IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Force Construction Ltd. v. Campbell, 2008 NSSC 149

Date: 20080516
Docket: SH 213071
Registry: Halifax

Between:

Force Construction Ltd.

Plaintiffs

and

Tammy Campbell

Defendant

Judge: Justice Kevin Coady

Heard: March 3,4,5,6,7 & April 1, 2, 2008, Halifax, Nova Scotia

Decision: May 16, 2008

Counsel: Cory Withrow, rep plaintiff
Allen Fownes, rep defendant

By the Court:

INTRODUCTION:

[1] This case is about the construction of a new house on a lot of land adjacent to Porters Lake, Halifax Regional Municipality. In April, 2003 Ms. Campbell purchased a building lot. She subsequently entered into an agreement with Force Construction Limited (Force) to build a home on that lot. Plans were prepared and costs were finalized. Force started the job in May, 2003 and Ms. Campbell moved in on August 7, 2003.

[2] The parties were on good terms at the start of construction. Their relationship had dissolved completely by the closing date. Ms. Campbell complained that Forces work was sub-standard and upon taking occupancy raised a considerable number of deficiencies. Initially there was an effort by Force to correct these deficiencies but as a result of other complaints and delay Force was unable to attend at the site to work on the deficiency items. In 2004 Ms. Campbell hired Birkshire Developments Inc. to correct the deficiencies.

[3] Throughout the summer and fall of 2003 serious problems arose in relation to the septic system, the heating system and the drainage system. In 2006 concerns

arose respecting the insulation barrier on the exterior walls. Force installed an alternative septic system in September, 2003. Force was unable to respond to the remaining problems as they had lost access to the property. Ultimately Ms. Campbell hired Birkshire Developments Inc. and Roode & Rose Plumbing Specialists to correct these problems.

[4] The building contract called for full payment ($90,421) before Ms. Campbell took occupancy. However, as a result of all the upset and uncertainty during the summer of 2003, Force waived this term of the agreement. Ms. Campbell has paid nothing under the terms of the contract. She has occupied the home since August 7, 2003. Force now seeks payment under the terms of the contract. Ms. Campbell seeks damages that she wants set off against her obligations to Force.

[5] On November 4, 2003 Force filed a Claim of Lien for registration pursuant to the **Mechanics Lien Act** claiming a payment of $91,859.28. On December 23, 2003 Force filed a certificate of Lis Pendens confirming the commencement of this action.

[6] Force's Statement of Claim alleged that they had built the home according to the contract and were therefore entitled to $91,859.28 as of September 24, 2003.

[7] Ms. Campbell filed a defence and counterclaim on March 17, 2004. She alleged that she had to pay other contractors to correct the many deficiencies left by Force . She claims that Force is in breach of the contract by producing a home that does not meet building standards. She blames Force for costs associated with the septic system, the drainage systems and other problems that arose during and after construction. She requests at paragraph 12 that "the defendant pleads set off in amounts that may equal or exceed the remainder of the claim of the plaintiff, in which case the claim of the plaintiff against the defendant ought to be dismissed with costs of this action to the defendant."

[8] The defendant's counterclaim seeks the following additional relief from Force:

- General damages for loss of convenience through the winter of 2003-2004 including extra heating costs, toiletries, storage charges, etc.

- General damages for diminution or loss of market value of the subject home.
- Damages equal to the future cost of operating the septic and heating systems.
- Damages for lost professional income.
- Damages for loss of reputation and professional income.
- Special damages for the cost of repairs, remediation and supervision where they exceed the set off.
- Reimbursement of higher interest costs.
- Costs.

[9] On the first day of this trial Ms. Campbell successfully applied to amend the counterclaim to include claims for punitive and/or exemplary damages and/or aggravated damages.

LACK OF EXPERT EVIDENCE:

[10] The value of the parties building contract was $78,626.95 plus HST of $11,794.05 for a total price of $90,421. The deposit is stated to be $1.00. Force's

principal, Mr. Kelvin Bellefontaine, testified that he received $39,000 in cash paid outside of the contract. Ms. Campbell testified that the figure was $59,000. Force has not received any payments pursuant to the contract.

[11] Ms. Campbell argues that the construction of the house was not performed in a "good and workmanlike manner" as required by the building contract. It is her position that the cost of remedying Force's work, plus her damages, should be set off against anything, if at all, owed to Force pursuant to the contract.

[12] It was therefore incumbent on Ms. Campbell to establish that the work completed was sub-standard and/or in breach of building codes and/or in breach of provincial and municipal standards. Expert evidence is critical to that task. Ms. Campbell did not qualify any of her witnesses as experts and that has had a material effect on her case. A review of similar cases indicate that experts are of great value in assessing the quality of construction. There is no question that a number of Ms. Campbell's witnesses could have easily been qualified as experts had the pre-trial ground work been done.

[13] This situation placed the court in a difficult position. Force, understandably, took the position that opinion evidence should not be admitted. Ms. Campbell took the position the deficiencies in construction were self evident and opinions were not required to prove same. The court was required to strike a balance that allowed Ms. Campbell to pursue her case and gave Force the evidentiary protection they are entitled to receive pursuant to **Civil Procedure Rule 31.08.**

[14] The court followed the approach approved in *M & P Logging Ltd. v. Carrier Lumber Ltd.* 2001 BCCA 125. Rowles J.A. stated at paragraphs 40-43:

> 40 In considering the question of whether the evidence of the mechanics should have been viewed as expert evidence, I think it is helpful to refer to the decision in R. v. Abbey, [1982] 2 S.C.R. 24 at 42, in which Dickson J., as he then was, observed:
>
> > Witnesses testify as to facts. The judge or jury draws inferences from the facts. In the law of evidence 'opinion' means any inference from observed fact, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them" (Cross on Evidence, [5th ed. (1979)], at p.442). Where it is possible to separate fact from inference the witness may only testify as to fact. It is not always possible, however, to do so and the law makes allowances for these borderline cases by permitting witnesses to state their opinion with regard to matters not calling for special knowledge whenever it would be virtually impossible for them to separate their inferences from the facts on which those inferences are based.

41 The difficulty in distinguishing fact from inference is further discussed in Sopinka, Lederman & Bryant, The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at 524:

> The opinion evidence rule was based upon the assumption that there is a clear demarcation between inferences and the facts which give rise to them. Under the rule, witnesses can testify only to the latter. Its application to particular facts serves to point out the artificiality of the distinction. For example, what if a witness who was a passenger in X's automobile testifies that X was driving at approximately 100 kilometres per hour? Assuming that the witness did not observe the speedometer, is the witness' statement one of fact of which he or she is permitted to testify, or is it an inference drawn from perceived facts?

42 In the present case, the trial judge admitted the evidence of two mechanics, Mr. Sam Cork and Mr. Dave Pitkethly. These witnesses were not called as expert witnesses to give opinion evidence; rather, they were called to describe what they had observed and done. As witnesses testifying to facts, the trial judge was entitled to hear and rely on their evidence.

43 An examination of the transcript shows that the answers to questions asked of these witnesses in examination-in-chief did not unacceptably enter the realm of expert opinion evidence. Both Mr. Cork and Mr. Pitkethly related how and why they repaired the D-8 Cat. Furthermore, counsel for the appellants did not object during the examination in chief, despite the trial judge's emphasis on counsel's right to object if the witness strayed into opinion evidence.

[15] In this trial Force's counsel did object whenever the defendants witnesses started to venture into pure opinion. It is fair comment that while the court sustained those objections, the court allowed the witnesses some latitude. Nevertheless, Ms. Campbell's case was hampered by her failure to qualify her

witnesses. One example is the “levelwall insulation” issue. It was not possible for the court to determine if Force’s application of the insulation was performed in a good and workmanlike manner and in compliance with building codes and product specifications.

MECHANICS LIEN ACT:

[16] This case was commenced pursuant to the **Mechanics Lien Act**. The claim of lien was registered on November 4, 2003. The Lis Pendens, Originating Notice and Statement of Claim were filed and registered on December 23, 2003. In order for this lien to be valid I would have to find Force completed its work no later than September 24, 2003.

[17] In Force's Statement of Claim, at paragraph 4, it is stated that the date of the last performance of services/or delivery of materials was September 24, 2003. In Ms. Campbell's Statement of Defence at paragraph 4 the defendant states "as to the Statement of Claim therein, the defendant admits paragraph 1, 2, 4 and 5".

[18] The evidence at trial does not support the September 24th date. Mr. Bellefontaine stated that at the time of the second deficiency list (September 17, 2003) he was not wanted around the site. Ms. Campbell testified that Force left the job in the lasts days of August, 2003 after a major blow-up. Further, she stated that she did not let Force on the property when the second deficiency list (September 17, 2003) was produced.

[19] Ms. Campbell did not address this issue in her pre-trial memorandum or in closing arguments. It may very well be that defendants counsel was aware of provisions of materials or services that did not emerge in the trial evidence. It is not my role to interfere with an agreement between counsel. I find that the lien is valid.

BREACH OF CONTRACT:

[20] There are three clauses in the building contract where breach comes into play:

> 3. The Owner agrees to pay to the Contractor the contract price of $78,626.95 + HST of $11,794.05 = $90,421.00 payable as follows:
>
> a. by a deposit of $1.00,
>
> b. by an advance of balance of funds upon final completion;
>
> The contractor agrees to construct a single family dwelling (hereinafter called the “dwelling”), on the lands in a good and workmanlike manner and according to the terms and conditions attached hereto and marked as Schedule “A”.
>
> 7. The contractor shall build the house on the lot and carry out all work in a good and workmanlike manner in accordance with:
>
> (a) the terms and conditions contained herein;
>
> (b) the plans, specifications, revisions and amendments attached hereto;
>
> (c) the National Building Code of Canada;

(d) all relevant subdivision requirements, restrictive covenants and building restrictions;

(e) Provincial and other applicable building by-laws and regulations.

[21] It is factually settled that Ms. Campbell did not pay Force pursuant to clause three. She advances the position that the home was not completed in a good and workmanlike manner and therefore she had a good reason not to pay. In other words she accuses Force of breaching the contract first.

[22] Force takes the position that the home was completed as agreed subject to deficiencies. Force argues that Ms. Campbells failure to pay was a breach. Force further argues that they were not given the opportunity to correct the deficiencies. Clause two states as follows:

> 2. The Contractor and Owner(s) agree that they will complete, on or before the day of completion a deficiency list. The parties shall allocate to each of those items an amount to be held back from the proceeds of sale until the particular item is completed. The parties agree that the holdback amount shall be held by the Contractor's Lawyer.

[23] I find that Ms. Campbell was in breach of the contract by failing to pay Force instead of adhering to clause 2.

[24] Ms. Campbell relies on clause 13 in support of her actions.

> 13. In the event the Contractor:
>
> (a) fails to complete the work within the period provided hereunder, reasonable delay excepted due to circumstances beyond the control of the Contractor; or
>
> (b) abandons the project;
>
> (c) becomes a bankrupt or insolvent;
>
> then the Owner's shall be at liberty to terminate this contract and to engage such other persons as may be necessary to complete the performance of the contract as provided for hereunder and the Owner(s) may deduct the costs of such other person from any monies due to the Contractor hereunder.

[25] There is absolutely no evidence that (a), (b) or (c) occurred. I do not accept Ms. Campbell's argument that Force abandoned. Force left when it was clear that Ms. Campbell would not close the transaction or allow them to complete the deficiencies.

[26] Ms. Campbell's argument that Force's failure to complete the home in a good and workmanlike manner was a basis for non-payment also fails. I have no evidence that establishes this assertion. I accept that there were deficiencies at the time closing was refused. Many of the other issues in this trial arose much later. Ms. Campbell had no basis to refuse to close. The contract required her to close, agree to a deficiency holdback and then take action to recover for subsequently discovered defects.

[27] In Goldsmith on Building Contracts (Thomson Carswell - 4th Edition) at page 5-5 it is stated:

> "A contractor is not, in the absence of some express provision in the contract, entitled to payment until substantial completion of the work. On completion, however, and on the proper fulfilment of any conditions precedent provided for in the contract, the owner must pay the agreed price. In the case of defects in the work, he may have a right to set up a counter-claim for damages to remedy the defective work, but he cannot escape liability for payment of the price agreed upon. Whether the owner is entitled to set off a counterclaim against his obligation to pay the contractor will depend on whether the two claims are inextricably entwined and it would be unfair to permit the contractor to be paid in the absence of a reduction to allow for the counterclaim."

[28] I do not find this to be one of those cases where it would be unfair to permit the contractor to be paid at the time of closing, that being August 7, 2003.

[29] The following cite from Goldsmith appears at page 6-5:

> "An owner is entitled to terminate a contract if it is clear that either before the commencement of the work, or during the course of it, the contractor is not in substance able or willing to perform the work. Frequently building contracts contain an express clause entitling the owner to take the work out of the contractor's hands, and forfeit the contract in certain circumstances. Sometimes the certificate of the architect or engineer, certifying the contractor's inability or unwillingness to complete, is required as a condition precedent to such right. An owner exercising such a right of forfeiture must comply strictly with the terms of the contract, or he may himself breach the contract by preventing the contractor from completing. Mere bad or defective work will not, in general, entitle an owner to terminate a contract, nor will a temporary slowdown in the progress of the work by itself but the contractor's work may be so bad or so defective as to amount, in substance, to a failure or refusal to carry out the contract work, and thus amount to repudiation."

[30] The defects apparent at the time of closing do not qualify as a "refusal to carry out the contract work."

[31] I am of the view that Ms. Campbell's breach only impacts on deficiencies.

DEFICIENCIES:

[32] It is common for there to be deficiencies in the construction of any building. These deficiencies are usually minor in nature and can be easily corrected. In the industry there are well established procedures to deal with deficiencies. The home owner agrees to close the sale when the home is complete and all permits are in place. A deficiency list is prepared and agreed to by the parties. Values are attributed to the deficiencies and that amount is held back by the owner/purchasers lawyer. The builder is entitled to return to correct the deficiencies to the owners satisfaction. Once complete the holdback is released to the builder and the transaction is complete.

[33] The building contract addresses this practice:

> 2. The Contractor and Owner(s) agree that they will complete, on or before the day of completion a deficiency list. The parties shall allocate to each of those items an amount to be held back from the proceeds of sale until the particular item is completed. The parties agree that the holdback amount shall be held by the Contractor's Lawyer.

[34] The building contract further stipulates as follows:

> "It is clearly understood and agreed that the owner will not take possession of the home, nor move any personal belongings into the property, until such time as the contract price has been paid in full to the contractor, and keys have been delivered by the contractor to the owner."

[35] The contractual closing date was to be July 31, 2003 but was delayed until August 7, 2003. While there were issues of completeness that caused the delay, I find that the parties agreed to this short extension and I attribute no legal significance to this delay.

[36] Ms. Campbell moved into the house on August 7, 2003 without paying the contract price. Clearly by that time relations were becoming strained. Mr. Bellefontaine testified that he allowed Ms. Campbell to occupy the house without payment because she had nowhere else to go and it seemed like the right thing to do in the circumstances.

[37] Ms. Campbell testified that there were performance issues throughout the summer of 2003. She stated that in late July she could see that the home would not be ready in a week. She complained that Force was disorganized when it came to coordinating the different trades and suppliers and that the workers on sight were young and unskilled. She testified that on closing day the scramble was on as

much was still to be done. Ms. Campbell moved in without paying because Force let her and because of her concerns about the septic system, the occupancy permit, and the overall status of the project. No deficiency list was prepared on August 7, 2003.

[38] On August 21, 2003 Ms. Campbell prepared a deficiency list and forwarded it to Force. That list was partially addressed by Force which indicates that the parties were still able to communicate at that time. The following list represents the items that were resolved:

- Shelving: linen closet needs 1 more shelf (completed on August 29th)
- Screen has hole in it - kitchen screen (completed August 29th)
- Patio Door Screen: door is warped, also has a hole in the screen (completed August 29th)
- Windows: 3 handles missing (completed August 29th)
- Bathroom: cabinet at end of tub (completed)
- Laundry Room: drain to outside (completed September 1, 2003)
- Laundry Room: connect heating (final September 18, 2003)
- Attic finish hatch doors (completed August 29, 2003)

- Attic secure insulation (completed August 29, 2003)
- Exterior: clean outside of house (completed in August, 2003)
- Exterior: clean up garbage/wood from garage outside (done August 2003)
- Heating: complete “time of use” heating system (done)
- Return extension cord (done)
- Paint closet door in entrance (likely a touch up)
- Touch ups: entry wall, entry overhead, edge of master closet door and shelves, shelf bracket in bedroom #2 (completed)

[39] The information contained in parenthesis represents Mr. Bellefontaine’s oral and written responses to these items. Ms. Campbell did not challenge Mr. Bellefontaines evidence on these points.

[40] The following represents the issues that were not resolved:

- Trim missing: side of tub (had to wait for ceramics to be installed)
- Blocks for under hot water tanks should be plastic

- Electrical: Floor plug in living room (extra to contract - not our responsibility)
- Electrical: hockey puck lighting under cabinets (extra to contract - not our responsibility)
- Exterior: pour cement for lamp posts (extra to contract)
- Exterior: connect/install lamp posts (extra to contract)
- Roof shingle at power stack needs to be [?] (worked on, not to clients satisfaction)
- Tar blotches on shingles (work on but not to clients satisfaction)
- Shutters on house (done except for 1 on order)
- Complete driveway/parking area (will be done when septic in)
- Drain pond in trees (will try to fix problem)
- HRM requirements - backfilling to be complete (when septic is completed)
- 16" ceramic around tub (this problem occurred because client did not want ceramic around tub)

[41] The septic system appears on this first deficiency list with the response of Force "waiting for approval - received September 19, 2003". This is not a true deficiency and will be addressed elsewhere in this decision.

[42] Further it is clear that a number of these items are extras.

[43] Ms. Campbell prepared a second deficiency list dated September 17, 2003. She testified that as she lived in the house she noticed further items and added them to her first deficiency list. It starts out with "I have contacted another builder and the additions to the deficiency list are as a result of having an expert opinion on my project." This second list includes the unresolved items on the first list as well as a number of new minor deficiencies. In addition Ms. Campbell expresses comments such as "who signed off on inspections of plumbing, electrical, framing, etc... during the construction?" and "who is the original plumber?" and "I am concerned about the water pipes in the outside wall of the kitchen leading to the sink, may require further investigation." She also cited many sub trades as unpaid and set forth monthly claims for lost wages, increased interest costs, increased heating costs and legal fees.

[44] Mr. Bellefontaine testified that at the time of this second list he was not wanted around the site and that has not been refuted by Ms. Campbell. This is further confirmed by the first item which states “Kelvin still has keys to my house, I want them out of his possession.”

[45] Ms. Campbell states at the end of the second deficiency list “I’m sure there will be other issues/concerns but this list is a place to start. Please let me know as soon as possible what we can do.” Notwithstanding this comment, I am satisfied that Force was never given an opportunity to correct these items. Further, I am satisfied that Ms. Campbell had no intention to allow Force that opportunity and was intent on having her “expert” attend to these deficiencies.

[46] On October 14, 2003 Ms. Campbell prepared a third deficiency list. It included many items from the second list as well as more minor items. This list revisited her “general damages” and the unpaid sub contractors. I accept Mr. Bellefontaine’s evidence that at that time he had no opportunity to attend at the property, address the deficiencies or get the transaction closed. In Force’s response to all items dated October 21, 2003, Mr. Bellefontaine concluded by saying “lets get this house closed”. I accept his evidence that if the house closed he would have

all deficiencies and remediations completed by a responsible person. I am satisfied that Ms. Campbell had no intention of allowing Force near her property at the time this list was prepared. I am satisfied that she had settled on having someone else do the work and deducting the cost from the contract price.

[47] In 2004 Mike Young of Birkshire Developments Inc. was hired by Ms. Campbell to address the deficiencies. I am satisfied that he corrected almost all of the true deficiencies on the 3 lists. In addition he corrected items which should have been on the list. This include the overpour in the garage, the cracked ceiling and the sealing of insulation. All repairs were to the satisfaction of Ms. Campbell. On October 15, 2004 he tendered an account for $17,168.37 and it was paid by Ms. Campbell. She seeks to have this amount set off against any money owing to Force.

[48] Ms. Campbell argues support for this decision is found in paragraph 13 of the building contract which states:

> 13. In the event the Contractor:

> (a) fails to complete the work within the period hereunder, reasonable delay excepted due to circumstances beyond the control of the Contractor; or
>
> (b) abandons the project;
>
> (c) becomes a bankrupt or insolvent;
>
> then the Owner's shall be at liberty to terminate this contract and to engage such other persons as may be necessary to complete the performance of the contract as provided for hereunder and the Owner(s) may deduct the costs of such other person from any monies due to the Contractor hereunder.

[49] I have decided elsewhere in this decision that Ms. Campbell breached the building contract by not paying Force subject to a deficiency holdback. It was, therefore, not open to her to proceed on paragraph 13 instead of paragraph 2 (deficiencies). I, therefore, deny her set off in the amount of $17,168.37

[50] I accept that the account of Birkshire Developments Inc. included work on items which are clearly "extras". The account was not itemized such as to allocate values to these items. In the overall picture, these items are not of any great significance.

THE SEPTIC SYSTEM:

[51] The problems related to the design and installation of the septic system became a "lightening rod" for the parties. No other issue caused as much grief for the parties. Force was plagued by regulatory and installation set backs throughout the summer of 2003. Ms. Campbell was distraught at having to watch the circus that was her septic system on her beautiful lakeside retirement home lot.

[52] In April, 2003 Ms. Campbell purchased the lot from Silas Developments Limited. The lot came with sub-division approval which included the approval of an on site septic system. The lot had not been cleared and no driveway had been installed and it was a very wet lot. Ms. Campbell's contract with Force required the following:

> 15. The Contractor shall install a septic area bed system in accordance with Nova Scotia Department of Health and Provincial and Municipal standards and will provide to the owner a copy of the final septic approval by the appropriate municipal authority.

[53] The installation envisaged was the approved "area bed system" that came with the purchase of the lot.

[54] In 2003 Janice Gammie was an employee of the Provincial Environment Department. It was her responsibility to regulate the installation of septic systems in the eastern shore area of Halifax Regional Municipality. I accept Ms. Gammie's evidence as the best accounting of the circumstances associated with the septic system issue.

[55] Ms. Gammie received an application for an area bed system on January 27, 2003. That application was submitted by Paul Beaver on behalf of Silas Developments Limited. Ms. Gammie had concerns about the soil, the size of the lot and the beds proximity to the lake. She met Paul Beaver on the site where they dug a test pit and measured separation distances. On February 12, 2003 she issued and approval for a 25 meter by 5 meter area bed system with an elevation of 1-2 feet above original ground.

[56] On May 23, 2003 Ms. Gammie received a complaint about the lot. She attended at the lot and found the driveway installed and the house foundation under construction. She determined that the driveway was the only place on the lot where the approved system could fit. She also determined that removing the driveway would not be a solution as the soil had been compacted. On May 30,

2003 she revoked the area bed approval "due to the fact that the site conditions at present do not allow for the selected on-site sewage disposal system to be installed on the property."

[57] On July 28, 2003 Glen Buchanan P. Eng. submitted an application on behalf of Force /Ms. Campbell for a peat system. Ms. Gammie testified that she was of a view that a peat system was the only system that could be installed on Ms. Campbell's property. She explained that peat systems are used on undersized lots or where there is a lack of a suitable area to install a conventional system. On August 6, 2003 she attended at the site and saw that the three peat modules were installed prior to approval. Nonetheless she issued an approval for the Buchanan peat system on August 7, 2003.

[58] In the following days Ms. Gammie attended at the site and determined that the excavations for the peat modules had been over excavated and the modules set too low to comply with the August 7, 2003 approval. Additionally she determined that stone had been used under the modules when the approval called for sand. She directed Mr. Buchanan to submit a further application that addressed these concerns. Force then dug up the modules, inserted sand and reinstalled the

modules. On September 18, 2003 Mr. Buchanan's revised application was approved and a permit issued.

[59] Ms. Gammie testified that the location of the driveway resulted in the revocation of the original area bed system approval. She stipulated that this conclusion is subject to "all other factors remaining the same".

[60] Force does not contradict the version of events advanced by Ms. Gammie. The principal, Kelvin Bellefontaine, testified that when he attempted to install the area bed system, the area filled up with water. He stated that there was no other place on the lot for it to go. Mr. Bellefontaine testified that Ms. Campbell made the decision to move the driveway and that Force incurred extra costs for designing and installing the peat system. Force seeks to recover $14,487.56 as an extra under the contract.

[61] Ms. Campbell testified that early on she met with Mr. Bellefontaine at the site to discuss the septic system. She stated that she showed him the approval for the area bed system and inquired whether moving the driveway would create a problem for the approved septic system. She testified that she received assurances

that it would not be a problem. Ms. Campbell also states that there were no discussions of an extra charge for the septic and that she considers all costs covered by the contract price.

[62] Ms. Campbell testified that she had no idea what a peat system was until the tanks and materials arrived at her lot. She said that she wanted a basic proven system and that she had no idea what it would look like. In fact, she claims that it was installed before she understood how it would work.

[63] Ms. Campbell raises a number of concerns related to her present septic system. She is “horrified” by the size and height of it. She complains that many of her tree’s came down when large machines were on site to dig up the peat modules when they were improperly installed. She describes “being in tears” watching the excavator remove the modules and then dropping them because the weight was too much. She seeks the cost of cleaning up after final installation, the cost of reforestation and the increased costs of annually maintaining the peat system.

[64] Force has charged Ms. Campbell for the design, purchase and installation of the peat system as an extra in the amount of $14,487.56. While this may represent

their real costs, they were prepared to accept $6,800 to close. Ms. Campbell argues that a septic system was part of the building contract and there was never a discussion about an added cost.

[65] Force was committed to install the area bed system that Ms. Campbell obtained with the purchase of the lot. Force went through the exercise of installing it as required. However, there was too much water in the proscribed area and there were no alternative locations on the lot. I find that Force's obligations ended there and anything after that is for the account of Ms. Campbell.

[66] Ms. Campbell attempts to deflect this reality by blaming Force for the relocation of the driveway. It is important to note that she was the only person with an interest in moving this driveway. If this relocation did impact on the installation of the area bed system, I find that is the result of her choice. However, I have some real doubt that the driveway relocation was the cause of the septic problem. Ms. Gammie acknowledged that the area bed system approval in 2003 was allowed notwithstanding concerns about soil, lot size and proximity to the lake.

[67] I will award Force $6,800 as an extra to cover the cost of installing the peat system. This was the amount that Force was prepared to accept in 2003 given all the circumstances surrounding the installation. I am satisfied that Force should never have undertaken installation of the peat system as they did not possess the proper skills.

LAUNDRY ROOM DRAIN:

[68] The plans for Ms. Campbell's house called for a drainage system in the laundry room. It was not done and Force acknowledges that they "missed it" during construction.

[69] This omission was detected by Ms. Campbell after occupancy as she was experiencing flooding in that area of the home. In early September, 2003 Force attended to correct the problem. They jackhammered a hole in the floor and through the foundation. Mr. Bellefontaine testified that he then put a drain pipe down through the floor, out through the foundation to a rock bed 50/60 feet away. Mr. Bellefontaine acknowledged that when he was drilling the hole in the laundry room, he broke a heating pipe in the infloor system.

[70] Ms. Campbell became concerned that Force's "repair job" was not providing proper drainage. In 2005 she requested Birkshire Developments Inc. to investigate. Birskshire's principal, Mike Young, testified that he made a hole in the pipe just outside of the foundation. He then applied water into the pipe leading to the rock drainage bed. He stated that "in 3 minutes water was coming back at me" telling him that there was no effective drainage out from the house.

[71] Upon further inspection Mr. Young found that the pipe through the floor was not connected to the pipe through the foundation. An examination revealed that the two pipes were not glued, were not lined up and were 6 inches apart. This resulted in the drainage water flowing under the concrete slab upon which the house was built.

[72] Birkshire corrected the drainage problem by digging a new ditch and running perforated piping to a proper drainage bed. All connections around the laundry room floor and the foundation were made secure. Birkshire issued an invoice for this work on May 12, 2005 in the amount of $1,458.24. It was paid by Ms. Campbell. She takes the position that this drain system was included in the

contract price and, as such, she is entitled to set off this account against any monies owing to Force.

[73] I make the following findings of fact in relation to the laundry room drain issue:

- Force forgot to attend to this item during construction when it could have been easily installed.
- Force's "repair job" was defective and thrown together in an effort to placate Ms. Campbell.
- Birkshire's repairs were all warranted and were all carried out in a good and workmanlike manner.
- The laundry room drainage system was included in the building contract/plans and were included in the contract price.

[74] Consequently, Ms. Campbell is entitled to set off Birkshire's account in the amount of $1,458.24.

WATER PROBLEMS AROUND HOUSE:

[75] The totality of the evidence establishes that this was a very wet lot. Ms. Gammie stated that there was only one location where a test pit could be dug that did not fill up with water. Mr. Bellefontaine testified that when they attempted to install the area bed septic system, the excavation immediately filled with water. It is not surprising that many aspects of this project were adversely affected by this unusual saturation. In fact, Mr. Bellefontaine in consultation with Ms. Campbell, moved the location of the house 10-15 feet closer to the lake because of the very wet locale.

[76] Mr. Young testified that when he was on the property he noted that there was a great deal of water around the foundation. He dug down three feet and found the water "bubbling" suggesting a high rate of inflow. He discovered an existing pipe that could not drain because it was not vented anywhere. Mr. Young installed drainage piping, dug a trench and ran the piping to a small brook on the property.

[77] This remedial work was carried out in 2004 by Birkshire Developments Inc. It formed part of the work carried out correcting deficiencies and appears on their deficiency list as "due to water around the house, (eight inches from surface) the

foundation on the west side of the house was dug up to relieve water levels. Installed pipe and stone leading away from the house to provide drainage." The cost of these repairs were included in Birkshire's October 15, 2004 account for correcting deficiencies in the amount of $17,168.37.

[78] While I have ordered that Ms. Campbell is not entitled to set off Birkshire's account for deficiencies, I do feel that Force is responsible for these drainage problems. It is certainly something that was anticipated in the building contract. The fact that Birkshire discovered piping indicates to me that Force attempted to address this problem but did so ineffectively. I will therefore award Ms. Campbell a set off in the amount of $1500.00

EXTERIOR WALL INSULATION:

[79] On September 13, 2007 Birkshire Development Inc. forwarded an invoice to Ms. Campbell in the amount of $6,962.30. That invoice related to the following work:

> Remove vinyl siding, apply aluminum adhesive and aluminum foil tape to seal rain screen. Applied blueskin to seal windows and

> doors. Installed flashing above all doors and windows. Tightened up the envelope. Re-installed vinyl siding. Labour 115.50 man hours. Material

[80] Obviously Ms. Campbell had concerns about the installation of the exterior insulation (levelwall) and the effect that it might have on her enjoyment of the home. She commissioned this work and paid the invoice. She seeks set off as against monies owing to Force under the building contract.

[81] Force takes issue with the necessity of this work. It contends that Pinto Engineering Limited carried out an insulation inspection that met with the approval of the municipality.

[82] Force relies also on the municipalities issuance of a final occupancy permit on March 24, 2006. That permit stated as follows:

> "The issuance of this permit does not imply compliance with all municipal bylaws or the provincial building code. It does confirm that all the appropriate reviews and inspections have been conducted and there were no apparent violations at the time of the issuance."

[83] The significance of the final occupancy permit must be viewed in light of the revocation of an occupancy permit issued October 6, 2003. The February 16, 2004 letter of revocation from the municipality stated as follows:

> "As you are aware, this project was under a Stop Work Order for an extended period of time (June 2, 2003 to August 7, 2003), pending reinstatement of the on-site septic approval. Work proceeded unlawfully during that time and a great deal of work was unable to be inspected by HRM Building Officials.
>
> Once the Permit was "reinstated", an Engineer's report was requested to confirm that the work undertaken during the Stop Work Order was in compliance with the Nova Scotia Building Code Act and Regulations. On August 12, 2003, you submitted a report from Pinto Engineering Limited. This report was accepted as the required confirmation of compliance and HRM Inspections resumed.
>
> It has subsequently come to HRM's attention that Mr. Milad Sidhom, who signed the "report", is not an Engineer, nor is he employed with Pinto Engineering Limited. It is on these grounds of "mistaken or false information" that the Occupancy Permit has been revoked."

[84] Obviously the municipality accepted Pinto Engineering Limited's report as a basis to issue the final occupancy permit.

[85] Birkshire's Mike Young testified that Ms. Campbell invited him back in 2007 to explore the exterior walls under the siding. He stated that he understood

her to be "suspicious". He removed the siding from the entire home one side at a time. Mr. Young testified to discovering the following:

- Windows not properly installed in that they were not caulked, flashing not installed and there was no blue skin sealer around the frames.
- The pieces of levelwall applied were irregular in size and shape and the finish job looked like it was made from scraps.
- There were areas where the above referenced pieces were not taped allowing many breaks in the seal.
- There were holes in the levelwall that limited its sealing properties.

[86] This is a critical area where expert opinion evidence would have been of great assistance to the court. Force takes the position that the levelwall was properly installed. Ms. Campbell takes the position that it was defectively installed. All that I can conclude is that two contractors have different views on proper application. I do not have evidence that Force's application was sub-standard or in breach of code or contrary to product specifications. I can agree that

the “before” photos are not as appealing as the “after” photos. However, this insulation is to be covered by siding.

[87] I find that Ms. Campbell has not established that the “levelwall” re-installation was necessary. She has not established that the installation by Force was substandard or defective. Ms. Campbell lived in the home for four years before this work was carried out but offered no evidence of effect. She was motivated by suspicion. Consequently, there will be no set off as against monies owing to Force under the building contract.

IN FLOOR HEATING SYSTEM:

[88] The contract and the building plans called for an in-floor radiant heating system. This was to be a water system supported by a hot water boiler. Force obtained the design and materials from Wolsey Canada and did the installation at Ms. Campbell’s home.

[89] This system has become quite popular in recent years as it provides a more comfortable and consistent environment than conventional radiators. It involves

embedding a pattern of water lines in the concrete floor. The boiler heats water and the water is passed through the pipes in the concrete. The pipes heat the concrete slab which in turn radiates heat. The system allows for the slow heating of the air in the room from the floor up.

[90] It is essential that proper calculations be carried out in order to ensure effectiveness in the premises as a whole or in individual areas. The size and pattern of the embedded pipes, as well as hot water capacity, are critical to the suitability of the system. Installation of such a system requires knowledge and training.

[91] Ms. Campbell's plans called for a "time of use" system. Put simply this is an arrangement where the home owner downloads and stores electricity during off hours at a lower rate. That energy is released throughout the day to service the heating systems as well as other home energy demands.

[92] Ms. Campbell reported problems as early as September, 2003 when outdoor temperatures dropped. She was unable to achieve adequate heat in her new home. She had Force attend and their only solution was to bypass the "time of use"

system. Any improvement was marginal. Ms. Campbell testified that by late December, 2003 the house was constantly cold with temperatures in the range of 50-54 degrees fahrenheit. She stated that all thermostats would be set at the maximum and lower temperatures persisted.

[93]   Mr. Bellefontaine testified that towards the end of 2003 he became aware of Ms. Campbell's concerns. Unfortunately, by that time the parties relationship had soured and Force was no longer welcome on the property. Force sent out the plumbing subcontractor, Atlantic Plumbing and Heating (Stephen McFarlane) to assess the complaints. Force did not receive a report because Atlantic Plumbing and Heating had not been paid for their earlier work. Force later found out that Ms. Campbell had retained Roode and Rose Plumbing and Heating Specialists Limited to address the problem.   Force states that they were never given the opportunity to repair the heating system and are not aware of the actions of Roode and Rose.

[94]   Stephen MacFarlane of Atlantic Plumbing and Heating Limited was retained by Force to do the plumbing in the house. He stated that the heating pipes were in the concrete slab when he first attended at the site. He described his plumbing

work as “from the concrete floor up”. Mr. MacFarlane stated that he advised Mr. Bellefontaine that the two 60 gallon hot water tanks were not sufficient to produce the energy required by the heating system. He alleges that Mr. Bellefontaine ignored his advice and directed him to install the two 60 gallon tanks.

[95] Mr. MacFarlane testified that nails had punctured the in-floor heating pipes in two areas requiring his repair. Additionally, he discovered that one of the in-floor pipes was located under an exterior wall thereby exposing it to freezing.

[96] Clarence Rose is the principal of Roode and Rose and has been in the plumbing trade for 31 years. He specializes in radiant heating systems. On January 7, 2004 Ms. Campbell asked him to investigate the lack of heat in her home. Mr. Rose carried out the appropriate calculations, checked out the existing equipment and gave an estimate on two options to get heat back in the house.

[97] The first option was to add a third 60 gallon hot water tank and to upgrade the secondary equipment. Additionally he recommended adding a 30% glycol solution to the system to avoid freezing. This option was priced at $6,600

including HST. The downside of this option was that there was insufficient room for this third tank.

[98] The second option was to remove the two existing tanks and to add a small but powerful water heater that would store energy in the concrete slab. All secondary equipment would be upgraded and glycol added to the system. The cost of this option was $7,700 including HST.

[99] Mr. Rose and Ms. Campbell settled on the second option and that system was installed. Ms. Campbell reports that the problem of heat has been corrected and she is now comfortable in her house. On January 7, 2004 Mr. Rose invoiced Ms. Campbell $460.00 for his initial investigation. On March 12, 2004 Mr. Rose invoiced Ms. Campbell $576.12 for the required electrical work. On March 9, 2004 he issued an invoice for $7,700.00 for the system. Ms. Campbell paid all three invoices and seeks recovery from Force.

[100] I find as a fact that Force is entirely responsible for the failed heating system. Ms. Campbell had every right to expect a warm and comfortable home as a term of the building contract. She was denied that as a result of Force's slip shod

installation and erroneous calculations. Ms. Campbell will have a set off in the amount of $8,736.12.

EXTRAS:

[101] The building contract anticipates that there will be "extras" required during construction. Paragraph 1 of schedule "A" states:

> "At any time during the progress of work upon giving reasonable notice to the Contractor, the Owner(s) may, in writing, request changes to the work described in this Agreement. If the changes are capable of being made, the Contractor will confirm to the Owner(s), in writing, the additional cost of the changes which are to be paid for by the Owner(s) or the reduction in cost which will reduce the purchase price to the Owner(s). An appropriate amendment shall be attached to the Agreement as a schedule. The Owner(s) is/are to pay the Contractor for the extra on the Completion Date.

[102] The evidence discloses that the "in writing" requirement was waived by both the builder and the owner. Force alleges $21,014.48 in extras as follows:

- Septic Costs for Peat System $14,487.56
- Lamp Posts $ 1,466.25
- Floor Plug $ 436.32
- Garage Door Opener $ 800.11

- Concrete Deck $ 974.68
- Floor Cleaning $ 230.00
- Windows $ 363.68

I will deal with each item individually.

SEPTIC COSTS:

[103] This item has already been addressed earlier in this decision.

LAMP POSTS:

[104] I am satisfied that the two lamp posts on the front lawn are extras as they are not covered by the contract. I am also satisfied that they were improperly installed and had to be fixed by Birkshire. I am awarding Force $500 for their contribution to this extra.

FLOOR PLUG:

[105] I am satisfied that this item is an extra and that Force failed to complete it. I am awarding Force Construction $200 for their contribution to this extra.

GARAGE DOOR OPENER:

[106] This is an extra requested by Ms. Campbell. Mr. Bellefontaine testified that he installed a garage door opener for $695 plus HST. Ms. Campbell testified that there was no discussion of it being an extra but acknowledges that she anticipated a cost of $400 above contract. I am awarding Force $400 (tax included) for this item.

CONCRETE DECK:

[107] This is an extra and was installed outside of the house. Ms. Campbell acknowledges this is an extra but claims that they had an agreement that the cost would be $600. I am satisfied that Force expended $974.68 and I award that amount to them.

FLOOR CLEANING:

[108] Mr. Bellefontaine had no recollection of this extra. Ms. Campbell acknowledges this was an extra as her floor required an acid bath. I award Force $230 for this extra.

<u>WINDOWS</u>:

[109] Mr. Bellefontaine testified that he was asked to install a kitchen window that was not included in the plans, and that the cost was $275 plus HST. He testified that he had to remove another window in the bedroom at a cost of $88.50. Ms. Campbell disputes both items. I am satisfied these are extras and I award Force $363.68.

<u>ALLOWANCES</u>:

[110] The building contract addresses allowances at paragraph 24 as follows:

> "The Contractor agrees that included in the purchase price shall be the following allowances (these allowances do not include HST):

(a) CABINETS: includes kitchen, bathroom, counter tops and labour maximum allowance of $5,000.00;

(b) FLOORING: includes carpet, cushion floor, ceramic tile (if applicable) underpad and labour maximum allowance of $6,000.00;

(c) LIGHT FIXTURES, MIRRORS & DOORBELLS: Builders Standard, maximum allowance $500.00;

[111] The parties agree that Ms. Campbell paid $13,255 for these items and that she is entitled to a credit in this amount.

LOST PROFESSIONAL INCOME:

[112] In the counterclaim Ms. Campbell seeks the following relief:

> damages for lost professional income to the defendant from having to wait and attend her house for the plaintiff and its workers when they would fail to show up;
>
> damages for loss of reputation and professional income as a result of the Defendant's President Kelvin Bellefontaine telling suppliers and sub-trade contractors that she did not pay her bills when in fact there were legitimate reasons that the plaintiff was not being paid;

[113] Ms. Campbell testified that she lost professional income as an independent financial consultant as a result of these factors. The only evidence she advances in support of this claim is that in 2003 her income would have been between $60,000 and $80,000.

[114] Ms. Campbell has not provided any documentation or analysis of prior versus subsequent income. I have nothing before me other than the bald assertion that she suffered income loss for the reasons advanced. Consequently, I dismiss this aspect of the counterclaim.

LOST MARKET VALUE:

[115] In the counterclaim Ms. Campbell seeks the following relief:

> General damages for diminution or loss of market value, as well as lot market value for a home without the New Home Warranty she contracted for;

[116] Ms. Campbell testified that she would not buy the home herself for a variety of reasons. She stated that incomplete and replaced items have negatively affected value. Ms. Campbell's counsel acknowledges that this claim is "somewhat

speculative". In written submissions she describes the basis for this claim as follows:

> General damages for Ms. Campbell having to fully disclose to a future buyer of her home, the difficulties she had with the heating system, the drainage, the window and wall flashings and insulation, as well as for the peat system which replaced two earlier systems installed on her lot. Nominal recognition of the value of her home being affected by this requirement.

Ms. Campbell seeks $5,000 in damages.

[117] I have no evidence as to the present value of the home. I have no evidence that present value has been affected by the stated factors. This type of claim would require expert opinion evidence. I dismiss this aspect of the counterclaim.

LOST VACATION AND WEEKENDS:

[118] Ms. Campbell seeks $2,600 compensation for the loss of her 2003 vacation ($2000) and 3 weekends in 2003 ($600). She bases this claim on having to wait for trades to show and generally having to act as coordinator on the site. This

claim could be covered by the language "general damages for the defendants lack of convenience" in the counterclaim.

[119] I have no evidence as to how Ms. Campbell arrived at this figure. It appears to be entirely speculative. Further, I do not find it unusual that Ms. Campbell would be on site when her retirement home was being built. I dismiss this aspect of the counterclaim.

SEPTIC SYSTEM/ HEATING SYSTEM MAINTENANCE:

[120] In the counterclaim Ms. Campbell seeks the following relief:

> a present value to be calculated for Damages equal to the future cost of operating the septic system and heating systems installed by the plaintiff;

In relation to future septic maintenance, Ms. Campbell testified that she is unable to get anyone to do ongoing maintenance as it is such a small job. She stated that the task is too heavy for her. Ms. Campbell acknowledged that she would likely have ongoing maintenance costs had the area bed system been installed. Ms. Campbell did not provide any evidence as to the cost of either. The same

comments apply to the maintenance of the heating system. I dismiss this aspect of the counterclaim.

GENERAL DAMAGES IN TORT/BREACH OF CONTRACT:

[121] In the counterclaim Ms. Campbell seeks the following relief:

> General Damages for the defendant's loss of convenience, extra heating costs through the winter of 2003-2004 [and for the future if the heating system is not adequately repaired]; toiletries, storage charges, extra housekeeping and cleanup required for clean up over the period of remediation;

She seeks $10,000.00.

[122] In written submissions Ms. Campbell describes the basis for this claim as follows:

> General damages in tort/breach of contract in the construction including mental distress for failure of Plaintiff to deliver turnkey home on time, failure to deliver adequate heat, lack of proper drainage, loss of Ms. Campbell's amenities of enjoyment of her home, loss of convenience, anxiety over structural defects [based on 1991 *Stoddard v. Atwell* $3000 assessment and the more serious and numerous nature of Ms. Campbell's complaints]; failure to provide skill and judgment, Defendant being obliged to act as her

> own general contractor to find trades to finish her house to render it reasonably fit for habitation.

[123] The defendant relies on *Stoddard v. Atwil Enterprises Ltd.* (1991), 105 N.S.R. (2d) 315 as authority for this relief.

[124] I believe it is fair comment that these type of general damages are the exception in building contract cases. It is only in the most egregious cases that such awards are ordered. In *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155 Saunders, J. (as he then was) stated at page 163:

> [28] The law has changed and continues to evolve. At common law damages for breach of contract were traditionally limited to those related to compensation. The absolute rule was set out in **Addis v. Gramophone Co. Ltd.**, [1909] A.C. 488 (H.L.), and **Peso Silver Mines Ltd. (N.P.L.) v. Cropper**, [1966] S.C.R. 673; 58 D.L.R. (2d) 1, to the effect that damages for mental distress were not available in breach of contract cases because contractual damages must be tangible, estimable and compensatory.
>
> [29] New ground was broken in **Jarvis v. Swans Tours Ltd.**, [1973] Q.B. 233; [1973] 1 All E.R. 71, when Lord Denning awarded compensatory damages for "the disappointment, the distress, the upset and frustration" occasioned by a ruined holiday. He dismissed the argument that because such damages were difficult to quantify they ought be declined. He recalled the principle that difficulty of assessment is no deterrent to a legitimate claim. Lord Denning found that such damages were proper in breach of contract cases provided they conformed to the standard test for remoteness and foreseeability. As long as it could be said that the parties should reasonably have foreseen mental

> distress as a consequence of their breach at the time the contract was entered into, damages for such mental suffering will be awarded,

And further at page 164:

> [31] With respect, I do not consider Weatherston, J.A.'s reference to **Corbin**, supra, as imparting to the law in Canada a requirement that in order for a plaintiff to succeed in a claim for compensatory damages for mental suffering, he must first establish that the defendant's conduct amounting to a breach was "wanton or reckless".

[125] In *Stoddard v. Atwil Enterprise Ltd., supra*, Saunder J. (as he then was) stated at paragraph 113:

> I am satisfied that Mr. and Mrs. Stoddard have suffered mental distress by virtue of the defendant's negligence and breach of contract. This anxiety was first occasioned by continuous leakage from the time they moved in and was aggravated when their experts disclosed how dangerous their house was.

> [114] These damages are compensable. I need not repeat my analysis in the case of **Gourlay v. Osmond** (1991), 104 N.S.R. (2d) 155; 283 A.P.R. 155 (T.D.). Damages in this case for mental distress lie both in negligence and breach of contract. While the Stoddards' stress could not be compared to the acute depression suffered by Mrs. Eileen Gourlay (which necessitated medication and professional therapy) it was real and continuous nonetheless. I award the plaintiffs $3,000 nonpecuniary damages for mental suffering.

[126] Even if I accepted all of Ms. Campbells evidence and submissions at face value, they would not come close to the facts in the Stoddard case. This is not one of those cases where general damages for mental distress are warranted.

PUNITIVE OR EXEMPLARY DAMAGES:

[127] I allowed Ms. Campbell to amend her pleadings by adding a claim for punitive or exemplary damages. She alleges that Force "had not allowed for proper drainage and was prepared to allow Ms. Campbell to suffer the introduction beneath her foundation of a large volume of weekly back wash water, without any means of it draining away, with a pipe leading to nowhere ..."

[128] In written submissions Ms. Campbell described the basis for this claim as follows:

> Punitive and/or Exemplary Damages for high handed, reprehensible conduct of Plaintiff through the course of the project - from septic system, Stop Work Order, failure to arrange inspections, intentionally introducing water into area below slab with the apparent intention to cause future difficulty.

[129] Ms. Campbell seeks $10,000. She argues that such an award will deter Force and other contractors from acting in a similar manner.

[130] In *Vorvis v. Insurance Corporation of British Columbia* (1989), 58 D.L.R. (4th) 193 (S.C.C.) MacIntyre J. concisely stated the clear distinction between punitive and aggravated damages:

> "...Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject to punitive damages, but the role of aggravated damages remains compensatory...
>
> "Aggravated damages are awarded to compensate for aggravated damage ... Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment."

[131] In *Stoddard v. Atwil Enterprises Ltd., supra*, Saunders J. (as he then was) suggested that malice is required for an award of punitive or exemplary damages.

[132] Once again, even if I accepted Ms. Campbell's evidence and submissions at face value, they would not warrant punitive or exemplary damages. The strongest support would be the installation of the laundry room drain. Mr. Bellefontaine testified that he "missed it" during construction. When it was re-assessed by Birkshire Developments Inc. he found an exterior pipe and a drain leading away from the house. The most that can be said is that this piece of work was poorly carried out. I dismiss the claim for punitive or exemplary damages.

LOT RESTORATION:

[133] Ms. Campbell seeks a set off in the amount of $2,875 for "partial restoration of lot due to loss of trees from three attempts at septic system". This claim is made pursuant to the counterclaim which states as follows:

> Special Damages in an amount to be produced for trial, for the exact cost of repairs, remediation and supervision costs of the same where they exceed that which would otherwise be set off from the amount remaining owing under the contract between the parties;

[134] Mr. Bellefontaine acknowledged that he over excavated the holes where the three peat tanks were to be installed. He testified that the engineer and the

municipality required him to remove and re-install. Mr. Bellefontaine stated that he needed heavy machinery to carry out this task.

[135] Ms. Campbell testified that the heavy equipment destroyed most of the trees in the area of re-installation. She states that the loss of these trees has materially affected her privacy. Photographs submitted in evidence satisfy me of both.

[136] I am satisfied that Force had no idea how to install the peat system and did nothing to acquire that knowledge. The removal and re-installation can best be described as a circus.

[137] I have reviewed the invoice of Crowell Excavating and find their services to be an appropriate response to Force 's destruction. Ms. Campbell is entitled to a $2,875 set off.

PRUDENT GARDENER ACCOUNT:

[138] Ms. Campbell seeks a set off in the amount of $682.44 for "prudent gardener, finish septic mound, topsoil, seed, fertilizer, labour-dug up on instruction

of Glen Buchanan - slope too steep". I accept that landscaping was not part of the building contract. I find that these costs were associated with the reinstallation of the peat system. While I was not provided with an invoice, I find these costs to be reasonable. Ms. Campbell is entitled to a $682.44 set off.

BLUENOSE WELL DRILLING ACCOUNT:

[139] The building contract stipulates as follows:

> The contractor agrees to install, in a good and workmanlike manner, in accordance with all by-laws and regulations, both municipal and provincial a drilled well.

Force retained Bluenose to install a well. The account was not paid by Force because Ms. Campbell had not paid them on the building contract. Bluenose started a small claims court action against Ms. Campbell and she paid the account. Ms. Campbell seeks a set off in the amount of $4,351.75. Force Construction does not dispute that she paid this account. Ms. Campbell is entitled to a $4,351.75 set off.

LOCATION CERTIFICATE:

[140] The building contract stipulates as follows:

> The Contractor agrees to supply a location certificate in the Owner(s) name which shall show the final location of the footing.

Ms. Campbell paid this account in the amount of $373.75 and is entitled to a set off.

ADDITIONAL MOVING EXPENSES:

[141] Ms. Campbells occupation of the home was delayed one week by consent. She testified that Force agreed that the home would be ready on August 7, 2003. She arrived with the moving van to find a pile of gravel in the middle of the driveway and she was unable to unload her belongings. The solution was to leave everything on the truck until the next day. The added cost for the extra day was $240. Given that the total moving cost was $690, I find this figure reasonable. Ms. Campbell is entitled to a $240 set off.

MEALS/SUNDRIES:

[142] Ms. Campbell incurred $70.89 for meals and sundries as a result of the delay caused by the gravel pile. I find this reasonable. She is entitled to a set off in this amount.

HOTEL EXPENSE:

[143] Ms. Campbell incurred the cost of one nights accommodation while waiting to move into her home. She is entitled to a set off in the amount of $90.85.

LEGAL FEES:

[144] Ms. Campbell seeks a set off in the amount of $1,179.90 for legal fees incurred in defending an action started by Bluenose Well Drilling. She describes the basis for this claim as follows:

> Paid legal fees to Crowe Dillon Robinson to defend Small Claims Court action by Bluenose Well Drilling Limited - When it appears Small Claims Court was setting matter down for hearing on merits, not accepting that it had no jurisdiction in the Mechanic's Lien case.

Force argues that Bluenose should have sued Force instead of Ms. Campbell as there was no privity of contract. That may be so. However, Bluenose did initiate an action. I find that it was prudent of her to settle and to seek set off in this action. She had the benefit of the well and Force refused to pay the account. Ms. Campbell is entitled to a set off in the amount of $1,179.90.

EXTRA HEATING COSTS:

[145] Ms. Campbell seeks a set off in the amount of $646.49 for extra heating costs incurred between October, 2003 and March, 2004. She describes the basis for this claim as follows:

> 213.70 - propane for fireplace to supplement faulty heating system
>
> 134.79 - propane for fireplace to supplement faulty heating system
>
> 298.00 - extra electric heating costs for faulty heating system

The evidence advanced in support of this claim is minimal and confusing. I do accept Ms. Campbell's evidence about low temperatures after September, 2003. I

have already determined that Force is responsible for the inadequate heating system. Ms. Campbell is entitled to a set off in the amount of $300.

PHOTOS and FOIPOP APPLICATIONS:

[146] Ms. Campbell seeks a $105.20 set off for these expenditures. These are more about costs and I make no award.

CERAMIC INSTALLATION:

[147] Ms. Campbell seeks a set off in the amount of $218.05 for:

> Ceramic and installation around bathtub, to meet building code.

I am unable to determine whether this is an upgrade or included in the building contract. Consequently I make no award.

INTEREST ON IN TRUST FUNDS:

[148] Ms. Campbell seeks a set off in the amount of $628 for additional interest costs. She describes the basis for this claim as follows:

> Interest paid on $13,506.75 money paid “In Trust” for trades, money held by Boyne Clarke for 1 year. My cost: 1 year @ mortgage rate of 4.65%

This claim is made pursuant to the counterclaim which states as follows:

> Reimbursement of the higher interest costs on borrowed money to do remedial work to the house and being unable to borrow against the house owing to the Mechanic’s Lien which has been claimed by the plaintiff;

[149] Ms. Campbell testified that she had a personal relationship with three sub-trades who were not paid for by Force. They were Bluenose Well Drilling ($4191.75), Atlantic Plumbing Ltd. ($7,187.50) and Sure Air Ventilation ($2,127.50). These accounts totalled $13,506.75. She testified that she was embarrassed when they called looking for payment. She requested Force to pay these accounts and was told “pay me and I’ll pay them”. I accept this evidence.

[150] Ms. Campbell drew $13,506.75 from her mortgage and sent it to Force’s solicitor for disbursement to these sub-trades. The payments were not made and

the funds sat in the law firms trust account for a year. Ms. Campbell paid 4.65% interest on these funds. She is entitled to a set off in the amount of $628.

LINE OF CREDIT INTEREST:

[151] Ms. Campbell seeks a set off in the amount of $8.308.65 representing the following:

> Ms. Campbell claims, say, for ease of computation, 5% simple interest/Financing costs for remedial work done, placed on her lines of credit 9.65% vs the hoped for 4.65% mortgage. * interest calculated at 5% simple interest, per annum, non-compounded from date of above invoices i.e. those over $1000 to March 31, 2008 [starting dates vary, depending on when invoice paid] - see attached schedule "A" sheet for computations of simple interest, from invoice dates @ 5% per annum.

[152] She argues that she had to utilize non-mortgage lending to finance her expenditures. She acknowledges that her former counsel neglected to registrer her mortgage as a first charge before Force's lien was registered. Consequently, she was only able to draw 60% of the value of the mortgage. Force Construction can not be held responsible for this oversight and I make no award.

SUMMARY:

[153] Original contract price $78,626.96

Add HST	$11,794.05
ADD:	
Septic	$ 6,800.00
Lamp Post	$ 500.00
Floor Plug	$ 200.00
Garage Door Opener	$ 400.00
Concrete Deck	$ 974.60
Floor Cleaning	$ 200.00
Windows	$ 363.68
SUB TOTAL	$99,859.29
LESS:	
Laundry Room	$ 1,458.24
Exterior Drainage	$ 1,500.00
Heating System	$ 8,736.12
Lot Restoration	$ 2,875.00
Prudent Gardener	$ 682.44
Well Drilling	$ 4,351.75

Location Certificate	$ 373.75
Moving Expenses	$ 240.00
Meals, etc.	$ 70.89
Hotel	$ 90.85
Legal Fees	$ 1,179.40
Heating Adjustment	$ 300.00
Trust Account Interest	$ 628.00
SUB TOTAL	$77,372.85
LESS:	
Allowances	$13,225.00
TOTAL	**$64,147.85**

[154] I order that Ms. Campbell pay Force the sum of $64,147.85 as full payment of the building contract.

COSTS:

[155] I will accept written submissions on costs if the parties request such relief. However I will state that this is one of those cases where there is no clear winner. Also, I find that both parties contributed to the circumstances that led to this trial.

J.