

CANADA / JUDGMENT

Epic Restoration Services Inc. v. Fuller et. al.

2023 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 232 Epic Restoration Services Inc. v. Fuller et. al.,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Epic Restoration Services Inc. v. Fuller et. al.,

2023 BCSC 232

Date: 20230216

Docket: S186318

Registry: Vancouver

Between:

Epic Restoration Services Inc.

Plaintiff

And

The Estate of Desmond Maurice Fuller, Deceased, By His Executor and Personal Representative
Rudyard Kipling Fuller

Defendant

And

Epic Restoration Services Inc.

Defendant by way of Counterclaim

And

The Dominion of Canada General Insurance Company and,

In French, Compagnie D'Assurance Generale Dominion Du Canada

also known as Travelers Canada

Third Party

Before: The Honourable Justice Loo

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

November 21-25 and 28-30, 2022

December 1-2 and 15-16, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 16, 2023

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INTRODUCTION

- [1] On January 17, 2017, there was a flood at a residential property at 1112 Spruce Avenue in Coquitlam, British Columbia (the "Property"). The cause of the flood was a ruptured pipe.
- [2] The third-party Dominion of Canada General Insurance Company, also known as Travelers Canada ("Travelers"), responded to an insurance claim made by the insured, Desmond Maurice Fuller ("Desmond Fuller"), pursuant to a policy declaration dated May 22, 2016. The terms of the applicable policy (the "Policy") were contained in Travelers' "Canadian Classic Homeowners Form" with a Sewer Back-up Rider.
- [3] On January 18, 2017, Epic Restorations Services Inc. ("Epic") was retained to perform restoration and repair work on the Property. On January 19, 2017, an Access & Authorization agreement (the "A&A Agreement") was signed by a representative of Epic, and by Desmond Fuller authorizing Epic to perform work on the Property.
- [4] Between January and June 2017, Epic performed work at the Property, which gave rise to disputes which will be described below.
- [5] On February 16, 2017, there was a second flood that required Epic to do additional emergency work.
- [6] Payments for emergency repair work in respect of both floods, and for other work, were made directly by Travelers to Epic.
- [7] The amount in issue in this proceeding arises primarily from the non-emergency repair work performed by Epic. On March 3, 2017, an itemized invoice for those repair costs (less a deductible already paid) in the amount of \$39,693.80 (the "Repair Invoice") was issued by Epic to Travelers. It does not appear that Desmond Fuller or his son Rudyard Kipling Fuller ("Rudy Fuller"), (the "Fullers") received the Repair Invoice until May 30, 2017.
- [8] In April 2017, a cheque was sent to Desmond Fuller by Travelers, in the amount of the balance then outstanding in respect of the Repair Invoice. It was a "co-payable" cheque, meaning that it was made out to both Epic and Desmond Fuller.
- [9] On April 13, 2017, Desmond Fuller deposited the co-payable cheque into his bank account.
- [10] In June 2017, Epic took the position that it had finished the work at the Property and sought payment. Desmond Fuller refused to pay.
- [11] On June 1, 2018, this action was commenced.

- [12] On January 30, 2019, Desmond Fuller passed away. This action was later continued in the name of his estate, by his executor and personal representative, Rudy Fuller. As stated above, Rudy Fuller is Desmond Fuller's son.
- [13] Subsequently in 2019, the disputed funds were retrieved from Desmond Fuller's bank account and paid into court.
- [14] Epic seeks judgment against the estate of Desmond Fuller (the "Estate") in the amount of \$38,654.12 (this amount being the full amount of the Repair Invoice less some minor adjustments), interest at the contractual rate of 24% per annum, costs, and an order that the funds paid into court be paid out to Epic in partial satisfaction of its judgment.
- [15] The Estate has advanced counterclaims against Epic for, among other things, poor workmanship, work not performed, and unauthorized disposal of items.
- [16] The Estate has advanced various third party claims against Travelers, including allegations that Travelers has breached a duty to defend owed to it under the Policy and a claim for lost rental income.

FRAMEWORK OF ANALYSIS

- [17] In my view, this claim together with the counterclaim and the third-party claim ought to be addressed by asking the following questions:
- Who is entitled to the funds paid into court from the co-payable cheque?
 - Which, if any, of the Estate's counterclaims against Epic ought to succeed, and for what quantum?
 - Which, if any, of the Estate's third party claims against Travelers ought to succeed, and for what quantum?

WITNESSES AND CREDIBILITY ISSUES

- [18] In total, seven witnesses were called by Epic:
- Joseph Rorke, the owner of Epic;
 - Jamie Love, the Travelers claims adjuster;
 - Dale Brown, Epic's operations manager in 2017;
 - Brian Pflueger, who installed the floor tiles in the basement of the Property;
 - Byron Williams, who built the sub-floor;
 - Rachid Amimer, who installed the drywall; and
 - Robert McLean, who installed tiles in the bathroom and around the fireplace.
- [19] The Estate called two lay witnesses:

- a) Cynthia Lucas, the owner of a design and renovation company; and
- b) Rudy Fuller.

[20] Travelers called one witness: Jordan Pritchard, Travelers' director for property claims management.

[21] With one exception, it is my view that the witnesses generally testified in a credible manner. I am satisfied that most of the witnesses answered the questions asked of them in a straightforward way and did the best that they could.

[22] That said, some of them had more difficulty recalling the facts in issue than others, and were therefore caught in mistakes which could be demonstrated by reference to documents. There were some witnesses whose testimony I found less reliable than others. For example, Ms. Lucas' testimony was flawed because she did not have personal knowledge of the events in question. Similarly, Mr. Pritchard was not present or involved in the events giving rise to the lawsuit and, for that reason, his evidence was not particularly germane to the issues to be determined.

[23] The witness whose credibility requires specific comment is Rudy Fuller. There were many instances during cross-examination in which Rudy Fuller demonstrated himself to be a difficult witness. On more than one occasion, he refused to answer the simplest and most obvious of questions when he viewed the answer to be unfavourable to the Estate's case: for example, he refused to acknowledge that there were two names on the co-payable cheque, or the purpose of a notice of application which was clear on its face.

[24] Further, when confronted in cross-examination with statements he made in his direct examination, he denied making those statements in order to resist propositions put to him in cross-examination.

[25] For example, in direct examination, he testified that when Mr. Rorke attended at the Property to demand return of the co-payable cheque, Desmond Fuller had refused to hand over the cheque and expressed concerns with the Repair Invoice. On cross-examination, it was put to him that the Fullers no longer had the co-payable cheque by this time as it had already been deposited. It was also put to him that that he had received the Repair Invoice by this time. In response, Rudy Fuller denied that he had said in direct examination that Desmond Fuller refused to hand over the cheque; rather, he testified on cross-examination that he had said in direct examination that Desmond Fuller had refused to repay the money. Further, he denied on cross-examination that he had said in direct examination that Desmond Fuller had complained about the Repair Invoice; rather he said that he had testified in direct examination that he and Desmond Fuller were dissatisfied with Epic's work.

[26] Contrary to his denials on cross-examination, Rudy Fuller's testimony on direct examination was as follows:

Mr. Rorke paid a visit to the house to ask for the cheque and I was present at the time. Mr. Rorke demanded that cheque from our late Mr. Fuller. Being present, Mr. Fuller did not want to hand over that cheque because he did not fully understand it, and he expressed issues with this restoration invoice 6733R.

The first issue he had, he told Rorke, I glanced through the invoice and you did not do any work in the laundry room.

Mr. Rorke said, "that's okay don't worry about it".

Our late Mr. Fuller said well I'm going to hang onto this cheque.

[27] Given these difficulties with Rudy Fuller's evidence, I will be cautious about relying on it without independent corroboration.

[28] Some of Rudy Fuller's evidence is subject to further scrutiny because it is comprised of hearsay statements from his late father. In the recent decision of *Simard v. Simard Estate*, 2021 BCSC 1836, Justice Fleming held:

[40] The onus is on the party tendering the hearsay evidence to establish threshold reliability on a balance of probabilities. The threshold reliability of the out-of-court statement, and if admitted its ultimate reliability, are assessed by considering all relevant factors, including the presence of supporting or contradicting evidence: *Khelawon* at paras. 2, 4. Evidence will not corroborate the threshold reliability of a statement unless it is independent evidence that supports the truth of an assertion. Applying a functional approach, the admissibility inquiry focuses on the particular dangers presented by the hearsay evidence at issue and the circumstances relied on to overcome those dangers. Ultimate reliability is concerned with whether, and to what degree, the statement should be believed and relied on to decide issues in the case: *Bradshaw* at para. 39.

[29] Notwithstanding the foregoing analysis, I intend to examine each disputed factual issue on an individual basis, and I have been able to reach conclusions on most or all of the issues without having to rely primarily on my assessment of the credibility of any of the witnesses. It is important to recall the words of Mr. Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.) at 357 who stated:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

EXPERT EVIDENCE

- [30] The Estate tendered two expert reports at this trial, both authored by Evan Stregger. Although Mr. Stregger has a lengthy and impressive resume as a quantity surveyor, I ruled during the course of the trial that some of the evidence in his reports fell outside of his qualifications, and that some of his evidence--particularly in his second report--was inadmissible because it was argumentative, and it purported to assign blame and to assess responsibility.
- [31] I ruled that the reports were admissible on a limited basis:
- a) to explain tests conducted by him and his observations;
 - b) to compare those observations to the BC Building Code and other published standards; and
 - c) where the work was in his view non-compliant, to estimate the cost of bringing the work up to standard.
- [32] In the course of cross-examination, it was established that many of Mr. Stregger's opinions about deficiencies and industry standards were based on a comparison between Epic's work and the standards set out in the BC Housing Residential Construction Performance Guide for New Homes (the "Guide"). The Guide is intended for new home builders seeking to obtain home warranty protection. The Guide states that its requirements go beyond the requirements of the BC Building Code. To the extent that Mr. Stregger relies on comparisons between the Guide and the work performed by Epic, those comparisons do not meet the Estate's burden of proving that Epic's work was deficient, in the circumstances of a flood restoration.

THE CO-PAYABLE CHEQUE

- [33] There was substantial evidence advanced and submissions made regarding the co-payable cheque, but the legal status of that cheque is straightforward.
- [34] The instrument on its face is a co-payable cheque. When a cheque is made payable to two people, they both must endorse it, in order for it to be deposited. The fact that the cheque stub refers only to Desmond Fuller was explained by Mr. Love as a formatting or printing issue and is irrelevant to the cheque's validity or legal status.
- [35] In his testimony, Mr. Love explained Travelers' rationale for delivering a co-payable cheque. He said that it gives the insured the final sign off. Once the repairs are done, the cheque can then be endorsed to the contractor and payment will be complete. Because the homeowner is holding the cheque, they have final say as to when the contractor is paid. Mr. Love testified that Travelers still uses this practice.

- [36] There is conflicting evidence about whether there was or ought to have been a letter enclosed with the cheque explaining Epic's reasons for issuing a co-payable cheque. It appears on balance that no such letter was provided.
- [37] There is also conflicting evidence about whether Mr. Love explained the payment options to Desmond Fuller. Mr. Love testified that he told Desmond Fuller, in a telephone call on or about April 4, 2017, that Desmond Fuller had three options:
- a) he could receive the money and do the repairs on his own;
 - b) he could agree to have Epic do the work; or
 - c) he could ask another restoration contractor to provide an estimate or scope of work for review by Travelers.

Rudy Fuller testified that his father denied having such a call with Mr. Love.

- [38] Rudy Fuller testified that he and his father were led into depositing the cheque at the bank by the wording on the cheque stub, by a call that they made to the Travelers call centre, and by their discussions with bank staff. This alleged call to Travelers was not logged by the Travelers call centre system. It appears that no such call was made.
- [39] Given the return of the funds to Travelers and its payment of the funds into court, it is my view that none of this evidence matters to the disposition of the case. In my view, it is clear that the funds were intended to pay the Repair Invoice and, indeed, were payable to Epic.
- [40] This issue is governed by the law as set out in *Belfor (Canada) Inc. v. Drescher*, 2021 BCSC 2403, at para. 16, citing *London Eco-Roof Manufacturing Inc. v. Syson*, 2020 ONSC 1338 at para. 16:

[]

- c. A contractor is not, in the absence of some express provision in the contract, entitled to payment until substantial completion of the work. However, on completion, the owner must pay the agreed price. In the case of defects in the work, the owner may have the right to set up a counterclaim for damages to remedy defective work, but he or she cannot escape liability for payment of the price agreed upon.

[]

- [41] In this case, it is clear that the work was substantially completed, subject to counterclaims which have been advanced in this proceeding for defects in the work.
- [42] The funds are Epic's funds, subject to the counterclaims advanced by the Estate. Whether the counterclaims require some or all of the funds to be paid to the Estate will be determined by the assessment of the Estate's counterclaims below.

THE ACCESS AND AUTHORIZATION AGREEMENT

- [43] As stated above, the legal relationship between the parties was governed by the A&A Agreement which was signed by Desmond Fuller and a representative of Epic on January 19, 2017.
- [44] By signing the A&A Agreement, Desmond Fuller authorized Epic to "perform all necessary repairs" to the Property "due to the damage caused by water". The "Work" meant "Emergency clean up or repair", "Cleaning & restoration of contents", and "Structural repairs".
- [45] In the A&A Agreement, Epic "agrees that all work will be completed in accordance with accepted industry standards, practices, guidelines and codes".
- [46] In the A&A Agreement, Desmond Fuller agreed that if, for any reason, the insurance company were to deny payment of the claim, he would be "solely liable" to Epic for payment of the work completed and "will pay same" within 30 days of invoice.

THE ESTATE'S CLAIMS AGAINST EPIC

- [47] Given my conclusion above that the funds paid into court belong to Epic, subject to any amounts payable in respect of the Estate's claims against Epic, it is necessary to assess each of those claims.
- [48] I will deal with the claims as they are set out by the Estate in its extensive written submissions. I will refer to each of the claims using the Estate's numbering system in the order in which they are advanced.

(2.1) Claims Regarding the Epic Contract

- [49] The Estate argues that the A&A Agreement is not enforceable, on the basis that:
- a) Epic was authorized to perform all necessary repairs to the building but many of the repairs were conducted by sub-trades; and
 - b) the A&A Agreement is invalid due to lack of consideration.
- [50] These arguments are without merit.
- [51] Epic was contractually responsible to ensure that the work was performed but there is no term requiring it to use only its own employees. Alternatively, even if the A&A Agreement could be construed as stating that Epic would do all work by its own employees, a failure to abide by that term would not invalidate the contract. There was no evidence advanced to show why this would have made any difference to Desmond Fuller or that the use of sub-trades caused him any specific loss not encompassed within other claims.

[52] The Estate's second argument misunderstands the law of consideration. That law requires that there be an exchange of promises, not that a specific amount be agreed upon before the agreement is signed. Under the A&A Agreement, Epic agreed to do the work to accepted industry standards, and in return Desmond Fuller agreed to assume various liabilities. Those counter-promises are sufficient to satisfy the need for consideration.

(2.2) Claims Regarding Work Never Performed

[53] The Estate claims that three items on the Repair Invoice were charged for but never performed.

[54] Task #111 charges for the application of membrane to all 309.22 sq. ft. of the bathroom but it appears that the membrane should have been and was applied only to the shower walls. In relation to his supplementary report, Mr. Stregger admitted an error in relation to the presence or absence of a waterproof membrane (Page 3, both bullet points). In particular, Mr. Stregger admitted that the waterproof membrane was installed on the fiberboard installed around the bathtub, as stated in his primary report. There is no specific evidence before me of the square footage to which the membrane was actually applied. It is my view that a fair estimate based on the evidence before me is an overcharge of \$1,000, approximately one half of the total charged.

[55] Task #114 charges for the ceramic/porcelain tiling of the bathroom walls. However, photo evidence entered during the trial appears to show no tiles floor to ceiling. The evidence of Mr. Stregger in his supplementary report is that 51.07 sq. ft. of 236.89 sq. ft. were tiled around the bathroom. Multiplying this fraction by the amount charged at task #114 results in an overcharge of \$2,878.79.

[56] Task #137 charges for 11.5 feet of lower cabinetry in the kitchen. The evidence of Mr. Stregger is that the lower base units of cabinetry in the kitchen measured 7.0 feet, not 11.5 feet as set out in the Repair Invoice. Epic argues that the numbers generated by Epic's software are not necessarily what one can see and that Mr. Stregger's calculation does not account for waste. However, I understood that evidence of Mr. Rorke to pertain primarily to the flooring. I find that there was an overcharge in respect of task #137--calculated by multiplying the total charged by the fraction 7.0/11.5--totalling \$1,211.65.

[57] Tasks #100-103 charge for work in the laundry room which Epic admitted was not done. The overcharge for this aspect of the work totalled \$488.09.

[58] The overcharges total \$5,578.53. Epic argued that these overcharges should be disregarded, as Travelers agreed to pay these amounts, and has not complained about paying the amount of the Repair Invoice for the work that was ultimately done. I agree with this submission to the extent that it affects the rights as between Epic and Travelers: Travelers may have a complaint but they have not advanced a claim against Epic in this action.

- [59] The Estate has no claim against Epic for these overcharges. To the extent that Epic charged more than was appropriate and Travelers agreed to pay Epic's charges, the Estate has suffered no loss.
- [60] The overcharges impact the calculation of interest and I will address that issue at the end of these reasons.

(2.3) Claims Regarding Poor Workmanship

Uneven Bathroom Floor and Walls/Uneven Flooring in Basement

- [61] There was extensive evidence on the issue of uneven floors. The Estate alleged that post-restoration, the flooring in the bathroom and in the basement generally was uneven, and not level. The Estate argues that the flooring constituted a safety risk, and that Epic breached its obligations under the A&A Agreement by not providing the Fullers with a flat, level floor.
- [62] Mr. Williams testified that in order to make a subfloor, two-by-fours are adhered to the concrete and then a plywood floor is adhered on top. Mr. Rorke testified that the floor was built on a sloping and peak and valley slab, so the subfloor would have some slope to it.
- [63] Mr. Fleuger, who was hired to install tile, testified that he suggested to Desmond Fuller that he ought to "float the floor". This would mean pouring a levelling compound over the floor which, when hardened, would make the floor flat and level. Floating the floor in this way would cost approximately \$2,000 or \$3,000. Mr. Fleuger testified that he explained this option and the cost to Desmond Fuller, and that Desmond Fuller said that he should proceed without floating the floor. Desmond Fuller said, just proceed as it is, and do the best that you can.
- [64] The Estate does not allege that Desmond Fuller directed Mr. Fleuger or anyone else to float the floor. Mr. Fleuger's evidence is that creating a level floor was difficult if not impossible given that the underlying sub-floor was uneven, and that Desmond Fuller was advised of the issue.
- [65] There was a further issue concerning the tiles chosen for the work which appears to have contributed to the unevenness of the tile floor. In this regard, there was much evidence advanced about a trip by Desmond Fuller, Rudy Fuller and Mr. Rorke to a store called Jordan Tile. Mr. Rorke had suggested that they meet there to pick out tile for the kitchen floor.
- [66] The Estate is critical of Mr. Rorke for recommending this particular tile store which had few options in the price range dictated by the Travelers approved budget, and for not being clear about that budget, but ultimately, Mr. Rorke agreed that the Fullers could purchase tiles in the \$5.49 to \$6.95 range rather than the \$3 to \$4 budgeted range at no charge to the Fullers, and that Epic would absorb the difference. Mr. Love testified that he was asked to approve an extra cost for tiles but he testified that he was stuck with the quote approved by the Travelers review process. He told Mr. Rorke that he could not authorize further funding for tiles.

- [67] In his testimony, Rudy Fuller sought to distance himself and his father from the decision to choose the tiles which were ultimately chosen, but I find that the tile choices were made or at least approved by the Fullers. The Estate argues that Mr. Rorke's name is on the purchase order for the tiles and he signed it. However, this would be expected given that Epic was paying for the tiles. Mr. Rorke had no logical reason to force the Fullers to choose particular tiles which were almost double the price approved by Travelers.
- [68] Mr. Rorke testified that he recommended that 12x12 tiles be installed because smaller, square tiles could more readily adapt to the unevenness of the floor. The tiles ultimately purchased were 12x24.
- [69] When asked whether he ran into any issues during the tiling process, Mr. Fleuger testified that in the corners, when you pushed down on one side of a tile the other side would rise up. I infer that this was another indication that the sub-floor was uneven. Again, Mr. Flueger testified that Desmond Fuller told him to proceed with the tiles that had been chosen.
- [70] Mr. Williams, who installed the subfloor, testified that when he built the floor it could not be significantly raised--it had to be of a consistent height so that the other components of the house would match up with it. Significantly raising the subfloor would mean replacing door jambs and other parts of the house.
- [71] Mr. Williams testified that his objective is to achieve a subfloor which is as flat as possible, and to do the best that he can, with what he is given. He remarked that "level is different than flat". He testified that he tries to make floors as flat as possible, but not necessarily level. He said that the floor in the basement of the Property was relatively level for the age of the house.
- [72] I observe that Travelers' - and by extension, Epic's - obligation is to put property back to its original condition. In order to find a breach, I would have to find that the floor was inadequate even given the underlying conditions.
- [73] There are photos which show tile work before the flood being uneven with large gaps. When confronted with these photos, Rudy Fuller admitted that this work was "not the best work" but argued that "the issues are only surface". He recalled Desmond Fuller wanting to change the tiling and being unhappy with the original tiling contractor.
- [74] In summary, regarding the issue of the uneven floors, I find, based primarily on the evidence of the sub-trades, that the subfloor was uneven and that the unevenness of the tile floor was inevitable as a result. Desmond Fuller was advised how the problem could be fixed, but he decided not to "float the floor" at additional cost.
- [75] The Estate argued that the resulting floor was unsafe, but there is no admissible evidence which proves that the resulting floor constituted an unacceptable safety risk, or that Epic was required to level the floor or to refuse to do the work for safety reasons.

[76] For these reasons, the Estate's claims in respect of the unevenness of the floors are dismissed.

Lack of Adhesive Applied to Bathroom Wall Tiles

[77] This claim is based on Mr. Stregger's evidence that he cut a small piece away from one tile and concluded from that experiment that adhesive and mortar was not applied in a manner that would form a bond between the tile and the drywall, and that the "stability of the tile installation is questionable".

[78] Mr. McLean testified that mortar is applied in dollops and not at every point at which the tile and drywall meet.

[79] Mr. Stregger's inspection occurred in 2020, some three years after the work was completed. There is no record that he observed loose tiles at that time, and his observations do not indicate any cracking of tiles, grout, or anything else that would indicate an unstable or questionable tile installation. Despite an allegation that "no adhesive was applied to the bathroom wall tiles", there is no evidence that any tiles had fallen off after three years.

[80] The evidence of Mr. Stregger is insufficient to establish that the stability of the tile installation was questionable or that the installation was contrary to the BC Building Code which requires that "ceramic tile shall be set in a mortar base or applied with an adhesive".

Air Barrier Details (Vapour Barrier)

[81] Mr. Stregger was asked to conduct an invasive inspection of the exterior walls of the suite, and in particular the bottom plate areas, with a view to determining whether proper vapour barriers have been installed and sealed.

[82] However, it is clear from his report that he did not personally observe that the vapour barrier was not properly lapped and sealed. Further, in my ruling on the admissibility of his expert report, I excluded a sentence in which he inferred, based on the method used to cut the drywall, that it is "likely that the vapour barrier has not been lapped by 50 mm and sealed".

[83] In light of the foregoing, there is no admissible evidence to establish that the vapour barrier was not lapped and sealed as required.

[84] Further and in any event, I observe that there is no evidence that the vapour barrier was properly lapped and sealed before Epic did its work or that Epic's work would have necessarily dealt with the vapour barrier. As stated above, Epic is only required to return the Property to the state that it was in before the flood.

Other Poor Workmanship Claims

[85] There are a number of other items claimed by the Estate which are based on excluded portions of the Stregger reports. As there is no admissible evidence to prove the Estate's case on these issues, the following claims are dismissed:

- a) Non-uniform painting, exposed electrical outlets;
- b) Kitchen countertop pieces unaligned;
- c) No caulking back splash; and
- d) Incorrect drywall thickness.

(2.4) Claims Regarding Devaluation of Kitchen Cabinetry

[86] The kitchen had lower and upper cabinets. The Estate claims that while the lower cabinets were damaged by the flood, the upper cabinets were not.

[87] The Estate claims that the Fullers did not authorize the replacement of the upper cabinets and that all of the cabinets were replaced by Epic using cabinetry of lesser value. The Estate advanced evidence through Ms. Lucas that replacement of the original cabinetry with cabinetry of like kind and quality would require custom milling. In this regard, the Estate claims damages from Epic of approximately \$44,000.

[88] Mr. Rorke testified that the upper cabinets were replaced because Epic was unable to find lower cabinets to match the upper cabinets. He agreed that Epic was not legally obliged to replace the upper cabinets but did so as a service to the client.

[89] Rudy Fuller testified that his father denied authorizing the upper cabinets to be replaced, and in particular by the specific cabinetry used. He testified that his father preferred light coloured furniture. The replacement cabinets installed by Epic were dark-coloured.

[90] There are at least three questions to be answered regarding this claim. Were the replacement cabinets of like kind and quality? Were the replacement cabinets authorized by Desmond Fuller? In any event, is the Estate entitled to claim for the cost of cabinets as estimated by Ms. Lucas?

[91] Regarding the issue of like kind and quality, the Estate argues on the basis of evidence given by Rudy Fuller and Ms. Lucas that the doors and interiors were solid wood and that the "cathedral arches" on the replacement doors would require custom milling. However, Ms. Lucas did not personally observe the original cabinets and could not tell from the photos whether the boxes behind the cabinet doors were melamine or solid wood. Rudy Fuller was insistent that they were solid wood.

[92] On the other hand, Mr. Rorke and Mr. Love testified that the original cabinets were of average quality, melamine boxes with solid wood doors.

[93] Produced in evidence at the trial was a quote from Home Depot, in relation to the original cabinetry which was purchased by Desmond Fuller in 2005. The one-page document contains a diagram and then this text:

Mills' Price "Hartford" Natural Maple

Ready to assemble cabinets

No Mouldings.

Cabinet knobs/handles sold separately. Installation included if on site at time of cabinet installation.

[94] In my view, this description does not indicate cabinets which were custom milled or which would require custom milling to replace. They were "ready to assemble". The fact that the knobs and handles were sold separately indicates that the cabinets were mass produced.

[95] It is my view that the Estate has not proven that Epic has breached its obligation to replace the cabinets with like kind and quality.

[96] The Estate argues that Epic's obligation to replace damaged items with "like kind and quality" required Epic to install cabinets in the same colour and with the same type of appearance as the originals. However, these are only two of the factors that might be considered when determining like kind and quality. The cost of the replacement cabinets must also be reasonably similar to the original ones: in this case, the estimates given by Ms. Lucas appear to be far in excess of the cost of cabinets which are mass produced for and could be purchased from a mainstream retailer such as Home Depot.

[97] In any event, I find that the cabinets installed by Epic were approved, either expressly or implicitly, by Desmond Fuller.

[98] The Fullers saw the cabinets being installed and could have said something at the time. It is notable that after all of the cabinets were installed, Epic offered and Desmond Fuller agreed to have a stack of additional drawers added at the end of the cabinet to accommodate a cutlery drawer. That piece was the same material and colour as the other cabinetry installed by Epic.

[99] If the Fullers took the position that the replacement cabinets which had been installed were in breach of the terms of the Policy, it was incumbent upon them to complain when the new stack of the same material and colour was later added. There is no evidence that they did, and I find that they either acquiesced to the replacement cabinets or that Desmond Fuller expressly authorized them. On this issue, I do not accept Rudy Fuller's evidence that Desmond Fuller told him that he denied selecting, or at least agreeing to, the colour of the kitchen cabinets.

[100] For the reasons set out above, the Estate's claims against Epic for the further replacement cabinetry are dismissed.

(2.5) Claims Regarding Completion of Restoration Work

[101] The claims referred to in this section of the Estate's written submissions are duplicative of those at s. 2.1 to s. 2.4 of its argument.

(2.6) Claims Regarding Repair to Building Perimeter

[102] The Estate appears to claim that both Epic and Travelers are liable to it for work done to the building perimeter by contractors, other than Epic, retained by Desmond Fuller at the same time that the Epic scope of work was being carried out.

[103] There is no claim against Epic for this work. There is no evidence that anyone directed Epic to perform it. The scope of work at the Property was defined by Travelers, not Epic.

[104] The claim against Travelers for the cost of the exterior work will be addressed below.

(2.7) Claims Regarding Change Order

[105] Following the issuance of the Repair Invoice by Epic, various "trade-offs" were agreed to between Epic and Desmond Fuller, by which Desmond Fuller agreed to forego certain repairs set out in the Repair Invoice in exchange for other improvements to be carried out in the basement, at no further cost to Desmond Fuller.

[106] In particular, the bathroom walls were not tiled. In exchange, tile was installed on the kitchen floors instead of vinyl, and the fireplace surround was tiled.

[107] While Mr. Rorke testified that the trading of repairs in one area in favour of other areas was done outside of communications with Travelers; Travelers did not take any issue with these trade-offs. The amount payable by Travelers did not change, and so it is not surprising that Travelers would be indifferent.

[108] The Estate took the position that these trade-offs were carried out without authority, and relies on the fact that the change order document which set out the trade-offs between the Repair Invoice and the work ultimately done was not signed by Desmond Fuller. The change order and the Repair Invoice were sent to the Fullers at least by May 30, 2017.

[109] I do not accept that Desmond Fuller did not know of, and did not approve of the changes described above.

[110] There is no evidence that either of the Fullers complained during the course of the construction that the tile work in the kitchen or the fireplace tiling should not be or ought not to have been done.

- [111] The Fullers attended at Jordan Tile to discuss tile for the kitchen and hallway, for the fireplace, and for the tub surround. They ultimately chose tile which was, as described above, in excess of the budget permitted by the Repair Invoice.
- [112] It does not make sense that Epic would have completed all of these changes without authorization from the insured. It would not benefit the contractor to do so.
- [113] Finally, even if there were a failure of authorization, it would have no legal consequence in this action. There is no claim for the bathroom walls to be tiled or for the tile on the kitchen floors to be replaced with vinyl.
- [114] In its argument, the Estate complains that despite the change order, the Repair Invoice still charges for the items traded away. That is so but the Repair Invoice does not charge for the new items. The change order which was prepared after the Repair Invoice describes the trade-offs.

(2.8) Claims Regarding Disposal of or Damage to Chattels

- [115] Epic has acknowledged that it will compensate Desmond Fuller for damage caused by Epic to a two-seat loveseat, as well as a mirror that was broken in transit to or from the Fuller Property. Those items total \$1,039.68.
- [116] A dining table has already been the subject of a compensation payment. It appears that the items still at issue between the parties are a three-seat leather sofa, and a one-seat leather sofa.
- [117] The three-seater was returned to the Fullers in a disassembled state, and Rudy Fuller testified that he and his father could not reattach the parts. Despite an email from Epic stating that it would "make it right", the Fullers purchased replacement furniture approximately two weeks later. I find that given that it was Epic's fault that the three-seater was returned to the Fullers in a disassembled state, it was up to Epic to proactively take steps to try to reattach the furniture. It is not clear on the evidence whether it could have been reattached. I find that Epic is liable to the Fullers for the replacement cost of the three-seater: the cost is \$849 plus applicable taxes, or \$950.99.
- [118] Regarding the one-seater, Rudy Fuller's evidence at trial was that the chair was damaged, and that "a chunk of it was missing from one side". When it was pointed out to him in argument that the photo he had cited as the basis for this claim was in fact an unattached part of the three-seat sofa and not the one-seat sofa, he sought to argue that the one-seater had been disassembled, not damaged. The only claim on the evidence is that the one-seater was damaged. That claim has been disproven and it is dismissed.

(2.9) Claims Regarding Contractual Interest

- [119] This is not a claim by the Estate against Epic. Rather, it is a claim by Epic against the Estate and will be addressed below.

(2.10) Claims Regarding the Court Order Interest Act

[120] In light of the foregoing analysis, no net amounts are owed by Epic to the Estate. Therefore, no interest is payable by Epic to the Estate in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79, or otherwise.

(2.11) Claims Regarding Legal Fees

[121] Epic asked that claims for costs be addressed following the determination of the merits of this action. At the end of these reasons, I will provide instructions to the parties in relation to the issue of costs.

The Estate's Claims Against Travelers

(3.1) Repair Satisfaction Guarantee

[122] Travelers' policy declaration form contains a "repair satisfaction guarantee" which states as follows:

When your home is damaged, the last thing you should have to worry about is the quality of the repair work. That's why, when one of our recommended repair facilities performs the work, we'll stand by it.

We guarantee that the quality of the repair materials, techniques and workmanship described on the estimate will meet professional home repair standards. We commit to remedy deficiencies to meet those standards for two years from the date repairs are completed.

The guarantee applies only to costs for actual repairs to remedy deficiencies associated with work performed by a recommended repair facility.

[123] In my view, this statement does not add anything of substance to the Estate's claim.

[124] At most, the guarantee promises that if Epic's work is deficient, Travelers will take steps to ensure that any deficiencies are remedied. It can also be read to say that if Epic fails in its responsibilities, Travelers will be financially responsible for making sure that the work is remedied.

[125] Travelers argues that reliance on this passage is not pleaded in the third-party notice, and that this passage is found on the backside of a cover letter from Travelers and does not form part of the Policy.

[126] These issues do not have to be determined to resolve this action. Travelers' guarantee, if it is one, is unnecessary, because to the extent that Epic's work was incomplete or deficient, damages awarded on the Estate's counterclaim will be paid from the amount paid into court.

(3.2) Claims Regarding like Kind and Quality

- [127] This claim is duplicative of the claims against Epic set out above regarding devaluation of the kitchen cabinetry. The reasons set out in relation to s. 2.4 of the Estate's submissions against Epic also apply to this claim by the Estate against Travelers.
- [128] Under this heading, the Estate also makes a claim against Travelers for the cost of a bedroom headboard.
- [129] Claims for damaged chattels are governed by the section of the Policy entitled "Coverage C - Personal Property". This section provides for two possible bases for payment: Replacement Cost Basis and Actual Cash Value. Payment on a Replacement Cost Basis will be "the cost to repair or replace, whichever is less with new materials of similar kind and quality, without deduction for depreciation". Replacement Cost is not payable unless the insured actually repairs or replaces the insured loss or damage, and unless the insured makes a claim for Replacement Cost within one year after the date of loss.
- [130] If the insured chooses not to repair or replace any article, Travelers will pay for the loss or damage to that article on an "Actual Cash Value Basis".
- [131] In this case, the Fullers replaced the damaged headboard with a new headboard, but the cost of the new headboard was actually less than the Actual Cash Value paid by Travelers. Therefore, the Estate has no claim under this part.

(3.3) Claims Regarding Repair to Building Perimeter - Coverage A, Dwelling Building

- [132] At the same time that the Epic work was ongoing, the Fullers hired a company called Groundhog Excavating Ltd. ("Groundhog") to investigate flooding in the basement which did not appear to come from the source of the first flood. A representative of Groundhog stated that:

With a quick camera investigation, we found the perimeter drainage tile had broken and collapsed in various locations including the discharge to the ditch. This was causing water to back up and build pressure and force its way into the house from under the foundation walls.

- [133] Since no one from Groundhog testified, this note is not admissible for the truth of its contents but only as an explanation for why the Fullers undertook the work that they did.
- [134] The Estate has no valid claim for the costs of Groundhog's work and other work done to the exterior of the house, for the following reasons.
- [135] First, no insurance claim was advanced for this work. Desmond Fuller issued a cheque to Groundhog on May 9, 2017 and no claim for reimbursement was made at that time, or at any time until the action. Travelers was unaware of this payment until the Estate produced its third amended list of documents on October 31, 2022.

- [136] Second, the Estate has not proven that the work was required. Rudy Fuller testified that Desmond Fuller told him that Dale Brown told him that the exterior work had to be completed before the interior work could be carried out. However, Mr. Brown has denied this, stating that he would not even have been qualified to make that statement. On this issue, I prefer the evidence of Mr. Brown.
- [137] Any written evidence from Groundhog stating that the work was required is inadmissible, as no one from Groundhog testified at the trial.
- [138] Third, the claim for the costs of Groundhog's work is excluded by the Policy. The Policy generally excludes claims for loss and damage caused by water, unless resulting from the sudden and accidental escape of water from a plumbing, heating, sprinkler or air conditioning system, a household appliance, a swimming pool, a watermain, or a roof or eavestrough.
- [139] Finally, the claim was not pled. Paragraph 3 of the third-party notice defines "water damage" as the January 2017 water damage. Therefore, the claim in the third-party notice for "repair of water damage" means a claim for loss from the water damage in January 2017. Any new claim would be barred by the two-year limitation periods set out in the Limitation Act, S.B.C. 2012, c. 13, and the Insurance Act, R.S.B.C. 2012, c. 1.

(3.4) Claims Regarding Personal Liability, Coverage E

- [140] This Estate's claim which seeks an order that Travelers pay its legal costs misconstrues the Policy. This section of the Policy covers liability to third parties for personal injuries and for property damage. It is inapplicable to the circumstances of this case.
- [141] In any event, the insured at no time made a request of a defence from Travelers, and the claim for legal costs is not pled against Travelers.

(3.5) Basis of Payment

- [142] By reference to a provision in the Policy which states that no payment will be made under this Form unless or until repair or replacement of the insured loss or damage is actually completed, the Estate alleges that the payment by Travelers was made before the work was completed and that this fact made the cheque somehow invalid or requires the payment by Travelers of the Estate's legal fees.
- [143] This argument misapprehends how a co-payable cheque works. As described above, the cheque is intentionally issued before the work is completed. It is made co-payable so that the cheque can be signed by the insured and delivered to Epic when the work is substantially complete, even if there are counterclaims regarding defective work which may still be outstanding.

(3.6) To Whom Insurance Money is Payable

[144] The policy declaration states that Part I insurance funds are payable to the Bank of Montreal and to Rudy Fuller. It is unclear on the evidence why this is so, but no claim has been advanced by the Bank of Montreal or Rudy Fuller which arises from the payment of the co-payable cheque to Desmond Fuller. Rudy Fuller is not a party to this action, and has not advanced any claims on his own behalf.

(3.7) Regarding Insurer's Obligation to Furnish Forms

[145] The Estate has advanced a claim based on s. 27 of the Insurance Act which is misconceived. Section 27(1) provides as follows:

27(1) Immediately on receipt of a request, and in any event no later than 60 days after receiving a notice of loss, an insurer must furnish to the insured or person to whom insurance money is payable forms on which the proof of loss required under the contract may be made.

[146] The Estate advances a claim that Travelers' failure to comply with s. 27 somehow entitles the Estate to repayment of all of its legal fees. However, the only consequence of not providing proof of loss forms is that the insurer is not entitled to require the insured to wait for 60 days after proof before commencing an action, under s. 23(2). There is no valid claim advanced by the Estate against Travelers under s. 27.

(3.8) Regarding Contribution and Indemnity

[147] The claim for contribution and indemnity in the third-party notice is founded on the facts set out in para. 10 of Part 1 of that notice, which states as follows:

In addition, if Mr. Fuller is liable to Epic Restoration Services Inc., which is not admitted but specifically denied, then any such money is properly due and owing by Travelers Canada to Epic Restoration Services Inc. and Mr. Fuller seeks contribution and indemnity for same from Travelers Canada.

[148] The Estate is entitled to have the funds paid into court by Travelers used to partially satisfy the Estate's liability to Epic under the Repair Invoice and otherwise.

[149] The Estate has no other valid claims against Travelers for contribution or indemnity.

(3.9) Disposal and Damage to Chattels

[150] These are claims against Epic and are addressed above.

(3.10) Rental Loss

[151] The Estate claims for rental loss pursuant to Coverage D, subparagraph 2 of the Policy which states as follows:

If you rent or hold for rental a part of your residence, and a tenant cannot live there because of the damage caused by loss or damage we insure, we will pay

Your actual loss of rental income from a part then rented, and

The loss of fair and reasonable rental income you had anticipated receiving from a part then held for rental.

We will, however, deduct those expenses which do not continue.

- [152] Mr. Pritchard stated in his direct examination that when assessing rental loss claims, Travelers' objective is to put the insured back into its pre-loss position. In my view, that is the correct approach.
- [153] There was evidence of a rule within Travelers not to consider a rental loss claim if the unit was not rented at the time of loss. However, that rule does not appear in the wording of the Policy. The court's task is to determine the claim for rental loss based on what would have happened during the covered period had there been no flood.
- [154] Rudy Fuller testified that for the years prior to the flood the unit was rented only sporadically for short periods of time. However, a note from Mr. Love on February 7, 2017 states that the basement unit had only recently been rebuilt into a legal suite and that the occupancy permit had been obtained only a month before the claim date. Therefore, the sporadic nature of the rentals prior to the pre-flood renovations is not necessarily indicative of what would have happened following those renovations. I find that but for the flood, it is probable, although not certain, that the unit would have been successfully rented for the period between February and June 2017.
- [155] There is very limited evidence on which to ascertain the appropriate rental rate for this basement unit in 2017. Rudy Fuller testified that the market rate at the time was between \$1,800 and \$2,000 per month, and that he was advertising the unit at \$1,800. Travelers objected to this evidence on the basis that Rudy Fuller is not an expert regarding rental rates. There is a note prepared by Travelers that upon running a search, presumably online, they found two properties, one at \$1,200 and one at \$1,500. After a drive-by viewing, they determined that the appropriate rate for the Property suite was \$1,200. Travelers' evidence on this issue is no more determinative than Rudy Fuller's. In view of the foregoing, I find that a reasonable rental rate at the time was \$1,500.
- [156] The Estate is not entitled to any loss of rental income for January 2017 as the unit was not rented at the time of the flood on January 17. For the period between February to June 2017 inclusive, I find that but for the flood, the unit would have been rented at \$1,500 per month, less a 33.3% contingency that it would not have been rented. Therefore, the damages for this part of the claim are \$5,000.
- [157] Travelers has already paid the sum of \$3,794.75 in relation to the rental loss claim. Therefore, it is liable to the Estate for the additional sum of \$1,205.25.

Loss of Use

- [158] The Fullers did not repair any of the deficiencies which allegedly existed after June 2017. The Estate now argues that the unit was made more difficult or less lucrative to rent by the deficiencies, and claims for loss of use from July 2017 to the present. Rudy Fuller testified that no repairs were made because the deficiencies were "evidence" and because he wanted to provide the other parties with an opportunity to obtain an expert report regarding the alleged deficiencies.
- [159] The claims for deficiencies advanced by the Estate have been dismissed. Therefore, there were no ongoing deficiencies which can ground a loss of use claim.
- [160] In any event, the Estate was not entitled to refuse to repair items said to be deficient and then to make a claim for loss of use against Travelers based on those deficiencies. It had an obligation to mitigate any losses it perceived itself to be suffering during this period.
- [161] The Estate's claim for loss of use after June 2017 is dismissed.

(3.11) Court Order Interest

- [162] The Court Order Interest Act, R.S.B.C. 1996, c. 79 [COI Act] applies to the amount payable by Travelers to the Estate.

(3.12) Costs

- [163] At the end of these reasons, I invite the parties to make further submissions on costs, in writing.

CONTRACTUAL INTEREST

- [164] In the A&A Agreement, Desmond Fuller agreed "to pay interest at the rate of 24% per annum on any overdue accounts".
- [165] The enforcement of contractual interest provisions was addressed recently in *Century Services Corp. v. LeRoy*, 2022 BCCA 239 [Century Services], wherein the Court of Appeal held:
- [89] Notwithstanding cases such as *Magnum Leasing*, supra, most courts are reluctant to interfere with contractual interest rates, especially those agreed upon by commercial parties. While the day has passed when "Chancery mend[ed] no man's bargain" (see *Maynard v. Moseley* [1676] 3 Swan 651 at 655, cited by Harman L.J. in *Campbell Discount Co. v. Bridge* [1961] 2 All ER 97 (C.A.), rev'd [1962] 1 All ER 35 (H.L.)), modern courts do not regard themselves as having some free-floating discretion to ignore or vary contractual terms of which they disapprove. Equity 'follows the law' and still operates on certain principles to this day. It will not enforce penalties; it will relieve against certain mistakes; it will relieve against an unconscionable bargain or fraud. But I am not aware of any equitable principle that would permit a court to rewrite a commercial loan agreement solely by virtue of the judge's opinion that an interest rate (though legal) was excessive, or that a party's

misconduct was deserving of punishment in the form of the denial of interest at the rate agreed upon

- [166] Century Services involved a loan between a lending company and a business, secured by a mortgage over a residential property owned by the business owner's spouse. The contractual interest provision in that case resulted in the debt increasing from about \$378,000 in February 2009 to more than \$6.5 million in 2021. At pre-judgment rates under the COI Act, the debt would have been about \$426,000.
- [167] I have considered whether Century Services is distinguishable from this case because of the references in the passage above to commercial parties but, in my view, it is not. The debtor in Century Services was an individual homeowner. The consequences for the Estate are not nearly as grave as they were for the debtor in Century Services. Although the interest rate in this case appears high, I am bound by Century Services to award interest to Epic at the contractual rate.
- [168] I have considered whether Travelers' payment into court in 2019 changes the contractual interest payable but, in my view, it does not. Before paying the funds into court, counsel for Travelers sought to pay the funds to Epic but the Estate did not agree. The A&A Agreement provides that Desmond Fuller was obliged to pay any amounts owed to Epic that the insurance company did not pay.
- [169] In the section above regarding work never performed, I found that the Repair Invoice contained overcharges totalling \$5,578.53. Regardless of the fact that Travelers did not seek the return of these funds from Epic in this action, it would not be appropriate for the Estate to be required to pay interest on charges for repair and restoration services it did not receive.
- [170] Epic is entitled to interest on \$32,124.60, being \$37,703.13 less \$5,578.53, at the contractual rate of 24% per annum.

SUMMARY AND CONCLUSION

[171] In summary, I order that:

- a) The Estate shall pay the sum of \$37,703.13 to Epic, being the funds paid by Travelers on account of the Repair Invoice \$39,693.80 less \$1,990.67 for damaged chattels;
- b) The Estate shall pay interest to Epic at the contractual rate of 24% per annum on the sum of \$32,124.60, from June 6, 2017 to the date of payment;
- c) The funds paid into court to the credit of this action shall be paid to Epic or to its counsel in trust for Epic and shall constitute a credit in favour of the Estate in respect of the amounts set out above;
- d) Travelers shall pay the sum of \$1,205.25 to the Estate, in respect of the Estate's claim for rental loss.

- e) Other than the awards for damaged chattels and rental loss described above, the counterclaim and third party claim of the Estate are dismissed.

Costs

[172] The parties and counsel shall have liberty to make submissions regarding costs by means of written submissions delivered first by Epic and Travelers on or before the date which is 30 days from the date of these reasons.

[173] The Estate shall be entitled to deliver responsive written submissions within 14 days of the delivery of the submissions by Epic and Travelers.

[174] The submissions shall be limited to five pages from each party. The submissions shall be delivered to my attention at the Court registry, by email, at the same time that they are exchanged among the parties.

"Loo J."

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