

CANADA / JUDGMENT

Kleineniggenkemper v. Spieker

2021 BCSC 533

COURT

Supreme Court of British Columbia

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2021 BCSC 533 Kleineniggenkemper v. Spieker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kleineniggenkemper v. Spieker,

2021 BCSC 533

Date: 20210324

Docket: S54897

Registry: Vernon

Between:

Yvonne Kleineniggenkemper and Norbert Hustemeier-Hennig

Plaintiffs

And

Siegfried Wilhelm Spieker, Erika Christa Spieker, Margaret Elaine Kentel and RE/MAX Shuswap Realty

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiffs:

M.S. Dugas

Counsel for the Defendants S.W. Spieker and E.C. Spieker:

J. Frame

Place and Dates of Trial/Hearing:

Kelowna, B.C.

January 11-15, January 18,

January 20-21, 2021

Place and Date of Judgment:

Vernon, B.C.

March 24, 2021

Introduction

[1] The plaintiffs' claim arises out of their purchase of a home on an acreage near Salmon Arm, British Columbia, in 2010. The defendants were the vendors. The property and home were connected by underground pipe to a water source on the adjacent property, which was and remains owned by the defendants, Siegfried Wilhelm Spieker and Erika Christa Spieker ("defendants"). In 2015 the defendants terminated the plaintiffs' access to that water source. The plaintiffs seek the creation of the easement over that adjoining property to allow continued access to that water source and damages.

Background

[2] Until the sale at issue the defendants owned two adjacent properties, identified as "198 Edgar" and "220 Edgar", near Salmon Arm, British Columbia. They sold 198 Edgar to the plaintiffs in August of 2010.

[3] They are of German background and speak fluent German.

[4] When the defendants originally acquired the property in the early 1980s the two plots of land were part of a single, largely undeveloped, parcel of land. In 1981 they decided to build a home on what is now 198 Edgar.

[5] The initial source of water that was established for the home was from the area of Metcalfe Creek. The defendants constructed a cistern that was approximately eight feet deep and six feet in diameter with a concrete lid. A system of pipes buried approximately three feet underground delivered water from that source a distance of approximately 1,700 feet to the home. The topography of the land is such that the water is delivered by gravity to the home. The notice of civil claim ("NOCC") refers to this as the "Vendors' Well". Since one of the issues is whether it is in fact a well, adopting that term here could be confusing. I will refer to that water source as the "Metcalfe source", unless I am referring specifically to the NOCC.

[6] Within a relatively short period of time after the completion of the construction of the home in 1983, the defendants had a well drilled near the home. That well is approximately 340 feet deep with a narrow bore and a pump placed deep into that well.

- [7] The defendant Mr. Spieker has a plumbing and electrical trade background. He created a system of valves to allow a selection of the source of the water from either of the Metcalfe source and the drilled well for use in the home and for outdoor irrigation.
- [8] The defendants lived in the home continuously from the completion of its construction in 1983 until the subject sale in 2010. The drilled well was used as the principle water source for the home for approximately two years after it had initially been completed (roughly to 1986), for another period of time during 1998, and finally in the winter of 2009/2010, for a total of approximately five years. For the balance of the 27 years prior to 2010, the Metcalfe source was the principal source of water for the home.
- [9] Over the years between 1983 and 2010, the defendants subdivided smaller lots from the larger property. The last subdivision occurred in 2005, at which time 198 Edgar and 220 Edgar were created. The boundaries of those lots resulted in the Metcalfe source being located on 220 Edgar, while the home and the drilled well are on 198 Edgar.
- [10] By the spring of 2010 the defendants had decided to sell 198 Edgar and listed it through a realtor, Ms. Kentel. The listing posted by Ms. Kentel included in its description that the water source was a "drilled well".
- [11] At approximately the same time, Ms. Kentel had the defendants complete a property disclosure statement (the "PDS"). The document is formatted with prepared questions and allows a selection of "yes", "no", "do not know", or "does not apply" responses by initialling a box. Within that PDS the responses to four of the questions give rise to claims advanced by the plaintiffs. They are as follows (using the numbering from the exhibit):

THE SELLER IS RESPONSIBLE for the accuracy of the answers on this property disclosure statement and where uncertain should reply "Do Not Know." This property disclosure statement constitutes a representation under any Contract of Purchase and Sale if so agree, in writing, by the seller and the buyer.

THE SELLER SHOULD INITIAL THE APPROPRIATE REPLIES.

1. LAND

YES

NO

DO NOT KNOW

DOES NOT APPLY

A.

Are you aware of any encroachments, unregistered easements or unregistered rights-of-way?

[initials]

2. SERVICES

A.

Indicate the water system(s) the Premises use:

Municipal * Community * Private * Well ☐ Not Connected *

Other _____

B.

Are you aware of any problems with the water system?

[initials]

...

4. GENERAL

B.

Are you aware of any material latent defect as defined in Real Estate Council of British Columbia Rule 5-13(1)(a)(i) or Rule 5-13(1)(a)(ii) in respect of the Premises?

[initials]

[12] In the spring of 2010 the plaintiffs were German residents. They had made a decision that, if they could find suitable property in the North Okanagan/Shuswap area, they would move to Canada.

[13] At least until the completion of the purchase, Mr. Hustemeier-Hennig had no functional English literacy. Ms. Kleineniggenkemper had very limited verbal English skills and no functional English reading skills.

[14] The plaintiffs engaged the services of a realtor, Ms. Rahn, in large part because she spoke fluent German. They travelled to Canada to look at properties in early 2010. Ms. Rahn identified 198 Edgar as a potentially suitable property. She arranged an initial viewing. At that time, only Ms. Spieker was present and there were no discussions relevant to the issues in this litigation. The plaintiffs viewed the home and had a cursory look at the property. They were impressed by what they saw and interested in a potential purchase.

[15] That interest resulted in a second viewing within one or two days of the first viewing. The evidence from the witnesses is not entirely consistent as to when the plaintiffs presented their offer, but it was either at or very soon after the second viewing. Nothing turns on that timing, as there is no dispute that all of the relevant dialogue and inspection occurred before the offer was presented.

- [16] At the second viewing the plaintiffs, the defendants, and each of their relators were in attendance. Everyone except the defendants' realtor, Ms. Kentel, spoke German and virtually all of the discussion was in German. At points Mr. Spieker translated some of the discussion to Ms. Kentel.
- [17] There are some disputes as to the precise content of the discussion, but there is agreement that it included the following:
- a) The home was connected to both the Metcalfe source and the drilled well;
 - b) The Metcalfe source was not on the 198 Edgar property;
 - c) The defendants would provide continued access to the Metcalfe source following the completion of a purchase by the plaintiffs;
 - d) The drilled well had limitations in terms of the quantity of water it produced.
- [18] Much of the dialogue occurred in the home, but the parties did spend time walking the property. That included leaving the 198 property and going onto the 220 property to view the Metcalfe source. During that time there was further dialogue.
- [19] Before the plaintiffs' offer was presented to the defendants, Ms. Rahn reviewed it with the plaintiffs. She did not provide a line by line verbatim translation, but she did review the contents of each page and explained the various terms to the plaintiffs. She had prepared the standard form document in advance and inserted content where required. She included in the proposed offer a series of clauses for the benefit of the plaintiffs, commonly referred to as "subject to" clauses. Two of those are as follows:

Subject to the Buyer, at the Buyer's expense, receiving and being satisfied with a report from a certified third party concerning the operational function and condition of the components of the sewage system, and compliance with the Sewerage System Regulation by May 31, 2010. This condition is for the sole benefit of the Buyer.

Subject to the Byer, at the Buyer's expense, receiving and being satisfied with a report from a certified third party concerning the quantity and quality of the water supply by May 31, 201. This condition is for the sole benefit of the Buyer.

[Both paragraphs crossed out and initialled by the plaintiffs.]

- [20] The plaintiffs advised Ms. Rahn that they did not see a need for those two clauses and they were struck out and initialled by the plaintiffs before the offer was presented to the defendants.
- [21] Appended to the offer and incorporated into it was a title search of 198 Edgar. It makes no reference to any easements or rights of way on 198 Edgar or to the fact that 198 Edgar benefits from any such easements or rights of way on 220 Edgar.
- [22] The offer also includes an entire agreement clause at para. 18 as follows:

18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[23] The final page of the document includes what I would refer to as a warning, or caution, to all parties to the contract. The first paragraph includes the following:

THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE CONTRACT AND SHOULD NOT AFFECT THE PROPER INTERPRETATION OF ANY OF ITS TERMS.

1. CONTRACT: This document, when signed by both parties, is a legally binding contract. READ IT CAREFULLY. The parties should ensure that everything that is agreed to is in writing.

[24] The plaintiffs initialled or signed each page before it was presented to the defendants.

[25] After the offer was presented it was accepted by the defendants and they too initialled or signed each of the pages.

[26] The transaction completed and the plaintiffs took possession of the property in August of 2010. Between that time and November of 2015 the plaintiffs lived on the property and used the Metcalfe source as the principle source of water. There were no issues with the adequacy of the water supply.

[27] During that period of time the parties had become close friends.

[28] By 2015, the defendants had decided they would sell 220 Edgar. They entered into a contract of purchase and sale for the disposition of 220 Edgar in or about August 2015. It had a closing date of September 15, 2015. Conditions placed in that agreement by the purchasers included the following:

This offer is subject to the Buyer by September 1, 2015 being satisfied that the Seller's have terminated the water supply to any other neighboring properties. This condition is for the sole benefit of the Buyer.

[29] The defendants then verbally informed the plaintiffs that their access to the Metcalfe water source would be ending. Mr. Spieker met with the plaintiffs who were unwilling to accept that they would no longer have access to the Metcalfe source. The brief discussion that took place did not result in any solution acceptable to either party.

[30] As a result, the defendants tried to use the drilled well source and found that it was not capable of adequately satisfying the household needs and had no capacity for outdoor watering. The well was tested in or about August 2015 and it produced .09 gpm, far below what is required to meet the needs of a home.

[31] On September 4, 2015 the defendants sent a letter to the plaintiffs advising of the pending sale and the need to terminate the plaintiffs' access to the Metcalfe source. That letter reads as follows:

Please be advised that we have contracted to sell the real estate which adjoins your Property.

As a result of the aforesaid transaction, your Property will no longer be able to access water from our adjacent real estate.

Please be advised that as of September 17, 2015, your ability to access water from our real estate will cease.

[32] In November of 2015 Mr. Spieker physically terminated the delivery of water from the Metcalfe source to 198 Edgar.

[33] As a result, the plaintiffs purchased a storage tank and connected that to the home. They have hauled water from remote sources and relied on the storage tank to deliver water to the home. It is not cost effective even when rationing water use.

[34] In addition, the plaintiffs had a water-well driller attempt to drill wells on four sites on 198 Edgar. The attempts have been as deep as 1,000 feet, but all were unsuccessful in finding an alternative source of water on the property.

[35] The defendants made a "with prejudice" proposal intended to mitigate any damages that the plaintiffs may be found to be entitled to. Subsequent to the completion of the trial, but before the release of these reasons, the parties informed the court that a form of that proposal has been accepted.

[36] On the information provided to me by counsel, that mitigation proposal is only relevant if I find that the plaintiffs have proved their claim or some portion of it.

The Plaintiffs' Claims

[37] The NOCC alleges fraudulent misrepresentation, breach of contract, negligent misrepresentation, and proprietary estoppel. All of these causes of action are based on statements alleged to have been made by the defendants during the second meeting ("oral representations") and/or the representations in the PDS.

[38] The relief sought is an easement over 220 Edgar and damages.

[39] The plaintiffs' claims are associated to the termination of the access to the Metcalfe source not to the inadequacies of the drilled well.

Fraudulent Misrepresentation

[40] The oral representations are alleged to have been fraudulent misrepresentations. In the NOCC the plaintiffs say that the oral representations were that 198 was "supplied with water from the Vendors Well" (the Metcalfe source) and that it "would provide an adequate and dependable supply of water to the property at all times, potentially subject to seasonal variations and supply".

Positions of the Parties

[41] The Plaintiffs say the two alleged oral representations were false in fact arguing that:

- (a) the Property was not supplied by the Vendors' Well;
- (b) the Vendors' Well has not at all times provided an adequate and dependable supply of water to the Property; and
- (c) given the state of the titles of Property and the Vendors' Property, upon conveyance of the Vendors' Property the Vendors' Well (had it existed) would cease to provide an adequate and dependable supply of water to the Property.

[42] The plaintiffs allege that these oral representations induced the purchasers to enter into the contract, and that "as a result of entering into the contract the purchasers have sustained loss and damage."

[43] Mr. Spieker testified that he did not make the alleged statements. His evidence is that he told the plaintiffs that they could have access to the Metcalfe source for as long as the defendants owned 220 Edgar.

[44] In any event, the defendants argue that the allegations of fraudulent misrepresentation must fail on the basis that the statements alleged cannot be shown to be false and/or that the plaintiffs cannot show that the defendants knew them to be false, and/or that they were not relied on by the plaintiffs in entering into the contract.

[45] The defendants also stress that what the plaintiffs are really asserting is that the defendants failed to keep a promise that they would enjoy continued access to the Metcalfe source. As a result they say caveat emptor applies. They also argue the entire agreement clause to say that any such promise is unenforceable.

Analysis

[46] The test to determine whether a representation is a fraudulent representation is not in dispute. It is set conveniently set out by Mr. Justice Romilly in *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 42 as follows:

[42]

1. the defendant made a representation of fact to the plaintiff(s);

2. the representation was false in fact;
3. the defendant knew that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
4. the defendant intended for the plaintiffs to act on the representation; and
5. the plaintiffs were induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

[47] First, the plaintiffs say that 198 Edgar was not in fact supplied with water from a well on 220 Edgar. For clarity, this assertion is that the Metcalfe source was not a well but that it was, in fact, a diversion of Metcalfe Creek for which a water licence was required.

[48] The alleged fraudulent misrepresentation set out in the NOCC was not specifically attributed to the defendants in testimony at trial. Neither plaintiff testified that that was actually spoken. What occurred is that the parties stood next to the equipment that is the Metcalfe source and Mr. Spieker explained that it provided water to 198 Edgar. The statement actually attributed to the defendants in the plaintiffs' testimony does not include that the Metcalfe source was a well at all, so this assertion cannot succeed.

[49] In addition, the Merriam-Webster dictionary's definition of a well is "an issue of water from the earth: a pool fed by a spring", "a pit or hole sunk into the earth to reach a supply for water". There may be other definitions, including statutory definitions, but none have been placed into evidence or referenced in argument. There is no expert opinion evidence and no evidence from any local or other government representative as to what does and does not constitute a well in that context. Even if the defendants referred to the Metcalfe source as a well, the evidence does not establish that the characterization was false.

[50] Still further, even if Mr. Spieker had said what the NOCC alleges, I reject the proposition that Mr. Spieker knew it was false or was reckless or unsure if the representation was true or false. I am satisfied that he believed the source to be a well and that belief was a reasonable one.

[51] In addition, the representation was made in the context of an actual observation of the water source by the plaintiffs. Any nuances as to the characterization of the water source were there to be seen by the plaintiffs. I reject the proposition the plaintiffs would have relied on his use of the word "well".

[52] The other claims connected with the oral representations relate to the alleged statement that the Metcalfe source "would provide an adequate and dependable supply of water to the property at all times, potentially subject to seasonal variations and supply".

[53] As noted, there is dispute between the parties as to the specific content of discussions that took place during the second meeting and prior to the presentation of the offer.

- [54] Mr. Spieker says he specifically indicated the access would only be during the defendants' ownership of 220 Edgar. I will digress to note that the plaintiffs confirmed at trial that they do not seek to rely on this statement as a foundation for relief, be it as a promise or agreement.
- [55] The plaintiffs' assertions as to what was said are less precise. As noted above, their NOCC alleged the oral representation was that the Metcalfe source "would provide an adequate and dependable supply of water to the property at all times, potentially subject to seasonal variations and supply". They did not, however, testify those were the words of the defendants. Mr. Hustemeier-Hennig testified that Mr. Spieker said the plaintiffs' access to the Metcalfe source would be "forever" or with "no limit". The dialogue between the parties at that second meeting was in German and he suggested that the German word(s) used by Mr. Spieker could mean either "forever" or "no limit". In further cross examination he described different German words for the English equivalents of "no limit", "forever" and "without limit". I was left unclear on what specific words he says were spoken by Mr. Spieker and what the literal English interpretation would be. My impression was that his testimony reflected his impression of what Mr. Spieker had said more than his recall of actual words spoken and a precise English translation of those words. He did agree with the proposition that the plaintiffs' claim could be summarized as the defendants promising permanent access to the Metcalfe source and then breaking that promise.
- [56] In her testimony, Ms. Kleineniggenkemper said Mr. Spieker told them they would get water from the Metcalfe source without any limitations. She said that there were no discussions about any legal entitlement to access to the Metcalfe source. When asked about the characterization of the plaintiffs' claims, she generally agreed that the plaintiffs' claim could be summarized as the defendants promising permanent access to the Metcalfe source and then breaking that promise. She maintained that it was an agreement not a promise.
- [57] Both plaintiffs acknowledged that the defendants did not specify or make any comment about what would occur at the point in time the Spiekers no longer owned the property.
- [58] There is a critical distinction between a promise or an agreement to provide access to the Metcalfe source and a representation of fact that a permanent right to water from the Metcalfe source was somehow attached to 198 Edgar. The testimony of the plaintiffs could support the former, but not the latter.
- [59] The first requirement in proving a fraudulent misrepresentation is that there be a representation of fact. The plaintiffs have failed to prove that this occurred.
- [60] With this conclusion, analyzing the remaining components of the test is unnecessary and somewhat strained. I will, however, make some additional observations.
- [61] Even if the defendants' statements could be categorized as a representation of fact, the plaintiffs acknowledge that the defendants did not specify or make any comment about what would occur at the point in time the Spiekers no longer owned the property. At some point

following the completion of the purchase, the plaintiffs drew the inference from the defendants' statement that the access to the Metcalfe source would survive the transfer of ownership of 220 Edgar. It is in fact that inference from the statement which the plaintiffs complain is false and for which they seek to hold the defendants accountable. There was no expression by the defendants that the access would be permanent and termination of that access was initiated to facilitate an intended sale of 220 Edgar. This is not a proper foundation for establishing a fraudulent misrepresentation.

- [62] Further, I would not conclude that the defendants knew the statement to be false or were reckless as to its truth. If Mr. Spieker did not express that the access would be during the defendants' ownership of 220 Edgar, I accept that is what he intended. There was no easement and no plans to create one. The defendants specifically set that out in the PDS. He honestly intended to give access during the defendants' ownership and fully understood that he could only do so while they owned the property and in fact did so. The PDS and the terms of the contract were entirely consistent with this view. He never represented that there was an established right, in the form of an easement or otherwise, to permanent access.
- [63] Both plaintiffs acknowledge that they had not, at the time of the statements, specifically turned their minds to the prospect of the disposition of 220 Edgar by the defendants. In effect, they acknowledge that the interpretation they now assert was not even in their minds at the time they say that they relied upon it. If the alleged misrepresentation did not operate on the mind of the persons seeking relief so as to induce them to enter into the contract and thus affect their interest, it was not material to the transaction.
- [64] The plaintiffs point to circumstances where statements of so-called half-truths have been described as misrepresentations and say that is applicable here. It is a difficult analysis to apply here, given the distinction between a statement of fact and a promise. In addition, the proposition really requires that I conclude the defendants knew what inference the plaintiffs were taking from the statement attributed to them. I cannot reach that conclusion. In addition the plaintiffs knew the truth before entering into the contract and therefore could not have been induced by the alleged misstatement.
- [65] In the result, even if I was prepared to accept the plaintiffs' version of the dialogue at the second meeting regarding the access to the Metcalfe source, I am unable to conclude that the representations were fraudulent.
- [66] It is my conclusion that this portion of plaintiffs' claims must fail.

Breach of Contract

Positions of the Parties

- [67] The NOCC alleges four representations in the PDS statements were inaccurate. They are as follows:

- a) "the water system that the Property used was a "well"".

- i. At trial the plaintiffs abandoned any claim, based on item "a").
 - b) "the Vendors were not aware of any problems with the water system".
 - i. The plaintiffs allege there were in fact two problems. First, "the water system drew from an unlicensed source". Second, "the water supply to the Property would cease upon conveyance of the Vendors' Property due to the fact that the Property's access to the water supply on the Vendors' Property was not registered on title to the Property via a right-of-way or an easement, and this right of access was also not reflected on title to the Vendors' Property".
 - c) "the Vendors were not aware of any unregistered easements or rights-of-way in respect of the Property".
- The plaintiffs argue that "access to the water supply on the Vendors' Property was an easement or right-of-way in respect of the property, which was not registered on title to the Property and, conversely, that this right of access was not reflected on title to the Vendors' Property".
- d) "the Vendors were not aware of any material latent defects in respect of the Property".
 - i. The plaintiffs allege that each of the water supply problems constituted a material latent defect that would render the property unfit for habitation.
- [68] Since the PDS statements were expressly incorporated into the contract of purchase and sale, the plaintiffs claim there has been a breach of contract.
- [69] The defendants argue that the representations or statements in the PDS reflect the defendants' honest beliefs at the time of the completion of the document and the claims based on them must fail.

Analysis

The Vendors were not aware of any problems with the water system

- [70] The applicability of the doctrine of caveat emptor in contracts for the sale of land and a vendor's obligations of disclosure in a PDS are described by the British Columbia court of Appeal in *Nixon v. McIver*, 2016 BCCA 8, as follows:
- [31] The doctrine of caveat emptor was colourfully summarized by Professor Laskin (as he then was) in "Defects of Title and Quality: Caveat Emptor and the Vendor's Duty of Disclosure" in *Law Society of Upper Canada, Contracts for the sale of land* (Toronto: De Boo, 1960) at 403:
- Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms.
- [32] The leading decision on the maxim is *Fraser-Reid v. Droumtsekas* (1979), [1980] 1 S.C.R. 720 at 723, in which Mr. Justice Dickson (as he then was) recognized the continuing application of the doctrine of caveat emptor to the sale of land:

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. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

- [33] The doctrine continues to apply to real estate transactions in this province, subject to certain exceptions: fraud, non-innocent misrepresentation, an implied warranty of habitability for newly-constructed homes, and a duty to disclose latent defects.
- [34] A vendor has an obligation to disclose a material latent defect to prospective buyers if the defect renders a property dangerous or unfit for habitation. A latent defect is one that is not discoverable by a purchaser through reasonable inspection inquiries. See *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191 (S.C.), and *Cardwell et al v. Perthen et al*, 2006 BCSC 333 [Cardwell SC], aff'd 2007 BCCA 313 [Cardwell CA].
- [48] Information contained in a disclosure statement that is incorporated into a contract of purchase and sale may be a representation upon which a purchaser can rely: *Ward v. Smith*, 2001 BCSC 1366 at para. 31. However, a vendor is only obliged to disclose his or her current actual knowledge of the state of affairs of the property to the extent promised in the disclosure statement and need say "no more than that he or she is or is not aware of problems": *Arsenault v. Pederson*, [1996] B.C.J. 1026 (QL) (S.C.) at para. 12. In other words, the vendor must correctly and honestly disclose his or her actual knowledge, but that knowledge does not have to be correct. A vendor is not required to warrant a certain state of affairs but only to put prospective purchasers on notice of any current known problems. The purpose of a disclosure statement is to identify any problems or concerns with the property, not to give detailed comments in answer to the questions posed. See *Anderson v. Kibzey*, [1996] B.C.J. No. 3008 (QL) (S.C.) at paras. 13-14; *Zaenker v. Kirk* (1999), 30 R.P.R. (3d) 9 (B.C.S.C.) at para. 19; *Kiraly v. Fuchs*, 2009 BCSC 654 at paras. 47, 49; and *Roberts v. Hutton*, 2013 BCSC 640 at para. 83.

- [71] Read in isolation the question in the PDS is a simple one. One might reasonably interpret it as asking nothing more than whether the system is functioning; that is to say, that the home is adequately supplied with water by the water system.
- [72] In the context of this case, it becomes clear that the question at issue in the property disclosure statement is open to some interpretation. The plaintiffs' position is that the question is intended to extend not only the defendants' knowledge of the physical functioning, but include consideration of any legal inadequacies or limitations that could possibly be of concern to the purchasers including whether off-site water sources were secured by an easement.
- [73] I will first address the proposition that the Metcalfe source was unlicensed. There is no evidence that the Metcalfe source was licensed, but the allegation of a breach also implies an obligation that it be licensed. This arises from the assertion that the Metcalfe source is a diversion of Metcalfe Creek, as opposed to a well and as such required a licence.
- [74] Simply put, the evidence does not support that, at the time of the conveyance, any licence was required for the source. The plaintiffs referenced inquiries made in 2017 of the local government. Ms. Kleineniggenkemper testified that she was informed that a licence would be required to create a diversion of the creek. In fact she applied for and was granted a license for the diversion. The evidence does not, however, establish that a license was required when the defendants constructed the structure or that its existence at the time of sale was in violation of any current legislative requirements. Certainly there is no evidence that the defendants had any knowledge of any such violation or requirement.
- [75] The additional "problem" about which the plaintiffs complain is the absence of a legally secured access to the Metcalfe source; that there was no easement or other legally enforceable entitlement to access the Metcalfe source.
- [76] The defendants stated specifically in answer to question 1A in the PDS that there was no unregistered easement or right of way affecting the property (see para. 11 above).
- [77] For his part, Mr. Spieker testified that when the defendants answered the question regarding the water system having in mind only the drilled well and that answer was based on his experience. His evidence was that the drilled well was inefficient, but that it was able to meet the needs of the home at all points in time when they chose to use it. That had been for approximately five years during the 27 years that the defendants lived in the home on what became 198 Edgar. The most recent use of it before the sale was in the fall and winter of 2009/2010, shortly before the sale. There was no testing of the drilled well until five years later, in 2015.
- [78] The defendants' interpretation of the question was a reasonable one. Viewed collectively, the defendants' responses were consistent. Further, his view was that the water supply from the drilled well was adequate, although not abundant, and was operating properly.

[79] I also note that the water system as a whole had functioned for the entire 27 years that the defendants owned the property.

[80] I am unable to conclude that the response was anything other than an honest representation of his belief at the time.

The Vendors were not aware of any unregistered easements or rights-of-way in respect of the Property

[81] This argument is the converse of what the plaintiffs assert in the preceding paragraphs. Here, the plaintiffs assert the defendants ought to have responded by indicating there was an unregistered easement or right of way.

[82] I accept that the defendants honestly believed it to be accurate.

[83] The Land Title documents attached to the contract of purchase and sale confirm that there is no easement or other registered right over 220 Edgar or any benefit of such to 198 Edgar.

[84] This response is clearly factually accurate and consistent with the defendants' evidence as to the state of the title.

The Vendors were not aware of any material latent defects in respect of the Property

[85] In *Nixon v. McIver* at para. 34 the court stated a "latent defect is one that is not discoverable by a purchaser through reasonable inspection inquiries." Here the plaintiffs viewed the Metcalfe source, the state of title certificate, and had available to them a subject clause to have the water system inspected. It is impossible to describe the issues here as latent defects.

Negligent Misrepresentation

Positions of the Parties

[86] As a further alternative, the plaintiffs claim the same PDS statements were negligent misrepresentations that induced the plaintiffs to make the offer, approve the PDS, and ultimately enter into the contract.

[87] The defendants say that the plaintiffs have failed to prove that any of the PDS statements were negligently made. In addition, they argue that there can be no assertion of negligent misrepresentations in the face of the entire agreement clause.

Analysis

[88] In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, the court set out the general five requirements to prove a claim of negligent misrepresentations at para. 33. They are:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;

- (2) the representation must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making the misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
- (5) the representee must have suffered damages as a result of relying on the representation.

[89] In *Intrawest Corp. v. No. 2002 Taurus Ventures Ltd.*, 2007 BCCA 228 the British Columbia Court of Appeal reviewed the Supreme Court of Canada decisions which had commented on whether a claim for negligent misrepresentation can be made where the contract contains an entire agreement clause. It then stated:

[38] The Supreme Court of Canada made it clear in *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, and, continuing the analysis, in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 and *Cognos*, that breach of pre-contractual representations may be actionable as both a breach of contract and negligent misrepresentation, with clear exceptions arising from the express terms of the contract.

[53] In considering whether the exclusion clauses applied to exclude liability in contract, Lambert J.A., for the Court, referred (at paras. 40-41) to the particular circumstances in that case, which involved a commercial enterprise inducing a customer to enter into a standard form contract of adhesion by making an intentional oral representation that turns out to be untrue. He held (at para. 45):

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specially acknowledged by that party, or in some other way.

[58] Thus, whether the entire agreement clause excludes *Intrawest* from liability for negligent misrepresentation is not easily answered. The principles of concurrency, as expressed in *BG Checo*, support the entitlement of a plaintiff to choose either, or both, contract and tort remedies. It is also clear, however, that parties may arrange their affairs to exclude liability in tort by including valid exclusion clauses in their contract.

[90] The Court of Appeal there found that the entire agreement clause under consideration did exclude liability in tort for negligent misrepresentations. It identified an important aspect of the analysis to be whether or not the contract was a "standard adhesion contract".

[91] Here the plaintiffs cannot be described as sophisticated parties. In addition, they were unfamiliar with Canadian real estate transactions. On the other hand, they retained an experienced realtor who prepared the offer and fully explained the process and the contractual terms. She included subject clauses to protect their interests.

- [92] Not only does the contract contain the entire agreement clause, but there is the warning to all parties referred to above at para. 23.
- [93] The plaintiffs had full opportunity to inspect the property and chose to remove clauses inserted by their realtor for their benefit to independently confirm the quantity and quality of the water. The plaintiffs suggested in their testimony that the clause was unnecessary, because they knew the Metcalfe source provided good quality water in sufficient quantity. It is ironic that they would read down the scope, relevance and importance of the "subject to" clause, and yet argue for a much broader interpretation and scope of the question in the PDS about "problems" with the water system.
- [94] In the circumstances here, it is my conclusion that the entire agreement clause would preclude this claim for negligent misrepresentation.
- [95] Even if the entire agreement clause does not preclude the tort claim, I conclude that the plaintiffs have not proved negligent misrepresentation. My observations above regarding the statements in the PDS have application here in assessing whether the statements were untrue, inaccurate or misleading. When the PDS statements regarding the water and unregistered easements are read together they were not untrue, inaccurate or misleading.
- [96] In addition, the alleged reliance upon them by the plaintiffs was not reasonable. They viewed the entire water system, including the nature and location of the Metcalfe source. They were fully informed as to what they were acquiring in the purchase.

Proprietary Estoppel

Positions of the Parties

- [97] Finally, the plaintiffs claim proprietary estoppel. They allege that the oral representations and the statements in the PDS "induced an expectation that they had the right to access" the Metcalfe source and that it would be "unjust and inequitable" for the defendants to prevent that continuing access.
- [98] The defendants argue that they disclosed all of the relevant information about the Metcalfe source before the contract was entered into. That, together with the entire agreement clause, must result in the conclusion that there is nothing unjust or inequitable about their enforcement of their property rights over 220 Edgar.

Analysis

- [99] The plaintiffs referred to *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, and *Sabey v. Rommel*, 2014 BCCA 360, for the Court of Appeal's statements of the applicable test. Since those decisions, the Supreme Court of Canada has had occasion in *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 15 and 23 to comment on the equitable doctrine and articulated the test in this way:

- [15] An equity arises where (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word: [citations omitted]
- [23] As we have seen, to establish proprietary estoppel one must first establish an equity of the kind that proprietary estoppel protects. This requires three things: a representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property, reasonable reliance on that expectation, and detriment as a result of the reliance. When the owner of an interest in the property over which the claimant expects to enjoy a right or benefit is responsible for the representation or assurance, then the equity established by the claimant's reasonable reliance may be given effect by proprietary estoppel.
- [100] The legal construct is difficult to apply in the context of this case. The NOCC sets out the claim as follows:
45. Further, and in the alternative, the Vendors through their actions, including but not limited to making the Oral Representations and the PDS Representations, induced an expectation in the Purchasers that they had the right to access water on the Vendors' Property (the "Expectation").
 46. The Purchasers relied on the Expectation created by the Vendors and acted to their detriment in respect to the Property.
 47. In the circumstances, it would be unjust and inequitable for the Vendors to rely on their strict legal rights in respect of the Vendors' Property to prevent the Purchasers from accessing water on the Vendors' Property, as per the Expectation.
- [101] During submissions the parties were asked to comment on whether the promise or assurance that the defendants said they gave (to provide access to the Metcalfe source during their ownership of 220 Edgar) could be the foundation of any remedy. The plaintiffs indicated they deny any such promise and advance no claims based on it. Specifically, they say such an assurance forms no part of their claim and agreed with the defendants that no remedy is available to them on the basis of that assurance.
- [102] The claim advanced is that the detriment is the decision to purchase. There is no allegation of any subsequent detriment. This is not surprising, as they did not take any steps in further reliance on the representation after the purchase was complete. For certain they relied on the Metcalfe source for water until it was no longer available to them, but they did not forego anything or take steps based on the alleged promise after the purchase was completed.

- [103] The plaintiffs are effectively saying that they should have received, in the purchase, an easement over 220 Edgar when the contract they entered into makes no reference or provision for the easement or a continuing access to the Metcalfe source. It essentially is a request for the court, in the face of an entire agreement clause, to impose a term that the plaintiffs could have included in the contract but did not.
- [104] If I accept that the oral representations are as alleged and that, together with the PDS representations, the plaintiffs relied on them to acquire a right to access the Metcalfe source, I am unable to conclude that the plaintiffs' reliance on them was reasonable. The various terms of the contract, including the entire agreement clause as set out above, simply do not support such a finding.
- [105] The claim for proprietary estoppel also fails.

Conclusions

- [106] The plaintiffs have failed to establish any of the claims advanced in the NOCC against the defendants the Spiekers. The plaintiffs did not proceed with their claims against Ms. Kentel and RE/MAX Shuswap Realty. The claim is dismissed.
- [107] The defendants made a "with prejudice" proposal intended to mitigate any damages that the plaintiffs may be found to be entitled to. Subsequent to the completion of the trial, but before the release of these reasons, the parties informed the court that that a form of that proposal has been accepted. On the information provided to me by counsel, it is only relevant if I find that the plaintiffs have proved their claim or some portion of it.
- [108] Subject to facts relevant to costs which are not before me, I would order that the defendants are entitled to their costs. If either party wishes to speak to the matter of costs they are at liberty to do so. Supreme Court Scheduling should be advised of the need to speak to costs within 30 days of the release of these reasons for judgment.

"D.A. Betton J."

The Honourable Mr. Justice Betton

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