SUPREME COURT OF YUKON

Citation: *Yap v Wiebe*,
2026 YKSC 41

Date: 20260603
S.C. No.: 20-A0132
Registry: Whitehorse

BETWEEN

Ian Yap and Charmaine Cheung

Plaintiffs

AND

Joshua Wiebe, Jennifer Wiebe, Wiebe Design and Construction Inc.
and Annie Lake Trucking

Defendants

AND

Joshua Wiebe, Jennifer Wiebe, Wiebe Design and Construction Inc.

Third Parties

AND

Annie Lake Trucking

Third Party

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	Jeremy Ellergodt
Counsel for the Defendants and Third Party Defendants, Joshua Wiebe, Jennifer Wiebe and Wiebe Design and Construction Inc.	Mark E. Wallace

REASONS FOR DECISION

Overview

[1] This decision is about the damages owing to the plaintiff homeowners, Ian Yap and Charmaine Cheung, because of a faulty sewer pipe installation in their new home,

built in 2017-2018. The defendants Joshua Wiebe, Jennifer Wiebe, and Wiebe Design and Construction Inc., the designers, builders and general contractors of the home, have admitted liability in contract and tort.

[2] The plaintiffs suffered four sewer backups -June 2019, August 2019, April 2020, and July 2020- because of two defects. The first was a perforation in the sewer pipe near the foundation of the house created by one of the defendants' construction workers who pounded a wooden stake used for concrete forms through the pipe. The second was a slump of the earth on which the sewer pipe rested and the failure of the entire pipe system to achieve the required 2% grade, preventing the proper functioning of the gravity driven system.

[3] The defendant sub-contractor Annie Lake Trucking, who installed the sewer pipe, has settled with the plaintiffs and did not participate in this trial.

[4] The first issue is the extent and cost of the repair required to put the plaintiffs into the position they would have been in had there been proper performance of the contract by the defendants, or into the position they were in before the defects. The second issue is the apportionment of liability and damages between the defendants and the sub-contractor who inserted the sewer line and who has settled with the plaintiffs. The third issue is whether any damages should be awarded for loss of use and enjoyment of the property.

[5] In cases where liability has been admitted, generally expert opinion or fact finding by the Court on liability issues will not be required, due to admissions made in an agreed statement of facts. In this case, additional fact finding and analysis is required to decide apportionment. The test for apportionment is a question of fact and law and

based on the degree of fault of the relevant parties. It is determined by various factors set out in the jurisprudence, requiring an assessment of the circumstances. The plaintiffs and the defendants disagree on the degree of fault to be apportioned between the defendants and Annie Lake Trucking.

[6] The amount of damages is in dispute. In general, the defendants argue the damages are limited to the cost of the lift pump and its installation. The plaintiffs argue the damages include the cost of the excavation of the pipe, the replacement of the pipe section affected by the perforation, and regrading to achieve the minimum 2% slope.

[7] In the following I will set out the relevant facts agreed to, and for each issue I will set out the applicable law, the positions of the parties, the relevant evidence and my findings of fact where required, and my conclusion based on the application of the law to the facts.

[8] During the trial there were arguments over the admissibility of certain documents. Those were addressed in separate rulings and will not be repeated here.

Background

[9] The plaintiffs and the defendants Joshua and Jennifer Wiebe entered into a contract of purchase and sale for a home located at 12 Iskoot Crescent, Whitehorse, Yukon on June 3, 2017. The purchase price was $702,500.

[10] The defendant Wiebe Design and Construction Inc. (Wiebe Design) is a corporation with the defendants Joshua and Jennifer Wiebe as directors. It was responsible for the custom design and construction of the home.

[11] The Wiebes were the main point of contact for the plaintiffs for decisions about the design and construction of the home. The Wiebes provided the plaintiffs with updates on the project by way of on-line weekly project summary reports.

[12] Wiebe Design contracted with Annie Lake Trucking, the defendant subcontractor who settled with the plaintiffs and is no longer part of this action, for the installation of the sewer pipe at the home. The sewer pipe extended from the 'stub' (the short, exposed end of a pipe for the purpose of future connections) at the home to the service stub installed by the City of Whitehorse at the property line near the street.

[13] In or about May 2017, Richard Hunziker of Annie Lake Trucking attended at the home to install the sewer and water line. He noted at his examination for discovery that the grade was minimal. He said he would not install a sewer pipe unless he could achieve a grade of 2%, required by the building code. He suggested to Joshua Wiebe that the sewer pipe be run through the wall of the basement, instead of under the foundation. Joshua Wiebe instructed Richard Hunziker to keep the sewer pipe under the foundation as long as it was installed with grade and to the building code. If the 2% grade could not be achieved, Richard Hunziker said the system would not work and he would not install it. A pump-up system or something similar would have to be installed.

[14] Richard Hunziker was ultimately satisfied that he achieved the 2% grade for the sewer pipe from the stub in the home to the stub connected to the City of Whitehorse sewer hook-up.

[15] The contract of purchase and sale stated at General Terms C "to the best of the Vendor's knowledge, the water and sewer/septic systems servicing the Property are in good working order." In the conditions section, the contract provided in Included Items

"The Property shall be developed and constructed in accordance with Schedule "B" – Plans and Specifications". Schedule B was appended to the contract. Under 3600 Rough Plumbing it states:

> Plumbing system consists of:
>
> - Drainage and water piping as per code.
> - All rough in fixtures as per attached email price quote
> - 4 outdoor faucets
>
> extra cost item: A lift pump for the basement sanitary may be required if 2% grade cannot be established between the city stub at the property line and the main house drain location in the basement slab. By calculation it is very close and we should be able to make it work without a pump. If a pump does end up being needed the cost will be approximately $3,000.

[16] The weekly project summary report repeated the content described above under 3600 Rough Plumbing Specifications. The report also contained a comment from Jennifer Wiebe dated April 19, 2017: "Josh has this on his to do list to check into :) he will get back to you soon!" This report was sent by email from Wiebe Design to Ian Yap on May 13, 2017.

[17] There was no further discussion about the grade or a lift pump between the parties in writing or orally.

[18] Construction of the home was completed in January 2018. The plaintiffs took possession in February or March 2018.

[19] On June 4, 2019, the plaintiffs had a sewer backflow into their home. They contacted a plumber to clear the sewer line.

[20] On August 14, 2019, the plaintiffs had another sewer backflow into their home. They again contacted a plumber and requested they investigate the cause of the backflow.

[21] The plumber's investigation revealed a section of the sewer pipe was punctured by a large wooden stake, and there was a low point, or slump, in the sewer pipe.

[22] After receiving this information, the plaintiffs informed the defendants of the stake and slump defects. They asked the defendants to make the necessary repairs. Wiebe Design's insurance representative told the plaintiffs one of Wiebe Design's employees had pierced the pipe by pounding a wooden stake through it.

[23] No steps to repair the defects were taken until June 15-17, 2020. The insurer for Wiebe Design engaged Tri-M Plumbing to undertake a trenchless repair of the portion of the pipe containing a puncture from the wooden stake. The repair involved inserting a liner within the pipe to patch the damaged portion. The first attempt to insert a liner was unsuccessful. The second attempt resulted in the installation of a liner within the damaged portion of the pipe.

[24] In the meantime, the plaintiffs had experienced a third sewer backflow into their home in April 2020. They were unable to use the bathrooms or running water for an unspecified time. The plaintiffs immediately cleaned up the water and sewage to prevent mould and water damage to their home.

[25] After the liner was installed, in July 2020, the plaintiffs had a fourth sewer backflow into their home.

[26] The consequences of the four sewer backflows into the plaintiffs' home included water and other debris entering the home and soaking into floors, walls and other

building materials. Water also leaked out of the sewer pipe into the surrounding soils in their yard.

[27] The defendants and the insurer refused to repair the slump defect. The plaintiffs engaged Tech-Con Engineering Services at their own expense to excavate and fix the slump defect. On June 2 and 3, 2021, the excavation occurred and the contractors were able to fix the slump but could not achieve the requisite 2% grade. There was an elevation difference of three millimetres between the stub at the home and the city stub. The replacement service line was installed at a 0% grade.

[28] Richard Savage, a civil engineer (limited licensee) working at Tech-Con Engineering Services, assisted the plaintiffs in their investigation and repair of the slump defect. He also provided expert opinion evidence at trial.

[29] Along with Richard Savage, the plaintiffs engaged a materials specialist, a structural engineer, and an appraiser to provide the following expert opinions: the cause of the sewer backups; the expected standard of care of the parties involved in the design and installation of the sewer pipe at the home; the operation of a sewer system consistent with the expectations of owners of a new home; the state of the liner and the integrity of the trenchless pipe repair; the reasonableness of the defendants' estimate of the cost of installing a lift pump and its efficacy; the structural scope of work required to replace the portion of the pipe damaged by the wooden stake; and an appraisal of the value of the home.

[30] The damages of $295,315.63 claimed by the plaintiffs include regrading and excavation to repair the slump defect, underpinning and work to repair the stake defect, supervision of the repair work, reimbursement for the repair, engineering and expert

costs incurred to date, and loss of enjoyment of the property during the sewer backflows and the repairs.

Admissions of Liability

[31] Although the defendants did not specify the nature or scope of their admissions, counsel for the defendants advised the Court that all three defendants admitted liability in both tort and contract. The specific allegations of liability are set out in the statement of claim. Thus, the defendants' admissions include that they breached the contract by failing to ensure that the plumbing systems in the home, including the sewer pipe, were in good working order and were constructed in accordance with the applicable standards, codes, by-laws and regulations.

[32] The defendants' admissions further include they owed a duty of care to the plaintiffs and they breached that standard of care by failing to ensure the design and construction of the sewer pipe installation would be free from deficiencies, defects and damage, and would be done in accordance with applicable standards; by failing to ensure that the work performed by the subcontractors was fit for its intended purpose and compliant with applicable standards and the home was constructed in a good and workmanlike manner; and by failing to rectify any deficiencies, defects and damage to the home in the work performed by them and the sub-trades, specifically the sewer pipe defects and resulting damage.

Issues

[33] The following issues arise in this case:

1. What repair is required and at what cost, to put the plaintiffs into the position they would have been in had there been proper performance of

the contract by the defendants, or into the position they were in before the defects?

2. What is the apportionment of liability between the defendants and the sub-contractor defendant who installed the sewer line and who has settled with the plaintiffs?

3. Should damages should be awarded for loss of use and enjoyment of the property?

Issue 1: What repair is required to put the plaintiffs into the position they would have been in had there been proper performance of the contract by the defendants (contract) or into the position they were in before the defects (tort).

Law

Breach of contract

[34] In a breach of contract claim, the wronged plaintiff is entitled to be put in as good a position they would have been in if there had been proper performance of the contract by the defendant (*Red Deer College v Michaels*, [1976] 2 SCR 324 at 330).

[35] Generally, the starting point for assessing damages for breach of a building contract is the cost of reinstatement or performance. If those costs are substantially greater than the amount by which the value of the property has diminished, or are disproportionately high relative to the value gained by performance, then courts may be reluctant to award that amount as damages (*Nan v Black Pine Manufacturing Ltd*. (1991), 55 BCLR (2d) 241 (CA) (*Nan*) at 13). The modern approach to assessing damages in this context is to review the facts and compensate the plaintiffs in a way that is reasonable to both parties (*Nan* at 14). Courts have also considered whether the owner has undertaken or has shown the intent to undertake the remedial work (*Strata*

Corp. NW1714 v Winkler (1987), 20 BCLR (2d) 16 (CA) (*Strata Corp.*). In assessing the reasonableness of the cost of repairs, the court should "not be overly critical", since the need for repairs is a result of the builder's breach of contract (*Strata Corp.* at para. 28, citing *Nu-West Homes Ltd. v Thunderbird Petroleums Ltd.* (1975), 59 DLR (3d) 292 (Alta SC (AD))).

Tort

[36] The purpose of an award of damages for a tort is to put the innocent party into the position they would have been in had the tort not occurred (*Rainbow Industrial Caterers Ltd. v Canadian National Railway*, [1991] 3 SCR 3).

Concurrent liability in contract and tort

[37] The Supreme Court of Canada in *BG Checo International Ltd. v British Columbia Hydro & Power Authority,* [1993] 1 SCR 12 wrote that in cases of concurrent liability in contract and tort, it is anomalous to award different damages for the same wrong, only because a different cause of action is selected. The Supreme Court of Canada recognized however that certain circumstances and policy choices may require a distinction.

[38] Certain courts have also stated that the distinction is important (*Sills v Children's Aid Society of the City of Belleville* (2001), 53 OR (3d) 577 (CA)).

[39] However, learned academics specializing in contract law have written that in both contract and tort cases, damages are generally calculated by attempting to determine "what would have been" had the wrong not occurred (Jamie Cassels, *Remedies: The Law of Damages*, (Toronto: Irwin Law, 2000)). SM Waddams in *The Law of Damages* (Aurora, Ont: Canada Law Book, 1991 –) at 5.20 writes:

> It is commonly said that the measure of damages for breach of contract differs from that in tort in that contract damages, but not tort damages, give to the plaintiff the benefit of the bargain. The most generally accepted formulations of compensatory principles, however, are wide enough to embrace both contract and tort. Thus, it is usually said that the object of compensatory damages is to put the party complaining in the position that would have been occupied "if the wrong had not been done" or "if his rights had been observed". It will be seen that these formulations are quite capable of supporting a rule of contract damages that gives to the promisee the benefit of the bargain, for if the wrong had not been done the contract would have been performed and the promisee would have received the benefit of performance.
>
> *Vermilion & District Housing Foundation v Binder Construction Limited,* 2017 ABQB 365 at para. 182 (*Vermilion*)

Positions of the Parties

[40] Counsel agree in this case there is no difference between the amount of damages to be considered for the breach of contract or to compensate for the tortious conduct.

[41] The defendants note the contract provides the property shall be developed and constructed in accordance with Schedule B Plans and Specifications appended to the contract. It includes the provision set out above in paragraph 15 that if the 2% grade cannot be achieved, a lift pump may have to be installed at a cost of $3,000. The defendants argue the plaintiffs contracted for the lift pump solution to the grading defect and so they cannot claim damages for the excavation and re-grading. Installing the lift pump in compliance with the contract puts them into the same position as they would have been in had the contract been performed and if the defect had not occurred. The increased scouring flow the lift pump would provide will address any problems caused

by the liner inserted to fix the stake defect. The defendants provided a cost estimate of $8,167.95 from Tyler Stoelwinder, an employee of Hurlburt Enterprises Inc., for the lift pump and its installation.

[42] The plaintiffs state that the relevant part of Schedule B Plans and Specifications applied only during the construction process and is not now enforceable. The defendants did not mention the grade or the lift pump to the plaintiffs after the note from Jennifer Wiebe in the weekly project summary report dated April 19, 2017, and included in the email dated May 13, 2017, saying, “Josh was checking into this” and he would get back to the plaintiffs soon. There was no opportunity during the construction process for the plaintiffs to address the problem. They had no knowledge the 2% grade was not achieved until they contracted with Tech-Con Engineering Services to excavate the property at their own cost in June 2021, under the supervision of Richard Savage. The defendants did not raise with the plaintiffs the possibility of the installation of a lift pump to solve the slump defect or the flat section at any time during the discussions about investigation and repairs. Further, the plaintiffs rely on the expert evidence of Richard Savage that the defendants’ cost estimate of $8,167.95 for the lift pump and installation is too low, and inadequate as it does not consider many additional aspects of the installation. Richard Savage also opined that the lift pump would require ongoing maintenance and would have risks of failure which would not return the plaintiffs to the same position as they were in had the gravity fed sewer system been properly installed.

[43] The plaintiffs also rely on the materials specialist engineer who noted similar maintenance issues with the lift pump, as well as installation challenges, and that although a pump could address the liner issues by increasing the scouring flow, it would

not address the building code issues or return the plaintiffs to the same position they were in before the defects.

[44] The plaintiffs also say that in this case, there is no difference between the cost of repair and the diminution of value of the home. They rely on the expert appraiser who testified that both defects - the stake defect requiring the insertion of a liner, and the grading defect - would be required to be disclosed if the property were for sale. This is supported by case law confirming that sewer defects are latent defects requiring full disclosure (*McKenzie v Smith*, 2016 ABQB 114; *Smiley v Salat*, 2018 ABPC 178; *Yue v Stones*, 2009 BCPC 81; *Harvey Gauthier v Smith,* 2022 YKSM 7). The proper working of a sewer system in or attached to the home is essential to the liveability of a home. The appraiser opined that the cost of repair of both defects would be equivalent to the loss of value of the home. Thus, in this case the diminution in value and the cost of reinstatement are the same. The appraiser's valuation of the home as of October 21, 2024, without sewer defects was $1,000,000 based on a comparative analysis.

[45] The plaintiffs say the cost of repair and diminution of value of the home is $213,670 plus a 10% contingency for a total of $235,037.

Analysis

Brief Conclusion

[46] The lift pump solution does not satisfy the plaintiffs' lawful claim for damages. The contractual provision in Schedule B referencing the lift pump does not apply because there is no evidence that the 2% grade cannot be established. Alternatively, the contractual provision's enforceability was limited to the time of initial construction. Even if the contractual provision were applicable and enforceable, an installation of the

lift pump does not put the plaintiffs into as good a position as they would have been had the contract been performed. Nor does it put them in the position they were in before the defects. The lift pump requires additional maintenance, and there are risks of flooding if it fails, or if there is insufficient power or a power outage. This does not meet the expectations of the owner of a new home. The cost estimate of the lift pump installation provided by the defendants is also unrealistically low and inadequate.

[47] The cost of repairs to excavate, replace the section of the pipe near the foundation of the home with the liner, and to regrade the system is reasonable and will restore the plaintiffs to a position as though the contract was performed and as though the defects had not occurred.

i) The contractual provision referencing the lift pump does not apply

[48] The contractual provision in Schedule B related to plumbing and the sewer pipe showed the intention of the contractor was to achieve the building code requirement of the 2% grade. If the contractor became aware they could not achieve the grade, the provision states they may install a lift pump at the cost of $3,000. Thus, a lift pump is a possible solution, not a mandated solution. That possible solution is to be considered only once the 2% grade cannot be achieved.

[49] In this case, there was no evidence that the grade could not or cannot now be achieved. The plaintiffs' expert evidence was that the grade could at the time of construction and can now be achieved. The possibility of installing a lift pump was not necessary to be considered.

[50] The question of whether this contract provision applies in these circumstances requires an application of the principles of contract interpretation. They are succinctly

set out in *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.),* 2018 ABCA 305 at para 97:

> The objective of contractual interpretation is to ascertain the intention of the contracting parties by reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. The words of any one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purpose and the commercial context: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*., 2016 SCC 37 at para 27, [2016] 2 SCR 23; *Tercon Contractors Ltd. v British Columbia (Transportation and Highways),* 2010 SCC 4 at para 64, [2010] 1 SCR 69.

[51] The surrounding circumstances were further explained by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, [2014] 2 SCR 633 (*Sattva*):

1. The surrounding circumstances must never overwhelm the words of an agreement. The interpretation of a contract is necessarily grounded in its text and read in light of the whole contract (*Sattva* at para. 57).
2. Courts may never use the surrounding circumstances to deviate from the text of the contract such that it creates a new agreement (*Sattva* at para. 57).
3. The surrounding circumstances must only consist of evidence that is objective of the background facts at the time of the contract's execution (*Sattva* at para. 58).

[52] The Supreme Court of Canada in *Sattva* also elaborated on the commercial context aspect: "the text of the contract should be read in a fashion that accords with

sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed" (para 47).

[53] In this case, the words in the Schedule B provision must be interpreted in their ordinary meaning in the context of the whole contract. The words confirm the intention of the parties to have a gravity fed sewer system, as the provision references the possible need of a lift pump only if the 2% grade is not achieved. The home design plans did not include a lift pump, and the defendants subcontracted with Annie Lake Trucking, experienced installers of gravity fed sewer systems. Joshua Wiebe testified that a gravity operated sewer system is preferable to a system reliant on a lift pump, especially in a new home build. The contract includes a warranty that the sewer system would be in good working order.

[54] The possibility but not inevitability of the installation of the lift pump was evident from the surrounding circumstances known at the time of the contract and evidenced by the wording in Schedule B, specifically: "by calculation it [the 2% grade] is very close and we should be able to make it work without a pump."

[55] The application of good business sense and sound commercial principles to the interpretation of the contractual provision, including the intention of the parties to ensure building code compliance, is consistent with the need to ensure that the 2% grade cannot be achieved before considering the lift pump installation. While it is possible to achieve building code compliance through alternative routes if the same result intended by the building code can be accomplished, the justifiable expectation of a new homeowner is the installation of a simple gravity fed sewer system in good working order. Indeed, the defendant contractor had no experience with lift pump installations:

they were not installed in the six other homes he had built. He testified a gravity fed system was preferable, especially for a new home. It was clear the defendant contractor intended to and tried to get a 2% grade and the possibility of the lift pump installation was only if that could not be achieved.

[56] The good business sense and sound commercial principles are also consistent with the intended applicability and enforceability of this contractual provision at the time of construction. The cost of $3,000 for the installation of a lift pump only makes sense where the inability to establish a 2% grade is confirmed before the completion of construction. Otherwise, the cost would exceed $3,000, as shown by the defendants' own expert cost estimate of lift pump installation of $8,167.95.

[57] In fact, Annie Lake Trucking and the defendants were unable in this case to achieve a 2% grade. However, neither they nor the experts stated that achieving a 2% grade was not possible.

[58] The plaintiff's expert Richard Savage confirmed that a 2% grade was achievable. He has a diploma in civil engineering technology and a limited licence to practice civil engineering. He has expertise in the construction and installation of residential sewer systems and has worked in the Yukon over the last 40 years in the area of design and installation of municipal infrastructure. He has worked for engineering consulting firms, for construction companies, and as a private consultant for developers. In this case, he provided an expert opinion on the standard of care expected of a general contractor, how properly installed residential sewer systems work, and the various repair methodologies and their costs given the state of the sewer line in this case. He was a

credible and reliable witness, giving his evidence in a straightforward, clear, and knowledgeable manner.

[59] Richard Savage testified it was necessary to do more work to connect the sewer line properly to achieve the 2% grade, and that from his review of the drawings completed by the expert retained by Annie Lake Trucking, there was sufficient elevation difference to achieve the grade. He testified there was no reason why they should not have been able to achieve it. He further stated the grade could now be achieved by lowering the pipe and city stub in the street.

[60] The plaintiffs' other expert engineering witness, Dr. Troy Eggum, also stated the 2% grade could be established. Dr. Eggum has a PhD in mechanical engineering, is a professional engineer and a materials and corrosion specialist with expertise in forensic engineering of materials, product failure, and piping systems in plumbing and municipal water and wastewater systems, among other things. He provided his expert opinion on the current state of the plaintiffs' sewer pipe, and an analysis of the patch repair and how it impacts the integrity and function of the sewer line. He was a credible, knowledgeable and reliable witness who was objective and straightforward in his testimony. While the focus of his opinion was on the liner repair, Dr. Eggum stated that remediation to address the insufficient slope (and liner condition issues) could include excavation beyond the service connection to the municipal system to create a pipe system with sufficient slope throughout. He did not suggest that the 2% grade could not be achieved.

[61] The fact that the 2% grade was not achieved during the construction was due to negligence, not because it was impossible. The contract provides that only if the 2%

grade could not be established, a lift pump may be required. In this case there is no evidence that the 2% grade could not be established then and cannot be established now. The plaintiffs have provided expert evidence that it could have been at the time of construction and that it can be established now. There is no contractual requirement for the plaintiffs to accept the installation of a lift pump at this stage in satisfaction of the performance of the contract.

[62] Further, as noted above, the Schedule B provision contemplates the installation of a lift pump during construction, not after completion, of the home. This is evidenced by the low cost of $3,000 for the lift pump installation.

[63] For these reasons, the Schedule B contractual provision does not apply and is not enforceable in the circumstances of this case.

ii) The lift pump would not return the plaintiffs to the position they were in before the defects

[64] Despite my finding that the contractual provision does not apply and is not a defence to a breach of contract, it is still necessary to determine if the installation of the lift pump could put the plaintiffs into the position they were in before the defects occurred, in satisfaction of damages for the tort claim. I find that the lift pump will not put the plaintiffs in the same position as they were before the defects. In addition, the cost estimate of the lift pump and its installation is in any event unreliable as a measure of damages.

[65] The defendants provided a one page five line cost estimate for the lift pump: $4,779 for the Simplex Grinder, 26 gallon, one horsepower pump, including a storage tank into which the waste water would be pumped before entering the main sewer pipe; and $3,000 for two days labour to install it, including ABS pipe and fittings to connect

the plumbing in the house to the ‘pump station’ (city hook-up), plus GST, for a total of $8,167.95. Accompanying the estimate from the defendants was a will-say statement from Tyler Stoelwinder who prepared the estimate on January 30, 2024. In that statement he said he took photographs of the plaintiffs’ home, which he called the site. He provided the photographs to a subcontractor, the name of whom Mr. Stoelwinder could not remember, who provided the price for installation of the sewage lift pump system. In his statement he wrote that despite its age of two years the price estimate was accurate.

[66] Richard Savage opined on the requirements of a lift pump installation, the effectiveness of a lift pump, and on the estimate given by Tyler Stoelwinder. Mr. Savage agreed that a sewage lift pump is an alternative to achieving a 2% grade and is allowable under the building code as it accomplishes the solution the code is designed to address. The pump is used to provide scouring flow, meaning the creation of sufficient velocity of the flow of the water through the pipe to keep solids in suspension throughout its length. However, Mr. Savage testified the pump system has greater maintenance and operational costs than a gravity fed sewer system; these costs may reduce property value or be a disadvantage in selling the property. Mr. Savage also noted the electrical circuit panel in the home would have to have sufficient capacity to operate the pump.

[67] Mr. Savage identified the following concerns about the Stoelwinder estimate:

- The estimate does not describe the necessary work to complete the installation, and the labour costs appear to be based on new construction, not installation within an existing structure;

- The total cost of the estimate appeared very low based on Mr. Savage's understanding of the pump out system and the work required to install it – namely excavation and removal of existing concrete floor, subfloor, cement pad and granular fill in order to install the tank and pump beneath the basement and tie it to the existing piping through a large deep trench; the supply and installation of a small diameter force main discharge pipe inside the existing gravity sewer pipe; and the restoration of the floor after the installation;
- The estimate was for a single pump, which could fail, and if not immediately noticed or if there were a power outage, would cause flooding. A duplex system with two pumps – one primary, one back-up – would provide greater security because it would switch automatically to the second pump in the event of a failure of the first pump. A second pump however does not address the power outage issue; and
- The venting would have to be done properly to ensure no odour in the home and the Stoelwinder estimate did not include the connections necessary for venting.

[68] Dr. Eggum also testified about the lift pump system. He noted that the installation of the lift pump would likely require the installation of a new pipe, because of the inability of the existing pipe to connect properly to the lift system. This was not considered in the Stoelwinder estimate.

[69] Dr. Eggum noted that it would be difficult to put the plaintiffs in a position equivalent to a new home build without extensive remediation to address the insufficient

slope and the liner issues. Although one of the options he identified was the installation of a sewage pump system, he stated “increased maintenance including mechanical disruption of debris buildup will decrease the likelihood of backups, however, will also introduce increased wear and tear and the potential for damage to the pipe system components.”

[70] To conclude on this point, although an appropriately sized lift pump system with sufficient electrical current in the home would likely achieve the requisite scouring flow to allow the sewer system to function properly, the required increased and ongoing maintenance and the risks of failure of the pump, as well as the dependency on sufficient and ongoing electrical power, are all real concerns that do not exist with a properly installed gravity system. These additional concerns requiring ongoing attention may affect the value of the home, may increase the wear and tear on the pipe components and will not allow the plaintiffs to be in the same position as they were before the defects occurred.

[71] Even if the installation of a lift pump were an appropriate measure of damages, I accept Mr. Savage’s opinion that the cost estimate provided by the defendants is not accurate. I find it is unreliable and I have no means of determining the credibility of those who created the document. While the estimate and the will-say statement were part of the joint book of documents and thus the date, the author and the fact they are true copies are accepted without proof by agreement, many questions remain. The supplier who calculated the estimate is unknown, the photos of the site taken by Mr. Stoelwinder and given to the supplier for the calculation of the estimate were not produced, and the information provided to the supplier about the home is unknown.

Neither the supplier nor Mr. Stoelwinder testified at trial. The estimate is two years old, and was missing multiple details, as noted by Mr. Savage and Dr. Eggum. The onus is on the defendants to provide a credible and reliable estimate if they wish to persuade me on a balance of probabilities that the plaintiffs' damages should be limited to the purchase and installation of the lift pump. They have not satisfied this burden. The plaintiffs have successfully raised legitimate concerns about the estimate, and it is not their burden to provide an alternative estimate, especially when they are not relying on this option for their damage claim.

iii) The lift pump and the stake defect

[72] It is necessary to address the defendants' argument that the lift pump is the solution to the damages caused by the negligence that created the stake defect, as well as the ongoing issues with the liner. The defendants state that the increased consistent scouring flow created by the lift pump will solve any remaining problems created by the liner and return the plaintiffs to the position they were in before the stake defect occurred.

[73] The plaintiffs claim the liner has not repaired the stake defect. The video of the pipe taken by the plumber revealed aspects of the section of the pipe with the liner leading to Dr. Eggum's opinion there was an ongoing increased risk of backflows. The plaintiffs want to replace the section of the pipe with the liner. They say the lift pump solution will not put them back into the position they were before the stake defect occurred because of these ongoing risks of backflow and the costs of maintaining the pump as described above.

[74] I find that the lift pump will not return the plaintiffs to the position they were in before the stake defect. While the lift pump could increase the scouring flow and thus substantially reduce the risk of backflow, the ongoing maintenance issues identified by Richard Savage, including the risk of flooding if sufficient power is not maintained, do not meet the standard expected of a new homeowner.

[75] Dr. Eggum testified risks of backflows remain as result of the section of the pipe damaged by the stake defect and repaired by the liner. There is an increased risk of reduction in wastewater flow velocity and of debris settlement caused by the protrusion in the pipe from the ongoing presence of one of the remaining wooden stake fragments, the reduced diameter caused by the liner and possibly a double liner, the rough surface of the liner, much rougher than the smooth PVC pipe in the rest of the system, and the step-change in the height of the pipe in that area caused by the liner.

[76] Dr. Eggum agreed that a lift pump can successfully create a scouring flow that will mitigate or possibly eliminate these risks. However, the same issues about the lift pump identified by Richard Savage affect its utility for the repair of the stake defect. The risk of pump failure, the ongoing maintenance required, and the dependence on consistent and sufficient electrical power remain factors that contribute to not returning the plaintiffs to the position they were in before the defects.

iv) ***The plaintiffs' proposed costs of repair are reasonable.***

[77] I will address the costs to repair each of the defects separately. I find that the costs of repair provided by the plaintiffs are reasonable, especially in the context of the value of this new home.

[78] The defendants did not introduce any expert opinion evidence on the reasonableness of the proposed costs of repair. The defendants maintained that the lift pump was the contractual solution, and that excavation for the repair of either defect was unnecessary. They argued the lift pump could fix the stake defect and the grading defect by ensuring the maintenance of scouring flow, allowing solids to flow smoothly through the pipe thereby preventing backups.

Cost to repair stake defect

[79] Dr. Eggum confirmed that the liner repair could lead to future backup events if scouring flow could not be maintained. He identified the problems noted above from viewing the videos taken by the plumber. In the absence of a lift pump, scouring flow can be maintained if the homeowner flushes the system regularly to wash out debris. If concerned about the sufficiency of this approach, the owner could hire a third party to deliberately introduce substantial amounts of water into the system. Alternatively, the homeowner could hire a third party to insert a snake or similar tool into the line to disrupt the collection of any debris and flush it down.

[80] Although Dr. Eggum testified on cross-examination that the liner was likely made of epoxy resin and plastic, was stable with a 50 year design life, and was unlikely to need to be replaced, he noted the limitations of the information provided to him: he did not know what actual material was used for the liner, how it was installed, or why the first liner installation failed.

[81] The plaintiffs retained Matthew Hartog, a structural engineer, to assess the requirements for installing a new section of pipe to replace the section damaged by the wooden stake and repaired with the liner. Mr. Hartog opined that the front portion of the

house would have to be excavated and shored up or underpinned, using helical piles as support for the foundation. This would allow excavation, removal of the repaired section of the pipe and replacement with a new pipe.

[82] The factors contributing to the reasonableness of the costs of the proposed repair are: this is a new home, valued at $1,000,000; the current state of the liner repair shows vulnerabilities to continuing backflows, even if the risk is low; a backflow did occur after the liner was installed; the liner repair is very close to the plaintiffs' home, increasing the vulnerabilities; and the only way to minimize backflow would be to increase scouring flow, a constant stress and ongoing maintenance issue. The proposed costs of replacing the pipe which was damaged by and contained (and still contains) part of the wooden stake are reasonable. It puts the plaintiffs in the position they were in before the defects and is consistent with the contractual obligations.

Cost to repair grading defect

[83] The plaintiffs' proposed option to repair the grading defect is to excavate and establish a new connection to the city sewer line. I find that this is reasonable, given the following facts: the expectations of a new home build; the building code requirement; the likelihood of further backups if the grade were not re-established; the importance to livability of a home of a reliable, working sewer system; and the $1,000,000 appraised value of the home.

Intention to repair

[84] A key factor contributing to an assessment of reasonableness identified in the jurisprudence is the plaintiffs' intention to do the work. Here there is considerable evidence of this intention:

- The plaintiff Ian Yap testified this home was their dream family home
- The plaintiffs excavated at their own expense to investigate the backflow issues after the insurance adjuster denied coverage for the slump defect, showing their commitment to resolve the problem
- In the many emails between 2019 and 2020 among the plaintiff Mr. Yap, the insurance adjuster, and Joshua Wiebe, Mr. Yap indicated his desire for a permanent solution that would restore him and his wife to the position they expected to be in after proper completion of the contract. Examples of those statements are:

  > "…just wanted to confirm that the proposed repairs will be a sufficient long term solution to fix the pipe issues for our home.
  > …
  >
  > This is our home and if a trenchless repair is not feasible, there may be no other alternative but to consider options that are more expensive and/or require more time and effort, including trenching or re-construction. We don't have much choice in the matter as the use and value of our house has been significantly reduced by the defects in the sewer pipe.
  >
  > …
  >
  > We want the pipe to be repaired properly and permanently.
  >
  > …
  >
  > We wanted to confirm that the trenchless repair will perform as well and last as long as a new pipe properly installed. We will need to verify over time that the recent repair performs as good and lasts as long as a new, sewer pipe properly installed in order to determine if the repair has put us in the same position as having a new, properly installed sewer pipe, which was originally intended and agreed to."

[85] For the above reasons the proposed costs of repair submitted by the plaintiffs are reasonable. A discretionary 10% contingency is reasonable. The proposed costs are in 2025 dollars, and the usual increase in cost estimates is 5% per year, as Richard Savage testified. The contingency allows for a further 5% for unforeseen or unexpected costs which are more likely with this kind of underground construction repair.

Issue 2: What is the apportionment of liability and damages between the defendants and the subcontractor for the grading defect?

[86] The defendants were the developers, designers and builders of the home. They were also the general contractors who engaged various subcontractors to do specialized work, including the defendant Annie Lake Trucking, who were hired to install and backfill the sewer pipe system at the home. Each of the defendants failed in their legal duties owed. How much of the fault and subsequent cost to repair the grading defect should be apportioned to the defendants and how much to Annie Lake Trucking?

Positions of the parties

[87] The plaintiffs argue that 80% of the fault be apportioned to the defendants and 20% to Annie Lake Trucking. They state the defendants' responsibility for the design of the home; their failure to confirm the elevations to ensure the grade could be achieved; the height at which the home was built making it difficult for Annie Lake Trucking to achieve the grade; their awareness of the slim margins; their rejection of Annie Lake Trucking's suggestion to elevate the home connection of the pipe; their failure to confirm the grade had been achieved; and their knowledge of the day to day activities of the sub-contractor means that they should bear the majority of the responsibility.

[88] The defendants by contrast state that Annie Lake Trucking should bear 80-85% of the fault, and the defendants 15-20%. The defendants say Annie Lake Trucking's

faulty installation of the pipe and failure to verify the 2% grading when they knew the requirement and knew it would be difficult to achieve makes them more responsible. The defendants argue that Annie Lake Trucking was the first tortfeasor and that they had greater knowledge than the defendants of what is required to instal a sewer line properly.

[89] I find that the defendants are 65% liable and Annie Lake Trucking is 35% liable for the grading defect for the following reasons.

Law on apportionment

[90] The *Contributory Negligence Act,* RSY 2002, c 42 (the *Act*) sets out statutory requirements for apportionment of liability and damages in an action.

> 1 Apportionment of damage or loss
>
> (1) Subject to subsections (2) and (3), if by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> (3) Nothing in this section makes a person liable for damage or loss to which the person's fault has not contributed.
>
> 2 Degree of fault
>
> If damage or loss has been caused by the fault of two or more persons, a judge or a jury, as the case may be, shall determine the degree in which each was at fault, and if two or more persons are found at fault, they are jointly and severally liable to the person suffering damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and to indemnify each other in the degree to which they are respectively found to have been at fault.

[91] The amount of damage or loss, the fault, and the degrees of fault are questions of fact (s. 4 of the *Act*).

[92] The wording of the Yukon statute is identical to that in the *Contributory Negligence Act,* RSA 2000, c C-27 in Alberta as set out in the decision of *Vermilion.* The jurisprudence from Alberta interpreting apportionment is applicable here.

[93] Apportionment of fault depends on each parties' misconduct in each case (*Vermilion* paras. 284 – 85 citing *Heller v Martens*, 2002 ABCA 122 (*Heller*) at para. 30). Comparative blameworthiness requires a consideration of "all the circumstances of the case" to assess the "degree of departure from the standard or care" (*Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305 at para. 41, citing *Heller* at paras. 31 and 34). A broad range of fault apportionment exists in the jurisprudence because of the fact dependent nature of the inquiry. Courts have articulated a number of relevant factors to consider in apportioning fault:

- the nature of the duty owed by the tort-feasor to the injured person
- the number of acts of fault or negligence committed by a person at fault
- the timing of the various negligent acts
- the nature of the conduct held to amount to fault
- the likelihood of injury or loss
- the gravity of injury or loss which might occur
- the costs of avoidance
- the general practice of those engaged in similar activity
- the importance or urgency of the task
- the options or alternatives available to the parties
- the extent of the opportunity to avoid or prevent the accident or the damage
- whether the conduct in question was deliberate, or unusual or unexpected

- whether one party had greater knowledge or greater control over the activities at a location.
- the knowledge one person had or should have had of the conduct of another person at fault.

(*Vermilion* para. 284 and cases cited therein)

Analysis

[94] Below is my consideration of the relevant factors for this case. Due to the settlement of the plaintiffs with Annie Lake Trucking there was incomplete evidence of Annie Lake Trucking's full involvement. They did not testify and instead the parties relied upon excerpts from their examination for discovery. The contract between them and the defendants was not provided. However, there is sufficient evidence to make the apportionment determinations requested. In assessing the factors below, where I make no comment on the greater responsibility of one over the other, the responsibility is equal.

[95] **Nature of the duty**: The nature of the duty on the defendants is greater due to the various responsibilities arising from their roles as designer, builder and general contractor.

[96] The designer owes a duty to design the site and the home so that the applicable code and standards requirements are met. The defendants in their role as designers were required to design the house so that a 2% grade between the house and the sewer connection stub at the property line could be achieved. Richard Savage opined that the defendant designers had sufficient information from the as-built stub elevation and the building elevations to determine adequate grade was available for proper installation. There were no drawings created by the designer in evidence, only drawings created by an expert engaged by Annie Lake Trucking after the

commencement of the litigation. The defendants knew there was a real risk they might not obtain the requisite minimum service grade, evidenced in part by the insertion of Schedule B. The knowledge of the risk imposed a heightened duty on the defendant designers to ensure the building code requirements were met.

[97] The duty of the builder and general contractor is to ensure the work is completed in accordance with the applicable building code and performance specifications at the time of construction. The builder and general contractor did not meet their obligation to ensure the sewer pipe was properly installed according to the Canadian Plumbing Code and the City of Whitehorse Servicing Standards. They did not require or conduct an as-built survey of the sewer line after the installation was completed. They did not ask if Annie Lake Trucking used a survey level or a measuring rod. Nor did they use any such tool themselves to verify the grade. They did not request Annie Lake Trucking to video the pipeline to confirm there was no slump in the line, nor did they do this themselves.

[98] The defendants as designer, builder and contractor should have requested proof of proper installation from Annie Lake Trucking or verified it themselves to fulfill its duty to the plaintiffs. Joshua Wiebe testified he deferred to and relied on the expertise of Annie Lake Trucking. However, as a general contractor he owed a duty to the plaintiffs to ensure the work of the sub-contractors met the requirements and standards.

[99] Annie Lake Trucking had a duty to ensure they completed their installation of the sewer line and the backfill in accordance with the applicable building code and performance specifications at the time of construction. They should have confirmed there was a sufficient elevation difference between the existing sewer stub at the property line and the building foundation tie-in points to enable the 2% grade to be

achieved. They knew there was a real risk of not achieving the required minimum service grade. They communicated this to the defendants, and suggested a modified design and construction to ensure the grade was achieved. This knowledge of the risk imposed a heightened duty of care upon them. Annie Lake Trucking did not conduct an as-built survey of the installed service by qualified survey personnel of the full length of the service installed, to ensure the grade was achieved.

[100] **Number of acts**: The defendants failed to design the system connections properly; failed to oversee the work of Annie Lake Trucking; failed to ensure their directions were followed; failed to consider seriously the adjustment suggested by Annie Lake Trucking to ensure the grade could be achieved; and failed to request verification or do their own verification of the grading after installation. The defendants committed more negligent acts than Annie Lake Trucking.

[101] Annie Lake Trucking failed to install the pipe to code and according to the directions of the defendants. They failed to verify the grading with an as-built survey to ensure the 2% grade had been achieved. They knew it would be difficult to achieve the grading as they suggested the pipe be connected through the wall of the house rather than under the basement floor. When the defendants did not accept their suggestion, Annie Lake Trucking proceeded with the work, despite their concerns.

[102] **Timing of negligent acts**: The defendants designed the home and the necessary sewer pipe connections. The faulty design was the first negligent act. The defendants have admitted negligence in the design. Although the plaintiffs' own expert, Richard Savage, testified that it appeared from the drawing of the Annie Lake Trucking retained expert that there was sufficient elevation to achieve the 2% grade, there were

no drawings of the defendants to review. The weekly progress summary report stated that achieving the grade would be ‘very close’ and a lift pump may be required. Although the defendants turned their minds to the requirement and the actual calculation, their design made it difficult for Annie Lake Trucking to complete the installation properly.

[103] The next negligent act was Annie Lake Trucking’s failure to install the sewer line properly, and failure to verify with a reliable tool that the proper grade had been achieved.

[104] The defendants’ negligent acts of failing to supervise and verify the work of Annie Lake Trucking were the later negligent acts.

[105] **Nature of conduct**: The conduct of the defendants in deferring completely to Annie Lake Trucking on an issue where they knew there was a concern about achieving the applicable code and standards was careless and well below the standard expected of a designer, builder, and general contractor.

[106] Similarly, the conduct of Annie Lake Trucking in installing the sewer line incorrectly and failing to verify its proper installation when they were fully aware of the risk and had even suggested an alternative was equally careless.

[107] **Likelihood of injury**: Failure to reach grade was known by both the defendants and Annie Lake Trucking to be likely to cause sewer backflows and incur costs.

[108] **Gravity of injury**: The cost to the homeowners of sewer backflows into their home and the cost of repair were known by both the defendants and Annie Lake Trucking to be significant.

[109] **Cost of avoidance**: For the defendants and Annie Lake Trucking, the cost of avoidance of the problem was low. The defendant designer could have ensured the correct elevation was achieved through the design. Both could have checked Annie Lake Trucking's work as it was ongoing and before the backfill was done, by doing an as-built survey and/or by conducting a video of the pipe. If this had been done it would have led to a discussion between the defendants and Annie Lake Trucking and subsequently with the plaintiffs about whether the grade could be achieved through a different design and construction, such as putting the pipe through the wall of the house rather than under the basement, or attaching the pipe to the city stub at a lower elevation, or through installing a sewage lift pump. This would have reduced the cost of remediation after construction was completed and backflows had occurred.

[110] **General practice of those engaged in similar activity**: Richard Savage's evidence was that an as-built survey to verify the work is prudent. This was the primary responsibility of Annie Lake Trucking. As the general contractor, the defendants should have requested a survey as verification, as part of their oversight responsibilities.

[111] **Importance or urgency of the task**: A properly working sewer system is essential for the basic and necessary functioning of the house, and essential for its livability. It is very important. The defendants and Annie Lake Trucking knew this.

[112] **Options or alternatives**: As noted, the design may have been able to be adjusted at either the house end or the city end, or a lift pump could have been installed at construction, if it were clear that the 2% grade could not be achieved. These options or alternatives were the primary responsibility of the defendants as designers and

builders, with input from Annie Lake Trucking whose expertise may have been helpful in devising a solution.

[113] **Extent of the opportunity to avoid or prevent the damage**: Annie Lake Trucking had the first and greater opportunity to avoid or prevent the damage because they did the installation. If they had checked while they were doing so, they may have been able to adjust and achieve the grade. When they were finished installing the line but before backfilling, if they had done an as-built survey and/or a video of the pipe it would likely have shown the problems of the slump and the failure to achieve the grade. The defendants would then have had to authorize and direct a solution to avoid the damage.

[114] **Deliberate, unusual or unexpected conduct**: None of the conduct was deliberate. The failure of the defendants and Annie Lake Trucking to verify the grade when they knew the inability to achieve it was a potential risk may be considered to be unexpected and unusual in the context of the construction of a system essential for livability of the home.

[115] **Greater knowledge of or control over activities**: The defendants as the designers, builders and general contractors had greater control over the work to be done. They also had control over the day-to-day activities of the subcontractor including how the work was to be done, as ultimately, the defendants owe duties under the contract to the homeowner. However, Annie Lake Trucking had greater knowledge of the installation of sewer lines, as indicated by Joshua Wiebe and Richard Hunziker.

[116] **Knowledge one person had or should have had that the other was at fault**: Both the defendants and Annie Lake Trucking knew that the other may have been at

fault. Annie Lake Trucking told the defendants that it would be difficult to get the 2% grade and suggested an alternative of connecting the pipe at a higher elevation at the house, a suggestion that was rejected by the defendant Joshua Wiebe. The defendants knew that Annie Lake Trucking expressed difficulty with the grade and should not have accepted their statement they had achieved grade at face value without verification.

[117] A review of some of the cases on apportionment shows the courts' assessment of the relevant factors is factually driven.

[118] In *Vermilion*, the Court had to apportion liability for defective flooring in a senior housing complex between the architect who provided architectural and structural engineering services to the plaintiff and the contractor who provided the construction and related services. In finding the contractor 65% liable and the architect 35% liable, the Court noted that the architect failed to provide a design for the grading at the site that met professional standards and failed to conduct reasonable proper field reviews of inspections of the construction project. The court referenced the principle set out in *Canadian Law of Architecture Engineering*, 2nd ed (Toronto Butterworths, 1994): "… the duty to inspect is not confined to visual inspection, but extends to making such enquiries as are necessary to ascertain that the work has been satisfactorily performed" (*Vermilion* at para. 155 citing *Roco Developments Ltd. v Permasteel Engineering Ltd.* (1983), 1983 CanLII 529 (BC SC), 46 BCLR 103, [1983] BCJ No 1851 (SC), *Kon Construction Ltd. v Terranova Developments* Ltd., 2015 ABCA 249). The contractor failed to construct in accordance with the plans and specifications, had a greater opportunity to prevent the defect because they were involved in the day-to-day work,

and had greater knowledge and control over the activities at the site, including knowledge of its sub-contractors.

[119] In *Dabous v Zuliani* (1976), 12 OR (2d) 230 (ONCA), a chimney in a house was improperly installed and caused a fire. The Court of Appeal apportioned 25% of the fault to the architect who failed to supervise the installation adequately, even though that would have required removal of concealing drywall, and 75% to the builder for improper installation.

[120] In *Boulderwood Development Co v Edwards,* [1984] 64 NSR (2d) 395 (NSSC AD) a soft spot was found in a vacant lot during excavation in preparation for a building. The court found the engineer 60% at fault for provision of advice on constructing a foundation on a lot that was unsuitable and that resulted in the moving of the house. The concrete contractor was found to be 40% at fault.

[121] In *Homes by Jayman Ltd. v Kellam Berg Engineering & Surveys Ltd.*, 1997 ABCA 30, fault was apportioned equally between the engineer who designed but failed to inspect and supervise the construction of a mound septic system, the contractor, and the developer who did not maintain the integrity of the mounds.

[122] In *Yukon (Government of) v Norcope Enterprises Ltd.*, 2024 YKCA 6, liability was found in contract and negligence for conduct resulting in the removal and replacement of the concrete apron at the Whitehorse International Airport, due to cracking of the concrete. The Court of Appeal upheld the trial judge’s apportionment of 50% to Tetra Tech for providing a problematic concrete mix design and inadequate quality control; 35% to Norcope for poor construction practices; and 15% to the Yukon government for failing to “pay attention to what was happening on the project” (at para. 5).

[123] A final example from the case law is *Madalena v Comox-Strathcona,* 2009 BCSC 1597, in which there was water damage in a new home. The designer/builder was found to be 75% liable because there were several design flaws which the court found to be the most blameworthy faults, as they increased the seriousness of impacts of the subsequent construction and maintenance breaches on the integrity of the home. He also performed some of the inadequate construction work. The contractor was found 15% liable because he failed to properly seal and flash the window and door openings, which increased the risk of building envelope failure. The homeowner in this case was found 10% liable because she failed to maintain the gutter system properly.

[124] Applying these factors and the limited guidance from the jurisprudence to the circumstances of the present case, the defendants are responsible for 65% because of their more significant duties in their multiple roles, and Annie Lake Trucking is responsible for 35% because they performed the actual work and did not properly verify it complied with the applicable standards.

[125] The defendants were the designers, the builders, and the general contractors. They had a duty to ensure the construction of the sewer pipe system met the building code standard of a 2% grade, from the design phase to the completion of the construction. Although they did not perform the actual construction, they chose the sub-contractor, they were responsible for giving directions, overseeing and ensuring the work was done to code and to specifications, including verification, and they were responsible during construction for considering alternatives if meeting the 2% grade requirement was not possible. As the general contractor, they had control of the work site and had knowledge of Annie Lake Trucking’s day-to-day activities. Their knowledge

of the slim margins to achieve the 2% grade, and of the importance of a properly working sewer system for the livability of the home gave rise to a heightened duty.

[126] Annie Lake Trucking were experts in the area of sewer pipe installation, and they did the actual faulty work. They knew it would be difficult to achieve the 2% grade as they raised their concern with the defendants and suggested an alternative. Even with this knowledge, they continued to do the work and did not properly verify the grade at completion.

[127] The plaintiffs' position that Annie Lake Trucking bears the majority of the fault does not consider the defendants' overall project design and building responsibility, their control of the project work activities including those of the subcontractor, and their responsibility to ensure the sewer system was in good working order, essential for the livability of the home. Their position that Annie Lake Trucking was the first tortfeasor contradicts their admission that the defendants' design was faulty and cannot be accepted.

[128] The defendants' position does not consider the expertise of Annie Lake Trucking that was legitimately relied on by the contractor, their knowledge that the grade would be difficult to achieve, and the fact that they did the work with this knowledge and did not check it properly with an as-built survey and/or video.

Issue 3: Damages for loss of use and enjoyment of the home

Positions of the parties

[129] The plaintiffs claim damages in the amount of $15,000 for loss of use and enjoyment of the home. The four backflows and the risk of future failures created stress

and distress for the plaintiffs. They were without use of water and plumbing during the backflows and had to clean up the messes.

[130] The defendants argue that there was little to no evidence provided by the plaintiffs in support of their claim for loss of use and enjoyment, although counsel acknowledges the clean-up of the sewer backflows was an unpleasant necessity.

[131] I find that an award of non-pecuniary damages in the amount of $6,000 is appropriate.

Law on damages for loss of enjoyment and use

[132] Modest non-pecuniary damage awards in the $5,000-$15,000 range for loss of enjoyment and use of property have been granted by courts for losses resulting from flooding. In *Mundell v Wesbild Holdings Ltd.*, 2007 BCSC 1326, the plaintiffs received $15,000 for the mental distress and frustration occurring due to water and drainage problems caused by the developers that resulted in seven years of a soggy, smelly and unsightly backyard.

[133] In *Allison v Radtke*, 2014 BCSC 1832, the plaintiffs received a $10,000 non-pecuniary damage award because they were forced to sell their horses and were unable to use their land the way they had in the past due to water and sewage flooding.

[134] In *Bavelas v Copley* (1999), 1 MPLR (3d) 290 (BC SC); 1999 CanLII 5420 the plaintiff's property suffered damage from a neighbour's artificial drainage ditch and the plaintiff received $5,000 in non-pecuniary damages.

[135] In *Ward v Cariboo*, 2021 BCSC 1495, the plaintiffs were awarded $35,000 because their basement was unhabitable after floods in 2015 and 2020. It required lengthy restoration and resulted in a loss of furniture and personal possessions; the

floods resulted in their inability to enjoy two thirds of their property due to sewage contamination and the inability to use their pasture and ponds for their farm animals, so they could no longer keep them; and they had to endure the foul sewage smell after both floods.

Analysis

[136] Here Mr. Yap testified that he and his wife had to clean up the mess of sewage in their basement after each of the four backflows. On one occasion the backflow occurred while out of town guests were visiting. Ms. Cheung was pregnant when the backflow occurred in the fall of 2019 and Mr. Yap assumed additional responsibility because he did not want to cause her additional stress. Two backflows occurred when the plaintiffs had a very young baby. Each time they were unable to use the bathroom facilities or any water for an unspecified period of time. The risk of future backflows while waiting for repairs to be done created stress.

[137] Mr. Yap's emails with the insurance adjuster and Joshua Wiebe from 2019-2020 and entered as an exhibit at trial confirmed these concerns. For example, on November 4, 2019, Mr. Yap wrote that he was not sure when the next backflow will occur and this was a cause of stress. He noted they could not use the washroom, take a shower, and it affected their day to day living when back-ups occur. He wrote that is there were a delay in the arrival of the plumber they had to find alternative place to use the facilities. They have had to clean up backflow to prevent mould. On December 8, 2019, Mr. Yap wrote "the continued delay and threat of the damage getting worse is also quite mentally stressful on us. The sewer line is just so important to the functioning of our home." On July 26, 2020, after the fourth backflow Mr. Yap

noted that they had to stop what they were doing to address the backflow, hope the plumber was available to unclog the pipe and did not expect to be dealing with these issues in a new home.

[138] The evidence in this case of loss of use and enjoyment and mental distress is not as significant as that in many of the cases relied on by the plaintiffs. However, the plaintiffs experienced four sewer backflows and their aftermath over a period of approximately a year, and the ongoing fear of more backflows occurring. While there was no loss of use or enjoyment of the property for an extended period of time, there was a loss of use of the plumbing system in the home for short periods of time, there was unwanted clean-up work on four occasions, including when Ms. Cheung was pregnant with their first child and when that child was a newborn, and there was the ongoing stress of not knowing when another backflow might occur.

[139] This entitles the plaintiffs to a non-pecuniary award of $6,000.

Conclusion

[140] The plaintiffs are entitled to the following:

[141] Damages for breach of contract and in negligence of $213,670 for the costs of repair of the stake defect and of the grading defect, plus 10% contingency, for a total of $235,037. The cost of the stake defect repair is $109,897.50, (Arctic Backhoe Services Ltd. and GoliathTech) plus $10,041.25 (Tech-Con Engineering Services' supervision) (not apportioned) and the cost of the grading repair is $83,690 (Arctic Backhoe Services Ltd.) plus $10,041.25 (Tech-Con Engineering Services' supervision) (apportioned).

[142] Damages for loss of use and enjoyment of the property of $6,000 (apportioned).

[143] Damages representing the costs incurred by the plaintiffs of the emergency plumbing services to address the sewer backflows and the investigation of the defects in the amount of $2,100 (all apportioned).

[144] Damages representing the costs incurred by the plaintiffs of Tech-Con Engineering Services for the investigation of the grading defects and consulting advice in the amount of $4,851 (all apportioned except $630).

[145] Damages representing the costs incurred by the plaintiffs of the services of Dr. Eggum and Matthew Hartog in estimating the cost of repair of the liner defect, in the amount of $6,916.88 (not apportioned).

[146] Damages representing the costs incurred by the plaintiffs for the excavation and repair of the slump defect in June 2021 by Arctic Backhoe Services Ltd. in the amount of $30,780.75 (apportioned).

[147] In summary, the non-apportioned damages are $127,485.63, and the apportioned damages are $137,463.00. The 10% contingency amount is $11,993.88 on the costs of repair for the non-apportioned damages, for a total of $139,479.51, and the 10% contingency amount on the costs of repair for the apportioned damages is $9,373.13, for a total of $146,836.13. The total damage award is $286,315.64.

[148] Costs may be spoken to in case management if the parties are unable to agree.

_____

DUNCAN C.J.