
**ARBITRATION IN VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS
(Decree 841-98 of June 17th, 1998)
(Building Act, R.S.Q., c. B-1.1)**

**CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)
A body duly authorized to conduct arbitrations by the Régie du Bâtiment**

BETWEEN : **Dina Khafagi and Hussam El-Din Mohamed**
(hereinafter called « the Beneficiaries »),

AND : **Construction Voyer Inc.**
(hereinafter called « the Contractor »),

AND : **La Garantie des bâtiments résidentiels neufs
de l'APCHQ inc.**
(hereinafter called « the Manager»).

CCAC file no^o : S10-0401101-NP

ARBITRATION AWARD

Arbitrator : M^e Albert Zoltowski

For the Beneficiaries : Mrs. Dina Khafagi and Mr. Hussam
El-Din Mohamed

For the Contractor : Mr. Pascal Voyer

For the Manager : M^e Luc Séguin

Date of the arbitration award : October 26th, 2010

Identification of the parties:

Arbitrator : *Me Albert Zoltowski
1010, de la Gauchetière West
Suite 950
Montreal (Quebec) H3B 2N2*

Beneficiaries : *Mrs. Dina Khafagi and Mr. Hussam El-Din
Mohamed
18945 du Traîneau Street
Pierrefonds (Quebec) H9K 0A1*

Contractor : *Construction Voyer Inc.
4083 Le Corbusier boulevard
Laval (Quebec) H7L 5E2

c/o Mr. Pascal Voyer*

Manager : *La Garantie des bâtiments résidentiels neufs
de l'APCHQ inc..
5930, Louis-H.-Lafontaine boulevard
Anjou (Québec) H1M 1S7

c/o M^e Luc Séguin*

Mandate :

The arbitrator was appointed by the Canadian Commercial Arbitration Centre on January 6, 2010.

Chronology :

February 16, 2008 : Execution of the Preliminary contract;

February 16, 2008 : Execution of the Guarantee contract – Building in divided co-ownership;

May 27, 2008 : Pre-acceptance inspection and acceptance;

June 19, 2008 : Notarized deed of purchase and sale;

October 22, 2009 : Inspection by the Manager;

December 3, 2009 : Manager's decision;

January 6, 2010 : Appointment of the arbitrator;

February 10, 2010 : Notice of preliminary hearing and of the hearing on the merits communicated to the parties;

February 16, 2010 : Preliminary hearing via telephone conference;

March 17, 2010 : On-site visit by the arbitrator and request to postpone the hearing on the merits;

March 23, 2010 : New notice as to the hearing on the merits communicated to the parties;

March 29, 2010 : Hearing on the merits;

October 26, 2010 : Arbitrator's award

AWARD

Introduction

[1] This case concerns one or more construction defects affecting the hardwood flooring in a new two-storey house owned by the Beneficiaries that is located at 18945 du Traîneau, Pierrefonds (hereinafter "the Building").

[2] On October 22, 2009, Mr. Luc Bondaz inspected the Building and issued a report (herein after the "Manager's decision") dated December 3rd, 2009.

[3] In his report, he deals with two separate claims. The first is entitled "1. Bulging section of the hardwood flooring on the ground floor". In his analysis, he states that a section of the flooring which is 3 feet wide and located along the wall in the living room and dining room on the ground floor of the Building, has been properly repaired and the gap between it and the rest of the floor closed on its own in the months following the repair work. He concludes that this particular claim does not meet the requirements of a latent defect and he disallows it.

[4] In the Manager's decision the second claim is described as "2. Perceptible creaking of the hardwood floor". In his analysis, the Manager states that the Beneficiary reports a perceptible creaking sound emanating from various spots in the flooring throughout the Building. According to the Beneficiary, creaking sounds became perceptible soon after his/her acceptance of the Building in the summer of 2008.

[5] Furthermore, the Manager writes in his decision that since the Beneficiary notified the Contractor and the Manager in writing as to the existence of these problems only in May 2009, the one year delay between the date of discovery and that of the written notice exceeded the 6 months which is the maximum delay permitted by law for the guarantee coverage to apply. On this basis, he rejects the Beneficiaries' claim n° 2.

[6] The Beneficiaries filed their contestation of the Manager's decision with the Canadian Commercial Arbitration Centre (herein called "CCAC") on January 4th, 2010 with a one sentence explanation:

"We would like to take this claim to arbitration."

[7] After an exchange of correspondence between the undersigned arbitrator (hereinafter called the "Court"), the Beneficiaries, the Manager and the Contractor, a preliminary hearing via a telephone conference was held on February 16, 2010.

[8] On March 17, 2010, which was the date fixed for the hearing on the merits, the arbitrator visited the Beneficiaries' residence in their presence, one of their two expert witnesses, Mr. Janidlo, (their second expert witness waited at the Laval Court House) and the Manager's attorney, M^e Luc Séguin.

[9] In the course of that visit, M^e Séguin notified the arbitrator and the other persons present that the Manager's representative, Mr. Luc Bondaz, will be unable to attend the hearing due to a temporary health problem. He then requested that the hearing be postponed to a later date.

[10] Despite an objection by the Beneficiaries, the arbitrator granted the postponement. Subsequently, the arbitrator notified the parties that the hearing will be held on March 29, 2010 at 1010, De La Gauchetiere West, suite 950 in Montreal.

[11] On that date, the hearing was held as scheduled. In attendance were both Beneficiaries, their two expert witnesses Messrs. Deschamps and Janidlo, Mr. Pascal Voyer who represented the Contractor as well as Mr. Luc Bondaz and counsel Luc Séguin for the Manager.

Claim n° 1 mentioned in the Manager's decision – "Bulging section of the hardwood flooring on the ground floor"

[12] At the beginning of the hearing, all the parties agreed that claim n° 1 in the Manager's decision was not to be debated at the hearing.

[13] The Beneficiaries stated that the repair of the bulging section of the hardwood floor on the ground floor of their Building had been satisfactorily repaired by the Contractor in October 2008.

[14] Consequently, the Court concludes that the Beneficiaries withdrew this claim from their contestation in arbitration.

Claim n°2 mentioned in the Manager's decision – "Perceptible creaking of the hardwood floor"

[15] In the Court's view, the issues relating to this claim that are submitted for the Court's determination may be described as follows:

"1. Whether the Beneficiaries notified in writing both the Contractor and the Manager about the alleged construction defect within a reasonable delay, which may not exceed 6 months, after they discovered it.

2. If the Court rules that the Beneficiaries respected such delay, the second issue to be determined is whether or not the alleged construction defect is covered by the guarantee."

The Beneficiaries' proof

First witness, Mr. Hussam El-Din Mohamed (co-Beneficiary)

[16] Mr. Hussam El-Din Mohamed (co-Beneficiary) testifies that the bulging of the floor along the wall in the living and dining room began to appear one month after acceptance of the Building in the summer of 2008. The Contractor repaired this problem in October 2008. After that date, there were no other problems with the flooring until it started to creak. The creaking became loud on the ground floor (but not in the section along the wall that was repaired in October 2008) and, on the first floor in his wife's dressing room, in the master bedroom and in their son's room.

[17] The creaking increased over time, especially in the witness wife's dressing room where certain strips also began to move in February 2009.

[18] At the date of this hearing, the creaking was at its worst.

[19] There is a humidity meter in the Building. It was installed and initially set by the Contractor. The witness makes manual adjustments to it in the spring, summer, fall and winter according to the guidelines. The humidity level in the house is maintained between 27% and, in the winter, 40%. He makes these seasonal adjustments in relation to the temperature outside de Building.

Second witness : Mr. Marc Deschamps, architect

[20] The next witness for the Beneficiaries is Mr. Marc Deschamps, architect. The Court accepts him as an expert witness. His report dated February 26, 2010 has been communicated to all the parties prior to the hearing and is filed as Exhibit B-2. The witness visited the Beneficiaries' residence on February 22nd

2010. He notes that the flooring was creaking in all the rooms throughout the house, on both floors. He describes the noise level as medium to loud.

[21] During his visit, the witness noticed wide gaps of up to 4mm in width between the strips of flooring in certain places (pictures 4 and 5 in his report). In his testimony, the witness also refers to gaps near the demarcation between the strip of flooring that had been repaired in October 2008 (on the ground floor), and the rest of the flooring. He also refers to gaps in the master bedroom, and in Mr. and Mrs. Khafagi's dressing room.

[22] In his report, he notes that Mr. Hussam El-Din Mohamed informed him that he did not perceive any noticeable differences in the width of the gaps between winter and summer. The expert writes that gaps that exceed 1/16th of an inch in width (1.6mm) are not acceptable. He refers to a publication of the APCHQ ("Association provinciale des constructeurs d'habitations du Québec") that supports this view.

[23] In his report, he also notes that certain strips that adjoin those with the wide gaps, also move (page 2 of his report).

[24] In his opinion, the cause of both the gaps and the creaking is the improper installation of the flooring on both the ground floor and the first floor.

[25] During his visit, he observed that the inside temperature was 21^o Celsius and the humidity level was 30%.

[26] He noted that Mr. Hussam El-Din Mohamed (co-Beneficiary), told him that when the family is present at the residence, they raise the temperature to 22.5^o Celsius. In his opinion, the humidity level in the house is normal.

[27] He observed that there was no black felt paper which is usually present between the sub-floor and the flooring. In his opinion, however, its absence is not a "fault".

[28] To eliminate the creaking, he is of the opinion that there is no way to perform the repair work without removing the existing flooring and replacing it with a new one.

[29] When cross-examined by the Manager's attorney, he confirmed that, in his opinion, there are no other possible causes of the creaking than poor installation of the flooring.

[30] When asked to specify the exact nature of the inadequate installation which he qualifies as poor workmanship, he states that the strips were not properly nailed or stapled to the subfloor. This explains why some strips were moving. In certain spots, he observed that there was an absence of nails or staples. He also confirmed, in the course of the cross-examination, his statement made in paragraph 4.3 of his report namely that Mr. Hussam El-Din Mohamed

mentioned to him that the creaking began quite soon after acceptance of the Building and that such creaking is heard in the winter and the summer.

[31] He is not capable of explaining why the strips of flooring along the wall on the ground floor, that were repaired in October 2008, are not creaking. He guesses that the strips were properly nailed.

[32] When cross-examined by the Contractor, he states that between the date when the wood is delivered to a residence and its installation, it should remain in the house for some 4 to 5 days to become acclimated to the home's environment. He confirms that wood used in flooring changes volume and thickness depending on the humidity level of a home environment.

Third witness : Mr. Daniel Janidlo

[33] The next witness for the Beneficiaries is Mr. Daniel Janidlo. He has taken a 250 hour course at Vanier College in home inspections. He has worked as a home inspector for 6 months and has performed over 350 home inspections. Neither the Manager nor the Contractor contested the Beneficiaries' request to have him accepted by the Court as an expert witness.

[34] The Court recognizes Mr. Janidlo as an expert witness in this case.

[35] Mr. Janidlo visited the Building some six times, though not exclusively for the purpose of examining the hardwood floors. At no time, did he see any condensation on the glass windows or get shocks from static electricity.

[36] He conducted a general inspection of the building on May 22nd 2009 and prepared a report (filed as Exhibit A-8). In his first report (Exhibit A-8) on page 2, he notes that at the time of his visit, the humidity level was within the acceptable range (40% and the client confirms it goes up and down a few percentage points at most) but the floor still had large gaps. Some of the gaps he saw were at least 1/8th of an inch wide. He writes that he saw too many large gaps in the flooring to call this a normal installation.

[37] For the purpose of the hearing, he prepared a second report dated February 2010 which he files as Exhibit B-3. It deals exclusively with the hardwood flooring.

[38] In his testimony, he relates that besides the large gaps between the strips, there are some additional problems which he discovered after removing in approximately 15 minutes a number of strips using only a very simple tool :

- a) In the master bedroom, he identified several strips that were not nailed at all or had only one nail or a staple (page 1 of B-3). He identified similar problems in a section at the bottom of the stairs on the ground floor (page 2 of B-3), on the landing in the walk-in closet (page 3 of B-3) and at the stair landing (page 4 of B-3). He states that according to the guidelines of several hardwood floor

manufacturers named in his report (page 9 of B-3) every strip must be fixed with at least two staples or two nails. The nails should not be closer to the ends of the strips than 2 to 3 inches.

- b) He has seen that at least one board has not been properly reversed so that the groove of the first board rests against the groove of the adjoining board instead of its tongue (page 3 of B-3).
- c) Near the ventilation grill (page 1 of B-3), he saw certain strips of flooring that were improperly cut.

[39] The witness is of the opinion that the creaking of the floors and the wide gaps between the strips in various places throughout the Building were caused either by the complete lack of nails or staples in certain strips or their incorrect nailing pattern. He adds that the exact nailing pattern varies slightly with each manufacturer of hardwood floors depending on the width of the strips.

[40] During his cross-examination by the Contractor, the witness excludes an incorrect humidity setting of the humidity controls as a probable cause of the creaking throughout the house.

Fourth witness: Mrs. Dina Khafagi (co-Beneficiary)

[41] The next witness is Mrs. Dina Khafagi (co-Beneficiary). She states that the creaking and the gaps in the flooring were discovered by her and her husband only in February 2009. She repeats that these problems were unrelated to the strip of flooring that was bulging on the ground floor and that had been successfully repaired by the Contractor in October 2009.

[42] She states that the humidity level in the house is always between 29% and 40% depending on the period of the year.

[43] She declares that the creaking is so loud that it disturbs her son's sleeping pattern in the afternoon and at night.

Manager's proof

Fifth witness: Mr. Luc Bondaz

[44] The Manager's sole witness is Mr. Luc Bondaz, the author of the Manager's decision.

[45] The Court accepts him as an expert witness.

[46] Regarding item 1 in his decision entitled "Bulging section of the hardwood floor on the ground floor" he confirms that during his inspection, one of the Beneficiaries told him that he/she is satisfied with the repair performed by the Contractor relating to that specific problem. He reiterates that one of the

Beneficiaries told him that he or she discovered creaking noises from the flooring very soon after acceptance of the Building in the summer of 2008.

[47] During his inspection on October 22nd 2009, he measured the humidity levels of the flooring and the surrounding environment, both of which were normal. At that time, he noticed that certain strips were moving, including their nails. He saw this in the master bedroom and the walk-in closet. He considers that a movement of the strips is only a symptom rather than the cause of the alleged construction defect.

[48] He files as Exhibit A-13, pages 50-51 and 54 and 55 of a publication of the Garantie maisons neuves APCHQ entitled "Owner's manual" ("Manuel du propriétaire") which is distributed to every new home owner. In it, it is suggested not to lower the humidity level in a residence beyond 35%.

[49] According to him, it is difficult to identify the cause of the problems affecting the flooring in the Beneficiaries' residence, whether it was an incorrect humidity level inside the Building or some other cause. He says that inadequate installation is a possible cause of these problems as well.

[50] He states that according to professional literature, if the humidity level in a house is too low, it could cause 4mm wide gaps between the strips. In his career, however, he only saw 3mm wide gaps but never as wide as 4mm. He is also of the opinion that if the cause of the problems was an improper installation of the flooring, the Beneficiaries would have detected these problems (creaking and gaps) soon after their acceptance of the Building. By improper installation, he refers to an improper humidity level in the wood before it was installed as flooring.

[51] During his cross-examination, the witness states that a humidity level between 30% and 35% would be in the acceptable range to keep the strips from contracting and gaps appearing between them. He also offers the opinion that if the floor would have undergone what he calls a "humidity shock", it would never regain its original shape. He confirms that during his visit on October 22nd 2009, the appearance and condition of the flooring was similar to those described in architect Deschamps's report (Exhibit B-2).

[52] He did not observe what he calls the "weaknesses" of the flooring mentioned in Mr. Janidlo's report (Exhibit B-3). If he had, he would have conducted a more thorough investigation. During his cross-examination, he confirms that one cannot determine the humidity level or its duration for a hardwood floor to undergo a "humidity shock". He is also of the opinion that it would take 5 to 6 months to discover that a hardwood floor has indeed undergone such a "humidity shock".

[53] He does not know why the section of the flooring along the wall on the ground floor that had been repaired in October 2008, reacted differently to the "humidity shock" than the rest of the flooring whose reaction was a contraction of the strips and the emergence of wide gaps between them.

Contractor's proof

Witness: Mr. René Voyer

[54] Mr. Voyer, testifies on behalf of the Contractor.

[55] He states that the floor boards were delivered to the Building on May 9, 2008. Prior to their delivery, the wood was stored in a humidity-controlled warehouse. Under cross-examination, he stated that the sub-contractor installed the flooring on the day following the day of its delivery. The wood could not remain uninstalled any longer as the prevailing humidity level in the house was very high (around 80%) following its painting.

[56] On May 27, 2008, he made the pre-acceptance inspection together with the Beneficiaries. At that time, he delivered to them the Owner's Manual published by the Garantie maisons neuves APCHQ (Exhibit A-13). The thermostat and humidity controls were installed two days after May 27, 2008. The witness indicates that he explained to the Beneficiaries how to adjust the humidity controls and advised them to maintain a humidity level in the range of 40-45% inside the house.

[57] He states that on October 27, 2008, the Contractor repaired the section of the flooring on the ground floor that was bulging. That section swelled and rose some 2 or 3 inches above the rest of the floor. It was very exceptional, something he never saw before.

[58] He recalls that in February 2009, he received a call from one of the Beneficiaries who was complaining about the creaking flooring. He visited their residence in early March and saw very wide gaps measuring some 4mm in width or more.

[59] He noticed then that the humidity level in the house was 24%. He explained again to the Beneficiaries how the heat exchanger and the humidity controller (humidistat?) operate. He made a third visit to the Beneficiaries' residence on June 2nd 2009. He noticed that there were no gaps at all in the flooring. However, the creaking was still present, particularly in areas around the rooms, but not in their middle.

[60] In his opinion, the cause of the problems was that in the summer 2008, the humidity level in the house was excessive by high. This caused some strips to be pulled loose. In the winter months, the strips contracted and gaps appeared between them.

[61] The Beneficiaries' residence is a "Novoclimat" building. Its thermal envelope is air-tight. It is easier for the Beneficiaries to control the humidity level inside their "Novoclimat" home than in a traditionally constructed building.

[62] In the manuals that the Contractor distributed to the Beneficiaries, the subject of humidity levels is not discussed.

[63] During his cross-examination, he stated that he does not know why a strip of flooring on the ground floor swelled and bulged and the rest of the flooring did not.

[64] Nor does he know the reason why at the time of his third visit in June 2009, the floors returned to their normal state even though the Manager's expert, Mr. Luc Bondaz, was of the opinion that after a "humidity shock" the floors never regain their original appearance.

Analysis and decision

Issue n° 1

[65] The exact date of the discovery was either sometime in the summer of 2008 as allegedly mentioned to Mr. Bondaz by one of the Beneficiaries and recorded by him in the Manager's decision and which is also reiterated in Mr. Deschamp's decision (Exhibit B-2) - or in February 2009 as stated by the Beneficiaries during their testimony.

[66] It must be noted that what is mentioned by Mr. Bondaz and Mr. Deschamps in their reports constitutes hearsay evidence, namely they are reporting as true a statement made to them by another person.

[67] From the Court's perspective, we are dealing here with a question concerning the credibility of the Beneficiaries or potentially, a communication problem between English-speaking Beneficiaries and mainly French-speaking Messrs. Bondaz and Deschamps who recorded their comments.

[68] The Court notes that both Beneficiaries gave a similar testimony at the hearing, after first having made a solemn declaration to tell the truth (instead of an oath), that they first discovered creaking noises emanating from their flooring only in February 2009 rather in the summer 2008.

[69] During his cross-examination by the attorney for the Manager, Mr. El-Din Mohamed stated that the only problem with the flooring in the summer of 2008 was the bulging section along the wall on the ground floor that has been successfully repaired in October 2008. He testified that after October 2008, there were no problems with his flooring until February 2009.

[70] His wife, Mrs. Dina Khafagi essentially confirmed her husband's testimony. The Contractor as well as the attorney for the Manager had the opportunity to cross-examine her on this particular point (i.e. the date of discovery of the creaking) but they have not used it.

[71] What is also important to emphasize is the fact that Mr. Voyer, in his testimony, never mentioned that the Beneficiaries complained to him about their flooring creaking when he met with them in October 2008. He also stated that it is only in February 2009, that they first complained to him about the creaking floors. His testimony is consistent with that of the Beneficiaries to the effect that they first complained about the creaking floors to him in February 2009, after their discovery of this problem.

[72] On the basis of the evidence presented, the Court concludes that the probability of the Beneficiaries having first discovered the creaking of their flooring in February 2009 is higher than the probability of their discovery of it in the summer of 2008.

[73] We know that the date of the written notice dealing with this problem that the Beneficiaries sent to the Contractor and the Manager was on May 29, 2009 (Exhibit B-4). The intervening period of approximately 4 months between the date of their discovery and their written notification to the Contractor and the Manager was both reasonable and within the 6-month maximum delay specified in paragraphs 3 and 4 of article 10 of the *Regulation*.

Analysis of issue n° 2

[74] The next issue for the Court's consideration and decision is to determine whether the creaking and the gaps in the flooring constitute a construction defect covered by the guarantee.

[75] The position of the Beneficiaries is that these problems constitute poor workmanship on the part of the Contractor and are attributable to an improper installation of the hardwood floors. The incorrect installation, according to them, consists in not acclimating the wood long enough between its delivery to the residence and its installation and the absence or insufficiency of nails or staples in a number of strips that form part of the flooring.

[76] The argument of the Manager is essentially that if indeed the Beneficiaries discovered these problems only February 2009 then the real cause of such problems was their own fault, namely their failure to maintain at all times an adequate humidity level inside their home.

[77] The Contractor's position is similar to that of the Manager. Its representative, Mr. Voyer, recognizes that in some sections of the flooring, there is an absence or insufficiency of nails or staples, but argues that the creaking and the gaps would have occurred despite such absence or insufficiency because of the incorrect humidity level being kept in the house at all times by the Beneficiaries.

[78] First, let us consider the argument of the Manager and the Contractor based on the Beneficiaries' fault namely, their failure to maintain an adequate humidity level at all times in their home.

[79] This argument is based on paragraph 3 of article 12 of the *Regulation* which states the following:

“12. *The guarantee excludes:*

...

(3) *repairs made necessary by a fault of the beneficiary, such as inadequate maintenance or misuse of the building, as well as by alterations, deletions or additions made by the beneficiary;*

...”

[80] According to the Contractor's evidence, Mr. Voyer visited the building three times namely on October 27, 2008 (to repair the bulging section of the floor), in early March 2009 and on June 19, 2009. In his testimony, Mr. Voyer mentioned that the humidity level in the Building was at 24% during only one of these 3 visits.

[81] Testifying for the Manager, Mr. Bondaz stated that during his inspection of the Building on October 22, 2009 the humidity level of the flooring and of the surrounding area were normal. (See paragraph 47 above).

[82] When we review the evidence presented on behalf of the Beneficiaries, both Beneficiaries stated that they always keep the humidity level in the house between 27% and 40%. Moreover, Mr. Hassam El-Din Mohamed testified that the humidity controls were first set by Mr. Voyer around the time of the acceptance of the Building and that subsequently, he adjusted them manually on a seasonal basis and in accordance with the guidelines. In the periods of the year when the Beneficiaries kept a humidity level between 27^o and 35^o (35^o being the recommended level according to the Owner's Manual published by Garantie maisons neuves APCHQ (Exhibit A-13), - can the tribunal consider them to have been at fault? To find fault on their part, the Manager or the Contractor would have had to present clearer evidence to the Court on this particular point. The Court notes that Mr. Bondaz testified that a humidity level between 30% and 35% would be adequate (See paragraph 51 above). Assuming that at some periods during the year, the Beneficiaries would have kept the humidity level at 29% (according to Mrs. Khafagi) or 27% (according to Mr. Hussam El-Din Mohamed), or even 24% as reported by Mr. Voyer during one of his visits – what effect would it have on the flooring? There was a lack of convincing evidence on this point.

[83] Since the burden of proof was on the Manager and the Contractor to convince the Court that not only the humidity levels kept by the Beneficiaries were inadequate but also that the required repairs to their flooring would be a direct result flowing from such humidity levels and since they did not discharge this burden, the Court rejects their argument based on the Beneficiaries' fault.

[84] Then the next question is whether or not the above described problems constitute poor workmanship.

[85] The Beneficiaries' expert, Mr. Deschamps testified that the level of the creaking noise was medium to loud during his inspection visit. Mrs. Khafagi, in her testimony, stated that its loudness is sufficient to disturb their son's sleep pattern. The undersigned, during his visit at the Building prior to the hearing, also noticed that walking on the flooring causes unusual creaking noises. Such a situation is certainly abnormal.

[86] The gaps between the strips of flooring of up to 4mm are also too wide and abnormal according to expert Mr. Deschamps's testimony and as stated in his report. In his testimony, Mr. Bondaz himself admitted that in his experience he never saw such wide gaps in hardwood floors.

[87] As far as the probable cause or causes of these problems are concerned, the evidence based on Mr. Voyer's testimony shows that the installation of the flooring took place one day following its delivery to the Building, This is contrary to the acclimatation of 4 to 5 days prescribed by the majority of the floor manufacturers who are listed in expert Janidlo's report (Exhibit B-3).

[88] To refute the Beneficiaries' argument, the Contractor or the Manager would have had to show to the Court that a one day acclimatation period was sufficient for the type of flooring that was installed in the Building or in view of the then prevailing high (80%) humidity level in it resulting from the then recently completed painting operations.

[89] Uncontradicted expert evidence presented by the Beneficiaries also shows that some strips of their flooring show either a total absence or insufficiency of nails or staples.

[90] For these reasons, the Court has no difficulty to conclude that the installation of the hardwood floors in the Beneficiaries' home suffered from poor workmanship and is covered by the guarantee.

Reimbursement of experts' fees

[91] At the end of the hearing, the Beneficiaries asked the Court to order the reimbursement of their experts' fees to them. For this purpose, they promised to send their experts' invoices to the Court within 3 days following the hearing. The Manager asked and was granted an additional 7 days to make written representations concerning these invoices, which he has done.

[92] Expert Marc Deschamps addressed 2 invoices to the Beneficiaries. The first is dated February 26, 2010 and mainly concerns a two hour inspection of the Building and the preparation of a written report. The total amount is \$677.25 including GST and QST. His second invoice is dated March 30th 2010 and concerns mainly his attendance at the Laval Court House on March 17th 2010 (1.8 hour x \$117.90/h) and his attendance at the hearing on March 29th 2010 (5.3 hours) plus disbursements. The total amount of the second invoice is \$995.11 including GST and QST. The Beneficiaries' other expert, Mr. Daniel Janidlo, issued an invoice dated March 30th 2010. From this invoice, it appears that Mr. Janidlo charged \$50. per hour for research and the preparation of his report and \$75. per hour for an onsite inspection on February 21, 2010. He also charged one half day of his time for the scheduled arbitration hearing on March 17, 2010 (that had to be postponed) and one day of his time for his appearance at the hearing on March 29, 2010.

[93] The Manager argues that since the Beneficiaries did not prove that they paid all of these 3 invoices, they are not entitled to be reimbursed for them. He argues that there cannot be a reimbursement without a prior payment pursuant to article 124 of the *Regulation*.

[94] He also submits that the number of hours claimed by expert Janidlo that he allegedly spent during arbitration hearings as well as his hourly fee is unreasonable. He points out that Mr. Janidlo's hourly fee is higher of that of architect Deschamps. He asks the Court to reduce Mr. Janidlo's fees by \$475. from \$1,475. to \$1,000. plus GST and QST.

[95] The Court notes that its jurisdiction to order a reimbursement to the Beneficiaries of their experts' fees rests on article 124 of the *Regulation* which states:

"124. The arbitrator shall, where applicable, decide on the amount of reasonable fees for a relevant expert's opinion to be reimbursed by the manager to the plaintiff where the latter wins the case in whole or in part.

..."

[96] Since the Beneficiaries, who were the plaintiffs, won their case, the question is whether the Court may order a reimbursement of their experts' fees without proof having been made of their payment by the Beneficiaries.

[97] In the Court's view, the answer to this question is "yes". According to the Court's interpretation of article 124 of the *Regulation*, it is sufficient for the Beneficiaries to prove their liability to pay the experts' fees without having to prove their prior payment. When an expert's invoice is addressed to a plaintiff, the latter is liable to pay it. No other proof of the plaintiff's liability is required.

[98] The Court notes that its interpretation of article 124 of the *Regulation* is also based on fairness which, in circumstances such as those of the present case, provides him with an additional jurisdictional basis.

[99] The Court also notes that the Manager has not filed any authority (jurisprudence, doctrine or relevant legislation) to support his argument concerning the question of reimbursement without evidence of a prior payment.

[100] As far as the two invoices presented by architect Marc Deschamps are concerned, the Court considers that the amounts that appear thereon are reasonable and the expert's written and verbal opinion presented at the hearing were relevant. Consequently, the Beneficiaries have the right to be reimbursed the full amount of both these invoices.

[101] Looking now at expert Janidlo's invoice, the Court is of the view that a slight reduction of his fees is required. For his presence during the Court's visit at the Beneficiaries' residence on March 17, 2010, he is entitled to two hours of his time at an hourly fee of \$75. For his presence at the hearing on March 29, 2010, it is reasonable to grant him 1.5 hours for his preparation prior to the hearing and 5.3 hours for his presence at the hearing, at an hourly fee of \$75. for a total of \$510. for those services.

[102] In light of these reductions, the Beneficiaries have the right to be reimbursed \$1,010. plus GST and QST on account of expert Janidlo's invoice dated March 30, 2010 that has been issued by M.D. Inspect Plus inc.

Additional conclusions

[103] Article 120 of the *Regulation* provides:

"An arbitration award, once it is made, is binding on the interested parties and on the manager.

An arbitration award is final and not subject to appeal."

[104] Furthermore, article 125 of the *Regulation* states:

"Expenses incurred by the interested parties and by the manager shall be borne by each one of them"

[105] The last question is what is the value of the Beneficiaries' claim? According to a detailed estimate presented by architect Deschamps, the total amount is \$28,700. including GST and QST. It refers to the replacement of the existing flooring both on the ground and first floors of the Building by a new one of a similar quality.

[106] In the Contractor's view, replacing the flooring would cost \$8,000. while repairing it would cost \$2,000. to \$3,000. According to the Manager, the cost of replacing the flooring would be \$10,000. and \$4,000. to have it repaired. These quick estimates by the Contractor and the Manager do not seem to include either GST or QST and were offered without any additional explanation.

[107] In light of the widely differing estimates, it is the Court's view that a reasonable estimate for the replacement of the flooring both on the ground floor and on the first floor of the Beneficiary's Building would be between \$10,000. and \$15,000. including GST and QST if the work is entrusted to the Contractor or the Manager.

FOR ALL THESE REASONS, THE ARBITRATION TRIBUNAL:

ALLOWS the Beneficiaries' contestation in arbitration as to item n° 2 in the Manager's decision entitled "Perceptible creaking of the hardwood floor";

DECLARES that the Beneficiaries have given written notice to both the Contractor and the Manager of the problems (creaking and gaps) affecting their hardwood floors within a reasonable period not exceeding 6 months, as prescribed by the *Regulaiton*;

DECLARES that the creakings and excessive gaps in the Beneficiaries' hardwood floors are symptomatic of their improper installation which constitutes poor workmanship within the meaning of the *Regulation*;

ORDERS the Contractor, and failing it, the Manager to repair such defect on or prior to December 20, 2010 in accordance with the construction standards and the rules of the art applicable thereto, in such a way that once repaired the flooring's appearance, stability, functionality and life expectancy will be equivalent to those of a new hardwood flooring of the same or similar quality as the existing flooring in the Building;

ORDERS the Manager to reimburse to the Beneficiaries, on or prior to November 20, 2010 the following amounts:

- a) \$677.25 on account of invoice n° 317-FA1 dated February 26, 2010 issued by Marc Deschamps, architect,
- b) \$995.11 on account of invoice n° 317-FA2 dated March 30, 2010 issued by Marc Deschamps, architect, and

- c) \$1,010. (plus GST and QST) on account of invoice n° 131947 dated March 30th 2010 issued by M.D. Inspect Plus inc. in connection with expert Janidlo's services.

DECLARES that the arbitration fees shall be charged to the Manager.

Montreal, October 26th, 2010

M^e ALBERT ZOLTOWSKI
Arbitrator / CCAC