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'Poorly built house' case ends after lengthy fight

Both sides are claiming victory in a bitterly contested case involving defects in a new luxury home in Ottawa's Central Park subdivision, which was purchased for $443,500 in August 2000.

For the next four years, the parties were engaged in what a judge later called "an intense and drawn-out saga" over problems with the house at 69 Whitestone Dr.

The purchasers were Karen Somerville and Alan Greenberg, a married couple who bought the luxury house from Ashcroft Homes.

After they moved in, Greenberg and Somerville compiled a list of 130 problems with the house, ranging from dirty windows to undersized ducting and furnace capacity. A lengthy fight developed, and ultimately the buyers commenced litigation in 2001 against virtually everyone involved in the home construction and purchase, including the Ontario New Home Warranty Program (now Tarion).

After several conciliation attempts, ONHWP finally determined that the duct work was defective and ought to have been warranted.

Starting in December 2002, Somerville began to experience poor health, and was eventually diagnosed by her doctor with sick building syndrome due to a hypersensitivity to mould.

By October 2003, the couple had vacated the house and abandoned the contents on the doctor's recommendation. They never returned. As the trial judge later said, "In hindsight, the combination of a problematic house, a mass production builder, and the expectations of these plaintiffs rendered the possibility of the repair of the home an impossibility."

Last summer, Ashcroft purchased the home back for its then-market value of $550,000.

In February and March of this year, the case proceeded to a month-long trial on the issue of compensation for other damages suffered by Somerville for sick building syndrome, out-of-pocket expenses, appliances and fixtures left in the house, mental stress, expert fees, legal fees, and money spent on repairs. The total amount claimed exceeded $1.5 million.

In early August, Justice Robert L. Maranger released his decision, awarding the plaintiff buyers $15,000 in general damages for stress and emotional upset, and a further $6,675 for testing and repairs, for a total award of $21,675. He turned down the claim for $1 million in punitive damages.

"On the fundamental question of whether the defendant builder breached its contract with the plaintiffs," Justice Maranger wrote, "the evidence in this case supports a finding of a breach of contract. The reconciliation reports from ONHWP, the outstanding work orders from the City of Ottawa, the building code violations, the evidence of engineers who prepared reports on behalf of the builder, all support the proposition that this was a poorly built house. The Agreement of Purchase and Sale provides that the `Real Property will be constructed in a good and workmanlike manner.' This house, in my view, was not."

Both sides of the case issued statements after the 32-page decision was released on August 5. David Choo, president of Ashcroft Homes, welcomed the decision of Justice Maranger. He was "satisfied" that the court's decision "effectively addresses the key issues in this unfortunate court case."

"From the outset of this long and difficult situation we have made every effort to address each of Ms. Somerville and Mr. Greenberg's concerns up to and including repurchasing of their home from them."

He added that his company took the judge's comments seriously and would strive to improve customer service.

Somerville and Greenberg issued a statement noting that they were pleased that Justice Maranger agreed with their experts in relation to the poorly built home resulting in a breach of contract, but "we are obviously disappointed that (he) did not accept our experts' opinions that this poorly built home caused Karen Somerville's illnesses, e.g., asthma and sick building syndrome, and that we should vacate that home for health reasons."

The judge will decide later whether or not to award costs to one party or the other, and the amount of any award.

In this case, the trial lasted four weeks and involved the testimony of numerous experts and thousands of pages of documents. Generally, a court case and trial of this length can cost each side several hundred thousand dollars in fees before a final decision is reached. I would not be surprised if the combined legal costs exceed the market value of the house.

Judges usually order the losing party to pay part of the winner's legal fees. Here, one thing is certain: There will be no winners in this case, no matter which side is ordered to pay costs.

It's an unfortunate truth that litigation is only for those who have deep pockets or are willing to lose a substantial chunk of their assets in the process of making their point in court.

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The decision of Justice Maranger is available without cost on the website of the Canadian Legal Information Institute at http://www.canlii.org/on/cas/onsc/2005/2005onsc14354.html (and below). Neither side has yet announced any plans to appeal.

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[Cited Decisions and Legislation]

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KAREN SOMERVILLE and ALAN GREENBERG	)))	Barry Laushway, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
ASHCROFT DEVELOPMENT INC., ASHCROFT HOMES CENTRAL PARK INC. and PAUL KELLY	)))	Paul Leamen, for the Defendants
	)	
Defendants	))	
	)	
	)	**HEARD:** February 21 through to March 17, 2005

REASONS FOR JUDGMENT

Mr. Justice Robert L. Maranger

Introduction

[1] On the 17th day of August, 2000, the plaintiffs bought a home from the defendant builder. The parties for the next 4 years bitterly argued over the rectification of problems with the house. The defendant builder finally bought back the residence from the plaintiffs for its market value on August 11, 2004. This trial dealt with whether the plaintiffs were entitled to any other form of compensation by way of damages, as a result of the purchase of this house and its aftermath.

Background and Factual Analysis

[2] The plaintiffs Karen Somerville and Alan Greenberg are husband and wife. On December 11, 1999, they entered into an Agreement of Purchase and Sale with the defendant, Ashcroft Homes. The agreement was for the purchase of a residential dwelling, known as the Cardin Model Home, to be built in a subdivision known as Central Park in the City of Ottawa, the address of the home was to be 69 Whitestone Drive. The total purchase price including a lot premium and other extras was $443,442.97.

[3] The Agreement provided for a closing date of July 3, 2000. This was extended to August 17, 2000, with the consent of the plaintiffs.

[4] On August 17, 2000, the transaction closed. The plaintiffs attended 69 Whitestone Drive for an inspection of the home. They legitimately expected to be moving into their fully completed brand new home; instead they found a number of trades people inside the house still performing work. Thus began an intense and drawn out saga between these homeowners and this builder in relationship to the construction of this house.

[5] The plaintiffs were told that the work remaining was fundamentally cosmetic and that within a two-week timeframe the home would be completed to their satisfaction.

[6] The plaintiffs did not accept this analysis and based upon their own assessment engaged Bottriell Engineers to conduct a detailed inspection of the home. This was carried out on August 28, 2000. This firm of engineers specializes in home inspections.

[7] Bottriell s report was a detailed critique of the workmanship in relationship to this house, it enumerated 130 problems, some very minor such as dirty windows , some more serious such as undersized duct work, or too small of a furnace. This report was in large part derived from the plaintiffs own inspection and perception of the deficiencies with the home. The covering letter from Bottriell to the homeowners states, Our attached deficiency list was derived from the list you provided us. Your list was reviewed and these deficiencies were verified and included as part of the report .

[8] The report precipitated a meeting with the plaintiffs and the defendant builder. The first meeting was on September 1, 2000 with Mr. John Stokes the construction manager for the builder. It appeared that the parties were going to work out their difficulties, Ms. Somerville at the outset disclosed how she intended on dealing with the matter and with the defendants. In her correspondence, dated September 8, 2000, she stipulated the following Given that there are in excess of 130 line items that are going to be addressed, I will be treating this as a project and preparing a weekly status report based on the list that we provided to you on August 31, plus any new problems that surface. I will provide you with a copy of the progress of this project each Friday .

[9] The issue of work deficiencies and problems, as they relate to 69 Whitestone Drive, were in my view, really only a question of degree. The evidence at trial clearly supports the general proposition that this house had a significant amount of problems. However, what transpired in the ensuing 4 years is difficult to

comprehend. The plaintiffs, particularly Ms. Somerville, embarked upon a campaign of prodigious letter writing, involving numerous third party entities, which included the Ontario New Home Warranty Program (ONHWP), the City of Ottawa, politicians from all levels and to a certain extent the media. The plaintiffs hired a great number of experts to assist in attempting to prove the deficiencies or other claims. The plaintiffs frustration over the home was palpable and at times understandable. Ms. Somerville authored several hundred letters and e-mails as a result of either her dissatisfaction with the home, the builder, or a given third party involved in the dispute. This culminated in a law suit commenced on August 16, 2001, that originally had as named defendants virtually any individual or entity associated with this home and the dispute respecting its deficiencies and repairs.

[10] The only defendants remaining at the commencement of trial were the builder, and Mr. Paul Kelly the solicitor who represented the plaintiffs on the real estate transaction respecting 69 Whitestone Drive. The Court was advised at the outset that the issue of Mr. Kelly s potential responsibility was not to be dealt with during this trial and that this was to be strictly considered as a case between the plaintiffs and the builder.

[11] This trial lasted 4 weeks and involved the testimony of numerous experts and thousands of pages of documents. Counsel for the plaintiffs very thoroughly, and skilfully presented an overview of the day-to-day lives of the plaintiffs from the day they moved into this house up to the date of this trial. The amount of detailed information provided to advance the different claims in this case, made the determination of the essential a daunting task. In terms of extricating the most important facts, a review of the reasons why it became impossible to repair 69 Whitestone Drive was the chosen approach and in this regard the following evidence and findings were in my view the most important:

When the initial report from Bottriell was completed on August 30, 2000, the parties at first showed some goodwill and the desire to rectify the situation. The builder replaced an undersized furnace and acknowledged the error. The builder provided an air conditioner to the plaintiffs at no charge to attempt to make amends for their inconvenience. What became reasonably clear early on is that the parties could not agree on what in fact had to be repaired or when the repairs could be performed.

As with most new homes, 69 Whitestone Drive was subject to the Ontario New Home Warranty Program (ONHWP) which was a mechanism for resolving disputes between homeowners and builders concerning work deficiencies with new homes. The parties tried for almost 8 months to settle their differences without the programs intervention, but the number of complaints, the difficulty caused by both parties in scheduling repairs, and a breakdown in communication made this impossible.

On March 2, 2001, a representative of ONHWP, Mr. Paul Rochon, found 39 warranted items under the program and 42 items that were not warranted. One of the key items that was not warranted in that report was the Heating Ventilation Air Conditioning system (HVAC) and more particularly, the size of the duct work located throughout the home and the need for it to be replaced with larger duct work. After the plaintiffs engaged their own expert on the issue of the duct work and numerous letters were exchanged, the ONHWP finally commissioned their own report concerning the HVAC and on August 12, 2001, several reconciliation reports later ONHWP determined that the duct work in question ought to have been warranted.

This issue of the duct work acted as a barrier to performing other repairs, such as repairs to drywall, painting and miscellaneous other work. Ms. Somerville felt that these had to wait until such time as the duct work problem was addressed, simply because the replacement of the duct work would necessarily involve damaging paint and drywall located throughout the home.

The problems in relationship to this house surfaced at various intervals between the original purchase and repurchase by the defendants. The plaintiffs from time to time would make legitimately increased demands to the defendants to undertake certain repairs. The requests to have things done to the house became an ever-expanding matter. Leaks in the roof, ice build up on the roof, water in the basement, the smell of sewage in the home, mould growth in the bathroom, the lack of damp proofing around the house, were not necessarily in the Bottriel report, but surfaced with the passage of time. The notion that this house could be repaired quickly had for all intents and purposes become a logistical impossibility.

The potential to repair the home to the satisfaction of the plaintiffs was further marred by the issue of what access was allowed or provided for the various trades people responsible to complete the repairs to the home. The scope of the work that would have had to be performed to put this house in a condition that would have satisfied the plaintiffs would have required, in my view, a substantial block of time. The plaintiffs would have had to move out of the house for one month or two months. Furthermore, allowing trades people to come in for large blocks of time while the plaintiffs continued to reside in the home was particularly problematic in this case, because Ms. Somerville was a self-employed business consultant who required the use of her home to conduct her business affairs.

On April 2, 2001, the possibility of having the home repaired to the parties mutual satisfaction was hampered when a lawyer representing Ashcroft Homes delivered correspondence to the homeowners. The letter was an ultimatum with respect to the scheduling of trades people. The position taken was that the completion of remedial work to the home was to be in accordance with the first reconciliation report from ONHWP and nothing more.

On August 16, 2001, the plaintiffs issued a Statement of Claim against the builder, a number of the trades people involved in the construction of the house, ONHWP, the City of Ottawa, and Mr. Paul Kelly. The claim being advanced was for compensation above and beyond the rectification of their home.

The plaintiffs engaged the services of an engineering firm, Buchan, Lawton, Parent LTD (BLP), who prepared a report, dated October 25, 2002. This report listed some 86 building and construction issues. Their report advised and considered that out of the 86 deficiencies, 36 items constituted building code violations. The report highlighted outstanding work orders with the City of Ottawa. The same firm prepared and filed a report indicating that the costs to complete the repairs listed would have been between $260,000 to $334,000.

Karen Somerville became involved in the Central Park Community Association, one of the mandates of this association was to collectively deal with Ashcroft Homes regarding the problems with the homes in the Central Park Development. Ms. Somerville felt free to use the media and also created a national website called Canadians for Better Built Homes. In essence, Ms. Somerville became an activist, with respect to the issue of home building and specifically targeted Ashcroft Homes.

In December of 2002, Ms. Somerville began to experience poor health. In January 2003, she read information on mould and Sick Building Syndrome (SBS). The plaintiffs noticed a build up of some mould in their bathroom. Ms. Somerville was tested for mould allergies in the spring of 2003, the results proved to be negative. On June 6, 2003, an air quality investigation was conducted by the Engineering firm BLP, they concluded that the house was contaminated with mould. In September 2003, Ms. Somerville was referred to Dr. Molot who diagnosed her with SBS and found that she was hypersensitive to mould.

In October 2003, Mr. Greenberg and Ms. Somerville vacated the home on the advice that the home was now toxic. They were informed that the air quality in the home was making Ms. Somerville very ill. They were also told not to remove the furniture from the home because mould spores located in the home had somehow contaminated their personal belongings and furnishings. The advice in question came from Dr. Molot and BLP s representative, Ms. Carol Ann Hinde.

The plaintiffs never returned to the home. In hindsight, the combination of a problematic house, a mass production builder, and the expectations of these plaintiffs rendered the possibility of the repair of the home an impossibility.

[12] On the fundamental question of whether the defendant builder breached its contract with the plaintiffs, the evidence in this case supports a finding of a breach of contract. The reconciliation reports from ONHWP, the outstanding work orders from the City of Ottawa, the building code violations, the evidence of engineers who prepared reports on behalf of the builder all support the proposition that this was a poorly built house. The Agreement of Purchase and Sale provides that the Real Property will be constructed in a good and workmanlike manner . This house in my view was not.

[13] The trial went into a great deal of detail with respect to the nature and degree of deficiencies. The importance of arriving at a particular conclusion as to the magnitude of these deficiencies is of limited use in this case, this is because the builder bought back the house on August 16, 2004, for its then market value of $550,000. The Court can infer that the builder bought the house back as though it were without deficiencies. This effectively eliminated the need to speculate as to the depth of the repairs, and rendered moot the issue of whether there was a need to spend $334,000 to fix the house as postulated by the engineering firm BLP.

[14] What this Court was called upon to adjudicate was whether or not any other compensation in the form of damages should be awarded to the plaintiffs by reason of the actions of this builder and the breach of contract. The plaintiffs claim an assortment of damages including: Non-pecuniary and pecuniary damages for Karen Somerville for SBS, a subrogated claim in this regard for OHIP, out-of-pocket expenses on account of moving out of the home, loss of business income for Ms. Somerville, general damages for both plaintiffs for mental stress, punitive damages, special damages for the costs associated with experts and legal fees, reimbursement for appliances and fixtures left at 69 Whitestone Dr., reimbursement for landscaping and improvements done at the residence, and reimbursement for money spent on repairs to the home. The total amount claimed exceeded $1,500,000.

[15] The determination of these various claims resulted in the necessity to address the following specific matters that arose during the course of the proceedings:

1) Do the warranty provisions contained in the Agreement of Purchase and Sale operate so as to preclude the plaintiffs from suing the builder for anything other than the repair of the house or the costs they incurred to complete any repairs to the house?

2) Did the plaintiff Karen Somerville establish that she sustained Sick Building Syndrome because of the faulty construction and design of 69 Whitestone Drive?

3) Are the plaintiffs entitled to reimbursement for the various expenditures they incurred as a result of moving out of the house in October of 2003?

4) Is the plaintiff Karen Somerville entitled to damages for loss of business income?

5) Should the plaintiffs be awarded damages for inconvenience, disruption and mental distress resulting from the actions of the builder?

6) Are the plaintiffs entitled to punitive damages?

7) How should the issue of costs for experts, the reports of experts, and legal fees both before and after the commencement of this action be treated in this case?

8) What impact did the purchase of the home by the defendant builder have on this matter, and should the plaintiffs be entitled to be reimbursed for chattels left behind, improvements made to the house or property, or money spent on repairs to the home?

Warranty Issue

[16] The parties in this case entered into a standard Agreement of Purchase and Sale. Counsel for the defendant, Ashcroft Homes, in an effort to summarily dispose of this law suit argued that as a matter of law, the plaintiffs were not entitled to damages for: illness, costs associated with moving out, loss of business income, inconvenience and mental stress, reimbursement of expenses incurred and the reimbursement of costs incurred for experts and legal fees. The thrust of the argument was that paragraph 6 of the Agreement of Purchase and Sale incorporates s.13(1) and s.13(2)(b) of the *Ontario New Home Warranties Plan Act,* which in essence defines the defendants warranty obligations. The relevant sections of the *Act* state the following:

Warranties

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations. R.S.O. 1990, c. O.31, s. 13 (1).

Exclusions

(2) A warranty under subsection (1) does not apply in respect of,

(b) **secondary damage caused by defects, such as property damage and personal injury;**

[17] The argument put forward was that all other damages being claimed apart from a relatively small sum expended to repair the roof were secondary damages caused by defects, such as property damage and personal injury , and that the Agreement of Purchase and Sale, at paragraphs 6 and 24 act to effectively eliminate any independent or concurrent responsibility in tort. The clauses in the agreement provide in part:

> **6 CONSTRUCTION WARRANTY** The Vendor is enrolled under the provisions of the Ontario Home Warranties Plan Act The Vendor warrants that, subject to the exclusions prescribed by the Act and Regulations, the Real Property will be constructed in a good and workmanlike manner and that for a period of one year from the closing date or the date of occupancy by the Purchaser, whichever is earlier, will be free of defects fit for habitation Constructed in accordance with the Ontario Building Code under which the Building permit was issued, affecting health and safety Free from major structural defects.
>
> **24 ENTIRE AGREEMENT** This agreement constitutes a binding contract of purchase and sale and expresses the entire understanding and agreement between the parties hereto and there is no representation, warranty, collateral agreement or promise whatsoever affecting the Real Property other than as expressed herein in writing. This Agreement shall not be amended, altered or qualified except by a memorandum in writing signed by the parties hereto.

[18] The proposition put forward was that the warranty provisions and the Agreement of Purchase and Sale had the combined effect of precluding the plaintiffs from claiming damages in negligence and acted as a bar to the various heads of damages being pursued by the plaintiffs in this particular case.

[19] In my view, the case law does not support this strict interpretation of the relationship between someone buying a house and a builder. The limits of one s ability to sue for tortious remedies are not vacated by warranties having to do with the construction and fitness for habitation of a particular building.

[20] In the Supreme Court of Canada decision of *Winnipeg Condominium Corporation No. 36* v. *Bird Construction Company Ltd.,* 1995 CanLII 146 (S.C.C.), [1995] 1 S.C.R. 85, Mr. Justice La Forest speaking for the court makes the following comments with respect to the concurrent possibility of contractual and tortious responsibility from the perspective of a builder. At paragraphs 21 and 23 he states as follows:

> In my view where a contractor (or any other person) is negligent in planning or constructing a building, and where the building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants. The underlying rational for this conclusion is that a person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care .
> I observed that it is well established in Canada that the duty of care in tort may arise coextensively with a contractual duty.

[21] An Agreement of Purchase and Sale that contains warranties with respect to the correct building of a home, pursuant to the *Ontario New Home Warranties Act, supra,* would govern claims with respect to work deficiencies and the need for repairs, however, this does not necessarily preclude a plaintiff from bringing an action in negligence for negligent construction and all of the various heads of damages that can flow from that negligence.

[22] In the *Winnipeg Condominium* case, *supra*, Justice La Forest further indicates at paragraph 25 the following:

> In my view, a contractor s duty to take reasonable care arises independently of any duty in contract between the contractor and the original property owner. The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home owner. By contrast, the duty and tort with respect to materials and workmanship flows from the contractor s duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these two duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract.

[23] The Agreement of Purchase and Sale and the warranties contained therein, do not preclude a plaintiff from claiming for such matters as illness caused by SBS, and all of the damages that flow from such a claim.

[24] The unusual nature of this case and some of the claims being advanced by the plaintiffs are actions in tort, and in my view can stand alone and independent of the Agreement of Purchase and Sale and warranties contained therein. Therefore, I would reject this argument as a means of summarily dispensing with all of the plaintiffs claims.

Sick Building Syndrome

[25] The plaintiffs claim that as a result of the deficiencies of design and construction of the house Ms. Somerville became very ill. The alleged problems

creating the health difficulties included: water infiltration in the basement, toxic exhaust gases entering the home, poor air circulation because of undersized duct work and a lack of venting in the master bathroom allowing for the development of excessive mould. The suggestion was that these problems created a cocktail effect that rendered the air in the home poisonous to Karen Somerville. The claim is framed in both negligence, and as damages flowing from a breach of contract.

[26] It is trite law to say that the plaintiffs must prove the elements of a claim in negligence. This onus was summarized by Professor G.H.L. Fridman in The Law of Torts in Canada at pages 403-404:

> The plaintiff must establish that he was owed a duty of care by the defendant: he must also discharge the burden of showing that the defendant breached that duty by some act or omission that constitutes negligence .. his obligation is to convince the court on the balance of probabilities, that it was more probable than not that his injury or damage was caused by negligence on the part of the defendant He must produce evidence that, unless contradicted, tends to show that the defendant was negligent.

[27] In relationship to damages resulting from a breach of contract the onus would be on the party claiming the damages to show they were caused by the defendants breach. In either tort or contract, in the matter at hand, the plaintiffs would have to prove on a balance of probabilities that the construction and design of 69 Whitestone Drive caused Ms. Somerville s health problems.

[28] Karen Somerville and Alan Greenberg resided at 69 Whitestone Drive for approximately three years and two months. In October 2003, they vacated the home and left all of their belongings behind, largely on the advice of Dr. Molot and Ms. Carol Ann Hinde, a representative from BLP. This advice was predicated on the notion that the house, due to the existence of mould, a poor ventilation system and off gassing from building materials had air that was making Ms. Somerville very ill. They also advised that all of the plaintiffs belongings were now contaminated and unusable.

[29] Karen Somerville testified that in December of 2002, she began to develop a chronic cough, and that by the spring of 2003, she began to have a variety of symptoms of poor health, including: sore throat, post nasal drip, nasal congestion, episodic sneezing, lethargy, decreased concentration, aching in the jaw and finally symptoms of asthma.

[30] In and around this time frame, the plaintiffs noticed that mould was beginning to grow in certain areas of their ensuite bathroom. Ms. Somerville also acknowledged that she read an article in the Globe & Mail Newspaper dated January 28, 2003, on SBS; the article described the possible effect of mould on a person s health. The plaintiff further indicated that she made the correlation between her symptoms and the mould found in the bathroom.

[31] In April of 2003, Ms. Somerville was referred to Dr. Zave Chad, an allergist and immunologist. In his report to Dr. Salamon, Ms. Somerville s family physician, Dr. Chad indicates that he saw her for Rhinitis and a cough. He also indicated that he performed allergy tests including tests for mould allergies and that the results were negative. He did advise Dr. Salamon that Ms. Somerville was allergic to fresh cut grass and dogs.

[32] The combination of Ms. Somerville s health problems, acquired knowledge on SBS and the presence of some mould in their bathroom caused her to request that the engineering firm BLP conduct an indoor air quality assessment of 69 Whitestone Drive. As a result of this request, Ms. Carol Ann Hinde, M.A., an employee of BLP conducted, according to her report dated July 2003, an indoor air quality investigation in the ensuite bathroom of 69 Whitestone Drive on June 6, 2003 .

[33] Ms. Hinde s qualifications were not those of a scientist or an engineer. The evidence showed that she possessed a Masters degree in Geography, had participated in some seminars on indoor air quality and was involved in a variety of studies and projects both as a researcher and manager regarding indoor air quality. The issue of whether she could testify on the subject as a qualified expert was seriously contested. The Court allowed her to give evidence on the specific findings and testing of 69 Whitestone Drive, with the corollary that the qualifications would go to the weight of her evidence.

[34] The Court has had the opportunity to review not only the report but also to hear the testimony of Ms. Hinde in relationship to this investigation. I find as a fact that the investigation simply involved Ms. Hinde s visually inspecting what can best be described as small to noticeable amounts of mould in the shower stall and between the glass blocks of a shower wall located in the ensuite bathroom. It further involved her removing some of the samples of this mould and having the samples analyzed by a laboratory Paracel Laboratories Ltd. The laboratory then indicated the following findings:

> Please find enclosed the final report for samples received June 6, 2003. While Paracel provides information on the molds recovered, **interpretation of the results is the responsibility of the client.** Those propagules identified that are known to be toxigenic or pathogenic are as follows: Rhoma species have been isolated from cellulosic substrates, and is hydrophilic. Some species are toxigenic and allergenic. None of the remaining propagules identified are known to be toxigenic or pathogenic .

[35] Ms. Hinde s report postulates the following:

> the findings indicate high amounts of several mold species are present along with high amounts of mold parts Specifically the analysis identified the molds Cladosporium cladosporiodes, Phoma species and Botrytis cinerea. Some species of the Phoma genus are toxigenic and allergenic, however, the analysis was only able to identify down to genus level. Cladosporium is commonly found outdoors and is a cause of asthma and hay fever. It is less common indoors unless there is a source of indoor contamination. Houses with poor ventilation may have a heavy concentration of Cladosporium.

The report then points to the lack of a fan in the ensuite bathroom, the duct size problem, and the notion that a window cannot be open year round to remove excess humidity. It further highlights Ms. Somerville s specific concerns respecting her health and the presence of mould in the home.

[36] In cross examination, Ms. Hinde acknowledged that an indoor air quality analysis was not performed as part of her investigation and report of June 6, 2003.

[37] The Engineering firm, BLP then suggested that Ms. Somerville see Dr. John Molot. Dr. Molot is a family physician with a specific interest in environmental medicine. He saw Ms. Somerville several times in September 2003. He diagnosed her with SBS, the report filed explains how he arrived at this conclusion:

> The environmental exposure history, using the CH20PD2 model[1], was not significant except for her home environment, which is where she also works. She had moved into the house, which was newly constructed, in August 2000. According to the history, there were problems with the construction, with a leaking roof and foundation. In the summer of 2002, mould was found growing in the ensuite shower stall. Several problems were identified including ventilation problems, which could also contribute to increased moisture (e.g. no exhaust fan in ensuite bathroom) and subsequent mould growth. Moulds (cladosporium, phoma and botrytis) were identified from swabs taken from the ensuite bathroom.
>
> **Discussion:** The following significant points can be made from this initial assessment:
>
> Ms. Somerville was well prior to moving to her new home at 69 Whitestone
> The house had problems with accumulation of moisture, while still new
> The IAQ assessment by BLP suggested inadequate ventilation and significant mould exposure
> Moulds will thrive in outdoor environment if excessively humid[2]
> New homes will gas off significant volatile organic compounds (VOC) from a variety of building materials[3], especially if humid. Pollutant exposure in the indoor air will increase with inadequate ventilation
> Indoor pollution of VOCs can exacerbate asthma[4]
> Poor ventilation is a common cause of SBS[5]
> Increased humidity is a common cause of SBS[6]
> Moulds are a common cause of SBS[7]
> Ms. Somerville s symptoms of itchy eyes, sore throat, and upper and lower airway irritation, together with fatigue, headache and decreased concentration are typical for SBS1213
>
> The diagnosis was asthma and sick building syndrome with probable sensitivity to moulds

[38] Dr. Molot s evidence and his report were more of an argument for SBS than a legitimate diagnosis. It was predicated on a finding that Ms. Somerville s self-reporting was flawless and that she had no history of these types of health problems. The evidence showed that the clinical notes and records of Ms. Somerville s family physician, Dr. Salamon, indicate some pre-existing symptoms. The notation for February 1999, clearly indicate Ms. Somerville having symptoms of a heavy chest, a cough and bronchitis. This pre-existing history was not dealt with to any satisfactory degree in Dr. Molot s findings. The diagnosis is also inextricably intertwined with the conclusions of BLP that the home was riddled with air quality problems and was virtually contaminated. He does not discuss or analyze in any meaningful way other possible causes for Ms. Somerville s difficulties such as allergies unrelated to the home.

[39] In this respect, it is important to note, that prior to Ms. Somerville and Mr. Greenberg leaving 69 Whitestone Drive, an indoor air quality analysis was never performed. BLP s report and investigation of June 6, 2003, consisted of the examination of some mould in the bathroom and the suggestion that the duct size, off gassing and general problems respecting improper ventilation caused the air in this home to be of such poor quality that it made Ms. Somerville sick. With respect to the mould in the bathroom, photographs filed as exhibits show that the amount of mould in question was not significant. It is also important to note that actual air quality testing performed by BLP on November 17, 2003, indicated that there was far more mould at the exterior of 69 Whitestone Drive than in the interior, especially the Cladosporium species Ms. Hinde identified as the problem for Ms. Somerville.

[40] In terms of the air quality in the home, the defendants filed an expert report from Building Science Investigations, Inc. and called evidence from Mr. Jonathan Solomon. He testified that on March 18, 2004, they conducted an indoor air quality and microbiological forensic investigation of the subject property. This investigation included a general air assessment which measured the level of carbon monoxide, carbon dioxide, relative humidity, and general volatile organic compounds. The general air quality assessment showed that the air in this house at the point in time of the measurement was normal. With respect to the issue of mould growth in the house, their conclusions were clear in that they simply stated that there are no readily identifiable indoor air quality related problems or material mould growth associated with this residence . The testing in this case was a comprehensive analysis which involved visual inspection, the collection of culturable and non-culturable air samples, throughout the house as well as outside.

[41] Mr. Jonathan Solomon was qualified as an expert in relationship to building sciences and mould. His qualifications were impressive, they included: Bachelors of Science Degree in Environmental Engineering and a Building Science Certification from the University of Toronto. He indicated that he was the only Engineer and Building Scientist in North America currently participating in the American Industrial Hygiene Association Environmental Microbiology Proficiency Analytical Testing Program. He further testified that he had attained a specialization as a structural mycologist (analyzing fungi within the building envelope). Finally, Mr. Solomon testified to having performed approximately 2100 microbiological investigations, and to having been qualified as an expert by other tribunals on a number of occasions.

[42] The timing of the tests was an issue raised at trial, due to the fact that there was no one living in the house since October 2003, and that the mould had been cleaned up. It was suggested that this had the impact of substantially weakening the evidentiary value of the air quality tests performed after that date. The logic of this argument is certainly valid. However, Mr. Solomon testified that if there ever was a serious mould problem or air quality problem in the house, some residual manifestation of the problem would have surfaced at the time of their investigation. This evidence was compelling. I accept this opinion as valid.

This conclusion was undefeated by any of the other evidence heard on the subject during this case.

[43] Finally, BLP on behalf of the plaintiffs engaged ECOH Management Inc. to conduct an investigation and prepare a report on mould and air quality in the home, they conducted their tests in July of 2004. The Court can only infer that this was in part to refute the findings of Building Sciences Investigation Inc. This firm also conducted a comprehensive analysis and investigation of the air quality in the home. The report indicated the following:

> The assessment involved a complete visual examination of the house, a brief visit to the neighbours house, collection of air samples, collection of tape lift samples of settled dust and collection of vacuum dust samples from porous materials Based on the visual examination, sampling results and other measurements it is concluded that: 1. A mould amplification site is unlikely on the main floor, upper floor and the basement. 2. Furniture and other household furnishings do not have any signs of mould growth or water damage. 3. Accumulated dust on the furniture and other articles is indicative of normal fungal ecology of the area. 4. Mould types and concentration in the general air at 69 Whitestone Drive is similar to that in the neighbour s house at 67 Whitestone Drive.

The crux of this report is that the amount of mould in this house was for all intents and purposes within normal ranges.

[44] I find as a fact that no real air quality testing was conducted in the summer of 2003. BLP gathered some evidence of mould samples and had them tested; they did not do anything else. They did not conduct an air quality investigation respecting mould or general air quality in the manner that Building Science Investigations Inc., or ECOH Management Inc. did in the spring and summer of 2004.

[45] In relationship to the proposition that off gassing from materials, moisture problems, poor air ventilation because of the duct work and improper vent placement created poor air quality in this home, I find that these may show poor quality of construction however, standing alone they do not prove poor air quality. These deficiencies were still in existence after October 2003, when the investigations by Jonathan Solomon, and ECOH Management were performed. There simply was no independent evidence to support a finding that the air in that house was bad. In truth, the only general air quality analysis ever performed demonstrated the contrary.

[46] Dr. Molot s report and conclusions were based upon Ms. Somerville s subjective complaints, and the analysis of BLP. His report quotes at length findings made by BLP concerning ventilation problems, air quality problems, and the existence of mould in the home . This erroneous information and the subjective complaints of Ms. Somerville led Dr. Molot to conclude that there could be but one cause for Ms. Somerville s illnesses, and this is the poor air quality at 69 Whitestone Drive. The problem with this conclusion is that there was no independent evidence to demonstrate on a preponderance of probabilities that there was anything particularly wrong with the indoor air quality at 69 Whitestone Drive. Frankly, the best evidence comes from the various indoor air quality investigations conducted in November and later in the spring and summer of 2004, all of these demonstrated scientifically that there was nothing wrong with the indoor air quality at 69 Whitestone Drive.

[47] I also find that Dr. Molot s report does not to any significant degree, exclude any other possible causes of Ms. Somerville s ill health. It is entirely possible that Ms. Somerville was suffering from ill health in the winter of 2002 and spring of 2003, and that she began to feel better when she left 69 Whitestone Drive. However, the required nexus between her ill health and the poor construction or design of this house, simply has not been made in this case.

[48] In an article entitled Sick Building Syndrome Diagnosis in Search of a Disease, Dr. Ronald Gots, M.D., Ph.D. generally hypothecates that SBS is so vague and so general a diagnosis that to try to ascribe blame to a building for certain illnesses can be problematic. He indicates:

> The symptoms that bring indoor air to the attention of building managers are generally common and non-specific: fatigue, headaches, and eye and nose irritation. Because almost anything can cause these symptoms, they are not tip-offs of SBS. And patients belief that a particular building is the culprit can impede medical investigation.

[49] The plaintiffs have the obligation of demonstrating on a preponderance of probabilities that Karen Somerville s health problems were caused by the improper construction of 69 Whitestone Drive. This onus has not been met on the facts of this case. The evidence demonstrating that there was nothing wrong with the indoor air quality at 69 Whitestone Drive far outweighs any evidence to the contrary.

[50] Consequently, I find that the plaintiffs in this case have not proven that the construction and design of 69 Whitestone Drive was the cause of Ms. Somerville s health problems on a balance of probabilities. Therefore, the claims for damages on account of Sick Building Syndrome are dismissed, including all special damages for medical expenditures related to this claim. The subrogated interest claim from OHIP is also dismissed.

[51] In relationship to non-pecuniary damages had the plaintiffs been successful on liability, I would have assessed these damages at $40,000 given the nature and scope of the pain and suffering presented by Ms. Somerville in this case.

Abandonment of 69 Whitestone by Plaintiffs in October of 2003

[52] The plaintiffs abandoned the subject property during the month of October 2003, and left behind most of their furniture and personal effects. The decision to vacate the premises was as a result of advice received from Dr. Molot and BLP, the engineering firm who came to the conclusion that the subject home and contents were contaminated.

[53] Karen Somerville and Alan Greenberg now claim as damages for breach of contract and negligence the following out-of-pocket expenses:

> rent and related living expenses - $26,412
> moving expenses - $15,014.62
> other expenditures due to vacating home -$7,360.70

[54] The nature of the expenses claimed range from the basic rental costs of accommodation, to attempted clean up of the furnishings and the reacquisition of items left behind but needed for the apartment. Some items claimed such as a $701 catering bill, $576 for a fully decorated Christmas tree, or meals in restaurants, were frankly very difficult to rationalize as legitimate claims under virtually any case scenario.

[55] The issue of responsibility for the out-of-pocket expenses incurred on account of vacating the premises in October of 2003, comes down to the following question: Was the defendant builder responsible in negligence or in contract for the plaintiffs decision to vacate the premises and incur the various out of pocket expenses they now claim?

[56] This question has already been determined by my findings on the issue of Sick Building Syndrome . The plaintiffs have not established on a balance of probabilities that Ms. Somerville s health problems were as a result of the construction or design of 69 Whitestone Drive, or that her illness was due to SBS. The plaintiffs have not established on a balance of probabilities that the subject property or its contents were contaminated and therefore uninhabitable and unusable.

[57] The decision to leave the home and virtually all of their possessions was based upon the advice of Dr. Molot and Ms. Carol Ann Hinde. The builder did not suggest, encourage or take any action to compel the plaintiffs to abandon the subject property. The financial consequences of the decision to leave the home are not a problem that can be visited upon the defendant builder, on the facts of this case.

[58] In relationship to the advice to leave all of their personal belongings behind and incur expenditures related to this decision, I have little hesitation in finding as a fact that it became undeniable that this entire course of action was simply unnecessary. The investigation and report commissioned by the plaintiffs, and prepared by ECOH Management Ltd., left little room for doubt in this regard. The report concluded that Furniture and other household furnishings do not have any signs of mould growth or water damage. Accumulated dust on the furniture and other articles is indicative of normal fungal ecology of the area. In the face of this evidence the continuation of claims for expenses related to furnishings and personal effects left behind as against Ashcroft Homes is difficult to justify.

[59] The Court heard evidence and reviewed photographs concerning the plaintiffs returning to the home on November 27, 2003. The plaintiffs were apparently advised of the need to wear the type of protective clothing worn by persons handling extremely hazardous or poisonous material. The Court heard evidence that even with this apparel, Ms. Somerville became ill with a cough, a heavy chest and a severe headache within an hour of entering the home on November 27, 2003. Ms. Hinde opined that the N-95 mask with its charcoal filter was not providing adequate protection for Ms. Somerville. I find all of this evidence in many ways troubling, especially in light of the evidence later showing that the house was not contaminated. The notion that Mr. Greenberg also had to wear this protective gear when he never manifested any illness from the air in the house, seemed to be nothing but an attempt to exaggerate the notion that the house was somehow contaminated. It did very little to add to the credibility of any of these claims.

[60] The claims arising from the abandonment of 69 Whitestone Drive have not been established. The plaintiffs have not proven that they needed to leave the home and its contents because of the negligence of the defendant.

[61] The Court has made a finding that the defendants did breach the contract by failing to provide the home that the plaintiffs bargained for in the Agreement of Purchase and Sale. Are the out-of-pocket expenses claimed for leaving the home damages that reasonably flow from that breach? They are not. The home had defects but it was not contaminated or uninhabitable. The best evidence heard at this trial supports the opposite conclusion. The plaintiffs did not have to leave the house in October 2003, and incur the various expenses they now claim. They may believe they did, but this belief, however fervent is not the financial responsibility of Ashcroft Homes in this case. Therefore, all claims for out of pocket expenses incurred as a result of leaving the home and contents are dismissed. This includes claims for the attempted clean up of the mould and/or the furnishings purportedly contaminated by the mould.

Wage Loss Claim of Karen Somerville

[62] The plaintiff, Karen Somerville, in the Amended Statement of Claim, claimed for loss of business income against the defendant builder in the amount of $245,000. Ms. Somerville testified at trial that the loss had conservatively reached $300,000.

[63] Ms. Somerville testified that she ran her own consulting practice, the business was operated as a corporate entity. The fundamental purpose was to provide both businesses and government agencies advice and consultation with respect to strategic planning and management. Ms. Somerville was also a Ph.D. candidate in Business Management at Carleton University. She further indicated that prior to engaging in the Ph.D. program, and moving into 69 Whitestone Drive, her corporation generated business income in excess of $170,000 per year. Ms. Somerville further indicated that her income was reduced significantly by reason of the purchase of 69 Whitestone Drive. Ms. Somerville claimed that this was primarily due to the amount of time she had to spend in dealing with all of the problems with the house. The health difficulties Ms. Somerville suffered were also described as a contributing factor to her income loss in the years 2002/2003.

[64] The claim was put forward under three possibilities: Firstly, Ms. Somerville s chronic health problems caused by the poor construction of the house prevented her from working to her full potential. Secondly, because the house was defectively built she could not use it as a home office. Finally, the argument most relied upon was that due to the amount of time and energy devoted to dealing with the problems associated with the residence, Ms. Somerville was precluded from performing her work as a consultant.

[65] The proposition that the construction of the home caused health problems and hampered her ability to produce business income does not require a great deal of analysis. The previous examination of this issue specifically eliminates attributing responsibility for health difficulties and any corresponding income

loss incurred by Ms. Somerville to the defendant builder.

[66] The second and third possibilities in terms of attaching liability to the defendant builder for an alleged loss of income, fall under the rubric of damages caused by the defendants breach of contract. The central question thus becomes did Ms. Somerville sustain a loss that could have been reasonably contemplated by the parties at the time the contract was entered? The analysis requires that the following issues be addressed: Are the damages claimed too remote? Has the loss claimed been proven? Has the plaintiff, Ms. Somerville, mitigated her loss?

[67] The question of remoteness of damages involves the application of the old rule first stated by the courts in England in *Hadley v. Baxendale* (1854), 9 Ex. 341,156 E.R.145. The rule states that parties to a contract will only be held liable for losses suffered that could have been reasonably contemplated at the time the contract was entered into. The rule consists of two parts: imputed knowledge and actual knowledge of special circumstances. In *Hadley, supra,* at 354-355 the court described the rule in part as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated.

[68] On the facts of this case, I have little difficulty in finding that the business income loss claimed is too remote a loss when applying the first part of the test in *Hadley v. Baxendale, supra*. I find that a reasonable person would not have contemplated that a party would lose business income of $300,000 in the ordinary course of events, due to a breach of contract in relationship to the proper construction of a house.

[69] The second part of the test requires an examination of whether the defendant builder was in possession of any actual knowledge of special circumstances at the time the contract was entered into. In this case, Ms. Somerville testified that at the time the Agreement of Purchase and Sale was entered into, it was made known to the builder that she would be using the home as an office for her consulting business. I accept this as being the case. The difficulty here, however, is that the evidence did not support a finding that the residence could not be used as an office, or that the deficiencies made the home unusable. The evidence in fact demonstrated that the premises were used from time to time for Ms. Somerville s work.

[70] The proposition most relied upon in this case was that because the house was poorly built Ms. Somerville was required to expend an extraordinary amount of her time and energy towards rectifying the problems, which precluded her from earning business income through her consulting practise. The principle difficulty with awarding damages for loss of income using this argument involved Ms. Somerville s numerous other uses of time that would have also impacted on her ability to work. The evidence led at this trial make it virtually impossible to determine what amount of time Ms. Somerville lost on account of problems with the house and having to deal with the defendant builder, as juxtaposed to her involvement in the obtaining of her Ph.D., her involvement in the Central Park Community Association, her acting as an advocate for another homeowner, her dealings with the media, or the depth of her involvement in this litigation. The time Ms. Somerville devoted to these matters have little or nothing to do with the actual breach of contract.

[71] This problem is a blend of causation and a response to the second question posed, has Ms. Somerville proven her damages? In Ms. Somerville s evidence in cross-examination when asked whether or not she kept a detailed record of the actual time lost on account of dealing with the deficiencies as compared to other matters, she indicated that she did not, but that it would have been a good idea to keep such records.

[72] The onus is on Ms. Somerville to prove damages on a preponderance of probabilities, the claim for business income loss has not been substantiated on the evidence adduced at the trial of this matter. The damages claimed for loss of business income are disconnected to the breach of contract. Ms. Somerville could have worked at her consulting business, and also dealt with the builder or lawyers in relationship to the house. It was her decision to deal with this problem in the manner that she did and to remove herself from her life as a consultant. It is impossible on the evidence presented at this trial to determine what if any income loss can be directly attributable to her dealings with Ashcroft Homes in relationship to the deficiencies in this house.

[73] In this case, Ms. Somerville is claiming loss of business income of $300,000 and had any of this amount been proven to be the responsibility of the defendants there would still be the question of mitigation of damages. The principle of mitigation in cases of breach of contract was stated in *Red Deer College v. Micheals et al.* (1975), 57 D.L.R. (3d) 386 (S.C.C.) per Justice Laskin:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum damages payable to the plaintiff. The reference in the case law to a duty to mitigate should be understood in this sense
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken steps to avoid there unreasonable accumulation.

[74] The plaintiff, Ms. Somerville in this case did not take any steps to avoid the perceived loss of business income. The claim advanced here is for lost income over the course of several years. Some fairly simple steps could have been taken very early on in this case to significantly reduce any perceived loss. These would include finding alternative office headquarters, or devoting less time to matters unrelated to the deficiencies in the home. The claim for a loss of business income on the evidence heard at this trial is for all of the aforementioned reasons dismissed.

Are the Plaintiffs Entitled to Damages on Account of Mental Stress and Loss of Enjoyment of Life in this Case?

[75] The acquisition of a new home, and moving into a new home is in and of itself a stressful event. The number of problems and deficiencies with 69 Whitestone Drive went well beyond average, well beyond what can be considered acceptable. The parties here can in many respects point to each other when it comes to the issue of access to the home to effect repairs. The Court heard a great deal of evidence as to the attempts to schedule trades people to perform repairs. The failure and inability to do so has already been documented and analyzed. In my view, in cases such as these, the responsibility to appease and to take every step to rectify should fall squarely on the shoulders of the builder. I believe it to be a fair comment that the hallmark of a good home builder should be customer service after the purchaser moves into their new home.

[76] The case of *McHardy v. Charlene Witt Realty Ltd.,* [1999] O.J. No. 265 (Gen.Div.) was in many respects factually similar to this matter. *McHardy, supra,* involved a plaintiff who had acquired a new home and who had numerous difficulties with respect to its construction. In that decision after analyzing the evidence and concluding that the home had a great many problems for which the builder was responsible, an award of $4,500 in damages was made for compensation, for inconvenience, disappointment and the loss of enjoyment of their greatest asset .

[77] In the case of *Smerigilio v. Great Gulf Homes Ltd.,* [1999] O.J. No. 85 (Gen. Div.) which involved a dispute between new homeowners and a builder over the installation of granite floors, the court in that case awarded the plaintiffs the sum of $6,000 as compensation for the defects listed and for the inconvenience of having to live with such defects. This sum includes any tax involved and includes compensation for the inconvenience that the plaintiffs will experience when the remedial work is done. The case does not specifically segregate damages for inconvenience but it was a consideration in the amount awarded.

[78] The plaintiffs in this case were in a different league than in either *McHardy* or *Smeriglio, supra*. This matter dragged on for years. The evidence presented in this case gives me little difficulty in concluding that Ms. Somerville and Mr. Greenberg in their dealings with the defendants and trying to have repairs done to their house, suffered inconvenience, disappointment, the loss of enjoyment of their home and stress.

[79] The defendant builder in this case should have been aware at all times of the outstanding work orders with the City of Ottawa and the fact that an occupancy permit had yet to be produced in relationship to this home. There were numerous deficiencies that should have been acknowledged early on in the negotiations such as the undersized duct work, the damp proofing, or the lack of a fan in the bathroom. These should have been rectified in a prompt and efficient manner. As in the *McHardy, supra,* case the acceptance of responsibility was not forthright and unequivocal.

[80] In this case, the plaintiffs are entitled to some compensation under this head of damage. In my view, the plaintiffs are entitled to the higher end of this type of award of damages. In the circumstances of this case, I award $15,000 in general damages for the stress, emotional upset and difficulties they had to endure as a result of the poor construction of this home.

Punitive Damages

[81] The plaintiffs have also claimed punitive damages of $1,000,000. The Supreme Court of Canada in the case of *Whitten v. Pilot Insurance Company* [2002] 1 S.C.R., provided a framework respecting what would be required factually prior to taking the extraordinary step of awarding punitive damages. The decision provides an analysis of the purpose for punitive damages as well as what factors should be considered in deciding the amount of the award.

[82] Although presented in the context of appropriate instructions to a Jury, the principles are clearly applicable in any civil case where a plaintiff seeks this remedy. The court in that decision at page 597 indicated the following:

> An award of punitive damages in a contract case, though rare, is obtainable. It requires an actionable wrong in addition to the breach sued upon a contract
>
> The trial judge s charge to the jury with respect to punitive damage should include words to convey an understanding of the following points: (1) punitive damages are very much the exception rather than the rule, (2) imposed only if there has been **high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.** (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community s collective condemnation (denunciation of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) The jury should be told that while normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a windfall in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[83] The evidence heard at this trial does not justify an award of punitive damages. What occurred in this case was unfortunate, a builder built a home that was defective and deficient, however, they did nothing that can be categorized as high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour .

[84] In some respects, early on in the case, the defendants attempted to placate the plaintiffs when a determination was made that there was some difficulties with the house i.e. providing of an air conditioner at no charge. The breakdown in communication, the degree of problems and the failure to

acknowledge deficiencies with the home justify damages for inconvenience and stress, however this case was a far cry from one which could justify the imposition of punitive damages.

[85] Therefore the claim for punitive damages is dismissed.

The Plaintiffs Claim for the Costs of Legal Fees and Expert Reports

[86] The plaintiffs have put forward a claim in this case for the costs of expert witnesses and reports. In the Statement of Claim it is framed as costs for independent consultants to investigate and qualify defects and deficiencies in design and construction and to recommend appropriate action . The amount claimed at trial included legal fees. The total for engineering and other consultant work was $43,493.37. The total for legal fees was $77,789.05. The plaintiffs also seek interest charges on money borrowed to fund the litigation. These amounts would not include the money expended for the trial of this matter. In my view, however, when one tries to categorize these expenses, they are for the most part costs within the traditional legal meaning of the word.

[87] I do not particularly have difficulty in accepting that these sums were spent. The plaintiffs clearly engaged the services of a number of experts, and had a number of lawyers acting on their behalf in advancing this claim. The real question here is whether these claims should be addressed as special damages or as part of the broader question of responsibility for the costs of this litigation. The question of costs is really a matter which will require further argument and representation by both sides in this dispute following the release of this decision. I can confidently say that the defendants have likely matched the plaintiffs in costs incurred in this case. They have engaged several experts and have filed a number of reports at various stages throughout this case. It is to be noted that the Statement of Claim here was issued on August 16th, 2001, and that the lions share of the plaintiffs expert reports and legal fees leading up to the trial were incurred after that date.

[88] The *Courts of Justice Act* at section 131(1) provides:

> Costs Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Rule 57.01(1) provides for a codification of the factors a court is to consider when determining this issue. This area of the law has undergone and continues to undergo changes on a seemingly continuous basis, as is evidenced by the amendments to the rules governing costs that took effect on July 1, 2005.

[89] In Orkin s *The Law of Costs* at pages 204-207, the author discusses and analyzes the issue of disbursements including the costs of experts and how the courts have been capable of including the costs of expert witnesses and their reports both before and during a trial as part of the overall review and assessment of a parties costs.

> To be assessable, disbursements must be reasonably necessary to advance a party s position, and the amount of a disbursement must be reasonable. Reasonableness of expenditures for witnesses is based on what seemed reasonable at the time, i.e. before and during the trial In a personal injury action, bills for medical and actuarial assessments directed towards the trial or the legal dispute between the parties should be dealt with in costs rather than considered as special damages.

[90] In the case of this action, the only expenditures incurred by the plaintiffs which would seem to clearly fall out of the category of a cost related disbursement were those incurred prior to the commencement of the action in August of 2001. These were the initial reports obtained by the homeowners for the very specific purpose of demonstrating or proving the deficiencies with the house. I have little difficulty in allowing some of these as special damages. However, the expenses incurred once the action was commenced are more fairly adjudicated from the perspective of an examination of the entire conduct of the parties and the ultimate result of all of this litigation from the beginning to the end.

[91] My review of the brief of disbursements filed by the plaintiffs show the following expenses incurred prior to the start of this action: Bottriell s initial inspection reports predating the lawsuit which total $1,170.50, Temviron s inspection fee respecting the homes H.V.A.C. of $267.50, and the cost of the first air balancing test in early August of 2001, of $312.98. The total amount I would allow under this part of the plaintiffs claim is $1,750.98.

The Impact of the Defendants Buying the Home In August 2004

[92] On the 21st day of July, 2004, the defendant builder agreed to buy back the home for $550,000. The transaction closed on the 11th of August, 2004. This amount exceeded the sale price by $105,557.03. This event came three years into the lawsuit and involved no doubt a great deal of give and take between the parties, but its impact on the overall matter cannot be taken lightly. In terms of mitigating the plaintiffs direct loss as a result of the breach of contract this seemed to be the only effective means of accomplishing this goal. The prospects of ever repairing the home seemed doomed fairly early on in this case and short of completely repairing the house to the plaintiffs satisfaction, this was the only effective means of mitigating the direct loss occasioned by the breach of contract.

[93] The plaintiffs chose to leave behind certain chattels and fixtures such as appliances and a chandelier. They advanced the position at trial that the defendants should reimburse them the price of these items. There is no such obligation in this case. The defendants did not suggest or encourage the plaintiffs to leave these items behind. The defendants did not agree to acquire these items in the Agreement of Purchase and Sale to buy back the house. The evidence suggests that the plaintiffs were never precluded from retrieving these items at any time they so desired. To compel the defendants to purchase these items would be wrong.

[94] The plaintiffs have claimed damages against the builder for improvements made to the subject property. The principal item under this heading was approximately $25,000 for landscaping. The house was sold for its market value. Improvements to a home are factored in when a purchase price is arrived at

as between a buyer and a seller. Had the defendants simply bought the house back for the price paid by the plaintiffs, this expenditure could have been viewed as a direct loss, however, since it was reacquired at market value, the improvements are subsumed in the purchase price. I do not award anything to the plaintiffs for this part of their claim.

[95] The plaintiffs did incur expenditures which can be directly related to the breach of contract on the part of the defendant builder, and which are not erased by the buy back in August, 2004. The costs actually incurred by the plaintiffs to perform remedial work for defects in the home are recoverable, because they are a direct consequence of the defendant builder s breach. The evidence showed that $4,924.42 was spent on repairs that can be properly categorized as expenses made by the plaintiffs to remedy deficiencies resulting from the defendants breach. These included $ 4,270 to repair a leaking roof, and miscellaneous smaller amounts for minor but justifiable remedial work. Therefore, I award a further $4,924.42 in this case.

JUDGMENT

[96] The plaintiffs are therefore granted a judgment in this case of $21,675.40. Prejudgment interest on this award shall be in accordance with the *Courts of Justice Act*.

CONCLUSION

[97] This was an unfortunate matter. The parties at various times during this long drawn out affair became entrenched in what can only be described as questionable positions. It seems to me, however, that once the builder finally took the extraordinary step of buying back the house at its market value, this act should have put into place the required mechanisms to forever extinguish the fires of this litigation.

COSTS

[98] Counsel may approach me through the trial coordinator s office with respect to the issue of costs, particularly in relationship to the methodology of making representations on this issue.

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Mr. Justice Robert L. Maranger

Released: August 5, 2005

COURT FILE NO.: 01-CV-018136

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KAREN SOMERVILLE and ALAN GREENBERG

Plaintiffs

- and

ASHCROFT DEVELOPMENT INC., ASHCROFT HOMES CENTRAL PARK INC. and PAUL KELLY

Defendants

REASONS FOR JUDGMENT

Mr. Justice Robert L. Maranger

Released: August 5, 2005

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[4] Weisel CP. *Assessing exposure to air toxics relative to asthma*. Environ Health Perspect. 2002 Aug;110 suppl 4:527-37
[5] Seppanen OA. *Summary of human responses to ventilation*. Indoor Air. 2004;14 suppl 7 102-18
[6] Fang L. *Impact of indoor air temperature and humidity in an office on perceived air quality, SBS symptoms and performance*. Indoor Air. 2004;14 suppl 7 74-81
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13Environmental Protection Agency USA. *Indoor air facts no. 4 (revised): sick building syndrome SBS)*. Indoor Air Publications. April 1991

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