

Claim No: 422286

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Curnew v. Lre Toulany Ltd., 2014 NSSM 42

BETWEEN:

SHELDON CURNEW and SO YOUNG MOON

Claimants

- and -

LRE TOULANY LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on March 12, 2014 and April 23, 2014

Decision rendered on August 5, 2014

APPEARANCES

For the Claimants self-represented

For the Defendant Peter Coulthard, QC
Counsel

BY THE COURT:

[1] The Claimants purchased a new home under construction from the Defendant. The date of the Agreement of Purchase and Sale is May 8, 2012, with a closing scheduled for July 18, 2012.

[2] This claim seeks damages of \$12,000.00 for alleged deficiencies, most of which are said to be in three of the four bathrooms in the home. There is also a claim concerning the alleged failure to supply eaves troughs (gutters and downspouts).

[3] The claim was meticulously documented by the Claimants, who are undoubtedly quite unsatisfied with some of the workmanship and also with the response (or lack thereof) by Louis Toulany, the principal of the Defendant company.

[4] The Defendant does not deny that there are some problems, but defends on several grounds, including the fact that the Claimants accepted the workmanship in a pre-closing inspection and only raised some of their concerns later. There is also a contention that the Claimants have gone overboard in their claims that they have to tear out and replace significant amounts of these three bathrooms, rather than making repairs at a much lower cost.

[5] To further confuse matters, the Claimants sought recourse through the applicable home warranty company, Lux, and that company apparently did an inspection and made a report without giving the Defendant any form of notice or any opportunity to participate.

[6] And to add yet another layer of confusion and misunderstanding, the Claimants hired a lawyer who attempted to advocate the Claimants' position, but who made some factual errors and who demanded that items be repaired with the apparent added stipulation that the Defendant (i.e. Mr. Toulany) not rectify these items himself but use "qualified" outside forces. Mr. Toulany takes the view that if there are deficiencies, he is (or was) entitled to rectify them and the Claimants are not entitled to dictate who does the actual work.

The sequence of events

[7] The problems can be traced back to the time just before closing. Everything was complete except for the basement bathroom, which was still being worked on. The main thing missing was the vanity, but the tiling was also not fully completed. This bathroom contained a tiled shower stall. According to the Claimants, they were not happy with the tiling job from the outset. They also complain that the Defendant never removed the excess grout, and they say they spent twelve hours later just removing grout. Mr. Curnew described the condition of this bathroom as an "abysmal mess." He testified that Mr. Toulany made verbal promises that everything would be completed and cleaned up even after the impending closing. The Claimants say that they took comfort from the fact that Mr. Toulany was still working on the other side of the semi-detached structure and would be on site for at least another week.

[8] The purpose of a pre-closing inspection is to get on record with any obvious deficiencies, or what might be referred to as patent (or evident) defects. It is also customary for holdbacks to be negotiated, to secure any work that

needs to be done. This is especially important in transactions where there is no warranty that will survive closing, but is less crucial in a purchase from the builder since there are many legal obligations that survive closing.

[9] In that context, it is important to look at how the Claimants responded at the time of the inspection. They were accompanied on this inspection by their real estate agent, who made them aware that they could require a holdback for any deficiencies. In an email from Mr. Curnew to their agent, dated mere hours after the inspection and also mere hours before the closing, he writes:

Hi Guys.

No major issues ... here's our happy closing list for 11A Renfrew:

1. Finish landscaping at front steps
2. Smooth rear deck railing
3. Baseboard and shelf (upstairs bath)
4. Smooth wall, touch up paint around shower; (master bath)
5. Adjust outlets to lie flush (kitchen)
6. Adjust switchplate to lie flush (basement bath)
7. Touch up paint around outlets (kitchen)
8. Gap under baseboard (basement) please don't caulk to fill; prefer removal and a scribed fit on lower edge'
9. Gap under baseboard (den) caulking is acceptable

No holdback, but as a favour, could Louis please add a dimmer to master bedroom light! Talk to you guys in the morning,

[10] Mr. Curnew testified that he did not mention the incomplete state of the downstairs bathroom because he was relying on Mr. Toulany's verbal promise that it would be complete. This is a difficult statement to credit, given that he took the time to mention some extremely minor items as requiring attention. One would have thought that there would be a statement in the email to the

effect that the bathroom was thus far incomplete and, whether or not he insisted on a holdback, that there was a verbal promise to complete it and leave it clean.

[11] Mr. Curnew testified that he was unhappy with the tile work and told Mr. Toulany as such. Mr. Toulany testified that he recalled Mr. Curnew saying that he did not think his wife would like the colour of the tile. In any event, nothing about the tile work was said in the email quoted above, that was supposed to document the issues from the purchasers' point of view.

[12] It appears that during the days following the closing, when Mr. Toulany was still on site, he became annoyed with the Claimants and what he regarded as their repeated attempts to take advantage of him. He took offence to the fact that they had asked him several times to send over a cleaner to look after areas that they did not regard as sufficiently clean. He says that he sent over the cleaner three or four times, and still the Claimants were not happy. Eventually, he put his foot down and told the Claimants that he was not prepared to do any more, that this was now their property and no longer his responsibility.

[13] My first observation is that Mr. Toulany could have been a bit more understanding of the Claimants, who were relatively young and (I believe) first time home buyers. My other observation is that the Claimants did not appear to appreciate that every new property comes with minor blemishes, and that they cannot expect the builder to "hop to it" every time they notice something.

[14] The bigger problem was that when a more serious issue arose, namely water leaking from one of the top floor bathrooms, Mr. Toulany's response was coloured by the fact that he was already totally annoyed with the Claimants.

This caused him to offer a totally inappropriate solution that probably made matters worse, and to which much of the ongoing dispute can be traced.

[15] Not too long after closing, the Claimants noticed water leaking through the ceiling in the kitchen, just below the master bathroom. Mr. Toulany was called and he showed up with a caulking gun, and without any real investigation he started caulking many of the joints in the bath surround, on the apparent theory that water may have been getting into the walls that way. In his own words, "I caulked the hell out of everything."

[16] As the Defendant would now quite properly concede, this response was totally inappropriate. There clearly should not be water leaking through the ceiling in a brand new home. It should have occurred to someone with Mr. Toulany's experience and expertise that the water could have been leaking for a number of different reasons, not least of which might have been the plumbing. For him to assume without investigation that the problem would be solved by caulking all of the joints in a bath/shower enclosure above the area where the leaking was evident, was destructive and lacked professionalism. There is no question in my mind that he caulked joints that are not intended to be caulked, which has left that bathroom unsightly and which could also have made the problem worse in two respects:

- a. Water may be getting trapped behind the caulking, and
- b. The opportunity to investigate and repair the leak in a timely manner was lost.

[17] By December of 2012, the Claimants were serious enough about the alleged deficiencies that they sought legal advice and had their lawyer write to

the Defendant's lawyer (not trial counsel). In that letter, lawyer David Morrison complained of the following, which I set out in summary fashion:

- a. **Lack of gutters** He pointed out that the Claimants were promised gutters within 60 days of closing, and had paid \$659.61 as an extra for them. The latter statement was actually incorrect, but the contract did call for gutters and they had not been installed.
- b. **Ensuite bath** He referred to missing or incomplete grouting and a number of other deficiencies, leading to leaks and creating an unsightly situation.
- c. **Third floor bath** The allegation was that the caulking around the shower failed on first use, leading to water infiltrating the subfloor and creating the leak below. He referred also to lack of sealing of sections of the tub enclosure, incomplete caulking, dried caulking in areas needing to be removed and damage to a wall where caulking had failed.
- d. **Basement bath** The complaint was of poorly done tiling (uneven) and messy caulking, leading to a number of unsightly conditions.

[18] The response from the Defendant's lawyer on February 11, 2013, was that the Defendant was prepared to do the gutters as soon as weather permitted, and that the other issues should be taken to the New Home Warranty provider (Lux) to make a determination as to which issues ought to be resolved by the builder.

[19] The Claimants took this direction and contacted Lux, which issued a Conciliation Inspection Report on May 24, 2013. Curiously, it appears to have done its inspection and produced the report without (properly or at all) informing or involving Mr. Toulany. In that report it "decided" that the builder should repair the caulking in the third floor bathroom to "meet reasonably with the manufacturer's recommendations." It concluded that issues with the basement shower were "patent defects" and therefore not a matter for the new home

warranty but a contractual issue between the builder and the purchaser. As for the roof, where by then there had been a section of soffit that had become loose, it determined that the builder was responsible to fix it.

[20] Mr. Toulany testified that he had no notice of the inspection and no input into the eventual conclusions. Whether or not this is true - and I am not entirely convinced that he had zero knowledge of what Lux was doing - it does not really add or subtract anything from the task entrusted to me. I do not differentiate between what may be the responsibility of the warranty program and that of the builder. All of the issues complained of are potentially the responsibility of the builder, having been reported in a timely manner. There is nothing in the home warranty that relieves the builder, in this case the Defendant, from primary responsibility to make good on any failure to perform work in a workmanlike manner.

[21] Nor am I bound in any way by the findings of the warranty inspector.

Discussion of specific items: Basement shower stall

[22] The Claimants say that the Defendant failed to install a promised glass door, and they also complain that the tile work was done poorly. They also say that the grouting was poorly done and the whole area left in need of serious clean up. The Defendant says that there was never any glass door promised; that he assumed that the Claimants would be using a shower curtain. As for the poor tiling, the Defendant says that the Claimants accepted the tile work in the pre-closing inspection. He also says that the area was left clean.

[23] The Claimants appear to want to have the tile shower torn out and replaced with an acrylic enclosure. I do not think that they can justifiably hold the Defendant responsible. In my view, there are at most minor deficiencies in the tile shower that should be addressed as such. The Claimants can choose to live with them, or try to repair them. The Claimants do not appear to have pursued any estimate to have such repairs made, so I will in due course have to come up with a fair assessment of damages based on the evidence before me.

Discussion of specific items: ensuite bath

[24] Based on the photos provided and the evidence of all parties, there are significant deficiencies to be rectified. There is water leakage and damage to the baseboards. The evidence of the Claimants, which I accept, is that they need to use towels just to catch the water every time they use this shower.

[25] The issue I have is with the Claimants' proposed full replacement and rebuild of this unit. I do not believe that they have established that it is not possible to have same repaired by someone properly qualified in repair and restoration.

Discussion of specific items: main floor bath

[26] The Defendant's attempt to use caulking to stem the leaks has been a failure, leading to an unsightly and unsatisfactorily performing result. I repeat my comments about the ensuite bathroom. I believe it is capable of repair.

Discussion of specific items: gutters and soffit

[27] The Defendant takes issue with the amount the Claimants spent on the missing eaves and downspouts, namely \$1,242.00. The Defendant says that this is (in effect) a retail price, whereas he could have had it done wholesale.

[28] In my opinion, the Defendant forfeited any right to complain about the cost of the work, given that he simply failed to do the job himself in a timely fashion. The Claimants are entitled to recover this cost, in full.

Repairing upstairs bathrooms

[29] The Claimants sought estimates from companies that appear to specialize in constructing new bathrooms. These companies would be understandably reluctant to repair and salvage the existing work, for a number of reasons, including the fact that they would not want to guarantee such work. The difficulty is that the Claimants have an obligation to mitigate their damages, which means seeking the least expensive fix. They did not ask the correct questions, or perhaps asked the wrong people.

[30] The companies that provided estimates to the Claimants were not present in court to explain their estimates, or perhaps to elaborate on what less expensive options might have been available. That is problematic for the Claimants.

[31] The questions that ought to have been asked by the Claimants were: can this be repaired to bring it to a reasonable standard, and what would it cost to do this? And the persons or companies to whom the questions should have been

directed were - not only the ones that the Claimants did approach - but also those who specialize in repair and restoration.

[32] I was impressed by the evidence of Greg Frampton, who was called by the Defendant and qualified as an expert in bathroom restoration. This gentleman testified that all of the fixtures could be removed (carefully) for the purpose of checking for underlying problems, and they can be reinstalled. He considered all of the problems, with the exception of the tiled shower, to be correctable. His very rough estimate was that it might take two men two days to do the removal and reinstallation of one tub/shower surround. He did not specify how long it would take for the other shower, but I would infer that the time would be about the same. My notes do not show that he expressed any opinion about the basement shower, which is, in my view, mostly a cosmetic problem.

[33] In this type of case, where the work has not been done, the best the court can do is provide Claimants with some resources, and they can decide what they want to do and how to do it, and whether to supplement it with their own resources. There is no question of the Defendant doing any of the work himself. The relationship is far too damaged for that to be permitted. Instead, he must answer financially for his failure to construct certain elements to a workmanlike standard.

[34] Assessing damages is not an exact science. Doing the best I can with the evidence provided, I am prepared to award the Claimants the following:

- a. For eaves, downspouts and soffit repair: **\$1,242.00**

- b. For minor deficiencies in the basement shower stall, I believe this is best approached as a minor abatement which I assess at **\$250**.

- c. For each of the other two bathrooms, I believe that \$1,500.00 would be an appropriate budget for repair and restoration. I base this on the likely cost of four man-days plus materials, such as drywall and other consumable items. The total for these items is therefore **\$3,000.00**.

[35] In the result, the Claimants shall recover \$4,492.00 plus their cost of \$193.55 for filing and \$92.00 for service, for a total of \$4,777.55.

Eric K. Slone, Adjudicator