Citation: Cumiford v. Powell River and Stefanovic
2001 BCSC 960

Date: 20010628
Docket: S673
Registry: Powell River

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRACEY CUMIFORD

PLAINTIFF

AND:

CORPORATION OF THE DISTRICT OF POWELL RIVER

DEFENDANT

AND:

STEFAN STEFANOVIC

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACAULAY

Counsel for Plaintiff: M.R. Giroday

Counsel for Defendant: J.M. Poole

Third Party: No-one Appearing

Dates and Place of Trial: February 20-23, 2001

Powell River, B.C.

[1] The plaintiff, Tracey Cumiford, is the unhappy owner of a very poorly constructed house located in the municipality of the defendant, Powell River (the “municipality”). The Third Party, Stefan Stefanovic, obtained a building permit from the municipality and built the house over a period of about one year, commencing in April 1989. Stefanovic also built an illegal rear addition, changed the roofline and added an upstairs suite, all without permit. Stefanovic later sold the house to another person, who in turn sold it to Cumiford in July 1995.

[2] Cumiford alleges that the municipality breached its duty to her as a subsequent purchaser by failing to adequately inspect the house during the construction phase.

[3] The municipality claims against Stefanovic, who did not participate in the trial, for monies expended to date to remedy structural deficiencies, as well as for indemnification for any damages it may be required to pay to Cumiford.

Issues

[4] The central legal issue relates to the scope of the duty owed by the municipality for the failure of its building inspector to inspect, identify and resolve Building Code violations during the course of construction. Cumiford

contends that the municipality is liable for all failures to identify code violations and that the constellation of violations is such that the only reasonable solution is to tear the house down and re-build it at a cost of up to $176,500. Alternatively, she claims the cost of repairs to rectify the deficiencies. Cumiford also claims exemplary damages.

[5] The municipality contends that the scope of its duty was restricted to preventing violations resulting in hidden defects that created a danger to the health and safety of occupants of the house. According to the municipality, it has already paid to successfully resolve the difficulties related to the structural integrity of the house and the remaining deficiencies do not affect health and safety.

[6] In addition, other issues arise. These relate to the credibility of certain witnesses; whether the municipality knew that Stefanovic was unlawfully constructing the rear addition and adding an upper storey without a permit; the cost of remedying deficiencies; and finally, whether the municipality is entitled to recover against Stefanovic for the cost of rectifying structural deficiencies, or any other deficiencies, for which it may be found liable.

The Building By-law

[7] In 1980, the municipality enacted a building by-law:

> The Corporation of the District of Powell River, By-law No. 989, *A By-law to provide for the administration and enforcement of the Building Code, the demolition and moving of buildings within the Municipality and the erection, maintenance and safety of buildings within the Municipality* (27 October 1980),

(the "by-law"). The by-law was enacted to provide for the administration and enforcement of the Building Code described below. Specifically, the by-law applied to the design, construction and safety of any residential dwelling constructed within the municipality.

[8] By the terms of the by-law and pursuant to the provisions of the *Municipal Act* (then R.S.B.C. 1979, c. 290 and Regulations under the Act), the *National Building Code of Canada, 1977 as amended*, and adopted by the Province, the *British Columbia Plumbing Code 1972 as amended*, and the *Building Regulations of British Columbia* (collectively the "building code") applied to all construction within the municipality.

[9] The by-law imposed a number of obligations on any owner of property within the municipality who wished to build or renovate a residence. These included requirements that the

owner obtain a building permit before commencing or continuing any work on the residence and not occupy the residence until a Certificate of Occupancy was issued to evidence compliance with the health and safety requirements of any applicable by-laws. Although some sections of the by-law were amended from time to time, the provisions to which I will refer remained in effect during the relevant time period.

[10] As is usually the case with such by-laws, the responsibility for enforcing the by-law rested primarily with the building inspector employed by the municipality. Under the by-law, the building inspector controlled the issuance of any building permit before the commencement of construction, as well as any certificate of occupancy after the completion of construction. The form of permit required a description of the proposed work. Any drawings and specifications had to be submitted to the inspector for approval before issuance of the permit. The owner was not allowed to change any of the work described in the permit, the drawings, or the specifications, without the approval of the inspector. The by-law also required the building inspector to conduct on-site inspections during construction.

[11] Sections 6.1 to 6.4 set out the owner’s obligations as they related to the obtaining of the permit before the

commencement of any work and notifying the inspector in a timely way of the need for inspections:

6.1. (1) Every owner of any property shall obtain any applicable Building Permits required by this by-law in connection with any proposed work prior to the commencement of the work.

(2) The issuing of any Building Permit, the approval of the drawings and specifications, or any inspections made by the Building Inspector shall not relieve the owner of any building from full responsibility for carrying out the work or having the work carried out in accordance with the requirements of this by-law.

6.2. (1) The holder of a Building Permit or his agent shall notify the Building Inspector when the excavation for the foundation of any building is complete.

(2) Except where the approval of the Building Inspector has been obtained, no person shall pour concrete into the forms for the foundations of any building.

6.3. (1) Any owner or any other holder of a Building Permit shall

(a) give at least forty-eight (48) hours' notice to the Building Inspector of his intention to start work on the building site;

(b) give at least twenty-four (24) hours' notice to the Building Inspector and obtain his inspection and approval of the work:

(i) after the forms for footing and foundation are complete, but

prior to the placing of any concrete;

(ii) after the removal of formwork from a concrete foundation and installation of perimeter drain tiles and damp-proofing, but prior to backfilling against the foundation;

(iiii) after framing and sheathing of the building are complete, including fire-stopping, bracing, chimney, duct work, plumbing, and gas venting, but prior to the application of any insulation, lath or other interior or exterior finish which would conceal the work;

(iv) before any underground piping or plumbing is covered in;

(v) after all insulation has been installed;

(vi) after the building is complete and ready for occupancy, but prior to any occupancy.

(2) Before covering any underground piping or plumbing, water and pressure tests of all above and below ground plumbing systems are required.

(3) Where any part of a plumbing system is covered without notice to and approval of the Building Inspector as required under this section, the owner shall uncover any work upon the request of the Building Inspector.

6.4 Except where the approval of the Building Inspector has been obtained, no person shall cover or conceal in any manner any reinforcing steel or structural frame work of any building, any masonry of any chimney or fireplace or any

> warm air ducts or ventilation pipes from any heating apparatus.

[12] Independently of any notification by the owner of the need for inspection, the inspector also had the right under the by-law to enter any building, at any reasonable time, while it was under construction, or alteration, to inspect for compliance with the by-law. Other steps were also available to the inspector to enforce compliance. I will discuss those later.

[13] In 1989, the municipality employed Gordon Reed as its single building inspector. When Reed was unavailable due to illness or holidays, Arne Johanson filled in for him as inspector. Accordingly, Reed and Johanson were responsible for enforcing the building by-law at the material time. Reed was the senior inspector. He was employed as the building inspector for the defendant for about 25 years until he retired in 1994. Johanson, on the other hand, only worked for the municipality for a short period of time.

[14] The conduct of both Stefanovic, as the owner of a building under construction, as well as Reed and Johanson, as the building inspectors, must be assessed with regard to their respective duties and obligations under the by-law.

The construction

[15] Reed granted a building permit to Stefanovic for the construction of a single family dwelling on a vacant lot located at 6667 Drake Street, in the municipality, on April 21, 1989. Before doing so, Reed met with Stefanovic at the lot where the proposed house was to be built. By that time, Stefanovic had already started clearing the property.

[16] Stefanovic did not provide any plans or specifications when he applied for the permit. It appears that Stefanovic had neither drafting nor building skills. Reed provided Stefanovic with a sketch showing a typical cross-section of a one-storey house with a crawl space. On it, Reed noted a list of particular information that he required before he would issue the permit. This included information respecting the foundation, type of roof framing, insulation and heating.

[17] Stefanovic returned a copy of the sketch to Reed, albeit with very little information recorded on it. In particular, the sketch did not specify the requested information respecting the foundation and floor joists. In the end result, the drawing bore little or no resemblance to the house as constructed, with or without the rear addition or second storey.

[18] According to Reed, little happened from April 21 until May 25 when he re-issued the permit. The day before that, Reed attended another property owned by Stefanovic because Stefanovic wanted to move the building from that site to Drake Street. Reed had earlier dealings with Stefanovic respecting this building, which had been constructed without any building permit, and refused to give him permission to move it.

[19] Stefanovic must have commenced construction almost immediately after receiving his permit. By June 12, he had finished preparing the site and had constructed footing forms.

[20] Curiously, no inspections are noted on the permit for Drake Street, as required, even though a few inspections were carried out during the course of construction. Reed explained the lack of inspections by stating that it was the obligation of Stefanovic to call for inspections. Reed suggested that he had no other way of seeing what takes place. This evidence ignored the other options available to an inspector, particularly when dealing with a builder, or owner, who had already demonstrated a propensity to ignore the requirements for permits and inspections.

[21] In any event, Reed rarely inspected the construction while it was under progress at Drake Street. His notes record only three visits to the site during construction, all in

September. These inspections resulted from concerns expressed to Reed by Johanson, based on inspections that the latter had initiated.

[22] It is clear that Stefanovic never, at any time, called for inspections as required. In the result, no inspections were carried out at various crucial points, including when the foundation was finished and the second floor added.

[23] Reed was away on holidays during the middle two weeks of June 1989 but offered no explanation for not conducting any inspection before that time. By August, Reed was seriously ill and, after that, frequently away from work. Reed did not work at all for the period, November 1989 to February 1990.

[24] Shortly after his return to work in February 1990, Reed observed that Stefanovic and his wife appeared to be occupying the residence. As a result, Reed initiated and conducted a final inspection on March 12, 1990. Following that inspection, Reed issued an occupancy certificate but without requiring any further work.

[25] There is no indication that Reed ever inspected the construction site before becoming ill in spite of his earlier dealings with Stefanovic. There is also evidence, which I accept and will set out in detail momentarily, that by

September, Johanson, who conducted several inspections, had developed significant concerns about the poor workmanship and building code violations. Johanson told Reed of those concerns and recommended red-flagging the project. A red-flag, or stop work order, would have had the effect of requiring Stefanovic to cease construction until he complied with any directions the inspector gave to rectify code violations.

[26] There were discrepancies in the evidence as between Reed and Johanson, as well as between Reed and others. Before proceeding further, I will set out some of my principal concerns and conclusions about Reed's credibility.

[27] Reed's notes were cryptic, at best. It is impossible to discern from reviewing his notes what detailed concerns, if any, were apparent to Reed on inspection. Where Reed's evidence respecting the inspections or his discussions with Johanson differs from that of Johanson, I prefer the evidence of Johanson, which was supported by detailed notes.

[28] Reed's evidence also bordered on the mendacious; it was self-serving and designed to deflect any personal responsibility. At best, Reed attempted to reconstruct events in a favourable light. I am not persuaded that he has any significant reliable independent recollection of events. I

will return to this later when I discuss his evidence respecting his knowledge of the rear addition, changed roofline and upstairs suite.

[29] Reed's response to the concerns raised by Johanson was entirely inadequate. He was in a position of seniority and, after making it clear that he would deal with the concerns himself, did nothing except visit the site and make some suggestions to Stefanovic that he can now only vaguely recall. While it is understandable that Reed may have been distracted by his serious illness by this point, his failure to act cannot be excused.

[30] During Reed's absences, Johanson conducted all inspections. His first inspection was on June 12. By that time, the footing forms had already been installed but Stefanovic wanted to pour a concrete floor rather than build a wood floor over a crawl space as set out on the building sketch. In addition, Stefanovic proposed to use concrete blocks for the foundation.

[31] On Johanson's insistence, Stefanovic provided a rough drawing setting out these changes. It showed the frame of the house supported on a foundation consisting of cement block, with an apparent three and one-half inch cement slab in between.

[32] During a further inspection in August, Johanson noted problems with poor workmanship requiring a need to re-do the cement block work which was uneven, of different heights and gaps, and not mortared between the joins. Around that time, Stefanovic also told Johanson that he planned to build a second storey. Johanson told Stefanovic that he would have to submit plans before proceeding. Stefanovic never re-did the block work nor did he submit any further plans. Johanson recorded all these events in the inspection file.

[33] By September, Johanson had also noted framing problems and concluded that the house was not being built to code standards at all. As earlier set out, he recommended to Reed that a stop work order be issued so that no further work could proceed until the deficiencies were resolved but Reed declined to do so.

[34] When Johanson told Reed about his concerns, Reed responded that he was being too hard on the builder and that Reed would take care of it himself. According to Reed’s notes made the following day, he conducted a rough framing and plumbing inspection and had a long discussion regarding plumbing methods. He conducted two further inspections in September but his notes offer little detail. There is nothing

to suggest that Reed ever told Stefanovic to remedy any of the existing deficiencies.

[35] After September, Johanson carried out one further inspection in December. He recorded that the chimney could not be passed and must come down but nothing further was ever done.

[36] Reed suggested that while he was sick, it was the responsibility of Johanson, or others, to inspect and, if necessary, shut the project down for failure to meet code requirements. Regardless of which employee or employees had a responsibility to inspect in the circumstances, I am satisfied that no other inspections were carried out and that no stop work order was ever posted in spite of identified building code violations involving the foundation and framing.

[37] Reed was not prepared to accept responsibility for any deficiencies in the inspection process and made the incredulous suggestion that Johanson was the individual responsible. When asked what he could have done faced with Stefanovic's refusal to call for inspections, Reed said "not a whole lot" except inform his superiors in March 1990 that Stefanovic was occupying the premises. I disagree and will return to this later when I discuss other means of enforcing compliance.

[38] According to Reed, there was never any point in recommending a stop work order. He testified that the municipality did nothing about non-compliant owners generally, and Stefanovic specifically. Instead of addressing the issues of obvious non-compliance and poor workmanship, Reed issued the certificate of occupancy on March 20, 1990 without ever requiring any rectification of existing building code and by-law violations.

The additional construction

[39] There were also conflicts in the evidence as to when Stefanovic actually built the rear addition and added the second storey, neither of which were described on the building permit or sketch. Reed testified that he did not become aware of any of this work until several years later when, acting as a private building inspector, he inspected the home shortly before Cumiford purchased it.

[40] Specifically, Reed denied that the additional work was done, or in progress, at the time of his final inspection in March 1990. He further testified that he re-attended the property later that spring in relation to complaints by a neighbour about unrelated matters. Reed also attended the house in 1993 at the request of the owner previous to Cumiford, respecting problems with the bathroom and utility

room floor areas. Reed denied noticing the rear addition on any of these occasions. I view all of that evidence with considerable scepticism.

[41] There is no doubt that Reed informed both Cumiford and her realtor in 1995 that the rear addition was built without a permit but Stefanovic informed Johanson of his plans for an upper floor back in August 1989 and that information was available to Reed. It is also apparent that Stefanovic simply proceeded as he wished with little or no regard to either the by-law or the building code. It must have been apparent to Stefanovic that Reed was not going to act on the concerns expressed by Johanson. I doubt that Reed would have reacted any differently whether or not the upper level or rear addition were under construction before March 1990.

[42] In my view, it is likely that both the upper level and the rear addition were under construction before March 1990. After Reed returned to work in February 1990, Johanson transferred for a short time to the engineering department of the municipality. While working there, he became aware through discussions with co-workers, that Stefanovic was building a further addition to the rear of the house. According to the personnel records, Johanson ended his

employment at the municipality on March 16, 1990, before the certificate of occupancy was issued for the residence.

[43] Johanson considered it common knowledge that the rear addition was under construction. It is now known that this structure consisted of a closed in back porch, rear storage area and covered second story sun deck, all resting on a concrete patio slab. No permit was obtained for any of this work and none of it was ever inspected.

[44] Gino Francescutti was a member of the engineering department of the municipality during the construction of the Stefanovic residence. In cross-examination, he agreed that the Stefanovic residence was discussed frequently at the municipal hall and that, at some point, although he was unable to say when, he heard that Stefanovic had begun an addition. Even if I am wrong and Reed did not know personally, these other municipal employees, who worked closely with the building inspector, knew that Stefanovic was adding the rear addition yet no action was taken.

Enforcing compliance

[45] There is no doubt that Reed had numerous powerful tools at his disposal to deal with non-compliance. For example, under the relevant municipal bylaw, he could have revoked the

building permit, posted a stop work order and refused to issue the occupancy certificate. The municipality could have prohibited occupancy and sought the court's assistance as necessary to enforce its remedies.

[46] At the beginning of these reasons, I described the building by-law. Section 4 of the bylaw sets out the powers of the building inspector to enforce compliance. These included the power under s. 4.6 to suspend work ("stop work" order) or prohibit occupancy under s. 4.7.

[47] In addition, pursuant to s. 4.10, Reed could have ordered the immediate suspension of any construction and, failing rectification, demolished the construction at the expense of the owner. Under s. 5.7, he could have revoked the building permit. Finally, under s. 12.1, the municipality had the right to enforce its bylaws by performing the work itself if it chose to do so.

[48] It may be that the municipality, or some of its elected councillors, preferred not to enforce its building by-law. It may be, as well, that this attitude filtered down over time to Reed and others, but there is no doubt that the building inspector had many tools lawfully available to him to enforce the building code and by-law. No evidence was called on behalf of the municipality respecting any policy decisions

limiting the means by which the building inspector could enforce compliance.

[49] The operational duties of the building inspector clearly included the conduct of inspections, the issuing of stop work orders to ensure compliance and deciding whether a certificate of occupancy should be granted to demonstrate compliance. Reed never conducted adequate inspections when he knew or ought to have known that Stefanovic was not complying with the bylaw and the building code. Reed never issued a stop work order in spite of demonstrated foundation and framing problems and other construction not in accord with the permit. Reed issued the certificate of occupancy without requiring rectification of known deficiencies relating to the foundation, framing and lack of permit for the rear addition and upper storey. In my view, as I will later set out, these failures were within the scope of the duty of care owed by the municipality to subsequent purchasers of the property.

Cumiford purchase

[50] James Jahruas is a realtor with 30 years experience selling homes in the area. He toured the Drake Street home when Stefanovic first listed it for sale in the early 1990s. He described it as an absolute disaster; it was not built to code and there was no sign of a proper foundation. Jahraus

testified that he refused to show the home to any of his prospective customers. He also confirmed that, after recently walking around the exterior, he would not accept a listing to sell the property, even if asked, because of its obvious defects. In effect, he described the house as unmarketable even though the foundation problem has now been adequately addressed.

[51] In spite of those concerns, the house has been sold twice. Stefanovic successfully sold the house and the new owner then listed it for sale again in 1995 before selling it to Cumiford. At the time, Cumiford was 25 years old. She was a single mother with a small child looking for her first home on a limited budget.

[52] Cumiford first visited the home with her realtor, Cindy Russell, on June 27, 1995. On June 29, she made an offer to purchase the property for $75,000 and ultimately accepted a counter-offer of $77,000. The offer was subject to arranging a first mortgage of $73,250 and a building inspection.

[53] The condition respecting the building inspection was added at the suggestion of the realtor who also recommended that Gordon Reed carry it out. By that time, Reed was no longer employed by the municipality and was, instead, conducting private building inspections. Russell probably

recommended this precaution at least in part because the vendor disclosure statement disclosed that the hallway floor needed repairs and there were signs of moisture in the upstairs loft bedroom. Cumiford observed these problems as well. She described the hallway floor area as spongy.

[54] Cumiford re-attended the house for the inspection with her father, Russell and Reed. On that occasion, Reed informed her that the rear addition was built without a permit. Reed suggested that the problems in the hallway floor might be due to a lack of ventilation in the floor and, according to Cumiford, suggested the problem could easily be fixed. Reed also advised her of other relatively minor deficiencies requiring fixing, including the following:

(1) new toilet seal;
(2) caulk around upstairs bathtub;
(3) painting or adding vinyl to the exterior; and
(4) replace corrugated roof cover upstairs.

Cumiford assumed that she would be able to do these repairs herself or with the help of friends for a modest amount.

[55] A second inspection was required when the bank raised questions about the floor problem and the ceiling height. Reed conducted a further inspection. Again, Cumiford and

Russell were present. By that time, Cumiford had heard that the house may have been red-flagged during construction. She asked Reed about that. He said that it had been but assured her that the flag could not be lifted unless all building codes were met. He also told her that the house was a good buy for her. Reed denied saying this but I accept that he did.

[56] Following his further inspection, Reed reported directly to the bank in writing. In his letter, Reed stated the main floor ceiling height measured approximately seven feet two inches, although he also suggested there might be sufficient framing height for a full seven foot six inch ceiling. That suggestion was in error; there is no room for a full height ceiling in the living room, dining room or kitchen.

[57] Other evidence confirmed that the actual ceiling height in the living room was only seven foot, one-half to three-quarters inch. This height is over five inches under the minimum of seven foot, six inches required by the Building Code for the living room, dining room or kitchen. On further measurement by other witnesses, the kitchen and dining room were also under the minimum.

[58] Reed also said this about the bathroom and adjacent hallway floors:

> It would appear that the plywood sheathing was installed over the concrete slab with little or no provision for ventilation to the underside of the sheathing in these areas. It should also be noted that the water closet is not properly secured. The fixture moves when weight is applied to the adjacent floor.

He also referred to the laundry room floor:

> The laundry room floor beneath the washer and dryer may have problems similar to those found in the bathroom. It was also noted that the floor tiles in the laundry room are incomplete.

[59] Apparently, the bank was satisfied with these answers as the mortgage was approved and eventually funded so that the purchase could complete. There was, in fact, no concrete slab under those floor areas.

[60] The defendant called Russell as a witness. Russell testified that when she and Cumiford first visited the property, it was obvious that there were problems with the floors on the main level. They were wavy and sounded different. Those observations, coupled with the content of the disclosure statement, led to her recommending the building inspection.

[61] According to Russell, Reed told them during the first inspection that the foundation was improperly installed. He also stated, in effect, that Stefanovic had a poor reputation as a builder and that the project had been red-flagged at some

point. She did not recall any statements about the rear addition. I accept that Reed told Cumiford and Russell that the project had been red-flagged, which was untrue, but I think it is more likely that the conversation took place during the second inspection as described by Cumiford.

Foundation, floor and framing deficiencies

[62] About one month after moving in, Cumiford decided to tackle the floor problem. Upon cutting away some of the existing hallway flooring, she discovered sand underneath instead of cement slab. Eventually, it was determined that there was no slab beneath the hallway, kitchen and laundry room. After determining that the presence of sand indicated a failure to meet building code standards, Cumiford retained legal counsel.

[63] This matter has been in litigation for the very considerable period since and, as a result, Cumiford never proceeded with any of the minor repairs or exterior upkeep originally recommended by Reed. As a partial result, some areas such as the exterior siding may have worsened over the intervening period.

[64] The problems with the foundation, pad and framing were addressed by a number of expert witnesses. The essence of the

findings were set out in a report dated December 20, 1996, by John Chace, a building inspector retained by the defendant.

Chace described the house as follows:

> The major problem is how the previous owner has constructed certain elements and how they specifically compare to code issues. … In actual fact, a 24 x 48 1 1/2 storey bungalow with an approximate 12 x 34 second floor suite was constructed on a rather unique and substandard slab and sand buried wood frame for lack of a better description, type floor system. The type of foundation would not have been approved under any type of code that I am aware of and I have never seen an equivalent system.

Chace went on to identify the problems in the foundation and floor system:

> This is a strip footing system which appears to be 14″–18″ wide with varying thicknesses of concrete. It appears to have a single row of concrete blocks placed on top of that, which appear to have been stacked and filled, but no proper fill or mortar. The outside areas have not been parged nor have they been protected with insulation or damp proofing. Being only one block high, would also be short of the minimum 18″ frost protection that is required. The floor system is a partial slab on grade that has been raised, which buries the wood plates. This could cause a major problem with rotting. About half the floor area are wood joists buried in sand. Some areas have been wrapped in plastic but there is no moisture protection or ventilation. This is totally unacceptable.

Chace also addressed framing deficiencies:

> The frame has a number of potential problems specifically 2 x 6 joists in the patio area, the construction of the rear stairs and handrail design,

> the general framing based on non destructive observations would be in question, and a number of major code deficiencies, as mentioned in the previous report such as materials, anchoring, ventilation, window size and flashing.

[65] The reference to framing should be understood in the context of what Chace actually observed. His inspection notes disclosed the following:

> There are a number of areas where the house is deficient in framing such as anchorage to the foundation, roof member sizing and spacing in the back porch area, anchorage to the foundation and framing members and sill plates improperly installed. In general, a lot of things appear to have been done in a poor manner and it is doubtful whether they would comply with the code. I would think, judging from the rest of the house, that this same poor manner would be evident if the walls were opened up so that the actual framing could be reviewed.

[66] It appears to me that Chace mainly observed framing problems in the rear addition, although his comments respecting attachment to the foundation necessarily must apply to the original house.

Rectification of foundation and floor problems

[67] A trial date was originally set for the spring of 1998 but the parties agreed to adjourn it so that the municipality could attempt to resolve the foundation and slab problem. Dynastat Systems was retained to provide a proposal “to meet

the requirements of the building code and restore an even, safe and durable living area." After referring to the "non-complying foundation wall and inadequate concrete floor on grade", Dynastat recommended:

> [T]he construction of a completely new concrete perimeter foundation including strip footings with a cross section of 2 feet wide by 8 inches high, reinforced with two strands of #6 reinforcing rod around the entire perimeter. A vertical foundation wall will be poured on top of the footing with dimensions of 2 feet high by 8 inches wide.

[68] It is a little unclear whether the Dynastat proposal included the addition at the rear. It referred to the present area on the main floor, including the addition, accurately as totalling 1128 square feet. The addition is about 250 square feet. Later, in its proposal, Dynastat referred to pouring 700 square feet of new floor while the house was jacked up thus suggesting that the addition was excluded from the proposal. Dynastat quoted $26,700 for this work.

[69] At the request of counsel for the municipality (not counsel at trial), Dynastat later offered what was to be a simpler solution to avoid the cost of lifting the structure and removing the existing wall. The new proposal involved laminating an additional wall to the existing foundation but

doing nothing about the slab under the rear addition or the non-complying ceiling heights.

[70] Dynastat quoted $12,000 for the revised proposal. Cumiford permitted the municipality to proceed with this proposal.

[71] Ultimately, a local contractor performed the work, but at a total cost of $38,209. Nobody suggests that the work performed failed to meet the requirements of the revised proposal. An engineer has since certified that the foundation upgrade generally meets building code requirements. The slab for the rear addition was expressly excluded from the certification.

[72] It is unfortunate that the parties did not address the apparent flaws in the revised proposal before the municipality spent so much money. The final Dynastat proposal never addressed the problems associated with the lack of any foundation and the inadequate slab beneath the rear addition. As well, by proposing to laminate a new wall to the existing foundation under the original house, the revised proposal did not address the manner in which the frame of the house was attached to the existing foundation. Finally, as the house was never raised, the proposal did not address the main floor

ceiling heights that continue to be less than permitted by the code.

The other inspections

[73] Johanson has also worked as a private building inspector since ending his employment with the municipality. At the request of plaintiff's counsel, he inspected the finished dwelling on two occasions; once over a period of about seven and one-half hours in April 1996 and most recently, in November 2000. Following the first lengthy inspection, which preceded any of the repairs set out above, Johanson produced a detailed written assessment. He also took a series of photographs to illustrate his observations and concerns.

[74] It is not necessary to recite all the individual defects set out in the report. The following is illustrative of the most serious:

> FOUNDATION
> - This is a very poor foundation with no foundation at rear addition, repairs to main house should be done A.S.A.P.
> - Work to protect rear addition from rot should be designed and installed A.S.A.P. before major damage from moisture occurs. Possible settlement @ front east corner.
>
> WALLS (FRONT)
> - Windows have wood trim with no flashing and are exposed to rain and wind, a good quality exterior paintable caulking should be properly

applied to top and sides to protect them from moisture intrusion — ALL WINDOWS.

WALLS (RIGHT)

- This wall does not follow the line of the foundation and should be flashed to prevent insect or moisture intrusion although main structure has sufficient between grade and wood framing addition at rear does not and should be before base of wall starts to rot.

ROOF

- Very poor for 6 yrs old.
- Joint where old roof meets new roof was not done properly so wood beneath shingles is wet and will rot if not fixed.
- Needs replacement A.S.A.P.

FRAMING

- All sizes of framing members to code

CODE NON-COMPLIANCE ITEMS THAT CAN BE SEEN (does not include areas that removal of material is required)

- smoke detectors
- fire separation between suites
- smoke detection
- water proofing of floors
- hieght [sic] from grade of wood framing
- foundation walls
- roof space ventilation
- above grade masonary [sic]
- flashing of walls on conc (west wall)
- dampproofing windows/doors
- roofing - soffit ventilation
  - flashing for elec. mast
  - exposure of shingles
- siding - flashing
  - caulking
- dwelling ventilation & humidity control
- plumbing - ventilation & piping
  - hot water tank overflow
  - openings in walls
- ceiling hieghts [sic] in living room
- all interior door widths except laundry room
- all interior door hiegths [sic] except kitchen to porch door

Earlier in the report, Johanson referred to the following detail:

> FOUNDATION
> Size: 8″ conc. block wall on footing
> • Conc. block (8″ x 8″ x 16″) on footing, block work in very poor condition with many gaps between blocks allowing air, rain and insects free access to house.
> Strongly recommend parging of foundation wall to seal many gaps and missing mortar in joints.
>
> Addition at rear was framed on top of patio slab and has no protection from moisture at grade level — this is important. See appendix for more info.
>
> …
> ROOF 3 PANELS
> • This roof is shot and needs replacement, numerous pieces of metal slipped under joints, uneven application leaving too much exposure, poor plumbing flashing, and loose unattached elec. mast flashing not properly installed, leaking into soffit space.
> See Appendix.
>
> BASEMENT
> This house appears to be slab on grade but upon inspection it showed no slab at two inspection points and because of deflections in all floors it is doubtfull [sic] that there is any conc. used at all — big time code violation.
>
> …
> LIVING ROOM
> • The living room has a hieght [sic] of 7′ 3/4″ floor to roof (5 1/4″ less than minimum hieght [sic] allowed by code)
> • The floor in this room seams [sic] a bit uneven, possible problem with sleepers under floor sheathing
> • Light and fan in center of room is just 6′ 0″ from floor
> • Front door need to have better weather stripping or repaired to fit frame better

- Door way from livingroom to hallway is 29″ wide x 6′ 5″ high – just short of code required 30″ width
- living room thermostat located by hallway opening.

HALLWAY

- The floor in hallway is very bad and through an inspection hole near kitchen and @ panel by living room it would appear as though the entire house is built the same way – which is no slab, but just floor sheathing on 2 x 4′s laying on sand – which is very bad!

  If this is true for the rest of the home then all the floors must be removed and a concrete slab poured or all floors removed, concrete or preserved wood pads layed [sic] and a preserved wood floor sheathing layed [sic] down throughout the home – or some other acceptable method to correct this horrible situation, code violation.

  Cost for such a project may be obtained from any quality contractor and I suggest if you go for prices from contractors obtain written quotes from several (3).

[75] For the most part, Johanson only reported on visible deficiencies although he also removed part of the flooring to view the floor joists, some of which were buried in sand and rotting. It was apparent from this inspection that Stefanovic never fully completed the underlying concrete pad for the house. Johanson also opined that lack of proper site preparation and footings may explain the subsidence of the south-east corner at the front of the dwelling noted at the time of each of his private inspections.

[76] The purpose of the second private inspection in November 2000 was to report on the foundation work done at the request of the municipality. According to Johanson, this work was limited to parging the foundation by painting over the mortar bricks with a slurry mix to fill the cracks. Johanson graphically equated this to painting over a rusty car. No changes were made to the foundation itself and, according to Johanson, the house still sits crooked on it. According to Johanson, the overall foundation and house still slopes downward to the front as referred to above and finally, the clearance between grade and the bottom of the siding is still inadequate. Johanson's opinion respecting the slope of the foundation is difficult to square with the engineer's certification following the foundation repairs. On balance, I give more weight to the certification.

[77] At the time of the November inspection, Johanson also observed a white phosphorescent coating underneath the soffit near the chimney consistent with water penetration and consequent damage to the inner wood structure.

[78] In Johanson's opinion, it would not be cost-effective to attempt to repair the home to meet National Building Code standards. He recommended knocking down the house and re-building but also agreed, in cross-examination, that lesser

steps might be taken if the goal was simply to make the home habitable.

[79] Other evidence also confirmed the existence of building code deficiencies. Wayne Sage has over twenty years experience as a builder, including new home construction and renovations and is also an experienced cost estimator. He was asked to provide a cost estimate to effect repairs based on the Johanson findings after the first private inspection. After inspecting the home for about one hour, Sage concluded that it would be a waste of time to repair the existing structure and recommended it be torn down and re-built. He estimated a total cost, including taxes, of about $176,500 to demolish and then re-build an 1100 square foot residence on site.

[80] Sage re-estimated the costs in July 2000 based on certain assumptions and concluded that the house could be re-built for about $124,000. One of the assumptions was that the floor slab and perimeter flooring installed by then was adequate, with a proper load bearing capacity and passed by a local inspector. In spite of the work done at the foundation level, Sage still concluded that it would not be cost effective to repair the house as other problems relating to water infiltration and failure to meet code standards had not been

addressed. During his evidence, Sage referred to the house as built by someone who had no idea what he was doing.

[81] The defendant relied on Mr. Walker who is also an expert in construction methods and costs. Walker suggested that less expensive alternatives would suffice to make the premises habitable. In a report dated October 17, 2000, Walker referred to the rear addition as impossible to bring up to reasonable standards and recommended that it be demolished and re-built at a cost of approximately $25,000. He then suggested that all necessary repairs identified by Johanson could be carried out for about $4,300 to $7,700. These included a partial credit for roof replacement of $1,200, adding exterior flashings and battens for about the same amount and $50 for electrical work. At trial, Walker explained that he saw no need for recessed lighting and suggested that low profile lighting such as fluorescent lighting might be added for a further $700.

[82] Walker considered the framing in the original house to be adequate. In his report, Walker stated:

> So far as I was able to see by looking into the roof spaces and by random checking with a stud finder, the front part of the building is properly framed with suitably sized members at the correct spacings. Rafters could be seen. As noted above, they are at 16” on centre and are 2”x4”. The timber appears to be of normal structural quality. They are supported

> at mid-span by walls which are framed of 2″x4″ studs, also at 16″ on centre, plates etc and, so far as I was able to see, are cut square and securely nailed together. I was not able to see the framing to the ground floor but found by stud finder that studs are also at 16″ on centre and probably 2″x4″. Floor joists were also entirely concealed but are at 16″ on centre and probably 2″x8″. They span approximately 12′ between the outside walls and a central partition. The walls are plumb and true, the upper floor is level and the roof surfaces of that part of the house are sloping evenly. It is therefore, in my opinion, reasonable to assume that problems with the framing are confined to the rear ten feet of the house.

Walker never saw the exposed framing as Johanson did. He also never addressed the poor attachment of the framing to the foundation, or the non-compliant ceiling heights, all of which counters his assumption that the framing problems were confined to the rear addition.

[83] As well, during cross-examination, Walker testified that he had never seen the full Johanson inspection report. This seriously weakened the weight to be given his opinion as to costing. He also accepted a standard significantly below code even in circumstances where other defence witnesses such as Chace would not have.

[84] In my view, the house is neither safe nor habitable. It has not been properly framed; it rests inadequately on a poor foundation and, at the rear, on an inadequate concrete pad; it

either leaks or is at serious risk of leaking due to inadequate flashings and roof installation; ceiling heights are low enough in the living room, dining room and kitchen that many light fixtures would present a danger to persons of normal height. Some interior doorways are dangerously small.

[85] With the exception of the low ceiling heights, most of these defects were hidden to Cumiford when she purchased the house. While the defects should have been apparent to Reed, he never dissuaded her from purchasing. She was never alerted to, or independently aware of, the significant foundation and framing problems throughout the house. With those findings in mind, I will now address the scope of the duty owed by the municipality to Cumiford.

Scope of duty

[86] Although counsel for Cumiford argued that the building inspectors had a duty to post and enforce stop work orders upon learning of any building code violation, I do not agree that the scope of duty is as broad as suggested. Not all violations will result in known or foreseeable harm. The municipality correctly asserted, in my view, that the scope of the duty of care owed in the present circumstances is confined to deficiencies that may affect the health and safety of future occupants. See *Anns v. London Borough of Merton,*

[1977] 2 All E.R. 492 (H.L.); *Kamloops v. Nielsen*, [1984] 5 W.W.R. 1 (S.C.C.); *Rothfield v. Manolakos,* [1990] 1 W.W.R. 408 (S.C.C.); and *Ingles v. Tutkaluk Construction Ltd.* (2000), 8 M.P.L.R. (3d) 1 (S.C.C.).

[87] In *Ingles*, the court affirmed the well known two-step *Anns/Kamloops* test which I need not repeat here as both counsel agreed that a duty of care was owed. Instead, counsel disagreed about the scope of the duty but *Ingles* assists in determining that issue as well. Writing for the whole court, Bastarache J. pointed out that a traditional negligence analysis is to be applied once it is determined that inspections have occurred at the operational level. To determine the standard of care expected of a reasonable, prudent person in the circumstances of the inspector, I must consider, in part, the likelihood of known or foreseeable harm, the gravity of that harm and the burden of cost which would be incurred to prevent the injury.

[88] The Supreme Court of Canada also considered the scope of the duty owed in an earlier decision in *Rothfield*, *supra*, where the municipal building inspector acted under a by-law similar to the one in the case at bar. According to *Rothfield*, where a municipality adopts a building by-law for the health, safety and protection of persons and property

pursuant to the *Municipal Act*, the inspector must exercise reasonable care during the course of the permitting and inspection process to ensure the project meets the standards imposed by the by-law.

[89] Returning to the reasons of Bastarache J. in *Ingles*, the foregoing does not require the inspector to discover every latent defect or every failure to meet code standards. The inspector is expected to act reasonably to detect defects and order them remedied.

[90] I am satisfied that the foundation and framing problems that were identified throughout the original house, as well as the addition, were of a type to place at risk the health and safety of occupants of the house. The inspectors knew or ought to have known of the defects in the foundation and framing. Those defects could easily have been prevented or rectified if they had carried out proper inspections or posted a stop work order until the owner demonstrated compliance. Reed acted unreasonably, in particular, in not taking sufficient steps to enforce the by-law by failing to require more detailed drawings; conducting inadequate inspections; or failing to inspect at all when he knew that Stefanovic was non-compliant; and finally, by failing to post stop work orders. It was, or should have been apparent to Reed that the

project, as permitted, was seriously non-compliant and, as well, that the rear addition and upper storey were being built without any permit.

[91] While counsel for the municipality contended that the municipality must only be held liable for latent defects, I disagree. The test that I have set out includes, but is not limited to, cases of latent defects. In any event, the inspectors knew of the defects. Johanson reported serious problems with both the foundation and framing while construction was in process. Reed failed to act on those reports.

[92] The municipality also contended that Cumiford knew, or should have known of many of the deficiencies when she bought the house and that this knowledge operates either to limit the scope of the duty of care under the second branch of the *Anns* test or as a limitation on the damages available for the inspector's breach of duty. I need only address the two key aspects of knowledge alleged: the low ceiling heights and the lack of a permit for the rear addition.

[93] Although the low ceiling heights were apparent, Cumiford had no way of knowing from her inspection that this indicated the framing did not meet building code standards. Indeed, in his letter to the bank, Reed suggested that there was adequate

framing to provide full ceiling height. Cumiford was told that the rear addition was built without permit, but viewing the information provided by Reed in its totality, I conclude that she was reassured by his statement that the red flag was only removed once the building code had been complied with. Accordingly, I find no support for the contention that the scope of the duty of care should be limited or that damages should be limited on these bases.

[94] While it is arguable that Cumiford ought to have noticed other less serious code deficiencies before buying, such as inadequate sealing around windows, I need not address them as they fall outside the scope of the duty of care in any event. Although numerous, the other deficiencies were relatively minor and did not seriously impact on health or safety. As a result, the scope of the duty of care did not extend to enforcing compliance by the builder. To hold otherwise would place the municipality in the position of an insurer and go far beyond the test for determining the scope of the duty set out earlier.

[95] In the final result, I conclude that the municipality breached a duty of care owed to Cumiford when its building inspectors failed to take reasonable steps to enforce the building code and by-law in relation to the observed

deficiencies in the foundations and framing. As well, the municipality is liable for the failure of its inspectors to take any enforcement steps respecting the unauthorized second storey and rear addition in spite of becoming aware of those structures before issuing an occupancy certificate for the dwelling.

Damages

[96] The significant issue on damages is whether the whole of the structure must be torn down and replaced. Cumiford argued that any renovation would be impractical and that the only reasonable solution is to tear the house down and rebuild. The municipality argued that relatively inexpensive remedial work would ensure that the house is not a danger to the safety and health of its occupants. Both positions are flawed, suggesting an intermediate approach.

[97] Does the entire structure need to be torn down? While there is no doubt that the rear addition must be torn down and rebuilt with adequate framing on a proper foundation, it is less clear whether the ongoing foundation problems described by Johanson and the questionable framing in the original structure present ongoing dangers that cannot be resolved by further remedial work. For that reason, I must consider

whether further repair work to the main structure will render it safe.

[98] On the other hand, the position advanced by the municipality was predicated on a finding that there was no liability for any of the un-permitted work on the rear addition or the second storey, but I have rejected that position. As well, the municipality argued that the framing problems in the original structure were limited to the low ceilings which will not present any danger provided low profile overhead light fixtures are installed. That argument does not address the likely problems with the second storey framing which is probably seriously deficient. Nor does it fully address the difficulties associated with low ceiling heights and the risk associated with hanging fixtures.

[99] In my opinion, the award of damages should provide for the rear addition to be torn down and properly reconstructed. A reasonable allowance on the evidence for that purpose is $25,000.

[100] In addition, the questionable framing in the main structure, including the second storey and roof, will require more intrusive exploration and ultimately repair to ensure safety. The problem of low ceiling height can adequately be addressed, in my view, by installing recessed lighting

fixtures. The only other deficiency identified that raises a safety issue was dangerous positioning of the hot water tank overflow at the outside of the house. I prefer and accept the evidence of Edward Bakker respecting the cost of repairs over that of Walker in such regard.

[101] Bakker is an experienced sheet metal fabricator with significant construction experience and has also personally built seven custom homes. Bakker estimated the cost of limited changes to the original house to render it safe and more liveable. He made no recommendations respecting the later addition as he considered the quality of construction so poor that nothing could be done. Otherwise, Bakker recommended repairs at a total cost of about $14,000. Of this total, the most significant amounts were $2,800 for roof replacement, $2,780 for exterior vinyl siding with flashings and $5,000 for electrical upgrades including recessed lighting to accommodate the low ceiling height.

[102] Bakker considered but rejected other solutions to the low ceiling height, including low profile light fixtures but these would necessarily still drop below the ceiling height. Bakker has since added estimates of $600 to elevate the water tank and add an outside drain as well as a further $600 to $700 to supervise the work. The total cost of repairs

approximated $15,000 according to Bakker although none of the proposed repairs actually bring the house into compliance with the code. Making adjustments for the unknown condition of the framing, particularly upstairs, on the one hand and the inclusion of items such as siding replacement which is not a safety issue on the other, I find $15,000 to be a reasonable estimate to bring the balance of the building to a safe and habitable level.

[103] I award general damages of $40,000 against the municipality.

Punitive damages

[104] The municipality was in a unique position to monitor and control the construction process. Reed, in particular, conducted himself in a way that was completely inadequate. If there had been evidence that his employers knew and encouraged him to so conduct himself, I would have seriously considered awarding punitive damages. I am unable, in the circumstances, however, to conclude that Reed was anything more than negligent. In particular, his conduct at the time was not demonstrably malicious, high handed or oppressive so as to justify a punitive award.

Third party claim

[105] The building permit contained an indemnity provision whereby Stefanovic agreed to indemnify the municipality against any claims arising out of the granting of the permit or inspections pursuant to the permit. It is clear from the evidence that Stefanovic negligently or deliberately constructed the house without any regard to his obligations under the by-law. I find that the municipality is entitled to recover its expenses incurred to date to rectify the foundation problems, as well as the damages it must pay Cumiford from Stefanovic.

Apportionment of liability

[106] In accordance with s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333, liability as between the named defendant municipality and Stefanovic, who is not named as a defendant, is joint and several. As such, the plaintiff is entitled to recover damages fully from the named defendant municipality. Although I agree with the suggestion of counsel for the municipality that the liability should be apportioned 75% to Stefanovic and 25% to the municipality, the building permit constitutes an express contract such as that contemplated in s. 4(2)(b) of the Act. The municipality is

entitled to recover fully on its indemnity claim and the degree to which each party has been found to be at fault is not strictly relevant for the purposes of this litigation.

Costs

[107] Cumiford will be entitled to her costs on scale 3 unless there was an offer to settle impacting on either entitlement or the level of costs in which case, counsel have leave to bring it to my attention.

"M.D. Macaulay, J."
The Honourable Mr. Justice M.D. Macaulay