Citation: *Harvey-Gauthier v. Smith*, 2022 YKSM 7

Date: 20221125
Docket: 21-S0055
Registry: Whitehorse

**SMALL CLAIMS COURT OF YUKON**
Before Her Honour Judge Ruddy

SERGE HARVEY-GAUTHIER

Plaintiff

v.

SUSAN PAULINE, aka SUSAN DESJARDINS-SMITH,
aka SUSAN DESJARDINS, aka SUSAN SMITH

Defendant

Appearances:
Serge Harvey-Gauthier — Appearing on his own behalf
Susan Smith — Appearing on her own behalf

## REASONS FOR JUDGMENT

[1] This is an action for compensation to remedy defects in relation to the purchase and sale of a residential property in Haines Junction, Yukon. The plaintiff, Mr. Harvey-Gauthier was the purchaser. The defendant was the vendor. As noted in the style of cause, the defendant has at different times used the surnames of both Desjardins and Smith. For the purposes of this decision, I will refer to her as Susan Smith, as that was the name she preferred at trial and is the name predominantly used in the documentation.

[2] Mr. Harvey-Gauthier filed a Claim in Small Claims Court on November 1, 2021, alleging missing items and defects in the house he purchased from Ms. Smith. Specifically, he seeks compensation for the following:

1. The cost of replacing three windows because of condensation between the triple panes of glass;
2. A missing kitchen cabinet;
3. The lack of an exhaust fan over the kitchen stove; and
4. Replacement of the sewer line.

[3] The parties were able to resolve the issues in relation to the kitchen cabinet and exhaust fan following a pre-trial conference. Accordingly, trial proceeded on September 1, 2022, only in relation to the windows and sewer line.

[4] Ms. Smith filed a Reply on November 19, 2021, denying any responsibility for replacement of the windows and the sewer line.

**Background**

[5] In brief, the factual background is that on May 26, 2021, Mr. Harvey-Gauthier made an offer on Ms. Smith's property located at 108 Alsek Crescent for the sum of $349,000. A Contract of Purchase and Sale (the "Contract") was entered into with a completion and possession date of June 28, 2021. The date was amended by addendum on two separate occasions and the sale ultimately completed on July 30, 2021.

[6] Prior to making the offer, Mr. Harvey-Gauthier and his real estate agent viewed the property on May 15, 2021. As Mr. Harvey-Gauthier works at a remote mine site, his real estate agent conducted a final walk-through of the property for him on July 26, 2021, prior to completion of the sale.

[7] Shortly after taking possession of the property on July 30, 2021, Mr. Harvey-Gauthier noted condensation accumulating between the panes of glass on three windows, including two of the three sections of the windows in the living room and one section of the window in the room he assigned to be his office. He testified that the condensation blocked the view from the living room windows and did not immediately evaporate when the weather changed from rain to sunshine and was still present when he had the windows replaced in September.

[8] Later in the fall of 2021, Mr. Harvey-Gauthier had a conversation with the tenant of the neighbouring property owned by Parks Canada. The neighbour asked Mr. Harvey-Gauthier if he was aware that there had been a problem with the sewer line and that the sewer lines for each of the two properties connect to a shared line to the town's sewer system.

[9] The neighbour further advised Mr. Harvey-Gauthier that there had been a blockage near a tree on the neighbour's property. The problem was fixed, but the neighbour told Mr. Harvey-Gauthier that the Village of Haines Junction had sent a letter to Ms. Smith recommending that the sewer line be replaced so that each property had a separate line to the sewer system. Mr. Harvey-Gauthier was able to get a copy of the

letter from the Village. It is filed as part of exhibit 4 in these proceedings, along with other documents regarding Mr. Harvey-Gauthier's claim in relation to the sewer line.

**Burden of Proof**

[10] As the plaintiff, Mr. Harvey-Gauthier bears the onus of proving his claim, including both liability and any damages. The standard of proof is the civil standard of proof on a balance of probabilities, rather than the criminal standard of proof beyond a reasonable doubt. The balance of probabilities is often interpreted to mean more likely true than not.

**A Note About Credibility**

[11] In any trial, the trial judge must assess the credibility of the evidence provided, both witness testimony and documentary evidence. In this particular case, there were no observable concerns with respect to the credibility of either party. Both were honest and forthright in their evidence and I have no difficulty accepting their testimony as fact.

[12] Similarly, there were no issues with respect to the credibility or validity of the documents provided, although there was a conflict between the documentation and the testimony in relation to what happened with the sewer line that will need to be reconciled.

[13] Thus, the primary question for me is not the credibility or reliability of the evidence itself, but whether it is sufficient to prove the Claim.

**The Law**

[14] While the factual circumstances differ between the windows and the sewer line, the applicable law is the same for both.

[15] As a general rule, home purchases are subject to the doctrine of *caveat emptor*, loosely translated as "let the buyer beware". As noted by the Supreme Court of Canada in *Fraser-Reid v. Droumetsekas*, [1980] 1 S.C.R. 720, at page 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. In 1931, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an uncompleted house. The breach has since been opened a little wider in some of the states of the United States by extending the warranty to completed houses when the seller is the builder and the defect is latent. Otherwise, notwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, caveat emptor remains a force to be reckoned with by the credulous or indolent purchaser of housing property. …

[16] Application of the doctrine essentially means that any vendor liability is extinguished upon completion of the sale. In *Gibb v. Sprague*, 2008 ABQB 298, at para. 16, the Court adopted the following quote form *Beaulne v. Ellenor*, 2000 ABPC 117, with respect to the underlying rationale for the continued application of the doctrine of *caveat emptor* to real estate transactions:

> …The underlying theory of this rule is that the purchaser is able to address through warranties and conditions those special matters that are relevant to the purchaser and are essential matters of fact or quality which underly the purchaser's willingness to acquire the property. Put from the vendor's perspective, it is seen as unreasonable for the vendor to become in effect a guarantor or insurer to the purchaser for things which were not

> made known by the purchaser to the vendor at the time of negotiation and consummation of an agreement of purchase and sale.

[17] Over time, however, exceptions to the application of the doctrine of *caveat emptor* to real estate transactions have developed. These exceptions are summarized by Chisholm J. in *Mollet v. Craven* 2014 YKSM 6, at para. 28:

> Generally, four exceptions exist with respect to the application of *caveat emptor* to the sale of land:
>
> (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.
>
> (see *Cardwell v. Perthen* 2007 BCCA 313; *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191 (S.C.))

[18] The threshold question is whether there is indeed a defect, defined at para. 20 in *Connie v. Sampson*, 2009 ABPC 61, "as a shortcoming or a failing or as the lack something essential."

[19] Once a defect is established, the court must then consider whether the defect is latent or patent. The law is clear that failure to disclose latent defects may give rise to liability while failure to disclose a patent defect will not. The difference between the two is explained in the following passage from the *Gibb* decision, at para. 19:

> The distinction between what constitutes a patent or a latent defect is a prerequisite to determining the extent of a vendor's obligation of disclosure under the principle of *caveat emptor*. Patent defects are those that can be discovered by conducting a reasonable inspection of the property and making reasonable inquiries into its qualities. The vendor is not obliged to call patent defects to the purchaser's attention. In the case of patent defects, the purchaser must rely upon their own personal inspection. Accordingly, absent concealment of such defects by the vendor, the purchaser cannot complain of such defects and *caveat emptor* will apply. On the other hand, a latent defect is one that could not have been identified by a purchaser upon a reasonable inspection of the property. For that reason, a latent defect known to a vendor must be disclosed to the purchaser. Should a vendor fail 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.

[20] Liability requires the vendor to have knowledge of the latent defect or to be reckless as to its existence.

**Issues**

[21] Based on the case law, the issues to be decided, in relation to both the windows and the sewer system, are as follows:

1. Is there a defect;
2. Is the defect latent or patent:
3. Did the defendant have knowledge of the defect;
4. Does the defendant’s failure to disclose the defect give rise to one of the identified exceptions to the doctrine of *caveat emptor*; and
5. Should the plaintiff be successful in establishing liability, what are the appropriate damages.

**The Windows**

[22] Before addressing the identified issues in relation to the windows, it must be noted that Mr. Harvey-Gauthier testified that the same issue has happened in four more windows since he filed his Claim. He did not provide any details in terms of which windows or when the issues were first observed. It must be understood that the Claim before me does not include any claim with respect to these four windows. In addition, Ms. Smith was not given proper notice or a reasonable opportunity to provide evidence regarding additional windows. As a result, this decision can, and will, only address the three windows replaced in September 2021 which are identified in the Claim that is properly before me.

*Positions of the Parties*

[23] Mr. Harvey-Gauthier argues that the condensation between the panes of glass clearly indicates that the windows had failed. He further argues that this amounts to a latent defect as it was not readily apparent during either his initial walk-through on May 15, nor the final walk-through performed by his real estate agent on July 26, 2021. As a latent defect Ms. Smith was obligated to advise him of same.

[24] Ms. Smith argues that the windows were old. The house had been constructed in 1975, but she believes the windows in question were installed around 1992 and thus it is not surprising they would be nearing the end of their life span. She says that Mr. Harvey-Gauthier never asked how old the windows were, and argues it was open to him to have either an appraisal or home inspection done, but he chose not to.

Essentially, her position is that the defect in the windows was patent and could have been discovered by Mr. Harvey-Gauthier had he taken appropriate steps.

*Was there a Defect?*

[25] The facts are not particularly in dispute. Mr. Harvey-Gauthier has provided photographs clearly depicting the condensation between the panes of glass, filed as exhibit 1 in these proceedings. He has also provided the invoice for replacement of the windows at a cost of $2,465.56 by LAK Services. On the invoice, the contractor has written, in the Notes section, “Windows requiring repair have condensation buildup between panes indicating they have been failed for some time”.

[26] While the contractor was not called as a witness, this information was confirmed by Ms. Smith in her testimony. She indicated that she had had issues with the windows similar to those described by the plaintiff and as seen in the photographs. She could not recall exactly how long it had been an issue, noting that it would come and go, but estimated that it would have been an issue for a couple of years.

[27] Based on this information, I am satisfied that there was a defect in the windows.

*Was the Defect Patent or Latent?*

[28] In assessing whether the window defect was patent or latent, I am mindful of the comments of the British Columbia Court of Appeal in *Cardwell v. Perthen*, 2007 BCCA 313, with respect to whether there is an obligation on a purchaser to have an inspection performed by a qualified person. The Court makes it clear that this is not a requirement,

but notes that there may well be circumstances where assessment of defects may reasonably require inspection by someone with expertise. At para. 48, the Court notes:

> …The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. 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 his or her attention. [emphasis added]

[29] Thus, in making the determination of whether the window defect was patent or latent, I must consider whether the steps taken by Mr. Harvey-Gauthier amounted to a reasonable inspection and reasonable inquiries sufficient to identify a patent window defect, or whether retention of a home inspector would have identified the window defect making it readily ascertainable and therefore a patent defect.

[30] With respect to the question of whether reasonable enquiries would have been sufficient to inform Mr. Harvey-Gauthier about the defect, as suggested by Ms. Smith, I am not satisfied that such an inquiry would have brought the window defect to light. Learning the actual age of the windows may have put Mr. Harvey-Gauthier on notice that issues may arise with the windows given their age, but it would not have alerted him to the fact that some of the windows had already failed, unless Ms. Smith volunteered that information. I do not believe a reasonable enquiry in these circumstances would have required Mr. Harvey-Gauthier to ask the specific question of whether Ms. Smith had experienced any condensation between the panes of glass in any of her windows.

[31] Turning to whether a qualified home inspector would have readily observed the window defect during the course of an inspection, unfortunately, neither party called a qualified home inspector to testify. While that is not at all surprising given the relatively small amount at issue in relation to the window defect, it nonetheless means I have not had the benefit of expert evidence on this particular point. I must therefore make this assessment solely on the evidence of the parties themselves.

[32] The evidence establishes the following:

- Mr. Harvey-Gauthier did a walk-through with an experienced real estate agent on May 15, 2021, and had the agent walk-through again on July 26, 2021, but the condensation between the window panes was not apparent during either walk-through;
- Mr. Harvey-Gauthier said the weather was dry during his May 15 walk-through;
- Ms. Smith testified that the problem had been happening for a couple of years, but would come and go;
- Mr. Harvey-Gauthier noted that the problem appeared during rainy weather; and
- There is no evidence suggesting that the window frames themselves were visibly decaying; nor is any decay visible in the small portion of one of the photographs showing part of one of the frames.

[33] Based on this information, I am satisfied on a balance of probabilities, meaning that it is more likely true than not, that the window defect was related to the weather. As such, I am satisfied that it would only have been readily apparent on an inspection in certain types of weather conditions such as rain or elevated humidity.

[34] As the defect would only be readily visible in narrow circumstances, I find that the window defect was a latent defect.

*Knowledge of the Defect*

[35] Based on Ms. Smith's admission that the condensation problem in the windows had been happening off and on for some time, I am satisfied that she had knowledge of the defect.

*Failure to Disclose and Liability*

[36] The remaining question in relation to the windows is whether Ms. Smith's failure to disclose the defect in the windows is sufficient to establish one of the exceptions to the application of *caveat emptor*.

[37] With respect to the first category, fraudulent misrepresentation or concealment, I would note there was no evidence to support a finding that Ms. Smith actively concealed the defect.

[38] In terms of misrepresentation, Mr. Harvey-Gauthier points to the Contract, noting that clause one references windows specifically, and argues that Ms. Smith cannot then ignore the problem with the windows.

[39] The clause referred to by Mr. Harvey-Gauthier, however, simply states that the windows themselves are included items in the sale. It does not speak to the condition of the windows.

[40] The only warranty as to condition included in the Contract is located on page one, added under the phrase "Payable on the following terms" and states "Vendor warrants that all plumbing, heating, mechanical, electrical systems and all included appliances to be in working order on closing". Windows clearly do not fall within any of these enumerated items. Later at clause seven, the Contract reads "There are no representations, warranties, guarantees, promises or agreements other than those set out above, all of which will survive the completion."

[41] In addition, the evidence is clear that Ms. Smith was not asked about the windows, and she made no representations with respect to their condition.

[42] As the inclusion of the windows in the Contract does not amount to a warranty as to their condition and as Ms. Smith did not otherwise make any representations as to their condition, there is no basis upon which to find fraudulent misrepresentation.

[43] The third exception, where the vendor is reckless to the truth or falsity of statements made as to fitness, is similarly not established in this case, as Ms. Smith made no statements as to fitness.

[44] The fourth exception requires the plaintiff to establish that the defect rendered the premises dangerous. There is no evidence to suggest the window issue created any danger or potential for danger.

[45] This leaves the second exception, which requires the plaintiff to establish that the defect rendered the house unfit for habitation. There is no evidence to suggest the defect in the windows prevented Mr. Harvey-Gauthier from living in the home. That being said, fitness for habitation has been the subject of some debate in case law. The majority of cases have now adopted a broader view of the criteria than just the question of whether the home is livable. This approach is summarized in the decision of *Swayze v. Robertson* (2001), 39 R.P.R. (3d) 114 (Ont. Ct. J.) as follows:

> 31 Furthermore, I am of the opinion that the term "premises unfit for habitation" does not mean that the defect must be such that the entire residence must be rendered uninhabitable. Rather, in cases such as this I am of the view that application of the principle can, and must mean something more qualified.
>
> 32 I take the position that any decisions regarding habitability of the premises must be made on a common sense and reasoned approach based on the facts of each case. It seems to me that the correct approach must be to consider it in the context of whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole. That, I find has been established in the case at bar. [emphasis added]

[46] In this case, the only evidence with respect to the impact of the window defect on Mr. Harvey-Gauthier's use of the property was his evidence that the condensation in the living room window affected the view. While this suggests at least some impact on the enjoyment of the premises, in my view, it is not sufficient to meet even the much broader definition with respect to fitness for habitation articulated in the *Swayze* decision.

[47] In the result, as none of the exceptions have been established, I am not satisfied that Ms. Smith's failure to disclose the window defect in this case gives rise to any

liability to compensate Mr. Harvey-Gauthier for the windows. The Claim in relation to the windows has not been made out.

**The Sewer Line**

*Facts*

[48] The relevant evidence in relation to the sewer line includes Mr. Harvey-Gauthier's testimony, the letter from Public Works Manager, Collin Kallio, the testimony of Ms. Smith, and the letter she sent in response to Mr. Kallio's letter.

[49] Mr. Harvey-Gauthier's evidence was as follows:

- The neighbouring tenant advised him that there had been a blockage in the sewer line by the tree on Parks Canada property related to roots. The blockage was fixed, but required the area to be dug up. He was further advised that the two properties share a common line to the town's sewer system and the Village of Haines Junction had sent a letter recommending that be changed;

- He was able to obtain a copy of the letter from the Village of Haines Junction;

- He has had no problems with the sewer line since taking possession of the home, but he has taken special measures to avoid problems including increased heat and a dripping tap to relieve pressure;

- He spoke to an ATCO employee recently who had come to turn off power for the house next door, and he is concerned about the impact that may have on the shared sewer line;

- He had a new bathroom installed in the basement and was advised by his plumber that everything in the wall was normal;

- Mr. Harvey-Gauthier also provided documentation indicating Ms. Smith had been a Councillor for the Village of Haines Junction from 2015 to 2021. Mr. Harvey-Gauthier seemed to believe this fact elevated both Ms. Smith's knowledge of the sewer system issue and her obligation to inform him of same. However, the relevance of this fact to the determination of whether the sewer line is defective was not clear to me.

[50] The letter from Mr. Kallio is addressed to Ms. Smith and dated November 4, 2020. The body of the letter includes the following information:

- Public Works responded to a sewer blockage at Ms. Smith's property, which first occurred on November 2, 2020. They used a mobile steam boiler to thaw 20-30 feet of ice blockage;

- A camera inspection was completed showing significant root growth at 12 feet from the main sewer cleanout in the basement, which is likely the cause of poor drainage and icing. A subsequent camera inspection was done on November 4 after a plumber had completed a power

snake root cutting process. The inspection found the line to be free of roots but showed a separate defect of 1.5 inches of standing water 60 feet from the basement cleanout;

- They noted that when the sewer service on Ms. Smith's property was cleared, the sewer services to the Parks Canada house (Lot 65) was also cleared, suggesting the two sewer services are connected. Camera footage and visual inspection confirmed the two properties shared a line and their combined sewer services joined a sewer lateral near the frontage of the Parks Canada house;

- The fourth paragraph of the letter states: "It is recommended that you replace your sewer service to prevent future root growth and freezing. It is also recommended at that time that you coordinate with the owner of Lot 65 to arrange for each of your properties to be connected to its own water and sewer laterals. This will ensure that neither sewer or water service is affected by any actions of the other".

- The letter advises that work undertaken in 2018 would have included an additional lateral to Ms. Smith's property to which her sewer line could be independently connected.

[51] Ms. Smith's evidence about the sewer line, from her testimony and reply letter, was as follows:

- On October 31, 2020, there was a backup in the sewer line causing liquid to seep into her basement through the drain. She turned off the water and contacted the Village to ask about having her line "snaked";

- The snake was not available, and she learned that it was with her neighbours who had a blockage in their sewer line;

- Part of the snake had broken off and was caught in the new backflow preventer the government had installed;

- The neighbour's line was finally snaked and rooted on November 4, 2020, but by this time, her line, which was blocked because of the neighbour's clogged line, had started to freeze;

- Her line was cleared after the neighbour's line was cleared;

- The plumber sent a camera down her line and did pull back some roots. She says it was a mere handful that he showed her. The plumber noted no breaks or other issues that would impede her line;

- With respect to the standing water noted by Mr. Kallio, she says that was because there was nowhere for the water to drain until the neighbour's clog was cleared;

- She did not experience any further issues with the sewer line prior to selling the house;

- She says she did not disclose the information about the sewer event to Mr. Harvey-Gauthier because the blockage was on the neighbour's property not hers, she believed her line did not drain because the backflow preventer was not working properly, and there were no issues with the integrity of her sewer line. She says shared sewer lines were common in the area, and she did not feel there was any need to replace her line to separate it from the neighbour's line;

- On June 10, 2021, Ms. Smith wrote a letter sent by email to CAO Rodin in response to Mr. Kallio's letter to ensure that "the whole picture" of what happened would be on record. The letter is filed as part of exhibit 5 in these proceedings;

*Was there a Defect?*

[52] There is conflicting evidence between Mr. Kallio's letter and Ms. Smith's version regarding the events of October/November, 2020. The letter suggests the blockage occurred on Ms. Smith's property when it notes that, with the clearing of her line, "the sewer at Lot 65 (Parks Canada) also became cleared". The letter indicates "significant root growth" as the likely cause. Mr. Kallio's letter also noted what he termed to be a defect observed in the line after the roots were cleared, that being standing water.

[53] Ms. Smith contends the whole problem began with a blockage in the neighbour's sewer line and problems with the backflow preventer. These combined to prevent her line from draining causing it to freeze. She says that the number of roots in her line were minimal and did not contribute to the problem, and that the plumber found no

problems with the integrity of her sewer line. She further says the "standing water" was not a defect; it was a result of the water having nowhere to drain because of the neighbour's blocked line.

[54] Mr. Kallio was not called as a witness. Accordingly, there was no opportunity to put Ms. Smith's version to him. There was also no opportunity to test the credibility of the information contained in his letter. Thus, I am unable to find that the evidence establishes either that the "significant root growth" observed in Ms. Smith's line necessarily caused the poor drainage and freezing of the line or that the "standing water" was a defect.

[55] Further, as no evidence was called from anyone with expertise in relation to sewer systems, I am unable to make any findings as to what role, if any, the backflow preventer played in the relation to the problem.

[56] I am satisfied that the evidence does establish certain facts on a balance of probabilities.

[57] Firstly, as Ms. Smith's version about where the blockage first occurred is consistent with what the neighbour told Mr. Harvey-Gauthier, I am satisfied that it is more likely true than not that the original blockage began in the sewer line on the neighbouring property rather than Ms. Smith's line, but due to the shared sewer connection to the municipal line, the blockage on the neighbouring property ultimately led to Ms. Smith's line failing to drain and subsequently freezing.

[58] That being said, Ms. Smith did admit that roots were found in her sewer line and removed once the line was cleared, albeit she suggests the volume of roots amounted to no more than a handful rather than the "significant root growth" referred to by Mr. Kallio. Ms. Smith's letter goes further in noting: "Previously there had been a very large spruce tree over the sewer line that has since been removed, and as a result roots would get into the line, but it has been less and less over the years (as I was happy to see)".

[59] From this evidence, it is clear to me that, while roots may not have been proven to be the cause of the sewer blockage in October/November, 2020, there is nonetheless a history of root infiltration into the sewer line that Ms. Smith was clearly aware of.

[60] Secondly, as Ms. Smith conceded that her sewer line connected to the sewer line on the neighbouring property, and this connection was confirmed in Mr. Kallio's letter to her, I am satisfied the evidence proves the sewer lines of both properties connect under Parks Canada's property into a joint line to the municipal sewer line.

[61] In terms of whether these facts establish defects in the sewer line, as noted, the evidence is insufficient to establish either that roots caused the particular problem in October/November, 2020 or that the "standing water" amounted to a defect. These conclusions, however, are not determinative of the issue. I must still consider whether the admitted history of roots infiltrating the sewer line and/or the shared sewer connection amount to defects.

[62] With respect to the roots, there are numerous cases that speak to whether or not a history of root infiltration amounts to a defect.

[63] In *Smiley v. Salat*, 2018 ABPC 178, the vendors had experienced a sewer backup 14 and one-half years before selling their house. They were advised that the backup was caused by roots and that there was a low spot in the sewer line. The vendors then began participating in a city program to have their sewer line periodically inspected and maintenance conducted. This information was not disclosed to the purchasers. One month after taking possession of the home, the purchasers experienced a sewer backup.

[64] Higa J. found that the tree root issues were not a “home maintenance matter”. Rather, the Court concluded them to be a defect. In so concluding, the Court summarized similar findings in other cases:

> 39 In *McKenzie v Smith*, 2016 ABQB 114, Master Schultz states,
>
> > A defect is defined as a fault in a component of the improvements to the property.
>
> 40 In *McKenzie*, the action also related to sewer problems and the existence of tree roots intruding into the sewer line. The City of Edmonton had visited the subject property on a number of occasions and had augered and removed tree roots. The subject property was part of a city maintenance program. Additionally, there was a sag in the sewer pipe on the residential side.
>
> 41 In the context of those facts, Master Shultz found there was "... a defect in the integrity of the sewer system and constitutes a defect or lack of something essential in the waste management system". Further at paragraph 23, "Accordingly, I find that the sag in the sewer line and the root infiltration constitute a defect located on the residential side of the property line".
>
> 42 In *Yue*, the home owners were aware of a prior sewer backup, that the home was on a "Precautionary Maintenance Program" and a clean out of roots was conducted arising from a call by the home owner. In the context of those facts, the Court found a defect existed.

> 43 In this action, it is clear there were continuing issues relating to the existence of roots in the sewer line on the private side of the Property. Those issues commenced from 2002 through 2015 and were described earlier in these reasons. The existence or potential of roots intruding into the sewer line is an imperfection, deficiency or shortcoming. The existence or potential of roots intruding into the sewer line is a weakness or fault in a component of the Property and constitutes a defect.

[65] Even though the evidence in this case does not establish that the sewer backup in October/November, 2020 was a result of the roots found in the sewer line, I am nonetheless satisfied, based on the case law, that the existence of or potential of roots intruding into the sewer line in this case amounts to a defect.

[66] With respect to the connected line, I was unable to find any cases directly on point. I did, however, find the analogous decision of *Hanisch v. McKean*, 2013 ONSC 2727, which involved a vendor's failure to advise the plaintiff, who purchased a farm with the intention of starting an organic food business, that the property was on a shared waterline. It was not until the neighbour advised the plaintiff that her water, which came from the plaintiff's property, was contaminated that the plaintiff learned of the shared waterline. The trial judge found that the shared waterline was material to the value of the property and amounted to a latent defect.

[67] In this case, the evidence itself clearly demonstrates why a shared line is a defect. As pointed out in Mr. Kallio's letter, the existence of a shared line necessarily means that issues arising in the sewer line on one property may have a detrimental impact on the sewer line on the connected property. Indeed, that is exactly what Ms. Smith contends happened in October/November, 2020. The blockage on the

neighbouring property led to her line failing to drain and freezing. Clearly, her sewer line would not have frozen, but for the connection to the neighbouring sewer line.

[68] I find the connected sewer line to be a defect.

*Was the Defect Patent or Latent?*

[69] Having determined both the potential for root infiltration and the connected line to be defects, I must next determine whether the defects were patent or latent.

[70] With respect to the roots, I would adopt the following comments of Higa J. in *Smiley* in finding the history of root infiltration in this case to be a latent defect:

> 54 Again, the issues in this action relate to the existence of roots in the sewer line on the private side of the Property. Sewer lines exist underground, therefore, determining whether roots exist in the sewer line, the extent of any root growth and what remedial action, if any, is necessary requires the use of a camera inserted into the sewer line. Those matters cannot be observed or detected through simple, unaided visual inspection. A greater degree of investigation is required.

[71] With respect to the connected line, there is no evidence before me to suggest that Mr. Harvey-Gauthier could have learned of the connection absent use of a camera inserted into the line. Indeed, Mr. Kallio's letter indicates that the suspected connection was confirmed by use of a camera, suggesting that he, as the Public Works Manager, was not aware the two properties were connected. Ms. Smith does suggest that the practice was common in the area, but she did not provide any evidence to suggest another method whereby Mr. Harvey-Gauthier could have made himself aware of the fact his sewer line connected to that of the neighbouring property.

[72] I am satisfied that both the history of root infiltration and the connected line were latent defects.

*Knowledge of the Defects*

[73] The evidence clearly establishes that Ms. Smith was aware the two lines were connected, before the property was sold. She testified to this effect, and she had received the letter from Mr. Kallio. Further, Ms. Smith not only confirmed the presence of roots in the sewer line, but her letter indicated that this was not the first time, albeit she appeared to believe that this concern was on the way to resolving itself with the removal of the spruce tree.

[74] The evidence not only establishes that Ms. Smith had knowledge of the two defects, but that she knew it could well become an issue of concern with respect to the sale of her property. I come to this conclusion as she made no reply to Mr. Kallio’s letter dated November 4, 2020 until June 10, 2021, after she had entered into the Contract, but before the completion date. Indeed, her email exchange with Mr. Rodin indicates that she felt the need to respond to Kallio’s letter to get her version on file, specifically because she was selling the house. She was concerned enough that the issue may come up to take steps to correct the record, but not enough to ensure Mr. Harvey-Gauthier was made aware of what had happened with the sewer line the preceding year.

*Failure to Disclose and Liability*

[75] In assessing whether Ms. Smith's failure to disclose the defects in the sewer line gives rise to one of the exceptions, again, there were no warranties with respect to the sewer line in the Contract; nor did Ms. Smith make any representations as to the condition of the sewer line. Accordingly, as with the windows, the first and third exceptions are not applicable.

[76] With respect to the second and fourth exceptions, whether the defendant was aware of a latent defect that rendered the home unfit for habitation or dangerous, in the case of *McKenzie v. Smith*, 2016 ABQB 114, the Court considered the impact of a sewer back up on habitation, noting at para. 40:

> In the case at bar, the Purchasers have continued to reside in the premises but have been deprived of the use and enjoyment of the finished basement. Given that a working sewer connection is essential to the liveability of a home, a "common sense and reasoned approach" leads me to take judicial notice that sewer backups are dangerous or potentially dangerous to occupants of a residence, thereby making the area in question unfit for human habitation. The absence of expert evidence on this point is not fatal to the claim. …

[77] While Mr. Harvey-Gauthier has not yet experienced a problem with the sewer line, given the recency of the events of October/November 2020 and the fact that power has apparently been turned off to the neighbouring property, I am satisfied, on a balance of probabilities, that there is very real potential for a future blockage either on Mr. Harvey-Gauthier's property or on the neighbouring property. I am further satisfied that a potential blockage would affect the habitability of the residence.

[78] In all the circumstances, I am satisfied that Ms. Smith had an obligation to disclose both latent defects with the sewer line and failure to do so gives rise to liability. The Claim with respect to the sewer line has been made out.

*Damages*

[79] As I am satisfied that Mr. Harvey-Gauthier has established liability with respect to the failure of the defendant to disclose the latent defects in the sewer line, this leaves the question of damages.

[80] Unlike the windows, there is no invoice before me establishing the specific amount Mr. Harvey-Gauthier is out of pocket to correct the defects. Indeed, he has not undertaken any steps to address either of the defects. He has not had anyone inspect or assess the sewer line, using a camera or otherwise. He has obtained no opinions on the work required to correct the defects, nor has he obtained any estimates of the cost of such work. Rather, he testified that he did not want to invest any money in relation to the sewer line until he knew the outcome of his claim.

[81] The problem with this approach is that Mr. Harvey-Gauthier, as the plaintiff, is not only required to call sufficient evidence to prove that the defendant is liable for the wrongful act, he is also required to prove damages.

[82] As noted by the Supreme Court of Canada in *Red Deer College v. Michaels* (1975), 5 N.R. 99; 57 D.L.R.(3d) 386, at 390, "…It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is."…

[83] In *Twin Cities Mechanical & Electrical Inc. v. Progress Homes Inc.*, 2005 NLTD 134, the Newfoundland and Labrador Supreme Court referenced the following text in describing the general law as it relates to proving damages for breach of contract:

> 104 Goldsmith, in Canadian Building Contracts (Third Edition) sets out general principles pertaining to damages arising from breach of contract at p. 118 of the text:
>
> > The right to claim damages is the usual remedy for a breach of a contract. In order to recover damages, the injured party must be able to establish that he has in fact suffered a loss, and that such loss is the result of the breach of contract. The principal purpose of damages is to put the injured party, so far as money can do so, in the same position as if his rights had not been violated. But not all damages suffered, even if the result of the breach, can necessarily be recovered. Only such damages as either arise naturally from the breach or, in the special circumstances of the case, may reasonably be supposed to have been within the contemplation of the parties at the time of entering into the contract can be recovered. Any other damages are said to be too remote.

[84] It is clear on the evidence that Mr. Harvey-Gauthier has not as yet suffered actual loss, as there have been no issues with the sewer line and no out of pocket expenditures to date. Unfortunately, he has provided me with no evidentiary basis upon which to assess the amount required to remedy the defects in the sewer line. In the circumstances, it is open to the Court to conclude that Mr. Harvey-Gauthier has failed to prove his damages and decline to make any award.

[85] However, it must be remembered that Small Claims Court has been designed to enable lay persons to have their disputes adjudicated in an informal and accessible forum. This approach recognizes that the majority of litigants in Small Claims Court

have no legal training. Flexibility is required to ensure that all parties receive a full and fair hearing.

[86] While Mr. Harvey-Gauthier was advised at the outset of the trial that he was obliged to prove damages, it appears that he did not have a full understanding of what that actually means. I further note that this trial proceeded in English, which is not Mr. Harvey-Gauthier's first language. He was provided with periodic explanations in French of any English terminology he did not understand, but it was clear that his level of comprehension in English is simply not equivalent to his comprehension in French.

[87] In all of the circumstances, I am of the view that fairness demands that Mr. Harvey-Gauthier be given a further opportunity to provide the Court with appropriate evidence and argument with respect to the assessment of damages. Furthermore, as fairness must extend to both parties, Ms. Smith will also be given the opportunity to call evidence and make submissions with respect to damages.

**Conclusion**

[88] In the result, the plaintiff's claim with respect to the defect in the windows is hereby dismissed. The defendant is, however, liable in damages for failing to disclose the defects in the sewer line. The matter will be set down for a further hearing to hear evidence and argument with respect to the assessment of appropriate damages.

______________________________

RUDDY T.C.J.