Indexed as:

Petruzzi v. Coveny

Between
Caesar Petruzzi and Elizabeth Jane Petruzzi, Plaintiffs, and Colin Paul Coveny and Cheryl Ann Coveny and the Township of Beckwith and Harold Betts, Defendants

[1991] O.J. No. 1678

48 C.L.R. 225

7 M.P.L.R. (2d) 183

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Action No. 280/87

Ontario Court of Justice - General Division
Ottawa, Ontario

Doyle J.

September 27, 1991

(35 pp.)

J. Patrick Watson, for the Plaintiffs.
Lee Ward, for the Defendants, Colin Paul Coveny and Cheryl Ann Coveny.
Susan E. Hodgson, for the Defendants, Township of Beckwith and Harold Betts.

DOYLE J.:--

ISSUES

In this action, the plaintiffs, purchasers of a residence from the defendants, Colin Paul Coveny (Coveny) and Cheryl Ann Coveny (Cheryl Ann), claim damages for defects in its construction. The residence is a three-bedroom bungalow built on a lot owned jointly by the Covenys and which is described as part of the south-west half of Lot 10, Concession 10, in the Township of

Beckwith, in the County of Lanark and designated Part 2 on plan 27R1680. In addition, a claim is made for damages for emotional stress and trauma caused by the condition of the premises and the resulting problems. The plaintiffs further claim damages from the remaining defendants for failure to properly inspect the premises during its construction, thereby failing to enforce the Ontario Building Code, township by-laws and good construction practice.

FACTS

The Covenys sold the property to the plaintiffs on September 26, 1986. They had obtained a building permit from the Township of Beckwith, pursuant to an application for same dated July 9, 1984 (Exhibit 61). The application was accompanied by a set of plans but these could not be located. The application described a single family dwelling and garage with a crawl space instead of a basement and one bathroom in the bungalow.

Coveny, a brickmason, was building his first house and he purchased the plans for $200 from an architect who had placed an advertisement in a local newspaper. Coveny had poured the footings himself, his first experience in that kind of work, and he said he must have observed that operation at some time prior to the construction of this house. He also installed the drainage system although he had not done it before, and it was here that problems were serious. He had not read the Ontario Building Code before the commencement of work, and said he put up the building as if it contained only a crawl space instead of a full-size basement, as the permit issued to him was for that type of dwelling. He stated that he had connected a drainage pipe to the sump pit even though he had never done it before and had never seen it done. Despite raising the height of the basement ceiling to reach some 7' 2 1/2", he never made a change or alteration to the plans he had filed, relying on what he said was a statement made by the defendant Betts that he would look after the change on the plans.

Betts was hired in 1982, as Chief Building Officer and By-law Enforcement Officer for the Township of Beckwith, although he had no previous experience in inspections. He was 58 years of age at the time of the construction, and he had been a carpenter until 1970, at which time he became a general contractor.

There was no township engineer. Betts had no knowledge of the existence of a township building permit by-law until litigation began. It came into effect in 1976. Betts had said at the examinations for discovery, he never made a note on his inspections, but at trial said he would have made notes on the back of a photocopy of the application for a building permit but was unable to find the copy for the subject property nor the plans submitted with the building permit. He could not specifically recall any of the minimum six inspections that should be made on the construction of any residence but felt he had fulfilled his obligations in this respect. His practice was to accept the word of the builder if he found a particular area of work had been covered up by the time he arrived for inspection. In the several years he worked as a building inspector, he had never issued a stop order nor asked that work be uncovered so he could do a proper inspection.

The Covenys had commenced the building of their residence in the fall of 1984, and had completed the basement and the ground floor as a cover by December of that year. The basement had been changed to a full height of 7' 2 1/2" by then and a bathroom had been installed in it. Both Covenys insisted that Betts was aware that they had moved in before the full first floor of the bungalow was built and that there was a bathroom in the basement. They alleged that Betts had used the facilities.

Construction then continued in the spring and the Covenys moved into the upper part in May 1985. They denied that water came into the basement at any time prior to the sale of the property to the plaintiffs. The electrical work, some of the plumbing and other special areas had been turned over to sub-trades. There was an interim approval of the rough electrical work but no final inspection and there were a number of dangerous conditions existing in that system when the Covenys sold.

An interim occupancy permit was issued by the Township but the time of its issue was disputed. Coveny said they received that approval in October 1984, when they moved into the basement. Betts said that it had to be in May 1985, as he could not and never would issue an interim occupancy permit if only the basement was constructed. No permit and no record of its issue were produced at trial.

No application was ever made for the final occupancy permit, and it is apparent it would never have been successful.

In October 1986, after the purchase, the plaintiffs said that approximately two inches of water had come into the basement through the joint formed by the footings and the walls. When Caesar Petruzzi (Petruzzi) saw this, he attempted to make holes in the basement floor to allow the water to escape but more water came in through the holes. Since then every spring and fall water has come into the basement. It would remain for a few days to a week.

Counsel for the Covenys argues that there was no evidence of water in the basement as the experts who viewed the premises for different parties saw only a dry basement and one in particular saw no water marks that would indicate consistent entry. This is the first issue to be decided. Gerald Coleman, the real estate agent who had negotiated the sale, had described a visit he had made to the premises in October 1986; to pick up his firm's sign and he and another agent had assisted in pumping the water out through a basement window. A neighbour, Joseph Doucett, had also testified that he saw water in the basement as well as a number of other deficiencies. He had noticed it coming through at the point of the footings on the south wall and most recently in the spring of 1990, just before he testified. I find that the plaintiffs' allegations on this point are to be accepted.

There were a number of other deficiencies complained of, some in the garage, at the front steps, at the cedar deck at the back, others with respect to kitchen cupboards, the kitchen flooring, the lack of a gas-proof wall separating the garage from the rest of the house, the fireplace hearth, roof trusses, and the inadequacy of support beams for the property.

THE LAW

At this point, it is necessary to determine whether any liability attaches to the Covenys as owner-builders, to Betts and the Township as enforcers of the Ontario Building Code, the by-laws of the Township and good construction practice, to the plaintiffs with respect to contributory negligence and finally whether the principle of caveat emptor applies.

The plaintiffs have based their claims on a finding of negligence against all defendants and they say that the damages they have sustained by virtue of defects, of which they were unaware prior to their occupation of the home, are directly attributable to the poor workmanship on the part of the Covenys which in turn constitutes negligence on their part and they allege negligence on the part of the remaining defendants whom they say failed to ensure that the dwelling was constructed

in compliance with building standards, thereby resulting in defects and causing the damages incurred by the plaintiffs.

In the case of a completed house, if a purchaser wishes to protect himself from a defect in quality when he buys a newly built home, he must do so by covenants in the conveyance (Redican v. Nesbitt 1924, 1 D.L.R. 536, 1924, S.C.R. 135). In Thomas v. Whitehouse 1979, 95 D.L.R. (3d) 762, 24 N.B.R. (2d) 485 (N.B.C.A.), it was said that caveat emptor will give way to a fraudulent representation. Based on negligence, however, a purchaser may recover if a new house is constructed in a negligent manner (Smith v. Melancon 1976, 4 W.W.R. 9).

In Anns v. London Borough of Merton 1977, 2 All E.R. 492, the Council of the municipality under its by-laws, was under a duty to inspect the foundations of buildings, particularly those parts which would be covered up as construction proceeded. Any weakness or defect in the foundations would be hidden and anyone who subsequently acquired the building would have no means of intermediate inspection. If the municipality was required to inspect, it must use reasonable care and that care must be related to the duty to ensure compliance with building by-laws and codes. Failure to do this would amount to negligence. In Anns, the inspections were inadequate and the Municipality, in addition, had approved defective plans. The duty of care extended to occupiers of the dwelling. Lord Wilberforce said at p. 504:

> To whom the duty is owed. There is, in my opinion, no difficulty about this. A reasonable man in the position of the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them, not of course to a negligent building owner, the source of his own loss.

Reference to Anns was made in Fraser-Reid v. Droumtsekas 1980, 1 S.C.R. 720 (S.C.C.), where the builder was found negligent in the construction of a dwelling and the court said at p. 726:

> The House of Lords has held that an action will lie, apart from any contractual warranty, against a builder for breach of statutory duty imposed by a building by-law, by any person for whose benefit or protection the by-law was passed. Anns v. London Borough of Merton (1977) 2 All E.R. 492. The English Court of Appeal has held that a duty of care is owed by a builder to prospective buyers, and the issue of whether or not there has been breach of the duty will depend on all relevant considerations going to the question: "Did the builder act as a competent and careful builder would have acted in what he did or did not do?" Barry v. Metropolitan Property Realizations Ltd. [1978] 2 All E.R. 445 (C.A.). See also button v. Bognor Regis United Building Co. Ltd. [1972] 1 All E.R. 462 (C.A.).

In City of Vernon and Phillips v. Manolakos et al. (indexed as Rothfield v. Manolakos) 1990, 1 W.W.R. 408; 63 D.L.R. (4th) 449 (S.C.C.), the court held that a municipal authority acting under statute owes a common law duty of care to neighbours and to subsequent owners in occupation of a subject property, who have not had an opportunity to inspect it, to ensure that the structure is safe and sound and that the applicable building regulations are complied with. The City of Vernon had

issued a building permit despite the manifest inadequacy of the plan which accompanied the application, relying on on-site inspections to ensure that the requisite standards were met. The court said that once the municipality had made a policy decision to inspect building plans, it owed a duty of care to all who might be injured by the negligent exercise of that power. It was required to show reasonable care in its powers of inspection and would incur liability only for these defects which it could reasonably be expected to detect and order remedied.

In Kamloops v. Nielsen 1984, 2 S.C.R. 2, 1984, 5 W.W.R. 1, 10 D.L.R. (4th) 641, the Supreme Court of Canada held the defendant municipality owed a duty of care to a subsequent owner-occupier of premises when it undertook inspections to enforce conformity with building by-laws and failed to see defects during construction which it should have been able to observe. It was held jointly liable with the owner-builder.

In Just v. British Columbia, 64 D.L.R. (4th) 689, the plaintiff was injured when a rock fell on his car on a highway maintained by the defendant. By s. 8 of the Highway Act, R.S.B.C. 1979, c. 167: "The Minister may . . . . maintain a highway". A crew established to deal with problems on cliff faces developed its own programme of inspection. The Supreme Court of Canada, in ordering a new trial after the plaintiff's claim was dismissed at trial and an appeal disallowed by the British Columbia Court of Appeal, held that the manner and frequency of inspections were not policy decisions but operational in nature and as such were subject to review by the court to determine whether the defendant has exercised due care. The court said at p. 691:

> In comparatively recent years the law of torts has evolved by imposing on public authorities a common law duty of care based on the neighbourhood or proximity principle, frequently called the Anns principle [infra]. This has resulted in substantially increasing their liability in negligence for activity which they are authorized to carry on by statute but in respect of which the statute imposes no duty of care. This change in the law was not brought about by legislation but through the evolution of the common law which has traditionally taken account of the changing views and needs of society.

and at p. 706:

> The decisions in Anns v. Merton London Borough Council and Kamloops v. Nielsen indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a bona fide exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.

Caveat emptor must also be considered. A purchaser will not recover if he does not exercise reasonable diligence and fails to observe defects which he ought to see in the dwelling he purchases.

The following cases have been considered: Dutton v. Bognor Regis Building Co. [1972] 1 All E.R. 462; Gurdial Dha et al. v. Steven Ozdoba et al. dated April 2, 1990 S.C.B.C. (unreported); Batty et al. v. Metropolitan Property Realizations Ltd. et al., [1978] 2 All E.R. 445 Hansen v. Twin City Construction Company Ltd. and Stefanik [1982] 4 W.W.R. 261; Ordog v. District of Mission

et al., 110 D.L.R. (3d) 718; 638733 Ontario Inc. et al. v. Ward 9 R.P.R. (2d) 278; McCallum v. Dean and Dean, [1990] O.W.N. 873; Brunswick Construction Ltee v. Bernard E. Nowlan et al. [1975] 2 S.C.R. 523.

In Hansen and Ordog, recovery was allowed against the builders despite the absence of warranties as the plaintiffs had sued in negligence.

I conclude that the defendants owed a duty of care to see that subsequent occupiers of the property did not suffer damages through their negligence.

DAMAGES

An initial question to be answered is whether the area under the ground floor is a crawl space or a basement. The provisions of the Ontario Building Code contain different floor slab and drainage requirements for each type. In my view, there is no question that it is a basement. Coveny insisted it was only a crawl space but he also had relied on Betts to make the necessary changes on the plans filed with the Township when he "decided to go with a full basement after footings were poured". Coveny told Betts he would be increasing the height by adding rows of cement blocks to the foundation walls. He kept referring to it as a basement, and I find it incredible that he still insisted it was a crawl space. Even his expert witness, George T. McCaffrey, a professional engineer, described it as a basement, as clearance in the basement is more then 1.8 meters (5' 11").

The most important item of damages is that of the water coming into the basement. Petruzzi had dug two holes outside the foundation after water was found in the basement. In the first, he located weeping tile at the same elevation as the top of the footing, unheard of in construction. The second hole was dug in line with the sump pit, and he could not find a Y pipe or a T pipe attached to the 4" weeping tile which would be required to bring the water back into the house into the sump pit in order to pump it out. A requirement of the Ontario Building Code states that drainage tile must be installed completely underneath the footings (s. 9.14.3.3 of the Regulations), and it must have a depth of not less than 6" of crushed stone over it (S. 9.14.4.2).

Petruzzi could not locate crushed stone under the floor slab, and Coveny said he had placed mixed sand and gravel as a base for the basement floor and if there was crushed stone, it would have been part of that mixture. His brother said crushed stone was present. I conclude it was not. Bedrock was close to the surface of the earth and Coveny said he had run the drainage tile into the house under the footing and under the bedrock at a point where a cavity existed, and he insisted the water ran into the sump pit from under the sludge tank which formed the fourth wall of the pit, the other walls being poured concrete.

McCaffrey, the professional engineer retained by the Covenys, who had visited the site with John H. McCalla, a professional engineer retained by the plaintiffs, with a view to the preparation of a joint report on the steps to be taken to rectify the problem of water in the basement, had written a report on April 30, 1990 (Exhibit 34), in which he said:

> It would appear that the water infiltration results from the natural rise in the groundwater table above the level of slab-on-grade floor, there being no functioning mechanism in place to locally depress it. It was previously reported (Oliver Mangione McCalla, April 30, 1987) that the drainage tile is installed above the level of the floor at certain locations. The tile may or

may not be adequately sloped, but regardless, it is not connected to an interior pumped sump pit.

The installation of a properly installed perimeter drainage tile system should rectify the water infiltration problem. The tile should be set at all locations below the level of floor slab, with adequate positive slope to an interior sump pit.

McCalla's report dated April 30, 1987 (Exhibit 29) made it clear that there were three defects in the drainage system as follows:

1. The drainage pipe should be below the level of the basement floor as stipulated in paragraph 9.14.3.3 of the Ontario Building Code.
2. The top and sides of the drainage pipe should be covered with not less than 6" of crushed stone as stipulated in paragraph 9.14.3.5 of the Ontario Building Code.
3. The drainage pipe is not connected to the sump pit as stipulated in paragraph 9.14.5.2 of the Ontario Building Code.

In a later report (Exhibit 30) dated April 29, 1990, McCalla said the following:

3. By far the most important single factor is the lack of an effective perimeter drainage system. Because the floor is some 5 1/2" below the top of the footing under the south foundation wall, it may be difficult, if not impossible, to install the new perimeter drainage tile at a sufficient depth below the floor to effectively control high seasonal ground water levels.
6. Mr. McCaffrey and I agreed that an effective perimeter drainage system must be installed which would discharge into a new sump pit to be installed at a low point along the north foundation wall. A pump would discharge the collected water from the sump to the low ground to the west of Mr. Petruzzi's property.
7. We agreed that the critical factor was to ensure that the new perimeter drainage piping was placed along the south wall at a level several inches below the level of the basement floor in the periodic seasonal high ground water levels. If, when the ground was dug out along the south wall to install the new perimeter drainage system, it were to be found that the level of the bedrock was too close (say, 4" or less) to the level of the basement floor, it would be necessary to consider raising the level of the basement floor. The present headroom in the basement is 7' 2 1/2" so that raising the floor level by, say, the 8" necessary to cover the exposed footing along the south wall, would reduce the headroom in the basement to 6' 6".
8. In summary, the two principal factor causing the periodic water entry are the lack of an adequate perimeter drainage and disposal system together with the fact that the elevation of the basement floor is some 6" to 8" too low considering the lay of the land and other rela-

tive factors. It may well be possible to control and thereby prevent the periodic water entry by the installation of an effective perimeter drainage and disposal system alone but one should be prepared to consider raising the level of the basement floor if that is found to be impracticable.

McCalla's evidence confirmed his findings in the two written reports and he particularly found that the top of the drainage tile was 10 1/2" above the level of the floor in the basement on the south side of the house. The ground water was entering the basement area via the south foundation wall at the joint between the footing and the basement floor.

Both engineers confirmed there was no connection to the sump pit. McCaffrey noted in his April 30, 1990, report (Exhibit 34): "There was no evidence of any inlet into the sump from the exterior drainage tiles", and McCalla said by direct observation, he was satisfied that the drainage pipe was not connected to the sump pit.

McCaffrey's solution to the water infiltration problem was the installation of a proper perimeter drainage tile system, to be set at all locations below the level of the floor slab with adequate positive slope to an interior sump pit. He estimated the cost at between $5,000 and $6,000 including the cost of some tunnelling under the front steps to allow the drainage system to pass through. This sum also included the enlargement of the sump pit if necessary.

McCalla also felt the drainage system was essential and it would have to be sloped from the south side to the lower north side of the house. It would then enter the house on the north side to be collected in a new sump pit to be then pumped outside. McCalla felt there would be problems with the bedrock. If it was close to the surface, a trench would have to be dug through it to allow a proper slope throughout, and this was an unknown quantity. If it became too expensive to cut through the bedrock to allow the tiles to run completely below the basement floor slab, consideration would then have to be given to raising the basement floor some 6" to 8" to save on the rock excavation. The new slab would in itself cost $7,000 to $12,000, particularly if the present slab had to be demolished. McCalla had estimated, as well, a cost of $6,000 for the drainage system, $1,500 to $2,000 to raise the cedar deck at the back or hand excavate under it after removing some of the boards of the deck in order to allow the tile system to be installed under the deck, and another similar sum to raise the front steps, first, to allow tunnelling through and secondly, to correct the problem of the settlement of those steps since the plaintiffs moved in. McCaffrey would have left the steps in their present position. Evidence had been given that settlement of some two to three inches had taken place and further foundation work was required to bring it back up to its proper position and prevent further settling. It should be raised to prevent the last step from being too high. McCalla would allow a further figure of $1,500 to $2,000 for the trench in the bedrock. The total for the drainage system and the repair of the front steps would run from $10,500 to $12,000 in his estimation.

There were two written submissions made which were supported by the viva voce evidence of their authors. The first, from Donald Laporte of CR Associates, showed an estimated cost of $12,400 for the correction of the drainage system and it included $2,500 for the replacement of the cedar deck which Laporte said would be damaged during its removal to allow excavation for the drainage tile system. Laporte had also estimated $10,601 as the cost of a new slab in the basement. The evidence of both McCaffrey and McCalla supported the view that this would be unnecessary if the drainage tile system was installed below the level of the floor slab in a proper slope. It is all the more important to dig through the bedrock to achieve a proper system, as it would not only save the

expense of a new slab but would allow the additional 6" to 8" of headroom in the basement if the floor level did not need to be raised.

A second submission, by L.B.L. Construction; for $3,590 was too low and contained too many exclusions of responsibility to be taken seriously. It was severely criticized by McCalla during his evidence.

Generally, the evidence called for annual increases of about 5% in the cost of construction. Laporte's estimate was made four years ago, and I would assess the cost of repairing the drainage system and the front steps at $14,000. I find that the raising of the basement slab is unnecessary, or speculative at best.

There was a suggestion that the plaintiffs, who saw exposed footings in the basement should have been suspicious but Petruzzi said he was told by Coveny it was to sit on to enjoy the fireplace in the basement. That statement would have allayed any suspicions.

The area was very swampy and the Covenys suggested that excessive water was directed towards the plaintiffs' house by the fact that the neighbour to the east had raised the height of his land to a level several feet higher and water was not being directed to the front ditch. That construction took place after the plaintiffs' house was built. Theodore Smith, a second expert used by the plaintiffs and one who has considerable experience as a general contractor and as an expert frequently called into court and whom Betts recognized as a very knowledgeable person in his field, testified that any excess water would not have caused the basement to flood as it is directed to the dividing line between the two properties and then to the ditch.

The plaintiffs' were not restricted in their examination of the premises on two occasions prior to signing an agreement of purchase and sale and it is argued that they had an opportunity to bring an expert to the premises to look for defects. In my view, this is not the normal practice and purchasers have the right to expect that there exists compliance with township bylaws, building codes and construction practice.

With respect to this item of damages, I find the Covenys negligent in the installation of a weeping tile system higher than the basement floor slab at least in the south side and I find Betts negligent in his inspection of the system. If he did inspect after backfilling took place, he failed to order the area uncovered and if his inspection took place before the tile system disappeared from sight, he failed to see that its height would have allowed water to get into the basement. The responsibility of each will be determined later.

Counsel for the defendants strongly urged a discount as no estimates had been obtained from local contractors. Word, however, that the Township of Beckwith was a party to this action had already spread. Evidence was given that requests had been made to obtain prices from local contractors and none were provided.

Electrical repairs had been carried out at a cost of $1,253.93, pursuant to directives received from Ontario Hydro, and this will be added to the plaintiffs' recovery, to be paid solely by the Covenys. Betts had nothing to do with the electrical inspections. If this has already been paid by the covenys, it can be deducted from the final summary.

The plaintiffs also claim $3,500 for the installation of vents for the shower, basin, laundry tub and toilet as required by the Ontario Building code. Coveny said that the interior plumbing inspection which passed the rough plumbing would have included vents for these fixtures but it is clear

that there are no vents. Petruzzi has been a plumber since 1963 and he should have raised questions in this regard. Part of the piping, however, was hidden behind drywall and the lack of venting in this area was not evident to Petruzzi prior to purchase. No witness was called to substantiate an estimate of $3,500 from Glebe Mechanical Inc. and Petruzzi felt the remedies would cost $5,000 although he was not familiar with the cost of residential plumbing. I must allow only a minimum amount and I set the cost at $2,000 of which Petruzzi will be responsible for one-half to cover the portion which was not hidden. Caveat emptor will apply to this extent. The remainder will be assessed against all defendants.

The garage has a number of deficiencies. The evidence leads me to the conclusion that the concrete floor slopes inward despite Covenys' allegation that it was level when he left the premises and water accumulates at the back of the garage and gets into the basement at the stairs which are located at that point. Three solutions were suggested. The first was to place a thin layer of concrete over the entire floor slab, and having it slope to the front to allow water to run out but this has to be discarded as that layer would be too thin and brittle and it is doubtful that there would be an effective bonding. The second solution would be to take up the entire slab and replace it with a properly sloped new one. A third alternative would be to cut out a section extending 12" or 18" into the garage along its entire width and replace it with a new section which would reverse the slope. This latter solution appears to be reasonable. The only estimated cost thereof was suggested by Coveny at $800 and by Smith at $1,000. Although the garage floor was in plain view, the purchasers said they were not aware of its inward slope and it is a defect which McCalla felt would have been apparent even to a lay person. Caveat emptor applies and this item is disallowed.

The plaintiffs claim $132.20 being the cost of installing angle irons to support the tracks for the garage overhead doors. The tracks had been supported by twine. This was a condition which was clearly visible even though the open garage doors might have temporarily hidden it. This item will be disallowed.

The plaintiffs claim that the wall between the garage and dwelling is not continuous and does not provide the gas and fire separation they say was required by the Ontario Building Code. The garage is large enough for a storage area and the Code requires only a gas-proof separation and not protection against fire although it would be most reasonable to have that added protection.

Smith had estimated a cost of $1,500 to install fire-code gyproc in the complete wall in question but acknowledged that the code was silent in this regard. He estimated a reduced cost of $500 for making the wall gas-proof. This was an important defect and in my view, was not discoverable by the plaintiffs. They will recover against all defendants. The defect should have been seen by Betts even though the garage wasn't built until September, 1985, as Smith was able to see through the dividing wall when he looked from the attic inside the dwelling portion of the building. Betts knew there was to be a garage and hence a gas-proof wall on the east of the dwelling portion of the building was required. That wall was up when the Covenys moved in May 1986 to live in the upper part. For the same reasons two self-closing doors are required and the cost of their installation of $100 will be added to the amount recoverable.

Smith had also found what he said was a serious def lection in the roof trusses installed to support the roof and he said it would increase with time. The garage was 30 feet wide. He warned of the possibility of collapse of the roof under a heavy load of snow and said the deflection "can be minimized and left structurally sound by installing a secondary steel beam extending from the post between the overhead doors to the opposite location on the wall of the main dwelling". (Exhibit 43,

p. 6) There was no evidence of an engineer's approval on the roof trusses although they appear to be within the code requirements with respect to their lengths. However, the deflection has already appeared and some danger is associated with it. The installation itself may be at fault rather than the make-up of the trusses. The Covenys will be solely responsible. There was no evidence that Betts had anything to do with the inspection of the garage premises and in any event, there was no indication of problems with the trusses during the course of construction at that tinge. Smith's estimate of $1,200 is accepted as reasonable.

A similar problem dealing with support of the main floor in the dwelling has arisen. A deflection exists under the dining room and living room floors and at the main entrance. There is no danger of the collapse of the floor even though the deflection is present. A bulge has appeared in the kitchen. It is apparent from Smith's evidence that the requirements are barely met with 2" x 4" joists and a centre beam of laminated wood supported on teleposts. The minimum standard is stretched to the limit. Smith agreed that Betts could not have issued a stop order as conformity to the code is present, but he does say that there is a considerable amount of instability, excessive movement and vibration in those areas. The dishes in the dining room rattle, the television antenna in the living room waves, and the floor sags when someone walks by. The floor has what was called a rubber effect. Smith says that the floor is made of plasterboard or chipboard but there were imperfections and it was not possible to patch. An underlay is required. Damage is certainly present and it may have been caused during the several months the floor was exposed to the winter elements. McCaffrey, for the defendants, blamed the waves in the floor on the use of aspenite despite the Code allowing it and on moisture during construction. Compliance with the Code does not always absolve a builder's responsibility. The floor needs stability and I conclude that it is defective and that it is the responsibility of the defendants, the Covenys as builders and the remaining defendants for failing to see that the floor was on a firm basis particularly after exposure. Smith has suggested additional steel beams on teleposts and estimates the cost at $2,000. The figure is reasonable.

The same kind of flooring supported vinyl overlay in the kitchen, the breakfast room and the dining area and the joints began to raise two or three months after the plaintiffs moved in. The photographic evidence amply supports the problems in the vinyl and Smith said debris could be found under it. He laid the blame on the installers and said that a minimum of 10 years of use should have been anticipated before any problem arose. An underlay was now required. This is another defect for which only the covenys would be responsible. The installation was done negligently. Evidence was given that the floor looked in good condition at the time of sale and Betts said he would not have been required to inspect vinyl as it is not a concern under the Code and not part of his function. The cost is allowed at $1,000.

The evidence disclosed that kitchen cupboards, counter tops including a splashback were not securely fastened to the floor or walls and this is a defect created by the negligence of the Covenys in failing to do it properly. Smith estimates the cost at $200 and again the sum is reasonable. Betts was responsible to see that it was done correctly before the final permit could be issued and he will share in the responsibility.

Marble was installed at the front of the back to back fireplaces in the living room and the dining room but they were not wide enough at 12" to provide the necessary fire protection. The code requires 16" from the outer surface of the brickwork. Again the covenys are responsible for failing to adhere to the code requirements. Betts and the Township are also responsible for Betts' deficient inspection. He should have found a breach of the Code.

A claim was made for the estimated cost of repairs to the deck at the rear for a sum of $500. The agreement of purchase and sale (Exhibit 2) required the Covenys as vendors to complete the deck railing and to paint it. The deck was made of cedar but the railing was built in spruce, a less valuable type of lumber. A 9-year old boy was sent to paint it and the painting was incomplete. Petruzzi said there were no representations made that cedar would be used for the railing and there is no evidence of a complaint raised at the time of closing. This item will be disallowed.

A final claim centres around "the inconvenience, the mental distress and the trauma" caused by the defects. Mrs. Petruzzi said that the condition of the basement was a nightmare and it could only be used for storage and for laundry. A damp and musty smell was present continually but the use of a dehumidifier would have eliminated that. Mrs. Petruzzi described the work she had to do each time water came into the basement. She had trouble keeping up with the flow of water. The plaintiffs had expected to use the basement as a recreation room but didn't. Other defects such as the condition of the floor, the electric wiring, exposed switches, kitchen cupboards coming off the walls, etc., contributed to the plaintiffs' distress. The plaintiffs have claimed $5,000 and I assess damages for the emotional upheaval they must have gone through at $4,000. All defendants will share in this responsibility.

GENERAL COMMENTS

When credibility was in issue, it was resolved in favour of the plaintiffs and that of the expert witnesses. Coveny said too many things which were contradicted by other evidence. He and his brother differed on the use of crushed stone under the basement floor slab. He maintained the garage slab was level when it was not. Coveny said the trusses were stamped by an engineer and then later said he didn't know. He said the existence of plumbing vents would have been established by the interim plumbing inspection when clearly there were none. There was too much insistence on the weeping tile system being laid lower than the footings when clearly it was higher on the south side as well as on parts of the east and west sides of the building.

With respect to Betts, it is hard to imagine the existence of a system of inspections, literally hundreds, which kept so few records of what the inspections revealed. Probably the greatest omission on his part was his failure to recognize coveny for what he was, an inexperienced builder. What would have been required was a great deal more surveillance on this project. The tile problem occurred at the beginning of the work and it failed to alert Betts to what was ahead. I find both sets of defendants equally at fault in these areas where both were found to be involved.

SUMMARY

The following repairs and damages apply to all defendants:

Tile system	$13,000.
Plumbing vents	1,000.
Gas-proof wall	500.
Self-closing doors	100.
Additional support	2,000.
Mental distress	4.000.

TOTAL	$20,600.

Smith has said that 20% should be added for supervision of the work by a general contractor or someone with similar ability. This will add $3,320 with the mental distress figure of $4,000 excluded for a total of $23,920. The Covenys and the Township will be jointly responsible to the plaintiffs for this amount but as between themselves each will be liable for one-half. I have deleted $1,000 on the repair of the tile system, for the raising of the front steps, a defect which Betts said he was not required to inspect. It is added to the following summary.

The following are amounts for which only the Covenys will be liable:

Front steps	$1,000.00
Electrical	1,253.93
Roof trusses	1,200.00
Vinyl floor	1,000.00
Hearth	300.00
Supervision (all items except electrical)	700.00
TOTAL	$5,453.93

The Goods and Services Tax must finally be considered but the repairs could have been carried out before that tax came into being on January 1, 1991. It will not be allowed as part of the claim.

Issues of interest and costs remain to be determined and the trial co-ordinator will be in touch with you to arrange a date. At that time counsel may bring up any matter which may have been omitted.

DOYLE J.