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44601 B.C. Ltd. v. Ashcroft (Village)

Between
444601 B.C. Ltd., plaintiff, and
Corporation of the Village of Ashcroft, defendant

[1998] B.C.J. No. 1964

81 A.C.W.S. (3d) 1021

Kelowna Registry No. 25036

British Columbia Supreme Court
Kelowna, British Columbia

Burnyeat J.
(In Chambers)

Heard: May 20, 1998.
Judgment: filed August 18, 1998.

(39 pp.)

Municipal law -- Liability of municipalities -- Negligence -- Standard of care, building construction approval -- Sale of land -- The contract -- Breach of contract -- What constitutes.

This was an application by Ashcroft for a judgment dismissing 244601's claim for damages for breach of contract, fraudulent misrepresentation or negligent misrepresentation. 244601 claimed judgment of the action. 244601 bought land from Ashcroft which had either owned or had a mortgage on for some years. A building was built on the site in 1981. The building was approved for occupancy by the building inspector for Ashcroft despite that fact that it had no fire-stops. The building was eventually acquired by Ashcroft and put up for sale. Ashcroft had described the building as dilapidated and stated that it would assist in evaluating the current building operational status. Sheppard had quickly inspected the building and taken a video of it. He stated his interest in the building to an Ashcroft employee, Watson, and had asked whether a caretaker's suite could be built on it. Watson stated that it was zoned for it. Sheppard did not look at blueprints. A contract of purchase and sale was signed which contained an exclusionary clause stating that no

representations, warranties, guaranties, promises or agreements were made outside it. 244601 was incorporated to buy the building. 244601 applied to build a caretaker's suite. This application was denied by Ashcroft because there were no fire-stops. 244601 stated that Ashcroft fraudulently or negligently represented that the final building inspection had taken place. In the alternative, Ashcroft was negligent in its performance of the final inspection.

HELD: The application for dismissal was allowed. There was no fraudulent misrepresentation. Watson was unaware that the building was not constructed in accordance with the Building Code. He did not say that the building had been constructed to allow for a caretaker's residence, only that it was zoned for it. 244601 did not act on any of the representations. There was no negligent misrepresentation and there was no reasonable reliance on any statement. The exclusionary clause in the purchase of sale agreement was not vitiated because there was no fraudulent or negligent representations. Ashcroft was not negligent because 244601 had suspended any duty of care owed to it.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 18A. Land Title Act, s. 181.

Counsel:

L.C. Gunnlaugson, for the plaintiff.
F.R. Scordo, for the defendant.

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1 BURNYEAT J.:-- The defendant applies pursuant to Rule 18A for judgment dismissing the claim of the plaintiff for damages for breach of contract or for fraudulent and/or negligent misrepresentation arising out of the purchase from the defendant by the plaintiff of land within the boundaries of the defendant. On the other hand, the plaintiff claims judgment with the amount of the damages to be considered at a later date. The issues in contention are the obligations, if any, owed by the defendant to the plaintiff arising out of the roles of the defendant as an inspector and regulator of the property sold and as the vendor of the property.

BACKGROUND

2 The defendant has had a long involvement with this property. Prior to 1981, it owned the property. The property was then sold subject to a mortgage in favour of the defendant. As subsequent owners purchased the property, the property remained subject to this mortgage. Canso Enterprises Ltd. purchased the property in early 1986. A Tax Sale Notice was filed by the defendant against the property in 1991 and, on September 24, 1992, the defendant again became the owner as

a result of the failure of Canso to pay $55,000 for the 1984 through 1986 balances owing for municipal taxes.

3 Throughout, the property has been zoned "M1" and "P1." The "Permitted Uses" under M1 Zoning include: "Commercial Recreation." The "Permitted Uses" under P1 zoning include: "Places of assembly including ... community halls ..." and "recreation." Since built, the building on the property has been used as a restaurant, lounge, banquet facility, fitness centre and daycare centre. The defendant has referred to this property throughout as a "Family Entertainment Centre (Racquet Sports Centre)."

4 Prior to commencing construction of the building in 1981, the then owner applied for a building permit. Pursuant to Bylaw No. 356 of the defendant, a permit could be issued if:

> The proposed work set out in the application conforms with this Bylaw and all other applicable Bylaws of the authority having jurisdiction and further does not contravene any Provincial or Federal Statute or Regulation.

There was a further provision that any application for a permit to erect a building was to conform to a number of provisions before a permit could be issued. Those pre-conditions included that all drawings for the project were to bear the seal and signature of the member of the Architectural Institute of British Columbia and/or the Association of Professional Engineers of British Columbia.

5 Under Bylaw No. 356, the duties of the owner of property included that every owner shall:

> a. Permit the authority having jurisdiction to enter any building or premises at any reasonable time for the purpose of administering this Bylaw ...
> h. Give at least 24 hours notice to the authority having jurisdiction and request his inspection of the work ...

6 By-Law 356 required the owner to give notice to request inspection five times during the construction process: when the forms for footings and foundations were complete but prior to pouring any concrete, after removal of form work from the concrete foundation but prior to backfilling against the foundation, when the framing and sheathing of the building were complete "including fire-stopping ... but before any insulation, lath or other interior or exterior finish is applied which would conceal such work", before the building drain, sanitary or storm sewer was covered or any part of the plumbing system was covered, and after the building was complete and ready for occupancy but before occupancy.

7 An application to erect the building was made in July, 1981 and a building permit was issued on July 29, 1981. The area of the building was described as being approximately 9,000 square feet and the building use was described as "recreation." The initial inspection relating to foundation and first floor framing was conducted prior to July, 1981. That initial inspection was done in the presence of Mr. Huber who was the Building Inspector for the defendant between 1981 and 1990.

8 The August 31, 1981 Inspection Report indicates "O.K." for a number of items but also contains the following note:

> Fire Separations: N.B.C. 3.1.9 (2)(a) fire-stops shall be provided at every stud wall and partitions at ceiling and floor levels.

In his affidavit sworn November 4, 1996, Mr. Huber indicates that this entry was made at the time of one of his inspections.

9 At his discovery, Mr. Huber was asked the following question and gave the following answer:

> Q Are you aware that that drywall does not exist in this building?
> A Yes, I have one inspection sheet requiring fire separation walls, and after that I did no inspection of the building.

It is clearly not the case that he did no further inspections as his November 4, 1996 affidavit continues:

> The document also records my attendance at the premises on December 18th, 1981, when I permitted occupancy for only the upper level, which was the bar and restaurant area. An occupancy permit for the lower level was not issued probably because I was not called back for a final inspection.

10 His December 18, 1981 Inspection Report contains this note: "No occupancy will be permitted until occupancy inspection has been completed." There is also this notation on the Inspection Report: "Occupancy permitted only for upper level. Call back for final. Dec.18-81.a)"

11 Mr. Huber described his "usual practice" regarding deficiencies as follows:

> ... my usual practice was to direct the owner or contractor to remedy the deficiencies that I noted. I then proceeded on the basis that the owner or contractor would remedy the deficiencies. I did not return for re-inspection unless called by the owner or contractor. Therefore, when Mr. Sheppard [through the plaintiff] purchased the lands and premises in June of 1993 I did not know that there were any building code infractions with respect to the lands and premises.

It should be noted, however, that the August 31, 1981 Inspection Report made note of the fact that the necessary fire-stops were not provided as the drywall did not go from floor to ceiling at each partition. Accordingly, that was a deficiency which was known in August but was not apparently checked by Mr. Huber in later inspections including the December 18, 1981 inspection.

12 At his discovery, Mr. Huber was asked what the responsibilities of an inspector were. He

stated: "The building inspector's responsibility is the guaranteeing the safety of the structure, health and safety of the public on that building." In his discovery, Mr. Huber also indicated that he had no training in the area of building inspections prior to joining the defendant in 1981 and that he only started to take courses about these matters in the fall of 1981.

13 Mr. Huber confirmed that, prior to an owner commencing business operations, it was necessary to obtain a business licence. He was then asked the following questions and gave the following answers:

> Q Are you saying then that the Village of Ashcroft, the defendant in this action, allowed the building to commence, or the owners to commence operations in the building without final inspection or approval?
> A Q Well in that case I guess they did. I would prefer if you wouldn't guess. While that's a fact.
> A They gave them a business licence without an occupancy permit.

14 The building suffered extensive fire damage in 1982. While he was the building inspector during 1982, Mr. Huber stated that he did not perform an inspection after the renovations which followed the fire. He stated that no inspection has been done of the building since the last inspections he did in 1981.

15 The copy of the Inspection Report attached as Exhibit "B" to the affidavit of Mr. Huber had the initials "O.K." indicating "Approval" of the "Final" [Inspection] and for "Occupancy." Unfortunately, the date that the initials "O.K." were added is not shown on this Inspection Report. However, it is clear that these are the spaces on the report form which would be marked "O.K." if final inspection had been undertaken and if occupancy had been approved. There are no explanations given by the defendant regarding these notations. As these notes are clear, as business licenses were subsequently issued, and as the building was subsequently occupied by the original owner and by subsequent owners including the defendant, I can conclude that a final inspection did, in fact, take place. Occupancy was then permitted on the basis that the final inspection found no outstanding deficiencies. I make that finding. I make this finding despite the fact that I can also find that the deficiencies set out in the August 31, 1981 Inspection Report had not been corrected. I make that finding as well. Although it might have been possible for the fire-stops to have been included after August 31, 1981 but subsequently removed after the 1982 fire damage, this is highly unlikely. Accordingly, I am satisfied that the plaintiff has shown on a balance probabilities that the necessary fire-stops were never in place and that, despite this deficiency, final inspection and occupancy were approved and business licences subsequently issued.

16 Even if I found that there had been no final inspection, it is clear that both the upper and lower levels of the building were occupied and the business was operating from the building after construction was complete in 1981.

SALE OF THE PROPERTY

17 The assessed value of the lands and buildings in 1993 was $171,500 and the estimated replacement value of the building was $748,000. After it became the owner because of the tax sale, the defendant decided to sell the property. In April, 1993, it described the property as having been vacant for a number of years with the building in a "dilapidated condition." Initially, the defendant decided to call for sealed written tenders for the purchase and sale of the property and a "Property Sale Notice" was drafted by Robert Watson, the then Clerk and Treasurer for the defendant. This Notice was published in a local newspaper and was posted. In the Notice, the "Condition" of the property was described as: "As is, no warranty implied."

18 As no tenders were submitted, the defendant decided to call for proposals and a further Notice was drafted by Mr. Watson. This Notice was also published in the local newspaper. The second Notice was almost identical except that the word "proposal" had been substituted throughout for the word "tender." The provision as to "Condition" was identical as was a provision offering a possible lease:

> A building lease agreement will be made available of up to six months duration during the time period between acceptance of offer and completion of sale, to allow for building inspection, renovations and mortgage completion.

19 Written proposals accompanied by a 10% deposit were required by the Notice and an upset price of $75,000 was set. Both Notices contained the following provision: The Municipality will assist to the extent it is able to in having evaluated current building operational status.

20 In his affidavit, Mr. Watson described the purpose of these provisions:

> These Clauses were inserted because the premises were in a dilapidated condition. Council was not prepared to spend any money to upgrade the premises. Other than providing assistance "to the extent it is able", Ashcroft wanted to make it clear to prospective purchasers that they would have to make their own investigations and inspections, and be responsible for their own decisions. Ashcroft was also prepared to entertain proposals to lease the lands and premises for six months to give prospective purchasers even more time "to allow for building inspection."

INVOLVEMENT OF THE PLAINTIFF AND BYRON SHEPPARD OF THE PLAINTIFF

21 Mr. Sheppard became interested in the property when visiting Ashcroft from Kelowna. He described himself as a machinist and millwright but also indicated that he had owned four or five duplexes in Alberta: "... which I used to do all the maintenance work for." In his discovery, Mr. Sheppard stated:

> ... when I ever come into any strange town that I don't know too much about I like snooping around to see what is for sale. And that is when I located this

> building was boarded up and going down to the Village office I asked questions like who was paying the taxes, etc., etc., and he informed me that it was actually up for bids.

22 Mr. Sheppard went to the Village office and met with Mr. Watson who agreed to accompany him to view the property. In his discovery, Mr. Sheppard testified that he wanted to take about 15 minutes to look at the structure and that was approximately how much time he spent inside the building: "... I always carry my video camera with me, and they said the power was still on, so I quickly took a video of it and went home."

23 In his discovery, Mr. Sheppard said that he observed: "... there was a severe damage with water damage, the roof had leaked severely in front of the bar and the hardwood floor was twisted up about two to three feet in places, and in court four the water had poured down the walls and they had two big sheets of drywall that had come off the ceiling, and the whole wall was saturated and half the floor was water damaged, which also was hardwood." He also described the state of the "pump house" as having all the equipment but "... the ceiling tiles were all down on the equipment so it looked worse than it was." He also noticed "two or three frozen water lines", that the stucco on the outside of the building had deteriorated where water had leaked into the stucco, that there were broken mirrors and broken windows and that there were "hairline cracks" in the indoor swimming pool. Mr. Sheppard admits that he saw a number of Inspection Reports hanging from the walls of the premises but that he did not study them "in any detail" at that time or prior to the purchase of the property.

24 The role of Mr. Watson appears to have been limited as Mr. Sheppard testified in his discovery that all he wanted Mr. Watson to do was to open the building and to turn on the lights so he could view the inside of the building. After they had walked through the building, Mr. Watson left the property while Mr. Sheppard went outside to "take another look at it." There appears to have been no discussion about price of the property as Mr. Sheppard testified at his discovery that he already knew the price from the Notice posted at the Village Office.

25 Mr. Sheppard states that he then went back to Kelowna, spoke about the matter with his wife, showed her the video, asked her if she would be interested in moving to Ashcroft and, when she indicated that she would, decided to make an offer on the property. Mr. Sheppard testified that he had not only been to Ashcroft two or three times and that the last time was approximately four years prior to May, 1993. In his discovery, Mr. Sheppard also testified that his wife had never been to Ashcroft.

26 Within days, Mr. Sheppard went back to Ashcroft. He then met with Mr. Watson. At his discovery, Mr. Sheppard stated that he was interested in whether it was possible to build a caretaker's suite in the building as he and his wife would want to live in the building or would want whoever was running the centre to live in the building. Mr. Sheppard testified that he asked Mr. Watson whether it was possible to have a caretaker suite and that Mr. Watson confirmed: "... its

zoned for that and there is no problem at all." Regarding the caretaker's suite, Mr. Sheppard was asked whether his concern "was safety of the building" and answered at his discovery: "Safety of the building and everything else."

27 In his affidavit, Mr. Watson stated: "I also recall Mr. Sheppard asking me about a caretaker's suite. I informed him that the lands were zoned to permit a caretaker's suite and that he should deal with Thompson Nicola Regional District as they were carrying out the building permit and inspection duties on behalf of Ashcroft. Whether the property was zoned M1 or P1, a caretaker's suite is a permitted use."

28 Mr. Sheppard testified at his discovery that he had asked Mr. Watson for blueprints of the building at their first meeting, that Mr. Watson indicated that blueprints would be made available, that he renewed this request at the second meeting and that Mr. Watson then told him: "... somebody has borrowed them out of the office but we will locate them." Mr. Sheppard said that he wanted the blueprints: "... because I told him at the time if I purchased it it's nice to know where the plumbing is, where the heating is and everything." Mr. Huber stated that, sometime prior to May, 1993, he had provided the blueprints to the then owner of the property and that the blueprints had never been returned. Accordingly, the defendant was never in a position to provide the blueprints. When asked to confirm that he had decided to buy the building without having seen any blueprints or any building inspection documents, Mr. Sheppard testified at his discovery:

> A Well, I would say you're right on that, mainly because I knew it would have to be built by architects that, I mean they had to have drawings and it would have had to have been approved.

29 In his affidavit, Mr. Watson also stated that: "At no time did Mr. Sheppard ask me for building permits, occupancy permits or building inspection reports relating to the lands and premises. However, Mr. Sheppard was provided with copies of the subdivision plan, the Property Sale Notice and the B.C. Assessment Property Assessment Notice prior to the completion of the sale."

30 When asked whether he had requested any further documents from Mr. Watson, Mr. Sheppard testified during his discovery:

> Q A Did you ask for any other documents? Well I wanted to know who the building inspector -- not the inspector, I wanted to know who the fellow that was the general contractor at the time, and what it cost to build it, and why they built it, and why they built it so far out and all this and that. I probably asked him a lot of questions.
> Q Did Mr. Watson try to answer them as best as he could?
> A Q He did so. You were satisfied that he was trying to answer them as best as he could?
> A I was under the impression, yes.

31 At his discovery, Mr. Sheppard confirmed that, prior to the purchase of the building, he was

not shown any blueprints, applications for building permits, building permits or inspection reports. Mr. Sheppard confirmed that he asked who had previously owned the building and how long it had been empty. He was advised by Mr. Watson that the building had been empty for approximately four years. Regarding the availability of inspection reports and whether he had asked Mr. Watson about them and why they had not been produced, Mr. Sheppard testified at his discovery: "I believe we talked about that and they looked in the office and they could not find nothing on the building itself."

32 Other than the two meetings with Mr. Watson, Mr. Sheppard did not have any other meetings with Mr. Watson or with anyone else on behalf of the defendant prior to the Contract of Purchase and Sale being signed.

CONTRACT OF PURCHASE AND SALE

33 A personal cheque for $5,000 was delivered to the Village and handed to Mr. Watson at the second meeting. At the second meeting, Mr. Sheppard also advised Mr. Watson that he wanted an answer quickly as he was going to Northern Manitoba to fish and that, if he found something there that he liked and wanted to buy, he would purchase that property and would no longer be interested in the Ashcroft property. A Contract of Purchase and Sale was prepared by Mr. Sheppard. It was signed by Mr. Sheppard on May 21, 1993.

34 The plaintiff was incorporated to purchase the property. The Council of the defendant approved the sale to the plaintiff on June 1, 1993. The contract was signed on behalf of the defendant that day. The purchase price was to be $75,000 which included the balance due and owing for 1993 taxes. The sale was to complete on June 30, 1993.

35 Paragraph 9 of the Contract contained the following provision:

> There are no representations, warranties, guarantees, promises or agreements other than those set out above, all of which will survive the completion of the sale.It was also stipulated that there would be no adjustment for "taxes, rates, local improvement assessments, fuel, utilities or other charges." The adjusted sale price was paid by cheque on or about June 30, 1993.

36 Regarding the question of why he did not exercise the option to lease the property for six months, Mr. Sheppard indicated at his discovery:

> I guess I could have, but my thing in the past all my life if I see something I like and I think the potential is there, I usually don't go into all the formalities, I either buy it or reject it.

37 At his discovery, Mr. Sheppard acknowledged that the Sale Notice was read and understood by him and that he was given a copy of it at his first meeting with Mr. Watson. He also

acknowledged that he was aware of the replacement value of $748,000 and he confirmed that it sounded like a reasonable estimate of the cost of replacing the building.

38 The signed Purchaser's Statement of Adjustments contained the following clause:

> A surveyor should be used to establish the location of boundaries or improvements. You should ensure that you are aware of the zoning and uses permitted for the property you are purchasing. You should check with the local municipal authority to find out the property's zoning before completing the purchase. If you want a professional opinion about the quality of construction or state of repair or any improvements, you must get that opinion from an architect or engineer.

39 That Statement of Adjustments was prepared by the law firm representing the plaintiff as purchaser. That law firm was also acting for the defendant as vendor. The Freehold Transfer was signed on June 29, 1993 and was registered in the Land Title Office on June 30, 1993. The Freehold Transfer was in "Form A" (s. 181) of the Land Title Act.

40 After the purchase, the plaintiff undertook some $75,000 in renovations and repairs. On August 26, 1994, the plaintiff applied for a Building Permit for a caretaker's suite. At that time, he was advised that the building required a "one hour fire rating 5/8 inch type X drywall installation throughout the finished ceilings" in order to comply with the Building Code. Accordingly, his application to build the caretaker's residence was denied. This requirement of the Building Code was in effect prior to the construction of the premises in 1981, during the operation of various businesses with the approval of the defendant when others owned the property and during the ownership of the property by the defendant. The drywall which had been installed went only from the floor to the dropped ceiling so that there was a gap between the dropped ceiling and the actual ceiling. The gap in the drywall meant that there was no full fire-stop between the rooms in the building.

POSITION OF THE PARTIES

41 The plaintiff says that the defendant did know or should have known that the building was not built to the standards of the Building Code in 1981 or in 1993 and that it failed to disclose this to the plaintiff. The plaintiff says that the defendant fraudulently or negligently represented that the usual inspections had been undertaken for the property prior to an Occupancy Permit being granted. Alternatively, if a final inspection was conducted, it was performed negligently as the fire-stops required by the Building Code were never incorporated within the building.

42 On the other hand, the defendant says that the plaintiff has not proven the negligence of the defendant in that there is no evidence regarding the extent of the damage to the building and what repairs were carried out during July, 1982 after the premises had suffered extensive fire damage. Accordingly, it is not clear how it came to be that fire-stops were not provided within the building.

In the alternative, the defendant says that even if the plaintiff can prove that the defendant was negligent, that no duty of care was owed by the defendant to the plaintiff in the circumstances of this case. In the further alternative, if the defendant did owe a duty of care to the plaintiff in the circumstances, the defendant says that the clause in the contract providing for "no representations, warranties, guarantees, promises or agreements" is a limitation or exclusion clause, the effect of which is to exclude or limit its liability or duty of care. In any event, the plaintiff placed no reliance on what was done or not done by the defendant when the plaintiff decided to purchase the property on an as-is where-is basis.

FRAUDULENT MISREPRESENTATION

43 The plaintiff says that the "knowledge that the building was not built to the standards of the Building Code fell within the sole jurisdiction of the Defendant" and that the failure of the failure of the defendant to disclose the non-conformity constituted a fraudulent misrepresentation. The plaintiff also claims that the statement made by Mr. Watson that a caretaker's suite "is no problem at all" or, as Mr. Watson recalls saying, "the lands were zoned to permit a caretaker's suite", was a fraudulent misrepresentation which induced the plaintiff to enter into the contract of purchase and sale.

44 Whether damages will flow from fraudulent misrepresentation will depend on whether the defendant made a false representation of fact (knowingly, without belief in its truth or recklessly and carelessly), the defendant intended that the plaintiff would act on the representation in the manner in which it did act, the plaintiff acted on the representation and the plaintiff sustained damage by so acting: BG Checo International Ltd. v. British Columbia Hydro and Power Authority (1990) 44 B.C.L.R. (2d) 145 (B.C.C.A.). Because an allegation of fraudulent misrepresentation is an extremely serious allegation, the standard of proof has been held to be "... somewhat higher than a simple preponderance of probability ... ": Berry v. Lefevre Estate [1992] B.C.J. No. 553 (B.C.S.C.).

45 Where a vendor knows of the latent defect but fails to disclose that latent defect to a prospective purchaser, the vendor may be held liable for fraudulent misrepresentation: Rowley v. Isley [1951] 3 D.L.R. 766 (B.C.S.C.). On the other hand, there is no duty on the part of a vendor to disclose patent defects to the purchaser: patent defects being those which are discoverable by conducting a reasonable inspection of the premises and making reasonable inquiries into its qualities. In the case of patent defects, the rule of caveat emptor strictly applies. It is also the case that a purchaser will be held to a fairly high standard of inspection: see for instance Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc. (1996), 141 D.L.R. (4th) 394 (Ont.C.A.).

46 In this case, the failure of the drywall to reach from floor to ceiling was a patent defect which was actually discovered by the plaintiff on his first and only inspection of the building. Because the ceiling had fallen in a number of places, it was easy to see that the drywall did not reach from floor to ceiling. Accordingly, the failure to disclose such a patent defect would ordinarily not be

actionable.

47 However, the question then is whether a patent defect which does not comply with a bylaw or a Building Code can become a latent defect because of this non-compliance as the failure to comply becomes the latent defect. It is difficult to reconcile the four decisions dealing with this question. In Ekkebus v. Lauinger (1994), 39 R.P.R. (2d) 23 (Ont.Ct. of Justice-Gen.Div.), the court was dealing with a defendant vendor who had installed an outdoor hot tub which did not comply with a bylaw requiring that a fence with a locked gate surrounding hot tubs be provided. The plaintiffs had been found liable in another action for injuries sustained by a infant who wandered onto the property and they now sought indemnity from the defendants who had sold them the property and who had installed the hot tub. The court held that the defect in the property could have been detected by the plaintiffs by checking with municipal authorities to ascertain whether the hot tub complied with appropriate bylaws and, accordingly, the lack of fence "clearly" fell into the category of a patent defect. In finding that the plaintiffs had not demonstrated a breach of contract, the court noted:

> From a policy standpoint, the protection and safety of the public are of the utmost importance, as is compliance with municipal by-laws in general. However it would be both unrealistic and unworkable to hold vendors liable in contract in perpetuity for any failure to comply with such by-laws after the conveyance of the property and the assumption by a purchaser of both the rights and responsibilities that attach to ownership. (at p.30)

48 In Petruzzi v. Coveney (1991) 7 M.P.L.R. (2d) 183 (Ont.Ct.of Justice-Gen.Div.), the plaintiffs claimed against the vendors and the township for damages out of construction which did not comply with the Building Code or the bylaws of the township. The vendor had installed sewage drainage pipe incorrectly. The drainage tile was not connected to an interior sump pit and the perimeter drainage tile system was improperly installed. There had been a number of inspections but no final occupancy permit was granted and it was clear that one would not have been available. Doyle J. found for the plaintiff against all defendants but did not compensate the plaintiffs for some of the patent plumbing defects. Although the plumbing did not comply with the Building Code, he was not prepared to find that the defects were latent as he found that the plaintiffs had some expertise in plumbing.

49 Jakubke v. Sussex Group (1993), 31 R.P.R. (2d) 193 (B.C.S.C.) dealt with the purchase of a house from a vendor who was also the general contractor, who had been renovating the house, and who had knowledge that one of the bedrooms being renovated did not conform to the height requirements in the Building Code in place for West Vancouver. Mr. Justice Errico held that this was a latent defect and that the vendor's failure to disclose the latent defect amounted to fraudulent misrepresentation. He made that finding despite the fact that the height of the bedroom ceiling was readily visible and measurable. There was a specific finding that the work had been completed after final inspections had been undertaken and the work that was done was, to the knowledge of the vendor, unauthorized and unlawful. The court also found that the bedroom and bathroom did not

comply with the current Building Code. However, if they had been part of the original construction 50 years prior to the sale to the plaintiffs, the two rooms would have been in compliance at that time even though they were now non-conforming. Mr. Justice Errico concluded:

> I think that what was to be observed here was not a patent defect. What could be observed here could have been lawful, depending on the date of construction. While what could be observed should have excited concern and suspicion in the minds of the realtors ... the defect was not one that arose by necessary implication from something visible to the eye. I think that in this case, where the remodelling was done without a building permit and in direct contravention of the directives of the appropriate authorities, and was done by ... [the vendor] or under his direct instructions, that there was then constituted a latent defect, and that the conscious non-disclosure of that defect ... constitutes a fraudulent misrepresentation. (at p.203)

50 Rawson v. Hammer (1982), 23 R.P.R. 239 (Alta.Q.B.) dealt with the vendor's failure to disclose that proper building permits had not been obtained. In finding that there was fraudulent misrepresentation, Legg J. held that, even though the defects themselves were readily visible, the fact that the Building Code had not been complied with was an enough to render the defects latent:

> The male defendant did not communicate to the plaintiffs the fact that none of these permits or certificates were ever obtained and that the construction of the house did not comply with the Building Code. Nor did he tell the plaintiffs that a gas inspector had found a leak in the propane system and that it had not been repaired. (at p.247)

51 Where, to the knowledge of the vendor, the proper building permits have not been obtained or construction has taken place which is not in conformity with the Building Code, the failure to disclose such a defect will amount to fraudulent misrepresentation. In this case, the defect "... was not one that arose by necessary implication from something visible to the eye." (per Errico J. in the Jakubke decision). While it should have been obvious to the plaintiff that the drywall did not reach from floor to ceiling, this would not have been a defect which would clearly allow this purchaser to conclude that the walls had not been built so as to comply with the Building Code. At the same time, there must be a more stringent liability attached to this defendant as it was the vendor, the inspector, and the issuer of business licences. In the circumstances, I am satisfied that failure of the walls to be built from floor to ceiling was a latent defect.

52 Because there must be a conscious intention to deceive, it must be shown that the defendant through its officers or agents "had a guilty mind." The plaintiff dealt only with Mr. Robert Watson and I am satisfied and so find that he was not aware that the building was not constructed in accordance with Building Code standards and requirements.

53 I also cannot be satisfied that the defendant made a false representation of fact intending that

the plaintiff would act on the representation in the manner in which it did. Mr. Sheppard testified that he asked Mr. Watson whether it was possible to have a caretaker's suite. He reports that Mr. Watson advised him: "It's zoned for that and there is no problem at all." Assuming that this was what was said by Mr. Watson, it accurately represents the facts. It is clear that caretaker suites are allowed in the zoning which is in effect. Mr. Sheppard does not allege that Mr. Watson indicated that the building had been constructed in accordance with the Building Code or that all final inspections had taken place. While Mr. Huber must be taken to have been aware that the building was not originally built in accordance with the Building Code, Mr. Sheppard did not speak with Mr. Huber.

54 I am also not in a position to find that the plaintiff acted on any actual or implied representations made. It is clear that Mr. Sheppard was only interested in finding out who the general contractor had been at the time the building was built, who had previously owned the building, and how long it had been empty. Nothing of what Mr. Sheppard did allows me to conclude that he in any way relied upon what was said to him by Mr. Watson or on the implication that the building inspector had given final approval to the building. Accordingly, even though I can find that the defect was a latent one, I cannot find that the representation was made to the purchaser relating to the latent defect and, in any event, even if such a statement had been made, there was no reliance by Mr. Sheppard and the plaintiff on such a misrepresentation.

NEGLIGENT MISREPRESENTATION

55 There are a number of cases where a municipality has been held liable in tort for failing to tell a purchaser that a building does not conform to the by-laws. However, in order that a purchaser can bring a case within the law set out in Hedley Byrne, a number of requirements must be found. Those requirements were summarized by McLachlin J.A. (as she then was) in Kingu v. Walmar Ventures Ltd. (1986), 10 B.C.L.R. (2d) 15 at p.23 (B.C.C.A.):

> I conclude that a plaintiff suing on a pre-contractual representations is not as a matter of principle confined to his remedies in contract, but may sue in tort for negligent misrepresentation. However, the question of whether a duty of care in tort arises must be carefully scrutinized in light of all the surrounding circumstances, including the rights and obligations which the parties have themselves established by their contract.
>
> The question then is whether the requirements of tort liability on the basis of Hedley Byrne are satisfied in the case at bar. Those requirements may be summarized as follows:
>
> (1) A false statement negligently made;
> (2) A duty of care on the person making the statement to the recipient. A duty of care

does not arise unless:

(a) the person making the statement is possessed of special skill or knowledge on the matter in question, and
(b) the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;

(3) Reasonable reliance on the statement by its recipient;
(4) Loss suffered as a consequence of the reliance.

56 The defendant says that the plaintiff has not established that any representation was made regarding compliance with the Building Code or the existence of fire separations. The defendants also says: "A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not." (Per Hedley Byrne & Co. v. Heller [1963] 2 All E.R. 575 per Lord Devlin at p.613.) In this case, at a time when the plaintiff says that there was a misrepresentation, the defendant says that it was advising all purchasers and this purchaser in particular that the property was "as is, no warranty implied" (as set out in the Property Sale Notice), that potential purchasers were urged to take advantage of a six month building lease agreement which would allow time for "building inspection, renovations and mortgage completion", that there were no representations, warranties, guaranties, promises or agreements sought by the plaintiff and such were specifically excluded by the contract of purchase and sale and that the purchaser's Statement of Adjustments contained the warning that this plaintiff should seek information as to the zoning and uses permitted for the property. The defendant also says that the purchase price reflected what was being purchased by the plaintiff so that the plaintiff was fully aware that the building had not been occupied for about four years, had previously been damaged by fire, and required considerable work in order to bring it into accord with current bylaws and the current Building Code. The defendant says that, in return for the low purchase price, the plaintiff accepted the property "as is."

57 Again, I cannot conclude that any "false statement" was made negligently or at all. At the same time, I cannot find that there was "reasonable reliance" on any statement made by the defendant. I am also satisfied that the surrounding circumstances make it clear that the defendant was not undertaking any responsibility regarding the building which was being sold. In the circumstances, there has been no negligent misrepresentation.

THE EFFECT OF THE EXCLUSIONARY CLAUSE ON THE MISREPRESENTATION

58 The plaintiff says that failure to disclose the latent defect vitiates the exclusionary clause: "No representations, warranties, guaranties, promises or agreements." It also says that this also applies to the clause contained within the Property Sale Notice: "As is, no warranty implied."

59 Absent a collateral contract which incorporates the "as is, no warranty implied" provision contained within the Property Sale Notice, that provision does not form part of the agreement between the parties. This is the case whether or not there was an exclusionary clause. In order for a provision that is not found in a final contract to be binding, the parties must have intended for it to be incorporated into the contract or at least have intended it to be a collateral contract which was to survive the formation of the final contract. The exception was set out by Lambert J.A. in Zippy Print Enterprises Ltd. v. Pawliuk (1994), 100 B.C.L.R. (2d) 55 (B.C.C.A.):

> 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 specifically acknowledged by that party, or in some other way. (at p.72)

60 Even if the "as is" provision can be characterized as a representation, it was certainly not one which induced this purchaser to buy the property. Accordingly, I find that there was no collateral contract incorporating the "as is, no warranty implied" provision contained within the Property Sale Notice within the final contract of purchase and sale.

61 It is clear that an exclusionary clause such as "representations, warranties, guaranties, promises or agreements" will not bar a claim for fraudulent misrepresentation: Davis v. Moranis and Smith, [1949] 4 D.L.R. 433 (Ont.C.A.), Domokos v. Phillips (1996), 5 R.P.R. (3d) 33 (N.B.Q.B.), Rawson v. Hammer (1982), 23 R.P.R. 239 (Alta.Q.B.), Pearce v. Van Severen Chocan, [1997] B.C.J. No. 29 (B.C.S.C.) and Turner v. Visscher Holdings Inc. (1996), 23 B.C.L.R. (3d) 304; Turner v. Visscher Holdings Inc., [1996] B.C.J. No. 998, Vancouver Registry No. CA017834, Finch J.A., B.C.C.A., May 7, 1996.

62 Having found that there was no fraudulent or negligent misrepresentation, it is clear that the exclusionary clause contained within Paragraph 9 of the Contract of Purchase and Sale excluded any representations, warranties, guarantees, promises, or agreements, short of fraudulent and/or negligent representations.

WAS THE VILLAGE NEGLIGENT?

63 The plaintiff says that the defendant was in breach of a duty of care owed by the defendant to the plaintiff in the defendant's capacity as a municipality issuing and controlling authority for building standards, building permits, occupancy permits and business licenses. They say that the defendant breached its duty to properly carry out inspections of the property thereby inducing the plaintiff to enter into the purchase of the premises without knowledge of the Building Code violations. On the other hand, the plaintiff says no duty of care was owed or, alternatively, that any duty of care owed was limited by circumstances and the contractual relationship between the parties.

64 A private law duty of care may be owed by a public authority to a private person if the two-stage approach enunciated in Anns v. Merton Londonborough Council [1978] A.C. 728 (H.L.) is present:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises.
>
> Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may arise.

65 In City of Kamloops v. Nielsen et al (1984) 10 D.L.R. (4th) 641 (S.C.C.), the test in Anns was adopted in a decision dealing with the duty owed by a municipality to third parties who were subsequent owners of a property that had been inspected by the municipality:

> The by-law prohibited construction without a building permit, provided for a scheme of inspections at various stages of construction, prohibited occupancy without an occupancy permit and, perhaps most important, imposed on the building inspector the duty to enforce its provisions. It should be noted, however, that the by-law also imposed a duty on the owner of the building or his agent to give notice to the building inspector when the building reached the various stages at which inspection was called for under the by-law.
>
> It seems to me that, applying the principle in Anns, it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city's building inspector a duty to enforce the provisions of the by-law. This would be Lord Wilberforce's "operational" duty. Is the city not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have had him in contemplation? (per Wilson J. at p.664)

66 In City of Vernon v. Manolakos (1989), 41 B.C.L.R. (2d) 374 (S.C.C.), the court dealt with the liability of the City to both the owner and to neighbours and concluded that a duty of care was owed to both. As to the owners, the majority held that the failure of the owners and the contractors

to give timely notice for on-site inspection while constituting contributory negligence did not complete absolve the City from liability. As to the neighbours of subsequent purchasers, all justices held that it was clearly not unreasonable for them to rely upon the City to ensure that the construction would not threaten their safety. Speaking on behalf of the majority, La Forest J. described the scope of the duty owed by the City as follows:

> It must be borne in mind that a municipality, once it has made the policy decision to inspect construction, is not bound to discover every latent defect in a given project, nor every derogation from applicable standards. Rather a municipality is only called upon to show reasonable care in the exercise of its powers of inspection. Accordingly, a municipality, whether the duty of care is owed to an owner builder or a third party, will only incur liability for such defects as it could reasonably be expected to have detected and to have ordered remedied. This is implicit in the decision of this Court in Kamloops v. Nielsen. (at p. 382)

67 It is clear that the duty imposed by a municipality to an owner may be limited by the duty imposed upon an owner to advise the building inspector when various stages of construction have been reached. However, in this case, despite the fact that a deficiency was discovered during the August 31, 1981 inspection, the correction of that deficiency was not made and was subsequently not discovered on subsequent inspections. By not insisting that the deficiencies be rectified, the Village was in breach of a duty which owed to subsequent purchasers such as this plaintiff. It is clearly the case that inspections subsequent to August 31, 1981 were undertaken. I have also found it to be the case that, despite the failure to correct the deficiency, a later final inspection and "O.K." was provided despite the fact the deficiency had not been corrected. The defendant did not show "reasonable care" in the exercise of its powers of inspection. In subsequent inspections, it would have been very easy to push up the drop ceiling to confirm that the fire stops provided by the drywall went from floor to ceiling. Having found a deficiency which was recorded on the August 31, 1981 Inspection Report, the inspector apparently made no attempts on his subsequent visits to ascertain whether the deficiency had been corrected. In fact, he went further. In the December 1981 Inspection Report he provided his "O.K." for the final inspection and for occupancy. He must have done that without checking to see if the deficiencies set out in his August 31, 1981 Inspection Report had been corrected.

68 However, it is clear that there are circumstances in which it is reasonable to conclude that a person to whom a duty of care is owed has effectively excluded itself from the scope of duty owed. Can it be said in these circumstances that this plaintiff excluded itself from the consequences of the duty of care owed by this defendant to this plaintiff. As well, can it be said that the exclusionary clause contained within the Contract of Purchase and Sale was broad enough to exclude the defendant from its negligence.

69 The Contract of Purchase and Sale contains the proviso that there are "no representations, warranties, guarantees, promises or agreements other than those set out above survive the

completion of the sale. There is nothing within the Contract of Purchase and Sale which can be described as "representations, warranties, guarantees, promises or agreements" other than that the vendor must provide title:

> Free and clear of all encumbrances except subsisting conditions, provisions, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown; registered or pending restrictive covenants, rights-of-way, or easements, in favour of utilities and public authorities; and except as otherwise set out herein.

70 The essential question is whether the second stage of the test set out in Anns, supra, applies or whether there are: ...any considerations which ought to negative, or to reduce or limit the scope of the duty or the class person to whom it is owed or to the damages to which a breach of it may arise". Speaking on behalf of the majority, La Forest and McLachlin JJ. in BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), 75 B.C.L.R. (2d) 145 clearly state that a plaintiff may sue either in contract or tort. This right to sue is: "... subject to any limit the parties themselves have placed on that right by their contract." (at p.155). They also stated: "Generally, the duty imposed by the law of tort can be nullified only by clear terms." (at p.156). Their conclusion is set out at p.157:

> We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract. (at p.157)

> We conclude that neither principle, the authorities nor the needs of contracting parties, support the conclusion that dealing with a matter by an express contract term will, in itself, categorically exclude the right to sue in tort. The parties may by their contract limit the duty one owes to the other or waive the right to sue in tort. But subject to this, the right to sue concurrently in tort and contract remains. (at p.162)

71 I am satisfied that Paragraph 9 of Contract of Purchase and Sale did not specifically exclude the negligence of the defendant. While it may well have excluded fraudulent misstatement and negligent misstatement, it did not specifically exclude other negligence and, in particular, the duty of care owed by municipal body which elects to inspect to owners and subsequent purchasers.

72 In an earlier decision in London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), 97 D.L.R. (4th) 261, McLachlin J. in a separate judgment concurring with the majority concluded that there could be a voluntary assumption of risk arising out of the circumstances of the parties entering

into a contract:

> But the voluntary assumption of the risk can be grounded on a broader basis than waiver based on the contract's exclusion clause, as the three judges of the court below who dealt with the matter in tort concluded. Quite apart from the particular contract term, it can be argued that the concatenation of circumstances giving rise to the tort duty, of which the contract with its exemption of liability is one, are such that they limit the duty of care the employees owed to the plaintiff. As Wallace J.A. put it (quoting Purchas L.J. in Pacific Associates Inc. v. Baxter, [1990] 1 Q.B. 993 (C.A.) at p.1011), the question of whether there are circumstances qualifying or negating the duty of care "can only be answered in the context of the factual matrix including especially the contractual structure against which such duty is said to arise".
>
> The law of tort has long recognized that circumstances may negate or limit the duty of care in tort. Indeed, as noted earlier in these reasons, this is one of the fundamental theories by which scholars have explained the defence of voluntary assumption of the risk. Waivers and exemption clauses, whether contractual or not, have long been accepted as having this effect on the duty in tort. As Fleming, op. cit., at p.265 (dealing with the complete negation of any duty of care), puts it: "The basic idea is that the plaintiff, by agreeing to assume the risk himself, absolves the defendant from all responsibility for it. The latter's duty of care is thus suspended. (at pp.322-3)

73 In this case, the defendant relies on the following facts to support the proposition that the plaintiff agreed to assume the risk and absolve the defendant from all responsibility: the property sale notice contained the term that the condition of the property was "as is, no warranty implied"; while Mr. Sheppard had in his possession the August 31, 1981 Inspection Report prior to completing the sale he either found its contents unimportant or he chose to ignore the report; the statement of adjustment signed by the plaintiff urged him to "ensure that you are aware of the zoning and uses permitted for the property you are purchasing"; the plaintiff knew that the building had suffered extensive fire damage and had been vacant for a number of years and was in an obvious state of disrepair; the plaintiff knew that the building had a replacement value of $748,000 and an assessed value of $171,500 but that the price for the land and building was $75,000; the plaintiff ignored the suggestion that the property could be leased for up to six months to allow for "building inspection, renovations, and mortgage completion"; no request was made by the plaintiff for copies of inspection reports, occupancy permits, or building permits; the plaintiff only requested blueprints as "... it's nice to know where the plumbing is, where the heating is and everything"; the plaintiff and his wife decided to move from Kelowna to Ashcroft and to buy the land and buildings after only a very short viewing of the property, that Mr. Sheppard of the plaintiff had extensive experience with buildings and the repairs and maintenance of buildings; Mr. Sheppard only wanted

Mr. Watson at the site to turn on the lights for him; and there was a provision in the contract that "no representations, warranties, guarantees, promises, or agreements" other than those set out in the contract would survive the completion of the contract.

74 The Contract of Purchase and Sale and the $5,000 deposit were provided to Mr. Watson sometime during the meeting when the alleged representations by Mr. Watson were made. Mr. Sheppard stated that he and his wife had already made the decision to move to Ashcroft before he attended that second meeting with Mr. Watson during which the alleged representation was made. Taking into account all of the surrounding circumstances of this purchase, I am satisfied that the plaintiff "thus suspended" any duty of care owed by the defendant to it.

CONCLUSION

75 The claims of the plaintiff are dismissed. Because of the allegations of fraudulent misrepresentation, the defendant sought costs on a Special Costs basis. I am not satisfied that those allegations or the actions taken by the plaintiff during the litigation was so scandalous or outrageous as to attract Special Costs. Accordingly, the defendant will be entitled to costs on a Party and Party (Scale 3) basis.

BURNYEAT J.

cp/d/jep/kjm/DRS/DRS