**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
Cite as: Permacrete Restoration Services Ltd. v. Myra, 2005 NSSM 11

**Claim No. 180784**

**BETWEEN:**

Name: **Permacrete Restoration Services Limited** Claimant

- and -

Name: **Calvin Myra** Defendant

**Revised Decision:** The text of the original decision has been revised to remove personal identifying information of the parties on September 22, 2006. This decision replaces the previously distributed decision.

**Appearances:**
Claimant: Steven Zatzman
Defendant: Donn Fraser

## D E C I S I O N

[1] This matter was heard on Thursday, May 5, 2005.

[2] The hearing before me essentially involved an assessment of damages. There had been a previous ruling issued by Adjudicator M.J. McGinty under date of November 14, 2002. She found that the "job [was] defective" and I consider, therefore, that the issue of liability is *res judicata*. Adjudicator McGinty left open the issue of whether or not the deficiencies could be corrected by repair or whether replacement was necessary and gave the Claimant, Permacrete an opportunity to repair the cracks. That has occurred and has apparently been unsatisfactory as the Defendant/Claimant by Counterclaim, Calvin Myra, has had the matter brought back before the Court.

[3] As Adjudicator McGinty no longer holds office as an adjudicator, the matter was brought back before me, a procedure contemplated by Section 6(9) of the Nova Scotia *Small Claims Court Act*.

[4] After carefully considering the evidence, exhibits and submissions, I find that the appropriate measure of damages in this case is the cost to repair, not the cost to replace.

[5] In Mr. Zatzman's written submission of October 1, 2002, he quotes a passage from Goldsmith on Canadian Building Contracts (which has been adopted with approval in at least one Nova Scotia case, *Castlewood Building Services v. Garson* (1992), 111 N.S.R. (2d) 43 (affirmed at 130 N.S.R. (2d) 91 (C.A.)). I quote only in part:

> *If the breach consists merely of defective work the damages will usually be the reasonable costs of remedying the defects.*

[6] Mr. Fraser, for the Defendant/Claimant by Counterclaim, argues that his client did not receive what he contracted for, the attempted repairs were ineffective and that the expert retained by his client, Mr. Jack Bateman, gave the opinion that the work should be replaced.

[7] It seems clear that the deficiencies, i.e. the cracking and spalling, do not in any way affect the structural integrity of the job. The issue is purely one of aesthetics. This is not to suggest that aesthetics are not important, particularly where, as here, the work is at a person's private residence.

[8] It also seems to be common ground that the cracking and spalling would have been caused by frost heave being exerted from below. In this regard reference is made by the Claimant to the Permacrete contact which was entered at Exhibit C-20 (Tab 2), and which excludes damage caused by "freezing" among other things. Mr. Cole, for

Permacrete, says that this document would have been delivered to Mr. Myra. Mr. Myra denies that he ever signed or saw this contract.

[9] It is clear that the contract was not signed by Mr. Myra and I find as a fact that it was never given to him or brought to his attention. Therefore, that language would not apply.

[10] I find that the warranty language in the letter of June 14, 1999, which was entered at Exhibit D-2, applies. It reads:

> *...we can offer a guarantee on our concrete work for as long as the present owner owns the property*.

[11] As alluded to above, essentially the only issue in this case is whether or not Permacrete is liable for the cost of repairs or is required to pay for the full job to be replaced by another company.

[12] I am satisfied on the evidence that a repair can be effected which will be both completely satisfactory from a structural and functional point of view and, will have an appearance which is sufficiently attractive that such will comply with the contractual obligations, either implied or through the written warranty, that Permacrete would have.

[13] Based on the evidence, I fully expect that the crack, particularly the larger crack, will remain somewhat visible following the repairs. In cases such as this, it seems to me that while the principles of law are well recognized, ultimately it comes down to a judgment call for the trier of fact to apply. In my view, an obligation to repair is all that can reasonably be required in this case.

[14] The Defendant/Claimant by Counterclaim did not provide any evidence with respect to repairs. The Claimant/Defendant by Counterclaim provided two quotes to repair :

| | |
|---|---|
| Carl MacLean | $ 360.00 + HST |
| Duron Atlantic Limited | 845.00 + HST |

[15] I would allow an amount of $600.00 plus HST , i.e. , $690.00, being the approximate mid-point between these two estimates as for allowance for repairs.

[16] The Claimant is entitled to the balance owing on the contract of $402.50. This will be setoff against the amount owing by the Claimant to the Defendant.

[17] I find that there was insufficient evidence to make a finding regarding the paint on the siding and I disallow that claim.

[18] The Defendant/Claimant by Counterclaim is claiming costs of $1,601.00. Under Section 29(1)(b) of the Nova Scotia *Small Claims Court Act* an adjudicator **may:**

> *Make an order requiring the unsuccessful party to reimburse the successful party for such costs and fees as may be determined by the regulations.*

[19] Under Regulation 15 of the Small Claims Court General Regulations reads:

> *15(1) The adjudicator **may** award the following costs to the successful party:*
> *(a) filing fees;*
> *(b) transfer;*
> *(c) fees incurred in serving the claim or defence/counterclaim;*
> *(d) witness fees;*
> *(e) costs incurred prior to the transfer to the Small Claims Court pursuant to Section 10;*
> *(f) reasonable travel expenses where the successful party resides or carries outside the county in which the hearing is held;*
> *(g) additional out of pocket expenses approved by the adjudicator.*

[20] As will be seen, the authority to award costs is discretionary. And, it can only be exercised in favour of the successful party. In this case, it seems to me that success has

very much been divided. In light of this, I decline to award costs in favour of either party.

[21] I order the Defendant, Calvin Myra, to pay to the Claimant, Permacrete, the amount of $402.50, which will be setoff against the amount in the following paragraph.

[22] I order the Claimant/Defendant by Counterclaim to pay to Calvin Myra the amount of $690.00 plus HST, subject to the setoff amount in the previous paragraph.

[23] I have already indicated and repeat that I decline to make any award of costs and as well, I decline to make any order with respect to prejudgment interest.

[24] In the result, the Claimant/Defendant by Counterclaim, Permacrete Restoration Services Limited, shall pay the amount of $287.50 to the Defendant/Claimant by Counterclaim, Calvin Myra.

**DATED** at Halifax, Halifax Regional Municipality, Nova Scotia on June , 2005.

**Michael J. O'Hara**
**Adjudicator**

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