

## IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Bernard v. Marlin Pools & Spas Ltd., 2014 NSSM 49

Claim No: SCCH 420751

### BETWEEN:

Name Jim and Betty Bernard **Claimants**

Name Marlin Pools & Spas Ltd. **Defendant**

Stephen Hiscock appeared for the Claimants.

Paul Thompson appeared for the Defendant.

**Editorial Notice:** Addresses and phone numbers have been removed from this electronic copy of the judgment.

### DECISION

#### Facts

This is a claim in breach of contract arising from the purchase and installation of an above-ground pool. The Claimants, Jim and Betty Bernard, are husband and wife and live at 110 Leiblin Drive in Halifax, Nova Scotia. The pool is a Yorkshire model and was supplied by the Defendant, Marlin Pools & Spas Ltd. ("Marlin"). The purchase took place on September 29, 2012 but the installation was not completed until May, 2013. The total cost was \$6014.45 which included the pool, installation, water and HST.

I note that while the invoice is in the name of Jim Bernard, I find Betty Bernard was an active participant in the dealings with Marlin. At all times, she intended to be bound by the contract. I find her to be a party to the contract along with her husband and, therefore, she is properly a Claimant in this matter.

After the pool was installed, the Bernards noticed rippling and other issues affecting the appearance of the pool. A closer examination revealed several of the buttresses not properly secured and others not flush to the ground. Further, the pool was not resting in the frame. According to the Bernards, their installer, James, indicated that such things “happen all the time”. During the summer, they contacted Marlin’s owner, Andrew Cooke, who told them the pool was safe to use for the summer and he would return in September to re-install it. The Bernards’ reply was unequivocal, they declined his offer indicating the pool was “condemned”. I assume this followed the viewing of the pool by Peter Burdock of Colby Leisure Pools Ltd. (“Colby Leisure”) as no evidence or certificate from any authority was tendered into evidence to substantiate such a claim. Colby Leisure has met with the Bernards and offered to replace the pool. The Cooke’s are seeking the full purchase price of the Yorkshire pool, effectively, a rescission of the contract.

### **The Issues**

- What are the terms of the contract?
- Did the Defendant breach any warranties under the *Consumer Protection Act*?
- If so, what is the appropriate remedy?

### **The Evidence**

I have summarized the parties’ *viva voce* evidence below. I must state that I have reviewed in detail all of the documentary evidence presented in this hearing, even though some of it may not have been referred to in these reasons.

#### Evidence of Betty Bernard

Betty Bernard testified that she has owned swimming pools for 11 years. She and her husband share the pool with her children and grandchildren every Sunday during the summer months. She described herself and her husband as “constantly in the pool” in the summer.

The Bernards decided to replace the previous pool because their old one was rusting and had several holes. They knew the best prices on pools came at the end of the season and purchased the pool which is the subject of this proceeding in September 2012. Marlin offered a 30% discount on pools purchased late in 2012. She spoke with Julia, an employee of Marlin and instructed her to install the pool once the order was completed. The pool was installed in October, 2012, and an invoice was issued to her in the amount of \$6014.45 which they paid. The invoice was entered into evidence as an exhibit.

The representatives from Marlin indicated their plan was to install the pool in 2012, and return in the Spring of 2013 to install the pump. As a result, the pool was not used in 2012 as it was too

late in the season. The Bernards winterized the pool in preparation for the Spring. A representative from Marlin, named James came to the house to install the pump. When James was advised of the condition of the pool, he responded to the Bernards that "it happens all the time". The Bernards were not satisfied with that response, so they contacted Marlin's owner, Andrew Cooke.

The Bernards e-mailed Mr. Cooke sometime in May or June to ask what could be done about the condition of the pool. They followed up with a subsequent e-mail when they did not receive an answer for a further two weeks. Neither e-mail was entered into evidence. Mr. Cooke advised them to continue to use the pool and he would reinstall it in September. He did not attend to their place until 2014. The reason they were given for the delay was Marlin was booked and did not have time to make the changes in 2013. They advised Julia at Marlin they were not satisfied with the response.

The Bernards remained concerned with the safety of the pool and were not comfortable hosting their annual summer pool parties. However, they did continue to use the pool. At the end of 2013, they winterized it again by cleaning and vacuuming the pools and added chemicals to maintain the pH balance at an acceptable level.

Under cross examination, Ms. Bernard acknowledged that Mr. Cooke and James came to the property on March 21, 2014 and did some corrective work at that time. However, they were adamant that nothing other than the installation of the pool and the visit from James was done by Marlin during 2013 or until March 2014.

#### Evidence of Peter Burdock

Peter Burdock is a co-owner of Colby Leisure which deals in the sale and installation of pools and spas. He has been an owner of that business for approximately 13 years. This is not his regular vocation as he is a full-time police officer with the Halifax Regional Police Department.

He testified that primary business of his business is the installation and sales of aboveground pools. They also conduct repairs. He estimates that he has worked on or installed in excess of 200 pools during this time. He indicated that he had certification from the Canadian Pool Operators, however no evidence was given as to the nature of the certification or what it entails. In any event, the certification expired last year and it has not been renewed. He provided a report to the court which included a quote for a new pool.

Mr. Hiscock sought to have Mr. Burdock qualified as an expert witness on the subject of the installation of pools.

The leading case in Canada on the admissibility of expert opinion evidence is the Supreme Court of Canada decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case requires four criteria to be considered for a witness to be qualified to give expert opinion evidence. These criteria are (1)

relevance, (2) necessity, (3) absence of an exclusionary rule, and (4) a properly qualified expert. In addition I have considered the decision of Justice Warner of the Supreme Court of Nova Scotia in *Lunenburg Industrial Foundry and Engineering Limited et. al. v. Commercial Union Assurance Company of Canada et al.*, 2005 NSSC 62.

I am not persuaded that Mr. Burdock possesses the requisite knowledge and experience to qualify him as an expert. He has received no specialized training; he works in this business on a part-time basis. He acknowledged in evidence that he is a competitor to Marlin. Mr. Burdock did not testify to ever seeing the structure of a pool fail. He does not have the technical expertise to testify as to what would happen to these walls or the pool if it were not installed correctly. He does not deal with this line of pools. He is not familiar with this model. Based on Mr. Burdock's evidence and that of Mrs. Bernard, it is apparent that Colby Leisure will receive business for the installation of a new pool should the Bernards be successful in this matter.

The Small Claims Court repeatedly hears evidence from competitors. For example, it is common in those cases involving a claim in negligence of contractors to call other contractors who worked on that particular job or project. Such evidence does have value in that the contractors can often speak to what they have observed and what was done to remedy a situation, which may be relevant in calculating damages. However, they have a vested interest in the work they performed and often justify it. Their opinion is not expert opinion evidence. Mr. Burdock attended to the Bernards' residence and took multiple photographs in preparing his report and making his observations. These I find useful and have allowed them to be admitted pursuant to the less formal rules of evidence under the *Small Claims Court Act*. However, I find his opinion on the structural integrity of the pool to be of little value.

Mr. Burdock testified that the photographs were taken on August 24, 2013. He reviewed the various photos and showed specifically, how several of the buttresses were not installed flush to the ground or flush against the pool as recommended. In several cases, the buttresses were tipped away from the pool rather than toward. In several photographs, it shows the pool coming out of the frame.

#### Evidence of Andrew Cooke

Andrew Cooke is the owner and president of Marlin. He has owned his business for approximately ten years. He has been working in construction for a total of approximately twenty-five years, presumably inclusive of his time with Marlin. He testified that his company offers both sales and installation of in-ground and aboveground pools.

He testified that the pool was sold in September when the price is discounted to allow the company to clear away inventory. The pool was to be viewed in the Spring so the pump could be installed. He indicated that it is common for a pool to experience some lifting and movement over a winter. Indeed, he believes that is the case with this particular pool. In his opinion, using the pool up to September 2013 was not dangerous. He testifies that he installs approximately 100

pools per year. He offered to take the pool down and fix it or replace it but the Bernards declined his offer. He indicated that the pool would be fixed pursuant to the manufacturers' warranty, which according to Mr. Cooke is still in effect. He estimates that it will take approximately two days install it correctly and any broken components can be replaced for as little as \$1000.

He testified that he is not certain why the plates moved or why there would be an increase in tension on the straps, but he has seen it happen previously. He has rarely seen pools fall. He is of the opinion the straps are largely cosmetic. He testified that no pool is perfectly level, but in his opinion, this pool is not going to fail.

Under cross examination he testified that he was not present when the pool was installed but he was aware of the concerns in the Spring of 2013. He did not see the pool when the Bernards registered their complaint in September 2013. He merely took the word of his workers that everything was satisfactory and the pool was usable until then. He did not wish to do anything about it as he was operating on a tight schedule for the summer. At the time of the hearing he testified he had 70 pools booked thus far for 2014. He could not state with certainty how long it would take to reinstall a new pool or to do the work. He testified that if he felt it was an immediate problem, he would have attended to their place and fix it immediately.

There was considerable discussion on the part of both the Claimants and Defendant about the warranty, which covered the pool. A paper copy of a warranty from Swim'n Play Inc. was not entered into evidence until provided by Mr. Thompson. The Bernards testified they did not receive one. I accept their evidence in this regard and find as a fact that they did not have a copy of the warranty throughout the relevant period of time.

## **The Law**

In order to justify rescission of a contract, it is necessary first to find there was a breach and secondly that the breach amounted to a complete failure of consideration.

### Breach

This issue involves a consumer sale where the purchasers are the Bernards and the seller is Marlin. The contract is for both goods and services and thus, reference is made to ss. 26(3)(e), (h) and (j) and s.26(5) of the *Consumer Protection Act*:

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

(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;

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

(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.”

## **Findings**

In considering the evidence, I have already commented on the evidence of Peter Burdock. However, I accept his evidence as to what he observed. I found Betty Bernard to be forthright and direct in her testimony. No other witness besides Andrew Cooke was called for the Defendants, and he was not present for the installation. He did not observe the pool until March 2014. Where his evidence differs from that of the Claimants and their witnesses, I accept that of the Claimants

In looking at all of the evidence, I am unable to conclude that pool is unfit for its purpose, lacks merchantable quality or is not durable for a reasonable period of time as required by s. 26(3) of the *Consumer Protection Act*. I accept the evidence of Peter Burdock and the photographs he took for his report as to the physical appearance of the pool. However, I do not accept his opinion that the pool has been compromised. That assertion has not been proven. Indeed, I am unable to point at any objective evidence to show that any part of the pool has been damaged, aside from several buttresses. As noted below, the Bernards’ concern and lack of faith was completely justified and understandable. However, it is not proof of actual damage. Further, I note that the Bernards continued using the pool even in the face of these concerns. Given the lack of independent evidence, I am unable to conclude that the pool is unsound. Any liability for what amounts to an allegation of defective goods is rejected.

## Installation

The second issue is the installation. It is clear from viewing the photographs, that the pool has a number of difficulties. There are numerous bends and jags in the liner and body of the pool. It is not necessary to have specialized expertise to know that that a pool must fit correctly in its metal frame. In my opinion, it is also logical that buttresses must be fixed flush to the ground and to the side of the pool. No offer for corrective action was taken until September, 2013. I find the pool was installed improperly. Thus, the work was not conducted in a proper and workmanlike manner. I find s. 26(5) of the *Consumer Protection Act* has been breached.

## Mitigation

It is settled law that in the face of a breach of contract, the wronged party is expected to mitigate his or her losses. In other words, they are expected to take corrective action to rectify the breach.

Failure to mitigate was not pleaded by the Defendant, however, it is a necessary consideration in awarding damages.

I find the Bernards notified the Defendants as soon as they experienced difficulties, namely when James from Marlin attended to their residence. They were not satisfied with his response, so they escalated their complaint to the only apparent person who was in authority, Mr. Cooke. When Andrew Cooke received the complaint, he did not reply for two weeks and then simply referred them back to his staff. He then told them to wait. In the meantime, they were looking at a pool with bending buttresses, wrinkled sides and a pool not in its frame. They were understandably concerned, not only for their safety but to know if the pool would give way and cause potential water damage. Marlin took no action. Their employees referred the Bernards to Mr. Cooke, who in turn referred them to his employees. The reason given was Marlin was busy.

Mr. Cooke did not view the pool himself until March 2014 after the Claim had been filed. It was not until he was in court that he acknowledged that it could be fixed in a few days for as little as \$1000. However, that was too little, too late. The Claimants' lack of faith in Marlin was both justified and deserved.

The Claimants' next step should have been to attempt recovery under their warranty. Unfortunately, they did not receive a copy of the warranty until May 2014. They had no reason to believe there was anything in particular in place or to know where to locate the warranty. They now have a copy.

This action only deals with the relationship between the Bernards and Marlin. I also should point out that the presence of a manufacturer's warranty is no defence for a seller to any breach of warranties under the *Consumer Protection Act*. The law is clear the relationship lies between the purchaser and seller.

Perhaps a better course for the Bernards would have been to seek an opinion from another representative from the manufacturer on the state of the pool as well as an estimate from a contractor to remove the pool and reinstall it. Unfortunately for the Bernards, that was not done. However, I find in all of the circumstances, they have adequately demonstrated they have mitigated their losses.

## **Relief**

The principle for compensation for a breach of contract is to put the parties back to the position that they would have been in had the contract been fulfilled. I have found that the installation has been performed incorrectly. If I had the evidence, I would have been prepared to award the Bernards an amount sufficient to have the pool drained, the ground levelled and the pool reinstalled. In the absence of such evidence, I am left to rely upon the only figure as to the value of the installation, namely the \$2000 installation fee shown on the invoice. Accordingly, I award \$2000 under this head of damage plus HST for a total of \$2300. I also order \$200 to replace the

buttresses. In addition, the Claimants shall have prejudgment interest at a rate of 4% per annum commencing September 29, 2012, up to and including the date of the hearing, May 15, 2014, for a total of \$166.67.

### **Costs**

I am prepared to award costs for filing together with service of documents. In doing so, I recognize that the amount ordered is less than \$5000, the threshold for the higher filing fee charged to Claimants. To that end, I fix the Claimant's costs at \$150.

### **Summary**

In summary, I find the Defendants, Marlin Pools & Spas Ltd., liable to the Claimants, Jim and Betty Bernard, as follows:



Amount Allowed	\$2500.00
Prejudgment interest	\$ 166.67
Costs	<u>\$ 150.00</u>
<b>Total Judgment</b>	<b>\$2816.67</b>

Order accordingly.

Dated at Halifax, NS,  
on September 4, 2014.

---

**Gregg W. Knudsen, Adjudicator**

Original: Court File  
Copy: Claimant(s)  
Copy: Defendant(s)