Claim No: SCBW 449070

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
Cite as: Conrad v. Bernd's Ceramic Tile, 2016 NSSM 37

BETWEEN:

GLENN LEWIS CONRAD and JUDITH AILEEN CONRAD
Claimants

- and -

BERND KREBES d.b.a. Bernd's Ceramic Tile
Defendant

---

## REASONS FOR DECISION

---

**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Bridgewater, Nova Scotia on May 20, 2016

Decision rendered on July 6, 2016

**APPEARANCES**

For the Claimants self-represented

For the Defendant Rubin Dexter,
Counsel

**BY THE COURT**:

## Introduction

[1] This claim seeks the maximum amount of damages available in this court, $25,000.00, for alleged improper installation of a porcelain tile floor by the Defendant in the Claimants' home in Bridgewater in about September of 2010. The floor failed very soon after it was installed, in the sense that there was progressively worse grout cracking and loose tiles. Many attempts at remedying the situation were made in the ensuing years, with no success. The Claimants want to remove this floor and have it replaced, at considerable cost.

[2] The Claimants' home was undergoing a major renovation at the time, of which the tile floor was just a small part. The entire renovation was in the range of $150,000.00, while the tile work originally cost a fraction of that. The precise amount is difficult to discern from the documents, as the Defendant did other work which is not brought into question.

[3] Many of the facts are not in serious dispute. The following narrative of facts is borrowed substantially, at times quoted directly, from the Claimants' written submission to the Court.

## The Facts

[4] The home in question was some 23 years old when the Claimants bought it. It was partly gutted, with a view to opening up the kitchen area. The plan was to use ceramic tile in the kitchen and a few other areas.

[5] In August 2010 the Defendant was contracted to install approximately 715 square feet of porcelain tile flooring which was completed late September 2010. The tile flooring area included from the half bath and laundry room adjacent to the attached garage door entrance extending through the kitchen dining area through to the centre hallway to the front door entrance as well as the floors in the main and en-suite bathrooms.

[6] The Defendant was given a clean palate upon which to work - i.e. existing kitchen cabinets and counters were removed, as were all bathroom fixtures and vanities plus all wall baseboards.

[7] The Claimants specifically instructed the carpentry contractor, also working on site at the same time, and the Defendant to work together to ensure the sub-flooring was properly screwed off [i.e. tightly screwed into the floor joists] prior to the Defendant starting their work as the new counters, pantries and vanities were to be installed over the newly laid tile flooring. The Claimants say, which I do not doubt, that they wanted no problems due to improper floor preparation.

[8] The carpenter appears to have done as instructed, namely screwing the sub-floor to the joists.

[9] The Claimants were informed by the Defendant that in order to have an even transition between the floor tiles and adjacent hardwood floors being installed by the carpenter, he recommended using an underlayment material

called DITRA-XL, eliminating the need for a second layer of plywood sub-floor. The Claimants agreed.

[10] The Claimants expected that the tiling work would be completed, along with whatever additional work the Defendant was contracted to perform, in a professional manner according to industry standards and manufacturers installation specifications.

[11] All internal renovations were completed before the Claimants moved into their home on October 2, 2010.

[12] Very shortly thereafter, the Claimants noticed a couple of loose tiles in the laundry room as well as cracks in the grout lines between the tiles. They notified the Defendant who came and replaced the loose tiles with a couple of spare tiles left over from the original installation. The Defendant had no plausible explanation as to the reason for the loose tiles; but reassured the Claimants that if there were any further problems they would return to remedy them.

[13] During 2012 and 2013 the Defendant came at the Claimants' request to observe the continuing problem of loose tiles and cracked grout. On each occasion they replaced the loose tiles and cracked grout using up the remainder of spare tiles. There was some discussion about insurance, which came to naught.

[14] At this time the Claimants felt they needed to clearly demonstrate to the Defendant that the problem was not isolated to a few loose tiles, and so started to place coloured sticky dots on the floor every time they observed or felt a loose

tile and adjacent cracked grout. By mid-2014 they had several dozen dots on the floor and felt they could demonstrate to the Defendant that they had a very significant problem which required a comprehensive remedy.

[15] The Defendant attended again, observed the continuing problem as indicated by the coloured dots, and acknowledged there was a serious problem.

[16] The Defendant (at that time) placed the likely blame on the mortar, speculating that the manufacturer might have changed the formula to produce a mortar more fitting to the trend toward the use of larger tiles, preventing possible sagging. The Defendant suggested that one unfortunate result was that the mortar might not possess the same adhering qualities of the previous formula. The Defendant stated that they had a similar problem with another installation and were able to lift the tiles and relay them. The Claimants were sceptical that this would work, for a variety of reasons, including a fear that the tiles would break and the exact tiles could not be sourced.

[17] The Claimants instead requested that the tiles be removed and replaced with new tiles. The Defendant asserted that it would be too difficult to replace the tiles because the counters, island, pantries and vanities were installed over the tiles and that it would be virtually impossible to remove the tiles without removing the cupboards, counters, island, pantries and vanities. The Defendant assured the Claimants that they could fix the problem without involving all that work and expense. The Claimants felt they had no choice but to allow the Defendant to try this solution.

[18] The Claimants insisted that - to confirm the root cause of the loose tiles and cracked grout - the Defendant bring in their supplier of the mortar and DITRA-XL underlay to inspect the situation.

[19] Samples were taken. There is no evidence of anything wrong with the mortar used.

[20] In late November 2014 on a single day the Defendant’s workers were able to remove two thirds of the tile in the laundry and kitchen area and relay the same tiles - returning the following day to install the grout. It later became evident that several original tiles had been broken, which were replaced with off-colour replacement tiles under the laundry set and refrigerator. [It is well known that original die lots of many products can be hard to match.] The Defendant did not touch the main and en-suite bathrooms.

[21] The Claimants say that there was grout on the tiles that needed cleaning, and they asked the Defendant’s advice on how to clean it. There was a conflict in the evidence as to whether the grout could be easily removed. The Claimants say that the entire area the Defendant had worked on was, and still is, smeared with dirty, blackish, blotches of epoxy grout.

[22] The Claimants also say that there remain several loose tiles the Defendant had allegedly replaced, and three tiles conspicuously in front of the garden doors that had cracked corners resulting from the Defendant's unsuccessful attempt to remove them.

[23] The Claimants continued to complain about the dirty tiles, but by then the relationship appears to have broken down.

[24] The Claimants contacted Mr. Wout de Koe of Elegant Flooring Inc,, as to the result of the lab analysis of the tiles and underlying DITRA-XL removed from the floors. The Claimants learned that reports had been sent to the Defendant, and also that the Defendant had been offered free DITRA-XL, grout, and mortar, and tiles at Elegant Flooring's landed cost to be used in the repair of the floor.

[25] It appears that the Defendant had already picked up the free DITRA-XL, but used it on an unrelated project.

[26] The report that the manufacturer supplied was admitted into evidence, but is - upon objection by counsel for the Defendant - being given no weight by the court because the author of the report is not identified and no one was present in court to support it.

[27] Between then and now, efforts to resolve the problem outside of court were unsuccessful. The Claimants have been cooperative and have allowed the Defendant and his advisors access to experts and advisors, to allow them to inspect and arrive at their opinions.

[28] The Claimants called several witnesses to support their claim that the tiling was improperly installed, and to establish the measure of damages.

[29] Scott Goodfellow is a sales representative for Taylor Flooring in Bridgewater. He produced an estimate to remove the offending flooring and

replace it with a similar product, at a total cost of $16,722.00. This quote does not include the cost to remove and replace cabinetry, which would be necessary for a proper job. All of that extra work would likely inflate the total price to at or above the $25,000 limit of this court.

[30] Frank Marcantonio is the Atlantic Territory Manager for Schluter, the manufacturer of the DITRA product that was used between the sub-floor and the tile. He showed samples of the product, and screened an industry video showing the proper way to install the product.

[31] He also had inspected the Claimant's home and took photos and samples. His conclusion was that at least some of the problem was caused by the Defendant having used some mortar as a levelling compound - over the DITRA - instead of having done all of the floor levelling in advance. He also noted that on some of the removed tiles, the dry mortar showed a swirling pattern indicating that it had not been applied correctly, with the result that the tiles did not set into the mortar and adhere properly. The fact that the tiles came up so easily, in some places, showed that they were not adhering properly.

[32] Counsel for the Defendant cross-examined Mr. Marcantonio, and revealed the defence theory that until then I had not appreciated. He asked Mr. Marcantonio whether or not he had inspected the floor joists in the basement. He admitted that if the floor is unstable, such as by having inadequate bridging between the joists, the floor on top may show cracks in the tiles and in the grout - i.e. the type of damage seen here.

[33] Mr. Wout De Koe, the President of Elegant Flooring, supported Mr. Marcantonio's hypothesis that the tiles had not been properly set into the mortar,

and thus became loose.  He concurred that an inadequately braced sub-floor will move too much and can create problems with a tile floor above, but that is the precise problem that using DITRA should address.

[34] The Defendant himself testified, which I will get to shortly, but the principal witness for the defence was Iain Cocks, a carpenter who has been accepted as an expert witness in other court cases.  His theory, fleshed out in a written report, is the following:

> It is my opinion, based on my inspection, the problem of the loose tiles is not with the tile installation. The loose tiles and grout are the result of the structural instability of the floor assembly supporting the kitchen floor. The floor assembly supporting the kitchen was never completed. The floor joists, which spanned 13 foot 8 inches were installed on l6 inch centers, and the plywood sub-floor was nailed on top of them, but that was all that was done. No bridging was ever installed between the floor joists at the middle of the span, as required by the National Building Code of Canada, (which sets a minimum standard.) As the Span Tables in Table A-l of the Building Code indicate, (see attached pages) for 2x10 inch floor joists (38 mm X 235 mm) with a joist spacing of 16 inches (400 mm) and a span length of 13 feet 8 inches ( 4.17 meters ) bridging must be installed between each floor joist at the mid point of the joist span as described in Division B, section 9.23.9.5 paragraph 2 of the National Building Code (see attached pages).
>
> Because no bridging was ever installed between each floor joist, the required structural integrity of the floor assembly was never achieved. Because bridging was not installed between the floor joists, the floor system lacks lateral support, ie; because the floor joists are not properly braced they act independently and not as a unit. Bridging is used to help distribute the load on the floor joists. Without it the floor joists are allowed to twist and rack and move up and down, causing the floor to move up and down under foot. This structural problem is exacerbated when the floor has a live load added to it as in this case, a complete set of kitchen cabinets with a large center island installed on top of the tile floor. The floor will move up and down as loads are applied to it. causing the tile bed to break, and the floor tiles to become loose and the grout crack. This will be an on going structural problem until the floor system is properly completed, as required by the National Building Code of Canada.

[35] Mr. Krebes testified on his own behalf. He was trained in Germany and has been a tile installer for about 35 years. He is convinced that he properly installed the Claimants' floor. He was familiar with DITRA, although this was the first time he had used DITRA-XL (a slightly thicker version).

[36] He testified that he looked at the floor joists before starting the job, and satisfied himself that the joists were no further apart than 16". He was concerned that the plywood should be properly screwed down to the joists before he started (which it was.) He did not consider himself to be qualified to assess the adequacy of floor joists, and said he relied on the assurance of the Claimant (Mr. Conrad) that the house was solidly built.

[37] He admitted that he had done a little bit of levelling with the mortar, but did not believe that this would have caused the problem experienced.

**The questions I have to answer**

[38] I have to determine, on the evidence, what is the most probable cause of the failure of this floor. If I accept the defence position that there was nothing wrong with the Defendant's tiling work, I have to go on and consider whether the Defendant ought to have done more to satisfy himself that the floor joists were adequately braced to support the load being placed upon them.

[39] The evidence of Mr. Cocks is difficult to ignore, but (in a way) hard to accept as a full explanation. As he explained, the absence of bridging or other methods to tie the joists together would have allowed the floor structure to move in different directions in a wave like motion, as opposed to only moving as a unit. Had it only moved as a unit, there would be no forces causing the tiles to come

loose or the grout joints to crack. The whole tiled floor would have moved as a unit.

[40] The DITRA (whether XL or not) is designed to absorb a certain amount of movement, which it may be doing here, though to an insufficient extent to avoid cracking entirely.

[41] I accept that there is some evidence of the mortar application having been less than optimum. It is logical that this might be visible in the tiles that were loosest, and came up first. But it is difficult for me to believe that the Defendant, as experienced as he is, would have ruined an entire tile floor with inadequate mortaring. It is possible that his unfamiliarity with DITRA-XL caused him to pay less attention to the specifications associated with that product, but I would still expect that his long experience with tiling in general would have caused him to place sufficient mortar and apply enough pressure to get adequate, if not maximum, adhesion. This causes me to think that something else must be going on.

[42] The tiled area is large. The tiles are large and heavy. The National Building Code specifications are there for a reason. Probably in many homes, with other types of flooring (such as linoleum, carpet or even wood) the lack of bridging would never be noticed. Such a floor might squeak here and there, or might feel like it is moving slightly under certain conditions, but the finish flooring would not fail.

[43] It is quite plausible that this heavy tile flooring was precisely the wrong flooring material to survive the instability of a large span without bridging of the joists.

[44] As with many “perfect storms” the effects can be magnified by other problems. Here, there is evidence that the Defendant did not apply mortar to at least some of the tiles in the recommended pattern for installation over DITRA-XL, a product with which he was inexperienced, at the time. He used a swirling motion rather than the straight line motion that the manufacturer recommended. In the tiles that came up, and which were available to be inspected, there is evidence of inadequate amounts of mortar and a lack of proper “seating.” I am satisfied that some of the difficulty with this floor stems from improper workmanship. All of that made the underlying instability of the floor a greater problem than it might have been.

[45] There has also been some damage done by the Defendant during his repair efforts. I accept that the Defendant tried, at least for the first few years, to rectify the problem. No one seemed to know why it was occurring. The black splotches on the tile, which the Claimants still complain about, appear to have been the result of the Defendant’s use of some other type of mortar or grout during the repair efforts. I am not satisfied, however, that this problem cannot be resolved in some non-destructive fashion, such as by cleaning with some form of solvent. I believe that the Claimants’ frustration is such, at this point, that they are hypersensitive to any problem with the floor, however minor.

**Does the Defendant bear responsibility for the subfloor?**

[46] The Defendant testified that he looked at the sub-floor and was at least superficially satisfied that it was adequate for the tiles it would support. He understood that thoroughly screwing down the plywood to the joists was an

essential step in creating a stable surface upon which to tile. But he was not an expert in framing carpentry, and did not claim to be one.

[47] A number of other individuals looking into the floor issue also looked at the floor from the underside, and did not detect a problem. But none of them was expert in framing carpentry either.

[48] It is probably no coincidence that the "gutting" of areas of the main level occurred, and which might have created a much larger area for a flooring system that had ever been contemplated in the original design.

[49] It is fortuitous that the floor joists were even visible at the time the floor was installed. In many cases, with projects on upper floors or in houses with finished basements, it would be pure guesswork as to the condition of the floor joists, because they would be hidden by the drywall ceiling of the floor below.

[50] In an ideal world, every expert floor installer would have the expertise to assess the sub-floor and judge whether it fully complied with the Building Code. But in the actual world we live in, this is not the case. The Defendant did understand that the plywood sub-floor had to be properly fastened to the joists, but it does not appear that he turned his mind to whether the joists themselves were properly braced. Perhaps he was fooled by the small amount of strapping that was present, but more likely he simply assumed that the construction met Code. I expect that tilers such as the Defendant rarely experience problems, because most homes will not have this particular problem, at least not to the same extent.

[51] I do not believe there is a sufficient evidentiary base for me to hold the Defendant responsible for failing to detect the deficiency in the bracing or bridging of the floor joists.

**Is there any liability?**

[52] As I have noted, all of the evidence points to movement of the floor. There is evidence which I accept that at least some of the movement occurred because the floor joists were not properly bridged or braced. But there is also evidence of poor mortaring technique (swirls) and inadequate seating of the tiles into the mortar, which could include a problem with inadequate amount of mortar being used.

[53] Sections 3, 4 and 5 of the Nova Scotia *Contributory Negligence Act*. provide that:

> 3 (1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> 4 Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.
>
> 5 In every action, the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

[54] This statute, though obviously applicable to torts, and in particular to negligence, has been held to apply to actions for breach of contract as well: *MacDonald v. Wedderburn*, 1999 CanLII 951 (NSSC).

[55] The question of whether or not any degree of liability placed upon a Defendant is sufficient to render that Defendant fully liable to the Claimant - i.e. whether liability is joint or only several - does not appear to have been answered directly. In the case of tortfeasors, the recent case decided by the Nova Scotia Supreme Court in *Perrin v. Blake*, 2016 NSSC 88 found that where the Plaintiff is at least partially liable, the responsibility of Defendants is several:

> [45] Based on the foregoing, if Blake and Adshade are found to be negligent and Perrin is contributorily negligent, her recovery against each defendant is limited to the extent of their individual liability.

[56] The logic in that case drew considerably from tort principles and cases from other jurisdictions, which do not necessarily apply here. The unanswered question is whether this Defendant, who may have contributed to the loss suffered by the Claimant, can be held partially responsible only, commensurate with his degree of liability.

[57] In my view, the plain reading of the statute, read with contract principles in mind, suggests that the Defendant can be held responsible where he has breached the contract and created conditions which, mixed with conditions not of his creation, resulted in damages. A Defendant in a contract action should only be asked to answer for the damage he caused, unlike the situation in tort where joint tortfeasors are placed at risk of answering for all of the damage that an innocent Plaintiff suffers,

[58] The factual theory I accept in this case is that there were deficiencies in the framing of the floor joists. The identity of the original framer of the home is not known to me. That person would bear some responsibility. The contractor

who performed other renovations for the Claimant may be partly responsible. He or she, if a qualified carpenter, should have known the provisions of the Building Code and ought to have assured that there was adequate bridging. Lastly, the Defendant failed to use proper mortaring technique, causing some of the tiles to become loose, or making it more likely that they could not withstand the forces created when the floor joists moved.

[59] I would hold the Defendant responsible to the extent of 25% of the damage suffered by the Claimants.

[60] I do not hold the Claimants personally responsible for any of the damages, in a direct sense, but the fact is that the risk of inadequate construction of the floor falls upon them. It would not be just to hold the Defendant responsible for that risk, which was not of his creation and which (I have found) he did not have a duty to discover.

**Damages**

[61] Counsel for the Defendant has been critical, with some cause, of the Claimants for failing to prove that the entire floor needs replacement, when quite possibly lesser repairs could be done that would create a satisfactory result.

[62] I accept the Claimants' position that the cost of full replacement of the floor - including removal of the structures sitting on the tile - would cost at least, if not more than, $25,000.00. Had the Claimants already incurred this expense, the onus would have been the Defendant's to satisfy the court that the Claimants had failed to mitigate their damages. However, what we have at this point, is a written quote for part of the job, with a verbal quote for the balance.

[63] In my experience, claimants complaining of inadequate workmanship who are awarded a sum of money that is less than they were seeking, still have a decision to make: do the entire repair and pay the difference, or treat the recovery as a budget to fund a lesser form of repair.

[64] I find that there are likely solutions that would cost less than $25,000.00. By way of example, the island and cabinets may be left in place, with the tile being cut and baseboards or quarter round being used to cover the transitions. Areas of the tile may be removed and replaced. Other areas may be left in place, where the difference in colour might not be noticeable. In some areas, large areas may have to be replaced entirely.

[65] Unfortunately, the Claimants did not produce evidence showing all of the alternatives open to them. They have, so to speak, only considered the most drastic repair.

[66] Under these circumstances, the court is in a position of having to estimate on very thin evidence what it might cost for a more <u>reasonable</u> repair. On all of the evidence, I am assessing the Claimant's total damages at $16,000.00. This does not include the cost to shore up the joists, which is something that the evidence suggests ought to be done before any more tiling work is done.

[67] In the result, I hold the Defendant responsible for 25% of $16,000.00, which is $4,000.00. The Claimants are also entitled to their costs of $199.35 to issue the claim, plus $195.00 for the cost of service of a subpoena plus travel.

**Eric K. Slone, Adjudicator**