house and additions be demolished, Mr. Quaile is of the opinion that all of the deficiencies can be remedied and at considerably lower costs than that of demolition and replacement.

[177] In his report of October 8, 2013 (Exhibit 84), Mr. Quaile provided a budget estimate for the work of repairs and rebuilding the garage and house structures. The estimate for the house was approximately the sum of $62,000 which did not include the required septic work and HST. The estimate for the garage was $43,250 before HST and assumed the garage was unheated. If the garage was to be heated, the building would require insulation, vapor barrier and finishing the walls and ceiling.

[178] After reviewing Tacoma's conclusions and recommendations, at page 5 of his report dated November 4, 2013 (Exhibit 83), Mr. Quaile states his conclusions regarding the house, the additions and the garage:

> **Conclusions**
>
> The August 2, 2012 report by Tacoma Engineers questions whether it is feasible to repair the existing structure to current Code requirements. It also finds that the building is not structurally adequate and should not be occupied.
>
> In our opinion the Tacoma conclusions are unnecessarily alarmist and ought not to have been presented without further structural analysis. The two beams that are overstressed are located directly above the original foundation wall. A temporary shoring post near mid span of each would more than satisfy safety concerns. In the case of the roof joists over Area 3, our structural analysis shows that the OBC compliance of these members is· limited by deflection and not strength. A reasonable conclusion would be that these joists will flex more than desired under their full design loading but will still have more than enough strength to provide safety against collapse. Similarly, the floors can be made safe for occupancy by addition of minor temporary supports in the crawl space. We recommend that consideration be given to installing temporary supports so that the home may be occupied pending permanent repairs.

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> **3.2 Garage Structure**
>
> Tacoma Engineers have not provided an engineering assessment by a Professional Engineer for this structure. The unsealed report by Jeff Thompson, EIT, finds the structure to be unsafe.
>
> We reviewed the building structure and agree that the roof structure is unsafe and cannot be repaired without major reinforcement. Also the slab foundation does not conform with OBC 1986 or more recent codes. We conclude that it will be more economical to demolish and replace the building than to carry out repairs.

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[179] At page 7 of this report, his summary and recommendations are restated.

[180] At the time he prepared his report, Mr. Quaile also prepared some costing as found in Exhibit 84 to which I have referred. More current costing was evidenced in his report dated November 7, 2014 (Exhibit 85) in which he critiqued the Steenhof estimates and adjusted his own estimate for the cost of repairs to the house in the amount of $69,000 using "a slightly different approach." Mr. Quaile adjusted the Steenhof numbers for actual work in the amount of $207,000 without HST. Then Mr. Quaile adjusted his total based on the Steenhof itemization to arrive at $69,000. In his review, Mr. Quaile used the following:

- RS Means Building Construction Cost dated 2015
- Steenhof "Estimate Summary Sheet" dated September 1, 2013

[181] Mr. Quaile was of the opinion that it was much more cost effective to renovate the existing house than completely demolish the existing structure and rebuild it. While I agree with Mr. Quaile's opinion that the garage must be demolished and rebuilt, I do not agree with his cost estimate regarding the house and additions for the following reasons.

(a) I disagree with Mr. Quaile's opinion that it is much more cost effective to renovate the existing house and additions than to completely demolish and rebuild them. Cost effective for whom?

(b) I do not agree that the Tacoma Engineering conclusions and recommendations are "unnecessarily alarmist"; and

(c) I do not agree that the house ought to be occupied "pending permanent repairs" as recommended by Mr. Quaile.

[182] For the following reasons, I reject Mr. Quaile's opinion evidence as to costing for the garage, house and additions which affects the quantum of damages. I reject his opinion

that the house and additions could be repaired for the amount of $69,000 and that Ms. Gemeinhardt and her daughter could occupy the house "pending permanent repairs".

[183] Mr. Quaile admitted that his cost estimates for the garage did not include insulation, or heat (woodstove), or the framing and finishing of the bedroom, the interior walls or the ceiling. He testified in cross-examination that he did not go into the partitioned room and he did not know what was in it.

[184] He explained that he took the position that the building was a garage not a residence. Therefore his estimates are not for the replacement of what Ms. Gemeinhardt bought but something less, a basic detached garage.

[185] Mr. Quaile did not know whether Mr. Babic needed a permit for building the 14x14 wood shed.

[186] Mr. Quaile did not include the cost of replacing the masonry chimney attached to the summer kitchen in his estimates. He instead proposed to supply a steel chimney pipe.

[187] Mr. Quaile's estimates for remediation of the foyer was for a basic concrete porch and not a finished room.

[188] Mr. Quaile did not allow any amount for mould remediation although he went into the basement and saw mould on the walls. He did not know whether Mr. Emmons' estimate of $10,000 for mould remediation was reasonable.

[189] Mr. Quaile admitted that he had recommended to Stewart Title that they get quotes from local contractors for the work required but this recommendation was not followed. He never contacted any Barrie contractors or any contractors in Simcoe County. There was no evidence that Stewart Title had followed Mr. Quaile's recommendations.

[190] Mr. Quaile did not include any estimate for the installation of a replacement septic system (Mr. Emmons' estimate $9,500 plus HST).

[191] Mr. Quaile admitted that if he added the cost of his two estimates for the remediation of the garage and the additions to the house plus the Emmons estimates for the mould remediation and septic tank you would get to $155,092.50 plus HST. This amount would be increased by other factors: 5% overhead, 10% profit, 25% contingencies for renovations.

[192] Mr. Quaile did not provide any estimate for remediation of the original house. He was not informed that Mr. Babic had gutted the entire house. He did not provide estimates tor work required to be done to the house.

[193] Mr. Quaile agreed that there was no ventilation in the house to allow air to circulate between the insulation and the roof. He further agreed that the failure to provide proper ventilation will cause mould to grow in the wall/ceiling cavities and that a lack of proper

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air barrier or vapour barrier will cause moisture to form in the cavities which in turn promotes mould growth.

[194] Mr. Quaile also admitted that the RS Means Manual is for U.S Construction costs, not for Canadian construction costs. Mr. Quaile did not produce his calculations on how he converted the U.S data to a useful format for construction costs in the Barrie area. He did not bring his calculations to trial because he had not been asked to do so in the past. As a result, there was no way to check his calculations to test if they were accurate.

[195] Mr. Quaile did not use the renovation manual published by RS Means, he used the new construction manual. Mr. Quaile disagreed with Mr. Emmons that the renovation manual provides for 25% contingencies instead of a 3% allowance for new construction because of the unforeseen contingencies in renovations.

[196] When asked whether it would have been better for him to have gotten quotes from local contractors, he agreed. I find that Mr. Quaile's estimates are not reliable when compared to Mr. Emmons' quantitative surveys because Mr. Emmons' work is based upon known, local construction costs.

[197] When asked whether he had a contractor who would excavate the crawl space under the additions by hand to at least 4 feet below grade Mr. Quaile could not provide the name of even one contractor who would agree to do that kind of work.

[198] I find it highly unlikely that any contractor would take on the excavation by hand in the space under the additions to create a basement. Given the evidence of Mr. Adema, it is more likely that local contractors would demolish the structure with a loader and haul away the debris. This would be a much less expensive approach to reconstructing the additions.

[199] Mr. Quaile further claimed that four men could excavate the crawl space by hand in one day. This notion is simply not reasonable or realistic. There simply would not be enough room for four men to work in that confined area and it is completely unrealistic to believe that this method could be done for the estimated amount Mr. Quaile provided. I find this approach simply is not reasonable, realistic or cost-effective.

[200] Mr. Quaile did not provide any quotes for replacing the elaborate plaster ceilings in the house. He would supply basic drywall that would be taped and painted.

[201] Mr. Quaile did not allow any amount for electrical work in the original house.

[202] Mr. Quaile made no allowance for replacing the defective plumbing (leaking from upstairs bathroom) or for any plumbing at all (all installed illegally without permits). He did not look at the mechanical, electrical and plumbing systems. He did not allow for an environmental assessment for contamination caused by raw sewage.

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[203] Mr. Quaile also agreed that there was no way that a lay person would be able to determine what methods of construction were used before destructive testing was done. It was only by opening the walls that the deficiencies in the construction could be seen.

[204] Mr. Quaile also agreed that whatever version of the *Building Code* that was in effect when a building permit was applied for would be the version of the Code that would apply to that permit unless the Chief Building Official of the Township of Oro Medonte exercised discretion to allow an earlier version of the Code to apply under Part 11 of the OBCA. It therefore was up to Ms. King to decide if relief would be given under Part 11(Ms. King made it clear in her evidence that she did not believe that Part 11 applied in this case and in any event she did not grant and would not exercise her discretion to grant relief under Part 11).

[205] I find Mr. Quaile's estimates are unrealistically low. He did not include estimates for all of the work required. I prefer the opinions expressed by Mr. Adema of Tacoma Engineering to the opinion of Mr. Quaile regarding the remediation work for the house and additions. The approach that makes the most sense given all of the problems identified by Mr. Adema on partial destructive testing would be to demolish the house and additions and rebuild. Mr. Quaile's estimates simply ignored critical deficiencies such as the mould problem, the mechanical, electrical and plumbing issues. Reinforcing overstressed spans in light of the roofing and framing issues in the additions make no sense. Digging by hand a new basement 4' high below the additions by a crew of four men also made no practical or effective sense given all the serious deficiencies associated with the additions.

[206] I find that Mr. Quaile's opinion to renovate, instead of demolish and rebuilding the house and additions, does not even offer a viable band-aide solution. I am thoroughly unconvinced that remedial work could be carried out to cure all the ills associated with the house and additions anywhere near the estimated cost of $69,000. I find that Tacoma's approach is not "unnecessarily alarmist" by any measure where Mr. Quaile's approach is incomplete and unrealistically low.

[207] Neither Mr. Quaile nor Stewart Title followed his recommendation to obtain cost estimates from local contractors. Instead, Mr. Quaile resorted to the unreliable RS Means Manual for new construction in US dollars. This explains why Mr. Quaile's estimates are so much lower for the remedial work. His scope of work was for less than what remedial work was actually required.

[208] As a result, Mr. Quaile would only agree that the remediation costs were just over $155,000 for the garage and the additions. He allowed nothing for the remediation of the house and his estimate was for a bare garage. His estimates did not include HST.

[209] The Babics chose to rely on Mr. Quaile's estimates. All the defendants have chosen to accept remediation costs based on Mr. Quaile's opinions which I have rejected as totally unrealistic and ineffective in these circumstances.

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Lack of Building Permits

[210] The Babics testified that after they purchased the farm, Mr. Babic lived on the farm and Mrs. Babic lived in Barrie with their two children. This living arrangement allowed Mr. Babic to renovate the garage, the original farm house and to construct the new additions. In the Fall of 1988, the Babic family moved into the house together.

[211] The construction work was carried out largely by Mr. Babic and some of his relatives. While his relatives had some construction experience, Mr. Babic's experience was limited to carpentry work – mostly framing houses. The evidence disclosed that Mr. Babic did not obtain building permits for the renovations to the house, the construction of the new additions to the house, the reconstruction of the garage and the 14' by 14' shed behind the garage. It is clear from all of the engineering evidence and evidence of Bobbi-Joe King that this work did not meet the requirements of the *Ontario Building Code*.

[212] Ms. Gemeinhardt claims the Babics' liability is not dependent solely on whether they intentionally deceived her or whether they made representations recklessly and/or negligently. She asserts that the Babics made misrepresentations by failing to disclose in writing that they had performed all the described work without any permits and this work did not meet the *Ontario Building Code* (OBC) standards. She claims they are liable to pay damages because of their failure to make these representations in writing whether or not this failure to disclose was intentional.

[213] The Babics testified no one told them they needed building permits for the work done so building permits were not obtained. I totally reject this evidence. The Babics had a duty to inform themselves of their legal obligations to obtain building permits and to make sure that the construction work they did on the property met the requirements of the OBC. I find they never did so.

[214] I find the Babics could and should have informed themselves of their legal obligations before they did any construction work in any number of ways. Despite their evidence to the contrary, I find there is no reasonable basis to conclude that the Babics made any reasonable efforts to inform themselves of the law. Much of their evidence in this regard undermines their credibility.

Evidence of Apolonija Babic and Findings

[215] Mrs. Babic's sister, Maria Cvenkel, worked for the City of Barrie's Building Department as an engineering technologist. She prepared the June 17, 1988 plan for the additions to the house. Mrs. Babic testified she was absolutely sure her husband did not do any of the work on the house until he took her sister's plans to the Township of Oro-Medonte to see if he needed a permit. However, the Babics did not build the additions in accordance with her sister's plans. There was no 8' high block wall foundation, there was no basement, there was no concrete floor in the basement, there were no 8" floor joists beneath the floor to the kitchen, there were no 6" ceiling joists above the ceiling. There was also supposed to be insulation in the basement and there was none.

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[216] Mr. and Mrs. Babic both gave evidence in their examination for discovery that Mr. Babic attended the Township office to find out if he needed a permit to build the additions to the house before he started work. Mrs. Babic testified he went after the Maria Cvenkel plan was completed. In cross-examination, invoices from various material suppliers were put to Mrs. Babic. Concrete footings were poured for the additions on May 7, 1988. This and other evidence proved that work on the additions started long before June 17, 1988. I find the Babics' evidence about attending the Township office before work started is false.

[217] Further, Mrs. Babic's evidence that she did not know what footings were poured and where and whether the house was completely gutted is not believable. She may not have been at the farm as often as her husband but on her visits to the farm that she made during construction, she would have known about the footings and she would have known about the installation of drywall by seeing what was there to be seen.

[218] When asked why she testified that Mr. Babic went to the Township office with her sister's plans to find out if he needed a building permit, she admitted she did not know whether he did this or not. Mrs. Babic changed her evidence again. This time Mrs. Babic testified that her husband went to the Township two times. The first time he went was before Easter and that he started to work on the house around Easter 1988. He returned to the Township office a second time with Mrs. Cvenkel's plans after they were prepared on June 17, 1988.

[219] This was the first and only time that there was an assertion that Mr. Babic had made two trips to the Township office to inquire whether he needed a building permit. I find Mrs. Babic's evidence about the two trips to the Township office also to be false in an attempt to explain why she had stated she was absolutely sure that her husband did no work before a Township employee told him that he did not require a permit. Rather, there is evidence that the Babics had the house gutted without any permit and without ever telling the Township of their intent to completely renovate the house and to add additions.

[220] She continued to testify in cross-examination about all of the work and materials supplied that went into the home before June 17, 1988. This evidence indicated that Mr. Babic completely renovated this house without getting a permit and that he never went to the Township office. I find there was no reason for him to go to the Township office to inquire whether he needed a permit in mid-June of 1988 or later when he had already done much of the work including installing new plumbing, electrical wiring, insulation and drywall throughout the house before June 17, 1988.

[221] Mrs. Babic admitted she could have made her own inquiries of the Township whether building permits were required if she wanted to. Mrs. Babic could have asked her sister, Maria Cvenkel, if building permits were required. Mrs. Babic denied she ever spoke to her sister about Ms. Cvenkel's work. She claimed she was not very close to her sister. I find Mrs. Babic's evidence on this point to be suspect and unreliable. Her evidence is implausible especially since Ms. Cvenkel drew up plans for a permit and because her

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sister gifted the PanAbode building to her and Mr. Babic in and around 1993 when the Cvenkels moved to Prince George, British Columbia.

[222] It is also incredible that Mrs. Babic would claim she was not close to her sister when Maria's husband, Joe Cvenkel, helped Mr. Babic renovate the house and build the additions, allow the Babics to use Mr. Cvenkel's trade accounts to purchase materials at a discount and because Maria used her skills as an engineering technologist to draw up plans for the addition.

[223] Rather, it is reasonable to infer that in these circumstances, the Babics would have asked Maria for help with the construction preparation, that Maria had told them they needed a building permit, and that she drew plans for them to obtain the permit.

[224] I find on all the evidence that Mr. Babic had nearly completed the structural work and rough-in construction before June 17, 1988 when the Cvenkel plans were completed. By that date he had described he was not going to bother getting a permit and he did not use the Cvenkel plans.

[225] I find the Babics were wilfully blind to their own legal obligations and reckless by building without building permits when they knew they needed those permits to carry out construction.

[226] Mrs. Babic was also aware of the requirement to obtain building permits for the PanAbode and the barn addition, and septic system approvals. She completed forms and prepared elaborate sketches to obtain permits; she never told anyone that the Babics had built additions to the house or the garage. The Babics also did not tell their lawyer, Klaus Jacoby, about the construction without permits.

[227] I find that Mrs. Babic played significant roles in obtaining permits in 1990 and 1991 and that she was far more knowledgeable about permits than her evidence would suggest. Overall, I find Mrs. Babic did not give credible and reliable evidence regarding the building permit issue.

Evidence of Leopold Babic and Findings

[228] I also find that, like his wife, Mr. Babic was not a credible or reliable witness. I prefer the evidence of Ms. Gemeinhardt supported by the evidence of her sons, Erik and Stefan, and their experts over the evidence of the Babics. Mr. Babic took the stand on May 19, 2015 near the end of the trial. He had the benefit of hearing the evidence of most of the witnesses by the time he testified including the evidence of his wife. He maintained that no one ever told him that he needed any building permits. If he had known, he would have obtained them. However, he admitted he never asked anyone if he needed a building permit. He admitted he had essentially rebuilt the house and garage without building permits.

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[229] He attempted to minimize his role in the construction and that most of the work was done by his brother-in-law, Joe Cvenkel, and brother Rudy, both bricklayers by trade. They never told him he needed building permits for the work he did to the house. The evidence of Mr. Babic disclosed his major role in all the work he did. He admitted that he had essentially completely rebuilt the house and the garage/accessory building without permits.

[230] Although he claimed that he never changed the exterior doors of the garage, he completed major renovations to the garage including installing a partition, insulation, sheathing, the ceiling, and drywall on the walls to create a finished space. He put in a new roof, new steel siding, more electrical wiring, a woodstove and part masonry/part steel chimney. All of this work was done around 1991. I reject Mr. Babic's evidence and accept the evidence of Mr. Laking that Mr. Babic did increase the exterior dimensions of the building without a permit around 1991 in accordance with my previous findings and reasons.

[231] Mr. Babic denied that the finished room was used as a work area for him. He claimed it was used for storage. He claimed that the Babics kept a medical bed in the room but only for storage. He denied he slept in that bed or that the room was set up as a bedroom. He later admitted that he could have used the finished room as a bedroom if he liked. Although he testified that he had slept in the bed when he argued with his wife, he denied he ever told this to Ms. Gemeinhardt. He admitted that if someone looked at the room it would look like a bedroom because of the bed and other furnishings. A woodstove was installed in the garage in the Fall of 1991.

[232] He admitted that he installed insulation in the garage that did not allow for any ventilation or a proper air barrier. He testified that he used the same methods of construction when he insulated the house.

[233] He claimed that he used proper vapor barrier in some parts of the house but he used plastic bags for other parts. He admitted that the only way to determine where he used the plastic bags instead of the proper vapor barrier was to tear down all of the walls to expose all of the insulation. He agreed the only way to fix the mould problem and to properly inspect the plumbing and electrical wiring in the house would be to remove all of the drywall and remove the insulation.

[234] Mr. Babic stated he believed he only needed a building permit for new construction. Although he admitted that he made structural changes to the roof of the house (skylight) and garage (steel chimney for the woodstove), he testified he did not know he needed building permits for this work. He also installed a new woodstove in the house which he connected to the original chimney without a permit or WETT inspection.

[235] Mr. Babic still claimed he did not know he needed a building permit for structural changes after 1993 when the Township of Oro-Medonte ordered the Babics to get building permits for the PanAbode given to them by the Cvenkels. The Babics moved the PanAbode onto their property without a permit.

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[236] I find Mr. Babic's evidence that he believed he did not need building permits is incredible. It is only one of the many excuses made by Mr. Babic. He had worked in the construction industry in the past. He knew or ought to have known that he needed permits to do the work he did on the house and garage. He knew he needed a building permit when the first additions were built to the barn in 1990. He knew he needed a building permit for the PanAbode in 1993. His evidence that he did not know he required a building permit or no one told him that he needed one or someone at the Township had told him he did not require one lacks any credibility whatsoever.

[237] In-chief, Mr. Babic testified he told Ms. Gemeinhardt while they were standing between the porch and kitchen door that he had not obtained building permits when he did the renovations. This was likely on the fourth visit by Ms. Gemeinhardt and after they had reviewed all of the work he had done. He testified Ms. Gemeinhardt asked if he had obtained building permits and Mr. Babic replied "no". Ms. Gemeinhardt's response was that building permits were not needed because "everything is so beautiful". This visit was before August 2007, before the Babics wanted to sell. There were no further discussions with Ms. Gemeinhardt about building permits.

[238] On cross-examination, Mr. Babic was challenged on his claim that he verbally disclosed to Ms. Gemeinhardt that he had built or renovated without building permits. The allegation was never pleaded by the Babics and the issue was never raised before trial. The Babics' Statement of Defence found at Tab 2 of the Consolidated Trial Record at para. 15, the Babics plead:

> 15. The defendants made no representations whatsoever to induce the plaintiff to enter into the APS. …

[239] I find Mr. Babic's evidence about making oral representations to Ms. Gemeinhardt prior to the agreement of purchase and sale that he built or renovated without building permits is not believable.

[240] The evidence of Ms. Gemeinhardt is to be preferred that there were no oral representations made by the Babics that construction work was done without permits. I accept her evidence that if such representations were made, she would never have bought the property.

[241] In any event, the issue of whether there were oral representations on which the parties could rely is moot by virtue of the agreement of purchase and sale. The parties agree that "There is no representation, warranty, collateral agreement or condition, which affects this agreement other than expressed within." The Babics relied upon this provision in their defence at para. 14 of the Statement of Defence (Consolidated Record, Tab 2, page 5).

[242] The evidence of Mr. Babic regarding the basement is also rejected. He testified that a little water leaked into the basement around a window near the wall not where the bushel baskets of vegetables were kept near the stairs to the basement over the Winter until

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Spring. He testified the basement never flooded. This was untrue and I reject his evidence regarding the condition of the basement and his evidence that he told Ms. Gemeinhardt about water in the basement. I accept Ms. Gemeinhardt's evidence that she was never told about water in the basement and only learned of the problem after closing through correspondence between Mr. Jacoby and Mr. Carter. I have already dealt with this evidence which refers to Mr. Carter being advised of a small amount of water entering the basement at the steps. This is untrue. The vegetables were kept in that location in the first place because it was supposedly dry. The Babics' evidence as to the location of the water is inconsistent and contradictory both as to the source of the water and the amount. Ms. Gemeinhardt's evidence is that the basement flooded. Water infiltrated through the walls and the evidence of her sons is to be preferred as to the condition of the basement and the work done to raise up the floor with limited success. The basement was damp and mouldy. The sump pumps were added and replaced. They burned out as they could not keep up with pumping out water from the basement. The Babics' evidence about their basement is one more area of evidence not to be believed. The whitewashed walls and painted floor concealed a wet basement condition never disclosed by the Babics to Ms. Gemeinhardt.

[243] Mr. Babic's evidence about taking Maria Cvenkel's plans dated June 17, 1988 to the Township of Oro-Medonte's office also defies belief. He testified that he knew when he bought the farm how important it was for him to make sure that there were building permits and there were no issues with permits.

[244] He testified he went to the Zoning Department at the Township to ask if he needed a building permit for the additions to the house. He could not explain why he went to the Zoning Department instead of the Building Department. He indicated he did not ask to pick the right person when he spoke to the receptionist. He did not have the name of the person to whom he spoke at the office. He thought he was doing work on an existing structure. He was told by someone in the Zoning Department he did not need anything from them. However, he was not told by the Building Department that he needed a building permit. Neither did he make a second trip to the Township office as suggested by his wife. He denied Maria Cvenkel told him that he needed a building permit. He denied Maria Cvenkel told him to prepare drawings to show the proposed method of construction, to get a building permit and that he asked for the plans so he could apply for a building permit. He denied that he needed a building and that is why Maria Cvenkel prepared the "site plan" which showed the location of the additions and method of construction.

[245] When asked why the plans were prepared in such detail, he replied that Maria Cvenkel put in all the details "because that was the way it was to be done".

[246] When asked why the work was not done in accordance with the Cvenkel plan, his evidence varied. He first testified that Joe Cvenkel said it was not necessary to construct as Maria had specified because he had put so many pieces of wood in the floors and ceilings that larger sized dimensions of wood were not necessary.

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[247] Mr. Babic testified he did not recall whether he saw what size the dimensions of wood were used in the additions.

[248] Mr. Babic then admitted that he knew from the time of the framing of the additions that the dimensions of the lumber used were not the proper size. Mr. Babic testified that everything done in accordance with the plan was false.

[249] Mr. Babic further admitted that unless Mr. Pepper stated in his report that the additions were built in accordance with the Cvenkel plan, he was absolutely wrong. The evidence clearly established that the additions were not built in accordance with the Cvenkel plan. Mr. Babic neither told Mr. Pepper nor his lawyer, Mr. Jacoby, that the additions were not built in accordance with the Cvenkel plan.

[250] When asked if Mr. Babic ever told Ms. Gemeinhardt that the additions were not built in compliance, he answered "no". When it was put to him that he knew that the additions were not in compliance and he did not disclose that fact to Ms. Gemeinhardt in writing, he answered "that's true".

[251] I find Mr. Babic had far more knowledge about the requirements for building permits than he was prepare to admit at trial. He has no reasonable excuse for alleged ignorance about building permits. His whole recounting of his dealings with Maria Cvenkel and attending the Township of Oro-Medonte offices raise serious questions about dealings with Maria Cvenkel and whether he attended the Township offices at all. His admission that he never made any inquiries (except with some unknown person in the Zoning Department) is clear evidence that, at best, he was reckless when he built and/or renovated without asking if he needed permits. Much worse, I have found that he had already completed much of the renovation of the original house and work on the additions before June 17, 1988. Given this evidence, there would be no reason for him to attend the Township offices at that juncture to inquire about obtaining building permits for structures already built by him.

[252] I find the Babics knew or ought to have reasonably known that they needed permits and they chose not to apply for them likely to save expense. Further, I find the Babics were wilfully blind to their legal obligations and reckless by building without permits when they did not make inquiries whether they needed any such permits. Of the Babics' failures to obtain permits, ignorance of the law is not an excuse: the *Ontario Building Code Act*, 1992, c. 23 s. 8(11, 10.1), s. 36 (1)(c), the *Provincial Offences Act*, RSO 1990 c. P. 33, s. 81.

The Plaintiff's Read-In Evidence and Findings

Evidence of Leopold Babic

[253] Counsel for Ms. Gemeinhardt read in excerpts from the examination for discovery transcript of Mr. Babic. These excerpts confirm that Mr. Babic gutted the whole original house, renovated it and built new additions. He told Ms. Gemeinhardt that he never had

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problems with water in the basement except if snow was not cleared away from the basement window. Only a little water came in if snow was not cleared. I have rejected this evidence in my reasons.

[254] He testified about the Cvenkel plan dated June 17, 1988. He could not remember the person to whom he spoke at the Township of Oro-Medonte offices, whether it was a man or a woman. He did not ask for a demolition permit. He claims he told a Township employee that his intention was just to rebuild an existing porch and he was told he did not need a permit for that. I have already discussed Mr. Babic's incredible evidence about the Cvenkel plan and his alleged attendance at the Township offices. However, even if he did attend the Township office, by his own admission, Mr. Babic did not disclose his real intentions. He did not just rebuild the porch. He tore it down and rebuilt a new structure from scratch without a building permit. This is one more example of Mr. Babic's lack of credibility. Mr. Babic made no reasonable effort to inform himself of his legal obligations about whether or not he needed a permit. He never asked whether he needed a permit to do the work he actually did. He was not misinformed by a Township employee if he actually attended. Rather, Mr. Babic mislead the alleged employee and could not have expected to get the answer allegedly received.

[255] Further, Mr. Babic admits he never obtained a septic use permit. He admits that he submitted a drawing showing the location of the septic system on April 12, 1990 to the Simcoe County District Health Unit in which he showed the location of the septic system in order to get a building permit for the barn addition. By that time, he had already built the additions to the house.

[256] On or before April 12, 1990, Mr. Babic knew or ought to have reasonably known that he should have obtained building permits for the additions. He had seventeen and a half years to obtain proper permits before he sold the farm to Ms. Gemeinhardt but he did not do so. Mr. Babic never obtained the permits he knew or ought to have known he should have taken out before renovations and additions were done. He chose not to do so.

[257] Mr. Babic was ordered on September 29, 1993 to obtain a building permit for moving the PanAbode building onto the farm. Mr. Babic only obtained a building permit for the barn addition in 1990 because he hired a contractor, Mr. Huyer, to build the addition, and in 1993 because he was caught by a building inspector in moving the PanAbode onto his property without a permit.

[258] Mr. Babic's behavior is consistent with the conclusion that he intentionally avoided taking out permits and only did so when he was required to do so by others or he was caught by the Township. Mr. Babic's behavior is consistent with the conclusion that he knew he needed permits, decided not to get the required permits and that he had no intention of letting anyone know that he had built and/or renovated without permits.

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Evidence of Apolonija Babic

[259] She testified that work was done on the house before the Cvenkel plan was completed on June 17, 1988. Because the house was torn apart, she lived either with her sister or parents. The house was put back together gradually. The work was completed by September 1988 when she and the children moved into the house. This evidence and the building material invoices are inconsistent with Mr. Babic's evidence that he did not start the renovations to the house until after he received the Cvenkel plan and he attended the Township of Oro-Medonte offices to find out if he needed a building permit. Mrs. Babic's evidence is that he started major renovations to the house earlier in 1988.

[260] Mrs. Babic further admits that she never made any inquiries at the Township herself but relied on what her husband told her about whether or not they needed a permit or not. She also admitted that she had no way of knowing if he had been mistaken or correct in his alleged belief he did not need a building permit. Mrs. Babic was part owner of the house. She had the same legal duty as her husband to inform herself of her legal obligations. She should not have relied on what Mr. Babic told her. Rather, she should have made her own inquiries and did not do so. She could have checked with her sister, Maria Cvenkel, or called or attended the Township herself to ask questions of a Township building official whether building permits were required.

[261] She testified that there was never a time when a Township employee or building inspector was ever inside the Babics' house during the entire time they owned the house. As a result, there was never a time that a Township official could have observed and become informed that major renovations had taken place in the house.

[262] She testified that there never had been a flood in the basement or even a problem with water in the basement. This evidence is inconsistent with the evidence of Mr. Babic. It is also inconsistent with the letter dated February 4, 2008 that Mr. Jacoby wrote to Mr. Carter two months after closing. All of these versions of events are inconsistent with the observations of the furnace installers from Sargeant Company (Exhibit 27, page 31) who observed water on the floor on January 7, 2008, a little over one month after closing.

[263] While the Babics denied freshly whitewashing the basement walls to conceal evidence of past flooding, such denials are suspicious given the events post-closing. Mrs. Babic's evidence denying ever having a flood or a broken pipe in the basement is also not believable.

[264] The Babics admitted they built without permits. Expert witnesses testified the Babics did not build in accordance with the *Ontario Building Code Act*. The defects in construction were all concealed. No one could have observed the structural problems without destructive testing being done. I find there was no way that Ms. Gemeinhardt could have possibly known that there were latent defects in the house, additions and accessory/garage before closing. I find that the Babics failed to disclose the latent defects which they knew or ought to have reasonably known identified by Ms. Gemeinhardt's engineers and even identified by Mr. Quaile to some extent.

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Evidence of Bobbi-Jo King and Findings

[265] Ms. King testified as the Chief Building Official (CBO**)** for the Township of Oro-Medonte.

[266] Bobbi King testified that she was the Chief Building Official for the Township of Oro-Medonte. She became the CBO on August 10, 2012 and she replaced Mr. Kim Allen, the former CBO, who retired in June 2012.

[267] Ms. King testified that Tab 17, of Exhibit 2, was an order to remedy an unsafe building made on April 24, 2009. This order related only to the 24'x32' garage. Mr. Allen's order was based upon a structural engineering report prepared by Tacoma Engineers.

[268] Ms. King further testified that the Municipality has no record of ever issuing a building permit for the 24'x32' garage.

[269] Ms. King also testified that it appeared that the original structure was a pole barn that was altered, converting it to an accessory building with finished living space and a wood stove. No permits were taken out for these alterations. She further opined that building permits should have been obtained for the building and the later alterations.

[270] Ms. King further gave evidence that there were major changes made to the south wall of the garage (side opposite to the road) compared to what was there when photographs were taken of the garage. The changes to the south wall also required a permit.

[271] Ms. King opined that if any changes were made after 1986, permits would have been required for all of this work and no permits were obtained.

[272] Ms. King also gave evidence that the structural changes to the wall and roof of the garage were concealed by finished walls and a ceiling inside the garage, and therefore the structural changes could not have been observed by a visual inspection.

[273] Ms. King also testified that the original structure was built on poles that had foundations. This was an appropriate construction method for an agricultural building, but not for a garage or an accessory building. Engineered changes would have been required for the structure if it was built as anything other than an agricultural building.

[274] Ms. King gave evidence that the first Tacoma report of February 9, 2009 was received in the Township office by April 23, 2009. Ms. King stated that as a result of this report, an in depth structural evaluation of the building was required and that this would include exposing the connection between the concrete slab floor and the walls, the original foundation type and the structural headers above all openings, as well as the roof structure. She also would have required evidence that the building would have to meet standards to deal with minus 20 degree temperatures.

[275] The wood stove, which was not a permanent heat source, did not meet requirements of the OBCA for heating an accessory building. Therefore a permanent heat source would

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have to be properly installed and all electrical work would have to be inspected and approved by the Electrical Safety Authority (ESA).

[276] There would also be a concern about the fact that the records of the Health Unit from 1991 indicated that the septic system was only for a three bedroom residence. There was an additional bedroom in the accessory building/garage as well as four bedrooms in the house. This meant that to obtain approval for the accessory building the issue about the size of the septic system would also be a concern if any attempt was made to restore and preserve the building.

[277] Ms. King also pointed out that in 1990 the Simcoe County District Health Unit had received an application for an addition and renovation to the large barn on the property. This indicated that there was an existing septic system but it was not an approved system because it was only for a 3 bedroom, 1 bathroom house.

[278] Ms. King further testified that if the property had five bedrooms (being the house and the accessory building) this would affect the size of the septic system and a larger tank and tile bed should have been installed.

[279] Ms. King testified that the 2012 OBCA applies in this case if the accessory building/garage was built without permits, without ESA approval, and without a septic system approval, "You can't apply an old code if there's no permit issued."

[280] Ms. King testified Part 11 of the OBCA allows a CBO to recognize something done without a permit and it allows flexibility to recognize structures that do not meet current code requirements.

[281] Ms. King further gave evidence that the septic system would not have been allowed to be installed in the location it was in. Ms. King also gave evidence that in her opinion the tank was less than 20 years old when she inspected it (after she became CBO in 2012).

[282] The tank was probably installed in 1992 or later. A permit would have been required for this installation. The Babics would have been the owners of the property when this installation occurred.

[283] The round tank was older and was merely a holding tank. The newer tank (less than 20 years old) was rectangular with two chambers and an inlet and outlet. This tank should have been connected to a tile bed.

[284] Ms. King inspected the septic tanks on March 8, 2013. She believes that the tank was less than 20 years old on March 8, 2013.

[285] Ms. King also gave evidence that the location of the septic tanks, in the sketch prepared as part of the September 5, 2001 application to the SCDHU is shown in different locations than where the tanks were located when she inspected the septic tanks on March 8, 2013.

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[286] This evidence is consistent with Mr. and Mrs. Babic having a new septic tank installed after 1993 without obtaining permits.

[287] The round holding tank predated 1990 in Ms. King's opinion. The tank was less than 600 cubic feet and it therefore did not meet the minimum size of 600 feet which was the standard in 1990. The round holding tank dates back until the 1950's or 1960's.

[288] Ms. King also gave evidence that when she inspected the septic tanks she did not observe any damage to the pipe into the 2nd chambered tank. It appeared to be a plastic type of pipe and definitely was not clay. This pipe suggests that the installation of the two chambered tank had to be installed later than 1980's because of the type of material used.

[289] Typical material used for pipe in a septic bed in the 1990's would be plastic, before plastic clay was used for pipe in tile beds.

[290] Ms. King also gave evidence that there was no outlet pipe from the septic tank and therefore it appeared that there was no leaching bed or septic bed connected to the tank.

[291] Ms. King testified that when she inspected the septic tank that there was no evidence that the leaching bed had been turned over by a plow. The field to the west of the tanks had been plowed but there was no sign of stone or pieces of broken pipe which she would have expected to see if a plow had turned up the tile field.

[292] I find in this action the Babics raised all sorts of possible explanations for why the septic system failed by March 2013. These amounted to nothing but speculation that was self-serving and did not have any basis in fact.

[293] Ms. King's evidence refutes unequivocally the Babics' claims that they never installed a septic system or that the system they installed sometime in the 90's had a septic tile bed that was damaged by the use of an industrial snake or was clogged by a diaper flushed down the toilet and/or was damaged when a plough over turned the tile bed.

[294] Ms. King's evidence leads to the reasonable conclusion that a two chambered tank was installed by the Babics without a permit. It was located too close to the house to meet code requirements and that it was not properly installed.

[295] The two chambered tank was apparently used as a holding tank without a tile bed. This was a latent defect that Mr. and Mrs. Babic should have disclosed.

[296] Mr. Babic's evidence that he never had a problem with the tank is also not believable. The sump pump was directly connected to the septic tank; it caused flooding of the basement through the walls by effluent. The Babics white washed the walls to conceal the flooding that had occurred. Mr. and Mrs. Babic's septic contractor also gave evidence that they had the septic tank pumped out frequently. This also suggests that they had to pump out the tank because the tank was really acting only as a holding tank.

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[297] Ms. King also testified that the Ms. Cvenkel drawing dated June 17, 1988, that showed the location of the house on the property indicates that the exterior dimensions of the main house was 24.5 feet by 37 feet plus a 30 feet by 12.5 feet existing porch.

[298] Ms. King gave evidence that if this drawing was brought into the Township offices she would not have advised the person who brought it in that they did not require a building permit.

[299] This evidence is inconsistent with Mr. Babic's claim that some unknown person employed by the Township had told him he did not need a building permit to build the addition shown in the Cvenkel drawing.

[300] When asked if this could have occurred back in 1988 (the time when Mr. Babic claims he attended at the Township Planning Office with the Cvenkel sketch to ask if he needed a permit). Ms. King stated in response that in 1988 the CBO was Ron Kolbe and she was certain that he would never have misinformed Mr. Babic by telling him he did not need a permit for the house addition.

[301] Ms. King further stated her opinion that it was not possible that anyone employed at the Township offices in 1988 would have told Mr. Babic he did not need a permit for the work proposed in the construction drawing prepared by Ms. Cvenkel.

[302] It is noteworthy that Mr. Babic admitted under cross-examination that he did not build the additions to the house in accordance with the drawings prepared by Ms. Cvenkel (his sister-in-law). However Ms. King's evidence refutes Mr. Babic's evidence that in 1988 an unidentified employee in the Planning Department had told him he did not need a building permit because of the size of the addition.

[303] Ms. King gave evidence that permits were required to convert the original existing sun room or porch to living space and to add the summer kitchen. A porch cannot be converted to habitable space without a permit.

[304] Ms. King further gave evidence that the wood burning cook stove in the summer kitchen would have required a permit that was not obtained. Also plumbing permits were required for the kitchen. Plumbing and electrical permits should have been obtained. There are no records that any of these permits were applied for.

[305] Ms. King also stated that she had personal experience working with Ron Kolbe as a building inspector at the Township in 2005-2006. She then left that job and worked elsewhere until she was hired as the CBO in 2012. She therefore has knowledge of the practices and procedures followed in the Township offices in 2008. Ms. King made the point that based upon her knowledge of the practices and procedures used by Mr. Kolbe in 2005, there was no possibility that any employee of the Township would have ever told Mr. Babic he did not need permits (building, plumbing and electrical) for the renovations he proposed to do.

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[306] Ms. King claimed that it was not uncommon for persons who built without permits to claim that they were told by a Township employee that they did not require a permit. In her opinion, these kinds of allegations are not credible because of her knowledge of the practice and procedures in the Township offices.

[307] Ms. King also gave evidence that if requested, the Township would produce a permit list to a lawyer who was making enquires about a property that his/her client was buying. This evidence refutes the claims by Stewart Title that Mr. Carter would not have discovered that the renovations to the accessory building/ garage, the septic system, the additions to the house, and the enclosure of the porch at the front of the house were built without permits. Mr. Carter could have obtained this information if he had asked for a permit list. This is important to consider along with Mr. Carter's evidence that if he had made inquiries of the Township before closing, he would have asked for a permit list and learned that the renovations and additions to the house, accessory building/garage, and septic system were all constructed without permits.

[308] While Stewart Title never introduced any evidence to support its position, it based its denial of coverage in part on the allegation made by a former Stewart Title employee, that Mr. Carter could not have discovered that construction work was done without permits by making an inquiry of the Township because he only would have got a compliance letter and not a permit list.

[309] Ms. King noted that Mr. Babic knew he needed permits for a barn addition in 1990. He took out a permit to build an addition to keep sheep in dated April 25th, 1990. He also obtained a permit to build an accessory shed on September 16th, 1991.

[310] The Babics also got caught when they brought a prefabricated wood shed or a PanAbode onto the property and they had to take out a building permit on October 12th, 1993.

[311] Ms. King gave evidence that these were the only three permits the Babics applied for.

[312] I find that Mr. and Mrs. Babic were well informed by April 25th, 1990 and were virtually certain by October 12th, 1993 that they should have obtained permits for the renovations and additions to the accessory building/garage, and the house. They could not claim ignorance of these obligations after April 25, 1990.

[313] The Babics therefore knew for many years before they sold the farm to Ms. Gemeinhardt that they had made major renovations and additions for which they should have obtained permits. They further knew or ought to have reasonably known that they had a duty to disclose these facts to Ms. Gemeinhardt before they sold the house to her in 2007.

[314] Throughout this litigation, until Mr. Babic testified at trial, the Babics maintained the position that they had no obligation to disclose this information to Ms. Gemeinhardt.

[315] It was only at trial that Mr. Babic changed his story to testify that he had disclosed the fact that he had renovated and built additions to the accessory building/garage and house

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without permits. This was in effect an admission that disclosure should have been made of this information to Ms. Gemeinhardt before closing. This evidence was also completely inconsistent with Mr. Babic's pleadings and his answers given under oath at Examinations for Discovery.

[316] Mr. Babic did not make this disclosure in writing about renovating the building without permits. His evidence therefore does not meet the requirements of the Statute of Frauds and the four concerns clause in the Agreement of Purchase and Sale (APS).

[317] Mr. Babic changed his evidence near the end of this lengthy trial, after an overwhelming preponderance of evidence, including that of Ms. King, made it apparent that he knew he needed permits to do the construction work he did.

[318] Had Mr. Babic admitted prior to trial that he had built/renovated without permits when he knew he was required by law to take out permits this trial would not have been nearly as long as it was. Ms. King would not have been a necessary witness at trial.

[319] I find the Babics were legally obligated to disclose that they did not apply for permits or have their construction work inspected. Had this information been disclosed in writing prior to closing, Ms. Gemeinhardt claims she would not have completed her purchase of the farm.

[320] Both Mr. and Mrs. Babic knew after April 25, 1990 about the need for permits. Mrs. Babic had no reasonable basis for claiming ignorance about this issue. She was a joint owner of the house and both her and her husband were ordered to obtain a permit for the PanAbode building they moved onto the farm in 1993 when her sister moved out to B.C.

[321] Both Mr. and Mrs. Babic had no reasonable basis for believing that they could rely upon "buyer beware" to withhold this information from Ms. Gemeinhardt. They knew they might lose their sale if they disclosed this information. The reasonable conclusion is that they intentionally withheld this information in order to avoid losing the sale. At best they were reckless and/or willfully blind to their obligations. They sold their farm for much more than it was worth because they withheld this information.

[322] Ms. King further gave evidence that most of the construction/renovation work done by the Babics or by the persons they hired to do this work was not in compliance with OBCA requirements.

[323] This included the insufficient clearances between the wood burning appliances, flammable materials, and a lack of air space in the brick shielding wall in the summer kitchen. The brick wall would never have been approved, nor would the cook stove chimney. Part eleven of the OBCA would not apply to these defects because they were new construction without permits.

[324] Ms. King testified that the brick wall would have to be deconstructed and then reconstructed to 2012 OBCA standards.

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[325] Ms. King testified that both chimneys to the house had significant cracking and that both chimneys required replacing.

[326] Ms. King also testified that the additions to the house were built without permits and she issued an unsafe order for the house on April 3, 2012. (Exhibit 2, Tab 19)

[327] Ms. King also issued an order to prohibit occupancy of the house. (Exhibit 2, Tab 20)

[328] Ms. King also issued an unsafe order for the septic system on March 8, 2013 after she discovered that the system was not really a septic system.

[329] The unsafe septic system was also subject to an earlier order by Mr. Kim Allen made on July 30, 2009 to remedy the unsafe septic system.

[330] Ms. King also explained that maintaining a septic system is the only part of the OBCA that is retroactive. (Section 8.9.1.2) This provision of the code took effect in 2002.

[331] Ms. King further gave evidence that the concrete slab in the accessory building/garage was not a structural slab and that there were framed walls on top of the slab. This slab was crumbling when Ms. King observed it.

[332] Ms. King further agreed that the photographs taken by the Stewart Title's adjuster in his report dated February 26, 2009 indicated that the roof of the accessory building/garage was bowed in a number of areas indicating serious defection.

[333] Ms. King also gave evidence that in her opinion, based upon her knowledge of industry standards and based upon the value of construction she uses when issuing building permits, that the average cost of building a garage is $75.00 to $85.00 per square foot (or a basic cost of $61,440.00 for basic construction not including demolition, waste disposal, permit fees, assuming that the homeowner was building themselves instead of paying for labour).

[334] Ms. King testified that the current cost for building a house or an addition was $175.00 per square foot for a subdivision house.

[335] Ms. King also confirmed that HST would be in addition to these amounts.

[336] Ms. King further confirmed that the adjuster's report of two, four-piece bathrooms and four bedrooms in the house in February 2009 was very different than the application for permits in 1990 and 1991 (barn additions) that indicated the house was a three bedroom house with only one bathroom.

[337] This information is also not consistent with the Babics' evidence that they had five bedrooms in the house, four upstairs and one downstairs when they converted one of the upstairs bedrooms to a second four-piece bathroom. They then added another bedroom in the accessory building/garage according to the Gemeinhardts.

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[338] Ms. King also gave evidence that the wood deck that wraps around the additions to the house also was built without a permit.

[339] Ms. King described the changes in the house as a result of the additions to be an "incredible difference" including the change in the roof pitch and the height of the windows. The front porch also locked very different from the photos of the house taken by the Babics in the first year after they purchased it.

[340] Ms. King further gave evidence that there were major structural changes made to the house based upon the photos.

[341] Ms. King further gave evidence that the skylight in the roof of the house required a permit if a rafter had to be cut to install the skylight.

[342] Also the changing of the roof on the original sun porch to a pitched roof from a flat roof would have required a permit.

[343] Ms. King also gave evidence that although there was an access hole from the basement of the original house into part of the crawl space below the additions, this hole was filled with duct work and it would have been impossible to inspect anything in the crawl space because the ductwork blocked access and the ability to inspect from outside the crawl space.

[344] Ms. King testified that if the opening between the original house and the addition was opened up by Mr. and Mrs. Babic (which they admit was done when they owned the house) that this work would have required a permit also.

[345] The fact that the roof of the house was deflecting when she inspected it also indicated that the structural changes made to the house when the additions were built were not done properly because of improper sizing of the support structures.

[346] Ms. King further explained that she conducted her own inspections of the house on April 3, 2013, almost immediately after she had received Tacoma's report of August 2, 2012. She then ordered that the house was not to be occupied because it was unsafe due to structural issues, because the septic system was unsafe and the house was not to be occupied until building permits had been obtained for required remedial action or demolition.

[347] Ms. King also testified that she did not know how Ms. Gemeinhardt could live in the house during renovations. She would have to have someone show her how this could be done.

[348] Ms. King gave evidence that based upon her experience the cost of replacing a septic system like the system on the Gemeinhardt farm was between $12,000 to $17,000 depending on the size of the tank and the tile bed.

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[349] Ms. King further gave evidence that the elevation of the sun porch and original kitchen had changed after the additions were added onto the house. The difference in elevation is apparent from the number of stairs to the original back door (total a couple of steps) to the number of stairs to get up to the wrap around deck and the kitchen door off of that deck after the additions were built (total five steps) the difference in elevation is three steps at six and one-half inches per step. Therefore the decks were two very clearly different decks.

[350] Ms. King testified:

> A: …You don't just issue an unsafe order 'cause there was no permits, there's more basis to it than that.
>
> Q: …But to be clear you have ordered this building to be remedied and you have made a specific provision that occupancy is prohibited immediately.
>
> A: Yes.
>
> Q: And that you have made that order on April 3, 2013?
>
> A. Correct.

[351] No permits were obtained and Ms. King required permits be obtained. When she inspected on April 3rd, 2013 the walls had been opened up to expose structural elements.

[352] Under Cross-Examination by counsel for the Babics, Ms. King testified:

> A bedroom is a finished space that has a bed in it or it is being used as a bedroom.
>
> If someone used the room in the garage as a bedroom then the garage becomes an accessory building and is no longer just a garage.
>
> The conversion of the garage to an accessory building would require the building to be brought up to a higher standard of construction and would affect the size of the holding tank and septic system required because it would increase the number of bedrooms for the house.

[353] When cross examined further, Ms. King clearly stated that it was her opinion that Ms. Gemeinhardt could not live in the house while renovations were being done.

[354] It was not Ms. King's job to come up with design solutions for the repair or replacement of the buildings. It was her job to review design drawings.

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[355] Ms. King clearly stated on re-examination that if a lawyer asked for a permit list he/she would be provided with it.

[356] Ms. King also gave evidence that even if the size of the accessory building/garage had not changed in size, it still would have required a permit to enclose the south wall and install the wood stove.

[357] She testified about the requirements of the *Ontario Building Code Act* for building permits and structures and the septic system located on Ms. Gemeinhardt's property.

Legal Analysis

[358] The Babics submit it is inconceivable that they would have done any of the work on the house, additions and garage knowingly and in contravention of the law. They relied upon the decision in *Cotton v. Monahan,* [2010] O.J. No. 1786 (SCJ), upheld by the Ontario Court of Appeal [2011] O.J. No. 4944.

[359] In *Cotton*, the trial judge dismissed the plaintiff's action. He held that there were latent defects to the property including structural, electrical and plumbing defects. However, there was no evidence that the vendors were aware of the defects, that they purposely or knowingly concealed any defects or that they recklessly disregarded the truth of any representations made. The purchasers made a decision to forego their due diligence and there was nothing done by the vendors to entice them into making an offer nor did they do anything to purposely or otherwise conceal problems with the home nor given any misleading misrepresentations about the home.

[360] In *Cotton*, at para. 50, the trial judge held:

> The onus is on the purchasers to prove on a balance of probabilities that there were latent defects with the property. They must further prove that these defects were known to the vendors and they purposely concealed them in order to sell their house or in the alternative there was reckless disregard of the truth or falsity of any representations made by the vendor regarding any defects known to them: *McGrath v. MacLean* (1979), 95 D.L.R. (3d) 144 (O.C.A.)

[361] In *Cotton*, the Court of Appeal held at para. 5:

> In our view, the trial judge's finding that the respondents were simply unaware that the workmanship was defective is fatal to the argument that they concealed the defects in order to sell the property or that they were wilfully blind with regard to the defects.

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[362] In Cotton, the appellants were aware of the fact that the respondents had done extensive renovations on their own without a permit and without inspection. The appellants were caught by the rule of *caveat emptor*.

[363] Counsel for Ms. Gemeinhardt submits that there are reasonable grounds to question whether *McGrath*, *supra*, is correct on all points. He relies upon a decision of the Manitoba Court of Appeal in *Alevizos v. Nirula*, [2009] M.J. No. 433. In *Alevizos*, at para. 29, Scott C.J.M. considered *McGrath* with two other cases and stated:

> … in my view incorrectly explains the principle by stating that it applies when latent defects are actively concealed; this is not right – it is rather the concealing of a patent defect to make it latent that makes the activity fraudulent.

[364] Scott C.J.M. made references to numerous sources which indicate that a representation may be technically true but practically false and that silence and half-truths amount to a fraudulent misrepresentation: *Alevizos* at para. 24.

[365] In *Alevizos* at para. 21, Scott C.J.M cites *Halsbury's Laws of England*, 4th ed. reissue (London: Butterworths, 1998), vol. 31 (at para. 748), note that when a representor has said something to another, a duty may arise to say more. To withhold some material information after making a representation is a misrepresentation.

[366] While *McGrath* continues to be the law in Ontario, it stands for the principle that if a vendor knows of a latent defect then the vendor must disclose the defect. He or she is not entitled to remain silent. *Kelly v. Pires*, [2015] O.J. No. 736 (S.C.J.) at paras 55-56.

[367] I find the case at bar is distinguishable from *Cotton*. The Babics essentially completely rebuilt the house and garage. They expanded the house substantially. Ms. Gemeinhardt was not made aware that all of the construction had been done without building permits. Ms. Gemeinhardt had not foregone home inspection. To the contrary, Thomas Proctor, her father, performed an extensive inspection. The basement walls were freshly whitewashed. The floor was painted. Ms. Gemeinhardt was told by Mr. Babic there were no water problems in the basement. She was not told there were serious flooding problems with the basement until she experienced those flooding problems for herself shortly after closing. The water was contaminated by wastewater from the septic system. Work was done to raise the basement floor. Plumbing work was done to create another sump pit. Sump pumps could not keep up with pumping out the water. They simply burned out, were replaced and burned out again.

[368] The whitewash of the basement walls to cover up water stains caused by water entering the basement is evidence of the Babics' concealing a patent defect and thereby rendering it a latent defect. The whitewash covered the evidence of water leakage into the basement. The Babics knew this and therefore had a duty to disclose. They had covered the water stains and other evidence of water leakage by whitewashing the walls. I find there was active concealment of the past flooding of the basement by the Babics.

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[369] Further, someone who builds a house is liable for all latent defects in the house construction where they did not make inquiries about the legal requirements of construction and where they did not arrange for inspections of the work they did. The Babics did not obtain building permits when they knew they should have for all the construction they did. They did not obtain electrical, plumbing and building permits. They did not obtain WETT inspections for the woodstoves and fireplaces they had installed. They did nothing in this regard. They claim they did not know they required permits for the work they did. This is false. They only applied for building permits when someone else required them to obtain permits or when they were caught by the Township of Oro-Medonte building inspector after they moved the PanAbode onto their property in 1993. Ignorance of the law is no defence. In this case, the Babics knew they needed permits but chose not to obtain them. Liability extends to all latent defects because it would be impossible for the vendor/builders to know if his or her work was done safe and compliant with building codes if they never made any inquiries as to any requirements of building statutes or by-laws. Any representations they would have made about the quality of the construction work or lack thereof would therefore be reckless: *MacAulay v. Wagorn*, [1991] O.J. No. 409 (O.C.J. Gen. Div.)

[370] Mr. Babic did most of the construction work himself, aided by family members. He admitted that he knew what was done and much of the material used was not adequate for structural support. He had worked in the construction industry before as a framing carpenter. He knew or ought to have known or reasonably to have known, that the materials he used in the reconstruction of the house and garage were not adequate to meet industry standards and/or building code requirements.

[371] The Babics knew from the Maria Cvenkel drawings and plans what materials they should have used in constructing the additions to the farm house. However, they did not construct the additions in accordance with the Cvenkel drawings. They ignored her advice and built something deficient to save money.

[372] The Babics knew about defective materials used in the work which would not comply with the *Building Code*. They fully intended to construct the house, additions and garage their own way with whatever materials they felt were appropriate. By this conduct, I find there was reckless disregard of the truth or falsity of any representations made by the Babics regarding any defects known to them.

[373] Further, Mr. Babic had concealed the most serious of latent defects which I have previously identified and discussed. No one could have discovered these latent defects without destructive testing being done. Certainly, neither Ms. Gemeinhardt nor Mr. Procter could have discovered them. This applied to the structural elements, the plumbing and electrical, the insulation and vapor barrier as well as the water stains and mould in the basement and attic. Even Tacoma Engineering in their report dated February 9, 2009 could not comment about the structural elements at that time for review. It took multiple attendances on site by a number of engineers with only partial destructive testing to discover the latent defects they reported. Ms. Gemeinhardt was in no better position. Rather, she was in a worse position. There was no lack of due diligence by her.

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She had pursued a home inspection that would not have revealed the latent defects without destructive testing. I find the Babics fundamentally misrepresented the defect of water leakage. Further, as vendor/builders, they knew about the defective construction, improper materials used in the construction of the farm house, additions and garage. Their conduct demonstrated reckless disregard of the defects known to them. They told no one. Not the Township of Oro-Medonte, not their lawyer, and certainly not Ms. Gemeinhardt to whom they had a legal duty to disclose. Therefore, the principle of *caveat emptor* and/or lack of due diligence do not apply in this case.

[374] In the alternative, I find the Babics liable for negligent misrepresentation. The test for negligent misrepresentation is stated by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, as follows:

(a) Did the person making the misrepresentation owe a duty of care to the person they made this representation to?

(b) Was the representation untrue, inaccurate or misleading?

(c) Was the person making the representation negligent by making it?

(d) Did the person that the representation was made to rely upon it?

(e) Did the person to whom the representation was made suffer damage?

[375] In the case at bar, the test has been satisfied in respect of all elements for the reasons I have given.

Conclusion - Liability

[376] I find the Babics have breached the agreement of purchase and sale. They are jointly and severally liable for damages to Ms. Gemeinhardt for their failure to disclose latent defects either orally or in writing prior to closing. They were reckless and negligent in failing to disclose to Ms. Gemeinhardt latent defects either known or ought to have been reasonably known to them.

B. DAMAGES

Overview – Cost of Replacing House, Additions and Accessory Building/Garage

[377] Ms. Gemeinhardt submits that this court should use the construction estimates of Joseph Emmons, the professional quantitative surveyor called by her. Mr. Emmons gave evidence that the cost of reconstructing the house and additions would cost the sum of $428,758.68 including HST. Ms. Gemeinhardt further requests that this amount should be adjusted upward because the estimate was done in September 2013. It is submitted that a reasonable adjustment would be to add an additional 10% to bring the total to $471,634.54.

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[378] In addition, Ms. Gemeinhardt seeks damages for the cost to reconstruct the garage which Mr. Emmons estimates in the amount of $110,279.03. This estimate was also done on September 25, 2013 and is inclusive of HST. Ms. Gemeinhardt proposes that this amount be adjusted upward an additional 10% because of the length of time this estimate was prepared. The adjusted price would be the sum of $121,306.93.

[379] Ms. Gemeinhardt submits that the total for the construction of the house, additions and garage is the sum of $592,941.41 to be paid on a joint and several basis by all defendants.

[380] The Babics submit that the cost of constructing an entirely new house and garage is founded entirely on Tacoma's "alarmist" recommendations not accepted by both Mr. Quaile and Mr. Pepper. I do not agree and have rejected this argument for reasons given. I have found that Ms. Gemeinhardt is entitled to the cost of replacing both the house and the garage. The issue here is quantum – what would be the appropriate amount and who should pay it.

[381] The Babics dispute the cost estimates of Mr. Emmons as being exorbitant. He conceded on cross-examination that the house and garage that he costed out results in substantial betterment over the quality construction and features of an old farm house. The Babics submit that Ms. Gemeinhardt's claims and that of Stewart Title for contribution and indemnity be dismissed with costs.

[382] I have rejected the cost estimate of Mr. Quaile as being unreasonably low. It was incomplete and did not encompass all the work required to remediate the house. Further, Mr. Quaile's estimate to replace the garage was seriously flawed and did not come close to the actual replacement cost. He never obtained pricing information from local contractors and he used the RS Means US Construction Manual for new construction to prepare his estimate.

Evidence of Joseph Emmons and Findings

[383] Mr. Emmons is employed by Steenhof Building Services Group. He was the only quantity surveyor or quantitative surveyor to testify at trial called by Ms. Gemeinhardt. He was the only witness to provide estimates for all of the work required and he used information obtained from local contractors to make his estimates. He was qualified to give expert opinion evidence in the field of quantitative surveying regarding Ms. Gemeinhardt's property.

[384] He prepared three reports dated September 25, 2013 (Exhibit 45, 46 and 47). Mr. Emmons estimated the cost of demolition of the accessory building/garage, for the disposal of waste, for reconstructing of the structure Ms. Gemeinhardt purchased and for taxes, permit fees and all other required expenses, was in the amount of $110,279.03 including HST of $12,686.97. This estimate was set out in Exhibit 46 dated September 25, 2013 and was based on the 2012 OBCA and 2012 costs.

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[385] Mr. Emmons estimates included fees for engineering work (required tor the slab), for design drawings, permits, surveying , power and water, as well as mechanical costs (heat) and expenses for supervision of the job ,waste disposal , contingencies and contractor profits and overhead costs. Mr. Emmons estimate also includes building the new structure to the same level as the existing structure.

[386] The defendants have alleged that this will result in the plaintiff receiving something better than what she purchased from the Babies. This claim is denied and has been rejected by me. This can be seen in the photographs marked as Exhibit 1, tab 15 page 10 which shows the garage on April 16, 2006. At this time the garage looked like a relatively new structure. This photo was taken approximately 15 months before Ms. Gemeinhardt first saw the garage in July/August 2007 and was approximately 20 months before her purchase of the farm was completed on December 5, 2007. The accessory building did not look anything like the older building that was likely replaced in 1991.

[387] It is also noteworthy that Stewart Title independent adjusters report (Exhibit 2, tab 12) dated February 28, 2009 also suggests that the costs of replacing the accessory building/garage would be in the range of $104,175.00 not including HST. This amount included engineering fees. The report estimated in 2009 the cost to replace the structure itself was $40,000.00 in 2009 but this did not include demolition costs or debris removal and disposal.

[388] This adjuster recommended that a local contractor be asked for an estimate of the cost to r the repair to the garage. However that contractor suggested that an engineering assessment was necessary because of the complexity of the construction issues and because it may be less expensive to simply pay out a settlement to Ms. Gemeinhardt rather than pay for reconstruction (Exhibit 2, tab 12, page 3).

[389] The costs of construction have continues to rise since 2009, when Claims Pro delivered its report to Stewart Title and they continued to go up since 2013 when Mr. Emmons did his report for the garage replacement costs (based on 2012 costs) .

[390] Construction costs have continued to rise since Mr. Emmons testified in 2014 and continue to rise to the date of judgment.

[391] The Claims Pro report from February 28, 2009 set a figure for the cost of building a new garage at $40,000.00 in 2009 compared to Mr. Quaile's estimated replacement of the basic structure at $43,250.00 plus HST in his report dated October 8, 2013 (Exhibit 89). The scope of work in the Claims Pro report is not described in much detail. However it is obviously not a complete scope of work because there is no demolition or waste removal expense included in the Claims Pro estimate. I find that the Claims Pro report of $40,000 to replace the garage in 2009 not including demolition and disposal costs, demonstrates that Mr. Quaile's estimate is unreasonably low and demonstrates that Mr. Quaile's estimate is nowhere in the vicinity of the actual replacement cost. It is noteworthy that

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the Claims Pro adjuster had spoken at least to one local contractor before the 2009 adjuster's report was delivered.

[392] I accept Mr. Emmons' evidence and prefer it to the evidence of Mr. Quaile and Mr. Pepper. His evidence was more complete, thorough and was a more accurate reflection of the cost to replace the accessory building/garage.

[393] I find that the remedial cost of tearing down the existing accessory building/garage and replacing it with a structure which included heat and finished space would be more than $110,279.03 at this time because of the time that has passed since 2012, the year in which Mr. Emmons based his estimates.

[394] I find Mr. Emmons' evidence is the best evidence on the cost of remediation of the accessory building/garage because he based his estimate upon more recent costs of construction, on figures based upon what local contractors would have charged in 2012 and because his scope of work included all the scope of work required.

[395] I find the cost of remediation of the accessory building/garage is in the sum of $110,279.03 in 2012 dollars plus an allowance for inflationary increase since 2012 to the date of judgment by 10% (2.5% x 4 years = 10% = $11,027.90).

[396] Therefore, judgment is awarded to Ms. Gemeinhardt against the defendants Leopold Babic and Apolonija Babic jointly and severally for the remediation costs associated with the accessory building/garage in the amount of $121,306.93 plus post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

[397] With respect to the cost of replacing the additions and the house, I find that Mr. Emmons' estimates are preferable to those of Mr. Quaile. I have found that Mr. Quaile's estimate of $69,000 as set out in his report of March 17, 2015 (Exhibit 86) for the remediation of part of the house was unreasonably low.

[398] As I have previously found, Mr. Quaile's scope of work for the house is not reasonable given all of the evidence of the defects to the original house, including but not limited to, flooring issues, septic system issues, no plumbing, electrical or building permits, improper air barriers and insulation and ventilation. There are also mould and environmental issues.

[399] Mr. Quaile did not attempt to provide any estimate on the cost of remediation of the original house other than the cost of repairing the beams and post at the interface between the original house and the additions. Mr. Quaile did not even attempt to assess whether remedial work was required to the original house except for the replacement of the foyer. He limited his comments to dealing with structural issues. He proposed a scope of work that was impractical (excavation under the floors of the addition to gain access to shore up the floors). He also did not allow for restoration of the house to the level of finish that Ms. Gemeinhardt bought. For example he allowed for drywall instead of plaster ceilings (see exhibit 57). He would not replace the masonry chimney

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from a wood burning cooking stove with a new masonry chimney. He proposed a steel insulated pipe as a chimney instead.

[400] Mr. Quaile also proposed that the front porch would be changed into an uncovered concrete porch with a metal railing and not restore it to the finished room that Ms. Gemeinhardt described as a foyer. Mr. Quaile did not know that this structure had been an addition to the house built by Mr. Babic.

[401] Mr. Quaile claimed he was not aware of, and was not asked to deal with the costs of dealing with the defective air barrier and the lack of ventilation causing mould in the house. As a result Mr. Quaile's scope of work for the repair of the house and the additions was not an estimate of all work required. Mr. Quaile's estimate was for only part of the necessary remediation work. Like the garage estimate, Mr. Quaile provided an unreasonably low figure for the scope of work he agreed was necessary. Mr. Quaile's final figures for the remediation of part of the house was for $69,000.00 as set out in his report of March 17, 2015 (Exhibit 86).

[402] Mr. Emmons' estimate for demolition and replacing the additions only was $255,872.98 including $29,436.71 for HST. The estimate of $255,872 .98 does not include the remediation of the original house. (Exhibit 47)

[403] Mr. Emmons was also asked to provide an estimate for the cost of demolishing and removing the entire house with additions and for these structures. (Exhibit 48)

[404] Based on the evidence of Mr. Emmons, I find the cost of remediation of the house and additions is the sum of $428,758.68 which includes HST based upon his cost estimate evidence which I accept. This amount is expressed in 2012 dollars. I find it reasonable to award and allowance for inflationary increase since 2012 to the date of judgment as I did regarding the cost of remediation for the accessory building/garage by adding 10% (2.5% x 4 years = 10% = $42,875.86). With this added inflationary increase, I find the total cost of remediation of house and additions in the amount of $471,624.54.

[405] I find this approach to be fair and reasonable in all the circumstances.

[406] In concluding that the evidence of Joseph Emmons was the best evidence in determining the cost of remediation for Ms. Gemeinhardt's house, additions and accessory building/garage, I have also considered the appraisal evidence of Robert Carruthers called by Ms. Gemeinhardt and Robin Jones called by Stewart Title. I find each of their evidence was problematic and I did not rely on their evidence for the following reasons:

Evidence of Robert Carruthers, Robin Jones and Findings

[407] Robin Jones is a real estate appraiser called by Stewart Title. He was qualified to give expert opinion evidence as to the difference in market value of Ms. Gemeinhardt's property with existing dwelling and garage as opposed to the market value without existing dwelling and garage.

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[408] Mr. Jones prepared two reports dated November 26, 2009 (Exhibit 79) and report dated February 24, 2014 (Exhibit 80).

[409] His appraisal was based on an exterior "street side" inspection on November 45, 2009. He never attended on the property or in the house and garage. It was his opinion that the subject property as of November 5, 2009 had a market value with existing house and double-garage in the range of $550,000 to $570,000. The market value without the existing house and double-garage was $435,000. He opined that "the house and double-garage have a 'market value' relative to the existing property of approximately $115,000 to $135,000 as of the effective date of November 5, 2009."

[410] In his report dated February 24, 2014 (Exhibit 80), Mr. Jones states he conducted another exterior "street side" inspection like his first inspection. This time he produced an opinion which with a number of market value estimates as follows:

- Market value estimate of subject property without the existing house and double-garage as of December 5, 2007: $351,000.
- Market value estimate of subject property without the existing house and double-garage as of February 20, 2014: $500,000.
- Market value estimate of subject property with the existing house and double-garage as of February 20, 2014: $665,000.

[411] I find Mr. Jones's evidence was of less assistance to this Honourable Court than that of Mr. Carruthers. Mr. Jones never did anything more than a road side appraisal. He never set foot on the property. Mr. Carruthers did a complete inspection of the property. However, this was long after the house was no longer being occupied.

[412] In addition Mr. Jones did not attempt to provide an opinion of value of the buildings as of the date of closing. In addition there were many errors in Mr. Jones report, for example on page 2 of his report Mr. Jones wrote: "an exterior "street side" inspection of the property was conducted on the subject property on December 5, 2007..."

[413] When he testified Mr. Jones admitted that he did not do an inspection until sometime in 2009. He did not inspect the property at all in 2007.

[414] Mr. Jones only provided a land value for the date of closing, December 5, 2007. This opinion was of no assistance in determining what the total value of the property was as of the date of closing and what the value of the buildings were.

[415] Mr. Jones also conducted his inspection in Winter when there had been a large accumulation of snow on the property. He therefore could not from his road side inspection see much of anything of the land.

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[416] Mr. Jones methodology was also inappropriate because he used comparables that included many properties located far to the north and east of the Gemeinhardt property. This clearly had the effect of reducing the appraised value of the Gemeinhardt property.

[417] Mr. Carruthers used closer properties as comparables and he did provide a value for the land and houses as of the date of closing. I found Mr. Carruthers was also more experienced and qualified than Mr. Jones.

[418] Counsel for the Babics did not call any expert real estate appraiser as a witness and although he cross-examined Mr. Carruthers he had no evidence to lead on the value of the property as of the date of closing or since.

[419] Robert Carruthers has been a professional real estate appraiser since 1976 (38 years' experience) by the time he testified on December 2, 2014. He was called to testify on behalf of Ms. Gemeinhardt. He was qualified to give expert opinion evidence on the value of Ms. Gemeinhardt's farm at the time of purchase and currently. He prepared a report dated September 22, 2014 (Exhibit 51). He inspected the property on July 21 and September 17, 2014 for the effective dates of valuation as at September 17, 2014 and December 5, 2007 retrospectively.

[420] Mr. Carruthers investigated the value of properties north of Barrie. He determined that the closer the property was to Barrie and the Highway 400/Penetanguishene Road corridor, the higher the value of the property. Mr. Carruthers noted that the Gemeinhardt property was located close to both of these more valuable land areas.

[421] However, Mr. Carruthers did not see the buildings on the Gemeinhardt farm until 2014. By that time the buildings had deteriorated, had been left with large holes where destructive testing had been done by the engineers and the house and accessory building had not been occupied for several years. The house was also full of mould.

[422] Mr. Carruthers' opinion regarding the market value of the subject property was as follows:

1. Current market value as at September 17, 2014: $670,500
   Contributing value of improvements: $275,000 (for house and garage)

2. Retrospective market value as at December 5, 2007: $536,400

   Contributing value of improvements: $210,000 (for house and garage)

[423] Mr. Carruthers had reviewed many comparable sales that were closer and more realistic than those selected by Mr. Jones for the subject property. However, there were not an abundant number of comparables to consider. Also, as stated, the property was in a much deteriorated condition when inspected in 2014 than it was in December 2007.

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[424] Mr. Carruthers' appraisal evidence had further limitations when he used various percentage factors to account for the value of vacant land as opposed to improvements. He valued the land per acre and then allocated percentage factors normally used by appraisers to value vacant land as opposed to land with improvement contributions.

[425] His methodology was not reliable and not helpful to the court. The essential issue related to the amount required to replace the house, additions and accessory building/garage.

[426] The evidence of Mr. Adema and Mr. Emmons assisted the court in this regard. The evidence of the quantity surveyor, Mr. Emmons, was much preferred over the evidence of Mr. Carruthers and Mr. Jones. Although Mr. Carruthers and Mr. Jones were experienced in their field, their evidence was neither helpful nor reliable for reasons stated. Accordingly, I did not rely on the evidence of either appraiser to determine the market value of the subject property on various dates. Rather, the best evidence as to the cost of rebuilding the house, additions and accessory building/garage was that of Mr. Emmons which was relied upon by this court.

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Conclusion - Cost of Replacing House, Additions and Accessory Building/Garage

[427] I find the total cost to replace the house, additions and accessory building/garage are as follows:

(a)	House and Additions:	$471,634.54
(b)	Accessory building/Garage:	$121,306.93
	Total:	$592,941.47

Betterment

[428] The Babics submit Ms. Gemeinhardt's claim that she is entitled to a new home and garage, constructed at extravagant cost, results in betterment. I disagree. The Babics rely on engineering evidence that repairs to the existing structures can be done at a reasonable cost to address safety concerns and remedy building code deficiencies, I have rejected this evidence. Stewart Title also submits that if Ms. Gemeinhardt is awarded damages to replace the house, additions and accessory building/garage she will receive more compensation than she is entitled to receive. This would result in betterment.

[429] Stewart Title submits that Ms. Gemeinhardt's claims should be limited to the value of the buildings at the time of her purchase or at the very least, the value of the buildings at the time of trial. I disagree.

[430] I find the buildings are essentially a complete write-off and worth nothing because of latent defects. They must be replaced. The principle of betterment does not apply in these circumstances where the principal residence needs to be replaced: *Nan v. Black Pine Manufacturing Ltd.*, 1991 Carswell B.C. 75 (B.C.C.A.). Rather, in measuring

damages, the plaintiff ought to be put back into the position she was in before the harm or loss occurred.

[431] Neither Stewart Title nor the Babics have proven that Ms. Gemeinhardt would enjoy a betterment as a result of being awarded the cost of reinstating her house, additions and garage. There is no reasonable basis for granting any allowance for betterment since the betterment claim is speculative.

[432] In *Fors v. Overaker & Mallon*, [2014] O.J. No. 3108, the defendants and third parties argued that an allowance for betterment should be deducted from the plaintiff's damages. The plaintiff had purchased a house with significant water problems related to the sump pump system, the septic field, moisture in the basement and leaking from a skylight. Shaw J. held the defendants and third parties had failed to prove that the damages would do anything more than indemnify the plaintiff for the expense he must incur to reinstate his home after it was damaged due to the negligence of the defendants. Further, if a deduction from the damages for betterment was allowed, the plaintiff would suffer a loss because he would have no way to recover the amount deducted. Shaw J. held it would be inequitable for the plaintiff to recover less than the full cost of reinstatement of his home where his loss was due to the misrepresentations of the defendants and where the betterment claim was not proven and was merely speculative.

[433] I adopt the reasoning of Shaw J. in *Fors*, at paras. 187-190. I find Ms. Gemeinhardt is entitled to the full cost of reinstatement. Also cited, was the Ontario Court of Appeal decision in *DeBattista Gambin Developments Ltd. v. Niran Construction Ltd.*, 2013 ONCA 161 (CanLII), where the Court rejected a claim by the defendant Niran for a betterment deduction from the damages awarded by the trial judge to the plaintiff.

[434] In all of the circumstances of the case at bar, I find it would be inequitable for Ms. Gemeinhardt to suffer a loss if a deduction from her damages for betterment were allowed. There is no evidence that the value of the house she purchased would have been enhanced if the basement water and septic problems were remediated or if the remedial work had been done before Ms. Gemeinhardt had purchased the house that she would have paid a higher price. The price she paid was reflective of the house with no such problems: *Fors*, supra at para. 190.

[435] For these reasons, I find neither the Babics nor Stewart Title are entitled to any deduction for betterment from Ms. Gemeinhardt's damages.

The Front Foyer

[436] The Babics submit that Ms. Gemeinhardt is not entitled to any damages for the front foyer which was pulled down by Ms. Gemeinhardt after a tree fell on it causing significant damage. They submit the front foyer was destroyed by an act of God and by nothing they did. I reject this argument and make no deduction from Ms. Gemeinhardt's damages for the front foyer damaged by the fallen tree.

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[437] Rather, there is sufficient and cogent and evidence that the front foyer had fallen victim to Mr. Babic's shoddy workmanship well before the tree incident. The front foyer was an enclosed and finished structure. It was found to be pulling away from the existing house as it was not properly tied into the roof structure. The front foyer sustained water damage from its leaky roof. This structure was also constructed with scavenged improper materials such as used boards painted with lead paint. The Babics cannot avoid liability and damages associated with the front foyer which forms part of the existing house renovated by Mr. Babic without a building permit.

[438] For these reasons, I find there shall be no deduction from Ms. Gemeinhardt's damages relating to the front foyer.

Mitigation

[439] Ms. Gemeinhardt as the plaintiff, has a duty to take all reasonable steps to mitigate or minimize her loss or damages. The onus of proof on the issue of mitigation is on the defendants to establish that if she had taken certain reasonable mitigating steps, her damages would be lower.

[440] For the reasons that follow, I find neither the Babics nor Stewart Title have satisfied their onus that Ms. Gemeinhardt failed to take reasonable steps to mitigate her loss.

[441] Ms. Gemeinhardt testified about the steps she took to mitigate her damages and to provide for her daughter Natasha. This included bringing a trailer onto the property under very difficult conditions in which they lived for almost two years. Also, Ms. Gemeinhardt testified about her unsuccessful relocation to Pembroke to find suitable and affordable housing. Natasha missed her father which made it necessary for them to return to Barrie. Ms. Gemeinhardt testified about her purchase of the house on Berczy Street in Barrie which she could only carry with the help of her ex-husband and brother living there and paying expenses. Every move left her overall finances more depleted. Every move was necessary because Ms. Gemeinhardt did not have the means to rectify or remedy the massive problems facing her regarding the farm house, additions and garage. I accept her evidence as completely credible in this regard.

[442] Ms. Gemeinhardt's evidence was supported the by testimony of her lawyer Leon Carter. Mr. Carter was called to the Ontario Bar in 1969 and has primarily practiced real estate law. He had previously acted for Ms. Gemeinhardt and acted for her on the purchase from the Babics, her difficulties subsequent to closing and for her claim against Stewart Title.

[443] In addition to Ms. Gemeinhardt's evidence, Mr. Carter's evidence was most persuasive as to the steps the plaintiff took to mitigate her damages.

[444] Mr. Carter also acted for Ms. Gemeinhardt when she borrowed a further $160,000.00 by way of a mortgage on the farm so that she could buy the house on Berczy Street. She

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subsequently refinanced that $160,000.00 charge and paid it out by paying $163,431.00 to obtain a discharge. A new mortgage taken out was for $200,000.00.

[445] Mr. Carter gave evidence corroborating Ms. Gemeinhardt's evidence that she attempted to mitigate her damages and arrange for alternative accommodations for herself and her disabled daughter Natasha after it had become apparent that there were many defects in the farm house and garage and that destructive testing of these structures would be necessary to determine the scope of the work required to remedy the latent defects to the garage, house and septic system.

[446] The trust ledger statement from the sale of 1927 Russell Road (the Midhurst property) that was sold by Ms. Gemeinhardt and her estranged husband was dated December 7, 2005 (Exhibit 27, page 13).

[447] This indicates that although the adjusted purchase price was $1,049,754.09 most of this money was used to purchase the Babic farm ($800,930.64 to Klaus Jacoby on closing and $14,631.11 to pay transaction costs). Because of other expenses paid on closing, including $196,094.71 to pay off the existing mortgage, Ms. Gemeinhardt had no funds left over from the sale of the Midhurst property. This was the reason why Ms. Gemeinhardt borrowed a $140,000.00 of the purchase monies by way of a VTB mortgage at 6 per cent interest from the Babics in order to complete her purchase of the Babics' farm.

[448] Ms. Gemeinhardt purchased a house in Pembroke on August 25, 2010 for an adjusted purchase price of $49,204.21. She borrowed $27,000.00 of the purchase price. Her transaction costs were $500.00 (lenders fee and disbursements) for a total transaction cost of $4,376.87.

[449] Ms. Gemeinhardt borrowed $27,000 .00 and she received a net advance of $26,500.00. She provided a further $26, 581 .08 of her own monies to buy the house in Pembroke. (Exhibit 27, tab 2, page 11)

[450] Ms. Gemeinhardt refinanced the mortgage on the Pembroke house on June 2, 2011, approximately 9 months after she purchased that house.

[451] The refinancing resulted in the payout of the original $27,000.00 mortgage at a cost of $29,938.59. She also paid other transaction costs. The net result being that she received $10,105.57 of the $70,000 .00 mortgage advance after the original mortgage was paid out. (Exhibit 27, tab 2, page 008)

[452] On July 27, 2011 Ms. Gemeinhardt purchased 134 Berczy Street, Barrie with the intention of moving into that house from Pembroke. The adjusted purchase price was $130,780.99. The house required renovations before she could move into the house with Natasha.

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[453] Ms. Gemeinhardt borrowed a $160,000.00 mortgage from a private lender on July 27, 2011. The lenders fee of $1,160 .00 was deducted from the advance, the net amount payable to her was $158,400.00. She had to pay out an existing mortgage on her farm property to obtain this loan which was cross-collaterized on both the farm and the new house at 134 Berczy Street.

[454] After paying out the mortgage, taxes owed to the Township and transaction fees including mortgage brokers fees and legal fees for the new mortgage Ms. Gemeinhardt received a net amount of $133,194.00 which was used to buy the house at 134 Berczy Street.

[455] On April 20, 2012 Ms. Gemeinhardt did a refinancing of the mortgage on Berczy Street (2nd mortgage on farm). This refinancing resulted in the payout of the $160,000.00 mortgage that was borrowed to buy the house at 134 Berczy Street. After payment of $163,431.41 to pay out the existing 2nd mortgage (1st on Berczy Street) and other expenses, and transaction costs Ms. Gemeinhardt received a net advance of $5,248.81.

[456] The defendants have alleged that Ms. Gemeinhardt failed to mitigate her damages by using her funds to obtain suitable accommodations for her and her family after it became apparent that her home on the farm was unsuitable for her to live in. The defendants have alleged that it was not necessary for Ms. Gemeinhardt to live in a trailer on the farm.

[457] Ms. Gemeinhardt has given evidence that she could not afford to renovate the Berczy Street house and that she did not receive sufficient funds from the refinancing of the mortgage on the farm to pay for the renovations to the Berczy Street house. Therefore she and Natasha had to live in the trailer until her father took them in.

[458] Ms. Gemeinhardt claims she made reasonable efforts to mitigate, first by buying a house in Pembroke and second by buying a house in Barrie. However she never was able to raise sufficient funds to pay for the renovations of the Barrie house.

[459] Mr. Carter's trust statements and reporting letters for the various real estate transactions corroborated Ms. Gemeinhardt's evidence that she did take reasonable steps to mitigate and that she was left with no choice but to live in the trailer on the farm for the length of time she did.

[460] Further, the Babics took the position that the failure by Ms. Gemeinhardt to retain a professional home inspector was a failure on her part to exercise due diligence. This proposition was put to Mr. Carter in his cross-examination. This was rejected by Mr. Carter. His evidence was that at the time he would not have recommended that she hire a home inspector as they were not doing a very good job. However, Ms. Gemeinhardt used her father, an experienced contractor, to perform a home inspection. I find that Ms. Gemeinhardt did exercise due diligence and reject any suggestion by the defendants to the contrary. For these reasons, I find the Babics and Stewart Title have not established that Ms. Gemeinhardt failed to mitigate her damages. To the contrary, the evidence is overwhelming that she did.

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Special Damages

[461] The evidence of Ms. Gemeinhardt, her sons, Stefan and Erik, and Leon Carter, together with the supporting exhibits prove that Ms. Gemeinhardt incurred and paid for the following various expenses resulting from the latent defects and the Babics' negligent misrepresentations.

[462] Ms. Gemeinhardt took possession of the property on December 11, 2007. The furnace was not working. She paid $241.90 to a heating contractor on December 12, 2007 to try to repair the furnace. She further learned at about the same time that the furnace had to be replaced and that the basement was flooding.

[463] By December 31, 2007, the furnace had been replaced and Ms. Gemeinhardt paid the sum of $7,869.75 (less $1,000 credit) to Sargeant Fuels to replace the furnace, install the life-breath device and replace the oil tank.

[464] Ms. Gemeinhardt had to pay for electrical work to be done in the basement by February 13, 2008 in the amount of $2,075.25. A further plumbing bill was paid by Ms. Gemeinhardt in the amount of $2,047.50 to replace the sump pump and for other plumbing work. She was billed for this work on January 9, 2008. The plumber did more work in April 2008 to install a second sump pit and a second sump pump for $525. This was due to the new existing sump pump (installed in early January 2008) being unable to keep up with the flooding of the basement.

[465] Ms. Gemeinhardt also paid for an upgrade to the basement floor to raise it up by installing flagstone over top of the existing concrete floor. The labour was done by her sons, Stefan and Erik. The cost to install the basement flagstone was $700 for labour plus four material invoices pooling the amount of $1,357.97.

[466] I find that Ms. Gemeinhardt paid the sum of $846.95 for a full tank of oil on closing. The evidence established the tank was only a quarter full. She is entitled to the cost of filling three-quarters of the oil tank in the amount of $635.21.

[467] Ms. Gemeinhardt also paid a $1,000 mortgage broker's fee. I find the mortgage broker's fee would not have been necessary but for the Babics' unreasonable refusal to compensate Ms. Gemeinhardt for the flooding, defective furnace and oil tank and the reimbursement of the oil missing from the tank that was not provided by the Babics at the time of closing. Under these circumstances, Ms. Gemeinhardt was perfectly justified in wanting nothing more to do with the Babics and to discharge immediately the vendor take-back mortgage. She paid legal fees in the amount of $963.90 for early repayment of the mortgage.

[468] Before Ms. Gemeinhardt purchased the trailer, she rented one in which she lived with Natasha. The amount of the rental she paid was the sum of $2,489. She then purchased the trailer which included the electrical connection in the amount of $5,403.02.

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[469] She paid Hapamp Elmvale Limited to locate electrical cables in the amount of $219.22.

[470] She paid Pillar to Post Home Inspectors $565 for a mould report.

[471] She paid V. Geffens to pump the septic tank on September 15, 2008 for $300.

[472] Ms. Gemeinhardt also advances a claim for loss of rental income in the amount of $56,250 plus pre-judgment interest. No documentation was produced to support this claim.

[473] She testified that it was intended that her family members would also reside at the farm and pay rent. She submits that she would still be living on the farm with her son Erik and his girlfriend, son Stefan and his girlfriend and son, Natasha and Ms. Gemeinhardt's father. She would continue to do so for an indefinite period of time into the future. She claimed a loss of at least $1,000/month in rent. She and Natasha were left on the farm after everyone moved away. She claimed loss of rent revenue for a minimum of 5.5 years at $1,000/month and loss of room and board revenues plus groceries from her father. This amount is discounted to $56,250 where there may have been some months when her sons did not pay rent.

[474] By January/February 2010, Erik left the house. He had been paying $400/month. Thomas Proctor was paying $300 - $400/month plus groceries. He left the farm in March 2010. Stefan contributed another $400/month. He testified that his girlfriend and son lived on the farm for approximately eight months after closing before they moved out – approximately July 2008.

[475] Ms. Gemeinhardt and Natasha moved to the Pembroke house which was purchased on August 25, 2010.

[476] I find Ms. Gemeinhardt's loss of rental income claim to be unsupported by any documentary evidence. Also, the claims are somewhat speculative and remote. Stefan left the farm in 2008 with his girlfriend and son. They left of their own choice. I would reject any claim for loss of rental income regarding Stefan and his family. Erik paid to his mother $300 in rent and lived on the farm until 2010. He left the farm because he felt sick when he lived there. Thomas Proctor lived in the house and was getting sick as well. Erik testified he would have continued living on the farm if not for his health issues.

[477] I would allow lost rental income for Erik Gemeinhardt and Thomas Proctor until Ms. Gemeinhardt and Natasha moved to Pembroke in September 2010.

[478] I calculate the rental loss as follows: Erik Gemeinhardt $400 x 8 months (January – August) $3,200; and, Thomas Proctor $400 x 6 months (March – August) $2,400, for a total of $5,600.

[479] I have allowed some allowance for groceries contributed by Thomas Proctor. I would round the loss of rental income to $6,000 plus pre-judgment interest.

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[480] I would summarize and award Ms. Gemeinhardt special damages against the Babics as follows:

1.	Repair furnace:	$250
2.	Sergeant's invoice for furnace:	$7,869.75 less credit of $1,000 = $6,8869.75
3.	Electrical repairs:	$2,075.25
4.	Plumbing repairs:	$2,047.50
5.	Plumbing invoice (second sump pump):	$525.00
6.	Cost to install flagstone in basement: (includes labour of $700 plus material)	$1,357.97
7.	Overpayment for fuel oil paid to Babics on closing:	$635.21
8.	Legal fees for early repayment of mortgage:	$963.90
9.	Broker's fees to arrange refinancing to payout Babic VTB:	$1,000.00
10.	Paid to rent trailer:	$2,489.00
11.	Trailer purchase including electrical connection:	$5,403.02
12.	Paid to Hapamp to locate electrical cables:	$219.22
13.	Mould report from Pillar to Post:	$565.00
14.	V. Geffens to pump septic tank:	$300.00
15.	Loss of rental income:	$6,000

Total: $30,700.82, together with pre-judgment interest from the date of the statement of claim against the Babics dated November 30, 2009 pursuant to the provisions of the *Courts of Justice Act*.

[481] Ms. Gemeinhardt shall have judgment against Leopold Babic and Apolonija Babic jointly and severally in the amount of $30,700.82 together with pre-judgment interest pursuant to the provisions of the *Courts of Justice Act* from the date of the statement of claim being November 30, 2009 until judgment.

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General Damages

[482] Ms. Gemeinhardt submits that the Babics owed her a duty of good faith and a duty of honest performance of their agreement of purchase and sale. She relies upon the Supreme Court of Canada decision in *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494. The Supreme Court of Canada recognized that good faith contractual performance is a general organizing principle of the common law of contract and it is a common law duty which applies to all contracts. The parties have a duty to act honestly in their performance of their contractual obligations: *Bhasin*, supra at para. 76.

[483] The organizing principle of good faith exemplifies the notion that in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith: *Bhasin*, supra at para. 65.

[484] As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it to support a claim for damages according to the contractual rather than the tortious measure: *Bhasin*, supra at para. 88.

[485] In this case, the Babics failed to fulfill their duty to deal with Ms. Gemeinhardt in good faith. Their failure to disclose that they had built without permits or that they did not know whether the construction work was done properly, their inaccurate and incomplete answers to questions put to them and their half-truths in answering those questions are evidence that the Babics did not deal with Ms. Gemeinhardt honestly. This gives rise to a claim for damages for breach of contract as well as a claim for damages in tort, and a claim for general, aggravated and punitive damages.

[486] I have already found that the Babics are liable to Ms. Gemeinhardt for breach of the agreement of purchase and sale and damages for the cost to replace the house, additions and garage. These damages were awarded against the Babics on a joint and several basis.

[487] As a result of their breach of the agreement of purchase and sale and their tortious acts, I find Ms. Gemeinhardt is entitled to general damages against the Babics. I find that the Babics did not fulfill their duty to act honestly in their performance of their contractual obligations.

[488] Ms. Gemeinhardt's loss of use and enjoyment dates back to December 2007 – some eight and a half years ago. The evidence which I accept clearly establishes that during this time of loss of use and enjoyment of the farm, Ms. Gemeinhardt has been making payments on her mortgage and other payments for the other expenses such as property taxes, out of her limited fixed income that she received for her permanent disability. She incurred a great deal of financial difficulty because she had to make these payments on

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her limited income yet she was unable to live on the farm. While she lived in the farm house for a time, she was subjected to basement flooding, septic and environmental contamination and mould problems. She and Natasha had to live in a trailer because of difficult living conditions and Township orders.

[489] Ms. Gemeinhardt and Natasha suffered greatly during the time they lived in the trailer on the farm with no running water. They had to haul water in buckets and haul waste out of the trailer in buckets. They were deprived of a proper kitchen and a bathroom with shower facilities which were especially important for Natasha. They had to live in a cramped and poorly heated trailer.

[490] During the time they lived in the trailer, Ms. Gemeinhardt suffered serious emotional health issues for which she required hospitalization. She suffered from mental distress and anxiety as a result of the Babics' misconduct and breach of the agreement purchase and sale. In particular, she suffered as a result of the Babics' breach of good faith and honest dealings.

[491] Damages for breach of conduct should, as far as money can, place the plaintiff in the same position as if the contract had been performed. This includes damages for mental distress caused by the breach of contract where it is reasonably foreseeable that the mental distress could be caused by the breach of contract: *Fidler v. Sun Life Assurance Company of Canada*, [2006] 2 S.C.R. 3.

[492] I find the Babics ought to have foreseen that Ms. Gemeinhardt would suffer severe hardship and mental distress as a result of Ms. Gemeinhardt not having a home she could live in with her family.

[493] For the loss of use and deprivation, Ms. Gemeinhardt's mental distress and for the breach of good faith and honest contractual dealings, I would award Ms. Gemeinhardt general damages against the Babics in the amount of $85,000 plus pre-judgment interest at the rate of 5% per annum in accordance with rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, commencing from February 6, 2008 being the date of Leon Carter's letter to Klaus Jacoby: Exhibit 27, page 37, to the date of judgment.

Punitive Damages

[494] Ms. Gemeinhardt claims punitive damages against the Babics in the amount of $250,000. She submits that she and her daughter have suffered severe hardship. Ms. Gemeinhardt was deceived and treated in bad faith. It is submitted the Babics' conduct has been reprehensible and egregious. Further, Ms. Gemeinhardt submits that the Babics should be penalized to deter them from this kind of wrongful and illegal conduct. A message of general deterrence is also required to send a message to the community that these kinds of wrongful acts will be punished appropriately and that no one may expect to profit from this kind of conduct.

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[495] I am of the view that the Babics' conduct was wrongful and deceitful. I do agree that their conduct was malicious and egregious so as to attract and award punitive damages. Punitive damages are non-compensatory. Rather, they are a sanction in monetary terms to deter arbitrary, capricious and high-handed conduct to the detriment of Ms. Gemeinhardt. The evidence establishes such conduct on the part of the Babics. They were dishonest in their dealings with Ms. Gemeinhardt. They lied to her. If she had known the truth about the Babics' property, she would never have purchased the farm. They ought to have known and foreseen that their misconduct would have subjected Ms. Gemeinhardt to many years of expense and suffering. The Babics' conduct attracts specific and general deterrence.

[496] For these reasons, I find Ms. Gemeinhardt is entitled to an award of punitive damages which I assess in the amount of $50,000 payable jointly and severally by Leopold Babic and Apolonija Babic to Ms. Gemeinhardt.

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Conclusion - Damages

[497] For reasons given, Ms. Gemeinhardt is entitled to judgment for the following damages against Leopold Babic and Apolonija Babic jointly and severally:

(a) Damages for the cost of replacing the house, additions and accessory building/garage $592,941.47;

(b) Special damages in the amount of $30,700.82 together with pre-judgment interest from the date of the statement of claim November 30, 2009 pursuant to the provisions of the *Courts of Justice Act*;

(c) General damages in the amount of $85,000 together with pre-judgment interest at the rate of 5% per annum commencing from February 6, 2008 to the date of judgment; and

(d) Punitive damages in the amount of $50,000;

for a total amount of $758,642.29 plus interest.

II. THE SMALL CLAIMS COURT CLAIMS

The Gemeinhardt Claim

[498] In her Small Claims Court action issued February 26, 2008, Ms. Gemeinhardt claimed for the costs to attempt to repair and later replace the furnace and other related expenses such as moving the oil tank as well as other additional works to install new plumbing to stop water from being pumped into the septic tank, to attempt to waterproof the basement, to install a second sump pit, to raise the floor of the basement to try to stop water from coming in, and other out-of-pocket expenses including electrical wiring. All of these claims are well documented with corroborating evidence in the form of receipts, photographs, and the testimony of Ms. Gemeinhardt, her sons and Mr. Carter. In her

Small Claims Court action, Ms. Gemeinhardt claimed the Babics negligently concealed previous problems with water leakage in the basement and the defective furnace. Failure on the part of the Babics to disclose latent defects was a negligent misrepresentation arising from the suppression of the truth. Ms. Gemeinhardt claimed the cost to repair the basement and furnace in the amount of $10,000. There is also an issue of trespass involving Mr. Babic.

[499] The Babics denied any concealment and pleaded *caveat emptor*. They alleged the plaintiff should have retained a qualified building inspector prior to her purchase. Further, the Babics had no reason to believe the furnace was not in good working order. They also denied they were responsible for any trespass. The Babics submitted that the plaintiff's claims be dismissed with costs.

[500] By my order dated February 23, 2016 following my order dated November 17, 2014, both Ms. Gemeinhardt and the Babics' Small Claims Court actions were consolidated to be tried with the actions commenced in the Superior Court of Justice.

[501] The Small Claims Court claims of Ms. Gemeinhardt have been determined in her favour for reasons previously delivered herein.

[502] Specifically, I find the following:

- The oil tank: The Babics filled the oil tank on November 14, 2007 before they delivered possession of the farm. The undertaking to ensure that the oil tank was filled on the date of closing was intended to survive closing. Despite this undertaking, the oil tank was three-quarters empty. Ms. Gemeinhardt paid for a full tank of oil. She was awarded the sum of $635.21 representing her overpayment for fuel oil paid to the Babics on closing.

- The furnace: Mrs. Babic further gave evidence that she and her husband had the furnace inspected on January 30, 2007. After February 1, 2007 and until closing, she testified they did not use the furnace. Mrs. Babic then changed her answer to they might have used the furnace maybe two or three times after February 1, 2007 but they did not put on the furnace in the Fall of 2007.

[503] The Babics should have disclosed to Ms. Gemeinhardt prior to closing that they had not used the furnace and they did not know whether it would work as of the date of closing. The Babics had paid for repairs to the furnace in early 2007 and afterward they claimed they seldom used it.

[504] The Babics' failure to disclose that they had to make repairs to the furnace in January/February 2007 and that they did not know whether the furnace worked in December 2007 was a further failure to disclose a latent defect.

[505] The furnace would turn on but would stop running after a short period of operation. The Babics knew there were serious issues with the furnace. Failure to disclose this

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information was a concealment of a defect that could not be discovered during a typical inspection of the premises. The furnace required replacement. It did not work when Ms. Gemeinhardt took possession and it could not be repaired. I have awarded for damages regarding the repairs and replacement of the furnace.

[506] Ms. Gemeinhardt's claims regarding basement flooding: I have discussed this issue at length and all of the efforts that Ms. Gemeinhardt undertook to repair this problem earlier in my reasons. I have awarded Ms. Gemeinhardt damages for these repairs. I have found that the doctrine of *caveat emptor* does not apply in this case. I have found that the Babics concealed latent defects regarding which they made negligent misrepresentations to Ms. Gemeinhardt. I have allowed Ms. Gemeinhardt for Small Claims Court claims elsewhere in my reasons; special damages.

[507] As for the issue of trespass, I find that Mr. Babic was summoned by Ms. Gemeinhardt to remove his chattels from her property. In response to her demand that he do so, he attended on her property with his son and certain chattels were removed. I would dismiss the claim for trespass. Nevertheless, Ms. Gemeinhardt has been successful in her Small Claims Court action and she is entitled to her costs against the Babics.

The Babics' Claim

[508] As for the Babics' Small Claims Court action, they claim the sum of $10,000 just as Ms. Gemeinhardt had claimed that amount in her claim. The Babics' claim was for *detinue* and conversion of chattels described in Exhibit 70. They relied on Schedule "A" in the agreement of purchase of sale dated August 14, 2007 as well as the right of storage expanded for an unlimited time by the plaintiff found in her letter dated November 12, 2007. It is alleged this right was later terminated by Ms. Gemeinhardt.

[509] Ms. Gemeinhardt denied the Babics' allegation and sought to have the Babics' claims dismissed with costs.

[510] I find the Babics' claims made in their Small Claims Court action did not have any backup documentation to corroborate their claims. Their claims were unproven. The evidence in support of their claims amount to nothing more than a handwritten list prepared by the Babics months after they were sued by Ms. Gemeinhardt. Mr. Babic admitted that he and his wife sat down together and made up the amounts set out in their claim. Further in his cross-examination, Mr. Babic was specifically questioned about the items listed on Exhibit 70. He testified that some of the items he still had or had but used up. Either items, he either never had or did not have. This evidence further undermined his claims. Not only were the values unsupported guesswork but Mr. Babic was claiming for items he never had or still had in his possession, or had at one point in time and used up. In this regard, his claims were questionable and his evidence lacked credibility and reliability. I find that the Babics have failed to prove their damages and their claims.

[511] Also, the words written into Schedule "A" of the agreement of purchase and sale by the Babics' lawyer indicated his clients were only entitled to leave equipment and machinery

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on the property. I find most of the machinery and equipment were tractor accessories sold with the tractor to Ms. Gemeinhardt. Most of the other items were sold with the farm.

[512] The Babics further gave a bill of sale to Ms. Gemeinhardt in which they transferred to her all chattels left on the farm after closing. The bill of sale is found at page 3 of Exhibit 69. Although Ms. Gemeinhardt agreed to allow the Babics to store chattels on the farm after closing, this agreement was breached by the misconduct of the Babics.

[513] I find the bill of sale dated November 26, 2007 and executed by both Mr. and Mrs. Babic to be a full and complete defence to the claims by the Babics in their Small Claims Court action.

[514] For these reasons, I would dismiss the Babics' Small Claims Court action with costs to Ms. Gemeinhardt.

III. CLAIMS BETWEEN MS. GEMEINHARDT AND STEWART TITLE

Factual Overview

[515] On December 5, 2007 Mr. Carter arranged for Ms. Gemeinhardt to purchase title insurance from the defendant, Stewart Title. Stewart Title issued Policy 0-7763 1725786 (the "Policy") with respect to her purchase of 2109 20th/21st Sideroad, RR2, Shanty Bay, in the Township of Oro-Medonte (the "Property") *(Exhibit 2, Tab 2)*. The Policy was purchased in lieu of Mr. Carter performing the searches traditionally performed by lawyers acting for purchasers of real estate, including a 'building and zoning" search. Also forming part of the Policy was Stewart Title's Septic Endorsement.

[516] At the time the Policy was purchased Stewart Title understood that Ms. Gemeinhardt had purchased the Property for $950,000 and so the Policy provided coverage up to $950,000 as of the December 5, 2007 "policy date" for all Covered Title Risks, as outlined and limited by the Policy.

[517] On or about December 15, 2007 Ms. Gemeinhardt's farm house suffered severe flooding as well as a breakdown of the furnace. She later discovered latent defects in the buildings on the Property, and that the Property had suffered environmental contamination from the dispersal of raw untreated sewage onto the Property.

[518] Ms. Gemeinhardt made a claim against Stewart Title and sought to be compensated for the major defects in the buildings and because of the environmental contamination to the land. The nature of her claim is set out in her September 16, 2007 letter to Stewart Title *(Exhibit 7, Tab 1)* wherein she claims that she is entitled to compensation for a wide range of *physical defects* caused by "defective work" and the use of "substandard materials".

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[519] In a letter dated December 2, 2008 Stewart Title denied coverage providing that the types of claims submitted are *physical defects* and as such are not covered under the Policy *(Exhibit 2, Tab 5)*. After subsequent correspondence Stewart Title again provided an explanation to Ms. Gemeinhardt in a letter dated July 28, 2009 *(Exhibit 2, Tab 13)*.

[520] On April 24, 2009, the Township of Oro-Medonte issued an "Order to Remedy Unsafe Building" restricting access to the plaintiff's 768-square-foot double detached garage *(Exhibit 2, Tab 17)*. The order obliged Ms. Gemeinhardt to "obtain required building permits to rectify structural deficiencies as per the report of Tacoma Engineer dated March 27, 2009."

[521] On July 30, 2009, the Township of Oro-Medonte issued to Ms. Gemeinhardt an "Order to Remedy Unsafe Sewage System" *(Exhibit 2, Tab 18)*. The order obliged Ms. Gemeinhardt to pump her septic tank, seal or cap the outlet from the septic tank and obtain required sewage system permits to repair and/or replace the "failed sewage system".

[522] On March 8, 2013, the Township of Oro-Medonte issued an "Order to Remedy Unsafe Building" *(Exhibit 2, Tab 19)*. This order obliged Ms. Gemeinhardt to "repair and restore" the septic system to "proper working condition" and, in the meantime, arrange for alternate accommodation from a seasonal travel trailer.

[523] On April 3, 2013, the Township of Oro-Medonte issued an "Order to Prohibit Occupancy of Unsafe Building" with respect to Ms. Gemeinhardt's "existing dwelling, use of the plumbing systems and use of the septic system" *(Exhibit 2, Tab 20)*. The Township also issued an "Order to Remedy Unsafe Building". Although there was reference to no building permits having been obtained for the rear additions, deck, masonry chimney and wood burning appliances, the "required action" column referred to the dwelling additions and modifications to the existing dwelling as not being "structurally adequate as constructed" and the septic system being "unsafe" and "inadequate". Occupancy of the dwelling and use of the septic system was prohibited, but only "until such time as Engineer's reports and building permits have been obtained for required remedial action or demolition".

Position of the Parties

Position of Stewart Title

[524] Stewart Title's position is that as at the time of purchase, a search of the municipal records would not have revealed any open building permits or lack thereof. Therefore, to the extent that Ms. Gemeinhardt has any damages, her remedy is as against the Babics for constructing renovations with numerous deficiencies and without the requisite permits.

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[525] There were no open building permits or outstanding Orders issued by the Township when Ms. Gemeinhardt purchased the Property. As regards the failed septic system, there was no deficiency notice, notice of violation or work order issued by the municipality as at the Policy Date. A Local Authority Search at that date would not have revealed that a use permit had not been issued at a time when a permit was required.

[526] All the Orders to Remedy issued by the township were issued post-policy, with the first one being issued sixteen months after the Policy was issued.

[527] Stewart Title states that its denial of coverage was in accordance with the Policy, which excludes the failure of existing structures or any part of them to be constructed in accordance with applicable building codes. Stewart Title pleads and relies upon the following terms of the Policy:

> **COVERED TITLE RISKS**
>
> 29. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date.
>
> **EXCLUSIONS**
>
> 7. The failure of your existing structure(s) or any part of them to be constructed in accordance with applicable building codes. This exclusion does not apply to violations of building codes if notice of the violation appears in the Public Records at the Policy Date or if the existence of the violation would have been disclosed by a Local Authority Search of the Land at the Policy Date. This exclusion does not limit the coverage described in Item 20(f) or 29 of the Covered Title Risks.

Position of Ms. Gemeinhardt

[528] After closing, Ms. Gemeinhardt obtained evidence of latent defects in the buildings on the Property including environmental contamination from the dispersal of untreated sewage onto the property due to the fact that there was no septic system.

[529] She made a claim against her title insurance policy because of major defects in the buildings constructed without building permits and because of the environmental contamination to her house and land. On or about April 13, 2009, Stewart Title denied coverage under the Policy alleging that the types of claims made by Ms. Gemeinhardt were not covered due to exclusion provisions in the Policy.

[530] Ms. Gemeinhardt submits that Stewart Title has improperly denied coverage and is in breach of the terms of the Policy and the Septic Endorsement annexed to the Policy. She

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claims damages for breach of contract against Stewart Title. Ms. Gemeinhardt further submits that the doctrine of *contra proferentem* applies.

The Issues

[531] The issues to be determined are as follows:

1. Were the Orders issued by the Township of Oro-Medonte to "Remedy Unsafe Building ", which obliged Ms. Gemeinhardt to "obtain required building permits to rectify structural deficiencies" a "Covered Title Risk" within the meaning of Stewart Title's policy?

2. Were the Orders to "Remedy Unsafe Sewage Systems", which obliged Ms. Gemeinhardt to obtain sewage systems permits "to repair or replace failed sewage system" or "repair and restore to proper working condition" covered by the "Septic Endorsement" attached to Stewart Title's Policy?

3. Is the doctrine of *"contraproferentum"* applicable?

4. If there is coverage, in whole or in part, under Stewart Title's Policy, what amounts are payable pursuant to the Policy?

5. Did Stewart Title breach its obligation to act in good faith?

6. Did Stewart Title act in bad faith, such that punitive damages are warranted?

7. If the defendants are liable for breach of their respective, but distinct, contracts, can they be jointly and severally liable?

8. What is the appropriate relief?

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Analysis

1. ***Were the Orders issued by the Township of Oro-Medonte to "Remedy Unsafe Building", which obliged Ms. Gemeinhardt to "obtain required building permits to rectify structural deficiencies" a "Covered Title Risk" within the meaning of Stewart Title's Policy?***

2. ***Were the Orders to "Remedy Unsafe Sewage Systems", which obliged Ms. Gemeinhardt to obtain sewage systems permits "to repair or replace failed sewage system" or "repair and restore to proper working condition" covered by the "Septic Endorsement" attached to Stewart Title's Policy?***

The Policy

[532] In this case, Stewart Title issued its Gold Policy to Ms. Gemeinhardt ensuring "title" and providing protection against "Actual Loss resulting from any risk described in the Covered Title Risks as set out in this Policy if the event creating the risk existed on the Policy Date or, to the extent expressly stated, after the Policy Date". (Stewart Title Gold Policy: Exhibit 2, Tab 2, Owner's Coverage Statement; also, Leon Carter's Record: Exhibit 27, Tab 1, page 64 and following.)

[533] The Policy referred to defines "Title" as the: "ownership of your interest in the land, as shown in Schedule "A": (i) Title – the ownership of your interest in the land, as shown in Schedule A". (Stewart Title Policy, supra)

[534] The "Policy Date" of the Policy is December 5, 2007. Stewart Title submits the relevant Covered Title Risks are items 20(f) and 29, which provide coverage if:

> 20. You are forced by a Governmental Authority (or in the case of 20(a) hereunder, you are forced by the affected neighbour or a party who benefits from the Easement) to remove or remedy your existing structure(s), or any portion thereof, other than a boundary wall or fence, because:
>
> (a) it extends on to adjoining land or on to any Easement (even if the Easement is excepted in Schedule B);
>
> (b) it violates a restriction, covenant or condition affecting the Land, even if the restriction, covenant or condition is excepted in Schedule B;
>
> (c) it violates an existing zoning by-law or ordinance;
>
> (d) it is located on land under the jurisdiction of a conservation or similar governmental authority without approval;

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(e) of any outstanding notice of violation or deficiency notice;

(f) any portion of it was built without obtaining a building permit from the proper Governmental Authority, provided a building permit would have been required by such Governmental Authority at the time of construction of the structure or relevant portion thereof.

29. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date.

[535] Annexed to the Policy is the Septic Endorsement, which provides the following coverage:

1. The Company insures the Insured against loss or damage arising from any outstanding notice of violation, deficiency notice or work order issued as of the Policy Date affecting the septic system which services the land.

2. The Company also insures the Insured against loss or damage in the event that a local authority search would have disclosed:

a) that the certificate of approval and/or the use permit issued for the private septic system servicing the land does not conform with the current as-built nature of construction; or

b) that a certificate of approval and/or a use permit had not been issued at the time the system was constructed and a certificate and/or use pem1it was required at the time of construction.

[536] The coverage provided under the Septic Endorsement is limited by the following:

3. The Company does not insure against any loss or damage related to the functionality and/or age of the system unless such loss or damage arises from an issue covered under paragraphs 1 and 2 above. (Exhibit 2, Tab 2)

[537] The Policy also sets out EXCLUSIONS "you are not insured against loss, costs, legal fees and expenses resulting from:

7. The failure of your existing structure(s) or any part of them to be constructed in accordance with applicable building codes. This exclusion does not apply to violations of building codes if notice of the violation appears in the Public Records at the Policy Date or if the existence of the violation would have been

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> disclosed by a Local Authority Search of the Land at the Policy Date. This exclusion does not limit the coverage described in Item 20(f) or 29 of the Covered Title Risks."

[538] Stewart Title submits that neither Covered Title Risks Items 20(f) or 29 nor the Septic Endorsement are applicable to provide coverage for the orders issued by the Township of Oro-Medonte. Stewart Title submits that the orders were not issued because the property was allegedly altered without permits, but because there are structural inadequacies that make certain aspects of the Property "unsafe". Further, Stewart Title submits that the orders were issued after the Policy Date, and would not have been disclosed by a "Local Authority Search" as at the Policy Date.

[539] For the following reasons, I disagree.

Interpretation of the Title Policy

[540] In *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, (2016), 127 O.R. (3d) 663 at pp. 680-681, para. 66, the Ontario Court of Appeal set out the following principles of interpretation for insurance contracts as well settled in Canadian Law:

> [66] The following principles of interpretation for insurance contracts cited by the appellants in their factum are well settled in Canadian law and are not disputed by Chicago Title:
>
> - the court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promotes the true intent and reasonable expectations of the parties at the time of entry into the contract;
>
> - where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected;
>
> - ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties;
>
> - an interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided;
>
> - coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly;

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- the contract of insurance should be interpreted to promote a reasonable commercial result; and

- a clause should not be given effect if to do so would nullify the coverage provided by the policy.

See, e.g., *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, [1995] S.C.J. No. 74, at para. 19; *Non-Marine Underwriters, Lloyd's London v. Scalera*, [2000] 1 S.C.R. 551, [2000] S.C.J. No. 25, 2000 SCC 24, at paras. 67-71; *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398, [2001] S.C.J. No. 27, 2001 SCC 72, at para. 49; *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447, [2002] O.J. No. 4496 (C.A.), at paras. 23-28, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 33, 189 O.A.C. 197*n*; *Tannahill v. Lanark Mutual Insurance Co.*, [2010] O.J. No. 2736, 2010 ONSC 3623, 86 C.C.L.I. (4th) 69 (S.C.J.), at para. 26; and *Sam's Auto Wrecking Co. v. Lombard General Insurance Co. of Canada* (2013), 114 O.R. (3d) 730, [2013] O.J. No. 1413, 2013 ONCA 186, at para. 37.

[541] In *MacDonald* at para. 67, Hourigan J.A. commented on the basis for Canadian courts having developed these fundamental principles:

> [67] Responsible consumers purchase insurance policies for indemnification. Canadian courts have developed these fundamental principles of interpretation as a means of ensuring that these consumers are treated fairly and that their reasonable expectations are protected. The principles are to be applied rigorously in the interpretation of insurance contracts. It is not sufficient, as the motion judge did in this case, to cite the principles and then move on to an interpretation of a contract of insurance that is free from any analysis of how the principles apply to the contract in issue.

[542] Hourigan J.A. held that the motion judge's interpretation of a coverage provision as to marketability was overly restrictive and violated the principle that coverage provisions must be broadly construed. He went on to set out a two-step approach when determining the issue of coverage:

> [72] … The correct approach to the issue of coverage is to determine, first, whether the defect in issue has rendered the property unmarketable as that term is defined in 11 (i.e., can a potential purchaser refuse to close an agreement of purchase and sale on learning of the defect). The next question is whether coverage is excluded under the exclusions or limitations of liability provisions of the title policy. … *MacDonald* supra, para. [72]

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[543] For the following reasons, I find there is coverage under Covered Title Risks Item 20(f) and 29 of the Policy.

[544] Stewart Title raises a technical defence that the order to remedy the building (garage) was issued pursuant to s. 15.9(2)(a) of the *Ontario Building Code Act* because the building was unsafe not because a building permit was lacking (see letter of Stephen Piper dated January 2, 2009, Exhibit 2, Tab 8). Nowhere in the Policy is there a reference to this section or any other section of the *Ontario Building Code* in accordance with the evidence of Leon Carter.

[545] I find Stewart Title's interpretation of the Policy is both unduly restrictive and unreasonable. If its interpretation were accepted by this court (which it is not), then the Policy would be completely useless to the insured and would not serve any reasonable purpose. This was not what the parties intended. Of importance was the evidence of Ms. King that she would never issue an order to remedy just because a permit was not obtained. There would have to be some other factor as well such as the building being unsafe.

[546] Stewart Title marketed this policy to lawyers such as Mr. Carter by asserting that traditional off-title searches like making enquires to a municipality about building permits would no longer be necessary. Title insurance was supposed to reduce the lawyers' work load on residential purchases and was expected to reduce the cost of the title searches done, to speed up closings (lawyers would no longer have to wait for municipal authorities to reply to enquiries from lawyers about building permits) and to save the purchasers expenses. Municipalities charge fees for services like answering enquiries about building permits (user pay charges). If numerous enquiries are made for zoning, taxes and other searches the costs could be substantial.

[547] Mr. Carter testified that if he had done a building and zoning search at the Township of Oro-Medonte for the Babic property, that search would have revealed recent renovations were done without permits. This evidence is undisputed.

[548] His evidence was clear that if he had made inquiries regarding building permits, he would have learned that the Babics had renovated buildings without building permits. He would have informed Ms. Gemeinhardt of this fact. Ms. Gemeinhardt testified she would not have purchased the farm if she had known there were no building permits taken out for the renovations and additions.

[549] Mr. Carter and Ms. King both agreed that if Ms. Gemeinhardt had asked the municipality for a copy of the permit list before closing, he would have received it. Mr. Carter made it clear that he did not ask for this permit list because he bought title insurance coverage for Ms. Gemeinhardt instead. He also made it clear that he would have asked for a permit list if he did not buy title insurance.

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[550] Mr. Carter testified that he would have known as soon as he looked at the permit list that there were no permits for house additions and renovations and the work done in the garage. I accept his evidence. It is not accurate for Stewart Title to claim that an inquiry with the building department would have resulted in Mr. Carter obtaining only a compliance letter. Mr. Carter was far too experienced and knowledgeable to limit his inquiries only to a compliance letter.

[551] Despite this fact, Stewart Title took the position that an inquiry would not have disclosed to Mr. Carter that there were no building permits. I disagree. Quite to the contrary, the evidence is overwhelming that the Babics did not take out building permits for the construction of the 14' x 14' shed, the garage, the additions and the renovations to the house.

[552] Stewart Title also denies coverage on the grounds that Item 21(f) does not apply because the reason for the orders to remedy were not solely due to the fact that permits were not obtained.

[553] Stewart Title claims the orders to remedy were made because of two reasons: (a) that no permits were obtained; and (b) because work was not done in accordance with the *Ontario Building Code* and, therefore, the buildings were unsafe. As a result, coverage was excluded. I disagree.

[554] Item 21(f) of the Policy provides for two conditions precedent to be met:

1. No permit was obtained, and,

2. A permit would have been required when the work was done.

[555] I find that coverage exists under the Covered Title Risks Items 21(f) and 29. Under Item 20(f) the evidence is clear that no building permits were obtained by the Babics and those building permits would have been required when the work was done.

[556] As for Item 29, as at the Policy Date of December 5, 2007, there were "adverse circumstances affecting the land which would have been disclosed by a Local Authority Search of the land at the Policy Date".

[557] I accept the evidence of Mr. Carter and Ms. King and conclude that if Mr. Carter had conducted such a search at the Policy Date he would have found that there were no building permits taken out by the Babics for the construction of the shed, additions, house and garage.

[558] Therefore, Question 1 is answered in the affirmative in favour of Ms. Gemeinhardt.

[559] I would also answer Question 2 in the affirmative in favour of Ms. Gemeinhardt.

[560] Regarding the septic system, on July 30, 2009 the Township of Oro-Medonte issued to Ms. Gemeinhardt an "order to remedy unsafe sewage system" (Exhibit 2, Tab 18). The

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order obliged Ms. Gemeinhardt to pump her septic tank, seal or cap the outlet from the septic tank and obtain required sewage system permits to repair and/or replace the "failed sewage system".

[561] The evidence by the Township established there was no approved holding tank with no tile bed as it emptied directly into the ground next to the house. There were no proper permits taken out by the Babics. The ground next to the house became saturated from raw sewage that contaminated the soil and contaminated the basement.

[562] The Septic Endorsement is subject to a broad construction. The title insurance policy should be interpreted to promote a reasonable commercial result. The Septic Endorsement should not be given effect if to do so would nullify the coverage provided by the Policy. I find the loss claimed by Ms. Gemeinhardt falls within ss. 1, 2(a) and (b) of the Septic Endorsement and accordingly, there is coverage under the Septic Endorsement.

[563] The next step in the analysis is to determine whether the coverage is negated by any exclusions or limitations of liability in the Title Policy.

[564] Stewart Title relies upon **EXCLUSIONS** section 7 of the Policy. Stewart Title's position is that the unpermitted construction was discovered many years after the Policy Date and consequently, there is no coverage. In addition, the Policy excludes the failure of existing structures or any part of them to be constructed in accordance with applicable building codes. I do not agree.

[565] The Exclusion provision must be restrictively interpreted. As in *MacDonald*, the unpermitted construction was an existing defect that crystalized when Ms. Gemeinhardt became aware of the defect. Exclusion 7 does exclude "the failure of your existing structure(s) or any part of them to be constructed in accordance with applicable building codes". However, Exclusion 7 goes on to provide that this exclusion does not apply to violations of building codes <u>if</u> notice of the violation appears in the Public Records at the Policy Date <u>or if</u> the existence of the violation would have been disclosed by a Local Authority Search of the Land at the Policy Date. This exclusion does not limit the coverage described in Item 20(f) or 29 of the Covered Title Risks. (emphasis added)

[566] I have found that if Mr. Carter had conducted a search in the building department for the Township of Oro-Medonte at the Policy Date, he would have found that the Babics had not obtained the appropriate building permits or septic use permits. Exclusion 7 further provides that the exclusion does not limit the coverage described in Items 20(f) or 29 of the Covered Title Risks.

[567] I conclude that Items 20(f) and 29 provide coverage and indemnification regarding the defects in issue and coverage is not excluded by Exclusion 7. As for coverage provided under the Septic Endorsement, paragraph 3 does not apply. In this case, Ms. Gemeinhardt's claim is not based upon loss or damage related to the functionality and/or age of the system. Rather, her claim arises from an issue covered under paragraphs 1 and

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2 namely, the "septic system" which services the land was constructed without the certificate of approval and/or a use permit required at the time of construction.

[568] I conclude that Ms. Gemeinhardt also has coverage under the Septic Endorsement of her Policy. Such coverage is not excluded by paragraph 3 and the she is entitled to indemnification under the Septic Endorsement of her Title Insurance Policy. The terms of the Policy are unambiguous as is the Septic Endorsement regarding coverage and exclusions.

3. Is the Doctrine of "Contra Proferentum" Applicable?

[569] In my reasons, I have discussed the principles of interpretation of insurance contracts and, specifically, those principles as they apply to this title insurance policy: *MacDonald*, supra, at paras. 66-67.

[570] Given my reasons, it becomes unnecessary to discuss this issue any further.

4. If there is coverage, in whole or in part, under Stewart Title's Policy, what amounts are payable pursuant to the Policy?

[571] Stewart Title submits that the remedial costs should not be awarded if the court finds that such remedial costs exceed the appraised value of the property with and without improvements. The Policy describes the "lesser of" certain actual loss measurements. As well, basic contractual principles provide that where the cost of remediation is higher than the resultant fair market value increase, the cost of remediation should not be awarded.

[572] The Policy provides as follows concerning claims under Covered Title Risk 20(f):

> (i) For a claim under Covered Title Risk 20(f), even if the defect is also covered under another Covered Title Risk, we have the following options:
>
> (i) Where the cost of removing or remedying the portion of the structure built without a permit is less than $50,000, we will pay for the removal or remediation.
>
> (ii) Where the cost of removing or remedying the portion of the structure built without a permit is greater than $50,000, we may,
>
> 1. Pay for the removal or remediation; or
>
> 2. End the coverage for the claim by paying you your Actual Loss as determined by an appraisal conducted by a member of the Accredited Appraiser Canadian Institute and

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> those costs, legal fees and expenses incurred up to that time which we are obligated to pay. The appraiser will be selected by you from a list of at least 2 appraisers to be provided by us. The appraiser will be instructed by us. We will pay the appraiser's fees and expenses. If we cannot agree on the value of the Actual Loss, we can end all coverage under this Policy by paying you the current fair market value of the Land without regard to the defect insured against by the Policy, and you will transfer your Title of the Land to us.

[573] I have found there is coverage under the Policy and that the cost of remediation is more than $50,000. It involves not only the septic system but a host of other defects. I have concluded that the cost of remediation is in the amount of $592,941.41 regarding the house, additions and garage.

[574] Stewart Title submits that if this court finds there is coverage, damages are limited to the loss in market value of the title insured assets. The measure of damages would be equal to the value of the insured interest with and without the defect.

[575] Stewart Title further submits that remedial costs should not be awarded to Ms. Gemeinhardt if the court finds that such costs exceed the appraised value of the asset. The Policy describes the "lesser of" certain actual loss measures. As well, Stewart Title asserts that basic contractual principles provide that where remediation is higher than the resultant fair market value increase, the cost of remediation should not be awarded. Stewart Title therefore submits that, should damages be awarded against it, the proper measure of damages would be the diminution of the value of the property and not the cost of remediation.

[576] I have considered the issue of damages and specifically the cost of remediation relating to Ms. Gemeinhardt's claim against the Babics. I have reviewed all of the evidence including all the engineering and appraisal evidence. I identified the shortcomings in the appraisal evidence specifically and as a whole and concluded that the cost of remediation in all the circumstances was the most appropriate remedy. The evidence of Mr. Emmons was preferred to the evidence of others including Mr. Carruthers and Robin Jones, the appraiser called by Stewart Title for reasons stated. I am not satisfied that Ms. Gemeinhardt would receive any "windfall" in this case. Rather, she is entitled to recover the full value of the loss, in order to place her, as reasonably as possible, in the monetary position she would have been in if the agreement of purchase and sale had been fulfilled: *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (Ont. C.A.), at para. 16.

[577] I have considered the reasonableness of the cost of rectification. It is not unreasonable nor is it grossly disproportionate. I have considered the diminution of value to the property. The house and its additions and the garage – all in their present condition, have

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no value. They are to be demolished given the host of serious problems previously identified. Mr. Emmons' evidence is the best evidence regarding the cost of remediation.

[578] I have found that Ms. Gemeinhardt has coverage under Stewart Title's Title Insurance Policy. She is entitled to indemnification under that Policy. I find that Stewart Title breached its Title Insurance Policy by denying coverage. Stewart Title shall pay the sum of $592,941.41 to Ms. Gemeinhardt being the replacement cost of house, additions and garage.

General and Punitive Damages

5. Did Stewart Title breach its obligation to act in good faith?

6. Did Stewart Title act in bad faith, such that punitive damages are warranted?

[579] I have considered the organizing principle of good faith with respect to contractual performance. The principle is cited in *Bhasin v. Hrynew*, supra.

[580] The Supreme Court of Canada has also affirmed the duty of good faith which requires an insurer to deal with the insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Bhasin v. Hrynew*, supra, at para. 55, *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 63.

[581] The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Company*, 2002 SCC 18, [2002] 1 S.C.R. 595.

[582] Ms. Gemeinhardt agrees that the breach of the insurer's duty to properly investigate, adjust and pay the insurance claim is a different cause of action than her claim against Babics' in both contract and tort. Ms. Gemeinhardt submits that had Stewart Title fulfilled its contractual obligations to her by dealing with her in good faith and honestly, her house problems should have been remediated by the end of 2009. She would not have suffered the same amount of losses and harm she has suffered because of Stewart Title's unreasonable denial of coverage and its bad faith in its dealings with their insured.

[583] Stewart Title submits that Ms. Gemeinhardt has referred to the Supreme Court of Canadian enunciation of the "organizing principle of good faith with respect to contractual performance" as pronounced in the recent decision of *Bhasin v. Hrynew* 2014 SCC 71. It is noted that at paragraphs 12-15 of that decision the court accepted that the offending party "repeatedly misled Mr. Bhasin" *(para.12)* and "acted dishonestly" *(para. 15)*. The court noted that the duty of good faith was already in place in insurance contracts *(para. 44)* and enunciated the new "organizing principle " as meaning simply that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" *(para. 73)*. However, the court did recognize that "a party to a contract has no general duty to subordinate his or her interests to that of the other party." *(para. 86)*

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[584] The Ontario Court of Appeal recently noted in the context of automobile insurance in *Ross v. Bacchus* (2015) ONCA 347*:* "Insurers, like any other defendant, are entitled to take cases to trial." *(para. 51).*

[585] Stewart Title submits that there is nothing in the evidence of Stewart Title, as read in as part of Ms. Gemeinhardt's case, suggesting that Stewart Title acted dishonestly or misled her. Rather, Stewart Title and its representatives have repeatedly responded to her concerns, providing consistently alleged reasonable interpretations of the Policy.

[586] Stewart Title's representative, Steven Piper interpreted the Policy in the context of its provisions, the claim asserted and the evidence provided to that point. He then retained appraiser Robin Jones, notwithstanding the denial of coverage. It is submitted that it is understandable that Mr. Piper would want to know the probable damages even though his position was that there was no coverage. Mr. Jones reported to Stewart Title on November 26, 2009, just before the plaintiff sued Stewart Title on November 30, 2009. After being sued, Stewart Title did not serve Mr. Jones' November 2009 appraisal. It referred the matter to defence counsel, who delivered a Statement of Defence on January 14, 2010, in which the grounds of denia1 were reiterated, as can be seen from the Consolidated Trial Record. The issues with respect to title insurance were joined more than five years ago. There is no evidence of delay on Stewart Title's part in getting this matter to trial and having the issue of policy interpretation adjudicated, as any insurer has the right to do. In this regard, I would agree with Stewart Title.

[587] Stewart Title submits Ms. Gemeinhardt may disagree with Stewart Title's interpretation of the Policy. Stewart Title may not have acted upon an adjuster's recommendations, given its position that there is no coverage. But, there is no evidence that Stewart Title acted as did the insurer in *Whiten v. Pilot Insurance Co.* 2002 SCC 18, where the insurer was found to have pursued an arson defence against its insured homeowners when there was no direct evidence of any arson and all the insurer had despite an extensive investigation was "the fact that its policyholder had money problems" *(para. 102).*

[588] The court recognized that the insurer had the right, even the duty, to investigate claims but must do so fairly and diligently *(para. 161).* Pilot Insurance did not do so. Indeed, the court found that the homeowners ran into 'the insurer from hell" who, instead of providing its insured with peace of mind, confronted the insured with "obduracy and bad faith". *(para. 159)*

[589] Stewart Title submits that is not our case and I would agree. Stewart Title proceeded on what it believed to be a reasonable interpretation of the Policy provisions. Nevertheless, I have found Stewart Title's position to be erroneous for reasons given. This being said, the evidence does not support Ms. Gemeinhardt's claim that Stewart Title failed to act in good faith or acted in bad faith.

[590] Further, Ms. Gemeinhardt has not pleaded bad faith in her Statement of Claim nor has she sought leave to amend her pleading accordingly.

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[591] Ms. Gemeinhardt submits that Stewart Title has attempted to misrepresent the terms of its Policy by taking an unreasonable position with respect to the interpretation of the Policy and with respect to its obligations to its insured from the outset of this case. It is submitted that Stewart Title has acted in an arbitrary and capricious manner. Further, it is submitted that Stewart Title's actions were done with a lack of "good faith". I disagree. The evidence does not support Ms. Gemeinhardt's allegation.

[592] I find that Stewart Title has not breached its duty of good faith. Neither do I find that Stewart Title acted in bad faith. In either case, I would not award general or punitive damages to Ms. Gemeinhardt against Stewart Title regarding these claims.

7. If the defendants are liable for breach of their respective, but distinct, contracts, can they be jointly and severally liable?

[593] Ms. Gemeinhardt submits that the Babics and Stewart Title are jointly and severally liable for her loss.

[594] Stewart Title submits that if this court finds the Babics and Stewart Title liable for their breach of their respective, but distinct, contracts, then they are to be held severally liable.

[595] The ability of the court to find parties jointly liable for separate breaches of contract was addressed by Chief Justice Laskin in the Supreme Court of Canada decision of *Dominion Chain Co. v. Eastern Construction Co.* 1978 CarswellOnt 381 *(at para. 14).*

> I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case.

[596] The issue was addressed in greater detail by the Alberta Court of Appeal in the decision of *Isfeld v. Petersen Pontiac Buick GMC (Alta.) Inc.* 2013 CarswellAlta 1192, at paras. 28-30, where the court was asked whether liability could be apportioned between two parties who had separately breached different contracts causing the same damages. Upholding the trial judge's decision that the parties should be severally liable, the court agreed that that causes of action against the two defendants were "separate and distinct" and "their promises to the plaintiffs were several, not joint".

[597] It is alleged the damage caused by the Babics' alleged breach of their contract of sale and their tortious acts of misrepresentation and deceit, is different from the damage caused by Stewart Title's alleged breach of its title insurance policy and, in particular, its obligation to pay Ms. Gemeinhardt her "actual loss" as defined in the Policy. Similarly, Ms. Gemeinhardt's cause of action as alleged against the Babics is different from the cause of

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action she asserts against Stewart Title. As such, Stewart Title submits that if liable, the parties are to be held severally liable.

[598] I agree that Ms. Gemeinhardt pursued claims against the Babics for damages caused by a breach of their contract of purchase and sale and their tortious acts of misrepresentation and deceit. As well, Ms. Gemeinhardt pursued claims against Stewart Title for damages caused by a breach of the title insurance Policy. While the causes of action differ, the damages claimed for the replacement cost of the house, additions and accessory building/garage are the same. I have found that the Babics as between themselves are jointly and severally liable to Ms. Gemeinhardt for her damages. However, I have not found Stewart Title liable for general and punitive damages arising from Ms. Gemeinhardt's claims for tortious acts committed by the Babics. Judgment for these heads of damages are to be paid by the Babics alone to Ms. Gemeinhardt on a joint and several basis.

[599] While the Babics are exclusively liable for these damages, the damages for the replacement cost of the house, additions and the accessory building/garage awarded against the Babics triggers the obligations on the part of Stewart Title to pay the same amount pursuant to the Policy. I disagree with the proposition that Stewart Title in these circumstances ought to be held severally liable because the damage caused by the Babics regarding the replacement cost issue is different. Quite to the contrary, the amount is the same. My reasons have identified why and how I arrived at the replacement cost amount which for the purpose of quantifying this head of damage is identical under either contract.

[600] I find Stewart Title jointly and severally liable together with the Babics to pay Ms. Gemeinhardt the cost of replacing the house, additions and accessory/garage in the amount of $592,941.47.

[601] I also find Stewart Title liable to pay to Ms. Gemeinhardt special damages in the same amount found owing by the Babics for reasons given. These damages flow from the Babics' breach of contract which engages coverage under the Stewart Title Policy. Accordingly, I find Stewart Title jointly and severally liable together with the Babics to pay special damages in the amount of $30,782 plus pre-judgment interest from the date of the statement of claim November 30, 2009 pursuant to the provisions of the *Courts of Justice Act*.

[602] Stewart Title is entitled to pursue one or both of the Babics for contribution and indemnity.

8. What is the appropriate relief?

[603] For the foregoing reasons, Stewart Title is jointly and severally liable with the Babics to pay the cost of replacing the house, additions and accessory garage in the amount of $592,941.47 and special damages in the amount of $30,700.82 plus pre-judgment interest from the date of the statement of claim November 30, 2009.

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IV. CLAIMS BETWEEN STEWART TITLE AND THE BABICS

Contribution and Indemnity

[604] Stewart Title commenced third party proceedings against Leopold Babic and Apolonija Babic seeking contribution and indemnity for any amounts which Stewart Title is adjudged liable to Ms. Gemeinhardt, contribution and indemnity pursuant to a transfer to Stewart Title of Ms. Gemeinhardt's rights as against either or both of the Babics, and costs.

[605] Stewart Title adopted Ms. Gemeinhardt's allegations as against the Babics in her Superior Court of Justice action 09-1584 issued November 30, 2009.

[606] I have found there are Covered Title Risks for which coverage is provided in the Title Insurance Policy and for which Ms. Gemeinhardt is entitled to indemnification. She also has coverage under the Septic Endorsement. Stewart Title breached the Policy by denying coverage.

[607] I further find the Covered Title Risks were caused by the Babics in failing to obtain building permits and the proper permits for the septic system. I find Stewart Title is entitled to contribution and indemnity from both Leopold Babic and Apolonija Babic for any amounts which Stewart Title is adjudged liable to Ms. Gemeinhardt. I further find that Stewart Title is entitled to be fully indemnified by the Babics pursuant to a transfer to Stewart Title of Ms. Gemeinhardt's rights as against the Babics. In this regard, Stewart Title pleads and relies on the following term of the Policy: Stewart Title Policy, Exhibit 27, Tab 1, page 67.

> TRANSFER OF YOUR RIGHTS
>
> When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must do not do anything to affect these rights. You must let us use your name in enforcing these rights.

Babics Not Entitled to Credit

[608] Ms. Gemeinhardt submits that the insurance contract between her and Stewart Title is a private contract of insurance that does not prevent her from double-recovery against both the Babics and Stewart Title: *Krawchuk v. Scherbak* (2011), 108 (3d) (598), 2011 ONCA 352.

[609] In *Krawchuk*, the defendant vendors argued that because the plaintiff purchaser had already settled with her insurer Stewart Title, she should not be allowed a double-recovery. The Ontario Court of Appeal held that the title insurance policy fell under the private insurance exception or the "Bradburn Rule" that where a plaintiff recovers under

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an insurance policy for which he/she has paid the premiums, the insurance monies are not deductible from the damages paid by the tortfeasor: *Krawchuk*, supra at para. 99.

[610] Further, in *Krawchuk*, at para. 100, the Ontario Court of Appeal held:

> [100] In *Cunningham v. Wheeler*, the Supreme Court re-affirmed that the private insurance exception remains part of Canadian Law. According to Cory J., writing for the majority, the basis for this private insurance exception is that the plaintiff has made a sacrifice and planned for possible contingencies by purchasing private insurance and the wrong-doer should not be allowed to benefit from the plaintiff's sacrifice and forethought through a deduction in the amount he or she must pay: *Cunningham v. Wheeler*, [1964] 1 S.C.R. 359.

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[611] I find the Babics are not entitled to any credit for any amounts that Ms. Gemeinhardt may recover from Stewart Title.

CONCLUSION – SUMMARY

1. Cheryl Gemeinhardt shall have judgment against Leopold Babic and Apolonija Babic jointly and severally and they shall pay to Cheryl Gemeinhardt the following amounts:

   (a) Damages representing replacement cost plus post-judgment interest pursuant to *Courts of Justice Act* in the amount of $592,941.47.

   (b) Special damages together with pre-judgment interest commencing from the date of the Statement of Claim dated November 30, 2009 in accordance with the *Courts of Justice Act* in the amount of $30,700.92.

   (c) General damages together with pre-judgment interest at the rate of 5% per annum pursuant to rule 53.10 of the *Rules of Civil Procedure* commencing form February 6, 2008 being the date of Leon Carter's letter to Klaus Jacoby in the amount of $85,000.

   (d) Punitive damages in the amount of $50,000

2. Cheryl Gemeinhardt shall have judgment against Stewart Title Guarantee Company jointly and severally together with Leopold Babic and Apolonija Babic and it shall pay to Cheryl Gemeinhardt the following amounts:

   (a) Damages representing replacement cost plus post-judgment interest pursuant to *Courts of Justice Act* in the amount of $592,941.47.

(b) Special damages together with pre-judgment interest commencing from the date of the Statement of Claim dated November 30, 2009 in accordance with the *Courts of Justice Act* in the amount of $30,700.92.

3. (a) Stewart Title Guarantee Company is entitled to contribution and indemnity from both Leopold Babic and Apolonija Babic for any amounts which Stewart Title Guarantee Company is adjudged liable to Ms. Gemeinhardt;

(b) Stewart Title Guarantee Company is further entitled to be fully indemnified by Leopold Babic and Apolonija Babic. pursuant to a transfer to Stewart Title Guarantee Company of Cheryl Gemeinhardt's rights as against Leopold Babic and Apolonija Babic.

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COSTS

[612] If costs cannot be agreed upon, the parties shall arrange a time and date through the trial coordinator at Barrie for a costs hearing. In advance of any such hearing and at least ten days prior to the hearing date, the parties shall serve and file written costs submissions. Those submissions shall consist of a concise cost summary not exceeding three pages, a costs outline, draft bill of costs together with relevant authorities.

DiTOMASO J.

Released: July 20, 2016