Claim No: SCCH 467292

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Christie v. Foley (Above the Rest Permanent Roofing Systems)*, 2019 NSSM 2

BETWEEN:

ISABEL CHRISTIE and CLARENCE CHRISTIE

Claimants

- and -

RAYMOND G. FOLEY c.o.b. as
ABOVE THE REST PERMANENT ROOFING SYSTEMS

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 11, and November 8, 2018

Decision rendered on January 1, 2019

APPEARANCES

For the Claimants	Lisanne Jacklin Counsel
For the Defendant	Ryan Lebans Counsel

BY THE COURT:

[1] The Claimants are a husband and wife who for about 37 years owned a home at 68 Ross Rd., in Dartmouth, Nova Scotia. In October of 2011, they contracted with the Defendant to have installed a new metal roof at a cost (including HST) of over $28,000.00. The roof carried with it a 20-year, transferable warranty.

[2] Metal roofs are sold at a premium price on the basis that they are supposed to provide many trouble-free years. The Claimants say that this roof was problematic almost from the get-go, and that it continues to be problematic in that it leaks in many spots. The claim was issued on August 25, 2017, seeking damages in the amount of $25,000.00.

[3] The Defendant denies that the roof is defective. He also says that the Claimants have no standing to bring this claim.

The question of standing

[4] Before considering the merits, I will consider the argument that calls into question the Claimants' right to sue. In June of 2015, they sold the property to their son and daughter-in-law, Scott Christie and Lourdes Soto-Moreno ("Scott" and "Lourdes"), who are not parties to this claim, although they appeared to support it, with Scott testifying at some length. This change of ownership only came to light as the eventual hearing approached in October 2018, and the Claimants were forced to amend the claim. The Defendant did not have time to amend the Defence, but suffice it to say that counsel for the Defendant takes strong objection to the claim being allowed to continue.

[5] This transfer of ownership is significant because if it is a breach of warranty case, who are the beneficiaries of the warranty? The sale contract gives no details of how the warranty is transferred. Absent any formalities, common sense would suggest that the warranty simply transfers by operation of law upon the ownership of the home (and the roof) transferring to new owners. A new owner should, within the 20 years, be able to make a claim simply by establishing that they now own the roof.

[6] The claim is pleaded as breach of contract, negligence and/or breach of warranty.

[7] The Defendant's argument is to the effect that the Claimants should be regarded as having relinquished any interest in the roof, and if so, it is difficult to see how they are in any position to make a claim.

[8] Assume for a moment that the roof is defective and would cost $25,000.00 to repair or replace. If the Claimants are permitted to make this claim, would that not place the Defendant in some type of double jeopardy, since the new owners could make out a similar claim for breach of warranty? If the Claimants collect the $25,000.00 in damages, what reason is there to expect that they would use that money to repair or replace the roof? As such, they argue, the Claimants as former owners have no apparent standing to make such a claim.

[9] I cannot see how characterizing the case as breach of contract or negligence changes the analysis. Absent unusual facts, the Claimants cannot claim damages that they have not incurred, nor stand to incur.

[10] In anticipation of this argument, the Claimants stated in their Claim:

> 12. As part of the Purchase and Sale, the Plaintiffs (sic) agreed to pay the cost of repairing the roof, which included pursuing a remedy for the cost of repair against the Defendant and providing any and all damages received from the Defendant to the Purchasers.

[11] The Claimant, Isabel Christie, testified about the circumstances of the sale to Scott and Lourdes. She and her husband were looking to downsize at about the same time that Scott and Lourdes were resettling back in Nova Scotia. They negotiated a friendly sale at a price of $400,000.00 which was $100,000.00 below what they believed to be market value, representing a gift to Scott and Lourdes. There was no real estate agent involved. Scott found precedents on the internet for an Agreement of Purchase and Sale, and it went through several re-drafts before being signed. I will refer to certain clauses shortly but suffice it to say that there was no mention therein of any potential claim against the Defendant. In fact, the agreement stated that the purchasers were taking the property on an “as is” basis.

[12] Ms. Christie testified, however, that she told Scott and Lourdes that “we would pay to make the roof watertight” and that “it was our lawsuit to pursue.” She says that she never actually read the written agreement which is arguably at odds with the verbal agreement that she refers to. Neither the Claimants not Scott and Lourdes had independent legal advice. They simply took the agreement to the same lawyer, W. Blair MacKinnon, who looked after the closing of the deal on behalf of both buyers and sellers, but offered no advice concerning the deal. There was no evidence that Mr. MacKinnon had any knowledge of the alleged verbal agreement.

[13] Ms. Christie was adamant that she agreed to repair the roof and seek a remedy from the Defendant, and that she feels morally obligated to do so regardless of what this court may decide.

[14] Scott testified and confirmed that his mother undertook to fix the roof if he and Lourdes bought it.

[15] Only one version of the Agreement of Purchase and Sale was placed in evidence, although there were several. One difference was that the named buyer was originally just Lourdes, while it later became Scott and Lourdes. It was the Claimants' evidence that what did not change from draft to draft was the following language:

> 11. The property is sold in its "as is" condition, that is, in the condition it is in at the time of the signing of this agreement and with regard to such existing condition, whether known by the Seller or not, the Purchaser shall not call upon or require the Seller to make any repairs, maintenance, renovations or do any other work to the property whatsoever from the date of the agreement to and including the date of closing or thereafter. The cost of any such repairs, maintenance or renovations shall be at the sole expense of the Purchaser and the Purchaser shall indemnify the Seller shall he pay or be required to pay for any such repairs, maintenance and renovations. Nothing here in shall be construed or deemed to affect any adjustments on closing set out in this Agreement.

[16] On its face, nothing could more at odds with the notion that the Claimants (the "Seller") retained any obligation to make repairs or fund the making of repairs. Scott and Lourdes ("the Purchaser") expressly waive any right to require the Claimants to make any repairs.

[17] The Defendant argues that the Claimants should not be permitted to raise the existence of a collateral agreement that is so contrary to the express terms of the agreement. Counsel cited a number of cases which I will consider below.

[18] In *Mowry v. Brideau*, 2000 CanLII 9161 (NB CA), purchasers of a property were successful in suing the vendors for damages for misrepresenting the state of the property, but some heads of damage were disallowed because they no longer owned the property at the time of trial.

[19] *Greco v. Zulich Construction Corp.*, 2004 CanLII 16628 (ON SC) was a case for damage to a property from blasting operations years earlier. Damages were disallowed because the Plaintiff no longer owned the property, having sold it to her son. The court stated:

> [15] Since we don't know what was paid to her or for her or on her behalf, nor the financial arrangement for her living there and we don't know the actual market value of the house, we are unable to conclude she suffered financial damages on the disposition of the home.
>
> [16] ... Here, however, the Plaintiff may have received or may in the future receive the full market value of the house, or more, without having had to pay anything for repair or making a repair of any alleged damages.
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> [17] In summation, it has not been proven on the balance of probabilities the damages complained of were caused by nuisance or negligence and even if there were there has been no proof to the required standard that the Plaintiff suffered any financial loss.

[20] *Vanguard Properties Ltd. v. Gauvin Construction Ltd.*, 1991 CanLII 807 (BC SC) was a case by a condominium developer suing for construction deficiencies. By the time of trial, the units had been sold, and the question was asked "whether the plaintiffs are entitled to recover, as general damages, the

cost of future repairs to a building which the defendants were retained by the plaintiffs to construct." The court stated:

> **Analysis**
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> 64 Fridman on *The Law of Contract in Canada*, 2d. ed., states at p. 681 with respect to the purpose of damages:
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> > The leading and well-accepted principle is that the plaintiff must be put in as good a position as he would have been had the contract been performed. In the words of Lord Atkinson in *Wertheim v. Chicoutimi Pulp Co.*, referred to with approval by Hodgins J.A., for example, in *Cockburn v. Trusts & Guarantee Co.,*
> >
> > > [a]nd it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed...That is a ruling principle. It is a just principle.
> >
> > The tenor of this language indicates that in some instances the proper award may be not substantial damages but merely nominal ones, recognizing the fact that a breach of contract has occurred, therefore an action will lie, even though no actual loss has been suffered by the plaintiff. Furthermore that, in general, damages are intended to be compensatory or restorative, not punitive or exemplary. However, it is also clear that in certain instances the proper assessment of the plaintiff's loss is what he has paid over to the defendant (restitution) or what he has expended in reliance on the defendant's contractual promise. (emphasis added)
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> 65 In my view, it is clear that the law of contract does not contemplate an award of damages to a plaintiff based on the expectation of expenses to be incurred or on the mere intention of the plaintiff to effect repairs needed as a result of a breach of contract, unless it is clear that the plaintiff has a legal obligation to perform those repairs at the time of the award of damages.

> 66 I concur with the submissions of counsel for the defendants that the right to damages of an owner of a building who discovers that the building requires expensive repairs due to a deficiency in the performance of the construction contract, cannot crystallize and accrue on the discovery of the need for those repairs. Rather, the right to damages crystallizes when the owner becomes legally bound to perform such repairs and the repairs are actually performed. Otherwise, as pointed out by counsel for the defendants, by reason of an intervening event, it would be possible for the plaintiff to never actually perform any repairs and yet be compensated for those repairs without actually suffering any loss. (Emphasis added)

[21] The Defendant also relies on *Hawrish v. Bank of Montreal*, [1969] SCR 515, 1969 CanLII 2 (SCC), where the court upheld the principle that a collateral agreement cannot stand where it is in direct contradiction to the main contract.

[22] The law of collateral contracts is more expansively set out in the text *The Law of Vendor and Purchaser* by Victor Di Castri, at paragraph 208:

> While the basic rule is that oral evidence is inadmissible to vary the terms of a writing, the law permits an exception in the case of an oral collateral agreement entered into by the parties before or contemporaneously with the making of the writing and supplemental thereto. Where this issue is raised it is the duty of the court to look at all the circumstances surrounding the execution of the contract. Extrinsic, oral or documentary evidence is admissible to establish the true conditional character of the contract or that there is no contract at all.
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> The investigation, apparently, need not be limited to express contractual statements.
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> But the collateral agreement, being viewed with suspicion by the law, must not be inconsistent with the terms of the written agreement, must be strictly proved, and demonstrate clearly that the writing alone does not express the whole contract of the parties. The existence of an *animus contrahendi* on the part of all the parties is essential.
>
> While the alleged oral collateral agreement may be entered into prior to or contemporaneously with the writing purporting to evidence the contract, the agreement must be made during the course of the dealing leading to the consummation of the bargain, and form an essential ingredient of the bargain.…

[23] Responding to this line of argument, the Claimant relies on a recent decision of the BC Court of Appeal in *Globalnet Management Solutions Inc. v. Cornerstone CBS Building Solutions Ltd.*, 2018 BCCA 303 (CanLII), which (to state it simplistically) upheld the right of a developer to sue a negligent contractor, notwithstanding that the building had been sold. At para 73 the court wrote:

> [73] In the result, I conclude, with respect, that the trial judge erred in ruling that neither plaintiff suffered loss by reason of the defendants' breach of contract or tortious conduct. Whichever party to the Agreement of Sale and Purchase benefitted, Globalnet retained its causes of action; the repairs were required; and the building has been brought up at its cost to the standard it would have been had the negligence not occurred. In my opinion, it would be unjust and contrary to principle to permit the defendants to avoid responsibility by virtue of dealings that are *res inter alios acta*.

Disposition of this issue

[24] That latter quotation brings up a point that I believe is missing from the Defendant's analysis of the issues. Virtually every reported case on collateral contract began as litigation between parties to that contract, i.e. an alleged party to the collateral contract denying its very existence. The rules prohibiting oral evidence of a collateral contract, and all of the other similar rules, are in place to protect a party who has entered into a written contract from having his rights adversely affected by something at odds with that written contract. These rules are protective of the contract, as written.

[25] But what about third parties who may have dealings with one or other of the contracting parties, but are not themselves parties to the contract?

[26] Here the Defendant is entirely a stranger to the contract for the sale of the property. The Defendant seeks to profit from or rely upon dealings that are said to be *res inter alios acta*. That ancient legal doctrine holds that a contract or judgment cannot affect one way or the other the rights of one who is not a party to the contract. The principle of *"res inter alios"* has a common meaning: "A matter between others is not our business."

[27] In the analogous situation of a judgment between other parties, the principle has been relied upon more than a century ago in *International Harvester Co. v. Leeson*, 1914 CanLII 333 (SK QB), citing the contemporaneous version of Halsbury's on the point:

> 7. In Halsbury's *Laws of England* vol. 13, at p. 343, para. 478, the law of estoppel by judgment is further set out: —
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> > A judgment inter partes raises an estoppel only against the parties to the proceedings in which it is given and their privities, i.e., those claiming or deriving title under them. As against all other persons it is *res inter alios acta*, and with certain exceptions though conclusive of the fact that the judgment was obtained and all its terms is not even admissible evidence of the facts established by it.

[28] I believe that, on the specific facts before this court, the principle can be stated thus: the Defendant, as a stranger to the contractual dealings between the Claimants and Scott and Lourdes, may point to those dealings (as *prima facie* evidence of what they show) but cannot avail itself of doctrines such as estoppel or any other rules prohibiting the establishment of a collateral contract or pointing to a different meaning to the words used. That is what the Defendant in essence is saying, that the Christies and Scott and Lourdes are <u>bound</u> by their written agreement, and that they are prohibited from varying it or establishing a collateral contract that is at odds with the written contract.

[29] It is precisely in this sense that the principle of *res inter alios* applies. In the case before me, the evidence overwhelmingly points to the Claimants and Scott and Lourdes having:

a. Agreed that the Claimants would repair the roof at their expense,

b. Agreed that the Claimants would pursue remedies for the roof, and

c. Made an honest error in relying on a standard precedent for an Agreement of Purchase and Sale and failed to make mention therein of their collateral agreement.

[30] The written agreement was drafted without legal advice, and even more significantly without independent legal advice for any of the them.

[31] I believe this court is right to say to the Defendant that it should not profit from the Claimants' error, and that the Defendants are not bound by the wording in the Agreement of Purchase and Sale.

[32] Moreover, given that both Scott and Ms. Christie testified unequivocally that there was such a collateral misunderstanding, the contract between them would be susceptible of being rectified (assuming a legal remedy was required). In other words, the Claimants and Scott and Lourdes are capable of agreeing, and have agreed, that the contract should not be enforced according to the exact letter of the wording, which contract is a matter entirely between themselves and no business of the Defendant.

[33] I find as a fact that the Claimants undertook to repair the roof and pursue their remedies against the Defendant, and have standing to bring this lawsuit. That collateral contract is legally binding on the Claimants. As such, they may collect damages if they can prove them. The extent of that remedy is an entirely different matter, which I will now consider.

Damages

[34] There is a considerable amount of evidence that the roof has experienced leaks over the years, and that it still leaks in places. That evidence was supplied by the Claimant Isabel Christie and by her son, Scott Christie, who is one of the current owners.

[35] Isabel Christie testified that after the job was completed in 2011, there were leaks into the sunroom immediately in the area of a skylight. The Defendant came out and did some repairs, and on one occasion Scott Christie put some caulking around a window. In 2014, there was a major leak that resulted in an entire wall of drywall becoming saturated with water and starting to collapse. They were encouraged to make an insurance claim, which was only partly successful in that the insurer agreed to pay some of the cost of interior repairs, but not the cost to repair the roof itself. Ms. Christie testified that they called the Defendant a number of times, and by late 2014 he refused to make any further attendances without being paid. At that point the Claimants began to call other companies to do patching or repairs. Several repairs were attempted in late 2014 and mid-2015.

[36] Meanwhile, in July 2015 the home was sold to Scott and Lourdes.

[37] In August 2015, Eldon Contracting did a further attempt to stop leaking, which did not appear to be successful.

[38] The fact that there were active leaks and attempted repairs at or around the time of the transfer corroborates the evidence that the Claimants intended to follow through with repairing the roof.

[39] Scott Christie testified that after he and his wife took ownership, he began to look more closely at the roof to try to figure out why it continued to leak. By then there were several active leaks, including most seriously in the area of the east dormer. He crawled into the attic to observe active leaks and he took many photographs most of which, unfortunately, are not all that helpful. In June 2016 he hired a company (B&R Roofing) to “caulk the crap out of it,” which appears to have given some temporary relief.

[40] It was about in that time frame that Scott was able to observe what he believes is an incorrect joint in an area of the roof that is not visible from the ground. Although it does not appear that this has created any leaks, he had a temporary patch put over that seam.

[41] In the weeks and months prior to the trial, there was active leaking around a bathroom vent as well as water visible on the inside, of uncertain origin. All in all, he notes that there are eight distinct areas that leak or have leaked.

[42] The only expert witness called by the claimant was Mr. Jean Nowlan, who has been in the metal roofing industry for approximately 10 years. Prior to that he says that he worked with other aluminum products such as doors and

windows, as well as in general construction. The only training he has in the area of metal roofs was on the job training. He gave some evidence describing generally the methods used for installing metal roofs. Unlike some expert witnesses, this gentleman did not provide any type of written report; in fact, there was a draft report created on his behalf by Scott Christie, which report Mr. Nowlan completely disavowed. That is another whole story which does Scott no credit, but which (in the end) does not change anything.

[43] Mr. Nowlan examined the roof and took a series of photographs. It was his conclusion that many areas of the roof were not done properly, such as:

a. Flashing at top of skylights not placed under metal roof;
b. 3 of 4 skylights done incorrectly;
c. 2 or 3 splice locations done incorrectly - not overlapped;
d. Different profile metal used in one area - aesthetic issue only;
e. Missing flashing under an eave;
f. Loose flashing near skylights in several places;

[44] He testified that much of the roof would have to be removed to ascertain if it was done correctly.

[45] He would not rule out the possibility of this roof being repaired, as opposed to being replaced, and estimates the cost to do so at $5,000.00 minimum, up to $10,000.00 or $11,000.00 maximum. He estimated the cost of replacement at about $30,000.00.

[46] The Defendant called as its expert Justin Brown, who has been in the business for about 13 years. His qualifications were not contested, although his

impartiality was doubted because of the number of times he has done jobs for the Defendant. It was also pointed out to him by counsel for the Claimant that the registration for his sole proprietorship Jay's Universal Metal Contracting had lapsed for non-payment, which he admitted had happened before and was later reinstated. (To date it remains revoked.) He is clearly not sophisticated in business, though that does not make him a bad roofer.

[47] He also inspected the roof and took photos. He found areas that could explain some of the leaks, but he did not inspect inside the home and did not remove any of the roof to get a closer look at potential trouble spots.

[48] He testified that some of the problems around the skylights were as a result of the skylights themselves being old, a concern that was echoed by the Defendant in his testimony. Mr. Foley testified that he noted to the Claimants before the work was done in 2011 that the skylights should either be removed or replaced, which (he says) the Claimants did not want to do.

[49] Isabel Christie testified in reply that Mr. Foley never mentioned a problem with the skylights until the third time he came back in response to leaks. She says that had they known the skylights were problematic, they would not have spared the small additional expense of maybe $1,000.00 in the context of a $28,000.00 roofing job.

[50] I have no hesitation in saying that I prefer the evidence of Isabel Christie over that of Mr. Foley, on that point. My impression of Ms. Christie (Mr. Christie did not testify) was that she was sensible and open to advice. It is not believable that she would have refused to deal with faulty or worn skylights, had she known of the risk. I find as a fact that there was no discussion of the state of the

skylights prior to the new roof being installed, and that the Defendant cannot blame the Claimants for failing to follow his advice.

[51] Although Mr. Foley in general defended his work, he had to acknowledge that there had been calls about leaks and that, at one point, he refused to make any further attendances without payment.

[52] Mr. Foley had to concede that he was not there at all times during the initial roofing job, though he says that he attended for at least some period of time every day.

Findings

[53] I am satisfied that the roof has leaked consistently since it was installed, and that multiple efforts to fix it have come up short. I found the evidence of both Mr. Foley and that of Mr. Brown unconvincing. The evidence of Mr. Nowlan was slightly more convincing, but his conclusions were vague. The upshot is that there is an established breach of the warranty, giving rise to a claim for damages.

[54] But what damages have been proved? I believe the problem is that, to date, no one has been willing to undertake a major review and repair job, because of the amount of money it would cost just to get answers, let alone to repair the roof.

[55] In a more perfect scenario, this would already have been done and the true cost of repairing the roof (assuming repair is possible) would be better known.

[56] Unfortunately, this court case cannot wait. The parties have presented their evidence and I am obliged to arrive at a result, based only on what is before me.

[57] Based on all of this evidence, I am inclined to take Mr. Nowlan at his word that a repair would cost somewhere between $5,000.00 and $10,000.00 or $11,000.00. The Claimants have not proved to my satisfaction that the roof is unsalvageable and needs to be replaced. They have proved that it is defective, and the Defendant has not been able to make good on his contractual promise of a workmanlike roof.

[58] My assessment of damages is $7,500.00, halfway between $5,000.00 and $10,000.00. In the result, with this sum of money in hand the Claimants and the current owners will have to choose how they proceed.

[59] The payment of these damages will exhaust the Defendant's warranty and contractual responsibility and close the matter between them, which should be some relief for all parties.

[60] The Claimants are entitled to their cost of issuing the claim and have also asked for witness and service fees, in the total amount of $805.12. There shall be judgment for a total of $8,305.12.

Eric K. Slone, Adjudicator