Vokey v. Edwards

Ontario Judgments

Ontario Superior Court of Justice

Killeen J.

Heard: January 25-28, 1999.

Judgment: May 4, 1999.

Court File No. 26080/97

[1999] O.J. No. 1706 | 99 O.T.C. 347 | 88 A.C.W.S. (3d) 10

Between Deborah Vokey and Deborah Swanson, plaintiffs, and Michael W.G. Edwards, Elaine Dorothy Edwards, Royal LePage Real Estate Services Limited and John Page, defendants

(21 pp.)

Case Summary

Sale of land — The contract — Conditions and warranties — Remedies of purchaser — For quality defects — Agency — Relations between principal and agent — Agent's duty to disclose — Breach, effect of — Particular agencies — Real estate agents.

Action by Vokey and Swanson against Edwards for damages for breach of warranty and fraudulent misrepresentation, and against Royal LePage and Page for breach of contract, breach of fiduciary duty or negligence. Swanson and Vokey wanted a three-bedroom house with a pool. Page, a real estate agent for Royal, took them to see the Edwards' house in December. The pool was covered by a vinyl top. Mrs. Edwards told Swanson that the pool was in good condition. Page recommended against an independent inspection of the house to save costs. The parties signed an offer the following day. Page inserted a warranty clause about the pool into the offer, providing that it was in good condition to the best of the Edwards' knowledge and belief. The Edwards advised Page that they had to do annual repairs to the pool. The Edwards signed a disclosure statement providing that they had to effect repairs to the pool every spring. Page did not mention the disclosure statement. Vokey and Swanson did not learn of this statement until January, but, on Page's advice, decided to proceed with closure in February. In April, they discovered the sad state of the pool. Two experts inspected the pool and found it to be unsafe and unusable. The estimated cost of its repair was $22,000.
HELD: Action dismissed against the Edwards, but allowed against Page and Royal.

The Edwards made no fraudulent misrepresentations about their swimming pool to Swanson and Vokey. They willingly signed a disclosure statement advising that the pool required annual repairs. They had no intent to deceive. The warranty clause was inadequate to protect Swanson and Vokey. The representation and warranty made by the Edwards was truthful to the best of their knowledge and belief and therefore did not violate the reach of the warranty clause in question. Page egregiously failed Swanson and Vokey in his duties as an agent by

recommending against a professional inspection and in telling them they could fully rely on the warranty. Page also erred in failing to advise Swanson and Vokey of the Disclosure Statement. Page's behaviour directly led them to signing the agreement to their detriment. Swanson and Vokey were awarded $22,000.

Counsel

Robert Haas, for the plaintiffs, Deborah Vokey and Deborah Swanson. David Rowcliffe, for the defendants, Michael and Elaine Edwards. David Kirwin, for the defendants, Royal LePage Real Estate Services and John Page.

KILLEEN J.

1 The plaintiffs, Deborah Vokey and Deborah Swanson, have sued the defendants, Michael and Elaine Edwards, for damages for breach of warranty and fraudulent misrepresentation arising from the condition of a swimming pool which was purchased by the plaintiffs from these defendants as part of a real estate transaction. They have also sued their real estate firm, Royal LePage Real Estate Services, and its employee, John Page, for breach of contract, breach of fiduciary duty or negligence incidental to this transaction. There are also crossclaims involving the two sets of defendants in the action.

THE FACTS

2 In the late summer of 1996, Ms. Vokey and Ms. Swanson, who were friends, decided to buy a house together in London. Ms. Swanson had purchased a prior house at 12 Rosewood Avenue in December, 1993, and, at that time, had used the services of John Page of Royal LePage as her agent in the search for that house. By 1996 they felt ready to buy a better house together and, once again, it was decided to retain Mr. Page to help them find the new home. It was their common desire to buy a three-bedroom house with an in-ground pool which they could use for exercise and entertainment. Ms. Swanson was also interested in a home with a large yard to accommodate her dog. They were prepared to pay something in the range of $120,000 to $130,000 for the house.

3 Ms. Swanson first listed her Rosewood Avenue home with Mr. Page and eventually was able to sell it under an October agreement for sale which provided for a closing on February 14, 1997.

4 Having entered this agreement, Ms. Swanson, along with Ms. Vokey, directed their attention to finding a replacement home and instructed Mr. Page to help them with this task. Over November and into December, it would seem that Mr. Page took them to see in the order of eight or ten homes, using their monetary and other criteria as his general guideline.

5 There is no doubt that their central criterion was a home with a good pool. Mr. Page showed them several homes with pools, including one in Byron under a Power of Sale and one in Pond

Mills, but the plaintiffs had concerns over the pools at these homes or other problems they saw. For example, one pool had a deck which was caved in, another was awkwardly slanted towards the back of the house and the Power of Sale house was being sold on an "as is" basis, preventing them from getting any written condition or warranty for the pool. There is no doubt that the plaintiffs relied heavily on Mr. Page's advice as they looked at these houses and their pools.

6 Ms. Swanson says that they first became aware of the house at 88 Cantley Crescent in a weekly bulletin of the London-St. Thomas Real Estate Board about mid-December and immediately called Mr. Page to arrange for a viewing. This property was owned by the defendants, Mr. and Mrs. Edwards. They had bought it under an agreement for sale, dated March 27, 1986, for $83,500 and the closing took place in June of that year.

7 By 1996, the Edwards were interested, like the plaintiffs, in a better house. They were attracted by the homes in a new subdivision in east London known as Summerside and went to an open house display there in August, 1996, where they met an agent, Jayne McFadden, also of Royal LePage, who represented the builder, DiVincenzo Homes.

8 Ms. McFadden, who testified, recalled that they revisited the subdivision on several occasions over the next several months and finally decided to buy a new home at Lot No. 44, on the west side of Chelton Road, for a price of $177,900, with a closing date specified for March 31, 1997.

9 As part of the deal, the building firm agreed to guarantee a sale price for their Cantley Crescent home at a figure of $124,800, if they could not sell it for a better price.

10 The result was that the Edwards signed an agreement for the purchase of Lot No. 44 on November 16 and, the same day, signed a listing for the sale of their Cantley Crescent home with Ms. McFadden's firm, Royal LePage, at $129,500. This listing was to expire on February 28, 1997.

11 While there is some confusion in the evidence about dates, I have concluded that the plaintiffs visited 88 Cantley at about 7:00 p.m. on the evening of Wednesday, December 18. When they arrived, they met Mrs. Edwards and her son. They were very impressed by the good condition and layout of the house during their inspection and Mr. Page was equally enthusiastic about its condition. Mrs. Edwards' son turned on the backyard lights so that they could check the backyard and pool. They did only a very cursory check of the pool. They found it covered by a vinyl top and there were some bricks holding it down. Also, there was some snow and ice on the cover. Ms. Vokey recalled that they tried to lift a corner of the cover but could only move it about 10" or so and really could see nothing underneath.

12 In the brief period that the plaintiffs talked to Mrs. Edwards, I am satisfied that Ms. Swanson asked her about the condition of the liner in the pool and Mrs. Edwards simply replied that it was a cement pool without a liner, in good condition, and that her family used the pool regularly and enjoyed it. I draw this conclusion from the combined evidence of Mrs. Edwards, the plaintiffs and Mr. Page.

13 The plaintiffs acknowledged that, after their inspection, they were very impressed by the property. They said that Mr. Page recommended against an independent professional inspection of the house because it was not worth the cost.

14 Mr. Page had a different recollection on this latter issue. He recalled that the family who had bought Ms. Swanson's house earlier in the fall had an inspection and said that both plaintiffs felt that the inspection which was done was ridiculous and a waste of time. In other words, he was saying that they made an independent choice not to have a professional inspection done although he agreed with their decision and supported it. I found the plaintiffs' evidence much more persuasive than his on this issue.

15 What is clear is that, after the visit, both plaintiffs were enthusiastic and wanted to put an offer in. They admitted that Mr. Page told them "to sleep on it". On the following morning (December 19), they decided to put an offer on the property at a price of $126,000, with a closing on February 14, 1997 to conform with the closing for the sale of Ms. Swanson's home.

16 I am satisfied that, before he drew up the offer for them, Mr. Page told them that he would insert in the offer a special Royal LePage warranty clause about the pool which would fully protect them against defects in the pool and would substitute for a professional inspection. The actual warranty clause which went into the offer reads this way:

> The Vendor represents and warrants to the best of his knowledge and belief that the swimming pool and equipment are now, and on the completion date shall be, in good working order. The Parties agree that this representation and warranty shall survive and not merge on completion of this transaction.

17 Mr. Page says that he obtained this clause from a Royal LePage book of precedents and did not simply make it up himself. It is really hard to imagine how a major real estate firm could provide such a weak clause to a customer seeking full warranty protection on a house or any of its components but I will say more about that issue of the warranty later.

18 Mr. Page proceeded to explain the warranty clause to the plaintiffs before he got their signatures on the offer that morning. Both plaintiffs said that he told them that if any problems appeared with the pool when they opened it in the spring one of two things would happen: either the Edwards would have to rectify the problem or, failing that, the property would go back to the Edwards and the plaintiffs would be restored to their position before the deal was closed.

19 I have to say that I found the evidence of the plaintiffs on this issue to be doubtful and probably a product of wishful, after-the-fact, reconstruction.

20 Mr. Page, who testified quite credibly on this issue, said he told them that, if problems arose, the Edwards could be called upon to rectify them, failing which they could be sued for damages under the warranty.

21 Mr. Page, at the time of this transaction, had about 12 years' experience as an agent and did

not strike me as one who would make the somewhat excessive statement attributed to him by the plaintiffs.

22 The plaintiffs signed the offer in the morning and Mr. Page took it over to Edwards' house after making an appointment through the listing agent, Ms. McFadden, who was also to be present.

23 Both plaintiffs said that before Mr. Page left their home, they told him to make it clear to the Edwards the importance they attached to the warranty as to the "good condition" of the pool and their concern that the pool had been "professionally closed" in the prior September.

24 Mr. Page dutifully went over to the Edwards home at about noon and met Ms. McFadden and the Edwards.

25 He says he first had them sign a "Dual Representation" agreement under which they agreed that he could act for both sides. Then, about the time when Mr. Page was starting to go through the warranty clause, Ms. McFadden intervened to produce a Disclosure Statement which the Edwards had signed on November 16, along with the listing agreement. This Disclosure Statement, which is a critically important document in this case, contained a section at the end in which Mrs. Edwards made the following disclosure about pool repairs:

> As a Vendor, if you are aware of any latent defects on your property you are required by law to disclose them. We have concrete repairs every year when we open pool repaired by us. (Italics on Mrs. Edwards' answer).

26 Both Mr. Page and the Edwards said that the warranty clause was discussed thoroughly at the Edwards house and Ms. McFadden recalled specifically that she produced the Disclosure Statement during the discussion and that it was reviewed along with the warranty clause.

27 There is no doubt that Mr. Edwards re-emphasized in the discussion that he had to do annual repairs to the pool, including parging, before it could be used each Spring. It must also be said that he probably under-emphasized the scope of the repairs because Mr. Page recalls him saying that the repairs only took a matter of an hour and cost "next to nothing".

28 In his own evidence, Mr. Edwards tried to say that he told Mr. Page it took about 10 hours work but I have found this evidence unconvincing in the light of the evidence of Mr. Page and Ms. McFadden. At another point in his evidence, he conceded grudgingly that the work usually took about four or five evenings' work with the parging mix costing about $50. Also, he admitted that the remedial work was more extensive in some years than others.

29 After Mr. Page finished his discussion with the Edwards, he withdrew to allow Ms. McFadden, as the listing agent, to review the offer and price with the Edwards. The Edwards decided to counter-offer at $128,000 and deleted some lace curtains from the chattels going with the house. Mr. Edwards also told Mr. Page to tell the plaintiffs that he would go over and do all the remedial work at the house in the Spring.

30 Mr. Page took the revised offer over to Ms. Swanson's residence at about 3:00 p.m. and reviewed the counter-offer and his discussions at the Edwards' house. Mr. Page claims he told the plaintiffs that Mr. Edwards had mentioned that "minor work" on cracks, including parging, had to be done every spring and that they were satisfied to go forward with the counter-offer because they felt "secure" under the warranty he had provided for them. He conceded, however, that he made no reference to the Disclosure Statement which had been produced and discussed at the Edwards house and which had been in the possession of Royal LePage since November 16.

31 Both plaintiffs vehemently denied that Mr. Page told them anything about annual repairs, large or small, at this 3:00 p.m. meeting before they signed off on the counter-offer. They both say that if they had seen the Disclosure Statement or heard about the annual repairs a red flag would have gone up and they would not have proceeded further without a professional inspection of the pool.

32 My appraisal is that their common evidence on this critical issue is entirely credible and I find that they were not told by Mr. Page about the required repairs. Both plaintiffs struck me as meticulous purchasers who were very sure of what they wanted and, most clearly, they wanted a problem-free pool and had made that clear to Mr. Page. I conclude, further, that Mr. Page's failure to communicate the contents of the Disclosure Statement is both incredible and inexcusable, bearing in mind that he and Royal LePage were supposed to be acting in the plaintiff's best interests, as their agent, and that the Disclosure Statement had, as at least one of its important purposes, the protection of the purchasers.

33 In any event, by late that Thursday afternoon, the sale agreement was concluded and each set of parties went on with their closing and post-closing plans.

34 The plaintiffs paid two visits to the Cantley Crescent premises in January preparatory to the February 14 closing. At the second of these January visits, held in late January, the plaintiffs met Mr. Page and Mr. Edwards at the premises. At this meeting, Mr. Edwards mentioned the Disclosure Statement and the need for annual repairs to the pool. Both plaintiffs say that they were somewhat "shocked" to hear about such required annual repairs. They say they spoke to Mr. Page about this after the visit and he reassured them by telling them that the repairs were minor and would be covered in any event by the warranty.

35 By this time, of course, the agreement was in force and the plans of the plaintiffs were, as it were, written in stone. They decided to accept Mr. Page's advice and proceed to close.

36 On this issue, as on others, Mr. Page had a different recollection of what he told the plaintiffs and when. I found his evidence evasive and slippery on this question and concluded that he tended to explain away those allegations of the plaintiffs which might implicate himself in liability for their plight.

37 The closing occurred uneventfully on February 14 and it would seem that the lawyers representing the parties were not advised about the festering pool issue.

38 In April, the plaintiffs decided that it was time to check the pool and they removed the cover. Both were profoundly upset by the condition of the pool and Ms. Vokey, an engineer by training, was probably apoplectic. They quickly called Mr. Page to complain and he, in turn, contacted Ms. McFadden so that Mr. Edwards could be brought over to see the sad condition of the pool.

39 On a Saturday in late April or so, the plaintiffs met Mr. Page and Mr. Edwards at their pool. There is little doubt that the pool was a hopeless mess by this date. A very heated discussion ensued and Mr. Edwards at least admitted that he had never seen the pool in so bad a condition before.

40 Mr. Page tried to play the role of a peacemaker by suggesting that each side should get a few independent appraisals of the state of the pool and then get together later to resolve the matter.

41 The parties did agree to this proposal but, later, Mr. Edwards decided to see a lawyer and, thereafter, the dispute did not settle and led to this litigation.

42 It might be added, here, that it was only in May that the Royal LePage firm finally got around to giving a copy of the November 16 Disclosure Statement to the plaintiffs.

43 In the late April-May period the plaintiffs retained two experts to review the plight of their pool, Walter Schmoll and Andrew Patriquin. Both of these experts testified at the trial and confirmed that the pool was unusable in its then condition, requiring, as they both opined, major remediation work.

44 Mr. Patriquin, a consulting engineer with extensive experience in cement materials, gave a detailed and compelling description of the grave deficiencies in this pool.

45 The pool is 20' x 40' in size. It was probably at least 20 or more years old and was approaching what he called "the end of its life cycle". It was built of masonry cement block topped off with a concrete cap around the perimeter. He noted that the pool's exterior walls appeared to have been repaired many times by parging with a cementitious material with a painted finish. This work was not done professionally and amounted to ineffective patchwork. He said that the top 8" to 16" of the walls were showing signs of complete deterioration. In particular, pieces of concrete block were missing in several places along the top course and there were critical cracks throughout the walls, some of which were allowing the infiltration of groundwater.

46 Mr. Patriquin was very pessimistic about the usefulness of repairs to the block walls by way of replacement and re-grouting. He said the serious deterioration had been going on for at least the past few years and that such repair work might end up costing $12,000 to 15,000 and would

only be a further "band-aid" solution. He was emphatic that the current state of the pool rendered it unusable and also stated that it constituted a physically hazardous structure because of the large, sharp cracks and the likelihood that more pieces would fall out of the walls. He thought it unlikely that any contractor would dare to do repair work except on a cost-plus basis, without guarantees.

47 Finally, Mr. Patriquin provided some helpful evidence on another point in this case. He said that a qualified inspector would have seen the serious "distress" in this pool in the fall of 1996 and also was of the opinion that, at the time of closing in February, the deficiencies would have been as noticeable as they were in April or May.

48 Mr. Walter Schmoll is the owner of a business known as Hollandia Pool & Landscape. He has been in the pool business for 19 years. His examination of this pool confirmed Mr. Patriquin's evidence that there had been "failure" around the top course of blocks and he also emphasized that, in his opinion, the entire wall system had failed because of the breakdown of mortar joints. In effect, the ideal solution would be to replace the entire block system with new blocks but this was not realistic in terms of cost. His suggested solution, which I accept as sensible, was to install a "steel reinforcing cage" inside the walls and then apply a concrete case over the cage. His cost estimate for this repair was about $22,000 including G.S.T. and painting.

49 To complete the picture, I would point out that another plaintiffs' witness, William Graham, reasonably estimated the cost of completely filling in the pool and providing a landscaped cover of grass at about $9,000, including G.S.T.

THE LEGAL ISSUES AND THEIR RESOLUTION

50 Mr. Haas, for the plaintiffs, raised two points against Mr. and Mrs. Edwards namely, (1) fraudulent misrepresentation, and (2) breach of warranty. As to his case against Royal LePage and Page, he relied upon negligence and breach of fiduciary duty on the part of Mr. Page for which Royal LePage would be vicariously liable.

51 I will deal with the plaintiffs' case against the Edwards first.

(1) Fraudulent misrepresentation

52 Fraudulent misrepresentation would, if proved, survive the closing of this transaction on February 14, 1997, and would not be defeated by the caveat emptor principle or related disclaimer clauses in the agreement for sale: see, for example, the following statement in 29 C.E.D. (Ont. 3rd), Title 130, para 654:

> Once the contract has been completed and has been executed, the maxim of caveat emptor applies save for exceptional cases, as where there has been fraud, a total failure of consideration or an error in substantialibus, such as the purchaser purchasing his or her own property. After completion a purchaser must protect himself or herself against a defect in title, quantity, or quality by covenants in the conveyance.

53 A good general statement about the elements of fraud or fraudulent misrepresentation may

be found in Perell & Engell, Remedies and the Sale of Land, 2d ed. (Toronto: Butterworths, 1998), at pp. 92-93:

> A person makes a fraudulent misrepresentation when he or she makes a false statement without belief in its truth and with the intent to deceive. Fraud involves a "wicked mind" and a discordance between what a person says and what a person believes. Fraud involves intentional dishonesty, the intent being to deceive. Thus, to succeed in an action for deceit or for fraudulent misrepresentation, the plaintiff must show not only that the defendant spoke falsely and contrary to belief, but that the defendant had the intent to deceive, which is to say he or she had the aim of inducing the plaintiff to act mistakenly. There is an element of proximity associated with the intent to deceive; the plaintiff must show that the defendant's design was directed at the plaintiff or at a class of persons that includes the plaintiff.

54 Perell & Engell also draw from the leading authorities the following five major elements for an action based on fraudulent misrepresentation or, what they call, an action for deceit (at p. 92):

> Where the misrepresentation is fraudulent and the remedy sought is damages, the claim is known as an action for deceit. The major elements of deceit are (1) a false statement by the defendant, the defendant knowing that the statement is false or being indifferent to its truth or falsity, (3) the defendant having an intent to deceive the plaintiff, (4) the false statement being material and the plaintiff being induced to act and (5) the plaintiff suffering damages. The court will not make assumptions to assist a plaintiff to make out a case of fraud, and the onus is on the plaintiff to rigorously and distinctly prove the claim.

55 It is my view that Mr. and Mrs. Edwards did not make any fraudulent misrepresentations about their swimming pool to the plaintiffs.

56 On November 16, 1996, when they signed the listing for the property, they willingly signed a Disclosure Statement for the listing agent, Ms. McFadden, in which they disclosed the fact that the pool did in fact require annual repairs when it was opened each year in May. It may be that the disclosure then made and later made to Mr. Page at the signing of the agreement could have been fuller but I am entirely satisfied from their evidence that they had no intent to deceive nor were their statements about the pool made recklessly.

57 It is important to note that throughout the period from November 16 down to the signing on December 19, the Edwards were not under financial pressure to conclude a sale. Under their purchase agreement with DeVincenzo Homes they had a guaranteed price of $124,000 on their own home.

58 The evidence about the day of the signing, from Mr. Page and Ms. McFadden, also confirms that the Edwards honestly believed that they were making appropriate disclosure about the conditions for the pool and the need for repairs each spring. In his conversation, Mr. Edwards even asked Mr. Page to tell the plaintiffs that he would come over in the spring to open the pool up and do the opening repairs.

(2) Breach of Warranty

59 The warranty, drawn from the Royal LePage precedent book, is a rather strange and hybrid creature. At best, it can only be called a watered-down warranty because it warrants "to the best of his knowledge and belief" that the pool and its equipment are "in good working order" both at the signing of the agreement and the completion date.

60 The serious weakness in this so-called warranty or representation is that it is qualified so starkly by the words "to the best of his knowledge and belief". I am satisfied, on the evidence, that when the Edwards signed the agreement in front of Ms. McFadden and Mr. Page they honestly believed the pool was and would be in good working order, subject only to the relatively minor repairs that they had been required to make each year. Thus, I cannot conclude there has been a breach of warranty under the warranty clause, as drafted.

61 I am reinforced in this view of the warranty clause by the judgment of Philp J. in John Levy v Cameron & Johnstone *(1992), 26 R.P.R. (2d) 130* (Ont. Gen. Div.). The warranty clause in this case read as follows:

> The vendor herein covenants that to the best of his knowledge, there are not now, nor shall there be at the time of closing, any contaminated waste material in or on the said lands.

62 This clause is so close in its terms to the clause before me as to be indistinguishable from it. Philp J. concluded that the use of the words "to the best of my knowledge" made the clause a "qualified" warranty, following a very old judgment of the Supreme Court of Canada in the case of Confederation Life Assn. v. Miller *(1887), 14 S.C.R. 330* where Gwynne J. said this at p. 344:

> Now this statement being qualified by the words 'to the best of my knowledge and belief' can only be untrue, if the contrary to what is stated be the truth - namely, that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say, and the learned judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction is that the language of the warranty being framed by the defendants themselves the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it.

63 Philp J. accordingly ruled against liability under the warranty in this way at p. 147 of John Levy:

> In my view, the use of the words "to the best of my knowledge and belief" did not warrant the absolute truth of the statement that there were no contaminant waste materials, but qualified the statement by the use of those words. I find that the warranty and representation made by Mr. Levy was reasonably fair and truthful to the best of his knowledge and belief, and therefore not a breach that would justify the defendant to refuse to close the transaction or to rescind the contract.

64 I feel constrained, on the facts of this case, following the John Levy and Confederation Life cases, to rule that the representation and warranty made by Mr. and Mrs. Edwards was

reasonably fair and truthful to the best of their knowledge and belief and therefore did not violate the reach of the warranty clause in question.

(3) The Claim Against Royal LePage and Page

65 Mr. Haas argues that Mr. Page was in a fiduciary relationship to the plaintiffs and either breached the duties inherent in that relationship or was, in any event, negligent in the performance of his duties as an agent for the plaintiffs.

66 The Supreme Court of Canada has made it clear in International Corona Resources Ltd. v. Lac Minerals Ltd., *[1989] 2 S.C.R. 574* that certain classes of relationships, including that of principal and agent, are assumed to give rise to fiduciary obligations. Thus, there is a strong, but not an irrefutable presumption that such a relationship is a fiduciary one in which fiduciary obligations are present.

67 Professor Fridman in his treatise, The Law of Agency, 6th ed., (Toronto: Butterworths, 1990), at pp. 152-53, has described these fiduciary duties as "equitable in character" and has called them "a complex of duties" which arise irrespective of any contract between the parties. Most clearly, they include the duties of loyalty, good faith, full disclosure of material facts and, in general, the competent protection of the client's interests.

68 Here, I am satisfied that the plaintiffs reposed special confidence and trust in Mr. Page based on their prior relationship with him and their needs incidental to this particular purchase and its planning. They made it clear what their precise needs were in their house search and their central desire for a trouble-free swimming pool.

69 I conclude that Mr. Page egregiously failed them in his duties as an agent and fiduciary in this transaction.

70 First, I have found that he recommended against a professional inspection of this house and then told them that they could fully rely on the warranty which he and Royal LePage provided. To me, this very weak warranty provided much more protection to the vendors than it did to the plaintiffs. While I think that the plaintiffs may have overstated what they understood the warranty to mean - they said he told them the deal would be cancelled if there was anything wrong with the pool which the vendors refused to correct - nevertheless, there is no doubt they expected the warranty to provide more than its words called for and relied totally on his promise that this warranty was sufficient to protect them fully against defects in the pool.

71 I conclude, then, that this warranty was totally inadequate to match the reasonable expectations of the plaintiffs and constituted both a breach of fiduciary duty and negligence in the circumstances. At the very least, Mr. Page failed to provide the plaintiffs with a warranty which a reasonably prudent agent would have provided to protect them. It is no answer for Mr. Page, or his employer to say, as he did say, that this was the only precedent he could find. It simply did not provide adequate and reasonable protection for the purchasers he acted for.

72 Another equally egregious mistake was committed by Mr. Page in failing to advise the

plaintiffs of the existence of the Disclosure Statement which had been provided by the Edwards on November 16, when the listing was signed.

73 Ms. McFadden gave credible evidence that the Royal LePage firm had been requiring its agents to obtain these Disclosure Statements for at least two years before this transaction. Mr. Page, on the other hand, gave somewhat evasive evidence on this point and tried to create the impression that they were only in vogue on a voluntary basis for, perhaps, six months before this transaction.

74 I accept Ms. McFadden's evidence without hesitation and conclude that Mr. Page was in serious dereliction of his duties in failing to check the listing agreement and failing, thereafter, to provide the plaintiffs with a copy of the Disclosure Statement.

75 It is to be remembered here that Mr. Page was in fact told about the Disclosure Statement at his meeting with the Edwards and Ms. McFadden and actually saw it. Yet, when he returned to the plaintiffs with the Edwards' counter-offer on the afternoon of December 19 he once again failed the plaintiffs by not producing a copy of it for their perusal or even telling them about it.

76 At this sensitive point in the negotiations the plaintiffs were placing great reliance on Mr. Page to make sure that the Edwards knew of their own reliance on the warranty and yet he told them nothing about the important Disclosure Statement.

77 I conclude that, if Mr. Page had told the plaintiffs about the Disclosure Statement and its contents, as he should have, earlier or even on December 19, the plaintiffs would have stayed their hands, refused to accept the counter-offer and would have insisted on an inspection of the pool. In other words, these two breaches by Mr. Page directly led to the plaintiffs signing the agreement to their detriment.

78 In the result, I find the defendants, Page and Royal LePage, breached their fiduciary and agency duties to the plaintiffs.

79 I assess the plaintiffs damages at $22,000 based on the most helpful evidence of Mr. Schmoll, supported, as it was, by that of Mr. Patriquin. I have considered the question of betterment, in light of the age of the pool but, in the circumstances of this case, I have concluded that Mr. Schmoll's recommended method of remediation only gives the plaintiffs a pool "in good working order" via the cheapest and most realistic method available and, as it seems to me, these defendants must be liable for that cheapest way to meet the "good working order" standard.

80 The defendants, Mr. and Mrs. Edwards, asserted a cross-claim against Royal LePage and Page for disgorgement of Mr. Page's share of the commission entitlement, totalling $4108, based on the breaches of duties or negligence of Mr. Page. I feel I must reject this claim because, while Mr. Page failed in his duties to the purchasers, he did not fail in his duties to the Edwards. As it seems to me, it would be unjust and inappropriate to transpose duties and disentitle Mr. Page and RoyalLePage to the commission earned in this case.

81 In the result, the plaintiffs will have judgment against Mr. Page and Royal LePage in the sum of $22,000. The action will be dismissed against Mr. and Mrs. Edwards.

82 I may be spoken to on costs and interest if counsel cannot agree on these issues.

KILLEEN J.
