

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Floors Plus v. Homeland Builders Inc., 2009 NSSM 62

BETWEEN:

FLOORS PLUS

Claimant

- and -

HOMELAND BUILDERS INCORPORATED

Defendant

AND BETWEEN:

HOMELAND BUILDERS INCORPORATED

Claimant

(and Defendant by Counter-Claim)

- and -

HUBERTUS WOLF and CHRISTA WOLF

Defendants

(and Claimants by Counter-Claim)

DECISION AND ORDER

Place of Hearing:

Halifax, Nova Scotia

Dates of Hearing:

July 31, 2008 and September 19, 2008

Heard Before:

Gavin Giles, Q.C.
Chief Adjudicator

Appearances:

For Homeland Builders Inc. – Kevin A. MacDonald

For Hubertus Wolf and Christa Wolf – Martin C. Dumke

For Floors Plus – Francis Chisholm, Vice-President, Sales & Operations (as agent)

Dates of Written Submissions:

October 15, 2008 (Floors Plus)
October 20, 2008 (Hubertus Wolf and Christa Wolf)
November 13, 2008 (Homeland Builders Inc.)
November 28, 2008 (Hubertus Wolf and Christa Wolf)

Date of Decision:

January 17, 2009

Gavin Giles, Q.C., Chief Adjudicator

INTRODUCTION:

[1] This matter has been before the Small Claims Court of Nova Scotia for some time. Some would say, perhaps, for too much time.

[2] Unlike most matters proceeding before the Small Claims Court of Nova Scotia, this one offered numerous complexities.

[3] First, it entailed fairly significant sums of money. Depending on the party, the sums of \$25,000.00, \$15,000.00 and \$4,421.91 were involved.

[4] Second, the matter offered up considerable other complexities. Beyond the fact that there were multiple parties, the claims, counter-claims and defences of each party interlocked with others. Two of the parties, though represented by counsel in Nova Scotia, resided most of the time outside of Nova Scotia. Hence, scheduling had to accommodate their presence within Nova Scotia. Language was also a difficulty. Two of the parties spoke German and only limited English. In the result, simultaneous translation was required for at least part of the hearing. It tended to slow matters down and it lead to some minor controversies over the accuracy of the interpretation. I am indebted and all of the parties should be indebted to Mr. Dumke. He is a German-speaking lawyer practicing in Nova Scotia. Though he acted for the Defendants, and Claimants by counter-claim, Hubertus Wolf and Christa Wolf, Mr. Dumke was fair, objective and even-handed in his assistance with the German language testimony which was before the court.

[5] Third, all of the parties made diligent efforts to resolve their claims on a consensual basis prior to commencement of the hearing. In fact, I was initially asked by the parties to appoint myself as a mediator to assist them in arriving at some consensual resolutions of their claims, counter-claims and defences. When that initiative failed and it was not a failure resulting from any lack of *bona fides* on the part of any one party or representative the parties asked me to preside over their hearing on the basis, in part, that I already had some familiarity with the relevant facts and issues.

THE PLEADINGS:

[6] The initial claim in this set of proceedings was filed by Floors Plus against Homeland Builders Incorporated ("Homeland") on September 6, 2006. By way of its claim form, Floors Plus was seeking from Homeland the payment of an unpaid invoice for the supply,

delivery and installation of certain building materials, namely: tile and hardwood flooring. Homeland defended against the Floors Plus claim on September 29, 2006. Noteworthy is that Homeland did not counter-claim against Floors Plus.

[7] Also on September 29, 2006, Homeland commenced its own claim against Hubertus Wolf and Christa Wolf ("the Wolfs"). The claim commenced by Homeland against the Wolfs was for the balance which Homeland said was due and owing to it on a construction contract pertaining to the construction, by Homeland, of a house for the Wolfs.

[8] The Wolfs filed a Defence and Counter-claim on January 10, 2007. The Wolfs' general contention against Homeland is that the latter's work was sub-standard and required (or requires) remediation which has come (or which will only come) at some considerable expense.

[9] The Floors Plus claim is in the sum of \$4,421.91. Homeland's claim is in the sum of \$15,000.00. The Wolfs' counter-claim is said by them to exceed \$25,000.00. That said, they have nevertheless conceded all elements of their counter-claim beyond \$25,000.00 so that it can stay within the Small Claims Court of Nova Scotia's current monetary jurisdictional limit.

BACKGROUND:

[10] Homeland and the Wolfs entered into a written Construction Contract on or about February 18th, 2005 ("the Contract"). The Contract purported to regulate the construction of a residential dwelling house by Homeland for the Wolfs.

[11] The Contract appeared in several different iterations in the hearing exhibits before me. That said the essential elements from iteration to iteration remained unchanged.

[12] Clause 3 of the Contract provided that:

[Homeland] agrees to provide a dwelling house on the lands built in compliance with all applicable building codes and all authorities having jurisdiction, in effect at the date of this Agreement to the standards of workmanship required by established industry practice. [Homeland] also agrees to supply all the materials and perform all of the work for the construction, in accordance with plans dated April 16, 2004, revised September 22, 2004, and Foundation plans dated

April 16, 2004, revised October 5, 2004, and, Scope of Work, dated October 21, 2004, (see Appendix A attached), forming a part of this Agreement, and will apply for and provide an Occupancy Permit when construction is completed.

[13] The Contract was of the fixed-price variety. In other words, all the Wolfs were doing was paying an amount. In exchange, they were receiving a new residential dwelling house. Though there were items, such as kitchen and bathroom cabinetry, countertops and light fixtures which were to be procured by the Wolfs within the confines of allowances built into the fixed price, all of the implementation, execution and completion of the construction work required for the new residential dwelling house was in Homeland's hands.

[14] An important provision in the Contract, more about which will be set out below, was found within Clause 8:

[Homeland] agrees to construct the dwelling house in accordance with paragraph 3, of this Agreement in a proper and workmanlike manner and with all due diligence and to have the said dwelling house completed sixteen (16) weeks from start date, provided that the Builder does not guarantee the completion or possession of the dwelling house this date if delays occur which are caused by unfavourable weather, strikes, fires, shortages of materials and/or labour, acts of God or any other causes beyond the reasonable control of [Homeland].

[15] At the time of their entry into the Contract, the Wolfs were represented by Anthony L. (Tony) Chapman. Mr. Chapman was (and is) a prominent corporate-commercial and property lawyer with the Cox & Palmer firm in Halifax. Mr. Chapman, like the Wolfs, is also German-speaking.

[16] Notwithstanding the 16-week build-out provision referred to above, there was not much, if any, definition of a so-called "start date". Instead, there were certain expectations held by the Wolfs about when Homeland would start construction. These expectations were not necessarily shared by Homeland. Homeland has underscored the exceptions to the Contract with respect to a 16-week build-out. More about those exceptions will be set out below.

[17] It was common amongst the parties that the Wolfs' house was not completed within 16 weeks or when contemplated, at least by the Wolfs. Though more about this aspect of the matter will be set out below, it was clear that Homeland was delayed in its completion of the construction of the Wolfs' house. There were many dates for completion expected even by

Homeland. They included dates in June, July and August of 2005. It was not until the very latter part of August (may be even the early part of September), 2005, that the Wolfs' house was actually completed to the point that it could be inhabited.

[18] Beyond difficulties with the completion of the construction, issues also arose about normal construction deficiencies. Some of these were all but benign in nature. Others were large, complex and would entail significant sums to fully rectify.

[19] There were various attempts ongoing from the early part of the fall, 2005, onward to rectify construction deficiencies in the Wolfs' house. There was common ground expressed by the parties that many of the deficiencies were ultimately rectified to the acceptability of all involved. Still other deficiencies were not, according to some, rectified even to the date of the hearings before me. As for those deficiencies, representations have been made by and on behalf of the Wolfs that they ought to receive an award of special damages to compensate for whatever rectifications may have to take place in future.

[20] By way of written submissions (dated July 11, 2008 (Homeland) and July 19, 2008 (the Wolfs)), Homeland brought an interlocutory application to determine the application of Clause 6 of the Contract to the hearing before me which was then pending.

[21] In Mr. MacDonald's very able submission on behalf of Homeland, the argument was that as a result of the Wolfs' possession and occupation of their house on or about August 22, 2005, they were prohibited, contractually, from making claims with respect to construction deficiencies other than those claims which had already been made and had been agreed to by Homeland at a subsequent inspection.

[22] In any equally able submission by Mr. Dumke on behalf of the Wolfs, he disputed Mr. MacDonald's contentions. In particular, Mr. Dumke stressed that it was crucial to know what the Wolfs did with respect to their occupation of their house as well as when and why they did it.

[23] Implicit in Mr. Dumke's submission were the suggestions that the Wolfs took possession and occupation of their house because they had no choice (they had to live somewhere), that their occupation of the house was acquiesced in by Homeland and that Homeland, as the sole cause of the delays in the completion of the Wolfs' house, could not attempt to take advantage of them.

[24] In my decision on Homeland's application, I held "that there [was] a considerable divergence between the parties as to the cause(s) of the construction delays, their effects on the Wolfs, the reasons for the Wolfs' occupation of their house at the time it was occupied and any agreements (express or implied) arising out of that occupation". In the result, I held that "it would be unduly oppressive if not draconian, to decide against the Wolfs without giving them the chance to fully develop the theory of their case".

THE FACTS:

[25] The Wolfs' first experience with Homeland was in August 2004. The Wolfs were seeking a cost estimate (or quotation) for the construction of a house to a plan they had received. The Wolfs were aware of Homeland through some friends who had constructed a new house in the subdivision where the Wolfs had purchased land. The friends were very satisfied with Homeland's work.

[26] The Wolfs' plan went through several iterations. The last one, dated on or about September 22, 2004, formed the eventual basis for the estimating or quoting which Homeland provided to the Wolfs.

[27] The Wolfs' plans were relatively comprehensive. In addition to showing basic structural members, partitions, ceiling heights and exterior elevation views, the plans also went so far as to detail where the Wolfs wanted electrical outlets, switches and fixtures in each room. These latter specifications went through their own iterations too; as Mr. Wolf amended these installations from time-to-time.

[28] The Wolfs' specifications as to other construction details were also ongoing. For example, Mr. Wolf was still specifying plumbing fixtures "one grade down from Hans Grohe" as late as April, 2005.

[29] Though the Contract appears to have been signed by the parties as late as January, 2005, Homeland's actual construction began about a month earlier, on or about December 12, 2004. According to Homeland's "owner", Gerald Slade, it was important to commence construction as quickly as possible given concerns about frost and other winter conditions.

[30] There appeared to be some considerable question on whether or not December 12, 2004, was the "start date" as provided for in the Contract (see above). That said,

for reasons which will be explained in greater compass below, there is not a lot which turns on the so-called "start date".

[31] The Contract was subject to considerable input. Some of its clauses were standard clauses contained within all of Homeland's contracts. Other clauses were more discrete. Some of the latter were drafted (or suggested) by Mr. Wolf. Others were suggested by the Wolfs' then solicitor, Mr. Chapman.

[32] The most significant "sticking point" arising out of the Contract was the 16-week build-out time period. According to Mrs. Wolf, the house should have been completed 16 weeks from September 12, 2004, "unless there were strikes or anything else like that".

[33] The Wolfs were not contemplating a build-out period of any greater than 16 weeks from December 12, 2004. According to Mrs. Wolf, Homeland's standard form contract contained a 13-week build-out period. Also according to Mrs. Wolf, Mr. Wolf had decided on the 16-week build-out period because of his concern over the quality of workmanship. In other words, Mr. Wolf did not want to see Homeland rushing to complete the construction project.

[34] The Contract contained a relatively standard Clause 9. It related to so-called "extras". It required "extras, deletions and errors" to be amended or corrected only by way of written order signed and counter-signed by both Homeland and the Wolfs. The clause provided that Homeland's fixed price could rise or fall depending on the written orders issued. An expansion of the required work would increase the fixed price. Conversely, a contraction of the required work would reduce the fixed price.

[35] Homeland's workmanship on the Wolfs' house was warranted. Though Mrs. Wolf testified that she and Mr. Wolf had sought written warranties from Homeland for various of the components by which the house was comprised, such warranties were never delivered.

[36] One of the Wolfs' primary concerns over the construction of their house was the amount of time it took Homeland to complete construction. For whatever reason, Mr. Wolf expected that the house would be completed not later than the end of May, 2005. How that related to 16 weeks from December 12, 2004, was not clear. It did seem, however, from Mrs. Wolfs' testimony that she and Mr. Wolf appreciated the possibility of delays as a result of attempts at construction during the winter months.

[37] The Wolfs were both in Nova Scotia in April, 2005. According to Mrs. Wolfs' recollection, the house was "well away from being completed" at that time. According to Mrs. Wolf, discussions between Mr. Wolf and Mr. Slade of Homeland Builders resulted in the latter's statement that the house would be completed in June.

[38] On the basis of an expected June 2005 completion date, Mr. and Mrs. Wolf were in Montreal in April selecting kitchen cabinetry and related fixtures at an Ikea store. They made arrangements with Ikea for the kitchen cabinetry and related materials to be delivered to their site on July 5, 2005. Their expectation was that Homeland would not be able to complete their construction any earlier. Their expectation was also that the construction would not be completed any later either.

[39] In early June, 2005, Homeland appeared to have informed the Wolfs that their construction would not be completed that month either. In response to their prompting, Mr. Slade told them that construction might be completed by the end of August. According to Mrs. Wolf's testimony, Mr. Slade also said that he had "no idea" when construction would be completed.

[40] As a result of Homeland's position on completion of construction, the Wolfs cancelled their arrangements to be in Nova Scotia in July, 2005. They then exchanged e-mail messages with Mr. Slade on June 30, 2005. It was then that Mr. Slade estimated that Homeland would require another six weeks to finish construction.

[41] According to Mrs. Wolf, six weeks from June 30, 2005, was considered by the Wolfs to be "firm date". In fact, Mrs. Wolf recalled asking for a firm date "plus one week".

[42] The reasons for construction holdup were many and varied. In fairness, it did not appear on the totality of the evidence to be able to lay them all at Homeland's feet.

[43] For example, the Wolfs were themselves dealing in early July 2005 with Floors Plus on the selection and installation of the tile and hardwood flooring in the house. There were some problems with respect to the required quantity of tile, in particular. According to Mrs. Wolf, she and Mr. Wolf were dealing with an Anna Magyar at Floors Plus. She, in turn, was dealing with Mr. Slade at Homeland. Somehow, Ms. Magyar ended up with the wrong set of plans for the Wolf's house. Those plans improperly stipulated the required quantity of tile. A rectification eventually had to be made. That took more time.

[44] In addition to some small difficulties with respect to the required quantity of tile, a tiling sub-contractor recommended to the Wolfs by someone was not available for assignment to them by Floors Plus. That led to the Wolfs' selection of another tiling contractor to be made available to them through Floors Plus. Though according to Mrs. Wolf, "the new guy was good too" that appeared not to be the case. Not only was "the new guy" not available as quickly as the originally-intended tiling contractor, he proved not to be as competent either.

[45] There were also some difficulties over the selection of hardwood flooring. One aspect of the installation required "plain" hardwood flooring. The other aspect required "engineered" or "composite" hardwood flooring.

[46] Though the Wolfs knew from representations made to them by Floors Plus that their hardwood flooring would be of two different types, Mrs. Wolf was absolutely clear in her recollection that she was told by Floors Plus that the hardwood flooring would appear to be the same. Upon installation, that was not the case.

[47] Additionally, there were disputes between the Wolfs and Floors Plus over the cost of the hardwood flooring. As is common in such circumstances, the Wolfs were working within an allowance for certain finish items provided to them by Homeland within the latter's fixed price. For whatever reason, the tiling costed out to a \$1,000 more than the amount within the Wolfs' allowance. Accordingly, it was effectively "extra" to them. The Wolfs knew this. They were dealing with Floors Plus and the tile suppliers themselves.

[48] There were also minor discrepancies over the selection of interior doors (solid core instead of flat panel) and certain trims. Though these things sounded "minor" in nature, they were also headaches. They served to increase the level of communication between the Wolfs and Homeland. They also tended to increase Homeland's time commitment to the project as the "headaches" were identified and sorted out.

[49] By the middle of August, 2005, the relation between the Wolfs and Homeland was starting to breakdown. The Wolfs, in fact, moved from their direct communications with Homeland to communications with Homeland through their solicitor, Mr. Chapman. It was not clear how, if at all, that this mode of communication advanced the Wolfs' cause. Homeland was still experiencing delays in attending to final construction details. Problems with sub-trades was just one example. Though the plumbing in the new house was not complete, Homeland was having difficulty retaining the services of a plumber. There were no plumbers to be had.

[50] Though the Wolfs' anticipated moving into the new house for the latter part of the summer, that was not to be. Instead, they and their guests were required to repair to a bed and breakfast nearby. Though they had attempted to occupy the house, the facilities were lacking. Mrs. Wolf described in her testimony that the situation at the house without adequate facilities was "horrible".

[51] Though the new house was habitable by the Wolfs by the end of August, 2005, it was not finished. Additionally, there were deficiencies. Some items remained to be completed. Other items which had been completed had to be rectified.

[52] The period between the latter part of 2005 and the latter part of 2006 was replete with rancour and finger-pointing between the Wolfs and Homeland. The Wolfs alleged a number of construction deficiencies including very serious deficiencies with respect to the installation of their tile and hardwood flooring. Homeland, in turn, alleged numerous attempts to rectify the deficiencies which were hampered or prevented by the Wolfs because access to the house was not possible.

[53] In September, 2005, the Wolfs continued to communicate with Homeland through their solicitor, first Mr. Chapman, and then through his colleague, Mr. Schweiger. The efforts by Messrs. Chapman and Schweiger were aimed primarily at the rectification of deficiencies. To this date, some deficiencies though not all of them remain to be rectified.

[54] The alleged deficiencies might best be classed as ranging between "benign" and "serious". In the most serious instances, the Wolfs have designated work primarily by Floors Plus as "lousy" and "terrible". This was particularly so with respect to tiling especially floor tiling and hardwood flooring. The range is better expressed in a list of deficiencies dated September 3, 2005, and prepared for the Wolfs by Mr. Schweiger (Exhibit 2, at Tab 11).

[55] Substantial repairs to the tiling in the house were undertaken by Floors Plus in the summer of 2007. Mrs. Wolf testified that much of the work (by Kevin Charlton) was good; even "super". Some other work, that which was more along the lines of repair as opposed to new installation, was not so good. The use of so-called "schluter strips" in the original installation of some of the tiling made the rectification of deficiencies very difficult. Additionally, some grout repairs undertaken by Kevin Charlton in the summer of 2007 employed a material having a slightly different appearance from that which was installed originally. Accordingly,

those repairs, whilst perhaps structurally sound, did not satisfy the Wolfs from an appearance perspective.

[56] Beyond their concerns about tiling and hardwood flooring, the Wolfs were also concerned about the measurement device installed inside of the cistern which was part of the foundation of the new house. According to Mrs. Wolfs' testimony, the cistern was required because the soil where the house is located is rocky and is not particularly well-suited to the installation of wells. Accordingly, wells in the area are supplemented by rainwater which collects on the roof of the house and is transferred through eaves troughs and downspouts into a cistern (or tank) which sits below the house.

[57] In circumstances where water use is high and precipitation is low, water can be purchased from independent suppliers to fill up the cistern. For that purpose, a water level indicator is required. The Wolfs have complained that the water level "alarm" installed in the cistern by Homeland is not an indicator which permits them to know, from inside the house, at a moment's glance how much water they have. Instead, they are reliant on an alarm which rings or buzzes at different levels as the volume of water in the cistern decreases.

[58] Jürgen Zeigler was retained by the Wolfs to inspect their house and advise them as to deficiencies. He later reported to them on the deficiencies he detected for the purposes of this case. He was called by the Wolfs as an expert in general house construction and, in particular, in tiling and hardwood flooring, electrical and plumbing, including the plumbing which would be installed for a cistern of the type which the Wolfs had.

[59] Mr. MacDonald, on behalf of Homeland, as did Mr. Chisholm, on behalf of Floors Plus, took some exception to Mr. Zeigler's qualifications. Mr. MacDonald noted, I think accurately, that Mr. Zeigler was not a carpenter. Mr. Chisholm noted, again I think accurately, that Mr. Zeigler was not a tiler.

[60] The threshold test for the admission of a witness's testimony as "expert" is very low. According to Sopinka, John and Lederman, Sidney N., *"The Law of Evidence in Civil Cases"*, Butterworths, Toronto, 1974 (at pp. 309-310):

... It must be demonstrated that the witness possesses sufficient background in the area so as to be able to appreciably assist the court. The test of expertness so far as the law of evidence is concerned is skill in the field in which it is sought to have the witness's opinion. The admissibility of such evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently

experienced in the subject-matter at issue, the court will not be concerned about whether his skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[61] In support of Mr. Zeigler's qualification as an expert on behalf of the Wolfs, Mr. Dumke led considerable evidence about his qualifications.

[62] Trained as an electrician in Germany some years ago, Mr. Zeigler has spent most of his life in one form or another of the residential construction industry.

[63] In addition to electrical work, Mr. Zeigler has been engaged in HVAC and refrigeration work. He has also worked in Canada as a general construction contractor since about 1994.

[64] In the course of his career over the last decade and a half, or so, Mr. Zeigler has constructed approximately 60 houses. He has pre-fabricated approximately 30 more houses for shipment to and assembly in Germany. Mr. Zeigler has also constructed a 39-unit hotel.

[65] Mr. Zeigler's father's trade was tiling. Mr. Zeigler worked "on the job" for many years, especially as a younger man. Though he agreed that he had no formal training with respect to tiling, he had plenty of experience. He regarded himself as capable of commenting upon the structural suitability and appearance of any tiling job. Mr. Zeigler confirmed that he had been retained the Wolfs only for an opinion and not for any actual work which they had commissioned or might require in the future.

[66] Though Messrs. MacDonald and Chisholm raised issues with respect to the true nature of Mr. Zeigler's expertise, I concluded that he readily passed the low threshold test referred to above. He was experienced with electrical work and HVAC work. He had substantial on-the-job training as a tiler. He had worked as a general construction contractor for some years, building almost 100 houses. He had done commercial construction work by virtue of the 39-unit hotel referred to above.

[67] Though the points raised by Mr. MacDonald and Mr. Chisholm were well-taken, I concluded that Mr. Zeigler's opinion evidence would be accepted, subject only to weight. That, so far as I understand it, is the common test.

[68] Mr. Zeigler's comprehensive report, dated April 4, 2007, was lead into evidence as Exhibit "8" (July 31, 2008). Mr. Zeigler's report included a table of deficiencies (both "benign" and "serious"). It also included a set of close-up photographs of tiling and trim deficiencies to which Mr. Zeigler had referred.

[69] Mr. Zeigler's table of "On-site Review of Deficiency List, November 3, 2005", was dated by both the time of his report (April 4, 2007) and his testimony (July 31, 2008). Accordingly, some of the larger array of deficiencies to which Mr. Zeigler had referred on November 30, 2005, had since been rectified, either to the Wolfs' approval or as I will set out below, reasonably.

[70] That left Mr. Zeigler's primary concerns as follows:

Among the deficiencies, the most glaring and costly deficiency was the tile work completed with the residence. The tiled rooms are the kitchen, the hallways, the small bathroom, and the large bathroom. In the course of my inspection, I found, among other things, that the tile installation was not properly centred, grout installation generally not properly completed, leaving many of the grout lines either empty or improperly completed. Many of the grout lines were cracked, leaving the tile work less than water tight

Around the showers and on the transition from walls to floor, no expansion joints with silicone were installed, resulting in cracked joints and defeating the purpose of providing a watertight wall and floor covering. As a consequence, moisture will be able to enter into the walls with foreseeable mildew contamination

Overall, the tile and grout work was partially incomplete and overall not an acceptable installation. In addition, some of the subfloors below the tile work was [sic] not properly installed.

In some areas of the house, the tiles were finished with an aluminum channel, which was improperly installed. Corners and edges were not tightly installed, leaving the aluminum trim exposed and posing risk of injury. In addition, the installation of the aluminum trim was not performed to specifications. Ordinarily, the trim is installed prior to the tile work, then the tiles are installed into the channel of the trim work The trim cannot be replaced without removing the tiles.

I have come to the conclusion, based on the inspection, that the tile work has to be removed, the subfloors and walls properly secured and new tile work installed.

[Reference to some relatively benign deficiencies and to the water level indicator in the cistern]

The deficiencies in regards to the hardwood flooring are twofold. Firstly, despite representations to the contrary, the finish of the downstairs hardwood floor and upstairs hardwood floor is not the same. Secondly, the air exchanger installed on the premises has no dehumidifier, which allows the relative humidity to rise beyond the recommended 55%. At the time of inspection, the house showed a 70% relative humidity and the hardwood floors showed individual pieces under high tension due to moisture absorption, bending upwards, leaving the floor uneven. Walking across the floors resulted in the floor cracking with loud noises. The initial recommendation is to use the dehumidifier within the building to reduce relative humidity over several weeks to 55%, at which time the floor would have to be checked again.

[71] Mr. Zeigler's concerns about the tile work done in the Wolfs' house by Floors Plus can be summed up in a single word: "poor". He referred in his testimony to the schluter strips, the fact that they were not cut properly, the fact that they were not mitred properly, the fact that they were sharp and could cause injury, and the fact that in some respects, they were not properly centred.

[72] Though Mr. Zeigler did refer in the course of his testimony to some repair techniques which could be employed by the Wolfs on the tile work in the house, some of them would now be impossible because the tiles were no longer available. In that regard, many of the tiles selected by the Wolfs from Ms. Magyar at Floors Plus were discontinued lines in limited quantities. Thus, by purchasing what was often times the bare minimum number of tiles to do any particular aspect of the work, the Wolfs denuded themselves of the ability to effect the future adjustments and repairs.

[73] As critical as he was of the tiling work, Mr. Zeigler reserved his most stinging criticism for the hardwood flooring installed in the Wolfs' house by Floors Plus. He referred to the fact that the hardwood types were not the same finish or colour. He referred to the loud cracking noise complained about by Mrs. Wolf. He said that he had "never heard this noise before" and that the "flooring appears to be under a lot of tension".

[74] Mr. Zeigler described the tension as a form of lifting of the hardwood flooring planks from the subfloor. For example, in one room where the flooring is the worst, Mr. Zeigler described a 7/8 inch gap between the bottom of the entry door and the top of the flooring's surface. When the door is opened, however, its free side actually strikes the flooring.

[75] Mr. Zeigler hypothesized as to the cause of the floor's lifting or cracking. One main reason was that it had not been installed with the appropriate expansion joint between itself and adjacent wall structures. Another problem, according to Mr. Zeigler, is that the hardwood flooring in the Wolfs' house was either not glued to the sub-strate or was not glued properly.

[76] The final problem considered by Mr. Zeigler with respect the hardwood flooring in the Wolfs' house was the ambient humidity. When Mr. Zeigler checked, the ambient humidity inside of the house was some 70%. Mr. Zeigler described that level of humidity as "way too high". He went on to testify that if the level of humidity inside of the Wolf's house was reduced, some of the snapping and cracking of the hardwood flooring would be reduced or eliminated.

[77] Mr. Zeigler attended at the Wolf's house in both the spring of 2007 and on July 29, 2008 (two days before he testified).

[78] By at least the latter visit, many of the tiling deficiencies had been rectified. Mr. Zeigler made specific reference to the tile baseboards employing the schluter strips and to the correction of the tile kitchen counter backsplash.

[79] Mr. Zeigler also stood by while Floors Plus' Kevin Charlton removed a few tiles from the main bathroom in the Wolf's house to look at the installation method. According to Mr. Zeigler, Mr. Charlton indicated that the tiles had been installed correctly and that as such, the problem must be with the sub-strate.

[80] Finally, Mr. Zeigler made reference to some of the prior installation of the schluter strips. In many respects, according to Mr. Zeigler, it could not be repaired. If it was cut too short, it was cut too short. If it was improperly mitred, an attempt to properly mitre it would leave it too short. As such, Mr. Zeigler still advocated some wholesale tile removal and re-installation. Mr. Zeigler also testified that some work securing or shoring up the floor sub-strate was also required.

[81] Mr. Zeigler's cross-examination was particularly helpful to my understanding of the Wolf's case.

[82] Mr. Zeigler conceded in cross-examination that of the 60 houses he has constructed, some were to different levels of quality and finish. He conceded that a type of house is generally what the client wants and what the client is prepared to pay for it.

[83] Mr. Zeigler also conceded on cross-examination that humidity was a big issue with respect to the Wolf's house. According to Mr. Zeigler, the combination of high humidity and the fact that the hardwood flooring had often times been installed flush (or tight) to the adjacent walls meant that natural expansion of the hardwood flooring had no place to go but up.

[84] Although some of the points raised with Mr. Zeigler on cross-examination appeared picayune, he did testify that the type of exterior caulking used by Homeland on the Wolf's house was considered generally to be acceptable according to industry standard. Mr. Zeigler also testified that he was not particularly familiar with the type of heat exchanger Homeland had installed in the Wolf's house. He did concede that it appeared to be consistent with the construction contract (Section G, Appendix "A", "Scope of Work"). Mr. Zeigler also couldn't specify a heat or air exchange system which includes dehumidification. Mr. Zeigler did concede that the contract did not include dehumidification.

[85] Mr. MacDonald and Mr. Zeigler sparred over the definition of an appropriate indicator for the level of water contained within a cistern. It appeared from Mr. Zeigler's description that he was not testifying about the type of apparatus to which Mrs. Wolf had testified. In essence, Mr. Zeigler was not testifying to an indicator to be located within the Wolf's house by which they could tell at any given moment what the water level in their cistern was. Instead, Mr. Zeigler was testifying to a \$750 series of floats which is, perhaps four in number, each of which would be set to go off at pre-determined water levels as the cistern was being depleted. How those switches would work differently, in a practical sense, from what Homeland had installed was not clear from Mr. Zeigler's testimony. Nor was it clear how what Mr. Zeigler testified to would actually work.

[86] In cross-examination by Mr. Chisholm, Mr. Zeigler offered some potential solutions for the tiling and hardwood flooring deficiencies. For example, expansion joints could still be cut in some of the floors at a cost of about \$1,000. In areas where hardwood flooring was flush (or tight) up against the adjacent drywall, it could be under cut to allow for an expansion joint after the baseboard trim had been removed. The baseboard trim could then be re-installed, re-filled and re-painted. The result would be the same as if the hardwood flooring had been installed with a proper expansion joint in the first place.

[87] Mr. Zeigler also repeated, in cross-examination by Mr. Chisholm, his earlier testimony with respect to tile repairs. According to him, there was nothing that could not be repaired so long as there were sufficient matching tiles available for whatever repairs were required. In that regard, Mr. Zeigler was most concerned about tile breakage in the course of repair; especially where the schluter strips had been used improperly. Mr. Zeigler testified that in his experience, it was extremely difficult to remove tiles trimmed with the schluter strips, re-install a properly cut and properly fitting schluter strips and then re-install the tiles. With breakage in such circumstances being all but virtually guaranteed, sufficient numbers of matching tiles would have to be available. Given the Wolf's purchase of their tiles which were in limited quantities, replacements could not likely be located.

[88] Kevin Charlton is a tiler who is self-employed but is engaged by Floors Plus approximately 95% of the time. He was brought up "in a flooring family". His virtual experience spans some decades.

[89] Mr. Charlton is an experienced installer of tiles, laminates, hardwood flooring and certain types of marine decking.

[90] In addition to installations, Mr. Charlton has sold flooring and has worked as a sales representative for a hardwood flooring manufacturer.

[91] Even in the course of his sales and manufacturer's representative careers, Mr. Charlton "always did installations on the side". Over time, he gravitated back to installations full-time.

[92] In addition to his basic general experience that he gleaned over many years of on-the-job training, Mr. Charlton had some specific product training. One product on which he was trained was the schluter system. He has also used products similar to schluter. He did not have formal training on those.

[93] Mr. Chisholm moved the qualification of Mr. Charlton as an expert in the installation of flooring. The qualification was a bit generic. I did not require that Mr. Chisholm be more precise. That was in part because of the nature of the forum. It was also in part because neither Mr. MacDonald nor Mr. Dumke objected.

[94] Mr. Charlton was on site at the Wolf's house in July, 2007. He saw the hardwood flooring installation. He heard the cracking. He thought it was "a tension issue". Though it may not have been as loud as Mr. Zeigler recalled it being, Mr. Charlton recalled that: "it was loud, you could hear it."

[95] Mr. Charlton underscored that humidity is an important point in the installation of hardwood flooring. The hardwood flooring chosen by the Wolf's was maple. According to Mr. Charlton, it is particularly sensitive to moisture. Another factor which made the Wolf's maple hardwood flooring even more susceptible to moisture was the fact that they had selected boards of a 3¼" width. Apparently, boards of that width will expand more with humidity than will narrower boards.

[96] Despite the cracking sound, Mr. Charlton was baffled by the fact that none of the Wolf's hardwood flooring appeared to be lifting. He regarded the hardwood flooring as "well-stapled to prevent it from lifting." He did not recall (but did not deny that) any of the doors catching on the flooring.

[97] Mr. Charlton recommended at the time that a reduction in humidity would permit the flooring to "relax". He was not then of the view (and was not of the view when he testified) that the flooring would "come back to 100%."

[98] As for the tile, Mr. Charlton repaired much of it. He removed and reinstalled some of the schluter strips. He removed tile, patched the wall behind the tile and either reinstalled cleaned-up tile or installed what new tile there was.

[99] Mr. Charlton asked Mrs. Wolf if she was satisfied and he recalled her telling him that she was.

[100] Another tile problem which Mr. Charlton reviewed was the cracking in one of the tile floors. He thought the tile was well adhered to the plywood beneath it and that the plywood was adhered to the joists below. There was still a cracking sound, however, and Mr. Charlton concluded that it must be coming from the joists.

[101] Despite his repairs, there were a number of aspects about the tiling work which Mr. Charlton regarded as sub-standard. Though he thought that he could repair satisfactorily most aspects of the improper installations, he could not do so without the requisite tile. One

example was the 45° corners which he thought had been poorly done. He also thought much of the caulking had been poorly done.

[102] There was some discussion in Mr. Charlton's cross-examination by Mr. Dumke about the suitability of materials installed by Homeland underneath the tile. At one point, Mr. Charlton testified to what he thought was "conventional wall board". He thought it should be "cementitious backer board". When presented with a hearing exhibit describing a tile installation process, Mr. Charlton could not say if it had been followed by Homeland or not.

[103] Though only hypothetical, Mr. Charlton thought that he would advise customers of the humidity requirements with respect to their choice and use of hardwood flooring. He appreciated that humidity was a fluctuating variable. He felt that the proximity of the Wolf's house to the ocean would make humidity issues more difficult to control. He also thought that hardwood flooring could withstand somewhat higher humidity than the manufacturers of it traditionally recommended so long as the level was constant.

[104] Homeland's Mr. Slade had 35 years' experience as a carpenter and had operated Homeland for some 15 years prior to its being engaged by the Wolfs. Prior to Homeland Builders, Mr. Slade operated Halifax Framing.

[105] According to Mr. Slade "if it's in carpentry, [he's] done it".

[106] Mr. Slade has built, or has been a part of the construction of some 250 houses. He has done commercial construction work as well.

[107] The Wolf's were referred to Homeland by another customer for whom it had constructed a house. The problems which Homeland experienced with the Wolf's (or vice versa) were novel. Homeland had not experienced those types of problems with a client in the past.

[108] Mr. Slade was not sure who called whom. He thinks the Wolfs called him. He recalled that being in the latter part of the summer of 2004.

[109] Mr. Slade recalled a couple of telephone discussions with the Wolfs and then a site meeting. He didn't recall much of the site meeting and did not make any notes of it. His

recollections were limited to the fact that the Wolfs wanted a good quality house and wanted it to be constructed "soon".

[110] Mr. Slade recalled giving Homeland's quotation to the Wolfs on or about April 18, 2004. He had prepared a "take-off" on what the Wolf's house was to cost. He had given their plans to his sub-trades and to his suppliers for quotations on materials and on sub-trade work. Homeland's intention was to use its own labour and that's what it did with respect to the Wolf's house.

[111] According to Mr. Slade, quotations are not an easy task. They require considerable input. They can take between six and ten weeks to prepare. They require input from others. I have referred above to sub-trades and suppliers.

[112] The prices received from sub-trades and suppliers are usually only "good for thirty days." As such, the quotation process has to mature quickly.

[113] Given the date upon which Homeland presented its quotation to the Wolfs, Mr. Slade concluded that it started no later than the early part of September, 2004 and maybe as early as the early part of August, 2004.

[114] With Homeland's quotation, Mr. Slade presented the Wolfs with a sample contract. He recalled that the final contract only had minor variations from the sample.

[115] Mr. Slade thought that Homeland's construction of the Wolf's house would start in the "early fall". I was unsure what he meant by that given the presentation of his quotation only on April 18, 2004. It was clear, however, from Mr. Slade's testimony that Homeland anticipated starting in on the construction of the Wolf's house, completing the site work and having the building "roof tight" prior to winter conditions setting in.

[116] The start date was a considerable factor to Homeland. The reality was that it is always more expensive to build during the winter months. To the extent possible, Homeland wanted to avoid that.

[117] The closer 2004 got to the winter months, the more concerned Mr. Slade became. He knew that Homeland's budget was dependent on roof tight construction by Christmas. In other words, Homeland intended to have the bulk of the construction completed

by the Christmas period so that only interior work would be required during the winter months.

[118] Despite an earlier start on work, Mr. Slade recalled the Contract only being executed on January 12, 2005.

[119] Mr. Slade recalled that the Wolf's primary concern was with respect to cost. After Homeland's quotation, there were discussions between Mr. Slade and the Wolfs particularly to Mr. Wolf about reducing the scope of the project. Smaller houses were discussed; lesser houses (in terms of quality) were discussed. Also discussed was a house with areas not completely finished.

[120] Though these types of discussions were ongoing for a time, there were never any conclusions reached. In the end, Homeland constructed for the Wolfs what they originally envisaged.

[121] Mr. Slade had no recollection of discussions with the Wolfs about extras or extra charges. There were a series of e-mail messages about changes to the Contract and how they would be regulated.

[122] The winter conditions experienced by Homeland made the construction of the Wolf's house difficult. There was considerable cold weather and a lot of snow. Access to the Wolf's site was compromised. There were numerous delays.

[123] Despite Homeland's expectation that the house construction would start in the fall and be "roof tight" by Christmas, it did not attempt to vary its price upwards. To reiterate, had Homeland known that its construction was going to be taking place in winter months, it would have quoted a higher fixed fee.

[124] Mr. Slade had almost daily e-mail exchanges with the Wolfs particularly Mr. Wolf. In addition, Mr. Slade e-mailed dossiers of photos of the ongoing construction to the Wolfs on a frequency of at least once per week. Mr. Slade recalled greater levels of communication with the Wolfs than was common with Homeland's other clients.

[125] Mr. Slade did not recall any concerns being expressed by the Wolfs over delays relative to the weather, etc. Instead, Mr. Slade recalled Mr. Wolf's constant comment that he and Mrs. Wolf simply wanted a good job and if it resulted in delay, so be it.

[126] Though the weather conditions had improved by the time Homeland had completed the framing of the Wolf's house, the installation of cedar shingles and the windows also proved difficult. By that time, there was a shortage of building materials, particularly shingles. Also, there had been changes made to the windows between the time of the original exterior elevation drawings and the time the windows were to be installed. Homeland's original framing was to the Wolf's original drawings but it had to be changed to accommodate window size and placement changes.

[127] Homeland did not have a written "change order" with respect to the windows. Mr. Slade testified that he had informed the Wolfs that extra charges would apply and that they had assured him they understood. Mr. Slade thus concluded that "the Wolfs were comfortable with proceeding this way". They never advised him to the contrary.

[128] Homeland also attributed delays to the Wolfs themselves. Mr. Slade testified, in particular, to problems with electrical layouts; in particular, numerous discussions with Mr. Wolf about where to install electrical outlets and switches. According to Mr. Slade, it took a long time for the Wolfs to decide those things. Though he couldn't say what the delay was specifically, he thought it was in the range of two-three weeks.

[129] According to Mr. Slade, delay piled on top of delay. It threw the project out of sequence. In the result, Homeland could not obtain the services of its preferred sub-trades when it wanted them. In that regard, Mr. Slade underscored that Homeland prefers to work only with specific sub-trades. It has had a long relationship with them. It knows their capabilities and the quality of their work. In circumstances where they were not available because of delays, Homeland felt that it had no choice but to wait for them to be available.

[130] Beyond the changes to the window layouts, there were others. For example, trims were added to areas where no trims had been originally specified. There were changes to the stairs and a closet was added to one of the bedrooms.

[131] Homeland obtained regulatory inspections on the Wolf's house at all of the proper times. These were inspections of footings, foundations, framing, insulation and the final inspection. These inspections did not produce any deficiencies other than "two little things on the final which were both fixed then and there".

[132] Though perhaps self-serving from Homeland's perspective, Mr. Slade testified that he did not detect any quality issues while the Wolf's house was under construction. In fact, Mr. Slade thought that the Wolf's house was superior to what Homeland usually builds.

[133] Mr. Slade was asked in direct examination by Mr. MacDonald to comment on Mrs. Wolf's testimony, about the construction, that "everything went wrong". Needless to say, he did not agree. He reiterated the problems that resulted from indecision on the part of the Wolfs, changes to construction layouts and the availability of sub-trades when they were required. Mr. Slade also testified to significant problems obtaining drywalling and painting services. He recalled that all of those workers had plenty of work to do in town and they did not want to drive all the way out to the Wolf's site to do work there.

[134] Although Mr. Slade recalled telling the Wolfs that their house would not be ready in the latter part of the summer of 2005, he knew that they were determined to arrive anyway. When they arrived on August 16, 2005, their house was close to complete but had no kitchen cabinets, some tiling left to be completed and only limited plumbing.

[135] The Wolfs asked Mr. Slade if he could provide for them a useable bathroom including a useable shower. Mr. Slade testified that one bathroom was available for use when the Wolfs arrived. It included a useable toilet, sink and shower.

[136] According to Mr. Slade, Homeland's final completion of the house was compromised by the Wolfs being there. They, perhaps understandably, did not want Homeland working on their house while they were present. That, however, was new to Homeland. Its clients usually do not attempt to move in until their houses are completely finished.

[137] Disputes over deficiencies arose almost immediately. The Wolfs appeared to be viewing their house as all but complete. Homeland was viewing it as in the process of completion.

[138] Mr. Slade recalled that by September 22, 2005, the Wolfs had prevented Homeland and its workers from accessing the house. Mr. Slade recalled that that decision (by the Wolfs) negatively affected painting, plumbing, the changing of window glass and flooring.

[139] Mr. Slade also recalled that the Wolfs were intimately involved in their flooring choices. In fact, the Wolfs were purchasing directly from Cera Tech for materials which were going to be installed by Floors Plus. That upset Floors Plus. Normally, Floors Plus would purchase from Cera Tech on behalf of a customer and then resell the products to the customer along with installation charges.

[140] Mr. Slade testified that the interaction between Homeland and Floors Plus was poor. Floors Plus was slow to act on its materials deliveries and installations. Materials were delivered some two and a half weeks prior to the commencement of installation. Even then, the Floors Plus installer then left the site for several days.

[141] The Floors Plus installation work was not up to Homeland's standards. Mr. Slade discussed this with Ms. Magyar. Mr. Slade recalled Ms. Magyar agreeing with his observations.

[142] When it came to the tiling, Homeland was particularly concerned about the grout and the use of the schluter strips. Homeland thought that both were fixable and that Floors Plus would arrange for the necessary repairs.

[143] Floors Plus's repair attempts were not successful. Primarily, they were not up to the Wolfs' standards. Though Homeland was not intimately involved with those repair efforts (they were being attended to directly by Floors Plus on behalf of the Wolfs), Mr. Slade had seen some photographs and had agreed that the repair attempts had failed.

[144] The time in question marked the Wolfs' denial of Floors Plus's access to the site. There was also a dispute with the Wolfs about the extent of the tiling to which they had agreed. They had sought the tiling of the laundry room floor. According to both Mr. Slade (and to his recollection), Ms. Magyar, the tiling of the laundry room floor was never included in the Floors Plus' original quotation.

[145] When it came to construction deficiencies generally, Mr. Slade testified that Homeland's practice is to work with owners to complete deficiencies and ensure that clients are happy. He testified that Homeland never got to that point with the Wolfs. They became frustrated and barred most workers from the site. The result was a form of standoff of a type which Homeland had not experienced in the past.

[146] Mr. Slade agreed with the Wolfs' assessment of some of the deficiencies. He regarded the tile work as poor. He thought it could still be fixed. He thinks that if Homeland was given the opportunity, all of the tile work could be fixed to the Wolfs' expectations and standards.

[147] Mr. MacDonald took Mr. Slade through the Wolfs' deficiency lists, both the one at Exhibit 8 (Mr. Zeigler's report dated April 4, 2007) and the one at Exhibit 7, Tab 8 (Mr. Chapman's correspondence of September 9, 2005).

[148] Though time does not permit and necessity does not require a close assessment of Homeland's response to the Wolfs' deficiency lists referred to above, a couple of examples are in order.

[149] First, Homeland disputes the Wolfs' observations regarding exterior and interior doors. The door referred to at 4.1 (Exhibit 7, Tab 8) was replaced. All of the interior doors are between half inch and five-eighths of an inch from the floor when closed. The doors are of the "Safe and Sound" variety. They are not particularly noisy when opened or closed. All of the doors have spray finishes. The finishes are smooth. Even the bi-fold doors are factory spray primed. They would have been painted had the Wolfs permitted Homeland further access to their house. Further, Mr. Slade cannot recall a dent in the garage door (4.4, at Exhibit 7, Tab 8). If there was one, he was sure it could be repaired.

[150] Second, all of the section 5 plumbing deficiencies have been rectified.

[151] Third, Mr. Slade regarded the electrical deficiencies as insignificant. Motion detectors did not work only because the main switch controlling them was in the off position. Some electrical boxes were not fair (or flush) to surrounding drywall. They had to be re-installed and were. Some electrical outlets were controlled by wall switches. With the wall switches in the on position, all of the affected electrical outlets worked properly. There was no wall switch installed beside the entrance doors. The Wolfs did not want one. It was not a deficiency. There are no light fixtures in the Wolfs' closets simply because they were not picked out. The electrical rough-ins are all there. Similarly, the electrical connection for a future sauna has been installed. The connection is through the attic without the required wiring is coiled up and ready to be connected in the future.

[152] Fourth, Homeland largely conceded the Wolfs' position with respect to tiling deficiencies. Much has been said of them already. The fact remains that some tiling deficiencies have been rectified. Others have not been rectified and might not be readily capable of rectification.

[153] Fifth, much has already been written about the Wolfs' hardwood flooring. In short, Mr. Slade did not know why it was making the cracking sounds it did. He thought it was humidity. There was nothing else that he could offer.

[154] Mr. Slade recalled that Homeland's final meeting on site with the Wolfs did not go very well. People were upset. The atmosphere was hostile. Mr. Wolf was yelling. Both he and Mrs. Wolf were unhappy.

[155] Mr. Slade made attempts at explanations but the Wolfs were not satisfied. There was more yelling, table pounding, door slamming, etc.

[156] Mr. Slade and his employee, James Murphy, left the meeting before it concluded. The meeting was simply not productive. Mr. Slade spoke with Mr. Chapman afterwards. He told Mr. Chapman what he would and would not fix.

[157] Homeland thought that if it repaired the things which it viewed as its responsibility, it would be paid. As far as it is concerned, it has done that. Mr. Slade testified on its behalf that it was owed \$16,131.31. It claimed that amount plus interest.

[158] Mr. MacDonald also took Mr. Slade through the Zeigler report.

[159] Mr. Slade was not aware that any doors were striking the flooring and he was never asked to repair them. He was not sure if he would do it now. If repairs were still required, he described them as minor; no more than \$150 or so.

[160] As for the rusting hinges, Mr. Slade testified that they were what came with the door. The environment is salty and he thought that stainless steel hinges would be a better idea. They were not included with the door and they were not specified in the contract. They would probably cost less than \$100.

[161] Mr. Slade testified that the water pump support in the utility room was not specified in the contract. He thought the pump support made out of MDF was acceptable. He agreed that the MDF should have been painted. He thought that would have taken five minutes.

[162] Mr. MacDonald and Mr. Slade engaged in substantial discussion in the course of the latter's direct examination over the water level alarm in the Wolfs' cistern. Mr. Slade testified that the alarm goes off when the cistern has only seven days of water remaining. Beyond that, Mr. Slade did not know how the alarm worked. He did not account for the possibility that on some days, water consumption by the Wolfs could be greater (or lesser) than on other days.

[163] Mr. Slade thought that the Wolfs now had the shower head specified. He also testified that he was told by his electrician that he had purchased good quality exterior motion detector lights. And that "you'd be hard pressed to find better ones".

[164] Homeland credited the Wolfs for the types of electrical switches they received. There was no smoke detector in the garage. It was not required by *Code*, nor was it included in the Contract. All other smoke detectors were working.

[165] There was no charge to the Wolfs for a 220 volt outlet in the kitchen, as it wasn't installed.

[166] Mr. Slade disputed Mr. Zeigler's contention that rust on the metal cabinets surrounding baseboard heaters was a deficiency. He reiterated that the environment is very humid and that rust will occur naturally. There was considerable discussion between Mr. Dumke and Mr. Slade in the course of the latter's cross-examination surrounding the so-called "Deal invoice". According to Mr. Slade, the Deal invoice was between Mr. Deal and the Wolfs. It had nothing to do with him.

[167] When pressed, however, it appeared that Mr. Slade had included the Deal invoice with Homeland's claim.

[168] Mr. Dumke's reference with respect to his questioning Mr. Slade was to Exhibit 7, Tab 6. That was Homeland's final invoice in the sum of \$16,131.31 referred to above. The attached summary made reference to the so-called "Deal invoice" in the sum of \$2,661.95 (Item 8.)

[169] Mr. Slade's own testimony in response to Mr. Dumke's questioning on cross-examination served to reduce Homeland's claim from the \$16,131.31 referred to above to \$13,070.17 (plus interest).

[170] Though Mr. Slade agreed with Mr. Dumke on cross-examination that the contract referred to written change orders, he insisted that there were written exchanges by way of e-mail messages with respect to several of the changes referred to earlier. When asked why some changes were the subject of change order, others the subject of e-mail exchange and others only the subject of verbal exchange, Mr. Slade really couldn't say.

[171] Mr. Slade testified that in some instances, when the Wolfs were on site, they made requests for changes. For whatever reason, he did not think he "had to confirm it". An

example is the pantry "system" as opposed to four pantry shelves which would have been installed as part of the fixed price.

[172] Much of Mr. Dumke's cross-examination of Mr. Slade related to the on-going difficulty with respect to tiling and hardwood flooring. There is little else which can be written about those issues. Mr. Slade conceded on behalf of Homeland that those installations were sub-standard. That was the reason why Homeland has withheld its payment to Floors Plus.

ISSUES:

- (i) Did Homeland breach its contract with the Wolfs?
- (ii) Did Floors Plus breach its contract with Homeland (and maybe with the Wolfs)?
- (iii) Are the Wolfs indebted to Homeland for all or any part of the sums claimed by Homeland from them?
- (iv) If not wholly indebted to Homeland, for what sums are the Wolfs indebted to Homeland?
- (v) Is Homeland indebted to Floors Plus for all or any part of the sums claimed by Floors Plus from Homeland?
- (vi) If not wholly indebted to Floors Plus, for what sums are Homeland indebted to Floors Plus?
- (vii) On any of the sums found due and owing by either the Wolfs (to Homeland) or by Homeland (to Floors Plus) is interest due and payable and if so, at what rate?

DECISION:

[173] Arriving at the resolution in this case, has not been an easy task.

[174] Though it is appropriate for citizens to have a general, easily-accessible and informal forum for the resolution of their civil disputes, the Small Claims Court of Nova Scotia is not ideally suited to this type of proceeding.

[175] First, evidence was heard over a lengthy period, bearing in mind that most Small Claims Court of Nova Scotia hearings. They tend to last for between a few minutes to a few hours.

[176] Second, there were some language difficulties which lead to a bit of confusion over the conclusions to be properly ascribed to the facts. That is meant as an observation only. It does not ascribe to Mrs. Wolf or to Ms. Havlovic-Lafarie any criticisms.

[177] Third, some witnesses, namely, Mrs. Wolf and Mr. Slade, contradicted not only each other but themselves. In Mrs. Wolf's case, language may have been the predominant factor. In Mr. Slade's case, he did not give the impression, especially in the course of Mr. MacDonald's careful direct examination of him, that he was fully attuned to the numerous issues which arose in the course of the project. Even with the passage of time, I would have considered in advance of his testimony that Mr. Slade would have had better recollections than he presented.

[178] Fourth, devoid as it is of a verbatim record of the proceedings, the Small Claims Court of Nova Scotia does not lend itself ideally to decision makers who may wish to reconsider evidence in real time, reflect on it and then render comprehensive decisions with respect to it. While an adjudicator's notes might be an alternative, it is far from a perfect one. One example only was my late resort to counsel and Mr. Chisholm for clarification of an important evidentiary point surrounding the inclusion or not of Floors Plus's claim as a part of Homeland's claim.

[179] Finally, the Supreme Court of Nova Scotia has already commented, somewhat negatively, on the appropriateness of the Small Claims Court of Nova Scotia as a forum for the resolution of complex claims. The underpinnings of that criticism, constructive though it was, were that civil claims at the outer edges of the Small Claims Court of Nova Scotia's monetary limit represent significant financial resources to many parties. As such, the desire expressed by the Supreme Court of Nova Scotia was for a greater, as opposed to a lesser, degree of formality in the Small Claims Court of Nova Scotia.

[180] It is within the confines of all of the above, bearing in mind the Supreme Court of Nova Scotia's criticisms, that I have attempted to fashion this decision.

[181] Floors Plus's claim has been referred to above and was highlighted in Mr. Chisholm's post-hearing written submission. That claim is in the sum of \$4,421.91. On behalf of Floors Plus, Mr. Chisholm has also claimed pre-judgment interest, calculated at the

contractual rate of 2% per month, commencing on August 25, 2005 30 days after the Floors Plus invoice for the work in question was submitted for payment to Homeland.

[182] Homeland's claim, as represented by its September 15, 2005, invoice totalled \$16,131.31. As Mr. Dumke accurately pointed out in his cross-examination of Mr. Slade, and as Mr. MacDonald has since conceded, the so-called "Deal invoice" in the sum of \$2,661.95 was mistakenly listed as an extra to the Contract. As that invoice had actually been paid by the Wolfs, directly, it should have appeared in Homeland's reconciliation as a credit. In the result, Homeland's claim of \$16,131.31 has been reduced to \$13,070.07. Additionally, Homeland claimed contractual interest of 18% per annum commencing on September 15, 2005.

[183] Clause 5 of the Contract contains the "terms of payment" as between Homeland and the Wolfs. It refers to applications for payment to be "submitted on or about the 1st and 15th of each month for percentage completed ...". Thereafter, the terms of payment appear to be "net seven days". There was additional allowance for inspection by or on behalf of the Wolfs with respect to the quantity of work claimed by Homeland to have been completed.

[184] Clause 11 of the Contract contains certain "default by purchaser" provisions. They relate mainly to Homeland's right to collect interest on past due payments – at the rate of 18% per annum – for works which had been completed. The Clause also contained a curious provision which appears to have permitted the Wolfs to withhold payments for work completed so long as there were questions or concerns surrounding its quality.

[185] The proper interpretation of that Clause presented me with some quandary. The Wolfs were clearly of the view that some of the work they had received on their house from Homeland had been of an inferior quality. They were supported in this view by Mr. Zeigler, whose expert's report was critical of some of the aspects of Homeland's work and suggested that upwards of \$25,000 may have to be expended by the Wolfs on various forms of rectification.

[186] There were also provisions in the Clause which also permitted the parties a short "cooling-off period" of two weeks during which the parties could attempt to work through their respective positions regarding both the quality (or lack thereof) of Homeland's work and the Wolfs' obligation to pay for it.

[187] On a plain reading of the Clause, interest did not accrue to an overdue payment at least until such time as the parties had had an opportunity to attempt to work through their differences. Less clear to me is whether the Clause can be so construed as providing

Homeland with an unfettered right to collect interest at 18% per annum in a manner consistent with Mr. MacDonald's argument on its behalf.

[188] Weighing in on my lack of clarity as noted above is the basic interpretive doctrine that an ambiguous contractual provision will always be construed against its drafter. Though the Contract may not have been one of "adhesion", it was not one which truly negotiated by the parties. Instead, Homeland's standard form received some forms of "tweaking" by the Wolfs, largely at the instance of Mr. Chapman. There was no evidence before me that Clause 11 received any such tweaking.

[189] The Wolfs' claim has been set out comprehensively in Mr. Dumke's post-hearing brief. The Wolfs put the sum due pursuant to the provisions of the original Contract at \$324,500 (Homeland's fixed price of \$334,500 less the \$10,000 which Homeland had allowed for the Wolfs' kitchen cabinetry).

[190] To that sum, the Wolfs added \$2,652 for what they conceded as extra to the Contract and deducted \$3,172.79 for credits to which they say they were entitled. They have also paid \$319,900 "on account". That leaves what they say is a total outstanding to Homeland of \$4,079.21.

[191] The Wolfs have also assessed extensively their entitlement to damages by way of counter-claim (against Homeland) relative to their deficiency costs. The Wolfs have put these costs at \$32,540. Offset by the \$4,079.21 referred to above, the Wolfs say that they are entitled to \$28,460.79.

[192] Additionally, the Wolfs have claimed \$3,341.51. That sum is said by the Wolfs to be in part for extra work or work not completed by Homeland, their increased travel costs and their alternative accommodations costs while they were in Nova Scotia for periods when the house was not suitable for habitation.

[193] Inclusive of \$3,341.51, the Wolfs claim totals \$31,802.29. On that, the Wolfs said that they are entitled to pre-judgment interest at the same 18% per annum claimed by Homeland.

[194] Perhaps noteworthy is that Homeland has not counter-claimed against Floors Plus for any of the remedial costs relative to Floors Plus' work as claimed by the Wolfs. Additionally, there does not appear to have been any attempt by Homeland to take direct action

against Floors Plus in an effort to lay off, as on a third party, the Wolfs' claims for damages.

[195] One assumes that Homeland had its reasons for not following up on those types of claims and counter-claims. Nevertheless, Homeland's decision does tend to leave the circle broken with respect to expected pleadings.

[196] Though all of Mr. MacDonald, Mr. Dumke and Mr. Chisholm have argued that the matter is one of fact; that is not completely correct. The matter is one of contract; namely breach (or a series of breaches) of contract.

[197] In a breach (or breaches) of contract, damages are assumed so long as they are within the reasonable contemplation of the parties. Moreover, such damages are limited to those which are required to put the party who (or which) has suffered the breach (or breaches) of contract, into the position that he, she or it would have been in had the contract not been breached. Accordingly, this decision is dependent upon the interplay between all of the parties and how each set of claims and the Wolfs' counter-claim intersect with each other.

[198] To deal with the larger points first, there is no question that the most significant matters identified by the Wolfs, both in their defence to Homeland's claim and in their counter-claim against Homeland, are the deficiencies in their tiling work and in their hardwood flooring. In fact, if one was to again review Mr. Ziegler's report (Exhibit 8, July 31, 2008), he puts the total to rectify the deficiencies to the Wolfs' tiling at between \$20,000 and \$25,000. Though he does not specifically set out a sum in his report with respect to the rectification of obvious deficiencies in the installation of the Wolf's hardwood flooring, he did refer in his testimony to the installation of an expansion joint for the undercutting of adjacent drywall at a cost of between \$500 and \$1,000.

[199] The Wolfs' claim for the rectification of deficiencies of \$32,540 referred to above includes all of the items set out as a schedule to Mr. Ziegler's report. In their adoption of that figure, there appears to have been no recognition by the Wolfs of the fact that the rectification of the deficiencies to their tiling work might cost them either the lower range of Mr. Ziegler's estimate or even less than that.

[200] There is little question on the totality of the evidence that but for the tiling and hardwood flooring deficiencies, the remaining deficient items would likely have been worked out to everyone's satisfaction. That said, the tiling undertaken for the Wolfs by Floors Plus was particularly poor. Even Kevin Charlton, who was called as an expert witness by Floors Plus,

decried the total lack of quality and attention to detail which had been paid by his predecessor installer. Noteworthy, at least to me, was Mr. Charlton's testimony that although he effected some rectifications to some tiling deficiencies, the Floors Plus tiling effort overall was much less than his personal expected standard.

[201] An expert installer's personal standard being whatever it was, it seems to me that the Wolfs should not reasonably be expected to demand much (if any) less. That is not to say that I agree with Mr. Ziegler's estimations of tile deficiency rectification at a range of \$20,000 to \$25,000. In fact, I am moved on the totality of the evidence to the conclusion that the Wolfs will merely learn to live with their installations the way they are (hardwood flooring excepted) and will not undertake any wholesale tile replacement.

[202] Bearing firmly in mind particularly Mr. Charlton's testimony, Floors Plus' claims in this matter are not tenable. They are accordingly dismissed. Their dismissal negates the need to consider their entitlement to pre-judgment interest, be it at 20% per annum, or any other rate.

[203] Homeland's claim against the Wolfs' is also untenable, though not totally so. Though for reasons which will be set out below, I largely reject the Wolfs' counter-claims, there was a sufficient lapse to the attention to detail on the part of Homeland to warrant a reduction in its claims, even from the \$13,070.07 referred to above.

[204] First, Homeland's "summary" accompanying its invoice dated September 15, 2005 (Tab 6, Exhibit 7, January 31, 2008) reveals that the \$13,070.07 includes the \$4,421.91 claimed by Floors Plus. As that sum has been disallowed because of Floors Plus' deficiencies in the installation of the Wolfs' hardwood flooring and the remaining deficiencies in the installation of the Wolfs' tiling, Homeland's claim is reduced to \$8,648.16. Additionally, Homeland has not justified, in the course of its evidence, several of its claims for extras. Referring again to the above-noted "summary", Homeland's claims for items 9 (Homeland Builders) and 1 (water) are disallowed. That further reduces Homeland's claim to \$7,802.84.

[205] Although I have not ignored the Contract's Clause 9 or the evidence and arguments lead by the Wolfs with respect to it, I cannot agree that Homeland is to be denied its "extras" simply because the Clause 9 formula was not followed.

[206] Instead, there is ample evidence from both Homeland and the Wolfs, to permit me to conclude that in many (if not most) instances, the formula for extras set out in the

Contract's Clause 9, was followed "only in the breach". In the result, it would be unfair to Homeland – and would represent an unjustifiable enrichment to the Wolfs – if the former's claims to extra charges outside of the Clause 9 formula were denied.

[207] The preponderance of evidence was, and I so find, that there was a sufficient level of communication written and otherwise between the Wolfs and Homeland with respect to individual extra items that there was no mutual intention to abide by the Contract's Clause 9 formula. To the extent that claims for extras were discussed and confirmed by e-mail messages, that is sufficient to found the justification for most of Homeland's claims for "extras". In fact, having used and relied upon e-mail and other forms of communication to discuss and resolve questions surrounding charges for "extras", the Wolfs would be stopped from now asserting whatever rights they would have had arising out of a plain reading of Clause 9 of the Contract.

[208] Further reductions from Homeland's claim are found within the deficiency listings prepared by both Mr. Ziegler and Messrs. Chapman and Schweiger.

[209] Though there was insufficient testimony led before me to permit me a close dissection of which of the Wolfs' claimed deficiencies were legitimate and which were not, some things simply stood out.

[210] Mr. Slade attempted to explain away some of the Wolf's claimed deficiencies in the course of his direct examination. I do not accept some of those explanations. The Wolfs' house was, by any measure, expensive. It was located in an area of other immodest houses. It was meant by the Wolfs as a vacation home, not a cottage. It had many relatively expensive features such as extensive tiling and the use of hardwood flooring. Beyond all of that, there was ample evidence that the Wolfs were seeking – and Homeland was offering – construction of superior quality.

[211] That said, some of the items claimed as "deficiencies" in the Ziegler and Chapman/Schweiger listings were much more in the way of maintenance. Houses, even new ones, require maintenance. That is especially so with respect to houses which are not constantly inhabited and those which are subject to harsher environments, as the Wolfs' house would be given its proximity to the ocean.

[212] In the circumstances, I am prepared to permit the Wolfs a credit of \$60 for the rusted storage area door hinges. Specified or not as stainless steel, the Wolfs were entitled to

expect that these hinges would be more serviceable than they ultimately were. That choice was Homeland's, not the Wolfs. Accordingly, it is left to Homeland to make good.

[213] I make a similar comment about Homeland's construction of the Wolfs' water pump support. I agree with Mr. Ziegler that such construction out of MDF would be an invitation to lack of serviceability. As I am nevertheless sceptical about Mr. Ziegler's assessment of remedial costs, I will limit that to \$250.

[214] With much having been said about the Wolfs' hardwood flooring already, little else needs to be added. Mr. Ziegler noted air holes requiring filling, sanding and refinishing. He placed the cost at \$200. That appears to me to be reasonable.

[215] Though not addressed by Mr. Ziegler, Mrs. Wolf testified to a number of "nail pops" in the drywall. These are common in new construction and are usually repaired by the contractor as either a deficiency item or a warranty item.

[216] As these "nail pops" appear sporadically and often require the services of the appropriate tradespeople only for short periods of time, they can be expensive to repair. Additionally, their repairs sometimes require additional priming and painting. In total, I will allow the Wolfs \$500 for this item.

[217] The rectification of these four deficiencies should cost the Wolfs no more than \$1,010. As a credit against the \$7,802.84 referred to above, that will further serve to reduce Homeland's claim to \$6,792.84.

[218] As for the remainder of the Wolfs' counter-claim, it is dismissed. Subject, of course, to my comments and finding above, there was insufficient evidence led before me to justify many of the Wolfs' counter-claims. Though I appreciate their earnest conclusions and convictions that they received much less than they had bargained for, that was simply not the case.

[219] Instead, their circumstances were akin to those of many who are engaged in new residential construction. It is a territory which comes with some uncertainty, some quandary, some aggravation and some additional expense. That does not necessarily mean that all owners are unreasonable and all contractors are incompetent. It is simply a reflection of the fact that some owners' expectations are excessive and some contractors' attention to detail is lacking. That is really all that happened in this case.

[220] I have read, with great interest, Mr. Dumke's excellent post-hearing brief on behalf of the Wolfs.

[221] I naturally accept the Supreme Court of Nova Scotia's statement of the law (per: Mr. Justice Warner) in *J & P Reid Developments Limited v. Ranch Tree Nursery & Landscaping Limited* (2006), 247 N.S.R. (2d) 131. That case stands for the age-old principle that if a contract requires written orders prior to an owner becoming subject to a contractor's charges for extras, the contract is clear and unambiguous and where there are no such written orders, the owner is not obligated to pay for any extra work undertaken by the contractor.

[222] That set of circumstances did not, of course, exist in the instant case. Instead, there was the Contract's clear and unambiguous Clause 9. It was not followed, as already noted, other than in the breach. There were other methods by which the Wolfs and Homeland communicated with each other on the approvals of extras. Accordingly, it would be unfair to permit the Wolfs to now resile from those other methods in favour of the pure Clause 9 provisions. To do so would permit the Wolfs to avoid any estoppels – of the type referred to above – which they had at least assisted in establishing.

[223] The more difficult aspect of this decision relates to the dismissal of those portions of the Wolfs' counterclaim which relate to the potential future wholesale replacement of their tiling. While I do not deny the breadth of the so-called "rule" from *Hadley v. Baxendale* [1854], 9 Ex. Ch. 341 – that the innocent victims of a breach of contract should receive, to whatever extent possible, sufficient damages so as to place them in the position they would have been in but for the breach – new principles of foreseeability have been recently superimposed on that rule so as to denude it of some of its historical significance. As was held recently by the House of Lords (per: Lord Hoffmann) in *Transfield Shipping Inc. v. Mercator Shipping Inc.*, [2008] UKHL 48 (at paras. 15-16):

... one must first decide whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have accepted responsibility. In the South Australia case the question was whether a valuer, who had (in breach of an implied term to exercise reasonable care and skill) negligently advised his client bank that property which it proposed to take as security for a loan was worth a good deal more than its actual market value, should be liable not only for losses attributable to the deficient security but also for further losses attributable to a fall in the property market. The House decided that he should not be liable for this kind of loss:

"In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking." (p 212)

What is true of an implied contractual duty (to take reasonable care in the valuation) is equally true of an express contractual duty (to redeliver the ship on the appointed day). In both cases, the consequences for which the contracting party will be liable are those which 'the law regards as best giving effect to the express obligations assumed' and '[not] extending them so as to impose on the [contracting party] a liability greater than he could reasonably have thought he was undertaking'.

[224] In the circumstances of this unique case, the Wolfs largely held control over the effectiveness of any means available to Floors Plus (and therefore to Homeland) to rectify deficiencies to the tiling work. I make that point for two reasons. First, the Wolfs were engaged directly with Floors Plus (and with the Floors Plus supplier, Cera Tech) for much of the implementation of the work defined by the Contract relating to tiling. Second, it was the Wolfs who made the determination that they would reduce their exposure to tile costs by selecting from Cera Tech (or from Floors Plus) tiles of a discontinued line, which were only available in limited quantities and which could not be supplemented by additional stock should the need arise.

[225] I find that it would not be reasonable for me to conclude on that basis that an implied term of the Contract (and of the contract between Homeland and Floors Plus) would be the requirement for the wholesale replacement of tiles if deficiencies demonstrated that only some tiling work was subject to re-do and replacement.

[226] I arrive at the same conclusion for another reason: as it is common in such circumstances for owners to specify the delivery of certain surplus or additional building

materials so as to be able to effect repairs and replacements efficiently as time goes on. In fact, in many construction contracts, owners oftentimes stipulate to particular proportional percentages of specific building materials to be kept in reserve post completion. This is especially so of building materials which are subject to "lots" or "runs" which may vary from one "lot" or "run" to another.

[227] Having had the effective benefit of the denial of the Floors Plus claim, the Wolfs have been afforded sufficient compensation – almost \$4,500.00 – to address reasonable additional repairs to their tiling work in the future as well as any diminution in value of their property as a result of any non-rectified deficiencies in that tiling work which remain over time.

[228] In summary, Floors Plus' claim against Homeland is denied. Homeland's claim against the Wolfs is allowed, but only to the extent of \$6,792.84. The Wolfs' counter-claim against Homeland is effectively denied.

[229] In further summary, the Wolfs shall pay to Homeland to sum of \$6,792.84. I have referred to Homeland's claim for interest above. Both the claim for interest at 18% per annum and the duration of the period for which the interest was claimed are denied. Instead, the Wolfs shall pay to Homeland interest on the \$6,972.84 referred to above at the "commercial rate" of 5% per annum for a period of two (2) years, or \$696.27.

[230] Given the respective parties' partial successes and partial failures in this claim, costs should probably be denied as well. That said, I am prepared to receive the parties' written submissions as to costs should they wish to make them.

EPILOGUE:

[231] I am greatly indebted to Messrs. MacDonald, Dumke and Chisholm for the thoroughness of their preparations and the excellence of their presentations. I would be remiss if I also failed to mention their courtesy, not only to me, but to each other as well.

[232] Though the case was long and difficult, it was made the more palatable, and therefore more efficient, by the attitudes which Messrs. MacDonald, Dumke and Chisholm displayed.

[233] I am obliged to all of them.

DATED at Halifax, Nova Scotia, this 19th day of January, 2009.

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

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