

Claim No: 298042

Date: 20081024_

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Mitchell v. BPM Construction Ltd., 2008 NSSM 88

BETWEEN:

Name Darrell Mitchell and Teresa Laybolt Claimant

Name BPM Construction Ltd. Defendant

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on July 3, 2009.

DECISION

BACKGROUND

- (1) The Claimants, Darrell Mitchell and Teresa Laybolt, had a new home built for them at 35 Meridian Court, Dartmouth, Nova Scotia, by the Defendant, BPM Construction Ltd.
- (2) Shortly after moving into their new residence, the hardwood flooring started to crack throughout the home, including the livingroom, diningroom, downstairs hallway, and upstairs hallway.
- (3) Paul Humphries and Brian Humphries of the Defendant were notified and inspected the hardwood flooring.
- (4) The hardwood flooring had been purchased by the Defendants through a distributor from a supplier of the product and installed by an installer retained by the Defendants. The Defendants contacted the representative of the supplier.

- (5) There were many discussions between the parties to this proceeding and other discussions involving the representative of the supplier. In February 2007, the parties agreed that the portions of the flooring that were cracked (estimated at between 20-25% of the entire flooring) would be replaced by the Defendants. The Defendants purchased six boxes of new flooring and hired persons to install it. This was at a total cost to the Defendants of \$1,500.00 plus taxes.
- (6) Shortly after the new flooring was installed, additional cracks started to appear in areas of the hardwood floor other than those which had been repaired. The Claimants estimated, and it is not disputed by the Defendants, that there is currently at least as much cracked or defective flooring as there was prior to the repairs which were performed.
- (7) At several points, moisture readings were taken throughout the home, and it was determined that there were no concerns regarding the moisture levels.

FINDINGS

- (8) The Claimants expressed some concern about the manner in which the repairs were performed, however, in my view, the repairs were performed satisfactorily and in accordance with standard practice for hardwood floor installation. Any defects were of a minor nature and without independent evidence concerning the nature of the alleged defects and the cost of repair, I am not prepared to allow any amount to the Defendants for alleged defective work based solely on their evidence.
- (9) The Claimants are claiming the cost of repairing the entire hardwood flooring throughout the home. The Defendants are prepared to replace any defective flooring but do not agree that the entire floor should be replaced.
- (10) The Defendants have been cooperative in trying to assess the damage, offering to make repairs, involving the third party supplier and dealing with the distributor of the product. However, to date, despite their best efforts, the problems have not been resolved.
- (11) What the Claimants are left with at this point is hardwood flooring that is clearly defective and when repairs were attempted, further cracks appeared in at least an equal amount of the flooring as was originally damaged.

- (12) When considering whether to order an amount to cover the cost of repairs to the currently damaged portion of the hardwood flooring, there is some hesitation to proceed in this manner as there is a possibility that this will cause further damage to other portions of the flooring, as occurred previously, and further, this would constitute a replacement in total of half or more of the entire flooring throughout the home, increasing the possibility of uneven finishes, buckling of individual pieces, and pieces not being flush to one another as removing and replacing defective parts requires removal not only of the cracked pieces but also adjacent pieces.
- (13) The issue in this case is one of contract interpretation. The Defendants constructed a new home for the purchasers.
- (14) In Kasperson v. O'Connor, 2007 CarswellNS 532, D.T.R. Parker, Adjudicator, of this Court held, and I agree with his conclusion that the implied warranties in the Consumer Protection Act, R.S., c. 92, s. 1, apply in a case involving supply of defective flooring.
- (15) A “consumer sale” includes “a contract of sale of goods or services”. A “purchaser” includes the purchaser of goods or services.
- (16) The only contract which the Claimants had in this case was with the Defendants. They had no contractual relationship with the supplier or distributor of the hardwood flooring.
- (17) Section 26(3) of the Act provides as follows:
- “26(3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:
- (a) a condition that the seller has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;
- (c) a warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made;

(d) where there is a contract for the sale of goods by description, there is a condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description;

(e) where the purchaser, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the purchaser relies on the seller's skill or judgement and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, a condition that the goods shall be reasonably fit for such purpose; provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(g) in the case of a contract for sale by sample

(i) a condition that the bulk shall correspond with the sample in quality,

(ii) a condition that the purchaser shall have a reasonable opportunity of comparing the bulk with the sample,

(iii) a condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;

(h) a condition that the goods are of merchantable quality, except for such defects as are described;

(i) a condition that the goods, whether bought by description or otherwise, are new and unused unless otherwise described;

(j) a condition that the goods shall be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale.”

- (18) The burden of proof is the civil balance of probabilities.
- (19) In Fraser-Reid v. Droumtsekas (1980) 1 S.C.R. 720, Dickson J. commented upon the issue of whether the implied warranty of fitness could be extended to contracts for sale of new homes, providing an exception to the caveat emptor principle. He stated as follows at page 728-729:

“15 The American case law upon which the appellants must rely, however, is far from consistent, even ten years after the decision in Schipper v. Levitt & Sons Inc. (1965), 207 A. 2d 314 (N.J. Sup. Ct.). There is, however, a distinct trend toward convergence of traditional products liability principles and those applying to new homes. The shift countenanced in the American Courts has been to take the English principles applicable to a home under construction and to extend those principles to completed houses, but only where the seller of the house is also the developer or builder and the house is a new unoccupied house: Carpenter v. Donohoe (1964), 388 P. 2d 399 (Colo. Sup. Ct.); Loraso v. Custom Built Homes Inc. (1962), 144 So. 2d 459 (La. Ct. App.); Bethlahmy v. Bechtel (1966), 415 P. 2d 698 (Idaho Sup. Ct.); Rothberg v. Olenik (1970), 262 A. 2d 461 (Vt. Sup. Ct.). It has specifically not been extended to the case of an unoccupied home sold by one owner to a new owner.”

- (20) The installer was not called to give evidence in this case. This proceeding only involves the claim of the buyer of the home against the contractor, and there are no other claims before the Court.
- (21) There is evidence that the hardwood floor sustained significant cracking and that the repairs which were done caused further cracking. The Claimants are obviously concerned that a partial solution is not satisfactory as it is likely to lead to further cracking. Based on their experience in this case, it is difficult to disagree with their conclusion.
- (22) There is sufficient evidence in this case to warrant a finding of a breach of the aforesaid statutory condition as to durability and fitness for purpose.

DAMAGES

- (23) The Claimants wish to have reimbursed to them the entire cost of replacing the flooring.

- (24) The Defendants submit that they should be responsible only for the cost of repairing the known defects amounting presently to approximately 25% of the flooring, having already repaired about 25%.
- (25) The Claimants are entitled to be placed in the same position as they would have been had the breach not occurred.
- (26) A partial solution has already been effected which cost the Defendants a total of \$1,500.00 and I find benefitted the Claimants to that extent.
- (27) I, therefore, award the Claimants the cost of replacing the defective flooring which is \$7,468.91 less the sum of \$1,500.00 already paid out by the Defendant. I allow a further deduction of \$150.00 for the cost of a minor defect in the flooring at the top of the stairs which the Claimants were aware of when they purchased the home.
- (28) I allow the Claimants the net amount of their claim or \$5,843.91.
- (29) The Claimants shall also have their costs in the amount of \$174.13.

Dated at Dartmouth, Nova Scotia,
on October 24, 2008.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)

