SUPREME COURT OF NOVA SCOTIA
Citation: *Layes v. Ramar Construction Limited*, 2024 NSSC 126

Date: 20240228
Docket: 498586
Registry: Halifax

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Between:

Kevin Layes and Carmen Blinn

Plaintiffs

v.

Ramar Construction Limited, a body corporate
and Larry Marchand and Darrell Marchand and Kevin Marchand

Defendants

v.

Michael Donovan

Intervenor

Summary Judgment and Abuse of Process Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	July 13 and 14, 2022, in Halifax, Nova Scotia
Final Written Submissions:	July 28, August 11 and 18, 2022 May 2 and 4, August 16, September 26 and October 3, 2023
Written Decision:	May 7, 2024
Counsel:	Robert Pineo, for the Plaintiffs Barry J. Mason, K.C. for the Ramar Defendants

James D. MacNeil (Watching Brief), for the Defendant Kevin Marchand
Colin D. Bryson, K.C. for the Intervenor, Michael Donovan, K.C.

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By the Court:

Background

[1] On June 13, 2013, the plaintiffs, Kevin Layes and Carmen Blinn, entered into a contract with Ramar Construction Limited ("Ramar") for the construction of a home at 31 Alben Lane, Wellington, Nova Scotia. The home was to be built for $459,000, paid on the following schedule and in the following amounts:

- A deposit in the amount of $10,000 before construction began;
- Upon the foundation being constructed and backfilled, a payment of $149,667;
- Upon the house being "water tight" with exterior siding both vinyl and stone, plumbing, electrical, ventilation and central vacuum "roughed in", payment of $149,667;
- Upon the completion of the home, payment of remaining balance of $149,666.

[2] Construction began in July 2013 and was substantially complete by July 2014. An occupancy permit was issued for the home on July 22, 2014. The plaintiffs were not happy with Ramar's work and refused to pay the balance of the contract price based on alleged deficiencies. In the fall of 2014, in the midst of the dispute, the plaintiffs took possession of the home and changed the locks. Although the plaintiffs took possession in October 2014, they did not move into the home full time until September 2015.

[3] On September 10, 2014, Ramar registered a builder's lien against the property for the unpaid balance under the contract ($209,010.84).

[4] On October 28, 2014, the plaintiffs filed an action against Ramar for breach of contract and negligence (the "2014 action"), citing 28 construction deficiencies. Ramar commenced its own action in support of its lien claim on November 25, 2014. The plaintiffs defended.

[5] By order dated December 10, 2014, the lien was vacated, with the plaintiffs paying $261,263.55 into court as security for the lien interest.

[6] By order issued February 21, 2018, the lien action and the plaintiffs' action were consolidated as Hfx No. 433686.

[7] The claims did not proceed through litigation expeditiously. The trial was originally scheduled for the fall 2018 but was adjourned in July 2018 at the plaintiffs' request, to allow them to obtain an expert report and to discover Ryan Marchand, a Ramar employee. The trial was rescheduled to late March 2019, but was adjourned again at the request of plaintiffs' counsel. The trial was rescheduled for November 12-14, 18-20, 2019.

[8] The trial of the 2014 action proceeded before Justice Warner on November 12, 2019. Kevin Layes and Carmen Blinn gave evidence from November 12-14, 2019. The trial resumed on November 18, and on November 19, Carmen Blinn completed her evidence. The plaintiffs then made a motion to adjourn the trial to allow for the calling of expert evidence relating to the structural integrity of the house and to make any pleading amendments necessary to address this issue. Justice Warner denied the motion. Following the ruling, the court granted an adjournment to allow the parties to discuss settlement. After about half an hour, a settlement was reached. The terms of the settlement were subsequently formalized in Minutes of Settlement. A Consent Order was issued to implement the agreement for disbursements of the funds held by the court and to deal with costs. The Consent Order provided that the monies previously paid into court by the plaintiffs as security for the lien interest ($261,263.55) would be disbursed as follows:

1. $80,000 to Michael F. Donovan Law Inc., in trust for the plaintiffs;
2. The balance, including all interest accruing on the full amount paid into court until the date of distribution, to Pressé Mason, in trust for Ramar.

[9] The action was then discontinued by Notice of Discontinuance. The parties did not sign Releases.

[10] On May 28, 2020, the plaintiffs commenced another action against Ramar, again alleging breach of contract and negligence in constructing the home (the "2020 action"). The plaintiffs are also advancing fraud claims against Larry Marchand, Darrell Marchand and Kevin Marchand in their personal capacities as current and former Directors of Ramar. The plaintiffs allege in the 2020 action that the home is "a total loss and cannot be remediated." They further allege that they have incurred expenses related to the construction of the home exceeding $1.2 million.

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[11] In their statement of defence filed July 29, 2020, the defendants Ramar, Larry Marchand, and Darrell Marchand (the "Ramar Defendants") allege that a settlement was reached by the parties to dispose of all the claims; that the action is an attempt by the plaintiffs to re-litigate the matters that were the subject of the previous lawsuit; and that the alleged facts which form the basis of the plaintiffs' claims were known or discoverable through reasonable investigation during the previous litigation. The Ramar Defendants plead the doctrines of *res judicata*, issue estoppel, cause of action estoppel and abuse of process. They also plead that the claims are statute barred pursuant to the *Limitation of Actions Act*, S.N.S. 2014, c. 35.

[12] On September 10, 2020, Kevin Marchand filed his defence. He also relies on the doctrines of *res judicata*, issue estoppel, cause of action estoppel and abuse of process. He further pleads that the plaintiffs' claims are statute barred.

[13] On August 23, 2021, the Ramar Defendants filed a motion for "for summary dismissal of the entirety of the Plaintiffs' claim on the basis that the claim is *res judicata* and statute barred, *inter alia*."

[14] On April 26, 2022, Michael Donovan, KC filed a motion seeking intervenor status in the proceeding. Mr. Donovan was legal counsel for the plaintiffs in the 2014 action, from March 2019 until its conclusion by settlement in November 2019. On July 17, 2022, Justice Keith granted intervenor status based on Mr. Donovan's interest in the "*res judicata*" defences, which include abuse of process.

The Motions

[15] While the Notice of Motion referred to *res judicata*, the Ramar Defendants indicated in their motion brief, filed on June 1, 2022, that they were seeking summary judgment "on the basis that the claim is an abuse of process or in the alternative, that it is statute-barred". The other parties also dealt with abuse of process in their motion briefs.

[16] Although the primary ground on which the Ramar Defendants were seeking dismissal of the plaintiffs' claims was abuse of process, the Notice of Motion referred only to Rule 13 (Summary Judgment) and not Rule 88 (Abuse of Process). In their briefs and at the hearing, the parties structured their arguments on both abuse of process and the limitation period in accordance with the analytical framework for summary judgment set out in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89.

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[17] In preparing this decision, a question arose in the court's mind as to whether abuse of process should have been dealt with by way of a motion under Rule 88. The court wrote to counsel for each of the parties by email on April 20, 2023, seeking their comment:

> As you are aware, the Defendants, Ramar Construction Limited, Larry Marchand and Darrell Marchand, filed this motion pursuant to Civil Procedure Rule 13.04, seeking an order for summary dismissal of the Plaintiffs' claim on the basis that it is an abuse of process or, in the alternative, that it is statute-barred. The motion was argued by all parties on this basis. However, upon review, I note that the Notice of Motion filed on August 31, 2021 [*sic*], indicates that the motion is "for summary dismissal of the entirety of the Plaintiffs' claim on the basis that the claim is *res judicata* and statute barred, *inter alia*". There is no reference to abuse of process or Civil Procedure Rule 88. Am I correct that all of the parties consent to the Court considering and determining whether the claim is an abuse of process?
>
> There is also a question in my mind as to whether abuse of process is properly dealt with via a Rule 13 motion. I refer you to Rule 13.01:
>
>> 13.01 Scope of Rule 13
>>
>> (1) This Rule is for summary judgment on evidence in an action and summary judgment on pleadings in an action or an application.
>>
>> …
>>
>> (3) **This Rule is not for disposal of** frivolous, vexatious, scandalous, or otherwise **abusive pleadings, which purpose is served by Rule 88 - Abuse of Process.**
>
> [Emphasis added]
>
> I recognize that the Court has considered abuse of process in the context of motions for summary judgment. It does not appear, however, that Rule 13.01(3) has been considered in any of these cases.
>
> I am seeking your comment on Rule 13.01(3) and on whether abuse of process should be decided under Rule 88, rather than under the Shannex framework applicable under Rule 13.04.
>
> Please provide me with your submissions by May 5, 2023.
>
> Thank you.

[18] In their responses, counsel for the parties all consented to the court addressing the issue of abuse of process despite the lack of reference to it in the Notice of Motion. They further agreed that the abuse of process claim should have been dealt with by way of a motion under Rule 88. In his response dated April 26, 2023, Barry Mason, KC, counsel for the Ramar Defendants, stated, in part:

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> The Applicants submit that the Court should address the issue of the applicable limitation period under Rule 13 and the issue of abuse of process under Rule 88.

[19] Colin Bryson, KC, counsel for the intervenor, wrote in his letter dated May 2, 2023:

> You are of course correct. Abuse of process motions should be brought under Rule 88 and not Rule 13. I am not sure how we all missed that, but we did.
>
> There is an important analytical difference between Rule 13 and Rule 88 motions which needs to be recognized and addressed. Rule 88 motions are final motions, in that the Court is to determine from the hearing whether or not an abuse has occurred and what the remedy for that abuse should be. The summary judgment (*Shannex*) analysis of whether or not there are genuine issues of material issues [*sic*] of fact etc. does not apply.
>
> While Mr. Mason is correct that the parties have already made extensive submissions on the merits of the abuse of process issue, the fact remains that, in theory, the misframing of the analysis through the Rule 13 lens could affect the whole process. Each party needs to step back and consider whether they would have done anything differently if the motion was framed and argued as a final motion, without applying the Rule 13 lens. This could be as simple as revisions to the pre-hearing memoranda, but could go as far as requesting further cross-examination. This is because the issue is no longer about whether or not there are genuine issues of material fact, but rather whether or not abuse of process has been demonstrated.
>
> On behalf of Mr. Donovan, I suggest as follows:
>
>> The Applicants amend their motion to bring the abuse of process claim pursuant to Rule 88.
>>
>> The Applicants consider whether they need to amend their supporting affidavits and pre-hearing briefs, and if amendments are desired, request permission to do so, and follow through if permission is given.
>>
>> The Respondents and Intervenor consider whether they need to amend their supporting affidavits and pre-hearing briefs, either in response to amendments made by the Applicants or in any event, request permission to do so, and follow through if permission is given.
>>
>> The parties determine whether further cross-examination is needed.
>
> This may be overkill, and the result may be that very little will change, but I submit that the above should be considered by all.
>
> …

[20] On May 26, 2023, the court met with the parties for a virtual status conference over Microsoft Teams. Counsel for Kevin Marchand was not in attendance. Counsel

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agreed to proceed as proposed by Mr. Bryson. Mr. Mason indicated that he would write to all counsel with a list of filing dates.

[21] On August 17, 2023, Mr. Bryson filed a modified version of the intervenor's original motion brief to properly address the abuse of process issue pursuant to Rule 88. The intervenor filed no new evidence.

[22] On August 21, 2023, Mr. Mason, on behalf of the Ramar Defendants, filed an amended notice of motion, adding a reference to Rule 88. The Ramar Defendants also sent a letter to the court indicating that they had no further submissions to make apart from those contained in their letter of April 26, 2023.

[23] On September 26, 2023, plaintiffs' counsel, Robert Pineo, wrote to the court to advise that the plaintiffs had reviewed Mr. Bryson's submissions on behalf of the intervenor and were adopting them as their own. He also confirmed that his clients were not seeking further cross-examination.

[24] Finally, on October 3, 2023, Mr. Mason filed a brief response to the intervenor's revised submissions and confirmed that the Ramar Defendants did not require further cross-examination of any witnesses.

Positions of the Parties

[25] The Ramar Defendants say the plaintiffs' claims are an abuse of process and should be summarily dismissed pursuant to Rule 88. They say the claims being advanced by the plaintiffs are essentially the same as those made in the 2014 action, which was concluded by way of a Notice of Discontinuance, a court order, and Minutes of Settlement. The Ramar Defendants submit that the 2020 action involves essentially the same parties and subject matters, and the plaintiffs are seeking similar remedies. The Ramar Defendants say that permitting the 2020 action to proceed would amount to a re-litigation of the 2014 action, which was resolved by way of settlement and documented on the record in court and by court order. In the alternative, the Ramar Defendants seek summary judgment on the basis that the plaintiffs' claims are statute barred pursuant to the *Limitation of Actions Act*. With respect to the claims against Larry and Darrell Marchand, the Ramar Defendants say summary judgment should be granted because there is no evidence to support the claims.

[26] The plaintiffs deny that their claims are an abuse of process or are out of time. They say the claims against Ramar in the current action relate to structural

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deficiencies, while the claims in the 2014 action were for architectural or cosmetic deficiencies. The plaintiffs submit that the 2020 action was filed within the limitation period because they did not discover the structural issues until after May 28, 2018. The plaintiffs further submit that there is sufficient evidence for the claims against Larry and Darrell Marchand to defeat the motion for summary judgment.

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[27] The intervenor submits that there is no merit to Ramar's defence of abuse of process. Like the plaintiffs, Mr. Donovan says the claims made in the 2020 action are different than the claims in the 2014 action. He further says the plaintiffs did not have the requisite degree of knowledge of the structural defects to have included them in the 2014 action any earlier than they tried in November 2019. Mr. Donovan submits that there are genuine issues of material fact with respect to when the plaintiffs ought to have discovered the claims. Mr. Donovan further submits that the burden should be on the Ramar Defendants to prove that the plaintiffs' claims are out of time, and not on the plaintiffs.

The Evidence

[28] In support of their motions, the Ramar Defendants filed the affidavits of Larry Marchand and Darrell Marchand, with attached exhibits containing pleadings and evidence presented at the trial in November 2019. The plaintiffs filed the affidavit of Carmen Blinn, with attached exhibits. The intervenor filed the affidavit of Michael Donovan, with attached exhibits.

[29] Carmen Blinn and Larry Marchand were cross-examined on their affidavits.

Preliminary Evidentiary Issue

[30] In their rebuttal brief dated July 6, 2022, the Ramar Defendants objected to one paragraph of the Donovan affidavit, and statements made within multiple paragraphs of the Blinn affidavit. At the beginning of the hearing on July 13, 2022, Mr. Mason, for the Ramar Defendants, informed the court that an agreement had been reached with plaintiffs' counsel that the contested paragraphs would not be entered for the truth of their contents. Counsel for the intervenor advised the court that the same agreement had been reached regarding the contested paragraph in the Donovan affidavit.

[31] Questions arose as to the scope of counsel's agreement at the end of the first hearing day, during Mr. Pineo's closing submissions. It became clear that the plaintiffs intended to rely on a statement contained in a May 12, 2020 structural

report prepared by Stantec Consulting Ltd. (“2020 Stantec Structural Report”), attached as an exhibit to Carmen Blinn’s affidavit, to establish a material fact underlying the fraud claims against the individual defendants. Specifically, the plaintiffs were seeking to rely on the report to establish that Ramar never submitted the third and final house plan with the raised ceiling and roof to HRM for approval. As plaintiffs’ counsel put it:

> Ramar constructed a home, not having the final plan approved, not telling the homeowners of that, and not telling HRM that there was a change in the design. We submit that that is deceit, and as directing minds of the company, the individual defendants played a role in that deceit.

[32] When this issue arose, James MacNeil, counsel for Kevin Marchand, asked the court to confirm his previous understanding that none of the attachments to the Blinn affidavit were being entered for the truth of their contents. Mr. Pineo responded that there had been no objection to the specific paragraphs attaching the 2020 Stantec Structural Report and a May 1, 2020 Stantec report on mould growth in the plaintiffs’ home (“2020 Stantec Mould Assessment Report”), or to the reports specifically, so both reports were admissible for their truth. The court directed counsel to file supplemental written submissions on the issue, which they did.

[33] In supplemental submissions filed July 27, 2022, the Ramar Defendants argue that the reports contain both hearsay and opinion evidence and, as such, are not properly before the court. They further note that the reports are not Rule 55 compliant and so cannot be filed pursuant to that Rule.

[34] Counsel for Kevin Marchand also filed submissions on July 27, 2022. Mr. MacNeil points out that any agreement relied on by the plaintiffs was only between Mr. Mason and Mr. Pineo. He says that if he had been advised that any statements in the 2020 Stantec reports were being relied on as the only facts supporting the claims against the individual defendants, he would have objected to the evidence *ab initio*.

[35] In submissions filed August 12, 2022, the plaintiffs argue that the exhibits are admissible pursuant to the express consent of counsel at the outset of the July 13-14 hearing, and alternatively by way of the fact that they were tendered as evidence without objection. The plaintiffs argue in the alternative that the exhibits are not tendered for the truth of their contents and are therefore not hearsay.

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[36] The plaintiffs also raised the possibility of an adjournment to allow them to adduce further evidence.

[37] Litigation is an adversarial process. The time to object to affidavit evidence is prior to the start of the hearing, not after the evidence has concluded: *Matthews v. Ocean Nutrition Canada Ltd.*, 2017 NSSC 16, at para. 29. There is no obligation on the party tendering an affidavit to advise opposing counsel in advance of the uses it intends to make of each paragraph or exhibit. In this case, the Ramar Defendants and Kevin Marchand assumed that the plaintiffs planned to rely on the 2020 Stantec reports as evidence of steps they had taken to discover the structural claims, and for no other purpose. They were wrong about that. The plaintiffs also wish to rely on the 2020 Stantec Structural Report for the conclusion or opinion that their residence "was not constructed as per the drawings submitted for permit and approved for construction by Halifax Regional Municipality" (page 31). In other words, the plaintiffs wish to use the 2020 Stantec Structural Report as evidence that the individual defendants failed to submit the third and final house plan with the raised ceiling to HRM for approval, which the plaintiffs argue supports the fraud claims against them.

[38] While the Ramar Defendants and Kevin Marchand failed to object to the paragraphs of Ms. Blinn's affidavit attaching the reports, or to the admission of any statements within the reports for their truth, the plaintiffs were fully aware from Mr. Mason's rebuttal brief – filed a week before the hearing – that the Ramar Defendants objected to the same evidence being admitted for its truth through Ms. Blinn. Mr. Mason wrote at page 1 of the rebuttal brief:

> 1. The Ramar Defendants object to the following statement in paragraph 11 of the Affidavit of Carmen Blinn: "it was confirmed that the third and final house plan with the raised ceiling and roof had never been submitted or approved by HRM." To the extent the Plaintiffs rely on the statement for the truth of its content, the Ramar Defendants object to this statement on the basis that it is speculation, opinion, argument, and/or hearsay.
>
> 2. The Ramar Defendants object to the following statement in paragraph 16 of the Affidavit of Carmen Blinn: "We learned from the HRM file that the house plans submitted for approval by HRM were not the same house plans used to construct our home. Specifically the plans regarding the 'Tall Wall' and the placement of the trusses on a 'jack wall' or 'pony wall' used for the actual construction were never

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provided to HRM.'" To the extent this statement is relied upon for the truth of its content, the Ramar Defendants object to this statement on the basis that it is speculation, opinion, argument, and/or hearsay.

3. The Ramar Defendants object to the following statement in paragraph 17 of the Affidavit of Carmen Blinn: "I learned that the house plan used to construct our home was not the house plan approved by HRM." The Ramar Defendants object to this statement on the basis that it is speculation, opinion, argument, and/or hearsay.

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[39] The Ramar Defendants and Kevin Marchand should not have assumed the uses the plaintiffs intended to make of the 2020 Stantec Structural Report. If either of the reports contained anything the defendants did not want admitted for its truth, they should have objected. It is unreasonable, however, to suggest that the plaintiffs would have been caught off guard by the defendants' objections when the plaintiffs revealed during argument that they were relying on the statement in the 2020 Stantec Structural Report for its truth, as the only evidence to support the fraud claims. The plaintiffs had notice of the Ramar Defendants' position that the evidence regarding whether HRM had been provided with the final house plan used to construct the home was opinion and hearsay. They also knew that they had not filed an affidavit from the authors of the 2020 Stantec Structural Report or anyone at HRM who had personal knowledge and could be cross-examined on the point.

[40] In the circumstances, the statement in the 2020 Stantec Structural Report should not be admitted for the truth of its contents. As will become clear, however, nothing turns on this exclusion. Even if the court accepted that HRM had not received and approved the final house plan, the plaintiffs have still failed to establish a genuine issue of material fact with respect to the fraud claims. Were it otherwise, in light of the defendants' failure to object before the hearing, the court would have considered adjourning the proceeding to allow the plaintiffs to file evidence from the authors of the report. As for the 2020 Stantec Mould Assessment Report, its relevance is to the issue of discoverability, which does not require its admission for hearsay purposes.

Summary of the evidence

Carmen Blinn

[41] In her affidavit, Ms. Blinn addressed the 2014 proceedings, along with the discovery of structural defects in the home.

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[42] Ms. Blinn stated that the claim brought forward in 2014 by herself and Kevin Layes concerned visible architectural and aesthetic deficiencies in their home constructed by Ramar. At no time during preparation of the 2014 case did they undertake destructive testing of the home. In other words, she said, they never opened the walls to observe the structural aspects of the home.

[43] Ms. Blinn stated that she and Mr. Layes took numerous photographs of all phases of the construction of their home. She added, however, that neither she nor Mr. Layes can tell whether structures are being constructed in accordance with the *National Building Code 2010* or HRM by-laws.

[44] On November 28, 2018, the plaintiffs obtained the discovery evidence of Ryan Marchand, Ramar's witness. During his examination, Ryan Marchand gave a variety of undertakings. On August 15, 2019, the plaintiffs received Ramar's answers to undertakings. These answers included reference to an engineer (Jonathan Langille) whom the plaintiffs had never heard of before. Ms. Blinn said they attempted to learn who Mr. Langille was from Ramar, but the information was not provided.

[45] According to Ms. Blinn, on October 2, 2019, after having reviewed the answers and 14 attachments with several pages from HRM, the plaintiffs went to the HRM offices in Dartmouth to meet with Katherine Lewis, Building Inspector. Ms. Lewis then arranged for a colleague to locate the building file.

[46] Shortly thereafter, the plaintiffs returned to the HRM offices to review the file. Ms. Blinn said the front desk clerk retrieved their file but would not hand it over to them to review it. Instead, the clerk photocopied the two house plans that had been submitted and "it was confirmed that the third and final house plan with the raised ceiling and roof had never been submitted or approved by HRM." Ms. Blinn said the plaintiffs could not obtain copies of anything else in the file without making an appointment to see the building inspector and filing a Freedom of Information application. The *Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 2 ("*FOIPOP*") provides a formal process to access records ostensibly under the control of government.

[47] Ms. Blinn said the trial of the 2014 action began on November 12, 2019. After five days of testimony, the plaintiffs made a motion to adjourn the trial to allow the engineers time to do some invasive investigations and provide a report on any structural deficiencies that could be the source of the architectural issues observed in the house. The court heard and denied the motion.

[48] Ms. Blinn stated that on November 19, 2019, during trial, the parties reached a settlement of the issues before the court. They put the settlement on the record, executed Minutes of Settlement, and filed a Consent Order of Discontinuance. The parties did not execute Releases.

[49] Regarding the plaintiffs' discovery of structural defects, Ms. Blinn tied it to learning from the HRM file that the house plans submitted for approval were not the same as the plan used to construct their home. Specifically, the plan regarding the "Tall Wall" and the placement of the trusses on a "jack wall" or "pony wall" used for the actual construction were not in the file.

[50] Ms. Blinn said they met with Katherine Lewis, along with Bill Pay of Stantec, on December 12, 2019. During that meeting, she learned that the house plan used to construct the home was not the house plan approved by HRM. The plaintiffs immediately hired Stantec to inspect the structural aspects of the home. Stantec provided a sketch of where they wanted to investigate the structure and asked the plaintiffs to hire a contractor to remove architectural components to expose the relevant structural areas. Stantec also requested that the plaintiffs hire a survey engineer company to determine if the site elevations of the home met the *National Building Code*.

[51] Ms. Blinn stated that during the December 12, 2019 meeting, Ms. Lewis advised the plaintiffs to make a FOIPOP application to obtain the entire contents of the HRM file for 31 Alben Lane. She said Ms. Lewis explained that she could not make copies of the file because it contained documents with signatures that would need to be redacted. Ms. Blinn stated that she made the FOIPOP request and received the file contents on December 18, 2020.

[52] At the end of December 2019, the plaintiffs hired Design Point Engineering and Surveying of Bedford, Nova Scotia, to determine the site elevations and whether they met the *National Building Code*. The results were provided on January 7, 2020, and stated that the home does not meet the site elevations prescribed in the *National Building Code*.

[53] Ms. Blinn said the plaintiffs hired a contractor to assist in removal of the architectural components so that Stantec engineers could inspect the structural components of the house. Stantec conducted invasive and destructive investigations of the home in February and March 2020, and produced a Structural Report dated May 12, 2020. The Structural Report opined that the house had several structural deficiencies amounting to breaches of the *National Building Code*.

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[54] Ms. Blinn stated that during Stantec's investigation, they discovered a wet spot on the upstairs bathroom ceiling. They asked the contractor to cut a hole in the ceiling so they could investigate the moisture in the gyproc and discovered that the vent stack (stink pipe) had not been vented out the roof. Instead, it had been vented into the attic, allowing plumbing residue to gather and mould to grow. There was a foul scent of mould and plumbing vapours present. According to Ms. Blinn, Stantec advised the plaintiffs to repair this as soon as possible. Ms. Blinn said the mould damage had been accumulating for over five years and was highly visible.

[55] On April 14, 2020, Stantec retrieved air samples from inside the home, which were sent to an air quality testing laboratory in Toronto. On May 1, 2020, the plaintiffs received a report from Stantec providing opinion on the mould issue in the home.

[56] On July 16, 2020, Katherine Lewis hand-delivered an Order to Comply revoking the occupancy permit for the home and giving the plaintiffs 30 days to either correct the structural deficiencies in the house or vacate it.

[57] Ms. Blinn said the plaintiffs vacated the home after receiving the order and have been living in rental accommodations since. The plaintiffs continue to store their possessions in the house.

[58] On cross-examination, Ms. Blinn testified that the plaintiffs moved into the home on a full-time basis in September 2015. She agreed that they took possession and changed the locks in October 2014, amid the dispute with Ramar.

[59] Ms. Blinn agreed that the plaintiffs noticed cracking in the walls after moving into the home on a full-time basis. There were cracks forming on the "Great Wall" and on top of doorways. Ms. Blinn agreed that they could hear cracking sounds coming from the attic when it was windy. She said she attributed the cracks to the house settling.

[60] Ms. Blinn was repeatedly evasive when Mr. Mason attempted to pin down exactly when she first became concerned that there may be structural problems with the home. She initially denied having concerns about "the structure" prior to 2018. She said her only concerns at that time were "architectural" or "cosmetic". She eventually acknowledged that she had concerns about the trusses. Ms. Blinn explained that she noticed during construction that the trusses in the "Great Room" appeared to have been cut, so she asked Ramar employees whether they would be joined or braced. She said Ramar representatives confirmed that they joined the

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trusses. Ms. Blinn agreed that the cracks were getting worse in 2015, 2016 and 2017, but again denied that she had concerns about the structure. She said her concerns were only about cosmetic issues "because Stantec came and they did a visual walkthrough and said they had no document to concern themselves with structure, just architectural."

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[61] The following exchange took place between Mr. Mason and Ms. Blinn:

> MR. MASON: And is it your evidence today as you sit here that structural issues were not a concern for you in the summer of 2018? Structural issues with the home?
> MS. BLINN: Um, there's no reason… I was wondering, but there was no reason, no documents that you had provided us through your disclosure, your ADD, to suggest that I should go that far…
> MR. MASON: Oh, okay.
> MS. BLINN: … at that time.
> MR. MASON: Even though you heard the wind, sounds like wood cracking in the attic.
> MS. BLINN: It's not my first house. It's not my first house.
> MR. MASON: Let me finish the question okay. Even though you heard, you saw cracks, and they were getting worse, and you heard this cracking sensation or noise in the attic. No issues in August of 2018? Let me ask you specifically. In August 2018, were you concerned about the trusses, or the structure of the home at that time?
> MS. BLINN: In 2018?
> MR. MASON: Yes. August of 2018.
> MS. BLINN: Well, I asked Stantec if they could review what I had and to see if they thought maybe um… we should go further. And they, with everything I had, the documents I had at that time that you had disclosed, there was nothing to give them concern that there should be something wrong with anything, of those components.
> MR. MASON: Okay. I'm not sure if that was responsive. But I'm just wondering, in August 2018, I'm asking a specific question, August 2018, were you concerned at that point that there was a problem with the trusses that was causing a structural issue in the home?
> MS. BLINN: No, because they came in August 2018 and did their visual walkthrough and there was nothing that they gave me to concern myself with the structure at that point.

[62] Mr. Mason then took Ms. Blinn to an email written by Kevin Layes to Bill Pay, Leif Fuchs and Brian Doucette at Stantec on August 22, 2018. The email, which was copied to Carmen Blinn, bore the subject line "Fireplace crushing down from above". Mr. Layes wrote:

Hi,

This morning there was another sound that came from the area above the fireplace.

Attached are updated photos which show the roof appears to be crushing down on the fireplace.

There is also a long crack that extends down the corner of the great room on the right side. The crack is more pronounced at the top than on the bottom and located on the opposite side of the wall from the sound last week that left the crack in the upstairs bedroom corner and ceiling edge [*sic*] The same group of trusses meet at these locations.

I have been giving more thought to the suggestion that shrinkage from the fireplace wood frame could be the reason behind the stress fracturing we are seeing along the corners and edges all around the area where the ceiling meets the fireplace. To me, shrinkage would result in gaps where the ceiling meets the fireplace corners and walls from a separating effect. What we are seeing is splintering of the joints and corners suggesting there is pressure where the edges all meet. It makes sense to me that pressure must be exerted downward and/or upwards around the entire column of the fireplace for the splintering from pressure to occur.

I do believe there is shrinkage within the fireplace wood and it is actually helping to relieve some of the downward and/or upward pressure on the fireplace framing being exerted from the cut roof trusses and/or movement in the footings. However the shrinkage of the fireplace framing is not sufficient to protect against the amount of movement being exerted downward on the fireplace frame from the roof or upward from the footing. The splintering at all four corners and all four edges where the ceiling meets the fireplace can not occur from shrinkage.

To see what else was happening I placed my 3’ level on the exterior walls for the great room that support the trusses above the great room and fireplace. The result of that check was the wall is angling outward on both sides. The room walls are wider at the top of the wall (base of the trusses) and more narrow at the floor. After careful consideration I feel there are only 3 possibilities.

1. The roof trusses, which were cut are not supporting the actual roof and as the chipboard deteriorates the roof is crushing down on the interior walls and fireplace frame and kicking the walls outward at the top.
2. The footings are moving (settling) and creating a shift with these walls.
3. Both of the above.

After more thought, I am of the inclination that as the chip board deteriorates, the roof is slowly falling inward and this is evidenced by the crushing of the fireplace framing and stress fracturing that is occurring around the areas clearly identified within the general vicinity of the great room… especially those above the doors, windows and fireplace frame. I did consider it is being triggered by the movement in the footing however the crushing down ward effect would mean the footings

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> need to be exerting upward pressure – which to me does not seem likely given that they are undersized and located in an infilled site.
>
> Thus I feel the cut roof trusses are more likely the culprit. I believe they are slowly falling inwards as the chip board deteriorates causing the downward pressure fractures around the fireplace and pushing outward on the walls. This would also account for the stress fractures found in the gyprock in the vicinity of the walls around the great room area. This correlates with the most likely location for the downward movement of the roof to start because those cut trusses in the great room are larger and more openly exposed than the trusses running perpendicular to them.
>
> I also feel this issue will continue to deteriorate beyond what it is now as the trusses lose what little strength is provided by both the strapping and chipboard holding the trusses together up top and reducing movement.
>
> Please see attached photos.

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[63] When asked whether she agreed with the content of the email at the time her husband wrote it, Ms. Blinn said yes. The following exchange occurred:

> MR. MASON: So this was your view and your husband's view in August 2018, that this was one of the possibilities. And I'm going to suggest to you that this was a view you held in 2017, as well, isn't that correct? "That the roof trusses which were cut and are not supporting the actual roof and as the chipboard deteriorates the roof is crushing down on the interior walls and fireplace frame and kicking the walls outward at the top". That wasn't a new revelation, that was something that you… you had that view in 2017, isn't that right?
>
> MS. BLINN: I just knew that they were cut and I was told they were joined, so I was wondering, maybe they didn't join them. I don't know when I had that view. Here I did, August. And I don't know when it started to… I don't remember when it started to crack at the four corners of the fireplace and the ceiling and the loft. I don't remember exactly when it started happening. I think one corner happened, and another, so I don't know what year exactly. It's been too far along. I can't say for sure.

[64] Mr. Mason took Ms. Blinn to an email she sent to Bill Pay and Leif Fuchs at Stantec on June 15, 2018. Under the heading "Project Approach and Scope of Services", she wrote:

> We would like you to do any invasive investigations as necessary to determine the quality of work performed.
>
> We would like your firm to enter confined spaces or be able to investigate any confined space (attic) to have a look at the trusses if possible.
>
> We would like you to look at municipal held documentation for the site (building records department). We can obtain copies.

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[65] Mr. Mason suggested to Ms. Blinn that she was asking Stantec to do invasive investigations because she was concerned about structural problems in the home. Ms. Blinn responded that she was concerned about everything in the home. When asked whether that included structural issues, she stated:

> Well, I didn't know if I should go that far, but I asked them to figure it out and let me know what they thought, if they should rip out gyproc and stuff like that. I'm not going to tear up my home just based on thinking something might be wrong. I need you to look and help me figure this out. So do what you need to do, if you think it's necessary. As necessary.

[66] Mr. Mason took Ms. Blinn to an email from Robert Pineo to Bill Pay at Stantec dated May 31, 2018, which stated, in part:

> I have met with my clients and they wish to proceed with retaining your firm to provide a Rule 55 compliant expert opinion report regarding the condition of the subject structure and the costs to cure any construction defects.
>
> We also discussed your projected fees of $7,500 in relation to the scope of work. We believe that this might well be inadequate and will not hold your firm to the estimated price should the work involved prove to be more extensive than currently understood by your firm. For example, **we believe that some intrusive inspection might be necessary**, which will change the scope of work quoted as well as possibly inflating the fees quoted.
>
> [Emphasis added]

[67] The following exchange then occurred:

MR. MASON:	So, Ms. Blinn, as you testified earlier, you were concerned about the trusses, you were concerned about the cracking in the walls prior to May of 2018, correct?
MS. BLINN:	The trusses and the cracks, yes.
MR. MASON:	And when… as you understand it, this idea of doing an invasive investigation was something that was being discussed well before May 31, 2018, wasn't it?
MS. BLINN:	I think May 31st was the first email we sent to Stantec and we talked with Rob to get this ball rolling. I don't think we … This was the first, like, let's get this done, we have a deadline.
MR. MASON:	It's fair to say that you had turned your mind or your husband had turned your mind to doing an invasive inspection well before May 31, 2018, correct?
MS. BLINN:	If necessary, yes. I mean when Brian came he took apart my siding, he took apart my window trims.. like that's invasive…

…

MR. MASON: You had turned your mind well before May 31, 2018 that you wanted an invasive inspection done of the home, isn't that right?
MS. BLINN: Yes. If necessary.

[68] Mr. Mason asked Ms. Blinn several questions about her interactions with HRM prior to trial:

MR. MASON: Now, in the last trial, if I recall your husband's evidence, I believe it was both of you went to HRM prior to trial in September or October 2019, to discuss issues with respect to documents that were provided, reports that were provided by Ramar to the HRM, is that correct?
MS. BLINN: We went to see if we could get access to the file.
MR. MASON: And you did have access to the file in September or October 2019, correct?
MS. BLINN: She couldn't provide us with copies… Uh, the first time we went, the inspector had to find the file. And then second time we went it was just the front desk, photocopied the plans she had in the file, but wouldn't let us open it and look at everything.. and then we received from Katherine Lewis an engineered plan for our tall wall that they had received from Ramar by email, and it didn't match what was built on site. So that was like end of October.
MR. MASON: So, before the trial which was in November 2019, correct?
MS. BLINN: Right. Yeah, like a couple weeks.
MR. MASON: And both you and your husband talked about those issues with respect to reports you claim were not provided to HRM at your trial in November 2019, correct?
MS. BLINN: That's right. Yes.
MR. MASON: And you were claiming damages associated with that as well as part of that trial weren't you?
MS. BLINN: Yes.
MR. MASON: And you were seeking compensation because you felt that Ramar had, I think your words were, "got a fraudulent occupancy permit", right?
MS. BLINN: Turns out it's true, yes.
MR. MASON: Okay, in your world it is, I understand that.
MS. BLINN: Well, we have Katherine Lewis.
MR. MASON: And so.. But that was part of the trial when you were advancing your claim in November 2019, was you were seeking damages because Ramar, in your mind, failed to provide the necessary reports and documents to the HRM, correct?
MS. BLINN: We tried to advance those claims, yes.

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[69] On re-direct examination, Ms. Blinn said she had concerns about the trusses possibly not being joined, causing a sagging of the roof, in “late spring 2018.”

Larry Marchand

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[70] Larry Marchand is a director and officer of Ramar Construction Ltd. Mr. Marchand stated in his affidavit that he was not personally involved in the construction of the plaintiffs’ home. He said the construction was handled and supervised by Ramar employees, and that he did not become involved with the plaintiffs until they refused to pay the balance of the contract price after the home was substantially completed in or about September 2014. Mr. Marchand stated that he was not involved in counselling or directing any Ramar employees with respect to construction or any dealings with the plaintiffs prior to that time.

[71] Larry Marchand reviewed the history of the relationship between Ramar and the plaintiffs. He attached copies of the pleadings in the lien action and the 2014 action. Mr. Marchand reviewed the terms of the settlement of the 2014 action and attached copies of the relevant documents. With respect to the 2020 action, he stated:

> 10. In July 0f 2020 I was served with the Notice of Action in relation to the within matter. I was surprised that the Plaintiffs were pursuing another lawsuit, again arguing that there are deficiencies with the home, but that they were unaware of these deficiencies prior to May of 2020. The Plaintiffs have had control of and/or been living in the property since September of 2014. They have had various engineers and other experts inspecting the house from the early stages of construction in 2013. I find the idea that they have only recently discovered some alleged deficiency or issue with respect to the home utterly unbelievable.

[72] Larry Marchand explained that he was advised by Ramar employees and subcontractors that the plaintiffs were heavily engaged and involved in the construction process. They were on site regularly and took many photos of every stage of construction. Mr. Layes sent Ramar staff an email indicating that he had an “extensive” photo collection. Mr. Marchand said the plaintiffs retained Stantec to review the foundation of the home in September/October 2013 and prepare a report on any deficiencies. Ramar did not agree with all the findings and recommendations but agreed to correct the alleged deficiencies to satisfy the customers. Mr. Marchand said it was his understanding that any alleged issues with the footings or foundation were identified through extensive investigation and evaluation performed on behalf of the plaintiffs and addressed prior to construction proceeding in 2013.

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[73] Larry Marchand addressed the trusses and the modification made to the building plan to raise the ceiling height as follows:

> 13. I am advised by Ramar employee Scott Sim and do verily believe that in November of 2013 he became aware of a potential problem regarding the headroom in a hallway on the upstairs floor. Scott is a draftsman and director of sales and home design for Ramar. The depth of the truss was deeper than had been anticipated and this reduced the area he had to work with. He wrote to the Plaintiffs to alert them to the concern and offer a solution. He advised that the options were to leave the design as it was, but cautioned that the result may be less functional and appealing than they were expecting. Alternatively, he offered to raise the ceiling height on the entire upper floor to 10'. In the circumstances, Ramar agreed to make this modification at no cost to the Plaintiffs if they wished to do so. The Plaintiffs directed Ramar to make the modification, provided that the entire roof on the main portion of the home was raised. … **The proposal did not require any modification of the truss system, nor modification to the approved plans.**
>
> 14. I am advised by Ramar staff and subtrades and do verily believe that the Plaintiffs were present and took pictures of the exposed trusses, and other aspects of construction throughout the build. They were onsite frequently monitoring the progress, posing questions to Ramar staff and subtrades, and raising issues or concerns with Ramar. They obtained copies of documentation relevant to the construction process from Ramar and its subtrades and, when they felt it was necessary, halted construction and retained their own independent experts to evaluate the project and provide feedback. Ramar responded to those concerns and attempted to accommodate the Plaintiffs [*sic*] requests.
>
> [Emphasis added]

[74] Larry Marchand attached copies of the municipal inspection reports and the occupancy permit for the home. He stated that, to his knowledge, "Ramar complied with all recommendations and directions of the municipal government with respect to this property."

[75] Larry Marchand was not cross-examined by plaintiffs' counsel regarding the fraud allegations against him.

Darrell Marchand

[76] In his affidavit, Darrell Marchand stated that he is a director and officer of Ramar. He indicated that he was not personally involved in the construction of the plaintiffs' home and did not personally direct staff in relation to it. He became involved when Ramar was required to pursue legal action in relation to the contract and lien filed on the property. He said his role was to instruct counsel throughout the

legal proceedings and he was present during the trial which occurred over 5 days from November 12-19, 2019. Darrell Marchand attached transcripts of the trial as exhibits. He was not cross-examined.

Michael Donovan, K.C.

[77] Michael Donovan stated in his affidavit that he retired from the practice of law in December 2021. On March 21, 2019, the plaintiffs requested that he represent them in existing litigation against Ramar that had been filed by their previous counsel in 2014. Mr. Donovan agreed.

[78] Mr. Donovan said that when he took over conduct of the litigation, he was not aware of any concerns about the structural integrity of the plaintiffs' house. The plaintiffs' claim was for numerous construction deficiencies and was supported by a Rule 55 expert report prepared by Stantec.

[79] Mr. Donovan explained that when Ms. Blinn's evidence was completed on November 19, 2019, the plaintiffs "were concerned about what they were learning recently about the structural integrity of their house and wanted to deal with these issues in the existing litigation if at all possible." As a result, he said, he made a motion to adjourn the trial to allow for the calling of expert evidence relating to the structural integrity of the house and to make any pleading amendments necessary to address this issue. The court denied the motion. Mr. Donovan attached a transcript of the motion and the court's ruling on it as an exhibit to his affidavit. Mr. Donovan noted that the court found that the structural issues were not included in the pleadings and refused to amend the pleadings to add these issues or grant an adjournment to allow these issued to be addressed in the existing litigation. Following the ruling, the court granted an adjournment for the parties to discuss settlement. The parties reached an agreement in about a half hour. Mr. Donovan stated that during his settlement negotiations with Mr. Mason, counsel for Ramar, he had requested a waiver of any possible limitation period for the structural issues and Mr. Mason rejected that request. He said there was no discussion of abuse of process during settlement negotiations.

[80] Mr. Donovan was not cross-examined on his affidavit.

The Pleadings – 2014 vs. 2020

[81] The 2014 pleadings are in evidence through the affidavit of Larry Marchand. The causes of action pleaded include breach of contract, negligence, intimidation,

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and trespass to property. Paragraph 12 of the statement of claim in the 2014 action states:

> The Plaintiffs plead that the reason that they have not paid the full amount in accordance with the Contract is that the Defendant has breached the Contract by constructing the house with the following deficiencies:
>
> > The foundation was not properly constructed in that the 25' foot long 8' foot deep basement concrete wall was not built on top of the footing below it. This resulted in engineering costs and delays to remove backfill and construct the wall and footings to support it. Additional foundation and footing cracks in various locations around the foundation had to be fixed with additional concrete, backfill and sealant. The Plaintiffs have incurred engineering costs and time delays while RAMAR worked to correct the issue over a 3 month period.
> >
> > The well was not properly cased as constructed (to the contracted depth) and has suffered runoff of surface water and leachate from the ground, causing it to have inordinate and illegal amounts of bacteria and compounds in the water. In addition, the Defendant ran this water through the heating and plumbing systems causing damage to those systems;
> >
> > The floors on the main floor were not constructed level or flat;
> >
> > The porcelain tires adhered to the floor on the main floor were installed incorrectly by leaving gaps filled with grout rather than being installed tightly together without gaps and the grout lines are uneven in depth and colour and do not run in a straight line;
> >
> > The wrapped posts on the front of the house were incorrectly constructed and are unsightly;
> >
> > The trim on the exterior of the house in the front and back was incorrectly installed and is unsightly and the gaps left in it will allow moisture to enter the walls of the house;
> >
> > The electrical mast was not properly adhered to the house;
> >
> > The septic system was exposed to the contaminated well water;
> >
> > The roofing cap was not properly installed and is loose from the roof, allowing insect infestation (wasps) and moisture to enter the roof;
> >
> > The brick siding was not caulked where the bricks meet the wall, allowing insect infestation and moisture to enter the wall;
> >
> > The roofing shingles are tearing, buckling and beginning to lift off the roof;
> >
> > Paint splattered on the siding, under the laundry room window, was removed with Spray Nine and the colour of the siding is now ruined;

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> The Mini Split Heat Pumps were installed in the wrong location, are too small for the home and their drain spouts drain directly on the patio decks;
>
> The HRV unit installed is too small for the home and the HRV drainage was improperly installed;
>
> The cabinet for the HRV unit to hide the intake and outtake ventilation hoses has not been installed;
>
> The water softener or water treatment option has [*sic*] been installed as per the Contract;
>
> The Contract required that the excavation of the site include driveway and sloped elevations which have not been completed;
>
> The large windows facing the lake were installed backwards and open into each other;
>
> The garage door opener has not been fully installed and is not working;
>
> The taps in master ensuite were installed in a damaged state;
>
> Interior bathroom caulking was used to seal exterior windows and doors and is peeling off the house;
>
> An old and rust [*sic*] Propane connector was installed;
>
> The propane flue exiting through the roof is twisted and bent;
>
> Many of the exterior lights burn out every 2-3 weeks;
>
> The drain pipe removing water from around the foundation was improperly installed;
>
> The freezer board around the house was incorrectly installed and has a crack in one location;
>
> The water tank, solar tank and pressure tank were improperly installed and are inaccessible;
>
> The water tank, solar tank, solar panels and pressure tank have been exposed to contaminated water for several months.

[82] The plaintiffs pleaded in the statement of claim that they were electing to have the contract completed and the deficiencies corrected by another contractor. They sought special damages, general damages, aggravated damages, and punitive damages.

[83] In the 2020 action, the plaintiffs say there were three sets of architectural plans and specifications to construct the home:

> Over the course of construction Ramar produced three (3) sets of architectural plans and specifications to construct the Home:

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> The first set of architectural drawings dated September 30, 2008 ("Plan 1") was submitted to HRM's Planning and Development Department at the start of construction. Plan 1 was approved by HRM;
>
> The second architectural plan ("Plan 2") was prepared and submitted to HRM for approval on August 7, 2013. Plan 2 was also approved by HRM; and,
>
> The third set of architectural plans Ramar prepared ("Plan 3") was dated October 21, 2013, and was never submitted to HRM for approval and therefore not approved by HRM.

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[84] Later, under the heading "Plan 3", the plaintiffs plead:

> The Plaintiffs plead that the construction of the Home was based largely on Plan 3.
>
> The Plaintiffs plead that **neither Ramar, nor any of the Defendants, nor anybody else, disclosed, discussed or otherwise provided Plan 3 to the Plaintiffs until March of 2014**, after many of the components of the Home were built.
>
> **The Plaintiffs plead that Plan 3 failed to meet Code requirements and standards.**
>
> The Plaintiffs plead that Ramar failed to follow many aspects of Plan 3.
>
> The Plaintiffs plead that these defects were latent defects and they did not discover them until employing expert assistance and receiving a report in May of 2020.
>
> [Emphasis added]

[85] The specific deficiencies alleged in the 2020 action are broken down into the headings "Footings and Foundation", "The Walls and the Roof", "The Plumbing", and "The 'Tall Wall'". With respect to the footings and foundation, the plaintiffs plead:

> The HRM Footing Inspection Report of August 7, 2013 uncovered various deficiencies in the footings which did not comply with the HRM approved Plan 1. Ramar attempted to remediate these deficiencies and submitted Plan 2 to HRM on August 7, 2013, to show their remedial actions.
>
> The Plaintiffs plead that notwithstanding Plan 2 having been submitted to HRM, Ramar made a further correction to a misaligned footing on August 8, 2013, without amending Plan 2 or disclosing this further correction to HRM Inspectors or to the Plaintiffs. Therefore, neither HRM nor the Plaintiffs knew of or approved of this further correction.
>
> On August 14, 2013, HRM carried out the foundation inspection and issued a report detailing numerous deficiencies that required Ramar to make corrections.

The Plaintiffs plead that between August 14 and November 7, 2013, Ramar made numerous footing and foundation alterations and corrections without notification to HRM or the Plaintiffs.

The Plaintiffs plead that Ramar did not arrange for the footings and the foundation to be re-inspected by HRM and neither disclosed nor discussed this with the Plaintiffs.

The Plaintiffs plead that the Foundation walls were not built high enough above ground level; and that the foundation elevations were not built in compliance with the Code.

The Plaintiffs plead that these defects were latent defects and they did not discover them until employing expert assistance and receiving a report in May of 2020.

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[86] The allegations regarding the walls and roof are as follows:

The Plaintiffs plead that on or about November 21, 2013, Scott Sim, an employee of Ramar, requested the Plaintiffs' agreement to have the upstairs ceiling raised an additional 24 inches. He represented to the Plaintiffs that the reason for this was to allow the headroom in the hallway upstairs to meet Code. The Plaintiffs relied on this representation and agreed to the change on the condition that no alterations to the exterior look of the house would be made deviating from Plan 2.

The Plaintiffs plead that Scott Sim misled them as to the actual reason for the change to the ceiling height and as to what action Ramar would take, and actually took, regarding the ceiling: the change was required to correct structural deficiencies; and what Ramar actually did was raise the entire roof by building a "Jack Wall" that was 2 feet, 8 inches (2'8") in height around the entire first floor perimeter of the Home.

The Plaintiffs plead that because the height of the roof was changed, the roof trusses approved in Plan 2 were no longer correct, so Ramar modified the trusses to fit the changed roof height. These modifications were not undertaken with the guidance with [*sic*] the manufacturer's engineer and they were not approved by any qualified engineer. The changes to the roof trusses were not disclosed to the Plaintiffs and the changes were not approved by the Plaintiffs.

Ramar did not arrange for the Jack Wall or the modified roof trusses to be re-inspected by HRM and neither disclosed nor discussed this with the Plaintiffs.

The Plaintiffs plead that Ramar utilized a manufactured girder truss in the structure of the Home. This girder truss was supported by a timber column to carry the load of the upper part of the Home to the foundation. The timber column utilized by Ramar was inadequate to safely carry the load. This has resulted in the Home being unsafe for habitation.

The Plaintiffs plead that these defects were latent defects and they did not discover them until employing expert assistance and receiving a report in May 2020.

[87] With respect to the plumbing, the plaintiffs plead:

> On December 16, 2013, Ramar arranged for an inspection of the underground plumbing. After the inspection, Ramar made changes to the underground plumbing which Ramar made [*sic*].
>
> The Plaintiffs plead that Ramar did not arrange for the underground plumbing to be re-inspected by HRM and neither disclosed nor discussed this with the Plaintiffs.
>
> The Plaintiffs plead that on March 4, 2014, Ramar arranged for an inspection of the rough-in plumbing. The March 4, 2014, Rough-in Plumbing inspection report noted that Ramar needed to ensure the plumbing vent stack was adequately supported, passed through the roof and that gases in the plumbing pipes corrected [*sic*] to ensure proper venting. Ramar did not comply with the HRM's directions to correct deficiencies with the rough-in plumbing.
>
> The Plaintiffs plead that the vent stack was not installed through the roof and vented the gasses into the attic of the home. This created a toxic mould problem within the attic and walls of the Home.
>
> Ramar did not arrange for the rough-in plumbing to be re-inspected by HRM and neither disclosed nor discussed this with the Plaintiffs.
>
> The Plaintiffs plead that these defects were latent defects and they did not discover them until employing expert assistance and receiving a report in May 2020.

[88] Finally, the allegations concerning the "Tall Wall" are as follows:

> On March 4, 2014, Ramar arranged for an inspection of the framing of the Home by HRM building inspectors. Upon inspection, the inspectors requested Ramar provide an engineered schematic sketch for the "Tall Wall" component build on site at home that was already built. Ramar provided the engineering schematic drawings for the "Tall Wall" on March 6, 2014.
>
> The Plaintiffs plead that on March 7, 2014, HRM approved the Tall Wall schematic drawing in a supplementary inspection report. After the March 4, 2014 inspection, Ramar made further structural changes to the framing, including to the Tall Wall. These subsequent changes were not disclosed to the Plaintiffs or to HRM.
>
> The Plaintiffs plead that Ramar did not arrange for the Tall Wall to be re-inspected by HRM and neither disclosed nor discussed this with the Plaintiffs.
>
> The Plaintiffs plead that these structural changes to the Tall Wall made the Home structurally unsound and unsafe for the Plaintiffs to inhabit it.
>
> The Plaintiffs plead that these defects were latent defects and they did not discover them until employing expert assistance and receiving a report in May of 2020.

[89] As against Ramar, the plaintiffs plead the following causes of action:

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> The Plaintiffs plead that Ramar breached the Contract by failing to:
>
> > Construct the Home in a workmanlike manner in accordance with the Code and municipal requirements;
> >
> > Properly have the Home inspected and re-inspected at property [*sic*] intervals of completion and correction; and,
> >
> > Provide proper disclosure of changes, deficiencies and corrections to deficiencies to the Plaintiffs.
>
> The Plaintiffs repeat the foregoing and plead that Ramar negligently constructed the Home by failing to adhere to its standard of care as set forth in the Code and municipal requirements.

[90] On the issue of damages, the plaintiffs plead:

> The Plaintiffs plead that the Home is a total loss and cannot be remediated. They must leave the Home and find other accommodations while they find a replacement home or demolish the Home and rebuilt it.
>
> The Plaintiffs plead that they have suffered personal injuries due to the stress of living in an unsafe house and because of breathing toxic mould for the past 6 years.

[91] The plaintiffs are seeking general damages, special damages, aggravated damages, and punitive damages.

The August 30, 2018 Stantec Report

[92] The plaintiffs and the defendants relied on the 2018 Stantec report, filed as an exhibit to the affidavit of Larry Marchand, for the truth of its contents. The Executive Summary at page ii states:

> Stantec Consulting Ltd. (Stantec) was retained by the [*sic*] Carmen Blinn and Kevin layes [*sic*] (Client) to perform a Deficiency Assessment (DA) for the residential property located at 31 Alben Lane, Wellington, Nova Scotia.
>
> The site observation work was performed on 7 July, 2018 by Brian Doucette (Senior Technologist) and 20 August, 2018 by Brian Doucette, Leif-Peter Fuchs (Architect) and Bill Pay (Structural Engineer). Access to the property was provided by the client.
>
> …
>
> Based on our findings, we have identified deficiencies to a total cost of:
>
> > $95,680 for Exterior Work
> >
> > $53,075 for Interior Work

> A total in the order of magnitude of $148,755 for deficiency remedial work is required.

[93] Under "Scope of Work" at pages 1-2, the report states:

> The scope of our work included interviews with the client, and a generalist (i.e., non-specialist) visual "walk through" assessment of major building/site systems to observe and document existing physical conditions.
>
> …
>
> The scope of our work performed is summarized as follows:
>
> - Reviewed existing documentation, where available and where provided by the Client.
> - Conducted a visual walk-through assessment of the site and building systems to check their general physical condition.
> - Conducted an interview with the client.
> - Identified and financially quantified our opinions of probable costs (in current dollar values) for work that is expected to be required.
> - Prepared a DA report
>
> The assessment of the site was based on a visual walk-through review of the visible and accessible components of the property, building(s) and related structures. The roof surface(s), interior and exterior wall finishes, and floor and ceiling finishes of the building(s) were visually assessed to check their condition and to identify "physical deficiencies" where observed. The assessment did include limited intrusive investigation of wall assemblies and attic space. No physical tests were conducted and no samples of building materials were collected to substantiate observations made, or for any other reason.

[94] Under "Exclusions", at page 2, the report states:

> Exclusions include the following:
>
> No reviews of municipal/public records for zoning, building, and/or fire & life safety code/regulatory compliances were conducted. Where we did see building code violations, they are noted in the commentary and included in the required work.
>
> Verification of the property's compliance with barrier-free accessibility requirements was not conducted.
>
> Investigation of whether or not the property resides in a flood plain was not performed.

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[95] Physical limitations to the scope of work are addressed at page 4:

> Stantec’s work did not include laboratory testing/investigation, excavation, testing of life safety systems or quantitative testing. As such, any recommendations and opinions of probable costs associated with these recommendations, as presented in this report, are based on walk-through non-invasive and limited invasive observations of the parts of the building(s) which were readily accessible during a visual review. Conditions may exist that are not as per the general condition of the system being observed and reported in this report.

[96] Under the heading “4.1.3 Building Framing”, the report states at pages 7-8:

> The concrete, lumber, drywall compound and most materials used in the construction of a newly built home can contain a significant amount of water, most of which evaporates during a home’s first few years. The drying process can create gaps between floorboards, cracking of drywall and shrinkage cracks in foundation walls. Drywall cracks are commonly associated with normal shrinkage and the settlement process. Cracks will typically occur in drywall compounds at joints particularly at corners. The interior wall and ceiling surfaces show cracking and nail popping which were noted to be typical of normal shrinkage and settlement.
>
> Photos were provided for our review from construction along with the truss manufactures [*sic*] shop drawings. Shamrock Truss was contacted, and a framing layout plan was provided for the revised layout. …
>
> Shamrock Truss provides references to Building Component Safety Information (BCSI) Guide to Good Practices for Handling, Installing, Restraining and Bracing of Metal Plate Wood Trusses and Ramar construction would be responsible for the installation of the trusses. The BCSI Guide is the established industry practice for the installation of engineered wood trusses. Any field modification that involves cutting, drilling or relocation of the trusses shall not be done without the approval of the truss manufacturer or design professional. **It was reported that there were site modifications made prior to installation of the roof which involved the roof line being increased by approximately 2’6”.** No documentation confirming if this information was provided to the truss manufacturer was available. **Information on how this extension was completed was not available at the time of this report. It was reported by the owner that some of the trusses were cut/modified on site however this was not able to be confirmed.**
>
> [Emphasis added]

The 2019 Trial – The Plaintiffs’ Evidence

[97] Transcripts from the 2019 trial are in evidence through the affidavit of Darrell Marchand.

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[98] Consistent with Ms. Blinn's evidence, the transcripts indicate that the plaintiffs attempted to advance claims for some of the deficiencies they are now claiming in the 2020 action. There is reference to the foundation being too low, water in the garage, modification of the trusses, the installation of a 2-foot 8-inch jack wall or "knee wall" onto which the trusses were placed, and a failure by Ramar to provide HRM with all the house plans.

[99] Mr. Layes discussed the trusses and the knee wall in his evidence on November 13, 2019:

MR. DONOVAN:	So, the question is, wherever you obtained it then, what, what was the significance of the picture of the knee wall?
MR. LAYES:	Well, after receiving the answers to the undertakings, I went back and read Ryan Marchand's discovery transcript, and in it he had been talking about a knee wall and using a knee wall to raise the upstairs. And I didn't know what a knee wall was.
MR. DONOVAN:	So, you obtained that drawing.
MR. LAYES:	Yeah.
…	
MR. DONOVAN:	Return to tab 34 in exhibit one. The second-last page there's a coloured drawing – illustration I suppose I should say – but…
THE COURT:	It's page 14, I think.
MR. DONOVAN:	Page 14?
MR. MASON:	That's what I have, My Lord, page 14.
…	
MR. DONOVAN:	Yeah, page 14 is the one I wanted to refer you to.
MR. LAYES:	Okay, yes.
MR. DONOVAN:	And in that, it shows the roof trusses resting on top of a wall of some kind. Um, was that ever referred to with you, as a knee wall?
MR. LAYES:	Yes. That's what Ryan calls it. He called it a knee wall.
…	
MR. DONOVAN:	So, they, they … Coming back to the drawing, then, uh, when was it that you were first able to access that drawing, and see what was there?
…	
MR. LAYES:	In August of this year.
MR. DONOVAN:	2019?
MR. LAYES:	Correct.
MR. DONOVAN:	What were the circumstances where you were able to access it?

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MR. LAYES:	Well, I had gone back to the emails from Scott Simm, and I had seen the plans – I could open those, those were sent to me in PDF – but these, at that time, I couldn't open; they were CAD. Or an odd program for us, for me. But in August I wanted to find out what exactly they were that was attached with those plans back in 2013, November 22nd, or 21st, 2013.
THE COURT:	**So, they were sent to you in 2013, September 21st, but you didn't have the CAD software to access it?**
MR. LAYES:	November 21st, yes sir.
MR. DONOVAN:	So, when you finally accessed them, you got a copy of this plan – this drawing – under tab 34, number 14, which shows the roof trusses resting on top of a wall of some type. Did you [unintelligible 10:12:18] knowledge that the roof trusses were installed in that way?
MR. LAYES:	No, I didn't. I didn't know that that's how they did it.

[Emphasis added]

[100] Mr. Donovan then took Mr. Layes to some photographs contained at Exhibit 6, Tab 1:

MR. DONOVAN:	Uh, and can you tell me if there's anything in those photos – 1.12 and 1.13 – that assists in understanding where the roof trusses are resting?
MR. LAYES:	The picture at one point – I took these photos, I took them from the vehicle as we were driving in to, to the house.
MR. DONOVAN:	And again, when did you take them?
MR. LAYES:	**That would have been in November of 2013.**
MR. DONOVAN:	Mm hm.
MR. LAYES:	**And uh, I mean, I see it now**… That is, if you look at picture 1.12, tab one, the, there's a, on each side of the building structure, there's a little, I'm going to say about three feet of a wall that's sticking up. And there's a two-by-four holding, or bracing it? And resting on top of it would be the trusses. So, this is to the left of the photograph.
MR. DONOVAN:	Mm hm.
MR. LAYES:	And then on the right of the photograph, you'll see additional trusses laying on top of a similar wall over there with a two-by-four brace to hold it. In picture 1.13, it's just as I got closer to the house, it's just another photograph of the same thing, and the upstairs here is under construction, so the framing is, is going on at this point.

> And then, if you look at picture 1.14, when I arrived, see the three green things at the bottom of the photo? That's where the septic is located, and that little, short wall is, you can see in the top, I'm going to say the top right corner of the photograph, with the brace? And in the other side of the structure you'll see that the roof trusses are already up, and they're sitting on that same, I'm going say three-foot, or approximately three-foot wall section that goes the entire length of the structure there.
>
> [Emphasis added]

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[101] Mr. Donovan reviewed several more construction photos taken by Mr. Layes of the trusses resting on the knee wall. The following exchange then took place:

MR. DONOVAN:	Okay, and what about the next photo, 2.9?
MR. LAYES:	Yeah, blurry photo. But this is a photograph of the, what's now the games room, or, or gym room. And those are the trusses hanging on the edge of that little wall upstairs. That's what that picture is. And there's bracing, as you can see, just holding up the trusses in the middle there.
MR. MASON:	My Lord, I'm going to stand. I'm not sure of the relevance of this line of questioning. There's an expert's report that's in evidence. It indicates that there's a few hangers on a truss that needs to be installed, and that's it. We're getting into all the details about trusses, and no expert opinion to say that there's anything wrong with these.
THE COURT:	Okay. I guess that's notice, Mr. Donovan, to keep moving fairly quickly. I'm kind of bogged down and haven't yet seen the significance of some of this evidence, even though I've read the briefs and am anticipating…
MR. DONOVAN:	Well, I, I, I can say…
THE COURT:	I'm anticipating stuff, but…
MR. DONOVAN:	…**I can say in general, that my friends are relying on HRM inspections for certain things and if the HRM didn't have all the materials when they did their inspections, that they'd be relevant to the issues. That's when we get to that.**
THE COURT:	Are you calling a witness from HRM to say what they had?
MR. DONOVAN:	**Uh, it depends on what my, uh, what, what the Ramar witnesses say. If they, if they agree that HRM didn't have all the relevant materials then I guess there's no need.** If I say…
THE COURT:	Okay, so…

MR. DONOVAN:	…[unintelligible] we may need a rebuttal witness.

[Emphasis added]

[102] With respect to the foundation, Mr. Layes testified on November 13, 2019:

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MR. DONOVAN:	Okay, can you tell us from your recollection, what experiences you've had with water in the garage, from the time you've moved into the property?
MR: LAYES:	It's, it's, it's… . During the summer, when it's uh, nice and sunny and dry it's not a problem unless it rains. If it rains, we have water come into the garage. In the winter, it's very bad. Our pavers are always ice, especially if it rains and then freezes at night. It's a skating rink, our front yard. And it's thicker at the house than it is at the road, so we..
THE COURT:	Sorry, s-s-thicker? Slicker?
MR. LAYES:	Thick, thick, the ice is thick, is thick to the point that you can't open the garage door – it will freeze it. And the concrete along the front of the garage door is all chipped and busted up because of the ice. When you go to, if it's frozen? And you open the garage the door overhead? It'll start tearing, so you gotta shut it off before you break the garage door opener. It freezes. So, it's, it gets pretty thick, the water, that is, and the ice. And they're pavers, so I can't really hack it, or anything like that, so I don't. We just don't use the garage in the winter. It's the… People come over, it's icy, it's really, it's scary, it's icy for people in our front yard. The…. If it's raining a lot out, you're, you're gonna be wear-, if you're wearing nice shoes, or something like that, your feet are going to get wet. We have water problems – not from the lake – not from the lake side, we have water problems from the roadside. And, and also, the ice can get thick enough that it'll be up underneath the siding, and that's what's making that siding at the bottom dangle all across the front. And, uh, I, we, we tried to do something with the pavers when we installed them, by having a drain, drains in the, in the pavers that would gather the water and take it ot the ditch. We even tried to, to bow it, but the problem is the road is higher and the foundation is lower, so even if you dug it out more and put

the bricks lower, the pavers for the driveway lower, all you're doing is making deeper water.

So, the foundation is about, it's about a foot too low in my opinion, only because of the…

MR. DONOVAN: No, don't, don't give us your opinion [laughs].

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[103] Carmen Blinn also testified regarding the photos they took during construction in 2013 which showed the 2'8" knee wall supporting the trusses (Darrell Marchand affidavit, Volume 2, Tab A4, pp. 112-114). Like her husband, she testified that the foundation was built too low to the ground (Darrell Marchand affidavit, Volume 2, Tab A5, pp. 12-16).

[104] Ms. Blinn also testified that she took 1500-1600 photos of the house during construction, and that she had given 1,300 photos to Stantec to assist them in preparing their 2018 report (Darrell Marchand affidavit, Volume 2, Tab A5, pp. 13-15).

Justice Warner's Ruling on The Motion for an Adjournment

[105] Following the conclusion of Ms. Blinn's evidence, Mr. Donovan introduced his motion for an adjournment, stating:

> MR. DONOVAN: Yeah. The uh, what we're uh, requesting, uh, is leave to file a supplementary expert report dealing with the sup-, the structural integrity of this house and whether the house, as built, is in compliance with the *National Building Code* and the HRM bylaws. And we're making this request because the plaintiff has good reason to believe that the HRM inspections that were done to secure uh, the uh, permits in this case were done by way of misleading building inspectors and concealing potentially dangerous structural defects in the house.
>
> (p. 229)

[106] He went on to indicate that his clients attended the HRM offices and learned that the final building plan which shows the increase to the height of the roof was not in HRM's file. Mr. Donovan took Warner J. through a variety of exhibits in an effort to establish that Ramar had submitted an earlier plan following the March 4, 2014 framing inspection, rather than the final plan which included the modifications to raise the roof. Mr. Donovan continued:

MR. DONOVAN: See, the concern, My Lord, is that as things stand now, uh, if these building permits uh – or, sorry – the, the, the occupancy permit is issued, the building permits were issued

on the basis of the information we have here, and HRM was not provided with the uh, the second Sani drawing, the uh, the plan of October 2013 was not provided with the CAD drawings, then their inspections would have been based on something other than was actually built, uh, and we would be in a situation where the house may well be structurally unsound because there were modifications made to the trusses, uh, without approvals from the engineers who designed them.

Uh, we have a situation where Mr. Layes uh, may have his million-dollar house that he may not be able to occupy or sell, uh, or otherwise insure, and what we want to do is to have uh, Stantec, uh, confirm or review the structural integrity issue, uh, review the HRM uh, permitting information and provide an opinion on whether the house is structurally sound, and the house as built is in compliance with the National Building Code and the bylaws.

And the reason that we're proposing this uh, is that if we don't do it now, in the midst of this case, when uh, we're, Your Lordship has already heard an abundance of evidence about this, this matter. **If, as a result of the, a determination that the house is structurally unsound uh, and we're not able to deal with it in this case, we're going to have to deal with it in another case. Uh, and in terms of uh, judicial economy and the interest of justice, I think it's best to be dealt with in this case.**

THE COURT: Um, before I hear from Mr. Mason, the struggle I'm having factually, is I can't believe that inspection reports would have been in a different file, unrelated, and stored by the City of Halifax, unrelated to any building permit applications and drawings and approvals that would have been given in the first place.

It makes no sense to me that the court would have before it, the only documents from the City of Halifax, the documents that are attached as tab 23 in exhibit two, when I can't believe it wouldn't have been in the same file [laughs] with the process from A to Z. Okay?

I'm, I'm struggling with the factual foundation upon which, um, upon which I can um, have reliable evidence. Uh, upon which I can um, have reliable evidence, which I'm skeptical of at the moment, that why I don't have the whole file – why I haven't got the full file when I believe they would have all been – I suspect – I find it… I can't believe an organization

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	that big with building inspectors and um, and I'm not, and I'm not drawing on my personal 47 years of being a lawyer, um, I…
MR. DONOVAN:	I just…
THE COURT:	I'm, I have, I'm struggling with the factual foundation of your motion.
MR. DONOVAN:	Wh-, wh-, wh… . No, not a word [?]. What I would say, My Lord, is that we are bringing this motion now, on the basis of the evidence we have. **And we're bringing it uh, because I, if we don't do it now we're going to be closing our case, we're going to be having a determination at the end of this uh, trial, as to whether various items within the house are paid for or not paid for, uh, and it may all be moot because we're going…. If, if the house is structurally unsound, uh, then, uh, things may not be fixed in it, it may not be occupied, and the… .** What we're asking for here is an opportunity, essentially, to use an adjournment that is going to take place anyway, uh, to…
THE COURT:	I haven't agreed to an adjournment, or a long adjournment.
MR. DONOVAN:	Well…
THE COURT:	I'd been pointing out the problems with regards to a six-day trial that lawyers scheduled for six days.
MR. DONOVAN:	Well, unfortunately I wasn't involved at that point…
THE COURT:	Not the judge.
MR. DONOVAN:	…but the…
THE COURT:	Okay, and whether it's you or your predecessor doesn't matter, you wear the hat.
MR. DONOVAN:	I understand [laughs].
THE COURT:	Okay?
MR. DONOVAN:	I, I understand that… I wear it today.
THE COURT:	Okay, yeah.
MR. DONOVAN:	But the, but the, the point is, that six days was obviously an unrealistic amount of time for the number of witnesses that, that were being called on both sides.
THE COURT:	Anyway, bottom line is there anything else you have to say with regards to your motion that, that, before I hear from Mr. Mason?
MR. DONOVAN:	**Well, my, my motion essentially, My Lord, is that uh, now is the time to do it, uh, because if we don't do it, uh, we're just inviting another uh, another lawsuit at another time.**
THE COURT:	Um, before I hear from Mr. Mason, um, Ms. [Kervin], can I see the pleadings? I think they're in a little envelope inside the file. ….
	…

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	Paragraph, paragraph 12 on the top, beginning at the top of page five outlines the claimed breaches of the contract. And it lists A to double B, um, as being the basis for the action that was commenced in 2014. Is there anywhere in that that it refers to trusses or the, or the structural um, the roof structure, or anything that's related to what you want us, at this stage, um, presumably to allow you to amend your statement of claim? To plead a "cc"?
MR. DONOVAN:	Twelve A says the foundation was not properly constructed.
THE COURT:	Right. I'm, I'm looking for something that relates… You're saying that there's an issue with regards to the trusses, and that the framing, the framing inspection report in response to it. You're suggesting that a plan that was sent was a plan that was not relevant – was, was the wrong plan. Uh, in response to a March 4, 2014 framing inspection in which the inspector um, discussed the trusses at point two of his inspection report, and asks for engineering for the tall wall that must be reconstituted, which I assume meant it had to be changed from whatever they were before. **And, and on its face, suggested they were aware of a change in the trusses and the tall wall – the great wall. They called it the tall wall, and…**
MR. DONOVAN:	Sorry, My Lord…
THE COURT:	…and, and, and I'm trying to find in the action that's before this court by the plaintiffs, Layes and Blinn, where there's a reference to anything, or whether this would be a new breach or a different breach other than that pleaded in 2014, which has been the process for the last five years, okay?
MR. DONOVAN:	Well, par-, paragraph six says the house is to be constructed in a workmanlike manner and according to the *National Building Code*…
THE COURT:	Yeah, right, and then it goes on in paragraph 12 to plead the particulars of the breach of that contract.
MR. DONOVAN:	Yes.
THE COURT:	And it, and it identifies and pleads, in particular, whatever number a BB amounts to. I guess that's 28 particular breaches of the contract.
MR. DONOVAN:	Mm.
THE COURT:	Okay? I'm not trying to be funny, but aren't you halfway through a trial – or part way through a trial – seeking to, to, uh, claim an additional grounds for the breach of the building contract?

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MR. DONOVAN: What we're dealing with is a situation where my clients first learned uh, of the structural issues based on the documentation…
THE COURT: Well, they had… All he's learned is he believes the plan that was attached in response to April 4th, was, was the plan of September/13, September 6/13. That's what, that's what, that's what…
MR. DONOVAN: No…
THE COURT: …the factual foundation you're asking the court to find.
MR. DONOVAN: Well, we also learned that the October 13th house design plans were not part of the materials that uh, were produced by HRM and we have no reason to believe that those plans were in the file.
THE COURT: No, you have to prove, not the other side.
MR. DONOVAN: Yeah. Well, we can testify to what he asked for and what he received.
THE COURT: Well…
MR. DONOVAN: **Coming, coming back to our, your question, uh, uh, of the things that are listed here, uh, if the circumstances are that the house is not structurally sound, uh, or that it doesn't comply … the inspections were not done in accordance with the building bylaws, then we'd move to amend to deal with that.**
THE COURT: Okay. Okay, thank you, that's your reply to my question about pleadings.
MR. DONOVAN: Yeah. I don't see those, those two issues spelled out in detail in the pleadings issued in 2014 …
THE COURT: Correct. And there was no amended statement of claim at some point in time in this process?
MR. DONOVAN: No, that, this is the statement of claim.
THE COURT: No. Okay, thank you. Mr. Mason, um, will I hear from you?

[Emphasis added]

[107] Mr. Mason's submissions were as follows:

MR. MASON: Thank you, My Lord. I don't profess to have 47 years of practice, My Lord, like you do, I've got 25. This is the first trial I've been in the middle…
THE COURT: You're 25?
MR. MASON: Twenty-five.
THE COURT: Uh, no.
MR. MASON: I wish I was 25, My Lord. [laughs].
THE COURT: Okay.
MR. MASON: [laughs] I feel like I'm 105.

THE COURT: Yeah, all right.

MR. MASON: This is the first, uh, trial that I've had in 25 years where there's been a request for an adjournment, in the middle of the trial, in order to get expert evidence to prove the plaintiff's claim. First time.

So let's look at the history a little bit of this case, what's occurred. Because what we've had is we've had a moving target. Ramar's had a moving target with the other side, trying to figure out exactly what they're claiming in this case.

Started in discovery, where we thought the issues were about the well, then it changes once, after we get the Stantec report, then some other issues. Now it's changing again, into some issues with the HRM, uh, and with uh, with drawings that were provided, constantly changing. The history in this file, My Lord, we know the rules. We know the rules are expert reports to be filed within six months of the finish date.

This trial was originally scheduled for October of 2018. We were ready to proceed. On the even of the finish date, in 2018, Mr. Donovan's predecessor, Mr. Pineo, wrote to the court requesting adjournment at the last minute in order to get expert evidence so that they would be able to present their case in October of 2018.

THE COURT: When was that finish date?

MR. MASON: The finish date was in July. it was mid-July, 2018, for the trial in October of 2018. The motion was heard by Chief Justice Smith, Associate Chief Justice at the time. And, My Lord, if you listen to the tape of that uh, hearing, they were within a whisper of not getting that adjournment. They got it. It was clear from the court at that time, that all expert evidence that was provided to Mr. Layes and Ms. Blinn, was to be produced, and supplied, by August 31st, 2018. Full stop. No more expert reports. That's it.

We had a period of time to provide a rebuttal report, which we did. The trial was then scheduled to March of 2019. Ramar was good to go again. At the eleventh hour, Mr. Pineo had an illness and was required to request – or requested – a further adjournment of the trial. The trial was then scheduled for July of uh, 2019.

My friend became involved, uh, on behalf of Mr. Layes and Ms. Blinn. They attempted to file an addendum uh, to their expert's report, from Stantec in June of 2019, which we've objected to. Because of the nature of this file – and, of course, in July, My Lord, we know what happened 2019, and unfortunately the court

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didn't have an available judge, so the matter then got set over to the dates that we're now, uh, in court.

In October – October 29, 2019 – my associate, or my partner, Mr. Jones, wrote to Mr. Donovan to confirm that the only expert evidence that we were relying upon was the evidence that we had uh, supplied to the court.

THE COURT: Sorry, when was.. who wrote?

MR. MASON: October 29th, by way of email.

THE COURT: Of this year?

MR. MASON: This year. There's not a document in there to confirm that, My Lord, but my … because we just found out about this motion this morning. Mr. Jones was able to check his phone to look at his emails, and he was able to confirm. I've reviewed them, the October 29th email that was sent to Mr. Donovan, and then Mr. Donovan's reply on October 30th.

THE COURT: The, and the substance of that email exchange was what?

MR. MASON: The substance was Mr. Jones was asking Mr. Donovan to confirm that the expert that we had uh, files is the expert evidence that the parties were relying upon. Mr. Donovan replied, on October 30th of 2019:

> These are the only experts we'll be relying upon.

Now, now that you've seen it, I understand my friend is making some kind of argument that Mr. Layes didn't become aware of the HRM file until subsequent, uh, August of 2019**. Quite frankly, that file was available for both parties to obtain, My Lord, prior to [trial]. That's not the fault of Ramar. Either party could obtain it.**

The issue of trusses has been something that Stantec was asked to investigate back in July of, sorry, August of 2018. You saw some of the emails between Ms. Blinn and Stantec, that I went through with her in cross-examination this morning.

There's no surprises here. The evidence isn't all of a sudden different. And you're quite right – in terms of the factual foundation, in terms of the HRM, we have nobody from HRM testifying in this trial to say what evidence they have, what evidence they, they, they don't have.

We don't have any expert evidence to say – let me be the devil's advocate for a minute – that there was any requirement on Ramar to provide revised drawings to the HRM to show that the frame

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had gone from 21 feet to 26 feet. We don't have any of that. None of that's before you.

What's before you, is a request by Mr. Layes and Ms. Blinn to adjourn a trial on day five of the trial. This is not an adjournment request**. Because, if that motion were granted, we're talking about a new trial.**

We're not going to be bringing in expert evidence at this stage, different expert evidence halfway through the trial. And me not have an opportunity to ask questions of the witnesses, who've already testified, about their case. I mean, this is an extraordinary request by the, by Mr. Layes and Ms. Blinn. And categorically, it has to be shut down. Enough is enough.

We are here; we are moving forward with this trial, and a request day five of the trial is not the time to be making it.

So My Lord, I'm not gonna beat the drum too much on this, but uh, our position is very clear. There should be no adjournment, no additional expert evidence coming in at this point. The parties have prepared on the basis of the expert evidence that we have. We are now well invested into this trial, and to allow an adjournment at this stage is really to declare this a mistrial and we're starting fresh, which is not anything that Ramar wants. Subject to any questions you have, My Lord, those are my submissions.

THE COURT: You're not asking the court to declare a mistrial, or are you? Sorry, Mr. Mason I'm talking to.

MR. MASON: Oh, sorry, My Lord?

THE COURT: Uh, are you asking the court to declare a mistrial?

MR. MASON: No, we're, we're asking the court to deny the motion so we can proceed.

THE COURT: Okay, I just thought the last sentence you said implied you may be looking for a mistrial.

MR. MASON: No, it uh, if uh, if Your Lordship was to go in that direction, we would have further submissions. But at this stage, uh, this matter needs to proceed.

THE COURT: Yeah. Mr. Donovan is uh, have you uh, anything new in reply? Did he throw a curveball at you?

[Emphasis added]

[108] Mr. Donovan made the following brief submissions in reply:

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MR. DONOVAN: Uh, just a couple of points. Um, the, my friend referred to the rule requiring experts' reports six months before the finish date - it says six months before the finish date, or as ordered by the judge. Uh, so obviously we're relying on the second part.

Um, and in terms of my confirming with the, or not calling any other experts other than the experts that we're calling, um, we're proposing to have the same expert deal with a different subject matter. Uh, and this, obviously developed at the, in, in the course of … there was no basis to bring the motion until Mr. Layes' evidence was provided.

THE COURT: Mr. Mason, uh, indicated that, that in his examination of Ms. Blinn, the issue of the trusses or the roof structure was dealt, was one of the issues put on the table with Stantec in 2018.

MR. DONOVAN: They were…

THE COURT: Is that, is that correct?

MR. DONOVAN: Uh, it depends on how you interpret the…

THE COURT: What's the docu-…

MR. DONOVAN: … exhibit 16. And the only indication is, this is a letter from Ms. Blinn to – or, email, I should say – to uh, to [Leif] Fuchs and Bill Pay. Uh, and what was being quoted is a, is at section three:

> We would like you to do any invasive investigations as necessary to determine the quality of work performed. We would like your firm to enter confined spaces and be able to determine the quality of work performed. We would like your firm to enter confined spaces and be able to investigate any confined space to have a look at trusses if possible.

Um…

THE COURT: The next sentence: We'd uh…

MR. DONOVAN: We would like you to look at municipal-held documentation for the site, uh, building records department, so obviously…

THE COURT: We can obtain copies.

MR. DONOVAN: ..we can obtain copies.

THE COURT: That was on June 15th, 2018.

MR. DONOVAN: But, obviously the uh, scope of work as ultimately defined, was narrower than, than what she is talking about there. [Unintelligible]

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THE COURT:	The topic was on the horizon. Whether or not the pleadings specific that the trusses were or were not compliant with the building code provisions, um, Ms. Blinn was asking Stantec in June of 2018 to look at the municipal documents, building records department, and that she – we – can obtain copies. That's the, that's uh, 14 months before it happened – 15 months before it happened.
MR. DONOVAN:	And the, the scope of the work ended up being defined more narrowly than that.
THE COURT:	But it was on the horizon of the plaintiffs, even if the pleadings didn't indicate anything related to trussing or roof structure. Is that fair? Or am I, am I not being fair in that factual context?
MR. DONOVAN:	I would say that it was a concern, uh, but they, they did not have the factual basis to cause them to believe they needed to conduct further investigations on that …
THE COURT:	Except…
MR. DONOVAN:	… beyond mentioning it as a possible thing for the experts to do.
THE COURT:	Right. And that they, that the plaintiffs would obtain copies. They wanted them to deal with the building department records.
MR. DONOVAN:	[Unintelligible] so if, if the ex-, if the experts had asked for it, they could have got them.
THE COURT:	Anything else, Mr. Donovan?
MR. DONOVAN:	Uh, no, I think that's it, My Lord.

[109] Justice Warner denied the motion for the following reasons:

THE COURT: Um, Civil Procedure rule one, consists of one sentence:

> These rules are for the just, speedy, and inexpensive determination of every proceeding.

Um, civil court cases are not free-for-alls. The first requirement in a civil proceeding is to file an action, or an application, and to identify, in the case of an action, a description of the parties, a concise statement of the material facts relied on by the plaintiff, but not argument or the evidence by which the material facts are to be proved. Reference to legislation relied upon if mat-, if the material facts make legislation applicable and a concise statement of the remedies claimed except costs.

In this case, on October 28th, 2014, the plaintiffs filed an action in which they claimed the existence of a building contract, and a breach of the building contract, the particulars of which they set out in paragraph 12 – 28 particulars. That statement of claim is compliant with the requirements of Civil Procedure rule 4.02 sub four, whose purpose is to give notice to the other side in a concise and precise way of

what the claim is. This matter has proceeded on the basis of the statement of claim and the statement of defence for five years.

I accept the representation made by Mr. Mason, that the matter was set down for trial in October of 2018, with a finish date of July 2018, that the plaintiffs asked for an adjournment of the trial. I'm not going to comment on whether it was a close decision as to whether the adjournment was granted or not, but the adjournment was granted. It was rescheduled for March, and by reason of circumstances beyond the control of either party – the illness of Mr. Pineo – the March scheduled date was adjourned to July, the July date was scheduled by the unavailability of judges during the summer to hear a civil case – presumably in six days.

Mr. Donovan asks, on behalf of the plaintiffs, on the basis of documents obtained sometime late in the summer of 2019, from the building inspection office of Halifax, and it's not clear to the court what was asked for, or what was provided, as the court has no evidence from anybody from the City of Halifax building inspection office.

On the basis of the documents in tab 23, whose re-, the order, uh, which do not necessarily satisfy me in the format that they have, that the, that the Sani drawing of September 6th, 2013, which is page seven of the tab, is the PDF file referred to in the Katherine Lewis email that's page six.

The court's concern with regards to the issue arises form the fact that the framing inspection report, which would have included, among other things, the truss issue, was dealt with expressly by the inspector in his March 4th, 2014, report.

My bigger concern is that on June 15, 2018, a month before the finish date, and before the plaintiff's request for an adjournment, before A.C.J. Smith, the plaintiffs wrote to Stantec seeking that they enter confined spaces or be able to investigate, to look at the trusses. Clearly, the issue that is not pleaded in the statement of claim, but which is the proposed subject matter of an adjourned expert report and advising that they wanted the engineers to look at the municipally – municipal-held documents for the site's building records department and we can obtain copies.

These communications preceded the request for an adjournment, and an extension of the finish date, which was granted, and new trial dates set.

A request is made in day five of a six-day trial – after the two plaintiffs have testified – to seek an adjournment for an expert report to deal with whether the trusses, or roof structure I presume, comply with the provisions of the *National Building Code*. The stated ground for it is the document attached at page seven, to exhibit two, tab 23. On the representation, sorry, at page seven on the basis that that is the document referred to in the email from Ramar at page six, in response to a framing inspection of the trusses. That's page five of that exhibit.

The request for the adjournment is, in my view, late. It would disrupt the basis for orderly civil proceedings in the Supreme Court. The rules are there to make the

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system just, inexpensive and expedient. And speedy, sorry. **It would not be speedy to allow an amendment to a statement of claim that does not allege structural or roof deficiencies in 2014 in the middle of a trial in 2019, when, from the evidence I've heard to date, it's clear that the parties could see an issue and asked engineers in June of 2018 to look into it.**

That was in June of 2018, we're in November of 2019. It is, it is (a) untimely, (b) would add to the expense of a process that, in my view, is excessive in the context of the pleadings and materials that I've heard to date, not focused whatsoever.

It would be unjust to the defendants after the plaintiffs have been examined, to give an adjournment to amend the statement of claim to include a new claim deficiency – a fairly major one, actually not fairly major, but major one I suspect – part way through a trial that's been adjourned a couple of times for more than a year and a half and is five years after the fact. When people sue, they have to give precise statements of the material facts upon which they rely, when they sue.

Um, it may be that this court will have to set new days to continue this trial. From the opening of the trial, I've expressed concerns about the fact the matter was scheduled by the parties for six days, and at no point, until yesterday, did anyone say: We think we need eight more days.

That's an abuse of the civil procedure and court system. It denies people access to justice to tie up one of 20 some-odd judges for 14 days on a matter that was not ready for trial. There's an obligation on the participants in the process to be ready to go if they're going to call on the resources of the courts to settle civil disputes, or to determine civil suits.

The only consideration um, that would go in the other direction I'm aware of, is the fact that for – if for any reason – the plaintiff thinks they have a claim with regards to the status of the structure, the truss structure, the roof structure of the property, and they have not pleaded until they're at trial, and they haven't investigated it until they're at trial, that it may end up having another duplication of the process if they insist on spending the money to do it. Which, on paper, they have the right to do.

But at the same time, the court has the right to control its own processes. I have often, at the beginning of a trial said if it's for one day, said each side has three hours to do everything they've got to do, and courts and civil proceedings do that regularly. And I regret that I didn't do that a week ago Tuesday. It would have forced everyone to get right to the nub. It would have applied to both sides equally. And it would have applied on the basis that it was the parties who estimated, and asked, the court for six days.

Um, granting an adjournment to bring in expert reports, when our rule 55 suggests people should have six months before they have to go to court in order to receive the expert reports to determine if they need to get their experts to rebut it, um, is not a mere inconvenience. It's a delay that means this trial would effectively be delayed for at least nine months. It would require possibly more discoveries, and it

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certainly would require the possibility of duplication of the evidence of the two parties who've spent five days on the stand. It's a complete and utter misuse of the court system.

The motion is dismissed, and I apologize if I went on in fairly aggressive terms as to why this is not a proper use of the civil courts of Nova Scotia.

Um, the parties have an obligation to only bring before the court not all their grievances, but only those which are relevant to the pleadings and material to the decision the court has to make. This is not Small Claims court; this is not a proceeding under Rule 57. Um, courts don't have unlimited resources. Uh, and justice isn't perfect, but it tries to be fair. It would be entirely unfair to have this process uh, amended or delayed or late expert reports on matters not pleaded in the statement of claim.

The motion is dismissed.

And, quite candidly, I shouldn't be hearing evidence with regards to the issue of the trusses because it's not one of the pleadings – one of the concise statements of material facts – that are set out in the statement of claim. There are 28 of them – quite a long list, but at least they're identified. And that's what this action is about, not some other issue that may be legitimate and bona fide, but it's not part of this proceeding. Okay?

[Emphasis added]

The Settlement Documents

[110] Following Justice Warner's decision dismissing the adjournment motion, the parties negotiated a settlement. The consent order, dated November 26, 2019, states, in part:

AND UPON IT FURTHER APPEARING that since the commencement of the trial of the consolidated action on November 12, 2019 the parties have reached a settlement **of the claims herein** and jointly request an Order of the Court to distribute the proceeds held by the Court, inclusive of any interest accrued, and the Court having heard the terms of the settlement and confirmed the intentions of the parties:

IT IS HEREBY ORDERED THAT:

The funds held by the Court under Hfx. No. 433686 and/or 432774, shall be paid out as follows:

Eighty Thousand Dollars ($80,000) to Michael F Donovan Law Inc., in trust on behalf of the parties Kevin Layes, Carmen Blinn and K Joseph Layes (Trustee) collectively;

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> the balance, including all interest accruing on the full amount paid into Court to the date of distribution, to Presse Mason, in trust, on behalf of the party Ramar Construction Ltd.

The parties are granted leave to discontinue this consolidated action without costs and shall file a Notice of Discontinuance forthwith upon the granting of this Consent Order.

[Emphasis added]

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[111] The Notice of Discontinuance, filed December 5, 2019, states:

TAKE NOTICE that the parties hereto, Ramar Construction Ltd., K Joseph Layes (Trustee), Kevin Layes and Carmen Blinn, wholly discontinue this action without costs to any party, in any event; in accordance with the Consent Order of the Honourable Justice Warner herein dated November 26, 2019.

[112] The Minutes of Settlement, dated November 21, 2019, state:

Without admission of liability, the parties to these Minutes of Settlement ("Agreement") agree to settle the claims of Kevin Layes and Carmen Blinn (collectively the Claimants), against the Defendant, Ramar Construction Ltd. in the within action and the claims of Ramar Construction Ltd. as Plaintiff, against K. Joseph Layes (Trustee) in the within action on the following terms:

> The parties agree that funds paid into court on or about December 10, 2014 totalling $261,263.55 under the within action, or under HFX No. 432774, which was consolidated into the within action by Order of the Court, shall be divided as follows:
>
> > $80,000 of said funds to the Claimants;
> >
> > The balance of any funds paid into Court, including any interest accruing on the total funds paid into Court, to Ramar Construction Ltd.

The parties will consent to any Court Order or execute any further documentation necessary to effect the distribution of the funds held by the Court as outlined above;

The parties agree to a discontinuation of the within consolidated action on a without costs basis, by Order of the court if necessary.

This Agreement shall be final and binding between the parties, their successors and assigns and may be signed by counsel on their clients' behalf.

The May 12, 2020 Stantec Structural Report

[113] As noted earlier, there was a dispute as to the use that could be made of the 2020 Stantec Structural Report. Ultimately, however, the outcome of these motions is not dependent on the report being admitted for the truth of its contents.

[114] The 2020 Stantec Structural Report identifies "numerous structural deficiencies and poor construction practices that have negatively impacted the residence" (page 30).

[115] The "Girder Truss Support Structure" in the Great Room is addressed at page 10:

> A structural analysis of the built-up post was completed to determine if the post was adequate to carry the intended load after the roof/ceiling was raised during construction. The capacity of the post is governed by the capacity of the 5 ply 2 x 4 section of the built-up post which was determined to have a factored resistance of 10,902 lbs (48.5 kN). The factored load on the post from the girder truss is 11,730 lbs (52 kN) as provided by the truss manufacturer. **The capacity of the upper section does not have enough capacity to support the design loads as a result of the increase in roof height.**
>
> Upon review of the manufacturer's shop drawings or the fabrication of the girder truss and the supporting elements, **it can be concluded than [*sic*] the timber column is not adequate to transfer the intended loads to the foundation.**
>
> [Emphasis added]

[116] The "Tall Wall" in the Great Room is addressed at pages 15-16:

> Tall Wall is located on the east elevation of the home in the Great Room. The design for the Tall Wall was prepared by SANI Engineering, (Appendix A). It was reported that the Tall Wall was originally constructed as detailed in the September 6, 2013 drawing. A revised design drawing was provided dated November 26, 2013 to accommodate a revised building height. Modifications to the Tall Wall structure and revisions to the residence should have been provided to HRM for approval. Meetings with HRM indicated that they did not receive revised drawings associated with the change to the building height or Tall Wall.
>
> Photos provided by the owner from construction confirms the construction of the headers for the lower and middle-level windows along with the installation of the girder truss post, Photo 24. At the time this photo was taken the headers for the top-level windows were not installed. It was reported that the smaller windows depicted in the September 6, 2013 drawing were installed and HRM representative, (Katherine Lewis) was on site to conduct a framing inspection on March 4, 2014, with deficiencies that included a request for the engineered drawing for the Tall Wall. An email provided by the owner indicated that the September 6, 2013 Tall

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> Wall drawing was provided to HRM on March 6, 2014 by Ramar representative. A Supplemental inspection was completed by HRM representative (Troy Mansfield) on March 7, 2014 which approved the installation of insulation (Appendix F). An email provided by the owner sent on March 9, 2013 [*sic*] to Ramar representative indicated that the "windows in the highest row" were not correct and needed to be changed, as per the revised plans dated October 2013. The shorter windows at the high level and header were removed later in March 2014 and replaced. No evidence of a reinspection of the Tall Wall by HRM for this change was provided.
>
> …
>
> The top-level window headers were confirmed to have been modified from the September 6, 2013 design and are not in conformance with any of the designs provided by SANI Engineering or HRM approved plans.

[117] With respect to the north window header specifically, Stantec concluded at page 17:

> This header is receiving the load form [*sic*] the girder truss installed in the roof. The nailed connection between the header and the top plate is insufficient to transfer the loads from the girder truss. This header has not been constructed in conformance with the design or using good construction practices.

[118] As to the north and south window headers, the report states at page 17:

> It was reported that there were site modifications made prior to installation of the roof which involved the roof line being increased by approximately 2'8". This change in roof elevation was reported to accommodate headroom clearances for doors and hallway ceiling height requirements of 2.1m for the upper floor hallways as per NBC 2010 Part 9.5.3 Ceiling Heights.
>
> A short wall was installed at the perimeter of the second-floor level to facilitate the change in roof elevation. As previously noted, meetings with HRM indicated that they did not receive revised drawings for their review and approval for the change to the building height or Tall Wall associated with the 2'8" short wall that was installed. Truss manufacturer drawing notes "ALL SECOND FLOOR SLOPING FLAT TRUSSES SIT ON A 2X6 SHOE ON TOP OF THE PLYWOOD".
>
> Upon review of the design drawings, prepared by SANI Engineering, and the observations made on site we have confirmed that the construction of the north and south headers are not in conformance with the design for the Tall Wall or the truss manufacturer's drawings.

[119] Regarding the knee wall or "short wall", Stantec had no information on lateral loads that would be imposed on top of the short wall. As a result, it was unable to

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calculate whether the knee wall or "short wall" had sufficient capacity to support the roof trusses. Stantec noted, however:

> Based on the observations made during the site investigation and the review completed on the structural elements in the area and record documents provided by the owner, installation of the short wall was not submitted to HRM for review or approval. The installation of the short wall has resulted in issues associated with the increase in ceiling heights that included but are not limited to access to attic space, increased heating and cooling costs and aesthetics. The installation of the short wall is not in conformance with the HRM approved building permit drawings dated July, 2013 or for support conditions as noted in the truss manufacture's [*sic*] drawings.
>
> [pp. 24-25]

[120] With respect to the foundation and site drainage, the report states at page 29:

> A topographic survey was completed by Design Point Engineering and Surveying in December 2019. A site drawing dated January 7, 2020, was prepared with the elevations registered at multiple points in the residence and surrounding area to review the grading and drainage for the site. An elevation difference of 60 mm (2 3/8") was recorded between bottom sill plate (top of foundation) 14.50m and finished grade 14.44m. Commonly, a minimum of 150-200 mm (6"-8") is required to minimize the potential of the egress of water in the building. The difference in elevation will also minimize the potential of water damage to building framing and finishes. It was noted in previous architectural inspections that the building OSB sheathing was showing evidence of moisture damage at the foundation. NBC 2010 Paragraph 9:15.4.6 states that "*exterior foundation walls shall extend not less that [sic] 150mm above finished ground level.*"
>
> A mild grade slope was noticed at the front size of the residence. Using the data obtained from the survey, the slope was calculated to be approximately 0.67%. In order to ensure adequate drainage, a grade slope between 1% and 2% is ideal. The survey recorded areas at the front entrance of the residence where the slope changes direction, creating isolated lower areas and may result in ponding. **This supports the reports by the homeowner that there is ponding at the front of the residence and that there have been drainage issues.**
>
> Poor drainage and ponding at the front of the home create issues during the winter months the site does not have appropriate drainage associated with free/thaw cycling. **It has been reported and observed that water enters the garage during rain events and from snow/ice melt.**
>
> The top of foundation is not in conformance with the extension above ground requirements of NBC 2010.
>
> [Emphasis added]

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Discoverability

[121] Although abuse of process is the primary ground on which the Ramar Defendants are seeking summary judgment, whether there is a genuine issue of material fact as to when the claims were or ought to have been discovered for the purposes of the *Limitation of Actions Act* is pertinent to the abuse of process analysis. For this reason, it makes sense to deal with the motion for summary judgment before the Rule 88 motion.

The parties' positions

[122] The Ramar Defendants say the claims against them in the 2020 action are out of time and statute barred by reason of the *Limitation of Actions Act*. The Ramar Defendants submit that the *Act* establishes a two-year limitation period that would have ended in September 2017, based on the fact that the construction ended by September 2014, and the transitional provision in s. 23 of the *Act* would apply to limit the period to 2 years from September 1, 2015. The Ramar Defendants submit that the 2020 action, commenced on May 28, 2020, was filed more than two and a half years after expiry of the limitation period. They say the claims for compensation arising from breach of contract or negligence relating to the construction of the home would be well out of time. The claims for personal injuries would be subject to the extension provision in s. 12, but pursuant to s. 12(6), that would only extend the period by a maximum of two years. Accordingly, the Ramar Defendants say, the limitation period for the alleged injury claims would have expired, at the latest, in September 2019.

[123] The Ramar Defendants submit that all the claims advanced by the plaintiffs were discoverable during the first three years following the collapse of the home purchase transaction in September 2014. The Ramar Defendants submit that there is no legitimate reason why the plaintiffs could not have dealt with the current claims in the original action and at the trial in 2019. They say the plaintiffs are attempting to circumvent the limitation issue by alleging that they were unaware of the structural defects until receiving an expert report in May 2020. The Ramar Defendants submit that the notion of discoverability does not assist the plaintiffs in the case at bar. The plaintiffs had total control over the home from 2014 until the present and had ample opportunity to investigate and explore any deficiencies and employ any experts they wished to do so. Their decision to forego expert investigation for a period of time or await the receipt of an expert report does not extend the limitation date.

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[124] The Ramar Defendants submit that there are no material facts in dispute on the issue of whether the limitation period has expired, and the plaintiffs have not demonstrated that their claims have a reasonable chance of success based on discoverability. As a result, summary judgment should be granted with respect to the claims against Ramar for breach of contract and negligence.

[125] The plaintiffs' argument on discoverability was somewhat of a moving target. In their pre-hearing brief, they tied their discovery of the structural claims to their visit to HRM offices in early October 2019, where they learned that the third and final house plan was not in their building file. The plaintiffs stated that it was this information that prompted them to retain Stantec to perform a structural assessment of the home. The plaintiffs took the position that the structural deficiencies could not have been discovered in the summer of 2018 when Stantec first assessed their home because Stantec relied on the building inspection results in concluding that invasive investigations were not necessary. The plaintiffs stated at page 17 of their pre-hearing brief:

> The law does not require that Mr. Layes and Ms. Blinn engage in destructive testing of their home based on nothing more than a suspicion. The law does not require Mr. Layes and Ms. Blinn to proceed on the basis that those with whom they contract are deceiving or misleading them, absent any indicator to that effect. Mr. Layes and Ms. Blinn did everything that was reasonably diligent to investigate the deficiencies in their home in the first instance. However, as soon as it became apparent to them that the outcome of the building inspection of the Home was potentially fatally flawed, they took all available actions to fully investigate for latent defects. They then filed their action within a two-year time period after discovering the material facts underlying the Current Action.

[126] However, during oral argument, plaintiffs' counsel retreated from the position that the structural deficiencies were not discoverable until October or November 2019, conceding that the claims were in fact discoverable as of August 22, 2018, when Kevin Layes sent the lengthy email to Bill Pay at Stantec, outlining his concerns with the structure of the home. The plaintiffs submit that even with this earlier discoverability date, the claims were still brought within the two-year limitation period.

[127] Michael Donovan, the intervenor, argues that mere suspicion is insufficient to trigger discoverability, and that the plaintiffs only had suspicions when Mr. Pineo retained Stantec on May 31, 2018. He further submits that the reverse onus on the party relying on the discoverability principle to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired,

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discussed in *Milbury v. Nova Scotia (Attorney General)*, 2007 NSCA 52, needs to be revisited following the introduction of the current *Limitation of Actions Act* in 2015.

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The Summary Judgment Test

[128] The test for summary judgment on the evidence was set out in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 and reaffirmed in *Arguson Projects Inc. v. Gil-Son Construction Ltd.*, 2023 NSCA 72. In *Shannex*, the court stated:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> - **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]**
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton's* first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> - **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**
>
> If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton's* second test: **"Does the challenged pleading have a real chance of success?"**

  Nothing in the amended Rule 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

  It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

  If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

  This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

  A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[35] "*Discretion*": The judge's "discretion" under the amended Rule 13.04(6)(a) governs the option *whether or not to determine the full merits – i.e.* the Fourth Question. I disagree with Mr. Upham's factum that Rule 13.04(6)(a) gives the judge "unfettered" discretion to just dismiss Shannex's summary judgment motion. The Civil Procedure Rules do not authorize judges to allow or dismiss summary judgment motions on an unprincipled or arbitrary basis.

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> [36] “*Best foot forward*”**:** Under the amended Rule, as with the former Rule, the judge’s assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to “put his best foot forward” with evidence and legal submissions on all these questions, including the “genuine issue of material fact”, issue of law, and “real chance of success”: Rules 13.04(4) and (5); *Burton*, para. 87.
>
> [37] *Conversion to an application*: Lastly, the judge and counsel “must” bear in mind Rule 13.08(1)(b):
>
> > 13.08(1) A judge who dismisses a motion for summary judgment on the evidence ***must***, as soon as is practical after the dismissal, schedule a hearing to do either of the following:
> >
> > > (a) give directions for the conduct of the action, if it is not converted to an application;
> > >
> > > (b) on the motion of a party or on the court’s own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application.
>
> [Emphasis Added]

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[129] The Court of Appeal explained the role of the motions judge on a summary judgment motion in *Hatch Limited v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] ...
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, **or the appropriate inferences to be drawn from disputed facts.**
> >
> > 11. **Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.**

[Emphasis added in original]

[26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does "weighing the evidence" mean?

[27] *Black's Law Dictionary* (10th ed.) defines weight as follows:

> **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.
>
> *Black's Law Dictionary*, 10th ed, sub verdo "weight of the evidence"

[28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:

> Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence.

[Emphasis added in the original]

John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Vol 1 (Toronto: Little, Brown and Company, 1983)

[29] The *Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law.

[Emphasis added in original]

[30] Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

[130] Although the motions judge is prohibited from drawing inferences from disputed facts, the judge "may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts": *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11.

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[131] With respect to the “real chance of success” threshold, the majority of the Court of Appeal in *Coady v. Burton*, 2013 NSCA 95, described it as follows:

> [43] In the context of summary judgment motions the words “real chance” do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase “real chance” should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a “real chance of success” is the kind of prospect that if the judge were to ask himself/herself the question:
>
> > *Is there a reasonable prospect for success on the undisputed facts?*
> >
> > the answer would be yes.

[132] The majority went on to describe a reasonable chance of success as “a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation” (para. 87).

[133] In *Lameman*, *supra*, the Supreme Court of Canada noted at para. 19:

> We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. **A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future.**
>
> [Emphasis added]

The Limitation of Actions Act

[134] The *Limitation of Actions Act* establishes a two-year limitation period for most claims in the province of Nova Scotia. The general limitation period is found at s. 8 of the *Act*:

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8 (1) Unless otherwise provided in this *Act*, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

(3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is

(a) in the case of a continuous act or omission, the day on which the act or omission ceases; and

(b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

[135] The *Limitation of Actions Act* came into effect on September 1, 2015, and contains transitional provisions applicable to claims that arose prior to that date:

23 (1) In this Section,

(a) "effective date" means the day on which this *Act* comes into force;

(b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.

(2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.

(3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of

(a) two years from the effective date; and

(b) the day on which the former limitation period expired or would have expired.

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> (4) A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date.

[136] Under s. 23, subject to issues of capacity, the latest potential limitation period expiry date for a claim that is discovered prior to September 1, 2015 is September 1, 2017.

[137] The leading case on when a claim is "discovered" for the purposes of s. 8 of the *Limitation of Actions Act* is *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31. In *Grant Thornton LLP*, the Supreme Court of Canada considered s. 5 of the New Brunswick legislation, which is almost identical to s. 8 of the Nova Scotia statute. The court, per Moldaver J., noted that s. 5 of the New Brunswick Act codifies the common law discoverability rule, which establishes that "the limitation period is triggered when the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts on which the claim is based" (para. 40). As to the degree of knowledge required to discover a claim, the court stated:

> [41] As noted, the Court of Appeal disagreed with the motions judge on the extent of knowledge required to discover a claim under s. 5. The motions judge held that a plaintiff needs to know only enough facts to have *prima facie* grounds to infer the existence of a potential claim. The Court of Appeal, on the other hand, held that discovery of a claim requires actual or constructive knowledge of facts that confer a legally enforceable right to a judicial remedy, which includes knowledge of every constituent element of the cause of action being pled. Thus, on the Court of Appeal's interpretation, in addition to knowledge of a loss and causation, a claim in negligence would include knowledge of a duty of care as well as knowledge of a breach of the standard of care.
>
> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: **a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.**
>
> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), **a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant.**

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This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, **a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise** (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[45] Finally, t**he governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known.** In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). **Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds.** As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]

Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. **A plausible inference is one which gives rise to a "permissible fact inference".**

[46] **The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability** (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (*De Shazo*, at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP*

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Realty Inc. v. Emery Jamieson LLP, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

[47] In my respectful view, endorsing the Court of Appeal's approach that to discover a claim, a plaintiff needs knowledge of facts that confer a legally enforceable right to a judicial remedy, including knowledge of the constituent elements of a claim, would move the needle too close to certainty. **A plausible inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve.**

[48] It follows that in a claim alleging negligence, a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care. Finding otherwise could have the unintended consequence of indefinitely postponing the limitation period. After all, knowledge that the defendant breached the standard of care is often only discernable through the document discovery process or the exchange of expert reports, both of which typically occur after the plaintiff has commenced a claim. As the Court stated in *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 55:

> Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, <u>the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action</u>**.**

[Emphasis added in original]

Although the Court in *K.L.B.* was dealing with discoverability in a different context, the basic principle is relevant here. The standard cannot be so high as to make it possible for a plaintiff to acquire the requisite knowledge only through discovery or experts. And yet, that is precisely the standard endorsed by the Court of Appeal in the instant case. With respect, that standard sets the bar too high. By the same token, the standard is not as low as the standard needed to ward off an application to strike a claim. W**hat is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently.**

[Emphasis added; My Emphasis in bold]

[138] In noting that suspicion may be enough to trigger a plaintiff's obligation to exercise reasonable diligence to discover material facts, the court in *Grant Thornton LLP* cited *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, at para. 42. In *Crombie*, the Ontario Court of Appeal was dealing with s. 5(1) of the Ontario *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B, which provides:

> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

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(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

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[139] The court held that the motion judge erred in equating the plaintiff's suspicion of hydrocarbon contamination with actual knowledge of contamination:

> 42 That the motion judge equated Crombie's knowledge of possible contamination with knowledge of actual contamination is apparent from her statement that "[a]ll the testing that followed simply confirmed [Crombie's] suspicions about what had already been reported on" (at para. 31). **It was not sufficient that Crombie had suspicions or that there was possible contamination.** The issue under s. 5(1)(a) of the *Limitations Act*, *2002* for when a claim is discovered, is the plaintiff's "actual" knowledge. **The suspicion of certain facts or knowledge of a potential claim may be enough to put a plaintiff on inquiry and trigger a due diligence obligation, in which case the issue is whether a reasonable person with the abilities and in the circumstances of the plaintiff ought reasonably to have discovered the claim, under s. 5(1)(b). Here, while the suspicion of contamination was sufficient to give rise to a duty of inquiry, it was not sufficient to meet the requirement for actual knowledge.** The subsurface testing, while confirmatory of the appellant's suspicions, was the mechanism by which the appellant acquired actual knowledge of the contamination.
>
> 43 Finally, I note that the motion judge stated that the appellant's claims were "available and discoverable" well before April 28, 2012. While not determinative, this suggests that the motion judge adopted too low a threshold for discoverability and did not focus on what was necessary to her analysis: she was required to determine when the appellant had actual knowledge of the elements of its claim, and in particular that the property was contaminated by hydrocarbons, and when a reasonable person with the appellant's abilities and in its circumstances, ought to have known of the contamination. The fact that contamination was there to be discovered was of course not sufficient to start the limitations clock.
>
> [Emphasis added]

[140] In the present case, discoverability is being considered in the context of a summary judgment motion. The leading decision on the approach to summary

judgment on the evidence in the context of a limitations defence is *Milbury v. Nova Scotia (Attorney General)*, *supra*. Although *Milbury* was decided under the previous iteration of the *Limitation of Actions Act* and the 1972 Civil Procedure Rules, "it has been consistently adopted in subsequent cases as properly describing how the *Shannex* framework should be applied to a limitations defence": *Wright v. Ratcliffe*, 2023 NSSC 287, at para. 32. In *Milbury*, the Court of Appeal stated:

> [20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired? …
>
> …
>
> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule …
>
> [24] In the context of a summary judgment application where a limitation defence is pleaded, **the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired.** Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. **Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle.**
>
> [Emphasis added]

[141] The intervenor submits that the analysis in *Milbury*, which he says puts a "reverse onus" on a plaintiff to lead evidence that the statutory limitation period has not expired, is no longer appropriate and should be revisited. The Court of Appeal in *Milbury* was dealing with the former *Limitation of Actions Act*. Under that legislation, most statutory limitation periods began to run from the accrual of a cause of action. Those statutory limitation periods were then subject to the common law discoverability rule. On a motion for summary judgment, once the defendant established that there were no genuine issues of fact on the question of whether the plaintiff's action was statute barred, it fell to the plaintiff to establish a real chance of success by presenting evidence that the limitation period had not expired due to the discoverability rule. The current *Limitation of Actions Act*, however, codifies the common law discoverability rule. In other words, the statutory limitation periods begin to run from the date of discovery. As a result, unless the 15-year ultimate

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limitation period has expired, it is no longer possible for a defendant to meet the "initial threshold" under *Milbury* of establishing that there are no genuine issues of material fact on the question of whether the plaintiff's action is statute barred without confronting the issue of discoverability.

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[142] The intervenor argues that the proper approach under the current limitations regime is for the Ramar Defendants, as the applicants for summary judgment, to have the burden to prove that the plaintiffs' claims were commenced more than two years from the day on which the plaintiffs discovered them. The intervenor states at page 12 of his modified brief:

> Given this movement away from a limitation measured in years from the breach, and with due respect to the Court in *Jesty*, it is submitted that the reverse onus in *Milbury* needs to be reconsidered. It is submitted that Ramar, as an applicant seeking summary judgment, should have the burden that all such applicants do, namely, to establish what they allege. This means that it is Ramar's burden to establish that there is no genuine issue of fact that this action was commenced more than "two years from the day on which" the Plaintiffs discovered the claim. It is no longer sufficient for Ramar, as applicant, to establish that the action was commenced more than two years following the alleged breach, with the Plaintiffs then being required to establish when they discovered the claim.

[143] While there is some logic to the intervenor's proposed approach, it fails to account for s. 9 of the *Act*:

> 9 (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).
>
> (2) A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b).

[144] Placing the burden on the claimant to prove when they discovered a claim makes sense. In the Nova Scotia Department of Justice's *Discussion Paper on Limitation of Actions Act*, published in April 2011, the Department explained the rationale for this provision at page 15:

> This provision clarifies the burden of proof in respect to the discovery limitation and the ultimate limitation.
>
> This provision follows the approach taken by the Manitoba Law Reform Commission who followed the same provision in the Alberta Act that was recommended by the Alberta Law Reform Institute that was in turn followed by law reform commissions in Australia and the UK.

> The Manitoba Law Reform Commission has conducted a helpful review of the law on this topic in its report. The Commission notes that the Canadian law, and Australian and UK law, is not clear on the burden of proof respecting limitations.
>
> The provision has a rational basis. Once the limitation has been raised, it is logical for the claimant to prove that the discovery period has not expired because the claimant has knowledge of the matters relating to the test for discoverability, such as the date of discovery, that the injury was attributable to the conduct of the defendant, and it was sufficiently serious to warrant bringing proceedings. Also, the claimant would have the necessary evidence.
>
> As for the expiry of the ultimate limitation period, it is logical that the burden of proof rest with the defendant because the defendant is best placed to know the date of the act or omission and should arguably carry the burden of the defence as a general principle.

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[145] The Manitoba Law Reform Commission, in its July 2010 report titled *Limitations*, wrote at pages 46-47:

> It is trite law that it is for the defendant to plead the limitation defence. As a defence it must be pleaded or the defendant cannot rely on it at trial. But the question of who then bears the burden of proof of persuasion on that issue is a surprisingly obscure one, and few texts even touch upon it.
>
> Intuitively, the common lawyer will be inclined to respond that 'he who asserts must prove', and to conclude that it should be for the defendant to bring himself or herself within the protection of the statute by showing that the cause of action was complete and actionable, or, as the case may be, that its actionability was known or discoverable, at a date so early that the limitation had expired before the statement of claim was filed.
>
> The discussions that exist in texts do not, however, support this view. Mew, for example, states as follows:
>
>> The burden is initially on the defendant to plead a limitation defence. That having occurred, however, the plaintiff will be required to show when time began to run or that some other basis for overcoming the limitation defence (for example, fraud, disability, waiver or estoppel) exists.

[146] The Alberta Law Reform Institute, at page 74 of its December 1989 report titled *Limitations*, articulated three reasons for placing the burden on the claimant:

> There are three reasons for placing the burden of proof under the discoverability rule on the claimant. First, when a claimant first knew something is based on his state of mind, and is a subjective matter peculiarly within his own knowledge. Second, the objective written or oral evidence of what a claimant was told will usually be more available to him than to the defendant. Third, the objective

> evidence about when a claimant ought to have discovered the requisite knowledge will also probably be more readily available to the claimant.

[147] In my view, when a summary judgment motion is brought based on an expired limitation period, the defendant must prove some facts supporting the expiry of the time period. In this case, for example, the Ramar Defendants have proven that construction of the plaintiffs' home was substantially completed in July 2014, with the occupancy permit being issued on July 22, 2014, and that the plaintiffs moved into the home on a full-time basis in September 2015. More than four-and-a-half years later, in May 2020, the plaintiffs commenced this action alleging breach of contract and negligence in constructing the home. These facts provide some support for an inference that more than two years have passed since the plaintiffs discovered, or ought reasonably to have discovered, any problems with their home. The burden then shifts to the plaintiffs to put their best foot forward and lead their evidence on discoverability.

[148] The court must then determine, based on all the evidence, if there is a genuine issue of material fact as to whether the limitation period has expired. If the answer is "yes", a trial is necessary and summary judgment must be denied. If the answer is "no", the court must proceed to consider whether the plaintiffs have demonstrated a real chance of success at trial on the issue of discoverability.

[149] This action was filed on May 28, 2020. As a result, the limitation period will have expired unless the claims were discovered, or ought to have been discovered, on or after May 28, 2018. In her affidavit, Carmen Blinn tied the discoverability of the structural defects to a visit to HRM offices in October 2019, where she and her husband learned that their building file contained only the first two house plans, and not the third plan with the raised ceiling and roof. It came out on cross-examination, however, that the plaintiffs had noticed cracking in the walls after moving into the home in September 2015. There were cracks forming on the "Great Wall" and on top of doorways. There were cracking sounds coming from the attic when it was windy, which they attributed to the house settling. Ms. Blinn agreed that the cracks were getting worse over time, in 2015, 2016, and 2017, but denied that she had concerns about the structure at that time.

[150] Ms. Blinn was referred to her email of June 15, 2018 to Bill Pay in which she indicated that the plaintiffs wished for Stantec to do "any invasive investigations as necessary", "to enter confined spaces or be able to investigate any confined space (attic) to have a look at the trusses if possible", and to "look at municipal held documentation for the site (building records department)". Ms. Blinn testified that

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she did not know at that time that an invasive investigation was necessary, and she wanted Stantec to help her figure that out. She was also shown an email sent by her counsel to Stantec on May 31, 2018, in which Mr. Pineo indicated that he and his clients "believe that some intrusive inspection might be necessary." Ms. Blinn agreed that she was concerned about the trusses and the cracking in the walls prior to May 2018. When it was put to her that she had turned her mind to having an invasive inspection done well before May 31, 2018, Ms. Blinn said, "Yes. If necessary." On re-direct examination, Ms. Blinn said she had concerns about the trusses possibly not being joined, causing a sagging of the roof, in "late spring 2018."

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[151] Although the plaintiffs initially took the position that they only discovered the structural issues after visiting HRM's office in October 2019, Mr. Pineo conceded during oral argument that, for the purposes of this motion, the structural issues were discoverable as of August 22, 2018, when Kevin Layes prepared the lengthy email to Stantec with the subject line "Fireplace crushing down from above."

[152] Turning to the first question in the *Shannex* analysis, is there a genuine issue of material fact, either pure or mixed with a question of law, on the issue of whether the limitation period has expired? In my view, the answer is "no." In *Smith v. Nova Scotia (Attorney General)*, 2010 NSCA 14, an appeal from a summary judgment decision, Hamilton J.A. noted that "[a]n issue of credibility or a dispute of fact exists where there is a conflict in the evidence and the trier of fact is required to accept the testimony of one witness over another to make a final determination on the issues raised" (para. 17). Here there is no such conflict in the evidence going to discoverability. The parties disagree on whether Ms. Blinn's evidence that she first became concerned about the structural integrity of the house in late spring 2018 is credible, and whether that evidence is consistent with the exercise of reasonable diligence by the plaintiffs. This does not amount to a genuine issue of material fact requiring trial.

[153] Moving on to the second question, does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact? The answer is "yes"; discoverability is a question of mixed fact and law.

[154] The third question is whether the challenged pleading has a real chance of success. The burden is on the responding party – the plaintiffs – to show a real chance of success. In my view, they have done so with respect to all but one of their claims. First, the law is clear that independently discoverable construction defects caused by a single act of negligence may give rise to separate causes of action: *Grey*

Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd., 2008 ONCA 384. In other words, it does not follow from the fact that the plaintiffs filed a negligence action seeking compensation for patent architectural deficiencies in 2014 that the current action alleging latent structural deficiencies is out of time. As the court noted in *Sabourin v. Proulx (c.o.b. Rejean Proulx Masonry)*, [2012] O.J. No. 3283 (Sup. Ct. J.):

> 20 When dealing with complex matters involving building defects, it is impractical to expect the owner to be able to identify all latent deficiencies at any given point in time just because one patent deficiency had been identified. In such cases, the limitation period begins to run when the Plaintiff knew or ought to have known of the existence of each latent deficiency. *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.* (2001), 47 R.P.R. (3d) 32 at para. 52 (Ont. S.C.J.), aff'd 15 R.P.R. (4th) 161, [2004] O.J. No. 597 (C.A.).

[155] As Justice Warner noted in his adjournment decision on November 19, 2019, the statement of claim in the 2014 action "does not allege structural or roof deficiencies." While the 2014 pleadings do mention the foundation, the reference was in relation to a different deficiency which the plaintiffs pleaded had caused them to incur engineering costs and time delays while Ramar worked to correct it over a three-month period. In other words, the deficiency had been rectified prior to the plaintiffs filing the 2014 action. There is no dispute that the plaintiffs attempted, inappropriately, to give evidence at the trial of the 2014 action with respect to some of the structural deficiencies claimed in the 2020 action. This is not evidence, however, that the limitation period for those claims has expired, since the trial occurred in November 2019.

[156] The plaintiffs admit that they noticed cracking in the walls after moving into the home in September 2015. There were cracks forming on the "Great Wall" and on top of doorways. There were cracking sounds coming from the attic when it was windy. The plaintiffs attributed these cracks and sounds to the house settling. Ms. Blinn agreed that the cracks worsened from 2015 to 2017 but denied that she had concerns about the structure at that time. Ms. Blinn testified that she became concerned in late spring 2018 that the cracking was a sign that Ramar had failed to rejoin the trusses during construction. She indicated that the plaintiffs knew that an invasive investigation to examine the trusses might be necessary when Mr. Pineo wrote to Stantec on May 31, 2018, but that they were relying on the experts at Stantec to determine the degree of inspection required. The plaintiffs are lay people, not engineers, and they were not eager to destroy portions of their home unless it was reasonably necessary. Stantec attended the property on July 7, 2018, and August 20,

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2018. In their report dated August 30, 2018, Stantec attributed the cracks in the walls and nail popping to normal shrinkage and settlement (pages 7-8).

[157] The Ramar Defendants point out that, contrary to Ms. Blinn's statement in her email of June 15, 2018, the plaintiffs, for whatever reason, failed to arrange for Stantec to review the HRM building file as part of their investigation. If they had done so, the Ramar Defendants say, Stantec would have been able to determine whether the plans in the file were consistent with the home's construction in July or August and the structural deficiencies they identified in the 2020 Stantec Structural Report would have been discovered much earlier. I note as well that in Stantec's report of August 30, 2018, the authors indicate that no information was available to them as to how the roof line was increased by approximately 2'6". The plaintiffs testified at trial, however, that they had several photographs, taken in November 2013, of the trusses resting on top of the "knee wall." Carmen Blinn also testified that she had given Stantec 1,300 photos to assist them in preparing their 2018 report. However, even if the deficiencies had been discovered and reported by Stantec on August 30, 2018, the limitation period would still not have expired.

[158] In my view, there is a real chance that the plaintiffs will be successful in proving that the limitation periods for their structural claims related to the walls and the roof, the Tall Wall, and the plumbing have not expired. It is an arguable and realistic position that August 2018 is the earliest point at which the plaintiffs had sufficient knowledge to trigger the limitation periods for these claims. It is also an arguable and realistic position that discovery of the deficiencies related to the walls, the roof, and the Tall Wall led to the discovery of the plumbing issue with the vent stack. Finally, it is an arguable and realistic position that the plaintiffs could not have discovered the foundation footings issue until they learned that the third and final house plan was not in their HRM building file.

[159] The only claim for which the plaintiffs have failed to show a real chance of success is the claim that the foundation walls were not built high enough above ground level, in breach of the *National Building Code* elevation requirements (para. 15 of the statement of claim). The plaintiffs' evidence at trial in November 2019 was that they had problems from the time they moved in with pooling water and ice build up, and that they attributed these issues to the foundation having been built a foot too low. The plaintiffs appear to have had all the information necessary to trigger a duty of inquiry long before May 28, 2018. It was the plaintiffs' burden to satisfy the court that they have a real chance of success at proving that the limitation period for the claim has not expired. They have failed to do so.

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[160] The Ramar Defendants' motion for summary judgment on the basis that the plaintiffs' claims are statute barred is denied with respect to all claims except the claim related to the foundation walls being too low. Summary judgment is granted with respect to the latter claim.

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The Fraud Claims

[161] The Ramar Defendants also seek summary judgment on the claims against Larry Marchand and Darrell Marchand in their personal capacities. Kevin Marchand has not filed a motion for summary judgment.

[162] In *Holloway Investments Inc. v. Hardit Corporation*, 2020 NSSC 132, Hunt J. reviewed the law in relation to the personal liability of directors and officers of a corporation:

> [39] It has been stated on multiple occasions that the corporate veil may only be pierced when a corporation is created or employed for illegal, fraudulent, or improper purposes, or when the directing mind of the entity directs or engineers such activity. See for eg: *642947 Ontario Limited v. Fleischer*, [2001] O.J. 4771 (Ont. C.A.).
>
> [40] Nova Scotia courts have weighed these issues as well. In *Lockharts Ltd. v. Excalibur Holdings Ltd.*, [1987] NSJ No. 40, the court stated that piercing the corporate veil is only done in exceptional circumstances:
>
> > 36 What can be drawn from the foregoing authorities? In my assessment, the fundamental principle enunciated in the *Salomon* case remains good law in Canada and "One Man Corporations" should be considered as separate entities from their major shareholder save for certain exceptional cases. A Judge should not "lift the veil" simply because he believes it would be in the interest of "fairness" or of "justice". If that was the test the veil in the *Solomon* case would have been lifted. On the other hand, the Courts have the power, indeed the duty, to look behind the corporate structure and to ignore it if it is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party.
>
> [41] In *Haggan v. Mad Dash Transport Ltd et al*, 2019 ONSC 3654, the Ontario Superior Court of Justice concluded that for personal liability to attach to a corporate directing mind, that individual must engage in some sort of action which effectively takes him or her outside his or her role as a representative of the company:
>
> > 34 A corporation is an inanimate legal entity. It can only operate through the actions of its directors, officers and employees. They take steps on behalf of the corporation by entering into negotiations, signing and

> terminating contracts. The corporation's legal actions can only be assessed through the conduct of its officers, directors and employees, in order to find those individuals personally liable for actions taken on behalf of the corporation, there must be some activity that takes them out of their role as directing minds of the corporation: *Normart*, at para. 18.

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[163] The plaintiffs allege that Larry Marchand, Darrell Marchand, and Kevin Marchand "as the directing minds of Ramar, counseled their employees Ryan Marchand and Scott Sim to deceive HRM during the inspection process and to deceive the Plaintiffs during the construction of the Home", and that "this deception led Ramar to the breach of the contract." The plaintiffs further plead:

> 45. The Plaintiffs repeat the forgoing [*sic*] and plead that the Defendants Larry Marchand, Darrell Marchand and Kevin Marchand committed the torts of fraud, fraudulent Misrepresentation [*sic*] and inducing breach of contract.
>
> 46. The Plaintiffs repeat the forgoing [*sic*] and plead the Defendants Larry Marchand, Darrell Marchand and Kevin Marchand have acted outside of the scope of their corporate authority and are personally liable to the Plaintiffs.

[164] Civil Procedure Rule 38.03(3) provides that "a pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice." Said differently, all the elements of the causes of action must be supported by facts in the statement of claim.

[165] In *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998] O.J. No. 2637 (Ont. Sup. Ct. (Gen. Div.), aff'd [1999] O.J. No. 3290 (Ont. C.A.), Winkler J. noted at para. 477 that, "Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved."

[166] The Supreme Court of Canada summarized the elements of the tort of civil fraud in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8:

> [21] Based on this jurisprudential history, I summarize the four elements of the tort of civil fraud as follows: (1) the defendant made a false statement; (2) the defendant knew, to some extent, that his statement was untrue (knowingly or recklessly); (3) the misrepresentation induced the plaintiff to act; (4) the actions of the plaintiff resulted in a loss.

[167] The court adopted a similar list of elements in relation to fraudulent misrepresentation in *Gallagher Holdings Limited v. Unison Resources Inc.*, 2018 NSSC 251 at para. 393:

> (1) the defendant made a false representation to the plaintiff;
>
> (2) the defendant
>
> a. knew the representation was false;
>
> b. had no belief in the truth of the representation; or
>
> c. was reckless as to the truth of the representation;
>
> (3) the defendant intended that the plaintiff should act in reliance on the representation;
>
> (4) the defendant did act on the representation; and
>
> (5) the plaintiff suffered loss by doing so.

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[168] The elements of the tort of inducing breach of contract are summarized in Lewis N. Klar in *Remedies in Tort*, Chapter 8 – Inducing Breach of Contract (Thomson Reuters Proview, 2023) at §8:6:

> In order to succeed in an action for inducing breach of contract, the plaintiff must establish: i) the existence of a valid and enforceable contract; ii) awareness by the defendant of the existence of the contract; iii) breach of the contract procured by the defendant; iv) wrongful interference; and v) damage suffered by the plaintiff.
>
> The Ontario Court of Appeal has stated the elements of the tort are as follows: (1) the defendant had knowledge of the contract between the plaintiff and the third party; (2) the defendant's conduct was intended to cause the third party to breach the contract; (3) the defendant's conduct caused the third party to breach the contract; (4) the plaintiff suffered damage as a result of the breach.
>
> Most recently, the New Brunswick Court of Appeal specified eight essential elements: (1) there must have been a valid and subsisting contract between the plaintiff and a third party; (2) the third party must have breached its contract with the plaintiff; (3) the defendant's acts must have caused that breach; (4) the defendant must have been aware of the contract; (5) the defendant must have known it was inducing a breach of contract; (6) the defendant must have intended to procure a breach of contract in the sense that the breach was a desired end in itself or a means to an end; (7) the plaintiff must establish it suffered damage as a result of the breach; and (8) if these elements are satisfied, the defendant is entitled to raise the defence of "justification".

[169] The pleadings in the 2020 action provide no details of the claims alleging unconscionable conduct on the part of the directors. The statement of claim does not indicate when or how Larry Marchand or Darrell Marchand "counseled" Ryan Marchand or Scott Sim to deceive HRM and/or the plaintiffs, which deception the plaintiffs say "led Ramar to the breach of the Contract." It should also be noted that there are no claims against Ramar in fraud or fraudulent misrepresentation,

notwithstanding the allegation that it was Ramar employees who deceived the plaintiffs and HRM, at the direction of the individual defendants.

[170] During oral submissions, the court asked plaintiffs' counsel to identify the material facts underlying the fraud claims against the individual defendants. Counsel pointed to the statement in the 2020 Stantec Structural Report that Ramar failed to submit the third and final house plan with the raised ceiling and roof to HRM for approval. No other material facts were referenced.

[171] The plaintiffs argue that the evidence that Ramar constructed a home without having the final house plan approved, and did not advise plaintiffs of that, is sufficient to "show there is a dispute over whether or not there was deceit." They say the evidence shows "an arguable issue requiring trial." Plaintiffs' counsel stated during submissions:

> What we know is, somebody from Ramar didn't submit the plan that was used to build the house. That's an arguable issue. We know that the individual defendants were the directing minds of that company. So, whether or not at this point, what evidence we're able to draw that connection, we've raised an arguable issue that will require discovery, disclosure and a trial to deal with. And I submit that is the correct statement of the law.

[172] As discussed earlier, the 2020 Stantec Structural Report is not admitted for the truth of its contents on this motion.

[173] The Ramar Defendants filed affidavits from Larry Marchand and Darrell Marchand. Both affiants stated that they were not personally involved in the construction of the plaintiffs' home. Larry Marchand stated that he was not involved in counselling or directing any employees of Ramar with respect to the construction or any dealings with the plaintiffs prior to the plaintiffs' refusal to pay the balance of the contract price. Larry Marchand also stated that the modifications to the design of the house to raise the ceiling height and the roof proposed and implemented by Scott Sim "did not require any modification of the truss system, *nor modification to the approved plans.*"

[174] Darrell Marchand stated that he was not personally involved in construction of the plaintiffs' home and did not personally direct staff in relation to it.

[175] Neither Darrell Marchand nor Larry Marchand were cross-examined with respect to the alleged "counseling" of their employees Ryan Marchand and Scott Sim to deceive HRM and the plaintiffs. Their evidence is unchallenged.

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[176] Even if the court was satisfied that Ramar did not submit the third and final house plan to HRM for approval, the plaintiffs led no evidence to support the allegation that Ramar, by not submitting the plan, knowingly or recklessly made a false representation to HRM and/or the plaintiffs. More importantly, the plaintiffs led no evidence that Larry Marchand or Darrell Marchand, the individuals against whom the claims in fraud and fraudulent misrepresentation are made, counseled Ryan Marchand, Scott Sim, or any other Ramar employee to deceive HRM and/or the plaintiffs by not submitting the plan. Since there is no evidence from the plaintiffs, and the evidence of Larry Marchand and Darrell Marchand went unchallenged, the Ramar Defendants have shown that there are no material facts in dispute with respect to the plaintiffs' claims of fraud, fraudulent misrepresentation, and inducing breach of contract.

[177] Moving to the second question of the *Shannex* test, does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact? Yes. The statement of claim raises questions of law with respect to the essential elements of fraud, fraudulent misrepresentation and inducing breach of contract, and the requirements for personal liability of corporate directors, and their application to the facts of this case.

[178] Does the challenged pleading have a real chance of success? No. The plaintiffs have failed to show that their claims against Larry Marchand and Darrell Marchand have a real chance of success. The plaintiffs led no evidence that the individual defendants were involved in any aspect of the construction and inspection of the plaintiffs' home, including any counseling of Scott Sim or Ryan Marchand not to provide the final house plan to HRM for approval.

[179] With respect to the plaintiffs' submission that summary judgment should not be granted because discovery examinations may yield evidence to support the fraud claims, the Supreme Court of Canada in *Lameman* made clear that a motion for summary judgment must be decided on the pleadings and evidence actually before the court, and not on suppositions about what might be proved in the future.

[180] Fraud or fraudulent misrepresentation is a very serious allegation. It has been described as "among the most disparaging type of allegations that can be made against an individual or corporation": *862590 Ontario Ltd. v. Petro Canada Inc.*, [2000] O.J. No. 984 (Ont. Sup. Ct. J.), at para. 316. It is highly improper to plead fraud and other unconscionable conduct without sufficient evidence, in the hope that such evidence will eventually come out during the discovery process. Even if they

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are subsequently withdrawn, unsubstantiated allegations of fraud have the potential to damage the reputation of those individuals and corporations against whom they are made.

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[181] Summary judgment should be granted to Larry Marchand and Darrell Marchand in relation to the claims in fraud, fraudulent misrepresentation and inducing breach of contract.

Abuse of Process

[182] Having found that summary judgment should not be granted on all but one of the plaintiffs' structural claims, the court must now consider whether the claims should be dismissed in any event as an abuse of process.

[183] The Ramar Defendants argue that the 2020 action is an attempt by the plaintiffs to relitigate claims that were already settled in the 2014 action. They note that the plaintiffs are advancing the same causes of action – negligence and breach of contract – in relation to construction of the home at 31 Alben Lane in Wellington. The Ramar Defendants submit that even if the claims in the 2020 action are different causes of action, the new claims could and should have been brought and decided as part of the 2014 action. The Ramar Defendants note that, by plaintiffs' counsel's own admission, the plaintiffs had "discovered" the structural claims by late August 2018, more than a year before the start of trial on November 12, 2019. Without amending the pleadings or obtaining an expert report, the plaintiffs attempted to advance the structural claims as part of the 2014 action. The Ramar Defendants submit that once it became clear to the plaintiffs that this strategy was not going to work, the plaintiffs sought an adjournment in the middle of trial. The Ramar Defendants say it would be an abuse of process to allow the plaintiffs to advance them now, having wasted five full days of trial.

[184] The plaintiffs submit that the 2014 action related to architectural or cosmetic deficiencies, while the 2020 action relates to structural deficiencies. They submit that abuse of process is an "equitable defence", and that the Ramar Defendants should not be permitted to rely on it since their failure to submit the final house plan to HRM for approval played a role in preventing the plaintiffs from discovering the structural issues earlier. Plaintiffs' counsel admitted that it was "unfortunate" that several court days were used but noted that, to his clients' credit, they at least tried to have the structural issues grafted onto the original action.

[185] The leading decision on the doctrine of abuse of process by relitigation is *Toronto (City) v. Canadian Union of Public Employees*, Local 79, 2003 SCC 63. In that case, an employer, at a grievance arbitration, relied upon an employee's conviction from a previous criminal proceeding to establish that the employee had engaged in conduct which justified his termination. The arbitrator ruled that the union, on the employee's behalf, could relitigate the conviction in the arbitration. The Ontario Court of Appeal rejected that ruling on the basis that finality concerns must be given paramountcy over the union's claim to an entitlement to relitigate the employee's conviction. The Supreme Court of Canada rejected the notion of a finality principle as a separate doctrine or independent test to preclude relitigation. It applied the doctrine of abuse of process by relitigation to estop the relitigation of the conviction. The majority, *per* Arbour J., stated:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" *(R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
>> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> 36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway*, *supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.
>
> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

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> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. **It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.** See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> **One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.** [Emphasis added.]

As Goudge J.A.'s comments indicate, **Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances** where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where **allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.** (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter*, *supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during

their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 et seq.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517 18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re litigation is not a guarantee of factual accuracy.

42 **The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process.** (See Doherty J.A.'s reasons, at para. 65; see also *Demeter (H.C.)*, *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. **In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts.** Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see

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Hunter, *supra*, and *Demeter*, *supra*), **the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.**

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

[Emphasis added]

[186] In *The Doctrine of Res Judicata in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2021), Donald J. Lange summarized the analysis in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, at page 207:

(1) The doctrine is not encumbered by the specific requirements of *res judicata*.

(2) The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.

(3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.

(4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.

(5) The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.

(6) The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.

(7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation (Lange refers here to the discretion not to apply the doctrine of issue estoppel (or abuse of process) if to do so would give rise to an injustice).

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[187] Lange states at pages 231-232 that abuse of process, like cause of action estoppel, has been described as a rule against litigation by instalment:

> Abuse of process by relitigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in *Henderson*. To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process. **In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings.** A party is not entitled to relitigate a case because counsel failed to raise an argument which the party wanted to raise or to relitigate an issue indirectly by "a cleverly camouflaged effort."
>
> Not bringing forward all claims, or counterclaims, arising out of one set of circumstances in one action is an abuse of process. …
>
> Bringing new cause of action which would contradict previous findings of fact in the first action is an abuse of process. **A second action based on a separate and distinct cause of action is not an abuse of process although such conduct departs from the rule against the multiplicity of actions. The failure to attempt to consolidate two actions does not make the second action an abuse of process. …**
>
> [Emphasis Added]

[188] The rule in *Henderson* was discussed in *The Doctrine of Res Judicata in Canada*, 5th ed. at page 140:

> The doctrine of cause of action estoppel is found in the much-quoted statement from the reasons for judgment of Wigram V.C. in *Henderson v. Henderson* [(1843), 3 Hare 100)]. The plaintiffs had obtained default judgment in Newfoundland against the defendant. The default judgment was based on an action for an accounting by the defendant of an estate and of partnership property. The plaintiff then sued in England on the default judgment and the defendant brought an action claiming that there was an indebtedness owed from the estate and partnership property. The defendant in England was attempting to raise something that should have been raised as a defence in the plaintiff's action in Newfoundland, namely, set-off, because the very nature of the Newfoundland action, being an accounting, required the defendant to bring forward any claims of set-off against the estate and the partnership property. The rule in *Henderson* is:
>
>> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not

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> (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[189] The Nova Scotia Court of Appeal considered the rule in *Henderson* in *Montreal Trust Company of Canada v. Hoque*, 1997 NSCA 153, where Cromwell J.A. wrote at para. 38:

> Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, *should* have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.
>
> [Emphasis in original; My Emphasis in bold]

[190] The court went on to note at para. 65:

> My review of these authorities shows that while there are some very broad statements that all matters which *could* have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party *should* have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.
>
> [Emphasis in original]

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[191] In *Nichols v. Purdy*, 2021 NSSC 30, Norton J. reviewed the modified formulation of *Henderson* referred to in *Hoque* and stated:

> [38] Lord Sumption in *Takhar v Gracefield Developments Limited*, [2019] UKSC 13, considered that the "should" in the modified formulation of the rule in *Henderson* "refers to something which the law would expect a reasonable person to do in his own interest and in that of the efficient conduct of litigation" (at para. 63).
>
> [39] The courts have clearly stated the fundamental precepts that litigants must not split their case; that litigation by instalments is not an acceptable practice; and, that upon filing a claim the litigant must bring forward their whole case: *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (at para. 18); *Cobb v Holding Lumber Co. Ltd.* (1977), 79 D.L.R. (3d) 332 (B.C.S.C.); *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152 (at para. 60); *Tsaoussis (Litigation Guardian of) v Baetz*, (1998) 41 O.R. (3d) 257 (at para. 19).
>
> [40] Layered on this substantive matrix is the instruction by the Supreme Court of Canada for trial courts to manage cases before them in a more efficient manner so as to provide greater access to justice for all litigants. In *Hryniak v. Mauldin*, 2014 SCC 7, the Court stated:
>
>> 1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>>
>> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> [41] Courts have not been reluctant to dismiss as *res judicata* a proceeding wherein a litigant could have raised matters in earlier proceedings, where they should have done so but failed to do so, and were unable to provide a reasonable explanation for why they did not. …

Analysis

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[192] From a procedural standpoint, the way this dispute about the construction of the plaintiffs' home has unfolded has been less than ideal. The question, however, is whether allowing the current action to continue would bring the administration of justice into disrepute.

[193] At the time the plaintiffs filed the 2014 action, their list of complaints related to patent architectural issues. These deficiencies included improper casing of a wall; uneven floors; incorrectly installed porcelain tiles; incorrectly constructed wrapped posts; improperly installed roofing cap, uncaulked brick siding; incorrectly installed trim; shingles tearing, buckling, and lifting off the roof; paint splatter; incorrect installation of mini split heat pumps; windows installed backwards; and so on. When the plaintiffs filed the 2014 action on October 28, 2014, they included every claim they were aware of at that time.

[194] As Justice Warner observed in his decision denying a mid-trial adjournment, the statement of claim in the 2014 action contained no allegations of structural deficiencies. The claims advanced in the 2020 action, on the other hand, all relate to alleged latent structural deficiencies which the plaintiffs say they could not have discovered until years after they filed the 2014 action. The fact that both the 2014 action and the 2020 action involve the same causes of action – negligence and breach of contract – in relation to construction of the plaintiffs' home does not mean that the current action is an abuse of process. As I noted earlier, the plaintiffs have shown that they have a real chance of success at proving that all but one of their claims could not have been discovered prior to May 28, 2018.

[195] The Ramar Defendants say the current action is an abuse of process because the plaintiffs gave evidence at trial in November 2019 about some of the structural deficiencies and are now attempting to relitigate those claims. The Ramar Defendants also say that because some of the structural deficiencies were mentioned in the plaintiffs' evidence at trial, those claims were captured by the settlement agreement reached by the parties on November 19, 2019. I disagree. Justice Warner was clear in his decision that any evidence pertaining to the structural deficiencies was not properly before the court. He stated:

> **Um, the parties have an obligation to only bring before the court not all their grievances, but only those which are relevant to the pleadings and material to the decision the court has to make.** This is not Small Claims court; this is not a proceeding under Rule 57. Um, courts don't have unlimited resources. Uh, and justice isn't perfect, but it tries to be fair. It would be entirely unfair to have this

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> process uh, amended or delayed or late expert reports on matters not pleaded in the statement of claim.
>
> The motion is dismissed.
>
> **And, quite candidly, I shouldn't be hearing evidence with regards to the issue of the trusses because it's not one of the pleadings – one of the concise statements of material facts – that are set out in the statement of claim.** There are 28 of them – quite a long list, but at least they're identified. **And that's what this action is about, not some other issue that may be legitimate and *bona fide*, but it's not part of this proceeding. Okay?**
>
> [My Emphasis added]

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[196] Immediately after receiving the court's ruling that the structural deficiency claims were not part of the 2014 action, the parties negotiated a settlement. The consent order, dated November 26, 2019, indicated that the parties "have reached a settlement *of the claims herein.*" In other words, the parties had reached a settlement of the claims in the 2014 action, which they knew did not include the structural claims. The minutes of settlement, dated November 21, 2019, stated that the parties "agree to settle the claims of Kevin Layes and Carmen Blinn … against the Defendant, Ramar Construction Ltd. *in the within action* …" In addition, the parties did not sign releases. The reason for this is obvious – Mr. Donovan had made it perfectly clear during his submissions that if the motion for an adjournment was denied and the experts later determined that the home was structurally unsound, the plaintiffs were "going to have to deal with it in another case." He later stated that if the structural claims were not dealt with in the 2014 action, "we're just inviting uh, another lawsuit at another time" In refusing the adjournment, Justice Warner stated that the possibility of a second action by the plaintiffs was the only factor militating in favour of allowing the motion.

[197] In my view there can be no doubt that when the parties left the courtroom on November 19, 2019 after agreeing to settle the 2014 action, they all knew that a second action was a strong possibility. The settlement terms did not include the execution of releases for this very reason. This action is not an abuse of process based on the previous settlement agreement.

[198] The Ramar Defendants' most compelling argument that the current action is an abuse of process is that the plaintiffs should have raised the structural issues as part of the 2014 action. Counsel for the plaintiffs conceded that the structural deficiencies were discoverable in late August 2018. As of August 3, 2018, trial of the 2014 action was scheduled for March 27-28 and April 1-4, 2019. It was later

adjourned to November 12-14, and 18-20, 2020. There was ample time for the plaintiffs to make a motion to adjourn the trial so that they could investigate the structural issues and amend their pleadings. This would have resulted in all the plaintiffs' claims against Ramar in relation to the construction of their home being dealt with in a single trial. Moreover, the allegation that the home is structurally unsound and cannot be remediated, if proven, would have rendered many of the architectural deficiencies moot. If the home is determined to be a total loss, as the plaintiffs allege, it becomes irrelevant whether the porcelain tiles were installed incorrectly, or whether the mini split heat pumps were installed in the wrong locations.

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[199] Indeed, even if the court accepted the plaintiffs' original position that they discovered the home may have serious structural issues when they visited HRM offices in early October 2019, there was still time to seek an adjournment based on this newly discovered information. Instead, the plaintiffs attempted, improperly, to advance some of the structural claims at trial before seeking a mid-trial adjournment.

[200] The issue for the court, then, is whether allowing the current litigation to proceed in the face of five days of wasted trial time would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice.

[201] Court time is a precious commodity. All litigants have a responsibility to ensure that it is not wasted. In all the circumstances, however, dismissing this action would do more harm to the credibility and effectiveness of the judicial process than would allowing it to continue. While bringing two separate proceedings violates the rule against the multiplicity of actions, the plaintiffs did not do so in order to obtain some strategic advantage. The claims in the current action are not a collateral attack on findings made in an earlier action or a new legal conception of facts previously litigated. They are new and distinct claims, and their determination would not undermine the integrity of judicial decision making.

[202] As a matter of judicial economy, the plaintiffs should have sought an adjournment of the 2014 action so that all their claims against Ramar could have been dealt with in a single trial. Even if they had done so, however, the structural deficiency claims are entirely distinct from the architectural deficiency claims, and far more serious. Their addition to the 2014 action would have resulted in a fundamental shift in the proceeding's focus. An action which was essentially ready for trial would suddenly have become nowhere near it. The new claims would have

required additional disclosure, further discovery examinations, new expert reports, rebuttal expert reports, and so on. While a single trial would have saved Ramar some time and expense, the pre-trial procedures associated with responding to the current action would have been required in any case.

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[203] Dismissing a proceeding as an abuse of process is a discretionary decision. It is an extraordinary remedy to be used sparingly, only in the clearest and most obvious cases. This is not one of those cases. The plaintiffs hired Ramar to build their home. They say they were forced to vacate that home in August 2020, after their occupancy permit was revoked. The plaintiffs' claims concerning the structural integrity of their home, if proven, have serious implications for everyone involved, and they have not been the subject of any previous judicial decision. In the circumstances, allowing the current action to proceed so that the substance of these allegations can be tested in court will do more to promote the integrity of the justice system than would dismissing the action as an abuse of process.

[204] The Ramar Defendants' motion for summary dismissal of the plaintiffs' claims on the basis of abuse of process is denied.

Summary

[205] The Ramar Defendants' motion for summary judgment on the basis that the plaintiffs' claims are statute barred is denied with respect to all claims except the claim that the foundation walls were not built high enough above ground level (para. 15 of the statement of claim).

[206] The Ramar Defendants' motion for summary judgment on the plaintiffs' claims against Larry Marchand and Darrell Marchand is granted in relation to the claims in fraud, fraudulent misrepresentation and inducing breach of contract.

[207] The Ramar Defendants' motion for summary dismissal on the basis that the plaintiffs' claims are an abuse of process is denied.

[208] When applicable a party may bring a request for a date assignment conference pursuant to Civil Procedure Rule 4.13.

[209] The Court notes that success has been somewhat divided. If the parties are unable to reach an agreement on costs, I shall receive written submissions within 30 calendar days of the date of this decision and any response submissions within 15 calendar days after that date.

[210] I ask that one of the counsel for the Ramar Defendants prepare the form of Order.

Bodurtha, J.

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