SUPREME COURT OF NOVA SCOTIA

Citation: *Harriss v. Keating Construction Company*, 2014 NSSC 84

Date: 2014-03-06
Docket: Syd. No. 337036
Registry: Sydney

Between:

Patricia Harriss and Kevin Sutherland

Plaintiffs

v.

Keating Construction Company Limited and Allan R. Keating

Defendants

Judge:	The Honourable Justice Frank Edwards
Heard:	February 17, 18, 19, 20, 21, 2014, in Sydney, Nova Scotia
Written Decision:	March 6th, 2014
Counsel:	Robert H. Pineo, Jeremy P. Smith and Alison Morgan, for the Plaintiffs Hugh R. McLeod, for the Defendants

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By the Court:

I Chronology and Background:

[1] This case is about the renovation of a one hundred year-old residence located in Gabarus, Nova Scotia. The property is owned by the Plaintiff, Patricia Harriss (Harriss) who resides there with the Plaintiff, Kevin Sutherland (Sutherland). Prior to June, 2009, the residence was a 1 ½ storey building on a four foot concrete frost wall. It had been a summer cottage.

[2] In 2009, Harriss and Sutherland decided to renovate the residence to make it a year round home. To that end, they decided to have the house raised from the existing foundation in order to install a four foot wooden "pony wall" on top of the existing concrete frost wall. By doing so, the basement level became potentially habitable. They also wanted to make the top level (previously not habitable) into a bedroom complete with a bathtub. Harriss and Sutherland wanted all three levels to be "open concept", that is, with no partitions or supporting posts.

[3] MacLean Construction raised the house and installed the pony wall for the sum of $22,000.00. MacLean applied for and obtained the appropriate renovation

permit prior to the commencement of their work. There is no evidence of any difficulties between the Plaintiffs and MacLean.

[4] In September, 2009, the Plaintiffs got bids on the balance of the renovation work from three contractors including the corporate Defendant. The three bids (all before HST) were as follows:

Argus: $140,000.00
Keating Construction Company $150,000.00
Munro and Gillespie $170,000.00

[5] Prior to submission of the Keating bid, the Defendant, Allan Keating, (I shall refer to both Defendants as Keating) and the company office manager/estimator, Blaine Cathcart (Cathcart), visited the site. At that time the house had not been lowered onto the new pony wall. Sutherland had already completely stripped the inside top level and partially stripped the main level interior.

[6] Starting in the basement, Keating and Cathcart, accompanied by Sutherland, examined all three levels of the house. During this approximately two hour visit, Sutherland explained to Keating and Cathcart what he and Harriss wanted done. In particular, Sutherland emphasized that they desired all three levels to be "open

concept." Sutherland also told them that he wanted a spiral staircase going from the basement level to the top level. Sutherland felt that a traditional staircase would take up too much room. (Dimensions of building: 27 ½ feet by 21 ½ feet).

[7] There is a conflict in the evidence about what was said about renovation permits. Sutherland says that Keating told him that he did not need a permit, that permits would slow the work down. Keating says Sutherland told him: "I don't want any permits and if you plan on getting a permit, you're not getting the job."

[8] Following the site visit, Cathcart prepared an estimate dated October 5, 2009. That document, apparently for internal company use only, estimated that the job would cost $171,000.00 ($167,000.00 plus $4,000.00). There is also a handwritten notation by Cathcart "Suggest mentioning $150,000.00." A second handwritten notation by Cathcart calls for three installments of $60,000.00:

> "Proposed,
> 60,000.00 deposit
> 60,000.00 crackfill complete
> 60,000.00 siding finished."

[9] On October 12, 2009, Keating emailed a proposal to Sutherland quoting a price of $150,000.00 before HST. Page 4 of that document states in part: "…this is

a budgetary quote until final decisions have been made on things like deck materials and design, interior stair layout and materials, cabinet materials etc/etc. I am ready to begin work on this project as soon as we can come to an agreement on pricing…"

[10] On or about October 20, 2009, the Plaintiffs met with Keating at his office. At that time Harriss gave Keating a cheque for $50,000.00. Keating subsequently prepared an invoice dated October 21, 2009 which acknowledged receipt of the $50,000.00 as a "Deposit on renovation on house in Gabarus." The following Monday, the Defendant Company began work on the project. [I note that the second installment of $50,000.00 resulted in an acknowledging invoice dated December 21, 2009 with the notation: "Interim payment on ***contract*** (2nd installment)." (Emphasis added)]

[11] Keating states that within two weeks of commencing work, the extent of the rot to the structure became apparent. Keating claims that the rot was much more extensive than he and Cathcart would have been able to detect during their initial inspection. Keating says he visited the site and then went to see the Plaintiffs who were staying in a nearby cottage. Keating says that the Plaintiffs agreed with him

that the job would proceed on a "cost plus" basis, and that Keating would provide them with cost cards so they could monitor the project cost.

[12] Keating says the Plaintiffs would benefit because he would not take a markup on the material cost (which he says, as a contractor, he got for 15% less than the general public). He says he would take his profit from the labour cost, that is, by charging labour out at a higher rate than he was actually paying his workers. The Plaintiffs deny that any such meeting took place. As far as they are concerned, the job remained a fixed price contract throughout.

[13] On November 13, 2009, Keating emailed a second document to Sutherland, which contained considerably more detail than the October 12, 2009 document. In particular, this document allowed for the provision of "spiral stairs." It also listed a number of items after this sentence on page 2: "The following items are included in the original price of 150,000.00 but were erroneously omitted…" Further on: "…I apologize for this taking so long to get to you. In the case of discrepancies between this contract and anything verbal agreed upon please let me know immediately so I can make changes…".

[14] There is no reference to the meeting alleged to have occurred earlier at the Plaintiffs' cottage where the alleged verbal change to a "cost plus" contract took

place. Unlike the October 12 document, the November 13 version does not contain a line stating that it is a "budgetary quote until final decisions have been made…"

[15] Page 3 of the November 13, 2009 document reads as follows:

> We hereby propose to supply and install materials and labour required to complete the following job for the sum of: $150,000.00 (SEE ABOVE).
>
> ADD H.S.T. TO THIS QUOTE:
>
> All work to be completed in a substantial workmanlike manner according to specifications submitted, per standard practices. Our workers are fully covered by Workmen's Compensation Insurance.
>
> ACCEPTANCE OF PROPOSAL The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. DEPOSIT OF 30% REQUIRED ON ALL ORDERS BEFORE CONSTRUCTION BEGINS. Balance due upon completion.
>
> Authorized Signature Note: This proposal may be withdrawn by us if not accepted within 90 days.
>
> Signature: Allan Keating Date of Acceptance NOVEMBER 13, 2009

[16] The same wording appears at the end of the October 12, 2009 document.

[17] Cathcart prepared both the October 12, 2009 and November 13, 2009 documents. Keating explained that he told Cathcart to put whatever the Plaintiffs wanted in the November 13 document. Keating says he had his verbal cost plus

agreement and therefore what went in the November 13 document did not matter to him. Under cross-examination Keating dismissed the November 13 document as "an unsigned piece of paper with words on it." On direct, he described it as no more than "a scope of work"… "a way for us to keep in order what he expected to be done."

[18] The work continued until early in April, 2010. During that time (November – April) Sutherland became increasingly frustrated with the lack of progress on the job. The Plaintiffs had expected to be back in their home by Christmas, 2009. Sutherland made his concerns known to Keating. In particular, Sutherland felt that there were not enough men on the job and those who were there were unsupervised and inexperienced. The Plaintiffs were also concerned that the workers were using the area near the barn as a toilet and generally were leaving the house and property in an untidy and unsanitary condition. They say that Keating repeatedly told them not to worry and that he would take care of it.

[19] By April 5, 2010, Keating's Job Cost Card shows that Keating had spent $153,707.91 on the project. Keating says he therefore advised the Plaintiffs that he needed more money. The parties met at Keating's office on April 9, 2010 at which time Harriss gave him another cheque for $25,000.00. That brought their total

payments up to $150,000.00 (October 20/09 - $50,000.00; December 21/09 - $50,000.00; February 17/10 - $25,000.00).

[20] It was during the April 9 meeting that the Plaintiffs first received Keating's job cost cards. The Plaintiffs say that Keating was stressing that he did not have enough money and wanted them to see what he had spent. They say Keating handed them the file and told them to take it with them and check it over. Sutherland says that out of curiosity he agreed to do so. Sutherland stressed that he continued to believe that any cost over-runs were Keating's problem and not his. Keating says that in the preceding months he had repeatedly asked Sutherland to take the cost cards but Sutherland never did until the April 9 meeting. The Plaintiffs deny that there were any prior offers for them to view the cost cards.

[21] Work continued until June, 2010. Keating's cost card for June 15, 2010 shows that Keating had $196,320.01 in the project at the time. (Keating's own expert witness, Mr. Leonard, drastically reduced this amount.)

[22] On or about June 20, 2010, Keating went to the site and met with the Plaintiffs. He says he told them that "until you come up with some money, I'm not coming back." The Plaintiffs say that, at that stage, all they owed Keating was $22,500.00, an amount equal to the tax payable under the contract. Sutherland

says that they told Keating that "…we're not paying the tax money until everything is completed." Keating left. Work on the job stopped.

[23] Sutherland says that he subsequently tried to contact Keating on numerous occasions without success. On June 28, 2010, Keating produced an invoice showing that Sutherland and Harriss then owed $71,848.97. Keating then placed this amount with a collection agency in order to pressure the Plaintiffs. Sutherland confirmed that he received a letter from the collection agency as well as phone calls. On September 23, 2010, by registered mail, the Plaintiffs first received the June 28, 2010 invoice. (They had received no cost cards from Keating for the April to June, 2010 interval). Keating has still not removed the Plaintiffs' names from the collection agency.

II Issues:

1. **Fixed price or cost plus contract**?
2. **Deficiencies?**
3. **The Collection Agency**

    a. Personal liability of Allan Keating
    b. Any liability?
    c. Punitive damages

III Analysis:

[24] ***Issue 1: Fixed Price or Cost-Plus:*** This is clearly a fixed price contract situation. The essential elements of a binding contract are offer, acceptance, and consideration. The October 12, 2009 document states on page 5: "we hereby propose to supply and install materials and labour required to complete the following job for the sum of $150,000.00." That is an offer by Keating. It is true that this offer was subject to "final decisions" on pricing certain specified listed items but, as noted, Keating does say on page 4 "…I am ready to begin work on this project as soon as we can come to an agreement on pricing" (those items).

[25] The parties met eight days later on October 20, 2009. It is not clear whether the pricing of the listed items had been completed at that time. What is clear is that the Plaintiffs accepted the $150,000.00 offer and made the required 30% deposit by paying Keating $50,000.00. Further, Keating does not dispute that he began work on the following Monday. I am satisfied that there was offer, acceptance, and consideration as of October 20, 2009. There was therefore a binding contract as of that date even if some specified items had yet to be priced.

[26] If all the required pricing had not been completed by October 20, 2009, those issues were put to rest shortly thereafter. Keating began work within a few days so he must have been satisfied that the outstanding issues had by then been substantially resolved. In any event, the outstanding issues had certainly been resolved before November 13, 2009. In the document bearing that date, Keating apologized for "taking so long to get this to you" (p.2). That would imply that the commitments contained in the document had been agreed upon days, if not weeks, before November 13.

[27] As noted, the qualification on pricing certain specified items was not in the November 13 document. There is nothing in the document about it being a "budgetary quote" nor is there any pending agreement on pricing anything. By November 13, 2009, the parties had a binding unconditional contract whereby Keating would do the complete job for $150,000.00 plus tax (at 15% $22,500.00). The November 13 document clarified and detailed the outstanding matters in the October 12 contract. The parties had agreed on all the terms of the contract despite the possibility that only Keating knew that he could not meet them. In legal parlance, the parties were *ad idem* (there had been a meeting of the minds). Keating insists that Sutherland kept changing the job requirements as the work proceeded. With one or two minor exceptions, I reject that notion.

[28] I noted earlier that Keating prepared an in-house estimate dated October 5, 2009. That estimate suggests that Keating knew prior to October 12 that the job would likely cost him $171,000.00. The proposed payment schedule (3 payments of $60,000.00) suggests that Keating knew the cost might go as high as $180,000.00. Why would he bid $150,000.00? (as suggested by the other handwritten entry). The obvious answer is that he wanted to keep the bid as low as possible in order to increase his chances of getting the job.

[29] I am satisfied that Keating fully anticipated that, when the agreed contract funds inevitably ran out, he would be in a strong position to pressure the Plaintiffs to come up with more money. He knew that the Plaintiffs were in temporary accommodation and were anxious to get into their house. Keating knew that, at that stage, the Plaintiffs would be highly dependent upon him to complete the job. It is likely that they would have had difficulty getting another contractor, and they would have already invested $150,000.00 in Keating. If they refused to put in more money, Keating knew he could do exactly what he did; walk away. Keating's miscalculation was twofold: (a) he did not anticipate that the Plaintiffs would stand firm, and (b) that he would be allegedly $70,000.00 over budget (as I have noted, an inflated figure).

[30] In any event, I do not believe Keating when he claims to have met the Plaintiffs at their rented cottage on November 9, 2009. As noted, he says that it was at that time that the Plaintiffs verbally agreed to a cost plus contract. Why would they? They had a fixed price contract. Why go to an open-ended contract which could only be advantageous to Keating? I doubt they would be tempted by a 15% discount on materials.

[31] If that momentous change had occurred, why did Keating not put it in the November 13, 2009 contract? Page 2 specifically states: "…In the case of any discrepancies between this contract and **anything verbal agreed upon**, please let me know immediately so I can make any changes…" (Emphasis added). There were no changes sought or made by either party.

[32] Perhaps most telling is that Keating did not provide the job cost cards until April, after his stated expenditure had exceeded the contract quote. I do not believe Keating when he says that he offered to provide the Plaintiffs with the job cost cards between November and April. I am satisfied that Keating was content to allow the Plaintiffs to continue to believe that they had a fixed price contract until they had paid the contract money. By the contract, the Plaintiffs were obliged to pay only the initial $50,000.00 deposit and no more until the work was complete

("balance due on completion"). Keating had therefore done very well to get the Plaintiffs to pay the full $150,000.00 less tax as of April, 2010. At that time, the job was a very long way from complete. The Plaintiffs had been more than reasonable.

[33] ***No Signatures:*** The Defendants place a lot of importance on the fact that the contracts were not signed. In the context of this case, I place no significance on the absence of signatures. Clearly, a verbal acceptance of a written offer can be binding. That is the case here. The absence of a written acceptance/signature may make proof of the acceptance more difficult but still very achievable.

[34] Here there is no doubt but that the Plaintiffs accepted the Defendants' $150,000.00 offer. Their $50,000.00 deposit on October 20, 2009 is irrefutable evidence of that acceptance (and of legal consideration). The fact that the Defendant started work a few days later is solid evidence that Keating believed that the Plaintiffs had accepted his offer. There is no evidence that Keating ever asked the Plaintiffs for their signatures on either the October 12 or the November 13 contracts. The contract does not require a signed acceptance nor is there a signature line.

[35] Defendants' Counsel cited G.H.L. Fridman in "The Law of Contract in Canada," (4th ed.) p. 49:

> "Definition: Acceptance means the signification by the offeree of his willingness to enter into a contract with the offeror on the terms offered to him by the latter…"

And further at p. 56:

> "an offer may be accepted by conduct as well as words…" and "…the nature of the acceptance depends upon the requirements, if any, stipulated by the offeror."

[36] In view of what I have described, the Plaintiffs clearly signified their acceptance of Keating's unconditional offer.

[37] In his brief, Defendants' Counsel also stated that his clients place "a great deal of reliance" on the case of **Halifax Graving Dock v. R.** (1921) 62 SCR 338. In that case (quoted in Fridman also on p. 56), there was no acceptance because the letter of purported acceptance introduced new terms and conditions. I have rejected Keating's evidence that the Plaintiffs introduced changes as the job proceeded. There were no changes direct or implied made by the Plaintiffs at the time of their acceptance on October 20 nor subsequently, after they received the November 13 contract. I am satisfied that their conduct throughout clearly

demonstrates that they unequivocally accepted both the October 20 and November 13 terms. The **Halifax Graving Dock** case therefore has no application here.

[38] ***Invitation to Treat:*** Defendants' Counsel also argued that the October 20 and November 13 documents constitute no more than an "invitation to treat." He cites Fridman at p. 35 **supra**.:

> "(c) Invitation to treat
>
> What is sometimes conceived as of an offer, by the alleged offeror or offeree, may be nothing more than a statement indicating a general commercial intent, a desire to make a contract with the party to whom the statement is addressed if a suitable arrangement can be reached. Such an 'offer' is considered to be nothing more than an invitation to treat, which is designed to elicit an offer from the party to whom it is addressed. Such may be the situation where a party submits a design or plan on the basis of which he hopes or expects that a contract to find the subject-matter of the design, or to undertake the scheme involved in the plan, will emerge. Submissions of this kind have been construed as indicating to the other party the general nature of the former's willingness to contract and the basis upon which he would be willing to contract. **They will not amount to offers capable of acceptance so as to create a finding contractual obligation unless they are expressed to be such clearly and unequivocally…" (Emphasis added)**

[39] In light of my findings, the contracts in question are not "invitations to treat." They are specific offers capable of acceptance so as to create a contractual obligation. This is especially so with the November 13 contract which leaves nothing to future agreements or pricing. Keating was not merely describing a

"scope of work." He was directly telling the Plaintiffs exactly what his company would do if the Plaintiffs paid the contract price.

[40] ***Job Cost Cards:*** The Defendants argue that Sutherland's receipt and inspection of the Job Cost Cards is strong evidence that there was no fixed price contract. Keating testified that he would not disclose the cost cards in a fixed price situation. Their content would be no one's business but his.

[41] Keating's argument would have some merit if Sutherland had been monitoring the cost cards throughout the November to April period, and continued to do so until June. I have already rejected Keating's evidence that he offered Sutherland the cost cards prior to their April meeting. There is no evidence that Sutherland got the cost cards for the April to June period. I am satisfied that he did not.

[42] I accept Sutherland's evidence that he examined the cost cards out of curiosity. Sutherland was obviously deeply committed to the project – he was there every day. He is an intelligent person and he is not employed. Sutherland had the time, the ability, and the interest to see if he could determine why the project was in trouble. I am satisfied that at no time did he accept by word or deed that this was anything but a fixed price situation.

[43] ***General Contractor*:** The Defendants say that Sutherland was a general contractor and therefore is responsible for any deficiencies in the work. They point out that Sutherland had hired MacLean to raise the house, had hired the electrician, and had done the plumbing himself. Sutherland and Harriss had also done the painting and some flooring.

[44] This is a flawed argument. Even if I accepted that Sutherland was a general contractor, that would in no way change the terms of the fixed price contract. As a general contractor, Sutherland would still be entitled to rely upon the terms of the contract and expect Keating to fulfill his contractual obligations. As I describe below, some of those contractual obligations did not conform to the Building Code but Sutherland knowingly accepted that. (See my comments regarding the spiral stairs, the insulation, and the deck.)

[45] ***Building/Renovation Permits*:** The Defendants rely upon the **Nova Scotia Building Code Regulations** which oblige "the owner" to obtain all required permits (s. 2.1.1.1). They argue that if there had been a permit, there would have been inspections. The inspections would have prevented the deficiencies which did occur. Therefore, the owner is responsible for any deficiencies.

[46] I reject this argument. While the Code says **owner**, I accept the evidence that it is usually the contractor who applies for the permit. In the MacLean application (Ex. 13), the Applicant is a representative of the contractor. Richard Munro says the cost of the permit would have been in their estimate.

[47] While I accept that Sutherland did not want permits, I also accept that Keating assured Sutherland that permits were not needed and would slow the project down. Keating had the knowledge and experience regarding Code requirements. The evidence is that the Regulations are not generally available to the public. Contractors, including Keating, are updated on the Regulations through paid subscriptions.

[48] Keating testified that on the first site visit in October, 2009, Sutherland stated: "I don't want any permits and if you plan on getting a permit, you're not getting the job." Harold Gillespie testified that Sutherland told him "he didn't want any permits." Richard Munro quoted Sutherland saying "no need for a permit." Yet, their company, Munro and Gillespie, proceeded to quote with a permit included in the price.

[49] I doubt that Sutherland was as emphatic as Keating would have me believe. In any event, Keating, who knew better, agreed to take the job on without permits.

Accordingly, Keating is responsible for any deficiencies that might have been avoided had a building inspector been present. As noted, I have made a few exceptions re the spiral stairs, the insulation, and the deck construction. In those instances, I am satisfied that Sutherland should be deemed to have waived compliance with the Building Code. But the main deficiency, the beam, belongs to Keating.

[50] Aside from the above, it is difficult to understand the permit argument on a common-sense level. In effect, the Defendant is telling the Plaintiffs that what happened is their fault because they did not have someone watching him. Had they done so, the Defendant seems to be saying that he would have done better. This argument, such as it is, ignores the fact that the Plaintiffs were entitled to rely upon Keating's knowledge and experience.

[51] I should add some general observations about Sutherland and his attitude toward the contract. Sutherland is more knowledgeable than most homeowners. He did the plumbing himself and completed some of the carpentry work (especially on the main deck). He is a strong willed person who is not reluctant to let people know what he wants.

[52] Sutherland did not want permits. As I noted, he did his own plumbing but he is not a qualified plumber. He subcontracted the electrical work. There were deficiencies in both the plumbing and electrical work. I am satisfied that Sutherland knew permits were required. Similarly, Sutherland was not concerned about Code compliance regarding the stairs, the insulation or the decks. For Sutherland, the issue was not whether the work complied with the Code. The issue for Sutherland was whether he got what he had bargained for under the contract.

[53] I note that in June 2009, in contemplation of the intended renovation, the Plaintiffs had a building inspection done by one Douglas Rigby, a certified building inspector. In his report dated June 8, 2009 Mr. Rigby states at p. 3:

> **"We recommend all new** foundation and **framing work be undertaken with the approval of a registered professional engineer."** (Emphasis added).

On page 4, he says:

> "Municipal development and building **permits must be acquired** by the related trades before the commencement of all work". (Emphasis added.)

It is difficult to understand why the Plaintiffs would ignore that advice.

[54] Finally, the Defendants argue that Sutherland is not a proper Plaintiff because Harriss owned the property. Clearly, Sutherland made the contract on his

and Harriss' behalf. Both contracts are addressed to Sutherland not Harriss. The invoice that went to the collection agency was addressed to both Sutherland and Harriss. Clearly, the argument that Sutherland is not a proper Plaintiff has no merit.

Issue 2: Deficiencies

[55] ***The Unforeseen***: Keating testified that the extent of the rot in the structure of the home did not become apparent until after construction began. When he realized that a lot more work and material would be required, he went to the owners and, by agreement, changed the project to cost plus from fixed price. I have already found that no such change took place, but I want to deal briefly with "the unforeseen" question.

[56] On their initial visit, Keating and Cathcart had an unrestricted opportunity to assess the condition of the dwelling. The top level interior was completely stripped and the main level was partially stripped. The underside of the main level was visible from the basement. Keating says he could see that 5 – 6 feet of the box sill was rotten. The inside boards fastened to the wall studding looked okay from the inside. Later, when Keating began work and removed the exterior siding, some boards showed exterior rot which was not visible from inside. Keating knew that

the building was over 100 years old and that much of the original structural wood was hand-hewn. Sutherland had demonstrated how bad one of the walls was by pushing it out with his hands. Significant rot was clearly visible.

[57] Keating has been in the construction business for more than 30 years. He tries to impress as competent and knowledgeable in his field. Given the age of the structure and the presence of significant visible rot in some areas, he should have anticipated that other areas he could not see would also be rotten. Keating had at least three options: (1) he could have done a closer inspection (e.g. by removing some siding); or (2) he could have made his bid conditional upon full inspection; or (3) he could have assumed there would be more rot and priced accordingly. I note that his October 5, 2009 estimate does allow for two of the four box sills.

[58] The bottom line is that Keating should have anticipated the unforeseen but he failed to do so. Keating must therefore bear the financial consequences.

[59] ***The Beam:*** Keating's expert, Mr. Leonard, identifies the failure of the beam on the main level as the main deficiency in the Plaintiffs' home. I am satisfied that Keating bears full responsibility for that deficiency.

[60] Keating knew from the outset that Sutherland wanted no posts on the main level. If there was one item Sutherland emphasized, it was his desire for an "open concept" on the main floor. That clearly meant no posts and Keating knew that.

[61] Keating also knew, or ought to have known, from day one that a beam would be required on the main level to carry the weight of the top level. He knew that Sutherland wanted a bedroom with a bathtub on the top level. Keating attempted to convey the impression that he only became aware of the need for a beam after construction began. His evidence was to the effect that one day he heard Sutherland mention the bathtub and, at that point, told Sutherland he would have to install a beam. If that is true (I find that it is not), that does not help Keating. As an experienced contractor, he should have known that a beam was required to support the upstairs weight. Mr. Leonard said Keating would have known about the necessity for a beam from the outset. Keating should therefore have included the cost of the beam and its installation in his original quote.

[62] The main floor beam is not specifically mentioned in either the October 12 or the November 13 contract. There is a beam mentioned for the basement. This was not installed but, because of the basement configuration, was replaced, by agreement, by a weight-bearing partition.

[63] As well, neither contract refers to "open concept" on the main level (but only respecting the top and basement levels). The absence of the reference to the required beam is the fault of Keating, who prepared the contracts (actually it was written by Keating's employee Blaine Cathcart who, without explanation, the Defendants did not call as a witness). Thus, if there is an arguable ambiguity in the contract, then I resolve that ambiguity in favour of the Plaintiffs.

[64] In **John Swan, Barry J Reiter, and Nicholas C Bala, *Contracts: Cases, Notes & Materials, 7th ed* (Markham: LexisNexis Butterworths, 206)** at 838, the authors state:

> Courts will sometimes refer to these approaches to interpretation as an application of interpretation *contra proferentum*, *i.e.*, an interpretation of the language of the contract against the interest of the party who drafted it. **If, for example, there is an ambiguity in a clause,** especially an exemption clause, **it will be resolved against the party who drafted the clause and who is seeking to rely on it. This approach is justified on the basis that the party who drafted the contract could have avoided the ambiguity and, not having done so, should bear the risk of an unfavourable interpretation …** [emphasis added]

[65] Page 2 of the November 13 contract states: "… reinforcing of walls and floors is included." The most obvious means of reinforcing the top floor was by installing a beam.

[66] Further, Keating was obliged to install a beam that did not require posts. Keating says he repeatedly told Sutherland that the beam required a post. It is possible that Keating belatedly realized the difficulty (and expense) of installing a beam that required no post. Keating may have attempted to persuade Sutherland to accept a beam with a post. But Sutherland insisted upon the original intention to have no post. If Keating had really believed he was not contractually bound to install a beam with no post he could have refused to install it and walked away (as Mr. Leonard suggested). Or Keating could have given Sutherland a letter confirming that he was installing the beam without a post at Sutherland's insistence and that Keating would not be responsible if the beam failed. Keating did neither.

[67] Keating proceeded to install a beam with no post. Keating testified in cross-examination that he phoned an engineer employed by a local building supply company. As a result of that discussion, Keating purchased and installed a 3 ply beam. It is unclear whether Keating was advised whether or not that beam required a post. In any event, it appears that Keating chose to install the beam and hope for the best. I am satisfied that at no time did Keating tell Sutherland that the beam he installed required a post.

[68] I do believe that Keating's employees, Mr. MacInnis and Mr. Jewett, did tell Sutherland that the beam required posts. But Sutherland had confidence in Keating and had Keating's assurance that he would have his open-concept main floor. Sutherland was relying upon Keating's expertise. In the circumstances of this case, Sutherland was entitled to do so.

[69] Exhibit 1A Tab 12 is a document showing a 30 foot beam that does require a centre post. That is not the beam which was installed in the home. Sutherland says he did not see that document until April of 2009. It is interesting also that the Defendants' witness Mr. Gillespie testified that, in his quote, he had an engineer design a floor plan for him. One would expect a prudent contractor to do no less.

[70] The beam failed. Mr. Leonard testified that there is a deflection of 2 ¼ inches at the centre of the beam. That means that at approximately 14 feet from the wall, the beam is 2 ¼ inches closer to the floor than it is at the wall. Leonard says that the deflection will get worse and remedial action is necessary. Unfortunately Leonard also says that the home has suffered permanent damage. The sagging floors, according to Leonard, cannot be made level even with the assistance of a hydraulic jack. The most that can be done now is to put in a beam to stop the floor from sagging further.

[71] Leonard says that a cheaper remedy would be to install a centre support post going all the way to the basement floor. The cost is approximately $5,000.00 but that is not what the Plaintiffs bargained for. Leonard estimates the cost of removing the existing beam and replacing it with a steel beam (no post required) is $16,571.50, plus tax $2,485.72. Total **$19,057.22**. I am satisfied that the Plaintiffs are entitled to have that job done at Keating's expense.

[72] ***The Spiral Staircase:*** There are two issues associated with the stairs: (a) faulty workmanship; and (b) non-conformance with the Building Code.

[73] ***(a) Stairs: Faulty Workmanship:*** The Plaintiffs' expert, Mr. Darrell Holloway (Holloway), testified that the main structural problem with the stairs relates to the centre column. Holloway says the column is not properly anchored to the basement floor, thus allowing movement. Mr. Leonard testified to the contrary. Leonard says the stars are solidly anchored. Holloway says the stair treads are not strong enough. Leonard says they are, though many of the treads squeak when walked upon. Leonard says it would be better to put up with the squeaking than to try to repair them. He says that putting additional screws in the wood risks splitting the wood making the problem much worse.

[74] On balance, I prefer Leonard's evidence regarding the stairs to that of Holloway. Holloway's memory of his visit to the site was at times vague. In fairness, Holloway was there only once and that was two years ago. Leonard was on the site at least twice and, on some points, seems to have made a more thorough inspection than Holloway. That is especially so with respect to the beam.

[75] ***(b) Stairs: Non-conformance with Building Code:*** The November 13 contract provides: "A set of spiral stairs will be constructed going to the main floor and the upstairs. **These stairs…will meet or exceed present building code regulations…**" (Emphasis added). This appears to be the only item in the contract where Keating specifically undertakes to comply with the Building Code.

[76] Both experts agree that the Code does not permit spiral stairs to be the primary means of egress from the building. There are three options available to remedy the problem: (i) tear out the spiral stairs and replace them with traditional stairs; (ii) install a traditional staircase elsewhere in the building; (iii) construct an exterior stairway to a top floor window.

[77] None of the options are either physically or financially attractive. I am satisfied however that I do not have to choose. I am satisfied that, even if Sutherland had been aware that the spiral stairs violated the Code (I believe he

probably knew), Sutherland would have insisted upon their installation. Sutherland wanted the spiral stairs because they take up much less room than traditional stairs. That concern is understandable given the small dimensions of the residence. Most would also regard an exterior stairway to be unsightly. When they testified, both Plaintiffs were concerned about the workmanship on the stairs, not about Code compliance. I am satisfied that Sutherland had set his mind on spiral stairs and nothing would have changed that. Sutherland would not have agreed to an additional set of stairs either inside or outside the house. I am satisfied that there is no compensable deficiency regarding the stairs.

[78] ***Insulation and Vapour Barrier:*** I accept Holloway's evidence that the R-12 insulation Keating installed does not meet Code requirements. Holloway recommends removing the fibreglass batt insulation and replacing it with closed cell foam. To access the insulation, the drywall would have to be removed and replaced. In the kitchen area, the cupboards would have to be detached from the wall and re-attached afterward. The cost would be substantial.

[79] I note that the November 13 contract (p.2) calls for the application of foam insulation. This was probably not done. There is evidence that, where it is visible (mainly in the basement), the insulation is the fibreglass batt type. Sutherland was

on the site every day and would have been well aware of what type of insulation was being installed. There is no evidence that he complained.

[80] I am satisfied that Sutherland was not concerned with whether or not the insulation was up to Code. I am satisfied that he was content to have the existing wall cavities filled with fibreglass batt insulation and that is what Keating did. There is no evidence that Sutherland at any time raised the slightest concern about the sufficiency of the insulation. I find that there is no compensable deficiency regarding the insulation.

[81] The vapour barrier would only be replaced if the insulation were replaced. Holloway did however raise some issues about the vapour barrier (where visible) not being properly sealed. I will allow **$250.00** for the rectification of that problem.

[82] ***The Decks:*** Two issues: (a) incomplete; and (b) not up to Code.

[83] ***(a) Deck Incomplete***: The November 13 contract states: "A new large deck will be constructed as requested. This deck will be constructed of white cedar as requested and be approximately 20 feet by 28 feet. Snap deck under the decking will be installed."

[84] The so-called "snap deck" is a fibreglass roof attached to the underside of the deck. This would allow the Plaintiffs to sit under the main deck (even when it rained) on a ground level deck they would install later. The main deck is over 8 feet above grade. There is an entrance door to the residence under the deck where the deck attaches to the house. The snap deck was never installed. Holloway calculates a cost involving a labour rate of $72.88 per hour. I have reduced that to a rate of $30.00 per hour. I therefore allow **$1,551.25** to supply and install the snap deck.

[85] When Keating left the job in June 2010, there were no stairs to the main deck and no side rails. Keating did leave pre-cut stringers for the stairs on site. Though the contract does not specifically provide for side rails and stairs on the deck, I have no doubt (given the height of the deck) that the contract required them. Keating would not have cut the stringers if he felt he was not obliged to build the stairs. Sutherland installed the stairs and side rails himself after Keating left.

[86] I have no specific evidence regarding the cost of the rails and stairs. Sutherland installed glass panels for side rails. These would be far more expensive then the wooden rails contemplated by the contract. There was also an additional

floor joist that Sutherland had to purchase and add to the deck. I am satisfied that an allowance of **$500.00** to complete the deck would be fair.

[87] ***(b) Deck not up to Code:*** The main issues here relate to (a) the span between the carrying beam and the point at which the deck attaches to the house; (b) the use of deck blocks rather than concrete bearing posts; and (c) the use of 4x4 posts rather than 6x6 posts.

[88] ***(a) The Span:*** Holloway did not cite the section of the Code which was ostensibly violated. Leonard had no problem with the span and opined that the whole deck met Code. The Plaintiffs gave no evidence that there was a problem with the deck feeling unsafe because of the span.

[89] I believe that the span was probably influenced by the Plaintiffs' desire to have a ground-level deck under the main deck. The addition of a second carrying beam, as recommended by Holloway, would compromise the clear space available for a ground-level deck. I am satisfied that that was the Plaintiffs' primary concern, not Code compliance. I find no compensable deficiency because of the span.

[90] ***(b) Deck blocks versus concrete bearing posts:*** Patricia Harriss gave evidence that when the 4 foot frost wall was installed in the 1980's, the original

intent was to go down 8 feet. That proved not to be feasible because of bedrock. Keating says that is why he did not dig for concrete piers. Sutherland was there and made no complaint about the use of deck blocks. Sutherland was not concerned about Code compliance so long as the deck blocks did the job. Apparently they have. This is not a compensable deficiency.

[91] ***(c) 4x4 wooden posts versus 6x6 wooden posts:*** Sutherland made no complaint about the size of the posts. I note that Sutherland worked for a time as a carpenter's helper and has done some carpentry work himself. If he had felt there was a problem, he would have said so.

Summary of Allowance regarding Decks:

Snap Deck	$1,551.25
Rails and Stairs	500.00
Total	$2,051.25

[92] ***Exterior Siding:*** The October 12 contract included the cost of installing "James Hardie siding". The November 13 contract contemplates an upgrade of $4,500.00 because Sutherland had decided to go with a "Canexcel shingle". Leonard testified that the "siding installed was less expensive than that originally

provided for." I am satisfied therefore that the siding installation is included in the $150,000.00 price.

[93] Holloway says the siding was poorly installed and requires repair. The photographs show that there are open gaps between the lower edge of some of the siding and the wall. They should be flush. Keating dismisses the problem as something one ought to expect in an older home with uneven walls. Holloway says there are ways to straighten the walls or shim them to make them appear flat. Keating had an opportunity to do both but did neither. Leonard says the siding was properly installed. Some of the siding had to be face nailed to keep it from blowing off. As well, Holloway identified some areas where the siding trim was poorly cut.

[94] I prefer Holloway's evidence on the siding issue. The siding is what everyone sees. If it is poorly installed, it obviously detracts from the overall appeal of the home. In his repair estimate, Holloway used $48.55 per hour for an installer. I will use $30 per hour. I therefore allow **$2,130.00** to repair the siding.

[95] ***Kitchen Cabinets*****:** Both contracts allow for the provision of kitchen cabinets. The November 13 contract specifies "…cabinets will be in an L shape

and complete with all related countertops, sink, taps and any required plumbing to install this."

[96] When Keating left the job in June, 2010, only some of the lower cabinets had been installed. These did not include doors. Keating says that the rest of the cabinets had been built and ready for installation. They were never brought to the site. Sutherland tried many times without success to contact Keating after June, 2010. Keating did not respond. Sutherland had no alternative but to hire someone else to provide the kitchen cabinets.

[97] I am satisfied that Keating was obliged to supply and install a complete set of kitchen cabinets by the $150,000.00 contract. I note that his October 5, 2009 in-house estimate allows for "kitchen cabinets – 12' X 23' – upper/lower – open upper white". Sutherland produced a receipted invoice dated October 7, 2010 from A and A Kitchens for the amount of **$8,100.00**. I will allow this amount.

[98] ***Leaking Doors*:** I accept Holloway's evidence that two of the exterior doors leak because of faulty installation. I also accept that the doors had substandard hinges which prematurely rusted. I therefore allow the sum of **$821.07** to rectify these problems (See Holloway's report – costs section p. 2 lines 1 – 4; p. 7 lines 49 – 53).

[99] ***Windows*:** Both Sutherland and Holloway testified that two of the kitchen windows did not function properly. Page 2 of Holloway's report states: "Windows non-functioning (RSO or shims too tight or beam not bearing on the foundation and compressing the window opening"). I accept Holloway's evidence. Leonard says he tried all the windows except: "I missed both windows facing east in the north addition". I am not sure whether Leonard was referring to the same two windows Holloway found defective. I accept Holloway's estimate of **$820.52** to replace the defective windows.

[100] ***Ceramic tiles in shower*:** I accept Holloway's evidence that Keating did a poor job of installing these tiles. I therefore accept his estimate of **$2,111.78** to remove and replace the tiles.

[101] ***Summary of Allowance for Deficiencies*:**

Beam	$ 16,571.50	
Insulation and Vapour Barrier	$ 250.00	
Snap deck	$ 1,551.25	
Finish deck, stairs and rail	$ 500.00	
Siding	$ 2,130.00	
Kitchen cabinets	$ 8,100.00	(tax included)
Leaking doors	$ 821.07	
Windows	$ 820.52	
Ceramic Shower	$ 2,111.78	
	$ 32,856.12	
Plus HST on $24,756.12	3,713.41	

($32,856.12 - $8,100.00)	$ 36,569.53
Less unpaid tax	-$ 22,500.00
Owing to Plaintiffs	$ 14,069.53

[102] ***Temporary Accommodation*:** Repair of the deficiencies (in particular the removal and replacement of the beam) will require the Plaintiffs to temporarily relocate. I will allow the sum of **$1,500.00** to cover temporarily moving and storing some furniture and paying for alternate temporary accommodation. I am not making any allowance for furniture damaged by Keating's employees. By leaving the furniture on site, the Plaintiffs voluntarily assumed an obvious risk.

[103] ***Issue 3: The Collection Agency***: As I noted earlier, in June, 2010, Keating submitted an invoice for $71,848.97, addressed to both Plaintiffs, to a collection agency. At that time, Keating knew or ought to have known the following:

1. That the Plaintiffs would dispute the alleged amount owing;
2. That the Plaintiffs did not know Keating was claiming this amount. Keating acknowledged that he did not send the invoice to the Plaintiffs until two months later, in September, 2010;
3. That the Plaintiffs believed they owed only the amount of the tax ($22,500.00) and that that amount was not due until Keating's work was complete (see contract);
4. That, as of June 2010, the project was not complete;
5. That Keating could have placed a lien against the property;
6. That placing the matter with a collection agency would cause the Plaintiff's to suffer stress and anxiety;

7. That placing the matter with a collection agency was an intrusion on the Plaintiffs' financial integrity in that it would negatively affect their credit rating.

[104] Keating testified during discovery more than two years ago on February 12, 2012. At that time he acknowledged that he had sent the invoice to the collection agency before he sent it to the Plaintiffs. Keating still took no steps to remove the matter from the collection agency. Keating was asked about that failure in cross-examination. He replied that he probably would have removed it, if he had been asked. In other words, Keating felt that counsel had failed to ask the right question. There is no excuse for Keating's behaviour. He compounded his initial transgression by not withdrawing the collection agency claim while this litigation proceeded. In cross examination, Keating said he believed the collection agency route was the most effective way of putting pressure on the Plaintiffs. He clearly does not regret what he did.

[105] Fortunately, the Plaintiffs did not experience quantifiable losses as a result of Keating's behaviour. They were not, for example, refused a loan or a mortgage. Beyond the aggravation of receiving a collection agency letter and some phone calls, Sutherland was unaffected in that he has not applied for credit since June, 2010. Patricia Harriss was refused an opportunity to co-sign a loan for a relative. She also had some temporary credit problems when she was trying to have a

propane tank installed on the property. She testified that she had never before had credit problems. I am satisfied that the difficulties she did describe were a direct result of Keating's action.

[106] In their Statement of Claim, the Plaintiffs pleaded the torts of Intimidation and Interference. The cases they provided were framed in negligence. [**Clark** v. **Scotiabank and Equifax**, (2004) 25 CCLT (3d) 109 (Ont. S.C.)] and contract [**Millar** v. **General Motors**, (2002) 27 BLR (3) 300 (Ont. S.C.)]. The Plaintiffs also claim punitive damages.

[107] The Plaintiffs' claim regarding the collection agency issue is against Allan Keating personally. They also claim, in the alternative, that the corporate Defendant is vicariously liable for Allan Keating's conduct.

[108] ***(a) Personal Liability of Allan Keating*:** On the issue of Keating's personal liability, the Plaintiffs' cite **BAE – Newplan Group Ltd.** v. **Altius Minerals Corp.**, (2010) 301 NFLD & PEIR 2014. At paragraph 14, the following quote is found from **Craik** v. **Aetna Life Insurance Co. of Canada**, (1995) O.J. No. 3286 (Ont. Gen. Div.), affirmed at (1996) O.J. No. 2377 (Ont. C.A.):

> When the director or officer is acting outside the scope of his/her authority in being motivated by advancing a personal interest contrary to the interest of his/her corporation or when the director or officer is committing a fraud or doing

> something with malice, the individual can be subject to personal liability. ***Unless the claim against the director or officer alleges fraud, bad faith, absence of authority, or a deliberate and intentional act constituting an intentional tort or some other exceptional circumstance whereby it can be said that the director or officer has made the act complained of his own distinct, personal act rather than the act of the operation, the claim should be struck out at the pleading stage***: see *Montreal Trust, supra,* at 195. (Emphasis added)

[109] In this case, I am satisfied that Keating was acting within the scope of his authority as an officer of the corporate Defendant. I am unable to say that the act complained of was "a distinct personal act rather than the act of the operation." I am therefore dismissing the action against Keating personally without costs.

[110] ***(b) Liability of Corporate Defendant:*** I have reviewed both the **Clark** and **Millar** cases. I am not persuaded that the Plaintiffs have made out negligence nor breach of contract on this aspect of their claim. If I am mistaken, the Plaintiffs would at best be entitled to only nominal damages.

[111] ***(c) Punitive Damages:*** There is no question but that Keating's actions were deplorable, high-handed, and arbitrary. Punitive damages may only be awarded in exceptional cases. This case comes close. However, I am not satisfied that Keating's actions reached a level of reprehensibility that would constitute an entitlement to punitive damages. I am therefore dismissing this aspect of the Plaintiffs' claim without costs to the Defendants.

[112] ***(d) Order to Remove Claim From Collection Agency:*** I am prepared to order the Corporate Defendant to immediately do whatever it can to have this matter removed from the collection agency. Counsel can refine that wording as they see fit in a draft Order. They may include recitals, for example, to the effect that this matter should never have been referred to a collection agency. Further, that the Plaintiffs' credit ratings should in no way be affected by any claim made by Keating.

[113] ***Conclusion:*** In view of my findings, the Defendants' counterclaim is moot. I hereby dismiss the counterclaim with costs to the Plaintiffs. I am allowing the Plaintiffs' claim (reduced as indicated) against the corporate Defendant. Accordingly, I am prepared to Order that the corporate Defendant is liable to pay the Plaintiffs the following:

Total Deficiencies: (HST included)	$36,569.53
Less unpaid Tax:	-$22,500.00
	$14,069.53
Add Temporary Accommodation Allowance:	$ 1,500.00
Balance owing:	$15,569.53

[114] In addition, the Plaintiffs are entitled to have their costs (party/party) and reasonable disbursements (to be taxed by me) paid by the corporate Defendant.

Plaintiffs' counsel are not entitled to be reimbursed for travel to and from Sydney, nor for accommodations and meals connected with their travel and stay here. When a party decides to hire non local counsel, he/she implicitly agrees to pay the additional expense.

[115] I will accept a written submission on the amount of costs from Plaintiffs' counsel within 10 days of receipt of this decision. Defendants' counsel will have 7 days after receipt of the Plaintiffs' submission to respond in writing.

Order accordingly.

Edwards, J.