IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Arenburg v. Gough*, 2018 NSSM 65

Claim No: SCK 462148

BETWEEN:

T. JOSEPH ARENBURG

Claimant/ Defendant by Counterclaim

-and –

JOSHUA GOUGH and SHAINA GOUGH

Defendants/ Claimants by Counterclaim

Bernie Conway represented the Claimant/Defendant by Counterclaim.

Robert C. Stewart, QC, represented the Defendants/Plaintiffs by Counterclaim.

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

DECISION

Background

(1) On October 27, 2015, the parties entered into a Construction Agreement where the Claimant, T. Joseph ("Joey") Arenburg, would construct a home for the Defendants, Joshua Gough and Shaina Gough, at [address removed], Nova Scotia. The home was completed and the Goughs reside there now. The claim and counterclaim arise, respectively, from certain alleged extras for which the Claimant was not paid and several costs and labour expended by the Goughs to complete the home to their specifications.

(2) The Defendants were originally described as "Joseph Gough" and Shaina Gough. It is clear from the documentation and his testimony, Mr. Gough's first name is

actually “Joshua” (or Josh). Accordingly, the style of cause is amended as set out herein.

(3) The Notice of Claim filed by Mr. Arenburg states that he is seeking $19,248. No particulars are given. It became clear once evidence was called that the particulars consist of those in a list entitled extras shown to the clients, which are a cover page of Exhibit 2. The total sought was $19,248.00. For the purposes of this matter, I adopt this list as the particulars for the claim.

(4) I note the decision and order were filed beyond the 60 day time limit prescribed by the *Small Claims Court Act*. The Supreme Court of Nova Scotia has found that the time limits prescribed under that section are directory rather than mandatory and do not trigger a loss of jurisdiction if the timelines are exceeded. Nevertheless, the parties have been anticipating the release of this decision and their patience is appreciated.

The Issues

- What were the terms of the contract?

- What, if anything, has the Claimant proven in support of his claim?

- What, if anything, have the Defendants proven in support of their counterclaim?

The Evidence

(5) The hearing took place over two days of evidence followed by written submissions. The documentary evidence was compiled largely by Shaina Gough. The evidence was thorough and presented logically. Mrs. Gough included comments. Some of those comments are descriptive, noting what is being depicted. Others more closely resemble submissions. I have ignored these latter comments.

(6) Accompanying Mr. Stewart’s written submissions was a separate statement prepared by Mr. and Mrs. Gough. This statement is not evidence, rather it is further submissions. As with other submissions, they will be considered in light of the evidence presented in court. Where the comments relate to matters that had not been in evidence, the submissions are given no weight.

(7) In preparing these reasons for judgment, I have considered all of the evidence, both documentary and photographic, and the oral evidence of the parties. While not all of the evidence is specifically referenced in this decision, each piece of evidence has been given the weight it is due along with the well reasoned and well written submissions of both counsel.

(8) I shall begin with a review of the evidence of each witness followed by my findings.

Trueman Joseph ("Joey") Arenburg

(9) Trueman Joseph ("Joey") Arenburg is a red seal carpenter who has been in the construction business for forty years. He is a self employed and lives in Coldbrook, NS. He is a distant cousin of Josh Gough.

(10) The Goughs purchased their lot on November 22, 2013. In 2015, they attended to Mr. Arenburg's home to discuss options for the construction of a home. After meeting with Mr. Arenburg, the couple made several decisions for construction and design. They were given an estimate of $282,000 with four allowances (flooring, kitchen, well and septic). This was reduced to a contract through the Construction Agreement on October 27, 2015. The contract refers to the materials supplied and work performed in accordance with the plans of Wes K. (i.e. Wesley Kaulback). The plans are not in evidence. The contract contains no scope of work and thus, there is no further clarification on what is included and excluded in the work. The construction price was actually $282,200. No evidence was given for why the increase of $200 from the estimate.

(11) The binder compiled by Ms. Gough was tendered into evidence and marked as Exhibit 1. ("the binder"). It was admitted into evidence with consent of both parties and referred to frequently in their respective testimony. For clarification, I note that any references to lettered tabs in these reasons refer to those contained in the binder.

(12) The Estimate dated August 23, 2015 appears in Tab B of the binder. The estimate refers to several allowances, namely, "Cabinetry - $15,000; Flooring - $15,000; Well - $6000 and Sewer - $10,000". While the term "sewer" has been used in the estimate and by the witnesses in their respective evidence, it is clear the home has a septic disposal system.

(13) The Construction Agreement is in Tab D.

(14) Mr. Arenburg testified he prepared the Construction Agreement based on the form used by Atlantic New Home Warranty. He acknowledges the payment included GST. He intended for the HST rebate to be paid back to the builder. This item does not appear in the document. This item has been removed from the counterclaim.

(15) Mr. Arenburg does not have any record of any deficiencies provided by the Goughs. The Certificate of Possession contained in evidence was filled out with the homeowners and filed with Atlantic Home Warranty. He discussed with the Goughs that allowances are set for certain aspects of the construction, namely if the allowance was not used, the homeowners would be credited for the difference. If it cost more than the allowance, then they pay the difference. He does not recall if the Goughs had an opportunity to read the document in its entirety. He prepared a list of extras and presented it to the Goughs. This document is tendered into evidence as a list of overages. It appears in Tab R. The items listed by Mr. Arenburg include the following:

Flooring – The allowance was $15,000 but they experienced a cost overrun of $5408.39. Mr. Arenburg is of the view that the allowance included both labour and materials and the cost to install a stairway. The Goughs believe allowances are based on materials only and it does not include the stairway.

Well – Mr. Arenburg testified that it is impossible to estimate the exact cost of well drilling as one does not know how deep the well must be drilled. Therefore, he believes he is entitled to the difference.

Kitchen Cabinetry – Both parties understood the allowance (in fact, the entire purchase price) did not include installation for the kitchen as Mr. Gough was going to do that work himself.

(16) He claimed $200 to install and paint the French doors. Crown molding was assumed to be done by Mr. Gough.

(17) There were several items which, according to Mr. Arenburg, were not on the plans but ultimately included such as the barn door track, laundry sink, and extra glass doors on the shower. The walls were originally to be tiled as the others were finished in glass.

(18) Mr. Arenburg was enjoying a southern vacation in February and March 2016 when some of the work was getting done. He was also away for the payment of a draw in March. He indicated there was no objection raised by his being in Florida on vacation.

(19) The sewer cost more to dig than anticipated, over $12,075 rather than $10,000.

(20) It was necessary to hire someone to remove tree stumps from the property, so they had the same excavators do all of that work. An occupancy permit was issued and it appears in evidence.

(21) Mr. Arenburg seeks extra for paint as he anticipated 3 to 4 different colours of paint. The Gough's chose seven or eight colours. He indicated it is costlier to buy paint in smaller amounts and this resulted in an extra.

(22) Mr. Arenburg prepared a breakdown of the extras and highlighted those in his evidence. He acknowledges seeking $20,371.75 but receiving $6929.89 on August 24 as an offer to settle. He was given a blank receipt to sign but he would not do so as he did not believe the full payment was made. He confirmed he cashed the cheque and kept the funds.

(23) He referred to a number of the items listed in the counterclaim. They consisted mostly of electrical fixtures. Mr. Arenburg indicated it is common for light fixtures not to be included in a construction quote so purchasers can add them at a later date according to their specifications.

(24) A laundry chute was contemplated and photographs thereof are included in evidence. A hole was cut into the floor following a nail through the ceiling. According to Mr. Arenburg, the chute was not shown on the plan.

(25) Mr. Arenburg testified the crown molding was to be installed and painted by Mr. Gough.

(26) He acknowledged the grading was not complete around the premises. The inspector issued an occupancy permit even though the grading had not been finished. He indicated the deck had not been completed.

(27) He testified that the Gough's picked out their own garage door which was purchased at the Home Hardware in Berwick. He denied asking Josh to manage the site and he has no idea what he is referring to in his counterclaim. He indicated there was no mention of difficulties during the construction. All issues arose after the fact. He acknowledged it cost $3700 to include a second glass wall in the shower.

(28) Under cross-examination by Mr. Stewart, Mr. Arenburg indicated the HST rebate form was not signed by him. He confirmed there is nothing in the contract regarding the HST rebate. There were no additional agreements in writing. He did not present the bill for any extras until after the construction was complete.

(29) He confirmed the draws for the construction were made as scheduled. The money was deposited into an account. The construction itself was based on an estimate of $282,000 (but contracted at $282,200) from plans prepared by Mr. Kaulback. There were no changes made to the drawings. He does not believe he mentioned how extras would be treated when the issue was discussed.

(30) When the first payment was deposited on March 3, 2016, the house was roof tight with the windows and doors fully installed. The second draw occurred on May 9. The power hookup was paid by the Goughs. Mr. Arenburg acknowledges he owes the Goughs for this amount.

(31) In his mind, the grading was resolved so he did not consider the issue any further. The extras were calculated the next day. The occupancy permit was issued on June 6. There is nothing in the Construction Agreement about making applications to Atlantic New Home Warranty. He believes the application process is described in the information package from ANHW.

(32) His last contact with the Goughs was made on August 24. By that point the relationship between the parties had deteriorated. If he had been contacted after the 24th, he believes the warranty work would have been done. A draft for $56,794.40 representing the builder’s lien holdback was received by him.

(33) The list of extras was presented to the Goughs before Mr. Arenburg went to pick up his cheque for the lien holdback. He does not recall the date.

(34) He believes the tile and laminate flooring allowance included both labour and materials. He believes he spoke with Mr. Gough regarding the change in structure of the walk-in shower that it would include the cost of an extra glass door. He discussed the sewer allowance with the Goughs. He also advised Mr. Gough to use three or four colours of paint rather than seven or eight.

(35) Other changes included: a wall added in the garage during construction, the addition of hollow French doors, crown molding was to be in the kitchen, dining room and family area which he believed was to be done Mr. Gough. The stair trim was originally part of the plans. There was some discussion regarding the tile work in the shower. He acknowledges the Goughs wanted a barn door in the downstairs bathroom. Once again he confirmed that Mr. Gough would be installing the kitchen cabinets. He is unlicensed to conduct the water test and therefore he did not do so himself.

(36) He acknowledged receiving $20,371on August 16, 2016 as a builder's lien holdback. He attended to upgrades in the siding for which he did not charge them. He believed that Mr. Gough was going to finish the laundry chute. The thresholds in each room were tacked in. They would not use a threshold.

(37) He testified that the Goughs did not discuss they were over budget during the construction. He indicated it was not his responsibility.

(38) They did not discuss the allowance any further once he saw what materials were going to be used. All stipulations were given to Nick and Jason, two of his employees. The flooring was completed according to the Goughs' instructions.

(39) Other than the cost of paint there was no indication if the matter went over budget. He confirmed he believed Mr. Gough worked on the cabinets on his own time as he was not present when the rest of the construction was underway.

(40) In redirect evidence, Mr. Arenburg acknowledged the well was drilled in the end of December 2015 or early January 2016. He confirmed the well driller could not guarantee potable water or tell how deep the well would be. The occupancy permit came the same day PK Construction arrived to make changes to the deck.

(41) As for finishing items, there remained only the crown molding, the laundry sink and the shower, along with painting. The flooring charge was more due to the upgrade in the type of stairs. For his purposes, the stairwell is included as part of the floor.

The Defendant's Evidence

Joshua David Gough

(42) Joshua David Gough has worked in the construction industry as a finish carpenter. He is employed with Michelin but has done his own work as well. He confirmed that he and his wife, Shaina, hired Mr. Arenburg to build their house. He met with Mr. Arenburg and his wife at the Arenburgs' home to review the styles and designs

considered for home construction. He recalls being shown the tub, the heat pump and various styles of moldings.

(43) He testified there was a certain amount of work that he would do such as the kitchen cabinets. While the construction was taking place, he advised Mr. Arenburg they wanted crown molding.

(44) After the first initial meeting, they received a quote of $282,000. They also discussed estimates and allowances. With respect to the kitchen, they discussed $15,000 allowance even though Mr. Gough was doing the work. They decided they would use $15,000 for higher end cabinets. With the flooring allowance, they believed that also covered the material. They did not discuss how the floor would look. The discussions did not include labour for the flooring. There were no discussions regarding the well or the septic.

(45) Both the estimate and Construction Agreement were prepared by Mr. Arenburg. According to Mr. Gough, they did not discuss extras when the Agreement was signed. He and Mrs. Gough advised Mr. Arenburg they had a budget for the house. If the cost exceeded $282,200, they would have needed to contact the bank for further financing. There were no discussions regarding the HST rebate. At the August 24 meeting, he found out there was supposed to be reference in the contract to the HST rebate.

(46) The construction started on the home in late January or early February. Mr. Arenburg was present at the beginning of the build. He left the country a few days before the first deposit into his account. There were no discussions of maximum amounts for windows or doors.

(47) Mr. Gough testified there were no discussions regarding the cost of electrical fixtures or plumbing fixtures or how they were to be paid. They discussed an “average style” of garage door. They did not discuss allowances for style, only that the style was left to them. There were no discussions on the amount of paint or limitations placed on colours.

(48) They acknowledged an allowance for flooring and carpeting of $15,000. He presumed that allowance would cover both material and labour. They discussed treads on the carpeted floor, which would cost extra. He believed the builders would do all work except the carpet, for which he was responsible.

(49) Mr. Gough shopped for a shower and change plates. They had a quote for glass for the walk-in shower and found two glass walls too expensive and over budget. There were discussions of budgeting at that time, particularly regarding the glass walls. Mr. Arenburg raised the issue of paint colours for the first time. Mr. Gough testified to doing a lot of the legwork himself as he originally believed Mr. Arenburg would do it. It is clear he found communication lacking regarding flooring and supplies.

(50) The couple considered French doors in their initial discussions with Mr. Arenburg. However, pocket hole style doors are shown on the plans. When the decision

was made to switch to French doors, there was no discussion of extra cost now or later. Mr. Arenburg was not in the province to have any such discussions. He described Mr. Arenburg as difficult to obtain information from with regard to costs. They discussed the additional wall in the garage. The ordered the wrong door and hinged it on the wrong side. It was supposed to be interior door rather than a metal door. They charged extra for the new door.

(51) He was surprised to see the PK Construction extras for $5827.63 (reduced to $2584.63). PK Construction were engaged to clear the property. There was never any discussion with Mr. Arenburg about what was to be done. He did not know who was responsible for what particular charges.

(52) He was given the list of extras from Mr. Arenburg. He had not heard any discussions about extras prior to Mr. Arenburg's delivery of the list (Tab R). They met in hopes of resolving their differences. He testified that he was satisfied with well and sewer costs believing they would be approximately $6900, as in $6000 for the well and sewer and $500 or $600 to move trees. He was satisfied with the water testing. The Gough's hired a third-party contractor to provide a quote to finish some of the deficiencies. They did not want Mr. Arenburg to return.

(53) Mr. Gough outlined the deficiencies which form part of his counterclaim:

Front door - Initially there was difficulty with the front door not latching. The door works now.

Mechanical Room Door - The door misses the latch from time to time and will not close.

Laundry chute – The laundry chute was not installed.

Paint/Fill - There are two or three inside corners where the crack fill and tape have fallen off. These needed to be fixed and repainted.

Bathroom Door - The bathroom door rubs at the top.

Garage Door - The garage door grinds along the top and does not latch sufficiently.

Siding – Some of the siding is not clipped near the top of the house and needs to be reinstalled.

Deck - The back deck was installed in the rain. A post was dug by hand and sunk. He believes a block on the post would bring it level.

(54) The couple also seek $1530 or ($30 per hour) for work they had to do to during construction.

(55) Under cross-examination, he confirmed he had eight years experience in finished carpentry. He worked making furniture during that time. He also worked eight years with

first choice kitchens. He and his wife had only engaged the claimant for construction. He had not hired anyone else.

(56) He had visited a number of other homes built by Mr. Arenburg. He acknowledged there was an allowance for kitchen cabinetry. He picked out the flooring. He knew there would be an additional charge for specialty material in the flooring but not material such as laminate. He noted there were allowances indicated on the exhibits.

(57) He did not ask about the extent of the allowances. He was not provided a list of the fixtures. He had grave concerns over specifications. He thought he and Mr. Arenburg would go over the work in more detail. He had asked for a list of what could be spent. The bank was not interested in specifications or fixtures as they had no idea what was inside.

(58) Mr. Gough indicated that Mr. Arenburg's response was that he was not into the details of the contract, using statements such as "it would all come out in the wash", "everything's good", etc. He also indicated the Goughs were not limited where they could buy materials.

(59) The first discussion regarding extras occurred when the Goughs received the extras list. He indicated they discussed the installation of the shower door. There was no discussion of the difference in price. Specifically he identified a text message where he asked Mr. Arenburg if they could order the glass doors for the shower and stay on budget. While not many details were discussed, he specifically recalls stating they must stay on budget.

(60) The first-time there was any mention of the HST rebate occurred in November 2016. Mr. Arenburg showed up with an HST rebate form stating these needed to be filled out. The HST and Atlantic Home Warranty forms were filled out at the same time. The Defendants did not read the documents. Mr. Arenburg did not stipulate what the documents related to. He was referred to paragraph 7 of the Construction Agreement. He acknowledged that it said the contractor will be responsible for the utility connection. They did not ask Mr. Arenburg to pay utility costs. He indicated he was concerned that Mr. Arenburg was down south because he could have been here to deal with any issues that arose.

(61) He was questioned by Mr. Conway about the extra charges:

Well - Mr. Gough feels that Mr. Arenburg did not tell him about the well until it was too late. He also feels he could have done more to keep the well drilling bill in line. There was no discussion about what would happen if the charge was too much.

French doors - He was not aware there would be a price difference. He did not ask.

Crown molding - He was aware there would be an additional cost for crown molding. He believed it was included even though it was not on the plan.

Extra paint – He understands why it costs more for extra paint but he does not agree he should be charged for them.

Barn door track – While not on the plans, Mr. Gough feels it should be covered. He put the door on himself.

Laundry sink - He was surprised to learn there was not a laundry sink included in the laundry room.

PK Construction Ltd. - The work was done long before June 24 as shown on the invoice.

(62) He noted there are five or six outstanding items still not completed as noted on the occupancy permit.

(63) He was referred to the Certificate of Possession issued by Atlantic Home Warranty. He knows there was nothing written about unfinished items. He has not contacted Atlantic Home Warranty.

(64) He confirmed the water test was paid by him. The contract does not state that it is required of him to perform the test. He believed clean drinking water was part of a house.

(65) As noted previously, he is seeking $1530 in time for the efforts he put into the home after construction. He has provided a very significant breakdown.

(66) He indicated there was no final walk-through. The list of deficiencies was prepared after the fact.

(67) In redirect evidence, he indicated there were no discussions regarding quality of materials in his first visit to Mr. Arenburg's house. There was some reference to crown molding and the laundry chute.

<u>Shaina Rae Gough</u>

(68) Shaina Rae Gough is married to Joshua Gough and they live in the property which is the subject of this litigation.

(69) Ms. Gough confirmed that she thought Mr. Arenburg would provide labour for all of the items for which there was an allowance. They were not told by him to include labour when budgeting their allowances. She believed the stairway installation was necessary for the occupancy permit, and thus, she did not believe it was an extra.

(70) The allowance for the well was $6000 and the actual cost was $9936. The well was dug on December 2015. They first learned of this extra cost in July 2016.

(71) She disagrees with the figure used for the kitchen. The allowance was $15,000. She spent $14,701.36. However this was showing is an overage on Mr. Arenburg's summary.

(72) She did not know about the extra costs for French doors or the crown molding.

(73) She noted as well the extra charge for the barn door track, the laundry sink, the door wall in the garage. She was also surprised by the cost of the glass shower.

(74) She noted the sewer cost $2650 more. She was surprised to learn in the invoices from PK Construction that the permits were not covered. She thought those were covered as part of the Construction Agreement.

(75) She was surprised by the extra for the colours and did not think it made any difference. There were no discussions regarding a budget for fixtures. She confirmed the installation charge was shown on the NS Power Bill.

(76) She has submitted into evidence a number of invoices for electrical fixtures which were not provided by Mr. Arenburg. She was not expecting to be charged for stairs as part of her flooring.

(77) With respect to the HST credit, she recalls them filling out the document but did not ask what she was signing. She indicated the form said they bought the property from Mr. Arenburg. In reality, they owned the land. The price indicated that it included HST. According to Mrs. Gough, she spoke with CRA about entitlement and explained to the court why she felt they were entitled. No reference was given by either counsel to a statute or regulation. Nothing from CRA other than the completed documents were tendered into evidence.

(78) They paid Mr. Arenburg $6929.89 in an attempt to settle the matter but she said they should not have done so, because it was not supported by any contractual provision. They are also seeking reimbursements for photographs and printing and binding.

(79) Under cross-examination, Ms. Gough confirmed she accompanied her husband in visiting the Arenburgs' house. She indicated that there was approximately one year between the showing to pick up materials and the house's construction. There were no changes other than the wall in the garage and the laundry chute. She asked for all receipts. She did not believe that stairs be included flooring. She was shown the soaker tub at the Arenburgs' place. They were not told what to budget for many purchases. They were simply advised to select something. She acknowledged those allowances were not in writing. She was concerned with the differences in the well drilling cost. She did not ask for any detail assuming it was being managed properly. Initially, she was not concerned that Mr. Arenburg was out of the country. It became clear it was necessary he be in Nova Scotia once "the paperwork started".

(80) She believes Mr. Arenburg should have done a better job tracking the money. There is no reference whatsoever to the types of light fixtures or plumbing fixtures. She does not know what Atlantic Home Warranty covers her. She has never contacted them. She did not realize the HST credit was for their benefit. In redirect evidence, she acknowledges her signature on some of the documents.

The Law

(81) This matter deals with the interpretation of the Construction Agreement and to a lesser extent, the estimate provided detailing the allowances. Both parties provided helpful written submissions in their closings.

(82) The leading case on contractual interpretation is *Eli Lilly & Co. v. Novapharm Ltd.*, [1998] 2 S.C.R. 129, where the court stated as follows:

"The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination....
...Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face....
..However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words."

(83) Both counsel have submitted cases dealing with ambiguity in contracts and the introduction of evidence of surrounding circumstances. Mr. Conway has cited *Hardman v. Alexander*, 2004 NSSC 122, where Justice Hood stated the following:

…Quoting from *RJB Investments Ltd. v. Ladco Co.* (2000),154 Man. R. (2d) 183 (Man. Q.B.), the court says:

> A fundamental rule of interpretation is that if the language in the written contract is clear and unambiguous then no extrinsic parol evidence may be admitted to alter, vary or interpret in any way the words used in the writing. ...

[2] The first question, as I have said, is a determination of whether or not the Agreement is ambiguous. In my view, there is an ambiguity in the meaning of clause 2.01. It could mean that there are to be five directors regardless of the number of shareholders or it could mean that the number of directors actually equals the number of shareholders. The *RJB* decision goes on to say in para. 11:

> Where the language is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. The court should not strain to create an ambiguity that does not exist. It must
>
> be an ambiguity that exists in the language as it stands, not one that is created by evidence that is sought to be adduced. Parol evidence may not be adduced where the effect of such evidence would be to contradict the written contract. Where the true intentions of the parties are not clear from the documents, then such evidence may be admitted assist in interpreting the true intentions of the parties. The parol evidence rule is intended to avoid injustice.

[3] I am therefore entitled to look at extrinsic evidence to determine what the intention of the parties was. However, I must bear in mind the words of Lord Wilberforce in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 ALL E.R. 570 (H.L.) where he says:

> ... No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction the background, the context, the market in which the parties are operating. ...

He continued at p. 574:

... When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

(84) Mr. Stewart submits that the contract is not ambiguous and therefore there is no need for me to rely upon any extrinsic evidence. To that end he relies upon two additional decisions of Justice Hood, *3081169 Nova Scotia Ltd. v. Lunar Fishing (New Brunswick) Inc.*, 2010 NSSC 147, and *SMART Innovations Consultancy Inc. v. Harbour Ridge Golf Club*, 2012 NSSC 98.

(85) The law respecting the introduction of evidence of surrounding circumstances was stated by the Supreme Court of Canada in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 S.C.C. 53. In that case, Justice Rothstein stated the following:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement…The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract…While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement**…**
>
> [58] The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.….Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.…
>
> …[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise. (*Citations removed*)

(86) In a more recent case, *Innotech Aviation v. Skylink Express Inc.*, 2017 NSSC 176, Justice D. Timothy Gabriel of the Supreme Court of Nova Scotia provided a detailed review of the law regarding contractual interpretation. He summarized the law stating as follows:

> [21]...In *Halifax Regional Municipality v. Canadian National Railway Company*, 2014 N.S.C.A. 104, Fichaud J.A. summarized the effects of both *Eli Lilly* and *Sattva Capital* as follows:
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> > 40. In short, my view is this. The text of article 2.2, read in the context of the entire written Agreement, supports the judge's interpretation. Evidence of the parties' purely subjective intentions cannot alter the parties' mutual intentions that are objectively manifested by the contractual wording of their written and signed Agreement. The surrounding circumstances comprise the objective evidence of the background facts, either known or which reasonably ought to have been known to both parties are or before the contract's signature. That evidence was properly admitted before Justice LeBlanc. The judge did not rely on that evidence. But the consideration of those surrounding circumstances supports the judge's interpretation of article 2.2.
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> [22] While the foregoing is not nearly exhaustive, it is certainly representative of the state of the law insofar as it pertains to the process of contractual interpretation. I conclude that I am to attempt to determine "the mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva Capital*, *supra*, para. 57).
>
> [23] In so doing, I am entitled to consider the surrounding circumstances to the extent necessary to ascertain the parties' mutual and objective intentions, but must remain rooted, first and foremost, in the text or words with which the parties have chosen to express themselves. Patently, this does not confer upon me a license to rewrite the contract. "Surrounding circumstances" as noted in *Sattva*at para. 58 consist "… only of objective evidence of the background facts at the time of execution of the contract … that were or reasonably ought to have been within the knowledge of the parties at or before the date of contract."

(87) In summary, the analysis consists of :

- Consideration of the parties' intention based on the language used in the contract;

- Evidence of surrounding circumstances, namely objective evidence of the background facts in the minds of the parties is relevant. Their subjective evidence is not relevant. Evidence of surrounding circumstances must not supersede or overwhelm the actual language used by the parties;

- If the contract remains ambiguous, resort must be had to the *contra proferentum* rule which is stated succinctly by Iacobucci, J., in *Eli Lilly*, paragraph 53:

"(Its purpose is) to protect one party to a contract from deviously ambiguous or confusing drafting on the part of the other party, by interpreting any ambiguity against the drafting party."

Findings

Terms of the Contract

(88) The parties entered into a contract for the construction of a home resulting in the preparation of the Construction Agreement dated October 27, 2015. Mr. Arenburg and Mr. Gough are relatives and knew each other for a long while. The interactions were made on an informal level. Perhaps, they overlooked some of the details.

(89) Ultimately, Mr. Arenburg (referred to therein as "the Builder") agreed to construct a dwelling house. In addition, he agreed to:

"supply all the materials and perform all of the work for the construction in accordance with...

..A floor plan and general specifications which the builder has in its possession similar to its Model entitled "Plan drawn by Wes K., excluding landscaping topsoil and retaining walls."

(90) The price of the house was "$282,200 GST included", which, obviously, I find included HST.

(91) It is noteworthy that paragraph 21 provides that the Construction Agreement forms the entire agreement.

21. Entire Agreement

This Agreement shall constitute the entire Agreement between the Builder and the Purchaser and there is no representation, warranty, collateral Agreement or condition affecting this Agreement other than as expressed in writing in this Agreement.

(92) Paragraph 7 provides that the contractor was responsible for utility connection, liability insurance, permits, surveys and fire insurance. They were not responsible for municipal deposits, utility costs.

(93) The contract provides for both extras and mistakes:

9. Extras, Deletions, Errors

(a) Any additions, removals, corrections, variations or price changes to the dwelling house referred to in paragraph 3, shall be effected only be (*sic*) a further agreement in writing signed by the Builder and Purchaser and attached to this agreement or a Change Work Order signed by the Builder and the Purchaser. Any "extras" shall be paid for no later than the next scheduled draw after its supply or construction.
(b) If the Builders and Purchaser do not agree as provided above, any additional work, materials, variations or extras requested by the Purchaser, but not provided for in the plans and specifications referred to in paragraph 3, will be classified as an extra and paid for by the Purchaser in addition to the purchase price.
(c) If the Builder discovers an error, inconsistency or omission and specifications referred to in paragraph 3, he shall not proceed with the work affected until he has received corrected or missing information from the Purchaser. (underlining mine)

(94) Paragraph 9 provides that any extras are to be "effected only by a further agreement in writing signed by the Builder and Purchaser". The payment is due after its

next scheduled draw once the work was completed.

(95) In the event the parties do not agree, any extras requested by the Purchaser and not contained in the plans and specification shall be paid by the Goughs. No time limit is specified for its payment.

(96) As for deficiencies, Arenburg was to arrange for a closing inspection with the Goughs. Following inspection, the Goughs were to notify Mr. Arenburg of any deficiencies.

6. Pre-Occupancy Inspection

(a) The Builder shall provide a notice to the Purchaser advising that on a date to be specified in the notice the dwelling house will be ready for occupancy, and further advising the Purchasers that an inspection shall take place on the date specified. The Purchaser shall make an inspection of the dwelling house on the date specified in the notice together with the representative of the Builder, at which time any omission or defects will be notice in writing. Taking occupancy will be deemed to conclusively prove the dwelling house is then complete and in full compliance with this Agreement except as to matters noted at the time of inspection.

(b) The Builder will cause to be corrected as soon as is practical, and to the reasonable satisfaction of the Purchaser, all the omissions and deficiencies noted, pursuant and agreed to in sub-paragraph 6(a).

(97) He was to correct those deficiencies as soon as practical to the reasonable satisfaction of the Goughs.

(98) None of the extras were subject to an agreement, but presented after the fact. They were not all requested by the Goughs. I find the Defendants did not make a written request to address deficiencies or make a claim under the Atlantic New Home Warranty.

(99) As a result, the question for this Court is which portion of the claim and counterclaim are described by the phrase “all the materials and all of the work for the construction” of the home. In answering this question, I consider the following:

- *Terms of the Contract* – While the plan is not in evidence and there is no scope of work, I must determine what expenses would be covered or limited that falls within the terms of construction. If the Goughs acknowledge something they requested is not in the plan, then it is an extra. It is not enough for either party to speak to what they normally do (Arenburg) or what they believe should be included (Goughs), the subjective intentions do not matter. I must also consider the adherence to the provisions in the Agreement designed to address extras and deficiencies (paras 6 and 9) and the extent to which the parties followed them.

- *Surrounding circumstances* – There is evidence of the parties’ expectations prior to the contract which continued during construction (e.g. some charge for well drilling was included).

- *Contra proferentum* – Despite consideration of the factors above, there remains

ambiguity in the terms of the contract. To address those potential ambiguities, I note the Claimant could have taken extra steps to prepare a schedule showing the scope of work, all allowances whether part of the estimate or not. This is the Goughs' first home construction. They relied on Mr. Arenburg and signed his standard form agreement. The interpretation in that instance must be interpreted against him as the drafting party.

(100) I note the construction is contracted to be "in compliance with all applicable building codes and all authorities having jurisdiction" and to the "Standards of workmanship required by established Industry practice". Other than the Defendants' claim for deficiencies, these standards were not raised or challenged by either side, and there was no evidence to establish these standards were not met.

Plans

(101) The contract refers specifically to material outlined in the "Plan drawn by Wes K.". The only plan submitted was marked as Exhibit 3 and showing as "2 of 8". The remaining 7 plans are not in evidence. Indeed, there is no evidence of anything other than the testimony of each party.

HST Rebate

(102) The contract is silent on the issue of the HST rebate. Therefore, I find there was no contractual obligation on the part of the Goughs to assign the rebate to Mr. Arenburg. Mr. Arenburg assumed he was entitled and had the Goughs sign the form. Mr. and Mrs. Gough did not take the time to read the documents. They assumed they were signing it as part of the process. The claim is no longer before the court and there is not sufficient evidence to make a finding in any event. In my opinion, it is for Canada Revenue Agency at its discretion to determine entitlement to the rebate based on the applications of the parties. The court has no jurisdiction over this issue.

Claim

(103) There are a total of 12 items listed on the Claim. They may be categorized as follows:

- *Items subject to allowance* (i.e. flooring, kitchen, well and septic)

- *Items changed during construction* – these were decisions made by the Goughs during the course of construction (French doors, crown molding, barn door track, laundry sink door/wall in garage, and shower glass)

- *Paint colours*

- *PK Construction Ltd.*

Items Under Allowance

(104) Prior to signing the Agreement, the Goughs were provided with an estimate showing four allowances. The Construction Agreement provided that “the Builder agrees to supply all materials and perform all of the work for the construction”. The allowances are not mentioned anywhere in the Construction Agreement.

Well and Sewer

(105) The allowance for well drilling was $6000 but it cost $9936.00. Therefore, the Claimant seeks $3936.00, in other words, approximately 66% greater than the amount quoted.

(106) I agree with the Claimant’s submissions that there is no way to guarantee how far a well must be drilled before an adequate supply of potable water is found. Accordingly, an allowance for well drilling should be an estimate. The legal status of an estimate was clearly stated by McLachlin, J.A. (as she then was) in *Roberts & Muir v. Price* (1987), 19 BCLR (2d) 375 (CA):

“At law, an estimate is neither a guarantee nor a warranty.”

(107) However, once the contract is executed, the estimate becomes absorbed into the building contract. The purchase price was $282,200. There is no mention of well drilling services or allowances in the contract. Both parties agree well drilling was included in the purchase price. Pursuant to paragraph 9, if the cost was to be extra, he was required to notify the Goughs and address the difference by written agreement. The work was performed in December 2015 and January 2016. The invoice is dated January 20, 2016. The Goughs were presented with the bill when construction was finished in July.

(108) Mr. Arenburg did not address this contingency in the contract. He did not take the steps required in the form of a written agreement to charge the Goughs extra. I allow $900 representing HST on the $6000 allowance. I disallow the remaining charges under this item.

(109) The sewer allowance was $10,000. The septic work was performed by PK Construction Ltd. An invoice dated June 24, 2016 shows the septic estimate of $10,500 plus HST or $12,075. I allow an extra of $1500 representing HST on $10,000.

Flooring

(110) In his overages list (Tab R), Mr. Arenburg seeks an additional $5868.81. He advised the Goughs to shop wherever they liked for flooring. The evidence submitted shows material costs totalling $13,692.94. It is not clear how much of the material cost related to the installation of the stairwell. Mr. Arenburg claims labour for the installation

of the stairwell of $1296.00. There is an invoice in evidence to support this amount.

(111) There is no reference in the documentation to show flooring includes the construction of the stairway. I am prepared to allow for material as floor covering on the stairs. However, I disallow anything else for the construction of the stairway.

(112) As for charges for labour, of the four items with allowances, two of them, the well and septic, clearly included labour. However, those items were not in control of the Goughs, or indeed, Mr. Arenburg. The kitchen cabinetry was a materials only allowance, as Mr. Gough intended to install them himself. One must turn to the surrounding circumstances for the flooring.

(113) In their evidence, Mr. and Mrs. Gough both stated there was no discussion of labour, only material. There were no designs or styles discussed for flooring either. Mr. Arenburg testified that it is his practice to include labour as part of the quote. Mr. Arenburg's evidence suggests the savings incurred by the Goughs occurred when the kitchen was installed, allowing for higher end cabinets.

(114) As with other aspects of the allowance, this item is vague and ambiguous. I find the Goughs knew that specialty material would result in an increased cost. However, a person looking at this objectively would have no way of knowing the amount of labour required to install flooring, or its cost. They rely on their contractor or builder for guidance. None was forthcoming. In his evidence, Mr. Arenburg testified the extra for the flooring was the result of the increase in the cost of the stairs. As noted above, the stairway was not included. I also find labour was not included. This item is disallowed.

Kitchen Cabinets

(115) The Claimant seeks an extra $135.70 for kitchen cabinetry. The Defendants argue the cabinetry came in under budget. The Claimant has not proven this item. This item is disallowed.

(116) Total allowed for items with allowances: $2400

<u>Items Changed During Construction</u>

(117) The Agreement specifically addresses extras or changes requested by the Goughs during construction. Essentially, I have allowed extras for those items which were added or changed at the request of the Goughs, particularly for those where they acknowledge the items were not on the plans. I have disallowed those which were not proven as extras.

French Doors

(118) Mr. and Mrs. Gough discussed French doors and pocket-hole doors during construction. Mr. Gough acknowledged the plans called for pocket-hole doors. I find this was an extra expense sought by the Goughs during construction, which were outside of

the plan. Mr. Arenburg provides in his claim for $400.00 to purchase and paint French doors. In his list, he claims $200. I award $200.

Crown Molding

(119) The Goughs intended to have crown moulding in several rooms. Mr. Gough believes he raised it with Mr. Arenburg but he acknowledged the crown molding does not appear in the plans. Mr. Arenburg testified that he believed Mr. Gough would install crown molding in the kitchen. Mr. Gough purports to have spent 6 hours installing crown molding. As above, Mr. Arenburg claims two different amounts for this item, $497.15 and $400. I allow $400 but reduce it by $100 in recognition of Mr. Gough's time. I award $300.00

Barn Door Track

(120) This item was not originally part of the plan. Mr. Arenburg was made aware of the cost during construction. There is a receipt in evidence substantiating the claim of $245.97. Mr. Gough testified he installed that item. Initially the plan called for a pocket door, which he claims was more expensive. There is no evidence as to the cost of a pocket door. However, I accept that a door of some type was necessary for the downstairs bathroom whether a barn door or pocket door. In the absence of evidence of value and in recognition of Mr. Gough's time, I allow nothing to the Claimant under this heading.

Laundry Sink

(121) The parties acknowledge this was not included in the plan but raised during construction when they realized the plan did not call for a laundry sink. I agree this is unusual. However, given that it was not in the plan, it is an extra. I allow $333.20.

Shower

(122) Mr. and Mrs. Gough selected a significant design for a shower. There is no evidence of an allowance. However, it is clear they discussed costs with Mr. Arenburg in planning its design. The key issue is if it were to have one glass door or two glass doors, the latter being the more expensive option. Mr. and Mrs. Gough both testified they were uncertain and concerned about staying within budget, which I took to mean within $282,200 for the entire build.

(123) The parties introduced text messages. In them it shows dialogue between Mr. Gough and Mr. Arenburg regarding concerns of the costs of the glass door. Mr. Arenburg promised to do something about the cost when he returned from his trip. However, the last text dealing with the shower is from Mr. Gough on April 28:

"I was talking to Blair (Glass Chek) and he said the doors were in so whenever u need them"

(124) I find this shows Mr. Gough decided to proceed with two doors rather than one. There is no evidence Mr. Arenburg called him back with any information on how to manage the price. At the same time, it was reasonable for Mr. Arenburg to assume Mr. Gough was satisfied with the arrangements and he was proceeding with two doors.

(125) There is no evidence of the cost of one door. Mr. Arenburg claims $2000, against an original cost of $3910, inclusive of installation. I find it difficult to believe the cost to install a single door is less than half the cost of a double door. I allow an extra but at a reduced amount. I allow $1400.

Door and Wall in Garage

(126) This item was raised during construction. I find this should be allowed. Mr. Gough claims there is a deficiency but that has not been sufficiently proven. I award the lower amount shown by Mr. Arenburg, $200.00.

(127) In summary, the total allowed for items added during construction is $2433.20

<u>PK Construction</u>

(128) As noted previously, PK Construction was employed to do the excavation work, install the septic tank and field, along with other jobs sought by the Goughs. For the latter work, Mr. Arenburg intended to bill the charges back to them. The well and septic work has been addressed.

(129) It is not clear the extent of the charges which relate to the Goughs extra work and those covered by the Agreement. I am satisfied the charges for float excavator, grubbing lot and piling firewood and stumping the lot (total $1147.50) all relate to the Goughs' request. The PK Construction invoice includes a permit cost of $500. This is covered by paragraph 7 of the Construction Agreement. Mr. Arenburg should bear that cost as well as the remaining items.

(130) I award $1147.50 under this heading.

<u>Extra Paint Colours</u>

(131) There was no limitation placed on the number of colours in the contract. No evidence was presented there were limitations in the plans. The parties did discuss them but only when construction was underway. I am not satisfied that was a term of the contract. This item is disallowed.

Claim Allowed

(132) The Claim of T. Joseph Arenburg is allowed in part. I award the following:

Items in Excess of Allowance	$2400.00
Extras added During Construction	$2433.20

Payable to PK Construction	$1147.50
Extra Paint Colours	$ 0.00
Total Allowed	$5980.70

Counterclaim

(133) The counterclaim involves quite a number of components. However, several have either been addressed or can be addressed without much difficulty. I shall deal with those at the outset.

(134) The HST credit has been removed from the counterclaim.

(135) The Goughs sent Mr. Arenburg a cheque for $6929.89 as an offer to settle. He cashed the draft and still retained the funds. They are seeking its return in full. No claim has been made by either party that it represents a full and final settlement of the amount. Counsel argue that this amount should be set off against or by any amount awarded to Mr. Arenburg (or added to the Goughs), once the claim and counterclaim have been set-off against each other. I agree with that approach.

(136) Mr. Arenburg acknowledges owing the Goughs for the Nova Scotia Power connection of $28.00. I allow that amount.

(137) The Defendants incurred a $40 expense to have their water tested which they determined was not required. They allege it was suggested by Mr. Arenburg. In my opinion, such a step was prudent and provided them with a benefit. I disallow this claim.

(138) The remaining items can be summarized as follows:

- Electrical Fixtures $3635.97 (total)
- Deficiencies $2727.39
- Gough's Labour $1530.00

Electrical Fixtures

(139) Mr. and Mrs. Gough testified they were surprised to learn electrical fixtures were not included as part of the construction. Mr. Arenburg testified that most construction does not address electrical fixtures as they are a matter of personal choice.

(140) The contract is silent on electrical fixtures. There were no discussions about fixtures until construction was completed. The Defendants note that plumbing fixtures were included, even though taps, faucets and other plumbing related fixtures are a matter of individual style.

(141) I find it reasonable to expect a certain amount of electrical fixtures are included in house construction as part of the purchase price, $282,200. There are $3635.97 in various invoices. I am prepared to grant an amount for fixtures but not the full amount

without further evidence. I award $2500 under this heading.

Deficiencies

(142) The Defendants presented a quote for $2727.39 to remedy several deficiencies. There is no evidence to corroborate most of the deficiencies, such as photographs or other means to show the effect of the work performed. Indeed, there is no evidence the work has been completed. The contractor who provided the quote did not give evidence. The photographs show the laundry chute and deck were started but not completed. I find these were part of the contract. I allow $704.16 (laundry chute, siding and deck) plus HST of $105.62 for a total of $809.78.

Labour Costs

(143) Mr. and Mrs. Gough seek $1530 to cover their efforts "managing the construction" and related jobs. They estimate 51 hours was spent at $30 per hour. I have heard their evidence and reviewed the documentation carefully. Respectfully, I find the claim to be excessive and largely unsupported.

(144) When any measure of home construction is underway, there is a certain degree of management the customer will choose to undertake, notwithstanding assurances by those involved that the matter will proceed without worry or concern. The items listed such as checking up on labourers and phone and e-mails to the contractor and sub-trades were prudent steps from which they derive benefit. Except for the installation work, I am not satisfied these were additional steps that were covered by the contract. I have previously adjusted for Mr. Gough's time performing construction duties when considering Mr. Arenburg's claim. Any additional, frustration, worry and upset would fall under the heading of general damages which is limited under the *Small Claims Court Act* to $100. I award $100.

Counterclaim allowed

(145) The counterclaim is allowed in part as follows:

NS Power Connection	$ 28.00
Electrical Fixtures	$2500.00
Deficiencies	$ 809.78
General Damages	$ 100.00
Total	$3437.78

Costs

(146) Mrs. Gough did an admirable job preparing binders and exhibits for court which were used by both parties and the Court. She should be reimbursed for her costs to do

so, namely, Staples ($81.36) and Walmart Photo Centre ($7.34) or $88.70. Additionally, the Goughs did make an offer to settle which was greater than the amount awarded to Mr. Arenburg by the court. They should also receive their filing fee of $66.00. I award the Defendants costs of $154.70.

Total Judgment

(147) As a result of the foregoing, the Defendants, Joshua Gough and Shaina Gough shall have judgment against the Claimant, T. Joseph Arenburg as follows:

Counterclaim Awarded:	$3437.78
Costs:	$ 154.70
Credit for Offer to Settle:	$6929.89
Set-Off of Claim Awarded	($5980.70)
Total Judgment	**$4541.67**

(148) An order shall be issued accordingly.

Dated at Halifax, NS,
on July 13, 2018;

Gregg W. Knudsen, Adjudicator

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