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Suit No: CI 89-01-40099
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	
NEW HOME WARRANTY PROGRAM OF MANITOBA INC., Plaintiff,	For the Plaintiff: M.G. Finlayson
-and-	For the Defendant: B.J. Filyk
BARRY EDWARD NAGAM, Defendant.	Judgment Delivered: November 7, 1991.

FERG, J.

The plaintiff brings this action to recover sums of money expended under its New Homes Warranty Program, to repair deficiences in a home built by the defendant.

The New Home Warranty Program is a scheme designed to protect new home purchasers from defects in workmanship or materials, non-compliance with building standards, and other usual deficiencies, the fault of the builder.

The builder, prior to construction, enters into an agreement with the plaintiff corporation which provides all the terms of the program which protects the purchaser, if the builder fails to complete its obligations to construct the home according to normal building codes and standards, and repair defects within a time limit. The builder covenants to reimburse the Program if it he or it fails to carry out his or its obligations under a "warranty certificate" which outlines, in detail, the obligations and the warranties afforded to the purchaser.

In this case, the agreement was executed on May 16th, 1986, covering a home to be constructed by the defendant for Mr. Shahid H. Chaudhry at 344 Rosehill Way in the City of Winnipeg. When the home was substantially completed it became evident there were a number of deficiencies. Notice was given to the defendant builder (by the purchaser and the Program) who did not complete the work, so in accordance with the agreement the purchaser and the plaintiff called for a conciliation report. This involves calling in an experienced independent conciliator to inspect the dwelling and make a report covering work to be done under the warranty. A first conciliation was completed on August 21, 1987 and a report (Exhibit

#4) on same was completed by the conciliator, George Anderson. The defendant builder was invited to attend the inspection but failed to do so. This inspection report listed seven complaints; leaking shower, drywall defects, defective floor seams, defect in bathtub, and rough basement floor. Only minor corrective work was completed after some months of waiting, by the defendant. Consequently the Program as it was obliged to do, called for a second inspection. This inspection by George Anderson, took place on August 4, 1988 (a year later, I note) and the report (Exhibit #5) dated August 23, 1988 was completed. Again the defendant did not attend the inspection, claimed he was too busy. This report contained 21 complaints, some of a quite serious structural nature, one of which led eventually to a successful prosecution of the builder under the Manitoba Building Code. Many defects listed were repeat items from the first report, but the report outlined a number of other defects and deficiencies which showed up a year later, but still covered by the warranty.

The builder was given formal notice to correct the items but upon his failure to do so, and after considerable delay, the Program, as it is bound to do under its program and contract, engaged an independent contractor to go in and do the work. I

note here, one of the defendant's defences was that the home purchaser refused to allow him on the premises to do the work, but I reject that defence since the evidence was all to the contrary from plaintiff's witnesses. I am satisfied the builder simply refused or neglected to discharge his obligations in a timely fashion, thus obliging the Program to act. I am also satisfied with the two inspections which were carried out by George Anderson, who gave evidence, a very experienced building inspector whose expertise was clearly outlined in the evidence.

The plaintiff called evidence then as to the value of the corrective work it was required to carry out. The repairs in the main were completed by one, Peter Cranmer, proprietor of a general renovation and construction company, Woodlin Construction. Mr. Cranmer detailed what work was done by his company and subcontractors, and the cost of same. His records were not the best, he had not kept all since he had no idea at the time the matter would end up in court, but I am satisfied, based on all the evidence that was presented, that he completed all the work required on a cost plus basis at reasonable cost. He did not retain his detailed time sheets,

but the Program directors were satisfied they got value for their money for the work completed by Anderson, and aside from some evidence called by the defendant as to what it claimed were excessive charges, I am satisfied the work was completed at the cost outlined by Cranmer and which was eventually paid for by the Program as reasonable. Cranmer did detail exactly what work was done, and one can appreciate that corrective work of this nature, correcting defects, can sometimes be much more costly than original work.

I need not detail the work here, but as an example, plaintiff called one Guy Arnel, a flooring contractor and expert of some 22 years experience, who detailed what had to be done to correct a defect in the flooring in the front foyer of the dwelling. His charges for the repair of the defective vinyl flooring was $1,010.12, and I accept, without hesitation, his charges as legitimate. Court also heard from one Brian Mansky the technical representative for the New Home Warranty Program who outlined all the steps taken under the program to have the deficiencies corrected in this particular dwelling, the problems with the defendant contractor, the delays and the hundreds of telephone calls, letters, and personal attendances, necessarily made to carry out

the obligations of the Program.

Suffice is to say, all in all, considering all of the evidence, the Program did all that was necessary to carry out its obligations to fulfil the warranties afforded to the home purchaser, all of which are outlined in the contract made between the plaintiff and the defendant. He, as well, verified the legitimacy of the contractors' charges to correct defects, as well as the effort and expense he and other employees of the Program expended and incurred over the rather long period of time before this matter was ended.

The contract clearly provides that where the Program is required to carry out the builder's obligations, the builder shall reimburse the Program for the total costs incurred plus a surcharge of 25% of those costs, to be paid as liquidated damages and not as a penalty. Firstly, as I said, I am satisfied in this case the Program was required by its contract to correct the deficiencies in this rather sloppily built dwelling. Secondly, I am satisfied, on all of the evidence presented by the plaintiff of the expense and time the Program was put to, that the 25% figure is a genuine and reasonable pre-estimate

of its costs or damages, and is not merely imposed as a penalty. On the evidence, I would have no trouble awarding the Program some $1,600.00 as damages for its expenses, which it is claiming.

I therefore find the defendant is obliged to reimburse the plaintiff for the following sums:

Sums paid to contractor:	$6,780.00
Surcharge of 25% (less $250. for inspections):	1,632.50
TOTAL:	$8,412.50

Plaintiff will be entitled to judgment for that sum and to interest on those sums at the applicable statutory rate, from the date of the first claim or demand.

Parties have agreed the matter of costs shall be held in abeyance. However, I would indicate plaintiff will be entitled to its costs as against the defendant, and if costs cannot be agreed upon, then the matter may be spoken to.