

*Case Name:*

**Whitehead v. Hampel (c.o.b. Hampel Contracting)**

**Between**

**Maxine Whitehead, Plaintiff , and  
Rod Hampel o/a Hampel Contracting, Defendant**

[2014] O.J. No. 4078

2014 ONSC 4908

Court File No. CV 12-36

**Ontario Superior Court of Justice**

**E.J. Koke J.**

Heard: July 21-25 and 29, 2014.

Judgment: August 26, 2014.

(81 paras.)

**Counsel:**

David A. Morin, for the Plaintiff.

Martin P. **Forget**, for the Defendant.

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**REASONS FOR JUDGMENT**

E.J. KOKE J.:--

**Introduction**

**1** Finding the cause of water leakage through a block basement wall is generally regarded as a challenging exercise. Water can enter a building at the top of one end of a wall and then migrate through the hollow blocks and exit on the floor at the other end. The search for the origin of the leak

is compounded by the fact that the evidence is usually buried below the ground and behind the wall.

**2** Devising a way to remedy the problem can represent an equally daunting challenge. In this case, the plaintiff discovered water leaking onto her basement floor several years after the defendant constructed a basement foundation under her trailer. This court is asked to determine the cause of the leak and to make an order that reflects the remedial measures that must be undertaken.

## **Background**

### **The Contract**

**3** The defendant contractor, Rod Hampel, is an experienced general contractor who operates his business in the community of Port Loring, Ontario. On September 15, 2009, he entered into a simple written contract with the plaintiff, Maxine Whitehead and her late spouse, Gordon Ball, whereby he agreed to construct a block foundation and basement under their single wide house trailer, which is located in Port Loring.

**4** The work to be performed by Mr. Hampel included the temporary removal of the trailer from its existing foundation, the excavation of the basement, followed by the installation of concrete footings at the base of the excavation, on which 12 courses of 10 inch high cement blocks were to be placed. Mr. Hampel was to install weeping tile around the base of the foundation for drainage and then backfill the foundation using sand. After a 4 inch thick basement floor was poured, the trailer was to be moved onto the new foundation. All interior work was the responsibility of Ms. Whitehead and Mr. Ball. The contract was to be completed for the fixed cost of \$40,627.00, plus G.S.T.

**5** After commencing the excavation work, Mr. Hampel experienced problems resulting from a high water table. Substantial amounts of water entered and remained in the bottom of the excavated hole. He decided to remedy the problem by filling in the bottom of the hole with a layer of gabion stone, on top of which he placed a layer of clear stone and then a layer of M gravel. He estimates that he placed several feet of these aggregates at the base of the hole. He also placed a weeping tile in a zig-zag pattern across the floor from end to end.

**6** The layers of aggregates were intended to displace the water that had pooled at the bottom of the hole and to provide compaction and drainage. Since Mr. Hampel had concerns about the suitability of constructing footings on this compacted material, he chose to use a "slab on grade" method to construct his foundation. The difference between a conventional foundation built on footings and a slab on grade foundation is that with a slab on grade foundation the footings and the floor are formed as one large concrete unit. This allows the weight of the building to be distributed across its entire base, rather than on its perimeter footings. Following the construction of the slab, the concrete blocks are set on the perimeter of the base, rather than on perimeter footings.

**7** The community of Port Loring is located in what is referred to in the Province of Ontario as an

"unorganized territory". Unorganized territories are territories without municipal organization. Building permits are not issued in unorganized territories since there is no municipal authority or building department to issue the permits and supervise the construction. Notwithstanding the fact that building permits are not issued in an unorganized territory, the *Ontario Building Code* (the "*Building Code*") does apply in unorganized territories, and it is the obligation of a contractor who performs work in an unorganized territory to ensure such compliance.

8 The work commenced on October 23, 2009, and it was completed on November 19, 2009. Mr. Hampel was paid in full. The plaintiff and Mr. Ball did not express any concerns about the scope and quality of the work at the time.

9 After the completion of the contract, and with the help of friends, Ms. Whitehead and Mr. Ball finished the basement by installing drywall around the perimeter walls, erecting a suspended ceiling and installing electrical outlets and lights. The basement was divided into three rooms, one of which was to be used as a furnace and laundry room, one as a spare bedroom and one as a recreation room. Ms. Whitehead sealed and painted the concrete floor. Baseboards were not installed.

### **The Water Leakage**

10 On January 23, 2012, a little over two years after the completion of the construction, Ms. Whitehead experienced a problem when water started leaking into her basement along the east wall. The problem occurred after a sudden winter warm spell, combined with rainfall. The water was mopped and vacuumed up within several days. Ms. Whitehead estimates that the water was about one half inch to one inch deep at its deepest. Approximately one to two weeks later, she again experienced a problem with water appearing along the east wall of her basement.

11 Mr. Whitehead reported no further incidents of water entering the basement in 2012. She testified that some water leaked into the basement a year later, in January 2013, and thereafter from time to time to the date of trial. According to Ms. Whitehead, the water came in at the base of the east wall.

### **The Insurance Claim**

12 Following the two incidents of water leakage in January 2012, Ms. Whitehead contacted her insurance company and inquired about making a claim for property damage. The insurer sent an adjuster to the house. The insurance adjuster spoke to Ms. Whitehead and took pictures, which were entered into evidence at trial. The claim was rejected by the insurer on the basis that the terms of the insurance policy excluded damage to property caused by water leakage.

### **The Legal Claim**

13 Following the rejection of her insurance claim by her insurer, Ms. Whitehead retained counsel and commenced this action for damages on April 23, 2012. Her claim includes:

1. The cost of repairing the foundation;
2. The loss of rental income;
3. The cost of replacing damaged personal property;
4. The cost of repairing the damages to the interior of the finished basement;  
and,
5. General damages.

### **1. Claim for Repairing the Foundation**

#### **Inspections and Investigations of the Property Arranged by Counsel for the Parties**

**14** The parties arranged to undertake a number of investigations to determine the cause and scope of the damage, and advice on what remedial work would be required. A summary of these investigations follows.

#### ***Ron Dahl - First General Services of Muskoka***

**15** Ron Dahl is a chartered insurance professional and has worked in the insurance field for 27 years. Mr. Dahl explained to the court that for the first 17 years he worked "on the insurance side" and for the last 10 years he has been involved in repair and restoration work. He currently manages the day-to-day operations of First General Services of Muskoka, a company that engages in restoration work and repairs, much of which is carried out on behalf of the insurance industry. He was called to give evidence by the plaintiff.

**16** Mr. Dahl does not have any specialized training in foundations and footings. He spends a considerable amount of his time preparing damage estimates for the company, along with two other estimators. He prepares his estimates using a software computer program called Xactimate. The company has a number of crews that perform the physical work and these are run by on-site foremen.

**17** Mr. Dahl attended at the site on December 19, 2012, with an excavation contractor. The contractor excavated along the entire back or east wall of the foundation to a depth Mr. Dahl described as "below the footings".

**18** Mr. Dahl reported that, in his opinion, there were several causes for the water leakage into the basement. Firstly, the weeping tiles were located in an area *below* the footings, as opposed to *at the*

*base* of the footings, which according to Mr. Dahl is where they should have been placed. Secondly, Mr. Dahl reported that material used to backfill the foundation appeared to be native clay soil, and not engineered backfill or sand.

**19** According to Mr. Dahl, the foundation is located in an area that is subjected to lots of groundwater because it is located at the base of a hill, which slopes towards the house from the east. Because this groundwater cannot penetrate through the clay or out through the weeping tile, it collected along the base of the foundation and footings, and by taking the path of least resistance, it worked its way through the foundation wall.

**20** Remedial measures to deal with the water leakage that were suggested by Mr. Dahl included:

- a) Excavating around the perimeter of the foundation;
- b) Removing and replacing the waterproofing membrane;
- c) Placing weeping tiles at the base of the foundation; and,
- d) Backfilling with engineered fill.

***Matt Hartog -- Giffin Koerth Forensic Engineering & Sciences***

**21** Mr. Hartog is a structural civil engineer who was called as an expert witness by the plaintiff.

**22** Mr. Hartog attended at the site on May 25, 2012. He did not excavate along the basement foundation or dig a test hole. His on-site observations led him to conclude that the water leakage could have a number of causes, which are set out as follows:

**23** Firstly, Mr. Hartog was advised by Ms. Whitehead that prior to the construction of the foundation by Mr. Hampel, there existed a drainage swale between the base of the hill and the residence, on the east side of the house. This swale directed water away from the home. He was advised by the plaintiff that the fill from the excavated area had been used by Mr. Hampel to fill in the void where the drainage swale had existed. As a result, water now flowed directly to the east foundation wall, where it could collect and leak into the basement.

**24** Secondly, aggravating the situation resulting from the removal of the swale was the fact that the soil around the base of the foundation appeared to have settled, resulting in a low spot where water collected.

**25** Thirdly, although Mr. Hampel did not install a sump pump, he did leave open a "sump pit" in the floor of the basement. According to Mr. Hartog, his inspection of this pit revealed that the

foundation did not appear to have been placed on a bed of granular fill. Granular fill allows water to drain away from the base of a foundation and is required by the *Building Code*.

**26** Fourthly, Mr. Hartog observed that the trailer was not anchored to the foundation walls with anchoring bolts. According to Mr. Hartog, anchoring is necessary in order to offset the lateral force of the soil against the outside foundation walls. A lack of anchoring can result in deflection/deformation cracks in a wall, which can cause or contribute to water leakage.

**27** Remedial measures recommended by Mr. Hartog to prevent further water seepage include:

- a) Anchoring the house to the foundation walls;
- b) Grading and re-creating the swale at the base of the house;
- c) Excavating around the base of the house and then inspecting for cracks in the mortar joints and tears or discontinuities in the waterproof membrane; and,
- d) Ensuring that there is a proper weeping and drainage system in place at the base of the foundation.

***Curtis Ketner -- Haliburton County Home Improvement & Repair***

**28** Mr. Ketner is the owner and proprietor of Haliburton County Home Improvement & Repair ("Haliburton County") and has operated this company for the past 24 years in the town of Minden, Ontario. As its name suggests, Haliburton County is a construction company that carries out general home repairs and improvements. Mr. Ketner has been involved in various aspects of the home building industry for the past 30 years and he was qualified as an expert in building construction, foundations, and drainage. He was called to give evidence by the defendant.

**29** Mr. Ketner attended at the site on September 9, 2013. He observed that the basement showed signs of water infiltration along the east wall and had left staining marks on the floor and wood materials. He excavated at the midpoint of the exterior of the east foundation wall, down to the drainage tile. Although there were some cracks in the parging that had been applied to the exterior of the blocks, when he pulled the waterproofing membrane away from the wall and inspected behind the membrane he did not find any cracks in the block foundation wall.

**30** In Mr. Ketner's opinion, there were a number of causes for the water leakage.

**31** Firstly, Mr. Ketner noted that the type of foundation that was constructed was slab on grade. He observed that the waterproofing membrane that had been applied to the exterior of the wall did

not extend below the block wall and down and around to the bottom of the base of the slab. In his opinion, the primary cause of the water leakage resulted from water infiltrating the basement between the waterproofing membrane and the footing, travelling through the bottom of the first course of concrete block where it joined the slab.

**32** Secondly, Mr. Ketner observed that the top of the waterproofing membrane had become separated and dislodged from the wall, and then covered with soil. Water was therefore coming into contact with the bare wall, and leaking through to the interior of the basement. He opined that the membrane likely came loose when the wall was excavated the previous December and care was not taken during the backfilling to keep the top of the membrane above grade.

**33** Mr. Ketner also noted that the building had a very short roof overhang and only one downspout, and in his opinion, this one downspout could not carry water away from the roof fast enough to prevent water from spilling over the edge of the roof. He also observed that the exterior grade of the yard on the east side of the house sloped toward the foundation, which resulted in excessive water being directed to this wall.

**34** Remedial measures suggested by Mr. Ketner included the following:

- a) Excavate and remove the first layer of the waterproofing membrane around the perimeter of the foundation; apply cove parging at the bottom of the block wall at the intersection of the footing and the wall and then apply a new membrane and extend it around the face of the footing.
- b) Install a minimum of a 4 inch drainage line (weeping tile) with filter sock beside the outside edge of the footing. This line should drain to the drainage ditch or dry well.
- c) Install fasteners and flashing on the top edge of the waterproofing membrane and then apply wall parging to the top edge of the flashing.
- d) Lower the exterior grade of the ground approximately 4 inches and re-grade the soil so it slopes away from the foundation.
- e) Add a downspout to the east side of the eavestrough at the south east corner of the building and readjust the eavestroughs so that they slope towards each downspout. Connect these eavestroughs to existing drain lines.

## **Evidence of Rod Hampel**

**35** Mr. Hampel agreed that the slab on grade method of constructing the foundation was an unconventional method to be used for a below grade foundation, and that it is his usual practice to build his basement walls on footings. However, based on his experience, and given the difficulties with the amount of water that had collected in the excavated hole, he felt that the slab on grade method would provide the greatest degree of structural stability for the foundation; this method would permit the foundation to "float" on the substrate material.

**36** Mr. Hampel indicated that he was surprised when he was informed that the waterproofing membrane had not been wrapped down and around the base the slab. He stated that it is his usual practice to bring the waterproofing membrane to the base of the footing and he candidly admitted that he had no explanation as to why he did not do so in this case, and he assumed responsibility for his failure to do so.

**37** With respect to the grade around the perimeter of the house, he stated that he graded the soil in such a way as to direct water away from the building and he had informed Ms. Whitehead and Mr. Ball that it was likely that this soil would settle and would have to be re-graded after several years.

**38** With respect to drainage of the lot, Mr. Hampel testified that he went beyond the call of duty. Although it was not a part of his contract, he dug a trench approximately 150 feet long on the south side of the property and installed a weeping tile in this trench in order to direct water away from the house. To the north of the house, he created a basin with his bulldozer in order to direct groundwater to the north side of the property.

**39** With respect to the fact that he did not install a sump pump, Mr. Hampel explained that the installation of a sump pump was not part of his contract and he was only instructed to include an opening in the floor for a sump pump. Also, in his view, it was not necessary to install a pump as there was no evidence of water pooling below the basement floor.

**40** With respect to the placement of the weeping tiles, Mr. Hampel stated that he typically places weeping tile at the base of the footing, as required by the Ontario *Building Code*. However, in this case he was dealing with a situation where he knew that there was a substantial amount of water that accumulated several feet below the slab and he decided to lower the weeping tile so as to drain this area. He described the slab as sitting on a bathtub, filled with water, and by lowering the weeping tiles he was in effect "draining the bathtub".

**41** With respect to his failure to anchor the building to the foundation, Mr. Hampel explained that this was due to a misunderstanding. He had suggested to Mr. Ball and Ms. Whitehead that he incorporate some supporting block walls ("pony walls") in the interior of the basement to provide lateral support to the outside walls but they objected because they had decided to turn the basement into living space and pony walls would interfere with this use. The anchoring system is installed from inside the basement and since Ms. Whitehead and Mr. Ball had indicated that they would be

finishing the interior of the basement themselves, he assumed that they would also install the anchoring system.

**42** Mr. Hampel agreed that an anchoring system is necessary and that this would normally be his responsibility.

**43** With respect to a suggestion by Mr. Hartog that he may not have anchored the block walls to the base of the slab, he agreed that he did not have a specific recollection of doing so. However, he stated that it is always his practice to anchor a block wall to a foundation. He can recall that the person who he hired to lay the blocks used his drill to drill holes and he is therefore confident that the walls are properly anchored as required by the *Building Code*.

**44** Finally, with respect to the material he used for backfill, Mr. Hampel insisted he used sand for backfill, and he denied that he had used native soil or clay. He also confirmed that he had placed granular material below the foundation.

#### **Discussion -- Claim for Repairing the Foundation**

**45** The parties and their experts are in substantial agreement with respect to the remedial work that is required to ensure the structural integrity of the basement foundation, to prevent future water leakage, and to bring the work in compliance with the *Building Code*. They agree that the installation of an anchoring system is necessary in order to provide lateral support to the walls. They also agree that a new waterproof membrane should be placed at the base of the block wall in such a way that it wraps around and below the slab.

**46** Although Mr. Hampel presents a good argument in support of his decision to place the weeping tiles well below the base of the slab, his placement of the tiles is not in keeping with the *Building Code*. In my view, the placement of weeping tiles at the base of the foundation should be included as part of the remedial work as well. It may very well be the case that in addition to installing new weeping tile at the base of the foundation, the weepers installed by Mr. Hampel can be left in place, thereby ensuring the continued drainage of the "bathtub".

**47** In his report and in his testimony, Mr. Hartog suggested that there may be cracks in the block walls and the blocks may not be anchored to the floor. Mr. Hartog did not excavate the walls and did not have the opportunity to inspect the walls. Mr. Ketner testified that he ran his hand along the blocks behind the waterproofing membrane and he could not find any evidence of cracking. The only evidence before the court is that water is penetrating at the base of the wall. In the absence of evidence that water is penetrating through the walls, or that cracks have been observed in the blocks, or that the walls have been compromised in any other way, I am not prepared to hold the defendant liable for any cracking in the walls. If this is a concern, this should have been more thoroughly investigated when the wall was excavated by the plaintiff in December 2012.

**48** Mr. Hartog also suggested that the walls may not be properly anchored to the base, as required

by the building code, and that a further investigation should be undertaken to determine if there are no anchoring bolts in place. I am of the view that there is insufficient evidence before the court to impose this requirement on the defendant. Mr. Hampel has been engaged in many construction contracts since he completed the work on Ms. Whitehead's property in 2009 and I am not troubled by the fact that he has no specific recollection of installing the anchoring bolts in this situation. Installing an anchoring system to hold a block wall in place on a foundation or a footing is a standard building practice and Mr. Hampel testified that he always follows this practice. Mr. Hampel engaged an experienced block layer to construct the wall and it is the responsibility of a block layer to set the first row of blocks on anchors. Without any evidence to suggest that he did not anchor the walls to the slab, I am not prepared to require Mr. Hampel to undertake the cost of investigating whether anchors are in place.

**49** With respect to the type of backfill which was used, I accept Mr. Hampel's evidence that the proper granular fill was used as backfill. This evidence is supported by the evidence of Mr. Ketner who testified that proper backfill was used. Also the photographs taken during the December 2012 excavation of the basement foundation clearly indicate that the excavated material was sand and not clay. I also accept Mr. Hampel's evidence that granular materials were placed below the slab. This is supported by the photographs of the opening in the basement wall for the sump pump, and by Mr. Hampel's bookkeeping notes and records, which confirm the purchase and supply of granular aggregates.

**50** Mr. Ketner provided a list of the remedial measures that he believes are necessary and sufficient to carry out the required work. I accept that these measures represent a reasonable summary of the work and materials that will be required to remedy the problems with water infiltration and to bring the building into compliance with the *Building Code*. With the exception of the changes to the eavestrough system, which was not part of his contract with the plaintiff, I am holding Mr. Hampel liable for the cost of undertaking this remedial work. In addition to the cost of the remedial work suggested by Mr. Ketner, I am also holding Mr. Hampel responsible for the cost of anchoring the trailer to the foundation.

### **Assessment -- Costs for Repairing the Foundation**

**51** Mr. Dahl and Mr. Ketner provided estimates for the cost of undertaking the required remedial work. In addition, Mr. Mike Buchanan, the proprietor of Buchanan Enterprise, which is an excavation and site preparation business located in Port Loring, Ontario, also gave evidence with respect to local labour rates and the costs of excavation work and granular materials in the Port Loring area.

**52** I have reviewed the estimates and I have decided to rely on the estimates set out by Mr. Ketner. In my view, his labour and material rates most closely represent what one could expect to pay for this remedial work in the geographical area where Ms. Whitehead resides. Mr. Ketner estimates the cost to be \$14,475.37, inclusive of taxes. I have reduced this to \$14,300.00 to take into

consideration that his estimate also includes the costs of installing an additional downspout and adjusting the eavestroughs.

**53** Mr. Ketner did not provide an estimate for anchoring the trailer to the foundation in his report. Mr. Dahl provided an estimate for this work, which was \$8,905.00. The scope of the work set out in Mr. Dahl's estimate was extensive, and included the removal of all interior ceiling tiles, as well as fixtures. His labour rates included a rate of \$67.34 an hour for a carpenter, \$59.13 for a ceiling installer, and \$34.38 for a labourer. Over and above these rates, he added 20% for labour and overhead, plus HST. By contrast, Mr. Hampel estimated that if he was asked to provide a quote for this work his estimate would be \$1,410.24, inclusive of HST.

**54** Based on the evidence of the other witnesses, I find that the extent of the work set out in Mr. Dahl's estimate for installing the anchors exceeds what is necessary. His wage rates, which are programmed into the Xactimate software, also exceed local rates. I am allowing \$2,500.00 for the cost of anchoring the building to the foundation, to be paid by the defendant.

## **2. Claim for Loss of Rental Income**

**55** Ms. Whitehead testified that in January 2012, a man by the name of Michel Rouselle, who she described as a friend, was living in her basement. According to Ms. Whitehead, Mr. Rouselle was planning to move to New Brunswick and he had asked her if he could stay with her "for a while". He had moved into the basement in December 2011, just prior to the water leakage and moved out in January 2012, after living there for two months.

**56** According to Ms. Whitehead, Mr. Rouselle had agreed to pay her \$400 per month. Ms. Whitehead testified that Mr. Rouselle moved out because of the water leakage. She asserts that she would have continued to rent out the basement after Mr. Rouselle moved to New Brunswick but she has been unable to rent out the basement because of the water leakage issue. She is claiming ongoing loss of rental income based on \$400 per month.

**57** Ms. Whitehead was unable to provide any documentary proof that she had received any payment from Mr. Rouselle. The agreement with Mr. Rouselle was oral and no lease was produced. Mr. Rouselle, who apparently now lives in New Brunswick, did not testify. I note that the basement does not have a kitchen, a bathroom, a refrigerator, a stove, or a separate entrance.

**58** I accept Ms. Whitehead's evidence that Mr. Rouselle was living in the basement at the time of the initial water leakage. I also accept that he may also have paid Ms. Whitehead some money. However, the evidence does not support the fact that Ms. Whitehead intended to rent out the basement to tenants on a permanent basis, but supports the fact that she was helping out a friend on a temporary basis.

**59** For these reasons, Ms. Whitehead's claim for rental income fails.

### **3. Damage to Personal Property**

**60** After Ms. Whitehead's claim to her insurance company was rejected, she met with counsel on March 7, 2012. Three days later, on March 10, 2012, she and a friend, Elaine Bain, took pictures of numerous items in Ms. Whitehead's basement that Ms. Whitehead claims were damaged as a result of the water leakage into her basement. Ms. Bain, who works for a fire and water damage restoration company, also assisted Ms. Whitehead in preparing a handwritten list of what they identified as "Non Restorable" items. They then prepared a second type written list on a form on which they listed the replacement value of the items. Thirty six items were included in this list, with a total replacement value of \$14,336.00.

**61** For the following reasons, Ms. Whitehead's claim for damage to her personal property fails.

**62** Firstly, although Ms. Whitehead produced photographs of all items she claims were damaged, no damage to any items is visible on any of the photographs, notwithstanding the fact that they are identified as "non-restorable". In cross-examination, Ms. Whitehead explained that with respect to many of the items, the damage did not become evident until sometime later. For example, the rust on the metal bases of the lamps did not reveal itself until later, nor did the damage to the wooden legs of her furniture. She claims that after the damage became apparent she then disposed of all of these damaged and non-restorable items without first taking photographs of the damage.

**63** The onus is on Ms. Whitehead to establish that she has sustained damages to her personal items. In my view, it was incumbent on her to provide some better evidence that these items were in fact damaged. At the very least she should have had available photographs of the items in their damaged condition, or oral testimony by witnesses confirming the damage.

**64** Secondly, in my view, many of the items that Ms. Whitehead alleges were damaged could not have been damaged as a result of the relatively small amount of water that leaked into her basement. For example, Ms. Whitehead lists a number of ceramic figurines, which were situated on shelves well above the floor, as non-restorable. She failed to explain how these figurines could have been damaged, given the fact that they are made out of ceramic and could not have been in direct contact with water. For some reason, a 32 inch television, which was situated more than 30 inches above the floor, is also listed as non-restorable. The evidence was that the only part of this television that was exposed to water was a portion of the electrical cord. Appliances such as her freezer, washing machine and dryer were also on the list of non-restorable items, notwithstanding the fact that these appliances are normally situated on metal or rubber feet, and any working parts would not have been affected by the water.

**65** Thirdly, Ms. Whitehead complains that some of the items were damaged because they were subjected to high levels of moisture in the basement over an extended period of time. When she was asked why she did not move these items to another location, she explained that her garage was full of her brother's "stuff" and it was not heated. This is the same garage she and Mr. Ball lived in during November 2009, when the basement foundation was being built. When she was asked why

she did not place the items in storage until she had dealt with the water issue, she explained that the community of Port Loring does not have storage units.

**66** In my view, with some reasonable effort on her part Ms. Whitehead could have wiped off and cleaned the items which she claims were subjected to moisture and she could have made arrangements to move them to a safe and dry location.

**67** Ms. Whitehead was not assisted by the evidence of Ms. Bain in her claim for damages to her personal property. Ms. Bain agreed that many of the items on the list showed no evidence of damage at the time the list was prepared.

**68** In conclusion, it is my view that Ms. Whitehead has not met the onus of establishing that any of her personal possessions were destroyed as a result of the water leakage, or that she took reasonable steps to prevent or minimize the alleged water damage.

#### **4. Claim for Repairing the Interior of the Finished Basement**

**69** Mr. Hartog recommended that the interior of the basement wall be inspected for cracks and mould. Such an inspection would require the removal of all interior finishes, i.e. drywall, insulation, and trim.

**70** Mr. Ketner did not believe such an inspection was required. He physically inspected the exterior of the foundation wall and did not find evidence of cracking in the concrete blocks. With respect to the existence of mould, he pointed out that the damage to the interior of the basement was minimal (staining in some areas of the floor and on the bottom of some of the door trim) and he did not find that the drywall had blistered or was comprised in any way. Also, he found that the humidity level in the basement was typical of that in other basements, and he did not detect dampness or odours that would suggest the existence of mould.

**71** Evidence was led at trial that there is air testing equipment available to test for the existence of mould. No such testing was carried out by the plaintiff.

**72** On the basis of the evidence, I find that the existence of mould in the basement is speculative at best. I am not satisfied that the plaintiff has demonstrated that it is necessary to remove the interior finishes to inspect for mould and cracking of the block walls and I am not prepared to order that the defendant be required to incur the cost of conducting such an inspection.

**73** There is evidence of staining on the floor and some of the door trims. I hold Mr. Hampel responsible for the costs of repainting the floor and refinishing the bottom of the door trim. Mr. Dahl's Xactimate estimate included a cost of \$3,587.00 to repaint the floor. There is no evidence of blistering or peeling of the paint, and I find his estimate to be high, given the nature and extent of the damage to the floor. I assess total damages to the interior of the basement to be \$3,000.00.

## **5. Claim for General Damages**

**74** The plaintiff cites the case of *Tucci v. City Concepts Construction Ltd.* [2000] O.J. No. 1723, 2 C.L.R. (3d) 291 ("*Tucci*"), in support of her claim that she is entitled to general damages.

**75** I agree that in a proper case general damages can now be awarded for breach of contract. However, I do not believe that this case justifies such an award.

**76** In *Tucci*, Cullity J. described the plaintiff's experience of living in the home that was being renovated by the defendant as "a horror story for his family". As a result of the defendant's negligence and delays, the plaintiff and his family were forced to live in what was described as a "construction site" for many months, during which time the main bathroom and the kitchen were unusable for significant periods of time. The plaintiff and his wife suffered constant stress and harassment as their complaints were ignored and the defendant continued to press them for payment of invoices. Mr. Tucci's health suffered as a result and he was forced to postpone his retirement.

**77** By contrast, Mr. Hampel completed his contract in a timely manner. There is evidence that he personally absorbed many of the additional costs that resulted from the high water table. The plaintiff lived in the premises for over two years after completion without any complaints, and even after the water issues arose, she continued to use the basement for such activities as doing her laundry.

**78** The plaintiff's claim for general damages is therefore denied.

### **Award for Contingencies**

**79** It is quite possible, in fact it is likely, that there will be unexpected costs that will arise during the course of the remedial work. Ms. Whitehead should not have to assume the risks of incurring such costs and as a result I am awarding her the sum of \$3,000.00 in anticipation of those costs. This represents about 15% of the overall award for damages.

### **Decision**

**80** The plaintiff entered into a contract with the defendant to have a basement/foundation constructed under her trailer. Slightly two years after completion of the contract she experienced water leaking into her basement. I have determined that the water leakage was caused by the failure of the defendant to follow standard industry practices. Also, some of the work was not in compliance with the *Building Code*. For the above stated reasons, I am awarding the plaintiff damages assessed as follows:

a) Cost of repairing the foundation	\$14,300.00
b) Cost of anchoring the trailer to the foundation	\$2,500.00
c) Cost of painting and refinishing the interior	\$3,000.00
d) Contingency costs	\$3,000.00
<b>Total damages, (incl. taxes and interest)</b>	<b>\$22,800.00</b>

**Costs**

**81** In the event the parties cannot agree on costs, they have 15 days following the release of this decision to deliver written submissions in relation thereto. Such submissions are to be no longer than 3 pages in length, exclusive of attachments.

E.J. KOKE J.