In the Provincial Court of Alberta

Citation: Hilman v. MacKenzie, 2011 ABPC 393

Date: 20111230
Docket: P1002000155
Registry: Fort McMurray

Between:

Janelle Hilman

Plaintiff

- and -

Randell MacKenzie and Carol MacKenzie aka Carol Sajna

Defendants

Judgment of the Honourable Judge S. A. Cleary

THE CLAIM

[1] The Plaintiff Janelle Hilman purchased her first home, a condominium, from the Defendants Carol and Randell MacKenzie. It is this transaction that gives rise to the civil claim which is the subject of these proceedings. Ms. Hilman claims that the MacKenzies should be held liable for a special assessment levied against that condominium shortly after the purchase was completed which amounted to $20,326. Ms. Hilman claims that the Defendants are liable for this amount by way of fraudulent or at least negligent representation that such a levy would not occur, thereby inducing her to enter into the contract to purchase the condominium. Ms. Hilman claims that a special relationship existed between herself and Carol MacKenzie which would give rise to Ms. MacKenzie's liability for negligent misrepresentation. The civil claim also alleged a breach of contract which was on the alleged failure of the MacKenzies to provide complete condominium documents which Ms. Hilman says would have disclosed the special assessment.

THE DEFENCE

[2] The MacKenzies deny they are liable for the amount of the special assessment. They claim that nothing in the contract required them to provide the condominium documents as Ms. Hilman claims. They further claim that the documents they did provide would have disclosed the special assessment if Ms. Hilman had only reviewed them with any care. They also claim that Ms. MacKenzie was not acting as Ms. Hilman's real estate agent, and so owed her no duty of care. Further, they say that Ms. Hilman was told of the levy, and even if she was not told of the levy, that she should have known about it because of the documents she was given. In the final alternative, the MacKenzies argue that the special assessment increased the value of the property by the same amount and that since she has the benefit of that increase and they received nothing, they ought not to be ordered to pay for it.

THE EVIDENCE

[3] Janelle Hilman is a 32 year old single woman, making her approximately 30 at the time of the transaction in question. She went to Simon Fraser University for one semester in biochemistry after high school and then entered the workforce and worked in the field of payroll and accounting for 10-12 years. At that time her cousin, who owned four companies in Fort McMurray, asked her to come and do payroll for those companies. She agreed to this proposition and moved to Fort McMurray in May of 2007 where she first rented a bedroom in her Aunt and Uncle's home. She stayed there for 11 months and then moved into the basement suite of a home belonging to her cousin. In January of 2009 she moved into a home owned by the company which also housed the company offices. She had never owned a home before, had only rented with family or lived on her own in basement suites.

[4] In 2008 Ms. Hilman became interested in trying to purchase a home in Fort McMurray. Her cousin and employer recommended that she engage the defendant Ms. McKenzie as a listing agent since Ms. McKenzie assisted one of his companies, a home building business, in that capacity. Ms. Hilman had known Ms. McKenzie in that capacity since she moved to Fort McMurray. Once or twice per month Ms. Hilman would assist Ms. MacKenzie in faxing real estate documents to lawyers when she came into the company offices.

[5] On the basis of this prior knowledge and her cousin's recommendation, Ms. Hilman asked Ms. MacKenzie to look into finding her a home to purchase either as a rental unit or in which she could live herself. She testified that Ms. MacKenzie said she would come up with some homes for Ms. Hilman. Ms. MacKenzie directed her to find out what amount she could qualify for as a mortgage. She accordingly contacted a mortgage broker also used by the company and was told she would qualify for only $250,000. She advised Ms. MacKenzie of that and, unsurprisingly, there was nothing available in this price range for purchase in Fort McMurray. Her hope of purchasing a home was abandoned for some time.

[6] In April of 2009, Ms. Hilman was hopeful that she might find a home that she would be able to afford to purchase, given that she had been in Fort McMurray for some longer time and had an impression that home prices had come down somewhat from the previous year. So, she

asked Ms. MacKenzie to start looking again for places that she might purchase for herself or as a rental property. She told her that she wanted a two bedroom place to live in or use as a rental. She said that she wasn't comfortable paying a lot of money for a mortgage and didn't want the home she bought to be "too much."

[7] Ms. MacKenzie originally provided a package of documents including some property listings, a letter outlining those and information about a Scotiabank zero-down mortgage opportunity because Ms. Hilman did not have any funds available to put down on a home. Ms. Hilman was not prepared to look at any of the properties in the first package provided to her, as the prices were between $400,000-$500,000 and she was unable to pay such an amount. She asked Ms. MacKenzie to keep her eye open.

[8] In May of 2009 her cousin/employer moved the business that employed her to Langley, B.C.. He did not have a position for Ms. Hilman with the relocated company. She obtained a new position with Wilson Industries in Fort McMurray, but the building containing the company offices was going to be converted to a rental property and she was no longer going to be able to reside there as part of the terms of her employment. Her new employment would be at a higher salary but would not provide her with living accommodations. She was going to have to find roommates to help her pay rent on the building where she then lived, or find a new place to live. She therefore contacted Ms. MacKenzie and told her it was now more urgent that she find a home in her price range.

[9] Ms. Hilman's mortgage broker did not pre-approve her this time for the purchase she was hoping to make. However, she hoped that the on-paper increase in her wages would allow her to afford something with a monthly mortgage payment well under $2500. Renting a basement suite in Fort McMurray at the time apparently would cost $2500 per month, and she testified that she could not afford that sum on her own. She therefore advised Ms. MacKenzie that she was looking for a property in the $300,000 range, and additionally that she had no funds available for a down payment. They discussed the zero-down Scotiabank option and Ms. MacKenzie advised her that this would likely still be available to her.

[10] In response to Ms. Hilman's request, Ms. MacKenzie provided another package of listings at the beginning of June 2009, this one containing less expensively priced apartments, condominiums and trailers in the $200,000-$400,000 range. Throughout June and July 2009 Ms. MacKenzie and Ms. Hilman walked through five or six condominiums and one trailer. With respect to some of these properties, Ms. Hilman sought the advice of her friend Cameron Spicer, testifying that he was a friend of her cousin and with some knowledge of buildings. She took Mr. Spicer with her to view the trailer that Ms. MacKenzie showed her.

[11] Ms. Hilman testified about the method in which the property showings took place. She testified that Ms. MacKenzie would point out various things in the properties that Ms. Hilman should be concerned about. With respect to one condominium in Abasand Ms. MacKenzie pointed out something about a dishwasher saying, "I don't want this one for you. I don't think it's a good fit for you." After this, any thought of purchasing that condominium was abandoned.

She testified that Ms. MacKenzie would point out which properties had been or had the potential to be upgraded and discussed which ones would be a good investment for her. Ms. Hilman testified that she told Ms. MacKenzie she was apprehensive about making a home purchase and spending that much money in Fort McMurray where it was so expensive to live. She testified that she was relying on Ms. MacKenzie to help her find what would be beneficial to her.

[12] At the end of July 2009 Ms. MacKenzie emailed some further listings and the two women saw a couple of other properties.

[13] At the beginning of August Ms. MacKenzie telephoned Ms. Hilman and said that she and her husband, the Defendant Randell MacKenzie (sometimes referred to in evidence as Randy), were going to selling the condominium they owned and they wanted to give her “first dibs” on purchasing it. She said that would permit her to purchase it for a firm $310,000, but if Ms. Hilman decided not to purchase the condominium they would list it the following week for $20,000 more. She was told that if she purchased their condominium she would do a private sale with them and therefore save the real estate fees.

[14] Ms. Hilman testified that her understanding was that a private sale would save her the real estate fees. She testified that in her mind there was no change in the relationship between herself and Ms. MacKenzie who she still viewed as her real estate agent. She said that she had no familiarity with what she needed to know or with any of the documents that she would need to have prepared. She testified that Ms. MacKenzie just kept telling her “not to worry about it, that she would walk me through everything.” She said that Ms. MacKenzie never told her that she could not rely upon her at the time of the private sale, and that she had never signed any paperwork with Ms. MacKenzie either at the start of the agency relationship, or at the time of the private sale. She testified that she had “known her for a long time and completely trusted her.”

[15] Ms. Hilman met Ms. MacKenzie and walked through the home both outside and inside. Ms. Hilman said that Ms. MacKenzie told her that the condo board had talked about replacing the siding of the building but that this issue had been discussed “forever” with nothing done about it. Ms. MacKenzie advised Ms. Hilman that it was “normal” for condo boards to discuss these types of issues and not follow through with them. The defendant Randell MacKenzie was not present at the viewing. She had asked if her cousin Riley could attend and assess the more technical aspects like the electrical system. He met her there about 15-20 minutes after the viewing had commenced, and looked at the property with her and Ms. MacKenzie for another 15-20 minutes. A spot in the basement where water had dripped was pointed out and Ms. MacKenzie advised this had only dripped once but there had never been any other issues. Ms. MacKenzie and Riley discussed the electrical panel and the hot water tank and heater and other fittings and determined they were in good shape. Ms. Hilman did tell Ms. MacKenzie that she wanted to think about it.

[16] Ms. Hilman and her cousin went for dinner and discussed the property and decided they both thought it was a good purchase. Ms. Hilman testified that she “didn’t have any reservation about” buying the property from Ms. MacKenzie since Ms. MacKenzie had lived in it herself

and would be aware of any issues outstanding and, as she said in her evidence, if there had been anything important that she needed to know "I believed that she would have told me about it."

[17] Ms. Hilman also spoke to her friend Cameron Spicer, her cousin and employer Kevin, and her friend named Kathleen and told them she was considering the purchase. She said that all of these people agreed it sounded like a good opportunity but that her friend Kathleen told her about other friends in town who became responsible for a large special assessment on a condominium and that Ms. Hilman should make sure that didn't happen to her with this property.

[18] With all this in mind, Ms. Hilman contacted Ms. MacKenzie and told her that she wanted to buy the property, but that she really didn't know what she was doing and that she was still nervous about spending the money. She said that Ms. MacKenzie assured her that she would walk her through it all and make sure to write everything up with her.

[19] The parties met on August 19 and sat at Ms. MacKenzie's dining room table to write out the contract. Ms. MacKenzie had a standard form of contract that she had brought with her from her work at the real estate agency. She told Ms. Hilman that it was the contract they used at her work and she didn't see any reason why it wouldn't work for them with this sale.

[20] Ms. Hilman testified that at the table before the contract was written, she asked Ms. MacKenzie what the chances were that she would end up with a large special assessment and that Ms. MacKenzie responded that "that would never happen because nobody here [presumably referring to the condo owners] could afford it." Ms. Hilman testified that her response was "Good, I can't afford it either." Ms. Hilman testified that Ms. MacKenzie advised her that there had been a $3000 special assessment for all the owners due in November 2009 but they had already paid that amount.

[21] Ms. MacKenzie showed Ms. Hilman the contract document and provided a feature sheet respecting the property that the MacKenzies had received when they purchased the property. Ms. MacKenzie showed her that the sheet laid out the number of bedrooms and the square footage. She had crossed out the original sale price and wrote in their sale price and also wrote on the sheet "For Sale by Owner."

[22] The purchase contract (Exhibit 6) was described by Ms. Hilman in her evidence as "everything that she provided that day for me." She said that everything was mostly already written in. Ms. MacKenzie told her that she had crossed out anything to do with the agency, and that because they were doing a private sale the brokerage wasn't involved, she had crossed out the parts to do with the brokerage. Both she and Mr. MacKenzie had already initialled the document before she had seen it.

[23] The address and 100% financing was already typed in on the contract and everything to do with the deposit was crossed off as there would be no deposit. These two items were initialled by Ms. Hilman. There was a portion that was crossed off which Ms. MacKenzie said had been

done in error so that had already been added back in by Ms. MacKenzie in handwriting, so those items were also initialled by Ms. Hilman.

[24] Under the “additional terms” portion Ms. MacKenzie did tell her that she needed to make sure that Ms. Hilman knew she was a realtor. To that end the contract contained a term 7.6 which said “Seller is aware the buyer is a licensed Realtor in the Province of Alberta.” Ms. Hilman said she did not read that term closely but she had been told that it contained the information about Ms. MacKenzie being a realtor. Of course the term itself was incorrect as Ms. Hilman was the buyer and Ms. MacKenzie, the realtor, was the seller. Nonetheless, Ms. Hilman acknowledged that what she believed she was initialling was that she knew Ms. MacKenzie was a realtor.

[25] One of the conditions to the contract was financing and Ms. Hilman testified that Ms. MacKenzie advised that she would have to get a property inspection done and that she would have to sign off on the condominium documents. There was a standard term in the contract that involved the sale of the buyer’s home and Ms. Hilman testified that this prompted her to ask Ms. MacKenzie if her purchase would be affected by any difficulty with the MacKenzies purchasing the home they wished to. She said at that point Ms. MacKenzie called Mr. MacKenzie into the room and asked him if that should be a condition and he said no, that they would still sell their condominium to Ms. Hilman.

[26] Ms. MacKenzie told Ms. Hilman that she would make sure that all the standard conditions were in the contract because Ms. Hilman did not know which ones should be included. The only condition that Ms. Hilman requested was that the approval for financing also include financing for renovations she needed to do to put a bathroom and bedroom in the basement of the condominium. She was going to have to rent the basement part of the home and use the rent to assist her with the mortgage payments. Therefore, she could not afford to purchase the home unless she was able to get it into a state where she could take in a renter. Ms. MacKenzie agreed and she wrote in that condition.

[27] There was also a condominium document condition included. Ms. MacKenzie told Ms. Hilman that she did not have the condominium documents and that she would have to get them to her. Ms. Hilman did not make any inquiries about the referenced condominium property schedule, testifying that she did not know she had to, and that Ms. MacKenzie told her that she would get her everything that she needed and she was relying on that. In the end the contract did not contain what would, in a standard transaction, be a typical condominium property document schedule.

[28] The contract also contained many crossed out portions which Ms. MacKenzie explained did not apply and Ms. Hilman initialled those. While they were there, Ms. Hilman provided a mailing address and that was filled in while she was there.

[29] Ms. Hilman said that she was okay with the contract at this point and they signed it. She testified that Ms. MacKenzie said that everything was “good and that we had written a deal for me.” She said that she never thought she should have anybody else review the contract because

Ms. MacKenzie had told her that she would walk her through everything, that Ms. MacKenzie was her realtor and this was her job and she trusted she would do it.

[30] A day or two later, Ms. MacKenzie brought the condominium documents to Ms. Hilman. She said that she had obtained them and photocopied them herself (Exhibit 1). This included the 2008 annual meeting minutes which Ms. MacKenzie advised were the most current, the reserve fund study and financial statement. She said she looked them over and did not know 100% what she was looking at so asked her friend Kathleen who recommended that there should be $1,000,000 in the reserve fund. She said she spoke to Ms. MacKenzie a number of times that week for logistical reasons and during one of those conversations asked about the reserve fund. She said that Ms. MacKenzie said between the reserve and operating funds there was over $600,000 available and that was adequate and that it would not be typical for a condo board to have a million dollar fund.

[31] Ms. MacKenzie said she was comfortable with that explanation, since being a realtor was Ms. MacKenzie's job and she trusted that she knew what she was doing. Although she reviewed the documents there was nothing in the documents that made her question anything.

[32] Ms. Hilman moved on towards the purchase. She arranged for a quote for the development of the basement so that amount could be added to the mortgage. Indeed the conditional removal date had to be moved because the contractor was not available at an early date. She obtained quotes for the renovations and electrical work. She had conversations with Ms. MacKenzie about the necessity of moving the condition removal date, making it clear that she would not be able to afford the home unless she could arrange to finance the work she needed to get a renter.

[33] Ms. Hilman hired a building inspector from a list of names provided by Ms. MacKenzie and a home inspection was done. This did not raise any concerns although there were a few minor items. Ms. MacKenzie was advised of this and asked that the deficiencies be scanned and emailed to her. There was some discussion about whether or not the MacKenzies would arrange to have some of these small things done. At least one of the items (water behind the shower tiles) was something the MacKenzies had already indicated they would not be prepared to fix, but Ms. Hilman included it as a request since Ms. MacKenzie told her that she should. Ms. Hilman said she viewed this as a continuation of Ms. MacKenzie "walking her through all the steps for purchase" of her new home.

[34] At the end of the day Ms. Hilman said she was prepared to accept the property in the condition the home inspector found it. She said the inspector advised the roof shingles had a good five years left and everything else was sound and looked solid.

[35] By about September 2, 2009, the only outstanding matter was the financing and Ms. Hilman ultimately received approval for that, although her mortgage broker had to make inquiries with two different companies due to her financial circumstances. She let Ms. MacKenzie know and Ms. MacKenzie told her that she would prepare and email documents

regarding the condition removal and change of date for that. Ms. Hilman testified that she received those documents at her work email with changes made and signed by the MacKenzies. Ms. Hilman printed, signed, scanned and emailed those documents back to Ms. MacKenzie. A copy of the sent email was not available but Exhibit 9 was clearly an email without Ms. Hilman's signature sent by email to her. It thus makes sense she would have received and returned the document by email as she testified. These documents say that the conditions to the contract were either fulfilled or were waived.

[36] On September 14 or 15, 2009, Ms. MacKenzie called Ms. Hilman in British Columbia where she was attending her brother's wedding. Ms. MacKenzie advised her that she had received notice of a meeting of the condominium owners to be held on September 24. She said this meeting was regarding a special assessment of $20,000-$30,000 per property, and that they had received notice of it after the condition removal date. She told Ms. Hilman not to worry about it because "She and Randy would not leave me high and dry."

[37] Ms. Hilman said she was shocked and did not know what to expect. She understood that since the notice was received after the condition removal date that she was going to be expected to be responsible for the assessment. She said Ms. MacKenzie told her that they felt she should be present at the meeting.

[38] On September 24 she met Ms. MacKenzie at the meeting. She said there was a show of hands to vote on the special assessment but as she was not considered a homeowner she was not permitted to vote. She testified that she told Ms. MacKenzie that she wished she would have known about this because she could have tried to add it to her mortgage. She said that Ms. MacKenzie did not respond to this statement. Ms. MacKenzie then left halfway through the meeting.

[39] Eventually Ms. Hilman moved into the condominium. She received a notice in November from the condominium board which outlined exactly the amount for which she would be responsible. She did not know how she was going to come up with the money. She called her lawyer who said he was still waiting for documents from Ms. Mackenzie's lawyer.

[40] Ms. Hilman testified that in the special meeting there was reference to a notice that had been mailed a year earlier and to the fact that all the owners "knew this was coming." She asked the property manager if she could get a copy of all of the documents and was told to request them by email. She did this several times and finally in February 2010 received all of the documents (Exhibit 2) including a notice sent to each owner in November 2008 and the minutes of the AGM in July 2009 which latter document detailed an assessment of $20,000-$30,000 per unit.

[41] Ms. Hilman's lawyer advised her to meet with Ms. MacKenzie to see if they could work matters out between them. She made this request in January 2010 but Ms MacKenzie could not meet her until February 2010. They did meet, along with Cameron Spicer who came with Ms. Hilman. Ms. Hilman asked Ms. MacKenzie what she had meant by 'not leaving her high and

dry'. She testified that Ms. MacKenzie said she was going to treat her like one of her kids and asked her what she had done to come up with the money. Ms. Hilman declined to answer this and then Ms. MacKenzie offered to pay her $2000 or $3000. Ms. Hilman said she did not feel this was adequate since she felt that they knew about the assessment and didn't tell her. Ms. MacKenzie said at this point that she did tell her about the special assessment and referred to the special meeting in September, which of course had occurred after the purchase was completed. By the end of the meeting Ms. MacKenzie had agreed to pay half of the special assessment and said she "wasn't going to lose her job over $20,000." Ms. MacKenzie said she needed a month to come up with the money. Mr. Spicer confirmed the details of this meeting, describing Ms. MacKenzie as "stomping off."

[42] After five weeks Ms. Hilman had heard nothing and the first half of the assessment was due to be paid by her on April 15. She emailed Ms. MacKenzie asking her when it was coming. Ms. MacKenzie emailed her back and said she was not in town and "was trying to work it out with Kevin" (Ms. Hilman's employer – who had never been involved in the proceedings in any way). She said that she would drop some papers off at Ms. Hilman's place in the next day or two. Ms. MacKenzie eventually delivered a letter (Exhibit 11) that said the MacKenzies would not pay the amount agreed, since both parties had the same information at the time of the purchase. The letter was signed by both defendants and included a copy of the July 2009 AGM, which of course were not included in the package of documents provided to Ms. Hilman before the conditions were deemed satisfied or waived. The letter stated that Ms. Hilman was advised of the upcoming special assessment on "more than one occasion" and inaccurately asserted that she had been given copies of the minutes. The letter also stated that they all met to remove the conditions on September 3, and that at that time Ms. Hilman was told that the property manager said that a special assessment of between $18,000-$23,000 was likely. The letter indicated that the home was priced below market value to accommodate this possibility.

[43] Ms. Hilman did not have the money to pay the special assessment. She had been planning to use the money Ms. MacKenzie promised to pay her to satisfy the first half of the amount due, and by implication, to come up with the money for the renovations between then and when the second half of the assessment was due, and use the hold back from the bank to pay the second installment. Cameron Spicer offered to do the renovations necessary to her home for about half of the quoted price without charging her up front for labour because the funds to pay for that would not be released by the bank until the work was done. After Ms. MacKenzie reneged on her agreement to pay the funds, the hold back at the bank was the only money Ms. Hilman had any way of accessing.

[44] The installments had to be paid on time because the corporation was going to charge her 5% per month on overdue payments.

[45] In the end Cameron Spicer and his parents came and spent a week with her to do the work on her home, doing it without charge up front so that she could obtain the funds from the bank. She was able to obtain the hold back on her mortgage and used those funds to pay the first installment. She pursued other financing options but in the end was forced to borrow money

from her cousin Kevin to pay the second installment. She has had no funds since those dates to pay the Spicers for their labour or to pay her cousin back but wishes to accomplish both of those things.

[46] Ms. Hilman testified that had she known of the upcoming special assessment at the time of the purchase, she would have tried to determine if it would even have been worth it to purchase the condominium, whether she could obtain financing to cover it and afford the payments on that amount, or have attempted to revisit the purchase price. She testified that her understanding of the point of having the conditions on the purchase contract in the first place was that they were an indicator of whether or not the sale would go through for both parties so that all adequate information would be provided and accounted for.

[47] On cross-examination Ms. Hilman admitted she entered the contract and that Exhibit 6, the contract, contained her initials and signatures. She admitted the sale was a private sale and that the contract did not say anywhere on its face that Ms. MacKenzie was her realtor or represented her in any capacity. The buyer's information on the face of the contract was her own, not Ms. MacKenzie's. She admitted that clause 7.6 of the contract meant to set out that Ms. Hilman was aware that Ms. MacKenzie was a licensed realtor.

[48] She testified that a realtor had special knowledge in the area that she did not and that she had no special knowledge. She said that it was true that Ms. MacKenzie had special knowledge that she did not. When asked if she thought she was at a disadvantage she said she did not think so since Ms. MacKenzie told her she would walk her through it. She said she did not feel that she was at a disadvantage because she WAS walking her through everything. When asked if she felt she got the proper knowledge and guidance she said she did not anymore, although she did at the time because she didn't realize what she was not provided.

[49] She admitted that neither Mr. nor Ms. MacKenzie were present when the home inspection was completed. She said she never paid any commission to Ms. MacKenzie and never signed anything that said Ms. MacKenzie represented her.

[50] She admitted to signing the condition removal documents but denied requesting the extension in order to get the condominium documents. She said that it was to get the quote for the basement. Although the extension also included the review of the condominium documents, she stated that Ms. MacKenzie drew that up and included all of the conditions which were on the original documents. She agreed to ultimately removing the condominium documents as a condition on September 3. She said she was satisfied with what she had (the implication being that she obviously did not know there was anything else available), and faxed the documents she had received (with the exception of the first page of the 2008 audit) to her lawyer for him to review. She asked the lawyer if there was anything else she should be concerned about. After doing this she removed the conditions precedent to the sale or agreed they had been satisfied.

[51] She did agree that the 2008 AGM minutes identified that the issue of siding had been discussed and various options were presented including patching, replacing the siding in two

installments after a special assessment and possibly taking out a loan and replacing all the siding. The owners present at the meeting were in favour of replacing the siding as soon as possible but the property manager was to get more quotes for the work.

[52] Another heading typed on the minutes was “Increase in Condo Fees/Special Assessment” and Ms. Hilman acknowledged those words were typed there. There was nothing typed in the body of the minutes under this heading. She pointed out that she knew there was a $3000 special assessment and an increase in condo fees, both of which had been disclosed to her by the MacKenzies who indicated they had paid the special assessment already.

[53] She agreed that the reserve fund study report dated September 7, 2007 included a paragraph under the heading “Considerations” on page 2 which stated “Should the Condominium Board elect not to fund the Reserve contributions as recommended, the association in future years may have to pass potentially burdensome special assessments, borrow money, defer necessary repairs and replacements until funds are available, which may result in additional expenses or poor building structures or curb appeal.” She agreed the paragraph said “years” and not “year.” She agreed she had that document when she released the conditions.

[54] She said that she had the documents and so did her lawyer before she signed the document indicating the conditions were released or waived, and that she did so after both she and the lawyer reviewed the documents.

[55] When asked if she was interested in other units in the building she said that Ms. MacKenzie showed her two other units in the building. She denied that Ms MacKenzie ever told her there was going to be a special assessment levied at the time those units were shown to her. She was shown a listing for a condominium priced at $349,900 but denied ever being shown that property.

[56] She agreed that the other properties she saw in the building were priced higher than the MacKenzie’s unit. She said they set the price at $310,000 firm because of the real estate fees being saved and if she did not buy it they told her they were going to list it for $20,000 more the following week. She absolutely denied that the decrease in the price was to account for the special assessment which was to come along.

[57] She agreed the repairs were done to the condominium – siding, roof shingles and windows were replaced. When asked if the property was improved she said it looked better and she “guessed probably” but didn’t know for sure whether value had been added to the property as a result of the work.

[58] In cross-examination, the email correspondence between herself and the MacKenzies in Exhibit 8 (the home inspection, etc.) was characterized as negotiations between herself and Ms. MacKenzie. She did not agree with that characterization. She said she composed this correspondence as a result of her telephone conversation with Ms. MacKenzie who instructed her to provide her a list of what the home inspector identified.

[59] She said she had no cause to disbelieve Ms. MacKenzie's comments about the adequacy of the reserve fund comments as she trusted Ms. MacKenzie because she was a realtor. She said it was not a buyer condition that she review the contract with her lawyer because she knew it was Ms. MacKenzie's job, she'd said she would walk her through it and she trusted that she would do it properly.

[60] Cameron Spicer corroborated portions of Ms. Hilman's testimony. He stated that he spoke to her about the condominium and that he knew she was going to have to renovate it to be able to afford it and that she had to get financing for that purpose. He heard nothing about the special assessment in question until after the conditions were removed and Ms. Hilman went to her first condo board meeting. He described her crying a lot as she tried to figure out how she was going to come up with the money to pay for it. He agreed that he ultimately offered to do the renovations for her even though she couldn't pay him right away and did get that done in time. He said that given everything else he knew, and their relationship, he felt that she would have told him about the upcoming special assessment and he would have told her to "hang on" to see if it was even worth purchasing.

[61] Mr. Spicer said he was present at the meeting between Ms. MacKenzie and Ms. Hilman held about 4-6 weeks before the special assessment was due. He said that Ms. Hilman was trying to figure out how to come up with the money. He thought it wouldn't be a good idea for Ms. Hilman to meet Ms. MacKenzie on her own so he came and sat and listened to the conversation. He said they talked about the assessment and whether or not Janelle knew or didn't know about it.

[62] He recalled Ms. Hilman saying that Ms. MacKenzie told her she wouldn't be left high and dry. At one point Ms. MacKenzie did agree to pay the first installment and that she said she wasn't willing to lose her job over this. She also said that Ms. Hilman could have gotten out of the deal even after the condition date because of this. He said that stuck with him because that was not his understanding.

[63] He said he was present through the whole meeting and Ms. MacKenzie stomped out. She said there was going to be a cheque for whatever the amount was before the date the first installment was due.

[64] Riley Hilman was called as a witness and corroborated Ms. Hilman's testimony regarding attending at the condominium with Ms. MacKenzie to view it. He said that he had no recollection of hearing anything about the special assessment during the viewing but became aware of it later after Ms. Hilman purchased the home, which he recalled as being in the winter of 2009.

[65] Sherri Russell, the Property Manager of the condominium corporation, testified. A portion of her responsibilities was to prepare and distribute packages of documents at the time of the sale of units in the corporation. She said that she was on holiday for the last two weeks of

August until after Labour Day 2009. She said she had no recollection of the MacKenzies coming to her at that time or afterwards for such documents, nor did she recall referring them to the president of the Board. She testified about the documents that she usually would provide and the method in which they were to be requested. She said she usually received a copy of a condominium property document schedule from a realtor outlining what documents were requested, or an email or fax referencing that list. It was obvious she dealt with such requests routinely in the course of her employment.

[66] While she was on vacation the property office was closed and typically buyers would not be able to obtain condominium documents during that period of time, although the president of the board would have a key to the office in her official capacity. There were notices posted on the door and put on the voice mail of the office. Homeowners were not informed when the offices are closed mostly for security reasons and her cell phone was put to voice mail as an emergency contact.

[67] She described the procedure followed for monthly board meetings and the annual general meetings. She advised that in 2009 the Annual General Meeting (AGM) was held in July. It usually took one to seven days thereafter for her to have minutes of any meeting sent to her, at which point they would then be available if requested, although any AGM minutes would be provided “for information only” until they were ratified at the following years’ AGM.

[68] Ms. Russell discussed the agenda for the 2008 AGM and the content of the meeting. She had some comment on the wording of the minutes but indicated that no decision was made at the 2008 meeting with respect to the work that eventually became the subject of the special assessment in question. She said this was further discussed at the July 2009 AGM as recorded in the minutes for that meeting which form part of Exhibit 2. She testified those minutes would have been available for informational purposes (because they are not official until accepted the next year). They would have been available as soon as she received them in July 2009, and would have been provided upon request by a homeowner or realtor with the caveat that they were for informational purposes until ratified. They would have been sent to the homeowners prior to the October 2010 AGM where they were approved and accepted.

[69] She corroborated Ms. Hilman’s testimony regarding her request for complete documents and the evidence details such requests were made December 15, 2009, January 13 and February 9, 2010. She did send Ms. Hilman the documents she requested (Exhibit 2), containing the notice sent November 18, 2008. This notice was sent as a result of considering the content of the reserve fund study. It outlined an increase in condominium fees of 45%. She said the letter was given to all the owners and was 99% sure the all the owners received a copy of the Reserve Fund study.

[70] Ms. Tracy Myers testified and was qualified with defence consent as an Expert Witness, able to give opinion evidence in the area of Realtor Standards of Practice and Condominium Property Management.

[71] Ms. Myers outlined for the court when an agency relationship commenced between a real estate agent and a client, defining that time as when confidential information was disclosed or when there was a conversation about what the client required to meet their needs. She stated that an agent owed their client full fiduciary duties and had the duty to conduct themselves according to the standards of practice set out in the Real Estate Council of Alberta (RECA) Agency Relationships Guide. She said that overall the duty of the agent was to do what was in the best interests of the client and to ensure that a transaction would be conducted within the rules and regulations.

[72] She stated that her belief was that an agent was required to give a copy of the RECA guide to any potential client and obtain in writing a statement from that person that they understood the agency relationship. She indicated that the rules governing real estate agents in Alberta were that even if there was nothing signed, the agency relationship would be considered to exist on an implied basis automatically once the relationship commenced. Further, an agency relationship was not dependant on compensation being paid.

[73] She also stated that “the minute” an agent was representing more than one party they must obtain written consent to do so.

[74] To terminate an agency relationship Ms. Myers testified an agent needed to obtain in writing a Customer Status Acknowledgement Form (Exhibit 21), outlining in writing that the client understood that they no longer had representation and making clear that the agent no longer represented the person in question and owed them no duties.

[75] With respect to transactions where there might be a conflict of interest, Ms. Myers testified that the standard of practice for a prudent or reasonable realtor was to put the existence of a conflict in writing either by way of a Customer Status Acknowledgement Form, and a term of the purchase contract noting the conflict, or amendment to the purchase contract noting it. In her opinion it was insufficient to identify a conflict and the parties’ consent to proceed in spite of it simply by noting that the seller was a realtor. She said that would not be sufficient to provide proper notice to the buyer of the cessation of the agent’s fiduciary duties.

[76] As to the transaction in question Ms. Myers said she would simply not have participated in it. She said that she would have had the transaction go through her office so proper forms could be used and have referred the buyer to another agent or brokerage. She said that she would not have been able to participate as the agent and seller in these circumstances because she would not be representing the buyer/client to the best of her abilities. She eloquently said “I can’t represent her because I’m representing myself and looking after my own interests and not hers.” She testified that the least that should have happened (if an outside referral was impossible) was completion of the Customer Status Acknowledgement Form so “that at the very least that person understands they are not being represented.”

[77] Ms. Myers went so far as to state that she felt the use of the standard form RECA contract in this case, altered by Ms. MacKenzie, was entirely inappropriate. She was quite obviously

shocked to find that the AREA logo had been removed. She did state that in her opinion the form would not have been appropriate for use in these circumstances and that rather she would have had a lawyer draft the contract unless she had listed the property through the brokerage. While Ms. Myers was obviously quite scrupulous about the proper use of these forms, I do not find that anything illegal or necessarily in conflict with the rules governing agents occurred simply through the use of the contract form.

[78] Upon reviewing Exhibit 6 Ms. Myers offered the opinion that it was not a complete contract for a normal condominium purchase. She said that the standard form provided a buyer's condition allowing for an agent to attach property schedules for both an inspection and condominium property documents. The condominium property schedule listed all the required documents as per the *Condominium Property Act*. She testified that a reasonable buyer's agent would ensure the schedule was attached and would do what was necessary to obtain the documents in a timely fashion. She testified that a prudent seller's agent would have them available even before an offer was made on the property so they could be provided forthwith.

[79] As to a review of the documents, Ms. Myers stated that it was not strictly speaking the agent's duty to review the documents beyond ensuring they were all present. If there were questions from the buyer regarding the content, Ms. Myers was of the view that a referral to a condominium specialist for a cost of $350-$400 would be appropriate. The implication of her testimony is that the agent should do nothing at all that would result in a buyer getting incorrect information.

[80] Ms. Myers reviewed the documents that were actually provided to Ms. Hilman. She indicated that in her opinion there was nothing in the documents that would have revealed an upcoming special assessment. She said the steps outlined in the 2008 AGM minutes seemed to be a reasonable response addressing the concerns raised by the reserve study.

[81] She also reviewed all of the documentation ultimately provided. She said that the package as a whole clearly showed that there was a special assessment upcoming. She said the November 2008 notice to the owners would have triggered a concern in her mind. Further, the July 2009 AGM minutes showed the special assessment of $20,000-$25,000 per unit. She said since the meeting was in July the minutes ought to have been included were they available so that the buyer could make an informed decision about whether to proceed or not. She testified that if the buyer had these documents in hand she would have had the opportunity to decide whether or not the purchase would be a good investment, including whether or not the investment would add value to the property at a cost she could bear, or whether the value would be insufficient or the cost too high so that she could "pull out" of the deal.

[82] Jane Hebblethwaite, President of the Board for the condominium project also testified. She advised that she recalled the documents being requested by the sellers sometime in the last two weeks of August, and she gave them "what she had at home" which was the content of Exhibit 1. She said that she put together a package, and left it in her mailbox for Ms. MacKenzie to pick up. She said that when Ms. MacKenzie called asking for the documents she advised that

Ms. Russell was on vacation and normally did that but that she, Ms. Hebblethwaite, could give Ms. MacKenzie "what I had at home." The clear implication of her evidence on that point was that she conveyed to Ms. MacKenzie this might not be a complete package and indeed she agreed with me when I questioned her directly on that point.

[83] The MacKenzies both testified. I will review their evidence in detail hereafter but their version of events is straightforward and diametrically opposed to that of Ms. Hilman on the key points in question.

[84] Ms. MacKenzie had been a realtor for five years. She certainly had extensive knowledge and experience in the field of real estate and both parties agreed to this. She advised that a home she and Mr. MacKenzie really liked came up for sale. She said she really wanted it and they decided to take a chance and put theirs on the market. She testified that they thought of Ms. Hilman and wanted to help her and felt they could do that since they had purchased their home at such a good price and done so much work to it. She testified that they had paid a $3000 levy on the home and "heard very strong rumours" about more possibly coming, although she said it had not been decided if this would happen or when and whether the increase would be in fees or a levy or both.

[85] She said they discussed offering the home to Ms. Hilman to help her get her foot in the door and said that Ms. Hilman "did know about these possibilities" (meaning the increase in fees or levies).

[86] Ms. MacKenzie stated she approached Ms. Hilman and told her she would make her a one time offer to purchase the home at $310,000. She said "there was no pressure at all if she didn't want it." She said "I told her there was going to be new windows put in, well, talk of new windows, talk of new siding and in some cases talk of new roofs." She said that on August 19 when they wrote up the offer she went over all that again.

[87] She said it was "no big deal" when an extension was required. She said Ms. Hilman was told at least twice about the existence of the levy and that she should have known there was a reason for what she said was the $30,000 difference in price since "she's not a 21 year old and she should have some basic knowledge." She said that she also discussed with Ms. Hilman a realtor friend of hers who was in a similar position and was paying off his levies in installments.

[88] She stated that she had no idea of the amount the levy was going to be and that she was not able to tell Ms. Hilman because she had only heard "rumours and hearsay" about the $18,000-$25,000 range. She insisted that they priced the home at $310,000 because they wanted to help Ms. Hilman out and felt the price of $310,000 plus the levy would be fair.

[89] She testified there was no real estate agent involved in this transaction in her opinion because it was she and Mr. MacKenzie selling the property to Ms. Hilman as a "for sale by owner." She said that she did not represent Ms. Hilman on the home inspection, didn't do paperwork for her, get any quotes, deal with her lawyer or the deficiencies. She said in her view

the transaction was “just two different sets of people getting together, writing an offer together, and doing what needed to be done.”

[90] She testified that the lack of the need to pay any commission did not factor into the pricing of the home. She said that she provided a feature sheet to Ms. Hilman for insurance purposes.

[91] Ms. MacKenzie testified to drawing up the contract and said that she advised Ms. Hilman to contact her own lawyer through the existence of clause 10.1 in the contract and that Ms. Hilman felt she didn’t need to and “from there it was up to her. She is an adult. She had the information and what she chooses to do with it is up to her.” Further, she stated that the contract contained a clause which identified her as a realtor, or at least was meant to do so. She said that since the contract did not say on the representation page that she was representing Ms. Hilman, that meant she was not, otherwise she would have put it in there.

[92] She said she used the standard form contract and whited out or crossed out inapplicable sections because she wanted the property to be specifically “For Sale by Owner” and to have something the three of them could follow. She said she knew this form and was familiar with it and that’s why she used it. She said the contract form protected all three of them.

[93] She insisted that she conveyed the information regarding the large levy to Ms. Hilman on several occasions when she was showing other homes in the complex and especially when this sale was taking place. She said “I told her why we were doing it, that this is what they were wanting to do, that this is the rumour we heard about potential levies and why they were coming about.” She said she then mentioned Derek, her realtor friend. She said they also discussed it when they removed the conditions. She maintained the issue was discussed several times and specifically denied ever telling Ms. Hilman that the special assessment would never happen because nobody could afford it.

[94] When asked about providing the condominium documents she said that she could only really testify to that in the “afterthought,” by which she obviously meant hindsight. She said when she picked up the documents they were in a sealed enveloped and she felt that Ms. Hilman should receive them as she did since, she said, “there was no representation.” She said she didn’t know what was in them, that she assumed they were up-to-date because she had received packages from the board before.

[95] She testified that she attended the meeting with Ms. Hilman and that she did tell her they would not leave her high and dry, but said she meant they had already not done that. She essentially agreed with the evidence about the February 2010 meeting with Ms. Hilman and Mr. Spicer and that in the end it was decided they would not follow through on her offer to pay half of the special assessment. The content of her answers in cross-examination will be discussed in detail hereafter.

[96] Mr. MacKenzie testified but not at great length. He said that in his opinion his wife was not acting as Ms. Hilman's realtor, although he did not recall her telling Ms. Hilman that she was not acting in that capacity. He said that he told Ms. Hilman "for sure" on August 19 about the special assessment and that he knew about it and its likely amount because Sherri Russell gave him this information just before they decided to put the home up for sale. He said the price of the home was set to account for the levy. He discussed being present during a viewing of the home. He participated in a minimal way in the preparation of the contract, testifying "To this day I don't even know what's in the contract as far as the provisions that you are talking about other than the sale of the house." He claimed to recall that Ms. MacKenzie told Ms. Hilman to get a lawyer. He also discussed a supposed meeting that took place "when conditions were removed." As to the condominium documents, he stated that he knew nothing about what condominium documents were provided, having left that matter to his wife to deal with. In spite of his insistence that he recalled vividly specific conversations about the special assessment and Ms. Hilman being advised to contact a lawyer, it is clear he had little other recollection of any detail.

FINDINGS OF FACT AND DECISION ON LIABILITY

What was Ms. Hilman told about the Special Assessment?

[97] It seems to be common ground that if Ms. Hilman was advised of the special assessment directly, she would have no cause of action against the MacKenzies – either because I would have to find she entered into the contract with her eyes wide open (i.e., that there was no misrepresentation, or breach of contract resulting in damages), or because she would never have entered into it in the first place.

[98] It is easy for me to conclude that Ms. Hilman was NOT advised directly of the special assessment, contrary to the position taken by the MacKenzies. On this point I absolutely accept the evidence of Ms. Hilman and reject that of the MacKenzies and I will outline in detail why that is.

[99] Ms. Hilman was so financially strapped that she was not in a position to afford the payments on her home at the $310,000 price without renovating the home so she could take in a renter. She required 100% financing for both the home purchase and the renovations. Having carefully listened to her it would be illogical to conclude that she would have knowingly taken on the obligation to pay a further $18,000-$23,000 that she had no ability to satisfy.

[100] Her conduct at the time she became aware of the special assessment is entirely consistent with her not having that knowledge in advance. She said she became aware of it at the time of the September 2009 general meeting and her first comment to Ms. MacKenzie was "I wish I would have known about this." I believe her when she says that had she known she would have tried to make other arrangements either through increasing her mortgage if possible or by renegotiating the price.

[101] Further, the witness Cameron Spicer described her as distraught when she became aware of the assessment as she did not know how she was going to pay for it. This is entirely consistent with her position that she did not know it was coming and inconsistent with the position that she did know in advance.

[102] After receiving the information she then began a search with the condominium corporation through Ms. Russell to obtain the documentation that might have indicated the assessment was coming. She sent numerous emails. She did not meet with Ms. MacKenzie until she had obtained that information and spoken to her lawyer about it. This is not consistent with her knowing this information in advance but is consistent with her trying to figure out what had been available as information before she made the purchase.

[103] The MacKenzies maintain that they told Ms. Hilman about the special assessment. Indeed, this is the real foundation of their defence to this claim. With respect, I did not find them to be reliable or credible witnesses on this central point. The difficulties with their evidence were numerous and included the following:

1. They were prepared to be cavalier with the truth when they drafted their letter to Ms. Hilman refusing the follow through on Ms. MacKenzie's offer to pay for half of the special assessment. Two items were of particular concern to me:

    a) The assertion that Ms. Hilman received all of the documents attached to the letter when she clearly had not. The explanation "well, we thought this was what she got" rang hollow at best.

    b) The letter contained an assertion that there had been a meeting between the parties on September 3, 2009 when it is clear from the content of the emails sent on or around that date that no meeting did take place, but rather that the task of signing off on the conditions was done by email.

2. Both maintained throughout their testimony that the property's price had been reduced by $20,000, but when cross-examination became particularly probing, Ms. MacKenzie began referring to a $30,000 price reduction, which was also the figure used in their March 2010 letter. This was obviously a tactic designed to bolster the suggestion that they were doing Ms. Hilman a real favour and to enhance the facade of altruism that they put up. I found this to be a troubling piece of evidence and indicative of Ms. MacKenzie's willingness to say anything without regard to the truth to support her position.

3. As will be discussed further herein, Ms. MacKenzie did her best to

minimize the extent of any agency relationship between herself and Ms. Hilman and this was in the face of clear evidence to the contrary. Her evidence in this regard can be described as nothing but self-serving.

4. Ms. MacKenzie stated there was “no pressure at all” on Ms. Hilman to take the property if she didn’t want it, but that statement is contradicted by her position that Ms. Hilman had to make the decision to take the property right then at the suggested price or she would list it the following week for $20,000 more. The clear implication was that the offer was withdrawn if that were the case. Ms. MacKenzie repeatedly insisted that she and her husband were trying to “help Janelle out” by giving her the property at a lower price. If that were truly her motivation she would surely have kept the offer open for Ms. Hilman whether she listed the property or not. She would have lost nothing by doing so. Again, I view her evidence on this point as self-serving and an attempt to cover the MacKenzies’ real motivation, which was to move the property as quickly as possible so they could complete the purchase on their dream home.

5. Regarding the amount of the special assessment, Ms. MacKenzie stated “I had no idea about the amount” and I was “not able to tell her.” She said she “only heard rumours and hearsay about $18,000-$23,000 ” and that there was nothing in stone. However, she did admit that she heard further from Sherri Russell after the July AGM and that at that point she knew the amount was going to be in the $18,000-$25,000 range. This evidence is problematic from two perspectives. First, Ms. MacKenzie clearly knew the range the special assessment would fall in. Second, both she and Mr. MacKenzie maintained they told Ms. Hilman about it and included the amount in their pricing of the property and in their discussions with her. In fairness, I am of the view that Ms. MacKenzie was not trying to deliberately mislead the court but her evidence on this point showed her willingness to be careless with detail when giving her evidence, and that clearly is indicative of her lack of reliability as a witness.

6. Ms. MacKenzie stated repeatedly that the applicability of real estate commission or not had nothing to do with the pricing of the property. If it were certain that she would bring the buyer to the property then I would accept her evidence on this point. However, it is clear, as she was finally forced to admit in cross-examination, that should another agent be involved in the purchase that person would be entitled to their share of the commission and that would amount to some $7000.00. I simply do not accept that the MacKenzies did not figure this into the pricing of their property. Although commission is paid by the seller if applicable, it makes no sense that a seller does not consider the final amount of cash in hand when deciding how to price a property and whether or not to accept the

offer. I find Ms. MacKenzie's evidence to the contrary to be illogical and unreliable.

7. Ms. MacKenzie implied there was a meeting to conclude the purchase by removing the conditions when it is clear from the email correspondence exhibited that no such meeting took place. She referred to the meeting at least twice in her evidence. In her direct evidence Ms. MacKenzie said that it was at this meeting that they had mentioned a realtor friend who was in the same position with a large special assessment and paid it off in installments. She said that it was at this time that Ms. Hilman stated that she "didn't know how she was going to do it" but that obviously she was aware of the assessment before the conditions were deemed satisfied. Given that Ms. Hilman was so careful to make sure she had approval to pay for the renovations it is not possible to conclude she would have taken on such another large obligation without a plan. Further, as I have found, the meeting referred to did not take place. At best Ms. MacKenzie has not sufficient recollection of the details of the transaction, so that I could rely on her evidence on this point.

8. Ms. MacKenzie's lack of recollection of the details of her dealings with Ms. Hilman was obvious at other points in her evidence including:
   - i) whether or not there were ever viewings of the first set of listings;
   - ii) the reason the first set of listings were unacceptable (when pushed in cross-examination she finally stated, "I think something happened and I think it was too high for her and she was uncomfortable.");
   - iii) whether or not Ms. Hilman was comfortable with the prices of the other Beacon Hill condos;
   - iv) the date of another viewing of a Beacon Hill condo;
   - v) the date of the offer to Ms. Hilman to purchase the property in question and whether that offer was made in person or by phone;
   - vi) the number of times Ms. Hilman viewed the property in question ("I don't know, I know it's at least twice but I'm not sure if it was three times");
   - vii) whether or not Ms. Hilman saw the property twice before entering into the contract;
   - viii) why Ms. Hilman required the amount of the renovations included in the financing ("Honestly, I don't remember." When pushed on this point in cross-examination as to whether or not it was because she could not afford to do it any other way, she did respond "Yeah, probably, yeah.");
   - ix) how she came to make the request to Ms. Hebblethwaite

for the document package ("I guess I spoke to Sherri and that's how I would have gotten Jane's number.");

x) whether or not she scanned and emailed the condition removal documents to Ms. Hilman;

xi) whether the issue of deficiencies revealed by the home inspection was dealt with by email;

xii) what, if any, deficiencies were addressed;

xiii) how the signing of the condition removal documents occurred;

xiv) why she and Mr. Mackenzie did not attend the July 2009 AGM;

xv) whether or not Ms. Hebblethwaite told her there was a possibility the documents provided to her were not complete;

xvi) when she next had contact with Ms. Hilman after the contract was concluded and for what purpose; and

xvii) the content of her conversation with Ms. Hilman after the September 2009 condominium owners' meeting ("I don't want to mislead, I know there was stuff spoken about but I don't know what Janelle and I talked about.").

9. I found Ms. MacKenzie to be argumentative and unresponsive to difficult questions put to her in cross-examination regarding the responsibilities she would have had to Ms. Hilman respecting the condominium documents if she were Ms. Hilman's agent. I accept that those questions were essentially rhetorical in nature but the fact that she was not prepared to answer them in a straightforward way makes her less reliable as a witness. Further she was dismissive and argumentative respecting the expert's opinion as to the conclusions that could be drawn from the condominium documents that were provided, even though she tried to maintain that she would not have provided Ms. Hilman with any substantive information regarding their content because she herself had no expertise in that area.

10. The email correspondence sent to Ms. Hilman as a response to the request to address deficiencies included, as part of the reason for declining to fix them, the rationale that the price had already been reduced by $20,000. This email made no reference to the fact that the price was reduced to account for the upcoming special assessment. Indeed, if there already were that reason for the price reduction it seems unreasonable to think that the MacKenzies would try and use the supposed reduction a second time as a reason not to pay for the deficiencies.

11. Ms. MacKenzie's reaction to Ms. Hilman's discovery of the upcoming special assessment was entirely inconsistent with having supposedly told

> her of it only weeks beforehand. When the meeting was announced Ms. Mackenzie told Ms. Hilman "Randy and I will not leave you high and dry," and when Ms. Hilman said "I wish I'd known about this earlier," Ms. MacKenzie made no reply.

[104] When questioned, Ms. MacKenzie admitted saying that she and Mr. MacKenzie would not leave Ms. Hilman high and dry but insisted that she *meant* they already had *not* left her high and dry. Frankly, this defies belief. Ms. MacKenzie is an intelligent, articulate person. To ask me to conclude that she said something she meant the opposite of, particularly on such an important point as this, is simply unsupportable. I find, rather, that Ms. MacKenzie knew that something was in the works with the special assessment and that she really did mean to convey that she and Mr. MacKenzie would assist Ms. Hilman. One hopes she meant that when she said it. What happened later between her and Mr. MacKenzie might have changed that position, one supposes. However, if Ms. MacKenzie really did believe they had NOT left Ms. Hilman high and dry, I find she would have said so right at that time.

[105] Again, Ms. MacKenzie's silence in the face of what essentially was an accusation that Ms. Hilman did not know of the special assessment is inconsistent with the position that she was told. I find that if Ms. MacKenzie had told Ms. Hilman, her response would not have been silence but rather something along the lines of an insistence that Ms. Hilman did know and that this is why the price had been reduced.

[106] Mr. MacKenzie's evidence was similarly unhelpful on the central issue. The following portions of his evidence make it impossible for me to accept his assertion on the main point that Ms. Hilman was advised of the special assessment:

1. He asserted that a meeting took place to remove the preconditions to the sale when I have found that clearly the evidence indicates no such meeting took place;

2. He asserted that he met Ms. Hilman at the first viewing of the home when it is clear from the evidence of the other witnesses present that he was not present then;

3. His evidence was inconsistent between direct and cross-examination on the point of how many occasions Ms. Hilman was supposedly advised of the special assessment. In direct examination he referred to the discussion taking place only on August 19, and in cross-examination he added vague details of a brief earlier meeting asserting the assessment had also been discussed then;

4. He was unable to specifically recall exactly what he told Ms. Hilman saying in cross-examination, "At that point all I remember is what Sherri told me, that it was going to be between 18 and 23. We told her that the

$3000 one would be paid and the other one was just talk, just hearsay";

5. He did not recall Ms. MacKenzie explaining anything about why various amendments were made to the standard form of the contract, although that discussion clearly took place;

6. He did not recall any response from Ms. Hilman when Ms. MacKenzie supposedly told Ms. Hilman she should get her own lawyer, although he maintained he recalled that specific point being made;

7. He did not recall the conditions being added to the contract on August 19;

8. He was unable to say when another meeting supposedly to discuss the deficiencies occurred, but maintained such a meeting occurred when clearly it did not;

9. He maintained he had a conversation with Sherri Russell asking if there would be any condominium documents available outlining the large special assessment and that she told him that nothing was available then. It is clear that this conversation likely did not occur at all. There would have been no reason to have the conversation before the condominium documents were found to be necessary which was on August 19, at which point Ms. Russell was on vacation, and indeed the minutes of the July 2009 AGM were available so there would be no reason for her to tell him otherwise. He was unable to say when that conversation occurred;

10. He maintained he did not keep any minutes or notices as a homeowner himself, which seems quite amazing, but also indicates a lack of any proper written foundation to provide information to Ms. Hilman.

[107] Ms. Hilman, on the other hand, gave her evidence in a straightforward and credible manner. She acknowledged facts in cross-examination which might have been argued not to be entirely in her favour. She had detailed recollection of the surrounding circumstances of the transaction, what led up to it, and the aftermath. Her evidence was logical and was corroborated by the written exhibits on numerous points. She was not shaken on cross-examination on material points. I accept her evidence and reject that of the MacKenzies.

[108] Therefore, I find as a fact that Ms. Hilman was not advised of the upcoming large special assessment which is the subject of this litigation. Rather, I find that the MacKenzies did not tell her of the special assessment. I accept that Ms. Hilman asked Ms. MacKenzie if there would be any large special assessments and that Ms. MacKenzie's response was that it was never going to happen because nobody there could afford it. I further accept that when Ms. Hilman said that was good because she couldn't either, Ms. MacKenzie did not provide her with any further information on the point.

Was there a Breach of Contract (Alleged Failure to Provide Condominium Documentation)?

[109] The Contract contained a term: 8.1(c) which read, “This Contract is Subject to the Buyer’s Condition regarding Condominium Documents as per attached Condominium Document Schedule.”

[110] Of course no Condominium Document Schedule was ever included in the contract but it is clear the parties must have intended that the Contract was subject to the Sellers providing all relevant condominium documents and to the Buyer having the opportunity to review them and be satisfied with them. Indeed, this essentially is what the Standard AREA Condominium Property Schedule actually says (see Exhibits 23 and 24).

[111] I therefore find two implied terms of the contract were:

1. The Sellers were to provide to Ms. Hillman a copy of all relevant condominium documents; and

2. the Contract was subject to her satisfaction with all the relevant documents.

[112] The question then becomes what were the relevant documents. It strikes me that a fair definition of the term “relevant documents” would include all documents necessary for the buyer to make an informed decision about the physical and financial condition of the property. Given what was available this broad definition might include both the unratified minutes of the 2009 AGM and the letter sent to the owners in November, 2008. Both of these items were considered by the expert to be sufficient to raise a red flag as to the financial obligations which were on the horizon for the owner of the property. If this definition is too broad, an examination of the standard Real Estate Contract Condominium Property Schedule reveals a list of documents and those include: “a copy of any minutes of proceedings of a general meeting of the corporation or of the board for the past 12 months.”

[113] It is to be noted that the copy of minutes is not a copy of “ratified minutes” but rather a copy of “any” minutes. This would obviously include the minutes from the July 2009 AGM which were clearly available, for informational purposes, at the time of the purchase. Not only were the minutes available but the defendants knew there had been a meeting in July and that important decisions were made at that meeting affecting the financial status of the properties. The most minimal of inquiries would have revealed the fact that the minutes of the meeting were available. Indeed, I find it interesting that the MacKenzies used the 2009 AGM minutes, still unratified, in their March 2010 letter to bolster their position that Ms. Hilman knew of the assessment but then tried to argue that they should not have provided those minutes to her as one of the terms of the contract. The defendants would have had to wait until Ms. Russell was available to obtain a proper condominium document package, but they were not willing to wait

and possibly jeopardize the purchase. They obtained what turned out to be an incomplete package from Ms. Hebblethwaite, checked it not at all, and gave it to Ms. Hilman. By their own admission they did absolutely nothing to ascertain they had complied with their obligation to provide the proper documentation under the contract. They each testified that they had no idea at all what documents were provided to Ms. Hilman (in spite of their assertions in their letter of March, 2009, as discussed previously).

[114] Counsel for the defendants correctly pointed out that Ms. Hilman signed a document indicating that she accepted the conditions of the contract had been satisfied with or were waived. In regards to this point it is clear that Ms. Hilman was indicating that she accepted the condition had been satisfied. I find the plaintiff was entitled to rely on the defendants performing their obligations under the contract. Relying upon that, she accepted that the document package was complete. She was not aware that anything was missing so as to be able to waive compliance with the condition. However, as I have found, the buyer's obligations in regards to this condition were, in fact, not satisfied. The so-called "waiver" relied upon by the buyer is of no relevance to the determination of their liability.

[115] Even if all the relevant documents were not provided, the defendants might be able to argue that they were not liable if the documents that were provided were sufficient to provide Ms. Hilman with the information she needed to make an informed decision on the property. In spite of argument to the contrary by defendants' counsel, I accept the evidence of the expert witness that the documents that were provided to Ms. Hilman were insufficient in this regard. The witness went through the documents in detail and explained that although some problems were noted in the reserve fund study, the subsequent actions taken by the board and set out in the minutes would have been interpreted as addressing those concerns, leaving nothing unattended. With hindsight and the benefit of further information a different interpretation might be put on those documents provided, but neither of those things were available to Ms. Hilman.

[116] Therefore, the defendants failed to comply with their obligations under the contract, and that failure resulted in Ms. Hilman completing the contract and incurring what loss she did. I further find the contract was so poorly and loosely drafted that I cannot conclude the parties intended the terms regarding condominium documents to merge with the conveyance and therefore find the breach of the term survives the conveyance in this case. The MacKenzies are therefore liable for Ms. Hilman's loss, the quantum of which will be discussed below.

Was There Fraudulent or Negligent Misrepresentation?

[117] Even if I am wrong on the issue of whether or not the MacKenzies are liable for breach of contract, I find that they would have been liable in any event in negligent or fraudulent misrepresentation.

A. Negligent Misrepresentation

[118] The law governing negligent misrepresentation is set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, where Iacobucci J., writing for a majority on the issue, referred to *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, and said, at paras. 30 and 33:

> [30] ... Though a relatively recent feature of the common law, the tort of negligent misrepresentation relied on by the appellant and first recognized by the House of Lords in *Hedley Byrne*, *supra*, is now an established principle of Canadian tort law. This Court has confirmed on many occasions, sometimes tacitly, that an action in tort may lie, in appropriate circumstances, for damages caused by a misrepresentation made in a negligent manner: ...
>
> . . . . .
>
> [33] The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

[119] The middle three points are easy to deal with in this case. I will deal with the issue of damages separately hereafter.

Nature of the Representation

[120] In this case it is clear that the representation regarding the lack of any special assessment forthcoming was untrue, inaccurate or misleading. As was discussed previously Ms. Hilman was not provided with appropriate documents to ensure she could make a proper determination about the existence of the special assessment.

Nature of the Actions of the Representor

[121] Ms. Mackenzie agreed that a person acting as a reasonable real estate agent in these circumstances ought to have obtained those documents for her and indeed as an agent she would have been required to disclose this information in any event. Therefore, if Ms. MacKenzie were

Ms. Hilman's agent, failing to provide the documents or clearly outline the special assessment was negligent performance of her duties.

[122] It was not seriously argued that Ms. MacKenzie acted in this case in accordance with the duty of care of a reasonable real estate agent. Her position was really based on the argument that she wasn't an agent at all.

[123] There is no doubt that a reasonable agent would have ensured that Ms. Hilman obtained a complete version of the condominium documents in question here. There is also no doubt that Ms. MacKenzie made absolutely no effort to determine whether or not the condominium documents were complete when she provided them to Ms. Hilman. I do not say that I am convinced that she deliberately provided incomplete documents to Ms. Hilman in breach of her duties, but rather that having made up her mind that she owed no duty to Ms. Hilman she was then reckless or careless in the extreme as to whether or not the documents were complete.

[124] Had she complied with her duty in this regard even if she were herself unaware of the upcoming special assessment, Ms. Hilman would have been able to easily determine that for herself.

[125] Further, there is no doubt at all that a reasonable agent would have had the duty to advise Ms. Hilman of the upcoming special assessment. In spite of the slight prevarication on the issue, Ms. MacKenzie was well aware that the special assessment was coming and approximately how much it would be. For the reasons I have already stated, I find that Ms. MacKenzie did not advise Ms. Hilman about the special assessment and indeed told her that it was "never going to happen." She therefore was in breach of her duty to Ms. Hilman in this regard.

Reliance on the Representation by Ms. Hilman

[126] I have already found as a fact that Ms. Hilman entered into the contract believing that she had all relevant information to assess her financial obligations, and that she would not have entered into it on these same terms had she known about the special assessment. Therefore, the representation was relied on in a reasonable manner by Ms. Hilman. The representations went beyond influencing Ms. Hilman to enter into the purchase contract to the point of her absolutely relying on them.

[127] In determining whether or not the MacKenzies are liable for misrepresentation, the only remaining question to be answered (aside from the issue of damages) is whether or not there was a special relationship between Ms. Hilman and Ms. MacKenzie which would give rise to an action in tort for negligent misrepresentation. It is common ground and well established in law that a real estate agency relationship is such a relationship. Therefore, the question to be answered may be framed as, "Was there an agency relationship between Ms. Hilman and Ms. MacKenzie?"

[128] Ms. MacKenzie clearly tried to minimize the agency nature of her relationship with Ms. Hilman in her testimony, as previously discussed. When asked directly if she was her agent her response was “I worked with her, yes.” When asked what Ms. Hilman told her what she could afford for a property she said, “I really can’t remember. I think it was under 400 or 410 or under 400 or 350 I really can’t remember”, when it was clear that Ms. Hilman did advise her of what her price range was. When asked whether she told Ms. Hilman she had ceased being her agent or discussed what it meant to not have the brokerage involved in the transaction she said, “We don’t talk to each other in that capacity. We’re associates, friends, we joked and stuff.” When asked why she chose not to use the Customer Status Acknowledgement Form to formalize what she said was the end of the agency relationship she said, “Probably because of that status of our relationship.”

[129] However, it is clear that Ms. Hilman engaged Ms. MacKenzie as her agent. She disclosed confidential information to her about her financial position. She provided Ms. MacKenzie with details of the requirements she had for a home. Ms. MacKenzie went so far as to explore various financing options for her while searching for a home and knew during this transaction what her financial position was. The evidence of Ms. Myers makes it clear that Ms. MacKenzie *was* Ms. Hilman’s agent, at least up until the point of this transaction. Indeed, when really pressed during cross-examination, Ms. MacKenzie could not herself deny this.

Did the Agency Relationship Continue?

[130] Ms. MacKenzie takes the position that because the transaction in question was “For Sale By Owner” that the agency relationship between the two women ceased. This simply does not accord with the evidence provided by the expert witness. In fairness, I am not sure how strongly Ms. MacKenzie herself disagreed with the proposition that once she was a realtor she was always a realtor and must conduct herself in accordance with the RECA rules and the Realtor Code.

[131] Ms. MacKenzie did none of the following things that might have defined the termination of the agency relationship:

1. She did not specifically communicate that she had ceased being Ms. Hilman’s real estate agent. Instead she said she told her that she and Mr. MacKenzie were “doing ‘a for sale by owner.” When asked if that was the extent of what she told Ms. Hilman, she stated, “Honestly, beyond that I can’t say.”

2. She did not have Ms. Hilman acknowledge anything to her saying that she understood Ms. MacKenzie was not acting in her best interests.

3. She put nothing in writing.

4. She did not use the Customer Status Acknowledgement Form.

5. She gave no explanation while going through the terms if the contract or in the terms of the contract itself that the portion purporting to identify her as a realtor had any implication for the relationship between the two of them.

6. She did not have an independent third party draft the contract and permitted Ms. Hilman to sign it with herself as a witness without speaking to her lawyer.

[132] On the other hand, Ms. MacKenzie did the following things that would lead any reasonable person to conclude that Ms. MacKenzie WAS still acting as Ms. Hilman's agent:

1. She indicated to Ms. Hilman that she would get the paperwork together for the transaction.

2. She drafted the entire contract using what was obviously a standard form real estate contract (in spite of the fact she removed the logo of the Alberta Real Estate Association) and filled in all the information including the financing term, prior to Ms. Hilman attending at her residence to sign it.

3. She deleted what was inapplicable and re-wrote mistakes, explaining to Ms. Hilman why that had been done.

4. She took Ms. Hilman through the contract and thereafter the process of finalizing the sale "step by step" as Ms. Hilman said she would. Indeed, Ms. MacKenzie used this same phrase, "step by step", at least four times in her evidence to describe the service she gave to her clients. I have no doubt that she told Ms. Hilman that she would do this for her and she in fact did so.

5. She drafted the conditions respecting financing and condominium documents.

6. She witnessed Ms. Hilman's signature on the contract.

7. She told Ms. Hilman that they had done a deal for her when the contract was signed.

8. She provided Ms. Hilman with the names of three home inspectors to choose from for the inspection of the property.

9. She obtained the package of condominium documents and provided them to Ms. Hilman.

10. She told Ms. Hilman what the package should contain. “I told her some of the stuff that should be in there, yes, including the reserve fund study and the minutes, yes, the newest minutes.”

11. She gave Ms. Hilman an amended feature sheet for the property since Ms. Hilman would need that for insurance purposes.

12. She discussed the content of the condominium documents with Ms. Hilman when Ms. Hilman had questions about the amount of the reserve fund, and did not refer her to a condominium expert or other third party.

13. She prepared the documents for the extension of the date to fulfill the conditions of the contract.

14. She assisted Ms. Hilman in addressing the deficiencies revealed by the home inspection.

15. She prepared the documents to indicate the conditions for the contract were satisfied or waived and sent them to Ms. Hilman for her signature.

[133] Considering all the circumstances I find there is absolutely no basis upon which I could conclude Ms. Hilman knew the agency relationship between her and Ms. MacKenzie had come to an end. I am prepared to accept that Ms. MacKenzie held that view, and conducted herself accordingly, representing the interests of herself and Mr. MacKenzie over those of Ms. Hilman. However, just because the relationship came to an end in Ms. MacKenzie’s mind, did not mean that it came to an end in fact. As both she and Ms. Myers said, essentially “once a realtor, always a realtor.” There were steps she could have taken to terminate the relationship and she did not take them. On the contrary, she continued to conduct herself outwardly, at least, almost entirely as an agent would, and to a person untrained in the nuances of real estate, any differences between her behaviour and that of an agent supposed to be acting in a client’s best interest would be indistinguishable.

[134] It is to be noted that in her own evidence Ms. MacKenzie finally admitted, “Janelle and the Hilmans acceptably see me as a realtor, no questions about that but I did let her know this was a ‘For Sale By Owner’ and no matter what it’s still a ‘For Sale By Owner’.” I have already stated that this was insufficient to identify to Ms. Hilman that the special relationship had been terminated.

[135] In this case there was an agency relationship between Ms. Hilman and Ms. MacKenzie which survived the offer for sale of the MacKenzie's home. Accordingly, as the cases make clear, Ms. MacKenzie owed Ms. Hilman a duty of care.

[136] Ms. MacKenzie is therefore liable herself for Ms. Hilman's loss by way of negligent misrepresentation given that the three other points have already been established (false statement, lack of prudence or adherence to standard of care and reliance).

[137] Mr. MacKenzie is also liable as he clearly had Ms. MacKenzie acting as his agent in this regard. It is obvious that she had the expertise and was responsible for drafting the contract on both of their behalf. Ms. MacKenzie made the offer to Ms. Hilman for both of them and arranged the viewing of the home. Mr. MacKenzie had very minimal involvement in contributing anything of substance to the contract, and merely signed where she told him to do so. He had almost no conversation with Ms. Hilman during that process. Indeed, he was not even present for most of the contract drafting. I cannot conclude otherwise but that Ms. MacKenzie was representing Mr. MacKenzie as well as herself in the transaction. While I do not find that Mr. MacKenzie himself had a special relationship with Ms. Hilman, his wife and agent clearly did. While I do not find that Mr. MacKenzie made the comment to Ms. Hilman about the special assessment "never going to happen" his wife and agent clearly did.

[138] It is well known that a principal is liable for the actions of an agent, including misrepresentations, and including negligent misrepresentations where the preconditions for the tort of negligent misrepresentation exist. See, for example: *Ismail v. Treats Inc.*, 2004 NSSC 16, [2004] N.S.J. No. 21.

[139] Therefore, in relying on Ms. MacKenzie as his agent, Mr. MacKenzie is also liable for her negligent misrepresentation to Ms. Hilman.

B. Fraudulent Misrepresentation

[140] Counsel for Ms. Hilman urges me to find the MacKenzies are also liable for fraudulent misrepresentation, relying on the case of *Nash v. McMillan* (1997), 222 A.R. 4 (Alta. Q.B.), among others. In discussing the definition of a fraudulent misrepresentation, Anderson, J., says at para. 33 and following:

> 33 In coming to my conclusion that there was fraudulent misrepresentation I have relied on the classic test for deceit which Lord Herschell sets out in the leading case of *Derry v. Peek* (1889), 14 App. Cas. 337 [U.K.H.L.] (at p. 374):
>
> > First in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is

> shewn that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true of false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement in such circumstances can have no real belief in the truth of what he states.

34 This test was approved and applied in this jurisdiction by Feehan, J. in 1984 in *Wishloff v. Boyko (supra),* at p. 265, where he describes the test as never having been doubted and as having been reiterated in one form or another in numerous authorities and tests, which he lists. The first case listed is that of *Charpentier v. Slauenwhite* (1971), 3 N.S.R. (2d) 42 (N.S.T.D.) where, at p. 45, Jones, J., adopts a distillation of the test from Cheshire and Fifoot's *Law of Contract* (6th Ed. at p. 241) as follows:

> Lord Hershell, indeed, gave a more elaborate definition of fraud in *Derry v. Peek*, saying that it means a false statement 'made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false', but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe it to be true.

35 In my view on a balance of probabilities, the defendant's representations as to the condition of the roof were false and the defendant did not honestly believe them to be true. Although I believe that the evidence supports active concealment by the defendant, meaning that her misrepresentations were indeed knowing and deliberate, even if such active concealment were not proved, the evidence is, in my opinion, still sufficient to prove that the defendant must have had strong suspicions that problems existed with the roof and, accordingly, her conduct with the plaintiffs was calculated to mislead them or to lull their suspicions. This, according to *Derry v. Peek (supra)* and its progeny, is enough for me to find fraudulent misrepresentation.

[141] Given my conclusions on the evidence outlined previously, I find the following:

1. Mr. and Ms. MacKenzie were aware of the upcoming special assessment and indeed of the range in which it would fall.

2. They did not tell Ms. Hilman about the special assessment.

3. When Ms. Hilman asked Ms. MacKenzie about the possibility of a special assessment Ms. MacKenzie told her it was “never going to happen” because none of the owners could afford it.

4. Ms. MacKenzie obtained an incomplete condominium document package and provided that to Ms. Hilman, representing that it was everything she would need.

5. Ms. MacKenzie did not even look at the condominium documents to see if they were complete.

6. Ms. MacKenzie attempted to set Ms. Hilman’s mind at ease regarding the content of the condominium documents when Ms. Hilman had a question about them, giving Ms. Hilman further reason to rely upon them as a complete representation of the financial matters relating to the property.

[142] Counsel for Ms. MacKenzie points out that Ms. MacKenzie is a respected realtor who would not knowingly jeopardize her reputation in the community. I see his point, but a deliberate misrepresentation is not a necessary precondition to a finding of fraudulent misrepresentation. The fact is that fraudulent misrepresentation may be based on a reckless misrepresentation. I find the best that could be said of Ms. MacKenzie’s state of mind is that she assumed the condominium package was complete and that she hoped the special assessment would not come to pass. If indeed this was true, it was a foolish and reckless state of mind to be in. Ms. MacKenzie blatantly misrepresented the completeness of the condominium document package to Ms. Hilman without any basis other than an assumption to found her comments. The MacKenzies had a notice from November 2008 which indicated the assessment was coming, and were provided with the same information by Ms. Russell along with what range it would fall in.

[143] While in her own mind Ms. MacKenzie might have felt that what she was doing was a favour to Ms. Hilman and that if her hopes regarding the special assessment were wrong, she’d been fair enough with the pricing to cover that event, this is not information she provided to Ms. Hilman. In the circumstances it was careless and reckless to provide Ms. Hilman with the information she did. It was, in my opinion, careless and reckless enough upon which I should base a finding of fraudulent misrepresentation as defined by the case law.

[144] As stated previously, since Ms. MacKenzie was obviously the agent for Mr. MacKenzie, he is also liable for any damages proven as a result of her commission of this tort.

DAMAGES

[145] Finally, there is the matter of damages and the question of what, if any damages are proven. The Plaintiff claims the cost of the special assessment. She comes to this amount as she borrowed half of the amount from her cousin and has not yet paid it back, and used the payout on her mortgage to pay the other half, having obtained the labour, the mortgage payout was to compensate for without charge up front. She states her intent is to pay back the loan made by her cousin and to pay for the labour provided to her by Mr. Spicer.

[146] The Defendants say that even if Ms. Hilman incurred these costs by reason of any misconduct on their part (which of course was not acknowledged), they ought not to be ordered to pay them because the value of the property was increased by the work that was done as a result of the payment of the special assessment. They argue that the increase in the value of the home is the same as the amount that was paid out, and that Ms. Hilman is the one who received the benefit, not them. They maintained the position that they were acting altruistically, to try and help Ms. Hilman out in her circumstances.

[147] The property in question was purchased by the Defendants in a foreclosure at far below the price they listed it for. They did some interior work to the property to put it in the state it was at the time of the sale. There was no evidence of an assessment of the value of the property at the time they purchased it. Nor did the Defendants provide any sort of assessment for the home either at the time of the purchase or after the work was done.

[148] In support of their position that the property was worth more than what Ms. Hilman paid for it and indeed was worth the purchase price plus the money she paid out and more, they provided real estate listings of other similar homes in the same complex which were for sale at the same time, arguing that the listings showed that even before the work done, the property would have been worth approximately $20,000 more than the selling price.

[149] To the extent that it is relevant, I reject the Defendants' position that they received nothing of value in this transaction. They wanted a quick sale on their home on their terms and they got it.

[150] It is to be noted that the properties most closely similar to that in question did not sell at the prices they listed for. In fact, the listings on those properties expired without them selling at all. The comparators, therefore, are of no assistance to the defendants' position.

[151] I find the defendants' claim that Ms. Hilman has received a benefit worth more than the loss she has suffered to be speculative at best. What is clear is that Ms. Hilman paid $20,326 that she had not bargained for. This is money she is out of pocket. This is the amount of her loss and as I have already stated the MacKenzies are liable for that loss either as a result of their breach of the contract or as a result of the misrepresentation made.

CONCLUSION

[152] I therefore grant judgment for the Plaintiff in this case as follows:

> **Damages** in the amount of $20,326.00
>
> **Costs** in the amount of $2032 plus the $200 filing fee, plus witness fees of $50.00 (for the attendance of three civilian witnesses and one Expert Witness).

[153] I realize solicitor-client costs were sought in the claim but I decline to order costs on that basis. While I see the MacKenzies' matter very differently than they do, I accept that they honestly felt they had a basis upon which they could defend the claim, however naive or uninformed that belief was. I do not feel it is necessary in these circumstances to exercise my discretion to express the disapprobation for their conduct in mounting a defence. Given my findings, I do think it is appropriate to award the filing and witness fees over and above the standard (at least in this jurisdiction) award of 10% costs for a defended action with counsel.

[154] Having said all of that, I note that neither counsel made oral submissions on costs in their argument, nor in fact did I ask for them. I therefore give either party leave to bring the matter of costs back before me for further submissions upon appropriate notice to the opposing side, provided such notice is given within 30 days of receipt of this judgment.

[155] Prejudgment interest is awarded as follows:

> On the first $10,163 which was due April 15, 2010, the amount is $246.39;
>
> On the second $10,163 which was due October 15, 2010, the amount is $204.67.

[156] The total amount of the judgment therefore is $23,059.06.

Heard on the 12th day of May and the 24th day of June, 2011.
Dated at the City of Fort McMurray, Alberta this 30th day of December, 2011.

S.A. Cleary
A Judge of the Provincial Court of Alberta

Appearances:

Suzanne Alexander-Smith,
for the Plaintiff

Clifton Jang,
for the Defendants