

ARBITRATION TRIBUNAL

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

Under the aegis of

CENTRE CANADIEN D'ARBITRAGE COMMERCIAL (CCAC)

CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)

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

**CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

File n°: Guarantee Plan: 095187-1

File n°: CCAC: S07-080201-NP

AVA SHAIKH

“Beneficiary” / Appellant

v.

CONSTRUCTION JEAN BRUNET INC.

“Contractor” / Defendant

and

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

“Manager”

ARBITRATION AWARD

Arbitrator :	Me Jean Philippe Ewart
For the Beneficiary :	Mrs. Ava Shaikh Mr. Dexter Joseph Mr. Ivan Mose, Building Insp.
For the Contractor :	Mr. André Brunet
For the Manager :	Me Élie Sawaya (Savoie Fournier) Mr. Jacques Fortin, arch., Insp./Conciliator
Date of Hearing :	29 October 2007
Hearing location :	Residence of Beneficiary

Date of Award:

7 November 2007

IDENTIFICATION OF THE PARTIES

“BENEFICIARY”/ APPELLANT:

AVA SHAIKH
4996 De la Morandière
Pierrefonds (Québec)
H9K 1S7

“CONTRACTOR” /DEFENDANT:

LES CONSTRUCTIONS JEAN BRUNET INC.
406 boul. Harwood
Vaudreuil-Dorion (Québec)
J7V 7H4

“MANAGER” OF THE GUARANTEE PLAN:

LA GARANTIE DES BÂTIMENTS
RÉSIDENTIELS NEUFS DE L'APCHQ INC.
5930 Louis - H. Lafontaine Blvd
Anjou (Québec)
H1M 1S7

MANDATE

A request for arbitration was filed by the Beneficiary dated 30 July 2007 and the undersigned was named arbitrator on 4 September 2007.

CHRONOLOGY

2006.05.24	Preliminary Contract (A-1) and Guarantee Contract (A-2)
2006.08.29	Declaration of Receipt of Building (A-4)
2006.08.29	Declaration of Performance of Work (A-5)
2006.09.25	Letter from Beneficiary to Contractor
2006.09.28	Letter from Contractor to Beneficiary (enclosure to A-11)
2006.11.09	Letter from Beneficiary to Contractor and APCHQ
2006.12.15	Request to open a file (claim) from Beneficiary to Manager
2007.01.07	Letter from Beneficiary to APCHQ, cold air to bedrooms
2007.01.22	Letter from Beneficiary to Contractor, cold air to bedrooms
2007.02.09	Manager's 15 day Notice to Contractor
2007.02.14	Response by Contractor to Manager (with enclosures)
2007.04.23	First Inspection by Manager
2007.05.09	Letter from Beneficiary to Contractor, <i>inter alia</i> water in the electrical box
2007.05.29	Letter from Beneficiary and APCHQ, including <i>inter alia</i> the buckling of wooden floors
2007.06.05	Second Inspection by Manager
2007.07.03	Decision by Manager (#095187-1) (A-15)
2007.07.30	Application for arbitration by the Beneficiary regarding the Manager's Decision above mentioned (A-16).
2007.08.08	Notification by CCAC of Application for Arbitration
2007.08.13	Response letter from Contractor to items raised by Beneficiary

2007.10.14 Letter from Beneficiary to Contractor, including *inter alia* a detailed list of Contractor visits and repairs
2007.10.29 Hearing
2007.10.30 Complimentary Decision by the Manager (A-19).

EXHIBITS

By consent at the Hearing, Exhibits have been initially labeled and numbered "A-" in accordance with the numbering of the Book of Exhibits filed by the Manager and any other additional exhibits which the Beneficiary filed and referred to were numbered and labeled "B-". The Beneficiary filed a VHS film cassette (exhibit B-1) showing various elements of damages which the Court has reviewed.

VALUE OF LITIGATION

The value of the elements under litigation, including *inter alia* the integrity and replacement of all ceiling panels in the bedrooms and bathrooms of the second floor, the damages from water in the foyer, replacement of the kitchen counter, joints repairs to the stone wall connections, buckling of the wooden floor in the master bedroom and the water infiltration in the electrical breaker box is between \$7,000 and \$15,000.

FACTS AND PROCEEDINGS

[1] This is a request for arbitration from a decision of the Manager (#095187-1) dated 3 July 2007 (the "Decision") (exhibit A-15) rendered in furtherance of claims by the Beneficiary under the Guarantee Contract entered into on 24 May 2006 (exhibit A-2) providing for coverage in accordance with the terms and conditions under a Guarantee Plan for new residential buildings (the "Guarantee Plan") administered by the Manager. The Beneficiary expressed a preference to have the arbitration proceedings in English.

[2] A first visit by an inspector of the Manager was effected on 23 April 2007 but did not result in a decision being rendered as we have been informed that the inspector was placed on sick leave after the inspection; a second inspection was effected on 5 June 2007 which resulted in the Decision.

[3] There are seven (7) points covered by the Decision:

- 3.1 Cracked joints along the stone wall connection at the side door;
- 3.2 Fissures (cracks) in the ceiling of the master bedroom and back (children's) bathroom;
- 3.3 Kitchen counter bulge;
- 3.4 Dent in the garage door;
- 3.5 Water leak from the master bathroom toilet bowl;
- 3.6 Water infiltration in the electrical breaker box, basement;
- 3.7 Children's bathroom toilet bowl – noise.

[4] The Decision requires the Contractor to effect the necessary works for points 3.1 and 3.2 above, provides that points 3.3 and 3.4 above should have been indicated in the Declaration of Receipt of Building (exhibit A-4), which they were not, and consequently are not covered by the Guarantee Plan, provides that point 3.5 above is due to an incorrect usage of the building by the Beneficiary and consequently is excluded from the Guarantee Plan and that points 3.6 and 3.7 above are in accordance with the rules of the trade and consequently are not covered by the Guarantee Plan.

[5] The Beneficiary under its Application for arbitration (exhibit A-16) appeals points 3.2 to 3.6 above and further indicates her concern that:

"...some of the relevant items that were discussed at the two inspections (April 23, 2007 and June 5, 2007) were not included in the report."

[6] The following additional points are therein raised by the Beneficiary:

- 6.1 Fissures in the ceilings of the children's bedroom and the master bathroom;
- 6.2 Water damage in the foyer (ceiling above the stairs to second floor);
- 6.3 Buckling of the wooden floor in the master bedroom.

[7] The Beneficiary informed the Court that it was withdrawing its appeal of points 3.4 and 3.7 above and that the Contractor had already effected repairs or agreed to effect the necessary repairs required under point 3.1 and 3.5 above, which points therefore required no further review.

[8] As to the additional points raised by the Beneficiary identified under paragraph 6 above, the Court initially indicated to the Beneficiary that it did not have jurisdiction on elements that were not part of the Decision and that there was a procedure under the Guarantee Plan to provide for such occurrence.

[9] During the course of the Hearing, the Manager, with the objective of restricting additional procedures and inherent costs thereof, agreed to include the additional points identified under paragraph 6 above and give the Court jurisdiction to same by rendering a complimentary decision of the Manager on such elements (the "Complimentary Decision"); a written decision (exhibit A-19), in confirmation of the verbal decision during the course of the Hearing, was promptly issued on 30 October 2007.

[10] There are four (4) points covered by the Complementary Decision:

- 10.1 Fissure(s) in the ceiling of the master bathroom;
- 10.2 Fissure(s) in the ceiling of the children's bedroom;
- 10.3 Fissure in the ceiling of the main stairwell, on the left side of the top of the entry door to the master bedroom;
- 10.4 Undulation of hardwood flooring lattes in the master bedroom.

[11] The Complimentary Decision indicates that repairs have been made to points 10.1 and 10.2 above and that no further fissures were apparent, that point 10.3 above is considered to be the normal behaviour of materials and consequently excluded from the Guarantee Plan, and that point 10.4 above is due to an incorrect usage of the building by the Beneficiary and consequently excluded from the Guarantee Plan.

[12] The Beneficiary filed an report prepared by Mose Home Inspection Services (exhibit B-2) and Mr. Ivan Mose, building inspector, member AIBQ was present at the Hearing.

PRELIMINARY MOTIONS

[13] There were no preliminary motions, save the discussion and decision above by the Manager to render the Complementary Decision, and jurisdiction of the Court was therefore confirmed.

ADMISSIONS

[14] The Contractor has admitted that there was missing insulation in the roof *inter alia* under his correspondence to the Manager dated 14 February 2007(exhibit A-11):

"Pour ce qui est de la plainte sur le froid dans sa chambre à coucher, nous venons de corriger le tout. C'était réellement une erreur de l'un de nos sous-traitants, la laine n'était pas soufflé au complet comme il se doit."
(our underline)

"As the claim of cold in her bedroom, we have just corrected it. It was really an error from one of our sub-contractors, the insulation was not applied completely as it should have been" – (our translation and underline)

as well as under his correspondence of 13 august 2007 (exhibit A-18) in connection with the fissures to the ceiling:

"Nous avons toujours accepté de faire ces travaux, car il y eu vraiment une erreur d'isolation au grenier" (our underline)

"We have always accepted to perform the work, as there has really been an insulation error in the attic" - (our translation and underline)

ANALYSIS

Fissures (cracks) in the ceiling of the master bedroom, master bathroom, children's bedroom and back (children's) bathroom (paragraphs 3.2, 6.1, 10.1 and 10.2 above).

[15] The Beneficiary has appealed this element of the Decision under the contention that the Contractor has only repaired the bedroom ceiling by covering same with compound and repainting the whole while it is the integrity of the ceiling itself that has been compromised and that the gyproc panels must be replaced; the Beneficiary further indicates, and the Court has been shown in the ceiling of the master bedroom, that there are further fissures (cracks) which have appeared following these repairs.

[16] In addition, the Beneficiary claims undulation of the ceiling panels.

[17] The Court is satisfied that the proof has been made, and the Contractor has admitted same, that the lack of insulation in part of the attic has caused condensation which resulting water has then leaked onto parts of the gyproc panels composing the ceiling of the upstairs bedrooms and bathrooms.

[18] There has been no preponderance of proof presented to support the Beneficiary's contention that the integrity of the gyproc ceiling panels has been compromised. The Beneficiary's expert report (exhibit B-2) states that:

"Conclusion. The condition of the drywall has been compromised"

[19] The Court agrees that the "condition" of some of the panels have been compromised but there is a distinction between condition, which may be remedied by appropriate correction, and "integrity" which may require replacement.

[20] This is not a case of integrity requiring replacement; proof has been made, *inter alia* under cross-examination of the Beneficiary's expert, that there was no mould present, and that any moisture was absorbed by the gyproc. In addition, the Beneficiary's expert report stipulates that:

"...the drywall will eventually dry and harden"

and the Court is satisfied that this is the case.

[21] Repairs having been made prior to the Court's inspection of the premises, it is not possible to reasonably identify any undulation or sagging of the ceiling

panels, even after a detailed examination with a flashlight and climbing on the furniture to examine closely the ceiling horizon.

[22] Consequently, the Court joins the basis of the Decision to require the Contractor to effect the necessary repairs to the fissures to the ceiling; there is evidence of fissures in the master bedroom and this must be corrected in accordance with the rules of the trade.

Kitchen counter bulge (paragraph 3.3 above).

[23] The Decision dismissed the claim on the basis that this was a readily observable condition which was not declared in writing in the Declaration of Receipt of Building (exhibit A-4). The proof is to the effect that this Declaration was duly completed, as well as the following and related Declaration of Performance of Work (exhibit A-5), and that no mention of a kitchen counter was made therein. The Court confirms the decision of the Manager and rejects the Beneficiary's claim on this point.

Water damage in the foyer; Fissure in the ceiling of the main stairwell (paragraphs 6.2 and 10.3 above)

[24] The Beneficiary confirmed that the foyer indication referred to the ceiling of the main stairwell.

[25] Upon inspection, there is a fissure apparent at an approximate ninety degrees (90°) angle from the master bedroom door. Not only the burden of proof on this element was not reversed, but the experts present, including Beneficiary's expert, confirmed that this was unlikely to result from water leaking but rather was due to the normal behaviour of materials. The Court agrees with these prevailing opinions and rejects the Beneficiary's claim on this point.

Buckling of the wooden floor in the master bedroom (paragraphs 6.3 and 10.4).

[26] The Court notes that this element was raised by the Beneficiary in its correspondence to the Manager dated 29 May 2007, stamped as received 31 May 2007, prior to the Manager's inspection of 5 June 2007 and that no mention of such element is made in the Decision.

[27] The Beneficiary claims that the missing insulation in the attic has caused water infiltration to the master bedroom floor and resulted in buckling of wooden floor lattes near the south corner of the bedroom, near and below a window.

[28] The Court has been shown significant condensation of windows on various sides of the house and on both the second and first floor.

[29] The Beneficiary has filed an extract of a Manager brochure entitled *Le Tour du propriétaire – Manuel du propriétaire*, more particularly page 47 thereof, the first page of a chapter pertaining to window condensation in homes. A careful reading of page 47 and following does not support the representations made by the Beneficiary but rather supports the Manager's contentions discussed at the Hearing and its conclusions under the Complimentary Decision in connection with this point.

[30] There was visible traces of water seepage from the window immediately above the floor area in question as well as related traces on the floor itself. The Beneficiary did not make the proof of the cause of the damage and more so, the Court also noted water dripping from another window in the children's bedroom which gives additional credence to the counterproof of a foreign cause made by the Manager.

[31] The Court agrees with the basis of the Manager's decision as detailed in the Complimentary Decision and rejects the Beneficiary's claim on this point.

Water infiltration in the electrical breaker box, basement (paragraph 3.6)

[32] After a detailed inspection of the outside power entry and a careful evaluation of the proof presented, including the Contractor's declaration that there was water in the electrical breaker box when he responded to a call from the Beneficiary contemporaneously to the incident in February 2007, the Court disagrees with the findings of the Decision that:

"... having not witnessed any infiltration nor found any apparent damages"

at the time of inspection, in June 2007, the Manager concluded that this installation is in accordance with the rules of the trade, noting that the electrician installer, following discussion with Hydro Quebec, concluded that the water resulted from melted snow accumulated in the outdoor access pipe.

[33] Taking into consideration the possible significant consequences and inherent dangers of water infiltration in an electrical main breaker box, the Court, having taken cognizance and acknowledging the undertaking by the Contractor that it is ready to pursue this matter further and to contact anew the necessary experts, being a certified electrician and the responsible personnel of Hydro-Quebec, requires the Contractor to contact another certified electrician(s) than the installer originally consulted as well as, if need be, the responsible personnel of Hydro-Quebec in order to review this matter and ascertain the water-tightness of the outside pipes and wire access and any other appropriate measures that the above referred experts may recommend in the circumstances.

[34] That in addition to having effected any correction that may be deemed advisable following such review, the Contractor obtain written confirmation from such expert(s) of the results of the required actions indicated above and that copy of same be remitted to the Manager, which may lead to an additional decision by the Manager as may be required.

[35] The Court further reserves the rights of the parties to require arbitration of any such further decision of the Manager, and in such event, taking guidance under sections 66 and following of the Code of Civil procedure pertaining to the joinder of causes of action, the Court maintains jurisdiction in connection therewith.

CONCLUSIONS

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[36] GRANTS the arbitration demand of the Beneficiary in connection with points 3.2, 6.1, 10.1 and 10.2 above as it pertains to Fissures in the master bedroom.

[37] DISMISSES the arbitration demand of the Beneficiary in connection with point 3.3 above (kitchen counter bulge), points 6.2 and 10.3 above (water damage in the foyer) and points 6.3 and 10.4 (buckling of the wooden floor in the master bedroom).

[38] ORDERS the Contractor to execute the necessary repairs stated at paragraph 22 of the present arbitration award, in accordance with the rules of the trade, within thirty (30) juridical days of the present award, failing which the Plan Manager is hereby ORDERED to execute or cause to be executed said repairs within the following thirty (30) days, such computation of delays commencing from the date of available certified Post Canada delivery evidenced by the Post Canada receipt to the Contractor.

[39] MAINTAINS jurisdiction for point 3.6 above (Water infiltration in the electrical breaker box), and taking into consideration that the incident occurred during the winter season, ORDERS the Contractor to take the necessary actions to give full effect to paragraphs 33 and 34 of the present arbitration award, and gives both parties the opportunity to conduct tests and submit observations and representations for a period of six (6) months following the present arbitration award.

[40] ORDERS, in accordance with section 123 of the *Regulation*, that the costs of the present arbitration be borne by the Plan Manager.

DATE: 7 November 2007

M^e Jean Philippe Ewart
Arbitrator