

CLAIM NO. SCCH 195939

DATE: 20040525

## **O R D E R**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

**Cite as: Hubley v. Wolseley Canada Inc., 2004 NSSM 18**

**BETWEEN:**

Name: KEVIN & CATHY HUBLEY

- CLAIMANT

Name: WOLSELEY CANADA INC. carrying on business as WESTBURNE  
PLUMBING AND HEATING

- DEFENDANT

**Revised Decision:** The text of the original decision has been revised to remove personal identifying information of the parties on August 8, 2007.

**DATES OF HEARING:** June 17, 2003, April 26 , 2004 and May 3, 2004

## **DECISION**

- [1] Kevin and Cathy Hubley purchased a wood and oil combination hot water furnace through the Defendant, Westburne Plumbing and Heating, manufactured by a firm named Benjamin, and installed in the summer and early fall of 2001. The design for the piping serving the furnace was done by the Defendant, Westburne. The furnace is not functioning properly. The Hubleys have sued Westburne seeking the cost of the furnace.
- [2] The furnace overheats when burning wood and then vents steam. The hot water piping serving the furnace was not originally installed in accordance with Westburne's design. Mr. Cal Patterson from Westburne inspected the furnace and suggested corrections to the piping. These changes were made in the summer of 2002. Mr. Soley, an estimator for a mechanical contracting firm who recommended the furnace, and Mr. Peckham, the plumber who did the work, both say the piping has been rectified in accordance with the design. The Hubleys have had the set up looked at by a representative of Benjamin and by a P. Eng. The furnace, it is said,

is working properly. The P. Eng., T.A. Robertson, says in his written report that the piping has, in essence, been done in accordance with the design. The problem persists. The Hubleys blame Westburne.

- [3] Everyone is at a loss to understand why the system is not working properly. The Hubleys have, understandably, lost patience. Westburne, however, had not as of the first date of hearing on June 17, 2003, seen the furnace since the changes to the piping to make it conform to the design were made. I adjourned the matter for them to be able to do so.
- [4] I did not expect that in adjourning the matter it would be almost another year before resolution. Westburne did inspect the furnace, but still they blame the installation and deny liability. Mr. and Mrs. Hubley, and their advisors, retain their position. My idea of an adjournment in hopes of a solution accomplished nothing. So, I now have to make a decision.
- [5] I am satisfied that the fault lies with Westburne. I am satisfied that the furnace has been installed properly and as directed by Westburne. I have the evidence of Mr. Robertson, Mr. Soley and Mr. Peckham to support the conclusion. I was satisfied in June 2003 and remain satisfied that Westburne has not given the Hubleys and their problem proper attention.
- [6] Mr. and Mrs. Hubley ordered a furnace in which they could burn wood. Wood is cheaper for them. Mr. Hubley also has a workshop that is heated by the furnace. This furnace has never been able to burn wood. It has failed in its fundamental purpose. The Hubleys want the furnace removed and their costs reimbursed in the total amount of \$8,107.40. I have decided that this remedy, although severe, is appropriate. The furnace is not what they purchased and after three years I do not think that there can be hope of rectification.

### **ORDER**

- [7] I order Wolseley Canada Inc. to pay to Kevin and Cathy Hubley the sum of \$8,107.40. The Hubleys are expected, of course, to facilitate the removal of the furnace for its return to Westburne.

Dated at Halifax, Nova Scotia

this 25<sup>th</sup> day of May, 2004.

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**J. WALTER THOMPSON, Q.C.**  
**ADJUDICATOR**

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