NOVA SCOTIA COURT OF APPEAL
Citation: ***Flynn v. Halifax (Regional Municipality***),
2005 NSCA 81

Date: 20050510
Docket: CA 214036
Registry: Halifax

Between:

Fabian Flynn and Trudy Flynn

Appellants

v.

The Halifax Regional Municipality, a municipal body corporate, Donald Williams, James Joseph Dunleavy, and Applewood Enterprises Limited, a body corporate

Respondents

Judges: Bateman, Hamilton and Fichaud, JJ.A.

Appeal Heard: February 15, 2005, in Halifax, Nova Scotia

Revised judgment: The text of the original judgment has been corrected according to the attached erratum, May 10, 2005.

Held: Appeal allowed in part per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.a. concurring.

Counsel: appellants in person
Peter D. Darling, for the respondents, Halifax Regional Municipality and Donald Williams
David Grant on behalf of James Dunleavey and Applewood Enterprises Ltd.

Reasons for judgment:

[1] This is an appeal by Fabian and Trudy Flynn ("the Flynns") from a judgment of Justice Arthur LeBlanc of the Supreme Court of Nova Scotia. The respondents, James Joseph Dunleavy ("Mr. Dunleavy") and Applewood Enterprises Limited ("Applewood"), have cross-appealed. The respondents, Donald Williams and the Halifax Regional Municipality ("HRM") have filed a Notice of Contention. The judgement on appeal is reported as **Flynn v. Halifax (Regional Municipality)** (2003), 219 N.S.R. (2d) 345; N.S.J. No. 483 (Q.L.).

[2] The Flynns sued the respondents and others in relation to the construction of their home. They alleged both breach of contract and negligence resulting in a house full of defects, both major and minor.

BACKGROUND:

[3] The Flynns' daughter, Natasha, and to a lesser extent, Mrs. Flynn, suffer from environmental allergies. They hired Shawna Henderson, who works under the trade name ABRI Sustainable Design, to design an "environmentally safe" home to be built in Seabright, Nova Scotia. They engaged Applewood Construction Limited to build the home. Mr. Dunleavy was, at the time, the principal of Applewood. Mr. Williams was a building inspector for HRM. The construction commenced in April of 1997 and was completed that fall.

[4] The trial decision provides substantial detail about the design and construction of the house. It suffices to say that the home, as built, did not conform to the original plans and suffered from major and minor deficiencies. Of particular concern was significant cracking in the foundation slab and an inadequately supported south wall. These two major defects, say the Flynns, substantially compromised the structural and environmental integrity of the home. There are many other problems with the house.

[5] The Flynns originally sought relief from the Atlantic Home Warranty Program ("the Program") . Unsatisfied with the Program's response, they commenced an action against those responding to this appeal, as well as Shawna Henderson and the Program. The Program settled with the Flynns before the trial commenced. On the first day of trial, counsel for the Flynns advised the judge that the action against Ms. Henderson had settled, as well. HRM had also cross-

claimed against the Program, which claim was extinguished by settlement. None of the respondents cross-claimed against Ms. Henderson.

[6] It was the Flynns' position at trial, supported by their expert, Roy T. McBride, a consulting structural engineer, the house is so defective that a rebuild was the only cost effective method of remedying the deficiencies. They alleged a defective slab; insufficient bracing of all four walls of the house, with the south wall presenting a particular danger; inadequate roof trusses and other less serious deficiencies. Their claim sounded in both contract and negligence. They alleged that HRM, due to its inadequate and incomplete inspection process, was equally liable with Applewood and Mr. Dunleavy for most of the major deficiencies. Archie Frost, civil and structural engineer, testified on behalf of HRM. It was his opinion the defects were not as extensive as suggested by Mr. McBride and the repair of individual deficiencies would suffice. I will provide fuller details on the various alleged deficiencies in the context of the discussion below.

[7] The trial judge determined the south wall should be repaired and the slab replaced. HRM and Mr. Williams were held to be jointly and severally liable with Applewood and Mr. Dunleavy, personally, for the defective south wall of the building. Applewood and Mr. Dunleavy, personally, were held liable for the slab. The damages awarded totalled $78,480.00 with $56,200.00 attributable to Applewood and Mr. Dunleavy, jointly and severally, and $22,280.00 to Applewood, Mr. Dunleavy, HRM and Mr. Williams, jointly and severally. The settlements from the AHWP ($30,000.00) and Ms. Henderson ($5,000.00) were deducted from these total damages, *pro rata*. An additional $1,000.00 termed "general damages" was awarded to cover specific more minor deficiencies.

[8] In providing this summary of the relief which is the subject of appeal, I make no finding on any aspect of the decision where the judge's intent in the relief ordered may be in dispute. An order has not yet issued and there may be certain findings, not on appeal which are subject to interpretation.

[9] Generally stated, it is the Flynns' position on this appeal that the scope of the liability finding is not sufficiently broad and the damages awarded are not adequate.

ISSUES:

[10] I have attached as “Appendix A” the issues listed by the Flynns in their factum on this appeal. “Appendix B” contains those raised by Mr. Dunleavy and Applewood on the cross-appeal and “Appendix C” sets out the single issue in HRM’s Notice of Contention. HRM and its employee, Mr. Williams, are represented by counsel. Applewood and Mr. Dunleavy were self represented but retained counsel for the hearing of the appeal. The Flynns were represented at trial but conducted the appeal without counsel.

[11] The issues are helpfully organized and restated by counsel for the HRM/Williams as follows:

(1) What is the appropriate standard of review of the findings of the trial judge?
(2) (From the Notice of Contention) Did the trial judge err in holding that the Halifax Regional Municipality could be held responsible for damages flowing from negligent inspection of buildings, in circumstances which did not create health and safety issues (said circumstances not being present here in any event)?
(3) (From the Notice of Cross Appeal) Did the trial judge err in holding that Mr. Dunleavy was personally responsible and negligent for the damages flowing from the breaches of contract of Applewood, both as to the work of Applewood and of subcontractors?
(4) Did the trial judge commit reviewable error in determining that the deficiencies in the slab were not something which ought to have been remarked upon by the Halifax Regional Municipality or Mr. Williams?
(5) Did the trial judge commit reviewable error in finding that no deficiencies in the roof trusses had been established?
(6) Did the learned trial judge commit reviewable error in holding that the deficiencies in the roof trusses, if they did exist, were not something which ought to have been remarked upon by the Halifax Regional Municipality or Mr. Williams?
(7) Did the trial judge commit reviewable error in holding that the south wall, only, needed repair, while no deficiency had been established with respect to the balance of the walls in the structure?
(8) Did the learned trial judge commit reviewable error in finding that the absence of drainage tile was not a construction deficiency?

(9) Did the trial judge commit reviewable error in holding that the Halifax Regional Municipality was responsible for the costs of the repair of the south wall, but not of the foundation slab?
(10) (From the Notice of Cross-Appeal) Did the learned trial judge commit reviewable error in holding that the south wall and the slab contained deficiencies which amount to a breach of contract by Applewood Enterprises?
(11) Did the trial judge commit reviewable error in calculating the damages flowing from the deficiencies in the south wall?
(12) Did the trial judge commit reviewable error in calculating the damages flowing from the deficiencies in the slab?
(13) Did the trial judge commit reviewable error in failing to allocate all or part of the settlement proceeds of the Atlantic Home Warranty Programme agreement, to the costs of roof replacement?
(14) Did the trial judge commit reviewable error in bringing into account the proceeds of the Henderson settlement (being issue 47 on page 61 of the Appellant's factum)?
(15) Did the learned trial judge commit reviewable error in allowing the Halifax Regional Municipality to set off the thrown-away costs of the abortive wall repairs, including granting leave to amend the Statement of Defence, if necessary?
(16) Did the learned trial judge err in not giving the Plaintiffs the ability to expand on their case in rebuttal, any more than what occurred (issue 48 on page 61 of the Appellants' Factum)?
(17) Did the learned trial judge err in allowing the Halifax Regional Municipality to call Timothy Nobes out of order (paragraph 47 on page 16 of the Appellants' Factum)?

[12] The above listing does not address all of the matters raised by the Flynns but captures the main issues on appeal.

THE STANDARD OF REVIEW:

[13] An appeal is not a re-trial. The powers of an appellate court are strictly limited. A trial judge's factual findings and inferences from facts are insulated from review unless demonstrating palpable and overriding error. On questions of law the trial judge must be correct. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of

palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and, therefore, be subject to a standard of correctness (**Housen v. Nikolaisen**, [2002] 2 S.C.R. 235).

[14] Palpable error was clearly and simply described recently by the Ontario Court of Appeal in **Waxman v. Waxman** (2004), 186 O.A.C. 201; O.J. 1765 (Q.L.):

> [296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: **Housen** at 246 [S.C.R.]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> [297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: **Minister of National Revenue v. Schwartz**, [1996] 1 S.C.R. 254; 193 N.R. 241 at 281 [S.C.R.].
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> . . .
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> [300] . . . the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. ...
> (Emphasis added)

[15] I provide this detailed explanation of palpable error because, in several respects, this appeal is a request for a retrial. As will be seen below, a substantial number of the trial judge's findings, which the Flynns urge are in error, flow instead from his factual findings where, in the face of conflicting evidence, he accepted that which did not favour the Flynns' position. This Court is not free to disturb these factual conclusions save in the limited circumstances set out above.

ANALYSIS:

Introduction:

[16] The contract between Applewood and the Flynns provided that ". . . all work would be done in accordance with the applicable building codes". It is the Flynns' position Applewood was in breach of contract and negligent in that its work did not comply with the applicable building codes and was otherwise deficient and HRM was negligent in not detecting the **Code** violations and deficiencies in its inspection process.

[17] The **National Building Code of Canada 1995** (**"NBC"**) is a model code for the construction industry, designed to ensure that buildings are structurally sound, safe from fire, free of health hazards, and accessible. Health and safety are the **NBC**'s primary objectives. Its Preface states:

> The National Building Code of Canada (NBC) is prepared by the Canadian Commission on Building and Fire Codes (CCBFC) and is published by the National Research Council. It is prepared in the form of a recommended model mode to permit adoption by an appropriate authority.
>
> The NBC is essentially a code of minimum regulations for public health, fire safety and structural sufficiency with respect to the public interest. It establishes a standard of safety for the construction of buildings, including extensions or alterations, the evaluation of buildings undergoing a change of occupancy and upgrading of buildings to remove an acceptable hazard.
>
> The content of the NBC pertains primarily to the needs of health and safety. Requirements unrelated to health and safety are kept to a minimum; any requirements that would increase the scope of the NBC are only considered after thorough consultation with regulatory authorities, provincial governments, other affected parties and Code users. Requirements for workmanship related to aesthetics only are not considered appropriate for the NBC although requirements for quality and durability that affect health and safety are appropriate.

[18] Divided into nine parts, the NBC spells out minimum requirements for fire protection; structural design; environmental separation, heating, ventilating and air-conditioning; plumbing; construction site safety; and housing and small building construction. The NBC has no legal status until adopted by a province, territory or municipal government.

[19] Part 9 of the **NBC** contains the requirements for residential construction (dwellings of not more than 600 square meters and fewer than three stories). Certain structural components not falling within Part 9 are governed by Part 4 and, generally, require design by a professional engineer or architect. As is clear from the differing opinions of the two experts who testified at trial, as well as the evidence of Shawna Henderson and that of the building inspectors, many of the **NBC**'s requirements are subject to interpretation.

[20] The legislative scheme governing municipal inspections in Nova Scotia commences with the **Building Code Act**. R.S.N.S. 1989, c. 46, s. 1 ("the **Act**"). The Minister of Municipal Affairs is authorized to " . . . make such regulations as are considered necessary or advisable for the purpose of establishing a Building Code governing minimum standards for the construction and demolition of buildings ..." (s. 4). Municipal councils are responsible for the administration and enforcement of the **Act** within the municipality (s. 5). Enforcement is done by municipal building inspectors.

[21] The **Act** limits the liability of public authorities:

> 27 No action or proceeding lies against the Crown, a municipality or a servant or agent thereof for any matter or thing done or omitted to be done by them in good faith and with reasonable care in exercising their powers or carrying out their duties under this Act or the regulations.

[22] At the time relevant to this appeal, regulations made under the **Act** adopted the **National Building Code of Canada, 1995**, as the "**Nova Scotia Building Code**", with some minor adjustments. A reference to the "**Code**" in this decision is a reference to either the **Nova Scotia Building Code** or the **National Building Code**.

Duty and Standard of Care - HRM:

[23] The judge set the municipality's duty and standard of care guided by the analysis of the House of Lords in **Anns v. London Borough of Merton**, [1977] 2 All E.R. 492 at 498 as refined by the Supreme Court of Canada in **Kamloops**

(City) v. Nielsen, [1984] 2 S.C.R. 2. He considered, as well, **Rothfield v. Manolakos**, [1989] 2 S.C.R. 1259 and **Ingles v. Tutkaluk Construction Ltd.**, [2000] 1 S.C.R. 298).

[24] He found that the municipality owed a duty of care to the Flynns which duty required the inspector to "carry out the inspections according to the [municipality's] policy in a reasonable and prudent manner." The judge's reference to "the" inspections meant those inspections that the municipality, as a matter of policy, had decided to undertake.

[25] The question of what inspections were required by the municipality was complicated by the then recent merger of several municipal units (Halifax, Dartmouth, Bedford and the County of Halifax) into a single municipality (HRM). Each municipality had different inspection policies prior to merger. As noted by the judge:

> [88] After municipal amalgamation on April 1, 1996, the building by-laws of the component municipalities of the Halifax Regional Municipality were eventually replaced by a single building bylaw (By-law Number b-201). Further, the current ***Building Code Regulations***, which came into force as of April 30, 1997 (Art. 1.1.1.2), require the owner to notify the authority at five points in construction, although it does not compel the authority to inspect at those specific times (Art. 2.1.1.11(a); Section 2.5). Thus while the County by-law only referred to three possible inspections, it was superseded by the more stringent requirement requirements of the ***Regulations***.

[26] As to the standard of care required of HRM, the judge said:

> [118] I am satisfied that the Municipality will only be liable for defects that would reasonably have been detected by the exercise of reasonable care in the inspection process that was in place at the relevant time (i.e. the summer and early autumn of 1997). . . . The municipality will not be held to a standard of perfection in interpreting the ***Building Code***; rather, "the mere misinterpretation of the ***National Building Code*** is not, of itself, necessarily negligence": ***Beutel Goodman Real Estate Group Inc. v. Halifax (City)*** (1998), 169 N.S.R. (2d) 248 (S.C.) at para. 22.
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> . . .
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> [129] I see no basis on which to limit the standard of care [to matters affecting health and safety] in the manner suggested by the defendants. The governing

> legislation does not suggest such a limitation, and there is no evidence that the Municipality had a policy that imposed one. The building inspector was obliged to carry out the inspections according to the policy in a reasonable manner; I do not see any authority requiring me to relieve the municipality of liability for negligence simply because it claims the resulting defects are not matters of "health and safety."
>
> [130] In the absence of a statutory or policy-based reason to limit the scope of the duty of care, the question becomes whether the defendants met the requisite standard of care in reviewing the plans and inspecting the building. The defendants (HRM and Mr. Williams) were subject to the standard of care of an ordinary, reasonable and prudent inspector in the circumstances, as Bastarache J. put it in ***Ingles*** at 328-329. The Municipality may be liable for defects the inspector could reasonably be expected to have detected and had the power to order remedied.
> (Emphasis added)

[27] This conclusion is consistent with direction of the majority of the Supreme Court of Canada in **Ingles**, **supra**, *per* Bastarache, J., at pp. 311:

> 18 ... To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, the court must determine whether the scheme represents a policy decision on the part of the authority, or whether it represents the implementation of a policy decision, at the operational level. True policy decisions are exempt from civil liability to ensure that governments are not restricted in making decisions based upon political or economic factors. It is clear, however, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy; see, for example, *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at p. 1243, *per* Cory J.; *Rothfield v. Manolakos, supra*, at p. 1266, *per* La Forest, J.

[28] The trial judge here concluded that the extent of the inspection scheme adopted by the municipality was a *bona fide* policy decision. Such decisions are informed by a variety of sometimes conflicting factors such as the limit on municipal resources, the concern not to impede timely construction progress, the need to reasonably accommodate existing practices of the building trades and the duty to enforce safe building construction. The judge was satisfied that, within the inspection scheme adopted by the municipality, Mr. Williams had been negligent only in failing to detect the structural inadequacy of the south wall, as will be discussed below.

[29] HRM has not appealed the judge's finding of liability. The municipality does not, however, endorse the judge's conclusion that HRM's standard of care is not limited to inspecting for matters affecting health and safety. HRM contends that the trial judge erred "in holding that the Halifax Regional Municipality could be held responsible for damages flowing from negligent inspection of buildings, in circumstances which did not create health and safety issues . . .". It is HRM's submission that the judge held the municipality to a higher standard of care than is warranted at law.

[30] For the purposes of this appeal, that issue need not be conclusively determined. As the Flynns are not represented by counsel, we do not have balanced legal argument on this issue. It is, therefore, not appropriate to embark upon a detailed examination of the extent of the private law duty of care of municipalities save as is necessary in the context of this case to do justice between the parties. Without endorsing in full the analysis of the trial judge, I am satisfied the municipality's standard of care articulated by the judge, if in error, favoured the position of the Flynns. As noted by counsel for HRM, the case law speaks of inspection schemes in the context of municipalities' responsibility for "health and safety" (see, for example, **Ingles**, **supra**, at para. 10). I interpret those words as having broad meaning consistent with the purpose of the building codes. The minimum standards set by the **NBC** and, consequently, the **Nova Scotia Building Code**, are said to concern matters of health and safety as is evident in the excerpt from the preface to the **NBC** set out at para. 17, above. Arguably, then, non-compliance with the building **Code**, does impact health and safety. It would follow that the inspections for **Code** compliance conducted by the municipality are intended to address matters of health and safety, broadly interpreted.

[31] The Flynns are critical of the inspection policies of HRM - they are seeking redress for what they submit is an inadequate inspection scheme. In effect, it is their position that it was the duty of the municipality to ensure complete compliance with the building **Codes**. The law is clear, however, that a municipality is not an insurer of the owner as to the compliance with its by-laws nor an insurer of the proper design and workmanship of projects undertaken by an owner (see **Rothfield**, **supra**, at para. 8 *per* LaForest, J. and **Ingles**, **supra**, at para. 40 *per* Bastarache, J.). Provided a municipality adopts and administers an inspection policy reasonably and in good faith, it is not bound to develop a scheme

which will detect every deviation from code. LaForest, J. said, for the majority, in **Rothfield**, at para. 8: ". . . a municipality. . .will only incur liability for such defects as it could reasonably be expected to have detected and to have ordered remedied." The question of what defects the inspector could reasonably have detected is one of fact and reviewed on the standard of palpable and overriding error.

The Liability of Applewood and HRM/Williams:

(a) The South Wall :

(i) Applewood:

[32] At trial Mr. Dunleavy, on behalf of Applewood, acknowledged that the south wall of the home, as designed by Ms. Henderson, was insufficiently braced and, due to its height, required an engineered design under Part 4 of the **Code**. He acknowledged, as well, he should have noticed this deficiency. Mr. Dunleavy says, however, the judge erred in holding Applewood liable for the inadequacy of the wall, because it was simply following the Henderson design. He takes issue, as well, with the amount of damages awarded to fix the wall.

[33] The contract between Applewood and the Flynns required that the contractor's work conform to the requirements of the "applicable building codes". The design of the south wall was not engineer approved thus not in compliance with the **Code**. The judge did not err in concluding that in building a wall which did not comply with **Code**, Applewood had breached the contract.

[34] On this issue the judge said:

> [92] A contractor may be liable where the architect's plans are so defective that an experienced contractor ought to have recognized obvious defects. In these circumstances the contractor's obligation to carry out the work which will perform the intended duty or function overrides the obligation to comply with the plans and specifications: ***Brunswick Construction Ltd. v. Nowlan*** [1975] 2 S.C.R. 523 at 529-530; ***Hudson's Building and Engineering Contracts***, 10th edn. (London, 1970) at 291-292. . . .
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> . . .

> Breach of contract
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> [101] The plaintiffs claim that Applewood (1) failed to carry out the work in accordance with the plans and specifications; (2) failed to do all the work in accordance with the applicable building codes; and (3) failed to repair defects within one year of the date of completion upon notification by the owner.
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> [102] Certain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good and workmanlike manner, the materials and work, when completed, must be fit for their intended purposes, and the work must be completed without undue delay (***Markland Associated Ltd. v. Lohnes*** (1973), 11 N.S.R. (2d) 181 (S.C.T.D.); ***Girroir v. Cameron*** (1999), 176 N.S.R. (2d) 275 (S.C.)).
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> [103] Applewood built the house required by the contract. In certain instances - as with the tarpaper on the roof - items required by the contract were omitted or altered. In most cases, however, I conclude that the plaintiffs consented to or initiated the changes, as was the case with the interior partition walls. With respect to the tarpaper on the roof, however, the plaintiffs relied upon Mr. Dunleavy's assurance that it was not necessary.
>
> [104] On the other hand, it is unquestioned that aspects of the design failed to meet requirements of the *National Building Code*. This was the case with the 14-foot south wall. In other cases - as with the poorly-made floor slab - there were clear failures to do the work in a "good and workmanlike manner". In this respect, Applewood breached its contract with the plaintiffs.
> (Emphasis added)

[35] I am not persuaded that the judge erred in finding Applewood liable for breach of contract in the construction of the faulty south wall.

(ii) HRM/Williams:

[36] As noted above, it was acknowledged at trial that the south wall required an engineered plan. Mr. Williams had incorrectly read the plans. He mistakenly thought that the engineer's stamp, which approved only the slab design, applied as well to the south wall. The judge found HRM and Williams negligent in permitting construction of the south wall to proceed. He said:

> [89] My findings of fact include the following points, which are particularly germane to the analysis:

. . .

> The 14-foot south wall of the house required an engineered design, under Part 4 of the ***National Building Code***. The wall as designed and built was insufficiently braced and supported. Neither Mr. Williams nor Mr. Dunleavy noticed that the wall as drawn on the plans fell outside the provisions of Part 9 of the ***Code***. Mr. Dunleavy failed to notice the structural insufficiency of the wall during the construction. Mr. Williams failed to notice it during his inspections.

[37] HRM/Williams has not appealed this finding nor the resulting liability and damages attached to the Municipality.

(b) The Slab:

(i) Applewood:

[38] Due to Natasha's environmental sensitivities, the Flynns did not want a conventional basement where moulds and other allergy triggers might thrive. Consequently, the original plans prepared by Shawna Henderson called for the house to be constructed on a monolithic slab. The northeast corner of the house, as designed, was butted into a bank of earth and partially buried. This would provide some energy savings. The Flynns were concerned that embedding the house into the soil in this way might contribute to mould and moisture in the living space. It was agreed between the Flynns and Applewood that the design would be changed to remove this feature. This change would require extensive excavation into the bank behind the house and construction of a retaining wall or a significant elevation at the southeast corner of the pad on which the slab would sit. As a result of this alteration in the design, Mr. Dunleavy was concerned that the monolithic slab could not be adequately supported on the lot. Accordingly, the contract signed between the Flynns and Applewood provided for either a monolithic slab or a frost wall and slab construction "to be decided after pricing". After removing the loose surface material on the lot, Mr. Dunleavy recommended proceeding with the foundation as a slab with a frostwall.

[39] The Flynns say, according to the contract, the monolithic slab could be replaced with the slab and frost wall only if the latter was a cheaper method of construction. The frost wall and foundation was not cheaper to build than was the

slab (excluding the cost that would be incurred in constructing a retaining wall or elevating the corner of the slab). Consequently, they submit, by building the frost wall and slab foundation Mr. Dunleavy breached the contract. The judge found, however, that the Flynns agreed to this change in the contract. That factual finding is supported by the evidence.

[40] The plan for the monolithic slab had been engineer approved, as is required by Part 4 of the **Code**. A frost wall and slab foundation generally falls within Part 9 of the **Code** and does not require engineered plans, as will be discussed below. Applewood constructed a four foot frost wall with an interior slab. The perimeter of the slab was poured to notch and rest on top of the frost wall. There was no mechanism to tie the slab and the wall together. It was agreed by both experts that the design was faulty and the slab was bound to crack, as it did.

[41] It was critical to the Flynns that the living space of the house be completely sealed off from the seepage of soil gases or moisture. This was to be accomplished by a continuous vapour barrier running under the slab and integrated with the vapour barrier in the walls. As the slab cracked and pulled away from the frost wall the under-slab vapour barrier was breached, thus exposing the living space to the potential seepage of soil gases.

[42] Another defect, acknowledged at trial, is Applewood's failure to pour an interior footing or otherwise thicken the slab beneath one of the load-bearing walls.

[43] The judge made the following findings:

> [55] . . . Mr. Dunleavy agreed that the slab was not thickened under the wall between the house and the garage.
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> . . .
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> [89] . . .
>
> The contract permitted the use of a monolithic slab or a frost wall and slab construction for the floor slab and foundation. A monolithic slab required an engineer-approved plan under the ***National Building Code***, but a frost wall design did not have such a requirement.
>
> . . .

> Mr. Dunleavy did not supervise the placement of the slab-on-grade and frost wall. He did not lap the vapour barrier under the slab in the manner required by the ***National Building Code***. He did not instruct the concrete installer to raise the wire mesh into the slab while it was being poured. The subcontractor removed the thermal break between the house and the garage. The slab under the supporting wall between the house and the garage was not thickened.
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> The floor slab has experienced significant and continuous cracking as a result of the way it was constructed, with a narrowed "lip" resting on the frost wall.
>
> . . .
>
> [99] . . . By his own evidence, however, Mr. Dunleavy was not present when the floor slab was poured, and was not sure if he had instructed the subcontractor to raise the wire mesh.

[44] Applewood took it upon itself to construct a substitute foundation system. The cracking of the slab was inherent to its design. Additionally, the concrete sub-trade hired by Applewood removed the thermal break between the garage and main house when pouring the slab. The judge concluded that the slab was not constructed in a good and workmanlike manner, which was in breach of the contract. He assigned full responsibility for the failure of the slab system to Applewood and Mr. Dunleavy, personally.

[45] It is Applewood's position on the cross-appeal that its work was "good enough" and that the judge erred in holding it to too high a standard of care - that of an engineer or architect. I find no merit in this submission and would dismiss that ground of cross-appeal.

(ii) HRM/Williams:

[46] It was the Flynns' position that HRM was liable for the problems with the slab because Mr. Williams did not require Mr. Dunleavy to file plans for the frost wall and slab construction in substitute for the monolithic slab. Had he done so, they say, he would have noted the slab's faulty design and could have ensured that proper footings were planned.

[47] There was evidence from Mr. Williams and Shawna Henderson that a residential frost wall and slab construction falls within Part 9 of the **Code** which does not necessitate engineered plans. It was Mr. McBride's opinion that, due to the potential loading of the stone sauna which was planned for the house, the slab and frost wall construction would require engineered plans. In the face of this conflict, the judge determined that engineered plans were not required. Consequently, he concluded Mr. Williams was not negligent in permitting the construction to proceed without new foundation plans being filed. I am not persuaded the judge erred in this regard as his conclusion rests upon his finding of fact, which is supported in the evidence.

[48] One of the five inspections required by HRM was of "footings". The Flynns say Mr. Williams was negligent in not inspecting for interior footings. There was evidence that the extra support necessary beneath load bearing interior walls of a house can be created using either separately poured "strip footings" or by thickening the slab in those areas. Once again, there was conflict in the evidence on whether, at the time of this construction, slab thickening in lieu of strip footings remained an acceptable building practice. Applewood used thickened footings (although acknowledging omitting the necessary thickening under one of the load bearing walls as mentioned above).

[49] Mr. Williams testified that it was the policy of HRM to inspect interior footings only if they were poured at the time the perimeter footings (those under the frost wall) were inspected. Generally, interior footings were not poured at that time. It was Mr. Williams' evidence that under-slab thickening did not lend itself to inspection, because the thickening was created contemporaneously with the pouring of the full slab pour and not visible. There was conflicting evidence on both the inspection policy of HRM and the capacity to inspect thickened footings.

[50] In the face of conflicting evidence, the judge accepted that of Mr. Williams. He made a clear factual finding:

> [89] My findings of fact include the following points, which are particularly germane to the analysis:
>
> . . .
>
> The Municipality was not required to inspect interior footings at the time the construction was under way, as it was not policy of the

> Municipality or practice in the industry to use interior footings until 1998. The policy until that time required only thickened footings.

[51] On these various issues the judge concluded:

> [141] I am not persuaded that Mr. Williams was negligent in not demanding a new set of plans when Mr. Dunleavy changed the slab design. . . .
>
> [142] There was no negligence in Mr. Williams' omission of an inspection of internal footings. Thickened footings remained acceptable practice until the year after the house was built. In the absence of a firm policy in this respect, the inspection that was carried out was not negligent.

[52] I add, there is no evidence that the lack of thickening under the one load bearing wall or the use of thickening in substitution for strip footings contributed materially to the cracking of the slab. The evidence was overwhelming that the significant cracking of the slab was attributable to its faulty design, described above at para. 40. Thus, even had Mr. Williams been remiss in his failure to inspect the interior footings, there was no proof of damage on that account.

[53] Applying the standard of review described above, I am not persuaded that the judge committed reversible error in declining to attribute liability for the defective slab to Mr. Williams and HRM.

(c) The Roof Trusses:

(i) Applewood:

[54] The Flynns say the judge erred in concluding the roof trusses were not deficient in the face of overwhelming evidence to the contrary.

[55] The only reference to roof trusses on the Henderson plans was a notation calling for “16 inch parallel chord truss to Eng. Specs.”. The plans did not provide details of the intended truss design. Applewood ordered the trusses from Kent Building Supplies. They were designed and built for Kent by Barrett Lumber. It was the opinion of Clem Webber, an employee and experienced truss designer with Barrett Lumber, that the parallel chord trusses specified in the Henderson notation could not span the distance called for in the plans. Accordingly, Barrett Lumber

supplied modified parallel chord trusses. Additionally, the plans had originally called for a cathedral ceiling in the main living room. On Mr. Dunleavy's recommendation, with the agreement of the Flynns, this design was changed to a flat ceiling.

[56] It was Mr. McBride's evidence that, normally, the designer of a house would specify the materials that are used in the construction of the roof and ceiling which information would be presented on the drawing as a "loading" factor. The load on a roof consists of the dead load and live load. Dead load is the cumulative weight of the roof components (roofing material, sheathing, the self-weight of the roof truss, insulation, strapping, vapour barrier, drywall, plus an allowance for mechanicals such as light fixtures, ductwork and ventilation). The live load refers to transient loads from weather factors such snowfall. A roof must be strong enough to withstand the sum of the actual dead load and the maximum live load common to the area. He testified:

> . . . Also, the drawing should provide enough detail to give general layout and indicate things like roof slopes, whether there's valleys or steps in the roof or changes in the geometry of the roof. With that information on the drawing, the drawings would go to a roof truss supplier. A design would be prepared normally using computer programs to indicate the member sizes, the types of connection, gang nail plates. With that, a placement drawing that indicates where each of the different type of trusses would be placed on the roof framing -- that package would be stamped -- each drawing of that package -- typically each truss is produced on an 8 ½ by 11 sheet, and each drawing should have an engineer's stamp affixed to it. And on that drawing there should be adequate information for the original designer or the building designer to review for conformance with layout, geometry and loading.

[57] While the Henderson designs did not contain the usual roof detail, it was Mr. McBride's opinion the drawings provided sufficient information from which required loads could be calculated.

[58] Both experts, Mr. McBride and Mr. Frost, opined the "as built" dead load of the roof trusses exceeded the 10 pounds per square inch capacity used by Barrett Lumber in the truss design according to mathematical calculation. This would result in undue lateral movement of the trusses, which, in turn, would cause the walls of the house to move in and out as the trusses reacted to the load. Additionally, a sufficiently high live load level could cause the roof to fail.

[59] Clem Webber testified that he had used the Alpine computer program to design the Flynns' trusses. This was his usual practice. He entered the specifications from the Henderson plans into the Alpine program to produce the design. He routinely uses the 10 pounds per square inch load capacity as is specified by the program, unless there are unusual features to the roof such as a roof mounted air conditioning system or heavier than normal building components. There were no such characteristics here.

[60] Darren Foster, a civil engineer in the engineered wood division of Barrett Lumber testified that a dead load of 10 pounds per square inch was that required by the **NBC** for usual residential house construction. At the time of the Flynn construction, the **NBC** incorporated the Truss Plate Institute of Canada ("TPIC") guidelines as the standard for residential roof truss construction. The Alpine software design package complied with the requirements of the TPIC.

[61] Barrett Lumber produces in excess of one thousand sets of trusses yearly using the Alpine Program, without complaint as to fitness. It was the evidence of Messrs. Foster and Webber that the roof, as built, was in compliance with both the **Code** and the Henderson plans, subject to the necessary adjustment from a parallel chord truss to a modified parallel chord truss.

[62] The Flynns said the trusses, to conform with the Henderson plans, required engineering approval. Foster and Webber testified that trusses designed under the Alpine program were in conformity with engineering specifications. It was not uncommon that the computer generated truss design was not separately stamped by an engineer. Indeed, although the Flynn truss design did not contain an engineering certification at the time of the construction, the design was subsequently approved by an Alpine engineer in preparation for trial

[63] Mr. Frost testified that, in inspecting the house, he did not see evidence of the truss movement he would have expected to have occurred if the load capacity of the trusses, as built, was in fact inadequate. There would have been cracking in the gypsum board where the wall met the ceiling. Mr. Frost concluded that there must be additional or unidentified load paths which compensated for what he perceived as a deficiency. This, he opined, may have brought the actual load capacity within that required.

[64] It was Mr. Dunleavy's evidence that in a five year old house if there were significant lateral movement in the walls due to the inadequacy of the trusses, the cracking spoken of by Mr. Frost would be evident. It was not.

[65] Mr. McBride, in his first report, had recommended replacement of the roof. He agreed on cross-examination that his reason for recommending replacement of the roof was to satisfy the Flynns wish to have the original cathedral design and had nothing to do with the structural fitness of the roof. It was only in response to the report of Mr. Frost that he addressed the roof truss issue. On cross-examination he further acknowledged that he had assumed trusses fell within Part 4 of the **Code** and required an engineered design. He had been unaware, until pointed out to him by counsel for HRM on cross-examination, that roof trusses could fall within Part 9 (Article 9.23.13.11) of the **Code** and, therefore, not require an engineered design. Mr. McBride acknowledged that without conducting a load test, he could not say that the roof, as built, did not satisfy the Part 9 load and span specifications.

[66] The Flynns say the judge erred in concluding that the roof was adequate as built. They say, as well, that the roof should have been constructed with sufficient strength to withstand the addition of solar panels. Applewood, knowing of their plan to install solar panels, should have built a roof that would withstand this additional load. This, they say, is a breach of contract.

[67] The judge was not satisfied that the Flynns made their intent to install solar panels sufficiently clear to Mr. Dunleavy. The Henderson plans did not provide for the addition of solar panels. The judge concluded that the trusses were adequate as built and Applewood was not in breach of contract. He said:

> [10] Mrs. Flynn said she and Mr. Flynn were interested in eventually installing solar panels on the roof of the house, and that Ms. Henderson was aware of this and was going to develop the design accordingly. No reference to solar panels appears in the plans. James Dunleavy, the contractor, testified that the Flynns discussed solar panels at their first meeting, but there was no reference to solar panels in the construction contract. A "Materials/Special Information List" prepared by Ms. Henderson (Exhibit 1, Tab 3) discusses (at page 2) "renewable energy sources" and states that the "design incorporates large passive solar component, please quote on a rough-in kit for a solar hot water system from Thermodynamics ..." I do not find this reference to be sufficient evidence that the "passive solar" aspect of the house incorporated a provision for solar panels.

[68] The judge's references to the roof truss issue in his decision demonstrate that he was aware of the opinions of Mr. McBride and Mr. Frost but, in the face of conflicting evidence, could not conclude that the trusses were unfit. He was not satisfied the absence of a stamp by a professional engineer at the time of construction, in itself, meant the trusses were faulty. He found:

> [139] I am also not convinced that there was any negligence or breach of contract in Applewood's construction of the roof. The builder reasonably relied upon the truss designs provided by Barrett Lumber.
>
> [140] While there is minor cracking in the wall, I am not convinced that this goes beyond the cosmetic, and accept Mr. Frost's assessment that there is no need to replace the roof. As such, none of the defendants are liable for the roof.
> (Emphasis added)

[69] Applying the above standard of review, I am not persuaded that this finding that no liability attached in relation to the construction of the roof is reversible error.

(ii) HRM/Williams:

[70] The Flynns say that Mr. Williams should have required that engineered truss plans be filed for inspection. The judge having found that the trusses were fit for the intended purpose, the fact that HRM did not require engineered truss plans did not cause the Flynns damage.

[71] The judge found, in the alternative, the inspection mandated by the municipality would not have revealed any inadequacy in the roof trusses. He said:

> [50] Mr. Williams said an engineer's stamp was a prerequisite for a truss design in the old City, but that this was not the custom in the County. Thus Mr. Williams lowered his inspection standards because he was in the former county. He acknowledged that he could not do an accurate assessment without having the truss designs with him when he inspected. In 1997 the policy of HRM was not to require that shop drawings of components built by third parties - such as wall trusses - be provided at the site during inspections. Gerard Donahoe, a building inspector and plans examiner, said the inspector had a discretion not to require a truss report to be filed until after the permit was issued, and Mr. Thornhill stated that inspectors did not check roof trusses for configuration.

. . .

> [135] . . . As to the roof trusses, although I am not convinced that there are defects demanding repair, I also conclude that no inspection Mr. Williams would have done under the policy existing at the time could reasonably have revealed any defects that did exist.
>
> . . .
>
> [138] The defendants do not admit that there is any problem with the roof trusses. In the case of the municipality, there was a clear policy decision that inspections would go no further than measuring the spacing of the studs. The lack of an engineer's stamp on the truss designs was a matter of practice, but does not create liability for the Municipality. To the extent that there is weakness in the roof trusses, it would not have been discoverable by any inspection the Municipality would have done.
> (Emphasis added)

[72] Once again, I am not persuaded his conclusion, which is supported by the evidence, is reversible error.

(d) Drainage Tiles:

(i) Applewood:

[73] The Henderson plans called for drainage tiles around the perimeter of the monolithic slab. It was not established that drainage tiles were contractually required when the foundation was changed to the slab/frost wall. Mr. Dunleavy concluded that drainage tiles around the perimeter of the frost wall were not necessary. He consulted with Mr. Williams and received HRM's approval to proceed without the tiles. According to the **Code**, drainage tiles are not required if their omission is approved by "the inspecting authority" (here, HRM). The judge found that neither Applewood nor HRM were negligent in the decision not to install drainage tiles. The Flynns say this is an error. They are experiencing significant moisture problems in the slab which they attribute to the lack of tiles. The tiles are necessary, they say, to properly divert the ground water.

[74] The judge said:

> [42] The plaintiffs say that no French drains or weeping tiles were installed to direct water away from the foundation. However, water collects on a slope behind the house and runs under the slab, and comes into the house through cracks in the slab. Mr. Dunleavy testified that Mr. Williams decided drain tiles were unnecessary, although they were called for on the plans. The plaintiffs say Mr. Williams' decision not to insist on drain tiles was negligent. Article 9.14.2.1(1) of the ***Building Code*** states, "[u]nless it can be shown to be unnecessary, the bottom of every exterior *foundation* wall shall be drained by drainage tile or pipe laid around the exterior of the *foundation* in conformance with Subsection 9.14.3 or by a layer of gravel or crushed rock in conformance with Subsection 9.14.4."
>
> . . .
>
> [144] It was the unanimous view of the defendants that drain tiles around the foundation wall were unnecessary. Given that it was the plaintiffs' responsibility to properly landscape the lot, the Municipality claims that they are the authors of their own misfortune. I conclude that Mr. Williams concluded in good faith that drain tiles were not necessary. This was not a negligent decision on his part or on Applewood's.

[75] Neither expert testified that drainage tiles were required on this site. In the absence of clear evidence that the installation of the tiles was called for by the contract, I am not persuaded that the judge's conclusion that no liability attached to Applewood on this account is reversible error.

(ii) HRM/Williams:

[76] As stated above, drainage tiles are required by the **Code** unless established to be unnecessary. It was Mr. Williams' opinion, when consulted by Mr. Dunleavy about omitting the tiles, they were not required because the slab was constructed above the exterior grade of the land. The judge found, as set out above, that in so concluding, Mr. Williams, was acting in good faith and not negligent. Applying the standard of review, I am not persuaded that the judge erred.

(e) Insulation Inspection:

(i) Applewood:

[77] The plans called for R 20 insulation in the exterior walls of the house. The materials list in the contract provided for this insulation as well as vapour barrier.

The Flynns say insulation was omitted by Applewood in one of the bedroom walls of the house as was vapour barrier between the living space and the garage. These defects were discovered by the Flynns during renovations in 2001. This, they say, is in breach of the contract. There was minimal evidence at trial about this alleged omission. Mr. McBride did not include in his estimate of repairs the cost of remediating this defect because it was not detected until after his report was complete. It is unclear from the evidence that the wall without insulation is an exterior wall, nor do the plans specify vapour barrier between the living space and the garage. The judge did not address this claim. In the circumstances, I am unable to conclude that his failure to do so was in error.

(ii) HRM/Williams:

[78] One of the inspections mandated by HRM policy was the "insulation inspection". The judge found that Mr. Williams, although he attended at the building site, did not actually conduct an inspection. While the judgment does not address this issue in any detail, clearly the failure to inspect in the face of a requirement to do so is negligence on the part of Mr. Williams, and, vicariously, creates liability for HRM.

[79] I am not persuaded, however, that insulation and vapour barrier in the area allegedly omitted were called for by the contract. There is no evidence that these features were required by **Code**. Accordingly, the judge's failure to address this issue is of no consequence.

(f) The Occupancy Permit:

[80] The Flynns claimed that HRM was negligent in issuing an occupancy permit. They frame the following ground of appeal:

> (42) The learned trial judge erred in law in failing to find the Defendants, Halifax Regional Municipality and Donald Williams, jointly and severally liable for all of the Plaintiffs' damages flowing from the entire building inspection process, including issuing an Occupancy Permit, despite obvious National Building Code violations.

[81] The judge found that the only "obvious" **Code** violation missed by Mr. Williams was the design and construction of the south wall. HRM/Williams were held liable.

[82] In October of 1997 Mr. Williams was called by Mr. Dunleavy to do an inspection for an occupancy permit. Mr. Williams identified additional work that would need completion in order to pass inspection. The Flynns moved into the house without obtaining the permit. Upon moving in the Flynns discovered additional deficiencies. Mr. Dunleavy did not remedy these to their satisfaction. They then contacted the warranty Program (para. 5 above) and, under that Program, went through a conciliation process which did not adequately address their concerns. The Flynns were of the view that the deficiencies in the house were attributable to HRM's flawed inspection process. They then contacted Gerard Donahoe, who was Mr. Williams's team leader at HRM. They complained to him of the continuing deficiencies. When Mr. Donahoe learned that the Flynns were living in the house without a permit he asked Mr. Williams to again visit the site and inspect for issuance of the permit. As a result of that inspection Mr. Williams issued an occupancy permit, but noted on the report the perimeter cracking in the slab as well as other, more minor, items of concern. He recommended that the Flynns obtain an engineering report to investigate the source of the slab cracking.

[83] The Flynns say, on this appeal, Mr. Williams was negligent in issuing an occupancy permit knowing of the existence of **Code** violations, which the Flynns submit include Applewood's failure to thicken the footing under one of the load bearing walls; failure to install drain tile; and the lack of a thermal break between the garage and living area. Assuming, without deciding, that the occupancy permit was issued prematurely, there is no evidence that this caused or contributed to the Flynns' loss. I would dismiss this ground of appeal.

(g) The Other Exterior Walls:

[84] The Flynns say the judge erred in limiting liability to the instability of the south wall only. It is their submission that all of the perimeter walls require strengthening.

[85] The Henderson plans did not specify exterior wall stud spacing. The contract specification list prepared by Mr. Dunleavy called for studs on 16" centres. The walls were built to 24" centres, which meets the requirements of the

Code. The fact that the walls were built on 24" rather than 16" centers, and therefore not in compliance with the contract, was not raised at trial.

[86] There was, however, some evidence that the exterior walls were not sufficiently braced. The exterior sheathing on the studs was styrofoam, as called for in the Henderson plans. The gypsum board on the interior contributed some rigidity. Applewood used wind ties to assist in stabilizing the walls.

[87] The **Code** does not directly address exterior wall rigidity but does contain a general clause that "[a]ll members shall be so framed, anchored, fastened, tied and braced to provide the necessary strength and rigidity" (**Code**, Article 9.23.2). It was Mr. McBride's opinion that the stability of the exterior walls did not comply with the spirit of the **Code**. Mr. Frost did not clearly address the adequacy of the exterior walls. Mr. McBride recommended the entire perimeter of the house be re-sheathed in plywood, from the inside, to add strength.

[88] There was no evidence that the wider stud spacing contributed to instability in the structure, although such would be a reasonable inference. The judge was aware, and noted in his decision, the Flynns were concerned about the stability of all exterior walls. It was their evidence and that of Mr. McBride that all of the walls shuddered in the wind and with the closing of exterior doors. As stated above, the judge found liability in relation to the south wall but, presumably through oversight, did not address the evidence regarding the other walls.

[89] In view of Mr. McBride's evidence that all walls were unstable and taking into account the fact that the studs, as built, were clearly not in compliance with the contract, it would be my respectful view that Applewood is liable for breach of contract on this account.

[90] Given the evidence that the stud spacing and sheathing was not clearly in breach of the **Code**, I am not persuaded that liability attaches to HRM and Williams on this account.

(h) Other Claims:

[91] The Flynns have made other submissions alleging procedural error by the trial judge in the conduct of the trial. I am not persuaded that the way in which the judge handled these matters of process is reflective of error.

THE APPLEWOOD/DUNLEAVY CROSS-APPEAL:

The Personal Liability of John Dunleavy:

[92] The Flynns claimed against Mr. Dunleavy personally as well as against the company, Applewood. It was their submission at trial, rejected by the trial judge, that they were contracting with Mr. Dunleavy in his personal capacity, not with his company, Applewood. They claimed, as well, that Mr. Dunleavy was liable as an agent of Applewood for negligent misrepresentation and for inducing Applewood's breach of contract. This too was rejected by the trial judge. They further claimed that Mr. Dunleavy was personally liable for negligent performance of his duties as an employee of Applewood. A variation on this claim found favour with the judge who held that Mr. Dunleavy was personally negligent and, therefore, jointly and severally liable with Applewood for damages. Mr. Dunleavy cross-appeals, disputing this finding. HRM takes no position.

[93] A number of mistakes occurred during the pouring of the concrete slab. Within the slab was a wire mesh grid. This grid was to be raised during the pour to ensure that it was in a mid-slab position to maximize heating efficiency. Such positioning may have provided an additional benefit by reinforcing the slab and thus limiting the cracking. The mesh was not raised during the pour. Additionally, the thermal break between the living space and attached garage was eliminated. Finally, the area under the stone sauna was uninsulated and not sufficiently thickened. It had to be later cut out and re-poured to fix these deficiencies. It was Mr. Dunleavy's evidence that the Flynns had agreed that the floor under the sauna need not be heated. Although Applewood underwrote the costs of remedying the sauna floor, the vapour barrier was compromised through this process.

[94] The judge's finding of negligence appears to be based upon Mr. Dunleavy's failure to adequately supervise the concrete subcontractor. In concluding this gave rise to personal negligence on Mr. Dunleavy's part, the judge relied upon the opinion of Freeman, J.A., for the majority of this Court, in **A.C.A. Cooperative Association v. Associated Freezers of Canada Inc.** (1992), 113 N.S.R. (2d) 1 (S.C.A.D.).

[95] In **Associated Freezers** the principal, Tomlinson, was a professional engineer who, when employed by an engineering company, Engineering Design

and Construction Managers Limited ("EDCM"), was responsible for the overall design and supervision of the construction of a warehouse, which was negligently designed. The warehouse collapsed causing substantial loss and resulting in litigation. Tomlinson was also a principal in the company (AFCI) that operated the warehouse and an officer of a company, Odyssey, that owned the warehouse at the time of the loss. AFCI was held to have been negligent in failing to take steps to avoid the building's collapse in the face of clear signs that the structure was compromised through a combination of faulty beams and ice build-up. AFCI's corporate negligence arose through the attribution of Tomlinson's knowledge of the building's defective design and another officer, Martell's knowledge of the dangerous ice build-up. Both were directing minds of the company, therefore their knowledge was the company's knowledge. The company, ECDM, was held to have breached the standard of a professional engineering company in the design of the building and Tomlinson, being the professional engineer who oversaw the design and construction of the building while a principal of that company, was held to have personally breached the same standard. The fact that the company, ECDM, was liable, did not absolve Tomlinson, an employee of the company, of the requirement that he, too, meet the professional standard.

[96] I respectfully conclude that the judge erred in holding that Mr. Dunleavy's failure to supervise the concrete subcontractor was negligent. Applewood hired a reputable sub-trade to pour the foundation. He assumed that they would do so according to accepted standards which would include raising the wire mesh to mid-slab and not removing the thermal break between the garage and the living space. This is not comparable to Tomlinson's breach of his professional duty as an engineer as was found in **Associated Freezers**. The complex and nuanced analysis of personal liability which founded the majority decision in **Associated Freezers** is not applicable here. I would allow the cross-appeal on that issue. The absence of personal liability on the part of Mr. Dunleavy, does not, however, absolve Applewood from liability for breach of contract for any faulty workmanship by its subcontractors.

The Impact of the Henderson Settlement on the Applewood's Liability:

[97] The cross-appeal of Applewood and Mr. Dunleavy submits that the Flynns' $5,000 settlement with Ms. Henderson discharges Applewood and Mr. Dunleavy entirely. Alternatively, the cross-appellants say that their damages should be calculated after deducting one-third of the total damages, as notionally owing by

Ms. Henderson to the Flynns, despite that one-third of the damages exceeds the $5,000 paid by Ms. Henderson to the Flynns.

[98] In my view, both arguments by the cross-appellants are unsupportable. The arguments fail to recognize the consequences of joint and several liability and the effect of the **Tortfeasors Act**, R.S.N.S. 1989, c. 471.

[99] Glanville Williams, in his seminal text, *Joint Torts and Contributory Negligence*, (London: Stevens & Sons Ltd, 1951) at p. 1 defines "joint tortfeasors" and "several tortfeasors" as:

> The term 'joint tortfeasor' is, in essence, well understood. Two or more tortfeasors are joint tortfeasors (a) where one is the principal of or vicariously responsible for the other, or (b) where a duty imposed jointly upon them is not performed, or (c) where there is concerted action between them to a common end. Except in the case of nonfeasance in breach of a joint duty, parties cannot be joint tortfeasors unless they have mentally combined together for some purpose.
>
> Where tortfeasors are not joint they are necessarily 'several', 'separate' or 'independent'. Several (i.e. separate or independent) tortfeasors are of two kinds: several tortfeasors whose acts combine to produce the same damage, and several tortfeasors whose acts cause different damage. ...
>
> ...Concurrent tortfeasors are tortfeasors whose torts concur (run together) to produce the same damage. They are either joint concurrent tortfeasors (briefly, joint tortfeasors) where there is not only a concurrence in the chain of causation leading to the single damage but also (apart from nonfeasance in breach of a joint duty) mental concurrence in some enterprise, or several concurrent tortfeasors, where the concurrence is exclusively in the realm of causation. ...

[100] In **S. Bransfield Ltd. v. Fletcher** (2003), 264 N.B.R. (2d) 366 (CA), the principal authority relied upon by the cross-appellants, the Court (para. 6) approved this principle. To the same effect: Lewis N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Canada Ltd., 2003) at pp.487-90 which reviews the Canadian case law.

[101] In the present case, Ms. Henderson was not a "joint tortfeasor" with Applewood. I have concluded that the judge erred in holding Mr. Dunleavy personally liable for negligence (see ante para. 96). Applewood was found liable for breach of contract and negligence. Applewood did not act in concert with Ms.

Henderson, nor are the above prerequisites satisfied in order to otherwise establish the relationship of joint tortfeasors with Ms. Henderson. Ms. Henderson designed. Applewood built. Their separate actions, either breach of contract or negligence, combined to cause damage to the Flynns.

[102] At common law, a release or discharge of a "joint tortfeasor" could, with certain exceptions, release or discharge the other joint tortfeasors. This principle did not apply to release "several tortfeasors" (or "several concurrent tortfeasors" as defined by Glanville Williams). See: Glanville Williams, pp. 5 and 37; **Bransfield**, **supra**, paras. 6 and 22; Klar, pp. 490-91. As Ms. Henderson was not a "joint tortfeasor" with Applewood, the automatic release principle has no application. This disposes of the cross-appellants' first submission, that the release of Ms. Henderson released them. We need not consider the effect of the **Tortfeasors Act** on the common law principle of automatic release against other joint tortfeasors (*Joint Tortfeasors & the Common Law "Release Bar Rule"*, Law Reform Commission of Nova Scotia, July 2002).

[103] Also at common law, a plaintiff could claim against any concurrent tortfeasor, joint or several, for the entire amount of the concurrently caused loss. This principle also applies to concurrent liability where, as with Applewood, one of the defendants is liable in both contract and tort. The plaintiff was not limited to a proportionate claim, such as the one-third posited by the cross-appellants here. (See: Glanville Williams, pp. 3-4 and **A.C.A. Cooperative Association Ltd. v. Associated Freezers of Canada Inc.**, **supra**, at para. 113.) This disposes of the cross-appellants' second submission, that their damages should be reduced to reflect Ms. Henderson's alleged one-third liability.

[104] The **Tortfeasors Act**, ss. 3(c) and 4(1) entitle a tortfeasor who is held liable for damages to sue for contribution "from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise". I make no comment on whether, or the extent to which, this provision would apply to Ms. Henderson and Applewood given the interplay of contractual and tortious liability.

[105] Applewood did not cross-claim against Ms. Henderson in this action, to claim contribution under the **Tortfeasors Act** or on any other basis. Therefore, the trial judge did not consider contribution issues as between Ms. Henderson and

Applewood. That situation is not a result of any act or omission by the Flynns, and has no bearing on their entitlement to damages from Applewood.

[106] I would dismiss these grounds of the cross-appeal.

THE ASSESSMENT OF DAMAGES:

[107] An appellate court may not substitute a figure of its own for that awarded by the trial judge simply because it would have awarded a different amount of damages if it had tried the case. Before the court can intervene, it must be satisfied that the trial judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one) or that the amount awarded is either so inordinately low or high that it must be a wholly erroneous estimate of the damage. This standard of review, which was established in **Nance v. British Columbia Electric Railway Co.** [1951] 3 D.L.R. 705 (P.C.) at p. 713, remains the law (**Naylor Group Inc. v. Ellis-Don Construction Ltd.**, [2001] 2 S.C.R. 943).

(a) Damages Awarded:

[108] The judge's calculation of damages was made difficult because the Flynns did not provide a breakdown of the amounts required to repair the various deficiencies. It was their position, advanced through their expert, Mr. McBride, the most cost effective method of addressing the many problems with the house was to rebuild it. A global figure was provided. Had the judge found that the defects were as widespread as asserted by the Flynns, their global approach to damages would have been a sound one.

[109] The judge did not accept the defects were as pervasive as suggested by Mr. McBride. In order to isolate the damages associated with the deficiencies found, the judge questioned Mr. McBride on the cost of repairing the individual defects. He accepted Mr. McBride's cost estimates.

[110] For the slab repair, he allowed the full amount suggested by Mr. McBride for replacement of the slab, subtracting only a $2000 allowance for rebar. This included the removal of the old slab, the installation of new interior footings and a new slab with in-floor heating. He said:

> [157] I am prepared to allow the full cost of the slab replacement as set out by Mr. McBride, subtracting only $2,000.00 to account for the rebar, which is not a ***Building Code*** requirement. The damages allowed for the slab thus amount to $45,000.00, plus 12 per cent ($5,400.00) to account for inflation over four years. Mr. McBride's estimates were prepared in 2000, and the work will not be done before 2004. This provides a total of $50,400.00 for the slab. Mr. Dunleavy and Applewood are jointly and severally liable for this amount.

[111] I am not persuaded that in excluding the allowance for rebar the judge erred within the standard of review. While rebar was called for in the monolithic slab construction, there was no evidence that it was necessary for the slab/frostwall foundation; that it was required by **Code**; or that it was commonly a part of the slab/frostwall construction.

[112] The Flynns say the judge should have included, in conjunction with damages for the replacement of the slab, an allowance for removal of the under-slab fill and replacement with compacted granular fill. It was Mr. Dunleavy's evidence that the fill under the existing slab was granular and compacted. Pictures taken during construction showed a compacting machine (a Bomag vibrating roller) on site. Mr. McBride opined that the under-slab fill may have contained larger rocks and, if so, could not have been properly compacted, resulting in under-slab instability and voids. Mr. McBride's opinion was based, in part, upon photographs taken after the compacting of the fill, which revealed that the plumbers had dug up large rocks from the sub-base, preparatory to their work in installing the plumbing. Boulders, if existing in the sub-base (which was required by **Code** to be granular fill or "undisturbed" soil) would prevent adequate compaction. Insufficient compaction could have contributed to the settling and cracking of the slab. In addition, Mr. McBride had detected voids under the cracks in the slab which he felt confirmed the inadequacy of the sub-base. Contractor Allen Offman testified on behalf of the Flynns and agreed that the boulders shown in the pictures should not be present in a properly compacted sub-base. Mr. McBride recommended that the sub-base be tested for adequate compaction, and, if found necessary, that it be replaced. No evidence was called by the Flynns on the projected cost of removing and replacing the sub-base. It was Mr. McBride's recommendation that the testing be undertaken at the cost of the owner.

[113] The judge did not specifically address the issue of the sub-base. In my respectful view, it was error for the judge not to have dealt with this claim. Mr. McBride's estimate of the cost to replace the slab (which was accepted by the

judge - see para. 110, above) included an amount for compaction of the existing fill but not for its replacement if necessary.

[114] Ideally this issue should be remitted to the trial judge for determination. I am reluctant, however, to put all parties to the expense and delay of further proceedings. I would find that the preponderance of evidence supports the conclusion that the sub-base needs replacement. I would add an additional $1500.00 to the damages awarded for replacement of the slab to cover replacement of the fill. This amount is an estimate of the damages, consistent with the principle in **Penvidic Contracting Co. v. International Nickel Co. of Canada Ltd.**, [1976] 1 S.C.R. 267. This sum is the responsibility of Applewood only.

[115] Mr. McBride allowed for a total cost of $25,500 to rebuild all exterior walls. Of this, he estimated $10,000 would be attributable to the south wall. The judge allowed that latter amount for the repair of the south wall. He said:

> [158] Mr. McBride estimated the cost to repair the wood framing of all the walls as follows:
>
> | | | |
> |---|---|---|
> | removing interior drywall and installing | | |
> | plywood (approx. 2300 square feet at $1.50/sq. ft.) | | $3,500.00 |
> | supply and install new plywood on walls (72 sheets) | | $6,000.00 |
> | Supply and install drywall taped and filled at $2.25/sq. ft. | | $10,000.00 |
> | paint interior (approx. 6500 sq. ft. at | $1.00/sq. ft.) | $6,000.00 |
> | **Total cost for wall framing** | | **$25,500.00** |
>
> [159] Mr. McBride estimated at trial that the south wall would account for approximately $10,000.00. I have found that repairs are necessary only to the south wall, for which I am prepared to allow an amount of $10,000.00, plus the full cost of repainting the interior of the house, $6,000.00. I add three per cent ($480.00) to reflect inflation over one year, as Mr. McBride's estimate on the south wall is drawn from his trial evidence. This results in a total of $16,480.00 to repair the south wall, for which HRM, Mr. Williams, Mr. Dunleavy and Applewood are jointly and severally liable.

[116] The method of remediating the exterior walls recommended by Mr. McBride was to remove the interior finish and apply plywood sheathing from the inside of the house. This, he opined, would stabilize the exterior walls. Since the stud-spacing deficiency was not raised by any party nor by the experts, I would find that the McBride repair method represents an adequate solution to the problem. The cost estimated by Mr. McBride to fix all exterior walls, including the south wall, was $25,500 for re-sheathing. Of the total cost of re-sheathing the judge allowed $16,000 for the repair to the south wall (before adding a 3% inflation factor, amounting to $480). In view of the evidence that all exterior walls required repair, I would increase this amount to the full $25,500 and apply the 3% inflation factor to this amount, resulting in $26,265. Of this amount, the $16,480 attributed by the judge to the repair of the south wall shall remain the joint and several responsibility of Applewood and HRM/Williams and the balance of $9,785 shall be the sole responsibility of Applewood.

[117] Mr. McBride estimated an additional $16,600 for costs attributable to a full rebuild of the house.

> [160] Mr. McBride also included amounts for permits, engineering (shop drawing and site review), electrical plumbing and heating amounting to $16,600.00, which he apportioned as follows:
>
> | | |
> |---|---|
> | Electrical | $4,000.00 |
> | Plumbing and heating | $7,000.00 |
> | Permits | $ 600.00 |
> | Engineering | $5000.00 |
> | (shop drawing and site review) | |
>
> [161] I will allow a portion of the $16,600 that Mr. McBride estimated for these additional matters. I am reducing the amount, however, to reflect the fact that the walls (other than the south wall) and the roof are not included in the damages. As such, I am reducing amount for engineering by half, to $2,500.00, and the amount for electrical work by $2,500.00 to $1,500.00. The remainder - $11,600.00 - is allocated equally to the south wall and the slab, adding an additional $5,800.00 to the damages on account of each area.

[118] It is unclear from the evidence what, if any, portion of the above amount is attributable to repair of the roof. The repair of the additional exterior walls will necessitate greater plumbing and electrical expense but should not require engineering costs. Of the $16,600 estimated by Mr. McBride, the judge attributed $11,600 to the south wall and slab. Of the differential of $5,000, $2,500 is for engineering, presumably for a rebuild of the roof. I would therefore allow an additional $2,500 on account of permits, plumbing and electrical attributable to the repair of the exterior walls, bringing the total new damages on that account to $12,285. This amount is the sole responsibility of Applewood.

[119] I am not persuaded that in declining to allow an additional 10% for construction contingencies the judge erred within the standard of review.

[120] The judge awarded $1,000 for Applewood's failure to install tar paper on the roof and the under-sizing of two support posts, which amount is not on appeal.

ATLANTIC HOME WARRANTY PROGRAM AND HENDERSON SETTLEMENTS:

[121] As has been discussed, above, after complaining to Mr. Dunleavy about the deficiencies in the home, and being unsatisfied with his response, the Flynns made a claim under the Program for the defects. This complaint resulted in a conciliation award in September of 1998. The conciliator directed Applewood to make some minor repairs, but considered most of the complaints to be matters of contract or patent defects, neither of which were covered by the warranty Program. The Flynns disagreed with the findings of the conciliator's report and joined the Program as a defendant in their action. The claim against the Program was settled before trial on a payment to the Flynns of $30,000 for major structural defects. This is the maximum payable under the Program.

[122] Shawna Henderson settled the action against her on a payment of $5,000.

[123] The Flynns submit the trial judge erred in applying the full amount of the AHWP and the Henderson settlements to reduce the damages. He said:

> [162] This results in total damages (apart from general damages) of $78,480.00. Of this total, $56,200.00 is attributable to Applewood and Mr. Dunleavy, jointly

> and severally and $22,280.00 is attributable to Applewood, Mr. Dunleavy, HRM and Mr. Williams, jointly and severally . . .
>
> [163] From this total, it is necessary to deduct the $35,000.00 that the plaintiffs have received from the two settlements: $5,000.00 from Ms. Henderson and $30,000.00 from the Atlantic Home Warranty Program. I allocate this amount proportionally between the two classes of damages: 72 per cent, or $25,200.00, shall be applied against the damages for which Applewood and Mr. Dunleavy are jointly and severally liable, leaving $31,000.00. The remaining 28 per cent, or $9,800.00, shall be applied against the damages for which all four defendants are jointly and severally liable, leaving $12,480.00.

[124] The Flynns say a portion of the settlements should have been credited to repairs of other defects including reconstructing the roof, the installation of drainage tiles, missing insulation and vapour barriers and the bracing of the other exterior walls. There was little evidence before the judge about the Program settlement, save that it was for "major structural defects". There was no agreement as to how the settlement would be applied to the damages found after trial. The judge did not accept the roof trusses required repair, nor that the omission of drainage tiles gave rise to liability. The only major structural defects were, therefore, the slab, the south wall, and, as I would now conclude, the other exterior walls. I am not persuaded that in reducing the damages for the slab and the south wall by the full amount of the New Home Warranty and Henderson settlements the judge erred within the standard of review. It is arguable that none of the Henderson settlement should have been attributed to the slab, as her plans played no role in its design. Clearly, however, the faulty south wall was directly attributable to her. There has, however, been no cross-appeal by HRM on this aspect of the settlement application. Therefore, on this issue, I am not persuaded that the judge erred within the standard of review.

SUMMARY ON DAMAGES:

[125] I have added an additional $12,285 to Applewood's liability for the bracing of the other exterior walls, plus $1,500 for the under-slab fill (total $13,785). This increases the amount for which Applewood is liable from $56,200 to $69,985. The total damages (excepting general damages) are increased from $78,480 to $92,265. Applying the settlements, pro rata, as did the trial judge, of the $35,000 settlement, $26,548.00 would be applied from the settlement to reduce the Applewood damages, leaving $43,437.00 payable by Applewood. The balance of the

settlements, $8,452.00 would reduce the damages owing by HRM and Applewood jointly from $22,280.00 to $13,828.00. The judge held that Applewood is solely responsible for an additional $1,000 in “general damages”. That additional amount remains payable, bringing the damages for which Applewood is solely responsible to $44,437.00.

SIGMA CONSTRUCTION BILL SET-OFF:

[126] In the years leading up to the trial HRM attempted to reach agreement with the Flynns on a method of fixing the south wall. The Flynns were reluctant to undertake a repair from the interior side of the wall. They were worried that the construction would aggravate Natasha's allergies. Mr. Frost proposed a means of securing the large windows on the south wall from the outside, although an interior repair was an admittedly better approach. The Flynns "consented" to permit the exterior repair proceed. It was to cost $19,000. Before the repair commenced the Flynns withdrew their consent. They had been advised that the exterior repair was unsafe and no more than a temporary fix. Unfortunately, by that time a contractor, Sigma Construction, had been engaged by HRM. The cancellation of the repair resulted in thrown away costs of $3,473.00 (including HST) for the aborted repair. Sigma billed HRM. This charge included direct hours ($1,400.00), sub-trade costs ($120.00) and loss of contribution in overhead and fees ($1,500.00) plus HST ($453.00).

[127] The trial judge did not accept HRM's proposal for this manner of repairing the south wall. Before trial HRM had intended to set-off the wasted Sigma expense as a payment on account of the damages for which HRM might ultimately be found liable. Because a different repair method was chosen by the trial judge, this intended "set-off" was no longer available. HRM, therefore, successfully applied to the judge to amend its defence and add a claim of set-off for the Sigma bill.

[128] The trial judge allowed a set-off in the reduced amount of $2500. He said:

> ¶ 169 I am prepared to allow the amendment of the defendants' pleadings. I do not believe there is any bad faith in the application, and I do not see any prejudice. The plaintiffs have had an opportunity to address the issue, which was canvassed at trial, and both interested parties addressed the issue in their post-trial briefs. I accordingly allow a set-off of $2,500.00. This set-off shall be applied against the

> portion of damages attributable to all four defendants ($12,480.00), thereby reducing that amount to $9,980.00.

[129] In permitting the set-off, the judge conducted no analysis on the merits. The claim clearly does not meet the requirements for set-off at law - that the obligations between the parties be liquidated debts and that there be mutuality **(Holt v. Telford**, [1987] SCJ 53 (Q.L.)). In terms of equitable set-off, the judge did not consider whether HRM had an enforceable claim against the Flynns for the amount of the Sigma bill. This is a pre-requisite for equitable set-off. There was limited evidence at trial on this issue. A pre-trial exchange of correspondence reveals that the Flynn's "consent" to the repair followed on a letter of November 14, 2002 from counsel for HRM advising that, absent the Flynns' agreement to permit the exterior repair, he would instruct HRM's Building Inspection Services to pursue their statutory remedies under s. 347 of the Municipal Government Act. On November 21, 2002 the Flynns' counsel:

> . . . If the Municipality insists on pursuing Mr. Frost's plan of action for the south wall, my client (sic) wishes to make it clear on the record that they are not in agreement with the plan because it will obstruct their view and will not be aesthetically appealing or that it will be a proper fix. Under no circumstances do they consider it a substitute for a proper installation and nor do they consider it to be a permanent solution.
>
> . . . They will not be estopped from arguing at trial that the south wall has yet to be remedied.
>
> Provided there is clear understanding of my clients' position as set out above, the HRM may proceed. . . .

[130] It is my respectful view that the trial judge erred in failing to require that the so-called "agreement" between the Flynn's and HRM resulted in an enforceable debt. On the record, it appears clear that there was, in fact no agreement, but simply initial acquiescence on the part of the Flynns.

[131] It was thought that the instability of the south wall created a safety hazard. The pre-trial repair was presumably in HRM's interests as it would forestall additional damages arising from Williams' failure to detect the Code violation in

the construction of the south wall. As stated, the exterior repair of the south wall was not accepted by the judge as the preferred method of remediating the deficiencies in the south wall. Even had HRM proceeded with the full repair, its costs of doing so would not be deducted from the damages payable to the Flynns because the proper interior repair would be required in any event. The alternate method of repair was not a substitute for that found to be required by the trial judge.

[132] There is no justification for equitable set-off in these circumstances. I would allow the appeal to remove this $2500.00 set off in favour of HRM.

COSTS:

[133] Unfortunately, costs of the trial have not yet been fixed. There has been mixed success on this appeal. The Flynns have succeeded in increasing their damages by $13,785.00 plus they succeeded in their appeal of the Sigma set-off ($2,500). This is very limited success given the multitude of items raised by them. The bulk of the increased damages has come at the expense of Applewood. Save for the Sigma Construction issue, HRM's liability remains essentially the same. The Flynns have been largely unsuccessful in their appeal against HRM. Mr. Dunleavy has succeeded on his cross-appeal on the issue of his personal liability. Applewood has been unsuccessful on its limited cross-appeal. It was not necessary to consider HRM's Notice of Contention.

[134] I would order that all parties bear their own costs of the appeal and cross-appeal.

DISPOSITION:

[135] The appeal is allowed in the limited extent set out above, increasing the net damages (after application of the settlement funds) payable by Applewood only (not including Mr. Dunleavy personally) to $44,437.00 and adjusting those payable by Applewood and HRM jointly and severally to $13,828.00 and removing the set-off of $2,500 in favour of HRM. All parties shall bear their own costs.

Bateman, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.

APPENDIX A

Issues Raised on Appeal by Fabian and Trudy Flynn
(Reproduced from Appellants' Factum)

1. Plans Review

   (a) The issue is whether the learned trial judge erred in law in failing to find the Defendants, the Halifax Regional Municipality, severally liable for allowing building inspectors to do plan reviews without any training or experience.

   (b) The issue is whether the learned trial judge erred in law in not holding the Defendants, Halifax Regional Municipality and Donald Williams, jointly and severally liable for allowing construction to proceed despite obvious violations of the National Building Code of Canada (1995), and information missing from the plans, which could reasonably have been detected by the building inspector during the plans review stage.

2. Slab and Footings and Footings Inspection:

   (a) The issue is whether the learned trial judge erred in law in failing to apply a uniform standard of care for the footings inspection conducted by the Halifax Regional Municipality's building inspection department, regardless of the area of the Halifax Regional Municipality in which construction took place, and in fact, applying a lower standard of care in the Plaintiffs' area of the Halifax Regional Municipality.

(b) The issue is whether the learned trial judge erred in law in failing to find all four (4) Defendants jointly and severally liable for all of the Plaintiffs' damages regarding the slab, footings and foundations, including, but not limited to the following errors of law:

(i) The issue is whether the learned trial judge erred in law in failing to find the building inspector and the Halifax Regional Municipality negligent in allowing construction to proceed without requiring the Defendants, Applewood and Dunleavy, to provide plans for the foundation and frost wall, and in failing to instruct the Defendants, Applewood and Dunleavy, to use interior strip footings, instead of thickenings in accordance with Halifax Regional Municipality Building Code By-laws and Regulations and policies.

(ii) The issue is whether the learned trial judge erred in law in not holding the Defendants Halifax Regional Municipality and Donald Williams, jointly and severally liable for the Plaintiffs' damages from the failure of the structural integrity of the slab, caused or contributed to by the Defendants' negligent inspection process and the Defendants' failure to enforce the National Building Code of Canada (1995).

(iii) The issue is whether the learned trial judge erred in law in deducting costs for the supply and installation of rebar in the slab to be reconstructed, where rebar was specified in the Plaintiffs' house design and thus required by the contract, which was required by the National Building Code of Canada (1995), and the standard of care of a reasonable contractor as attested to by the expert witnesses who testified at the trial on behalf of the Plaintiffs.

3. Drain Tiles

(a) The issue is whether the learned trial judge erred in law in failing to properly apply the National Building Code of Canada (1995) in not holding all four (4) Defendants jointly and

severally liable for not requiring the installation of drainage tiles, contrary to the National Building Code of Canada (1995) when there was no evidence adduced that these tiles were unnecessary and in fact there was evidence these tiles were necessary.

(b) The learned trial judge erred in law in not applying the Atlantic Home Warranty Program settlement to the costs of the installation of drain tiles.

4. Exterior Walls, Roof and Framing Inspection

(a) The issue is whether the learned trial judge erred in law in failing to apply a uniform standard of care for the framing inspection conducted by the Halifax Regional Municipality's building inspection department, regardless of the area of the Halifax Regional Municipality in which construction took place, and in fact, applying a lower standard of care in the Plaintiffs' area of the Halifax Regional Municipality

(b) The issue is whether the learned trial judge erred in law in failing to find all four (4) Defendants jointly and severally liable for all of the Plaintiffs' damages regarding all of the exterior walls.

(c) The issue is whether the learned trial judge erred in law in failing to give weight to the engineers' report and testimony that all of the exterior walls of the house required more adequate bracing and were not constructed in compliance with the National Building Code of Canada (1995).

(d) The issue is whether the learned trial judge erred in law in not finding the Defendants liable for the Plaintiffs' damages related to the roof design and roof trusses and in failing to assess the Plaintiffs' damages therefore, and in particular, but not limited to the following errors of law.

(i) The issue is whether the learned trial judge erred in law in not holding the Defendants, the Halifax Regional Municipality and Donald Williams, liable in failing to require the submission of roof truss designs; in failing to review the roof truss designs and to inspect the roof as required by the Halifax Regional Municipality Building

Code By-Laws; and in failing to ensure that the roof truss designs be stamped by a professional engineer, in accordance with the National Building Code of Canada (1995).

(ii) The issue is whether the learned trial judge erred in law in failing to apply the two (2) expert engineers' calculations that the design and construction of the roof installed in the Plaintiffs' house failed to satisfy the "dead and live load" requirements of the National Building Code of Canada (1995), instead of relying on his own observations as to the extent of the cracking of the walls.

(iii) The issue is whether the learned trial judge erred in law in failing to apply the National Building Code of Canada (1995) and the evidence adduced at trial by the Plaintiffs that the roof as designed and as built did not meet the minimum requirements for safe dead and live load pursuant to the National Building Code of Canada (1995).

(iv) The issue is whether the learned trial judge erred in law in failing to hold the Defendants, Applewood and Jim Dunleavy, liable for failing to adequately supervise their sub-trade Barrett Lumber, to ensure that roof truss diagrams were stamped by a professional engineer and were in fact engineered as required by the National Building Code of Canada (1995), and for failing to construct the roof trusses in accordance with the National Building Code of Canada (1995) and good construction practices.

(v) The issue is whether the learned trial judge erred in law in failing and ignoring evidence to the contrary, when he held that the roof does not present a safety hazard and a major structural defect for which he failed to hold all Defendants jointly and severally liable.

(vi) The issue is whether the learned trial judge erred in law in failing to give weight to the evidence that the contract for the construction of the Plaintiffs' house incorporated a provision for solar panels to be installed on the roof, and

accordingly, for failing to assess damages against the Defendants for the inadequate roof designed and built.

(vii) The issue is whether the learned trial judge erred in law in failing to hold the Defendants, Applewood Enterprises Limited and James Dunleavy, liable for the negligent design of the roof trusses prepared by its sub-trade, Barrett Lumber.

(e) The learned trial judge erred in law in not applying the Atlantic Home Warranty Program settlement to the costs for the roof reconstruction and redesign and repair of all the exterior walls.

5. Insulation Inspection

(a) The issue is whether the learned trial judge erred in law in failing to hold the Defendants, Halifax Regional Municipality and Donald Williams, liable for Donald Williams' failure to carry out any insulation inspection as found by the learned trial judge's findings of fact, contrary to his duty of care and the Halifax Regional Municipality's Building By-laws and Regulations.

(b) The learned trial judge erred in law in not applying the Atlantic Home Warranty Program settlement to the costs for installation of insulation and vapour barrier in the bedroom over the garage.

6. Occupancy Inspection and Permit

(a) The learned trial judge erred in law in failing to find the Defendants, Halifax Regional Municipality and Donald Williams, jointly and severally liable for all of the Plaintiffs' damages flowing from the entire building inspection process, including issuing an Occupancy Permit, despite obvious National Building Code violations.

7. Other Issues

(a) The issue is whether the learned trial judge erred in law in not permitting the Plaintiffs to claim their full losses and to recover their full losses from all of the Defendants.

(b) The issue is whether the learned trial judge erred in law in failing to allow the Plaintiffs' claim for general damages.

(c) The issue is whether the learned trial judge erred in law in apportionment of damages among the Defendants.

(d) The issue is whether the learned trial judge erred in law in allowing the Defendants to amend their pleadings after the trial had concluded.

(e) The issue is whether the learned trial judge erred in law in allowing the Defendants, Halifax Regional Municipality and Donald Williams to split their case by calling an additional witness to testify to a claim for a set-off raised during the trial by the Defendants.

(f) The issue is whether the learned trial judge erred in law in allowing a set-off.

(g) The issue is whether the learned trial judge erred in law in allowing a set-off against all four (4) Defendants for a portion of a bill paid only by the Defendant, Halifax Regional Municipality, with respect to the claim for a set-off.

(h) The issue is whether the learned trial judge erred in law in allowing the settlement received from Shawna Henderson to be applied to damages.

(i) The issue is whether the learned trial judge erred in law in how he treated the rebuttal of the Plaintiff's expert witness, Roy McBride.

(j) The issue is whether the learned trial judge erred in law in allowing the Defendants, Halifax Regional Municipality, to have an extension of time to file the post-trial submissions three (3) days after the Plaintiff's post trial briefs were due and submitted.

(k) The issue is whether the learned trial judge erred in law in failing to find all four (4) Defendants jointly and severally liable to the Plaintiffs for all of the damages sustained by the Plaintiffs, including damages for replacement of the slab, roof,

all exterior walls, installation of drainage tiles, installation of insulation and vapour barrier.

Appendix B

Cross-Appeal by Applewood and Dunleavy

1. What is the basis for liability of Mr. Dunleavy personally when the contract was with the limited company?
2. What is the duty of care owed by a contractor to an owner and has it been breached by James Dunleavy?
3. What is the proper measure of damages in construction cases where the plaintiff is left with a substantially usable asset?

Appendix C

Notice of Contention by HRM/Williams

Did the trial judge err in holding that the Halifax Regional Municipality could be held responsible for damages flowing from negligent inspection of buildings, in circumstances which did not create health and safety issues (said circumstances not being present here in any event)?