



*Building Code. As a result, the floor is inadequately supported, and significant remedial work is required to render it safe and alleviate creaking.*

- [3] As part of the record herein, I was provided with a copy of an order and decision dated July 21, 2005, of Adjudicator J.W. Steven Johnston. That decision comprises 81 paragraphs and, as referred to therein, was heard over two complete evenings of evidence. Contained in that decision is a comment by Adjudicator Johnston in paragraph 10 that Mr. Mitchell presented a list of complaints almost too numerous to independently itemize in his decision. He also noted at paragraph 8 that this matter “...*turned into the most acrimonious property transaction I have ever listened to in my entire career*”.
- [4] There seems to be no dispute as to the applicable law. There are three requirements for *res judicata*. I quote Justice Murphy from the case of *Imperial Oil Limited v. Atlantic Oil Workers' Union, Local 1* (2004 Carswell, NS 410), at para. 56:

*There are three preconditions to the operation of res judicata:*

- (1) *There must be a final judicial decision pronounced by a court of competent jurisdiction;*
- (2) *The parties to the judicial decision or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privy; and*
- (3) *The same question (cause of action or issue) must have been decided.*

- [5] In this present case there can be no argument at all with respect to items (1) and (2). The only potential issue is under item (3) - whether the same question was decided in a previous case. That is, was the issue of the flooring joists for the main floor one of the issues dealt with in the previous decision. I find it was. There are references to the flooring and structural issues in the previous written decision. As well, I accept Mr. Metlej's representation that at the previous hearing he specifically raised with the Claimant whether all of the alleged deficiencies were addressed in the Claimant's testimony at that time and the Claimant indicated in the affirmative. Mr. Metlej also represented at this present hearing that

Adjudicator Johnston had given the Claimant significant amount of procedural latitude in introducing evidence in regards to the alleged deficiencies beyond that which was originally alleged to have been deficient.

- [6] In coming to this conclusion I am mindful of the policy considerations for the rule of estoppel by *res judicata*. Again, I refer to Justice Murphy in the *Imperial Oil* case [para 55]:

*There should be an end to litigation and no individual should be sued more than once for the same cause.*

- [7] Here, it is clear that there was extensive evidence given on many, many alleged deficiencies at the first hearing. To attempt to reopen that case by means of a second law suit is, offensive to the public policy considerations in my view.

- [8] Counsel for the Claimant urged me to consider the comment of Justice Murphy in the cited case that there remains a discretion of the court to apply an equitable doctrine to achieve fairness in the circumstances of the case. I was not given any further elaboration of when such a discretion might be exercised. It seems to me on general principle that in order to exercise that sort of discretion, the case would have to be one of the most compelling. Mr. Mitchell, the Claimant herein, did not attend or testify so I did not have the benefit of his evidence of what misunderstandings he may have been under as to the terms of whether or not there was another remedy when he went into the first hearing. Even if he had, as I noted previously, it is my view that such would have to be of the most compelling nature in order to justify the exercise of such an equitable jurisdiction.

- [9] In my view, the policy consideration that there should be some finality to litigation is a significant principle that is not easily disturbed or outweighed and, in this case, there was nothing that anywhere near approached the type of standard that I consider would be applicable to override that policy consideration given and bearing in mind that the required three preconditions have been met here.

[10] In light of the above, the claim is hereby dismissed.

**DATED** at Halifax, Nova Scotia, this 7<sup>th</sup> day of December, 2006.

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**Michael J. O'Hara**  
**Adjudicator**

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