File No: C46037
Registry: Nanaimo

# In the Provincial Court of British Columbia

(CIVIL DIVISION)

BETWEEN:

LARRY HOOK and JANICE NELSON

CLAIMANTS

AND:

THE CITY OF NANAIMO

DEFENDANT

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE GOULD

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| Appearing on their own behalf: | L. Hook<br>J. Nelson |
| Counsel for the Defendant: | L. Murray (as Agent) |
| Place of Hearing: | Nanaimo, B.C. |
| Date of Judgment: | December 20, 2007 |

[1] THE COURT: This is an action by the claimants against the City claiming negligent inspection in the building of their home at 3524 Wiltshire Drive, in Nanaimo, B.C. The claimants are not the original owners of the home. It was built in 1993, with a certificate of occupancy having been issued on or about November the 10th, 1993.

[2] The claimants moved into the home in June of 1996. The balance of the facts are set out in an agreed statement of facts which was agreed to by the parties in September of 2007 and filed in these proceedings as part of one of the other exhibits. Accordingly, I do not propose to go through those basic facts in detail.

[3] One of the things that I noticed about this case is that there was an extraordinary amount of work done by the claimants in respect of this case. Regrettably, in my view, much of it was unnecessary, and with respect, I think they got into a morass of legal stuff which they likely had difficulty understanding, and much of what I heard was really irrelevant to the issues that were before the court.

[4] The claimants' action was dictated by finding out in January of 2005 that the home they had purchased in 1996 had a considerable flaw in it. That flaw was a leak into a lower area room that they called the games room and which was used

as such. Ultimately they found that there was considerable rot and mould in the joists and the sheathing between the games room and the suspended concrete floor above.

[5] The problem was discovered, as I say, in January of 2005, even though I did hear some evidence of a smell in perhaps 2001.

[6] Like any homeowner, they were distressed about this happening to their home. They looked around for answers and came up with their own retroactive theory that essentially says that the City was negligent in issuing an occupancy permit for the house before properly inspecting the construction of the games room and the slope of the garage floor.

[7] Because the claimants were not the original owners, they cannot say from observation what went into the building of the house because they were not there. They put together their theory that the damage resulted from two main factors: that the floor in the garage was not sloped towards the outside as required by the building bylaw and that City inspectors should have noticed that and should have declined to approve the garage floor; and secondly, that there was no vapour barrier, so-called, between the garage floor and the OSB which was used as sheathing under the garage floor. OSB stands for oriented

strand board.

[8] They also expressed concern about the use of OSB rather than plywood.

[9] The result was, when they discovered the leak and the damages that had been caused, Cromwell Restoration, now called BELFOR, was called in and they had to do what they called a level three abatement procedure, their highest level. That involved moving the residents out of the home for a while and equipping their employees with full protective gear for the workers and removing all rotten and mouldy material in sealed bags and then pumping out the air in the games room in order to replace it with clean air.

[10] Dr. Nelson, who had a number of other medical problems to deal with, had to live in alternate accommodation for some time.

[11] The garage floor was replaced and the games room was rebuilt, et cetera, at considerable cost.

[12] They said to themselves that this was only a three-year-old home when they moved into it, and it is not that old now. What caused this to happen and should not somebody be held responsible for it?

[13] It came out in the evidence that they have thought about suing the person who sold them the home, but he was deceased. They thought about the contractor but found out that he had left the country some time before, and the suspicion was left with them, and with me as I heard that, that others were after him.

[14] That left the City and resulted in these proceedings which have taken far too long for a whole variety of reasons which I do not propose to get into.

[15] As ably expressed by counsel for the City, there are some particular rules for taking action against a municipality. I will leave the subject of limitation periods and so on until later in these reasons.

[16] The evidence that I heard from the claimants was a retroactive interpretation of events. They could not do it any other way since, I have already said, they were not the original owners.

[17] I heard evidence from the representatives of Cromwell Restorations, now known as BELFOR. They looked at the damage and did remediation work after the leak was discovered. They discovered the mould that was found and all the other damage which had to be fixed.

[18] The claimants formed the impression from all who looked at the damage and those engaged in the reconstruction that the moisture had come from the garage floor above the games room. The claimants' theory goes this way:

> (a) that water had collected on the garage floor over the years and had seeped through the floor because the floor was not sloped towards the outside. One of the claimants' witnesses described the floor as dished - that was Mr. Coultish - sloping from both ends to a lower area in the middle, also that the floor was cracked;
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> (b) that water had then made its way to this area above the games area. They say that the vapour barrier had then made its way into the area above the games area. They say that the vapour barrier was the wrong grade to stop such moisture.

I pause to note here that it is not a vapour barrier as such. You find vapour barriers on walls, of course, and we heard some evidence about that which is not germane to this particular case. We heard from a witness that nowadays they would place a membrane between the sheathing and the cement floor, but that was not routinely done in 1993.

> (c) they say that the problem was exacerbated by the use

of OSB that was used for the sheathing, but I heard in other evidence that OSB is okay according to the Code.

[19] There is one crucial element to this matter and that concerns the location of the games room under the garage. The claimants believe that the City must have known about it and that it must have been there at the time of original construction. The City disagrees for the following reasons.

[20] First of all, the plans submitted to the City do not contain this room. Next, Robin Chapman, the engineer who designed the foundation and the garage floor, says there was no plan for this room. He says, and I quote, "I did not know that there would be living space under the garage." He says further in his evidence the design is not appropriate for a situation where living space is under the garage.

[21] Not only did Mr. Chapman do the design work, he would supervise construction from time to time, and he did the requisite certification for the City.

[22] Furthermore, both Ralph Topliffe and Tom Weinreich from the City, both supervisors, of building inspectors I think they described themselves as, say the plans filed with the City make no reference to a room under the garage, and these were the plans, of course, that were filed in order to get the

building permit.

[23] I accept the evidence from the City personnel and the engineer. I have to conclude that the games room was likely added after the occupancy permit was granted, or at least after the last inspection was done.

[24] Turning to the garage floor, the following should be noted. The claimants had lived in the house for some nine years before the so-called slope deficiency was noted or, if noted earlier, before any damage was noticed. Next, the City does not inspect garage floors for slope. Again, the impression from Mr. Topliffe and Mr. Weinreich, as well as from the engineer, Mr. Chapman, that this is left to the contractor to take care of. It appears to be one of those things that is so obvious in the construction of a garage that no one finds the necessity to specifically look at it. Even if somebody had inspected it in 1993, the evidence does not establish that what was there then is the same as in 2005.

[25] The City's practice to not inspect the slope of garage floors is clearly a policy decision, and the importance of that is referred to in the decisions put forward by the City's counsel.

[26] I have had the benefit of a written submission from Ms.

Walton on behalf of the City. I must say that submission is impeccable in its legal scholarship, in my opinion, and correctly applies the law to the facts.

[27] Any person pursuing a civil claim must prove their case on what is called a balance of probabilities. That is distinct from the criminal standard of proof beyond a reasonable doubt. The civil standard means that I would have to find that the claimants' version of events is probably true. I am unable to do so. I have ample evidence of the damage and lots of suggestions that this area of the house was not built properly. The villain of the piece is the original contractor, clearly. What I do not have before me is credible evidence establishing to the requisite standard that the City was somehow negligent in performing their inspection duties.

[28] I can sympathize with the claimants. None of us as homeowners would like to face the situation they found themselves in. However, there is no basis on the evidence for finding the City responsible. Accordingly, I dismiss the claim with costs of expenses under Rule 20(2)(c), and in view of my decision on the merits, I do not find it necessary to consider the limitation arguments any further.

(REASONS CONCLUDED)