

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Flynn v. Halifax (Regional Municipality), 2003 NSSC 253

**Date:** 20031222

**Docket:** SH 154747

**Registry:** Halifax

Between:

Fabian Flynn and Trudy Flynn

Plaintiffs

v.

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

Defendants

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** March 4, 5, 6, 7, 17, 18, 19, 20, 21, 26 and 27, 2003 and  
April 30, 2003 in Halifax, Nova Scotia

**Final Written  
Submission:** July 16, 2003

**Written Decision:** December 18, 2003

**Counsel:** Joseph M.J. Cooper, Q.C. &  
Ms. Maureen Walden-Ryan & Ms. Melanie O'Rourke  
(assisting Ms. Walden-Ryan), for the Plaintiffs  
Messrs. Peter Darling & Matthew Williams, for the  
Defendants  
Shawna Henderson, self represented  
James Dunleavy, self represented and on behalf of  
Applewood Enterprises

**By the Court:**

**INTRODUCTION**

[1] The plaintiffs, Trudy and Fabian Flynn, claim that a house they contracted to have built by the defendants James Dunleavy and Applewood Enterprises, contains defects that breach the contract and the *National Building Code of Canada*. They claim that the other defendants, the Halifax Regional Municipality and its employee, Donald Williams, a building inspector, negligently failed to detect the defects before or during the construction of the house and to require them to be remedied. Several other defendants were released from the action. Shauna Henderson, the house designer, was released on the second day of trial.

**BACKGROUND**

*The plaintiffs*

[2] Trudy Flynn was 49 years old at the time of trial. She and her husband Fabian Flynn, who was 50 years old at the time of trial, have two children, Natasha and Tyler. Mrs. Flynn holds a Bachelor of Arts from the University of Manitoba and is qualified as a nurse. Mr. Flynn is a military officer, working in health care administration. In March 1997 the plaintiffs bought a parcel of land in Seabright,

Nova Scotia, an area that was formerly part of Halifax County but which was incorporated into the Halifax Regional Municipality as part of the 1996 amalgamation. They decided to build “an environmentally safe family home” (as they describe it in their amended statement of claim) on the property.

[3] The house the Flynns decided to build had several special requirements.

Their daughter Natasha suffers from serious environmental illness and allergies as a result of mold exposure. Mrs. Flynn suffers from less extreme allergies.

Natasha’s allergies – including her adverse reaction to wood smoke coming from houses in their community of Lower Sackville – contributed to Mr. and Mrs.

Flynn’s decision to build a house in a more isolated location. They intended to build the house from materials that would not aggravate their daughter’s illness and allergies. Mrs. Flynn had investigated passive solar heating, and they intended to incorporate “passive solar” as a feature of the house. The Flynns had no experience in construction. Though they had owned houses, they had never built one.

*Designing the house*

[4] After buying the land, the Flynns contacted a home designer, Shauna Henderson. Ms. Henderson carried on business under the trade name ABRI Sustainable Design. As a designer, but not an architect, she was authorized to design buildings under Part 9 of the *National Building Code* (“Housing and Small Buildings”), that is, buildings up to three stories of less than 300 square metres. She was not authorized to stamp designs (as an engineer can) or to design larger buildings under Part 4 of the *Code* (“Structural Design”). She had acted as an evaluator and inspector for R2000-certified homes for energy-efficiency.

[5] Ms. Henderson had a background in designing homes with passive solar heating, and had written a manual for passive solar homes in Nova Scotia. She met with the Flynns in February or March 1997, and they requested that she prepare a set of plans for the house they intended to build at Seabright. She understood that the Flynns had two main concerns: they wanted passive solar heating, and they required a healthier environment for their daughter. She said they were concerned that the house should be ready before the beginning of the next school year in the autumn of 1997. Mrs. Flynn said Ms. Henderson appeared knowledgeable about their concerns.

[6] Ms. Henderson's design (Exhibit 1, Tab 1) called for the house to rest on a "monolithic slab" rather than a conventional foundation with a basement. A monolithic slab is laid down in a single cement pour, leaving no cracks through which soil gases can enter the house. Ms. Henderson's design called for the slab to be reinforced with rebar, wire mesh and thickened footings under weight-bearing walls. The design included "in-floor" heating by way of pipes that would run through the slab. The plans called for the placement of a vapour barrier under the slab to prevent entry of mold or of soil gases, such as radon.

[7] The Flynns intended to install a stone sauna, which would have health benefits for Natasha and act as an additional source of passive solar heat. Ms. Henderson's plan required the slab to be thickened under the sauna to support the extra weight.

[8] The two pages on which the slab design appeared – sheets 3 and 7 – were stamped by an engineer, Daniel Khan. None of the parties took issue with the necessity for an engineer's approval, pursuant to Part 4 of the *National Building Code*, for a monolithic slab like the one Ms. Henderson designed. Mr. Khan

testified that he has experience with concrete structures and, accordingly, his engineer's stamp relates only to the plan for the concrete slab. Donald Williams, the building inspector, testified that as far as he was concerned the engineer's stamp relates to everything on the page unless it is qualified by the engineer. If this assertion were correct, it would mean that the south wall of the house, which is a matter of controversy in this proceeding, would have been certified by Mr. Khan, as it incidentally appears on sheet 7 of the plans. However, I agree with Mr. Khan that he was not approving any part of the plan other than the monolithic slab. His stamp did not relate to the south wall of the house.

[9] Ms. Henderson's design did not include particulars of the design of the roof trusses, as this would be done by a roof truss design engineer working from her plans. Her plans stated only the materials to be used, but specified that the main roof assembly trusses should be to "Eng. Specs".

[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 Flynn

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.

[11] The design included a wall 14 feet high on the south side of the house that rose two floors to a cathedral ceiling. Part of the second floor was open to the roof, and an open landing looked down to the first floor, supported by wooden posts measuring eight inches by eight inches. This wall contained two large windows.

[12] Mrs. Flynn said Ms. Henderson met her at the municipal offices to apply for a building permit, and they supplied a copy of the plans with the application. The application was filed on May 20, 1997, and the building permit was issued July 15 (Exhibit 1, Tabs 17 and 21).

*Hiring a builder*

[13] With the ABRI plans prepared, the Flynns set out to find a contractor to build the house. Ms. Henderson said she recommended several builders, including Keith Sawlor and James Dunleavy. She was familiar with Mr. Dunleavy's work from R2000 inspections, though she had never worked with him directly. Mrs. Flynn testified that they were looking for a builder who was familiar with environmental illness and passive solar heating. She said they received quotes from Mr. Sawlor and Mr. Dunleavy. They did not think Mr. Sawlor understood their requirements sufficiently, partly because there was carpet in the model house they visited. Sawlor Construction quoted a price for the work of \$128,800.00 plus HST (Exhibit 4).

[14] Mr. Dunleavy, however, seemed knowledgeable about environmental illness and passive solar heating. He said he had 30 years construction experience. He expressed no concern about the monolithic slab, saying he had used them before. Mrs. Flynn said they did not discuss the R2000 and Atlantic Home Warranty Programs. She said he did not mention his company, Applewood Enterprises Ltd., and did not give them a business card. Mr. Dunleavy testified that it would be his



normal practice to produce a business card at a first meeting, although he did not specifically remember doing so in this case.

[15] After Mr. Dunleavy viewed the site, the Flynns met with him a second time, at Tim Hortons on Quinpool Road in Halifax. Mrs. Flynn said Mr. Dunleavy gave them the card of his company, Applewood, at this meeting. She said she understood that he used the company for purchasing. She said Mr. Dunleavy discussed the R2000 and Atlantic Home Warranty Programs at this meeting. While these programs were not referred to in the contract, Mrs. Flynn said Mr. Dunleavy told them that all of his homes were R2000 compliant and registered under the Atlantic Home Warranty Program. She said there was no discussion of costs of the warranty program, and she thought it was automatic. Mr. Dunleavy testified that he felt there was no requirement to build the Flynn house to R2000 standard or to register it with the AHWP, as they were not required by the contract.

[16] Reviewing the contract – which was dated July 4, 1997 (Exhibit 1, Tab 5) – Mr. and Mrs. Flynn had second thoughts about certain details. Mrs. Flynn said they then contacted Mr. Dunleavy, who provided a new contract, dated July 8, 1997 (Exhibit 1, Tab 6). Mr. Dunleavy's account of the signing of the two contracts is

different. He testified that the Flynnns asked him to bring two contracts to the meeting at Tim Hortons. The two contracts were very different; they contained different time and work requirements, and, more significantly, different prices. The July 4 contract included items – such as a septic tank – that were not, in fact, intended to be part of Mr. Dunleavy’s work. The July 4 contract states a price of \$162,000. The July 8 contract – which the parties agree is the document governing the actual construction – stated a price of \$101,741. Mr. Dunleavy testified that he understood that the Flynnns intended to present the July 4 contract, with its larger contract price, to the bank for financing purposes. However, Mr. and Mrs. Flynn both said the July 4 contract was never given to the bank. Mrs. Flynn said the two contracts were not signed at the same time, as Mr. Dunleavy claimed. She said they forgot about the July 4 contract until after this action was commenced. In any event, the July 8 contract is the relevant one. I accept Mr. Dunleavy’s explanation concerning the second contract, and find that the parties never intended it to govern the construction; indeed, the particulars it states appear to be for a completely different house.

[17] The contract of July 8, 1997, provided that the foundation of the house would be a monolithic slab or a four-foot frost wall, depending on pricing. It set

out framing requirements for the exterior and interior walls, floor joists and flooring plywood, the roof (including tarpaper) and wall sheathing, with an exterior air barrier. There were details of exterior finish, electrical components, plumbing and in-floor heating, insulation, interior finish and ventilation. Excavation and landscaping were not included in the contract. The payment schedule called for ten per cent upon signing, 50 per cent “upon roof-tight, windows/doors installed, ready for siding”, 30 per cent upon completion and ten per cent 45 days after completion. Construction was to be finished within 60 days after the work started. Mrs. Flynn said the payment schedule called for in the contract was not followed. Instead, they paid Mr. Dunleavy \$10,000 as a down payment, and a further \$25,000 in July or August, 1997. Their bankers had never handled a construction mortgage before, and they got the entire payment at once, though ultimately they did not draw down the entire available funds.

[18] Mrs. Flynn testified that Mr. Dunleavy said the monolithic slab could become very expensive. As a result, the contract provides for a monolithic slab or a slab and frost wall. After seeing the site, Mrs. Flynn said, Mr. Dunleavy reported that he did not want to use a monolithic slab because of the slope of the lot. She said Ms. Henderson was not concerned about the slope of the lot, and believed that

a monolithic slab would be appropriate. Ms. Henderson testified that she had recommended the placement of monolithic slabs on lots with a greater slope than the Flynns', and none of these designs had been changed. If there was a change being considered, she said, she would have consulted the engineer who had stamped the original plans. But she said once the frost wall and footings replaced the monolithic slab there was no need to refer to an engineer, since a standard frost wall foundation is covered by Part 9 of the *National Building Code*. Mr. Dunleavy began to plan for a conventional design for a frost wall and slab. Mrs. Flynn said she thought nothing more of it.

[19] Mrs. Flynn said that there was no discussion of the roof trusses until the walls were up. At that time, she said, Mr. Dunleavy told her the roof designers said the ABRI design would not permit a pointed roof, but required a flat roof.

[20] After the Flynns hired Mr. Dunleavy, Mrs. Flynn said, they received a call from Donald Williams, who was the building inspector responsible for their site. He said the house required a ventilation system, which did not appear on the plans, but this was his only concern with the plans. He said he had worked with Mr. Dunleavy before and the Flynns were lucky to have him building their house.

*Construction and building inspections*

[21] The construction began within a week after the signing of the July 8 contract. Mr. and Mrs. Flynn visited the site regularly. Mrs. Flynn said Mr. Dunleavy had three people working on the site, including himself. She and Mr. Flynn visited the site on vacation and offered to help. There has been some controversy as to the amount of work the Flynns themselves performed on the construction and precisely when they expressed their interest in assisting. Ms. Henderson said she always spoke to clients about “sweat equity” as a way to get the best financial benefit on the project. She would also point out that some contractors prefer not to have assistance from the owner. She said that as far as she knew, the Flynns were prepared to assist in building the house. Mr. Dunleavy said Mr. Flynn was interested in working on the construction from their first meeting, although Mrs. Flynn said there was no such discussion. Mr. Flynn testified that he worked on the site during his vacation, helping to put up walls, assisting Mr. Dunleavy with insulation and helping raise the roof trusses. Mrs. Flynn said she was on the site often during the construction, acting as a helper to Mr. Dunleavy and his two laborers.

[22] Donald Williams, the building inspector for the Halifax Regional Municipality, carried out four inspections prior to the final occupancy inspection: (1) an inspection of the footings; (2) an inspection of the foundation before it was backfilled; (3) a framing inspection; and (4) a pre-drywall inspection of the insulation and vapour barrier in the walls. He gave a “pass” on each of these. (Exhibit 1, Tab 24).

[23] During construction, Mrs. Flynn said, Mr. Dunleavy usually dealt with Mr. Williams. However, she said she was present for the framing and insulation inspections. She said that during the framing inspection Mr. Williams did not comment on the 14-foot south wall and the two large windows it contained, except to comment that the Flynnns must be rather wealthy due to the apparent cost of the windows. During the insulation inspection, she testified, Mr. Williams did not get out of his car, but simply said he had confidence in Applewood. Mr. Dunleavy testified that it was possible that Mr. Williams told him that he did not need to get out of the car during the insulation inspection. Mrs. Flynn said one of the walls in her son’s room had no insulation, and there was no vapour barrier between the toilet wall and the garage. I accept Mrs. Flynn’s evidence that Mr. Williams did not get out of his car during the insulation inspection.

[24] During the course of construction, it is common ground between the plaintiffs and Mr. Dunleavy that certain details of the plans were altered. Rather than a monolithic slab, Mr. Dunleavy built the house on a four-foot frost wall with a slab sitting on top of it. He believed this would be more efficient and cheaper, and he had serious concerns about the slope of the land. He said the Flynns accepted his opinion without consulting Ms. Henderson. Mr Dunleavy said after construction of footings and the frost walls, the foundation was backfilled and the material on the interior was compacted and tamped, and the foundation insulated. Foam insulation was laid beneath the slab, but Mr. Dunleavy said the Flynns opted not to have insulation beneath the stone sauna, where the slab was thickened to support the extra weight. Additional items appearing on the ABRI plans were excluded by the Flynns: the berm, windows above the french doors and lattice work.

[25] After building the foundation, Mr. Dunleavy testified, he built the structure of the house according to the plans. The roof trusses were supplied by Kent Building Supplies, who acquired them from Barrett Lumber.

[26] Mr. Dunleavy insisted that where changes were made to the plans during construction – as, for instance, where several interior partition walls were moved – the Flynns agreed to the changes. This was the case, he said, with changes to the walls of the mechanical room and kitchen, as well as a half-wall with shelves in it on the second floor. He said changes to the bathroom were handled in the same fashion. In all such cases, Mr. Dunleavy testified, Mrs. Flynn was present and approved the changes.

*Post-construction complaints*

[27] The Flynns moved into the house in September 1997. They had no occupancy permit, but Mrs. Flynn said Mr. Williams gave them verbal permission to move in. When Mr. Williams inspected for the occupancy permit, he had safety concerns about a missing guardrail and an open stair landing, and did not issue a permit. He testified that he did not give verbal permission for the Flynns to move in. Nevertheless they moved into the house in September, 1997. The issues Mr. Williams raised were eventually addressed, and an occupancy permit was issued about one year later.



[28] During the first winter the family spent in the house, Mrs. Flynn said, they began to notice defects. It was difficult to heat the west side of the house and the master bedroom. Their son Tyler's bedroom was very cold, and there was a misplaced thermostat. The uninsulated sauna area was cold as well. Ms. Henderson did an air tightness test and inspection on January 6, 1998, and noticed air leakage in several parts of the house, including the main bedroom, Tyler's room, the patio door and around dryer vents and electrical outlets (Exhibit 1, Tab 14).

[29] In the winter when it was windy the house would move, particularly the 14-foot high south wall with the two large windows. Mrs. Flynn said she could feel a tremor in wall when the wind was from the southeast. The wall and windows would also shake when a door closed. Over time she noticed cracks in the walls that appeared to grow after windstorms. During one bad windstorm she could see glass moving in the windows. There was also cracking in the ceiling and nail pops in several rooms.

[30] Mrs. Flynn said the concrete slab cracked for the length of the south wall, with cracks wide and deep enough that a ruler will extend up to 12 inches into cracks that are between a quarter-inch and a half-inch wide, depending on the

season. She said there was cracking in other areas of the slab as well, including the length of the wall along the garage, in the den, the utility room, and the garage. She said the cracking was ongoing since they moved into the house in September 1997 and was still occurring at the time of trial.

[31] Mrs. Flynn said the lack of drain tiles led to water gathering in the back of the house. Mr. Dunleavy told her drain tiles were not necessary due to the frost wall, and Mr. Williams agreed. She said they had to get rid of some furniture and shoes on account of mold caused by the resulting dampness.

[32] In February 1998, in response to the Flynn's concerns about the cold areas of the slab, Mr. Dunleavy returned to the house to install heating pipes and insulation under the stone sauna. He also installed a polyethylene vapour barrier in the area, which he said he tried to extend under the slab as far as he could reach; otherwise, he said, there was no way to connect the old and new portions of the barrier.

[33] On May 8 and May 24, 1998, the plaintiffs wrote to Mr. Dunleavy, pointing out various alleged deficiencies in the house (Exhibit 1, Tabs 10-11). Apparently

unsatisfied with his response, they subsequently claimed under the Atlantic Home Warranty Program for the defects. This complaint resulted in a conciliation award, dated September 10, 1998. The conciliator, Tom Jollymore, reviewed the Flynn's complaints and directed the contractor to make some minor repairs, but considered most of the plaintiffs' complaints to be either matters of contract or patent defects, neither of which were covered by the warranty program (Exhibit 8). The Flynn's subsequently included the Atlantic Home Warranty Program as a defendant in the action, until it was released in a settlement in 2001.

[34] Mrs. Flynn spoke to Gerard Donahoe, a plans examiner with HRM, who wrote her a letter dated 25 September 1998. He identified "two definite Code issues": the footing thickness and the soil gas barrier. He pointed out that there was no occupancy permit for the house, and that it was therefore a violation of the *Building Code Act* for them to be living in it (Exhibit 1, Tab 27). Mr. Donahoe said he directed Mr. Williams to contact Mrs. Flynn.

[35] The Municipality issued an occupancy permit on November 13, 1998 after Mr. Williams carried out another inspection. On the permit he referred to "extreme cracking in slab at rear" and required an engineer's report on the condition of the

slab (Exhibit 1, Tab 29). Mr. Dunleavy testified that he never obtained the engineer's report, as he believed it was not necessary.

## **THE PLAINTIFFS' CLAIMS**

### ***The slab***

[36] The plaintiffs say they relied on Mr. Dunleavy's skill and judgment when he told them that a monolithic slab was not possible on the site and that a slab-on-grade with frost walls would serve just as well. They also say the inspector, Mr. Williams, should have required new plans with an engineer's stamp. It is important to note, however, that the contract provided for the slab-on-grade and frost wall as an alternative to a monolithic slab, and that a slab-on-grade – as opposed to a monolithic slab – would not require an engineer's stamp in these circumstances. Thus, according to Mr. Williams' evidence at trial, once the decision was made to abandon the monolithic slab, there was no need for a foundation plan to be submitted. Mr. Donahoe, the municipal plans examiner, said he would want to see a new set of plans, but it does not appear that this was on account of any inspection policy or ***Building Code*** requirement.

[37] Mr. Dunleavy said he was not present when the concrete was poured. He said the thermal break between the unheated garage floor and the main dwelling was omitted by the concrete subcontractor, in his absence, during the cement pour. He testified that there was originally no insulation beneath the thickened slab under the stone sauna and interior load-bearing walls. He said the construction of the slab matched the diagram drawn by expert witness Archie Frost (Exhibit 32), with the slab butting against the perimeter foundation wall, and resting on top of the wall by means of a thinned edge on the slab.

[38] The plaintiffs say the lack of adequate compaction is contributing to the extensive cracking and settlement of the slab. Although the sub-base had been compacted, it was not further compacted after the plumbers had installed the pipes. Mr. Dunleavy acknowledged that this additional compaction was not carried out.

[39] The plaintiffs claim that Mr. Dunleavy failed to thicken the footings. He maintains that the footing under the wall between the stairs and the garage was not thickened, but says other footings were thickened.

[40] As well as failing to thicken the footings, the plaintiffs say Mr. Dunleavy failed to install rebar in the footings for extra support, and did not instruct the subcontractor to lift the wire mesh during the concrete pour to strengthen the concrete. Mr. Dunleavy's evidence on cross-examination was that he "assumed" that he would have instructed the subcontractor to pull up the mesh, or "assumed" that they would do so. He also said the wire mesh did not extend into the thin edge of the slab that rests on the top of the frost wall. He said there was no need to add rebar to the slab.

[41] The plaintiffs say Mr. Williams gave a pass on the footing inspection without negative comment. His inspection revealed that only the exterior walls were supported. They claim that he should have noted that there was no site preparation for interior footings. Mr. Williams said only exterior footings were required to be inspected in the old county, but that he would inspect interior footings at the same time if they were in place. In the former City interior footings were inspected. However, where footings were to be created by thickening the slab – as was the case here – it would not be possible to inspect interior footings. The plaintiffs say he should have informed Mr. Dunleavy of current requirements (e.g. for interior strip footings rather than thickening) if they were different from the

former requirements. According to the evidence of Edward Thornhill, Manager of Inspection, it took time to have the construction industry change its practice from using thickenings for footings to using internal strip footings (which could be inspected). This new policy and practice, he said, was not yet fully established in 1997. He stated that the change would have been in place by the beginning of 1998.

### ***Drain tiles***

[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.”

***Soil gas barrier***

[43] The plaintiffs say the ABRI plans and the ***Building Code*** required a soil and gas barrier under the slab. Mr. Dunleavy testified that in installing it he did not overlap the seams 12 inches, but only six to eight inches, and that it was not required by the Code to overlap the joints by 12 inches as the plaintiffs suggested. Article 9.13.1.3(1) requires that, with certain exceptions, “all wall, roof and floor assemblies in contact with the ground shall be constructed to resist the leakage of *soil gas* from the ground into the *building*.” Article 9.13.1.3(3) provides that where a soil gas barrier is beneath a slab-on-ground, as is the case here, “joints in the barrier shall be lapped not less than 300 mm.” Thus it appears that Mr. Dunleavy did fail to lap the joints to the extent required.

***Exterior walls***

[44] The plaintiffs complain that the exterior walls – most importantly the high south wall – are unstable. They say the south wall’s height, combined with its internal structure and lack of rigid external sheathing have left it inadequately braced. As a result, they say, it shakes easily. The ABRI design indicated that the south wall’s unsupported height was 14 feet, exceeding the maximum permitted under Part 9 of the ***Building Code***.



[45] The plaintiffs say Mr. Williams, the building inspector, negligently passed the plans for the south wall despite the *Building Code* violation. They say he should have required engineer-approved plans for the south wall before approving the plans. The plaintiffs argue that once HRM adopted a policy to examine plans, it owed them a duty of care to do so carefully and competently. As is discussed above, Mr. Williams took the view that Mr. Khan's engineer's stamp certified everything that appeared on the page; but I have found that the stamp related only to the slab, and not to the south wall. In this regard, I note that sheet 6 of the plans, which contains the specifications for the wall assembly, does not contain Mr. Khan's stamp.

[46] Mr. Dunleavy agreed at trial that the south wall is insufficiently braced. His evidence was that he did not notice the *Code* violation at the time.

### *Roof trusses*

[47] Mr. Dunleavy obtained the roof trusses from Kent Building Supplies, who, in turn, had them manufactured by Barrett Lumber, which designed them on the basis of Ms. Henderson's plans for the house. The requirements of Ms.

Henderson's plans. I am satisfied that, although the truss designs did not include an engineer's stamp, and they contained a disclaimer stating that they "should be approved by a registered professional engineer before use," this alone does not indicate that they were unsatisfactory (Exhibit 33). Designs containing an engineer's stamp dated 2002 were produced at trial (Exhibit 37, Tab 19). Mr. Dunleavy said roof truss designs are usually not stamped, and he relied on them. Clem Webber, the truss designer from Barrett, pointed out that the invoice includes sheet A-100, which states in part that the design complies with requirements of the Truss Plate Institute of Canada, the Canadian Standards Association and the *National Building Code* (Exhibit 37, Tab 16). His evidence was that he could – and did – get an engineer's stamp if necessary.

[48] The plaintiffs say the roof trusses lack a collar tie to prevent the roof from spreading laterally against the exterior walls, thus making the structure more unstable. Mr. Dunleavy said he attached the roof trusses to the house with four "toenails", which he considered preferable to sliding plates, which he said were optional.

[49] Mrs. Flynn said she had no discussion with Mr. Dunleavy about the roof trusses, other than when he informed her that a cathedral ceiling was not possible. She saw no plans or designs for the trusses and was not present for the shingling of the roof. While there were rolls of tar paper on the site, Mr. Dunleavy told her there was no need to use it. Mr. Flynn said he approached Mr. Dunleavy about the tar paper, and Mr. Dunleavy agreed that it should be on the roof, but it would be time-consuming to do the work over. Mr. Dunleavy said at trial that the tar paper was not necessary under the *Building Code* and the Flynn's agreed to leaving it out, although he agreed that it was required by the contract.

[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.

***Radon gas***

[51] Robin Barrett tested the Flynn house for radon gas. He trained in the United States under the Environmental Protection Agency (EPA) protocol for radon testing, and has been doing tests since 1993. He used the EPA protocol in carrying out a long-term (almost five months) test on the Flynn house. He said a longer term test gives a more accurate reading of radon levels, which can fluctuate. Radon occurs naturally in soil. It poses a lung cancer, mold and moisture risk. Mr. Barrett tested the air inside the house, but not the water. He said radon levels can be reduced through caulking and crack sealing.

[52] Mr. Barrett's test showed a level of 6 picocuries per litre (pCi/L), which he said equalled 222 becquerels per cubic metre (Exhibit 1, Tab 13). He testified that this exceeded the level recommended by the EPA – which calls for a maximum of 4 pCi/L – but fell below the maximum of 800 becquerels recommended by the Canadian Mortgage and Housing Corporation. The CMHC publication ***Radon: A***

*Guide for Canadian Homeowners* (1997) was tendered as an exhibit at trial (see Exhibit 28, p. 3).

## **EXPERT EVIDENCE**

[53] The Court heard evidence on the structural integrity of the house from two experts, as well as considering their various written reports. Roy T. McBride, who testified on behalf of the plaintiffs, is a structural engineer who was qualified at trial to give expert opinion evidence on structural engineering, and specifically on the assessment and repair of existing structures. Archie Frost, who testified on behalf of the defendants HRM and Mr. Williams, was qualified to give opinion evidence on all aspects of structural engineering and building as applicable to single-family dwellings.

[54] Mr. McBride's report, dated September 10, 1999 was based on a visual inspection undertaken to determine if there were major structural defects or areas of non-compliance with the *National Building Code*. He was also asked to examine the cracking of the floor slab and interior drywall. Mr. Frost completed a similar report for the defendant municipality, dated November 26, 1999.

***The concrete floor slab***

***Thickened footings***

[55] In his report Mr. McBride commented on the load-bearing wall between the master bedroom and the living room, den and bathroom, where the slab was thickened, it appeared, to the two-inch depth of the insulation. The other load-bearing walls appeared to rest on unthickened parts of the slab. Mr. Dunleavy agreed that the slab was not thickened under the wall between the house and the garage.

[56] Mr. McBride concluded that the slab construction did not meet the requirements of Article 9.15.3.2(1) of the ***Building Code*** that “the footing shall bear on undisturbed *soil, rock* or compacted granular *fill*.” He also considered this a violation of Articles 9.15.3.3(1) (“Footing Sizes”), 9.15.3.6 (“Thickness”) and 9.15.3.7 (“Footing Projection”).

[57] Mr. Frost agreed that the slab thickening under the sauna was eliminated when Mr. Dunleavy placed insulation beneath it, and that the insulation appeared to be removed under the thickened areas of the slab. It also appeared that the footing pads required under the exposed wooden posts had been omitted, which he

believed would be a *Code* violation if they were required under the design calculations. He calculated that the pad was not necessary where the concrete was thickened to six inches. He did not consider the removal of insulation to be a *Code* violation.

### *Mesh reinforcement*

[58] In his report, Mr. Frost wrote that there were omissions in the lapping of the steel mesh, contrary to the intent of the *Code*. In a later letter (dated October 9, 2002) he wrote that the failure to consistently lap the mesh might be poor practice, but not a *Code* violation. He based this conclusion on an analysis of the photographs taken during construction, which suggested that the purpose of the wire mesh was to hold the infloor heating pipes in place during the pouring of the slab, and to serve as nominal reinforcement for crack control. He believed that neither the *Building Code* nor the relevant Canadian Standards Association standard specifically required reinforcement for these purposes. Mr. McBride, in his letter of December 13, 2000, agreed that the laps of steel mesh were inadequately lapped, but did not refer to this specifically as a *Code* violation.

### *Cracking of the slab*

[59] Mr. McBride described two types of cracks in the floor slab. The cracks running along the perimeter of the slab were, he wrote, a major structural defect resulting from “differential movement between the perimeter foundation wall and the slab on grade” where the foundation wall moved to resist “reactions from the load-bearing walls”. The other cracks resulted from the “normal drying shrinkage due to the concrete curing and the fixity of the slab at locations of the load bearing walls”. Cracks of the second type normally stabilize within a few months; in this case they were continuing to appear two years after the house was built, indicating that the construction had not stabilized. Unlike the “structural” cracks, these minor cracks could be prepared and filled before installation of flooring. By contrast, no flooring materials could be laid until the major cracks were repaired.

[60] Mr. Frost considered the cracking the result of differential movement, the thinning of the slab where it butted against the frost wall, and the fact that the steel mesh did not extend into the thinned portion of the slab that lay on the frost wall. He did not consider the visible cracking to constitute a *Code* violation. However, he did write that the omission of a sealant between the inner surface of the perimeter wall and the edge of the floor slab violated Art. 9.13.8.3 of the *Building*



*Code*, which requires sealing of a “floor-on-ground” around its perimeter to the adjacent wall surfaces (as well as at any penetrations for pipes or drainage).

***The soil gas/vapour barrier***

[61] Viewing photographs taken during construction, Mr. McBride concluded that the under-slab polyethylene vapour barrier was not continuously sealed. Instead, he wrote at pp. 3-4 of his report, it was “turned up the inside face of the foundation wall” in the area of door between the dining area and outdoors. He concluded that when Mr. Dunleavy insulated beneath the sauna there was no evidence that the vapour barrier had been made continuous by lapping and sealing. Mr. Dunleavy agreed that the barrier was not lapped to the extent required.

[62] Mr. Frost agreed that there were omissions in the lapping of the vapour barrier, but did not think there was a ***Building Code*** violation (though it might violate the “intent” of the ***Code***). In his letter of October 9, 2002, Mr. Frost wrote that there may have been a need for a seal at the point where the floor slab met the perimeter foundation wall, although this would not have been the case had the original slab design been followed (he referred to Article 9.13.8.3). He also stated that the cracking of the slab did not nullify the soil gas barrier, and thus it was “a

matter of judgment ... whether the construction details employed provide a similar degree of resistance to the entry of soil gas as the requirements of the Code would offer.”

[63] Mr. McBride concluded (in his report and his letter of February 4, 2003) that the radon levels meant the vapour barrier was not sealed, a violation of Arts. 9.13.1.3 (“Required Soil Gas Control”), 9.13.8.1(3) (lapping of soil gas barriers beneath a slab-on-ground) and Appendix A of the *Code*. Mr. Frost suggested the radon gas could originate in well water. In his letter of October 9, 2002, he pointed out that there was no Canadian regulation that specified an acceptable level of radon in a home, and that the Radtrak test showed radon levels “far less than the limit at which Health Canada recommends remedial action.”

***Thermal break between house and garage***

[64] In his report, Mr. McBride said the lack of a thermal break – a construction joint – between the house and the garage was a violation of Art. 9.35.3.2(2), which requires a construction joint to be used between the main building and an attached garage in slab-on-ground construction. In his report, Mr. Frost agreed that the

thermal break appeared to be missing. However, he suggested there was no need for the break because, he said, the garage was not an enclosed garage.

***Recommendations for the slab***

[65] Mr. McBride recommended replacing the entire floor slab. This would include sealing the vapour barrier properly, running continuous insulation beneath the thickened parts of the slab, thickening the foundation of the sauna, and installing a thermal break between the house and the garage. He would provide for wire mesh and steel reinforcement in the new construction. It would also include the replacement of the infloor heating pipes.

[66] Mr. Frost recommended cutting around the perimeter of the slab-on-grade in the living area, tamping the gravel beneath it, and installing a new slab and footing strips (with insulation, vapour barrier, in-floor heating and the surface finished and sealed at the perimeter), at an estimated cost of \$7200 (plus \$300 for repairs to the garage floor). He admitted that it would be difficult to seal the vapour barrier. Mr. McBride considered Mr. Frost's recommendations for the slab inadequate to correct the ***Building Code*** violations or to provide a uniform slab suitable for an acid-etched finish.

[67] I note that Mr. Frost also pointed out that the posts supporting the exposed second floor, which rest on the slab, were installed as 4x4 posts, not 8x8 as the ABRI drawings required. Article 9.17.4.1(2) of the *National Building Code* (Column Sizes) requires a minimum column size of 6x6 (140 mm x 140 mm) unless there are calculations provided to show that a lesser size is adequate. Mr. Frost's own calculations indicated that the 4x4's were sufficient, but he considered this a possible instance of non-compliance with the *Code*. Mr. Dunleavy took the view that the 4x4s provided sufficient support, and said he used them in order to avoid narrowing the stairway.

### ***The south wall***

[68] Mr. McBride attributed the shaking of the high south wall to overstressing of the studs, which exceeded the maximum deflection permitted under the *Code*. The "calculated deflection and the lack of continuity of the metal bracing system due to the large windows and door in this wall have resulted in a very flexible wall," he wrote in his report (p. 7).

[69] Mr. Frost wrote that in the “service conditions” described in Art. 9.23.10.1 of the *Building Code* (“Stud Size and Spacing”), the 2"x6" studs at 16-inch centres (as required by the contract) were compliant for certain walls in the house, but not for the unsupported 14-foot south wall containing the two large windows. This wall, he wrote, had to be designed by a “professional engineer or architect skilled in the work concerned” pursuant to Part 4 of the *Building Code* (Art. 4.1.1.2(2)). The 2"x6" studs at 24-inch centres in that wall were not compliant with the *Code* (nor would they have complied if placed at 16-inch centres, as required by the contract).

[70] In addition, Mr. Frost wrote, the mullion post between the two large windows, apparently made up of “three nominal 2"x6" pieces” nailed together were “grossly inadequate” in terms of structural capacity and serviceability. The steel wind ties used for bracing were also inadequate (as they were in several other parts of the exterior wall). He concluded,

[d]ue to its unrestrained height and penetration for windows and doors, the middle length of the south wall has very little inherent stiffness and since the widths between the jambs of these openings are so narrow, the use of wind ties alone has added very little rigidity.... In my opinion, although it is apparent that an attempt to provide the necessary strength and rigidity was made, the results do not satisfy expectations of the Code clause 9.23.2.1.

[71] In his letter of October 9, 2002, Mr. Frost stated that the 2"x6" studs in the south wall met the load capacity requirements of the *Building Code*, and that there was “no prescribed deflection limit for wall studs given in the Code against which to state specifically that the calculated potential deflection is not in accordance with the Code.” As a result, Article 9.23.2.1 would be the measure of compliance, and it would be open to interpretation. He said the CSA requirement for structural timbers required that deflection under specified loads should not exceed 1/180 of the span. He wrote that the calculated potential deflection of the wall studs in this case was less than 1/180 of the span. Further, Appendix A-9.23.10.2 of the *Building Code* (“Bracing”) indicated that, because the walls were sheathed with gypsum board, no additional bracing was necessary. He maintained that the mullion post was the only element of the wall that failed to meet *Code* requirements.

[72] In his letter of February 4, 2003 Mr. McBride discussed the comments in Mr. Frost’s October 9 letter. Contrary to Mr. Frost’s claim that there was no prescribed deflection limit for wall studs, he wrote, Section 9.4.3 (“Deflections”):

presents maximum deflections for structural members for different types of building materials. In all cases the maximum allowable deflections expressed, as a ratio of clear span is 1/360 for plaster or gypsum board.... The studs in the south wall do not meet the

minimum requirements of the NBCC for strength or the implied requirements for serviceability.

***Recommendations for the south wall***

[73] Mr. McBride recommended strengthening the 14-foot south wall to meet the strength and deflection requirements of the ***Building Code*** by rebuilding the wall using 2"x8" studs with a design prepared by an engineer to meet the requirements of Part 4 of the ***National Building Code***.

[74] In his 1999 report Mr. Frost recommend stripping, replanning, strengthening and stiffening the middle length of the south wall (estimated cost: \$5600). He also recommended stripping the interior wallboard finish, installing additional stiffening and wind ties in certain other wall areas, at an estimated cost of \$2300. He provided a quote from a contractor (dated January 20, 2003) on stiffening the work on the south wall at a cost of \$19,500.00 (Exhibit 37, Tab 25).

[75] Reviewing Mr. Frost's recommendations in a letter dated March 7, 2000, Mr. McBride considered the estimate for strengthening the south wall reasonable, but that for the additional lateral stiffening to be "grossly inadequate for the scope of the work suggested and required."

[76] In his letter of July 12, 2002, Mr. Frost recommended a brace for the wall formed out of a vertical beam. Mr. McBride, in his letter of February 4, 2003, said this solution “would have a major impact on both the exterior appearance of the house and the sight lines from the great room” and would provide no additional stiffening for the outer jambs of the double windows or for the wall beyond the windows.

### *Roof trusses*

[77] Based on the truss designs, Mr. Frost concluded that the trusses as included in the plans and as built exceeded the permissible dead load. The dead load contemplated in the truss design was a total of 10 pounds per square foot (PSF) dead weight, meaning the weight of the roofing materials and trusses themselves. As the roof was actually built, however, Mr. Frost estimated the dead weight at 15.1 PSF (pp. 2-3). Mr. McBride later calculated the dead weight of the roof, as built, at 14 PSF (see his letter of February 4, 2003). The two experts agreed that the dead weight of the roof as built exceeded the design dead weight of 10 PSF. In his report Mr. Frost wrote that “no special provision was called for ... for thrust or movement at the truss bearing, and none appears to have been provided in the case



of the vaulted truss that was in fact used in the roof. From this it could be expected that the predicted movement will, if it occurs, likely show itself in the form of some disfigurement of the dry wall.” However, he did not see any evidence of such movement at that time (p. 4).

[78] In his letter of October 9, 2002, Mr. Frost expressed a continuing concern about the interaction of the roof trusses and the house structure supporting them, but concluded that “alternative additional and unidentified load paths exist compared to those employed by the truss design since no signs of movement approaching the magnitude suggested by the truss designer have become apparent even despite the apparent disparity in the dead load provided for by the truss design sheets.”

[79] In his letter of February 4, 2003, Mr. McBride argued that it would require more time to evaluate the effect of the extra dead weight of the roof, since the roof had likely not been subject to the design weight of snow load: “[t]he maximum movement would occur under the design loading condition that is based on a return period of once in thirty years for snow loading.... Given that the roof has not been

subjected to the design load does not relieve the responsibility of the original designer to meet the requirements of the National Building Code for both strength and serviceability.”

***Recommendations for the roof trusses***

[80] In his 1999 report Mr. Frost recommended a design check of the roof trusses at an estimated cost of \$850.

[81] In the document describing the scope of the work required (March 7, 2000), Mr. McBride specified that the roof be rebuilt with new framing, including steel beams and columns and 16-inch deep TJI rafters designed for a dead load of 20 lbs./sq. ft.

***Drain tiles***

[82] Mr. Frost wrote that the omission of drain tiles did not appear to be a ***Building Code*** violation, and that the lack of landscaping was responsible for directing water toward the foundation; however, he wrote, this did not fall within the scope of the ***Code***.

[83] In the description of the scope of work (dated March 7, 2000), Mr. McBride specified the excavation of a drainage trench and insertion of drain tiles. In his letter of February 4, 2003, he wrote that re-grading that had been done appeared to have redirected water around the house “under normal conditions” but that there was no information on how the site would perform under extreme conditions (such as heavy winter rains). He found evidence of water under the garage slab.

## **THE STATUTORY AND REGULATORY CONTEXT**

[84] Paragraph 4(1)(a) of the Nova Scotia *Building Code Act* authorizes the minister responsible to make regulations “for the purpose of establishing a Building Code governing minimum standards for the construction and demolition of buildings”, including regulations adopting by reference the *National Building Code of Canada*. Accordingly, the *Nova Scotia Building Code Regulations* adopted the *National Building Code 1995* effective April 30, 1997 (see s. 1.1.2.1). As such, the *National Building Code 1995* was the applicable document at all relevant times.

[85] The *Building Code Act* goes on, in section 5, to make municipal councils responsible for administration and enforcement of the *Act* in their municipalities (s.

5(1)). It is the responsibility of the council to appoint inspectors to administer and enforce the *Act* (s. 5(2)). The municipality “may pass by-laws not inconsistent with this *Act* or the regulations” (s. 7(1)) governing permits for construction, demolition, occupancy or change of occupancy (s. 7(1)(a)); requiring applications for permits to be accompanied by prescribed plans or other documents (s. 7(1)(b)); requiring the payment (and refunding) of fees for applications and issuance of permits (ss. 7(1)(c) and (d)); providing for inspection of construction or demolition (s. 7(1)(e)); and prescribing the time within which notices required by the regulations must be given to inspectors (s. 7(1)(f)).

[86] The *Act* prohibits construction, demolition, occupancy or changes in occupancy of a building to which the *Act* applies except in accordance with the *Act* and regulations and with a permit issued by an inspector and in force (s. 8).

Inspectors are required to issue permits except where the application requirements are not met or the proposed building, construction or demolition will not comply with an Act, a regulation or by-law made pursuant to the *Building Code Act* or Parts VIII or IX of the *Municipal Government Act* (s. 9(1)). An applicant is required to inform the inspector of any change in any information contained in the application (s. 9(2)) and an inspector may revoke (on notice) a permit that is issued

on mistaken or false information, where work has not begun within one year of the issuance of the permit, or where work is substantially suspended or discontinued for more than one year (ss. 9(3)-(5)). Inspectors' powers to enter, inspect, make orders for compliance with the *Act* or *Building Code* or to order that work cease are set out at sections 10-12 of the *Act*.

[87] The Halifax County Municipality *Building By-Law*, dated February 1993, provided that “the provisions of the Provincial Building Code Regulations, as amended from time to time, shall apply” (s. 3.2), and required that where there was a conflict between the by-law and another provincial or municipal by-law, regulation or code, “the higher or more stringent requirements shall prevail” (s. 4.2). The by-law required the building inspector to be provided with a construction completion certificate executed by a professional engineer or architect before issuing an occupancy permit for a building covered by Part 4 of the *National Building Code* (s. 7.2(d)). The inspection provision of the by-law stated:

- 9.1 The Building Inspector shall be notified and given an opportunity to inspect for compliance with the Regulations:
- (bb) the site before commencing backfilling a foundation, and before superstructure is placed on a foundation;
- (cc) the framing, roof, plumbing and insulation before wall framing is covered; and
- (dd) before occupancy.

[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*.

## **FINDINGS OF FACT**

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

The plaintiffs purchased their property in Seabright for the purpose of building an “environmentally-friendly” house in a more isolated location than their former community of Lower Sackville.

The plaintiffs hired Shauna Henderson of ABRI Sustainable Design to design the house, which they intended to include passive solar heating. Two pages of the plans included an engineer’s stamp, which related only to the slab design, and to no other part of the plans.

The plaintiffs hired Applewood to build the house, partly because of Mr. Dunleavy’s experience in building passive solar-heated homes.

The contract, dated July 8, 1997, was one between the plaintiffs, Trudy and Fabian Flynn, and Applewood Enterprises Ltd., for the construction of a partially-finished house. The contract price was \$101,741.00, which was paid in full.

The contract did not include excavation or landscaping. The plaintiffs installed a well and septic system.

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.

The Municipality was required to perform five inspections. Donald Williams, the inspector, performed these inspections on behalf of his employer, the Municipality.

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.

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.

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.

Mr. Dunleavy did not install tarpaper under the roof shingles.

Mr. Dunleavy, Mr. Williams and the concrete subcontractor agreed that there was no need to install drain tiles around the perimeter of the house.

During the insulation inspection, Mr. Williams did not leave his car, but said he had confidence in Applewood.

4x4 posts, rather than 8x8, were used to support the open part of the second floor.

The plaintiffs agreed to the change in the configuration of the roof and they did not contact Ms. Henderson about it. They also agreed to changes to the interior of the house, such as the moving of partition walls.

The radon gas level in the house, according to testing, was below 800 becquerels and did not require action under the Canadian standard.

The plaintiffs moved into the house in September, 1997, without an Occupancy Permit.

In February, 1998, Applewood removed and replaced a portion of the slab under the stone sauna in order to install heating pipes.

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.

The roof does not present a safety hazard.



## **ANALYSIS: DUNLEAVY AND APPLEWOOD**

[90] The plaintiffs allege that Applewood breached its contract by failing to construct the house in a good and workmanlike manner in accordance with the contract, the *National Building Code* and the plans and specifications. They claim against Mr. Dunleavy for negligence, negligent misrepresentation and inducing breach of contract, alleging that he was negligent in supervising his sub-trades and in overseeing the construction of the house; that he induced Applewood to breach its contract; and that he negligently misrepresented that he and Applewood had the necessary skill, expertise and experience to build the house in a good and workmanlike manner and in accordance with the *Code* and the plans.

[91] The plaintiffs say they relied on Mr. Dunleavy to have the skill and judgment of a reasonably competent contractor when he determined the suitability of the plans prepared by Ms. Henderson. They also claim that once Mr. Dunleavy abandoned aspects of Ms. Henderson's plans (e.g. for the foundation), he was responsible for the result. At trial, Mr. Dunleavy appeared to agree that the plaintiffs relied on his skill and judgment. But Mr. Dunleavy and Applewood take the position that the original plans were not set in stone, and were subject to modifications from the beginning. He also points out that one of the plaintiffs was

on the building site virtually every day, and says they were aware of the changes that were being made. Thus, Mr. Dunleavy and Applewood argue, many of the “defects” complained of are actually the result of changes the plaintiffs accepted. Mr. Dunleavy suggests that the report prepared by Mr. McBride was not intended to address the actual defects in the construction, but rather to make the house conform to Ms. Henderson’s original drawings. In other instances, they say, Mr. McBride’s comments criticize aspects of the construction that were not *Code* violations but were part of the plans, such as the insulation sheathing. In other instances, it is suggested, Mr. McBride’s recommendations reflect the best possible construction practices, rather than what was actually called for in the contract.

[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*, 10<sup>th</sup> edn. (London, 1970) at 291-292. In this case, the plaintiffs say, Mr. Dunleavy’s duty was even higher, because he knew Ms. Henderson was not an architect. As an experienced

builder, he should have recognized that the south wall was too high and had too much unsupported window area to be stable. Instead he told the plaintiffs that he was satisfied with the plans and recommended only minor changes, apart from the change in the type of slab to be used. Mr. Dunleavy agreed at trial that the south wall was flawed; in his submissions he points out that none of the inspectors, nor the designer, noticed the defect.

[93] As to other alleged defects in the construction, Mr. Dunleavy and Applewood say the only proven problem is the cracking in the slab – which they say should be sealed with polyurethane foam, and the slab depressurized. They say there is no need for an under-slab vapour barrier to be entirely sealed, since the slab itself creates a seal; the barrier would only need to be sealed if it were on top of the slab, pursuant to Article 9.13.8.1.2 of the *Building Code*. They say the roof trusses were based on an approved design, and it was simply not the practice of Barrett Lumber to obtain an engineer's stamp, and they claim that the thickened footings used were an acceptable practice at the time of construction.

*The nature of Mr. Dunleavy's liability*

[94] The plaintiffs claim against Mr. Dunleavy in several capacities. They allege that they had a contract of personal service with him, and that he is additionally liable as an agent and employee of Applewood. For their part, Mr. Dunleavy and Applewood say that if any liability does exist, it should rest exclusively on the company.

[95] The plaintiffs say they thought they were hiring Mr. Dunleavy personally and did not hear of Applewood Enterprises until they signed the contract. Mrs. Flynn said Mr. Dunleavy told them the company was used for “purchasing supplies”. They say Mr. Dunleavy did not present them with a business card at their first meeting. They said they were relying on Mr. Dunleavy and his self-proclaimed construction experience personally. I conclude, however, that nothing in the circumstances suggests that they were not aware that they were contracting with Applewood. The contract clearly identified the contractor as Applewood Enterprises Ltd. and Schedule A to the contract clearly states that the contract was between Applewood Enterprises Ltd. and the Flynns.

[96] The plaintiffs claim Mr. Dunleavy is liable as an agent of Applewood for negligent misstatement/misrepresentation and inducing Applewood's breach of contract. They also argue he is liable for negligent performance of his duties as an employee of Applewood, and the company is vicariously liable for its employee's negligence. The plaintiffs cite *ACA Cooperative Association v. Associated Freezers of Canada Inc.* (1992), 113 N.S.R. (2d) 1 (S.C.A.D.). Freeman J.A., writing for the majority, said, at paras. 91-93:

Two persons committed the negligence of each of AFCI, EDCM and Odyssey: the companies and Mr. Tomilson, their alter ego. The **Anns** analysis applied to each company applies to him with respect to that company. As a directing mind of the company he could not step outside of himself; it was his negligence that became the negligence of the company. But the company's responsibility for it did not cleanse Mr. Tomilson of liability in his own right.

He was in a relationship of proximity or neighbourhood with the persons who would use the building he designed for EDCM, repaired for Associated Freezers Limited/Odyssey and failed to safeguard for AFCI. He was bound to ask himself whether, in his reasonable contemplation, his negligence would cause loss to the customers. In each case a reasonable person in his position would have had to answer "yes". There was nothing in the second stage test in **Anns** ... to relieve him of a liability identical in each case to that of the company for which he was acting.

As a professional engineer employed by an engineering company, both Mr. Tomilson and EDCM had to meet a professional engineering standard in the design of the warehouse as well as the "neighbourhood" standard of **Anns**. As an officer and director of Odyssey and AFCI neither he nor company had to meet a professional standard, simply the "neighbourhood" standard stated in **Anns**. Because his negligence became the negligence of the companies he served, and became their own negligent corporate acts or failures, in my view it is more accurate to say the

companies are directly liable for their own negligent acts, than to say they are vicariously liable for Mr. Tomilson's negligence. They are liable in their own right for their own corporate negligence, just as he is liable in his own right for his own negligence.

[97] Following the reasoning of Freeman J.A., I agree that Mr. Dunleavy is subject to liability in negligence as a result of his position as the "directing mind" of Applewood.

***Negligence and negligent misrepresentation***

[98] The plaintiffs say Dunleavy breached his duty of care to them in that he (1) failed to adequately supervise his sub-trades and (2) failed to supervise the construction of the house, thus causing Applewood to breach its contract with the plaintiffs. With respect to the allegation of inducing breach of contract, Mr. Dunleavy and Applewood say there is no evidence to support this claim.

[99] Mr. Dunleavy and Applewood submit that the plaintiffs have not proven by any evidence that he inadequately supervised the sub-trades in particular or the construction in general. They say it is unquestioned on the evidence that Mr. Dunleavy was on-site most days and had the house finished within the time stipulated in the contract. He ensured materials were delivered, called for

appropriate inspections and monitored the work of the sub-trades, ensuring that inadequate work was put right. They also say Mr. Dunleavy consulted with the plaintiffs when questions arose in the course of the work. 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.

[100] The plaintiffs claim Mr. Dunleavy negligently misrepresented that he and Applewood had the necessary skill, expertise and experience to construct the house in a good and workmanlike manner, in accordance with the *National Building Code* and with the plaintiffs' plans and specifications. I see no evidence to suggest that Mr. Dunleavy misled the plaintiffs, however; by their own evidence they hired Applewood partly based on Mr. Dunleavy's long experience in construction. That experience is not questioned. Mr. Dunleavy produced a article from the *Chronicle Herald/Mail-Star* of December 9, 1989, that referred to him being awarded a Nova Scotia Home Award for "best housing construction" (Exhibit 48), as well as a pamphlet issued by the Canadian Wood Council ("Wood House '89") that illustrated one of his houses (Exhibit 45).

***Breach of contract***

[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.

[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.)).

[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 aspect 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.

#### **ANALYSIS: HRM AND WILLIAMS**

[105] The plaintiffs claim that the Halifax Regional Municipality and its employee, building inspector Donald Williams, owed a duty to exercise all reasonable care, skill, diligence and competence in reviewing the plans and carrying out the building inspections. They say the HRM and Williams breached their duty of care by failing to carry out the inspections at all stages of the construction as required, or, in the alternative, by carrying out the inspections negligently and failing to ensure compliance with the *National Building Code*. As a result of these alleged breaches, the plaintiffs claim damages against HRM and Williams for negligence.

***Duty of care of public authorities when inspecting construction***

[106] The plaintiffs say that, having implemented the building by-laws that required compliance with the ***National Building Code***, HRM had a duty to exercise reasonable care in carrying out its functions.

[107] The test for establishing the existence of a private law duty of care for a public authority when reviewing and approving building plans and conducting building inspections was defined by Lord Wilberforce in ***Anns v. London***

***Borough of Merton***, [1977] 2 All E.R. 492 at 498 and was adopted by the Supreme Court of Canada in ***Kamloops v. Nielsen***, [1984] 2 S.C.R. 2 at 10-13, where

Wilson J. wrote (for the majority):

(a) Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

(b) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

These questions, Lord Wilberforce said, must be answered by an examination of the governing legislation

Lord Wilberforce categorized the various types of legislation as follows:

statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case

where the local authority has done what the legislature authorized by has done it negligently;

statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

...

It seems to me that, applying the principle in *Anns*, it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a “policy” decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city’s building inspector a duty to enforce the provisions of the By-law. This would be Lord Wilberforce’s “operational” duty. Is the City not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the City was sufficiently close that the City ought reasonably to have had him in contemplation?

[108] The Supreme Court has applied the *Anns/Kamloops* principle to a duty of care owed to property owners by a municipality in several decisions. In *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259, the owners and contractors obtained a building permit for a retaining wall, but the inspector exercised his discretion not to require formal plans, based on the contractor’s experience and the low cost of the wall. The owners and contractor failed to inform the city when the construction reached a point at which an inspection was required. As a result, the inspector was not able to carry out the inspection that, performed reasonably, would have

revealed the design flaws. When he viewed the wall later, he ordered a period of monitoring before the backfilling was completed (which was done after 20 days). The wall later collapsed. The issue was whether the owners' failure to give sufficient notice of the need for an inspection relieved the municipality of its duty of care. LaForest J., for the majority, referred to *Anns* and *Kamloops* and wrote, at 1266-1267:

[T]he city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty is, of course, subject to such limitations as may arise from statutes bearing on the powers of the building inspector.

[109] The city was not expected to be an “insurer” for compliance with building standards, however; it was “not bound to discover every latent defect in a given project, nor every derogation for applicable standards” but was only required “to show reasonable care in the exercise of its powers of inspection.” Liability would only arise with respect to such defects as the municipality “could reasonably be expected to have detected and to have ordered remedied” (pp. 1268-1269). It was not unreasonable for the inspector to rely upon on-site inspections, rather than engineered plans, to ensure compliance with the by-laws. However, it was still “incumbent on the city to at least examine the specifications and sketches” to

ensure that they “may reasonably serve in the construction of a project” (p. 1269).

Justice LaForest wrote, at p. 1270:

Inadequacy in the sense of insufficiency is one thing, however; inadequacy in the sense of an obvious departure from the standards required by the by-law is another. In the present case, it was clear from the specifications that the project was inadequately designed. The building inspector’s testimony itself draws attention to the fact that the retaining wall would not hold if built with the amount of steel reinforcement described in the specifications.

[110] In the circumstances, a due exercise of the inspector’s powers, even though he was summoned late, could reasonably be expected to have prevented the danger. It should have been clear to him at once that the wall was potentially substandard, both because of the inadequate plans that had formed the basis for the permit to be issued, and because a crack had already appeared in the wall. In these circumstances, he should have ordered the cessation of the work and directed any corrective measures necessary for him to ensure that the structure was up to standard. To order a period of monitoring, after which construction could proceed if no further damage appeared, was negligent, since there was no basis upon which he could conclude that the construction met applicable standards (pp. 1273-1274).

[111] The Municipality argued that the plaintiffs should be denied recovery because they failed to alert the inspector at the appropriate time. However, the

Court found, the owners were not the “sole authors” of their own loss because this was not one of those rare cases where the owner builder “determines to flout the building by-law, or is completely indifferent to the responsibilities that the by-law places on him” (p. 1275). In the result, liability lay 70 per cent on the municipality and the inspector (jointly and severally) and thirty per cent on the owners (p. 1277).

[112] In *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298 the contractor convinced the owner to allow him to begin work on a basement renovation before obtaining a building permit. The job required installing underpinnings beneath the existing foundation to support the structure. By the time the permit was issued, the underpinnings were buried, and the inspector did not dig a hole to verify their depth, but relied on the contractor’s assurances. When the owner experienced flooding, he had the basement inspected by another contractor, who found the underpinnings did not meet the standard required by the *Building Code*. The owner successfully sued the contractor in breach of contract, and the municipality in negligence. The trial judge found the defendants jointly and severally liable, save for a degree of contributory negligence. However, the Court of Appeal had held

that by approving the beginning of construction without a permit, the owner removed himself from the class of persons to whom the city owed a duty of care.

[113] Bastarache J., writing for the Supreme Court of Canada, held that inspection schemes fall within the category of legislation that confers a power but leaves the scale of its exercise to the discretion of the responsible public authority, so that where the authority elects to do the authorized act, “and does so negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it” (p. 311, citing *Kamloops* at p. 11). He went on, at p. 312:

Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. Recently, in [*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201] at para. 28, Major J. reaffirmed that the measure of what is reasonable in the circumstances will depend on a variety of factors, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. The same standard of care applies to a municipality which conducts an inspection of a construction project. While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied....

[114] The first stage of the *Anns/Kamloops* test was met. It was reasonably foreseeable that a deficient inspection of the underpinnings could result in damage to the homeowners' property, or injury to the homeowners or others. The second stage of the test required an examination of the legislative scheme governing municipal building inspections (p. 313). The Court concluded that the purpose of the scheme was to "protect the health and safety of the public by enforcing safety standards for all constructions projects." The municipality owed a duty of care to all who might reasonably be expected to be injured by the negligent exercise of their inspection powers. While the legislation provided a discretion as to when to inspect, once the city decided to inspect and implemented this decision, it owed a duty of care (pp. 316-318). Bastarache J. explained the standard of care at pp. 328-329:

[T]o avoid liability the city must show that its inspectors exercised the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstances. The measure of what constitutes a reasonable inspection will vary depending on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury; see, for example, *Ryan v. Victoria*, *supra*, at para. 28. For example, a more thorough inspection may be required once an inspector is put on notice of the possibility that a construction project may be defective. In addition, a municipal inspector may be required to exercise greater care when the work being inspected is integral to the structure of the house and could result in serious harm if it is defective. While in some circumstances a more thorough inspection will be required to meet the standard of care, municipalities will not be held to a standard where they are



required to act as insurers for the renovation work. The city was not required to discover every latent defect in the renovations at the appellant's home. It was, however, required to conduct a reasonable inspection in light of all the circumstances....

The inspection scheme set out in the 1990 Building Code Act delineates the powers that are available to municipal inspectors to discover defects in a construction project. The city can only be held liable for those defects which the municipal inspector could reasonably be expected to have detected and had the power to have remedied.

[115] The Court restored the trial decision. The trial judge had found that:

[t]he inspector reached his conclusion that the depth and the width of the underpinning met the specifications in the plan on the assurance of a contractor who had already shown disregard for the requirements of the building permit, and tests which concluded that the other aspects of the underpinning had met the standard. Given the nature of the work, it was unreasonable to conclude that the width and the depth of the underpinning met the requirements of the building code without actually inspecting that aspect of the work (p. 332)

[116] The inspector failed to exercise his powers to ensure that the underpinning met the specifications in the plan and thus failed to meet the standard of care. The plaintiff's own negligence in allowing the contractor to begin work without obtaining a building permit did not rise to the level of "flouting" that would be necessary to bar recovery completely (pp. 332-336). The court restored the trial judge's apportionment of fault (p. 340).

[117] The first step of the *Anns/Kamloops* test requires only that it be reasonably foreseeable that negligent exercise of the Municipality's inspection power could cause damage to the plaintiffs. That a duty of care existed is not disputed by the parties in the present case, and I have no difficulty in concluding that the Municipality owed such a duty to the plaintiffs.

[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). This principle is reflected in section 27 of the *Building Code Act*, which states that “[n]o 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.” 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.

***Was the extent of inspection a policy decision?***

[119] The defendants (the HRM and Mr. Williams) claim that the extent of the inspections and of the plan review was a policy decision that cannot attract liability.

[120] In *Lyons v. Grainger* (1994), 16 C.L.R. (2d) 279 (Ont. C.J.(G.D.)) the plaintiffs bought a house from the defendant vendors that turned out to have serious defects. The vendors had had the prefabricated house erected by the defendant contractor on a preserved wood foundation. The building inspector had issued a building permit and had done a site inspection. The plaintiffs brought an action against the vendors, the municipality, the contractor and others. It was the policy of the municipality “not to require or to inspect the grading of lots”. As such, the complaints of surface drainage problems drew no liability upon the township. Further, the level of resources devoted to building inspections was a policy matter. Rutherford J. said, at p. 303:

It was a policy-related circumstance that in 1983, all residential and commercial building inspection was done by a part-time inspector and chief official in respect of whom no technical or professional qualifications, other than some practical experience and a nominal, governmental course was required. This I think I must take into account in determining what standard of care and level of scrutiny would be reasonably expected from Rideau Township when the Grainger house was being erected.

[121] The inspector's failure to notice an under-engineered or under-designed foundation wall in the plans or during an on-site inspection, or to note the improper location of a floor-joist support beam, did not constitute negligence in the circumstances:

There was no evidence led to establish what a reasonable level of care in such circumstances would be on the part of a building inspector, but in my view, given Mr. Eastman's working conditions and his expertise, I do not think he should reasonably be expected to have found the engineering errors in the professionally drawn plans Mr. Grainger had purchased. The Township is not to be put in the position of insuring the engineering quality of such plans and in all the circumstances, I do not think the Township acted unreasonably in its inspection of the plans and construction in failing to detect the underdesign mentioned. (p. 304)

[122] In *Hilton Canada Inc. v. Magil Construction Ltd.* (1998), 47 M.P.L.R. (2d) 182 (Ont. C.J.(G.D.)) the plaintiff obtained a building permit for a hotel based on a set of plans that were structurally deficient. During construction it became evident that there were serious structural deficiencies in the building, with "shear stress at the interior columns measuring about 120% greater than that specified by the applicable building codes" (paras. 4-5). The structural engineer and architect admitted their negligence and the plaintiff commenced an action against the municipality for negligently approving obviously deficient plans and confirming their compliance with the applicable legislation (paras. 6-7).

[123] The court dismissed the action, finding that the extent of review of the plans was a policy decision and the review that was done could not reasonably have been expected to reveal the defects. Chapnik J. held (at para. 79) that “the decision to conduct a cursory review of structural plans was in place prior to 1972 and passed along by example and word of mouth within the building department, since that time. Moreover, it was based upon a consideration of social, political and/or economic factors.” Once it was formulated, the policy had been applied uniformly over time. It was a decision of true policy, unreviewable on a standard of reasonableness (paras. 80-82). The inspections, furthermore, were not carried out negligently, but “in a conscientious and comprehensive manner, in accordance with the City’s mandate” (para. 83). The structural defects could not have been found by a reasonable and prudent inspector. The city was not liable (paras. 86-92).

[124] The plaintiffs argue that *Hilton* should be distinguished because it is inconsistent with the decisions of the House of Lords and the Supreme Court of Canada in *Anns*, *Kamloops*, and *Ingles*, and because the lack of clear and uniform inspection policies immediately after municipal amalgamation should not lower the standard of care. The plaintiffs say there is “little if any basis to claim that the

review and approval of the plans and the extent of inspections was the result of a policy decision that was not implemented at an operational level.”

[125] The defendants (HRM and Mr. Williams) argue that the evidence of Mr. Williams, Mr. Thornhill and Mr. Donohoe establishes several facts about the inspection process in the spring of 1997. To paraphrase:

(1) it was optional to submit plans with a building permit application for a Part 9 structure in the former Halifax County area;

(2) the plans for such a structure, if submitted, would only be reviewed by an inspector, as the more expert plans examiners worked on more complex structures;

(3) there were “only” five inspections carried out: footings, pre-backfill, post-framing, pre-drywall and pre-occupancy;

(4) the only mandatory footings inspections were those for exterior footings (i.e. footings under exterior frost walls). It was Mr. Williams’ evidence that he would inspect interior strip footings if they were poured at the same time as the exterior footings, but that it was not HRM policy to do so. As a result, the defendants argue, “in the spring of 1997 it was perfectly permissible for a contractor to proceed to create interior footings by way of thickening the poured concrete slab, in certain areas. This was the industry practice, and made it impossible for the Halifax Regional Municipality to inspect those interior footings. That is particularly the case where as with a slab on grade, the interior footings were at a different level, and made at a different time, from the exterior footings”;

(5) in the spring of 1997 it was not HRM policy to insist upon shop drawings for third-party components (such as roof trusses) being on-site during an inspection in the former Halifax County area. Instead, in those areas the inspector was “required ... to rely on his personal knowledge.”

[126] The defendants HRM and Mr. Williams say that in the spring of 1997 the HRM was still adjusting to the bureaucratic and organizational merger of the four predecessor municipalities a year earlier. Thus, they argue, the decisions about plans inspections and building inspection procedures were “true policy decisions, reasonably arrived at in good faith, and immune from attack.” As such the municipality can only be liable if there were defects in the structure that ought reasonably to have been discovered in the course of Mr. Williams’ inspections.

***Is liability for negligent inspection limited to issues of “health and safety”?***

[127] The defendants, HRM and Mr. Williams, claim the scope of the duty is limited to issues that relate to “health and safety”. They rely upon *Cumiford v. Powell River (District)* (2001), 21 M.P.L.R. (3d) 45 (B.C.S.C.). They claim there is no liability for deficiencies that affect the “performance but not the structural integrity” of the building. The court in *Cumiford* cited *Anns, Kamloops, Rothfield* and *Ingles* for the proposition that “[n]ot all violations will result in known or foreseeable harm ... The scope of the duty of care owed in the present circumstances is confined to deficiencies that may affect the health and safety of future occupants” (para. 86).

[128] The plaintiffs say nothing in the legislation limits the Municipality's inspection mandate to issues of health and safety, nor was there any policy in the department of imposing such a limitation. It is the plaintiffs' position that the design plans, the footings, the roof, the slab, the walls and the drainage systems are "integral to the structure of the house". Even if "health and safety" were the criteria, they argue, this would be encompassed by the structural violations in the house.

[129] I see no basis on which to limit the standard of care 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."

***Did Mr. Williams and HRM meet the necessary standard of care?***



[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.

[131] The defendants say that even major structural defects will not draw liability “if they would not reasonably be detected by the inspection process as instituted by the Municipality...”. In *Kirby v. Coquitlam (City)* (1996), 37 M.P.L.R. (2d) 113 (B.C.S.C.), for instance, the plaintiff’s foundation was found to be deficient 30 years after construction. He sought his repair costs from the municipality, claiming that the original inspections should have revealed the defect. The court concluded that there was no negligence in the inspector’s failure to notice the presence of organic fill (paras. 29-30, 38).

[132] The plaintiffs allege a lack of reasonable care in reviewing the plans, suggesting that a careful review could have prevented the construction of unstable

walls, the poorly-designed roof and the cracking slab. They say that even if it was reasonable for Mr. Williams to rely on the engineer's stamp on the original slab design, it was negligent of him to fail to require Mr. Dunleavy to submit revised plans when he changed the foundation design. I have already dealt with the matter of the alleged requirement for a revised plan; I am convinced on the evidence of the municipal inspectors and Mr. Dunleavy that it was not necessary for Applewood to provide a revised plan when Mr. Dunleavy opted to build the house on a slab-on-grade and frost wall.

[133] The plaintiffs also allege that Mr. Williams failed to properly perform the mandatory on-site building inspections. When inspecting the footings, they say, he should have rejected the thickenings and reinspected for interior strip footings. He should also have required soil compaction tests. The plaintiffs say Mr. Williams negligently waived the requirement for drainage tiles without requiring a hydrologist's report. In the framing inspection, they claim, he should have noticed the lack of a collar tie in the roof design and construction, as well as the flimsiness of the high south wall (at the pre-drywall stage). He should have ordered the work on the wall stopped so that it could be redesigned properly and rebuilt to comply with the *Building Code*. He should, they say, have required engineered designs to

be produced and stamped for his inspection and approval for both the roof trusses and the south wall. Finally, they claim, he was negligent in granting an occupancy permit when he knew that Mr. Dunleavy had not thickened the footings.

[134] The plaintiffs cite *Nova Scotia (Minister of Housing) v. Langille*, [1994] N.S.J. No. 414 (C.A.) in which the plaintiffs relied upon the expertise of a Department of Housing building inspector with respect to a house they were considering buying with Department of Housing financing. The inspection failed to reveal that the footings rested above the frost line, and the house was subsequently damaged by frost heaves. The Court of Appeal held the inspector liable for negligence and negligent misrepresentation.

[135] On the evidence, I am convinced that the Municipality and Mr. Williams bear some responsibility for the problems caused by the south wall. Mr. Williams should have identified the defects and *Building Code* violations in the wall, either at the initial plans examination stage or during the inspection process. 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.

## CONCLUSIONS

### *The south wall*

[136] Mr. Williams himself was concerned about the span of the wall, and Mr. Dunleavy admits that he should have noticed the weakness in the wall as well. I conclude that both Applewood and HRM were negligent in failing to identify the weakness in the design of the south wall that triggered a *National Building Code* violation. They failed to notice the problems with the wall, not only when they referred to the plans, but throughout the construction process (in Mr. Dunleavy's case) and during building inspections (in Mr. Williams' case). Had either of them identified the problem at the proper time, it could have been remedied at no additional cost to the plaintiffs.

[137] I accept Mr. McBride's proposal for the wall as the most appropriate remedy.

***Roof trusses***

[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.

[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.

*The slab*

[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. Nor am I convinced that any liability attaches to Applewood on account of the mere decision to change from a monolithic slab to a slab-on-grade with frost walls. This was clearly permitted by the terms of the contract. However, I find that Applewood's installation of the concrete slab was done in a negligent manner, and that Mr. Dunleavy shares in this negligence.

[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.

[143] I conclude that the only way to adequately address the defects in the slab is Mr. McBride's solution – a complete removal and replacement of the existing slab. I will, however, take into account that the proposal for repairs to the slab includes a provision for steel rebar, an item which does not ordinarily form part of a slab in a frost wall and slab construction.

*Drain tiles*

[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.

**SETTLEMENTS**

[145] The plaintiffs received a settlement of \$30,000.00 from the Atlantic Home Warranty Program in 2001. This was received "as a contribution towards the major structural defects in their home, pursuant to the warranty", according to the letter from the plaintiffs' counsel confirming settlement (Exhibit 14). According to a publication to the warranty program titled "Major Structural Defects" (Exhibit 13), in order to qualify as a major structural defect, a defect must "represent actual damage to the load-bearing component" and "must vitally affect the use of the home for residential purposes". "Actual Damage" means that:

the defect must represent a structural failure of some part of the load-bearing component. To be classified a Major Structural

Defect the defect must adversely affect the stability of the load-bearing component of the home and its capacity to transmit the imposed live (moveable structures, e.g. table) and dead (fixed structures, e.g. roof) load to the ground. A Major Structural Defect is a defect that endangers this capacity.

The load-bearing component of the home, for the purposes of the Warranty, is defined as the framing members and other structural elements that transmit the dead and live loads to the supporting ground.

[146] The document sets out examples of load bearing elements, including roof rafters and trusses, structural floor systems and slabs in the living area of the home, load-bearing partitions and walls and foundation systems and footings, among others. Non-load-bearing elements included exterior siding and sheathing, non-structural concrete floors in unfinished areas, doors, windows, insulation and sanitary and drainage systems.

[147] In order to “vitaly affect the use of the home for residential purposes”, the Warranty document continues:

a structural defect in the load-bearing component of the home does not have to render the home dangerous or otherwise uninhabitable. However, it must be of such a serious nature that it vitaly affects the use of the home for residential purposes.

Examples of qualifying conditions:

1. The structural capacity of the load transmissions component of the home is in question.



2. Inspections and investigations indicate that substantial further detrimental movement may take place.

Example of a condition that does not qualify:

1. Minor damage to the load-bearing component of the home has occurred but the stability of the home is not affected and the condition is not likely to worsen. (E.g. a crack in the foundation wall)

In this instance, the Program is not liable for correction unless, prior to the end of the fifth year after the date of possession of the home by the Purchaser, the defect worsens to an extent that it qualifies as a Major Structural Defect.

[148] The defendant Municipality argues that the only “major structural defect” in the present case is the south wall. I conclude, based on the language of the Warranty Program brochure, that the slab is a component that “vitaly affects the use of the home for residential purposes” and is sufficiently flawed to be considered a “major structural defect.” I note that the damage to the slab is apparently ongoing. Thus, the Warranty Program settlement was applicable to costs for both the slab and the south wall.

[149] The defendants claim that the plaintiffs have received adequate compensation for their damages. Mr. Dunleavy adds that Applewood provided services he estimates at a value of \$5,000.00 in his attempts to address the

plaintiffs's complaints after the house was built (for instance, by insulating under the stone sauna).

[150] In March 2003 the plaintiffs also received a settlement worth \$5,000.00 in services as part of an agreement to release Ms. Henderson from the proceeding (Exhibit 24).

[151] The defendants argue that the amounts received in settlement must be accounted for before any further damages may be awarded. I agree. The \$35,000.00 received will be applied proportionally to the respective damages.

## **DAMAGES**

[152] The plaintiffs claim their full losses from all the defendants, relying upon section 4 of the *Tortfeasors' Act*. They cite the statement of Freeman J.A. in *ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc.* (1992), 113 N.S.R. (2d) 1 (A.D.) at para. 118 to the effect that “[a] plaintiff should ... be entitled to recover the whole of his damages from any defendant who caused the whole of the loss. Contribution between the defendants is a matter of interest to the defendants, but of indifference to the plaintiff.”

[153] The difficulty with applying the *ACA* principle here is that the alleged loss consists of several discrete losses relating to different aspects of the construction and inspection process. The municipality and the builder cannot be held each to have caused the entire loss; for instance, in areas where the municipality had no duty to inspect, or performed the required inspections in a reasonable and prudent manner, any damage will be attributable solely to the builder.

[154] Mr. Dunleavy speaking also for Applewood, submits that the only defects that have been established are the weakness of the south wall and the cracks in the slab that he says need to be filled. Mr. Dunleavy says Applewood has offered to repair these defects, but the plaintiffs would not agree to this, and argues that the plaintiffs are effectively seeking to have the house rebuilt.

[155] I find Applewood liable in breach of contract, in that it failed to perform the work in a good and workmanlike manner. Applewood and Mr. Dunleavy are jointly and severally liable in negligence for the condition of the slab and the south wall. Applewood, Mr. Dunleavy, the Municipality and Mr. Williams are jointly and severally liable in negligence for the defects in the south wall. In both cases, I

conclude that Mr. McBride's recommendations are the most appropriate methods of fixing the problems.

[156] At trial, Mr. McBride estimated the costs of repair of the slab-on-grade as follows:

<b>Removal of slab (approx. 1800 square feet)</b>	
Saw cutting perimeter	\$4,000.00
Temporary support of interior walls and floor	\$3,000.00
Break-up, removal and disposal (25 cy at \$800/cy)	\$20,000.00
<b>Installation of new slab</b>	
Supply and install heating piping	\$2,500.00
Under-slab insulation and soil/ gas/vapour barrier	\$2,500.00
New floor slab, including pad and strip footings	\$12,000.00
<b>Geotechnical investigations and testing</b>	\$3,000.00
<b>Total cost to install new floor slab:</b>	<b>\$47,000.00</b>

[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.

[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
<b>Total cost for wall framing</b>	<b>\$25,500.00</b>

[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.

[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 (shop drawing and site review)	\$5,000.00

[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.

[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:



	<u>Dunleavy/Applewood</u>	<u>Dunleavy/Applewood/ HRM/Williams</u>
<u>Slab</u>	\$50,400.00	
<u>South wall</u>		\$16,480.00
<u>permits, engineering</u>	\$5,800.00	\$5,800.00
<b>TOTAL</b>	<b>\$56,200.00</b>	<b>\$22,280.00</b>

[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.

[164] I am prepared to apply the principle in *Penvidic Contracting Co. v. International Nickel Co. of Canada Ltd.*, [1976] 1 S.C.R. 267 in order to estimate



the amount of additional damages with respect to Applewood's breach of contract, particularly in not applying tarpaper to the roof as well as in replacing the 8x8 posts with 4x4s, based on the material available. On this principle I award general damages of \$1,000.00 against Applewood.

[165] In the result, then, the damages due jointly and severally from Applewood and Mr. Dunleavy amount to \$31,000.00, and those for which Applewood, Mr. Dunleavy, HRM and Mr. Williams are jointly and severally liable amount to \$12,480.00. Applewood is liable for a further \$1,000.00 in general damages.

### **THE SIGMA CONSTRUCTION BILL**

[166] The defendants HRM and Mr. Williams seek an amendment to the pleadings and set-off in the amount of \$3,473.00 (including HST and cancellation costs) with respect to an attempt to repair the south wall to which the plaintiffs initially agreed, but subsequently withdrew their consent. Mr. Frost obtained a quote for the reinforcement and strengthening of the centre mullion post in the south wall (Exhibit 37, Tab 25). The Flynns initially agreed to have the work done, but subsequently called it off. At trial the plaintiffs argued that the fix proposed by

Sigma did not comply with Mr. McBride's recommendation to strengthen the entire wall, not just the centre mullion post.

[167] Sigma submitted an invoice to Mr. Frost in the amount of \$3,473.00. 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) (Exhibit 37, Tab 27). The plaintiffs say no work was actually done on the property, and that they were not advised that they would be charged for any work at all; they also point out that they had no contract with Sigma Construction or with the HRM regarding the proposal to strengthen the wall. The defendants (HRM and Mr. Williams) submit that the plaintiffs required the repairs to be done from the outside, which led to the design of a steel beam, and their change of mind cost the Municipality the invoice amount, including HST and cancellation costs.

[168] Matthews J.A. discussed the principles of amending pleadings in *White v. Pellerine* (1988), 84 N.S.R. (2d) 341 (S.C.A.D.), where the appellants sought an amendment after trial but before the decision. At p. 342 he wrote:

It is clear from the case law that such an amendment should be allowed if it can be made without injustice to the other party and further that there is no injustice if that other party can be compensated with costs....

It is our opinion that if the amendment be allowed the parties would be in the same position for the purposes of justice that they were in when the plea of negligence now sought was not alleged. Although a new cause of action will be created, it arises out of the same facts as the cause of action already asserted....

While we cannot condone the fact that the appellants' solicitor failed to request the amendment much earlier, we are of the opinion that the parties here would not have conducted the proceeding in any manner different than was done to date, nor is it now necessary for either party to adduce further evidence. Granting the amendment will only entail the submission of further briefs. This does not create an injustice.

[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.

### **THE CROSSCLAIM AGAINST APPLEWOOD**

[170] The defendants HRM and Mr. Williams crossclaimed against Applewood (but not Mr. Dunleavy), claiming that if they are at fault, then the fault of Applewood and was greater. Thus the HRM and Mr. Williams claim a right to

indemnity and/or contribution from Applewood. This leaves only the crossclaim against Applewood. The HRM and Mr. Williams attempt substantiate their cross-claim by arguing that they have little knowledge of what transacted between Applewood and the plaintiffs; they specifically refer to the roof trusses (for which I have found no one liable) and the slab (for which I have found Mr. Dunleavy and Applewood liable).

[171] While I have found the four defendants jointly and severally liable for the damages applicable to the south wall, it is open to the HRM and Mr. Williams to seek indemnity from Applewood, though not Mr. Dunleavy.

## **DISPOSITION**

[172] I accordingly allow the plaintiffs' action against Applewood and Mr. Dunleavy for negligence in the construction of the slab, and against all the defendants for negligence in the construction and inspection of the south wall, subject to the set-off for the Sigma bill. I also allow the plaintiffs' action against Applewood for breach of contract.

[173] The plaintiffs included a claim for pre-judgment interest in their amended statement of claim. I am not making a determination of the rate or the period for which interest should be allowed. If the parties fail to agree on these details, I will accept written submissions on this issue when the parties make submissions on costs.

**J.**