

ARBITRATION TRIBUNAL

Constituted by virtue of *Regulation respecting the guarantee plan
for new residential buildings*
(O.C. 841-98 of 17 June 1998)

Under the aegis of

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

Arbitration body authorized by the *Régie du Bâtiment du Québec* responsible
for the administration of the Building Act (R.S.Q., c. B-1.1)

C A N A D A

PROVINCE OF QUEBEC

District of Montreal

File n°: GP 193555-1

File n°: 121804001

TIM SWEN GAST

-and-

HIASMINA GAMARRA RAMOS

“Beneficiaries” / Appellants

v.

SAMCON GORDON INC

“Contractor” / Respondent

-and-

**LA GARANTIE DES BÂTIMENTS
RÉSIDENTIELS NEUVES DE L’APCHQ INC.**

“Manager”

ARBITRATION AWARD

Arbitrator:

Me Tibor Holländer

For the Beneficiaries:

Ms. Hiasmina Gamarra Ramos (Absent)
Mr. Tim Sewn Gas representing himself
and
Ms. Hiasmina Gamarra Ramos

For the Contractor: Samcon Gordon Inc.
Me Joe Morrone Counsel for Samcon Gordon Inc.
Mr. Daniel Gamache, Manager of Customer Service

For the Manager: Me Patrick Marcoux, Counsel for
La Garantie des bâtiments résidentiels neufs de
l'APCHQ Inc.
Mr. Jocelyn Dubuc, Conciliator

Date of Hearing: September 5, 2012

Hearing location: Montreal Court House

Date of Award: 1 October 2012

IDENTIFICATION OF THE PARTIES

"BENEFICIARIES"/APPELLANTS: Hiasmina Gamarra Ramos &
Tim Sewn Gas
811 Rielle Street, Condo 307
Verdun, Québec
H4G 0A3

"CONTRACTOR" /RESPONDENT: Samcon Gordon Inc.
815 René-Lévesque Blvd. East
Montréal, Québec
H2L 4V5

**"MANAGER" OF THE
GUARANTEE PLAN:** La Garantie des bâtiments résidentiels
neufs de l'APCHQ Inc.
5930, boul. Louis-H. Lafontaine
Anjou, Québec
H1M 1S7

[1] For the purposes of the present Arbitration Award, the Tribunal shall only set out, refer to and/or highlight those facts, documents and exhibits that are pertinent to the award that is being rendered.

MANDATE

[2] A request for arbitration was filed by the Beneficiaries dated 14 April 2012 and the undersigned was named arbitrator on 20 April 2012.

CHRONOLOGY

- 2011.04.1 Preliminary contract and guarantee contract (Condominium) (the “**Contract**”). (Exhibit M-1).
- 2011.07.22 Letter of demand from the Beneficiaries to the Contractor, with the Manager’s receipt stamp dated 24 August 2011 (Exhibit M-2 *en liasse*).
- 2011.11.25 Letter of demand from the Beneficiaries to the Contractor with the Manager’s receipt stamp dated 30 November 2011 (Exhibit M-2 *en liasse*).
- 2011.11.25 Letter from the Beneficiaries to the Manager with the Manager’s receipt stamp dated 30 November 2011 (Exhibit M-2 *en liasse*).
- 2012.04.18 Decision by the Manager. (Exhibit M-3).
- 2012.04.18 Email from the Beneficiaries requesting arbitration to be submitted before SORECONI. (Exhibit M-4).
- 2012.04.20 Nomination of Arbitrator.
- 2012.05.15 Notice of Pre-trial conference.
- 2012.05.22 Email communication with the attorneys representing the Manager
- 2012.05.22 Reception of emails from the Beneficiaries and from the attorneys representing the Manager.
- 2012.05.22 Reception of email from the attorneys representing the contractor.
- 2012.05.22 Email communication with the parties.
- 2012.05.23 Reception of email communications from the parties in relation to the scheduling of the pre-trial hearing.
- 2012.05.23 Email communication with the parties scheduling the pre-trial hearing for Friday, May 25, 2012 at 2:00 pm.
- 2012.05.25 Pre-trial hearing with the parties held with the parties.
- 2012.05.25 Reception of email from the attorneys representing the Manager attaching copy of the relevant provisions of the “*Guide de Performance de l’APCHQ*” (Exhibit M-5, initially produced at the hearing as Exhibit A-5).
- 2012.06.08 Reception of email and letter from the attorneys representing the Contractor.
- 2012.06.08 Email communication with the parties rescheduling the completion of the pre-trial hearing.
- 2012.06.08 Reception of emails from the Beneficiaries.
- 2012.06.11 Pre-trial hearing involving the attorneys representing the Contractor and the Manager. The Beneficiaries failed to participate resulting in the pre-trial hearing being re-scheduled.
- 2012.06.11 Email communication with the parties to re-schedule the completion of the pre-trial hearing.
- 2012.06.11 Reception of email from the Beneficiaries.
- 2012.06.13 Email communication with the parties confirming the date of the completion of the pre-trial hearing.
- 2012.06.20 Pre-trial hearing involving the attorneys representing the Contractor and the Manager. The Beneficiaries failed to participate resulting in the pre-trial hearing being re-scheduled.

2012.06.20 Email communication with the parties confirming the date for the completion of the pre-trial hearing.
2012.06.20 Reception of email from the Beneficiaries.
2012.06.25 Email communication with the parties confirming the date for the pre-trial hearing.
2012.06.26 Completion of the pre-trial hearing involving the attorneys representing the Contractor and the Manager and the Beneficiaries who were represented by one of the Beneficiaries, Mr. Gast.
2012.06.26 Reception of email from the Beneficiaries.
2012.07.06 Email communication with the parties.
2012.07.06 Reception of email from the attorneys representing the Contractor.
2012.07.06 Reception of email from the Beneficiaries.
2012.07.06 Reception of email from the attorneys representing the Manager.
2012.07.06 Email communication with the parties.
2012.07.09 Email communication with the parties.
2012.07.17 Reception of letter from the attorneys representing the Contractor.
2012.08.31 Email communication with the parties.

EXHIBITS

[3] The Exhibits have been initially labeled and numbered “M-” in accordance with the numbering of the Book of Exhibits filed by the Manager and any other additional exhibits which the Beneficiaries filed at the Hearing were numbered and labeled “BG-”.

[4] The following additional Exhibits were filed by the Manager at the Hearing:

A-5 (M-5) *“Guide de Performance de l’APCHQ”, Section 11-2 entitled «Finitions de plancher: Revêtement de sol mal aligné par rapport aux murs adjacents, carreaux de céramique mal alignés, laize de revêtement de sol en rouleau dont le patron n’est pas aligné ou interstices entre les pièces composant le revêtement du sol», pages 236-237 and Sections 11-21 to 11-22 entitled «Finitions de plancher: Dénivellation excessive entre des carreaux adjacents en marbre, céramique ou pierre ou entre surfaces adjacentes», pages 256-257.*

[5] The following Exhibits were filed by the Beneficiaries at the Hearing:

BG-1 Specifications for the STELPRO Smart Thermostat “STCNP/SMART ELECTRONIC THERMOSTAT” (one (1) page).
BG-2 STELPRO “Installation guide «”CT” series / Heating cable” (Fourteen (14) pages).
BG-3 Specifications for the STELPRO “CT / TWISTED HEATING CABLE” (two (2) pages).

PRELIMINARY MOTIONS

[6] The parties did not challenge the competence or jurisdiction of the Tribunal and the jurisdiction of the Tribunal is therefore confirmed.

FACTS

[7] The Beneficiaries and the Contractor executed that certain Contract for the purchase of a residential building located at 811 Rielle Street, in Verdun, Quebec (the "**Property**").¹

[8] The Beneficiaries accepted the Property on 17 June 2011.²

[9] The Contractor installed ceramic tiles (12"x24") in the bathroom, living room, dining room and kitchen.³

[10] The Beneficiaries contracted with the Contractor for the installation of a floor heating system in the bathroom and living room of the Property at a cost of \$10,000.00.⁴

[11] The materials used by the Contractor to install the floor heating system consisted of heating cables and a thermostat manufactured by Stelpro Design.⁵

[12] The heating cables and thermostat were installed by Entreprise Electrique Roberge et Lambert (the "**Sub-Contractor**").

[13] The heating cables had to "*be embedded in concrete or covered by a thin concrete layer*".⁶

[14] Seeing that the Beneficiaries asked for the installation of ceramic tiles in the bathroom and living room, the area designated to be heated by a floor heating system, a self-levelling cement layer had to be applied to ensure the levelling of the ceramic tiles.⁷

[15] By letter dated 22 July 2011, the Beneficiaries filed a complaint with the Contractor and the Manager claiming poor workmanship in the placement of the ceramic tiles in the bath room, kitchen, dining room and living room.⁸

¹ Exhibit M-1

² Exhibit M-3

³ Testimony of Daniel Gamache

⁴ Testimony of Tim Swen Gast

⁵ Exhibits BG-1 and BG-3; Testimonies of Tim Swen Gast, Jean-Charles Roberge (the representative of the sub-contractor) and Daniel Gamache

⁶ Exhibit BG-2

⁷ Testimonies of Tim Swen Gast, Jean-Charles Roberge and Daniel Gamache

⁸ Exhibit M-2

- [16] By letter dated 25 November 2011, the Beneficiaries filed a complaint with the Contractor and the Manager claiming that the heating floor system was not “*tangibly warm to a comfortable temperature*”.⁹
- [17] On 23 February 2012, the Inspector of the Manager, Jocelyne Dubuc, visited the Property. His observations are duly noted in the Decision.¹⁰
- [18] The Decision dismissing the claims filed by the Beneficiaries was rendered on 19 March 2012.¹¹
- [19] This is a request for arbitration from a decision of the Manager entitled “*Décision de l’administrateur*” dated 19 March 2012 (the “**Decision**”)¹² rendered in furtherance of claims filed by the Beneficiaries under the Contract¹³ providing for coverage in accordance with the terms and conditions under a Guarantee Plan for new residential buildings (the “**Guarantee Plan**”) administered by the Manager for their Property.¹⁴ The Beneficiaries expressed a preference to have the arbitration proceedings in English.
- [20] There are three (3) points (“**Point(s)**”) covered by the Decision, though only Points numbered 2 and 3 are raised by the Beneficiaries and are in issue before the Tribunal, namely:
2. The floor heating system installed in the bathroom and living room does not allegedly provide heat within the Beneficiaries’ comfort level;
 3. The ceramic tiles in the bathroom, kitchen, living room and dining room were allegedly unlovely placed due to the Contractor’s poor workmanship.
- [21] The Decision states in regard to Point 2 that the floor heating system that was installed in the bathroom and living room was functioning and was efficient and accordingly, in the absence of poor workmanship by the Contractor, the Manager could not grant the Beneficiaries’ claim¹⁵.
- [22] The Decision states in regard to Point 3 that though there existed minor imperfections in the levelling of the ceramic tiles installed in the bathroom, kitchen, living room and dining room, the imperfections did not exceed the applicable norms in the construction industry and that in the absence of

⁹ Exhibit M-2

¹⁰ Exhibit M-3

¹¹ Exhibit M-3

¹² Exhibit M-3

¹³ Exhibit M-1

¹⁴ Exhibit M-1

¹⁵ Exhibit M-3

poor workmanship by the Contractor, the Manager could not grant the Beneficiaries' claim.¹⁶

PLEADINGS - BENEFICIARIES

[23] The Beneficiaries' complaints pertaining to Points 2 and 3 are described in Exhibit M-2.

[24] The Beneficiaries' position with regard to Point 2 can be summarized as follows. The Beneficiaries admit that a self-levelling cement layer had to be applied to ensure the levelling of the ceramic tiles. However, they are of the view that the self-levelling cement layer is the cause for the failure of the heating floor system to provide heating within their "*comfort level*".

[25] In addition, they argue that there aren't any standards governing heating floor systems. Accordingly, they are of the view that in as much as the thermostat provides for a temperature range "*between 3 and 35°C (37 to 95°F)*"¹⁷, the mere fact that the maximum temperature range of 35°C was not capable of being attained according to them, establishes that what they paid for does not in fact work. Since the maximum temperature range of 35°C could not be attained, the failure is attributed to the Contractor's poor workmanship in the application of the self-levelling cement layer.

[26] Regarding Point 3, the Beneficiaries argue that the imperfections in the levelling of the ceramic tiles placed in the bathroom, kitchen, living room and dining room was caused by the Contractor's poor workmanship.

PLEADINGS – CONTRACTOR

[27] Regarding Point 2, the Contractor argues that the heated floor was properly installed; in other words, the Contractor used the appropriate heating cables¹⁸ and followed the recommendations set out by the manufacturer's "*Installation guide*" in their placement.¹⁹

[28] With regard to Point 3, the Contractor argues that it is impossible to have a perfect levelled ceramic tiled floor. The Contractor is of the view that it followed the guidelines set out in the "*Guide de performance de l'APCHQ*"²⁰ and to the extent that there are imperfections, such imperfections fall within the guidelines of the "*Performance minimale attendue*", copy of which was communicated by the Manager to the Beneficiaries during the month of May 2012.²¹

¹⁶ Exhibit M-3

¹⁷ Exhibit BG-1

¹⁸ Exhibit BG-3

¹⁹ Exhibit BG-2

²⁰ Exhibit M-5

²¹ Exhibit M-5, section 11-21 page 256

[29] Lastly, the Contractor argues that the Beneficiaries have failed to discharge their burden of proof with regard to Points 2 and 3, in that the Beneficiaries have failed to adduce evidence establishing that: (1) the heating floor system does not function and that the alleged failure is related to poor workmanship in the placement of the heating cables and of the self-levelling cement layer; (2) the difference between the unlevelled ceramic tiled floors exceeded the applicable norms prescribed by section 11-21 of the “*Guide de performance de l’APCHQ*”.²²

[30] Therefore the Beneficiaries have failed to establish that the claims set out in Points 2 and 3 were caused by poor workmanship on its part.

PLEADINGS - MANAGER

[31] With regard to Point 2, the Manager argues that based on the inspection conducted by its inspector, the heating floor system was functioning. The inspector’s observations were noted in the Decision.²³ Therefore, in the absence of poor workmanship by the Contractor, the Manager was well founded in rejecting the Beneficiaries’ claim.

[32] With regard to Point 3, the Manager recognizes the presence of imperfections in the levelling of the ceramic tiled floor. However, such imperfections fell within the norms of section 11-21 of the guidelines set out in the “*Guide de performance de l’APCHQ*”.²⁴ Therefore, in the absence of evidence of poor workmanship by the Contractor, the Manager was well founded in rejecting the Beneficiaries’ claim.

[33] The Manager also argues that the Beneficiaries have failed to discharge their burden of proof in regard to Points 2 and 3, in that the Beneficiaries have failed to adduce evidence establishing that: (1) the heating floor system does not function and that the alleged failure is related to poor workmanship by the Contractor; (2) the unlevelled ceramic tiled floors exceeded the applicable norms prescribed by section 11-21 of the “*Guide de performance de l’APCHQ*”.²⁵

[34] According to the Manager, the Beneficiaries have failed to establish that the claims set out in Points 2 and 3 were caused by poor workmanship by the Contractor that would have fallen under the coverage of the Guarantee Plan.

²² Exhibit M-5

²³ Exhibit M-3

²⁴ Exhibit M-5

²⁵ Exhibit M-5

ISSUES

[35] Taking into consideration the facts of this case and the applicable provisions of the Regulations and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be considered:

- [35.1] Was the heating floor system properly installed?
- [35.2] Is the heating floor system functioning?
- [35.3] Is the thickness of the self-levelling cement layer the cause for the alleged failure of the heating floor system to heat the floors in the bathroom and living room within the Beneficiaries' "*comfort level*"?
- [35.4] Is the alleged failure of the heating floor system to provide heat within the Beneficiaries' "*comfort level*" caused by the Contractor's poor workmanship within the meaning of the Regulations and corresponding clauses of the Guarantee Plan?
- [35.5] Did the difference between unlevelled ceramic tiled floors exceed the norms prescribed by section 11-21 of the "*Guide de performance de l'APCHQ*" so as to constitute poor workmanship within the meaning of the Regulations and corresponding clauses of the Guarantee Plan?

ANALYSIS

[36] The Tribunal will review the evidence in relation to the individual issues raised by the Beneficiaries with respect to Points 2 and 3 of the Decision.

a. *Point 2: Heated Floor*

[37] The Beneficiary, Mr. Gast, testified that at the time of the acceptance of the Property, it was not possible for him to verify whether the heating floor system was functioning in accordance with his expectations because it was not cold at the time of the year.²⁶

[38] The fact that the Beneficiaries were unable to verify the functionality and efficacy of the floor heating system has no bearing on the outcome of the award that the Tribunal is called upon to render.

[39] In the letter of 25 November 2011²⁷, Mr. Gast wrote that:

"Even after three days of keeping the floor-heating run on highest temperature this week, the floor does not get tangibly

²⁶ The Property was accepted on June 17, 2011 (Exhibit M-3)

²⁷ Exhibit M-2

warm to a comfortable temperature. There is a slight difference to the non-heated floor in temperature, but the area where the floor-heating is installed does not supply an appreciable and sufficient temperature.”

i. *The Functionality of the heating cables and thermostat*

[40] Mr. Gast confirmed that following his complaint of 25 November 2011, the Sub-Contractor visited the Property and performed tests on the functionality of the heating floor system.

[41] Mr. Gast admitted that the tests performed by the Sub-Contractor established that the heating cables and the thermostat were functioning. However, according to Mr. Gast, while the Sub-Contractor tested and measured the functionality of the heating cables, it did not test or take any measures of the surface temperature of the heated floors in the bathroom and living room (the “**heated floors**”).

[42] Mr. Gast not being satisfied with the tests performed by the Sub-Contractor and the results thereof obtained, communicated directly with Stelpro Design (the manufacturer of the heating cables and thermostat) to learn that there were no norms governing the surface temperatures associated with heated floors such as his.

[43] Mr. Gast admits that the thermostat functions, however basing himself on Exhibit BG-1, he believes that in as much as the thermostat provides for a temperature range “*between 3 and 35°C (37 to 95°F)*”, the mere fact that the maximum temperature of 35°C was not attained (according to him), establishes that what he paid for does not in fact work.

[44] In so far as Mr. Gast is concerned, the heated floors did not provide during the winter months a “*comfortable level*” of temperature that was in accordance with his personal unqualified standards.

[45] Jean-Charles Roberge, works for the Sub-Contractor as an electrician and a project director. The Sub-Contractor installed the heating cables and the thermostat; however, it did not apply the self-levelling cement layer on which the ceramic tiles were placed.

[46] As appears from Exhibit BG-3, the Stelpro Design heating cables used by the Sub-Contractor “*can be installed under most types of floor coverings* (ceramic tiles...)*”. In the present instance, the heating cables were installed under the ceramic tiles.

[47] The Sub-Contractor used a Stelpro Design thermostat to control the temperature of the heated floors. The specifications contained in Exhibit BG-1 provided the following description relating to the operation of the thermostat:

“Efficient control for your heating cable”

“CONTROL: acts like a programmable thermostat by automatically lowering the temperature once per 24 hour period (Smart mode)”

[48] According to the testimony of Mr. Roberge, the heating cables and the thermostat were installed in accordance with the manufacturer’s guidelines. Once the heating cables were laid on the concrete slab, they were tested for resistance and functionality, prior to the application of the self-leveling layer of cement permitting the placement of the ceramic tiles.

[49] Following the placement of the ceramic tiles, he verified the functionality of the heated floors.²⁸ All the tests that were then performed established that the heating cables were functioning within the manufacturer’s suggested guidelines²⁹.

[50] Mr. Roberge was cross examined by Mr. Gast and admitted that: (1) the Sub-Contractor does not conduct tests to ascertain the surface temperature of the heated floors; (2) the Sub-Contractor does not have equipment to verify the surface temperature of the heated floors; (3) there are no norms governing the surface temperature of heating floor systems.

[51] Daniel Gamache, the Contractor’s manager of customer service testified that following the installation of the heating cables, a self-leveling layer of cement had to be applied to permit the placement of the ceramic tiles; however, he was unaware of the thickness of the self-leveling layer of cement that was applied on top of the heating cables, necessary to permit the placement of the ceramic tiles.

[52] Following the reception of Mr. Gast’s complaint he asked the Sub-Contractor to test the functionality of the heated floors, which was done. The tests performed by the Sub-Contractor confirmed that the heating floor system was functioning.

[53] The Inspector of the Manager, Jocelyne Dubuc, has been an inspector since 1986.

²⁸ Mr. Roberge testified that the tests were performed during the month of May 2011

²⁹ Exhibits BG-1 and BG-2

[54] Following the reception of the complaints filed by the Beneficiaries, Mr. Dubuc visited and inspected the Property. He took with him a thermometer to record the surface temperature of the heated and non-heated floors. His observations and test results recorded at page 4 of the Decision³⁰ state the following:

“Lors de l’inspection, nous avons vérifié, à l’aide d’un appareil prévu à cet effet, la température à la surface des planchers chauffants, puis de la surface des autres planchers afin de les comparer.

Dans la salle de bain, nous avons mesuré une température de surface de 26 degrés Celsius alors que le plancher du passage, lequel n’est pas chauffé, était à 23 degrés Celsius.

Dans la salle familiale, la température à la surface du plancher chauffant était de 26 degrés Celsius alors que sur le plancher non chauffé de la cuisine, elle était à 21,5 degrés Celsius.”

[55] Cross-examined by Mr. Gast on whether he took a reading of the thermostat temperature, Mr. Dubuc upon consulting his notes, declared that the thermostat was set at 28°C.

[56] When asked by Mr. Gast whether he found a surface temperature reading of 26°C to be comfortable, Mr. Dubuc affirmed that in so far as he was concerned, a temperature reading of 26°C was indeed comfortable.

[57] Consequently, Mr. Dubuc based on the results obtained could not arrive at the conclusion that there existed an apparent problem with the heating floor system which could be caused by the Contractor’s poor workmanship.

[58] Mr. Gast did not deal in his testimony with the circumstances surrounding the selection of the materials used to install the heating floor system in his Property.

[59] Were the heating cables and thermostat manufactured by Stelpro Design chosen by the Contractor or by him? Was he aware of the specifications of the materials to be used?³¹ Did he inquire as to the efficacy of the heating floor system? Did the Contractor represent that a surface temperature of 35°C was attainable with the installation of the Stelpro Design heating floor system?

³⁰ Exhibit M-3

³¹ Mr. Gast testified that Exhibits BG-1 to BG-3 inclusively, were obtained by him after November 2011 and subsequent to the tests performed by the Sub-Contractor at that time

- [60] Was Mr. Gast aware that a self-leveling cement layer would be used to allow for the leveling of the ceramic floors that were installed on top of the heating cables? Did he ask the Contractor what impact if any the application of the self-leveling cement layer would have on the emission of heat from the heating floor system that was to be installed?
- [61] Though in his testimony, Mr. Gast stated a number of times that the surface temperature of the heated floors was below his expectations, he never once stated or explained what his actual expectations were at the time that he contracted the installation of the heating floor system.
- [62] Even if the Tribunal could consider Mr. Gast's expectations for the surface temperature of the heated floors to equal that of the thermostat, namely 35°C³², that in itself does not allow the Tribunal to conclude in the absence of evidence, that the Contractor in its representations to the Beneficiaries warranted that the use of the particular heating floor system would provide heat at a maximum surface temperature of 35°C.
- [63] Mr. Gast failed to adduce any evidence useful to determine the Beneficiaries' expectations relating to the performance of the heating floor system; there was no evidence introduced by Mr. Gast dealing with any of the aforementioned questions raised by the Tribunal.
- [64] While Mr. Gast complained in November 2011, that the heating floor system was allegedly inadequate and was not "*tangibly warm to a comfortable temperature*"³³ he did not take any steps to keep a record (from October 2011 until the end of April 2012) of the surface temperature of the heated floors contrasted with the temperature setting of the thermostat.
- [65] In the letter of 25 November 2011³⁴, Mr. Gast wrote that:
- "Even after three days of keeping the floor-heating run on highest temperature this week, the floor does not get tangibly warm to a comfortable temperature. There is a slight difference to the non-heated floor in temperature, but the area where the floor-heating is installed does not supply an appreciable and sufficient temperature."*
- [66] Mr. Gast did not testify whether at the time he wrote the letter of 25 November 2011³⁵ he was aware that the "*programmable thermostat ... automatically [lowers] the temperature once per 24 hour period*".³⁶

³² Based on the letter of 25 November 2011, Exhibit M-2

³³ Exhibit M-2

³⁴ Exhibit M-2

³⁵ Exhibit M-2

- [67] Mr. Gast's testimony before the Tribunal merely repeated the complaint set out in Exhibit M-2, that only establishes that for a period of three (3) days sometimes up to 25 November 2011, after allegedly "...*keeping the floor-heating run on highest temperature [this week], the floor does not get tangibly warm to a comfortable temperature.*". The Tribunal is asked to conclude that during a period of three (3) days without knowing during which month Mr. Gast performed the test in question, the temperature on the thermostat was set at the maximum temperature of 35°C at all times. Even if the Tribunal accepts this as a fact, nevertheless, the Tribunal notes Mr. Gast's failure to provide an actual surface temperature reading, in that he simply states that "... *the floor-heating ... does not supply an appreciable and sufficient temperature.*
- [68] What does "*an appreciable and sufficient temperature*" mean in the absence of empirical data establishing the difference between the surface temperature of the heated floors and that of the thermostat, when the "*comfort level*" of individuals varies from individual to individual?
- [69] The Tribunal appreciates that in so far as the Beneficiaries were concerned, the heated floors did not allegedly emit sufficient heat that fell in their "*comfort level*". However, that in itself does not establish that the heating floor system was not functioning as a result of the Contractor's poor workmanship. Given the manner in which the "*smart mode*" thermostat operates to automatically lower the temperature once "*per 24 hour period*"³⁷, is it not conceivable that the thermostat effectively was controlling the temperature in the manner that it was designed to operate?
- [70] Mr. Dubuc was the only one who actually looked into and recorded the surface temperature of the heated floors and the temperature setting of the thermostat for the purposes of obtaining comparative data. His evidence establishes that a temperature setting on the thermostat of 28°C resulted in a surface temperature of 26°C emitted by the heated floors.
- [71] Mr. Dubuc's testimony was not contradicted by Mr. Gast. Mr. Gast did not adduce any evidence to establish that the surface temperature of the heated floors could not exceed the surface temperature of 26°C recorded by Mr. Dubuc, nor did he introduce any evidence to establish the surface temperature of the heated floors at the maximum thermostat temperature setting of 35°C.
- [72] Though Mr. Gast produced Exhibit BG-1, he did not address in his testimony the manner in which he operated and controlled the thermostat and whether as a result of the operation of the "*smart mode*" thermostat

³⁶ Exhibit BG-1

³⁷ Exhibit BG-1

the automatic reduction of the temperature once “*per 24 hour period*”, had an impact on the surface temperature of the heated floors.

- [73] Mr. Gast’s position is simple. In as much as there are no norms governing the surface temperature of heating floor systems, since the maximum temperature of the thermostat (35°C) did not provide a corresponding surface temperature emitted by the heated floors, the floor heating system was not functioning.
- [74] In view of the circumstances the Tribunal cannot give credence to this argument. In the absence of evidence establishing the cause of the alleged problems associated with the Beneficiaries claim, the Tribunal cannot come to the conclusion that the mere fact that there are no standards governing heating floor systems, that the floor heating system was not functioning due to the Contractor’s poor workmanship.
- [75] Based on the testimony of Mr. Dubuc, the Tribunal concludes that the evidence establishes that on 23 February 2012, the thermostat was set at 28°C, resulting in a surface temperature reading of 26°C. Taking into consideration the manner in which the “*smart mode*” controlled the temperature of the heated floors and that the floor heating system was functioning, the Tribunal cannot conclude that a higher thermostat temperature setting could not have provided a higher surface heat temperature emitted by the heated floors.

ii. *The thickness of the self-leveling layer of cement*

- [76] Mr. Gast and Mr. Gamache were the only witnesses to testify on this particular issue.
- [77] Evidently, Mr. Roberge could not testify on this issue since the Sub-Contractor did not perform the work in question. As for Mr. Dubuc, he inspected the Property some eight (8) months after the acceptance of the Property.
- [78] Mr. Gast stated that he was unaware of the thickness of the self-leveling layer of cement used to allow the placement of the ceramic tiles. He did not measure the thickness of the self-leveling layer of cement, in that to do so he would have been required to break ceramic tiles in different locations.
- [79] Mr. Gast testified that he “*believed*” that the self-leveling layer of cement placed over the heating cables on which the ceramic tiles were placed is the cause for the surface temperature of the heated floors being lower than the maximum temperature that could be set by the thermostat.

- [80] However, upon being cross-examined by Me Morrone, Mr. Gast admitted that: (1) no one told him that the problem was caused by the application of the self-leveling layer of cement; he merely “*assumed*” that the installation of the self-leveling cement layer is the source of the problem; (2) he did not have any proof that the manufacturer’s recommendations for the installation of the heating cables including the application of a self-leveling cement layer contained in Exhibit BG-3 were not followed.
- [81] Mr. Gamache stated that the self-leveling layer of cement had to be applied over the heating cables to permit the placement of the ceramic tiles, though he does not know the actual thickness of the cement layer that was applied.
- [82] Mr. Gast admitted that it was necessary to apply the self-leveling layer of cement on which the ceramic tiles were subsequently placed.
- [83] Mr. Gast was given the opportunity to engage an expert or (an experienced) witness in support of his alleged claim that the heated floors were not properly functioning for whatever reason, including that the thickness of the self-leveling layer of cement might have been the source of the problem. However, Mr. Gast did not avail himself of his right to bring before the Tribunal an expert witness or (an experienced) witness that may have shed some light on the issue raised by the Beneficiaries.

b. Point 3: Unlevelled Ceramic Tiles

- [84] The extent of Mr. Gast’s testimony on this particular issue was limited to his statement that in his “*opinion*”, the ceramic tiles were not leveled 100% and that the grout between the ceramic tiles was not evenly applied.
- [85] Mr. Gamache stated that according to him, it was impossible to lay ceramic tiles better than it was done and that the Contractor used the same installer to place the ceramic tiles throughout the Property.
- [86] Mr. Gamache in his testimony admitted that in fact the grout between the ceramic tiles was not evenly applied. However, once he ascertained this problem it was rectified.
- [87] With regard to the unlevelled ceramic tiles, Mr. Gamache identified the use of two distinct types of ceramic tiles, namely the use of mat ceramic tiles in the bath room and kitchen and glossy tiles in the living room and dining room. He furthered stated that mat tiles do not reflect light while glossy tiles do, therefore highlighting imperfections that could not otherwise be readily seen by the naked eye.

- [88] Mr. Dubuc inspected the Property³⁸ and testified before the Tribunal that he did not ascertain evidence that the grout between the ceramic tiles was not evenly applied.
- [89] Mr. Dubuc is an inspector with some 26 years of experience. He readily admitted in his testimony that the manner in which the ceramic tiles were laid was far from being perfect, and that he has seen better installations, however, perfection does not exist, and in so far as the imperfections that were ascertained are concerned, such imperfections fall within the norms set out in section 11-21 of the “*Guide de performance de l’APCHQ*”.³⁹
- [90] Mr. Dubuc testified that in accordance with the norms set out in section 11-21 of the “*Guide de performance de l’APCHQ*”, a difference of 1/16” (2mm) between ceramic tiles is considered to be excessive and that based on his visual inspection, he was unable to ascertain that the difference in the level of the ceramic tiles exceeded the aforementioned norms.
- [91] Mr. Gast did not contradict the testimonies of Messrs. Gamache and Dubuc that the uneven application of grout between the ceramic tiles was in fact corrected.
- [92] Mr. Gast failed to produce any evidence that could have supported a finding that the norms set out in section 11-21 of the “*Guide de performance de l’APCHQ*” were not respected by the Contractor.

CONCLUSIONS

- [93] It is a well-established principle of law that the burden of proof rests on the shoulders of the party making a claim before the Tribunal. Article 2803⁴⁰ reads as follows:

“2803. A person wishing to assert a right shall prove the facts on which his claim is based.”

- [94] In addition, the appreciation of the evidence by the Tribunal is guided by the principles set out in Article 2804⁴¹, that reads as follows:

“2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.”

³⁸ 23 February 2012, Exhibit M-3

³⁹ Exhibit M-5

⁴⁰ *Civil Code of Québec*, LRQ, c C-1991

⁴¹ *Ibid*

[95] At the pre-trial conference, the Beneficiaries were informed that it was up to them to produce all documents and witnesses including expert witnesses to establish the facts relating to Points 2 and 3 of the Decision. Although initially Mr. Gast indicated that he was considering engaging an expert, he subsequently advised the Tribunal that he was not going to produce an expert report and have an expert testify before the Tribunal on any of the issues raised by Point 2 and 3 forming part of the present arbitration.

[96] Pursuant to Article 2811⁴² reads as follows:

“2811. Proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.”

[97] Accordingly, it was up to the Beneficiaries to produce the necessary witnesses, documents, photographs and any other evidence susceptible of being produced in accordance with the applicable rules of evidence governing the production of evidence in the Province of Quebec.

[98] The Beneficiaries have the burden to prove on the balance of probabilities all the facts relating to Points 2 and 3 of the Decision.

[99] The rules governing the burden of proof provide a means for the Tribunal to weigh the evidence presented by the parties.⁴³

[100] The only Beneficiary to testify on the facts relating to Points 2 and 3 was Mr. Gast. There is no adverse conclusion drawn by the Tribunal by the failure of Ms. Hiasmina Gamarra Ramos to testify. The Tribunal is only concerned with the evidence that is presented before it and not by the number of witnesses that a party determines to bring before it.

[101] The Tribunal is therefore required to consider the merit of the Beneficiaries' claim in light of the obligations imposed upon the Beneficiaries to establish on the balance of probabilities the existence of those material facts relevant to the determination of Points 2 and 3 of the Decision, the whole in accordance with the principles of law governing the administration of evidence.

⁴² Ibid

⁴³ *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282

[102] In the present instance, the Beneficiaries had the burden of proof to establish the facts pertaining to Points 2 and 3 of the Decision, however, the Beneficiaries failed to discharge that burden, for the reasons set out hereafter.

a. *Point 2: Heated Floor*

i. *The Functionality of the heating cables and thermostat*

[103] The first issue that needs to be addressed is whether the heating floor system was properly installed. The testimonies of Mr. Roberge and Gamache establish that fact; Mr. Gast did not contradict their respective testimonies.

[104] The fact that the floor heating system was properly installed has to be weighed with the evidence relating to the functionality of the floor heating system.

[105] Mr. Gast did not adduce any evidence establishing that the heating cables and thermostat were not properly installed or that they did not function in accordance with their respective specifications, nor did he contradict the evidence of Mr. Roberge pertaining to the various tests performed by him prior to the acceptance of the Property and thereafter, confirming that the floor heating system was functioning.

[106] Though Mr. Gast claimed that the floor heating system did not provide heat within his “*comfort level*”, he nevertheless did not adduce any evidence that could have established in a consistent manner the existence of a drastic difference between the thermostat temperature and the surface temperature of the heated floors. It would have been easy for Mr. Gast to track and record the difference between the two temperatures to allow the Tribunal to correlate the difference of temperature between the thermostat setting and the surface temperature of the heated floors. Mr. Gast’s testimony that at the “*highest temperature.. the floor does not get tangibly warm to a comfortable temperature.*” is not corroborated nor substantiated by any evidence.

[107] The evidence of Messrs. Roberge and Dubuc was not contradicted by Mr. Gast. Their evidence establishes within the meaning and application of Article 2804 C.C.Q. that the heating cables and thermostat were in fact functioning and that a temperature setting on the thermostat of 28°C provided a surface temperature of 26°C. The Tribunal accepts the testimony of Mr. Dubuc that the heated floors’ surface temperature of 26°C is comfortable under the circumstances.

[108] In the absence of any proof presented by the Beneficiaries establishing that in fact the floor heating system was not functioning, the Tribunal does not have any evidence to consider that would render probable the existence of a deficiency in the floor heating system that was caused by poor workmanship by the Contractor within the meaning and application of the Guarantee Plan.

ii. *The thickness of the self-leveling layer of cement*

[109] The fact that Mr. Gast was of the “*opinion*” that the source of the problem can be traced to the application of the self-leveling layer of cement is insufficient in law to establish that as a matter of fact the problem rests directly with the self-leveling layer of cement that was applied to permit the placement of the ceramic files.

[110] An “*opinion*” or “*assumption*” does not constitute in law a fact allowing the Tribunal to conclude that the alleged source of the problem is rooted in the application of the self-leveling layer of cement. Mr. Gast’s “*opinion*” does not constitute a fact that the Tribunal can consider, since Mr. Gast’s opinion does not constitute evidence.

[111] Mr. Gast did not introduce evidence establishing the thickness of the self-leveling cement layer applied to the floors of the Property on which the ceramic tiles were placed. In accordance with the rules of evidence, only experts are permitted to provide their opinions, based on the facts established before the Tribunal and Mr. Gast is not an expert and did not produce any expert witness or any other witness to testify on this particular issue.

[112] Consequently, Mr. Gast not only failed to establish as a matter of fact that the source of the problem was directly caused by the thickness of the self-leveling cement layer applied to the floors of the Property, but he admitted that he merely “*assumed*” that that could have been the problem.

[113] Therefore Mr. Gast has failed to discharge his burden of proof to establish that the alleged failure for the heating floor system to provide heat that was in line with his expectations and within his “*comfort level*” (even though the Tribunal is unaware of what that “*comfort level*” would have consisted of) was a direct result of poor workmanship for which the Contractor is responsible within the meaning and application of the Guarantee Plan.

b. *Point 3: Unlevelled Ceramic Tiles*

[114]As previously stated, the extent of Mr. Gast's testimony on this particular issue was limited to his statement that in his "*opinion*", the ceramic tiles were not leveled 100% and that the grout between the ceramic tiles was not evenly applied. Having regard to Mr. Gast's "*opinion*", the Tribunal reiterates that what was already stated on the issue in the abovementioned paragraphs relating to the thickness of the self-leveling cement layer.

[115]Suffice to say, that in regard to the claim that the grout between the ceramic tiles was not evenly applied, Mr. Gamache's testimony that the problem was dealt with and corrected following Mr. Gast's complaint was corroborated by the testimony of Mr. Dubuc who was unable to ascertain evidence supporting this claim at the time of his inspection.

[116]Mr. Gast claimed that the ceramic tiles were unevenly placed. His testimony is vague and general in that he did not state whether the deficiency in question existed and applied to the entire surface area covered by the ceramic tiles, or it was localized in specific areas.

[117]Though Mr. Gast may not have been aware of the norms set out in section 11-21 of the "*Guide de performance de l'APCHQ*", at the time that he formulated his original claim, that in itself is not an excuse for not having taken the steps once he did become aware of the norms following the reception of Exhibit M-5 (months before the hearing) to ensure that the Beneficiaries establish that the alleged deficiencies exceeded the prescribed norms.

[118]Mr. Gast had to establish that the difference in the level between the ceramic tiles exceeded the norms of "*1/16" (2mm)*" set out in section 11-21 of the "*Guide de performance de l'APCHQ*".⁴⁴ Mr. Gast's assertions are not corroborated and substantiated by independent evidence allowing the Tribunal to come to the conclusion that the deficiencies claimed by Mr. Gast and observed by Mr. Dubuc exceeded the norms prescribed in section 11-21 of the "*Guide de performance de l'APCHQ*".

[119]To discharge his burden of proof, Mr. Gast could have produced photographs or witnesses establishing the nature of his claims relating to the unlevelled tires. He could have measured the difference between the unlevelled ceramic tiles that he was complaining about. In failing to adduce any evidence establishing his claim, Mr. Gast has failed to discharge his burden of proof to establish the existence of unlevelled

⁴⁴ Exhibit M-5

ceramic tiles that exceeded the norms set out in section 11-21 of the “*Guide de performance de l’APCHQ*”.⁴⁵

[120] In the absence of such evidence, the Tribunal cannot come to the conclusion that the existence of the imperfections claimed by the Beneficiaries and observed by Mr. Dubuc were caused by poor workmanship for which the Contractor is responsible within the meaning and application of the Guarantee Plan.

[121] In accordance with section 123 of the Regulation⁴⁶, and as the Beneficiaries have failed to obtain a favorable decision on any of the elements of their claim, the Tribunal must determine the division of the fees to be charged between the Manager and the Beneficiaries.

[122] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with sections 116 and 123 of the Regulation, shall be apportioned as to \$50.00 to the Beneficiaries and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[123] **DISMISSES** the arbitration demand and claims formulated thereunder by the Beneficiaries;

[124] **ORDERS** in accordance with section 123 of the *Regulation* that the costs of the present arbitration be borne as for \$50.00 by the Beneficiaries and for the remainder by the Manager.

DATE: 1 October 2012

(Signed) Me Tibor Holländer
Me Tibor Holländer
Arbitrator

⁴⁵ Exhibit M-5

⁴⁶ Regulation respecting the guarantee plan for new residential buildings, c. B-1.1, r.8