SUPREME COURT OF YUKON

Citation: *St. Cyr v Atlin Hospitality*, 2024 YKSC 52

Date: 20241004
S.C. No. 19-A0011
Registry: Whitehorse

BETWEEN

SHERENE ST. CYR, CLAYTON CONNER, AND CORAL ST. CYR (A MINOR) AND TRISTAN CONNER (A MINOR) BY THEIR LITIGATION GUARDIAN CLAYTON CONNER, AND 1440208 ALBERTA LTD.

PLAINTIFFS

AND

ATLIN HOSPITALITY LTD. AND ROBERT REED

DEFENDANTS

AND

S.C. No. 19-A0071
Registry: Whitehorse

BETWEEN

ATLIN HOSPITALITY LTD.

PETITIONER

AND

1440208 ALBERTA LTD.

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs — Michael McVey

Counsel for the Defendants — Mark Wallace

REASONS FOR DECISION

OVERVIEW

[1] This action relates to the purchase by the plaintiff Sherene St. Cyr and her company 1440208 Alberta Inc. (“208”) in September 2013 of a 14-acre rural Yukon property, located near Atlin, British Columbia (the “Property”). On April 5, 2019, the plaintiffs brought a claim for damages arising from a breach of the contract of purchase and sale, and negligent misrepresentations made by the vendor Robert Reed on behalf of his company Atlin Hospitality Limited (“AHL”), both of whom are defendants. The plaintiffs allege the residence’s substandard heating, electrical, and plumbing systems, as well as the occurrence of water ingress, resulted in toxic mould contamination, making the residence uninhabitable and causing significant illness to three of the plaintiffs.

[2] The 2013 purchase included a vendor take-back mortgage to allow for financing by the plaintiffs. The plaintiffs ceased making mortgage payments on May 28, 2018, when they left the residence due to the discovery of mould. On July 25, 2019, the defendants started a petition for relief by way of foreclosure, sale and possession of the property as well as other relief from the defaulted mortgage payments. The petition was converted to an action by court order and the two claims ordered to be heard together. The plaintiffs filed an amended statement of claim and the defendants filed an amended statement of defence and counterclaim, claiming relief from the defaulted mortgage.

[3] This summary trial was initiated by the defendants who seek to dismiss the plaintiffs’ claim in contract and tort for liability for defects in the property and to grant their counterclaim for a declaration of default under the mortgage and judgment in the

amount owing under the mortgage and related relief. The plaintiffs in turn request a declaration that if they are found to be in default of the mortgage, they are entitled to an equitable set-off of any amounts owing, against the damages arising from any breaches of contract and/or negligent misrepresentation of the defendants.

[4] This matter requires a determination of the allocation of risk between a purchaser and a vendor of residential real estate.

[5] The plaintiff Sherene St. Cyr says she was induced to enter the contract of purchase and sale by the defendants' representations about the Property, including its suitability as a year-round family residence, with adequate heating, electrical, and plumbing systems, and without water damage or mould. Her reliance on the defendant Robert Reed was based on his participation in the upgrading of the residence in 2000 and 2001, as well as his regular ongoing maintenance work at the Property, his work as an industrial electrician for 33 years, and as a renovator of other properties. In addition, their personal relationship including attending the same church in Atlin, provided assurance to the plaintiffs that his representations were reliable. She says she felt comfortable proceeding with the purchase and sale without an inspection other than a walk-through with the defendant Sherene St. Cyr in May 2013. She was comfortable in accepting that the conditions in the contract were satisfied. The problems with the residence that became evident over time showed a breach of the contract of purchase and sale, specifically that the systems were in good working order at the time of sale.

[6] The defendant Robert Reed denies making many of the representations attributed to him by the plaintiff Sherene St. Cyr. In any event, he says there is insufficient evidence of reliance because she had already made two previous offers to

purchase the Property without seeing it, and she made no mention of any of the representations between 2015, when she began living at the Property, and 2019, when she started the action, even though problems were evident. Further, any pre-contractual representations that may have been made have no force and effect because of the operation of the entire agreement clause in the contract of purchase and sale.

[7] In the claim in contract, the defendants rely on the doctrine of *caveat emptor*, or buyer beware, that places the onus on the purchaser of real property to satisfy themselves of the quality of the property being sold (*Cardwell v Perthen*, 2007 BCCA 313 ("*Cardwell BCCA*") at para. 22). Although *caveat emptor* does not apply where the vendor fails to disclose dangerous latent defects, the defendants say in this case many of the defects identified by the plaintiffs' expert were patent, discoverable on inspection, and the vendor had no knowledge of the other conditions of the house that led to the development of the mould.

[8] The parties have agreed that this summary trial is for the purpose of determining liability and set-off, and not for the determination of damages.

BRIEF CONCLUSION

[9] This case is suitable for summary trial despite some conflicting evidence over the misrepresentations made by the vendor because it is not necessary to reconcile the conflict. In sum, the claim in negligence based on the allegations of misrepresentations was excluded by the contract provisions, and in any event the plaintiffs did not rely on the defendants' representations.

[10] The entire agreement clause in the contract of purchase and sale excludes in this case the ability of the purchaser to bring an action in negligent misrepresentation.

[11] The principle of *caveat emptor* applies to the breach of contract claim. Most of the defects the plaintiff purchasers have proved through their expert and other evidence were patent defects for which the vendor is not liable. The vendor's representations are relevant to the determination of any exceptions to *caveat emptor*. The character of the residence as an all-year-round habitable home was a representation made by the vendor or an impression given. Yet, the majority of the issues that made the home not an all-year-round residence could have been discovered through an inspection. They were patent defects. The one latent defect related to the "building envelope" - poor vapour barrier, air barrier, and insulation rendering the residence unfit for habitation- was not known by Robert Reed. He was not reckless in the truth or falsity of any statements related to the fitness of the residence for habitation all year round. As a result, no exception to *caveat emptor* applies.

[12] The plaintiffs have not shown the defendants breached the contract of purchase and sale. The plaintiffs raised no deficiencies with the mechanical, plumbing, electrical, heating, water, and septic systems, all of which were warranted to be in good working order on closing, except for the wood stoves, and for which the plaintiffs took responsibility. The plaintiffs accepted the condition of the Property on closing.

[13] As a result, the plaintiffs' claims are dismissed.

[14] There is no dispute that mortgage payments are outstanding. There is a dispute about the amounts owing. As the amounts change as time passes, and because I have not received sufficient submissions to analyze the discrepancy between the outstanding amounts claimed by the defendants and the amounts paid by the plaintiffs, I make no finding here of the amounts owing under the mortgage. This judgment will be confined

to a finding that there has been default under the mortgage. I invite further oral submissions from counsel of the amounts owing under the mortgage and other remedies sought in the mortgage action before a final order is made. Dates may be obtained from the trial coordinator which I will direct to occur at the earliest possible time.

ISSUES

(a) Is a summary trial appropriate?

(b) Does the entire agreement clause in the contract of purchase and sale prevent the plaintiffs from bringing their tort claim in negligent misrepresentation?

(c) Do any of the exceptions to the principle of *caveat emptor* apply?

(d) Was there a breach of contract?

(e) Is the mortgage in default?

BACKGROUND

The Parties

[15] The plaintiff Sherene St. Cyr is 47 years old and lives in Calgary, Alberta, where she lived before moving to the Property. At the operative time, she was the owner of Done Right Roofing in Calgary, a home roofing business. She is the sole director of 208, a registered Alberta corporation which is also extra-territorially registered in the Yukon. She also has a master's degree in counselling psychology, with a specialty in Indigenous healing practices.

[16] She began travelling to Atlin regularly in 2007 as her previous husband was from Atlin. She had originally visited Atlin in her early twenties and said she knew after that first visit that she would spend her life there.

[17] The plaintiff Clayton Conner is the husband of Sherene St. Cyr who also resides in Calgary, Alberta. He is a muralist and during part of the operative time he operated an art retail store called Alaska Art Colony during the summers in Skagway, Alaska.

[18] Sherene St. Cyr and Clayton Conner began their relationship in 2012. They separated in or around June 2021.

[19] The plaintiff Coral St. Cyr is the daughter of Sherene St. Cyr. She was born in 2008 and lives in Calgary, Alberta.

[20] The plaintiff Tristan Conner is the son of Sherene St. Cyr and Clayton Conner. He was born in 2014 and lives in Calgary, Alberta.

[21] Sherene St. Cyr and Clayton Conner have a second child who was born in May 2019.

[22] The defendant Robert Reed is a sole director and operating mind of the company AHL. Robert Reed's father, George Reed, and a family friend, Bonnie Traplin, were shareholders of AHL. George Reed passed away before the sale of the Property was finalized.

[23] Robert Reed is 85 years old, a citizen of the United States and a permanent resident of Canada. He spends the winter months each year in the United States. He worked as an industrial electrician in a pulp and paper mill for 33 years. He owns Brewery Bay, a hotel in Atlin, and a home outside of Atlin, named Grayling Lake. He was involved in a four-year renovation of a motel in Yellowknife, along with carpenters,

electricians, drywallers, painters, roof contractor, and labourers. The dwellings at Brewery Bay and Grayling Lake were already built when he bought them. He has also bought, renovated, and sold various properties over the years.

The Property

[24] The Property consists of 14 acres of land and improvements at Kilometer 38 of the Atlin Road, on the Atlin Lake and Lubbock River. The legal description of the Property is Lot 1019, Quad 105C/04, Yukon Territory, Plan 2002-0191. It was known for many years in the nearby communities by the name “The Hitching Post”.

[25] The Property includes the main residence - a single-story log and wood-framed building with a partial basement. The main floor is approximately 1,100 square feet and has two bedrooms, small loft, kitchen, living room, and bathroom. The partial basement is approximately 750 square feet, one third of the main floor area, with a washer, dryer, hot water tank, batteries, electric panels, and wood stove. There is a massive rock that fills the remainder of the area beside the basement under the main floor. The Property also has three cabins – one two-story cabin, one small cabin, and a third larger cabin - and a barbeque shelter, cookhouse, greenhouse, and barn.

[26] The Property is completely off grid. Electricity is provided by solar and wind power, propane, and batteries, with a generator for back-up. There is a septic system. Water comes from a well contained in a well-house, with pipes connecting to the main residence.

[27] At the time of the purchase and sale in 2013, the main residence was heated by three wood stoves.

[28] The main residence was originally constructed in 1970. It was used seasonally. It had no running water, no electricity, and was heated with wood.

[29] In 2000, AHL, a Yukon corporation, bought the Property.

[30] In 2000 and 2001, Robert Reed, who lived in Texas at that time, came to the Property during the summer months to assist with upgrades. The bathroom, north end bedroom, partial basement, well and well-house, solar and electrical power, and septic system were added. The upgrades were supervised by George Reed and done primarily by a carpenter. Robert Reed assisted by installing the wind generator and solar system and assisted with the installation of the septic system and the building of the well house. The well water was pumped into the house by an electric pump and plumbing lines. Robert Reed also helped to install the exterior siding on the addition and the original cabin.

[31] Originally AHL intended to operate a guest lodge at the Property. However, this never materialized. George Reed and Bonnie Traplin lived in the residence full-time between 2000 and 2003. Other than this, the Property was used for recreational purposes by the owners.

[32] From 2005 to 2015, Barbara Pelletier and her husband were caretakers of the Property and lived full time in one of the guest cabins for the first two years. They left for a period of 18 months for Barbara to attend school. On their return they continued as caretakers but went to the Property on weekends, holidays, or other periods of time. When at the Property, the Pelletiers went to the main residence to use the telephone or for other purposes and stayed there on occasion. They left the Property in 2016.

[33] Robert Reed never lived at the Property. He came to Atlin in the summers and stayed at his own property nearby, Grayling Lake, and would visit the Property to do maintenance work. Only two people had ever lived at the Property all year round.

[34] In 2013, Robert Reed upgraded the solar electric system from a 2500-watt inverter to a 4000-watt inverter and installed a new electrical panel.

The Purchase and Sale of the Property

[35] The Property was listed for sale by two realtors in or about 2010, after the death of George Reed. The listings described it as a home, giving the impression it could be lived in all year round.

[36] Sherene St. Cyr met Robert Reed and his wife Charlene personally at some point within the three years before the purchase of the Property, as they attended the same church in Atlin, a small community of approximately 400 people. Sherene St. Cyr and her daughter had several visits with the Reeds at Grayling Lake, and once the Reeds visited Sherene St. Cyr and family at their home in Bragg Creek, a small community near Calgary.

[37] Sherene St. Cyr became aware of the Property in 2010, through word of mouth. On July 18, 2010, she offered through a realtor to purchase the Property, but the offer was not accepted by AHL.

[38] During the summer of 2012, Sherene St. Cyr and AHL, through Robert Reed, negotiated unsuccessfully for the purchase and sale of the Property, with a vendor backed mortgage.

[39] There is no evidence that Sherene St. Cyr attended the Property before making these two offers. Nor is there any evidence of any representations made by Robert Reed about the Property during that period.

[40] In May 2013, Sherene St. Cyr attended at the Property and was shown around it by Robert Reed. They disagree about what was said by Robert Reed during that visit.

[41] Robert Reed understood that Sherene St. Cyr wanted to operate an eco-tourism business at the Property. Sherene St. Cyr attested that she wanted to have a garden and animals and raise her family. In 2013, she had one daughter, Coral St. Cyr. At that time, Robert Reed had not met Clayton Conner. He was under the impression that she and her daughter would be living at the Property.

[42] After the May 2013 visit to the Property, Sherene St. Cyr made another offer to purchase the Property, on June 12, 2013. She used a form of contract of purchase and sale drafted by Grant Macdonald, a Whitehorse lawyer who was representing her in the proposed purchase of the Property.

[43] AHL accepted the offer of purchase on June 17, 2013. The original closing date was July 31, 2013.

[44] The terms of the contract included that Sherene St. Cyr would pay to AHL $650,000, consisting of a $10,000 deposit, $200,000 down payment less deposit, and a vendor backed mortgage of $450,000 for 10 years at an interest rate of 6% per annum and with quarterly payments of $14,987.76.

[45] The contract of purchase and sale contained the following relevant clauses:

> B. The Property Disclosure Statement dated June 12, 2013, is incorporated into and forms part of this Contract.
>
> C. The Vendor represents and warrants that the mechanical, electrical, plumbing and heating systems and all appliances will be in good working order on the Closing Date.
>
> …
>
> G. To the best of the Vendor's knowledge, the water and septic/septic systems servicing the Property are in good working order.

…

THE PURCHASER HEREBY OFFERS TO PURCHASE THE PROPERTY FOR THE PURCHASE PRICE AND ON THE TERMS AND SUBJECT TO THE CONDITIONS SET FORTH BELOW:

…

5 CONDITIONS PRECEDENT: The Purchaser's obligation to complete the purchase of the above described property is subject to the following conditions precedent:

…

(b) Subject to a valid approved final occupancy permit having been issued with respect to all improvements located on the Property or included in this transaction by the appropriate governmental or municipal agency or department. A property shall be deemed to have a valid approved final occupancy permit if the City of Whitehorse or the Yukon Territorial Government has no records of whether or not such an occupancy permit has been issued;

(c) Subject to the installation of any heating system, including without limitation, any wood stove, pellet stove, fireplace (propane or wood fired), heaters and/or oil monitor located on the Property having been approved by the appropriate governmental or municipal agency or department at the time it was installed;

…

(e) Subject to the Purchaser being able to confirm satisfactory all perils insurance coverage on the Property on or before July 7, 2013**;**

…

If any of the conditions set forth above with a date have not been satisfied on or before the time set forth above the Purchaser shall, by notice to the Vendor on or before that date, at the Purchaser's option, either waive such condition

> and complete the purchase of the above described property or elect not to complete. If the Purchaser fails to give such notice on or before such date, the Purchaser shall be deemed to have elected not to complete.
>
> All other conditions precedent shall be deemed to have been satisfied unless the Purchaser shall give notice to the contrary to the Vendor electing not to complete on or before the third business day prior to the closing date. …
>
> …
>
> 14 REPRESENTATIONS: There are no representations, warranties, guarantees, promises or agreements other than those contained herein, all of which survive the completion of the sale.

[46] None of the parties can find a Property Disclosure Statement related to the Property. Robert Reed has no recollection of completing one and Sherene St. Cyr has no recollection of receiving or seeing one.

[47] The sale did not close on July 31, 2013. On July 30, 2013, Sherene St. Cyr emailed Robert Reed to advise him that the only insurance broker willing to insure the Property required the main heat source to be propane, with wood heat as back-up only. She had learned that the three wood stoves did not meet the Building Code requirements. She needed to decommission two of the three wood stoves and install a propane stove. Robert Reed agreed to extend the closing date. He allowed Sherene St. Cyr to live on the Property for the rest of the summer in a teepee, to access the main residence for phone and internet, and to arrange for the heating changes in order to get insurance. She agreed to pay for and make all of these arrangements.

[48] An addendum to the contract was presented to Robert Reed by Sherene St. Cyr dated August 11, 2013. It extended the closing date to September 3, 2013. At Sherene St. Cyr's request, it also reduced the down payment to $100,000 and adjusted the

mortgage amount to $550,000, with a $100,000 lump sum payment due on October 31, 2013, in addition to the regular quarterly instalments. The addendum also assigned the contract of purchase and sale to 208 and confirmed the purchaser's limited access to the main residence and that improvements to the heating system would be subtracted from the deposit if the deal did not close.

[49] On August 22, 2013, a Yukon government inspector passed the installation of the propane stove and confirmed the decommissioning of the wood stoves.

[50] The mortgage was signed by AHL and 208 on August 30, 2013. The transaction closed on September 3, 2013, and the mortgage was registered on title to the Property on September 11, 2013.

[51] On October 21, 2013, Grant Macdonald's reporting letter to Sherene St. Cyr confirmed that before his office registered the transfer in the Land Titles office, Sherene St. Cyr had indicated her satisfaction with the condition of the Property including any chattels included in the purchase.

Occupancy of the Property by the Plaintiffs

[52] In 2014, the plaintiffs still lived in Bragg Creek and Sherene St. Cyr still operated her roofing business. The three plaintiffs and Sherene St. Cyr's two nieces stayed in the main residence from July 7 to September 10, 2014. On September 24, 2014, Sherene St. Cyr emailed Robert Reed to say "Too bad we didn't get to see you this summer. ... The Hitching Post was wonderful … ." They returned to their home in Bragg Creek for the winter.

[53] In May 2015, the plaintiffs relocated from Bragg Creek to the Property. Five members of the family moved to the main residence at that time – Sherene St. Cyr, Clayton Conner, Coral St. Cyr, Tristan Conner, and one niece.

[54] Sherene St. Cyr attested to the following issues after they moved in:

i. in June 2015, she opened the door to the wood storage room in the basement and saw for the first time the plumbing pipes covered in tape, insulation and heat tape. She feared the pipes would freeze in the winter.

ii. in the late summer or early fall of 2015, the plaintiffs discovered the electrical system was insufficient as they were running the generator frequently to have electricity. They ultimately had to replace every component of the solar-wind system, including the batteries and most of the solar panels, except for the inverter.

iii. in the winter of 2015, the plaintiffs discovered that the heating system was inadequate to heat the main residence for a family year-round.

iv. in the winter of 2015 to 2016 the pipe from the well house to the main residence froze frequently, requiring the use of the heat tape, which in turn required the use of the generator.

v. in the spring of 2016, the plaintiffs discovered water flowing into the basement during the spring run-off. Clayton Conner attempted to divert the water away from the main residence, repaired the wall and installed flashing along the exterior.

vi. in May 2018, Sherene St. Cyr found mould in the main residence, in the front hall closet and on the bottom of the bathroom shower curtain.

[55] Sherene St. Cyr's health first began to deteriorate in late summer of 2015. She began experiencing symptoms of muscle weakness, extreme fatigue, joint pain, brain fog, headaches, light sensitivity, blurry vision, sinus congestion, shortness of breath, numbness and tingling, frequent urination, mood swings, temperature regulation issues, and appetite changes. These symptoms varied from day to day but progressively worsened until she remained in bed for much of the time and was unable to work or care for the children or herself.

[56] Coral St. Cyr began showing signs of unusual fatigue and weakness around the summer of 2017.

[57] While the plaintiffs were away from the residence in January 2018, Sherene St. Cyr's symptoms improved. On her return to the residence her symptoms worsened.

[58] In May 2018, the mould samples were tested and the severity found to be very high, resulting in a recommendation that the source and cause needed to be determined and remediation undertaken. The experts who reviewed the data recommended the residence should not be occupied and that the contents should not be moved. The mould levels were well above the acceptable risk and exposure levels within an indoor environment.

[59] After receiving these results, the plaintiffs immediately left the Property.

[60] Sherene St. Cyr attests that she, Coral St. Cyr, Tristan Conner, and her youngest child have been diagnosed with Chronic Inflammatory Response Syndrome ("CIRS") the provocation of which they attribute to the mould in the main residence.

[61] 208 has admitted to not making mortgage payments when due and the last payment it made was May 28, 2018. This payment was for the payment due on January 1, 2018.

Communication of Property Issues to the Vendor by the Purchaser

[62] Robert Reed attended the Property during the summer of 2015 after Sherene St. Cyr told him at church that the generator would not start. When he attended at the Property, he found the generator was out of gas and the batteries were totally discharged. Sherene St. Cyr asked what the plug beside the generator was for. He told her it was to plug in the heat tape for the water lines from the well to the house.

[63] Other than this occasion in 2015, the plaintiffs did not contact Robert Reed about any of the issues they were experiencing at the Property. There was no reference to any of his representations made in May 2013 until the Statement of Claim was filed on April 5, 2019. This includes during meetings between the parties with a lawyer/mediator to attempt to resolve the matter out of court.

[64] The plaintiffs and the defendants were in regular contact throughout this time, usually by email, because of the mortgage payments. Since the first payment was due on October 31, 2013, 208 has made four mortgage payments on time. The email exchanges mainly consisted of Sherene St. Cyr asking for extensions of time for the mortgage payments and attempting to renegotiate terms. Nothing was mentioned about the representations or the condition of the property in any of the emails about the mortgage payments.

[65] Robert Reed was made aware for the first time on June 18, 2018, by Clayton Conner of Sherene St. Cyr's failing health and their view it was attributable to mould in

the residence. At that time there was no reference to any representations made by Robert Reed.

[66] Sherene St. Cyr attests she hesitated to confront Robert Reed about any of the Property issues they experienced or the representations she says he made to them about the main residence because she respected him, she lived in the same small community of which he was a member at least part of the year, and they attended the same church. She and Clayton Conner continued to pay for the repairs to the residence in the hope it would be livable.

Representations

[67] Sherene St. Cyr says during what she calls the inspection in May 2013, the first time she had been on the Property, she took video and made notes but no longer has them. She had never lived off grid before and was keenly interested in how things worked, especially the electrical - solar, wind, and generator. She attested she made it clear she wanted to raise her family on the Property.

[68] Sherene St. Cyr attests that Robert Reed made the following representations during the visit to the Property in May 2013:

i. the residence was suitable for a year-round family residence;

ii. Robert Reed had personally participated in upgrading the residence from a cabin to an off-grid residence his father lived in;

iii. he had personally undertaken the maintenance of the residence while his father lived there, and continued to do so since his father’s passing;

iv. the heating system was suitable for heating the residence for a family through the winter;

v. the current stoves were installed to the applicable building code in Yukon;

vi. he personally installed the pipes that formed part of the plumbing system;

vii. there was not a problem with pipes freezing;

viii. the heat tape had been installed on the pipes as a back-up safety measure in case the pipes froze;

ix. he had personally installed the electrical system, and it was in excellent working condition, including the solar and wind generation system to provide electricity to the residence;

x. the batteries for the electrical system were in good condition, and the generator would only need to be run for a couple of hours every other day in the winter, and very infrequently during the summer, to provide enough power for the residence;

xi. the metal roof was in good condition;

xii. the residence was not water damaged; and

xiii. there was no presence of mould in the residence.

[69] Robert Reed denies making many of these representations. He says that in May 2013 he showed Sherene St. Cyr around the Property. He took her through the main residence. He noted the boundaries, the dock, the meadow, and the well. He showed her how the Property was maintained and cared for, including the batteries and the solar power generator, and the plug in for the heat tape on the water lines from the well, which he said sometimes needed to be plugged in briefly in the cold weather.

[70] Clayton Conner attested that he attended at the Property before closing with Sherene St. Cyr and Robert Reed, who repeated many of these same representations.

[71] Robert Reed has no recollection of the second meeting at the Property and no recollection of meeting Clayton Conner before the closing of the purchase and sale.

Experts

[72] Sherene St. Cyr relied on three expert reports prepared by David Lark, Craig Fourie, and Sara Bradley.

[73] David Lark is a mycologist specializing in microbiology and mycology. He was qualified as such without objection and capable of providing opinion evidence on the presence of mould on a sample, the species of mould, the quantity of mould on a sample assessment of the Environmental Relative Moldiness Index ("ERMI") and HERTSMI-2 and how those results should be interpreted. He prepared an ERMI Analytical Report dated June 18, 2018, of a sample of dust collected from the residence at the Property on June 4, 2018. It was found to be 27.6 and any ERMI value greater than 20 is considered to be "Very High Relative". The report recommended the source and cause of mould should be determined and remediation undertaken, in order to reduce the ERMI level to below -4 to <0.

[74] I accept David Lark's expertise and findings of mould severity in the residence.

[75] Craig Fourie has an undergraduate degree in Engineering, specializing in Environmental Engineering, obtained in 1994, and a Master's degree specializing in microbiology, obtained in 1996, from the University of Cape Town, South Africa. He spent one year at the University of Michigan on exchange during his undergraduate studies, and one year at the University of British Columbia during his Master's studies. He obtained his engineering specialization from 1996-1998 at the University of Cape

Town. He no longer practices as an engineer and has been retired since 2020, except for ongoing research in the biotoxin field.

[76] The plaintiffs sought to qualify him as an expert in microbiology, able to give an opinion on the presence of mould, the cause of mould development, the effect of mould on humans and the habitability of a residence with mould, and the remediation necessary to remove mould from a residence and prevent its recurrence.

[77] Counsel for the defendants accepted Craig Fourie's expertise in the areas of mould testing and analysing test results, the source, type, formation and location of mould in the residence. Defendants' counsel objected to the comments and observations made by Craig Fourie in his report about the structure of the residence. Craig Fourie made many gratuitous critical comments about the construction design and standards in the report. Defendants' counsel argued that Craig Fourie was not qualified to make such comments.

[78] On my request, further clarification in writing was obtained from Craig Fourie about his construction and engineering knowledge and expertise. He wrote that he had gained an understanding of building codes and structural design as they relate to the development of mould or other environmental toxins. He wrote:

> For example, I cannot comment on the specifications and requirements as to how a wall in a home should be framed and what materials should be used. However, I can comment whether materials used during construction as well as the structural design meet the building code and are likely to prevent water ingress which leads to the development of mould as this knowledge is required for the investigation, remediation and prevention of mould development.

[79] He further says that from working with other engineers and professional builders, he developed an understanding of building codes, including knowledge of the changes,

as they relate to his mould expertise. He emphasizes however, that his focus is on biotoxins and fungal pathogens, and what situations increase their likelihood, such as failures in building design and materials.

[80] He prepared a report dated November 10, 2020, about the moulds in the residence at the Property. In that report, as noted by counsel for the defendants, his comments about the structure and design of the building went beyond his expertise in biotoxins and fungal pathogens and the failures in building design and materials that would increase their likelihood.

[81] I accept Craig Fourie's expertise in microbiology and his opinion on the source, type, location, and amount of mould in the residence. I do not accept any of Craig Fourie's opinions or comments on the design and structure of the residence.

[82] Finally, the plaintiffs rely on the expertise of Sara Bradley, a structural engineer, capable of giving an opinion on construction standards in the Yukon and Canada including with reference to the National Building Code, whether a structure has any construction deficiencies including whether the structure is built to code, how deficiencies or changes to a building affect the structure, integrity and habitability of the structure, including the risk of mould, the length of time any deficiencies in construction or the effects of those deficiencies have been in existence.

[83] Sara Bradley prepared a report dated December 10, 2020, setting out her observations of the residence after two visits in 2019 and 2020, and her opinion of what Robert Reed should have told or not told the purchaser about the residence, as well as her opinion of the deficiencies in the residence.

[84] Counsel for the defendants had no objection to Sara Bradley's expertise or the scope of her opinion evidence. He objected to two parts of her report: the part where she relied on Craig Fourie's findings that were not related to mould, and the part where she opined on the representations made or that should have been made by Robert Reed.

[85] I agree with counsel for the defendants. I will disregard Sara Bradley's opinion evidence based on Craig Fourie's observations beyond his mould expertise, as well as her opinion about what representations Robert Reed should or should not have made to Sherene St. Cyr about the residence.

Mortgage payments

[86] Starting with the contract of purchase and sale, which required an addendum reducing the down payment on the Property from $200,000 to $100,000, 208, Sherene St. Cyr's company, to whom the mortgage was assigned, had difficulty making the quarterly mortgage payments in the amount required and on time. At the time the petition was filed in July 2019, 208 was behind by five payments. The following table summarizes the payments made and which ones were late:

2014	January payment made in March; April payment made on May 12; October payment late
2015	January payment made on February 25; April payment late;
2016	April and October payments late
2017	January and April payments made in June, October payment made 3 weeks late in only half the amount and second half received in February 2018

[87] In 2014, the second part of the downpayment in the amount of $100,000 that was to have been made in October was not made until the following August and October, 2015, in the amount of $50,000 in total.

[88] Robert Reed deposed that reasons for late mortgage payments provided by Sherene St. Cyr including the following:

> She frequently cited difficulties with her Alberta roofing business, the seasonal nature of roofing work, and the bank's unwillingness to lend money. On multiple occasions, she advised me by email that her financial problems were due to Alberta's economic downturn. These emails included the following statements:
>
> a. "things are super rough in Calgary now";
> b. the economic down turn "is now being called an economic crisis";
> c. "Although my income has not changed, everyone is so sketchy about the Calgary economy";
> d. "It's the economy in Calgary. The news saying it went from "downturn" to "crisis. People become hesitant to spend money.";
> e. "It will be much better come March when we are at least officially entering roofing season."

ANALYSIS

Issue A – Is a summary trial appropriate?

[89] This matter is suitable for summary trial.

[90] Both parties agree this matter is suitable for summary trial for different reasons. The difference is their approach to the potential credibility issues arising from the varying recollections of the meeting of May 2013. Counsel for the plaintiffs says that credibility is not an issue because the defendant Robert Reed has poor recollection of what occurred in May 2013 and has no recollection of the second meeting attended by Clayton Conner. As a result, plaintiffs' counsel says he should not be believed.

[91] Counsel for the defendants focuses on the contract of purchase and sale as the primary basis for the litigation due to the entire agreement clause excluding the tort claim and therefore the need to determine the representations. Further, counsel argues that this Court has previously decided matters by summary trial where there were disputed claims of misrepresentations relating to the state of the property (*Ó Murchú v DeWeert*, 2020 YKSC 41 ("*Ó Murchú"*) paras. 118-130).

[92] Rule 19 of the Supreme Court of Yukon *Rules of Court*, OIC 2022/168, allows for the determination of a matter by summary trial.

[93] This Court has adopted the test of summary trial from *Norcope Enterprises v Government of Yukon*, 2012 YKSC 25, and the British Columbia Court of Appeal *in Ferrer v Janik*m 2020 BCCA 83, cited in *Ó Murchú v DeWeert*, 2020 YKSC 24:

> [13] Rule 19 permits a party to apply to the court for judgment, either on an issue or generally, in any of the following: "(a) an action in which a defence has been filed".
>
> [14] The leading case from the Supreme Court of Yukon on the test for summary trial is Norcope Enterprises Ltd. v. Government of Yukon, 2012 YKSC 25 ("Norcope"). Following Western Delta Lands Partnership v. 3557537 Canada Inc., 2000 BCSC 54, which built on the factors set out in Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court determined that the existence of one or more of the following circumstances will be cause for a summary trial application to fail:
>
> > [28] …
> >
> > (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
> >
> > (b) the unsuitability of a summary determination of the issues is relatively obvious, e.g. where credibility is a crucial issue;

> (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.

[15] In addition to these factors, it is also necessary to consider the Supreme Court of Canada decision in Hryniak v. Mauldin, 2014 SCC 7 ("Hryniak"), decided after Norcope. Addressing in part the historical reluctance of courts to provide decisions on discrete issues separate from the rest of the litigation, the Supreme Court of Canada noted the correlation between summary trial procedures and improved access to justice. After observing that alternative processes to trial can still be fair and just and a legitimate way of resolving disputes, the Court wrote:

> [28] ...The principal goal remains the same: a fair process that results in a just adjudication of disputes. **A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found.** However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure [emphasis added].

[16] In addition to these factors, it is also necessary to consider the Supreme Court of Canada decision in Hryniak v. Mauldin, 2014 SCC 7 ("Hryniak"), decided after Norcope. Addressing in part the historical reluctance of courts to provide decisions on discrete issues separate from the rest of the litigation, the Supreme Court of Canada noted the correlation between summary trial procedures and improved access to justice. After observing that alternative processes to trial can still be fair and just and a legitimate way of resolving disputes, the Court wrote:

> [27] . . .
>
> a) whether the court can find the facts necessary to decide the issues of fact or law;

> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
>
> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
>
> ii. the amount involved;
>
> iii. the complexity of the matter;
>
> iv. its urgency;
>
> v. any prejudice likely to arise by reason of delay; and
>
> vi. the cost of a conventional trial in relation to the amount involved.
>
> [17] The Court emphasized that not all factors will be relevant in every case, and discouraged a checklist approach.

[94] Here, the summary trial on liability for defects in the Property action in contract and tort, and on the mortgage foreclosure proceeding will be determinative of a large part of the litigation and separate from the damages. The summary trial was a two-day hearing and the litigation was not otherwise extensive. It is not a waste of time or unnecessarily complex; the amounts involved are significant and the issues not novel. Although there are some credibility issues, for the reasons set out below, the case may

be decided without having to decide on the conflicting evidence, and the Court is able to find the necessary facts to decide the issues of fact and law from the affidavit evidence. There is prejudice to both parties if further delay is incurred because of the length of time that has passed since the initiation of the claim and the non-payment of the mortgage; more delay will continue to reduce the deteriorating value of the residence.

Issue B – Does the entire agreement clause in the contract of purchase and sale prevent the plaintiffs from bringing their tort claim in negligent misrepresentation?

[95] At issue in this case is whether the plaintiffs can bring a claim in negligent misrepresentation given the contract of purchase and sale between the vendor and purchaser. The plaintiffs claim Sherene St. Cyr was induced to enter the contract by Robert Reed's representations to her. I conclude that the entire agreement clause excludes a claim in negligent misrepresentation.

[96] Generally, actions in contract and in tort may be pursued concurrently unless the parties have demonstrated their intention to do otherwise in a contractual provision (see *BG Cenco International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12). This intention is normally expressed through an entire agreement clause, as exists in this case at Clause 14 of the contract of purchase and sale:

> REPRESENTATIONS: There are no representations, warranties, guaranties, promises or agreement other than those contained herein, all of which will survive the completion of the sale

[97] The Court in *Sieben v Tremmel,* 2016 ABQB 686 ("*Sieben*") at para. 69, noted there are two lines of authority: one line provides that to bar or exclude a claim in negligent misrepresentation, the entire agreement clause must specifically state that liability in negligence is excluded (see *Zippy Print Enterprises Ltd v Pawluk* (1994), 100

BCLR (2d) 55 (BCCA)). The other line of cases provides that an entire agreement clause may preclude an action in negligent misrepresentation even if there is no explicit wording to this effect (see cases at para. 63 of *Sieben*). The Court in *Sieben* noted that those decisions considered the wording of the entire agreement clause, its characterization as an exclusion clause, and the intention of the parties and their level of sophistication. For example, in *Intrawest Corp v No. 2002 Taurus Ventures Ltd*, 2007 BCCA 228 ("*Intrawest*"), the Court of Appeal for British Columbia found that the entire agreement clause excluded a claim in negligence because they were sophisticated commercial parties, the contract was not a standard adhesion contract, it included details in the disclosure statement related to the responsibilities and obligations of the parties involved, as well as a detailed description of the development at issue, and the opposing party had ample opportunity to ask questions and receive answers to concerns about the development. The Court of Appeal for British Columbia concluded at para. 59:

> … In these circumstances, where the contract was clearly intended to govern the relationship between the parties, it would not accord with commercial reality to give no effect to the entire agreement clause in determining whether Taurus can claim a tort remedy.

[98] In *Ó Murchú*, the Court followed the finding in *Intrawest*. The contract of purchase and sale in *Ó Murchú* contained the same provision as Clause 14 in the contract in this case. The plaintiff purchaser, Ó Murchú, claimed the defendant vendor had made untrue misrepresentations which the defendant denied. The defendant argued the plaintiffs could not rely on any representation that was not in the contract and this Court agreed. The plain wording of the clause in the contract precluded

reliance on any representations, warranties, guarantees, promises or agreements other than those contained in the contract. That case was similar to the case at bar in that the litigation was over defects in a residential property that gave rise to the plaintiff claiming in contract and tort, based on misrepresentations allegedly made by the vendor at the time of the entering into the contract for purchase and sale, and on a breach of conditions and warranties in the contract. Neither party was a sophisticated commercial entity.

[99] I agree with the authoritative cases that provide for an exclusion of a tort claim through the contract without requiring explicit wording to this effect. As the Court wrote in *1250810 Alberta Ltd v 1284768 Alberta Ltd*, 2010 ABQB 125:

> [48] For there to be certainty in commerce, parties to a contract must be able to rely on the written contract as representative of their respective rights and obligations, so long as there is no evidence of oppression or misrepresentation. …

[100] The Court went on to quote from the Supreme Court of Canada in *Ronald Elwyn Lister Ltd v Dunlop Canada Ltd*, [1982] 1 SCR 726 at 745:

> [48] … Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. …
>
> Those comments are probably of even more weight where the person who wants to make an offer retains a solicitor and that solicitor drafts the offer, which is later accepted by the offeree. There must be certainty in commerce.[1]

[1] The second paragraph is from *Marwood Cedar Home Ltd v Hanson Food Processing Ltd*, [1988] AJ No 109 (ABQB) at para. 55, wrongly attributed to the Supreme Court of Canada.

[101] In this case, the contract was not a standard adhesion contract. It was prepared by the lawyer for the plaintiff purchaser. It was clear and unambiguous. The need for certainty in real estate transactions supports the interpretation of Clause 14 as excluding a tort claim based on negligent misrepresentation.

[102] In the alternative, I do not accept Sherene St. Cyr relied on the representations she said Robert Reed made to her for the following reasons. She was very motivated to purchase the Property. At the time of her visit to the Property in May 2013, when she says the representations were made, she had already made two offers to purchase it that had been rejected by Robert Reed. Several times in her submissions in this matter she called it her “dream home”. She had wanted to settle in or near Atlin since first visiting the community many years earlier. She wanted to use the Property for some kind of eco-tourism business and wanted to live more off the land.

[103] Sherene St. Cyr’s lawyer drafted the contract, including the entire agreement clause. She accepted all of the conditions in the contract, including the provision that the heating, electrical, and plumbing systems were in good working order at the time of closing. However, she knew before closing that she could not obtain insurance unless she decommissioned the wood stoves and obtained a propane stove. She knew the wood stoves did not meet the building code standards. She knew that the plumbing pipes had heat tape for use in the winter. She knew a generator was required to operate the solar and wind powered electrical system from time to time. She asked no questions of Robert Reed about whether the building code requirements were met. She agreed to close the purchase and sale without a disclosure statement from Robert Reed, despite this being one of the conditions in the contract. There is no evidence of an occupancy

permit being obtained, although Sherene St. Cyr's lawyer's invoice includes an entry that a search was done, even though obtaining it was a condition of the contract. Sherene St. Cyr confirmed to her lawyer that she was satisfied with the conditions on closing. Sherene St. Cyr, her daughter, and Clayton Conner lived in a teepee on the Property from July to September 2013, with access to the residence, and so was in a position to discover more about the residence during that time.

[104] Finally, Sherene St. Cyr made no reference to the representations in any of her correspondence with Robert Reed about the mortgage payments. This seems odd, given her identification of the issues in the residence between 2015 and 2018, the monies she said she spent to address the issues, and her difficulties during that same time in meeting the mortgage payment schedule.

[105] For all of these reasons, I find that she did not rely on the representations made by Robert Reed, to induce her into the contract of purchase and sale, even if this argument were available to her.

Issue C – Do any exceptions to caveat emptor apply?

Law

[106] The doctrine of *caveat emptor*, or buyer beware, has been described in *Nixon v MacIver*, 2016 BCCA 8, as follows:

> [31] The doctrine of *caveat emptor* was colourfully summarized by Professor Laskin (as he then was) in "Defects of Title and Quality: *Caveat Emptor* and the Vendor's Duty of Disclosure" in Law Society of Upper Canada, *Contracts for the sale of land* (Toronto: De Boo, 1960) at 403:
>
> > Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or

> deficient in expected amenities, unless he protects himself by contract terms.

[107] It was further described by the Supreme Court of Canada in *Fraser-Reid v Droumtsekas*, [1980] 1 SCR 720 at 723:

> Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. … The rationale stems from the *laissez-faire* attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

[108] As stated by the Supreme Court of British Columbia in *Cardwell v Perthen*, 2006 BCSC 333, aff'd on appeal in 2006 BCCA 313:

> [120] *Caveat emptor* has been described as operating passively because the vendor need not do anything to inform himself about the state of the property being sold or the existence of any defects: that burden falls to the purchaser. A vendor therefore has no obligation to review the condition of the home in order to be able to describe to prospective purchasers which areas are worn out, in need of repair, were constructed in a shoddy fashion or to the highest standard. Partly for historical reasons and in part because the buyer is in the best position to determine the quality of the home he wishes to purchase, the law has put the onus on the purchaser to determine the state and quality of the property being sold.

[109] There are exceptions to the applicability of *caveat emptor*. Many cases have described them as:

1. where the vendor fraudulently misrepresents or conceals;

2. where the vendor knows of a latent defect rendering the house unfit for human habitation;

> 3. where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
>
> 4. where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.

See *McCluskie v Reynolds* (1998), 65 BCLR (3d) 191 at para. 53.

[110] A defect has been defined as a fault in a component of improvements to real property, such as a "shortcoming or a failing or as the lack of something essential": *Connie v Sampson*, 2009 ABPC 61 at para 20, quoted in *Lewis v Plourde*, 2017 ABQB 235 ("*Lewis*") para 194. There are two kinds of defects: (i) patent defects - apparent or visible by conducting a reasonable inspection and making reasonable inquiries about the property's condition; and (ii) latent defects - not discoverable by observation and reasonable inquiry and inspection.

[111] The Court in *Lewis* provided a clear summary of the different obligations on the vendor depending on the nature of the defect:

> [198] …[A] vendor's obligation to disclose a defect in their real property is determined by whether the defect is a patent defect or a latent defect. *Caveat emptor* applies to patent defects in real property. Patent defects are those defects that are discoverable by reasonable inspection and ordinary diligence on the part of the purchaser, such as making reasonable inquiries into the property's condition. The vendor has no legal obligation to bring patent defects to the purchaser's attention. Thus, for patent defects, the purchaser is obliged to rely on their own personal inspection. A purchaser not only has an obligation to inspect but also an obligation to inquire. In the result, unless a vendor has actively concealed a patent defect, *caveat emptor* applies to protect a vendor from liability to remedy such defects.
>
> [199] A latent defect is a fault in a component of the improvements that could not be detected by an ordinary purchaser on reasonable inspection of the property. For that reason, a latent defect known to a vendor must be disclosed

> to the purchaser. Silence and half-truths as to the existence of defects can be an actionable misrepresentation: *Palmer v Van Keulen*, 2005 ABQB 239 at para 23; *Wright v Lyons* 2013 ABQB 20 at para 35 [*Wright*]. The vendor need not have actual knowledge of the latent defect if the vendor was reckless as to whether there was a defect or not in his property or had subjective knowledge of the undisclosed latent defect in his property: *Cardwell* at paras 123 and 128-130. If the vendor fails "to disclose to a purchaser a known latent defect, *caveat emptor* will not bar a purchaser's claim for damages resulting from such failure to disclose": *Gibb v Sprague*, 2008 ABQB 298 (Alta Q.B.) at para 19 [*Gibb*].

[112] In addition to this, the latent defect in order to fall within one of the exceptions to *caveat emptor* must be one that makes the property unfit for habitation. The onus is on the purchaser to prove the requisite degree of knowledge or recklessness on the part of the vendor. "The extent of the purchaser's obligation to inspect and make inquiries as to the state of the property may well be the determining factor as to whether a defect is patent or latent: Gibb at para 20" (*Lewis* at para. 200).

Defects in this case – patent or latent?

[113] The plaintiffs claim generally that they thought they were purchasing a home with operational systems suitable for year-round living for a family. They learned after living there for a period of time that there were defects in the heating, plumbing, and electrical systems, that there was non-compliance with the applicable building code, there was water in the basement, inadequate drainage, water damage, and mould was present. Specifically, the plaintiffs allege:

a) the heating system was not suitable for heating the residence for a family through the winter. There was insufficient insulation and vapour barrier to allow for any heating system to keep the residence sufficiently heated during the winter;

b) the pipes carrying water from the well froze continuously. The heat tape was required to be used, which in turn required use of the generator;

c) the solar and wind powered electrical system did not function well without the continuous operation of the generator ; and

d) the metal roof was not in good condition, the eavestroughs and gutters were poorly positioned, allowing water to enter the house, and the basement was not well sealed, so that water entered the basement.

[114] These defects resulted in a lack of suitability of the residence for full time occupancy by a family. This is the conclusion of the expert Sara Bradley in her report and her evidence is undisputed. Nor is there any dispute that there was mould in the residence, as noted by the expert mycologist David Lark and the environmental engineer Craig Fourie. The question is whether these defects were patent or latent, and if latent, were they covered by one of the exceptions to *caveat emptor*. I conclude the defects were patent, except for one, and the exceptions to caveat emptor do not apply.

[115] Sara Bradley's report was written after she visited the Property on two occasions - October 2019 and September 2020. No one had lived there since the end of May 2018. Her inspections were visual, except for removing a small piece of the corner wood trim, and a piece of the interior wood board finish to observe the inside face of the log construction. Her report focuses on the minimum building standards for year-round residential occupancy and the prevention of water ingress.

[116] Sara Bradley concluded the upgrades to the original log cabin built in 1970, and suitable for seasonal occupancy only, were insufficient to meet the construction

standards or the necessary requirements to allow the building systems to support full-time occupancy.

[117] Sara Bradley was able to see in the north bedroom addition the insulation was flush with the top of the ceiling joist, amounting to approximately R12 insulation (four inches), as opposed to the R60 Yukon requirement in the applicable 1990 National Building Code. By removing the small area of interior finishes, she observed black building paper between the log walls and the finishes. She observed this as well on the north end and east sides of the building. Robert Reed testified on examination for discovery that there was no insulation between the exterior siding and wall. Sara Bradley did not confirm whether there was insulation in the roof between the ceiling and roof deck but if there were, she concluded the insulation values would be low because the roof assembly was not thick. She was able to observe that roof assemblies were not insulated or remediated to maintain indoor temperatures or provide ventilation and barriers to prevent condensation; although she said at that point there were only minimal effects on the residence of condensation because it had only six discontinuous years of full-time occupancy. However, the expected impacts of failure of the insulation, vapour barrier and air barrier to be code compliant were that heating appliances would be unable to maintain an adequate indoor temperature in order to provide a comfortable living space, or to prevent water supply pipes and drainpipes from freezing. Heat would continuously escape from the walls and roof, resulting in melting roof snow, and causing ice damming at the eaves and condensation within the wall and ceiling assemblies.

[118] Further, Sara Bradley noted that the basement floors were not covered with moisture barriers, footings were deficient, undermined and failing, and the foundation

walls showed significant moisture damage. The site drainage and foundation wall drainage were insufficient. The gutters that were installed were ineffective at collecting and redirecting roof water. All of this allowed for water ingress that she said had been occurring since 2013.

[119] The ability of Sara Bradley to arrive at these conclusions after two visual inspections shows that these defects were patent. In addition, the plaintiffs had knowledge of other information before the closing date:

a) Heating system - the minimal insulation in the ceiling and roof was visible. Sherene St. Cyr was unable to get home insurance with the three wood stoves, unless she decommissioned two and installed a propane stove, which she did, resulting in a later closing date. The lack of insulation and the effects of heating through wood stoves were patent and she knew before closing the wood stoves did not meet code requirements.

b) Plumbing pipes - the heat tape on the pipes and the plug-in system were visible on inspection or walk through. The pipe connections were in a room in the basement with a closed door that could have been opened and viewed at any time, including during an inspection or walk through. The use of heat tape on the pipes in the winter was acknowledged by Robert Reed. The likelihood of the pipes freezing was patent.

c) Electrical system - the plaintiffs have not specified what was not working properly in the solar and wind powered electrical system requiring replacement of everything except the inverter and Sara Bradley did not address the electrical system in her report. Robert Reed advised the

house had never had more than two occupants, and the electrical system was in good working order at purchase. The presence of five people in the household placed additional pressure on the electrical system that was unanticipated by the vendor. At the time of the purchase, Robert Reed was unaware of any family of Sherene St. Cyr other than her young daughter. He learned of her partner Clayton at some point after the contract was signed. He had no knowledge that Sherene St. Cyr's nieces were planning to live there and of course did not know about the other two children as they had not been born in 2013. However, without any detail of why the solar and wind powered electrical system was inadequate, it is not possible to assess the nature of any defect.

d) Water ingress - the condition of the metal roof was visible.

Sherene St. Cyr owned and operated a roofing business and presumably had knowledge of roof conditions. The positioning of the eavestroughs and gutters could be observed. The massive rock occupying half of the basement was obvious and the absence of any sealing against the footings and foundation wall was visible. Although Sara Bradley concluded that there was water ingress and water damage beginning in 2013 and possibly earlier, all parties stated they saw no evidence of water in the residence in 2013. Robert Reed had no knowledge of any water ingress, from his own experience or from George Reed, Bonnie Traplin, or the Pelletiers. In fact, the plaintiffs stated the first time they were aware of water entering the residence was in the spring of 2016, after the snow

melt. During the second visit to the Property by Sherene St. Cyr and the first visit by Clayton Conner before closing, they observed Robert Reed working on the eavestroughs. If they had concerns, they could have made reasonable inquiries at that time but there is no evidence that they did. Anything related to water ingress was a patent defect.

e) Mould - there was no evidence of any mould in the residence until 2018. Robert Reed was not aware of the presence of mould from his own experience at the Property, or from George Reed, Bonnie Traplin, or the Pelletiers.

[120] One aspect of the defects is not patent. The absence of a proper vapour barrier and air barrier, and the lack of sufficient insulation in the walls were not visible defects. According to the expert Sara Bradley, these barriers and insulation form the "building envelope" and it was inadequate to keep the residence properly heated and moisture free (in the longer term) all year round. The upgrades did not include improving the building envelope in any part of the residence to allow for the heating system to function well.

[121] The question is whether Robert Reed knew of this latent defect and did not disclose it or was reckless in the truth or falsity of the information he provided that the residence was suitable for all year round living for a family, at least a family of two to three. A further question is whether the inadequate building envelope was a dangerous latent defect.

[122] Robert Reed was minimally involved in the upgrades in the main residence. The main construction was done by a carpenter, supervised by George Reed, now

deceased. Robert Reed's contributions were: construction of the well house and the pipes connecting the well to the house; installation of the solar and wind power electrical system; and helping with the exterior siding on the main residence. None of this work would have given him first-hand knowledge of vapour and air barriers, and insulation in the residence. Robert Reed did not actively conceal information that he knew about the Property and its condition.

[123] Further, the plaintiffs have not proved that Robert Reed was reckless about the truth or falsity of information about the suitability of the residence for year round family living. All systems were in working order at the time of the sale. He provided information within his knowledge and answered all questions put to him. He helped the plaintiffs with the electrical system and batteries after closing. He was forthright about the off-grid nature of the Property and that it had been upgraded from a cabin. His employment of regular caretakers and his continual presence every year to do maintenance, as well as his explanations to Sherene St. Cyr during the May 2013 visit showed the diligence necessary to ensure such an off-grid property remained habitable. At the time of the two previous offers and the May 2013 visit, he had only met Sherene St. Cyr and her daughter and was entitled to assume that her family was the two of them, in addition to Clayton Conner whom he met at some point after the contract was signed. There is no evidence he was asked about the suitability of the residence for more than a family of two or three people.

[124] It is likely that the existence of an inadequate building envelope was a latent defect that did affect the residence's fitness for habitation. However, the plaintiffs have

not proved Robert Reed's knowledge of the latent defect, or recklessness about the truth or falsity of any statement related to it.

Obligation on the purchaser to inspect as part of *caveat emptor*

[125] Sherene St. Cyr had an obligation as part of *caveat emptor* to ensure she understood the implications of what she was seeing on this unique off-grid Property. She cannot rely on Robert Reed or AHL as vendors to also be inspectors for her purchase of the Property.

[126] Contrary to what counsel for the plaintiffs has argued, the vendor has no legal obligation to bring patent defects to the purchaser's attention (*Lewis* at para 198). In this case, Sherene St. Cyr argues that Robert Reed, the vendor, stood in the shoes of an inspector. She says she relied on Robert Reed's knowledge of and experience with construction as well as his direct involvement at the Property in helping with the upgrades in the residence and with the ongoing maintenance. Her trust in his knowledge and experience, along with her personal relationship with him which increased her level of trust, led her to waive the requirement of an inspection. She characterized the visit to the Property in May 2013 as an inspection for those same reasons.

[127] At the same time, Sherene St. Cyr attested that the purpose of the meeting in May 2013 was to find out how an off-grid property powered by solar and wind and heated with wood worked. She took video and made notes, as Robert Reed explained how things worked at the Property. She did not ask for any of the content of the video or notes to be added to the conditions of the contract of purchase and sale.

[128] Robert Reed characterized the May 2013 visit to the Property not as an inspection but a viewing and a form of education about an off-grid property. It was to help Sherene St. Cyr to decide whether to make a third offer to purchase.

[129] Robert Reed's characterization of the May 2013 visit is more consistent with the facts as described by both of them. It was Sherene St. Cyr's first time on the Property, despite making two previous offers to purchase that were rejected, and he was explaining to her how the electrical, heating, and plumbing systems operated, as well as showing her the features of the Property.

[130] I do not accept that Robert Reed acted as an inspector on behalf of Sherene St. Cyr, thereby obviating her obligation to make reasonable inquiries and ensure she understood fully the implications of what she was seeing. He was the vendor of the Property and she was a prospective purchaser. He had never lived in the residence and Sherene St. Cyr knew that. In fact, it had been vacant except for the caretakers checking on it regularly for ten years. The purchase was not a "handshake deal" as counsel for the purchaser characterized it. The Property was listed and advertised through two realtors. The first two offers were made by Sherene St. Cyr through realtors. The contract of purchase and sale was a formal one, drafted by Sherene St. Cyr's lawyer. While negotiations were friendly, and a vendor take-back mortgage was agreed to, the price was close to the listed advertised price and there were no special arrangements or conditions that might be evident in a non-arms length transaction. Sherene St. Cyr cannot rely on the visit in May 2013 as an inspection provided by the vendor, thereby relieving her of any responsibility to discover the patent defects.

[131] A patent defect includes one that may not be visible on a casual inspection, but discoverable upon a reasonable inspection by a qualified person (*444601 BC Ltd v Ashcroft (Village)*, [1998] BJC No 1964 (BCSC). The Supreme Court of British Columbia stated that in some cases this "necessitates a purchaser retaining the appropriate experts to inspect the property" (*Cardwell et al v. Perthen et al,* 2006 BCSC 333 at para. 122). The Court of Appeal for British Columbia in that same case (*Cardwell* BCCA) dismissed this ground of appeal by the purchaser and clarified the Supreme Court's statement on this point at para. 48:

> … A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility – and liability – on the vendor to bring those things to her or her attention.

[132] In this case, Sherene St. Cyr admitted she had never lived in an off-grid property before and had no knowledge of its operation or requirements. She could not be expected to understand fully the implications of what she was seeing and what was required based only on her own experience. As Robert Reed deposed, "living off grid requires a commitment to diligent maintenance and management of equipment and facilities and an understanding of how the various systems work and can work together to mitigate any issues." And further, "living off grid is a very different lifestyle compared to city living, requiring knowledge and understanding of the electrical and other systems. You have to monitor the voltage in batteries and amperage draws and percentage of

batteries. You cannot operate too many electrical appliances at one time as it will draw the batteries down. All of the amenities of city living may not be available in off-grid living."

[133] Sherene St. Cyr knew this was a unique, off-grid property in a remote and beautiful location. This was in large part the attraction of the Property to her, and why she made two previous offers to purchase without visiting the Property.

[134] Sherene St. Cyr took a risk. She chose not to seek the opinion of a professional inspector, even knowing the unusual nature of the Property. If she had done so, many, if not all, of the defects she later complained of would have been apparent. Even the latent defect of the building envelope may have been raised during a professional inspection, given the visibility of the R12 ceiling insulation to Sara Bradley on visual inspection, and the general condition of the log home part of the residence. At the very least, an inspection could have reinforced the importance of ensuring the need for knowledgeable, ongoing maintenance, inspection, and repair of an off-grid property in a remote area.

Corporate identification doctrine

[135] The plaintiffs say AHL as the vendor must have the knowledge and actions of all its past and present directors, including George Reed, Bonnie Traplin, and Robert Reed attributed to AHL. As George Reed had much more involvement in the upgrading, he would have been aware of all the deficiencies, including the latent defects and therefore AHL was aware of the deficiencies, and liable for breach of contract. The defendants did not respond to this argument.

[136] The case relied on by the plaintiffs, *Cosmetology Industry Assn of British Columbia v Nguyen*, 2010 BCSC 1051 at para. 74, does not address the situation where one of the directing minds of the corporation is deceased. It is difficult to imagine how a corporation, which "is an abstraction" with "no mind of its own" can be liable because of the imputation to it of information within the knowledge of the deceased person. In addition, George Reed had no knowledge of the sale of the Property, commenced after his death, and could not benefit from the sale. He was no longer part of AHL at the time of the sale. The corporate identification doctrine does not apply in this context.

Issue D– Was there a breach of contract?

[137] There was no breach of contract because the purchaser accepted that the conditions set out in the contract of purchase and sale were met or waived. No deficiencies were raised, and the condition of the Property was accepted on closing, evidenced by the confirming letter of the purchaser's lawyer.

[138] Most of the defects were patent and visible on inspection by a qualified person who understood the implications of what they were seeing. The plaintiffs chose not to inspect and the vendor was not an inspector for his own property.

Issue E – Is the mortgage in default?

[139] AHL is entitled to judgment as a result of the default on the mortgage. The defendants' mortgage action is granted to the following extent:

i. a declaration that default has been made under the mortgage;

ii. a declaration that the mortgage charges the Property and ranks in priority to the interests of the Property of 208 and its employees, officers,

directors, shareholders, administrators, successors, and assigns and all persons claiming by, through, or under it;

iii. a declaration that all monies owing under the mortgage are due and payable to AHL;

iv. an order fixing the redemption period for the mortgage as 6 months, or in the alternative at such period as this Court shall determine.

[140] The amounts of redemption, default in payment of the redemption amount, judgment required to redeem the mortgage, interest and costs are adjourned for further submissions from counsel, specifically to address the discrepancy in the amount owing under the mortgage.

CONCLUSION

[141] The plaintiffs' action is dismissed. The mortgage action is addressed under Issue E above.

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DUNCAN C.J.