

Claim No: 312342

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

Cite as: Peters v. Gerald Mitchell Contracting Ltd., 2009 NSSM 55

BETWEEN:

COLIN PETERS

Claimant

- and -

GERALD MITCHELL CONTRACTING LIMITED

Defendant

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**REASONS FOR DECISION**

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on July 21, 2009, July 30, 2009 and August 4, 2009

Decision rendered on October 29, 2009

**APPEARANCES**

For the Claimant            self-represented

For the Defendant        Jillian Ryan, counsel

**BY THE COURT:**

**INTRODUCTION**

- [1] This is a claim and counterclaim arising from a contract to construct a new home.
- [2] The Claimant alleges that there are a number of deficiencies and other problems for which the Defendant should answer in damages. The Defendant says that there were some extras to the contract for which the Claimant should pay.
- [3] There are a number of factors that complicated the relationship between the Claimant and the Defendant. The most significant of those factors is that the Claimant himself is in the construction trade (in a capacity that was not made totally clear) and he drew up his own plans and specifications, ordered some of his own materials, and arranged for some of the trades directly. As a result, there are areas in the claim where it is not as clear as it might be whether or not the Defendant (or his sub-trades) were responsible for the matter in issue. It is always an easier matter where the general contractor has the ultimate responsibility.
- [4] Another complicating factor is that the relationship between the Claimant and the principal of the Defendant, Mr. Mitchell, became poisoned to the point where it no longer became reasonable to expect the Defendant to attend to work that would be considered routine warranty work. The Claimant himself contributed to the souring of the relationship by expressing his frustrations with the Defendant in a posting on the website

Kijiji, which posting was at the least unflattering or at the worst defamatory of the Defendant. It is not for me to decide whether it was legally defamatory or not, but I cannot ignore this factor entirely as I consider whether or not there is validity to the claims presented, as it clearly has clouded both parties' objectivity.

- [5] Another complicating factor is that the Claimant either has done or proposes to do some of the remedial work himself, and has attempted to place a value on his own time. He has prepared a comprehensive schedule of claims with material and labour estimates, almost none of which are based upon third party estimates, which is the usual currency used in this and other courts.
- [6] The total number of complaints is 57. The monetary total would be well in excess of - indeed more than double - the court's jurisdiction, but the Claimant is prepared to waive the excess, if any.
- [7] The complaints were presented in no particularly logical order, but will be referenced with the numbers that the Claimant used in the Claimant's presentation. To a certain extent, they are better dealt with by breaking them down into the following admittedly arbitrary categories:
- A. Significant complaints involving issues of principle.
  - B. Major complaints which are valued at or about \$500, or more.
  - C. Minor maintenance or warranty items.
- [8] All of the claims as presented sought also HST. In some cases that might be appropriate, but some of the claims do not involve HST, and others

seek compensation for work that the Claimant has done or proposes to do himself. In such a situation, it would not be appropriate to award HST since there is no evidence that the Claimant is eligible to charge HST, and any amount of HST that the Defendant might be ordered to pay would be an eligible input credit and therefore must be as a result of HST actually paid to an eligible supplier.

- [9] As such, I will not refer to HST as I go through the claims but will deal with it globally at the conclusion of these reasons.

#### **Other contractual provisions**

- [10] It is important to highlight certain provisions in the contract, which have a bearing on the claim. Clause 16 states that disputes over the quality of workmanship should be settled by arbitration. In many ways that would have been a more efficient way to resolve deficiency issues, since the arbitrator(s) could have been qualified builder(s) and perhaps resolved the issues on a site visit, with the benefit of a close-up inspection.
- [11] I am not prepared to say that the Claimant is barred from bringing his claims to court, especially since some of his complaints are not really deficiency claims, but I do wish it to be known that this has been a difficult and somewhat inefficient process.
- [12] Another clause to highlight is part of 15, which was handwritten in, and which states that “[i]f there are any deficiencies the contractor and client will agree before purchaser moves in or money is released.

- [13] Such a clause recognizes that the best time to deal with deficiencies is before the homeowner moves in, and before all of the money is released. This is for both parties' protection. It gives the contractor an incentive to satisfy the owner, and it also gives him a clear field in which to work.
- [14] In the situation here, the closing was delayed and there was a verbal agreement to allow the Claimant to close the transaction and move in, without any financial holdback for deficiencies. I am not prepared to find that this constituted a waiver of all possible deficiencies, because there is a warranty that applies to the work, but it highlights part of the problem - that this matter did not proceed as it ought to have done.

#### **OVERVIEW OF THE MERITS**

- [15] As will become clear by the end of these reasons, the claims are not entirely without merit, but have succeeded to only a fractional extent. My overall assessment of the Claimant and his evidence was that he took a very narrow and self-interested view of the matters, that he became hyper-critical, and that he expected a level of perfection that is seldom achieved, and hardly expected, in the very inexact craft of house building.
- [16] Despite the impressive amount of work that the Claimant put into documenting, preparing and presenting his case, the bottom line is that there were some garden variety deficiencies that, had the relationship not become so poisoned, would likely have been looked after without the need for litigation. To some extent the Claimant has been the cause of his own difficulties, as he is at least equally responsible for poisoning the relationship with the Defendant.

## **SIGNIFICANT COMPLAINTS**

- [17] **Item number 1** is a claim that the hardwood floor in the kitchen was damaged by the moving of the fridge on one or two occasions. This claim, while not the largest in dollar terms, appears to have been the one that largely sparked the dispute.
- [18] The Claimant alleges that it was workers of the Defendant that failed to take proper care, and in the result made gouges that cannot be repaired without replacing the entire floor. The amount of the claim is \$2,530.
- [19] The evidence supports a finding that some of the damage may have been done by painters who were working for the Claimant directly. There is also evidence that had the fridge been delivered in a more timely manner, it would not have been there and needed moving when the Defendant's workers came to finish up some of their work. And that in turn is partly a function of the Claimant himself contracting directly with some of the trades, as opposed to having everything done by the contractor.
- [20] Nevertheless, I am satisfied that the Defendant bears some responsibility for damage to the floor, but I am apportioning it half to the Defendant and half to others, for which the Defendant is not responsible.
- [21] I do not accept that the floor requires complete re-sanding or replacement. I accept the evidence of the Defendant that removal and replacement of a few boards would be adequate to repair this item.

- [22] I allow the sum of \$500, which if anything is generous.
- [23] **Item number 2** concerns the fact that no New Home Warranty was obtained for the house. There is no particular dollar value attached.
- [24] It appears on the evidence that the warranty was applied for by the Defendant, but the Atlantic New Home Warranty program refused to issue the warranty because the windows in the home had been purchased by the Claimant directly, rather than through the Defendant.
- [25] While I find this result surprising, I do not consider that the Defendant has done anything wrong and this is a matter between the Claimant and the warranty people. In addition, I have no authority to order that an warranty be given.
- [26] I allow nothing for this item.
- [27] **Item number 19** is another major matter. The Claimant says that the well was drilled in the wrong place, which creates a problem because the well-head is right in the path between the garage door and the patio, creating an unsafe obstacle.
- [28] The Claimant stated that the site plan showed a well location some distance from the house, to the northwest of the driveway.
- [29] The Defendant testified that he was governed by the lay of the land and cost considerations. Had the well been located where the Claimant now says it should have been, there would have been a significant problem as

the land is mostly bedrock and there would have to have been significant blasting in order to create a trench between the well and the house. Also, with a long run between the well and the house there is a risk of pipes freezing. The Defendant says that he saved the Claimant \$5,000 or more in costs by locating the well as he did.

- [30] The Defendant points out that the current location is better should any future problems arise that requires servicing or extra drilling. There is also no guarantee that a chosen spot, once drilled, will yield water.
- [31] The Defendant says that the Claimant was aware of the location of the well and raised no complaint, even in the original version of the Claim.
- [32] It does appear to me to be a situation where the Defendant was exercising his experience and discretion, trying to do the right thing. He was also aware that the Claimant was unlikely to have approved a major blasting expense, and went ahead in good faith believing that the Claimant would be content.
- [33] I am aware that communication between the Claimant and the Defendant was not always easy, and the Claimant was also travelling periodically for his work.
- [34] I do not regard the location of the well as a matter imported into the contract, such that the failure to site it precisely where indicated would amount to a breach of contract.



- [35] Common experience shows that wellheads sometimes show up in inconvenient places, and are dealt with by various means such as planting gardens around them and laying out paths to go around them.
- [36] I am not prepared to allow anything for this item.
- [37] **Item number 21** seeks \$3,150 to compensate for what the Claimant says was incorrect installation of the Tyvek. Item 21A complains of incorrectly applied Blueskin, but attaches no extra cost.
- [38] The Claimant's position is that the drawings which are part of the contract specify that "all joints tuck taped." It appears from the photos in evidence that some joints were taped but in most places the Tyvek was held down by the strapping nailed to the walls. According to the Defendant and his witnesses, this is an appropriate method that meets the Building Code as well as the specific instructions for this product.
- [39] The Claimant produced a photo in evidence of another home that the Defendant is constructing, which shows tape along all of the seams. The Claimant's view was that this indicates that the Defendant is aware of the correct procedure but did not follow it in his case.
- [40] The Defendant answered this position by stating that where Tyvek is applied and it is likely that the house is going to be exposed to the elements for a time, then extra precautions are taken to seal the house from the elements. Where there is strapping applied, however, and the house is to be sided immediately, this is not necessary. The main

protection comes from the Tyvek being overlapped the correct amount and held in place.

- [41] The Claimant believes that the additional taping would have increased the insulation value on the home. The amount he seeks is a refund of an extra \$3,150 which he paid for an additional layer of exterior insulation, which he says is now wasted because of the Tyvek not being taped.
- [42] I am simply not convinced that the lack of taping has in any way diminished what the Claimant has received. I am also not convinced that there was any contractual understanding which required the Defendant to go beyond the usual installation protocols.
- [43] I also do not accept that there was any deficiency in the application of the Blueskin, which the Defendant explained would not stick to the Styrofoam and therefore had to be applied over the Tyvek.
- [44] **Item number 23** is a significant claim which contends that the house was improperly sited on the lot. The Claimant says that the original site plan would have allowed enough space for an outbuilding between the driveway and the lot line. Instead, the home has been moved about 15 feet leaving only 60 feet to the lot line, which the Claimant says is inadequate for any future outbuilding.
- [45] The Defendant testified that he sited the home, with the full knowledge of the Claimant, to make best use of the natural contours of the land. This complaint is another one, the Defendant contends, which has been made

in an untimely fashion as the Claimant was fully aware of the siting and never complained before this matter came on for trial.

- [46] I agree with the Defendant. The Claimant was heavily involved at every step of the way, beyond what any ordinary homeowner would have done. Despite the fact that he travelled, it is inconceivable that he would not have been aware of how the building was sited and if he had any objection he should have raised it when the problem - if it was one - could have been solved.
- [47] I find no merit in this complaint. Again I do not regard the plot plan as the final word for contractual rights. I also find that any variance was expressly waived and by his silence the Claimant is estopped from raising this as an actionable matter at this time.
- [48] **Item number 45** seeks compensation for the closing (i.e. completion) date having been roughly 2.5 months later than originally scheduled. The amount claimed is \$7,400 based upon alleged losses on the sale of their other home, plus additional mortgage and other payments made on their other home. It measures the loss at \$100 per day, which is an amount one sometimes sees as a penalty clause in construction contracts.
- [49] It is true that the contract as signed called for completion by September 30, 2008. However, it also reserves the right to extend if there are delays caused by weather or anything for which the purchaser is responsible.
- [50] I believe that there is a prevailing expectation that completion dates are somewhat fluid, unless there is a clearly stated expectation that time will

be of the essence, in which case the contractor is on notice that there may be consequences. In larger projects, this is usually expressed in terms of a penalty clause that charges the builder for every day that the construction is late.

[51] Here there were some weather delays, as well as some difficulties with the excavation and blasting that contributed to the construction being delayed.

[52] On the evidence, I believe that the parties mutually understood early on that this was not a date likely to be met. The Claimant advised the Defendant that he had not yet sold his home, and a sense was created that there was no rush to complete. There is also some doubt as to whether the Claimant had the required funds to meet an earlier completion.

[53] Even if the Defendant could be said to have been in breach of contract, I do not believe that any damages have been proved. If anything, had the house been ready any earlier the Claimant might have been stuck carrying two homes and this might have cost him money. It is pure speculation to suggest that the Claimant suffered any losses as a result of the delay.

[54] Furthermore, I am less inclined to give credence to this claim when, the fact is, it was never raised in the months leading up to completion and occupancy. I believe that this claim is a recent invention, so to speak, sparked by the other disputes. Under all of the circumstances I am not prepared to accept this claim.

## **MAJOR COMPLAINTS**

- [55] **Item number 9** (also included in item 10) seeks in excess of \$1,000 for what is alleged to be defects in the paint job at the intersection of the walls and ceilings.
- [56] As I understand it, there are slight colour differences which result from the different painting techniques where brushwork meets roller work. The Claimant also contends that part of the problem is due to inadequate sanding, which he wants redone.
- [57] There is also the fact that shadows are visible at these corners in certain light conditions, which is natural.
- [58] It is also likely the fact that paint is absorbed differently by the joint compound which is at the corners, no matter how well sanded, than by the drywall itself.
- [59] I am willing to accept that there are probably a few areas requiring some attention, but I am also convinced that the Claimant is likely oversensitive to this and some other matters. He appears, with respect, to expect perfection where the standard is workmanlike.
- [60] The Defendant estimated that an experienced painter would take a half hour to fix the problem. With respect, this seems a bit optimistic. I will allow \$150 for painting repairs.
- [61] **Item number 11** complains that there is no cover built over the electrical panel in the unfinished basement.

- [62] The Defendant stated that it was not his decision, but rather that of Nova Scotia Power, where the electrical service entered the home, and that there is no practice to build a decorative box in unfinished areas.
- [63] I find nothing in the contract that would have required this item and allow nothing for it.
- [64] **Item number 13** complains of a crooked door casing on one of the bedrooms. The claim is for \$480. On the photographic evidence, there is a barely visible crack that requires some adjustment, and perhaps a new piece of casing. I regard the amount claimed as excessive and allow \$75 to repair this.
- [65] **Item number 14** complains that the fan in the master bath is not the proper size. The amount claimed is \$489.98.
- [66] The Defendant's position is that he put in a fan that met the Code, even if it was not the one that the Claimant wanted.
- [67] To resolve this difference requires me to consider the issue of the supposed Specifications attached to the contract. The Claimant negotiated a building contract with the Defendant, having brought a detailed set of specifications which he developed. The evidence is that the price came in too high, and in the negotiations toward a lower price the Defendant scratched out about 80% of the Claimant's specs and indicated that his standard specs would apply. It was that scratched out spec sheet that was attached to the eventual signed copy of the contract.

- [68] While I would not call the contract a model of clarity, in this respect it does appear to me that the Claimant cannot have it both ways. He did not appear to appreciate that his specs were, in effect, a wish list and that he was not willing to pay the price to have all of his wishes granted. As such I find no merit in this item.
- [69] **Item number 16** seeks \$2,711 to repair and/or replace the deck boards which, the Claimant says, were attached without leaving a proper space to allow water to run through.
- [70] The Defendant stated that the accepted practice is to abut the boards, and that in time there will be a bit of shrinkage. He stated that it would be unsafe to have left any spaces, which in time would have become large enough to catch high heels and create a danger.
- [71] The Defendant also points out that the Claimant was well aware of how this job was done and raised no objection at the time.
- [72] On a balance of probabilities, I accept that the Defendant's position is correct. The Defendant is a very experienced home-builder and his explanations make sense.
- [73] The Claimant appears to be concerned that ice and snow built up on his deck last winter. He is also concerned that when it melted it did not drain through the cracks. This does not appear to be an uncommon issue, and it is by no means an indication that the deck needs to be rebuilt. It is most likely a matter of time before the boards shrink a bit, exposing normal gaps.

- [74] **Item number 20** complains that the driveway is supposed to be a full 20 feet wide, and yet in places it is perhaps a couple of feet less. The Claimant seeks \$850 to make repairs.
- [75] The Defendant admits that the width is a bit short in areas, but states that it is within reasonable tolerances.
- [76] There is no evidence that the driveway is inadequate or that it does not serve its purpose. Should the Claimant eventually decide to pave the driveway, he can adjust the width to suit his wishes at that time. I allow nothing for this claim.
- [77] **Item number 24** seeks a refund of \$472.50 for insulation that was not placed around the garage.
- [78] The Claimant's position is that he believed he was paying \$3,150 to add a layer of insulation to the entire house which would have included the garage. In fact, as constructed, the garage was sheathed with OSB instead of Styrofoam, which the Claimant says should have brought about a credit.
- [79] The Defendant testified that the additional insulation was priced to include not just materials but all of the extra work that needed to be done, and that if there was some saving on materials it was very little as most of that price was labour. Sheathing the garage was an alternative which, according to the Defendant, is more than adequate for the garage, and adds extra stability in case of high winds.



- [80] I am not convinced that the Claimant is due any credit for this item. This was not a cost-plus contract where the Claimant is entitled to an audit of the Defendant's costs. It is also worth noting that, if the Defendant saved money in some areas, he certainly spent more in other areas, and this represents something of a 'wash.'
- [81] **Item number 25** seeks \$500 for what the Claimant says is the wrong placement of an exterior door. The Claimant says that the placement of the door is right under a structural beam which potentially affects the structural soundness. In his claim he actually asks for an engineering report to verify its soundness, failing which he wants compensation.
- [82] The Defendant testified that this occurred, in part, because the Claimant himself insisted on using the windows that he had already purchased, which in turn dictated that the door be located as it was.
- [83] I am far from convinced that there is a deficiency. Had the Claimant obtained a report that questioned the structural integrity, I might have considered compensation. Unfortunately, I have no jurisdiction to order any form of inspection, and absent proof that there is something unsound, I must regard this item as unproved.
- [84] **Item number 29** seeks \$556 for what the Claimant says is a missing fan in the garage. He says that it is in the applicable specifications.

- [85] The Defendant testified that he left it to his electrician to install what was in the specifications and that this is another item that the Claimant wanted but was not willing to pay extra for.
- [86] I do not regard this item as proved.
- [87] **Item number 31** complains of a squeaky floor in the living room and seeks \$500 as an allowance to investigate and repair this problem. The Claimant allows for the fact that there are a number of possible causes for such a problem.
- [88] The Defendant says that it should be easy to diagnose and resolve this problem, because the ceiling in the basement is unfinished and the floor joists are exposed.
- [89] While I am not unsympathetic to the issue of squeaky floors, the fact is that my role is to award compensation based on the facts as I find them. I do not award compensation for investigations that might lead to further claims. The Claimant took his claim to court and ought to have had evidence available to explain the problem.
- [90] Under the circumstances, and while it may appear a bit arbitrary, I am prepared to award \$150 for any problems relating to squeaky floors.
- [91] **Item number 33** involves cracks in the basement floor. The Claimant complains that the thickness of the concrete is inadequate, and has produced a photo which shows an area where the slab may only be three, as opposed to four inches. However, it is obvious that when concrete is

poured over rocks there will be places where it is higher and places where it will be lower. As such I place no significance on the thickness in the area depicted in the photograph.

- [92] The cracks shown in the photos are a concern, however. They appear to me to be in excess of what is to be expected in a basement floor. No doubt some attention should be paid to these cracks, which should be injection grouted or treated in some suitable way.
- [93] The amount claimed by the Claimant is \$1,972.15. Out of that, \$1,000 is the requested allowance to repair cracks. There are no estimates from third parties, and as such no reliable evidence of what these repairs would actually cost.
- [94] In the exercise of my discretion, doing the best I can with the available evidence, I would allow \$500 for concrete repairs.
- [95] **Item number 34** seeks compensation in the amount of \$542.33 for the fact that the posts supporting the deck do not line up exactly with the concrete footings.
- [96] According to the photos, the posts are well supported but slightly off centre. I understand that this is a function of having to estimate the location of the eventual posts when pouring the footings. Also, there can be some movement as a result of backfilling.
- [97] I agree that there is a slight unsightliness to this, but as the Defendant points out this can be fully alleviated by adding a small amount of gravel to

raise the level around the footing and obscure the top of it. This seems like a reasonable solution. The Claimant however wants the Defendant to pay for elaborate lattice work to hide the posts.

[98] I believe that the additional gravel is the appropriate solution and, in light also of the fact that I do not believe the deficiency to be serious, I allow the sum of \$150.

[99] **Item number 35** seeks \$660 to repair nail pops.

[100] Nail pops occur in almost every new home, and usually the builder will attend to it without charge within the first year. The Defendant testified that there was a greater risk of nail pops because the Claimant chose to sheath the house with Styrofoam, which gives the nails less material to grip into (presumably where they miss the studs). He says that he would have gone back routinely to deal with nail pops. The problem here is the poisoned relationship.

[101] I regard the amount claimed as excessive. Again there are no third party estimates. I would allow \$200.

[102] **Item number 47** seeks \$450 to repair a broken hose bib. It also claims that the bib is not installed properly; namely that there was no wood block installed in the wall with the result that the bib is attached directly to the siding.

[103] The Defendant had no comment on this item.

- [104] Clearly some attention to this is required, and in the absence of any reliable evidence I will allow the sum of \$200.
- [105] **Item number 51** seeks \$500 to deal with a toilet in the main bath that the Claimant says frequently backs up. The reason that he posits is that the toilet ended up right over a floor joist, necessitating tight bends in the drain pipe.
- [106] The Defendant's response is that the Claimant chose his own toilet fixtures and that they were installed by a qualified plumber. He had no idea why problems are being experienced.
- [107] I expect that the issue of floor joists will arise from time to time, because it is not always easy during the framing stage to determine where the toilet will eventually be located. As such, adjustments need to be made either by moving the toilet location slightly or using appropriate bends in the plumbing. Either way, the problem described should not happen, and may indeed necessitate a significant repair.
- [108] The Defendant is responsible for the plumber that installed the toilet. I will allow the \$500 claimed, which seems reasonable given all of the uncertainties.
- [109] **Item number 53** complains that the floor in the master bedroom is not quite level, but actually slopes a little toward the cantilevered bay window. The Claimant believes that the overhang may have settled slightly. The photos in evidence show that there is perhaps a slightly sloped area, although it is hard to tell given that there is carpet over the area.

[110] The Defendant says that a slight slope is normal and within acceptable tolerances. I have a hard time accepting this. I expect that having a slope, however slight, could be disconcerting, and the Claimant's suggested fix - lifting the carpet and apply some levelling compound - seems proportionate to the problem. The claimed cost is \$420. Once again, I accept the need for some attention to the problem but have some difficulty with the suggested cost. The area is small and it appears that the carpet would just have to be peeled back. In the absence of a third party estimate I allow \$150 for this problem.

[111] **Item number 54** seeks almost \$1,000 to make up for a week's wages for the Claimant, who took time off in early December 2008 to coordinate things that had to be done in order to move in on December 13.

[112] It is well known that many new homeowners either have to be or wish to be actively involved in the process, and they may need to take some time off work to do so. The Defendant estimated that 90% of his homeowners do that. There is nothing in the facts of this case that suggests that the Claimant's decision was unusual, or that the need for it could be traced to the Defendant's neglect of his contractual obligations. I see no merit in this claim.

[113] **Item number 55** seeks \$495 because the garage fan is not operated by a timer, as the Claimant had wanted. This is one of those items that was on the Claimant's specifications that did not survive in the eventual signed contract, and the Claimant is simply not entitled to insist upon it.

### **MINOR MAINTENANCE AND WARRANTY ITEMS**

[114] **Item number 3** is a missing screen in bedroom 3. There is no monetary claim attached to this and I decline to consider it further.

[115] **Item number 4** complains that the Defendant used some of the Claimant's own lumber to construct a mid-span structural wall support which was required by the HRM inspector. The Defendant says that his crew found lumber on the site which they assumed was theirs to use. Although the Claimant seeks \$134.15, on the available evidence all that was used was perhaps 20 or 30 feet of 2X6 (not even new!) which has a minimal value. I will allow \$25.

[116] **Item number 5** complains that the kitchen island light fixture is slightly off centre and not aligned perfectly with the island. The Claimant seeks \$45.

[117] The Defendant says that the Claimant worked with the electrician to locate the fixtures, and moreover that this is a minor matter.

[118] I see this as an extremely minor matter, within reasonable tolerances, and which most people would accept. I decline to allow anything for this item.

[119] **Item number 6** complains that the electrical plan called for a switched plug on the deck, which was not done. The claim is for \$235 for an electrician to perform this repair.

- [120] The Defendant's response is that the Claimant was working directly with the electrician and should have made clear his wishes at that time. It would have been minimal cost to do it then.
- [121] I am not satisfied that the Claimant should succeed as I find that he (and his wife) directed the electrician. If the Claimant failed to make his wishes clear, the Defendant should not have to pay for that.
- [122] **Item number 7** complains that the painting in the garage was not taken to a finish coat. The Defendant stated that it was not his practice to paint, but only prime garages.
- [123] I see nothing in the contract that requires finish painting in the garage and do not allow anything for this claim.
- [124] **Item number 8** complains of some MDF on window ledges having been damaged by excess moisture, causing it to swell. The claim is for \$112.50.
- [125] The photos in evidence are unhelpful. However, my sense is that there are probably a few areas that should be attended to as warranty items. I will allow the sum of \$50 for this item.
- [126] **Item number 12** complains of drywall mud being left on the top of the garage door, requiring cleaning. This is a trivial item that probably took 5 minutes to clean. I do not allow anything.



- [127] **Item number 15** complains that the Defendant's workers left a fire pit in the backyard, after burning some construction debris. He claims \$20 for his time cleaning it up, and seeks a further amount for an excavator to bury the burned area.
- [128] The Defendant stated that his men disposed of a great deal of the Claimant's trash, which was left lying around and interfered with some of the Defendant's workers.
- [129] I regard this also as a trivial item and allow nothing for it.
- [130] **Item number 17** is a complaint that there was no caulking done to prevent water getting behind the vinyl siding at the base of exterior doors. The Defendant testified that caulking is not necessary because of the way the flashing is installed.
- [131] In the absence of any evidence of leakage, I am not prepared to allow anything for this item.
- [132] **Item number 18** seeks \$45 for the hook up of a sewer alarm. The Defendant concedes that this should have been done and says that it would take an electrician 5 or 10 minutes to do it. I would regard \$25 as appropriate compensation.
- [133] **Item number 22** claims that the Defendant used the wrong type of insulation in an interior wall. This was to be used for sound insulation. He seeks \$101.55, which he says is the difference between the cost of the

insulation that he specified and that which was used - which was regular R12 batt.

[134] The Defendant states that he researched the matter and was told that the regular R12 would actually do a better job than the QuietZone which the Claimant says ought to have been used.

[135] The signed version of the contract specifications show that the specific reference to QuietZone was crossed out, and I find that it was acceptable for the Defendant to use a reasonable alternative.

[136] There is also no evidence that the sound insulation values are lacking, and I allow nothing for this item

[137] **Item number 26** complains of the Defendant's failure to clean out the basement of construction debris. The photos support the view that the Defendant's crew did not finish what they ought to have done. The Defendant says that this may have been because the Claimant was still doing some of his own work, which interfered with the efforts of his cleaners.

[138] The Claimant seeks \$80. In fact, the Claimant did this himself and I award \$30 in total for the inconvenience of having to do this minor cleanup.

[139] **Item number 27** complains that stairway walls were not cleaned of drywall dust. The photos support this claim. I allow the sum of \$25 out of the \$40 claimed.

[140] **Item number 28** complains of a failure to caulk the area in the siding where the electrical or other connections require the siding to be breached.

[141] There is no evidence that any leaking has occurred, but the caulking would probably have been a good idea and is something that the Defendant probably would have done if the relationship had not gone off the rails.

[142] The Defendant points out that it was Nova Scotia Power, and not he, who did the installation. Nevertheless, it is the responsibility of the contractor to look at all of the work and I will allow \$40 for this work to be done. The claim of \$242, as put forward, is excessive.

[143] **Item number 30** seeks \$74 to compensate the Claimant for the fact that he had to install a piece of baseboard under his computer desk. He admits that this occurred because the desk was late being installed, but says that the Defendant should have had someone return to do it.

[144] This is an item of almost trivial significance for which I will allow \$25.

[145] **Item number 32** seeks replacement of a slightly warped piece of wood under the kitchen sliding door. There is probably a slight bowing of the wood, but it is hardly obvious in the photos and I am not convinced that it is warped beyond normal tolerances. I allow nothing for this item.

[146] **Item number 36** seeks \$190 for repairs to drywall where cracks are said to be occurring. The photos do reveal some areas where attention is

required. Again, without third party estimates I am only willing to allow \$100.

[147] **Item number 37** seeks \$190 for repairs to joints in the MDF. The photos reveal that there are places where cracks have shown up, due to drying or shifting. The typical fix for such a problem is a thin bead of caulking. I doubt that it would cost more than \$25 for this to be done, and this is what I am prepared to allow.

[148] **Item number 38** seeks \$240 to repair some nicks and scratches in the MDF trim. There are indeed a few areas revealed by the photos, which are unsightly. However, I do not accept the amount claimed which I find excessive. I will allow \$100.

[149] **Item number 39** seeks \$440 to repair damage to some interior doors. The Claimant says that he and his wife did not notice these imperfections until some time after they moved in. This highlights the relatively minor nature of the nicks and dents that are depicted in the photos. I do not accept that replacement is necessary, and am prepared to award \$50 for repairs.

[150] **Item number 40** seeks \$70 to correct a minor problem with the opening and closing of the front door. This is a minor deficiency that a contractor would normally attend to. The Defendant says that he and his crew did the best they could, and that this may be an issue for the manufacturer. Again this is an instance where the Claimant obtained his own supply.

[151] Even so, the Defendant would normally have done all he could to attend to such a problem. Given the poisoned relationship between the parties, the Claimant will have to do it himself (if he has not already done so) or hire someone else. I expect that the sum of \$25 is ample to deal with this very minor problem.

[152] **Item number 41** seeks \$120 to adjust the laundry room door. I repeat what I said about number 40, and award \$25.

[153] **Item number 42** seeks \$90 to clean dirt out of the sliding mechanism of an exterior patio-style door. The photo in evidence shows some dirt buildup, likely which occurred during construction. I expect this got missed in the Defendant's clean-up efforts. However, I cannot accept that it would cost \$90 to do. I allow \$10.

[154] **Item number 43** seeks \$240 to repair a set of exterior stairs that does not sit properly on the patio stones, as a likely result of the stones having settled or something having shifted. The current makeshift fix involved the placement of shims.

[155] I believe that some attention would be appropriate but do not believe it would cost \$240 to repair. I allow \$75.

[156] **Item number 44** seeks \$170 to remove paint which was accidentally sprayed into the tracks of some bi-fold doors in two bedrooms, causing the doors not to move freely.

- [157] The claim is for new tracks. I am certain, however, that there is something that can be done to remove the paint and free up the mechanism, short of replacing the tracks, and I allow \$25 for that minor job.
- [158] **Item number 46** seeks \$150.86 to pay Nova Windows for a broken transom. The Claimant himself has not paid this. It appears to be a minor misunderstanding as to whether the Claimant or the Defendant is responsible. On all of the evidence the Claimant is not responsible, and can safely ignore this bill. It is, if anything, between the Defendant and Nova.
- [159] **Item number 48** complains that there was no humidity control during the construction. There is no monetary amount attached to the claim, which is said to be subsumed in other items. As such I will ignore it.
- [160] **Item number 49** complains that there is not enough hot water and seeks \$130 to repair the hot water heater.
- [161] Clearly this is a warranty item and should be attended to. As the Defendant points out, the heater itself is warranted through the manufacturer for one year and the Claimant should pursue this redress directly.
- [162] **Item number 50** complains that there is inadequate caulking around a tub and seeks \$90 to supply and install some extra trim.

- [163] There is no reason why the problem cannot be resolved with a tube of caulking which would cost less than \$5. I allow \$15 for this item.
- [164] **Item number 52** seeks \$130 because of an allegedly missing hose bib. The Claimant says that the Defendant failed to install one of two exterior bibs that were shown on the plans, having instead installed one outside and one on the garage. I do believe that this is an instance where the Defendant did not pay sufficient attention to the plans provided, but instead followed his usual practice.
- [165] The Defendant states that if the Claimant wants additional bibs they would be easy to install because th basement is unfinished.
- [166] I accept that there is some merit to the claim and allow \$100.
- [167] **Item number 56** complains of rusty door hardware on the door between the garage and the outside. The Claimant suspects that old hinges were used, and that the intention was to replace them with new hardware, but that this was missed. The amount claimed is \$164.
- [168] The Defendant seemed unaware of this problem, and believed that all of the hardware was new. Clearly it was not.
- [169] This item is a legitimate deficiency, but once again the amount claimed seems excessive. The cost to provide and install new hardware should not exceed \$50.

[170] **Item number 57** seeks \$235 because the electrical outlet on the deck is not where the Claimant wished it to be. That plug is used to run the rotisserie in the barbecue.

[171] The Defendant says that the Claimant could have had plugs wherever he wanted, and that he had the opportunity to direct the electrician but evidently did not do so.

[172] While there is some validity to the Defendant's point, there was still an obligation to refer to the plans and the evident failure of the electrician to do so cannot simply be ignored. I will allow \$150 for this item.

### **SUMMARY OF CLAIMS**

[173] The following table sets out the claims for which an amount has been allowed:

<b>Claim number</b>	<b>amount originally claimed</b>	<b>amount allowed</b>
1	\$2,530.00	\$500.00
4	\$134.15	\$25.00
8	\$112.50	\$50.00
9	\$1,000.00	\$150.00
13	\$480.00	\$75.00
18	\$45.00	\$25.00
26	\$80.00	\$30.00
27	\$25.00	\$40.00
28	\$242.00	\$40.00
30	\$74.00	\$25.00



31	\$500.00	\$150.00
33	\$1,972.15	\$500.00
34	\$542.33	\$150.00
35	\$660.00	\$200.00
36	\$190.00	\$100.00
37	\$190.00	\$25.00
38	\$240.00	\$100.00
39	\$440.00	\$50.00
40	\$70.00	\$25.00
41	\$120.00	\$25.00
42	\$90.00	\$10.00
43	\$240.00	\$75.00
44	\$170.00	\$25.00
47	\$450.00	\$200.00
50	\$90.00	\$15.00
51	\$500.00	\$500.00
53	\$420.00	\$150.00
56	\$164.00	\$50.00
57	\$235.00	\$150.00
<b>TOTAL ALLOWED CLAIMS</b>		<b>\$3,460.00</b>

### **THE COUNTERCLAIM**

[174] The Defendant advanced a counterclaim for certain extras. The amounts are:

- A. \$2,055.45 for extra blasting for the septic system.

- B. \$450 for extra electrical work that was said to have been necessary because the electrician was instructed to go back and do certain things differently.
- C. \$500 for an extra circulator for the shower.

[175] These claims are not proved to my satisfaction. There is nothing in writing to substantiate that the Claimant agreed to any of these things as extras, which is the usual practice. I believe that the Defendant only resurrected these claims defensively, given that the Claimant was raising so many claims against him. In the result, the counterclaim is dismissed without costs.

### **HST CLAIMS**

[176] As for HST, the award is an amalgam of claims, some of which would and others of which would not involve the payment of HST. I propose to allow HST on \$2,000, which adds another \$260.00 to the judgment.

[177] As for costs, the Claimant seeks \$180 plus the cost of filing, which would have been \$179.35. The \$180 was not documented, and the claim was served by the Claimant personally on the Defendant. Given the likely costs of the materials just to present the case, I am content that the additional sum of \$100 is warranted, and the costs award shall therefore be the rounded up amount of \$280.

[178] The Claimant shall accordingly have judgment for \$3,460 plus \$260 plus \$280, for a grand total of \$4,000.

**Eric K. Slone, Adjudicator**