

SUPREME COURT OF NOVA SCOTIA

Citation: *New Light Construction Limited v. Smith*, 2020 NSSC 42

Date: 20200214

Docket: Hfx No. 464716

Registry: Halifax

Between:

New Light Construction Limited
Plaintiff/Defendant by Counterclaim

v.

David Anthony Smith
Defendant/Plaintiff by Counterclaim

DECISION

Judge: The Honourable Justice M. Heather Robertson

Heard: November 18, 19, 20, 21, 25 and 26, 2019,
in Halifax, Nova Scotia

Final Written Submissions: December 3 and December 6, 2019

Decision: February 14, 2020

Counsel: Christopher W. Madill and Ibrahim Badawi, for the
plaintiff/defendant by counterclaim
Kent L. Noseworthy, for the defendant/plaintiff by
Counterclaim

Robertson, J.:

[1] The plaintiff and defendant by counterclaim New Light Construction Limited (“New Light”) is a small general contracting company, whose sole shareholder, officer and director is Mr. Finwick King.

[2] New Light entered into a fixed price contract dated August 30, 2016, for the renovation of a single-family bungalow located in the south end of Halifax at 5865 Balmoral Road, owned by the defendant and plaintiff by counterclaim, David Smith.

[3] This action involves the plaintiff’s claim for the balance owing on the original contract price upon its alleged repudiation by Mr. Smith and the payment of the last two invoices issued for extra work. The plaintiff also seeks a small sum for lost profit he would have earned had he been allowed to complete the contract. The defendant, Mr. Smith, and plaintiff by counterclaim, seeks a reconsideration of invoices paid and credits given to him, for inappropriate charges, the cost of completion of the project and personal expenses incurred.

[4] On the evidence before me, New Light has established, beyond the balance of probabilities, breach of contract and is entitled to recover the balance of the contract price owing and the unpaid amount of invoices for extras owing. David Smith’s counterclaim is without merit. My reasons are as follows.

The Project

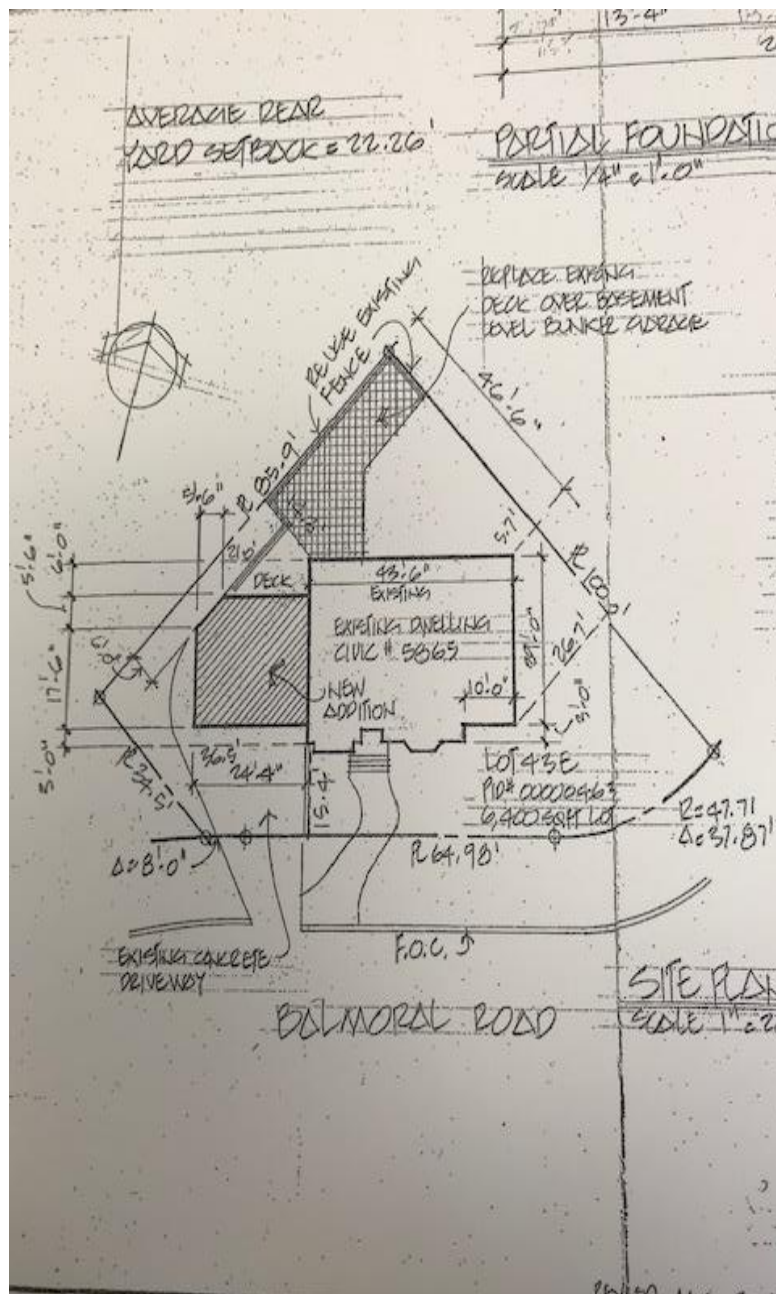
[5] 5865 Balmoral Road had been purchased by Mr. Smith from the original resident/owner who had lived in the property since its construction in 1957. The house had never been extensively renovated and each room was clad in the original tongue and groove vertical cedar panelling.

[6] Plans for the renovation, (Exhibit 10), prepared by Nigel Collinson, show the original bungalow main floor was 1395 square feet. The main floor contained a foyer, living and dining rooms, two bedrooms and one bathroom. The basement, also 1395 square feet in area, was finished and contained a study, rec room, two bedrooms and a bathroom.

[7] The plan contemplated that a two-storey new addition would be built on the northwestern side of the existing house and would cover the driveway area. On the

first level, the basement level, a two-car garage would be located and on the upper/main level a new living room would be built. Also included was a new powder room, the entrance to which would be off the foyer on the original main level. The main level of the existing house was to be gutted and rebuilt. Most of the basement level was to remain as is, with renovations to one bedroom and a bathroom. After renovations, the house would have a new total area of 3500 square feet. Exterior renovations included new decks, new siding and new roofing.

[8] The site plan of the old house and new extension are shown below:



[9] This renovation project later expanded in scope when serious leaks were discovered in the original basement.

[10] The rear basement wall of the existing structure was wet and the moisture had rotted the interior walls and even the new hardwood flooring, requiring costly solutions, and ultimately resulting in the gutting of the basement level which also occasioned a redesign of this living space. This was discovered in the fall of 2016. Mr. Smith testified that the escalation of costs commencing with this extra work on the basement level was a significant factor in the breakdown of his relationship with Mr. King. It also caused the project to be extended by many months. Mr. Smith terminated the contract on May 31, 2017.

Issues

- a. Did Mr. Smith breach the contract with New Light?
- b. What is the quantum of damages owing to New Light for Mr. Smith's breach of contract?
- c. Can Mr. Smith's counterclaim succeed?

Evidence and Findings of Fact

The Relationship

[11] Gleaned from the direct evidence of Mr. King and Mr. Smith, I will recount how their business relationship began in August 2016.

[12] The relationship between Mr. Finwick King and Mr. David Smith began as one of acquaintance in Lower Sackville, where Mr. Smith was the part owner of a bar and grill, called "The Beaver Bank Station." Mr. King was a frequent patron of the restaurant and his sister was employed there as a waitress, as was another woman, Samantha Clarke, who would later become Mr. King's girlfriend.

[13] Mr. King and Mr. Smith struck up a friendship and Mr. Smith told Mr. King of his plans to renovate a property he owned in the south end of Halifax. He had, by then, sought and received estimates from two other general contractors. Mr. Smith was aware that Mr. King's principal current business was in supplying and installing metal roofs under the name "The Forever Roof," a trade name of 3261531 Nova Scotia Limited, of which Finwick King was a 50% beneficial owner.

[14] Mr. Smith spoke generally of his project with Mr. King and asked Mr. King to provide him with a quote for a metal roof. The two visited the property with this in mind. Mr. Smith explained all of the renovations he planned: the new two-storey extension, the gutting and redesign of the main level of the existing house with the exception of one bedroom with the unvaulted ceiling. He explained he also planned the limited renovation of the existing basement, where he would maintain the rec room and study, maintain the rear northeast corner bedroom, and only renovate one bedroom at the front of the basement by enlarging it and also renovate an existing bathroom, as depicted by the heavy dark lines on the plan, (p. 1 of Exhibit 10).

[15] Mr. Smith explained that his current quotes were higher than he was happy with, coming in at \$475,000 and \$447,000.

[16] It was then that Mr. King suggested that, although he was winding down his general contracting activity under New Light, in favour of devoting all his efforts to The Forever Roof business, he would provide a quote to Mr. Smith for the complete job on a fixed contract price, based on the scope of work they discussed on site and outlined above.

[17] Mr. King then prepared a proposal between New Light and Mr. Smith for a fixed price contract of \$289,070.63 plus tax of \$43,360.50 for a total of \$332,430.50 as per the quote Exhibit 1 – Tab 1. When agreed to and signed by the parties on August 30, 2016, this became the contract now being litigated.

[18] Personal differences arose between Mr. Smith and Mr. King during the renovation period August 30, 2016 to May 31, 2017 when Mr. Smith terminated the contract. Each gentleman gave their own evidence about the breakdown of their relationship, some of which involved the restaurant workplace at The Beaver Bank Station, where Mr. King's sister and his girlfriend worked and where he was a frequent, if not daily, customer. They differ in their evidence about the timing of these events. But the renovations at 5865 Balmoral Road were well underway when problems arose, either in the late fall of the 2016 (Mr. Smith's evidence) or early winter of 2017 (Mr. King's evidence).

[19] Mr. King's sister and his girlfriend both complained of workplace sexual harassment by Mr. Smith's then legal counsel, Mr. Dwayne Rhyno. Mr. King became embroiled in their cause and made demands on Mr. Smith to address the situation. Eventually, these two ladies were let go from employment in early April 2017. Mr. King's and Mr. Smith's relationship had deteriorated to the point that there was by then little communication between them.

[20] Mr. Smith testified that he and Mr. King had a poor relationship from the fall of 2016 onward, as extra work in the basement began. He testified about one particular incident in the late fall when Mr. King asked Mr. Smith to come sit in his truck. He described Mr. King as being aggressive and abusive, raising his voice and intimidating him. Mr. Smith testified that Mr. King “threatened to destroy me financially and threatened to take me to court and take every penny he could out of me on this job.”

[21] Mr. King did not deny that a conversation took place in his truck but testified that Mr. Smith had begun speaking directly to Mr. King’s employees in his daily visits to the site and was instructing them directly on changes he wanted made, rather than dealing directly with Mr. King. As the general contractor, he required that all communication be direct between them so he could account for the extras and maintain an agreed scope of work. Mr. King agreed that he probably spoke forcefully and in a raised voice, admonishing Mr. Smith for giving direct instructions to his employees.

[22] Mr. King testified that he did not make any threats.

[23] In any event, the work progressed, the parties met at least weekly, texted often and continued the project. Shown as Exhibit 7 is the record of texts between the parties. Despite this heated discussion in the truck in late fall 2016, their subsequent communications appear cordial, show no rancor and reference them socializing together. Indeed, in his discovery evidence, Mr. Smith made no mention of any threats made against him by Mr. King.

[24] Oddly enough, throughout this conflict, Mr. Smith does not take issue with the quality of work performed by Mr. King’s company. He acknowledges that Mr. King is a good builder.

[25] Often misunderstandings can arise when a builder communicating with his client fails to explain construction details with sufficient clarity for the customer to fully grasp the job being scoped out. Yet, Mr. Smith is a particularly sophisticated client, particularly in the area of quantity surveying, oversight and contract management. Throughout their evidence, despite the personal issues, both men appeared to respect and understand one another’s professional skills.

Background of Parties

[26] Finwick King is a self-made man.

[27] Born in Newfoundland, he moved to Nova Scotia as a boy and at age 15 began working with his father and uncles, all of whom were in the construction business. Without formal training, he became a journeyman carpenter in the early 90's, the highest ranked carpenter position recognized by the Carpenters Union. He has run his own company, New Light, since the early 2000's and began The Forever Roof company in 2007. It installs three types of product of metal roof – slate, shake, and European clay tile, all manufactured in British Columbia. The Forever Roof also sells and installs a PVC roof system for flat roof that is a waterproof rubberized membrane. Mr. King has made himself a successful businessman.

[28] Mr. Smith was born in England. At matriculation, he took a three-year building management course at the Hertfordshire College of Building and became a quantity surveyor. He also took a trade as a brick layer.

[29] His first job was with a brick layer working in North London on a housing project with 315 new homes, measuring, pricing, issuing invoices and dealing with claims, using his skills as a quantity surveyor. After two and a half years, he had the opportunity to go to the middle east, working in Saudi Arabia and the United Arab Emirates, doing the same type of work for various companies, in building construction, road work, and bridge construction, all as a quantity surveyor.

[30] Next, his career took him offshore where he did the same type of work, but in the installation of pipelines, power cables, offshore moorings and platforms. He then worked at fabricating yards where the steel structure that supports a platform was manufactured and assembled, again measuring from plans and pricing up the designs of the supporting structures.

[31] Next, he worked in Germany, Sweden and Norway, as a quantity surveyor on the construction of the modules that are placed on the top of platforms for housing and workplace structures.

[32] Mr. Smith came to Canada in April 1991 and again worked for oil patch companies such as Husky Oil as a quantity surveyor on their various installations. They included large projects such as Hibernia, Cohasset-Panuke. Mr. Smith also worked with Emera on the Maritime Link. He now commutes to western Canada and works for other projects. He has therefore had a lifetime career as a quantity surveyor, dealing with construction contracts, scrutinizing documents, estimating invoicing, dealing with claims and holding others to account for work done on such contracts.

[33] During the course of construction at 5865 Balmoral Road, he was very careful to scrutinize each invoice for extras received, asked for the backup documents that supported the invoice such as man-hours, and supporting invoices for sub-contracted services, materials, rentals, etc. He would then recalculate the figures submitted and correct any errors.

[34] He was also aware of costing issues and negotiated with Mr. King for a labour rate on extra work required of \$30 per hour.

[35] Mr. Smith attended the site morning and evening in the fall of 2016 and less often by the spring of 2017, when he and Mr. King were not getting on so well. However, most decisions about the extra scope of the project were sorted out in the late fall when the water damage in the basement was uncovered and the space redesigned.

[36] Having listened to evidence of these two gentlemen and pored over exhibits that underpin this project as addressed by each of them, I have concluded that Mr. King is a good builder who keeps very good records, notes and support documents. He keeps his eye on the accounts and bills regularly as the project progresses.

[37] His explanations are cogent, reasonable and supported by the evidence. The quality of his work is very good and bears no complaint from Mr. Smith. His labour rates for extra labour seem reasonable at \$30 per man-hour, without further markup for value.

[38] Mr. Smith, I conclude is a very sophisticated customer who has spent his entire working life in the construction industry. He is knowledgeable about every aspect of planning and executing a building contract. He professionally monitors other people's work on job sites, costs jobs, negotiates claims and holds people to account. It is difficult to see how he could fail to understand the nature of the work quoted, the necessity for extras and the documents that evidence the work, the invoices and supporting material. The fact that he willingly paid all of these invoices up to May 24, 2017 is significant. After asking for and receiving supporting documents to every invoice and reviewing them in detail, he occasionally and immediately asked Mr. King to correct an accounting error or make further explanation. He dealt with every invoice in a timely fashion, indeed acquiescing to Mr. King's request to pay soon after receipt of the invoice. This seems in keeping with Mr. Smith's experience in managing building contracts. At odds with this are Mr. Smith's subsequent actions of June 2017, when he critiqued the entire project and found fault with each invoice many months after the fact.

Schedule for the Project

[39] As to the timing of the project, he testified his original expectation was that New Light would complete the renovation by Christmas 2016. Mr. King testified that he told Mr. Smith he would try his best to finish by Christmas, but he would not guarantee this. Mr. King recalled this discussion on the front lawn of the property on the first day they met there for a walkabout. He testified a late December finish date would have been very tight had all gone well. The full restoration of the basement level and other required or requested changes to the main level such as window replacements, stairwell, a finished attic storage space, insulation for sound barrier and other items, delayed the project significantly and the renovation therefore took three times as long to complete, Mr. King testified. I am satisfied that there was no agreed schedule to complete this contract.

State of Completion on May 31, 2017

[40] By the end of May 2017, Mr. King testified that the project was 90% complete, with painting, flooring and cabinetry and trim to be finished; each taking a few days pursuant to sub-contracts and final completion under the fixed contract. Indeed, much of these materials such as cabinetry and plumbing fixtures had been paid for either in whole or by significant deposits. Little remained to achieve 100% completion. Mr. Smith testified on direct that he felt the project was only 70% complete by May of 2017 but backed down from this view on cross examination.

[41] I accept that the project would have been completed well before the end of June 2017.

[42] In any event, Mr. Smith terminated the contract on May 31, 2017, necessitating an accounting for the plaintiff's outstanding invoices and determination of any credits that the defendant and plaintiff by counterclaim, says are owing to him.

[43] Each invoice was examined and addressed in this litigation.

The Fixed Price Contract of \$332,430.50

[44] The invoices issued pursuant to the main fixed price contract are four in number. The last invoice remains unpaid. Following termination of the contract by Mr. Smith, New Light commenced proceedings pursuant to the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended.

[45] The main fixed contract invoices were issued over time and are as follows:

No. 501	Partial payment (inclusive of tax) (Ex. 1 at Tab 3) Sept. 19, 2016	\$115,000.00
No. 502	Partial payment (inclusive of tax) (Ex. 1 at Tab 5) Oct. 11, 2016	\$57,500.00
No. 506	Partial payment (inclusive of tax) (Ex. 1 at Tab 13) Feb. 27, 2017	\$50,000.00
No. 511	Partial payment (inclusive of tax) (Ex. 1 at Tab 21) June 5, 2017	\$76,688.10

[46] Mr. King testified that he made notes in arriving at a final fixed amount (see Exhibit 1 – Tab 34) and that the exercise was to keep track of the estimates for cost of materials, subcontracted services as they came in and to gradually build the final contract price.

[47] Mr. King’s notes as to this final contract price are found at p. 10 Tab 34 of Exhibit 1. He testified p. 10 was the “Take-Off Sheet” of calculations he made to arrive at this contract pricing. The contents of this “Take Off Sheet” are as follows:

Material	\$46,771.77
Foundation	\$15,300.00
Plumbing	\$18,000.00
Framing Labour	\$9,500.00
Labour for to take roof [off] an put new on	\$9,000.00
Electrical	\$14,000.00
Insulation	\$10,300.00
Paint	\$9,400.00

Trim Labour	\$5,500.00
Cabinets	\$25,000.00
Strip inside and out	\$12,000.00
Flooring	\$8,000.00
Windows	\$7,000.00
My wages	\$12,000.00
Company	\$30,000.00
Drywall	\$8,694.00
Siding	\$6,000.00
Chimney Remove	\$2,500.00
Strip Roof	\$2,400.00
Subtotal	\$251,365.77
	\$37,704.86
Total before tax	\$289,070.63
Tax	\$43,360.50
Grand Total	\$332,430.50

[48] Mr. King testified on direct that the sum of \$37,704.86 found just beneath the subtotal of \$251,365.77 represented a 15% profit for New Light. He also testified that the sum of \$30,000 designated “Company” was a recognition of company overheads/expenses such as office rent, leased vehicles and equipment.

[49] With respect to the main contract for \$289,070.63 before tax, the defendant takes issue with two major items:

1. The Forever Roof installation as part of the contract price;
2. The inclusion of work inside the old bunker garage in the contract price; and the decking to be installed above. (Exhibit 10 – Plan 1)

The Roof

[50] Mr. Smith was aware that New Light and The Forever Roof company were distinct entities. Indeed, he was undecided whether to use a The Forever Roof slate style or pursue a different product made by another company, a supplier of barrel style roofing. He had received the fixed price contract quote (Exhibit 1 – Tab 1) and signed it as the contract on August 30, 2016, weeks before he made a decision to use The Forever Roof product.

[51] Further, the reference to the roof in Mr. King's notes at Exhibit 1 – Tab 34, page 10, "Labour for to take roof [off] and put new on 9,000.00" was explained by Mr. King in his testimony, and again dealt with on cross examination and redirect.

[52] Mr. King's evidence was that the original old roof on the structure was required to be removed as it was not properly supported once bearing walls were removed in Mr. Smith's redesign. The inclusion of manufactured support beams fit into the existing roof structure would have intruded down by 18 inches. Therefore, the decision was taken after discussion with Mr. Smith to tear off the old roof and replace the structure, i.e. pre-engineered roof trusses, new framing, plywood sheathing and rubber membrane, a watertight structural roof, at a cost of \$9,000 that would await the installation of whatever type of metal roof Mr. Smith selected at a later date.

[53] Mr. Smith's evidence was that the price of a finished roof was in the contract price and that the invoice from The Forever Roof was inappropriate, although he testified, he did pay it, under duress. An invoice dated April 27, 2017, from 3261531 Nova Scotia Limited, The Forever Roof, for installation of a metal roof, in the amount of \$22,821.75, was paid by Mr. Smith.

[54] He testified under cross examination that he was not given a quote from The Forever Roof from Mr. King, either verbally or in writing, before the contract was signed on August 30, 2016. He testified that he had selected The Forever Roof product before the contract date and therefore expected it to be in the contract price. He testified that he only revisited the idea of selecting an alternative roof product in the fall of 2016 after differences arose between he and Mr. King. Ultimately, he agreed that in late October he chose The Forever Roof product of the slate style.

[55] I do not accept this evidence. I accept that Mr. Smith had not made a selection of The Forever Roof product before late October 2016, when he finally chose it over the competition's product. Indeed, correspondence between himself and his designer, Nigel Collinson, dated September 22, 2016 (Exhibit 14) appears to confirm that he had not earlier chosen a roof product.

[56] I find as a fact that the roof cladding i.e. metal roof, was not quoted in the fixed contract price and came later as an extra when Mr. Smith finally chose it; well after the contract date of August 30. Mr. Smith later complained about the extra squares of roof materials which were needed because of the extra pitch to the roof elevation occasioned by Mr. Smith's wish to have a more vaulted ceiling in the living room.

The Bunker and Decking

[57] The bunker is an interesting structure. It was originally a swimming pool built by the first owners, then abandoned and made into a garage. The pool was covered over and clad in wood, 2 x 4's and decking, and incorporated into the backyard of the property. It was 36' x 14'4". A garage door was installed in the driveway end and it was then used as the single auto family garage. It leaked and was very dark and dank inside but had earlier been equipped with two electric bulbs in the ceiling.

[58] Mr. Smith's evidence is that although he was building the extension over the driveway, to include a two-car garage in the bottom level, he had planned to renovate the bunker as a storage space and required Mr. King to quote on the bunker in his fixed contract price, to provide a fully waterproof, dry, heated space, as per the drawings, with strapping and insulation on the new garage walls and the bunker, as depicted by the continued heavy lines on the plan. (See legend Exhibit 10 top left, page 1.) The notes on this plan do not specify insulation, only strapping in the bunker, an oversight according to the evidence of Nigel Collinson.

[59] Mr. Smith's evidence was that there had been an earlier quote before August 30, 2016 for the contract shown him by Mr. King at the restaurant in the approximate amount of \$250,000. (See Exhibit 1 – Tab 34, p. 17.)

[60] Mr. Smith inquired if this quote included the bunker. Mr. King said no. Mr. Smith testified that he sent him back to the drawing board to return with a quote that included the bunker and it was then that he presented the quote for \$289,070.63 plus tax found in Exhibit 1 – Tab 1, which he signed on August 30 to make it the final contract.

[61] Mr. Smith also testified that Mr. King suggested how he might waterproof the structure using a waterproof blueskin on the exterior and using a French drain system on the exterior to divert water away from the bunker.

[62] Mr. King's evidence is that, although they did look inside the dank and dark bunker on his walkabout with Mr. Smith on their first visit, he told Mr. Smith it would cost extra to remediate this bunker's wetness and therefore, he would provide a quote excluding the bunker. He agreed they had discussed ways to remediate the water infiltration in the bunker, but this was agreed to be left to another time, outside the terms of the contract.

[63] When cross examined as to why the plans (Exhibit 10) revised in August 2016, continued to show the bunker renovations, including replacement of decking atop the bunker, Mr. King testified that Mr. Smith did not want to return to Mr. Collinson and pay any more money to revise the plans, having already paid him \$7,000.

[64] Mr. King was challenged on cross examination about the inclusion of the bunker in the fixed contract price, suggesting the August 16 plans are incorporated by reference and the use of the word garage mentioned in Phase 2 & 3 (c). The contract reads as follows:

Scope of Work: *All reference to "drawings" in the statements below are referring to those signed August 2016*

Phase 1. Demolition of Main Floor as defined in drawings

a. includes removal of debris and materials from site

Phase 2. Reconstruction of Main Floor as defined in drawings

a. includes reconstruction of the existing exterior deck

Phase 3. Building New Addition as defined in drawings

Re: Phase 2 & 3

a. All Electrical work to be completed as defined in drawings

b. All Plumbing work to be completed as defined in drawings

- Gerber Midtown Faucets

- Standard Studio Basins

- Kindred Granite Sink

- Gerber Viper Toilets

c. Also includes excavation around garage and installation of BlueSkin Barrier.

[65] It is New Light's position that the reference to "drawings" above is as a guideline for the specific and limited scope of work set out below in the words of the contract.

[66] Mr. King testified that this language (c) only pertained to the garage in the new addition over the existing driveway. He also testified that calculations, as shown on Exhibit 1 – Tab 34, p. 17, were early workups of numbers which later led to the final Take Off Sheet, Exhibit 1 – Tab 34, p. 10, and the contract quote at Exhibit 1 - Tab 1.

[67] He testified that the bunker was not part of the main structure or main floor (Phase 1 & 2) and was not a part of the new construction, (Phase 3), saying it was never included in the fixed contract price. He also noted that there was no access to the old bunker garage from either level of the existing house.

[68] The bunker did, however, impact the main structure. Upon the water leaks being found in the foundation at the rear wall of the existing structure, a specialist Stevie-Crete, was called in to do the foundation repairs and waterproofing. Their technician, Mark Levy, did the work. Mr. King's evidence was that the leaks were located at the northwest corner of the existing basement, where the old bunker foundation actually joined the house at a 45-degree angle. At this juncture, of the two poured-concrete walls, there actually was an iron drainpipe imbedded in the concrete, which Mr. King testified was the source of the leaking into the existing house.

[69] The house foundation was sealed by Mr. Levy, whom, he said, as a courtesy, went into the bunker and marked with a red spray can the areas requiring future sealing in the bunker garage. Mr. King testified that he and Mr. Smith were advised it would be necessary to dig around the outside of the bunker footings to seal it and that this would involve excavation to its full depth and would be a big expense. Mr. King testified he did not do any work on the bunker and had specifically excluded it from his quote. Mr. Levy's assessment of the bunker was not made until later in the fall of 2016. On cross examination, Mr. Smith was asked, if the bunker was to be included in the project, why was there not any wiring or strapping applied at the same time that subtrades were on site wiring the new garage and renovated areas of the main structure. Mr. Smith's explanation was that they had agreed to leave the bunker to the end of the project so it could be dealt with in warmer summer weather. This does not seem reasonable to me. At any rate, one would expect a man with Mr. Smith's experience to have made some documentation of such a plan.

[70] Having heard both versions of the bunker evidence, I find that on the balance of probabilities it is more likely that the work in the bunker was agreed by the parties to be excluded from the fixed contract price before it was signed on August 30, 2016.

[71] Similarly, Mr. Smith asserts that the exterior deck over the bunker was included in the fixed contract price and was required to be completed by Mr. King. Yet he agrees that after the deck was removed in the early demolition in September 2016, there were visible cracks in the concrete roof allowing water intrusion into the bunker. Remediating these water problems would certainly have been at extra cost to the contract. Nor would it make sense to deck over this bunker roof, without effecting repairs first. Again, on the evidence before me I can only conclude that the bunker project including decking was excluded from the fixed contract price.

[72] These invoices for the fixed price contract dated August 30, 2016 were paid by Mr. Smith, save the last invoice.

Extra Work Approved and Invoiced

[73] The extra work invoiced is itemized inclusive of tax and is evidenced by the following invoices:

No. 503	Extra Work (outside scope) (Ex.1 at Tab 7) date Dec. 7, 2016	\$23,266.97
No. 504	Extra Work (outside scope) (Ex. 1 at Tab 9) date Jan. 24, 2017	\$17,511.76
No. 505	Extra Work (outside scope) (Ex. 1 at Tab 11) date Jan. 27, 2017	\$4,835.75
No. 508	Extra Work (outside scope) (Ex. 1 at Tab 17) date April 23, 2017	\$28,835.62
No. 509	Extra Work (outside scope) (Ex. 1 at Tab 19) date May 24, 2017	\$7,722.20
No. 510	Extra Work (outside scope) (Ex. 1 at Tab 20) date June 5, 2017	\$14,052.33

[74] The first four invoices for extras were paid by Mr. Smith, who says in his evidence he paid them under duress. These invoices detailed the substantial extra work required to complete the basement of the main structure. His cancelled cheques are in evidence. Mr. Smith did not make any further payments after May

24, 2017, leaving the last two invoices outstanding. He terminated the contract on May 31, 2017.

[75] Mr. Smith has revisited the paid invoices throughout the contract period and submitted written notes relating to each invoice identifying areas of disagreement (Exhibit 1 – Tab 113) for which he now seeks an accounting.

[76] Mr. Smith said in evidence that he prepared these notes on the advice of counsel, once the plaintiff New Light had liened the project, following the termination. He believes he wrote these notes in June 2017. Throughout the trial, I have referred to these notes as the “Smith Critique,” upon which I will comment further, later this decision.

[77] However, on two earlier occasions Mr. Smith questioned an invoice immediately after it was presented. The first was in January 2017, with respect to the invoice for extras dated January 24. Upon receiving the supporting documents, which he requested from Mr. King, he recalculated the man-hours spent and found an error: 172 man-hours not 188.5 man-hours. Mr. King agreed and the adjustment was made. This adjustment followed Mr. Smith’s usual and rigorous review of the “extras” invoices and backup documents upon presentation to him.

[78] Mr. Smith suggested there was a discrepancy found in another invoice for extras dated April 27, 2017 (Exhibit 1 – Tab 17). Mr. Smith’s counsel on cross examination of Mr. King introduced Exhibit 11 dated April 28, an almost duplicate invoice of Tab 17, which did not list an item for materials in the amount of \$5,122.74, resulting in a lesser balance owing. Mr. Smith had suggested that these materials were not for his project, but for some other job site Mr. King was working on. Mr. King testified that possibly his office secretary had mistakenly issued this document (Exhibit 11). He testified that he was not familiar with the document. He testified that the \$5,122.74 could not have been for materials sent to any other work site as he only had one project on the go, Mr. Smith’s renovation. I accept this evidence. Mr. Smith had paid this invoice (Exhibit 1 – Tab 17) on April 28, 2017, the day after it was rendered. On cross examination, Mr. Smith agreed he did receive backup documents (Exhibit 4) for this charge of \$5,122.74 in late April. On cross examination, Mr. Smith also had poor recall of when he first saw the invoice at Exhibit 11 or how it came to light.

[79] With respect to Mr. Smith’s complaint that he was forced to pay each invoice within a few days after presentation, I observe that Mr. Smith does not seem like the sort of man who after a lifetime of work in industry, could be easily

bullied. Nor did he make any contemporaneous notes about any objections to the invoices except the ones I have noted.

Law and Argument

Did Mr. Smith breach the contract with New Light?

[80] Mr. Smith claims justification in his termination of the contract. New Light submits that Mr. King did not have any justification, legal or otherwise, to unilaterally terminate the contract.

[81] The onus is on Mr. Smith to prove to the court his termination of the contract was legal.

[82] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) (Fridman) states at 664:

1. Recovery of damages for breach of contract.
 - (a) At common law
 - (i) Contract and other claims

When a contract has been broken, by non-performance at the time performance is due, or repudiation in advance of such time, the remedy at common law is an action for damages for breach of contract. The only possible defences available to the contract breaker are (1) that the breach was caused by supervening impossibility or frustration, (2) that the other party failed to perform some condition precedent upon the performance of which depended performance by the party alleged to be in breach, or (3) the existence in the contract of an exclusion or limitation of liability clause.

[83] When the non-repudiating party accepts repudiation, the contract is discharged. The non-repudiating party is then released from the contractual obligations, allowing that party to immediately sue the repudiating party for any damages flowing from the repudiation, including both losses suffered at the date of repudiation, as well as prospective losses flowing from the repudiating party's failure to honour their contractual obligations: *Keneric Tractor Sales Ltd. V. Langille*, 1987 CarswellNS 390 and *Guarantee Co. of North America v. Gordon Capital Corp.* 1999 CarswellOnt 3171 at para. 40.

[84] Supporting their claim for damages both before and after the repudiation, the plaintiff relies on *R.P.M. Investment Corp. (c.o.b. Mission Homes) v. Lange*, 2017 ABWB 305 at para. 62:

Notwithstanding that acceptance of a repudiation terminates a contract, the case law makes clear that the non-repudiating party may claim not only damages for work done prior to the repudiation, but also damages resulting from the repudiation itself. . . .

[85] Fridman, describes anticipatory breach at 585 and 586:

Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due . . .

The authorities reveal that, for this type of breach to occur the following must be established: (1) conduct which amounts to a total rejection of the obligations of the contract; (2) lack of justification for such conduct. If, to these, is added the acceptance by the innocent party of the repudiation, then the effect will be to terminate the contract. This does not mean that the repudiating party may be freed from his obligations. It simply means that the innocent party may be freed from his obligations, and may pursue such remedies as would be available to him if the breach had taken place at the time when performance was due.

[86] The plaintiff New Light argues that there are no defences available to Mr. Smith to justify repudiation.

[87] Mr. Smith did not take issue with the quality of work carried out by New Light. In his own words he wrote in his critique:

I must state that the work that has been carried-out as been of a very satisfactory standard and I am generally pleased with the quality.

[88] Notwithstanding Mr. Smith's allegations of threats or intimidation made toward him by Mr. King, for more than six months Mr. Smith allowed Mr. King to carry out the contract on his home. He made no mention of these allegations at discovery, carried on an active and cordial stream of conversation by text and email and continued to socialize with Mr. King, even celebrating his birthday with him in December 2016.

[89] Admittedly, there may have been some bad feelings between them, and their relationship was not always easy, but on the evidence before me, Mr. Smith lacks credibility in making these allegations and they do not amount to a legal justification for repudiation of the contract.

[90] *Doucette v. Giannoulis*, 2005 NSSC 166, is an interesting case in which Mr. Doucette had made actual physical assaults and threats on two defendants, yet his conduct was not found to rise to the level of providing legal justification for repudiation of the contract by the corporate defendant.

[91] Fundamental breach is an exceptional remedy. *Hunter Engineering Co. v. Syncrude*, [1989] 1 S.C.R. 426.

[92] Mr. Smith argues that because of these threats he felt trapped and that May 31, 2017 was the “first realistic opportunity he had to repudiate the contract.”

[93] I disagree. I do not accept that these alleged threats were proved or substantiated in any way, or if made rose to the level of interfering with the continuation of the contract that was completed in a more than satisfactory manner. Indeed, Mr. Smith did not issue another cheque on the main contract after February 27, 2017. He allowed New Light to continue the project to near completion after the drywall was installed and when the only work remaining was painting, flooring, installation of cabinets, fixtures and trim work.

[94] Mr. Smith agreed in cross examination that he did not plan to pay New Light any further money. He agreed that he continued to allow New Light to continue to work on the project knowing that he planned to terminate the contract.

[95] After hearing all of the evidence, the most likely reality seems to be that Mr. Smith simply ran out of cash. He chose not to complete the project by seeking financing. In any event, it does not relieve him of his obligation as a contracting party who has repudiated the contract without justification.

[96] There was no reason why New Light could not have completed the remaining two or three weeks of work to finish the contract.

[97] At the time the contract was repudiated, there was \$109,830.50 remaining owing on the contract price. Two invoices for extras remained unpaid: Invoice 509 (Exhibit 1 – Tab 19) for \$7,722.20 and Invoice 510 (Exhibit 1 – Tab 20) \$14,052.33 for a total of \$21,774.53.

[98] Had the contract not been repudiated, the evidence is that New Light would have completed the work remaining and provided Mr. Smith with an invoice for \$33,142.40 upon completion. Had Mr. Smith not repudiated the contact, he would have paid Invoice 511 dated June 5, 2017, in the amount of \$76,688.10 issued after the drywall and taping work had been completed.

[99] Indeed, the balance remaining on the fixed contract price not yet billed of \$33,142.40 is about 10% of the contract price. Any deficiencies would have been addressed at that time.

[100] There is no evidence before the court of the value of the work required to complete the project. Mr. King was not required to do so. Mr. Smith chose not to produce an expert to value the work remaining. Mr. Smith did not provide a Rule 55 Expert Opinion as to the value of the work remaining to complete the property. I made the ruling during trial that such an expert's opinion was required.

What is the quantum of damages owing to New Light for Mr. Smith's breach of contract?

[101] The plaintiff, New Light, has presented its calculations of the amounts owing under the contract and for extra work completed to the date of Mr. Smith's termination of contract. They are as follows:

Dates(s) of Payment	Reference	Amount of Payment
8/30/2016	Invoice 00501, Common Exhibit Book, Tab 3-4	\$50,000.00
9/1/2016	Invoice 00501, Common Exhibit Book, Tab 3-4	\$50,000.00
10/4/2016	Invoice 00501, Common Exhibit Book Tab 3-4	\$15,000.00
10/13/2016	Invoice 00502, Common Exhibit Book Tab 5-8	\$57,500.00
2/27/2017	Invoice 00506 Common Exhibit Book, Tab 13-14	\$50,000.00
Total Paid on Contract		\$222,500.00
Outstanding Principal (Total contract price of \$332,430.50 less \$222,500.00 paid on contract by Mr. Smith)		\$109,930.50

[102] The amounts paid by Mr. Smith to New Light for extra work outside the scope of the contract to date are as follows:

Dates(s) of Payment	Reference	Amount of Payment
12/16/2016	Invoice 00503, Common Exhibit Book, Tab 7-8	\$23,226.98
1/26/2017	Invoice 00504, Common Exhibit Book, Tab 9-10	\$17,511.76

2/1/2017	Invoice 00505, Common Exhibit Book, Tab 11-12	\$4,835.75
[04/28/2017]	Invoice 00508, Common Exhibit Book, Tab 17-18	\$28,835.62
Total Paid for Extra Work		\$74,410.11

[103] The total amounts of the unpaid invoices for extra work and for work carried out under the scope of the contract are as follows:

Date	Reference	Amount of Invoice
5/24/2017	Invoice 00509 (Extras), Common Exhibit Book, Tab 19	\$7,722.20
6/5/2017	Invoice 00510 (Extras), Common Exhibit Book, Tab 20	\$14,052.33
6/5/2017	Invoice 00511 (Scope of Work), Common Exhibit Book, Tab 21	\$76,688.10
Total of unpaid Invoices		\$98,462.63

[104] New Light claims loss of profit of 15% on the amount of its uncompleted work in the amount of \$4,322.92. Accordingly, the total damages owed to New Light by Mr. Smith are as follows:

Unpaid Extras Invoice 00509	\$7,722.20
Unpaid Extras Invoice 00510	\$14,052.33
Unpaid Invoice 00511 for completed scope work	\$76,688.10
Profit on remaining scope work	\$4,322.92
Total:	\$102,785.55

Lastly, can Mr. Smith's counterclaim succeed?

[105] Mr. Smith claimed that as his repudiation of the contract was justified, he was entitled to a "set off" or "credits" as a matter of law.

[106] Mr. Smith relies on *Gateway Realty Ltd. v. Arton Holdings Limited* (No. 3) 1991 CanLII 2707 (NSSC) paras. 58-60 wherein the court addresses bad faith and he relies on *Masontech Inc. v. Affinity Contracting and Environmental Ltd.*, 2014 NSSC 164, to counter any argument of estoppel for Mr. Smith revisiting all of the invoices presented to him throughout the life of the contract which he had reviewed and paid soon after presentation.

[107] Mr. Smith claims a set off against the plaintiff New Light at para. 13 of his amended statement of defence and counterclaim.

(a) Damages for Breach of Contract

~~to be particularized at trial~~; to complete the renovation of the house as per the contract.

[108] Mr. Smith's counterclaim was based on the following allegations, many of which I have dealt with in my analysis of the evidence. For clarity as to the counterclaim, I repeat them here.

[109] Mr. Smith's issues with New Light and its principal Mr. King were:

1. Personal conduct of Mr. King in relation to the suppliers and other trades used by New Light;
2. Refusing or neglecting to follow Mr. Smith's requests and directions;
3. Failing to complete the project by the timeline desired by Mr. Smith, namely, Christmas 2016;
4. Not preparing written addenda for extra work;
5. Double billing Mr. Smith for items allegedly included in the contract, including the installation of The Forever Roof system; and further failing or refusing to renovate the bunker garage and rear deck.

[110] On the evidence before me I find:

1. No evidence has been presented by Mr. Smith in respect to Mr. King's relationship with suppliers or other trades used by New Light.
2. With respect to neglecting to follow Mr. Smith's requests and directions, I find that the opposite is so. Mr. King dealt with all of the many changes and redesigns that Mr. Smith proposed, and the evidence is replete with this detail, from the selection and placement of windows, location of the fireplace and rebuilding its surround several times, to basement renovation details. There were two matters raised – that of a glass screen near the main door entrance and a corridor enclosure on the main level – both of which were extras, that Mr. King declined then to undertake. This could not constitute a breach of the contract.
3. With respect to New Light's failure to complete the contract by Christmas 2016, this is completely unfounded. I found that there was no agreed schedule for completion and Mr. Smith was well aware that

after the basement had to be gutted and was then redesigned, such a schedule could never have been met. However, the discussion of a possible Christmas 2016 completion date was never a term of the contract.

4. With respect to Mr. Smith's claim he asked for and was not given a written addendum for extra work, this is not so. When by email on May 4, 2017, he asked Mr. King for an explanation of where they were with the contract, that information was immediately forthcoming and received by Mr. Smith as he acknowledged on cross examination.
5. With respect to the allegation of double billing, and the renovation of the bunker garage, again I have made findings of fact on many of these items in my analysis of the evidence. However, I will address the "Smith Critique" now.

The Smith Critique

[111] Mr. Smith's claim rests largely upon the evidence of his notes made in June 2017, after he terminated the contract. This document is found in Exhibit 1 – Tab 113. Although entered in evidence in the joint exhibit book, it was entered not for the truth of its content, but only for the fact that it was prepared by Mr. Smith. It was prepared after Mr. King's lien claim was filed. Mr. Smith testified that he prepared this critique to note all of the relevant details of the dispute.

[112] Mr. Smith's counsel has conveniently summarized the charges for which he claims credit in his post-trial brief to the court.

[113] I will deal with these credits sought by the defendant and plaintiff by counterclaim.

[114] I have addressed his claim for The Forever Roof. This charge of \$22,821.75 was extra to the fixed contract price, as was any work related to the bunker and deck above the bunker.

[115] Mr. Smith claims \$480 for portable toilet rental charged to him as an extra. The extended length of the contract required this additional rental; it is also an expense New Light is required by law to provide for its workers. Mr. Smith paid this invoice upon presentation. I find it to be a legitimate extra expense, for which New Light was appropriately paid.

[116] Mr. Smith's critique also questioned New Light's charge of a management fee of \$3,600 itemized in Invoice 508, dated April 27, 2017, paid by Mr. Smith on the same date (Exhibit 1 – Tabs 17 and 18).

Finwick Project Management and Retrieving materials = 120 Man Hours at \$30.00 per hour

[117] Mr. Smith accompanied Mr. King on many occasions to attend suppliers to choose floor tile, plumbing fixtures and more. Most arrangements were arranged by texts between them (Exhibit 7). This charge was unchallenged by Mr. Smith when the invoice was presented. It accounts for Mr. King's hours at the agreed rate of \$30 and cannot reasonably be said, as claimed by Mr. Smith, that it should "be included in the \$30 rate for extras." Indeed, Mr. King accounted for the hours of each New Light worker on the job site at \$30 upon request and this charge reflects his own extra hours spent on the project. This was in my view an appropriate charge accounted for at the agreed rate of \$30.

[118] Mr. Smith claims for missing plumbing faucets \$2,584.05 (Exhibit 12). Mr. King testified that he accompanied Mr. Smith to Bird Stairs to select the fixtures and that he subsequently picked up the boxes of fixtures and delivered them to the project a few days before Mr. Smith's May 30, 2017 termination of contract. The fixtures went missing. I accept Mr. King's evidence respecting the delivery of these supplies.

[119] I have previously dealt with Mr. Smith's claim for an overpayment of \$5,122.74 on Invoice 508, a charge for materials. These materials were an appropriate charge and duly paid for by Mr. Smith in April 2017.

[120] Mr. Smith claims for an item "stonework \$2,591.67" on Invoice 510, dated June 5, 2017. Mr. Smith claims that a stone-veneer was noted on the plan (Exhibit 10 p. 3). This veneer was to be located on the front where the garage doors were located and the western side of the new extension.

[121] Mr. King's evidence was that he quoted vinyl siding on all exteriors and that it was agreed if Mr. Smith wanted to add a stone-veneer he would pay for it as an extra. In contemplation of this extra, he testified they installed a brick check, but as Mr. Smith declined to use stone, the 2'x10' walls were moved outward to provide a smooth exterior for the siding. This work was completed without any note of objection. I find Mr. Smith's later claim for the value of the stonework to be unfounded. I accept that the stonework would have been an extra; that Mr. Smith chose not to select it as he was concerned about costs. He visited the site

often. He watched the construction of the 2'x10' walls to provide smooth walls to accommodate the siding. He saw the installation of the siding and did not speak up about or document any deficiency.

[122] Mr. Smith and his counsel have prepared a set of calculations on which they base their claim for a final accounting with New Light. It assumes a state of completion of 70% as of May 31, 2017. It also assumes the court accepts all of the items of set off or credits to Mr. Smith and arrives at a balance of \$1,888.27 owing by New Light to Mr. Smith.

[123] Their accounting is as follows:

Defence and Counterclaim of Smith	
Proposal (fixed price contract with HST included)	\$332,430.50
70% complete of scope of work under Proposal	\$232,701.35
Loss of 15% profit on uncompleted work if contract was unlawfully repudiated	\$4,336.06
Payments by Smith on Proposal (fixed price contract)	\$222,500.00
Subtotals	\$14,537.41
Unpaid Extras to NLC	
Extras Invoice #000509	\$7,722.20
Extras Invoice #000510	\$14,052.33
Subtotals due to NLC	\$36,311.94
Credits to David Smith	
Forever Roof Invoice (double billed by NLC)	\$22,821.75
Portable toilet rental	\$480.00
Finwick Project management fee	\$3,600.00
Missing prepaid plumbing faucets and fittings (see Exhibit 12)	\$2,584.05
Purchase price for existing kitchen appliances	\$1,000.00
Credit due to overpayment on invoice 000508	\$5,122.74
Credit for stone veneer charges on invoice 000510	\$2,591.67
Total of credits claimed by David Smith	\$38,200.21
Balance owing to NLC	-\$1,888.27

[124] Mr. Smith's pleaded defences of fundamental breach and set off cannot be sustained.

[125] From the evidence before me, it is clear Mr. Smith is liable for his unilateral repudiation of the contract.

[126] Mr. Smith's counterclaim is without merit. It is simply not sustained by the evidence.

[127] In the result, the plaintiff New Light is entitled to special damages in the amount of \$102,785.55, prejudgment interest and their costs in this action.

[128] I decline to award general damages as sought by New Light.

[129] If the parties are unable to agree on costs, I will receive written submissions.

Justice M. Heather Robertson