

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Schofield v. Hearth Energy and Technology*, 2017 NSSM 81

Claim No: SCK 464661

BETWEEN:

Kimberely Schofield and Kenneth Schofield

Claimant

-and –

Hearth Energy and Technology

Defendant

Kimberely and Kenneth Schofield – Self Represented.

Lindsay Cuvelier represented the Defendant, Hearth Energy and Technology

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) In 2010, Kimberely and Kenneth Schofield purchased a pool from the Defendants, Hearth Energy and Technology (“HEAT”), a partnership owned by Catherine and Donald Balch. According to the Claimants, they experienced problems with the pool almost from the day they acquired it. The problems relate to the way the pool sits on the ground, specifically it is uneven. Additionally, there were difficulties with fading parts which played a part in the parties’ dialogue but does not form part of the claim.

(2) When the deficiencies were noticed, the Defendants and their employees came on-site to make adjustments to the pool several times since it was purchased. The Claimants allege the Defendants were negligent or breached the sales and service contract. The Defendants argue the pool has worn out or that it was damaged during

the harsh winter of 2014-2015. The Claimants initially sought the cost of a new pool, namely, \$10,746.75. During the proceedings, they reduced their claim to an amount which they were provided to repair the pool, namely \$4254.

(3) For the reasons stated below, I have found for the Claimants, but for a reduced amount, \$850 plus costs of \$150.

Issues

(4) Were the Defendants negligent in the installation of the pool? Alternatively, were the Defendants liable in breach of contract?

The Evidence

(5) Kenneth Schofield testified that the pool was installed by the Defendant on July 15, 2010 at a cost of \$8497.55. A copy of the quote and contract was tendered into evidence. While installing a deck around the pool, Mr. Schofield noticed the pool was sinking into the ground and bending outwards. He contacted Mr. Balch who came to the house to fix the pool. Mr. Balch's solution was to push the pool on its side to put more crusher dust underneath the pool. Mr. Balch was joined by others who put water on the crusher dust and tamped the pad (i.e. pounded the crusher dust to create a more compact and secure base upon which to set the pool). Mr. Schofield observed the legs bulging into the pool.

(6) He testified that when he contacted Mr. Balch, he would come and make any adjustments, usually within two or three weeks of being called. Sometime later he noticed the covering on parts of the frame was starting to fade. For awhile, he was able to order new parts under warranty so he ordered other parts which also started to fade.

(7) In 2016, Mr. Schofield contacted the "Pool Doctor" a business name used by Jim Sproule, to observe the sinking of the pool which happened over time. Mr. Sproule told him "I feel your pain". The last time Mr. Balch attended to his place was in 2016 when he pried up the pool, put crusher dust underneath the offending wall and sprayed foam insulation underneath it.

(8) The pool was manufactured by a company in New Jersey called "Swim & Play Inc.". Apparently, a manufacturer's warranty is in effect, but a copy did not come with the pool. A current copy has since been tendered into evidence. Mr. Schofield also tendered an e-mail from the manufacturer who attributes the problems with the pool to poor installation. Mr. Schofield provided a series of photographs which show the legs were indeed uneven and parts of it were bulging up through the liner. He provided several quotes: \$10,746.75 which involves a complete reinstallation of a new pool and another to repair the pool for \$4254.

(9) Under cross-examination, Mr. Schofield testified that Mr. Balch returned to make repairs several times after installation. The first time Mr. Balch put crusher dust under the pool and tamped it. The second time, he added new water and also put more foam

underneath the pool. They (Balch and his employees) returned more often since to put spray foam and crusher dust under the pool. He acknowledges the defective parts which faded would have been covered by the 25 year warranty. He estimates approximately 15 or 17 of those parts began to discolour.

(10) He continued to call Mr. Balch to give him the opportunity to rectify the difficulties as Mr. Schofield did not feel it appropriate that he be made to pay for any changes or repairs. Kay Balch indicated to him that she thought the problem was caused by tree roots. He acknowledged the problem could be the result of ground leveling. He acknowledged receiving an offer of assistance from Mrs. Balch to deal with the manufacturer to get the process moving. Swim and Play offered 70% coverage as the pool was six years old in 2015. He agrees 2014-15 was a very harsh winter. He was not present to see if the crusher dust was actually underneath the pool.

(11) In redirect evidence, Mr. Schofield indicated that the pool was pushed to install it on ground that was not properly tamped.

(12) The Defendant sought to introduce the evidence of Tanya Andreino, a personal lines broker at MacLeod Lorway Insurance. Her testimony related to the underwriting of swimming pool coverage in a standard home insurance policy. She also testified to an inordinate number of pool related claims in the winter of 2014-15. She has not done business with the Schofields in any way. She does not process claims as these are handled by an adjuster. I did not find her evidence helpful in this context.

(13) James Robert Sproule operates a sole proprietorship under the business name "Pool Doctor". Mr. Sproule has been working on above ground pools for approximately 25 years and he estimates he has worked on up to 500 pools during his tenure. He attended to the Schofield's residence to have a look at the pool as the pool walls were bulging out and the liner was sinking between the buttresses. He did not observe any other damage to the pool. He observed where the pool was bearing on the track and where it was pried back into place. He described the problem as common for round or oval pools as they do not have inside buttresses to create stability.

(14) In his report he prepared for the court, he described the process of installing a pool. The process begins with a layer of class A gravel being laid after the sod has been removed from the lawn. Once the gravel is put in place, a 2 to 3 inch level of crusher dust is installed and tamped. A layer of 12" x 12" cement blocks are placed under every upright post. The buttresses are angled 5/8" toward the inside of the pool so that it will straighten to 90° once water is added. He described the installation of foam to be laid under the liner. A foam layer is necessary to smooth out the wrinkles in the liner.

(15) In his evidence, he acknowledged the Schofield pool uses 15.5" x 8" blocks and indicated they are fine under the track around the pool. It is not difficult to put blocks underneath the track. He has not heard anybody using spray foam in the installation of a pool. Typically, there is nothing to hold up the track but crusher dust. He indicated the proper method to address problems when the pool is not sitting properly is to drain the

pool of water, take steps to level the pad and reset the pool.

(16) In redirect evidence, Mr. Sproule acknowledged there are different ways of performing the job of installing the pool. He described oval pools as problematic. He described their frame construction as “made of pop cans”, meaning the frame itself is constructed of lightweight aluminum. He describes himself as very fussy with groundwork. He estimates it would cost approximately \$2500 to remedy the problem experienced by the Schofields, however, to be certain, he would need to see the ground beneath the pool.

(17) Catherine Lorraine Balch and her husband Donald are partners in Hearth Energy and Technology. Her role in that business is as store manager and showroom sales. The primary business of the Defendant is the installation and service of heating appliances, fireplaces and heat pumps. In the spring and summer seasons, they deal in above ground pools and pool chemistry. The business has been selling pools for approximately nine years. She confirmed she met the Schofields in the summer of 2010 at the Kentville Home Show. Initially, they indicated they wanted an in-ground pool. After discussions it became clear that an above ground pool was more in line with their plans and budget. A quote was delivered and the job was paid in full.

(18) After the pool was installed, HEAT received a call from the Schofields indicating the pads did not look right as several sunk into the ground. As a solution, the pool was raised and crusher dust was added.

(19) They received another call in the summer of 2011 indicating the pads were sinking causing the uprights to rise on the opposite end. Everything looked right except the pads were sinking. She indicated they removed the sides and levelled the ground. They placed almost three inches of crusher dust. There were other calls regarding the pool and a concern for damage. At that point, her husband made the decision to remove the pads and reinstall pool. In 2013, Mr. Schofield complained of discoloration of some of the parts and he was able to obtain replacements through the warranty.

(20) In summary, Ms. Balch described the chronology as follows:

- 2011-2013 - Don Balch attended the premises and firmed up the pads.

- 2013 - the only problem was the discoloration of the coverings.

- 2014 – they received calls from the Schofields regarding their concerns with the uprights.

(21) During their attempts to deal with the manufacturer and distributor, they were told their distributor, Lordchem Industries, was in receivership and could no longer be contacted. Instead she set up a connection between the Schofields and Swim & Play. She described the Schofields as very receptive to that idea.

(22) In the summer of 2016, they were contacted by Mr. Schofield who indicated he had contacted Swim & Play. Once again, the pads were sinking and the uprights were lifting. Mr. Schofield had not contacted the Defendants in several years. Mrs. Balch attributed some of the damage to winter damage. She referred them to their insurance company. She put them in touch with Andrew Kaspar at Swim & Play, who offered them 70% coverage excluding the liner. Mr. Kaspar attributed the problem to negligent installation.

(23) Under cross-examination, Ms. Balch acknowledged giving different answers and responses. She indicated to Mr. Schofield the problem may be caused by tree roots or the ground shifting. She was not present when Mr. Balch and his crew installed the pool. She was not on-site when any pools were installed for any customers.

(24) Donald Reagh Balch is the other partner of HEAT. He estimates having installed approximately 100 pools over the past nine years. There have been no complaints up to this point other than the Schofields.

(25) He recalls the installation at the Schofields' house. He described the process of installing the pool. He took an estimate of the lowest points in the yard and dug at that point. He installed crusher dust but he does not recall whether he tamped the pad. He indicated they typically use styrofoam to smooth the liner on the bottom. He described the installation as "nothing out of the ordinary". To remedy any additional problems, the crew emptied the water twice but did not fully drain the pool. When it was drained, they removed the water, added more crusher dust, tamped and relevelled the pool. He estimates he visited the Schofields' residence approximately twenty times or more. He does not recall ever experiencing issues such as this with any other customer. He typically finds oval or round pools have issues with shifting. He made some of the fixes by hand using shovels and wheelbarrows. He believes the straps that were coming loose the result of the settling of the ground beneath the pool. He observed pot holes beneath it.

(26) Under cross-examination he was asked why he did not take the pool down in the first year. Mr. Balch indicated he had not experienced that much settling the following year and did not feel it was required. He maintains the problem was settling underneath the pad which made the beams rise.

(27) Mr. Balch confirmed that, during installation, he pushed the frame of the pool with his truck to straighten it from leaning. He does not believe there was a requirement to lay crusher dust to the edge of the pool. He does not believe the pool was in the tracking properly. He acknowledged repairing the installation by placing blocks underneath the legs.

The Law

(28) The parties acknowledge the transaction was a consumer sale. Accordingly, the provisions of the *Consumer Protection Act* apply. Subsection 26 states:

Implied conditions or warranties

26(1) In this Section and Section 27, "consumer sale" means a contract of sale of goods or services including an agreement of sale as well as a sale and a conditional sale of goods made in the ordinary course of business to a purchaser for his consumption or use but does not include a sale

- (a) to a purchaser for resale;
- (b) to a purchaser whose purchase is in the course of carrying on business;
- (c) to an association of individuals, a partnership or a corporation; or
- (d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

(2) In this Section and Section 27, "purchaser" means a person who buys or agrees to buy goods or services.

(5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful and workmanlike manner.

(29) In addition, there are a number of implied warranties contained in that section, namely the goods fit the description, they are fit for their purpose, they are of merchantable quality and durable for a reasonable period of time. Having reviewed the evidence, I am satisfied the Claimants have not proven any defects with the pool itself. In essence, this is a claim regarding the quality of the installation of the pool.

Findings

(30) The installation of the above ground pool took place in July 2010. According to the evidence of Donald Balch, the Defendant had been in the business of installing pools for approximately one or two years. This finding is based on the Balch's evidence that they were nine years in the business at the time the hearing in September 2017. He also estimated installing approximately "100 pools give or take" to that date. Accordingly, Mr. Balch would have had far less experience in the middle of his second summer in the pool business. It is impossible to say with certainty how many pools he would have serviced. Based on this evidence, I find he serviced no more than 12-15 pools.

(31) I find the problems experienced by the Schofields were not the result of any manufacturing defect. In addition, I reject any suggestion the problem was created by tree roots. That hypothesis was advanced by Ms. Balch without actually seeing the pool or its installation.

(32) The difficulties the Schofields experienced are the result of how the pool sits on the ground. In hearing the evidence, I find a pool, any pool, will shift and sink over time requiring it to be leveled. In this case, the problems occurred from the outset. For several years, the Schofields attempted to live with the issues, but they could not. I find the following factors were significant contributors to the problem with this pool:

Leveling the pool with the truck - In his evidence, Mr. Balch testified to pushing the sides of the pool with his pickup truck to move it back into the frame, rather than draining the pool and releveling it. Mr. Sproule described the construction of the frame as "made of pop cans". As a result, the pool made of lightweight aluminum, had the force of an

operating pickup truck pushing on one side of it and the weight of water on the other. There is no evidence as to the weight of the truck or the volume of water in the pool. It is common knowledge that one litre of water has a mass of one kilogram. I find this decision contributed to the damage to the structure of the pool.

Adjusting the Pad - As noted above, Mr. Balch's experience in installing above ground pools was limited only to a season and a half. By contrast, Mr. Sproule's experience shows there was nothing apparently unusual about the Schofield property, at least as it appeared around the pool. I recognize Mr. Sproule did not have the opportunity to look under the pool to determine the problem. Mr. Sproule identified several approaches that he would have done differently. Based on the foregoing, I find Mr. Balch's remedial steps to be inadequate and also contributed to the problems.

(33) Based on the foregoing, I find the pool was not installed in a workmanlike manner. Essentially, the Balch's inexperience led them to make unfortunate choices. There has been no limitation defense pleaded. Accordingly, I am left to assess damages.

Damages

(34) A claim under the *Consumer Protection Act* is one in breach of contract. Accordingly, the object of the court in an action for breach of contract is to put the parties in the position as if the breach had not occurred.

(35) There are three quotes in evidence, one for a complete installation of a new pool, \$10,746.75 (which is no longer in consideration by virtue of the Claimants amending their claim), one to repair the damage, \$4254, and a third for \$2500 to relevel the pad. Other than Mr. Sproule, none of the parties providing the quotes gave evidence.

(36) The pool was purchased and installed seven years ago. The Schofields have used the pool during that time without difficulty. It sits unevenly which I attribute to a combination of damage caused by Mr. Schofield moving the lightweight pool frame with his truck as well as inadequate remediation efforts. However, it has been usable, and used, all of this time. In my view, had the breach not occurred, the pool might last longer.

(37) The Schofields paid \$8497.55 for the pool and installation. The pool carried a manufacturer's warranty of 25 years. Essentially, I find the actions of Mr. Balch a contributing factor in the reduced lifespan of the pool. In addition, I also find that periodic adjustment of the pad may be necessary in any event. Other factors such as weather, age and use also contribute to its depreciation in value. There is no evidence as to the value of depreciation the Balchs' actions would have caused. I am left to estimate the amount. I do not believe it significant. I apply a factor of 10% or \$850.00. I also award partial costs of \$150.

(38) Therefore I find the Defendant liable to the Claimant in the amount of \$1000.

(39) An order shall issue accordingly.

Dated at Halifax, NS,
on December 20, 2017;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant (s)
Copy: Defendant(s)