**CITATION:** Glenn Jones v. Ecowater Canada Ltd., 2017 ONSC 1799
**COURT FILE NO.:** CV-10-403244
**DATE:** 20170329

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Glenn Jones, Patricia Jones and The Economical Insurance Group, Plaintiffs

**AND:**

Ecowater Canada Ltd., North Star Water Conditioning, Northstar Conditioning, Smitham Brothers Construction, Doug Smitham, Glenn Smitham, Tom Downer Ltd. and Harry Morison Lay, Defendants

**BEFORE:** Madam Justice Kristjanson

**COUNSEL:** *Joshua J.A. Henderson*, for the Plaintiffs
*Paul K. Lepsoe*, for Ecowater Canada Ltd.
*Ruth A. Henneberry*, for Smitham Brothers Construction, Doug Smitham and Glenn Smitham
*Karyn Shapira*, for Tom Downer Ltd.

**HEARD:** October 28, 2016

## ENDORSEMENT

### Facts

[1] In May, 2008, the Plaintiffs, Glenn and Patricia Jones, discovered that their cottage had suffered severe flooding damage attributable to the failure of a water filtration system installed as part of cottage renovations in 2001. The water filtration system was manufactured by the Ecowater defendants. The defendant general contractor, Smitham Brothers Construction (with Doug Smitham and Glenn Smitham, "Smitham Construction"), contracted with the Jones' for the cottage renovations. The water filtration was installed by a subcontracted plumbing company, Tom Downer Ltd. ("Tom Downer Plumbing"), which purchased and installed the water filtration system. Smitham Construction and Tom Downer Plumbing each bring partial summary judgment motions to strike out claims brought against them on the grounds of negligence and breach of implied warranties under the *Sale of Goods Act*, and to dismiss related cross-claims. The question of whether the North Star water filtration system was negligently manufactured, and damages, will proceed to trial regardless of the outcome of these motions.

[2] These motions were, essentially, a trial-in-a-box, which required piecing together affidavits, transcripts, discoveries and expert reports, and complicated legal issues. On the key implied warranty issues, given the factual and legal complexity, I do not have confidence that can resolve the issues in a fair way based on the law and evidence provided to me. It would not be in the interests of justice to do so. I direct that the issues of implied warranties under the *Sale of Goods Act* and at common law proceed to trial. I have found that there is no issue requiring a

trial on the alternative pleading of negligence against the moving defendants, expect for potential negligence surrounding the issue of installation of a drain which depends on a credibility issue I cannot resolve on these motions, so that negligence issue will proceed to trial.

**Background**

[3] A six-week trial is scheduled to commence in September, 2017. The Smitham Construction and Tom Downer Plumbing defendants state that a determination of the negligence and implied warranty claims on summary judgment will likely result in a much shorter two-week trial, although I am not convinced of this estimate

[4] The claim against the Ecowater defendants is a claim in negligence, primarily for manufacturing an allegedly defective water filtration system. Three engineers from Rochon Engineering retained by the plaintiffs have concluded that valves on the water filtration system units contained manufacturing defects which caused them to fail. Dr. Brian Ralston, retained by the Ecowater defendants, concluded that the most likely cause of failure of the valves was freezing of the water lines due to inadequate heating and/or winterization, and there were no manufacturing defects. Those claims will be proceeding to trial.

[5] The claim against Smitham Construction and Tom Downer Plumbing is for sale of a defective water filtration system or one not reasonably fit for its intended purpose, thus breaching implied warranties in the *Sale of Goods Act*. Argument on the motions included breach of implied common law warranties as well. There is an alternative claim that Smitham Construction and Tom Downer Plumbing were negligent, the particulars pled being that (a) they improperly designed or installed the water treatment system, and (b) hired incompetent servants, employees or subcontractor.

[6] Each of the defendants cross-claims against the other defendants for contribution and indemnity. Each of the defendants also pleads contributory negligence by the plaintiffs.

[7] It is notable that much of the argument on the summary judgment motions proceeded with respect to claims which are not clearly evident on the pleadings. The plaintiffs indicated that they would seek leave to amend their pleadings to assert breach of contract claims against Smitham Construction and Tom Downer Plumbing, expand the negligence claim against Tom Downer Plumbing to include a claim relating to installation of a water pump in 2007, and to clarify a claim based on implied common-law warranties. Pleadings amendments should be done before or at the return of summary judgment motions.

**Partial Summary Judgment: The Test**

[8] Not every case is appropriate for summary judgment; this is particularly true for partial summary judgment, when the motions judge must assess the advisability of summary judgment in the context of litigation as a whole. The court must have confidence that it can reach a fair and just determination without trial.

[9] Justice Karakatsanis for the Court in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126 held at para. 22:

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. 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. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

[10] The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record. If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under Rule 20.04 (2.1), unless it is in the "interests of justice" they be exercised only at trial. The goal, again, is to ensure a fair and just result that will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole. Justice Karakatsanis in *Hryniak* held that: "What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure." She noted:

> 60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[11] In *Hryniak v. Mauldin*, 2014 SCC 7, Justice Karakatsanis held at para. 50 that: "[A] process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."

[12] Justice Perell commented on this aspect of the test as follows in *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 CarswellOnt 14793, 2016 ONSC 5784 at para. 127:

> Part of this confidence or gut check that a summary judgment is fair and just is achieved if the judge is satisfied that he or she can justly and fairly decide the matter without the advantages of participating in the dynamic of a trial, where witnesses testify in their own words and can be observed through the rigours of

> both examination-in-chief and cross-examination, and where the judge has an extensive exposure to the evidence and sees the story of the case unfold without having to piece it together in chambers working from affidavits, transcripts, and factums.

[13] The Court of Appeal has expressed a similar concern, stating that: "Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.": *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 2014 CarswellOnt 7670 at para. 44.

[14] These issues are particularly problematic on summary judgment motions like these, which are factually complex, involve multiple parties, and raise complicated legal issues.

**Evidence Filed on the Motions**

[15] This was a trial-in-a-box, with a large amount of material filed on the motion, some of it not properly filed as evidence. The evidence before me included:

- six affidavits with exhibits (defendant Doug Smitham, plaintiff Glenn Jones, corporate representative William Thomas Downer for defendant Tom Downer Plumbing, and affidavits from lawyers for both Smitham and Downer);
- three sets of cross-examinations on affidavit (Doug Smitham, William Downer, Glenn Jones),
- five sets of examination for discovery transcripts or excerpts (Doug Smitham, Glenn Jones, William Downer, Mike Sherman, representative for the Ecowater defendants, and then third party architect Harry Lay.)
- five expert reports (four from the plaintiffs and one from the Ecowater defendants) attached to the Tom Downer Plumbing lawyer's affidavit and the plaintiff Glenn Jones' affidavit, and
- ninety-five pages of answers to undertakings attached to G. Jones' affidavit.

[16] Lawyers for each of the moving defendants tendered affidavit evidence which was not helpful in the determination of the motion. For example, a lawyer for Smitham Construction in her affidavit stated:

> I do further believe that the selection, delivery and installation of the water filtration units at the Plaintiffs' cottage by Downer, under the general supervision of Smitham, does not trigger the application of the *Sale of Goods Act* against the Smitham or Downer Defendants, as alleged by the Plaintiffs in their Statement of Claim. (emphasis added)

In fact, a central issue of mixed fact and law on the motion is whether those actions trigger the application of the *Sale of Goods Act* in the circumstances. It is inappropriate for a lawyer to

offer her opinion on a legal issue as a statement of fact in an affidavit filed on a summary judgment motion.

[17] That lawyer also provided the following affidavit evidence:

> I do verily believe that the Contract...was a Contract for the provision of labour and materials and was performed by Smitham in full compliance with all terms of the contract. (emphasis added)

In stating that the contract in issue in the litigation was performed "in full compliance with all terms", which is a conclusion of mixed fact and law, the lawyer gives no basis for her conclusion. Moreover, a key issue of mixed fact and law is whether the contract is properly characterized as one for the provision of labour and materials, and the lawyer should not be offering this conclusion as a statement of fact in her affidavit.

[18] That lawyer, quite unhelpfully, also swore that:

> "Since there is no evidence of any negligence or neglect with respect to the Smitham or Downer Defendants, that caused or contributed to the Plaintiffs' damages, I do verily believe that the within action ought to be dismissed against these Defendants at this time with costs."

Whether or not an action should be dismissed, with or without costs, is a decision for the judge hearing the motion, and is not properly the subject of a lawyer's sworn affidavit filed on a summary judgment motion.

[19] A lawyer for Tom Downer Plumbing swore in his affidavit that: "I verily believe that for the following reasons there is no genuine issue requiring a trial with respect to the plaintiffs' claims against Tom Downer Ltd. and the cross-claims against Tom Downer Ltd. made by the co-defendants...." . He then goes on to list five points which do not appear to be within his personal knowledge, and no basis for his information and belief is set out in the affidavit. Again, whether there is or is not a genuine issue for trial is a decision for the judge, based on the facts and the law, and is not something a lawyer should be concluding in his or her affidavit.

[20] There are five expert reports filed as exhibits to affidavits of the parties. They are relied on by the defendants to establish the proposition that there is no evidence of negligence by these defendants, and also relied on by the plaintiffs. As noted by Justice Perell in *Martin v. Attard Plumbing Ltd.*, 2015 ONSC 5037, 51 C.L.R. (4th) 108 at para. 69:

> The engineering reports relied on by both parties are, in truth, not properly before the court, being just filed as exhibits in the affidavits of others. Further, while it is possible that both engineers are qualified to give opinion evidence, the engineers did not testify and both their qualifications and their evidence have not been tested by cross-examination.

[21] If expert evidence is to be relied on, the evidence of the expert must generally comply with rule 53.03: *Sanzone v. Schechter*, 2016 ONCA 566 (CanLII) at para. 15. However, no objection was taken to filing the expert evidence as an attachment to affidavits in this case, and I

do not rely on the evidence to grant summary judgment. I do, however, caution counsel who intend to rely on expert reports on summary judgment motions - and affidavits - to reflect carefully on the evidentiary value of materials that they file.

[22] I have been left to sift through a massive amount of material relating to two partial summary judgment motions in a factually and legally complex case. Justice David Brown of the Court of Appeal of Ontario, in a presentation on "Summary Judgments: The Appellate Experience" (Carleton County Law Association, Civil Litigation Update 2016, November 28, 2016) made the following incisive points I commend to all counsel, particularly when dealing with complex motions such as these:

- Since summary judgment is a device to secure a final determination of a civil case on its merits, counsel must give motion judges the same degree of assistance on the issues as they would give a trial judge
- Factums must be thorough, not half-hearted efforts
- Factums should start with a concise overview and then develop the material facts, with extracts from or pin-point references to relevant documents, affidavits and transcript evidence
- Counsel must fully set out the relevant principles of law and explain how those principles apply to the specific facts of the case
- Counsel also must give the summary judgment motion judge assistance on understanding the remedies sought on the motion, where applicable
- Unfortunately, some counsel are not providing motions judges with the degree of assistance required for a litigation step that may dispose of the case on the merits, taking the attitude that the judge can find what's important "somewhere in the box"
- Motions judges do not have they time to look "somewhere in the box" for the answer; they require the professional guidance and assistance of advocates (emphasis added)

[23] I have struggled for far too long looking "somewhere in the box" for both legal and factual answers to the issues raised on the summary judgment motions. I cannot have confidence that I can do justice in the circumstances, and so dismiss the summary judgment motions and determine that the matters should proceed to trial. I set out the reasons below.

**Issues**

[24] I have considered the following issues in determining whether there is a genuine issue requiring a trial:

***Sale of Goods Act/Implied Warranties***

(a) Is there an implied warranty under the *Sale of Goods Act* or at common law pursuant to which the plaintiffs may claim against Smitham Construction and Tom Downer Plumbing?

(b) Does the contract between Smitham Construction and the plaintiffs limit any such implied warranty?

(c) Is there a limitation period issue in relation to the implied warranty? If so, has it expired?

(d) If not, was any such implied warranty breached?

***Negligence Claims***

(e) Are there any genuine issues for trial on the negligence claims?

**FACTS**

***The Smitham Construction Main Contract***

[25] The contract between Smitham Construction and the Jones is a stipulated price contract for repairs to the Jones' cottage (the "main contract"). The main contract does not refer to the water filtration system, which is set out in a separate contract relating to "Mechanical Specifications" and in a sub-contract with Tom Downer Plumbing. While "Contract Documents" are defined in Article A-3, it is unclear to me on the evidence whether the contract documents incorporate the Mechanical Specifications, and how either of those contracts incorporate the verbal amendment which allowed for the purchase of the North Star water filtration system rather than the initially specified type of water filtration system. The affidavit evidence of Douglas Smitham seems to indicate that the Mechanical Specifications contract is not part of the main contract, although it is clear on the evidence, as discussed below, that the water filtration system was purchased by Tom Downer Plumbing from Near North Supply; it was then invoiced to and paid by Smitham Construction; and Smitham Construction subsequently invoiced the plaintiffs who paid for the water filtration system.

[26] In the main contract, the "Work" is defined as "the total construction and related services required by" the contract documents for repairs to the Jones Cottage. "Provide" is defined to mean "to supply and install." "Product" is defined to mean "material, machinery, equipment and fixtures forming the Work, but does not include machinery and equipment used to prepare, fabricate, convey or erect the Work which are referred to as construction machinery and equipment." Smitham Construction argued that the filtration system is included in the definition of the Product, but given that I was unable to tie the Mechanical Specifications to the main contract, and the evidence of Doug Smitham was that the Mechanical Specifications were not part of the contract, I am not able to make this conclusion on the summary judgment motion. The plaintiffs also argue that the essence of the main contract was a winterized cottage with year round drinkable filtered water, and that if no water filter had been provided, then installation would not have been required.

[27] The General Provisions, GC 1.1.1, state that:

> The intent of the Contract Documents is to include the labour, Products and services necessary for the performance of the Work by the Contractor in accordance with these documents. It is not intended, however, that the Contractor shall supply products or perform Work not consistent with, not covered by, or not properly inferable from the Contract Documents.

[28] The General Provisions provide that nothing in the Contract Documents shall create any contractual relationship between the Owner (Jones) and a Subcontractor, Supplier, or other person performing the Work (GC 1.1.2). Tom Downer Plumbing is a subcontractor on the project.

[29] Section GC 3.9, Labour and Products, provides in part that:

> 3.9.1 The Contractor shall provide and pay for labour, Products, tools, construction machinery and equipment, water, heat, light....and other facilities and services necessary for the performance of the Work in accordance with the Contract.
>
> 3.9.2 Products provided shall be new. Products which are not specified shall be of a quality consistent with those specified and their use acceptable to the Consultant.

[30] Waiver of Claim is dealt with in section 12.2 of the General Conditions. As of the date of the final certificate for payment, the Owner expressly waives and releases the Contractor from claims that might arise from negligence or breach of contract, except:

> 12.2.1.1 arising from GC 12.1 – INDEMNIFICATION or GC 12.3 – WARRANTY;
>
> 12.2.1.5 those made in writing within a period of 6 years from the date of Substantial Performance of the Work ....or within such shorter period as may be prescribed by any limitation statute of the province....and arising from any liability of the Contractor for damages resulting from the Contractor's performance of the Contract with respect to substantial defects or deficiencies in the Work ....
>
> As used herein, "substantial defects or deficiencies" means those defects or deficiencies in the Work which affect the Work to such an extent or in such a manner that a significant part or the whole of the Work is unfit for the purpose intended....

[31] There are two relevant provisions bearing on warranties, both contained in GC 12.3, Warranty:

> 12.3.1 The warranty period with regard to the Contract is one year from the date of Substantial Performance of the Work or those periods specified in the Contract Documents....
>
> 12.3.6 The Contractor shall be responsible for obtaining Product warranties in excess of one year on behalf of the Owner from the manufacturer. These Product warranties shall be issued by the manufacturer to the benefit of the Owner.

***The Mechanical Specification Contract and the Water Filtration System***

[32] The Mechanical Specification contract dealt with plumbing and drainage issues. The contract required supply and installation of the water filtration system; the plumbing and drainage aspect of the Mechanical Specification contract appears to be the basis of the sub-contract awarded to Tom Downer Plumbing.

[33] Section 3.0 of the Mechanical Specification contract is entitled "Plumbing and Drainage." The relevant provisions relating to the water filtration system provided:

> 3.1.1 Supply and install the following fixtures including miscellaneous components to complete entire installation. Supply and install hot and cold water systems to serve all fixtures and equipment:
>
> ....
>
> (j) Water-filtration: 2-stage filtration system including a sand-filled sediment filter, an activated charcoal filter and ultra-violet sterilization, to purify all incoming water.
>
> Selection based on: Amtrek, Trojan. (emphasis added)

[34] The plumbing and drainage portion of the Mechanical Specification contract also required installation of a drain valve in the crawlspace to completely empty plumbing lines at the time of winterization with drainage water to empty away from the cottage (3.5.6), and to supply water plumbing and water filter to be connected to a water pump installed previously within the crawlspace (3.5.7). These aspects of the plumbing and drainage contract were also the responsibility of Tom Downer Plumbing.

***Evidence Relating to the Water Filtration Contract***

[35] By quotation dated October 5, 1999, Tom Downer Plumbing bid on the Mechanical Specification plumbing contract. However, instead of the 3-stage Amtrek or Trojan water filtration systems specified by the Mechanical Specifications, Tom Downer Plumbing bid for "1 Northstar sediment filter complete with bypass completely installed; 1 Northstar charcoal filter complete with bypass completely installed; 1 Ultraviolet filter #ADV8 completely installed."

[36] The affidavit evidence of Douglas Smitham for the Smitham Construction defendants is that Smitham Construction, the plaintiffs' architect and consultant under the contract, Mr. Lay, and the plaintiffs all accepted Tom Downer Plumbing's recommendation and the Northstar water

filtration system was installed. It is unclear to me, however, the exact nature of the verbal contract amendments.

[37] I find that Tom Downer Plumbing recommended, purchased, and installed the Northstar water filtration system, invoiced Smitham Construction, and received payment from Smitham Construction. Smitham Construction invoiced the plaintiffs and received payment from the plaintiffs for the North Star Filtration System.

[38] William Downer, a representative of Tom Downer Plumbing, in his affidavit and in transcripts filed, has given evidence that:

(a) Tom Downer Plumbing was provided with a copy of drawings and the Mechanical Specifications contract (Plumbing and Drainage) before submitting a quote for the work;

(b) By quotation dated October 5, 1999, Tom Downer Plumbing bid on the plumbing contract. However, instead of the 3-stage Amtrek or Trojan water filtration systems specified by the Contract, Tom Downer Plumbing based the quote on "1 Northstar sediment filter complete with bypass completely installed; 1 Northstar charcoal filter complete with bypass completely installed; 1 Ultraviolet filter #ADV8 completely installed." This was accepted by Smitham Construction;

(c) He discussed the North Star filtration units with the Plaintiffs' Consultant, Mr. Lay, and with Douglas Smitham;

(d) He purchased the Northstar water filtration units at Near North Supply;

(e) Part of the plumbing work Downer performed was the selection and installation of the Northstar water filtration units;

(f) He has never had any difficulty with a bypass filter on a Northstar water filtration system either before or after the installation at the Jones' cottage;

(g) The North Star water filtration system was installed pursuant to the manufacturer's manual; the sediment and charcoal filters were each equipped with bypass values; the manuals were left on site;

(h) Tom Downer Plumbing was paid by Smitham Construction, and the contract with Smitham Construction included providing the Northstar water filter;

(i) Tom Downer Plumbing did not contract with the plaintiffs directly; they purchased the water filtration units;

(j) The plumbing work performed by Tom Downer Plumbing was inspected and approved by the Georgian Bay Township Building Department;

(k) Tom Downer Plumbing did not service the Northstar system between installation and the escape of water in May, 2008.

[39] The defendant Doug Smitham, who gave discovery evidence as a representative of the Smitham Construction defendants, gave evidence on this motion that:

(a) Smitham Construction entered into the main contract, which he says is the only contract with the plaintiffs;

(b) Smitham Construction was provided with the Mechanical Specifications, although his evidence appears to be that this was not part of the main contract. Smitham Construction retained Tom Downer Plumbing to perform the plumbing and heating work as set out in the Mechanical Specifications, and accepted the written quotation from Tom Downer Plumbing which referred to the North Star filtration system;

(c) Smitham Construction, the architect Mr. Lay, and Mr. and Mrs. Jones "all accepted the plumber's recommendation" for the North Star water filtration system. I note that Mr. Downer referred to discussions with Doug Smitham and Mr. Lay only;

(d) Tom Downer Plumbing submitted its invoices for materials and labour including the North Star water filtration system to Smitham Construction, and Smitham Construction paid those invoices;

(e) The main contract required the water filtration system to be placed in the crawlspace (under the house). The Northstar system would not fit under the house and had to be moved to the main floor utility room;

(f) Tom Downer Plumbing as subcontractor was responsible for installing the drain.

[40] The Plaintiff Glenn in his affidavit and on discovery has given evidence that:

(a) The plaintiffs wanted a 12 month per year usable cottage, with filtered drinking water for year round use, which was part of the scope of work in the Contract;

(b) Smitham Construction was the General Contractor under the Contract, and the plaintiffs' architect Mr. Lay was the "Consultant" under the Contract. The plaintiffs contracted with Smitham Construction directly;

(c) The plaintiffs advised Mr. Smitham that they needed the best available water filtration system so as to drink potable water from the lake;

(d) The contract required an "Amtrek" or "Trojan" water filter. Instead, Smitham recommended a North Star water filter, based on the recommendation of Tom Downer Plumbing;

(e) Smitham Construction verbally subcontracted Tom Downer Plumbing to perform the plumbing and drainage portion of the Mechanical Specifications;

(f) The flood happened between March 30, 2008 and May 18, 2008, leading to extensive flooding, and damages of $636,907.92 for repair and remediation, replacement of lost contents, and living expenses during remediation;

(g) Three separate engineers retained by the Plaintiffs through Rochon Engineering have concluded that the valves on the water filtration units contained manufacturing defects which caused them to fail, as opposed to a freezing incident, and in essence, the water filtration unit was not fit for its purpose and failed due to slow growth cracks;

(h) On taking possession of the cottage after the repairs, Doug Smitham explained how to close up the cottage, and Mr. Jones wrote it all down;

(i) The plaintiffs never turned the water off for the winter season or drained the water lines prior to the 2008 flood, as he kept the electric heater on at the cottage, although they did not have a generator;

(j) Since the 2008 flood, the plaintiffs now fully drain the water system at the cottage as part of winterization;

[41] There was also evidence given by Glenn Jones about a new water pump installed by Tom Downer Plumbing in August, 2007. In his affidavit evidence, and on this motion, the plaintiffs allege that:

(a) The new pump increased the water pressure in the system;

(b) Tom Downer Plumbing failed to advise the plaintiff that a change in the winterization plan was necessary after replacing the new water pump;

(c) Tom Downer Plumbing failed to advise the plaintiffs that the water filters should be shut off and drained, even though the new water pump would increase water pressure in the system;

(d) Sometime between May 7, 2008 and May 17, 2008, the water filtration system failed as a result of prolonged water pressure created by the new water pump, which the plaintiff maintains was a result of negligent manufacture, not a freeze event.

**Implied Warranties – *Sale of Goods Act* and Common Law**

[42] Both the *Sale of Goods Act* and implied common law warranties protect claimants who purchase goods from intermediaries, rather than a manufacturer, and allow for claims along the chain of production and distribution. The primary implied warranty in this case is the implied condition of fitness for purpose sold. As the Supreme Court held *in ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, [1995] S.C.J. No. 79 at para. 97:

> It is important to note that a rationale for implying warranties in contracts of goods and services is that a supplier of goods generally has recourse against the

> manufacturer under the *Sale of Goods Act* as a result of the statutory conditions imposed. Thus, one can always proceed up the chain of production and ultimately recover from the one who should bear responsibility for the production of faulty goods. From time to time, the supplier will be unable to recover from the manufacturer, for example, owing to insolvency or limitation periods. However, arguably it is better that the purchaser be compensated and the supplier occasionally bear the cost of defects than leaving the consumer without a remedy.

[43] While the pleadings are based on implied warranties under the *Sale of Goods Act*, the plaintiffs have indicated that they will move to amend its pleadings to include common law implied warranties if required. The argument before me included argument on common law implied warranties. While the plaintiffs should have amended their pleadings before the summary judgment motion, given that the plaintiffs have pleaded implied warranties under the *Sale of Goods Act* (which include common law warranties), I regard this as a legal conclusion drawn from facts already pleaded and consider the motions including the common law warranties: *Muskoka Fuels v. Hassan Stell Fabricators Ltd.*, [2009] O.J. No. 5877, 2009 CanLII 78887 (Ont. SCJ), paras. 14-15.

**Primary Purpose of the Contract**

[44] Smitham Construction argues that the *Sale of Goods Act* does not apply to the contract, since it is a contract for labour and materials rather than one for sale of goods. G.H.L. Fridman states in *Sale of Goods in Canada*, 6th ed (Toronto: Carswell, 2013) that the best test is: in looking at the essential character of the contract, is it a contract for materials or for skill? He further explains at page 19 that:

> [I]f the primary object of the contract is the transference of property in something which was not originally the property of the 'buyer' then contract will be one of sale of goods, but if the **primary purpose** of the parties is the performance of certain work, or the provision of services, incidentally to which property in goods is to pass from one party to the other, the contract will not be one of sale of goods. [Emphasis added.]

This test was confirmed by the Supreme Court of Canada in *ter Neuzen* at para. 67.

[45] However, the contract need not be exclusively for the sale of goods in order for the *Sale of Goods Act* to apply. Determining the primary purpose of the contract can be difficult because performing labour or services often involves providing or installing parts and objects, and in this case, because the nature of the contracts changed. Tom Downer Plumbing purchased the North Star filter directly from Near North Supply in a contract to which the *Sale of Goods Act* would apply, for the purpose of the Mechanical Specification plumbing sub-contract. The North Star filter was then sold to Smitham Construction in fulfillment of the plumbing sub-contract; the Jones' then acquired the filter from Smitham Construction in paying the invoice. The statutory and common law rights that flow through this chain of contracts require further legal analysis and factual support. The plaintiffs argue that a chattel personal should not lose the coverage of the *Sale of Goods Act* because part of the contract to install it included doing further repairs.

[46] The evidence is that the plumbing portion of the contract was amended verbally, specifically with respect to the provision of the North Star filtration system. Given the verbal amendment, and the complexity of the factual circumstances and legal analysis, set out below, I cannot determine the primary purpose of the contract based on the affidavit and transcript evidence before me, and the legal argument submitted to me.

[47] The contracts are contained in exhibits to the affidavit of Douglas Smitham. There is a main contract for Repairs to Jones Cottage which does not contain the specifics of the plumbing requirements. The evidence of Doug Smitham is that the main contract is the only contract entered into with the plaintiffs. However, there is a separate Mechanical Specifications document, including the Plumbing (water filtration) contract, which appears to be separate from the main contract, and requires a water filtration system selection based on brand names Amtrek and Trojan. There is then a separate bid contract from Tom Downer Plumbing, which provides for a North Star water filtration system.

[48] There is evidence of a verbal amendment, whereby Tom Downer Plumbing recommended to Smitham Construction the use of the North Star Filtration system. However, I have not been able to determine the status of the Mechanical Specification contract in relation to the main contract; the circumstances of the verbal amendment and the understanding of the parties; and whether for a "primary purpose" *Sale of Goods* legal analysis, the circumstances surrounding the verbally amended contract should be analyzed separately, or the Mechanical Specifications contract as amended should be examined separately. The essence of the "cottage repairs" main contract requires further evidence, in light of the plaintiff Glenn Jones' evidence that the contract was for a year round usable cottage, with filtered drinking water for year round use, which was part of the scope of work in the Contract. He argues on this basis that a primary purpose of the contract was the provision of a winterized cottage with filtered water on a year round basis.

[49] All parties agreed that Tom Downer Plumbing recommended the North Star water filtration system. However, I am unable to determine the content of the discussions, the participants with respect to the verbal amendment, and the elements of the verbal amendment as it relates to understanding of the mutual and objective intentions of the parties. Since the determination of the primary purpose of the contract is a question of mixed fact and law, the factual context is relevant to interpreting the provisions. In *Sattva Capital Corporation v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.R. 633, at paras. 49-50, the Supreme Court of Canada held that the goal of contractual interpretation is to ascertain the objective intent of the parties, and that "the principles of contractual interpretation are applied to the words of a written contract, considered in light of the factual matrix." The Court cautioned that while the surrounding circumstances will be considered in interpreting contractual terms, they may not overwhelm the words of the agreement. At para. 57, the Court stated:

> The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts

> cannot use them to deviate from the text such that the court effectively creates a new agreement. [Citations omitted.]

[50] It is quite clear that the evidence should consist only of "objective evidence of the background facts at the time of the execution of the contract" meaning "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before" the contracting date (*Sattva,* at para. 58).

[51] On the record before me, however, I am unable to conclude that the moving defendants have established that the primary purpose of the contract is for labour and materials so as to exclude the *Sale of Goods Act*. I cannot grant summary judgment on the *Sale of Goods Act* issue on the grounds that the primary purpose of the contract was the provision of labour and materials rather than the supply of goods.

**Implied Warranties and The *Sale of Goods Act***

[52] Section 15 of the *Sale of Goods Act* provides statutory implied warranties of fitness for purpose and merchantable quality as follows:

> *Implied conditions as to quality or fitness*
>
> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> > 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
> >
> > 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
> >
> > 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[53] Dean Edgell in *Product Liability in Canada* (Butterworth's, 2000), pp. 115-126, states four conditions must be met for the implied warranty as to the fitness of the goods under s.15(1) to apply:

- The buyer must make the seller aware of the purpose for which the goods will be used;
- The buyer must rely on the seller's skill or judgment;
- the goods must be in the course of the seller's business to supply; and
- the contract must not be for the sale of a specified article under its patent or other trade name:

[54] In the current case, Smitham Construction and Tom Downer Plumbing cannot rely on the trade name exception in s. 15(1) because they purchased a filtration system that was different than the one specifically named and requested by the plaintiffs.

[55] The defendants should have been aware of the purpose that the water filtration system would serve. The plaintiffs also provide evidence that they relied on the general contractor's and plumber's skill and/or judgment, since they had originally wanted a different brand of filtration system, but accepted the recommendation to purchase the one ultimately installed. Smitham Construction deny choosing or recommending the system in their statement of defence to this claim, although the affidavit evidence is that Tom Downer Plumbing recommended the system to Smitham Construction, and it appears from my reading of the evidence that Smitham Construction subsequently spoke with Mr. Lay and Mr. and Mrs. Jones, and subsequently accepted the recommendation and/or conveyed the recommendation to the plaintiffs. This is the verbal amendment discussed above.

[56] There may be a question as to whether the goods were in the course of the seller's business to supply. The textbook excerpt by Dean Edgell suggests however that "the restriction of liability upon private persons...seems to be the sole purpose of this requirement" (at p. 124). The evidence is that both Smitham Construction and Tom Downer Plumbing purchased and sold the water filtration system in the course of business, and the normal course involved supplying goods used in renovations/plumbing.

[57] There may also be a question as to whether the express warranties and related clauses in the contract (see 12.2.1 and 12.3) exclude the implied warranties of fitness, either in the *Sale of Goods Act* or at common law. Section 15 applies to every contract for the sale of goods that fulfills the conditions set out in subsection (1) unless it is inconsistent with either an express warranty or condition in the contract, or the parties have expressly excluded its application. The language in the contract must be "clear, unambiguous and direct" if the express warranty was intended to contract out of the statutory protections in the *Sale of Goods Act* (Edgell, at p. 133).

[58] Specifically, clause 12.3.1 of the contract provides for a one year warranty period after the date of Substantial Performance of the Work. Clause 12.3.6 requires the Contractor to obtain product warranties in excess of one year on behalf of the plaintiffs from the manufacturer. However, it is unclear from the materials whether Tom Downer Plumbing obtained such warranties, or if Smitham Construction obtained such warranties, and if they did, what the terms of the warranties may be. I did not see evidence in the materials as to the manufacturer's warranty period. These clauses also do not seem to specifically exclude the common law warranties. Pursuant to *Sattva,* this would also be an area where oral evidence may be required.

**Implied Common Law Warranties**

[59] Even if the *Sale of Goods Act* applies, the plaintiffs argued on the motion that there was an implied warranty that the water filtration system would be of good quality, free from defects, and reasonably fit for their purpose. Dean Edgell states at p. 114, *Product Liability Law in Canada*:

> The principles codified in the Sale of Goods Acts apply to contracts for the provision of work and materials as well as to contracts for the simple sale of goods. So there will be implied into a contract for the supply of work and materials a term that the materials used will be of merchantable quality and that those materials will be reasonably fit for the purposes for which they were intended.

[60] These implied warranties apply to contracts for both goods and services, and therefore can apply to contracts for labour and materials, unless the circumstances are sufficient to exclude it (*ter Neuzen*, at paras. 73 and 82). There may also be an implied common law warranty as to the "quality of the materials supplied," particularly in building contracts (Fridman, at pp. 17-18). It may also be implied that the work "be done in a workmanlike manner" (Fridman at p. 18). Thus, the common law implied warranty of fitness potentially exposes both Smitham Construction and Tom Downer Plumbing to the same liability as a vendor of goods that is subject to the statutorily imposed implied warranty of fitness under the *Sale of Goods Act*.

[61] Justice Perell stated at para. 53 in *Martin v. Attard Plumbing*, that:

> At common law, unless the circumstances of the contract are such as to exclude the obligation, a contractor performing work and supplying materials impliedly undertakes to use materials of good quality, to do the work with care and skill and agrees that the work and materials will be reasonable fit for the purpose for which they were required.

[62] However, courts are to be very cautious in implying contractual terms and must consider "the specific nature of the contract and the relationship between the parties" to determine if "it was the intention of the parties that such a warranty be implied" (*ter Neuzen,* at paras. 83). The Court in *ter Neuzen* referred to a leading English case, *G.H. Myers & Co. v. Brent Cross Service Co.,* [1934] 1 K.B. 46, where it was held that "the liability of the person supplying goods in the course of doing work and labour is certainly not less than the liability of the person selling goods" (cited in *ter Neuzen* at para. 77). However, the UK court recognized that a contract may exclude such warranties, as has the Supreme Court of Canada (*ter Neuzen*, at paras. 78, 82-83).

[63] On the evidence before me, I cannot determine that there are no implied warranties. The plaintiff did not bring a motion for summary judgment on common law implied warranties, and the Ecowater defendants have raised serious concerns that such a finding would have the effect of implicitly determining the issue of whether or not the failure of the water filtration system was due to a manufacturing defect or a freezing event. Since all parties agreed that issue was to proceed to trial, and the expert evidence is not properly in evidence for the truth of its contents, on this partial summary judgment motion I cannot decide that issue.

**Limitation Periods for Common Law Warranties:**

[64] The moving defendants argued that the claim was made after seven years of use, and this would exceed the limitation period for common law warranties for goods and services. I was not provided with any case law on this point. Reasonableness may be an important part of determining the appropriate length of a statutory warranty period, and perhaps also of a common law warranty period. In oral argument counsel for Smitham Construction stated there could be an implied warranty, but only within a reasonable period of time in light of the six year waiver of claims provision.

[65] It may therefore be helpful to consider what the anticipated lifespan of a water filtration system, such as the one provided to the plaintiffs, would be. This information does not seem to be in the materials supplied by counsel, but the water filtration system was presumably expected to be functional for a period of time. Counsel may well wish to submit arguments on this point at trial, as well on the duration of statutory and common law implied warranties.

[66] I also note that as mentioned above, the main contract may purport to limit the contractor's warranty to one year after the date of Substantial Performance of the Work (see 12.3.1) which although not in evidence before me, is likely around the date of possession in 2002. However, the clause is arguably not clear or explicit enough to have done so. There may also be longer warranties involved for the filtration system given that clause 12.3.6 requires the Contractor to obtain product warranties in excess of one year on behalf of the plaintiffs from the manufacturer. These may also affect the analysis of the duration of the common law and statutory implied warranties. That information appears to be missing from the record before me.

[67] The interpretation of clause 12.3.6 was the subject of additional written submissions made by the parties; however, those submissions did not clarify the matter. The defendant Smitham raises a *contra proferentem* argument in written submissions in referring to the "vague wording" of that clause. Given my findings above, in light of *Sattva*, this too is an area that would require further submissions and oral evidence with respect to the factual matrix and understanding of the parties.

[68] I also note that the general limitation period, per s.4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B is two years. However, the plaintiff argues there is a discoverability issue if it is determined that the water filtration system failed due to a manufacturing defect.

[69] In the result, I decline to grant summary judgment on the *Sale of Goods Act* and implied warranty issues, and direct that they proceed to trial. There is simply too much missing information to say that a mini-trial could adequately answer the many questions I have raised. Given the verbal amendment to the contract, the evidence of William Downer, Doug Smitham, Henry Lay, Glenn Jones and Patricia Jones would be required, and I presume most if not all will be testifying at trial. In addition, significant legal submissions on the many jurisprudential questions I have raised will be required. For the reasons set out above, I do not have confidence that I can make the necessary factual findings, nor do I have the necessary legal principles, to fairly and justly dispose of these issues. It is not in the interests of justice to attempt to do. I have determined that the most efficient and proportionate procedure is the send these matters to trial.

**Negligence**

[70] The negligence claims against Smitham Construction and Tom Downer Plumbing are very brief. The plaintiffs claim that Smitham Construction and Tom Downer Plumbing were negligent, the particulars being that (a) they improperly designed or installed the water treatment system, and (b) hired incompetent servants, employees or subcontractor.

[71] First, it is uncontroverted that neither Smitham Construction nor Tom Downer Plumbing "designed" the water filtration system.

[72] None of the reports identify possible negligent installation issues or incompetence by Smitham Construction/Tom Downer Plumbing. Three engineers from Rochon Engineering have concluded that the valves on the Northstar water filtration units contained manufacturing defects that caused them to fail. The plaintiffs assert based on this evidence that the experts found the water filtration system was not fit for its purpose and failed due to slow growth cracks. The expert evidence of the Ecowater defendants is that the failure was due to freezing incidents and the failure of the plaintiffs to drain the water filtration system for the winter, or to keep it from freezing.

[73] The plaintiff Glenn Jones' evidence is that he was absolutely satisfied with the quality of work done by Smitham Construction and Tom Downer Plumbing and used Smitham Construction and Tom Downer Plumbing to renovate the cottage after the flood.

[74] On this summary judgment motion, the plaintiffs allege that the contract between Smitham Construction and the plaintiffs required Smitham Construction to install a drain in the utility room; Smitham Construction verbally subcontracted with Tom Downer Plumbing to install the drain; both defendants failed to install the drain; the lack of a drain exacerbated the flood damage.

[75] On this point, Doug Smitham on cross-examination gave evidence that he was "80% sure" that a drain was installed, although Glenn Jones' evidence is that no drain was installed. Smitham's evidence was that on the rebuild, no drainage system was installed, so photos of a lack of drain provided by Jones do not support the plaintiffs' theory that the drain wasn't installed in the original renovations. No expert report says that the drain had anything to do with the plaintiffs' losses, although the plaintiffs assert that expert evidence is not required, as if a drain had been installed, the damage would have been less. Doug Smitham on cross-examination noted that the purpose of a drain was to drain water out of the room where the filtration system was located, so "any water that went on the floor had just a good a chance as going out through the door to the rest of the facility...as down the drain." William Downer said he was "pretty sure" that the drain was installed, although he didn't know that for a fact. I am unable to resolve these issues on the record before me, as they go to credibility, and I direct that these issues proceed to trial in the negligence claim. While scanty, the drainage related issues may be encompassed in the negligent installation claim, although the plaintiff should consider whether the pleadings are sufficient.

[76] Glenn Jones on this motion for the first time asserts that Tom Downer Plumbing replaced the water pump in the cottage in 2007, increasing the water pressure acting on the system, and

did not advise the plaintiff that a change in his winterization plan was necessary. The evidence on this issue is confusing, and more confusing is the fact that no issues relating to the 2007 water pump replacement are pleaded. Tom Downer Plumbing notes that there is no expert opinion as to whether the increased water pressure caused or contributed to damages, and that the 2007 installation issues aren't properly raised in the pleadings which are directed solely to the initial installation of the pump. In the absence of pleadings that would make these allegations material, and in the absence of any other evidence of negligence by Tom Downer Plumbing or Smitham Construction, this issue is not properly raised by the plaintiff. I cannot grant summary judgment on an issue not raised in the pleadings, but I can determine that at this point, unless the pleadings are amended, the 2007 water pump change cannot be raised as an issue of negligence against Tom Downer Plumbing.

**Conclusion**

[77] This case demonstrates, to me, the dangers of the trial-in-a-box summary judgment, particularly where the issue is partial summary judgment. It is difficult for a judge to sort out complicated evidence and law in chambers; counsel must provide a motions judge with the same degree of assistance on all legal and factual issues as they would a trial judge. Counsel must also turn their minds to the evidence and in particular, issues of relevance and admissibility. Lawyers who swear affidavits should not be offering opinions or conclusions about legal issues, questions of mixed fact and law or the proper disposition of a case.

[78] In accordance with *Skunk v. Ketash*, 2016 ONCA 841 at para. 62, I note that I have not made determinations of law intended to be binding on the parties at trial and do not invoke Rule 20.04(4).

[79] The defendants did not succeed in their summary judgment motions as the *Sale of Goods Act* implied warranties and one issue of negligence will proceed to trial. The Ecowater defendants ask that no costs be awarded against them; given their very limited role, to clarify issues relating to the claims against them that will proceed to trial, no costs to be awarded against the Ecowater defendants.

[80] The parties are encouraged to settle the issue of costs. The plaintiffs were largely successful, although the negligence claim was narrowed as a result of these motions. Plaintiffs may provide brief costs submissions if required by April 11, with responding submissions by April 25th. Materials may be sent to my assistant by email or delivered to Judges' Reception.

Kristjanson J.

**Date:** March 29, 2017