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Lack of contract invites heartbreak

For Rick and Lori Bryden, the climax of a sad and costly tale is set for Jan. 29; that's the day the local sheriff in Brockville is slated to auction off their dream home-turned-nightmare.

They never even got to move in.

The saga began in 2002 when the family hired a close friend, Bob Pollard, to build a house for them on North Shore Rd. in Westport, Ont. Relying on goodwill rather than a solid contract and detailed plans, the parties agreed to build the 2,000-square-foot house for $200,000.

Excavation was completed and the footings poured in August 2002. But it wasn't long before disagreements arose about alleged defects with the footings, foundation, dormer framing, porch roofline and other issues. All work stopped in December of that year.

In 2003, Pollard sued the Brydens claiming $81,000 for work and materials supplied to the house, and the Brydens counterclaimed for $249,070, the amount they wanted to correct deficiencies.

A seven-day trial took place last January before Justice Kenneth E. Pedlar in Brockville. After reviewing the evidence, the judge awarded the builder $78,000 for work performed, despite the owners' claim that the work was defective.

In a 6,300-word decision, the judge ruled that a number of construction matters were incomplete and needed remedial work, but Pollard was entitled to be paid for work done to the date building stopped.

According to a statement issued recently by the Brydens, the former chief building official of the Township of Rideau Lakes declared in 2002 that the house met all building code requirements while it was under construction. The Brydens say he was wrong and recently commissioned four engineering reports that indicate significant deficiencies with the structure.

Based on those reports, the house is now subject to an Order to Comply, a Stop Work Order, an Unsafe Order and an Order Not to Occupy, all issued by the new chief building official of the township.

Today, the Brydens face a judgment against them for damages and costs totalling about $120,000, plus $300,000 or so to finish the house on top of their lawyer's bills. For five years they've paid taxes and a mortgage on an empty house, hoping for help from local and provincial politicians.

No assistance is available from the Tarion Warranty Corp. Tarion spokesman Robert Mitchell says there are two kinds of new home warranty coverage relevant to cases like this, where a property owner hires a contractor to build a house.

Financial loss protection is available when homeowners advance money to a builder who reneges on the contract, leaving them with less than they paid for. This wasn't available to the Brydens, Mitchell says, because the court and the Licence Appeal Tribunal ruled "the value of the work done by the builder exceeded what (the Brydens) had paid" and, as a result, "the Brydens did not suffer any financial loss."

Tarion's construction coverage is not available to the Brydens until the house is finished. Under the governing legislation, an incomplete contract home is ineligible for the warranty until the construction contract is "substantially performed," and the house is occupied.

In the fall of 2005, Pollard was convicted in provincial court and fined $750 for failing to enrol the home under the Tarion warranty program.

For now, the house is incomplete and exposed to the elements. The outstanding municipal orders will not permit occupancy until the problems identified by the engineers have been rectified.

To collect the money owed to him, Pollard has obtained a writ of seizure and sale. Acting on the writ, the sheriff will auction off the Bryden's equity in a house they own and occupy down the street.

The lesson to be learned from this tale is never to retain a contractor to build or even renovate a home without having a full set of construction plans prepared by an architect or engineer, and a detailed contract. Standard industry template contracts are available from the Canadian Construction Documents Committee (www.ccdc.org).

I also recommend hiring an architect or other professional to monitor ongoing construction.

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Pollard v. Bryden, 2007 CanLII 52016 (ON S.C.)

COURT FILE NO.: Brockville CV-03-0423

DATE: February 1, 2007

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E EN:	)	
	)	
Bob Pollard	)))	Richard T. Knott, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
Rick Bryden, Lori Bryden and Bank of Montreal	)))	Barry D. Laushway, for the Defendants
	)	
Defendants	))	
	)	
	)	**HEARD:** January 2, 3, 4, 5, 10, 11 and 12 2007

Pedlar, J

JUDGMENT

[1] The plaintiff is seeking judgment against the defendants Rick and Lori Bryden for the sum of $81,000.00, as the balance owing to him for work done and materials supplied in connection with the construction of a new, but still unfinished, home for the defendants. The action was discontinued against the other defendant Bank of Montreal. The defendants have counterclaimed in the amount of $249,070.00 as the amount allegedly required in order to perform remedial work on this unfinished new home.

[2] Prior to the construction of this house, the parties were close friends. That relationship resulted in both parties proceeding with this project by relying on the goodwill between them, rather than following standard business practices, such as signing a detailed written contract. I find that they were acting on different assumptions on very major issues right from the beginning.

[3] They first met in the third week of May 2002 to discuss the possibility of having the plaintiff construct a new home for the defendants, after the defendants became aware that Lori's mother was selling her home, and they had decided to move an existing house, in which they were living, to a neighbouring property, where she would live, and construct a new house on the original property, where they would reside. The defendants wanted work to begin by July 1st. The defendant Rick Bryden met with the plaintiff at that time and gave evidence in detail as to the date and time of the meeting and the items discussed.

[4] At the time of their first meeting, the defendants had prepared, on their own, some detailed sketches of the type of home they wished to have constructed. They also had a picture, out of a magazine, depicting a certain style of house that they were seeking and from which the sketches had been developed. Their evidence is that they had been planning, and dreaming about this house for several years. Rick Bryden would frequently work on the plans, spending hours going over the drawings, filling in details and making changes to accommodate the needs and wishes of themselves and their daughter.

[5] It is common ground that the plaintiff advised the defendants that they would need a proper set of professionally prepared plans, in order to proceed with construction. He advised them that BMP Lumber, amongst others, provided such a service and they would also be a potential source of many of the materials required. The defendants almost immediately followed up by retaining BMP to prepare a detailed set of construction plans. The plaintiff was not involved in that process other than, at the defendants' request, to inquire once as to how soon the plans could be ready, in view of the very tight time frame being pursued by the defendants.

[6] The defendant Rick Bryden testified that, during that first meeting, the plaintiff quoted him a cost of $100.00 per square foot to construct the type of home shown in the photograph and sketches, which they reviewed in considerable detail during the course of a three-hour meeting. Lori Bryden arrived home as the plaintiff was leaving and recalls a

brief discussion which included reference to the cost of $200,000.00 for this house, based on $100.00 per square foot, and the size of 2000 square feet. Their evidence is that approximately four or five years earlier, Rick Bryden had estimated it would cost him $150,000.00 to build this home himself. Their position is that they had a firm price, at that point from the plaintiff, to construct this house for $200,000.00.

[7] The plaintiff does not recall either the exact date or details of that first meeting. His evidence is that it was an exploratory meeting, during which he advised the defendant that an average price for construction of a house would be around $100.00 per square foot, to construct a basic bungalow with an unfinished basement. He states that he did not pay a great deal of attention to the sketches prepared by the defendant, as he would only be interested in a final set of construction plans, not only to provide necessary detail, but also because changes could occur during the preparation of those plans by a professional. His evidence is that he did not, and could not, based on those sketches, agree to a fixed price contract for the construction of this house.

[8] On the balance of probabilities, I find it is highly unlikely that a contractor, with 35 years experience in the construction industry, would agree to a fixed price contract before seeing a final set of construction plans. I reject the defendants' claim that a fixed price contract, to construct this house for $200,000.00 was agreed upon between the parties. Even if they were proceeding on that assumption, it is clear that the plaintiff had not entered into any such agreement. As the plaintiff points out, that would be an actual construction cost of $188,000.00 with GST. The defendants had made their own, unprofessional, estimate of a cost of $150,000.00 without labour, some five years earlier. There was no clarity achieved surrounding details related to many items, such as the exact heating system, or quality of plumbing or electrical fixtures, cabinetry, or flooring. Those details can affect the total cost by tens of thousands of dollars.

[9] At that point, the defendants had not obtained any mortgage financing or applied for surveying, or severance of the new lot, and did not realize a severance was required. The complexity of this project, and therefore the actual costs, appear to have been seriously underestimated by the defendants. They estimated it would cost $30,000.00 to relocate the old house, while the evidence is the actual costs were considerably higher, and the mortgage on that property was increased from the originally contemplated $30,000.00 to $83,000.00. The building permit application was signed on June 28, 2002 when the first draft house plans from BMP were not yet in hand. Everyone was working under a sense of urgency created by the wishes of the defendants and charged headlong into this project without many of the normal preparatory steps being completed in advance.

[10] By September, the plaintiff had received no funds whatsoever from the defendants, and prepared a written proposal to attempt to address the mistake of commencing work without a written contract, and give the defendants something to take to their bank. That proposal is dated Sept 16, 2002 and is contained at Tab 1 of the Book of Productions filed as Exhibit #1. It sets out a series of exclusions and allowances and sets the price for the plaintiff s portion of this house construction at $240,750.00 excluding septic, backfill and flooring. Allowances were set at $4,500.00 for kitchen cupboards, $2,500.00 for bathroom fixtures and $10,000.00 for furnace and air. I would expect any prudent person reading those allowances would recognize them as modest for a house this size and quality, with three bathrooms and radiant floor heating in the basement floor. It would be reasonable to expect to spend more on all items for which allowances were identified. In fact that is what was proposed here, as the defendants eventually chose kitchen cupboards priced at $8,500.00 and a heating system valued at $27,000.00 and plumbing fixtures of around $4,600.00. The excluded flooring was priced by the defendants at just under $14,000.00. Those items were not purchased because the construction was halted, but the approximately $37,000.00 over and above the plaintiff s price, without backfill and septic which would add another $10,000.00 or more, highlight the growing costs of this project, which should have been evident to all.

[11] The defendants took the plaintiff s proposal to the bank and signed a mortgage for $247,509.00 on this property on or about Nov. 2, 2002. They also took out a further mortgage on the old house situated on the other lot for $83,000.00.

[12] Final construction plans were not completed until Aug 15, 2002. Excavation had been done, and footings poured, a week before that, relying on the basement portion only of those plans, being page one of Exhibit #2. The defendant Rick Bryden was intimately involved in the development of the plans, including several meetings with the designer and having input into several changes reflected in the two previous drafts, prior to the final construction set being produced. In preparing the footings, the plaintiff's evidence was that gravel, referred to as engineered fill was used, at various depths to level the surface. Excavation had included the removal and reshaping of some bedrock, which left an uneven surface with some areas requiring a greater depth of gravel fill than others. The plaintiff's evidence was that they used a rented machine to tamp the gravel according to their usual practice and constructed the footings, in the absence of any directions to do otherwise, according to their usual standards, based on many years of experience building homes successfully on this type of surface in this part of Ontario. He considered it a normal pour for these footings. He gave evidence that he has done compaction tests approximately three times in the last ten years, when requested, and he did not consider that necessary in this case.

[13] His evidence was that they have a practice of calling the building inspector prior to pouring, as required. The inspector gave evidence that he has no record of inspecting these footings until after the pour. The plaintiff has no specific memory of this inspection beyond his standard practice for calling in advance. According to his evidence, the practice has also developed that once he calls, 48 hours in advance, that it is understood he can proceed to pour unless the inspector calls to ask him to wait until he can be there. With only page one of the BMP plans to go from at that point, it is unlikely the inspector would have failed to approve these footings, if they were built to the generally accepted standard for residential dwellings in that area. It appears that four years later, the foundation walls have not failed in any discernable way, and the footings which, along with metal posts, support the steel beams, will require some remedial work before the final framing stage is complete.

[14] The basement plan calls for two steel beams of a certain type, size and strength followed by the words "to be confirmed by engineer." The plaintiff's evidence was that when he received the beams from the supplier, who had also produced the plans, they were the size and type called for, and he assumed that the beams had been confirmed as the proper ones for this structure, prior to shipping. The witness from Roney Engineering stated that the contractor should have been alerted by the reference in the plans " to be confirmed by engineer" and inquired about any engineer's report. There clearly was no reference on the plans to having partial basement plans related to footings and posts confirmed by an engineer. The only reference was to the beams themselves. The plaintiff installed the steel beams in the areas shown on the basement plans, with the expectation that, at the final framing stage of the project, those beams would be straightened up, leveled, permanent posts installed and any changes to footings required by the building inspector would be taken care of prior to commencing placement of drywall etc. Those steps never took place as the project was called off prior to that stage.

[15] Unknown to either the plaintiff or the defendants, BMP retained Roney Engineering to prepare a design relating to the proper steel beams required, together with their support, including the type of posts and footings required for this structure. The plans for that design are dated August 20, 2002. The footings were poured on August 8, 2002. The Roney plans were not provided to any of the parties herein until the spring of 2003, after this dispute had arisen. Construction had ceased in December 2002, at a stage when the house had the walls up, doors and windows installed and the roof complete except for a very small section of steel. It is common ground that the house has not been constructed in accordance with the Roney design

[16] The plaintiff states that any required changes to do so can be achieved fairly easily, as the basement floor is still not poured and there is relatively easy access. Any new footings needed to support the beams can be dug out and installed. Footings have been placed according to the plans provided, not according the Roney plans and are not fully centered under the beams as positioned in the Roney plans, which also call for deeper footings. The web stiffener can easily be welded in and the one beam cut to the length required. The wood stripping to provide lateral support can easily be nailed along side the beams once they are lined up correctly and the permanent posts installed once they are leveled and in position. There is also some blocking that needs to be done as part of the final framing stage.

[17] There are also a variety of other framing issues identified in the report of Trought Engineering, most of which the plaintiff acknowledges as needing to be done prior to the final framing inspection. He estimates three men could complete all that work within four days, and acknowledges that his invoice showing an $86,000.00 balance owing should be reduced by around $5,000.00 as it included the completion of final framing. The claim of the plaintiff at trial was then for $81,000.00. The total billed by the plaintiff for this job was $161,000.00. Some payments made were credited to work the plaintiff did on the relocating of the old house, and after accounting for that and all payments received, the balance was $86,000.00. Catherine Pollard, the plaintiff s wife and bookkeeper for the business, gave evidence that when she totalled all the time sheets of the workers, and the invoices for material supplied to date, the total was $164,000.00 inclusive of a 10% supervision fee for the plaintiff, which had been reduced from his usual 20% as a favour to the defendants.

[18] There are some unanswered issues, such as why every other pair of main floor ledger bolts has been cut off. The plaintiff has no explanation, as he believes they were installed and there is no reason, or way to cut them off when installed. The report recommends the ICF supplier be contacted to decide the number of bolts that are required. Some of the issues raised he feels are related to exposure to weather, and others are related to not following the design, which changes he claims were requested by Rick Bryden.

[19] It was noted by the engineers that reviewed this construction that there has been no catastrophic failure of the footings, despite the passage of four years in an unheated basement, with standing water often higher than the top of the footings. There has been some cracking of the concrete, and at least one footing is described as failed , but no major structural problems have arisen. The house has, of course, not been subject to the full load that would exist if it were fully constructed and lived in. Even though the footings have not apparently failed in a way to cause any major damage to date, I would expect any prudent owners would want the Roney plans implemented, now that they are aware of them. That does not mean the plaintiffs were negligent in not building to that standard, without knowing of the plans. There was an urgency created by the defendants, who dealt with the designer and provided the only available plans to the plaintiff, in order to get the project going as soon as possible. The only reference to an engineer s confirmation on the plans provided was in relation to the beam itself, which was then provided, by the same source who had prepared the plans, and in accordance with the very specifications shown. I find it was not unreasonable for the plaintiff to proceed as he did, under the circumstances, even though with hindsight, it would have been ideal if he had made further inquiries.

[20] BMP retained Roney who delivered the plans to BMP. The Roney design is dated August 20, 2002. It was not forwarded to the defendants or the plaintiff. The footings had

been poured almost two weeks earlier. Roney had no contact with any of the parties to this action at that time, or during construction. Chris Roney s evidence is that it is normal to attach a copy of an engineer s report of this type to the house plans, and best practice to make a specific reference to that engineer s report on the face of the plans. In the absence of either of those things happening here, I find it is not a reasonable expectation that the plaintiff would make active inquiries.

[21] During construction, the defendant Rick Bryden dealt with certain subcontractors directly, including Tackaberrys for the rock excavation, and Delbert Adrain for other excavation, backfill and septic, as well as the installation of the drainage big 0 pipe around the house. Adrain s evidence is that Rick hired him, obtained permits discussed and agreed to the location of the septic system etc. The plaintiff did call him when he was ready for engineered gravel fill to be delivered to the site. Adrain billed Rick Bryden, and was paid for work done on both the new and old houses, except for $7,500.00 still owed to him for the septic at this house. Rick Bryden denies instructing him but concedes he did receive invoices from, and made payments directly to, Adrain.

[22] One of the defendants complaints about the plaintiff s construction of this house is that there is water getting into the basement. More than one witness testified that the big 0 drains into a ditch near the road at an elevation that is higher than the house, and that water will flow back into the basement as a result. Delbert Adrain gave evidence that those observations fail to recognize that the drainage is designed to flow in two different directions from the house. The pipe going to the ditch is connected from the area at the corner of the garage, which is higher than the outlet at the ditch and flows down to it. The rest of the drainage pipe around the house was designed to flow around to the other side and flow down into a swamp. That system was never completed due to the location of rock on that side of the house, which needs to be dug out to allow the big 0 to be installed low enough to permit the water to flow down into the swamp as intended. Once that rock is dug out the drainage system can be completed. Apparently none of the people who noted the apparent problems with this drainage system spoke to Delbert Adrain who installed it.

[23] Based on the evidence, I find, on a balance of probabilities, that the plaintiff did not hire Delbert Adrain to install this drainage. The defendant Rick Bryden did. The plaintiff was not involved in any of the supervision of that work and is not responsible for any alleged deficiencies, which should be discussed with Adrain. It appears, on the evidence available to this point, that rather than deficient work, it is more a case of further work needed to complete the installation before any final assessment can be made of how well it will function. Some of the fill around the foundation has also settled and the grading will need to be redone to have water flow away from the basement. The evidence was this settling of fill is normal and particularly to be expected after four years of exposure without the protection of sod, or other landscaping which usually would have taken place.

[24] Another major area of dispute relates to the framing of the dormers and the roofline on the porch. There is no dispute that both the dormers and the porch are not constructed according to the plans. The question is why. The dormers are wider than called for, and the porch roofline is lower, so that it obstructs approximately one-third of the view from inside the house. The plaintiff and two of his workers testified that those changes were requested, and approved by the defendant Rick Bryden. He requested the dormers be built one foot wider than on the plans, according to those witnesses, to accommodate a desk for his daughter in her bedroom at that location. The defendant denies requesting this change and states he noticed it during construction, as he was on site virtually every day. Upon inquiring, he was told by the foreman that they had misread the plans, and that it would not be a problem. He did not request that they change it back and build according to the plans. Both he, and his wife state that their daughter does not have any desk requiring such an increase in dimensions. The plaintiff, and his workers stated that it is easier and cheaper to build according to plan, and that the change required some changes to the rafters, each one of which were being specially built rather than delivered from a supplier. They did discuss the risk of snow build up between the valleys created by the change, but decided it would work.

[25] They were required to change the two outside dormers so that they matched. On the balance of probabilities, I find it highly unlikely that this change resulted from experienced carpenters misreading plans by making an outside dimension an inside dimension, and then choosing to continue to build consequent rafter changes on both dormers, and build a second dormer to match the first rather than simply correct the mistake which, even if it had occurred as described, was discovered relatively early into the framing of the first one. It is much more likely that these three men are correct when they state that the change was requested by Rick Bryden. I find as a fact that he did not ask them to change the dormers, as built, to the size on the plans. He was intensely involved in this project and was by no means an absent owner who shows up days or weeks later. It would have been a relatively simple correction to make, at that stage, and much simpler than continuing on and building a second oversized dormer, with all the other changes required to accommodate that.

[26] I have no explanation for the comment about the desk, unless he was thinking of future needs or possibilities, but I accept the evidence that such a reference was stated, as reported by all three witnesses. It is also significant that the defendants paid the plaintiffs $50,000.00 from a mortgage advance on November 29th and $20,000.00 from a personal line of credit on December 4, 2002 after the dormers were constructed as built, and told the plaintiff they would speak to the bank about getting further advances. The plaintiff had submitted a bill on November 25, 2002 showing an amount owing of $161,000.00 for work done to date, plus finishing the roof and supplying and installing all windows and doors. The amount of the invoice was not questioned. The issue was getting advances from the bank to pay the account.

[27] The plaintiff, and his workers testified that they built different styles of rafters for the porch and set them up for Rick Bryden to decide which porch roof position he preferred. He then stood out in front and chose one, which they then copied to construct the porch roof. They state they tried several different styles before the defendant chose one, while his evidence was he was only shown one model of rafter. His evidence at trial was that he told the workers that he was not happy with the roof, as it was being built, but that they ignored him and continued. The next day he discussed it with the plaintiff and said the work should stop and expressed his dismay about the porch roofline. The defendant stated that the plaintiff advised him, at that time, that the position of the porch roof was limited in height because of the metal roof on the house, which was already in place at the front, where the porch was to be built. At trial, the plaintiff stated it was not limited to the height of the steel in place, as that steel could have been cut back to place the rafters higher as desired.

[28] Regardless of the reason for this change, it appears that by the end of the second day, Rick Bryden was very upset with the results. When his wife arrived to pick him up, he was very upset about it, to the point of being physically ill. She was not present when the change was made, so she only knows what he has told her about the reasons. Again I find it difficult to understand how this very involved homeowner would allow such a significant portion of the construction to proceed without his consent, or in direct contradiction to his expressed wishes. He had been planning this house for years, and was intensely involved in the development of the plans and at the site daily, even helping with some of the work during the summer months.

[29] This work was done, according to his evidence, around the 10th or 11th of December. Work stopped December 19th. Only temporary posts had been put in to support the porch by that time. It appears that he was unhappy with the roofline when he saw it up, but that does not negate the possibility that he agreed to that rafter design, on the basis of what one rafter looked like, and realized after the roof was up, which only took two days at the most, that it was not as he had envisioned it. That seems much more probable than the work proceeding, against his direct instructions. On the balance of probabilities, I accept the plaintiff s evidence on the issue of the porch roof.

[30] When the parties met in January 2003 with the lawyer acting for both of them and the bank to discuss the growing problem of payment for the house construction, the defendants did not make any complaints about workmanship, or the plans not being followed, or the claimed contract price of $240,000.00 for the plaintiff s portion of the job. They testified that they went to that meeting to try and convince the plaintiff to return to the site and continue construction, by assuring him there were sufficient funds to complete it. The defendants paid the plaintiff a further $5,000.00 at that meeting. That would be strange conduct indeed, from someone who had seen their direct instructions ignored and work done in direct contradiction to their stated wishes, as well as unauthorized work done, not according to the plan which they had been developing and dreaming about for many years.

[31] One relatively minor issue relates to the widening of a hallway on the second level by one foot. The plaintiff states that was at the request of Rick Bryden, and he denies it. As far as I can tell, it means very little to this action, and I only comment on it as a further example of changes from the plan that would make no sense, unless requested.

[32] Following the January 2003 meeting with the parties and their lawyer, the lawyer and the plaintiff understood, although the defendants do not agree, that the parties would get together to try and work on the exact details of how each area of the house was to be finished, in order to try and arrive on a mutually agreeable price that would allow for the completion of the house. In preparation for that meeting, the plaintiff went and got a clean set of plans from BMP so they could go over them together and make notes. He also went to various sub trades and suppliers and had them agree to wait for payment until mortgage advances were available. He spent three days in preparation for the meeting, and then called the defendant Rick Bryden who declined to meet and said he was examining his options. I find that the plaintiff was still investing time, experience and credibility within the industry, and therefore services, on this project up until that date, and therefore this lien was filed in time and is valid. The workers had not been on site since December 19, 2002, but the plaintiff had continued his role, as contractor, of attempting to supervise and co-ordinate the job and clearly indicated a willingness to keep the project viable by offering to meet with the defendants, who refused to do so. His delivery of services ended on the date the defendants advised him not to return.

[33] Concord Engineering did a detailed geotechnical assessment of the foundation. Their report is at Tab 9 of Exhibit #15. They were concerned that there was no compaction testing of the gravel fill in the basement, or evidence of supervision of the work by qualified geotechnical personnel. The fill may have been compacted or stabilized by cement slurry in this case. They state it is common practice to have geotechnical personnel do compaction testing, as required by the Ontario Building Code. They point out this is even more critical when the plan is for radiant heating on all floor levels, as was contemplated here, although not shown on the BMP plans.

[34] The Building Code itself at S.4.2.4.1 (1) requires the design of foundations to be based on a subsurface investigation carried out by a person competent in this field of work, and one of the following: ...(b)established local practice where such practice includes successful experience both with soils and rocks of similar type and condition and with a foundation or excavation of similar type, construction method, size and depth, Subsection (a) refers to person especially qualified in the field of civil or geotechnical engineering

applying generally accepted principles of those professions.

[35] It appears that the Code draws a clear distinction between the more general reference to a person competent in this field of work and the later and more specific reference to a person especially qualified in the field of civil or geotechnical engineering. There is no requirement for all designs of basements to be preceded by a report by a geotechnical engineer. The evidence of the plaintiff is that compaction testing is rarely ordered in residential construction of similar foundations on similar lots of similar types of soils and rock formation in that part of Ontario. In his experience, that practice has been successful. The subsurface investigation, required by the Code, is apparently routinely conducted by excavators and contractors in the field under the supervision of a building inspector. Those excavators and contractors, under such supervision, are treated as persons competent in this field of work by the designers of foundation plans. While I have no problem with the concept that compaction testing would be useful in many situations, and therefore could be considered common practice, I find no breach of the Ontario Building Code under these circumstances.

[36] Concord also made an interesting discovery that the horizontal re-bar in the Nudura walls was consistently spaced at 18 inches while Nadura specifies 16 inch spacing in their current published specifications. The evidence was that the plaintiff hired an expert from Nadura to supervise the Construction of these walls, as it was the first major project of a complete house built from this type of construction. He and his workers had done some work with this product and taken training from the manufacturer. The re-bar is placed inside the Styrofoam walls by attaching it to pre-formed plastic frames designed and supplied by the manufacturer. Other than failing to install enough of them, there is no way to alter the number or positioning of the bars. If the re-bar is at 18 inches, it is probable that the forms supplied by the manufacturer were spaced to that dimension.

[37] The work was supervised by the expert from the manufacturer, who was present during that portion of the work and paid over $7,000.00 for his supervision. It may be that Nudura has changed specifications since the fall of 2002. There would appear to be no evidence of negligence by the plaintiff in this regard. As Concord point out, the implications relate to the backfill height that these walls are designed to support. That height can be increased by selecting a lightweight and/or more angular backfill material. The allowable finished outside grade, at the rear of the building, based on this concern, and Concord s recommendation to increase the height of the floor elevation, would be significantly lower than specified in the drawings.

[38] The Concord report also expresses concern about the height of the water table, and the topography, including the type of rock, and recommends a sub floor drainage system. They were unable to detect any cracks in the foundation, which has not heaved much, but they caution that the building has not been tested under design conditions. There is no evidence that either the foundation walls or the footings under those walls have failed. The footing at the basement walkout will need reconstruction and frost protection. The plaintiff acknowledges that as part of the unfinished work that would be required to be completed before the final framing inspection.

[39] Having made all the above findings, I find the plaintiff is entitled to be paid for the work he has done. The challenge is to properly value that work, in light of the evidence that the original claim for $86,000 included work that is admittedly not finished. The plaintiff has valued the cost of bringing this house up to that stage would be around $5,000.00 and reduced his claim to $81,000.00. He reviewed the report of Trought Engineering in detail and answered their issues as mostly relating to unfinished work or the result of him not having the Roney report, or the result of changes requested by Rick Bryden, or the drainage for which he was not responsible.

[40] A report from Teixeira Construction was filed estimating the cost of $249,070.00 to correct the deficiencies in this house which includes removing and replacing the steel roof, re-framing the dormers and porch, replacing footings and posts to the specifications of the Roney report, replacing the drainage system, concrete grouting, exterior grading and removing and re-installing the septic system. Most of those items the plaintiff is not responsible for, in view of my findings. It is difficult to determine a correct amount to discount the $86,000.00 claim, in order to properly reflect the value of work done and left undone yet included in that invoice. The percentage of completion estimated by the appraisers is not reliable in terms of actual cost of time and material. The total invoice was for $161,000.00 to include the final framing inspection. The evidence is that the cost of time and materials, to date, exceeds the total billed by $3,000.00. Obviously that final framing inspection work is not yet complete. That cost of time and material was calculated by using the time sheets of long-term employees and adding up invoices. I accept that evidence as reliable, and prefer it to the observations of the defendants, who claim workers were not there on certain days when the time sheet records claim they were. It is the normal business practice of the plaintiff to record time on job sites this way. On balance, it seems improbable that long-term employees, in a small business with daily supervision, would be either mistaken or dishonest about such important information. Under all the circumstances, and to allow for some uncertainties, I find it would be reasonable to allow $8,000.00 off the claimed price to bring this house up to the stage of being ready for final framing inspection. I therefore grant judgment in favour of the plaintiff in the amount of $78,000.00.

[41] I agree with counsel that this was a very sad case, to see formerly close friends, from a small community caught in such a difficult dispute. It was also particularly harsh to expend disproportionate legal and other professional expense on this process. It is the type of case where the costs are prohibitive, in view of the complexity of issues raised. I truly wish there was a cheaper, faster solution for people caught in circumstances like this. This case was a rather extreme example of litigation over this amount of money. I can only assume all parties made every reasonable effort to avoid trial and were well informed of the risks of proceeding. Nevertheless it troubles me that it was such a slow and expensive process for them.

[42] If the parties cannot work out the issue of costs I will receive written submissions from the party seeking costs, not to exceed two type written pages, together with a draft Bill of Costs within thirty days, with a ten day right of reply to the other side.

[43] I thank counsel for their assistance in dealing with this matter

Pedlar, J

Released: February 1, 2007