SUPREME COURT OF NOVA SCOTIA
Citation: Connolly v. Greater Homes Inc., 2011 NSSC 291

Date: 20110817
Docket: Hfx. No. 235624
Registry: Halifax

Between:

Jim Connolly and **Esther Enns**

Plaintiffs

-and-

Greater Homes, Inc., a body corporate

Defendant

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 22,23,24,25 and December 20,21 and 22, 2010 and April 18 and 19, 2011 at Halifax, Nova Scotia

Last Written Submission: May 31, 2011

Written Decision: August 17, 2011

Counsel:
Counsel for the Plaintiffs - Michael Ryan, Q.C. and Joseph Herschorn
Counsel for the Defendant - Geoffrey Saunders

Wright, J.

INTRODUCTION

[1] In mid-December, 2001 the plaintiffs Jim Connolly and Esther Enns entered into a Lot and Building Agreement of Purchase and Sale (the "Agreement") with the defendant Greater Homes Inc. Under that Agreement, the parties contracted for the purchase and sale of Lot 450 on Ridge Park Lane, located in a new subdivision then being developed in Halifax, and the construction of a new single family dwelling thereon.

[2] This Agreement emanated from a decision by the plaintiffs to move to Halifax from western Canada, following the appointment of Dr. Enns as Dean of Arts at Saint Mary's University. During a house hunting trip to Halifax, she and her husband chose one of the defendant's model homes in the subdivision which they wanted to build with several customized upgrades to create their dream home that they would enjoy well into their eventual retirement.

[3] After engaging in extensive negotiations with representatives of the defendant, including several alterations and upgrades to the original plans and specifications, the parties finally signed off on the Agreement which called for an original contract price of $327,900. However, because of other extras and upgrades stipulated as amendments to the Agreement, the total cost to the plaintiffs as calculated on the closing adjustments rose to $414,500.

[4] The closing date specified in the Agreement was April 30, 2002 meaning

that construction of the home would be carried out during the winter months. As it happened, construction was not complete by April 30th and the house was not then habitable. The closing date therefore had to be delayed for 10 days and it was on May 13, 2002 that the plaintiffs actually moved in, albeit with several items of finish work yet to be completed.

[5] The Agreement stipulated that the dwelling was to be constructed in accordance with the attached plans and specifications and the *National Building Code*. Also, the defendant agreed to register the property under the seven year Atlantic Home Warranty Program ("AHWP"). The Agreement also stipulated that the parties were to meet to do a final inspection of the home and that if any deficiencies were agreed upon by the parties, they were to be in writing and corrected by the defendant within a reasonable time after closing.

[6] The final inspection of the house took place shortly before the closing which both plaintiffs attended in the company of Saeid Saberi (President and General Manager of the defendant company) and Jean Alphonse (the site supervisor). That final inspection was cut short when both Messrs. Saberi and Alphonse had to leave early. At that point the list of deficiencies stood at 67 items and counting. A complete list complied by the plaintiffs was later delivered to the defendants around June 27, 2002.

[7] The defendant chipped away at some of the deficiencies over the next few

months over which the plaintiffs became increasingly displeased. However, they were given to understand that the operation of the AHWP was such that they ought to wait for the passage of the initial one year occupancy period before seeking a conciliation of any outstanding deficiencies.

[8] Ultimately, the plaintiffs wrote the AHWP on May 5, 2003 (just before the expiry of the one year period) requesting conciliation in respect of the outstanding deficiencies. The minutiae of that conciliation need not be reviewed here. Suffice it to say that after the conciliation process took place, an award was made on July 31, 2003 requiring several deficiencies to be rectified by the defendant. This again became a long drawn out process with extensions of time being given to the defendant by the AHWP. In the end, most of the repairs were made but some of them were done inadequately, creating ongoing problems which will be identified and dealt with later in this decision.

[9] The AHWP conciliation process is principally designed to address patent defects that appear during the first year of occupancy. Unfortunately, as time marched by, the plaintiffs discovered a litany of instances of defective workmanship in the construction of their home, some major and some minor. They have since been forced to engage a number of experts to identify the cause of the various problems and to design a cost and remediation program. They have now presented to the court a revised damages claim measuring the cost of restoration and remediation at $363,334.80 (plus a contingency allowance) of which only about a tenth has actually been expended thus far.

GENERAL CHRONOLOGY OF CONSTRUCTION PROBLEMS AND REMEDIATION

[10] The first sign of serious trouble occurred on Christmas Day of 2003 when the plaintiffs discovered water dripping from a pot light in the ceiling of the master bedroom. Being on the top floor, they suspected that the water infiltration came through the roof and they notified their insurer of the problem. The insurer in turn engaged Service Master to investigate but upon searching the attic, its personnel were unable to find the source of the leak. Because of the time of year, Service Master did not carry out an inspection of the roof until early May whereupon they recommended to the plaintiffs that they engage Philip DeBay, a certified building inspector, to perform a thorough inspection. Mr. DeBay did so on May 12, 2004.

[11] Mr. DeBay testified at trial as to his findings, after having been qualified to give expert opinion evidence on the quality of construction of the roof, the quality of construction at the joints between the masonry and the vinyl siding and with the window frames, and the quality of caulking. Mr. DeBay verified his expert report dated May 12, 2004 in which he set out the following conclusions:

> 1. The requirements of the NBCC were not met.
>
> 2. The manufacturers instructions were not followed.
>
> 3. The specifications included in the buildings construction plans were not met.
>
> 4. The missing components, code violations, plan variances, manufactures instruction variances and very poor workmanship comprised at least 75% or the roof shingle work and it leaks badly.
>
> 5. In consideration of the above, especially item no. 4 the entire roof membrane system should be replaced as soon as possible to prevent further incursion of the water.
>
> 6. The replacement should be inspected by the manufacturers representative so that the manufacturers warranty is in force. Supplementary inspections should be conducted by

independent forces to ensure code compliance and specifications compliance.

[12] When asked for his professional opinion with respect to the quality of the roof construction overall, Mr. DeBay testified that this was the poorest level of construction he had ever seen in his career from a professional contractor.

[13] The plaintiffs acted promptly on Mr. DeBay's recommendation that a new roof be installed by obtaining three quotes. They chose the middle quote submitted by Four Seasons Roofing in the amount of $9,883.50 plus HST and the roof replacement was carried out with dispatch in July of that year. Once that was done, their home insurer removed the roof exclusion from their policy which had been imposed when the leaking problem was first discovered.

[14] Concurrently with the roof replacement, the plaintiffs also engaged Kevin Innocent Masonry to rectify associated problems that had been identified with the flashing and caulking. Mr. Innocent replaced the flashing around the masonry (of which the front facade was constructed) to redirect water away from the walls. Mr. Innocent also made repairs in the area of the eaves over the front porch and further carried out caulking repairs to seal various openings.

[15] What was also happening in the spring of 2004 was the plaintiffs' detection of a recurring musty odour in the area of the master bedroom. Indeed, Mr. Connolly testified that he first noticed such an odour possibly as early as the fall of 2003. It was something that would come and go and appeared to correlate with wind and wet weather. The plaintiffs did a thorough cleaning of this area but that had no effect.

[16] The plaintiffs therefore decided to engage Mr. Kim Strong of Maritime Testing in June of 2004. Mr. Strong was qualified at trial to give expert opinion evidence on the detection of mould in structures and its remediation.

[17] Mr. Strong carried out an inspection of the home on June 21st and based on his observations of water penetration in the area of the master bedroom, together with the nature of the odours detected as coming from the wall receptacles in that general area, he concluded that mould growth in the wall cavities was very probable. In his written report of that same date, he recommended that the drywall under the windows in the subject areas be removed, at least in part, to determine the source of the mould growth. Once identified, he recommended it be removed by washing with a bleach solution and then allowed to dry before the area is rebuilt. He further indicated that the presence of the mould would persist unless the affected area was properly cleaned and the water entry problem solved.

[18] Mr. Connolly acknowledged that Mr. Strong's recommendations were not acted upon at that time. Rather, he testified that he and his wife put their efforts into the roof replacement and flashing and caulking repairs to see whether that solved the problem by eliminating the water penetration.

[19] Because of their growing frustration with the many construction deficiencies and the non-responsiveness of the defendant, the plaintiffs retained legal counsel sometime in 2004 (a predecessor to Mr. Ryan). They instructed counsel to seek arbitration under the arbitration clause contained in the Agreement. Despite repeated requests sent by their counsel to legal counsel for the defendant, no

response was ever received. At one point, a representative from the defendant had requested permission from the plaintiffs to inspect the roof when that work was going on but was told to make the request through the plaintiff's legal counsel at the time. Nothing further happened in that regard.

[20] Stymied in their attempt to resolve their differences with the defendant through arbitration, the plaintiffs commenced this action for damages on November 22, 2004.

[21] More than a year passed before the plaintiffs detected the return of the musty odour in the area of the master bedroom. They also began to notice dampness on the interior drywall in that area. Up until that point, the plaintiffs thought that the roof replacement and the flashing and caulking repairs carried out in July of 2004 had solved the water entry and resulting mould problem. Once they realized that was not so, they again engaged Mr. Strong who returned for a further site visit in late February, 2006.

[22] On the recommendation of Mr. Strong, Mr. Connolly removed certain areas of drywall, vapour barrier and insulation in the master bedroom and on the main floor beneath it near the front entry door. That enabled Mr. Strong to observe affected areas of the exterior sheathing that were wet and stained black indicating microbial growth. As an interim solution, Mr. Connolly cleaned the inside of the sheathing with a bleach solution which was followed by a treatment by Mr. Strong with a Microbe Shield to help control mould growth until permanent repairs could be completed. Mr. Strong also recommended that a competent person be hired

immediately to identify the exact cause of the water entry and to propose a suitable solution.

[23] Thus it was that Mr. DeBay was again engaged by the plaintiffs who inspected the premises on February 27, 2006. In his March 1, 2006 written report, he summarized his findings as follows:

> a. There was evidence of water incursion and mildew at the exposed locations.
>
> b. The joints at the rock facing (siding) of the structure and the windows and doors are inconsistent in width of opening, ranging from rock touching the window frames to one half inch plus wide.
>
> c. These joints are roughly mortared in and then surfaced caulked with the caulking smeared all over the vinyl window frame.
>
> d. There were many areas where the mortar and caulking receded from contact with the window, were open to the weather and permitting the entry of rain water into the structure.

[24] In light of those findings, the plaintiffs then had Mr. Innocent return to the property to repair defective joints between the window frames and the masonry.

[25] During the fall of 2006, Mr. Connolly opened up several more areas of drywall, vapour barrier and insulation on the front wall of the house (at both levels). After he had done this, Mr. DeBay returned to reinspect the premises in November to try and determine the source of the water entry. In his subsequent written report, supported by numerous photographs, he concluded as follows:

> 1. The builders did not follow the National Building Code of Canada's requirements, as adopted by the Province of Nova Scotia in 1986, for space behind masonry veneer, but in fact, their own of a 50% less space that is easily and undoubtedly breached on numerous occasions and locations with mortar and rock.
>
> 2. The builder neglected his own specifications shown in his own plans typical sections

> that called for “Tyvek” and used “Kaycan”.
>
> 3. The builder did not provide a method to prevent the entry of water at the rock to vinyl intersection joint, nor, did he provide means for the wind driven rain that enters this joint with a means of escape by not providing weep holes as required by code.
>
> 4. The builder constructed a building with materials that are very pleasing to the eye but, it is evident that he is unskilled and unknowledgeable about their characteristics and code requirements.
>
> 5. The mould and mildew that is apparent now will become more aggressive as time progresses and the condition is not corrected. This is a direct consequence of poor construction practices and lack of knowledge of same.
>
> 6. The type of visually pleasing but very poor construction practices are not in keeping with that which a reasonable person has the right to expect and can receive.

[26] At about the same time, the plaintiffs arranged for Mr. Strong to return to the dwelling to investigate the continuing odours and to provide preventative services. Mr. Strong took moisture readings and provided a further report to the plaintiffs dated January 28, 2007 in which he wrote as follows:

> Clearly, for whatever reasons and from whatever location, water is penetrating the outer shell of the house and resulting in areas becoming wet or damp that should not be wet. The odours that you are getting are due to microbial growth associated with this dampness.

[27] Faced with this situation and having a better appreciation of the magnitude of the problem, the plaintiffs sought out a building envelope specialist and eventually retained David Scott, a long time principal of the Morrison Hershfield firm based in Ottawa. Mr. Scott presented as a highly qualified individual whose credentials were accepted by the court as one able to give expert opinion evidence on building envelopes, water infiltration and property damage caused thereby, and building remediation.

[28] Mr. Scott held his first meeting with the plaintiffs in April, 2007 after reviewing a briefing document prepared by the plaintiffs. Mr. Scott concluded that it was necessary to remove the stone cladding on the front wall of the house to properly identify the construction problems and develop a remediation plan.

[29] Accordingly, the entire stone cladding on the front of the house was removed by Mr. Innocent's work forces on August 9 and 10, 2007 at which time Mr. Scott was present. In a letter to the plaintiffs dated October 9, 2007 Mr. Scott described the several building code deficiencies related to the original construction of the house resulting in water leakage into the front walls. He advised them that remedial work is now required to remove any contaminated material, de-contaminate framing, and replace exterior EIFS sheathing, sheathing membrane and stone cladding with code compliant system and details. He accordingly attached a detailed specification to enable the plaintiffs to assemble competitive quotes to undertake the rehabilitation work necessary to repair the damage resulting from water infiltration on the front wall and to eliminate related building code deficiencies.

[30] In preparing an expert report for purposes of trial under date of February 15, 2010 Mr. Scott's concluding paragraph reads as follows:

> Based on our site investigation, we conclude that several aspects of the exterior walls of the Enns/Connolly house were not constructed in conformance with the 1995 edition of the NBC. The exterior walls were not provided with a continuous air barrier system composed of material(s) with code compliant properties for air permeability. Manufacturer's instructions for the installation of products within external wall assemblies such as the sheathing membrane were ignored.
>
> The installation of the stone masonry on the north elevation did not comply with the NBC in many respects. Poor mortar bond to the stone and lack of code compliant detailing at

> the intersection with adjacent cladding systems allowed the entry of rain water behind the stone. The lack of an NBC required air space behind the stone and NBC compliant weep holes at lintels and flashings retarded drainage of the rain water back out of the wall. The sheathing membrane and OSB sheathing admitted water into the wall leading to pre mature deterioration.
>
> Remedial work is required on the exterior walls to prevent further deterioration and reinstate lost service life and performance.

[31] At trial, Mr. Scott confirmed that there were two sources of water ingress behind the front stone wall. One was the passage of water through the stone at the interface of the joints between the mortar and the stone which was poorly bonded (a sort of capillary action because of the poor adherence of the mortar to the stone) and secondly, a direct path of entry at the openings where the stone and vinyl interfaced. Mr. Scott considered both to be significant causes of the water entry.

[32] When asked for his opinion of the quality of construction of the stone wall on the front of the house, Mr. Scott testified that it was very poor in almost every element. He added that the construction of the stone wall facade was amongst the worst he had ever seen in residential construction.

[33] Mr. Strong was also present during the removal of the stone facade and based on his observations of mould growth in several locations noted, he suggested to the plaintiffs that samples be collected for analysis by others for species composition. The plaintiffs did that and subsequently retained Mr. Tom Rand of Mycotaxon Consulting Limited to analyze the mould samples taken from the house. Dr. Rand did so and then reported to the plaintiffs on the presence of active mould growth based on the samples provided.

[34] After receiving the detailed specification prepared by Mr. Scott for the necessary restorative and remedial work on the building envelope (having regard to the plans and specifications in the original Agreement), the plaintiffs asked four contractors for quotes. Of the two who replied, the plaintiffs selected Kiwi Construction, being the lower of the two bidders.

[35] Kiwi prepared its quotes based on Mr. Scott's specifications and also quoted on other work which the plaintiffs intend to perform following the outcome of this action. Although none of this work has been performed to date, the plaintiffs have both testified that they intend to carry it out when they become financially enabled to do so. In the meantime, the entire front wall of the house remains wrapped with tarpaulins to this day, which has served as a temporary solution to prevent the further ingress of water.

LIABILITY AND DAMAGES ISSUES

[36] This saga of events raises a number of legal issues which can be summarized as follows:

a) The extent of the liability of the defendant and the basis thereof;

b) Proof of damages;

c) Whether the plaintiffs failed to mitigate their damages and if so, to what extent;

d) Measure and quantum of damages, including whether the plaintiffs are entitled to costs of remediation rather than diminution in value of the property.

[37] In their Statement of Claim, the plaintiffs plead two causes of action. The first is breach of contract on the grounds that the defendant breached its obligations, express and implied, to construct the dwelling in a good and

workmanlike manner and in compliance with the applicable *National Building Code*. Alternatively, the plaintiffs plead that the defendant negligently performed its obligations under the contract.

[38] Although the defendant is clearly exposed to liability on the facts of this case both in contract and in negligence, in my view the legal issues are better dealt with under the law of contract. The relationship of the parties here is that of home builder and buyer and their respective rights and obligations are defined by the terms of the contract they entered into, both express and implied.

[39] The main issues in this case, as recited above, relate to damages. As I see it, the final determination of damages to be awarded on the facts of this case will be the same whether based in contract or in tort, given the following considerations:

1. An award of damages for breach of contract is intended to place the injured party in as good a position as it would have been had the contract been properly performed and completed;
2. Although the defendant strongly argues that the plaintiffs failed to mitigate their damages, mitigation in contract law is analogous to the principle of contributory negligence in the law of torts;

3. Although there is a difference between contract and tort law as to the relevant moment for determining whether damages were foreseeable (i.e., the time of formation of the contract in contract law and the time when the breach occurs in

tort law), nothing turns on that distinction on the facts of the present case;
4. There are no limitation of action issues at play here.

[40] It has long been established in the law of building contracts that there is an implied condition that the builder will perform the work in a good and workmanlike manner including the supply of good and proper materials as contracted for (see, for example, *Stoddard v. Atwil Enterprises Ltd.* (1991) 105 N.S.R. (2d) 315 and the authorities therein referred to). The defendant clearly breached that implied condition in many respects in this case, some of which have already been identified earlier in this decision and others which will be addressed later when a breakdown of the total claim is made. The expert evidence establishes that the defendant also failed to comply with the *National Building Code* in several instances. Before getting to that stage, however, it is necessary to first address the other damages issues set out above.

[41] Unquestionably, the plaintiffs bear the burden of proving their damages. The defendant, on the other hand, bears the burden of proving that the plaintiffs failed to mitigate their damages and that any unsuccessful expenditures intended to mitigate the damages were unreasonable. A plaintiff cannot recover damages which it could have avoided by reasonable conduct in the circumstances.

[42] These legal principles are nicely summarized in *Halsbury's Laws of Canada*, 1st ed., (2008 Construction Volume) at pages 217-219. It is unnecessary to quote at length from this authority other than to insert the following:

> What is reasonable depends on all of the circumstances of the case. The innocent party is not held to a high standard. The innocent party is only required to act based on what it knows at the time, without the application of hindsight. It need not undertake anything risky. The wrongdoer is entitled to expect the aggrieved party to act reasonably, not perfectly.

[43] The foregoing principles have been illustrated and applied by our court in *Stoddard* in which Justice Saunders wrote as follows (at paras. 108-110):

> 108. I also find no merit to the defendant's second argument. The general principle which underlies the law of mitigation is that a plaintiff must act reasonably to avoid further damage or increased costs against the defendant. This duty to act reasonably is related to the date for assessment of damages, in that the plaintiffs' duty to mitigate does not arise until a reasonable time after the assessment date. Normally the date of assessment is the date the contract is breached. However, there are certain exceptions to the "breach date rule". One of these exceptions is found, as here, in the so-called "repair" cases. The shift began with *Dodd Properties v. Canterbury City Council*, [1980] 1 W.L.R. 433 (C.A.)., where it was held that the plaintiff was justified in deferring repairs up to the time of trial. This principle was also applied in a case of defective construction, where:
>
> > "... the plaintiffs had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants who had vigorously disclaimed liability right to the door of the court."
>
> MacGregor on Damages, referring to *Cory & Son v. Wingate Investments* (1980), 17 Build. L.R. 104 (CA.))
>
> 109. This same approach was taken in *Costello v. Cormier Enterprises Ltd.* (1979), 28 N.B.R. (2d) 398 (C.A.), where the New Brunswick Court of Appeal held that the owner of the house was justified in waiting to establish the builder's liability before embarking on a full program of repair.
>
> 110. The Appeal Division of this court, in the case of *Canso Chemicals v. Canadian Westinghouse* (1974), 10 N.S.R. 306, referred to McGregor on Damages (13th edition at p. 229) for eight rules with respect to mitigation including:
>
> > "1. a plaintiff need not risk his money too far ...
> >
> > "8. a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."

[44] Justice Saunders went on to find (at para. 111) that it was entirely sensible

for the plaintiffs to have waited to ascertain their final legal position before deciding on the extent of the corrective measures they were willing to take. He added that there was no onus on them to incur further debt to effect these repairs and then await the outcome of trial and the determination of liability, noting that the defendant disclaimed any responsibility throughout.

[45] The plaintiffs are in a similar situation here with respect to the extent of the corrective measures to be taken, having testified that carrying out the necessary remedial work would require further borrowing on their part. I likewise conclude that there was no onus upon them to incur such further debt to carry out all the necessary remedial work prior to the outcome of this trial.

[46] The defendant has amplified its argument of the plaintiffs' failure to mitigate in two respects. First, the defendant contends that it ought to have been given the opportunity by the plaintiffs to itself carry out any necessary remedial work instead of being excluded, which the defendant says could have been done at a lesser cost. Secondly, the defendant contends that the plaintiffs failed to mitigate their major losses in the restoration of the house as a result of their inaction and failure to heed the advice of two of their experts received in 2004 about possible problems with leaks around the masonry on the front wall of the house. It is argued that the severe leaking problems experienced on that masonry wall would have been limited if not eliminated, had the remedial work been carried out in 2004 rather than in 2007. It is suggested that the plaintiffs ought to be equally liable for the resulting damage to that wall.

[47] I do not accept either of these arguments.

[48] As to the first point, the governing legal principle is that wherever it is reasonable, a party has a positive obligation to afford to the party alleged to have caused a deficiency an early opportunity to examine and to rectify it. That is consistent with general principles of mitigation (see, for example, *Ontario (Attorney General) v. CH2M Gore & Storrie Ltd.* (2002) 48 C.E.L.R. (N.S.) 145). The key question therefore is whether it was reasonable for the plaintiffs to have bypassed the defendant from the remediation process.

[49] Right from the start, the defendant displayed a pattern of indifference and lack of response to the plaintiffs' concerns. When they arrived in Halifax for the scheduled closing date of April 30, 2002 the house was not yet habitable. It only became habitable about two weeks later after the plaintiffs had made a number of arrangements on their own to make it so, and even though there were still construction items to be completed. In the meantime, the interior of the entire house had to be repainted because an inferior paint product had been used and applied sloppily. Even the repainting work done was substandard as will be detailed later in this decision.

[50] On the final pre-closing inspection, both Mr. Saberi and the site superintendent Mr. Alphonse left the house before the inspection was completed, much to the dissatisfaction of the plaintiffs. They subsequently completed a

deficiency list of the dozens of items outstanding which they sent to the defendant on June 27, 2002. Mr. Connolly testified that over the next several months the defendant responded to some concerns but others remained outstanding. These eventually became part of the conciliation process under the AHWP which the plaintiffs requested in May of 2003 (given their understanding that it was better to take their concerns to conciliation at the end of their first year of occupancy).

[51] In support of their request for conciliation, the plaintiffs prepared a document chronicling the builder-customer relationship history to that point. It is nine pages long and need not be reviewed in detail here. Suffice it to say that the document demonstrates the plaintiffs' growing dissatisfaction with the lack of response from the defendant in correcting the various deficiencies and why they said they found it impossible to work directly with the builder to resolve them. Anecdotedly, the "last straw" for them was when the builder attempted to repair the doorsill of the counter-sloped patio doors by applying the heavy blow of a sledgehammer.

[52] On July 31, 2003 AHWP released its award which required the defendant to correct several deficiencies (which need not be chronicled in full detail here). Mr. Connolly testified that the defendant subsequently attempted repairs on several of the outstanding defects (after obtaining extensions) but some were performed in an unsatisfactory manner, notably, the repainting of the interior, the shower installation and the bulges which remained in the floor in both the bedroom and the hallway areas. At this point, of course, the major defects in the construction of the home concerning the roof, front masonry wall and the air barrier were unknown (as

will be detailed later).

[53] In the meantime, the relationship between the plaintiffs and the defendant had further soured over a billing dispute. On October 11, 2002 the plaintiffs met with Mr. Saberi to try and sort out what they considered to have been an overbilling of $6,635.50 which encompassed three items, namely, a shortage of 198 square feet of living area, unperformed exterior painting and an overbilling for electrical upgrades. Mr. Saberi said that he would look into it and get back to them. He never did. This failure to respond exemplified a pattern of indifference to the plaintiffs' concerns, much to their frustration.

[54] On November 25, 2002 and again on February 20, 2003 the plaintiffs wrote follow up letters to Mr. Saberi but received no response whatsoever to their concerns. Mr. Saberi tried to explain this away at trial by saying that he informed the plaintiffs of his position at a chance meeting outside their home but in my view, whatever was said at the time was an inadequate response in what can only be described as an unpleasant encounter. The plaintiffs had no further contact with Mr. Saberi from May until December of 2003.

[55] As recited earlier, the first sign of serious trouble appeared on Christmas Day of 2003 when water began dripping from a pot light in the master bedroom. By that time, the plaintiffs had lost all confidence and trust in the defendant as a builder to respond to their concerns.

[56] With their growing frustration, the plaintiffs retained legal counsel (a

predecessor to Mr. Ryan) in June of 2004. They sought the assistance of counsel in respect of the defective roof, the overbilling dispute and a number of deficiencies that had been included in their AHWP claim that remained outstanding. Their legal counsel at the time wrote to counsel for the defendant to press these concerns but those exchanges of correspondence went nowhere, as did the plaintiffs' request for arbitration. Mr. Saberi's explanation at trial that he thought this request for arbitration meant the conciliation process under the AHWP is not credible and is completely untenable for a person of his experience in the industry, represented by legal counsel at the time as he was.

[57] The plaintiffs were therefore left with no alternative but to commence this action which they did on November 22, 2004.

[58] Given this pattern of indifference and lack of response by the defendant to the plaintiffs' concerns over this two year period, I find that it was reasonable for the plaintiffs to have excluded the defendant from the opportunity to carry out the necessary remedial work. The defendant cannot now be heard to complain that it was denied that opportunity.

[59] The second prong of the defendant's mitigation argument is premised on the plaintiffs' awareness of potential water entry problems in the front masonry wall of the house as early as June of 2004. In the above referenced report of June 21, 2004 Mr. Strong advised the plaintiffs that mould growth in the wall cavities was very probable and would continue any time the growth was stimulated by moisture. He therefore recommended some destructive testing by removal of the drywall under

the windows in the affected areas to try to determine the source of the mould growth (which should then be treated by a bleach solution). He cautioned that all underlying structural deficiencies that allowed water penetration must be fixed before the area was rebuilt.

[60] The defendant also points to a letter written by Dr. Enns to AHWP dated July 14, 2004 in which she explained that they were facing the possibility that there may be significant water damage to the exterior wall sheathing on the house. She was inquiring whether such water damage would be interpreted by the Program as "structural".

[61] In a subsequent letter to Mr. Innocent dated October 12, 2004 Mr. Connolly made reference to their earlier discussion about making a complete inspection of the stone facade to check for other defects (in addition to inadequate caulking at the intersection of the stone and the window frames and a loose sill stone). Mr. Connolly indicated that he would make further contact once they were ready to proceed on that matter.

[62] His further evidence, which I accept, was that once the roof was fully replaced in July of 2004 and the flashing at the intersection of the masonry and roof repaired concurrently, the musty odours disappeared. The plaintiffs therefore held off from doing the destructive testing recommended by Mr. Strong because as Mr. Connolly put it, "we put our efforts into the roof and flashing to see how well that solved the problem".

[63] Alas, there was a resurgence of musty odours in late 2005 (some 15 months later) in the area of the master bedroom. The plaintiffs also then noticed some dampness on the interior drywall in that area.

[64] I have already recited earlier in this decision the resulting steps that the plaintiffs then undertook, which lead to further investigations by Messrs. Strong and DeBay (in February and late fall of 2006), followed by the retention of Mr. Scott, the building envelope specialist, in February, 2007. Upon his recommendation, the front masonry wall was totally dismantled to properly identify the deficiencies and develop a remediation plan. That was carried out by Mr. Innocent on August 9 and 10, 2007 as above recited and the restoration has been pretty much in a holding pattern since then, with no further mould contamination having materialized.

[65] I have recited this evidence at some length toward the question of whether the plaintiffs acted reasonably to avoid further damage to their home, given the knowledge they had as the matter evolved. It is to be remembered that the innocent party is only required to act based on what is known at the time, without the benefit of hindsight. The wrongdoer is entitled to expect the injured party to act reasonably and not perfectly.

[66] Here, I find that it was not unreasonable for the plaintiffs to have held off from engaging in destructive testing of the house for further water damage once the odours disappeared after the remedial roof replacement and associated flashing and

caulking repairs performed in July of 2004. Once the odours resurged some 15 months later, the plaintiffs began their first destructive testing which lead to re-engaging Messrs. Strong, DeBay and Innocent in their further attempt to investigate the source of the water problem.

[67] Although the course of these investigations was not carried out with as much dispatch as they could have been up until early 2007, I am not persuaded that the defendant has discharged the burden upon it of proving a failure to mitigate on the part of the plaintiffs. Nor is there any evidence put forward by the defendant to prove that had the remedial work on the front masonry wall been carried out at an earlier time, the problems later experienced would have been limited, if not eliminated. That is not an inference which the court is prepared to draw in the absence of any supporting evidence. In the result, the assessment of the plaintiffs' damages claim will be made without reduction for failure to mitigate their loss.

[68] The remaining issue of damages to be addressed before assessing an item by item breakdown of the plaintiffs' claim is the proper measure of damages approach to be followed, namely, costs of remediation versus diminution in value.

[69] It is readily apparent that the costs of remediation in this case will exceed the diminution in value of the property (there being no specific evidence of the latter other than a sharp drop in the municipal assessed value when the major problems were discovered). However, the authorities are clear that the plaintiffs are entitled

to recovery of the costs of remediation even if it exceeds the diminution in value of the home if they can show that restoration alone will make good their loss and that they actually intend to carry out the remediation at reasonable cost.

[70] This legal principle is discussed in *McGregor on Damages*, 17th ed. (London: Sweet & Maxwell, 2003) in the following passage (at para. 34-010):

> The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the claimant may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the claimant's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to take damages for reinstatement rather than damages calculated by the diminution in value of the land.

[71] I note that this passage was cited with approval by the British Columbia Court of Appeal in *Nan v. Black Pine Manufacturing Ltd.* [1991] B.C.J. No. 910.

[72] Both plaintiffs have testified that they intend to carry out the necessary remedial work as recommended by their various experts once financially in a position to do so. Indeed, the front exterior wall of their home has remained covered with tarpaulins ever since the masonry wall was removed in 2007. I accept their position that restoration alone will make good their loss. To adopt the diminution in value approach as the measure of damages would result in the plaintiffs having to finance remediation costs caused by the poor workmanship by the defendant for which they were not responsible. Although the costs of remediation approach may result in a betterment in respect of certain repairs to be carried out, an appropriate reduction of their claim can be made, as will be addressed later in this decision in assessing the item by item breakdown. I

therefore am satisfied that the nature of the plaintiffs' loss is such that the damages award ought to be measured by the reasonable costs of remediation.

[73] Before moving on to that segment of this decision, it is important to recount the outcome of two motions which were made just prior to the commencement of the trial. In the first motion, the defendant sought leave to call witnesses in addition to Mr. Saberi and Mr. David Muise (a mould expert), having failed to provide a witness list to the plaintiffs in compliance with Civil Procedure Rule 4.18. In the other motion, the defendant sought to exclude the evidence of Mr. G.J. McCulloch (including his written report).

[74] Dealing with the latter first, Mr. McCulloch was initially engaged on behalf of the defendant (by a predecessor counsel to Mr. Saunders) to provide expert opinion evidence on the necessary remedial work and the cost thereof. Mr. McCulloch ended up on the plaintiffs' witness list rather than the defendant's and was subpoenaed by Mr. Ryan. The ruling of the court was that privilege on Mr. McCulloch's report had been waived by its release to the plaintiffs and his expert evidence was therefore ruled to be admissible at their behest.

[75] The circumstances surrounding the earlier motion were that the defendant failed to comply with the requirement under Civil Procedure Rule 4.18 to provide a list of its trial witnesses two days before the trial readiness conference (which was held before another judge on October 8, 2010). The case was permitted to proceed to trial, given the representation by defence counsel that the witness list would be confirmed by the end of the following week. That didn't happen. Indeed, the

required list still had not been provided by the time the pre-trial conference was held before me on November 12, 2010 (a mere six business days before the trial commencement date).

[76] It was not until the hearing of the motion on November 15th that defence counsel announced the three additional witnesses he intended to call at trial, namely, two supervisory personnel formerly with the defendant company and the masonry subcontractor it had engaged for the construction of the front wall. The former employees were to speak to the costs of the necessary remedial work.

[77] At the hearing of the motion on November 15th, (four business days before trial), counsel for the defendant candidly informed the court that any reasons proffered for the delay would not be persuasive and that none were being put forward. The court was nonetheless asked to exercise its discretion to grant relief from the Rule 4.18 requirement. That request was refused.

[78] In my view, when there has been an inordinate delay in complying with the requirements of Rule 4.18 which works to the prejudice of the opposing party, and no explanation for such delay is put forward, the Rule ought to be enforced by the court. In this case, there simply were no ameliorating circumstances under which the court could properly exercise its discretion to grant relief from the Rule. I hasten to add, as I did on the hearing of the motion, that I attribute this inordinate delay and inaction to the defendant itself and not to any shortcoming on the part of its legal counsel.

[79] In the result, the trial proceeded on the basis that the only witnesses who would be permitted to be called on behalf of the defendant were its principal, Mr. Saberi, and its mould expert David Muise (who in the end was not called to testify). They were the only two whose names were provided at the trial readiness conference. The defendant, in any event, presented no expert opinion evidence whatsoever at trial to counter the impressive array of experts who provided reports and gave oral testimony on behalf of the plaintiffs.

QUANTUM OF DAMAGES - CLAIM BREAKDOWN

Roof Replacement and Related Flashing/Caulking Repairs

[80] Because of the chronic nature of the several roof deficiencies outlined in Mr. DeBay's report dated May 12, 2004 above recited, he recommended to the plaintiffs that the roof be totally replaced rather than repaired. The plaintiffs accepted that recommendation and I find that it was reasonable for them to do so. They therefore obtained quotes from three different roofers and chose the middle quote of $9,883.50 plus HST which was provided by Four Seasons Roofing. Its president, Glenn Wright, testified that he could not now recall all the specifics of the roof problems but that the roof would not have been replaced unless deemed necessary from his site visit.

[81] Mr. Saberi testified that the replacement of the roof in 2004 could have been done by the defendant at a cost of $3,450. That does not stack up against the other evidence before the court and I do not accept it as being reliable. I therefore allow the plaintiffs' recovery of their actual expenditure of $12,326 (less a modest betterment allowance to be later applied), which is comprised of the accounts of Four Seasons Roofing, Kevin Innocent (for the flashing and caulking repairs) and

Mr. DeBay for his inspection and report.

Water Infiltration and Mould Contamination - north and south exterior walls

[82] The defects in the construction of the north wall (the front of the house) was the most serious of the many construction defects discovered and is the most costly to remediate. I have already reviewed the findings and conclusions of David Scott who presented himself as a knowledgeable and impressive witness in his field of expertise. It is, in my view, entirely reasonable for the plaintiffs to accept and act upon all of his recommendations for remedial work which calls for the complete replacement and rebuilding of all elements of the north wall, including the stucco wall section to facilitate proper drainage.

[83] As mentioned earlier, Mr. Scott prepared a detailed specification to enable the plaintiffs to assemble competitive quotes to undertake the restorative work necessary to repair the damage resulting from water infiltration on the front wall and to eliminate related building code deficiencies. He also prepared a Bid Form which the plaintiffs used to obtain two tenders for the project. They chose the tender submitted by Kiwi Construction Inc. which was the lower of the two and which encompassed most of the reconstruction work to be done.

[84] Kiwi is in the residential construction business and employs Chris MacNeil as its construction manager and estimator. Although Mr. MacNeil was not put forward as an expert witness, he has some 28 years in the construction business and contacted the several required sub-trades in preparing his tender. He confirmed that it was based on and in accordance with, the Morrison Hershfield specifications, including the addendum prepared by Mr. Scott on October 28, 2007

for the necessary restoration of the south wall in the area of the patio doors where further water penetration and mould had been discovered.

[85] Mr. MacNeil provided Kiwi's first quote for the restoration work to the north and south walls of the house under date of December 4, 2007 in the aggregate amount of $93,505 plus HST. With the passage of time leading up to trial, Mr. MacNeil updated this quote to the aggregate amount of $107,525 plus HST. He explained that this represented a 15% increase over the intervening two and half year period which was his rough estimate of the higher material and labour costs that would be incurred.

[86] Mr. MacNeil was unable to provide a breakdown of the components of this cost estimate as he no longer retained the working papers he had used. Although this is obviously a sizable sum, I am satisfied that the court should accept it because:

(a) It is predicated on the Morrison Hershfield specifications which the court has no reason to question in the absence of any expert evidence to the contrary and which was presented by a credible and reliable expert witness in the person of Mr. Scott;

(b) Mr. MacNeil presented himself as a credible and reliable witness;

(c) This estimate was verified in large part by the cost estimate prepared by Mr. McCulloch who, although called as a plaintiffs' witness, had been retained on behalf of the defendant;

(d) No cost estimate evidence was adduced by the defendant except that of Mr. Saberi whose evidence I found to be self-serving, unreliable and dismissive.

Indeed, Mr. Saberi made the incredible statement in his testimony that this house was built in accordance with the requirements of the *National Building Code*, without calling any expert evidence whatsoever to back that up and in the face of overwhelming evidence to the contrary.

[87] There is another aspect of the cost of the remedial work which I will deal with at this juncture, namely, a contingency allowance. Mr. Scott espouses a contingency allowance of 20% while Mr. McCulloch suggests one at 15%. In *Stoddard*, Justice Saunders awarded a contingency allowance of 10%.

[88] Because of the thorough investigations which have already been made identifying the various deficiencies in the construction of the plaintiffs' home, and the extent of full restoration work to be done, I conclude that a more moderate contingency allowance of 10% is appropriate in this case.

[89] In the result, I allow the plaintiffs' recovery of Kiwi's estimated reconstruction costs on the north and south walls in the amount of $107,525 plus HST plus a 10% contingency allowance for a rounded total of $136,000.

[90] Besides Kiwi, there are other suppliers of materials and labour who will have to be engaged to complete the restoration of the north wall. These have been proven as follows:

(a) Purchase of Bradstone material as the new facade on the north wall - $5,820;
(b) Labour to install Bradstone by Mr. Innocent - $9,545;
(c) Re-roofing garage as specified by Morrison Hershfield - $4,200;

(d) New front door as specified by Morrison Hershfield - $699;
(e) A site architect to supervise the restoration work - $4,485.

[91] All of the figures in the foregoing paragraph include HST and in my view, do not attract a contingency allowance.

[92] In addition to these prospective costs, the plaintiffs have already paid the following expenses (inclusive of HST) which I allow the recovery of, since they were reasonably incurred in mitigation of their damages:
(a) Mould investigation reports (4) by Mr. Strong - $1,001;
(b) Inspection reports (2) by Mr. DeBay - $650;
(c) Invoice from Mr. Innocent for repairing stone facade - $1,725;
(d) Materials purchased by plaintiffs to re-insulate and disposal of old master bedroom walls - $284;
(e) Invoices from Morrison Hershfield (3) for investigation costs - $9,061;
(f) Invoice from Dr. Rand for mould investigative work - $1,898;
(g) Jackhammer rental and concrete disposal by plaintiffs - $339;
(h) Materials for installing tarpaulin on north wall - $428;
(i) Materials for temporary front steps - $453.

[93] The final tally of the foregoing recoverable amounts as remedial costs for the water infiltration and mould contamination damage to the north and south walls is $176,588 (less a betterment allowance to be later applied).

Air and Vapour Barrier Defects

[94] The primary issue here is whether the plaintiffs' house was constructed with

a properly performing air barrier system as required by the *National Building Code*. The determination of this issue pits the evidence of Mr. Scott against that of Mr. Saberi.

[95] In a follow-up report to the plaintiffs dated November 28, 2007 Mr. Scott expressed the opinion that their home did not have either an appropriate air barrier material or detailing. The problem is that the building materials which might have served as an air barrier, i.e., the polyethylene and sheathing membrane were not appropriately joined. In other words, there is a lack of continuity between the subject building materials which is needed to create a proper air barrier. Mr. Scott was further of the view that the type of building wrap installed by the defendant here (where it substituted a Kaycan Sure Wrap product for Tyvek as specified in the contract) is too permeable to act as a proper air barrier (as opposed to the Tyvek product).

[96] Because of his conclusion that the building material system used here was not in compliance with the air barrier requirements under the *National Building Code*, Mr. Scott recommended to the plaintiffs that they remove (and save) the vinyl siding, replace the air barrier with Tyvek (as specified in the contract) and re-detail the perimeter connections and penetrations. Mr. Scott also expressed the opinion that proper installation of the Tyvek would require the removal of all the windows and doors.

[97] Mr. Saberi, on the other hand, described the elements of the air barrier system as installed which he maintained was not on the exterior wall but rather on

the interior wall. His view was that the installed vapour barrier acted as an air barrier in compliance with the Building Code.

[98] Mr. Saberi also explained how the Kaycan Sure Wrap product came to be substituted for Tyvek. He said that typically, vinyl siding manufacturers also make the house wrap product and the two are purchased as a package. The Kaycan product was used in this case because the colour of the vinyl chosen by the plaintiffs was supplied by that manufacturer. Mr. Saberi maintained that the defendant was entitled to make this substitution under the clause in the Agreement which allows the builder to replace materials with others of equal value, without notice.

[99] The problem with this argument is that the Kaycan product and Tyvek are not of like quality for purposes of serving as an air barrier, according to the evidence of Mr. Scott. He testified that Tyvek, if applied properly, creates an air barrier that meets the *National Building Code* requirements whereas the Kaycan product does not for that purpose.

[100] Once again, the defendant did not adduce any expert evidence to counter that of Mr. Scott. It is Mr. Scott's evidence that I accept over that of Mr. Saberi for the reasons earlier mentioned. I therefore find it reasonable for the plaintiffs to accept and act upon Mr. Scott's recommendations that the vinyl siding on the remaining three walls of the house be removed (and saved for reinstallation) and that the building wrap be replaced with Tyvek as the contract originally called for.

[101] The cost of this remedial work is again substantial. In Kiwi's updated Estimate dated April 6, 2010 the cost of the remedial work to be completed per the Morrison Hershfield specifications is set out at $32,983 plus HST. That includes an increase of about 50% for replacement of the building wrap with Tyvek over Kiwi's December 14, 2007 Estimate but Mr. MacNeil explained that this was accounted for by the implementation of new safety regulations for which Kiwi was required to invest in training and equipment. Since he acknowledged that his subsequent quote sought to recover some of that overhead cost (which ought to be spread out over several jobs), I conclude that it is appropriate to round this figure off at $30,000 plus HST to which a 10% contingency allowance should be added (making a total figure of $37,950 for this component).

[102] In addition, Kiwi has quoted the figure of $3,680 plus HST for the repair of vapour barrier breaches throughout the house. Mr. MacNeil acknowledged at trial that he was not sure exactly what was needed for this repair so he inserted the figure of $3,680 representing the cost of complete replacement for the vapour barrier.

[103] In view of that evidence, I conclude that this item should be reduced by a factor of 50% with the result that the amount of $2,327 should be allowed including HST and a 10% contingency.

Window Installation Faults

[104] The first issue to be addressed under this heading is whether the defendant supplied and installed windows of a quality that met the contract specifications. The 36 windows installed were Belmont single hung model windows of a thickness

of 2 7/8" manufactured by Kohler. The plaintiffs now complain that supreme quality Belmont windows with a thickness of 3 1/4" ought to have been installed and claim a replacement cost of $14,766.44 including HST.

[105] The specifications in the Agreement call for the supply of Kohler made single hung windows which were to be selected from builder samples. By virtue of an amendment to the Agreement dated January 15, 2002, the defendant agreed to install two additional windows in the kitchen and upgrade the windows in the library and master ensuite. Nowhere in the contract documents is there any mention of the specific model of windows to be supplied or their thickness.

[106] Mr. Connolly testified that the 2 7/8" frame windows are not of the quality he expected and that he spoke to Mr. Saberi about an upgrade to a “supreme” model. Mr. Connolly could not recall whether this discussion was before or after the Agreement was made. In any event, he acknowledged that Mr. Saberi did not specifically agree to supply and install the specific model window which he is now seeking as a replacement. Rather, he said he “assumed” from his discussion with Mr. Saberi that they were getting the 3 1/4" model window. He said he did not become aware of that discrepancy until a visit from a Kohler representative in December of 2007 over some warranty work. Hence, this aspect of the claim was not raised until an amendment to the Statement of Claim filed in May of 2008.

[107] Mr. Saberi testified that the 2 7/8" model window is that which is installed in its model homes (which the plaintiffs viewed).

[108] Based on this evidence, I am not persuaded that the defendant failed to meet the contract specification for the supply and installation of windows in the home. This aspect of the claim is therefore disallowed.

[109] There is, however, an even larger component of this claim for the removal and reinstallation of 30 windows in accordance with the Kohler and Tyvek instructions. It will be recalled that Mr. Scott testified that proper Tyvek installation requires a prior removal of all windows and doors. The Tyvek Installation Guidelines entered in evidence indicate that this is not an absolute requirement but states that the most effective time to install the Tyvek barrier is before the windows and doors are set. It then provides instructions that if the house has its windows and doors already installed, they must be properly flashed in accordance with the DuPont Flashing Systems Installation Guidelines.

[110] Obviously, it is preferable for the installation of the Tyvek barrier to be made before the windows are set since that is the most effective installation method. However, I am satisfied that there is another reason to justify the removal of the present windows as part of the remedial work. That reason is grounded in the evidence of Mr. McCulloch, whose evidence I accept, who wrote in his report that the window rough stud openings are too small for the windows as constructed. Mr. McCulloch stated that because this window framing job was sloppy (sizes too small etc.) pressure has been created on the window sills and most have bowed up in the centre and have caused cracks in the vinyl windows.

[111] All things considered, I conclude that it is reasonable for the plaintiffs to

remove the existing windows as part of the remedial work to facilitate both the Tyvek barrier installation and the enlargement of the rough window openings where necessary.

[112] In its Estimate for the reconstruction of the north wall earlier referred to, Kiwi included the cost of enlarging the six rough window openings in the north wall to enable proper reinstallation of the windows. I therefore infer from its subsequent Estimate dated March 31, 2010 that the quoted figure of $747.50 per repair for window installation includes the enlargement of the rough window openings in the remaining walls where necessary. There being 30 such windows, I allow the plaintiffs recovery of the sum of $22,425 plus HST. Adding a contingency allowance of 10% produces a total amount to be recovered in this regard of $28,367.

[113] An ancillary claim under this heading is for the sum of $5,713.20 as the cost of removing and reinstalling the kitchen counter top. Mr. Connolly testified that this would be necessary because of the removal of the kitchen windows as part of the remedial work. There is no expert evidence to support this position and I am not persuaded that this aspect of the claim should be allowed.

Driveway Entrance Installation Faults

[114] The complaint here is that when the defendant extended the width of the driveway entrance as part of the scope of its work, a shallow depression was created along the gutter where water and debris now collect. The cost of redoing this work by one continuous pour of concrete to ensure that the proper grade is obtained is estimated by Kiwi at $5,750 plus HST.

[115] The photographs in evidence show this depression to be a shallow one with only cosmetic implications. In any event, I agree with the submission of counsel for the defendant that there is insufficient evidence to confirm that this depression on a public street is a result of faulty workmanship on the part of the builder and that it did not pre-exist the widening of the driveway. This aspect of the claim is therefore disallowed.

Main Electrical Conduit Failure

[116] The photograph evidence depicts a round plastic conduit on an exterior side of the house running vertically from the power metre box to the ground. At ground level, it is buried in a concrete walkway which was poured directly against it. The same is true for a communications conduit running parallel to it which is broken apart about half way down.

[117] The plaintiffs complain that this mode of construction has blocked access to the conduit carrying electrical wire. They therefore seek a repair cost that would facilitate such access in respect of which two figures have been presented by Kiwi. In his December 4, 2007 quote, Kiwi estimated the repair cost of the main electrical conduit and to rebuild the surrounding poured concrete walkway at $4000 plus HST. In its updated quote of March 31, 2010 this figure rose to $6,800 plus HST (an increase of 70%). Mr. MacNeil acknowledged at trial that the latter figure allowed for the removal and replacement of the concrete and conduit out to the street.

[118] No adequate explanation was given on behalf of the plaintiffs as to why such a massive reconstruction would be required for this defect. I am therefore prepared to allow only the initial cost estimate of $4,000 plus HST plus a contingency of 10%. The resulting figure of $5,060 is generally consistent (and slightly less than) the amount verified by Mr. McCulloch in his evidence as an appropriate cost of repair.

Front Entry Canopy Post

[119] This is a relatively minor issue where the plaintiffs claim for the cost of supply and installation of a missing front canopy post at a cost of $1,322.50. Because it was not installed, the defendant provided an extended railing to meet the *National Building Code* requirements.

[120] The missing canopy post was not listed by the plaintiffs on their deficiency list provided to the defendant and AHWP. When asked whether the absence of the canopy post was a modification on the plaintiffs' instructions, Mr. Connolly testified that he didn't recall giving any such instructions but could not deny it.

[121] Mr. Saberi's evidence was that in a number of similar homes in the subdivision, the owners chose to excluded the post, opting for an extended iron railing which he thought was the case here. In view of the uncertainty surrounding Mr. Connolly's evidence, I am not satisfied on a balance of probabilities that this claim has been proven.

En-suite Shower Installation Faults

[122] The installation of the en-suite shower has been a chronic problem from the start. It was one of the items on the plaintiffs' deficiency list which went to conciliation under the AHWP. Pursuant to the AHWP award, the defendant carried out a repair which has proved to be entirely inadequate. Mr. Connolly testified that the door is now functional but that a sizeable crack keeps appearing in the adjacent wall area which he has to re-grout approximately every six months.

[123] The underlying problem, as verified by Mr. McCulloch who inspected it, is that the shower base and framing were installed substantially out of plumb. He said that the proper thing to do is to simply take it out altogether and reinstall it correctly with proper levelled support.

[124] It is argued on behalf of the defendant that this defect has been satisfactorily dealt with through AHWP who wrote to the plaintiffs on September 12, 2003 stating that in discussions with the builder, the installation meets or exceeds the manufacturer's specification. The defendant goes on to argue that because the results of the conciliation were to be final and binding upon the parties as a matter of contract, and that the defendant complied with its obligations under the AHWP program, this claim should now be disallowed.

[125] The fallacy of this argument is simply that the defendant never carried out a proper or adequate repair to correct this installation defect. It did not fully discharge its obligations under the AHWP, nor did it meet the implied condition under its contract with the plaintiffs of performing the work in a good and

workmanlike manner. The plaintiffs are therefore entitled to recover the cost of remedying this installation defect.

[126] The plaintiffs have included in their claim not only the cost of rebuilding the en-suite shower but also the cost of replacing its major components (shower base and door). In my view, the latter cannot be justified where the underlying problem was in the installation of the shower which can be rebuilt, using the same parts. I therefore allow the recovery of Kiwi's cost estimate in this regard of $5,462.50 plus HST plus a 10% contingency allowance for a total of $6,900.

Interior Painting Faults

[127] The interior paint work in this home does not have a happy history. When the plaintiffs inspected the home on the intended closing date of April 30, 2002 they observed not only a sloppy paint job but that the painting subcontractor had used an inferior quality of paint to the Benjamin Moore brand which had been specified in the Agreement. When this was brought to the attention of the defendant, it agreed to repaint the entirety of the interior which was then carried out in a two day period, having to paint around the fixtures which had already been installed.

[128] The plaintiffs were dissatisfied with the second paint job as well where they observed areas where the paint was uneven, the trim did not have clean lines, hinges were painted on and paint drips appeared in various places. They

complained to the defendant with no satisfaction.

[129] The inferior quality of this work was verified by Mr. McCulloch who inspected the home. His evidence was that the paint job was substandard for a $400,000 home, noting as well that it appeared that little sandpapering had been done in preparation for the application of paint. He saw no evidence of any wear and tear on the painted surfaces on the part of the plaintiffs, which was consistent with the evidence of the plaintiffs themselves. Mr. McCulloch concluded in his report that under the circumstances, the entire house now requires a complete painting of walls, ceilings and trim by a quality painting firm who knows how to prepare and paint walls and trim to meet the quality standards of a house of this value.

[130] The initial cost estimate submitted by Kiwi on December 4, 2007 came in at $13,000 plus HST. The updated figure in its March 31, 2010 quote was $17,500 plus HST (an increase of 35%). Mr. MacNeil acknowledged that the latter figure was based on a single quote from a painting subcontractor because he didn't have time to get competitive bids. I therefore prefer the figure put forward by Mr. McCulloch for repainting the house interior at a total of $15,500 plus HST (for a total of $17,825). I see no need to add a contingency allowance for this aspect of the work which is not latent in any respect, but do include it in the betterment allowance to be later applied.

Master Bedroom Floor Bulge

[131] Despite an attempted repair of this problem as part of the AHWP conciliation process, there still exists a bulge in the floor in the master bedroom

next to the stairway. Mr. McCulloch's evidence is that because of an improperly installed support post and structural framing, this area will have to be reconstructed to correct the problem. The AHWP conciliation process is predicated upon the builder carrying out the necessary repairs in a good and workmanlike manner. Here, it obviously failed to do so and the plaintiffs should now be entitled to recover the cost of the necessary repair.

[132] The estimate provided by Kiwi to repair this bulge and to repair the damage to the sub-floor by the defendant's previous unsuccessful attempt to rectify the problem was updated on March 31, 2010 to the figure of $1,667.50 plus HST (which is less than the repair cost estimate of Mr. McCulloch's). I therefore direct the recovery of that amount by the plaintiffs plus a 10% contingency allowance for this work.

First Floor Hallway Floor Bulge

[133] A similar problem continues to exist in the main floor hallway adjacent to the basement stairwell. Mr. McCulloch explained in his report that allowances have to be made in the framing to allow for the structure to settle and shrink. If that is not done, and because a steel beam will not shrink, a hump or high spot in the floor can result. He said that the remedial work would require removing the finished floors and replacing the hardwood only as necessary to match.

[134] I conclude that the plaintiffs are likewise entitled to recover the cost of repair of this deficiency. The updated Kiwi quote came in at $3,082 plus HST to which I would add a contingency allowance of 10%. This produces a total figure of $3,898 which is consistent with the repair cost estimated by Mr. McCulloch.

Interior Doors Installation Faults

[135] There are five interior doors in the home which function but do not fit properly. Mr. McCulloch's evidence is that these can be repaired without having to be replaced. Kiwi's updated cost estimate to "re-install five interior door frames that are neither square or aligned to adjacent walls" is $1,437.50. I allow the plaintiffs recovery of that amount plus HST but decline to add a contingency allowance for the remediation of this patent defect.

Bathroom Exhaust Fans and Installation Faults

[136] This relatively minor item arises from the plaintiffs' two-fold complaint of deficient installation of the second floor bathroom fans which were not the models for which they contracted.

[137] The deficient installation of the fans is shown in the photograph evidence. Mr. Connolly intends to complete the repairs himself and acknowledged in his evidence that it is not necessary to replace the powder room ventilation fan. Compensation for Mr. Connolly's own time in all respects will be dealt with separately in this decision. I do direct, however, that the plaintiffs are entitled to recover the cost of a replacement ventilation fan in the other bathroom in the amount of $230 including HST.

Cast Iron Plumbing Installation Faults

[138] The Agreement between the parties called for the installation of cast iron

risers from the basement floor to the second floor as an extra for which the plaintiffs paid $920. It is clear from the photograph evidence that cast iron was not used at the basement level, contrary to the Agreement. The plaintiffs are therefore entitled to recover the cost of correcting that deficiency, which work Mr. Connolly intends to do himself.

[139] To carry out that work, Mr. Connolly will incur a cost of approximately $308 (including HST) for materials and rental equipment. Once again, compensation for his own labour will be dealt with as a separate component of the damages assessment, which now follows.

Compensation for Mr. Connolly's Own Labour

[140] Mr. Connolly has itemized about 70.5 hrs of personal labour which he has invested or will need to invest in various aspects of the remediation to his home. Included in his claim is remuneration for this personal labour at the rate of $40 per hour, which is a figure he himself chose. Mr. Connolly, whose career has been in communications consulting, achieved a Certificate in Home Inspection from Dalhousie University College of Continuing Education in August of 2010, although it is not suggested that his proposed hourly rate is connected to that.

[141] Courts have often compensated plaintiffs for personally performing remedial work that would otherwise have to have been performed by a tradesman (see, for example, *Drake et al. v. Newfoundland*, [1999] N.J. No. 305).

[142] The only evidence before the court on hourly rates for this type of work is

that provided by Mr. Saberi who testified (albeit on a different issue) that his company generally hires carpenters at about $20 per hour and labourers in the range of $12-14 per hour. I find this range of hourly rates to be more reasonable over the arbitrary rate chosen by Mr. Connolly as a proper measure of compensation.

[143] Mr. Connolly testified that his recording of these hours was done in a conservative fashion which I accept. I therefore consider it unnecessary to go through the allocation of these hours on an item by item basis, other than to disallow the 8 hours of prospective labour allotted to the replacement of the powder room fan which is now acknowledged to be unnecessary. In the result, I allow Mr. Connolly to be compensated for his personal labour costs in the amount of $1,250 (62.5 hrs at $20 per hour).

Purchase Price Overpayments

[144] This category is comprised of the outstanding items which were the subject of the billing dispute between the parties dating back to 2002 as earlier mentioned.

[145] The plaintiffs maintain that they have been overbilled in three respects in the aggregate of $1,150. Their earlier claim for compensation for 198 square feet of missing living space has been discontinued.

[146] The first item is in respect of exterior front door painting which was not done at the request of the plaintiffs but for which a refund of $172.50 was never received as promised. Mr. Saberi gave some evidence of a loose arrangement made between the plaintiffs and his site supervisor about an offset for some rock that Mr. Connolly took but this evidence is clearly inadmissible as hearsay and also

unconvincing in any event. I find the plaintiffs are therefore entitled to a refund of $172.50 (including HST).

[147] The second item concerns electrical upgrades made to the house of which there are two components. First, the plaintiffs allege that they were overbilled for $172.50 because they were charged that amount in the closing adjustments for rough-in wiring in the basement which they say was included in a $300 extra from the electrical contractor.

[148] The problem with this aspect of the claim is that the court is being asked to draw an inference of double billing for this work predicated on an invoice which has not been proven (and which is identified only by a handwritten entry of the name at the top). Counsel for the defendant objects to the admissibility of this document as hearsay.

[149] Moreover, the invoice as written does not specify whether the items listed represents the cost of labour or materials or both. Even if this document were admissible, I find that it does not establish on a balance of probabilities that a double billing was made.

[150] The second component of the electrical upgrade issue is again based on the plaintiffs' comparison of the statement of closing adjustments and the electrical subcontractor invoice above mentioned. The statement of closing adjustments reflect that an extra was paid for electrical upgrades in the amount of $3,105 whereas the subject invoice from the electrical contractor shows an extra of $2,300.

The difference of $805 is now claimed by the plaintiffs.

[151] This aspect of the claim shares the same weakness as the one above. While such overbilling on both counts is a possibility, I am not satisfied on a balance of probabilities that either has been satisfactorily proven based on the evidence before me.

Costs During the Restoration

[152] There are four components to this aspect of the claim, namely,

(a) Off-site accommodation and living expenses during restoration;

(b) House contents removal, storage and replacement;

(c) Post restoration house cleaning;

(d) Additional house and contents insurance coverage.

[153] Mr. McCulloch in his report verifies that the performance of such extensive remedial work is going to create havoc in the household and that the solution would be to empty the home of all contents by either storing furniture in a storage container pod exterior to the house or to place it in the basement and garage areas to be sealed off. He acknowledges that this would require temporary living accommodation and moving costs. In his evidence at trial, he estimated that a period of three months would be required for the restoration work to be completed.

[154] The plaintiffs have put forward an off-site accommodation expense claim of $21,607 based on a single quote they obtained from Premiere Executive Suites at

Bishop's Landing. An expense of this magnitude cannot be justified and in the absence of any alternate quote being put forth, I prefer Mr. McCulloch's estimated figure of $10,000 including HST. I also prefer Mr. McCulloch's estimated cost of removal and storage of the house contents in the amount of $7,910 (including HST) over the figure of $16,232 proposed by the plaintiffs.

[155] Similarly, I prefer Mr. McCulloch's estimate of $1,130 (including HST) for the cost of post restoration house cleaning over the figure of $1,754 advanced by the plaintiffs. Mr. McCulloch's cost estimates in all three respects seem to me to be at a more reasonable level for these expenses which will have to be incurred. I make no allowance for the additional insurance costs claimed.

[156] In the result, I find that the plaintiffs are entitled to recover the rounded sum of $19,000 for the expenses they will have to incur during the restoration period.

Cost of Building Permits

[157] The remaining component of the plaintiffs' claim for damages is the ancillary cost of obtaining the necessary building permits from Halifax Regional Municipality.

[158] The evidence before the court indicates that for renovation type construction, including structural alterations and repairs, the permit fee is $5.50 per $1,000 of the estimated value of construction when complete.

[159] By my count, the aggregate of all the foregoing amounts awarded to the plaintiffs is $315,963. Of that amount, it appears likely that the estimated value of future construction for which a building permit would be required (excluding such components as shower re-installation, repainting the interior, and repairing faulty installation of interior doors and bathroom ventilation fans) would be in the range of $236,000.

[160] It follows, applying the building permit fee at the rate aforesaid, that the plaintiffs are likely to incur permit fees in the range of $1,300 in carrying out the necessary remedial work. They are accordingly entitled to recovery of that amount from the defendant as well.

BETTERMENT ALLOWANCE

[161] The issue of a betterment allowance was not a focal point in this case, either by way of evidence or closing submissions. However, it has been raised and now needs to be dealt with.

[162] There is a useful description of the concept of betterment set out in *Damages for Breach of Contract* (2 Ed.), Carswell (looseleaf) authored by Harvin Pitch and Ronald Snyder. It reads as follows (at para. 2-3(c)(I)):

> The issue of betterment arises in situations where the court adopts the "cost of performance" test and awards the cost of carrying out the repairs or, in the extreme, awards an amount sufficient to rebuild a defective structure. As a result of the repair or replacement of the damaged product or building, the plaintiff will receive a new product or building which will have a greater value than that which existed prior to the damage being sustained. The court, therefore, must decide whether to factor the "betterment" into the calculation of damages and reduce the damage award accordingly.
>
> For example, . . . a roof on a commercial building is expected to have a life span of ten years. After four years, as a result of negligent construction, that roof must be replaced.

> The new roof, when installed, will have a new life span of ten years. As a result, the plaintiff will have received a "betterment" consisting of a new roof which will last an additional four years.

[163] The authors then go on to observe that to date, Canadian courts have not applied a consistent approach to the issue because of competing policy considerations which argue both for and against such a betterment deduction.

[164] In any event, this is not a case where it can be said that the remedial work to be completed will increase the asset value of the house over what it would have been had the building contract been properly performed. There is no evidence of any such increased value here (the onus of proof falling on the defendant), nor can it be inferred by the court. Rather, this is a case where it can be said that certain aspects of the remedial work to be performed will produce a benefit to the plaintiffs insofar as the future need for replacement or maintenance of those items will be deferred. To the extent that that can be quantified, a betterment allowance can be applied, reducing the damages award accordingly.

[165] This approach to the assessment of a betterment allowance in building contract cases has been followed by the courts in this province, as illustrated in *Byrne Architects Inc. v. A.J. Hustins Enterprises Ltd.*, 2003 NSCA 21 and *Dartmouth (City) v. Acres Consulting Ltd.*, (1995) 138 N.S.R. (2d) 81. In both those cases, the builder had constructed a defective roof system on a commercial structure which had to be replaced. The new roof systems, of course, had a longer life expectancy which meant that the owner would have the benefit of deferred replacement or repair in the future. Because of that, the court applied a betterment

allowance reduction in the percentages of 25 and 20 respectively.

[166] In reviewing the various components of the claim in the present case, I am able to identify only three of them which ought to attract a betterment allowance, namely, the new Bradstone facade to be installed on the front wall of the house, the repainting of the interior (after nine years) and the slightly newer roof. In my estimation, the aggregate value of this remedial work is in the general range of $50,000. Rather than trying to put too fine a point on the calculation, which by its very nature in these circumstances will be imprecise, I choose to apply an average betterment allowance of 20% to that amount. In the result, the overall damages award will be reduced by $10,000.

CONCLUSION

[167] By my tally, the total amount of damages to be recovered by the plaintiffs from the defendant comes to $307,263. In addition to that, the plaintiffs are also entitled to recover pre-judgment interest on the actual expenses they have already incurred at a reasonable rate which the parties are encouraged to reach agreement on. The plaintiffs are also entitled to recover their party and party costs of this action which the parties are also encouraged to agree upon. If such agreement cannot be reached, I would ask the parties for written submissions within 30 days of the release of this decision.

[168] I would add that the court reserves the right to rectify any clerical errors or omissions in its calculation of the damages award should they be detected by either party.

[169] I would also add that the court fully recognizes that the size of this damages award is relatively high compared to the original contract price for the construction of the house. However, as I have already found, the plaintiffs are entitled on the facts of this case to recover the costs of the necessary remedial work as the proper measure of damages over the diminution in value approach. The plaintiffs should not be put in the position of having to finance remediation of poor workmanship for which they were not responsible. Rather, the defendant must bear such responsibility for the poor workmanship exhibited by the various subcontractors for whom it is responsible.

[170] This pattern of poor workmanship was compounded by the apparent indifference of the defendant to the plaintiffs' concerns over the various deficiencies. That indifference was displayed by failing to be responsive to the plaintiffs' early concerns, delays in rectifying several of the deficiencies followed by further instances of substandard workmanship in some of the repairs carried out. The defendant thereby lost the trust and confidence of the plaintiffs and understandably so, leading to the retention of outside contractors and consultants.

[171] The defendant then later refused (on two occasions) the plaintiffs' requests for arbitration (as called for in the Agreement) with its obvious advantages over proceeding to litigation. When the case did proceed to trial, the defendant then presented a paucity of evidence to support its position (through no fault of its counsel). It is therefore the author of its own misfortune in the ultimate disposition of this action.

J.