SUPREME COURT OF YUKON

Citation: *Ó Murchú v. DeWeert*, 2020 YKSC 41

Date: 20201027
S.C. No. 19-A0030
Registry: Whitehorse

BETWEEN:

TRAOLACH Ó MURCHÚ and BRIONI CONNOLLY

PLAINTIFFS

AND

LEONARD LEE DEWEERT, SANDRA LYNN DEWEERT, INSITE HOME INSPECTIONS and KEVIN NEUFELD

DEFENDANTS

Before Madam Justice G.M. Miller

Traolach Ó Murchú	Appearing on behalf of the Plaintiffs
James R. Tucker	Counsel for the Defendants, Leonard Lee DeWeert and Sandra Lynn DeWeert

REASONS FOR JUDGMENT
SUMMARY TRIAL

INTRODUCTION

[1] The Plaintiffs, Traolach Ó Murchú and Brioni Connolly (the "Plaintiffs"), have claimed against the Defendant vendors of their home, Leonard and Sandra DeWeert; the Defendant home inspector, Kevin Neufeld; and his company, Insite Home Inspections, for alleged defects in the condition of the home they purchased October 20, 2017.

[2] The Plaintiffs have sued Leonard Lee DeWeert and Sandra Lynn DeWeert (the "Defendants"), jointly, for having made misrepresentations to the Plaintiffs when they

entered into a Contract of Purchase and Sale (the "Contract") for the sale of property legally described as Unit B, CC136, Hillcrest Subdivision, Whitehorse, Yukon Territory, (the "Property"). The Plaintiffs have also sued the DeWeerts for having allegedly breached the Contract. The Plaintiffs claim that the DeWeerts breached conditions contained in the Contract and also that they have breached warranties provided in the Contract.

[3] The Defendants, Leonard Lee DeWeert and Sandra Lynn DeWeert, bring an application for summary trial seeking orders that:

a) Judgment is granted generally in favour of the Defendants Leonard Lee DeWeert and Sandra Lynn DeWeert;

b) The claim of the Plaintiffs against the Defendants, Leonard Lee DeWeert and Sandra Lynn DeWeert, is dismissed in its entirety; and

c) Costs are granted in favour of the Defendants, Leonard Lee DeWeert and Sandra Lynn DeWeert, against the Plaintiffs, to be assessed.

[4] The Plaintiffs submit that their claims against the DeWeerts are not appropriately dealt with at a summary trial and seek orders that:

a) The application be dismissed as the issues raised in the application are deemed unsuitable for way of resolution by summary trial;

b) In the alternative, judgment in favour of the Plaintiffs on the issues raised for reasons outlined herein; and

c) Costs for the summary trial be awarded to the Plaintiffs on a party and party basis.

[5] At their request, the Plaintiffs attended and participated in the summary trial by teleconference. Partway through, the telephone connection became so poor that at the request of the Court the Plaintiffs attended and participated in the rest of the summary trial by video conference.

[6] It was the position of the DeWeerts that the Plaintiffs' claim that the DeWeerts breached conditions precedent in the Contract must fail because the conditions precedent in the Contract merged when the sale closed and the title to the Property passed to the Plaintiffs. It was further the position of the DeWeerts that the Plaintiffs claim of breach of the warranty of no encroachment must fail as there was no encroachment.

[7] By the conclusion of the hearing of the summary trial, the Plaintiffs conceded that summary judgment should be granted with respect to their claim of encroachment. In fact, they indicated they were formally abandoning that claim. This claim is pleaded at para. 24 of the Statement of Claim.

[8] Further, the Plaintiffs ultimately agreed with the DeWeerts' position as it pertained to the merger of the conditions precedent, in para. 6 of the Contract, when the sale of the property closed. It was clear that both sides took the position that this legal principle applied and took effect in respect of the conditions precedent only. These are set out in para. 6 of the Contract of Purchase and Sale. The claims in respect of the conditions precedent are pleaded at paras. 25 and 26 of the Statement of Claim.

[9] The claims set out at paras. 24, 25 and 26 of the Statement of Claim are therefore dismissed. The determination of the remaining relief sought by the DeWeerts is discussed below.

The test for summary trial

[10] The Defendants Neufeld and Insite Home Inspections brought an application for summary trial about the validity and enforceability of part of the limitation of liability clause in the Inspection Agreement. The DeWeert Defendants were not part of that application. On June 19, 2020, Duncan J. [as she then was] decided that that matter was not appropriate to be decided by way of summary trial.

[11] Duncan J. set out the test for a summary trial in that earlier application for summary trial in this case brought by the Defendants Neufeld and Insite Home Inspections. That decision, reported at 2020 YKSC 24, summarizes the test as follows:

> [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] The British Columbia Court of Appeal in *Ferrer v. Janik*, 2020 BCCA 83, (*"Ferrer"*) summarized the factors set out by the authorities in British Columbia, and included *Hryniak*, for consideration of whether a summary trial is appropriate to determine one or some of the issues in a lawsuit:

> [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.

[12] The DeWeerts and the Plaintiffs agree that this is the applicable law for this summary trial.

Evidence

[13] In the Summary Trial, the DeWeerts relied on the following evidence:

1. The August 21, 2020, Affidavit of Leonard DeWeert;
2. The August 21, 2020, Affidavit of Sandra DeWeert;
3. The August 13, 2020, Affidavit of Lee Carruthers;
4. The October 1, 2020, Affidavit of Matthew Wilkinson;
5. Notice to Admit of the Defendants Leonard Lee DeWeert and Sandra Lynn DeWeert, to the Plaintiffs, served July 28, 2020;

6. Plaintiffs' Response to the Notice to Admit of the Defendants Leonard Lee DeWeert and Sandra Lynn DeWeert, served August 19, 2020;
7. Transcript from the Examination for Discovery of the Plaintiff Traolach Ó Murchú, p. 42 Line 23 to p. 48, Line 5;
8. An undated Expert Report of Christian Schmidt, ACS Mechanical; and
9. The September 24, 2020, Sur-Reply Report of Christian Schmidt, ACS Mechanical.

[14] While the written inspection report of Kevin Neufeld is referenced in the DeWeerts' material, counsel for the DeWeerts indicated at the case management conference that they would not be relying on that report for its truth.

[15] In the summary trial, the Plaintiffs relied on the following evidence:

1. The May 7, 2019, Affidavit of Traolach Ó Murchú;
2. The September 23, 2019, Affidavit of Traolach Ó Murchú;
3. The October 22, 2019, Affidavit of Traolach Ó Murchú;
4. The April 14, 2020, Affidavit of Traolach Ó Murchú;
5. The September 23, 2020, Affidavit of Traolach Ó Murchú;
6. The October 2, 2020, Affidavit of Traolach Ó Murchú;
7. The April 14, 2020, Affidavit of Brioni Connolly;
8. The May 4, 2020, Affidavit of Brioni Connolly;
9. The August 26, 2020, Affidavit of Stuart Massey;
10. The September 29, 2020, Affidavit of Terry Atkins;
11. The October 1, 2020, Affidavit of Gary Dunkin;
12. An April 16, 2019, Draft Expert Opinion of Ed McCudden; and

13. A September 3, 2020, Oil Furnace Installation Opinion Report of Neil McPherson.

[16] The Plaintiffs objected to the filing, as part of the Chambers Record, of the Sur-Reply Report of Christian Schmidt dated September 24, 2020. This report was provided well after the September 8, 2020, filing deadline for expert reports for trial. This sur-reply was in response to the McPherson report, which I permitted the Plaintiffs to file, also past the deadline, for use solely at this summary trial. In the interests of fairness I permitted the DeWeerts to file this September 24, 2020, Schmidt sur-reply for the same limited purpose.

[17] The Plaintiffs objected to the August 21, 2020, Affidavit of Leonard Lee DeWeert on the basis that it contains hearsay evidence at paras. 5, 7, 8 and 16. The Plaintiffs submitted that these paragraphs should be deemed inadmissible.

[18] After hearing argument I determined that para. 5 contains no hearsay, but rather an assertion that Mr. DeWeert was *not* told something. Paragraphs 7 and 8 contain statements attributed to persons other than Mr. DeWeert but are not relied on for their truth, simply that he heard them. Paragraph16 references a conversation with Lee Carruthers. This again is not relied on for its truth, and Mr. Carruthers provided affidavit evidence and was available for cross-examination.

[19] I therefore did not strike any part of Leonard DeWeert's August 21, 2020, Affidavit.

[20] At the September 17, 2020, case management conference for this summary trial the Plaintiffs indicated they wished to cross-examine Leonard DeWeert, Lee Carruthers and Christian Schmidt. The DeWeerts agreed to make these witnesses available for cross-examination. Leave was given to cross-examine these witnesses at the summary

trial, limited to one hour for each witness. In a communication to the trial coordinator September 30, 2020, Mr. Ó Murchú copied to opposing counsel, the Plaintiffs indicated they would not be cross-examining these witnesses at the summary trial.

[21] The summary trial proceeded on the basis of evidence in affidavit form, the written outlines of the DeWeerts and the Plaintiffs, including legal argument, and the oral submissions of counsel for the DeWeerts and of the Plaintiffs.

The Notice to Admit

[22] On July 28, 2020, counsel for the DeWeerts sent a Notice to Admit to the Plaintiffs asking them to admit a number of facts. Twenty-two days later, the Plaintiffs delivered a response to the Notice to Admit to counsel for the DeWeerts. The Rule requires a Response within 21 days and the deadline for delivery is 4:00 p.m. The response in this case was delivered at 4:57 p.m. rather than 4:00 p.m. on the 21st day, which, by operation of the Rule deems it to have been delivered on the following day.

[23] The DeWeerts submitted that the fact that the response to the Notice to Admit was delivered out of time alone means that the written statement provided in response was not compliant with Rule 31(2) of the *Rules of Court*, and the facts and documents contained in the Notice to Admit are therefore deemed to be true and authentic.

[24] I exercised my discretion pursuant to Rule 3(2) to extend the time for delivery so that the Plaintiffs could rely on their Response to the Notice to Admit.

[25] In their response to the Notice to Admit, the Plaintiffs admitted the following facts:

a. That the Plaintiffs took possession of the Property on October 20, 2017.

b. That, to the best of their recollection, they moved into the Property during the first or second week of November 2017.

c. That the lights in the Property functioned when turned on from when they started living there to December 24, 2017.

d. That the refrigerator in the Property functioned from the time they started living there to December 24, 2017.

e. That the electric water heater did provide heated water to the Property from the time they started living there to December 24, 2017.

f. That they did not observe smoke coming from the wiring or the electrical system in the Property from October 20, 2017, until December 24, 2017.

g. That water came out of the tap in the kitchen sink when the faucet was turned on from when they started living there to December 24, 2017.

h. That water came out of the tap in the washroom sink when the faucet was turned on from when they started living there to December 24, 2017.

i. That the toilet in the house flushed after the handle on the toilet had been pressed from when they started living there to December 24, 2017.

j. That the water storage tank on the toilet refilled with water after each time the toilet had been flushed from when they started living there to December 24, 2017.

k. That the clothes washer in the Property worked when it was turned on from when they started living there to December 24, 2017.

[26] There is no issue that the DeWeerts may rely on these admissions.

[27] In addition, the DeWeerts further submit that the written statement provided in response to the Notice to Admit was improper and inadequate. This is based on the Plaintiffs simply stating, "Not admitted", to a number of the facts they were requested to

admit, without setting forth in detail the reasons why they could not make the admission, as required by Rule 31(2).

[28] The DeWeerts submit that Rule 31(2) is the same as Rule 7-7(2) of the British Columbia Rules of Court, and they rely on the decision of *Skillings v. Seasons Development Corp*., [1992] 70 B.C.L.R. (2d) 14 (B.C.S.C.) ("*Skillings*"), which at paras. 5-11 provides that a reply to a Notice to Admit is improper and inadequate if it does not deny the truth of the facts sought to be admitted nor set out reasons in detail for not making the admissions. In such circumstances, it is mandatory that the facts are deemed admitted.

[29] On that basis, the Plaintiffs would be deemed to have admitted the following facts:

> 3.b. That during the period from October 20, 2017 until December 24, 2017 the heating system in the house kept the interior of the house on the Property at approximately the temperature set on the thermostat in the house on the Property.
>
> 3.c. That during the period from October 20, 2017 until December 24, 2017 the electrical system in the Property functioned and the Plaintiffs were able to use appliances and devices which required electricity in the Property.
>
> 3.e. That during the period from October 20, 2017 until December 24, 2017 the stove in the Property functioned when turned on.
>
> 3.g. That during the period from October 20, 2017 until December 24, 2017 the Plaintiffs were able to and did plug in and operate small electrical appliances to the outlets in the Property, and the appliances operated.

3.j. That during the period from October 20, 2017 until December 24, 2017 the Plaintiffs did not observe any leaks from any part of the plumbing system in the Property.

4. That on October 20, 2017, the electrical system in the Property functioned properly with no apparent problems or difficulties.

5. That on October 20, 2017, the electrical system in the Property was in good working order.

6. That on October 20, 2017, the plumbing system in the Property functioned properly with no apparent problems or difficulties.

7. That on October 20, 2017, the plumbing system in the Property was in good working order.

8. That on October 20, 2017, the heating system in the Property functioned properly with no apparent problems or difficulties.

9. That on October 20, 2017, the heating system in the Property was in good working order.

10. That on October 20, 2017, the mechanical system in the Property functioned with no apparent problems or difficulties.

11. That on October 20, 2017, the mechanical system in the Property was in good working order.

[30] At the commencement of the summary trial, the Plaintiffs indicated they had served, but not filed, an Amended Response to the Notice to Admit, which they believed addressed the deficiencies set out at para. 43 of the Defendant's outline. They sought to

withdraw their original Response to the Notice to Admit and to replace it with their Amended Response.

[31] After hearing submissions, I determined that it would be in the interests of justice, as discussed in *Skillings*, to permit the Plaintiffs to withdraw their original Response to the Notice to Admit and to replace it with their Amended Response. In coming to that conclusion, I took into account the impact on the DeWeert Defendants who relied on the deemed admissions in bringing the summary trial application. However, I concluded that as the Plaintiffs had never intended to make admissions by responding "Not admitted", it would be in the interests of justice that the Court have the more fulsome responses they submitted which are supported by the evidence before the Court. I determined that it would be in the interests of justice that this summary trial be decided on the basis of actual rather than technical admissions.

[32] The Amended Response to the Notice to Admit contains these amended responses:

> 3b. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017.
>
> 3c. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017.
>
> 3e. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. One of the rings on the stovetop did not work and one of the bottom oven elements did not work properly.

3g. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. The breaker switches often tripped if we plugged a couple of appliances, or phones, or lights into the same electrical outlet.

3j. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. The bathroom sink was leaking underneath.

4. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. From December 25 onwards, we learned of problems with this system and this system had not been altered by us.

5. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. From December 25 onwards, we learned of problems with this system and this system had not been altered by us.

6. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. On or around September 6, 2020, we learned of problems with this system and this system had not been altered by us. We later learned from admissions made by Mr. DeWeert under examination and from an affidavit from Stuart Massey, that the water pipes had frozen and burst in January 2017 and the damage was neither investigated properly or repaired properly by the DeWeerts.

7. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. On or around September 6, 2020, we learned of problems with this system and this system had not been altered by us. We later learned from admissions made by Mr. DeWeert under

examination and from an affidavit from Stuart Massey, that the water pipes had frozen and burst in January 2017 and the damage was neither investigated properly or repaired properly by the DeWeerts.

8. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. On December 27, 2020, we learned that the Furnace heating System was improperly installed and unsafe and it had not been altered by us. In August 2020, we learned from former tenants that the Furnace Heating System was not in good working order before we purchased the Home.

9. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. On December 27, 2020, we learned that the Furnace heating System was improperly installed and unsafe and it had not been altered by us. In August 2020, we learned from former tenants that the Furnace Heating System was not in good working order before we purchased the Home.

10. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. In January 2018, we learned that the warm air supply ducting in the Home was made of combustible materials which were totally inappropriate for carrying heat. Beyond that, we don't fully understand what is meant by mechanical systems as it applies to the Home.

11. Not admitted. We moved in over the course of a few weeks. To the best of our recollection, we started living there sometime during the first or second week of November, 2017. In January 2018, we learned that the warm air supply ducting in the Home was made of combustible materials which were totally inappropriate for carrying heat. Beyond that, we don't fully understand what is meant by mechanical systems as it applies to the Home. (underlining in original)

[33] All of these evidentiary issues were resolved for the purposes of the summary trial before commencing the submissions of the parties as to the appropriateness of a summary trial and on the substantive issues sought to be decided on the summary trial.

Positions of the Parties as to the Appropriateness of a Summary Trial

The Position of the DeWeerts

[34] The DeWeerts submit that the issues raised by the Plaintiffs with respect to them are discrete from the claims made against the other Defendants, and by their nature, are capable of being dealt with in summary fashion.

[35] The DeWeerts submit that the Plaintiffs' claims against the DeWeerts are rooted in the Contract. The terms of the Contract are clear and not in dispute. It is their position that this application can be decided without having to address significant issues of credibility.

[36] The DeWeerts further submit that this matter is currently scheduled for five days of trial, and the Plaintiffs have provided a list of 19 potential witnesses. The parties have been ordered to provide direct testimony of their witnesses by affidavit, and to have the witnesses available for cross-examination. The DeWeerts submit that even still, there is a significant likelihood that the trial of this matter will take longer than five days.

[37] The DeWeerts submit that this summary trial application will take one to two days and, if successful, completely dispense with the claims of the Plaintiffs against them. It will thereby save the time and expense of participating in a full trial of the matter. They characterize the rest of the claims brought by the Plaintiffs against the other Defendants as distinct and “complicated”.

[38] The DeWeerts submit that not only are the issues in this summary trial application entirely determinative of the litigation against them, but all of the evidence necessary to make those determinations is available in the application materials.

[39] The DeWeerts further submit that if this summary trial application is successful, there will not be any possibility of duplication or inconsistent findings from a trial of the remaining issues with the Defendant Kevin Neufeld, as the issues in this action regarding Mr. Neufeld arise out of a separate contract between the Plaintiffs and Mr. Neufeld and his performance of a property inspection.

[40] As well, the DeWeerts submit that while the Plaintiffs have claimed damages in the amount of over $250,000, the actual damages in relation to the claims brought against the DeWeerts are relatively small. The DeWeerts submit that the Plaintiffs have no evidence that the DeWeerts breached the warranties they provided in the Contract. Damages for breach of warranty are limited to the cost of repairs for the warranted items. Applying the principle of proportionality, the DeWeerts submit that a summary trial is the appropriate venue to resolve the issues before the Court.

[41] The DeWeerts submit that the cost of proceeding to trial in this matter is disproportionate to the amount reasonably sought by the Plaintiffs against the DeWeerts.

The Position of the Plaintiffs

[42] As noted above, during the hearing of the summary trial, the Plaintiffs abandoned their claim in respect of encroachment and agreed with the position taken by the DeWeerts on the conditions precedent.

[43] The Plaintiffs submit that this application for summary trial on the remaining issues should be dismissed on the face of the written submissions alone because it is apparent that the issues raised are not suitable for resolution by way of summary trial.

[44] The Plaintiffs submit that the August 21, 2020, Affidavit of Leonard Lee DeWeert, in which he says he relied upon information obtained from others makes clear the need for additional evidence. The Plaintiffs submit that they need more time to locate these people, talk to them, and put their evidence on the record.

[45] In respect of this submission I note that it is expected that participants in a summary trial will "put their best foot forward". It is generally not a proper objection to a summary trial that more time is needed to gather evidence.

[46] The Plaintiffs also submit that there are readily apparent credibility issues with respect to Mr. DeWeert's evidence. They point to the fact that statements made by Mr. DeWeert in his examination and in his affidavit, to the effect that there were no previous problems with the furnace he installed, are directly contradicted by the affidavit evidence of two of his former tenants, Stuart Massey and Gary Dunkin who describe multiple malfunctions of the oil burning furnace heating system in the Property, and consequent property damage to the systems in the home resulting from the malfunctioning of the furnace.

[47] In addition, the Plaintiffs submit that the affidavit evidence of Terry Atkins, the owner of the business that sold Mr. DeWeert the furnace unit, challenges Mr. DeWeert's statements with respect to his awareness of the need for a permit for furnace installations.

[48] The Plaintiffs further point to the conflict in the expert reports, and submit that it is difficult, if not impossible, for the Court to determine the issues raised without the benefit of cross-examinations of experts who have given opinions that are in direct opposition to one another.

[49] The Plaintiffs submit that these same experts will play a crucial role in determining damages, and in attributing those damages amongst the DeWeert and Neufeld Defendants. The Plaintiffs submit that those damages have not yet been attributed because of the interwoven nature of the issues and the extent to which they rely on the resolution of opposing expert opinions.

[50] The Plaintiffs submit that it is anticipated that the experts will give opinion evidence based on highly technical expertise and on the content of complicated installation manuals, as well as building legislation, regulations and codes. This evidence relates to the proper permitting, installation, inspection, functioning and safety of the systems in the Property.

[51] The Plaintiffs submit that the furnace installation manuals provided by the DeWeerts as exhibits to Leonard Lee DeWeert's Affidavit of August 21, 2020, speak to the need to consult local authorities and building codes. They also describe complicated installation instructions involving both the heating and electrical systems. These manuals also discuss safety issues and offer safety warnings. These manuals alone, the Plaintiffs submit, illustrate that the issues raised by this application are not suitable for summary trial disposition because they draw into question Mr. DeWeert's credibility on the issue of whether he was aware or should have been aware that a permit was needed for the furnace installation.

[52] The Plaintiffs submit that the DeWeerts' expert on the furnace heating system, Christian Schmidt, was provided with just a small selection of readily available evidence in order to form his opinions. It is the position of the Plaintiffs that Mr. Schmidt's opinion was based on limited information provided to him by the DeWeerts, rather than on all the evidence available. The Plaintiffs submit that the DeWeerts should not be permitted to rely on the expert opinion of Christian Schmidt at all, because it would be unfair to do so without the benefit of understanding the other expert opinions, and without the diametrically opposed opinions of the experts being resolved with the safeguards of trial.

[53] The Plaintiffs submit that there are now five expert reports on the record from four experts. They submit that all the reports speak to whether or not the systems in the home were in good working order on October 20, 2017, the date the purchase of the Property closed. The Plaintiffs submit that the expert evidence is crucial to resolving the claims against the DeWeerts and needs to be tested at trial.

[54] The Plaintiffs disagree that their damages should be limited to the cost of repairs for the warranted items. They rely on evidence as to the substantial cost to them of rectifying the conditions in the Property that rendered it unsafe for habitation as a result of the malfunction of the warranted items, and the related costs of living elsewhere while such work was done.

[55] Finally, the Plaintiffs submit that the issues as they pertain to the DeWeerts and to the other Defendants are so interwoven that they cannot be properly dealt with as separate issues on summary trial.

[56] The Plaintiffs point out that while counsel for the DeWeerts expresses doubt that the trial can be completed in the five days scheduled, they committed to completing the trial in that time, together with the other parties, at a case management conference.

The Positions of the Parties on the Issues to be Resolved on the Summary Trial

[57] I conclude that it is difficult, if not impossible, to properly assess whether a disposition of the remaining issues is appropriate on this summary trial without examining the applicable law and the evidence available to determine those issues.

The Position of the DeWeerts

[58] In respect of the Plaintiffs' claim that the DeWeerts breached the Contract in respect of their warranty that the mechanical, electrical, plumbing and heating systems in the Property were in good working order on October 20, 2017, it is the position of the DeWeerts that all of the available evidence supports the conclusion that they were in good working order. They submit that the Plaintiffs' claim against the DeWeerts for breach of warranty must fail.

[59] In respect of the Plaintiffs' claim that the DeWeerts made misrepresentations on which the Plaintiffs relied when they decided to enter into the Contract, it is the DeWeerts' position that they did not make any misrepresentations, and the Plaintiffs' claims against them for making misrepresentations must fail.

[60] In respect of the representation made by the DeWeerts that they were not aware of any additions or alterations made without a required permit or final inspection, the DeWeerts admit that they did install a furnace in the Property in 2013, and that they did not obtain a permit for that installation. It is their position, however, that when they installed the furnace and when they completed the Property Disclosure Statement

("PDS"), they honestly and reasonably believed that a permit was not required for that installation.

[61] The DeWeerts submit that while they dispute that they made any misrepresentation in the Contract, if there were a misrepresentation, it was only with respect to installing the Furnace without a required permit or final inspection. The damages naturally flowing from such a misrepresentation would be the cost of bringing the furnace installation up to the standard of the National Building Code of Canada. The DeWeerts have submitted an expert report indicating that there was nothing wrong with the installation of the Furnace, and that the cost of bringing that installation into compliance with the National Building Code of Canada would be less than $600.

[62] With respect to the alleged representation that approval was not required by local authorities for the installation of a chimney for a wood stove, it is the position of the DeWeerts that they did not make any such representation, nor is it contained anywhere in the Contract.

The Position of the Plaintiffs

[63] In respect of the Plaintiffs' claim that the DeWeerts breached the Contract in warranting that the mechanical, electrical, plumbing and heating systems in the Property were in good working order on October 20, 2017, it is the position of the Plaintiffs that there is significant evidence in the expert reports which will show that the systems in the house were not in good working order on October 20, 2017, and indeed were unsafe, rendering the Property uninhabitable. Further, there is affidavit evidence which directly contradicts the evidence of Leonard DeWeert that the systems were in good working order.

[64] It is the Plaintiffs' position that these evidentiary issues can only properly be determined at trial.

[65] In respect of the misrepresentation claims, Plaintiffs take the position that the DeWeerts made many misrepresentations on which the Plaintiffs relied when they decided to enter the Contract. The evidence which shows this is contained in the expert reports and the affidavits contradicting the evidence of Leonard DeWeert. This evidence shows that the conditions which proved to be unsafe and rendered the Property uninhabitable were known to, or should have been known to Mr. DeWeert before the contract was signed. Further, the representations made were, if not deliberate untruths, reckless misstatements.

[66] The Plaintiffs rely on the portions of the PDS which advised the DeWeerts that they were responsible for the accuracy of the answers in the disclosure statement, and should reply "Do Not Know" if uncertain. The Plaintiffs further rely on the portion of the PDS which advised the DeWeerts of the opportunity to review the condition of the property and Mr. DeWeert's evidence on examination that said he read and understood the PDS but he did not review the condition of the Property before completing the PDS.

[67] The Plaintiffs submit that misrepresentations were made by the DeWeerts in the PDS as follows:

1. para. 2E in respect of approval of local authorities not applying to the woodstove insert at the property;
2. 2F in respect of their awareness of a permit required for the installation of the furnace;
3. 2I in respect of their awareness of problems with the heating system;

4. 2J in respect of their awareness of moisture and/or water problems in the walls, basement or crawl space;
5. 2K in respect of their awareness of damage due to water;
6. 2N in respect of their awareness of problems with the electrical system, and;
7. 2O in respect of their awareness of problems with the plumbing system.

[68] The Plaintiffs rely on evidence in the expert reports as to problems with the heating system, the electrical system, the plumbing system and moisture and water damage. They further rely on affidavit evidence of Mr. Massey and Mr. Dunkin as to Leonard DeWeert's awareness of these problems.

[69] The Plaintiffs submit that the misrepresentation made at para. 2G is not the subject of a claim but is evidence of the DeWeerts' disregard for the truth. This paragraph represents that the DeWeerts were not aware of any additions or alterations made in the last sixty days. It is admitted that the water heater was replaced in that timeframe.

[70] In respect of the representation made by the DeWeerts that they were not aware of any additions or alterations made without a required permit or final inspection, it is the position of the Plaintiff's that there is good reason to doubt the credibility of Leonard DeWeert in respect of his assertion that when he installed the furnace and when the DeWeerts completed the PDS, they honestly and reasonably believed that a permit was not required for that installation. They rely on numerous warnings to consult with local authorities contained in the installation manual Mr. DeWeert says he used to install the furnace. Additionally, the affidavit evidence of Mr. Massey and Mr. Atkins directly

contradicts Mr. DeWeert on other aspects of his evidence, and, the Plaintiffs submit, calls into question Mr. DeWeert's credibility on every aspect of his evidence.

[71] It is the position of the Plaintiffs that Mr. DeWeert's credibility on this issue can only be appropriately addressed at trial.

[72] With respect to the alleged representation that approval was not required by local authorities for the installation of a chimney for a wood stove, it is the position of the Plaintiffs that such representations were made by Mr. DeWeert impliedly in the notice advertising the property for sale and in conversations between the Plaintiffs and Mr. DeWeert which are referenced in text messages before the Court.

[73] The Plaintiffs submit that Mr. DeWeert's credibility on this issue also can only be appropriately be addressed at trial.

LAW

[74] It is agreed that the doctrine of *caveat emptor* applies to the purchase and sale of real estate. The DeWeerts rely on *Cardwell v. Perthen*, 2007 BCCA 313, in this regard.

[75] As noted by the Plaintiffs, in *Cardwell* at paras. 23-25, there are generally four exceptions to the application of the rule of *caveat emptor*:

> [23] …
>
> > (1) where the vendor fraudulently misrepresents or conceals;
> > (2) where the vendor knows of a latent defect rendering the house unfit for 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 or her duty to disclose a latent defect that renders the premises dangerous.

> [24] … "The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine."
>
> [25] ...
>
> > … Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: *44601 B.C. Ltd. v. Ashcroft (Village)*, [1998] B.C.J. No. 1964 (S.C.)[Ashcroft]; *Bernstein v. James Dobney & Associates*, 2003 BCSC 986 [Bernstein]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example *Eberts v. Aitchison* (2000), 4 C.L.R. (3d) 248, 2000 BCSC 1103. [emphasis already added]

[76] The Plaintiffs submit that the Ontario Court of Appeal decision in *Krawchuk v. Scherbak*, 2011 ONCA 352, speaks to the respective duties of buyers and vendors of property and has factual similarities to this case. The "SPIS" referred to in that decision is the equivalent of the PDS here.

[77] At para. 77 of *Krawchuk*, the Court indicated:

> Although the completion of an SPIS is not mandatory, once a seller decides to fill one out, he or she must do so honestly and accurately and the purchaser is entitled to rely on the representations contained in the SPIS. In Kaufmann, Killeen J. held, at para. 119, that "once a vendor 'breaks his silence' by signing the SPIS, the doctrine of caveat emptor falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue". See, also, Alevizos v. Nirula, 2003 MBCA 148 (CanLII), [2003] M.J. No. 433, 180 Man. R. (2d) 186 (C.A.), at para. 38.

[78] Further, at para. 88 “while the SPIS emphasizes the purchaser's duty to enquire in order to fill in gaps in the vendors' knowledge, such an inquiry does not necessarily include a duty to challenge the vendor's honesty and forthrightness.”

[79] The Ontario Court of Appeal in *Krawchuk* referenced a Yukon decision at para. 89:

> [89] In Lyle v. Burdess, [2008] Y.J. No. 116, 2008 YKSM 5 (Sm. Cl. Ct.), Cozens Terr. Ct. J. considered the purpose of the Yukon Territory's equivalent of the SPIS, the Property Disclosure Statement ("PDS"). He said, at para. 68, that "[t]he primary purpose of the PDS is to disclose latent defects that would not be easily discoverable to a prospective purchaser in the time frame generally associated with completing a purchase and sale transaction. A prospective purchaser should be able to rely on the questions and answers in the PDS to inform him or her about past, as well as present, issues." …

[80] The Plaintiffs further rely on the Supreme Court of Canada decision in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, in support of their claim of negligent misrepresentation. At p. 125, the Court indicated:

> A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.
>
> Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care. The position adopted by the Court of Appeal seems to absolve those who make negligent misrepresentations from

> liability if they believe that their representations are true. Such a position would virtually eliminate liability for negligent misrepresentation as liability would result only where there is actual knowledge that the representation made is not true; the basis of fraudulent misrepresentation. …

[81] A summary of the law which the Plaintiff relies on is set out in the British Columbia Supreme Court decision in *Sahamis v. Lenz*, 2014 BCSC 2305, a case involving water damage, at para. 35:

> [35] … *caveat emptor* is not a defence in all cases. If the problem likely would not have been discovered by reasonable inspection and inquiries the condition is 'latent', and if it amounts to a dangerous defect or one that renders a house unfit for habitation, and if it is known to the vendor, or if it ought to have been known by him and he has been reckless whether such a problem exists, *caveat emptor* will not apply. In such a case the purchaser will have an actionable cause for damages relating to the fact the defect was not brought to light prior to the sale.

[82] The DeWeerts rely on the summary of the law set out in *Roberts v. Hutton,* 2013 BCSC 640:

> [77] Although different legal principles sometimes apply in determining whether liability exists for breach of contract or for the tort of negligent misrepresentation, no such distinctions arise in this case because the incorporation of the Disclosure Statement into the contract of purchase and sale constitutes representations by the defendants upon which the plaintiff was entitled to rely. See: *Ward v. Smith*, 2001 BCSC 1366 at para. 31; *Kiraly v. Fuchs*, 2009 BCSC 654 at para. 46 [*Kiraly*]; and *413255 B.C. Ltd. v. Jesson et al*, 2006 BCSC 1070.
>
> [78] To establish that the defendants negligently misrepresented the condition of the Building, the plaintiff must prove on a balance of probabilities that the representations in the Disclosure Statement concerning structural damage to the Building and/or the existence and extent of water damage and leaks were: (1) untrue, inaccurate or misleading; and also (2) that they were negligently made. See: *Hanslo v. Barry*, 2011 BCSC 1624 at paras. 108 and 109.

> [79] The standard against which the defendants' representations must be assessed is that of a reasonable person having that knowledge. See: *Zaenker v. Kirk* (1999), 30 R.P.R. (3d) 9 (B.C.S.C.) [*Zaenker*], aff'd 2001 BCCA 399.
>
> [80] Inquiry into whether the representations in the Disclosure Statement were untrue, inaccurate or misleading requires analysis of the veracity of the statements in the context of the circumstances that existed when the defendants signed the Disclosure Statement.
>
> [81] If it is determined that representations were factually untrue, inaccurate or misleading, the inquiry into whether they were negligently made then focuses upon the state of the defendants' knowledge of the state of affairs which they represented and upon whether they made full and complete disclosure that accorded with the extent of their knowledge.
>
> [82] Two other principles which arise in this case must also be considered.
>
> [83] Those principles are that:
>
> > 1) A disclosure statement is not a warranty. Its main purpose is to provide information with respect to current known problems. See: *Kiraly* at para. 47, and *Zaenker* at para. 19; and
> >
> > 2) When what is at issue is a latent as opposed to a patent defect, the disclosure obligations of a vendor may be enhanced. See: *Cardwell v. Perthen*, 2006 BCSC 333 [*Cardwell*]; and *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191 [*McCluskie*].

[83] The parties are not in dispute as to the applicable law.

ANALYSIS

[84] Summary judgment, as noted in *Hryniak* and also encapsulated in *Ferrer*, can only be granted where in that process, the Court can find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found.

The Contract and the Alleged Misrepresentations

[85] The Plaintiffs have sued the DeWeerts for breach of contract. Their suit is based, now that the claims for breach of warranty in respect of an encroachment and for breach of the conditions precedent are eliminated, on two alleged breaches of the contract. The alleged breaches are: first, of the warranty at paragraph C of the General Terms of the Agreement that "all mechanical, electric, plumbing and heating systems of the Property together with all appliances shall be in good working order on the Completion Date"; and, second, the inaccuracies in the PDS which forms part of the contract.

The Warranty and PDS Representations about the Condition of the Property and its Systems

[86] The evidence of the DeWeerts is that the electric system, the plumbing system, and the heating system in the Property were all in good working order on October 20, 2017. In part, they submit the Court should find this is true because they had resided in the Property between October 1, 2017, and October 20, 2017, and used the mechanical, electric, plumbing and heating systems which functioned normally and without problems during that period.

[87] The DeWeerts further rely on their evidence in support of their position that all representations as to the condition of the Property and its systems were honestly and reasonably made.

[88] The Plaintiffs submit that a summary trial is not appropriate with respect to resolving the alleged breach of this warranty because there is ample evidence contained in the various expert reports which is conflicting. The evidence relied on by the DeWeerts is contradicted by evidence contained in the Plaintiffs' expert reports.

[89] The Plaintiffs rely, in particular, on an April 26, 2019, Draft Expert Opinion of Ed McCudden; the September 3, 2020, Oil Furnace Installation Opinion Report of Neil McPherson; and, the September 4, 2020, Responsive Expert's Report of Jeff Clarke.

[90] Counsel for the DeWeerts submits that the Plaintiffs' expert reports are limited in their scope and cannot be used as evidence that the systems were not in good working order as of October 20, 2017.

[91] I disagree. While the expert reports relied on by the Plaintiffs are meant to be a critique of the manner in which the property inspection was conducted by the other Defendants, these reports also speak to the condition of the Property as depicted in photographs and videos. These are photographs taken by the Defendant Neufeld before October 20, 2017, and again, after the Plaintiffs discovered, for example, the water damage. The condition of the Property as depicted in the photographs and described in those reports, may well be, in conjunction with other evidence, circumstantial evidence of the condition of the property as at October 20, 2017.

[92] The DeWeerts themselves rely on an undated Expert Report of Christian Schmidt, ACS Mechanical and the September 24, 2020, Sur-reply Report of Christian Schmidt. They further rely on the October 1, 2020, Affidavit of Matthew Wilkinson, which is not an expert report, but does speak to the application of the City of Whitehorse By-Law covering the installation of oil burning equipment and as well to the application of the National Building Code of Canada to such installations.

[93] In addition to the conflicting expert reports, the Plaintiffs further submit that there is ample evidence to call into question the credibility of Leonard DeWeert. They further submit that Mr. DeWeert's admitted failure to obtain a permit for the installation of the

furnace meant that there was consequently no inspection, which would have prevented the dangers resulting from the improper installation.

[94] In Mr. DeWeert's Affidavit sworn August 21, 2020, he indicates that the furnace was used to heat the Property from August 2013, until October 2017. During that period of time, the Furnace failed to function only once, when the fuel tank which supplied heating fuel to the Furnace was permitted to run out of fuel.

[95] Further, Mr. DeWeert's evidence is that for the period of time from August 2013, until October 20, 2017:

a. The furnace ran properly and well;

b. The DeWeerts kept a properly functioning carbon monoxide detector in the vicinity of the Furnace; and

c. The carbon monoxide detector in the vicinity of the furnace never sounded an alarm to indicate that carbon monoxide was present.

[96] In Stuart Massey's Affidavit, he indicates that from June 1, 2016, through to the end of September 2017, he and three of his employees were tenants of Mr. DeWeert at the property. Mr. Massey indicates that between October 2016, and February 2017, the furnace shut down and Mr. DeWeert had to come to restart the furnace on four or five occasions. Each time Mr. DeWeert came to restart the furnace it took him one to two hours.

[97] Mr. Massey recalled that the furnace shut down in particularly cold weather.

[98] Mr. Massey described returning to the Property after being away for approximately two weeks over Christmas 2016. When he returned the furnace was blasting out cold air and water in the toilet was frozen. Once the furnace restarted it was

apparent that water pipes had burst. Mr. Massey repaired the damaged water lines, the shower fixtures and replaced the toilet which had cracked. Mr. DeWeert assisted in repairing the plumbing.

[99] Mr. Massey removed the damaged drywall and Mr. DeWeert replaced the drywall, but no replacement was done of the flooring that had been soaked with water.

[100] Contrary to the evidence of Mr. DeWeert, Mr. Massey indicated that there was soot buildup in the house from the furnace, and there was never a carbon monoxide detector in the house, in the furnace room or elsewhere.

[101] Mr. Massey also recalled that there was one separate occasion when the furnace ran out of fuel.

[102] Gary Dunkin, who was one of the employees residing in the property at the same time as Mr. Massey, indicated in his affidavit that there was no carbon monoxide detector in the house. He also recalled that the heating system stopped working about five times and that on each occasion Mr. DeWeert was called to fix the problem.

[103] This evidence calls into question Mr. DeWeert's credibility at large, and, in particular with respect to his representations that the heating system was in good working order and that there was no water damage.

[104] The expert reports document extensive water damage, problems with the electrical wiring and plumbing and problems with the way in which the furnace was installed which may explain why it repeatedly shut off in particularly cold weather.

[105] I find that the issue of warranty cannot be resolved on summary trial as credibility is a crucial issue. Further, I agree with the position of the Plaintiffs that the conflicting expert reports and their contents cannot be resolved without a trial.

The Furnace

[106] It is the DeWeerts' position that they reasonably held the belief that no permit was required for the installation of the furnace because:

a. They had an oil burning furnace professionally installed in a house which they previously owned in or about 2005, and the professional oil burning furnace technician in that case did not obtain a permit to perform that installation;

b. The professional oil burning furnace technician who installed the furnace for the DeWeerts in 2005 told Mr. DeWeert that there was no requirement to obtain a building permit for the installation of the furnace;

c. In 2013, Mr. DeWeert was able to purchase the Furnace himself, and did so;

d. When he purchased the Furnace, Mr. DeWeert was told that an oil burning furnace could be installed by anyone;

e. When Mr. DeWeert purchased the Furnace, he was not informed of any requirement to obtain a permit before installing it.

[107] It is the position of the DeWeerts that the evidence that they continued to believe that it had not been necessary to obtain a permit for the installation of the furnace, up to and including when they signed the PDS on September 19, 2017, can easily be found on the evidence before the Court.

[108] All of this rests on the Affidavit evidence of Leonard DeWeert.

[109] The DeWeerts further rely on Mr. DeWeert's evidence that the furnace was used to heat the Property from August 2013, until October 2017. During that period of time,

the furnace failed to function only once, when the fuel tank which supplied heating fuel to the furnace was permitted to run out of fuel.

[110] The DeWeerts further submit that there is no evidence that the furnace malfunctioned in any way during the period of time from October 20, 2017, until December 24, 2017, and there is no evidence as to the reason why the furnace stopped operating on December 25, 2017.

[111] The DeWeerts rely on evidence that on November 2, 2017, the Plaintiffs purchased a dual carbon monoxide/smoke detector and there is no evidence that the carbon monoxide detector purchased by the Plaintiffs at any time sounded an alarm to indicate the presence of carbon monoxide in the Property.

[112] The DeWeerts submit that there is no evidence that the Plaintiffs or their child have been exposed at any time to carbon monoxide in the Property.

[113] The DeWeerts submit that there is no evidence that the Furnace has emitted carbon monoxide in the Property or created any hazard to the residents of the Property at any time.

[114] In addition to the above-noted difficulties with Leonard DeWeert's credibility, the Plaintiffs point to the fact that the installation manual for the furnace Mr. DeWeert indicates he used has repeated cautions to consult with national and local authorities about applicable codes before installing the furnace. The installation manual also has repeated cautionary language around safety.

[115] In addition, the Plaintiffs rely on the affidavit evidence of Terry Atkins, the owner of the business where Mr. DeWeert purchased the furnace. Mr. Atkins indicates that there is record of Mr. DeWeert's purchase on July 24, 2013, and that it is his business

practice for staff to inform customers who inquire about installation that installation must be completed by a certified oil burner mechanic and requires a permit from the City of Whitehorse.

[116] As noted above, there is good reason to question Leonard DeWeert's credibility at large, and therefore with respect to his representation that he honestly believed, at the time he completed the PDS, that no permit was required for the installation of the furnace.

[117] I find that due to the crucial nature of credibility on this issue, it cannot be resolved on a summary trial.

The Woodstove Chimney

[118] The Plaintiffs claim at para. 20 of the Statement of Claim that:

> [20] …the DeWeerts misrepresented in the Property Disclosure Statement that the chimney installation, included in the installation of any wood stove, that approval was not required by local authorities. The chimney required approval by the City of Whitehorse Land & Building Services Department. The representations of the Property Disclosure Statement were relied on by the O Murchus [as written] in purchasing the Residence.

[119] While the pleading is awkwardly worded, I understand from the submissions of the Plaintiffs made at the summary trial hearing that they allege that the DeWeerts represented that approval was not required by local authorities for the installation of the chimney for a wood stove, which was in place in the Property at the time it changed hands.

[120] It is the position of the Plaintiffs that Mr. DeWeert impliedly made such representations in the notice advertising the property for sale and in conversations

between the Plaintiffs and Mr. DeWeert which are referenced in text messages before the Court.

[121] The Plaintiffs submit that Mr. DeWeert's credibility on this issue also can only be appropriately be addressed at trial.

[122] The DeWeerts submit, that with respect to the alleged representation that approval was not required by local authorities for the installation of a chimney for a wood stove, no such representation is contained anywhere in the Contract, and the Defendants did not make any such representation.

[123] The DeWeerts submit that the Plaintiffs cannot rely on any alleged representation that is not contained in the Contract itself.

[124] The DeWeerts point to para. 11 of the Contract, which states, in upper case letters:

> 11. THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE CONTAINED HEREIN, ALL OF WHICH CONTAINED HEREIN WILL SURVIVE THE COMPLETION OF THE SALE.

[125] I agree. The plain wording of the Contract precludes reliance on any representations, warranties, guarantees, promises or agreements other than those contained in the Contract.

[126] The DeWeerts submit that with respect to the allegation that they made a misrepresentation with respect to the installation of a chimney for a wood stove, a careful review of the Contract and the PDS discloses no such representation on the part of the DeWeerts. The DeWeerts did not provide a representation or warranty with respect to the installation of a chimney for a wood stove, as alleged by the Plaintiffs.

[127] The PDS at para. 2E poses the question: “Has the woodstove/fireplace insert installation been approved by local authorities?” The DeWeerts checked off the response: “Does Not Apply”. This is the only reference in the Contract to anything concerning a woodstove.

[128] There is no representation in the Contract as to the woodstove chimney. The Plaintiffs appear to have confused the reference to a “woodstove/fireplace insert” with the woodstove chimney. A woodstove/fireplace insert is not a chimney.

[129] I can find, and I do find, on the evidence before the Court, that the DeWeerts did not represent, in the Contract, that approval was not required by local authorities for the installation of the chimney for the wood stove which was in place in the Property. As the Plaintiffs cannot rely on any representation outside of the Contract, their claim in this regard must fail.

[130] The Plaintiffs’ claim at para. 20 of the Statement of Claim is dismissed.

CONCLUSION

[131] The DeWeerts’ application for summary judgment is granted with respect to the claims pleaded at paras. 20, 24, 25 and 26 of the Statement of Claim, which claims are therefore dismissed.

[132] The DeWeerts’ application for summary judgment on the balance of the claims is dismissed. Those claims must go to trial.

COSTS

[133] Both parties sought costs if successful. In the result, the Plaintiffs did not dispute the dismissal of claims pleaded at paras. 24, 25 and 26 of the Statement of Claim, but this position was not communicated until part way through the summary trial hearing.

The DeWeerts were therefore the successful parties on those parts of their application, and as well with respect to the claim pleaded at para. 20 of the Statement of Claim.

[134] The DeWeerts were unsuccessful, however, on the other grounds in their application, as I have determined that a trial is in fact necessary to adjudicate the remaining claims against them.

[135] In these circumstances, in which each party to the application was partially successful, it is appropriate that costs of the summary trial shall be payable in the cause. The amount of any such costs shall be determined by the trial judge.

_____

MILLER J.