

CANADA

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

**SOCIÉTÉ POUR LA RÉOLUTION
DES CONFLITS INC. (SORECONI)**

ARBITRATION TRIBUNAL

REF. N^o/ SORECONI : 050706002 & 050715001
REF. N^o/ ARBITRATOR: 13 249-8 & 13 249-8-1

Montreal, January 23, 2006

LILLO TRIASSI

-AND-

MARIA MATTEO

« Beneficiaries » / Plaintiffs

vs.

CONSTRUCTION TIVOLI INC.

« Builder » / Defendant

-AND-

**LA GARANTIE DES BÂTIMENTS
RÉSIDENTIELS NEUFS DE L'APCHQ
INC.**

« Plan Manager » / Mise en cause

ARBITRATION DECISION

**AFTER HAVING TAKEN COGNIZANCE OF THE PROCEDURES, HEARD THE
PROOF AND ARGUMENTS OF ALL THREE PARTIES, THE ARBITRATION
TRIBUNAL PROCEEDS TO RENDER ITS DECISION AS FOLLOWS:**

1. FACTS AND PROCEEDINGS

On September 5, 2003, the Beneficiaries purchased a property located at 3859 Colonel Street in Laval, for the amount of approximately three hundred thousand dollars (\$300,000.00) (“Property”). They took possession of the Property on April 30, 2004.

On that date, they filed the Declaration of Performance of Work (Exhibit A-5) and the Step 5 document (Exhibit A-6) with the Builder. In the Step 5 document (Exhibit A-6), a series of non-completed work was referred to by the Beneficiaries for work not carried out, incomplete or unsatisfactory and for which they received credit by the Builder. This other work was to be completed by another builder.

On October 13, 2004, the Beneficiaries filed a third Request to open a file¹ with the Plan Manager (Exhibit A-7). On February 14, 2005, they informed the Builder of the fact that they were lodging a complaint with the Plan Manager (Exhibit A-8), a copy of which was sent to the Plan Manager. Accordingly, the Plan Manager informed the Builder by a letter dated February 28, 2005 (Exhibit A-9), of the receipt of such letter and requested that the Builder intervene in the file within fifteen (15) days, failing which the Plan Manager would have to intercede in the file, inspect the property and render a decision.

On May 11, 2005, an inspection of the Property was carried out by Mr. Rénaud Cyr, Inspector-Conciliator for the Plan Manager and a decision was rendered on June 27, 2005.

The Beneficiaries are appealing several points of that decision, namely Points 8 through 16 and 19 through 22. The Arbitration Tribunal visited the Property to examine the alleged defects upon the request of the Beneficiaries. As the Beneficiaries have requested that the Arbitration Tribunal address them in English, the present decision is in English.

¹ The Arbitration Tribunal is seized of the third claim only and therefore has no details as to the grounds of the two previous claims.

2. QUESTION IN ISSUE

Is the decision of the Plan Manager well founded in fact and in law?

3. ANALYSIS AND DECISION

Point 6: Water Marks on the Ceiling of the Family Room (Trace d'eau au plafond de la salle familiale)

This point, though not under appeal, was brought to the attention of all the parties during the visit of the Property. The Beneficiaries pointed out that water had caused damage to the wooden board that holds the curtain in the Family Room. During the hearing of this matter, the parties agreed to a settlement on this point. The Arbitration Tribunal hereby takes act of the settlement that took place between the Beneficiaries and the Plan Manager, namely that the Plan Manager would remit one hundred dollars (\$100.00) to the Beneficiaries, without admission of any responsibility whatsoever, in final settlement for that point.

Point 8: Missing Mortar Resulting in an Opening at the Junction between the Back Patio and Brick Wall located on the Right Side (Manque de mortier (ouverture) à la jonction de la terrasse arrière et du mur de maçonnerie du côté droit)

Point 13: Damage to the Plasterboard situated on the Bottom of the Main Wall in the Basement (Dommage au placoplâtre au bas du mur central du sous-sol)

Point 16: Missing Stair at the Rear Entrance of the Garage (Absence d'un escalier au bas de la porte de service du garage)

Points 8, 13 and 16 were rejected by the Plan Manager on the basis that they were apparent, not notified at Step 5 and therefore not covered by the warranty. As stated, the Arbitration Tribunal has had the opportunity of visiting the Property and to see these points first-hand. The

Arbitration Tribunal concludes that these three (3) points were effectively apparent and had to be notified at Step 5. Considering the foregoing, the Arbitration Tribunal rejects these points of appeal.

Point 9: Missing Mortar Resulting in an Opening at the Junction of the Front Balcony (Manque de mortier (ouverture) à la jonction du balcon de l'étage avant)

Point 9 was rejected by the Plan Manager on the basis that it was apparent, not notified at Step 5 and therefore not covered by the warranty. On this point, the Arbitration Tribunal does not agree with the interpretation of the Plan Manager. Even though it was objectively visible, the arbitrator had to go on his knees to be able to see the missing piece of mortar. With all due respect, the Arbitration Tribunal does not consider that in the circumstances the buyers of a new house had to go to such lengths and are obliged to inspect the property so thoroughly when they take possession. A satisfactory inspection by the buyers when they take possession is required to be a diligent and a careful one, but not one based on the belief or presumption that there ought to be a problem in every square inch of the Property and requiring such efforts.

Accordingly, the Arbitration Tribunal considers that this problem was not apparent, grants this point and rules that the Builder will have to repair the hole, the whole in accordance with the rules of the trade.

Point 10: Flashing of Brickwork is Visible Above the Rear Roof (Solins de maçonnerie apparents au-dessus de la toiture arrière)

Point 10 has been resolved between the parties and is no longer under appeal.

Point 11: Incomplete Sealant around the Frame of the Front Door (Scellant incomplet au linteau de la porte d'entrée principale)

Point 11 was initially rejected by the Plan Manager on the basis that it was apparent, not notified at Step 5 and therefore not covered by the warranty. However, this point has been fixed graciously and without any costs, by an employee of a contractor, on sight (either of the Builder or the Plan Manager) at a time when other repairs were being done on the Property. The Beneficiaries, at that moment, pointed out the problem to the employee, who immediately fixed it.

It was difficult for the Arbitration Tribunal to assess the problem during the visit of the Property due to the repairs already done. At this time, the Arbitration Tribunal can only base its decision on the current situation, which appears to be satisfactory. Therefore, this point is rejected.

Point 12: Gap between the Soffit and the Brick Wall in Front (Espace entre le soffite et le mur de maçonnerie en façade avant)

Point 12 was rejected by the Plan Manager on the basis that it was apparent, not disclosed at Step 5 and therefore not covered by the warranty. The Arbitration Tribunal does not agree with the interpretation of the Plan Manager. This problem is situated at the highest point of the Property. For the same reasons as those given at Point 9, the Arbitration Tribunal considers that this problem was not apparent for the Beneficiaries and is therefore covered by the warranty. Moreover, the Inspector-Conciliator for the Plan Manager admitted in his testimony at the hearing that, had it not been for the fact that he considered the point to be apparent, he would have granted the claim on the basis that it constituted poor workmanship.

Therefore, the Builder will be ordered to effect the repair of this problem in accordance with the rules of the trade.

Point 14: Hairline Cracks below some of the Basement Windows (Fissures capillaires au bas de certaines fenêtres au sous-sol)

Point 15 : Hairline Cracks on the Garage Floor (Fissures capillaires à la dalle du garage)

These points were rejected by the Plan Manager on the basis that these hairline cracks resulted from the normal behaviour of the materials and therefore were not covered under the warranty. These cracks were also considered to be the normal behaviour of the materials by the expert, Amerispec, who was mandated by the Beneficiaries (but not present at the hearing) (Exhibit A-8, Point 13 of the report).

The Arbitration Tribunal is in agreement with this position and consequently rejects this point of appeal.

Point 19: Grounding Connection (Branchement de la mise à la terre à l'entrée d'eau)

Initially, the electric entry into the basement of the Property was not grounded. This point was dismissed by the Plan Manager on the basis that the Beneficiaries did not show the alleged problem to the Inspector-Conciliator during the inspection and therefore, no poor workmanship was shown. The reason for this was that the problem was hidden behind a wall and the Beneficiaries had not yet removed any portion of the wall to demonstrate the existence of the problem to the Inspector-Conciliator. Consequently, the Plan Manager rejected this point.

Nevertheless, the Beneficiaries called upon the Régie du bâtiment du Québec with respect to that matter. The Régie du bâtiment du Québec came to inspect the Property and sent an electrician to make the grounding.

During the visit of the Property, the Beneficiaries showed the alleged problem and the repairs to the Arbitration Tribunal. The Arbitration Tribunal was able to assess the situation. The situation has now evolved in that the grounding connection is done. However, the Beneficiaries have shown that the work was not properly completed, as the gyproc still has to be attached in a sturdy manner. This constitutes, in the opinion of the Arbitration Tribunal, poor workmanship that

needs to be repaired. Therefore, the Builder will have to attach the gyproc, the whole in accordance with the rules of the trade.

Point 20: Natural Ventilation in the Cold Room (Ventilation naturelle de la pièce servant de chambre froide)

The Beneficiaries are complaining about the fact that the Builder installed a window (although in conformity with the contract) instead of a ventilation system. The Plan Manager has rejected this point, as no problematic situation was shown to the Inspector-Conciliator during the inspection. However, in the decision of the Plan Manager, there is a note as to the presence of a window, which constitutes natural ventilation. Moreover, the Inspector-Conciliator, in his testimony, affirmed that natural ventilation provided by a window is better than natural ventilation provided by a ventilation system.

No proof was brought to the attention of the Arbitration Tribunal as to the deficiency of the ventilation. Nor was any proof brought to the Arbitration Tribunal that the installation of a window instead of a ventilation system was contrary to the rules of the trade. Therefore, the Arbitration Tribunal dismisses the claim of the Beneficiaries on this point.

Point 21: Installation of the Door Handle for the Front Door (Fixation de la poignée de porte d'entrée principale)

Point 21 was rejected by the Plan Manager on the basis that the problem was not shown to the Inspector-Conciliator during the inspection. Both at the hearing and during the visit of the Property, the Inspector-Conciliator stated that the claim of the Beneficiaries on this point was unclear. During his inspection, he had the expert report (Amerispec) in hand and asked the Beneficiaries to show him what was the problem, as the report only stated that the door handle was functional, but not properly installed. His understanding was that the door handle was not properly affixed to the door. The Beneficiaries, on their side, claim that the problem is that every

time they open and close the door, the entire frame shakes. The Beneficiaries state that they showed the problem to the Inspector-Conciliator. The Inspector-Conciliator denied that fact.

The Arbitration Tribunal saw the problem during the visit of the Property and was able to assess the misunderstanding of the parties on this point. The problem with the door handle existed during the inspection done by Amerispec in September 2004, and was still there when the Arbitration Tribunal visited the Property. Hence, the problem must have been there when the Inspector-Conciliator inspected the Property.

Considering the problem noted by the Arbitration Tribunal and that satisfactory proof was brought to the attention of the Arbitration Tribunal on this ground, this point is recognized and the Builder will have to re-install the door handle and/or any other part of the door that is causing the problem, in a manner that will minimize the problem of looseness in accordance with the rules of the trade.

Point 22: Grout is Crumbling around the Ceramic Kitchen Floor (Effritement du coulis de céramique au plancher de la cuisine)

During the hearing, the Beneficiaries withdrew their complaint on this point.

4. CONCLUSION, AMOUNT IN ISSUE AND APPORTIONMENT OF COSTS

In conclusion, the Builder will have to execute the necessary repairs stated at Points 9, 12, 19 and 21, the whole in accordance with the rules of the trade, within thirty (30) days of the present Arbitration decision.

The amount in issue is approximately \$20,000.00.

The costs of the present arbitration will be borne by the Plan Manager, in accordance with article 123 of the *Regulation respecting the guarantee plan for new residential buildings*.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

GRANTS the arbitration demand of the Beneficiaries for Points 9, 12, 19 and 21 as described in the text of this decision;

TAKES ACT of the settlement regarding Point 6, not under appeal, and **ORDERS** both parties to comply therewith;

ORDERS the Builder to execute the necessary repairs stated at Points 9, 12, 19 and 21 of the present arbitration sentence, in accordance with the rules of the trade, within thirty (30) days of the present sentence, failing which the Plan Manager is hereby **ORDERED** to execute said repairs within the following thirty (30) days.

In accordance with Article 123 of the *Regulation Respecting the Guarantee Plan for New Residential Buildings*, the costs of the arbitration will be borne by the Plan Manager.

Mtre. Jeffrey Edwards, arbitrator

For the Beneficiaries:

Mr. Lillo Triassi
Ms. Maria Matteo
3859 Colonel Street
Laval, Quebec H7E 5L1

For the Builder:

Mtre. Serge Crochetière
CROCHETIÈRE PÉTRIN
5800 Louis-H.-Lafontaine Boulevard, 2nd Floor
Montreal, Quebec H1M 1S7

For the Plan Manager:

Mtre. Luc Séguin
SAVOIE FOURNIER
5930 Louis-H.-Lafontaine Boulevard
Montreal, Quebec H1M 1S7

Visit of the property:

December 12, 2005

Hearing:

December 16, 2005

Construction Holidays over Year-End Period:

December 25, 2005, to January 7, 2006

Arbitration Decision:

January 23, 2006