

Claim No: SCCH - 478057

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Citation: *Chaisson v. Bevlo Products Incorporated (MacDonald Fencing)*, 2018 NSSM 69**

BETWEEN:

NICOLE CHAISSON and DANIEL CHAISSON

Claimants

- and -

BEVLO PRODUCTS INCORPORATED o/a MacDonald Fencing

Defendant

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**REASONS FOR DECISION**

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 10, 2018

Decision rendered on September 27, 2018

**APPEARANCES**

For the Claimants                      self-represented

For the Defendant                      Karen Parsons  
President

**BY THE COURT:**

[1] The Claimants own a home in the Portland Estates area of Dartmouth, Nova Scotia. In October of 2012, they contracted with the Defendant to build a fence around their property. This claim is brought because sections of the fence have become loose to the point of falling down, and some posts have rotted, caused (the Claimants say) by poor and improper workmanship.

[2] The fence was constructed out of pressure-treated lumber. It is supported by (mostly) 4" X 4" posts, sunk in concrete, 36 in number. The gate posts are 6" X 6". The design is a common one, with vertical wood slats on the bottom up to (I believe) a 5-foot level, and a top area with lattice panels adding another 18" to 24" to the height. The total length of the fence is 255 feet.

[3] The cost for the fence in 2012 was \$9,840.00 plus HST. There is evidence that is not contested, to the effect that the cost of a similar fence in 2018 would be approximately double that, as material costs (in particular) have risen dramatically.

[4] As the Claimants testified, and as is confirmed by several photos, at least nine of the 36 posts are loose, with the predictable result that entire sections of the fence are leaning and in some cases falling over.

[5] The Claimants contend that the Defendant made an error in how they set the posts in concrete, causing the posts to rot prematurely. The method that the Defendant used was to sink the post in a hole, and fill the hole with concrete up to a level of approximately 8 inches below the surface of the land. The rest of the hole was just filled with dirt. The Claimants say that the proper construction

technique would have been to fill the hole with concrete all the way to the surface, with a small “cap” of concrete showing, which would be rounded so as to shed water away from the posts. They say, backed up by a knowledgeable witness, that this is the appropriate technique, because burying exposed wood in the way they did allowed water to remain in constant contact with the wood causing it to rot prematurely.

[6] Peter deBellefeuille of Eastern Fence testified for the Claimants. He has long experience in the business and is now in a management position with Eastern Fence, one of the largest fencing companies in Eastern Canada. He testified that the pressure-treated wood that has been in use since about 2004 differs from that which had been used in the past, after the government passed regulations that abolished the use of arsenic-based preservatives for residential applications. The new chemicals are water based and not as protective. He testified that his company learned the hard way in about 2009 or 2010 that it is no longer good practice to bury posts in contact with the soil. They learned this when a number of their fences failed and they had to respond to unhappy customers. Since then, they have established a standard practice of sinking posts in concrete that extends just slightly above ground level, sloped in such a way that water does not remain in contact with the posts.

[7] Mr. deBellefeuille testified that the Claimants’ posts are rotting prematurely, being in constant contact with the clayey soil that is characteristic of the Portland Estates area. He was asked to give a quote on both repair and replacement of the fence. He stated that at a minimum nine posts would have to be removed, the concrete dug out, and replaced with new posts. He does not

think the falling-down sections of the fence are salvageable, in part because it would cost more to repair them than to replace them outright.

[8] It was his evidence that fences of this type should last for twenty years or more, if taken care of.

[9] The quote from Eastern Fence is \$12,500.00 plus tax to repair and replace sections of the fence, while the cost for a complete replacement is \$19,000.00 plus tax. Repair is more expensive generally because there is a lot of fussy work involved in taking sections apart and reassembling them.

[10] He would not encourage the Claimants to go with the repair, because the contrast between the new and the old sections will be noticeable, and also because there could be rot setting into the rest of the posts, which has not yet reached the point where the posts are loose or broken, but the Claimants could potentially be facing years of further repairs.

[11] Karen Parsons is the daughter of the founder of MacDonald Fencing. She has been in the business for about forty years. The company is a large one in eastern Canada and has done thousands of fences over the years. I think it is fair to say that it and Eastern Fencing are friendly competitors in a business with only a few major players.

[12] She testified that this particular job was done in September 2012 during an unusually wet season. She produced invoices for the products purchased for this job, including concrete and the wood itself which was "Pro-Nature" manufactured by Goodfellow. She produced literature on this product,

specifically a Technical Data Sheet that accompanies the product, which suggests that it is suitable for “ground contact” although it does not elaborate on the advisability of having ground contact where there is an alternative.

[13] It was Ms. Parsons’s evidence that customers tend to prefer fence posts without any of the concrete showing above ground. She stated that customers are usually given the choice whether to have the concrete extend above ground, although there is no evidence that the Claimants were given such a choice here. To the contrary, the Claimants say this was never discussed with them.

[14] It was Ms. Parsons’s evidence that there have been an unusual number of strong storms between 2012 and 2017 which put extra strain on the fence. It was her recommendation that the fence could be fixed, and in fact when first contacted by the Claimants her company produced an estimate totalling \$3,703.00 to repair the 9 posts and re-mount the sagging panels. She believes that the fence is largely functioning as it should, and that it would be a waste to rip it out and replace it.

[15] She was asked on cross-examination whether she regarded the fence to have been “durable,” to which she (tellingly) admitted that it was “not impressive” though “we have had hurricanes.”

### **Discussion**

[16] I am not much impressed with the Defendant’s response to being told of the problem. They appear to have believed that their responsibilities ended with the one-year parts and labour warranty that they extend with every fence

constructed. As such, they made no offer to assist the Claimants but rather proposed that they pay \$3,703.00 to have it repaired.

[17] The law is more demanding, and in particular there is the *Consumer Protection Act* which provides consumers with much greater protection in some circumstances. Section 26(3) of that Act reads:

26 (3) Notwithstanding any agreement to the contrary, the following conditions or warranties on the part of the seller are implied in every consumer sale:

(a) a condition that the seller has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

(b) a warranty that the purchaser shall have and enjoy quiet possession of the goods;

(c) a warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made;

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

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

(f) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, a

condition that the goods shall be of merchantable quality, provided that, if the purchaser has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

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

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

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

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

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

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

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

(4) For the purposes of clause (h) of subsection (3), it is not necessary to specify every defect separately, if the general condition or quality of the goods is stated with reasonable accuracy.

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

[18] The “reasonably durable” provision of s.26(3)(j) permits the court to look at whether the product meets that standard. Such an inquiry would naturally include consideration of the time that has elapsed.

[19] The warranty of “fitness for the purpose” in s.26(3)(e) also applies.

[20] In my opinion, this fence has shown itself to be less than reasonably durable, and not fit for the purpose of a fence in these wind, rain and soil conditions. I do not accept the Defendant's excuses that this fence was done during exceptionally wet weather, that the soil is particularly "clayey," or that there have been an unusual number of hurricanes and other storms. Nova Scotia is wet and windy at the best of times, and if local soil conditions are going to have a particular effect on fences, it was the business of the Defendant to note that and make recommendations for how to mitigate the effect.

[21] I will not go so far as to say that the product used should never be buried in contact with the soil, but I would have expected the Defendant to know what its competitor obviously knows - that it is prudent (these days) to have a concrete cap just above the surface in order to shed water away from the wood. The Claimants should have been advised that there were risks associated with burying the posts, and they should have been allowed to make an informed choice. The Defendant appears to have assumed that the Claimants would find such a cap to be less aesthetically pleasing, but failed to give them a choice in the matter.

[22] I find the Defendant to be in breach of the implied warranties in s.26(3) of the *Consumer Protection Act*, and in particular the warranties of "fitness for the purpose" and reasonable durability.

### **Measure of Damages**

[23] I accept the evidence of Mr. deBellefeuille to the effect that repairing the fence is not a good option. If nine posts have already rotted out, very likely others are in the process of prematurely deteriorating. The Claimants should not



be placed in a position of having to pay for future repairs for this same problem and having to sue the Defendant over and over again - which might be problematic from a legal point of view.

[24] The best solution, in my opinion, is to allow them to have a new fence but to reduce their recovery on the basis that they will have achieved a degree of “betterment.” Put another way, had the original fence performed better they would have had a six-year-old fence that would need eventual replacement. If they get a new fence, they will be spared that expense for a number of years. Although there was evidence that such fences can last as much as 20 years, I prefer a conservative estimate of 17.5 years. If it is appropriate to regard the life of such a fence to be 17.5 years, this would reduce the Claimants’ recovery by a factor of  $6/17.5$ , or roughly 34.28%.

[25] The Claimants shall have judgment for 65.72% of \$21,850.00, namely \$14,358.57. They are also entitled to their costs of \$319.35, for a total of \$14,677.92.

**Eric K. Slone, Adjudicator**