COURT FILE NUMBER	1501 09673
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFFS	Zachary Gillman and Lisa Stern
DEFENDANTS	Rodney Mitton, Wendy Mitton, Wayne Chaulk, 769115 Alberta Ltd. o/a Royal LePage Foothills Real Estate Services, Jim Hamilton, Homecrafters Home Inspection Services Inc., Maxine Jack, Robert Jack, John Doe General Contractor, and John Does 2-10
THIRD PARTIES	Maxine Jack and Robert Jack
DOCUMENT	**CHAMBERS ENDORSEMENT**

1. Zachary Gillman and Lisa Stern purchased an acreage on the outskirts of Calgary for $2,000,000 (the "Property") by Residential Real Estate Purchase Contract dated December 10, 2013 (the "Purchase Agreement") closing on March 7, 2014 (the "Sale"). The Property is a luxurious home built in the style of Frank Lloyd Wright located in the Municipal District of Foothills (the "Municipality"). Following the Sale, Mr. Gillman and Dr. Stern discovered numerous issues with the construction of the Property that posed a foreseeable and substantial danger to their health and safety, requiring fixing at significant expense. They have brought this action for recovery of some of their expenses.

2. The vendors, Rodney Mitton and Wendy Mitton, had purchased the property from Robert Jack and Maxine Jack in April 2007 by way of Country Residential Acreage Purchase Contract with Mr. Jack, which was amended several times (the "Jack Purchase Agreement"). The Mittons purchased the Property before construction was complete, taking possession on May 18, 2007. Prior to that, the Mittons obtained a pre-purchase inspection report on the Property completed by an engineer, David Perrin, with Adept Engineering Ltd. on April 27, 2007 (the "Adept Report") that commented on the condition of the Property and the work to be done, and raised some concerns. Mr. Jack responded to the Adept Report with information about some of the comments and concerns raised and agreed to complete certain work. The Mittons and Mr. Jack worked together to complete the construction of the Property between May 2007 and December 2007. The Mittons completed limited interior and exterior work, while Mr. Jack completed most of the construction as a condition of sale itemized in the Jack Purchase Agreement. The transfer of land was registered on June 6, 2007, and the Mittons physically moved into the Property in December 2007. They lived there continuously until December 2013.

3. Mr. Gillman and Dr. Stern obtained a home inspection report on December 12, 2013, after entering into the Purchase Agreement but before waiving conditions. Subsequently, they waived conditions, and the Property was conveyed to them on March 18, 2014. In May 2014, Mr. Gillman and Dr. Stern hired a contractor, Millar Creek Homes, to renovate the Property. It was this work that led to the discovery of alleged defects.

4. Mr. Gillman and Dr. Stern claim damages for the following major defects (paraphrased from the detailed descriptions given in the Plaintiffs' evidence):

1. The roof leaked, did not have proper flashing or ventilation, and the shingles and chimneys were improperly installed. As a result, the entire roof was removed and shingles replaced.
2. The house foundation was not insulated from frost and retaining walls were cracked.
3. There were improperly sealed transitions from the concrete foundation walls to the wood walls on grade, which permitted condensation and resulted in mold, and the bottom of the wall cavities were filled with rodent debris.
4. The backfill grade elevation was too high and the weeping tile was not properly installed.
5. Some of the exterior cladding stones had fallen off and been glued back on, but had been improperly installed on Tyvek, which did not provide an adequate moisture barrier.
6. Two floor joists were replaced and others reinforced to ensure structural integrity of the Property.

(collectively, the "Claimed Defects")

5. The Amended Statement of Claim includes additional areas of concern, such as leaky toilets and HVAC deficiencies, that are not being pursued.

6. Mr. Gillman and Dr. Stern hired Millar Creek Homes to remedy the Claimed Defects in addition to completing renovations. The repairs required were extensive, and were completed before the litigation was commenced. The Plaintiffs argue they were not obligated to wait until they or the Property suffered actual physical harm before effecting repairs, as their health and safety was at risk.

7. In the Amended Statement of Claim, they seek the damages for the difference between the market value of the Property without the Claimed Defects and the market value of the Property with the Claimed Defects or, in the alternative, the amount associated with remedying the Claimed Defects. They also seek special damages of up to $100,000 for repair and remediation, as well as travel and living expenses. They have filed receipts totaling $776,500.47 for remedying the Claimed Defects.

8. Mr. Gillman and Dr. Stern assert the Claimed Defects were concealed by the Mittons or were latent defects that the Mittons knowingly or recklessly misrepresented in the Sale.

9. As against Mr. Jack, they allege that he was the general contractor and owed them a duty of care. Mr. Gillman and Dr. Stern say Mr. Jack breached his duty of care to ensure the Property was constructed and completed in a good and workmanlike manner, and was fit for its intended purpose of habitation, among other duties. They also allege that Mr. Jack had a duty to warn them of any defects that rendered the Property unfit for habitation.

10. The Action was brought on August 21, 2015 against the Mittons, Mr. Jack and Ms. Jack, the Mittons' realtor Wayne Chaulk and 769115 Alberta Ltd. o/a Royal LePage Foothills and Royal LePage Foothills Real Estate Services (the "Realtor Defendants"), and the Plaintiffs' home inspector Jim Hamilton and Homecrafters Home Inspection Services Inc. (the "Home Inspection Defendants"). Affidavits of records were exchanged and questioning completed, including providing answers to undertakings. The matter is ready to be scheduled for trial, except for the provision of any Defendant expert reports.

11. The Mittons advanced a third party claim against the Jacks for contribution and indemnity if they are found liable to Mr. Gillman and Dr. Stern. The Mittons and the Jacks separately filed claims for contribution and indemnity against all Co-Defendants by way of Notice to Co-Defendants. The Realtor Defendants advanced a third party claim against the Mittons for contribution and indemnity. The Mittons and the Jacks plead contributory negligence against Mr. Gillman and Dr. Stern.

12. The Action was discontinued against the Home Inspection Defendants on December 6, 2017, against Ms. Jacks on January 18, 2018, and against the Realtor Defendants on March 29, 2018. The Statement of Claim was amended May 10, 2018 to reflect these discontinuances. The Plaintiffs have also

advised that, pursuant to their settlement agreements with the Home Inspection Defendants and Realtor Defendants, they limit their claims against the remaining defendants to that portion of the total damages which can be attributed to the remaining defendants.

13. Mr. Jack applies for dismissal of the action against him for prejudicial delay pursuant to rule 4.31 of the *Alberta Rules of Court*, AReg 124/2010 [*Rules*]. Alternatively, he seeks summary dismissal of the action against him pursuant to rule 7.3 of the *Rules* on the basis that the ten-year limitation period has expired or the two-year limitation period has expired for some of the Claimed Defects. He also seeks summary dismissal on the basis that he was not the general contractor when the Property was constructed so there is no legal basis for liability against him. In the further alternative, Mr. Jack asks for an order pursuant to rule 6.26 of the *Rules* permitting him to enter the Property for the purpose of carrying out an inspection. Both Mr. and Ms. Jack ask that the third party claim brought by the Mittons be summarily dismissed against them. In oral argument, the Court was advised that the Third Party Claim against Ms. Jack would be discontinued against her on a without costs basis. As a result, this decision refers only to Mr. Jack as applicant.

14. The Mittons apply for summary dismissal of the action against them pursuant to rule 7.3 of the *Rules* on the basis that Mr. Gillman and Dr. Stern have not disclosed any evidence to show that the Mittons are responsible for any damages allegedly suffered. They say there is no genuine issue to be tried and no merit to the claim against them.

Issues

15. Mr. Jack argues that he and Ms. Jack did not construct the home on the Property; they hired engineers and contractors to build it in 2004. Before construction was completed, the Jacks say they sold the Property to the Mittons on an “as is” basis. Six years later, the Property was purchased by Mr. Gillman and Dr. Stern. The issue framed by Mr. Jack is whether he can be liable for alleged construction deficiencies to future owners in perpetuity. With respect to the Third Party Claim for contribution and indemnity brought by the Mittons, Mr. Jack says there is no evidence that he knew of latent defects.

16. Mr. Gillman and Dr. Stern argue that Mr. Jack was the general contractor when the home was built on the Property, and that he breached his duty of care. Mr. Jack argues that there is no evidence to establish that Mr. Jack acted in any capacity other than as owner of the Property.

17. Mr. Jack has had no contact with the Property since December 2007, and argues he has have suffered prejudice due to the passage of time both before and after this Action was commenced in 2015. If the Action is not dismissed against him, he asks that the Court order that they be provided access to inspect the Property.

18. The issues to be determined with respect to Mr. Jack are:

1. Should the action against Mr. Jack be dismissed for prejudicial delay, pursuant to rule 4.31?
2. If not, should the action against Mr. Jack be summarily dismissed on the basis of the expiry of the ultimate limitation period or because Mr. Jack was not the general contractor and did not owe a duty of care?
3. If not, should Mr. Jack be given access to the Property for the purpose of carrying out an inspection?
4. Should the third party claim brought by the Mittons be dismissed against Mr. Jack?

19. The Mittons also seek summary judgment dismissing the Plaintiffs’ action against them. They argue that Mr. Gillman and Dr. Stern do not have any evidence or documents that show they are responsible for any of the Claimed Defects. The Mittons took possession of the property in May 2007, and lived there between December 2007 and December 2013. They say they completed minor work and maintained the Property, and did not experience any issues that are now identified by Mr. Gillman and Dr. Stern. At one

point, there was some water seepage in the basement during a heavy rainstorm but the Mittons say it was rectified by repairing a defect in the weeping tile system. The Mittons say they knew they had a positive obligation to advise the Plaintiffs of any patent defects, but that they were not aware of any of the Claimed Defects with the Property during the time they lived there. They say this is a classic case of "buyer beware", or *caveat emptor.*

20. In response to the Mittons' application, the Plaintiffs argue there were significant and costly defects they discovered after they purchased the Property, and that there is evidence that the Mittons knew about the Claimed Defects, or were reckless that they existed, and failed to disclose this information.

21. The issue to be determined with respect to the Mittons is:

1. Should the action against the Mittons be summarily dismissed on the basis that there is no triable issue as to whether they knew about the Claimed Defects, or were reckless that they existed, and failed to disclose them to the Plaintiffs?

22. I will first consider the Application for dismissal for prejudicial delay under rule 4.31, and then turn to the Applications for summary dismissal, including of the Third Party Claim brought by the Mittons against the Jacks. Finally, I will consider the Application for access to the Property for the purpose of conducting an inspection.

Argument and Analysis

A. The Jacks' Application for Dismissal for Prejudicial Delay – Rule 4.31

23. Mr. Jack asks the Court to dismiss the Plaintiffs' action against him on the basis of prejudicial delay. He also asks the Court to dismiss the Mittons' third party claim against him on the same basis. Rule 4.31 of the *Rules* permits the Court to dismiss a claim where delay has resulted in significant prejudice to a party. At the time the Application was brought, rule 4.31 provided:

> 4.31(1) If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

24. While this matter was under reserve, rule 4.31 was amended to add the following subsection:

> (3) In determining whether to dismiss all or any part of a claim under this rule, or whether the delay is inordinate or inexcusable, the Court must consider whether the party that brought the application participated in or contributed to the delay.

25. This new subsection codifies the case law applicable at the time this Application was argued and does not, in my view, change the applicable considerations for the Court. (See, for example, ***Transamerica Life Canada v Oakwood Associates Advisory Group Ltd***, 2019 ABCA 276 at paras 27-31 [***Transamerica***] and ***Nova Pole International Inc v Permasteel Construction Ltd***, 2020 ABCA 45 at paras 25-26.)

26. Rule 4.31 requires delay and significant prejudice to the defendant. Significant prejudice may be proven. Alternatively, if there is inordinate and inexcusable delay, significant prejudice is presumed. Inordinate delay may be rebutted by the plaintiff with evidence explaining or excusing it. In assessing whether there is delay or if delay is inordinate and inexcusable, the Court will look at the entire history of a

matter, including the conduct of the party that brought the application. Context is important in assessing the overall delay.

27. In ***Humphreys v Trebilcock***, 2017 ABCA 116 [***Humphreys***], leave to appeal to SCC refused, 37626 (14 December 2017), the Court of Appeal set out six questions for the Court to consider in applying rule 4.31, at paras 151-156:

> 151 First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
>
> 152 Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> 153 Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> 154 Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
>
> 155 Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
>
> 156 Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? This question must be posed because of the verb "may" in r. 4.31(1).

28. Mr. Jack concedes in his brief that the delay in this case is not inordinate. He is therefore not relying on the presumption of significant prejudice under rule 4.31(1). He argues that the Court should dismiss the action and third party claim under rule 4.31 for delay on the basis that there has been delay and he has suffered actual significant prejudice. The onus is on him to establish that he has suffered significant prejudice: ***Arbeau v Schulz***, 2019 ABCA 204 at para 35 [***Arbeau***].

29. ***Humphreys*** continues to be applied on applications under rule 4.31, including in ***Arbeau*** at para 16. There, the Court of Appeal noted:

> ...The questions identified in ***Humphreys***, while not a code that must be followed in a specific order in all cases, provide direction on the considerations to be taken into account on an application pursuant to rule 4.31 that can be adopted to the circumstances of a particular case. ...

30. In this case, the relevant questions are whether there has been delay, and, if so, whether there is significant prejudice. If Mr. Jack satisfies the Court that there has been delay and significant prejudice, the Court can then consider whether there is a compelling reason not to dismiss the action.

(i) Delay

31. The first factor is whether there was delay within the meaning of rule 4.31. In ***Arbeau***, the Court of Appeal noted that the reference in rule 4.31 to delay "in an action" and the first aspect of the ***Humphreys*** analysis "requires a review of the entire action, and not segments": at para 27. It is helpful to set out a chronology of events.

32. The chronology of events provided by the Plaintiffs and Mr. Jack, both before and after the litigation was commenced, is as follows:

(a) November 2004 – Jacks begin construction of Property;

(b) May 2007 – Property is sold to the Mittons before construction is complete;

(c) December 2007 – Construction mostly complete; Mittons move into Property;

(d) 2013 – Mr. Jack asserts that relevant and material records from the Municipality are lost due to flood;

(e) March 2014 – Closing of sale of Property to Mr. Gillman and Dr. Stern;

(f) May 2014 – Mr. Gillman and Dr. Stern retain contractor, Millar Creek Homes, to do extensive remodelling of Property and discover the Claimed Defects;

(g) August 21, 2015 – Action commenced by Statement of Claim;

(h) September 2, 2015 – Home Inspection Defendants' Statement of Defence filed;

(i) September 30, 2015 – Realtor Defendants' Statement of Defence filed;

(j) September 30, 2015 – Mittons' Statement of Defence filed;

(k) October 7, 2015 – Mittons' Third Party Claim against Jacks filed;

(l) November 30, 2015 – Jacks' Statement of Defence filed;

(m) December 23, 2015 – Home Inspection Defendants' Affidavit of Records served;

(n) January 20, 2016 – Realtor Defendants' Affidavit of Records served;

(o) January 25, 2016 – Plaintiffs' Affidavit of Records served;

(p) February 10, 2016 – Mittons' Affidavit of Records served;

(q) February 25, 2016 – Jacks' Third Party Statement of Defence filed;

(r) February 26, 2016 – Jacks' Affidavit of Records served;

(s) April 13, 2016 to August 24, 2016 – discussion among counsel regarding scheduling questioning for discovery;

(t) November 22, 2016 – Plaintiffs' Supplemental Affidavit of Records served;

(u) November 28, 2016 – Questioning of Plaintiffs by all Defendants' counsel except counsel for the Jacks;

(v) November 29, 2016 – Questioning of Mr. Hamilton and Mr. Chaulk by Plaintiffs' counsel;

(w) December 1, 2016 – Questioning of Mr. Mitton by Plaintiffs' counsel;

(x) December 12, 2016 – Home Inspection Defendants' Supplemental Affidavit of Records served;

(y) January 16, 2017 – Questioning of Mr. Jack by Plaintiffs' counsel;

(z) May 10, 2017 – Plaintiffs' Responses to Undertakings served;

(aa) May 18, 2017 – Mittons' Responses to Undertakings served;

(bb) June 22, 2017 – Mittons' Further Responses to Undertakings served;

(cc) July 4, 2017 – Mr. Jack's Responses to Undertakings served;

(dd) July 20, 2017 – Mr. Chaulk's Responses to Undertakings served;

(ee) December 6, 2017 – Action discontinued against Home Inspection Defendants;

(ff) January 18, 2018 – Action discontinued against Ms. Jack;

(gg) February 9, 2018 – Service of Plaintiffs' Expert Report by Dana Bjornson, P.Eng., M.Arch., Optimize Envelope Engineering Ltd.;

(hh) March 29, 2018 – Action discontinued against Realtor Defendants;

(ii) May 10, 2018 – Amended Statement of Claim filed to reflect settlement and discontinuances;

(jj) June 19, 2018 – Questioning by Jacks' counsel of Mr. Gillman and Questioning by Plaintiffs' counsel of Mr. Jack on Responses to Undertakings;

(kk) September 18, 2018 – Questioning of Mr. Gillman and Dr. Stern by Defendants' counsel on Responses to Undertakings and Questioning by Plaintiffs' counsel of Mr. and Ms. Mitton on Responses to Undertakings

(ll) February 23, 2019 – loss of evidence arising from the passing of potential witness from Municipality;

(mm) March 13, 2019 – Mr. Gillman's Final Responses to Undertakings served; and

(nn) September 25, 2019 – This Application filed by Mr. and Ms. Jack including Mr. Jack's application to dismiss the action for prejudicial delay.

33. The Court must examine "the overall progress of an action from the time the action was commenced until the application to dismiss is brought" to determine whether Mr. Gillman and Dr. Stern have failed to advance the action to the point on the litigation spectrum that a litigant acting in a reasonably diligent manner would have attained: at para 27. Delay is relative: ***Humphreys*** t para 115. Further, as the Court of Appeal held in ***Transamerica*** at para 21:

> ...Delay is not fatal just because the litigation has not progressed to the point that the "fastest" or even the "average" proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of proceeding, and it must be so slow that the delay justifies striking out the claim Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.

34. Any assertions of delay or prejudice prior to the action being commenced are not relevant on a rule 4.31 application, although delay in commencing an action may give rise to a limitations argument: ***Drain v Drain***, 2018 ABQB 468 at para 44 [citations omitted]. In this case, the applicable period is between August 21, 2015 when the Statement of Claim was filed to September 25, 2019, the date the Jacks' Application was filed. With reference to the chronology above, the relevant time period for review for the purpose of the Application under rule 4.31 begins at item (g), when the Statement of Claim was filed.

35. At the time this Application was brought in September 2019, the action had been ongoing for approximately four years. Records had been exchanged, questioning had been completed, the issues between parties had been narrowed to the extent that the action was discontinued against some Defendants, and the pleadings had been amended. The Plaintiffs have also retained experts and, as of September 2019, had provided an expert report.

36. As I have noted, Mr. Jack does not assert that the delay has been inordinate and the presumption of significant prejudice does not apply. Rather, Mr. Jack argues that while the delay in this case is not inordinate, the action is not at the stage that a reasonable litigant, acting diligently, would be at in similar circumstances. He argues that this case involves limited documentary evidence and that discovery should have been completed sooner. Further, there are gaps of time when virtually no action was taken by the Plaintiffs, such as questioning Mr. Jack on his undertaking responses on June 19, 2018, almost a year after they were provided on July 4, 2017 (which was also almost a year after the last of any of the Defendants provided their undertaking responses on July 19, 2017). While the Action was dismissed against three other parties during this period (December 2017 to March 2018), Mr. Jack argues that the discontinuances did not narrow any issues in relation to him, and the claims against him did not depend on a finding of liability against the former Defendants.

37. The onus is on the Plaintiffs to move the Action forward: ***Arbeau*** at para 37. The Plaintiffs say that this Action has proceeded at a pace that could reasonably be expected, given the complexity of the issues and the number of parties involved in the litigation. There were originally four groups of defendants with separate interests. In the four years between August 21, 2015, when the Statement of Claim was

filed, and September 25, 2019, when this Application was filed, the Plaintiffs note that the following steps have been taken:

(a) Close of pleadings;

(b) Questioning of all five parties;

(c) Service of the Plaintiffs' first expert report;

(d) Service of responses to undertakings

(e) Questioning on responses to undertakings; and

(f) Settlement and discontinuance of the action against the Realtor Defendants, the Home Inspection Defendants, and Ms. Jack.

38. The Plaintiffs have served another expert report since the Application was filed, and as a result, they are ready for trial. On an application brought pursuant to rule 4.31, the Court does not take into account steps taken after the application was filed.

39. On its face, the Action appears to have progressed steadily, especially given the number of initial parties that disclosed records and were questioned. The time taken to exchange records and schedule and conduct questioning in an action involving five groups of parties, including four groups of defendants, is reasonable. I also consider that Mr. Gillman was questioned by counsel for the Jacks on June 19, 2018, almost nineteen months after questioning of the Plaintiffs by the other counsel on November 28, 2016. Further, while the Plaintiffs took almost five-and-a-half months to provide their responses to undertakings from their questioning by all Defendants' counsel except counsel for Mr. Jack (from November 28, 2016 to May 10, 2017), Mr. Jack similarly took nearly five-and-a-half months to provide his responses to undertakings (from January 16, 2017 to July 4, 2017).

40. In addition, the issues in the action were narrowed when the Plaintiffs settled with, and discontinued the actions against, the Realtor Defendants and the Home Inspection Defendants. The Court looks at the progress of the action as a whole, and not just whether the discontinuances narrowed issues in respect of the claims against Mr. Jack. This is clear on a plain reading of rule 4.31(1), which refers to if "delay occurs in an action". And, as noted in ***Arbeau***, the Court must look at the action as a whole and not just segments: at para 27.

41. Mr. Jack's focus is really in respect of the delay before the Action was commenced. He notes that he had no further involvement with the Property after 2007, and that it would have been obvious to a reasonable litigant in the Plaintiffs' and the Mittons' position that the passage of time could result in difficulties in obtaining evidence. But the Court does not consider delay before an action is commenced on an application under rule 4.31.

42. In my view, the Plaintiffs have not delayed in pursuing their claim and have proceeded with reasonable diligence.

43. The Third Party Claim brought by the Mittons is for contribution and indemnity and is contingent on the Plaintiffs succeeding in their claim against the Mittons. In these circumstances, I do not find the Mittons were required to take separate steps to advance the Third Party Claim, and do not find any delay in how it has been advanced.

44. As I have found no delay in the progress of the Action, Mr. Jack's Application for dismissal for prejudicial delay is dismissed.

(ii) Significant Prejudice

45. In the event I am mistaken and there has been delay in the progress of the Action, I consider Mr. Jack's argument that he has suffered significant prejudice since the Action was commenced. The onus is on him to establish that he has suffered significant prejudice: ***Arbeau*** at para 35. This is the fourth factor set out in ***Humphreys***.

46. Mr. Jack argues that he has suffered significant prejudice due to the loss of evidence during the time since the Property was constructed and also since the Action was commenced. This includes both written records of the Municipality in 2013 and the death of a potential witness from the Municipality in 2019.

47. In ***Humphreys***, the Court of Appeal noted, at para 130:

> There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. "Delay may compromise the fairness of a trial". The unavailability of crucial witnesses – death, impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data. A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers.

48. The Court of Appeal goes on to note in ***Humphreys*** that "[t]his court has not, as far as we can tell, dismissed an action on account of delay because of nonlitigation prejudice": at para 138.

49. The Court of Appeal has considered that the passage of time leading to a loss of evidence may result in significant prejudice against a party. In ***Brace v Williams***, 2016 ABCA 384 at paras 3-4, the Court commented:

> There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. "Delay may compromise the fairness of a trial". The unavailability of crucial witnesses – death, impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data. A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers.

50. In ***Stabilized Water of Canada Inc v Better Business Bureau of Southern Alberta***, 2016 ABQB 543, aff'd 2017 ABQB 736, aff'd 2019 ABCA 146, the Master found significant prejudice in a defamation action where "essentially every support staff or lower level manager who was employed by [the defendant] who would have been involved in vetting the articles in question, are gone, and the vast majority of [the defendant's board members or directors who were involved are now dead or gone from]the defendant]": at para 34 (Master).

51. In addition, in ***Megatrend Holdings Inc v Glenbow-Alberta Institute***, 2007 ABQB 346 at paras 73-75, aff'd 2008 ABCA 236 the Court concluded that a trial could have been held prior to the death of a witness, as the action had been outstanding for seven years. In that case, there would be a credibility contest between the deceased witness' transcript of evidence and a live witness which gave rise to serious prejudice.

52. This Action was commenced eleven years after construction of the Property began, and eight years after the Jacks sold the Property to the Mittons. Given the passage of time, the Jacks did not keep all records in connection with the Property. Further, the Municipality's records regarding the permits and inspection reports for the Property were destroyed by flood in 2013. Finally, Mr. Jack notes that Ray

Veldhoen, Safety Codes Officer with the Municipality who inspected the Property during construction, passed away on February 23, 2019.

53. Because of the destruction of the Municipality's records and because the Jacks did not keep all records in connection with the Property, Mr. Jack argues that Mr. Veldhoen's passing means that he cannot obtain any form of evidence from the Municipality.

54. The loss of the Municipality's records in 2013 was prior to the commencement of the Action and is not as a result of delay in the progress of the Action. That cannot be said to be prejudice as a result of delay in the progress of the Action. But it may mean other evidence about the Municipality's inspections is more significant.

55. With respect to Mr. Veldhoen's passing away in 2019, it is not clear what, if any, evidence or records Mr. Veldhoen would have been able to provide. The Jacks were the homeowners and did not keep all their records of construction of the Property, although they do have two of the Municipal Inspection Reports – one dated January 27, 2005 for the foundation stage and one dated May 24, 2005 for the framing stage. The Municipality retained records but they were destroyed by flood. In these circumstances, it is not certain that Mr. Veldhoen would have kept personal records when the homeowners did not even do so. Although many years have gone by since Mr. Veldhoen inspected the Property, he may have had some recollection of the municipal inspections and the Property. His passing is prejudicial to all parties in the Action.

56. To succeed on an application brought pursuant to rule 4.31, it is not sufficient for there to be prejudice; where there is no inordinate and inexcusable delay, Mr. Jack must establish "actual significant prejudice caused by the delay": ***Arbeau*** at para 43.

57. Mr. Jack did not contact Mr. Veldhoen before he passed away to determine what, if any, recollection and documents he might have of the municipal inspections. In addition, there is another source of information about the municipal inspections. Mr. Jack's evidence is that he hired Geoff Brook, an engineer who acted as site supervisor and managed day-to-day operations, and was involved in the inspections. Mr. Jack says he was not present for any of the inspections of the Property.

58. There is no evidence before me from Mr. Brook regarding what documents he has or what he recalls about the municipal inspections. There is no evidence about his availability to give evidence on the same issues that Mr. Veldhoen would have been asked about. Indeed, Mr. Jack did not try to contact Mr. Brook in advance of this Application to find out what he recalls.

59. Mr. Veldhoen passed away at around the same time as the parties concluded questioning. Although I found no delay in the progress of the Action, even had questioning been completed one year previously, it is unlikely that a trial would have been heard by this time. Mr. Jack has not established that prejudice due to the loss of Mr. Veldhoen's evidence was caused by any delay in the progress of the Action.

60. In this matter, there is another witness who may be able to give evidence on the municipal approvals, it is unclear what evidence Mr. Veldhoen would have had, and where Mr. Veldhoen passed away before a trial could likely have been held. In the circumstances, I am not satisfied that the prejudice caused by the passing of Mr. Veldhoen reaches the level of significant prejudice to Mr. Jack.

(iii) Compelling reason not to dismiss the Action

61. Given my conclusions on delay and significant prejudice, it is not necessary for me to consider whether there is a compelling reason not to dismiss the Action.

B. The Jacks' and Mittons' Applications for Summary Judgment

62. In the Application before me, Mr. Jack also seeks summary judgment dismissing the claim against him, and summary judgment dismissing the Mittons' Third Party Claim against him seeking contribution and indemnity in the event they are found liable to the Plaintiffs.

63. Mr. and Ms. Mitton also apply for summary judgment dismissing the Plaintiffs' claim against them. In argument, their counsel agreed that if the Action is dismissed against them, there is no basis to maintain the Third Party Claim against the Jacks.

64. I begin by reviewing the law of summary judgment. I will then summarize the facts asserted by the parties, Finally, I will consider the separate applications brought by the Jacks and the Mittons.

(i) Overview of Summary Judgment Law

65. A party may apply to the Court for summary judgment dismissing all or part of an action where there is no merit to a claim or part of it: *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*], r 7.3(1)(b).

66. The test for summary judgment was articulated by the majority of a five-member panel of the Alberta Court of Appeal in Reasons for Judgment Reserved in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir-Jones***]. The Court of Appeal resolved conflicting appellate authority on the test for summary judgment in Alberta, and held that the test must be predictable, consistent, and fair to both parties. The key non-sequential considerations on an application for summary judgment are concisely summarized at para 47:

> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

67. The majority in ***Weir-Jones*** commented that there is no policy reason to continue to take a strict approach to summary judgment, as that would undermine the culture shift called for by the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 [***Hryniak***]: ***Weir-Jones*** at para 48.

68. ***Weir-Jones*** was applied by the Court of Appeal in ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 [***Hannam***], leave to appeal to the SCC refused, 39442 (18 March 2021). There, the Court of Appeal discussed the meaning of "genuine issue requiring a trial", noting at paragraphs 159 and 160 that the Court of Appeal had adopted the Supreme Court of Canada's procedural approach at paragraph 49 of ***Hryniak*** that:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

69. Further, the Court of Appeal noted that "[t]he "no genuine issue" concept no longer measures the merits of the parties' positions. It now concentrates on procedural fairness": ***Hannam*** at paragraph 161. The question is whether summary disposition is possible in light of the record, the evidence, the facts and the law: ***Weir-Jones*** at para 25.

70. Not every conflict in the evidence precludes summary judgment. A judge can draw inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability): ***Weir-Jones*** at para 38. Further, the Court may make common sense assessments of the evidence, particularly where there are bare allegations without supporting evidence, statements are self-serving, or the evidence is not consistent with other evidence: ***Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd***, 2018 ABQB 626 at paras 63-64.

71. There is no symmetry of burdens on an application for summary judgment. The Defendants must prove there is no reasonable claim, while the Plaintiffs need only to demonstrate that the record, the facts or the law preclude a fair disposition, and there is a genuine issue for trial: ***Weir-Jones*** at para 32.

(ii) Additional Facts relevant on Summary Judgment

72. Mr. Jack argues that he and Ms. Jack did not construct the Property, and that he was not a general contractor. His evidence is that he did not participate in the physical construction of the Property. He deposes that he was often working out of the country during the construction and did not have the time to undertake any physical work or play a supervisory role in the construction. Mr. Jack says he was not present for any of the inspections of the Property.

73. Mr. Jack says he hired two engineers. As noted above, Mr. Brook was hired to be the site supervisor who managed day-to-day operations and was involved in the design and preparation of some of the drawings for the Property. Mr. Jack says Mr. Brook provided his services through a corporate entity, Imperator Inc., also known as Imperator Projects ("Imperator") that was created by Mr. Jack. Mr. Jack and Mr. Brook were the directors. By doing work through Imperator, Mr. Jack said he could source more favourable prices and it would allow Mr. Brook to take on other work.

74. Mr. Jack also hired a civil engineer, Kevin Watson, who designed and certified the foundation of the Property, and prepared the designs, drawings and calculations for the footings, pilings and all steel framing and support. Mr. Jack says he only prepared high-level conceptual drawings of the Property, and that Imperator prepared more detailed drawings that were reviewed by Mr. Watson.

75. According to Mr. Jack, he relied upon Mr. Brook to provide recommendations on trades and the selection of materials, to schedule construction activities, and to make payments to the trades. He says he relied on the contractors he hired to advise on the construction, and did not make any final decisions about building materials. Any decisions he made were in accordance with the contractors' recommendations. There was no evidence from the contractors filed on this Application.

76. As has been noted above, the municipal inspections were conducted by Mr. Veldhoen, who was a Safety Codes Officer with the Municipality. He inspected the foundation and the framing and determined they were in compliance with the Alberta Building Code at the time. Also as has been noted above, Mr. Veldhoen has passed away and the Municipality's records were lost in the 2013 flood. Only partial inspection records are available through Mr. Jack, which include the Municipal Inspection Reports for the foundation stage and the framing stage.

77. Mr. Gillman and Dr. Stern argue that Mr. Jack acted as a general contractor and has breached his duty of care. Mr. Jack argues that there is no evidence to establish that he acted in any capacity other than as owner of the Property.

78. In support of the Plaintiffs' position, they highlight that Mr. Jack paid all the trades and suppliers personally. Mr. Jack's explanation is that he did so to ensure they were properly paid and to avoid the

registration of liens on the Property. They also point to various times when Mr. Jack would refer to himself as building a house, that the Municipal Inspection Reports refer to him as the “Home Owner / Builder”, and that he created drawings that Mr. Brook converted to CAD drawings. They also argue that he was involved in contractor and materials decisions.

79. Before construction of the Property was complete, the Mittons approached the Jacks to inquire about purchasing the Property. In negotiating the purchase, the Jacks and the Mittons understood that the Mittons would be responsible for finishing certain aspects of construction, and the Jacks would be responsible for others. Before the transaction closed, the Mittons obtained the Adept Report that set out findings of a pre-purchase inspection of the Property. Mr. Jack responded to issues raised in the Adept Report, which he says was done in consultation with his engineers and contractors in his capacity as owner and seller of the Property.

80. The Jack Purchase Agreement provided that the Property was sold on an “as-is” basis, subject to conditions agreed by the parties. The transaction closed on May 18, 2007. The elevation, gradient and rock cladding of the Property were all outstanding at the time of the sale of the Property. The Jacks argue these issues were within the Mittons’ responsibility.

81. The Mittons lived in the Property for approximately six years, from December 2007 until December 2013 when they sold it to Mr. Gillman and Ms. Stern. The sale closed in March 2014. Mr. Mitton says they did not experience any of the Claimed Defects. The only issue they had was limited water seepage in the basement during a heavy rainstorm, which they repaired by replacing the weeping tile. They did not investigate further or check if the water resulted in mold. The Mittons did not have any complaints with the Property.

82. The Mittons listed the Property for sale in 2011. The Plaintiffs made an offer to purchase the Property from the Mittons in December 2013. They obtained a pre-purchase home inspection report from Homecrafters dated December 12, 2013 (the “Homecrafters Report”). The Homecrafters Report included observations about various systems and the structure of the Property. It did not note any required repairs or defects, and noted the structure, the roof and the exterior were all generally in good condition. There was no evidence of moisture penetration visible in the basement. It concluded: “This is a well built 7 year old home” and “The construction of the home is good quality”. The Plaintiffs had the Homecrafters Report before they waived conditions on the sale.

83. It was not until Mr. Gillman and Dr. Stern hired contractor Miller Creek Homes to perform renovations on the Property in May 2014 that they discovered the Claimed Defects (in respect of the roof, foundation, site grading and drainage, exterior cladding and floor joists). The Mittons argue that the principle of *caveat emptor* applies to preclude them from liability for the Claimed Defects. The claim against Mr. Jack is distinct from the claim against the Mittons. It relates to negligence in the construction of the Property and the allegation that he was the general contractor. The Third Party Claim by the Mittons against the Jacks is for contribution and indemnity in the event the Court finds there were defects that the Mittons should have disclosed when the Property was sold to the Plaintiffs.

84. The Claimed Defects are set out in the Mr. Gillman’s Affidavit, as well as in the Affidavit of William Ferguson of Millar Creek Homes. The Plaintiffs also rely on two Affidavits containing expert reports prepared by engineers Dana Bjornson of Optimize Envelope Engineering Ltd. dated January 22, 2018 and Kevin Krautheim of Pferdkraft Inc. dated November 12, 2019. Ms. Bjornson opined on the building envelope condition, while Mr. Krautheim provided an opinion on structural deficiencies.

85. Mr. Jack objects to Ms. Bjornson and Mr. Krautheim being considered experts and argues that their reports should carry no weight, as they did not attend at or inspect the Property. They prepared their reports based on a desk review of photographs and documents provided by the Plaintiffs. He has provided no expert evidence to challenge their conclusions.

86. The Jacks note that in reviewing records provided by Mr. Gillman, it appears that the alleged repair work began before this Action was commenced and continued thereafter. They say they were never provided with notice of the renovations or with an opportunity to access and inspect the Property. The Plaintiffs note that the Jacks have never asked to inspect the Property.

(iii) Jack Application

87. Mr. Jack argues that the Action is suitable for summary disposition and should be dismissed against him. He says the evidence is largely uncontroverted and there are no credibility issues. Mr. Jack asserts that he has proven the facts on the record on a balance of probabilities to establish that his involvement in the construction of the Property was solely as a homeowner, and not as a general contractor. He also argues that there is no evidence on the record to indicate that he had any knowledge of alleged latent defects in the Property. Finally, he raises limitations arguments regarding part of the Plaintiffs' claim and the entire Third Party Claim.

88. The crux of the Plaintiffs' claim against Mr. Jack is that he acted as the general contractor in constructing the Property, and was negligent in carrying out his duties. Further or alternatively, the Plaintiffs argue that he had a duty to warn them of any defect in the design or construction of the Property that made it dangerous or unfit for habitation. He breached that duty in failing to warn the Plaintiffs of the Claimed Defects.

89. The crux of the Mittons' Third Party Claim against Mr. Jack is that if the Mittons are found liable to the Plaintiffs, Mr. Jack should be required to make contribution and indemnify them on the basis of misrepresentation as to latent defects. The Plaintiffs' claim the Mittons misrepresented the existence of the Claimed Defects, and actively concealed them. The Plaintiffs' assert that the Mittons either knew about the Claimed Defects or were reckless as to their existence, and had a duty to disclose them to the Plaintiffs.

90. And, as a preliminary matter, the Action and Third Party Claim must have been commenced before the expiry of a limitation period. Mr. Jack argues that some of the Claimed Defects arose before the ten-year ultimate limitation period and are therefore statute-barred. The Plaintiffs argue the construction of the Property was part of one chain of events or transaction so the ten-year ultimate limitation period had not passed by the time the Action was commenced.

a. Limitation Period

91. Mr. Jack argues that part of the Plaintiffs' claim is statute-barred by the *Limitations Act*, RSA 2000, c L-12. He raises separate arguments relating to the Plaintiffs' claim and the Mittons' Third Party claim.

92. First, he says the Plaintiffs commenced an action for the Claimed Defects relating to the foundation and framing were brought after the ten-year ultimate limitation period prescribed in section 3(1)(b) of the *Limitations Act.* He points to the Municipality's inspection reports showing the foundation was completed by January 27, 2005, with framing done by May 24, 2005. As noted above, the Statement of Claim was filed August 21, 2015, more than ten years later.

93. The Plaintiffs rely on section 3(3) of the *Limitations Act*, which provides:

> (3) For the purposes of subsections (1)(b) and (1.1)(b),
>
> (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs.

94. The Plaintiffs allege that Mr. Jack breached his duties as builder or general contractor related to the entire construction of the Property, which continued until December 2007 when his work was completed.

The Action was commenced in August 2015, within ten years of when the cause of action rose. The Plaintiffs point to this Court's decision in ***Condominium Corp No 0225118 v Tamarack Ventures Inc***, 2016 ABQB 63 at para 8, where the Court declined to find discrete limitation periods during the course of a project in an action against the project engineer. The Court held that the ultimate limitation period began when the engineer's involvement with the project terminated. Similarly, in this case, the Plaintiffs argue that the limitation period for the cause of action against Mr. Jack commenced when his involvement ended in December 2007. That takes into account Mr. Jack's argument that the Property was sold partway through construction and he was not responsible for completing certain items, as the Plaintiffs argue the limitation period would commence when his involvement ceased.

95. In argument, counsel for Mr. Jack noted that this could lead to unfairness, as for example, the contractor doing the framing finished years before construction of the Property was completed when the Mittons finished the cladding. This may be a persuasive argument if the Action was brought against each of the contractors, including the foundation and framing contractors. But the Action is brought against Mr. Jack relating to his role in the construction of the Property. Further, the Municipal Inspection Reports identified incomplete items that were only later completed. For example, the foundation report said weeping tile and frost heave protection work needed to be finished. The frost heave protection work was only completed on July 5, 2007, within ten years of the commencement of the Action.

96. At a minimum, I find the ten-year ultimate limitation period argument depends on Mr. Jack's role in the construction of the Property. Once his role is decided, the Court can consider whether there was a continuing course of conduct or a series of related acts. If he is the general contractor, he cannot parse the limitation periods for different aspects of construction for which he was responsible.

97. The second limitations argument raised by Mr. Jack is that the Statement of Claim and the Mittons' Third Party Claim were brought outside the two-year limitation period set out in subsection 3(1)(a) of the *Limitations Act.* That provision provides immunity from liability if a claimant does not seek a remedial order within two years after the date on which the claimant first knew, or in the circumstances, ought to have known:

(i) That the injury for which the claimant seeks a remedial order had occurred;

(ii) That the injury was attributable to conduct of the defendant; and

(iii) That the injury, assuming liability on the part of the defendant, warrants bringing a proceeding.

98. The Plaintiffs say they only learned of Mr. Jack's involvement in the construction shortly before the issuance of the Statement of Claim. With respect to the Third Party Claim, Mr. Jack argues that the Mittons ought to have known about any latent defects in the Property during their ownership and occupancy, and certainly within two years of receiving the Adept Report that was prepared before their purchase closed. Mr. Jack argues that this principle of discoverability should also apply to the Plaintiffs as successors in title. On this argument, the two-year limitation period in respect of the Plaintiffs' claim expired before the Plaintiffs purchased the Property and before they were aware of the Adept Report.

99. I was provided with no authority to support this argument, and it is difficult to see how that fits in with a plain reading of section 3(1) of the *Limitations Act* or the principle of discoverability. The principle of discoverability does not require perfect knowledge: ***De Shazo v Nations Energy Co***, 2005 ABCA 241 at paras 31-32. It is sufficient if the material facts on which the cause of action are based are known or ought to have been discovered with reasonable diligence. Whether a claimant has acted with reasonable diligence will be analyzed in the context of the requirements of section 3(1) of the *Limitations Act*. Further, "[w]hat a claimant knew will inform what a claimant ought to have known in the circumstances": ***Clark Builders and Stantec Consulting Ltd v GO Community Centre***, 2019 ABQB 706 at para 257. This is a subjective aspect to the test under section 3(1). There must be a finding that the Plaintiffs knew or ought to have known about their claim.

100. I was presented with no authority to suggest that the Plaintiffs are bound by a determination of a date when the Mittons ought to have discovered their cause of action. I see no basis to conclude that the Plaintiffs' limitation period began before they purchased the Property on a date when the Jacks argue the Mittons should have discovered any latent defects with the Property.

101. I decline to dismiss the Application summarily on the basis of the limitation period.

b. Summary Dismissal of Action against Mr. Jack on Merits

102. I now turn to Mr. Jack's Application for summary dismissal based on the merits. The Plaintiffs' claim against Mr. Jack is that he acted as the general contractor, and negligently failed to exercise all reasonable care, skill or diligence of a competent general contractor. Mr. Jack says he was just the owner and is therefore not liable.

103. They assert Mr. Jack is liable for the Claimed Defects pursuant to ***Winnipeg Condominium Corp No 36 v Bird Construction Co***, [1995] 1 SCR 85 [***Winnipeg Condo***]. There, the Supreme Court of Canada held that there is a duty owed by a contractor to ensure that a building meets a reasonable construction standard. It is reasonably foreseeable to contractors that if they construct a building negligently, causing it to contain latent defects, that subsequent purchasers may suffer damage when those defects manifest themselves. The foreseeable danger will also ground a contractor's duty in tort to a building's subsequent purchasers for the cost of repairing the defect, if that defect is discovered prior to any injury and if it poses a real and substantial danger to the building's inhabitants. In ***Winnipeg Condo***, the structure was not merely shoddy; it was dangerous. There is a distinction between shoddy workmanship and dangerous defects. If the contractor should be found negligent at trial, the purchaser should recover the reasonable cost of putting the building into a non-dangerous state, but not the cost of any repairs that would merely improve the building's quality.

104. To succeed in their action, the Plaintiffs must prove on a balance of probabilities that Mr. Jack was the general contractor. They must also prove that the Claimed Defects posed a real and substantial danger to them. There is no remedy in tort for defects that do not pose a real and substantial danger.

105. On this Application, Mr. Jack has the onus of proving on a balance of probabilities the facts that support his position that there is no reasonable claim against him, while the Plaintiffs need only to demonstrate that the record, the facts or the law preclude a fair disposition, and there is a genuine issue for trial.

106. I start with the issue of whether Mr. Jack was the general contractor, and if so, whether he breached his duty of care. Finally, I turn to Mr. Jack's arguments that the Plaintiffs have not established any damages or that the damages were caused by any failure by Mr. Jack to satisfy his duty of care.

c. Was Mr. Jack the General Contractor?

107. Mr. Jack relies on the authors of a well-regarded text, who comment that if an owner enters into separate agreements with different contractors for portions of work, each of them may be a separate prime contractor and not a subcontractor: Thomas G Heintzman, Bryan G West & Immanuel Goldsmith, ***Heintzman and Goldsmith on Canadian Building Contracts***, 5th ed (United States: Thomson Reuters, 2019) (loose-leaf updated 2019, release 4), ch 12 at ss 7(b). This statement is not determinative as to whether Mr. Jack was the prime (or general) contractor, as the authors also note that an owner can act as its own general contractor and enter into contracts with the various trades on the project: ch 12 at ss 7(a). These statements are made in the context of whether there is a contractual relationship between an owner and the subcontractors. Whether an owner is also a general contractor is a factual determination.

108. Mr. Jack points to the Saskatchewan Court of Appeal decision in ***Roy v Thiessen***, 2005 SKCA 45, where the Court found that one owner, Ms. Thiessen, did not owe a duty of care as a builder because she "was not a contractor involved in the construction of the house": at para 36. The other owner, Mr.

Thiessen, acted as general contractor even though he had no training or experience. He personally did some of the construction, and no architect or engineer supervised or inspected the work: at paras 2-3.

109. Mr. Jack argues that ***Roy v Thiessen*** stands for the proposition that any liability arising from a breach of a builder's duty of care is based on a defendant's participation in construction, not ownership. The Plaintiffs say the case does not require participation in construction. I agree with the Plaintiffs. In ***Roy v Thiessen***, while there were trades hired to do some work and Mr. Thiessen did other work, the Court of Appeal found him to be the general contractor for the construction. Further, the Court of Appeal applied ***Winnipeg Condo***, noting that "[a] contractor can be liable for economic losses caused by defective buildings": at para 29.

110. Mr. Jack's evidence is that he engaged many contractors to do work. He says that does not make him a general contractor, and does not place those contractors in the role of subcontractors. He also says he hired Mr. Watson and Mr. Brook, engineers on whom he relied. His evidence is that Mr. Watson prepared drawings, designs and specifications, and Mr. Brook acted as site supervisor.

111. There is no evidence directly from Mr. Watson or Mr. Brook about their roles and what they did, although Mr. Jack provides some evidence. Mr. Jack says he relied on their expertise and relied on Mr. Brook for the management and supervision of the construction of the Property. He also relied on them to address concerns raised in the Adept Report when the Property was sold to the Mittons, although he personally signed the response sent to the Mittons.

112. Further, Mr. Jack's evidence is that Mr. Brook was responsible for supervising the construction, including directing trades. He says that Mr. Brook vetted the proposed contractors. He also says that to the best of his knowledge, the contractors had the requisite expertise, experience and qualifications to perform the work, but provides no supporting evidence or details for that conclusion.

113. The Plaintiffs argue that Mr. Jack cannot provide evidence about what Mr. Brook and Mr. Watson knew or did; he can only provide his own personal knowledge. Pursuant to rule 13.18 of the *Rules*:

> If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

114. If Mr. Brook vetted the proposed contractors, evidence about the expertise, experience and qualifications of the proposed contractors is beyond Mr. Jack's personal knowledge. Mr. Brook should provide that evidence in support of this Application, as required under rule 13.18.

115. Mr. Gillman and Dr. Stern argue that Mr. Jack was more than just an owner; he was also the general contractor so is liable for deficient construction work. They rely on an Ontario Superior Court decision in ***Pegah Construction Ltd v Panterra Mansions Joint Venture Corp***, 2013 ONSC 3226 at para 22. There, the Court explained two structures: one where an owner can hire a general contractor who, in turn, hires trades, and another where an owner hires a construction manager and the trades. The Plaintiffs argue that where construction proceeds pursuant to the second structure, the owner bears the risk associated with a construction management contract.

116. In this case, the Plaintiffs say Mr. Jack assumed all the risk as he hired a construction manager and the trades, who he paid directly. Mr. Jack does not have to be involved in the actual construction to be liable for defective construction of the Property if the Claimed Defects pose a danger to the occupants, as discussed in ***Winnipeg Condo***.

117. On an application for summary judgment, I must have sufficient confidence in the state of the record such that I am prepared to exercise my judicial discretion to summarily resolve the dispute. Here, Mr. Jack says there are no conflicting material facts or issues of credibility. But I find there are conflicting facts regarding his role, and the role of Mr. Brook, as to who was the general contractor. Mr. Jack's credibility is in issue as well in respect of his role. Finally, there is an issue as to whether all of the

Claimed Defects posed a danger to the Plaintiffs such that Mr. Jack, if found to be the general contractor, owes them a duty of care.

118. I cannot decide on the record before me that Mr. Jack was not the general contractor and therefore that he does not owe a duty of care to the Plaintiffs pursuant to ***Winnipeg Condo***. The record demonstrates that it is necessary to weigh evidence and assess credibility to decide this issue.

d. Was there a breach of the Standard of Care?

119. In any event, Mr. Jack argues that even if he owed a duty of care to the Plaintiffs as a general contractor, he did not breach that duty with reference to standards of safe construction. As a result, he asks that the action be summarily dismissed against him.

120. As noted above, in ***Winnipeg Condo***, the Supreme Court of Canada held that there is a duty owed by a contractor to ensure that a building meets a reasonable construction standard. Where the defects pose a real and substantial danger to the occupants of the building, the reasonable costs of repairing the defects and putting the building in a non-dangerous state may be recoverable in tort: at para 21. La Forest J explains the duty of care owed, at para 25, as follows:

> ... The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home owner. By contrast, the duty in tort with respect to materials and workmanship flows from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. ...

121. La Forest J further notes that "it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves": at para 35. This is distinguishable from situations involving shoddy or substandard work that is not dangerously defective: at para 42.

122. In the trial decision of ***Roy v Thiessen***, 2003 SKQB 249, rev'd in part 2005 SKCA 45, the Saskatchewan Court of Queen's Bench held that the standard of care owed to the defendant owners who were also found by that court to be builders "is one of a reasonable and prudent person who undertakes the construction of a house" or that of a "reasonably competent contractor": at para 35.

123. Mr. Jack argues that even if he is found to be a general contractor, there has been no breach of the duty of care with reference to reasonable standards of safe construction. In this case, Mr. Jack hired engineers (Mr. Brook and Mr. Watson) to prepare drawings, designs and specifications, and to assist with addressing the issues raised in the Adept Report. He hired Mr. Brook to act as site supervisor to manage the construction and supervise the work being done. Finally, he notes that the Municipality conducted inspections and approved the structural design, foundation and framing.

124. He says there is no expert evidence tendered by the Plaintiffs that establishes the standard of care. Further, Mr. Jack says there is no evidence as to whether a reasonable contractor would do something different than Mr. Jack did. Finally, in this case, some of the work was completed after the Mittons purchased the Property in accordance with recommendations in the Adept Report, and they were satisfied that issues raised in the Adept Report were addressed.

125. Mr. Gillman and Dr. Stern rely on the Affidavit of Mr. Ferguson of Millar Creek Homes, who completed renovations and repairs to the Property, and the Affidavit of Mr. Gillman for evidence on the Claimed Defects. They also rely on expert opinion evidence of Ms. Bjornson and Mr. Krautheim as to the quality of construction and the Claimed Defects. Both of the Plaintiffs' experts based their conclusions on a review of photographs and documents. In Ms. Bjornson's report, she notes that a site review had not

been completed, as the original conditions were repaired. She opines on the condition of the building envelope based on a review of documents and compared it with the requirements of the 1997 Alberta Building Code and expected industry standards at the time the Property was constructed. The Plaintiffs also rely on Mr. Jack's own evidence that Mr. Brook had no prior experience with building residential homes, and that Mr. Jack provided no specific information to support his assertion that he hired qualified contractors that were vetted by Mr. Brook.

126. It is not accurate to say that there was no evidence of what a reasonable contractor would do, or evidence that the standard of care was not met in this case. Ms. Bjornson reviewed industry standards in place at the time which addresses the standard of care. In addition, while the Municipality found the foundation and framing complied with the Alberta Building Code, as reflected in its Inspection Reports, that is not determinative. Ms. Bjornson's and Mr. Krautheim's expert reports opine on the standard of care.

127. The Plaintiffs note that Ms. Bjornson and Mr. Krautheim were not questioned on their affidavits and that Mr. Jack provided no responding evidence. Mr. Jack argues Ms. Bjornson's and Mr. Krautheim's evidence should have little weight, as Ms. Bjornson and Mr. Krautheim did not inspect the Property but only relied on photographs and documents.

128. It will be open to a trial judge to conclude that the experts' opinions should carry little weight, as was the case in ***Orr v Metropolitan Toronto Condominium Corp No 1056***, 2016 ONSC 7630 at para 29, where the court gave little weight to an expert valuation when she had not inspected the property. But in responding to a summary judgment application, the Plaintiffs' experts raise issues regarding the standard of care and the damages.

129. The evidence filed by the Plaintiffs raises a triable issue as to whether Mr. Jack breached his duty of care (if a duty is owed). I do not have sufficient confidence in the record before me to decide this issue on a summary basis.

e. Damages are not proven

130. In the further alternative, Mr. Jack argues that the Plaintiffs have not provided sufficient evidence that they have suffered damages that are recoverable at law, and as a result, the action should be summarily dismissed against him. Other than the Plaintiffs and Miller Creek Homes, who performed the renovations for the Plaintiffs and who Mr. Jack says is self-interested in alleging significant defects, none of the people who attended at the Property identified any defects. This includes the Mittons, who lived on the Property for more than six years with no issues. Neither the Plaintiffs' realtor, Mr. Chaulk, nor their Home Inspector, Mr. Hamilton, identified any defects. Finally, as noted, the Plaintiffs' experts, Ms. Bjornson and Mr. Krautheim, did not view the defects or attend at the Property.

131. The Claimed Defects include the roof, foundation, exterior cladding, drainage and site grading, and floor joists. Mr. Jack argues that even if these Claimed Defects demonstrate shoddy or substandard workmanship, those are not the types of defects for which there is recovery in law pursuant to ***Winnipeg Condo***. Further, the Plaintiffs argue that some of the Claimed Defects have led to the presence of mold. Mr. Jack argues that there is a lack of credible expert evidence to support this, and no evidence of mold or air quality inspection or testing. Ms. Bjornson describes "fungal growth" in parts of the Property from photographs.

132. The expert opinions of Ms. Bjornson and Mr. Krautheim are not based on first-hand observations of the Property. Mr. Jack argues the Plaintiffs cannot establish the Claimed Defects relate to the structural integrity of the Property. Indeed, he argues that some of the Claimed Defects, such as the stone cladding and certain water leakage, may be attributable to the reasonable use of the Property, or wear and tear, for which the Plaintiffs are not entitled to damages.

133. The Plaintiffs claim $776,500.47 for repairing all deficiencies identified by Millar Creek Housing. Mr. Jack has provided a Table of Invoices and Cost Summaries as Appendix "A" to his brief to show the breadth of what is claimed and that the invoices attached as exhibits to the Affidavit of Mr. Gillman do not reconcile with the amounts claimed.

134. The Plaintiffs argue that the Claimed Defects rise above what could be considered shoddy work. They were hidden until renovations were commenced, and the fact that none of the Mittons, Mr. Chaulk and Mr. Hamilton noticed them is not determinative. They were repaired promptly before they actually caused catastrophic damage but the issue is whether they would have caused a dangerous condition.

135. ***Winnipeg Condo*** sets out that recovery against a builder must go beyond "cases where the workmanship is merely shoddy or substandard but not dangerously defective": at para 42. But if it is reasonably likely that a defect in a building will cause injury to its inhabitants, that is sufficient to ground a duty in tort to subsequent purchasers for the cost of repairing that defect even before there is any injury: at para 36. The liability is for the reasonable costs of repairing the building to a non-dangerous state: at para 21.

136. The damages claimed raise triable issues about whether they create dangerous conditions, or are due to shoddy workmanship or regular use. There is also an issue as to the extent of the repairs required to repair the Claimed Defects as opposed to improving the Property. The Plaintiffs do not have to prove their damages in response to an application for summary dismissal of the claim. They have provided sufficient evidence that there are triable issues regarding damages, and I am not satisfied the Action should be summarily dismissed against Mr. Jack on the basis that there are no damages recoverable at law.

f. Liability of Mr. Jack as Owner

137. Mr. Jack argues in his brief that he has no duty of care and no liability to the Plaintiffs as an owner. The Plaintiffs' claim against Mr. Jack is not in respect of his previous ownership of the Property. I therefore do not make any determination on this argument as it is not in issue in the Action.

g. Causation

138. Mr. Jack says the Plaintiffs have not adequately addressed causation, as there were eight intervening years between when Mr. Jack's involvement with the Property ended and the Action was commenced. Further, Mr. Jack says the Mittons were responsible for some of the Claimed Defects, including grading and elevation work and the exterior cladding. Finally, Mr. Jack asserts that the Plaintiffs have not considered whether any of the Claimed Defects resulted from reasonable use of the Property.

139. Even as framed by Mr. Jack, causation is a triable issue. I am not satisfied that causation can be determined summarily on this Application.

(iv) Mitton Application for Summary Dismissal

140. Pursuant to Article 6.4 of the Purchase Contract between the Mittons and the Plaintiffs, the Property was purchased on an "as-is" basis with no warranties with respect to the Property. The Plaintiffs had a home inspection done by the Home Inspection Defendants that resulted in the 20-page Homecrafters Report that did not identify any major concerns with the Property. The Plaintiffs waived conditions and only after they began renovations did they identify the Claimed Defects.

141. The Mittons say this is classic case of *caveat emptor*, or "let the buyer beware" that relieves them of liability. The Plaintiffs allege that the Mittons were aware of some of the Claimed Defects with the Property and misrepresented their existence in the Purchase Agreement in breach of their duty to disclose them. They also allege that the Mittons actively concealed some of the Claimed Defects.

142. The Mittons apply for summary dismissal of the Action against them. They say the Plaintiffs have no documents or evidence to show that the Mittons are responsible for any of the Claimed Defects, and there is no genuine issue to be tried and no merit to the claim against them.

143. The Plaintiffs argue there is evidence that the Mittons knew of the Claimed Defects and failed to disclose this information to them, and as a result, *caveat emptor* does not apply. They further say the Mittons misrepresented to them the condition of the Property.

144. To determine whether this matter can be decided summarily, I first review the law of *caveat emptor*. I then consider whether *caveat emptor* applies in this case.

a. Caveat Emptor

145. The common law doctrine of *caveat emptor*, or "let the buyer beware" governs the purchase and sale of real property. It bars a purchaser's recovery from a vendor for patent defects, which are defects that are apparent or visible, or are discoverable on reasonable inspection by the purchaser: ***Gibb v Sprague***, 2008 ABQB 298 at para 19 [***Gibb***]. A vendor has no obligation to disclose a patent defect to a purchaser: ***Lewis v Plourde***, 2017 ABQB 235 at para 198 [***Lewis***]. A purchaser must rely on its own personal inspection, and also has an obligation to inquire into the condition of the property: ***Lewis*** at para 198. At the same time, *caveat emptor* does not apply to protect a vendor from liability for patent defects that have been actively concealed: ***Lewis*** at para 198.

146. If a defect is latent, it cannot be discovered on reasonable inspection. A latent defect must be disclosed by a vendor to the extent the vendor is aware of it: ***Gibb*** at para 19; ***Lewis*** at para 199. A vendor will be liable for a latent defect where the vendor had actual knowledge of it, or was reckless as to the existence of a latent defect: ***Gibb*** at para 27. If a vendor actively conceals a latent defect, *caveat emptor* no longer applies and the purchaser is entitled to seek damages: ***Swayze v Robertson***, 2001 CarswellOnt 818 (SCJ) (WL) at para 27.

147. This Court considered the applicability of *caveat emptor* in ***Gibb***, setting out questions to be asked to determine whether *caveat emptor* can be displaced, at para 15:

(a) Are the defects latent or patent?

(b) Did the sellers have knowledge of the latent defects or were they reckless as to their existence?

(c) Did the defendants make a fraudulent misrepresentation regarding the existence of latent defects?

(d) Did the plaintiffs rely on the fraudulent misrepresentations in purchasing the property? And

(e) Did the latent defects make the property unfit for human habitation or take away from the plaintiff's use, occupation or enjoyment of the property as a whole?

148. The Plaintiffs say that these questions can all be answered in the positive, and that *caveat emptor* therefore does not apply. I now consider whether these questions can be answered on a summary basis.

b. Whether Caveat Emptor Applies

149. The Mittons say they were unaware of any defects with the Property while they lived there. They also say they knew they had a positive obligation to make the Plaintiffs aware of any latent defects. They continuously lived in the Property between December 2007 and December 2013, during which time they completed some minor work and maintenance on the Property. They also experienced a small amount of

water seepage in the basement after a heavy rainstorm which was rectified by repairing the weeping tile. Both Mr. Mitton and Ms. Mitton swore affidavits in support of their Application.

150. The Plaintiffs argue that the Property contained numerous latent defects that could not be identified by them or the Home Inspection Defendants. These include:

(a) Lack of frost protection on the footings;

(b) Weeping tile had insufficient soil cover;

(c) Rot and insufficient moisture protection on below-grade wood sheathing;

(d) Improper fastening of stone cladding to the exterior wall; and

(e) Water infiltration in the basement (the "Latent Defects").

151. While there was some evidence of water seepage in the basement, the Plaintiffs argue that the Mittons concealed it by placing furniture in front of it. Following the reasoning in ***Moore v Taylor***, 2009 ABPC 138 at para 10, they argue it is therefore deemed to be a latent defect.

152. The Plaintiffs say the Mittons had actual knowledge of or were reckless as to the existence of the Latent Defects, and make the following arguments:

(a) The Adept Report drew to the Mittons' attention the issues with the frost protection on the footings, which Mr. Jack agreed to install. The Plaintiffs say the Mittons failed to undertake any independent investigation to ensure Mr. Jack installed the frost protection as agreed, and were reckless as to whether this had been done.

(b) The Mittons were aware of an issue with the weeping tile as they asked a landscaper to dig down and repair it when they had water seepage. The Plaintiffs say it was incumbent on the Mittons to disclose to the Plaintiffs the water infiltration issue with the weeping tiles.

(c) The Adept Report drew to the Mittons' attention the need to have damp-proof wood sheathing below grade. Mr. Jack represented that the wood was damp-proofed. Again, the Mittons failed to undertake any independent investigation, and were reckless as to whether this had been done.

(d) Mr. Mitton admitted that he had glued some stones that had fallen off the exterior of the Property. In his questioning, Mr. Mitton said that no more than ten stones fell off out of several thousand. The Plaintiffs say that the Mittons should have undertaken an investigation into the cause of the falling stones, and that Mr. Mitton had knowledge of or was reckless to the existence of improper installation of the stone cladding.

(e) The Mittons were aware of water infiltrating in the basement in the spring of 2009. The Mittons had a landscaper investigate and repair the weeping tile. The Plaintiffs say that even if the Mittons believed that they had fixed the water infiltration issue, they were reckless as to whether there was mold in the walls, and should have provided a full and frank disclosure of their knowledge of the water infiltration.

153. The Purchase Contract between the Plaintiffs and the Mittons contained a representation in Article 6.1(1) that there were no latent defects in the Property of which the vendors were aware. The Plaintiffs argue that to the extent there were latent defects about which the Mittons were aware, the Mittons have misrepresented the state of the Property. The Plaintiffs argue that they relied on this misrepresentation in purchasing the Property.

154. With respect to (a) and (c), the Mittons argue that there was no basis for them to follow up on Mr. Jack's agreement to do work to finish the Property. They relied on Mr. Jack's agreement and assurances, and also relied on the Municipality, who approved the Property for occupancy. The Adept Report was obtained for the purpose of determining how the construction of the Property was to be completed, following which the work was done.

155. With respect to the weeping tile and water infiltration issues in (b) and (e), the Mittons say a small amount of water seeped into the basement in the spring of 2009. Mr. Mitton said they discovered it when they saw some staining on the wood floor coming out from under the baseboard, but that the baseboard itself and the drywall were not discoloured. The Mittons were having landscaping work done so Mr. Mitton asked the landscapers to excavate down to the weeping tile to investigate, and they repaired the weeping tile. Mr. Mitton understood that the installation had not been done properly and the issue was fixed. The landscapers also excavated down to inspect the foundation. Mr. Mitton did not remove the flooring or look into the walls to check the extent of the damage. The Mittons argue that there is no obligation to investigate for mold every time there is a water spill or leak.

156. The Mittons also argue that they did not actively conceal any water damage in the basement. Mr. Mitton agreed on questioning that there was a desk in front of the wall where the water had seeped in and a couch in the area, but the furniture had always been there. Mr. Mitton noted that the Property was vacant for the last inspection and there was no furniture in the room.

157. With respect to the stone cladding issue in (d), the Mittons say the stones that fell off the exterior of the Property were not a defect. The stones were approximately fifteen inches long and three to four inches deep that Mr. Mitton glued back on with an adhesive. In his questioning, Mr. Mitton said that no more than ten stones fell off out of several thousand. The Mittons say these repairs were routine maintenance.

158. The Mittons argue this is a similar case to ***Belzil v Bain***, 2001 ABQB 890 [***Belzil***]. In ***Belzil***, this Court dismissed an action brought by purchasers against vendors of a home. There, the vendors had purchased an old home and finished the basement with wood framing, insulation and a vapour barrier on concrete walls. The purchasers retained a structural engineer, who inspected the house including removing framing and insulation. The structural engineer's report identified water in the basement and a crack on a wall that was not covered. The purchasers did not ask about the wall, and the vendors made no representations. After purchasing the home, the purchasers discovered an inward bulge on a basement wall when renovating, and an engineer opined that there was serious structural damage. The Court dismissed an action for fraudulent misrepresentation in these circumstances.

159. As set out in ***Weir-Jones***, to succeed on an application for summary judgment, the Mittons must prove there is no reasonable claim, while the Plaintiffs need only to demonstrate that the record, the facts or the law preclude a fair disposition, and there is a genuine issue for trial: at para 32. In that regard, the relevant uncontroverted facts are as follows:

> -The Mittons obtained the Adept Report on around April 27, 2007, and Mr. Jack's reply letter on around May 15, 2007. The Adept Report identified numerous construction issues for the Mittons to consider in deciding whether to purchase the Property, at which time the Adept Report noted that construction was not complete. Mr. Jack reviewed the issues identified in the Adept Report in consultation with his engineers and contractors to reply to the Mittons. The Mittons were satisfied with Mr. Jack's responses and purchased the Property.
>
> -The Mittons and Mr. Jack agreed how the construction would be completed as part of that transaction. They and Mr. Jack completed the construction on the Property in accordance with their agreement.
>
> -They performed routine maintenance and upkeep on the Property while they lived there. The only non-routine issue the Mittons identify is that water seeped into the basement in the spring of 2009.

The weeping tiles were investigated as the cause and repaired. There is no evidence of any further water infiltration in the Property and no evidence of mold in the basement or the walls as a result. On occasion, a stone would fall off the exterior of the Property. Mr. Mitton glued no more than ten stones back in place. He considered that part of regular maintenance.

-The Mittons sought to sell the Property in 2011. In December 2013, the Plaintiffs offered to purchase the Property. The Plaintiffs had a home inspection done by the Home Inspection Defendants, and ultimately waived conditions.

160. I am satisfied I can make the necessary findings on this record to decide the Mittons' Application on a summary basis.

161. In my view, the Adept Report does not impute the Mittons with knowledge of the Latent Defects relating to frost protection, damp-proofing wood sheathing, or any of the other Claimed Defects. The Adept Report was used to assist the Mittons in negotiating the completion of construction of the Property. That they accepted Mr. Jack's explanations and agreement to do certain work, and did not do any further independent investigation of that work, does not make them reckless as to whether that work was done. I was presented with no authority where a vendor was required to confirm the quality of construction work in a home purchased years previously or be found reckless as to the existence of latent defects in that construction.

162. Further, I find that the Mittons were not aware of insufficient soil coverage of the weeping tile system and were not reckless in respect of that issue solely on the basis that they had a landscaper dig down and repair another aspect of the weeping tile system. It was repaired in 2009, more than three years prior to the sale of the Property, and I find that there was no obligation on the Mittons to disclose that repair.

163. With respect to the water infiltration in the spring of 2009, the evidence is that the cause was located and repaired. There was no evidence of further water infiltration or mold in the basement as a result of this incident, and it was a small amount of water (as opposed to a flooded basement). I find the Mittons had no obligation to further investigate in these circumstances, and no obligation to disclose the infiltration or repair.

164. Finally, I find the stone cladding repairs made by Mr. Mitton to be routine maintenance. His evidence was that about ten stones out of thousands had fallen off the exterior of the Property in the time the Mittons lived there. This was not a latent defect, and I find the Mittons did not know or were not reckless about whether there were other issues with the stone cladding, including its installation.

165. Given my findings, I do not have to consider the Plaintiffs' arguments that the Latent Defects rendered the Property dangerous, potentially dangerous or unfit for human habitation, or take away from the Plaintiffs' use, occupation or enjoyment of the Property as a whole.

166. The Mittons are entitled to rely on Article 6.4 of the Purchase Contract that the Property was purchased "as-is", as well as on the doctrine of *caveat emptor.* I grant the Mittons' Application for Summary Dismissal of the Plaintiffs' Action.

(v) Summary Dismissal of Mittons' Third Party Claim

167. As has been noted, the Third Party Claim for against Ms. Jack is being discontinued on a without costs basis. Mr. Jack also applies to have the Third Party Claim dismissed against him, as it is based on a breach of the Jack Purchase Agreement with the Mittons to which *caveat emptor* applies. As outlined above, some of the Plaintiffs' allegations against the Mittons relate to their failure to independently confirm that Mr. Jack completed work as agreed.

168. The Third Party Claim is for contribution and indemnity. The Mittons acknowledged that they would only have a Third Party Claim if the Action was not dismissed against them. In oral argument, it was argued that if the Action is not summarily dismissed against the Mittons, there would be triable issues between them and Mr. Jack with respect to the construction of the Property resulting in the Latent Defects. These issues are intertwined as between Mr. Jack and the Mittons.

169. I do not have to decide whether there are triable issues as between Mr. Jack and the Mittons. As I have granted the Mittons' Application for Summary Dismissal, there is no basis to maintain the Third Party Claim for contribution and indemnity against Mr. Jack. For that reason, I grant Mr. Jack's Application for Summary Dismissal of the Third Party Claim against him.

C. Application for Inspection of the Property

170. Given that I have dismissed Mr. Jack's Application to summarily dismiss the Action against him, he asks for an order permitting him to inspect the Property pursuant to rule 6.26 of the *Rules*. Under (b), the Court may make an order permitting an inspection to take samples or make observations for the purpose of obtaining information or evidence, or both.

171. Mr. Jack argues that evidence from an inspection may be required to address issues of spoliation. He notes that the inspection may need to be invasive because the Claimed Defects have already been remedied.

172. The Plaintiffs note that at no time prior to his application did Mr. Jack request an opportunity to inspect the Property. They agree that Mr. Jack is entitled to inspect the Property pursuant to rule 6.26, but are not agreeable to unconditional destructive testing or the inspection of areas of the Property that are not in issue.

173. The Plaintiffs request an opportunity to reach a consent order with Mr. Jack, failing which any dispute may be submitted to the Court for determination.

174. I grant Mr. Jack's application for an inspection, and will provide the parties with an opportunity to agree before imposing terms.

Conclusion

175. In summary, Mr. Jack's Application for dismissal of the Action for prejudicial delay is dismissed. Mr. Jack's Application for summary dismissal of the Plaintiffs' Action is dismissed. Mr. Jack's Application for summary dismissal of the Third Party Claim by the Mittons is granted. The Mittons' Application for summary dismissal of the Plaintiffs' Action is granted. Mr. Jack's Application for an order permitting inspection of the Property is granted.

176. If the Plaintiffs and Mr. Jack are unable to agree on the terms of an order permitting inspection of the Property or if the parties are unable to agree upon costs, they may contact me within 60 days of the date of this Endorsement to arrange for further submissions. I may be reached through the Applications Judge Judicial Assistant at AJAssistant.KBCalgary@albertacourts.ca.

177. In closing, I thank counsel and the parties for their patience in awaiting this decision.

DATE OF DECISION: 2023-04-06

Signed: _____

APPLICATIONS JUDGE L.A. MATTIS