Citation: ☼

Date: ☼
File No: C-5228
Registry: Duncan

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

SHAWN ROBERT SLADE

CLAIMANT

AND:

RAYMOND DEMARCHI, CAROL HARTWIG and KIM JOHANNSEN

DEFENDANTS

RE/MAX DUNCAN and KIM JOHANNSEN

THIRD PARTIES

REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE E.C. BLAKE

Appearing on his own behalf:	S. Slade
Counsel for Defendants R. Demarchi and C. Hartwig:	P. Blair
Counsel for Defendant K. Johannsen and Third Parties:	O. Hyatt
Place of Hearing:	Duncan, B.C.
Date of Hearing:	December 12, 14, 2018, August 26, 27, September 5, 2019
Date of Judgment:	November 7, 2019

INTRODUCTION

[1] The Claimant, Shawn Slade, seeks contractual and tort damages against all of the named Defendants, arising out of his purchase of 2.5 acres of vacant land (referred to in these Reasons often as "the property") located near Duncan, British Columbia.

[2] The Defendants, Raymond Demarchi and Carol Hartwig, were the vendors of the property. At times in these Reasons, I will refer to them collectively as "the vendors". The Defendant, Kim Johannsen, was the realtor who acted on their behalf with respect to the sale of the property.

[3] Mr. Slade's claims against the Defendants may be summarized as follows:

1. A claim for contractual damages against Mr. Demarchi and Ms. Hartwig for breach of a warranty contained in the contract of purchase and sale;
2. A claim for damages in tort against Mr. Demarchi and Ms. Hartwig with respect to negligent misrepresentation about the application of the *Heritage Conservation Act* to the property; and
3. A claim for damages in tort against all Defendants for misrepresentation concerning the contents of the development permit applicable to the property.

[4] All parties agreed at the outset of the trial that court time would be used most efficiently if we began by exploring only the issue of the Defendants' liability. The issue of damages was adjourned to await the determination of liability.

[5] I should point out for completeness that there are third party proceedings in the present case as well. In order to avoid unnecessary confusion and complication of the issues, I will say nothing further about the third party proceedings at the moment.

[6] I will begin these Reasons with an overview of the evidence presented at trial. I do not intend this summary to be exhaustive by any means. It is intended merely to place into context the legal issues that will be analyzed later on in the Reasons. I propose to deal with specific parts of the evidence in more detail during the course of that later analysis.

SUMMARY OF EVIDENCE

[7] Mr. Demarchi and Ms. Hartwig purchased the property, as part of a larger land purchase, in 1997. The history of property transactions thereafter is a little complicated, but it appears that they began to make efforts to sell off this particular property at least as early as 2006. They had trouble attracting interest in it and decided to take certain steps to make it more appealing to potential buyers.

[8] Mr. Demarchi and Ms. Hartwig were aware that in property transactions in the Duncan area complications and uncertainty often arise due to archaeological issues, and so they chose to obtain an archaeological report themselves in order to "demystify" this particular property for prospective purchasers. Accordingly, in September 2012 they commissioned an archaeologist, Dr. Genevieve Hill of the firm Madrone Consulting, to conduct a survey of the property. Dr. Hill testified during this trial and her report was filed as an exhibit. The report has been referred to throughout as an Archaeological Overview Assessment, or simply an "AOA".

[9] The important part of the AOA, for purposes of this litigation, is found at page 15 of the report. It reads as follows:

> The results of the PFR *[defined in the report itself as "Preliminary Field Reconnaissance"]* identified: (1) a small area of intact midden on the northwestern boundary; (2) redeposited midden from the adjacent property, and (3) the possibility that the existing intact deposit may extend across a former land surface, now possibly obscured by overburden from the construction of the road and retaining wall. As such, the subject property has archaeological potential. However, the area of proposed house development is not anticipated to contain cultural resources as it is situated on bedrock.
>
> Archaeological sites are protected by legislation and may not be damaged, altered, or disturbed in any way without permit issued under either Section 12 or Section 14 of the Heritage Conservation Act. The property owners indicated that they would not wish to build in the vicinity of the identified site, but rather they plan to build in the area of exposed bedrock on the southeast section of the site where soils are thin and no midden was visible.
>
> Following a conversation with Eric Forgeng of the Archaeology Branch, it has been concluded that an Archaeological Impact Assessment is not

> required. However, due to the presence of intact deposits within the bounds of the subdivided property, any land alteration to this property will require a site alteration permit .... Under the terms and conditions of such a permit an archaeological monitor will be required to be present during land altering activities with areas of archaeological potential, which are limited to the area between the identified shell midden and the area under the imported soil to the north and northeast. The level of archaeologist involvement will be determined by the Archaeology Branch and based on development plans, taking into account avoidance of the area of archaeological potential.

[10] In order to place Dr. Hill's summary into context, I should point out that at some time (likely even before the AOA was prepared) Mr. Demarchi and Ms. Hartwig had taken steps to identify a suitable building site (a potential "footprint" or "building envelope") on the property. They were of the view that it would be helpful to prospective purchasers to have such documentation available to them when considering whether to purchase the property. At some time in or before 2014, they also commissioned a written fire hazard assessment for the same purpose.

[11] In August 2013, the vendors obtained a development permit for the property from the municipality of North Cowichan. The development permit is a rather complicated document that is some ten pages in length.

[12] In September 2014, the vendors listed the property for sale once more with Mr. Johannsen. The realtor asked them to complete a property disclosure statement, which they did. The evidence discloses that they did so together, but without any significant assistance from Mr. Johannsen. Ms. Hartwig placed her signature in the boxes provided for answers to the various questions on the form, and she then signed the document generally on behalf of both vendors.

[13] For purposes of the present litigation, the following question and answer on the disclosure form are of relevance:

> [4C] Are you aware if the property, or any part of the property, is designated or proposed for designation as a "heritage site" or of "heritage value" under the *Heritage Conservation Act* or under municipal legislation?

[14] Ms. Hartwig answered the question with a "No" response.

[15] In due course, and in accordance with his established practice, Mr. Johannsen put together a package of relevant documents concerning the property. The package contained a number of items, including an "information sheet". The information sheet described the property in a summary way on a single page. Amongst other things, it referred in this way to the development permit applicable to the property:

> Development permit with 5000 sq ft building envelope issued August 2013 upon completion of the following studies:
>
> - Archaeological Overview Assessment by Madrone Consulting
> - Ecological Assessment Madrone Consulting
> - Wildland Urban Interface Fire Hazard Assessment by Strathcona Forestry Consulting

[16] Mr. Johannsen's information package also purported to contain the entire development permit, the property disclosure statement which the vendors had completed, and a considerable amount of detail that is not relevant here concerning zoning and sewage issues.

[17] In November 2014, the Claimant became interested in purchasing the property. On or about November 19, he requested Mr. Johannsen to send a copy of the disclosure package to his own realtor, Scott O'Neil, who was in Australia at the time.

[18] It is common ground that the information package, which Mr. Johannsen sent to Mr. O'Neil, was incomplete in at least one important aspect. The development permit that was part of the package was missing three pages designated as "Schedule 1", which contained the all-important requirements needed to fulfill the terms of the permit.

[19] Mr. O'Neil reviewed the information package with the Claimant, but neither of them noticed that there were pages missing from the development permit. The Claimant did have some questions for Mr. O'Neil, and Mr. O'Neil passed the questions along to Mr. Johannsen via email. Mr. Johannsen responded to the questions by email as well. Although the specific questions and answers are not particularly germane to the present

litigation, the way in which Mr. Johannsen answered is significant, in my view, and I will return to this aspect of the matter later in these Reasons.

[20] In the end, the Claimant and his realtor were satisfied with the information they had received. Mr. O'Neil submitted an offer on his client's behalf to purchase the property.

[21] Some negotiation took place over the purchase price, and a final agreement was reached by the end of December 2014. The transaction completed and the Claimant took possession of the property early in 2015.

[22] In the spring of 2015, the Claimant submitted his residential building plans to the municipality of North Cowichan. They were rejected. It was at that point that he read for the first time the contents of Schedule 1 of the development permit issued to the vendors in 2013, the schedule that comprised the missing pages from Mr. Johannsen's information package.

[23] Upon reading the full development permit and consulting with the municipality, the Claimant discovered that if he wished to build a residence on the property he would be obliged to expend considerably more money than he anticipated in order to deal with matters of archaeological protection, environmental protection and fire prevention. As he investigated the situation further, he discovered that those extra expenses arose from the recommendations contained in the AOA and the fire assessment reports which the vendors had obtained years before, but which he himself had never set eyes upon.

[24] The Claimant did go ahead and build a residence on the property. I assume for the purposes of our present discussion that he did indeed expend more money in that endeavour than he had anticipated. He commenced the present litigation hoping to recoup that extra expenditure. He believes that he was misled in material fashion by all of the Defendants. In that respect, he has focussed upon the actions of the Defendant vendors with respect to the contents of the disclosure statement, and upon all of the Defendants with respect to the incomplete information package, he received in the lead-up to the purchase and sale transaction.

SUMMARY OF APPLICABLE LAW

[25] It will be helpful if I provide a general summary of the most fundamental principles of both contract law and tort law that underlie the present litigation. These general principles, when applied to the facts as I find them, will govern the outcome of the liability portion of the trial.

[26] As a general proposition of contract law, it is considered the purchaser's obligation to satisfy himself or herself of the quality of the property being acquired. This is the principle of *caveat emptor*, meaning "let the buyer beware".

[27] In the leading case of *Fraser-Reid v. Droumtsekas* (1979) 103 DLR (3d) 385, Dickson, J. (later the Chief Justice of Canada) said this about the rationale of the *caveat emptor* principle:

> 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.

[28] In that same case, the Court goes on to note that with the growth of consumer protection concerns in recent times the principle of *caveat emptor* has become much less significant in many areas of contract law, but remains in full vigour in the context of the purchase and sale of land. The British Columbia Court of Appeal has lately made that same observation on several occasions: See, for example, *Cardwell v. Perthen*, 2007 BCCA 313 or *Nixon v. MacIver*, 2016 BCCA 8.

[29] In the present case, I am satisfied on the evidence that the issue of fraud simply does not arise with respect to any of the Defendants. Indeed, I understood the Claimant to essentially concede that point in closing submissions. Nor can the possibility of "fundamental difference" arise here, since the Claimant did ultimately build a house on the property he purchased, just as he had intended all along.

[30] In applying basic contractual law principles to the present case, therefore, it simply remains to be determined whether non-innocent misrepresentation or contractual warranties come into play so as protect the Claimant from the full vigour of the *caveat emptor* doctrine.

[31] I turn next to the applicable principle of tort law that is raised in the present litigation, that being the issue of negligent misrepresentation. In the leading case of *Queen v. Cognos Inc.*, [1993] 1 SCR 87, at paragraph 110, the Supreme Court of Canada identified the five elements which a Claimant must prove in order to succeed on a claim of negligent misrepresentation. They are:

1. that there is a duty of care based on a "special relationship" between the representor and the representee;
2. that the representation was untrue, inaccurate or misleading;
3. that the representor acted negligently in making the representation;
4. that the representee acted reasonably in relying on the representation; and
5. that the reliance was detrimental to the representee in that it caused him or her to suffer damages.

[32] In the context of alleged misrepresentations by a vendor in a real property transaction, there is one further important qualification that must be made with respect to the first of the five elements listed above, that being the requirement for a finding that there exists a "special relationship" between the representor and the representee. This qualification arises because of the continuing pervasive effect of the *caveat emptor* principle discussed above.

[33] In the Ontario Court of Appeal case of *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal refused at [2011] SCCA No. 319, the Court said this at paragraph 118:

> .... I find that the special relationship extends only as far as the representations made in the PDS [Property Disclosure Statement]. If it is the PDS that creates the special relationship between the parties, that relationship must be confined to the representations made therein. If the special relationship extended further than the PDS, the result would be that all vendor/purchaser relationships would be "special relationships".

> This would defeat the purpose of the doctrine of *caveat emptor* entirely. *Caveat emptor* is intended to be the rule, not the exception. In my view, it would not be appropriate to extend any exceptions beyond their current state in law.

[34] This statement of the applicable law has been approved in this province on a number of occasions: See, for example, *Hanslo v. Barry*, 2011 BCSC 1624 (SC) or *Nixon v. MacIver*, 2014 BCSC 533, appeal dismissed 2016 BCCA 8.

APPLICATION OF THE LAW TO THE EVIDENCE

[35] The Claimant submits that he has a valid claim against the vendors for breach of a contractual warranty, originating in the misstatement contained in question 4C of the property disclosure statement.

[36] The simple answer to that submission is that the property disclosure statement never found its way into the contract, and hence no part of its contents can constitute a contractual warranty. I will explain that conclusion now.

[37] Paragraph 18 of the contract of purchase and sale in this case provides as follows:

> 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 the Contract*, all of which will survive the completion of the sale.
> (emphasis added)

[38] The portion of paragraph 18 which I have emphasized plainly contemplates that the property disclosure statement may or may not become part of the contract of purchase and sale, depending on the wishes of the parties. In the Claimant's submissions to the Court at the conclusion of the proceeding before me, the Claimant seems to proceed on the assumption that the property disclosure statement must have become part of the agreement of purchase and sale, presumably just because the

contents of that statement are so important. That is an incorrect assumption. It flies in the face of the wording of the agreement of purchase and sale, which he signed.

[39] The Claimant's realtor, Mr. O'Neil, submitted the first draft of the contract of purchase and sale. The draft document was on a standard form and was accompanied by two addenda, also on standard forms.

[40] In the first addendum, the following provision appears at paragraph 13:

> PROPERTY DISCLOSURE (Buyer and Seller)
> THE ATTACHED PROPERTY DISCLOSURE STATEMENT
> DATED (MONTH/DAY/YEAR) IS INCORPORATED INTO
> AND FORMS PART OF THIS CONTRACT.

[41] This would have been the place to insist on the property disclosure statement becoming part of the contract, if that was the intention. The paragraph remained incomplete in the Claimant's draft, however, no property disclosure document was appended and no attempt was made to identify any such document by month, day or year.

[42] The second addendum contained a further reference to "property disclosure" at paragraph 9, in the following terms:

> Subject to the Buyer on or before "December 14, 2014" approving the Property Disclosure Statement with respect to the information that reasonably may adversely affect the use or value of the Property. If approved, such disclosure Statement will be incorporated into and form part of this Contract of Purchase and Sale. The Seller will provide the Property Disclosure Statement within 24 hours of acceptance of this Offer.

[43] Mr. O'Neil apparently inserted the date of December 14, 2014, which appears in quotations above, into the standard form on the Claimant's behalf but then the entire paragraph was stroked out and the Claimant initialled the resulting deletion when the document was delivered to the vendors' realtor, Mr. Johannsen. That sequence makes little sense logically, but it is explained at least to some extent by the testimony of the two realtors before me.

[44] Mr. O'Neil testified that there are differing practices amongst realtors acting for purchasers concerning the wisdom of incorporating a disclosure statement into the contract of purchase and sale. He testified that it was his practice not to seek inclusion, and I took it from his evidence that he intended to follow his usual practice in this case. He certainly gave no indication that he intended to diverge from it.

[45] For his part, Mr. Johannsen testified that he was a little surprised that the Claimant was apparently not seeking to include the property disclosure statement into the contract of purchase and sale, but he took it to be a bargaining tool adopted by the Claimant in a situation where the purchase price for the property had not yet been fixed upon.

[46] The effect of the two realtors' testimony, when coupled with the wording of the contract of purchase and sale itself (including the two addenda) can only be interpreted to mean that the property disclosure statement was deliberately not made part of the final agreement. The Claimant may now regret having taken that position, particularly since it may have arisen from his realtor's choice rather than by any conscious decision on his own part. After-the-fact regrets, however, cannot act as a substitute for careful analysis.

[47] As I indicated earlier, the conclusion that the property disclosure statement did not form part of the contract of purchase and sale provides a simple answer to the Claimant's contention that the vendors breached a contractual warranty by supplying false information in answer to question 4C of the property disclosure statement.

[48] In all fairness, though, I think I should go further and express my conclusion that the impugned statement in the property disclosure statement was not wrong in any event. Unfortunately, my reasons for reaching that conclusion cannot be expressed in just a few words, but I will do my best to be as succinct as possible.

[49] I must begin by making reference to certain provisions of the *Heritage Conservation Act* (hereafter the "*Act*") upon which question 4C of the property disclosure statement is based.

[50] The term "heritage site" is defined in section 1 of the *Act* in the following way:

> "heritage site" means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people.

[51] The term "heritage object" is defined in the same section of the *Act*, as follows:

> "heritage object" means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people.

[52] Sections 9 and 10 of the *Act* then outline a formal and detailed procedure by which land or objects may be designated as either "heritage sites" or "heritage objects". The designation procedure involves the provision of notice to interested parties and the possibility of objections to a designation being raised and considered by the responsible government minister.

[53] The term "heritage value" is also defined in section 1 of the *Act,* as follows:

> "heritage value" means the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object.

[54] The term "heritage value" speaks from an entirely different perspective than the terms "heritage site" or "heritage object". "Heritage value" is a vague and abstruse term, referring to some sort of unstructured measurement of the value of a site or object. Its assessment undoubtedly plays a part in determining whether governmental authorities will seek designation for any given "historical site" or "historical object", but that, it seems to me, is the extent of its connection to any designation process.

[55] Question 4C of the property disclosure statement wades into the middle of these complicated legislative provisions in a remarkably clumsy manner. In asking whether a vendor's property "is designed or proposed for designation as a "heritage site" or of "heritage value" it confusingly refers to two entirely different concepts in one question. Surely it would have been wiser to have referred to prospects for heritage designation in one question, and posed a separate question (if there is one) concerning "heritage

value". If the two concepts really must be considered in one question it would be infinitely less confusing to have worded the question something like this:

> Are you aware if the property or any portion of the property is either:
>
> a) designated as a "heritage site";
> b) proposed for designation as a "heritage site"; or
> c) of "heritage value".

[56] Mr. Demarchi and Ms. Hartwig found themselves confronted with question 4C in its existing form, however, and I suspect that they probably struggled with it. Their response was obviously correct with respect to whether the property had ever been designated or proposed for designation as a "heritage site", but it is not so clear with respect to the part of the question that refers to "heritage value".

[57] It is my view that the effect of the conclusion reached by Dr. Hill in the AOA was to give the property some "heritage value" if there is any life to be breathed into that term at all. The fact that sections 12 through 14 of the *Act* provide for careful governmental oversight with respect to any development on the property can surely only be explained on the basis that the property has "heritage value", even though those words are not expressly used in the relevant sections.

[58] In short, it is my view that the terms "heritage value", "archaeological potential" and "archaeological value" cannot be interpreted as if they are phrases that are totally unrelated to one another, as the vendors now would have me believe. I think it is a far more likely interpretation that the archaeological value of a piece of property may, in an appropriate case, be considered to be one of the factors that helps to determine the heritage value of that property. I think it not coincidental that in 2015 when the Claimant sought clarification from the provincial government's Archaeology Branch concerning the status of his newly purchased property, the answer he received came from an official (Mr. Tal Fisher, C.D.) who referred to himself as a "Heritage Resource Specialist" and not merely an "Archaeological Specialist."

[59] The interpretation, which I propose for the interplay amongst the terms "heritage value", "archaeological potential" and "archaeological value", produces important practical consequences. If the effect of the AOA in this case was indeed to give not only "archaeological value" but also "heritage value" to the property, the correct answer to question 4C of the property disclosure statement would be "Yes". Seeing that response on the disclosure form would greatly increase the likelihood that prospective purchasers such as the Claimant would be alerted to the significant hurdles and costs facing them if they decided to purchase and develop the property. That seems to me to accord sensible with the very purpose for which property disclosure statements were designed.

[60] I listened carefully to both Mr. Demarchi and Ms. Hartwig answers to questions at this trial concerning the thoughts that went through their minds when they answered question 4C of the property disclosure statement. It appeared to me that they directed their thoughts virtually entirely to whether the property had been subjected to any sort of heritage designation procedure. Noting that no such designation had occurred and that none was proposed to the best of their knowledge, they correctly answered the first part of the question in the negative. The conclusions reached by the AOA, however, and the resultant heritage protections afforded by section 12 through 14 of the *Act* must mean that the answer given to the second part of the question was incorrect.

[61] That is not the end of the inquiry, however. There is settled case law in this province concerning the relatively limited significance of a property disclosure statement. A statement in a property disclosure statement is not a warranty. As MacKenzie, JA said in the recent decision of *Hamilton v. Callaway*, 2016 BCCA 189, at paragraph 43:

> [A] property disclosure statement obligates a vendor to honestly disclose his or her knowledge, not to warrant that knowledge was actually correct.

[62] To similar effect is Smith, JA's decision in *Nixon v. MacIver* (to which I have already referred) at paragraph 48:

> [T]he vendor must correctly and honestly disclose his or her actual knowledge, but that knowledge does not have to be correct.

[63] The essential question to be answered here is not whether the vendors were correct when they answered both parts of question 4C in the negative, but whether their answer honestly reflected their state of knowledge at the time.

[64] In this court, both Mr. Demarchi and Ms. Hartwig were adamant in testifying that they believed that they had answered the question correctly. They were not seriously contradicted as to their belief, and I found them both to be generally credible witnesses. In view of the difficult legislative provisions underlying the question they were called upon to answer, and also bearing in mind the thoroughly ambiguous nature of the question itself, I am not prepared to second-guess them.

[65] I find that the Claimant's claim against the vendors on the basis of a breach of contractual warranty must be therefore be dismissed. As I have tried to explain, the claim must be dismissed for two reasons. The first reason is that the property disclosure statement did not form part of the contract of purchase and sale. It therefore cannot serve as the basis for a claim of contractual breach. The second reason is that even if the vendors were wrong in part in their answer to the question in the property disclosure statement, they answered the question honestly and to the best of their ability. That was all they were required to do. The obligation to delve further into the matter lay with the Claimant as the prospective purchaser; it did not lie with the Defendant vendors.

[66] The next issue to address is whether the vendors' answer to question 4C of the property disclosure statement has been shown to amount to a negligent misrepresentation, as a matter of tort law. The conclusion on that point must surely be in the negative, in part for the same reasons which have informed my decision on the issue of the alleged contractual warranty. I will try to explain myself briefly once more, without treading over the same ground unnecessarily.

[67] Property disclosure statements do not have the sweeping legal effect that they are often thought to have. The contents of a property disclosure statement are not warranted to be true. A prospective purchaser reading such a document is entitled to presume only that its contents amount to a representation concerning the vendor's honest understanding of the underlying facts, nothing more. As I have already said, I am

satisfied that the property disclosure statement in this case did reflect the vendors' honest understanding of the underlying facts. The property disclosure statement did not therefore amount to a misrepresentation.

[68] It is precisely because property disclosure statements are of such limited legal significance that they often contain provision such as this:

> The prudent buyer will use this property disclosure statement as the starting point for the buyer's own inquiries; and
>
> The buyer is urged to carefully inspect the Land and, if desired, to have the Land inspected by a licensed inspection service of the buyer's choice.

[69] I note that both those provisions are contained in the property disclosure statement in the present case. The effect of those provisions is to emphasize exactly where the burden of uncovering problematic features of the property lies in a case where vendor fraud and misrepresentation are absent: It lies with the purchaser. That is the essential point the Claimant here does not seem to have fully grasped. As I will explain more fully in a moment, his own efforts to protect himself in this purchase of the property fall considerably below the standard that the law requires of him.

[70] I turn then to the last issue requiring analysis involving the assertion that there was negligent misrepresentation by all Defendants concerning the development permit applicable to the property.

[71] There is no doubt that the Claimant received seriously fault information about the development permit. In order to analyze the legal significance attaching to that misinformation, it is necessary to review in more detail the facts disclosed by the evidence.

[72] It now appears to be common ground that the vendors supplied Mr. Johannsen with the full and correct information concerning the development permit. The most likely scenario is that the relevant pages went missing when they were being collated in Mr. Johannsen's office for inclusion in the information package which Mr. Johannsen was putting together for distribution to prospective purchasers. The development permit

which found its way into the information package was thus incomplete, and unfortunately it was distributed to the Claimant (or, more precisely, to his realtor) without Mr. Johannsen noticing the error.

[73] Even that brief summary allows for one legal conclusion to be drawn right away; namely, that the misrepresentation claim against the vendors with respect to the missing pages of the development permit must fail. The information package distributed by Mr. Johannsen was not part of any property disclosure statement completed by the vendors. It was provided to the Claimant purely as a courtesy offered by Mr. Johannsen, in his capacity as a diligent realtor. The practical significance of that point is this: A purchaser's tort claim against a vendor for negligent misrepresentation is limited by law to misrepresentations contained in any property disclosure statement completed by the vendor. The authorities to which I referred in an earlier part of these Reasons make it clear that the "special relationship" that must be shown in order to prove a claim for negligent misrepresentation extends no further than that. On that basis alone, then, the Claimant's claim against the vendors for negligent misrepresentation with respect to the provision of the incomplete development permit must be declared still-born.

[74] The claim against Mr. Johannsen merits much more careful consideration of the evidence.

[75] The closing submissions which have been filed with the Court reveal that there is significant difference between Mr. Johannsen on the one hand and the vendors on the other hand concerning the precise evidence which Mr. Johannsen gave during the trial about the manner in which the pages went missing from the development permit.

[76] It is common ground that the pages went missing because of the faulty operation of a printer in the realtor's office. The dispute between the parties centres upon whether or not Mr. Johannsen's evidence should be interpreted to mean that he knew of the faulty operation of the printer beforehand.

[77] It is perhaps surprising that the entirety of Mr. Johannsen's evidence on this point was provided in answer to a question which I myself asked from the Bench, ironically as

a point requiring clarification. I have now listened to the recording of the relevant evidence, and my best transcription of it is as follows:

> It *[the development permit]* was complete when I saw it at Ms. Hartwig's. When I discovered the problem I spoke to my office assistant. We were having a copier that was having a feeding problem .... We repaired it after that at some point when we noticed pages stuck together.

[78] Unfortunately, that evidence was never "clarified" any further. In my view, it remains totally ambiguous. It could be interpreted to mean that he knew of the faulty printer before the information package in this case was put together, or it could mean that he only discovered the problem some time after that.

[79] To my mind, it does not much matter. Even if he did not know beforehand of the potential for the printer to cause problems of the sort that occurred, it was surely careless of him to distribute the information package without checking to ensure that all pages had been included. At least some of the documents in the package were immensely important and it took no great skill or commitment of time to ensure that they had all been included.

[80] It is my finding that the development permit which was delivered to the Claimant's realtor was "inaccurate" and "misleading" in the sense that those words are used in the decision of *Queen v. Cognos*, which I have referred to above. I also find that the inaccuracy came about as a result of Mr. Johannsen's carelessness in failing to check the documents before they were distributed. These findings together may be equated as a determination that Mr. Johannsen negligently misrepresented the state of the development permit to the Claimant.

[81] That is far from the end of the inquiry, however. In accordance with the dictates of *Queen v. Cognos*, the Claimant must show that it was reasonable for him to rely upon Mr. Johannsen's misrepresentation of the true facts before liability can be imposed upon Mr. Johannsen. On this aspect of the matter, however, it is clear to me that the Claimant cannot succeed, for the reasons which follow.

[82] To anyone who read Mr. Johannsen's defective information package with reasonable care, I think it would be glaringly obvious that there was something important missing from the development permit that was included. The first page of the development permit clearly states that the property is to be developed in accordance with two schedules and three appendices. Each one of those documents then appears in order and is identified in the pages which follow, except that the first schedule is not in its proper place. It is not in the document at all.

[83] During the course of this trial, I had the benefit of hearing evidence from the Claimant's father, David Slade. Mr. Slade is obviously a mature and respected businessman in the local community. He has built houses of his own and professed to being somewhat familiar with development permits. He seemed almost the quintessential "reasonable man", although he was not introduced as such during the trial. Mr. Slade was asked what he would do, based on his general knowledge and experience in life, if he was provided with a development permit like the one his son and his son's realtor received in this case. He was quite clear in agreeing that he would make sure that all of the listed schedules were included in the document. That answer accords entirely with common sense, in my view.

[84] The Claimant did engage in discussions with his own realtor, Mr. O'Neil, before submitting an offer to purchase the property. Mr. O'Neil was apparently in Australia at the time, which no doubt somewhat limited their ability to exchange ideas, but he gave evidence on this trial indicating that he carefully read the information package and reviewed at least parts of it with the Claimant.

[85] I am bound to say, however, that Mr. O'Neil's reading of the development permit cannot have been nearly as careful as he claims. Plainly, he did not notice that the permit was missing the essential Schedule 1, and that is remarkable indeed. The document really makes no sense without that schedule.

[86] In his efforts to assist the Claimant with a significant land purchase, Mr. O'Neil's attention to detail appears to have been a good deal less than perfect in many ways. While he did faithfully submit to Mr. Johannsen certain questions about the proposed

transaction which the Claimant put to him, he utterly failed to pay attention to some of the answers which Mr. Johannsen provided to him which should have alerted him to the need to be extremely careful with the proposed transaction.

[87] Before submitting an offer on the property, for example, Mr. O'Neil conveyed to Mr. Johannsen a potential problem which the Claimant had raised concerning the construction of a workshop on the property. Mr. Johannsen provided him with a tentative answer but suggested that he should speak with the municipality about such things. Mr. Johannsen then went on to point out that the "development permit is very specific as to what you can or can't do and there is one in place which you should have a copy of". I would have thought that a response of that sort would have sent Mr. O'Neil scurrying off to investigate in detail the development permit which he had been given in the information package. He testified in this Court that he did not even notice Mr. Johannsen's reference to the development permit.

[88] In a similar vein, Mr. O'Neil testified that while he read the single-page information sheet which Mr. Johannsen included in the information package, he somehow overlooked the references to the AOA and the fire hazard assessment which had been completed with respect to the property. I would venture to say that if he had taken the time to look at those documents, or suggest to the Claimant that he should do so himself, the likelihood is that the Claimant would have discovered in a timely way the very same obstacles that inevitably presented themselves to him after he had completed his purchase.

[89] There are no doubt other simple ways in which Mr. O'Neil, with his real estate expertise, could have protected the Claimant from the financial misfortune which eventually befell him in this case. The possibility of presenting an offer subject to obtaining a building permit from the municipality springs to mind. Mr. O'Neil testified that he was aware of the possibility of proceeding in that manner, but for some reason that prospect was never raised .

[90] In the end, though, I must bear in mind that Mr. O'Neil is not a Defendant in this proceeding and it is not my function to reach conclusions about his performance in this

matter. I need only say that, whether through bad advice or not, the steps which the Claimant ultimately took to protect himself from the misleading information which Mr. Johannsen's gave to him about the development permit were woefully inadequate. In my view, he has fallen far short of meeting the requirement set forth in *Queen v. Cognos* (referred to above) to show that he acted reasonably in relying on Mr. Johannsen's misrepresentation when making the decision to go ahead and purchase the property. His claim against Mr. Johannsen for negligent misrepresentation therefore cannot succeed.

CONCLUSION

[91] Based on all of the foregoing, I confirm my conclusions to be as follows:

1. The Claimant's claim for contractual damages against the Defendants Mr. Demarchi and Ms. Hartwig for breach of warranty in the contract of purchase and sale of the property must be dismissed;
2. The Claimant's claim for damages in tort against the Defendants Mr. Demarchi and Ms. Hartwig for negligent misrepresentation about the application of the *Heritage Conservation Act* to the property must be dismissed; and
3. The Claimant's claim for damages in tort against all Defendants for the misrepresentation concerning the contents of the applicable development permit to the property must be dismissed.

[92] It follows that the third party proceedings in this case are now rendered moot, and it will not be necessary to attempt to quantify the Claimant's various claims for damages.

[93] I have not addressed the matter of costs in these Reasons. I will entertain submissions from the parties on that issue if they find it necessary.

PCJ

The Honourable Judge E.C. Blake
Provincial Court of British Columbia