

COURT OF ARBITRATION

(constituted by virtue of the following regulation : REGULATION RESPECTING THE GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS under the aegis of the SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI), body of approved arbitration by the RÉGIE DU BÂTIMENT DU QUÉBEC asked to administer the BUILDING ACT (R.S.Q., c. B-1.1)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

FILE N° : Soreconi # 061214002
Guarantee # 087305-2

MONTRÉAL, February 25th 2007

ARBITRATOR: Marcel Chartier

Ranjit Singh
Tajinder Kaur

Beneficiaries

c.
Bétaplex inc.

Contractor

and
La Garantie des bâtiments résidentiels neufs de l'APCHQ inc.

Manager of the Guarantee Plan

ARBITRATION AWARD

Identification of the parties

BENEFICIARIES

Ranjit Singh
Tajinder Kaur
665, Rabis street
Laval, Québec
H7X 4H7

CONTRACTOR

Betaplex Inc.
132, Principale street
Laval, Québec
H2X 3V2
Me Marco Gaggino, attorney

MANAGER of the Guarantee Plan

La Garantie des bâtiments résidentiels
neufs de l'APCHQ inc.
5930 Louis-H-Lafontaine boul.
Anjou, Québec
Me François Laplante, attorney
Tél. : (514) 353-9960
Fax : (514) 353-3393

LIST OF EXHIBITS

List of exhibits filed by Manager of Guarantee Plan prior to the hearing

- A-1 Preliminary contract and guarantee contract dated November 1st 2004 (incomplete);
- A-2 List of pre-established elements for verification and reception of building dated June 21, 2005;
- A-3 Letter from beneficiary to the contractor dated June 21, 2006;
- A-4 15 days notice from the administrator to the contractor dated August 14, 2006;
- A-5 Letter from beneficiary to the contractor dated August 22, 2006;
- A-6 Decision of the administrator dated November 27, 2006;
- A-7 Pictures from the administrator;
- A-8 Request for arbitration dated December 16, 2006.

List of exhibits filed by the Manager's attorney at the hearing

- A-9 Date of reception of exhibit B-2 by the Manager of the Plan, i.e. June 27th 2006;
- A-10 A decision from the Manager dated January 9th 2006;
- A-11 A letter dated May 16th 2006 sent by the Plan Manager to the beneficiaries;

List of exhibits filed by the beneficiaries

- B-1 Deed of sale by the contractor to beneficiaries on June 28th, 2005 (Eric Baillie, notary)
Minute number 6266;
- B-2 a) The claim sent by the beneficiaries to the contractor dated June 21st, 2006, by the Post Office in Ste-Dorothée, Laval, and bearing item no: 79049833897;

b) also included a fax by the beneficiary to the contractor on August 23rd, 2006 about new cracks found in foundation, steps and old cracks fixed and that reappeared again.

ARBITRATION AWARD

Mandate

The arbitrator received his mandate from Soreconi (a society for resolution of conflicts) on January 12th 2007.

Chronology

November 1 st 2004	Preliminary contract and guarantee contract
June 21 st , 2005	Acceptance of the building
June 21 st , 2006	Beneficiaries' response to the contractor's letter of May, 4 th , 2006
August 14 th , 2006	15 days notice to the contractor by the manager
November 27 th 2006	Manager's decision
December 16 th 2006	Application for arbitration by the beneficiaries regarding the Manager's decision above mentioned
January 12 th , 2007	Apointment of the undersigned arbitrator
February 21 st , 2007	Hearing
February 25 th 2007	Arbitration award

Hearing of January 21st, 2007

[1] The audition took place at the office of APCHQ, Anjou, Qc.

[2] Were present at the hearing:

- a) Mr. Ranjit Singh, beneficiary,
- b) Mr. Statwant Singh, beneficiary's friend, who acted as a translator, to and from English, for the beneficiary as the latter testified in his own language,
- c) Me Marco Gaggino, contractor's attorney,
- d) M. Stéphane Chainey, contractor's representative
- e) Me François Laplante, manager's attorney,
- f) M. Yvan Mireault, architect, inspector conciliator.

[3] Here is the Plan Manager's decision:

« INDIVIDUALS PRESENT FOR INSPECTION :

Beneficiaries : Mr Ranjit Singh
Mrs, Tajinder Kaur
Contractor: Mr. Stéphane Chainey

Administrator: Mr. Yvan Mireault

LA GARANTIE DES MAISONS NEUVES DE L'APCHQ CAN NOT CONSIDER ITEMS 1 TO 5 UNDER THE TERMS OF THE GUARANTEE CONTRACT :

Items 1 to 5 below were claimed in the second year of the guarantee, that is, after the expiry of ghe guarantee covering non-apparent defects.

Consequently, for the guarantee to be applicable, we must be sure that the following criterion is met:

- Are the items claimed in fact hidden (latent) defects as defined in the guarantee contract?

In other words, the defect must be hidden, must exist prior to sale, must be unknown to the purchaser and serious enough to render the good(s) unfit for the use for which it (they) is (are) intended or which reduces its (their) usefulness to the extent that the consumer would not have

purchased it (them) or would not have paid such a high price for it (them) if he/she had known about the defect.

Based on our observations on site at the time of our inspection, it is our opinion that the situations described in Items 1 to 5 do not meet this criterion.

In fact, Items 1 and 2 below do indeed involve cracks and shrinking caused by the normal behaviour of materials during the drying process.

The guarantee contract also specifically excludes coverage for any repairs required as a result of errors or omissions committed by the beneficiary, such as inadequate maintenance or improper use of the building, or any repairs which become necessary because of deletions, modifications or additions carried out by beneficiary.

There is no doubt that the problems described in Item 3 below were caused by improper use of the building.

In conclusion, with regard to Item 4 below, at time of our inspection, the beneficiaries were unable to show evidence of any defects in the material and workmanship supplied by the contractor.

Consequently, *La Garantie des maisons neuves de l'APCHQ* can not intervene in these matters.

1. CRACK IN GYPSUM WALL TO THE LEFT OF THE KITCHEN COUNTER

The beneficiary's complaint involves a visible vertical crack at the junction of the wall and the metal corner bead.

2. CRACK IN GYPSUM WALL ALONG THE STAIRCASE LEADING TO THE BASEMENT.

The beneficiary's complaint involves a visible vertical crack at the junction of the wall and the metal corner bead.

3. WARPED STRIPS IN THE FLOORING IN THE GROUND-FLOOR LIVING ROOM AND FAMILY ROOM

Measurements taken during our inspection show a relative humidity of 60% on the ground floor of the home.

This high relative humidity causes the hardwood strips to expand, resulting in some minor warping of the flooring.

It should be noted that the beneficiaries are in the habit of hanging their wash to dry inside the house, a highly inadvisable practice.

The relative humidity inside the building should be maintained at 40–45%

4. UNPAINTED EXTERIOR STEEL CORNER GUARDS OVER FRONT GROUND-FLOOR OPENINGS

5. CALKING ABSENT AROUND BASEMENT WINDOWS

It should be noted that there is a protective base coat on the above-mentioned elements.

Decisions were rendered on the following items in complaint report 1. Please refer to the items indicated.

- | | |
|------------------------------------|---------|
| . LEFT SLOPE GARAGE ROOF | Item 17 |
| . SLIDING WINDOWS IN BASEMENT | Item 18 |
| . TELEPHONE CORD IN NO. 2 BEDROOM | Item 27 |
| . INSTALLATION OF ASPHALT SHINGLES | Item 9 |

Concerning the installation of asphalt shingles, the contractor explained that the repairs were carried out on April 10, 2006.

At the time of our inspection, we observed that the work had been correctly performed.

- | | |
|-----------------------------------------|---------|
| . ADJUSTEMENT OF CUPBOARD DOORS | Item 12 |
| . CRACKS IN GYPSUM WALL ALONG STAIRCASE | Item 15 |
| . CRACKS IN CONCRETE SLAB IN BASEMENT | Item 13 |

Yvan Mireault, architect
Inspecteur-conciliateur / Inspector-Conciliator
Service d'inspection et de conciliation / Inspection and Conciliation Service

- [4] At the start of the hearing, the beneficiary filed, as exhibit B-1, a deed of sale by the contractor to the beneficiaries dated June 28th 2005 by Eric Baillie, notary, minute number 6266. The date was recognized by both the manager's attorney and the contractor's attorney. The beneficiary filed a letter as exhibit B-2, dated June 21st 2006 by the post office in Ste Dorothée, Laval; it was also admitted by both attorneys. Then Me François Laplante, the manager's attorney, intervened to tell the arbitrator that one of the 2 documents filed as exhibit B-2 was already filed in his table of contents as exhibit A-3 being a letter from the beneficiary to the contractor dated June 21st 2006 and stamped: "APCHQ, reçu le 22 juin 2006, ASSOCIATION PROVINCIALE DES CONSTRUCTIONS D'HABITATIONS DU QUÉBEC INC. In exhibit B-2, the beneficiary had a second document, i.e. a FAX dated August 23rd 2006, sent by himself to the contractor with a copy to APCHQ (ATT: Madam Anne Marie Spezza)
- [5] Me Laplante referred to a document filed as exhibit A-9, at the hearing, which, he says, is the date of reception of exhibit B-2 by the Manager of the Plan. The delivery date, on the Canada Post document, A-9, is June 27th 2006, in which it is written : " Item successfully delivered to receiver", and it has the same Post Office item number 79049833897 as on B-2. The receiver is the Manager of the Plan.
- [6] The advocate also referred to exhibit A-2 in which "the declaration of reception of building" is June 21st 2005; it is signed by the contractor and only one of the beneficiaries i.e. Ranjit Singh, and not by Tajinder Kaur.
- [7] For Me Laplante, the date of the sale by the contractor to the beneficiaries (exhibit B-2 dated June 28th by the notary Baillie) is not the date of the "Acceptance of the building" according to the "Regulation respecting the Guarantee Plan for new residential buildings" which states at article 8:
- " « acceptance of the building» means the act whereby the beneficiary declares that he accepts the building which is ready to be used for its intended purpose and which indicates any work to be completed or corrected; (*réception du bâtiment*)"
- [8] Me Laplante filed as exhibit A-10, a decision from the Manager dated January 9th 2006 which is a previous decision that was not appealed by the same beneficiaries. Therefore the

advocate argued that, since the beneficiaries did not go to arbitration, the Acceptance of building should remain June 21st 2005 as being “chose jugée”. Accordingly, the “Date of Acceptance” of the building would be June 21st 2005 for any other claim for the same building by the same beneficiaries. The Manager’s attorney, Me Laplante, filed as exhibit A-11, a letter dated May 16th 2006, sent by his client to let the beneficiaries know that they could have gone to arbitration if they had not been satisfied with any point of his client’s prior decision.

- [9] The beneficiary argued that they did not become the owners until after the contract of the “notary” as he says, i.e. June 28th, 2005.
- [10] Me Gaggino, for the contractor, said that an arbitrator cannot amend a collective agreement and it is the same thing here; the “Acceptance of the building” has already been signed by both the contractor and the beneficiaries (sic) prior to the transfer by legal deed on June 28th 2005.

ANALYSIS OF THE EVIDENCE

- [11] In law, the deed of sale, in this case, could not have been the “Acceptance of the building”; that is the reason for the legislator to give a clear definition of “Acceptance of the building” in Article 8 of the “Regulation respecting the guarantee plan”.
- [12] The beneficiary did not deny that his letter of complaints was received by the Manager of the Plan after June 21st 2006, (one year after the “Acceptance of the building” June 21st 2005), but pleaded that the deed of sale was signed before the notary on June 28th, 2005, and that his claim was received by the Manager prior to June 28th, 2006, which is true; in fact it was received June 27th, 2006, (Exhibit A-9).
- [13] Both lawyers argued that the “Acceptance of the building” is June 21st 2005, and not June 28th 2005. Therefore, the manager’s decision of November 17th 2006 should be maintained since the points 1 to 5 inclusively were claimed in the second year of the guarantee, that is,

after the expiry of the guarantee covering “non-apparent defects”. There is no doubt, in the arbitrator’s mind, that the claims were received by the Plan Manager after the expiry (June 21st 2006) of the guarantee covering non-apparent defects.

[14] Article 10 (4) of the Guarantee Plan stipulates:

« repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec, which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent defects within the meaning of article 1739 of the Civil Code of Québec, and »

[15] It is clear that the inspector conciliator could not apply section 10 (4) for the guarantee’s decision of November 17th 2006, said Me Laplante and the arbitrator agrees.

[16] Article 10 (3) of the Guarantee Plan stipulates:

« repairs to non-apparent poor workmanship existing at the time of acceptance or discovered within 1 year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the poor workmanship: »

[17] It is clear that the inspector conciliator had to apply section 10 (3) of the Guarantee Plan.

[18] Articles 2110, 2113, and 2120 edict :

« Art. 2110. The client is bound to accept the work when work is completed; work is completed when work has been produced and is ready to be used for its intended purpose.

Acceptance of the work is the act by which the client declares that he accepts it, with or without reservation. »

« Art. 2113. A client who accepts without reservation retains his right to pursue his remedies against the contractor in cases of nonapparent defects or nonapparent poor workmanship. »

« Art. 2120. The contractor, the architect and the engineer, in respect of work they directed or supervised, and, where applicable, the subcontractor, in respect of work he performed, are jointly liable to warrant the work for one year against poor workmanship existing at the time of acceptance or discovered within one year after acceptance. »

[19] As the notice was not given to the manager, in writing, within one year after “Acceptance of the building” as provided for in article 2120 of Civil Code of Québec, the Guarantee Plan does not cover repairs to non-apparent poor workmanship.

[20] The beneficiaries’ rights are reserved in a common law tribunal.

CONCLUSION

[21] **FOR ALL THOSE REASONS, THE ARBITRATOR:**

[22] **CONSIDERING** the exhibits served and filed;

[23] **CONSIDERING** the fact that the beneficiaries’ claim was received by the Plan Manager on June 27th 2006 (exhibit A-9), and therefore not covered by the Plan;

[24] **CONSIDERING** the Guarantee Plan;

[25] **CONSIDERING** the above mentioned articles of the Civil Code of Québec;

[26] **CONFIRMS** the Plan Manager's decision;

[27] **RESERVES** the rights of the beneficiaries to go to a common law tribunal.

ARBITRATOR'S FEES

- [28] Clearly, the beneficiaries were not informed properly, although it was a service they paid for.
- [29] Consequently, the costs of the arbitration are to be paid by the Plan Manager as the circumstances warrant an appeal to fairness according to article 116 of the Guarantee Plan.
- [30] The fees are to be charged to the Plan Manager according to article 123 of the Guarantee Plan.

Montréal, February 25th 2007

A handwritten signature in cursive script that reads "Marcel Chartier". The signature is written in dark ink and is positioned above a horizontal line.

Marcel Chartier, lawyer
Arbitrator (Soreconi)