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Docket: CI 18-01-17893
(Winnipeg Centre)
Indexed as: The Rustic Wedding Barn Ltd. v. Wiebe, et al.
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THE RUSTIC WEDDING BARN LTD.,	)	Faron Trippier
	)	Irina Vakurova
plaintiff,	)	for the plaintiff
	)	
- and -	)	
	)	Marcel Jodoin
PETER MARTENS WIEBE, EDNA WIEBE,	)	Paul Reimer
ELAINE ENNS, SANDRA TOEWS AND JUDY	)	for the defendants
MOYER,	)	
	)	
defendants.	)	Judgment Delivered:
	)	July 18, 2025

BOCK J.

[1] The defendants move for summary judgment dismissing the plaintiff's claim. As I will explain, success on this motion is divided. The defendants' motion for summary judgment dismissing the plaintiff's claim for negligent misrepresentation is granted, but the balance of their motion is dismissed.

THE PARTIES' POSITIONS

[2] The five defendants are all members of the same family: Peter Wiebe is the father of the other four defendants, who are sisters.

[3] In early 2010, Mr. Wiebe and his daughters converted part of the Wiebe family farm into a wedding venue and bed and breakfast. They named their business, and the corporation which operated it, the "Rustic Wedding Barn".

[4] The Rustic Wedding Barn is located on the former site of the Wiebe family farm in the Rural Municipality of La Broquerie. The Wiebes' redevelopment of the property included redeveloping the barn, house and hay shed into a banquet hall, bed and breakfast facility and chapel. The redevelopment of the property and operation of the business required, among other things, various permits and approvals as well as ongoing compliance with a host of other regulatory requirements.

[5] On May 31, 2017, Elisabeth Schalla and her late husband, Ronald Schalla, acquired the Rustic Wedding Barn from the Wiebes by a written share purchase agreement (the "Share Purchase Agreement") through a corporation they controlled, 7443341 Manitoba Ltd. (Mr. Schalla has died since the commencement of this action.) The numbered corporation and the Rustic Wedding Barn Ltd. were then amalgamated and continued operating under that name. (For ease of reference, in these reasons I will refer to the plaintiff as the "Schallas" and the defendants as the "Wiebes", unless circumstances require otherwise.)

[6] The Schallas allege the Wiebes misrepresented the Rustic Wedding Barn's state of legal and regulatory compliance when they acquired it from them on May 31, 2017. The Schallas submit the Wiebes either knew or ought to have known these representations were inaccurate. According to the Schallas, they relied on the accuracy of those representations when they entered into the Share Purchase Agreement, and

they have incurred expenses and sustained other damages in order to bring the Rustic Wedding Barn into a state of compliance. The Schallas contend the Wiebes are liable to compensate them for negligent misrepresentation, breach of contract, or fraud.

[7] The Wiebes deny having made any misrepresentations at all. Alternatively, they submit even if some of their representations about the Rustic Wedding Barn were inaccurate, the terms of the Share Purchase Agreement bar the Schallas' claims for negligent misrepresentation or breach of contract. As for the Schallas' claim in fraud, the Wiebes argue there is simply no evidence to support it. Relying on the oft-cited test for summary judgment in ***Dakota Ojibway Child and Family Services, et al v MBH***, 2019 MBCA 91 (at paras. 107-113), the Wiebes state all of these issues can be resolved fairly on the basis of the affidavit evidence before me and none of them merits a trial. For these reasons, their motion for summary judgment ought to be allowed and the claim dismissed.

THE SCHALLAS' COMPLAINTS

[8] In order to understand the Schallas' claim, it is helpful to review the work the Wiebes did to establish the Rustic Wedding Barn.

[9] According to Edna Wiebe, who was the Rustic Wedding Barn's principal and manager of its day-to-day operations when she and her family owned it, the Rustic Wedding Barn commenced operations in early 2013, once all applicable zoning, inspection, licensing and permitting requirements had been met. In her affidavit she describes the steps the Wiebes took to accomplish this in some detail. A short summary of her evidence follows.

[10] On October 10, 2012, the Rural Municipality of La Broquerie approved the Wiebes' conditional use application under the ***Rural Municipality of La Broquerie Zoning By-law 5-96*** to permit use of "[t]he Barn", as it was described, for "recreational purposes" including "licensed functions such as weddings, birthday parties and gatherings."

[11] At about that same time, the Wiebes were directed by the Municipality's Chief Administrative Officer to obtain an occupancy permit from the Office of the Fire Commissioner. In order to obtain an occupancy permit, the Wiebes had to install a fire alarm system in the barn, which they did in late 2012. Manitoba Hydro inspected and approved that system on January 8, 2013. On January 16, 2013, the Wiebes submitted their formal application for an occupancy permit in respect of "the Barn" to the Office of the Fire Commissioner. The following day, that Office issued final occupancy permit #12022 for the barn to the Wiebes subject to two conditions: first, the installation of a slip-resistant stair tread at the exterior exit and second, the installation of a second-floor vent door. According to Edna Wiebe, that work was completed by March 31, 2013.

[12] With the occupancy permit in hand, the Wiebes then applied for and obtained a licence to serve liquor from the Manitoba Liquor Control Commission. At that point, Edna Wiebe attests, she "honestly believed that all necessary permits had been obtained" (Wiebe affidavit affirmed January 16, 2025, at para. 11). She has been advised by the other defendants that they "also believed that all zoning requirements and building code requirements for the Property and the Business had been met and, when the shares in the Corporation [i.e., the Rustic Wedding Barn] were sold… that the Property and the

Business were zoning-compliant and code-compliant" (Wiebe affidavit affirmed November 20, 2024, at para. 22).

[13] The negotiations between the Schallas and the Wiebes for the purchase and sale of the Rustic Wedding Barn began in February 2017 and culminated in the Share Purchase Agreement dated May 31, 2017. According to Ms. Schalla, during those negotiations "Edna Toewes (*sic*) repeatedly offered up and told us that Peter Weibe (*sic*) had obtained all necessary permits for the operation of the Company as a wedding business on the Property" (Schalla affidavit affirmed December 20, 2024, at para. 22). Further, "the Defendants held out and/or explicitly assured my husband and I that the Company and Buildings adhered to all municipal by-laws, had obtained all necessary permits for the Buildings, and that the structure of the Buildings met building code standards…" (Schalla affidavit affirmed December 20, 2024, at para. 23).

[14] Edna Wiebe does not deny Ms. Schalla's evidence on this point. Rather, she says, "I do not have a specific recollection of telling Mr. Schalla and/or Ms. Schalla that all necessary permits had been obtained but I likely would have said that as I honestly believed that all necessary permits had been obtained" (Wiebe affidavit affirmed January 16, 2025, at para. 11). The Schallas attest that they relied on the accuracy of these representations when they decided to enter into the Share Purchase Agreement.

[15] Article 3 of the Share Purchase Agreement contained 28 separate representations and warranties by the Wiebes to the Schallas. The Schallas' claim against the Wiebes is based on three in particular, Articles 3.13, 3.19 and 3.28. They provide:

> 3.13. Title to Real Property

> The Corporation is the beneficial and registered owner of the Real Property. All buildings, structures, improvements and appurtenances situated on the Real Properties are now, and will be at Closing, in the same condition as when they were last inspected by the representatives of the Purchaser prior to Closing, reasonable wear and tear excepted. None of such buildings, structures, improvements or appurtenances (or any equipment therein), nor the operation or maintenance thereof, violates any restrictive covenant or any provision of any federal, provincial or municipal law, ordinance, rule or regulation, or encroaches on any property owned by others.
>
> . . .
>
> 3.19. Compliance with Laws; Government Authorization
>
> To the best knowledge of the Vendors, the Corporation has complied with all laws, statues, ordinances, regulations, rules, judgments, decrees or orders applicable to the Business and the Corporation. The Corporation has all licences, permits, approvals, consents, certificates, registrations and authorizations (whether governmental, regulatory or otherwise) (the "Licence") necessary to carry on the Business or to own or lease any of the property or assets utilized by the Corporation. Each Licence is valid, subsisting and in good standing and the Corporation is not in default or breach of any Licence and, to the knowledge of the Vendors, no proceeding is pending or threatened to revoke or limit any Licence.
>
> . . .
>
> 3.28. Full Disclosure
>
> Neither this Agreement nor any document to be delivered pursuant to this Agreement by the Vendors or the Corporation nor any certificate, report, statement or other document furnished by the Vendors or the Corporation in connection with the negotiation of this Agreement contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statements contained herein or therein not misleading. There has been no event, transaction or information that has come to the attention of the Vendors or the Corporation that has not been disclosed to the Purchaser in writing that could reasonably be expected to have a Material Adverse Effect on the assets, business, earnings, prospects, properties or condition (financial or otherwise) of the Corporation.

[16] The sale of the Rustic Wedding Barn closed on June 1, 2017. Over the course of the next several months, the Schallas came into information which led them to conclude that some of the representations made to them by the Wiebes about the Rustic Wedding

Barn were inaccurate. According to Ms. Schalla, this information was brought to light as a result of two events in particular.

[17] The first event occurred in March 2018. According to the Schallas, they had concerns about the scope of Rustic Wedding Barn's liquor licence. Those concerns brought them into contact with Barry Plett, a building inspector with the Office of the Fire Commissioner. Ms. Schalla attests that Mr. Plett "did some digging into permits and use of the Buildings" (Schalla affidavit affirmed December 20, at para. 43). Mr. Plett's investigations revealed some deficiencies in Rustic Wedding Barn's operations, including the lack of any permit to use the hay shed as a chapel. The Office of the Fire Commissioner gave the Schallas "a small list which had a few changes we needed to make to the property" to address the deficiencies that had been identified by Mr. Plett (Schalla affidavit affirmed December 20, at para. 45).

[18] Although Ms. Schalla "expected this would be the end of it" (Schalla affidavit affirmed December 20, at para. 45), it was only the beginning. She and her husband were called to a meeting with two representatives of the Rural Municipality of La Broquerie, Irina Poplavski (the Municipality's Development Officer) and Anne Burns, and three representatives of the Office of the Fire Commissioner, Candace Summers, Neil Billedeau and Mr. Plett. At that meeting, and again by e-mail the following day, the Schallas were informed that "[m]ultiple buildings … have changed use without the required permits" and that there were "[i]ssues related to zoning that are not covered under the previous Conditional Use granted" (Schalla affidavit affirmed December 20, Exhibit "E"). In an email dated April 19, 2018, to Mr. Schalla, Mr. Plett outlined what

would have to be done to bring the three buildings comprising Rustic Wedding Barn's wedding venue to "an acceptable level of code compliance" (Schalla affidavit affirmed December 20, Exhibit "F"). According to the Schallas, their use of the Rustic Wedding Barn had not changed since they had acquired it. Thus, they reasoned, the issues identified by the Office of the Fire Commissioner must have pre-dated June 1, 2017, the closing date of the transaction.

[19] The second event occurred one evening during the fall of 2018. Ms. Schalla was scrolling through the Rustic Wedding Barn's email archives and came across correspondence from the Wiebes' realtor to their lawyer, Edwin Klassen, dated May 15, 2017, less than three weeks before the closing date. Attached to that email was a copy of a letter dated March 9, 2017, from Irina Poplavski, the Development Officer for the Rural Municipality of La Broquerie mentioned earlier, to a different lawyer, Bryan Peters (Schalla affidavit affirmed December 20, Exhibits "G" and "H", respectively). Mr. Peters had been acting for potential purchasers of Rustic Wedding Barn. Ms. Poplavski's letter was stated to be in response to an inquiry Mr. Peters had made on behalf of his clients on March 3, 2017.

[20] Ms. Poplavski organized her response to Mr. Peters by the two land title numbers comprising the parcel of property on which the Rustic Wedding Barn is located. The Schallas' claim against the Wiebes is based in part on the following comments by Ms. Poplavski with respect to Title No. 2246303/1, the portion of the property on which the barn is situated (copied as it appears in the original):

> To the best of my knowledge I cannot confirm that the owners of the aforesaid property are in compliance with all resolutions, including without limiting the

> generality of Development agreements, building restrictions, by-laws, building by-laws, and conditional use permits, building permits, and development permits.

[21] In particular, she noted (again copied as it appears in the original):

> **Building By-laws**
> The property owner is responsible to obtain a building permit from the Office of The Fire Commissioner. The applicant was advised of this responsibility in writing on October 11, 2012. To date the R. M. of La Broquerie was not contacted from the Office of the Fire Commissioner requesting authorization, which is part of the permit process. Therefore, it is understood that the property owner has not obtained a building permit from the Office of the Fire Commissioner.

[22] In addition, Ms. Poplavski attached to her letter "a complaint from people who rented the facility on the subject property" which the Municipality's inspector was "looking into...". The anonymized complaint, contained in an email bearing the subject reference "safety Issues", was dated October 27, 2016. In it the author made various complaints about the Rustic Wedding Barn, including its use of electrical extension cords, unprotected surface wiring, inoperative ceiling lighting, the suitability of the chapel's fire exit, and the adequacy of washroom facilities.

[23] Ms. Wiebe takes issue with both the significance of the Schallas' meeting in March 2018 and their discovery of Ms. Poplavski's letter. As regards the meeting at which Mr. Plett had told the Schallas about "[i]ssues related to zoning that are not covered under the previous Conditional Use", Ms. Wiebe now acknowledges that the Schallas did ultimately have to obtain a zoning variance for the house and hay shed, but says she did not know about that zoning defect until this litigation was commenced. Moreover, it is her understanding that "this issue was quickly rectified for Mr. and Ms. Schalla by the RM of La Broquerie" (Wiebe affidavit affirmed January 16, 2025, at para. 29).

[24] As regards Ms. Poplavski's letter of March 9, 2017, and the complaint enclosed with it, Ms. Wiebe asserts that Ms. Poplavski was simply mistaken with respect to the lack of a permit from the Office of the Fire Commissioner. As proof, she points to the issuance by that Office of final occupancy permit #12022 for the barn on January 17, 2023, described earlier in these reasons. As for the email complaint of October 27, 2016, Ms. Wiebe believes the complaint was not justified.

DISCUSSION AND DISPOSITION

[25] The Schallas' claims against the Wiebes are based on negligent misrepresentation, breach of contract and fraudulent misrepresentation. As I will explain, I find the Schallas' claim for negligent misrepresentation is barred by terms of the Share Purchase Agreement. However, I find there are genuine issues for trial with respect to the Schallas' claims for breach of contract and fraudulent misrepresentation.

Negligent Misrepresentation

[26] The Wiebes argue the claim against them for negligent misrepresentation is barred by Article 1.7 of the Share Purchase Agreement, the "Entire Agreement" clause, which reads as follows:

> 1.7. Entire Agreement
>
> This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral. There are no conditions, covenants, agreements, representations, warranties or other provisions, express or implied, collateral, statutory or otherwise, relating to the subject matter hereof except as herein provided.

[27] An "Entire Agreement" clause is a common feature in written contracts. Its purpose is to limit the parties' liability to one another to the rights and duties contained

within the four corners of the contract, and to exclude liability that might otherwise be imposed on them for negligence. Whether or not an entire agreement clause achieves its purpose is "a question of contractual interpretation …" (***Virden Mainline Motor Products Ltd. v Murray***, 2018 MBCA 82, at para. 37) ("***Virden Mainline***").

[28] The Schallas argue that Article 1.7 is insufficiently clear to bar a claim for negligent misrepresentation. I disagree. The language used in Article 1.7 leaves me with no doubt that the parties intended to limit their liability to the representations and warranties expressed in the Share Purchase Agreement.

[29] Indeed, that same intention is repeated in Article 8.3(d), by which the Schallas (on behalf of the Purchaser, 7443341 Manitoba Ltd.) agreed to execute and deliver a release in favour of the Wiebes as a condition of closing. The Schallas did execute and deliver a "General Release" pursuant to which the purchaser released any claim it may have against the defendants "excepting claims as to [the defendants'] obligations under the Share Purchase Agreement dated May 31, 2017." Although Ms. Schalla suggests that the General Release was somehow limited to the Schallas' decision not to have the property inspected by a structural engineer, the words used in the release simply do not bear that interpretation.

[30] In summary, the Schallas' claim of negligent misrepresentation cannot succeed in the face of the Entire Agreement clause contained in Article 1.7 and the General Release delivered in accordance with Article 8.3(d).

Breach of Contract

[31] I find that the Schallas' claims for breach of contract raise genuine issues for trial and are not barred by the terms of the Share Purchase Agreement. I will identify and discuss some of those issues for trial before explaining why I do not accept the Wiebes' argument concerning the terms of the Share Purchase Agreement.

[32] First, the accuracy of the representations in Article 3.13 to the effect that nothing about the buildings or their operation violated "any provision of any federal, provincial or municipal law, ordinance, rule or regulation," and in Article 3.19 to the effect that "[t]o the best knowledge of the Vendors [i.e., the Wiebes]" the Rustic Wedding Barn was in compliance with all relevant laws and had obtained all necessary governmental authorizations, is called into question by the information received by the Schallas at their meeting with representatives of the Municipality and Office of the Fire Commissioner in March 2018. Ms. Wiebe's evidence only tends to confirm the inaccuracy of the representation, inasmuch as she acknowledges that the Schallas did ultimately require a zoning variance in order to use the house and hay shed as a bed and breakfast and chapel, respectively. Although Ms. Wiebe has attested this zoning issue was "quickly rectified", she appears to admit by implication that it was an issue.

[33] Second, the representations in Article 3.13 and 3.19 appear to be contradicted by the contents of Ms. Poplavski's letter of March 9, 2017, in which she: (a) reported that "the property owner [had] not obtained a building permit from the Office of the Fire Commissioner" and, (b) disclosed the existence of a complaint which was the subject of further investigation by the Municipality's inspector. Ms. Wiebe's explanation for this

contradiction is, in effect, that Ms. Poplavski was mistaken and the complaint unjustified. I deal with Ms. Wiebe's explanation later in these reasons. That explanation aside, however, the contents of Ms. Poplavski's letter do raise an issue with respect to the accuracy of the representations made by the Wiebes to the Schallas in Articles 3.13 and 3.19, pitting Ms. Wiebe's assessment of the Rustic Wedding Barn's state of legal compliance against Ms. Poplavski's.

[34] Third, whether the contents of Ms. Poplavski's letter and the enclosed complaint are true or not, they obviously related to the Rustic Wedding Barn and could therefore be said to be relevant to its pending sale. In Article 3.28 of the Share Purchase Agreement the Wiebes represent, among other things,

> There has been no event, transaction or information that has come to the attention of the Vendors or the Corporation that has not been disclosed to the Purchaser in writing that could reasonably be expected to have a Material Adverse Effect on the assets, business, earnings, prospects, properties or condition (financial or otherwise) of the Corporation.

[35] "Material Adverse Effect" is very broadly defined in Article 1.1(r) of the Share Purchase Agreement. This gives rise to the third issue: was the mere existence of Ms. Poplavski's letter and the enclosed complaint "information that has come to the attention of the Vendors" that could have a "Material Adverse Effect" on the Rustic Wedding Barn within the meaning of Article 3.28 and Article 1.1(r)? One wonders, for instance, whether Ms. Poplavski's letter caused the clients of its original recipient, the lawyer Bryan Peters, to lose interest in pursuing the purchase of the Rustic Wedding Barn. If it did, the letter could arguably be said to be "information" within the meaning of

Article 3.28 and something which ought to have been disclosed. The evidence before me does not allow for a far determination of this issue on this motion.

[36] Fourth, Ms. Wiebe's decision not to disclose Ms. Poplavski's letter and its enclosure to the Schallas raises a triable issue with respect to her credibility. On the one hand, Ms. Wiebe asserts that she chose not to disclose this information because she genuinely believed the letter to be mistaken and the complaint to be unjustified. On the other hand, the Schallas assert that Ms. Wiebe chose not to disclose this information because she knew it might discourage them from proceeding with the purchase of the Rustic Wedding Barn. These competing arguments leave me to wonder why, if Ms. Wiebe was confident the information contained in the letter of March 9, 2017, was inaccurate and unjustified, she did not reveal it to the Schallas with the expectation that they, too, would come to the same conclusion? The answer to that question turns in large part on Ms. Wiebe's credibility and for that reason cannot be fairly determined on the basis of the evidence on this motion. In my view, it should be left for determination at trial, where Ms. Wiebe's credibility can be assessed in the context of the evidence as a whole.

[37] In fairness to the Wiebes, they also argue that the representations in Article 3.19 were expressly subject to the qualification that they were only true "[t]o the best knowledge of the Vendors", and therefore not warranted to be absolutely true. While that is so, I am nevertheless struck by the fact that less than three weeks before the sale to the Schallas was due to close, Ms. Wiebe received information in Ms. Poplavski's letter and the complaint enclosed with it which, on its face, contradicted the representations she was making in Article 3.19. Arguably, the receipt of this new information changed

and expanded the state of Ms. Wiebe's "best knowledge" about those matters. But instead of following up with Ms. Poplavski to seek clarification or disclosing Ms. Poplavski's letter to the Schallas so they could make whatever inquiries they might consider necessary, it appears Ms. Wiebe opted to do nothing. This evidence gives me reason to question not only the accuracy of Ms. Wiebe's representation about the "best knowledge of the Vendors", but also its truthfulness. Once again, the answer to this question will turn in part on Ms. Wiebe's credibility and can only be answered fairly after a trial.

[38] Finally, I turn to Ms. Wiebe's explanation for her lack of response to Ms. Poplavski's letter. Ms. Wiebe says she did not disclose Ms. Poplavski's letter and the enclosed complaint to the Schallas because Ms. Poplavski was mistaken and the complaint was unjustified. I do not know whether Ms. Poplavski was mistaken, because neither party led evidence from her to explain the contents of her letter. At best, I have Ms. Wiebe's lay opinion on the Rustic Wedding Barn's state of legal and regulatory compliance on the one hand, and the contradictory hearsay evidence contained in Ms. Poplavski's letter on the other. Nor do I know whether the anonymized complaint from October 2016 was justified, because neither party led evidence about the outcome of the municipal inspector's investigation referred to in Ms. Poplavski's letter.

[39] In short, the evidence does not permit to me to make the findings necessary to determine whether the Wiebes did, or did not, violate Articles 3.13, 3.19 and 3.28 in the Share Purchase Agreement. Thus, these issues must remain to be determined at trial.

[40] My conclusion on this point does not end the matter, however. The Wiebes argue in the alternative that a determination of these issues is unnecessary because Article 5.1, the "Survival Clause", and Article 10.2(a), the "Indemnification Clause", effectively bar the Schallas' claims for breach of contract.

[41] Article 5.1 provided:

> 5.1. Survival of Representations and Warranties of the Vendors
>
> The covenants, representations and warranties of the Vendors contained in this Agreement and any agreement, instrument, certificate or other document executed or delivered pursuant hereto shall survive the closing of the transactions contemplated hereby and, notwithstanding such closing, nor any investigation made by or on behalf of the Purchaser, shall continue in full force and effect for the benefit of the Purchaser for a period of 6 months following the Closing Date.

[42] Article 10.2(a), the "Indemnification Clause", provided:

> 10.2. Subject to the provisions of Section 5.1, the Vendors agree to indemnify and save harmless the Purchaser from all Losses suffered or incurred by the Purchaser as a result of or arising directly or indirectly out of or in connection with:
>
> (a) any breach by the Vendors or the Corporation of or any inaccuracy of any representation or warranty of the Vendors or the Corporation contained in this Agreement or in any agreement, certificate or other document delivered pursuant hereto;

[43] Briefly stated, the Wiebes' argument is that their obligation to indemnify the Schallas for breach of a representation or warranty in Article 10.2(a) was expressly subject to the six-month limit contained in Article 5.1. By operation of Article 5.1, the Wiebes' representations and warranties expired on November 30, 2017, along with any right the Schallas may have had to bring a claim in respect of them. Since the Schallas did not commence their claim, or even give notice of their claim, within six months of closing, their claim is now barred.

[44] I do not accept the interpretation of Articles 5.1 and 10.2(a) put forward by the Wiebes. In my view, the Wiebes' interpretation overlooks the opening paragraph of Article 3, which provides:

> Each of the Vendors jointly and severally represents and warrants to the Purchaser as follows and acknowledges that the Purchaser is relying on such representations and warranties in connection with its purchase of the Shares.
>
> [underlining added]

[45] When I read Article 5.1 in conjunction with the first paragraph of Article 3, I interpret it to mean that the Schallas were entitled to act in reliance on the accuracy of the Wiebes' representations and warranties for a period of six months after closing. Claims for indemnity under Article 10.2(a), including a claim for "any inaccuracy of any representation of warranty", are "subject to" Article 5.1. In the result, claims for indemnity based on acts of reliance on representations and warranties occurring more than six months after closing are barred, while claims based on acts of reliance less than six months after closing are not. I do not read Articles 3, 5.1 and 10.2(a) as requiring the Schallas to bring a claim for breach of Article 3 within six months of closing.

[46] The Wiebes also argue that the Schallas' claims are barred because they failed to give notice of their claims within six months of closing, in violation of another provision in the Share Purchase Agreement, also numbered Article 10.2, found under the heading "Notice of Claim".

[47] Before dealing with this argument, I pause to note that there appears to have been a drafting error in the Share Purchase Agreement as executed, inasmuch as it contains two separate provisions, both numbered 10.2. The first, which I have referred to as the "Indemnification Clause", deals with the vendors' obligation to indemnify the

purchaser. It is found under the heading "Indemnification by the Vendors". The second, which I will refer to as the "Notice Clause", deals with the parties' obligations to give notice of a claim. As mentioned, it is found under the heading "Notice of Claim".

[48] The Notice Clause provides as follows:

> 10.2 Notice of Claim
>
> In the even that a party (the "Indemnified Party") shall become aware of any claim, proceeding or other matter (a "Claim") in respect of which another party (the "Indemnifying Party") agreed to indemnify the Indemnified Party pursuant to this Agreement, the Indemnified Party shall promptly give written notice thereof to the Indemnified Party. Such notice shall specify whether the Claim arises as a result of a claim by a person against the Indemnified Party (a "Third Party Claim") or whether the Claim does not so arise (a "Direct Claim"), and shall also specify with reasonable particularity (to the extent that the information is available) the factual basis for the Claim and the amount of the Claim, if known.
>
> If, through the fault of the Indemnified Party, the Indemnifying Party does not receive notice of any Claim in time to contest effectively the determination of any liability susceptible of being contested, the Indemnifying Party shall be entitled to set off against the amount claimed by the Indemnified Party the amount of any Losses incurred by the Indemnifying Party resulting from the Indemnified Party's failure to give such notice on a timely basis.

[49] The Wiebes contend that the phrase "Subject to the provisions of Section 5.1" contained in the Indemnification Clause quoted earlier also qualifies the provisions in the Notice Clause, such that written notice of any claim based on a breach of representations and warranties was required to be given within six months of closing. I disagree, for two reasons.

[50] First, the Indemnification Clause appears to me to be completely independent of the Notice Clause. The only thing linking the two is what I interpret to be a drafting error, the error being that both clauses were mistakenly numbered "10.2". The phrase "Subject to the provisions of Section 5.1" only appears in the Indemnification Clause and

does not appear in the Notice Clause. From this it follows that the phrase "Subject to the provisions of Section 5.1" contained in the Indemnification Clause was intended to qualify the Indemnification Clause but not the Notice Clause.

[51] Second, the Notice Clause very clearly requires either party give written notice of a claim to the other "promptly". In this case written notice is alleged to have been provided by the Schallas' counsel to the Wiebes on September 20, 2018. For the purpose of this motion it is unnecessary for me to determine whether that notice was delivered "promptly" within the meaning of the Notice Clause. It is enough to say that the Notice Clause did not impose a six-month time limit on giving notice of a claim as the Wiebes assert.

[52] Finally, I make this observation. The parties could have easily articulated a clear limit on the Wiebes' liability for breach of a warranty or representation to claims made by the Schallas within six months of the closing date had that been their intention. The authorities filed by the Wiebes offer two examples of the kind of language that could have achieved that end. The survival clause in paragraph 29 of ***Virden Mainline*** provided in part that "[…] no Warranty Claim may be made or brought by [Virden Mainline] after the date which is five (5) years following the Closing Date; …". The survival clause in paragraph 46 of ***NOV Enerflow ULC v. Enerflow Industries Inc.***, 2015 ABQB 759 provided in relevant part that the vendors "[…] *shall not have any liability hereunder in respect of any representation and warranty unless a claim in respect thereof is made within the following time periods:* […]" (italics in the original). The Share Purchase Agreement, by contrast, does not contain such limiting provisions.

[53] To conclude this portion of my reasons, I find the Schallas' claims for breach of contract raise genuine issues for trial and are not barred by the Survival Clause, the Indemnification Clause or the Notice Clause (Articles 5.1, 10.2(a) and 10.2, respectively).

Fraudulent Misrepresentation

[54] The Schallas allege that the Wiebes are also liable for fraudulent misrepresentation. The Wiebes concede that a claim for fraudulent misrepresentation cannot be ousted by the terms of the Share Purchase Agreement.

[55] I make no comment on the relative merits of the Schallas' claim for fraudulent misrepresentation. Suffice it to say that my earlier comments with respect to Ms. Wiebe's credibility lead me to conclude that despite her professed honest belief in the representations and warranties she made to the Schallas, there is a genuine issue with respect to the allegations of fraud contained in the statement of claim.

THE APPLICATION FOR LEAVE TO MOVE FOR SUMMARY JUDGMENT

[56] This motion offers me an opportunity to provide some obiter comments with respect to the process for obtaining leave to move for summary judgment under the *King's Bench Rules*, M.R. 553/88, Rules 20.01 and 50(5.1).

[57] The current summary judgment rules in Manitoba are the result of new rules enacted in January 2018 and significantly amended in September 2019. A motion for summary judgment may only be scheduled after a pre-trial conference for the action has been held (Rule 20.01(2)), and only if the pre-trial judge is satisfied that it can achieve a fair and just adjudication of the issues in the action (Rule 50(5.2)). In practice, a party wishing to bring a summary judgment motion seeks leave of the pre-trial judge to do so.

The process for seeking leave is not the subject of any rule nor, as far as I am aware, any decision of this Court.

[58] In this case the defendants gave notice of their intention to seek leave to move for summary judgment in a single paragraph in their pre-trial brief. The plaintiff, who had already filed its pre-trial brief several months earlier, did not file anything in reply. At the pre-trial conference I heard submissions from counsel as to the suitability of adjudicating this action on a summary basis and granted leave to the defendants to bring their motion.

[59] Given the outcome of this motion, one might conclude that leave should not have been granted because despite the expenditure of time, effort and resources, the action has not been completely resolved and the length of time required for trial has not been materially reduced.

[60] In the hope that it may assist other litigants who seek leave for summary judgment, I offer the following suggestions to improve the leave-seeking process at a pre-trial conference.

[61] In my opinion, a party who seeks leave to bring a motion for summary judgment should consider including in its pre-trial brief the following:

(i) a draft notice of motion for summary judgment which sets out the precise relief sought and the grounds for the motion. This will help to focus the discussion at the pre-trial conference, particularly if the moving party is only seeking summary judgment on some, but not all, of the issues raised in the

pleadings, or against only one of a number of defendants. It will also ensure that if leave is granted, a notice of motion can be filed promptly;

(ii) a short summary identifying the "necessary findings of fact" contemplated by Rule 50(5.1) which the judge will have to make in order to grant summary judgment, the identity of each proposed deponent, a summary of their proposed evidence, and an explanation as to how that evidence will permit the judge to make those "necessary findings of fact". Here, for instance, I have concluded that a trial is necessary in part because of the fact of Ms. Poplavski's letter and the complaint enclosed with it. Unfortunately, there was no reference to that letter and complaint in either of the pre-trial briefs or at the pre-trial conference. In hindsight, it might have been useful to raise them for discussion then;

(iii) a short summary of the relevant law that will be applied to the facts; and

(iv) some brief explanation as to why a motion for summary judgment would be a proportionate, more expeditious and less expensive means to achieve a just result than a trial.

[62] The responding party should respond succinctly and in kind in its pre-trial brief (if not yet filed) or in a short supplementary pre-trial brief.

[63] Hopefully following these steps may result in a more informed discussion at the pre-trial conference on the merits of adjudicating all or some of the issues in the action by summary judgment.

SUMMARY

[64] To summarize my conclusions:

(i) the Schallas' claim of negligent misrepresentation cannot succeed in the face of the Entire Agreement clause contained in Article 1.7 and the General Release delivered in accordance with Article 8.3(d), and is therefore dismissed;

(ii) the Schallas' claims for breach of contract raise genuine issues for trial and are not barred by the Survival Clause, the Indemnification Clause or the Notice Clause; and

(iii) my comments with respect to Ms. Wiebe's credibility lead me to conclude that there is a genuine issue with respect to the allegations of fraud contained in the statement of claim.

[65] Given the divided outcome on this motion, costs will remain in the cause. I direct the parties to schedule a further pre-trial conference before me at their earliest convenience.

_____ J.