Claim No: 286662

# IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Burgess v. Rickard, 2008 NSSM 15

BETWEEN:

BRIAN CHARLES BURGESS

Claimant

- and -

RALPH RICKARD

Defendant

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## REASONS FOR DECISION

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**BEFORE**

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on December 18, 2007

Last of written submissions received
on February 18, 2008

Decision released on February 25, 2008

**APPEARANCES**

For the Claimant: self-represented

For the Defendant: self-represented

**BY THE COURT:**

[1] The Claimant purchased a rental property in February 2003. Prior to committing himself to the purchase he retained the Defendant to perform a building inspection. In this lawsuit, the Claimant alleges that the Defendant failed to discover a significant defect, with the result that he has been forced into unexpected and expensive repairs. He says that had he known about this defect, he might not have bought the property, or might perhaps have negotiated an abatement to the price.

[2] Although there are other issues, the Defendant essentially says that he was not negligent in the performance of the inspection. He also takes issue to having been sued personally, as he operates his business through a limited company.

[3] The evidence at trial occupied several hours and because we could not have hoped to finish that evening, at my invitation the parties submitted extensive written briefs several weeks thereafter, for which I am grateful, and which I have reviewed prior to rendering this decision.

**The Facts**

[4] The property is a 2-unit home on MacKay Street in Dartmouth. It is by all accounts a nice street with fairly pricey homes, although this particular property was not in good shape and was priced accordingly.

[5] The Claimant is a sophisticated and well-educated individual, but with limited experience in real estate and construction issues. This was only

the second real estate purchase he had ever made, and it was the first time he had occasion to use a home inspector. He was advised by his real estate agent to get an inspection and was given the name and number for Ralph Rickard. Based on this recommendation he called Mr. Rickard and indicated that he needed an inspection on fairly short notice.

[6] Mr. Rickard did not indicate to the Claimant during that call, nor on any occasion until the report was rendered, that the Claimant would not be contracting directly with him, but with a corporation, or that there would be any specific limitations of liability. Indeed, I would have found it rather odd to hear that such things were discussed as they could easily undermine customer confidence, if not entirely drive a potential customer away. I am satisfied that the discussion would have touched upon the Defendant's credentials, issues of cost and availability, and some discussion about the property itself.

[7] In fact, the Defendant operates his business through a corporation R. Rickard Consultants Ltd., and the eventual report produced contains a number of limitations on liability. I will address these points later in this decision.

[8] The defect that the Defendant allegedly missed was a rotting sill. As explained by all of the witnesses, the sill is a length of wood which sits on the foundation, and which in turn supports the house. It essentially ties the structure to the foundation . The effect of a rotting sill is that the house is not properly supported, throwing the structure out of level and causing elements such as siding to buckle.

[9] The home has some unusual features which likely contributed to the problem. Along one side of the building there is a rock retaining wall belonging to the neighbour, supporting a significant elevation change between this lot and the neighbour's land. This wall is so close to the building that a person cannot actually stand in the resulting trench. It also appears that there was (until repairs were recently made) no way water could easily escape this trench, either by diversion or drainage through the soil, with the result that standing water would remain in contact with the outside of the sill and the foundation for undue lengths of time. This situation of standing water over many years has led to rotting of the sill, which in turn has created an unstable platform for the house, which has become out of level. The softness of the rotting sill has allowed tree roots to penetrate. The settling of the house caused some of the siding to buckle, although the extent that buckling was visible on the initial inspection is somewhat open to question.

[10] The Defendant does not deny that this problem exists and that it is serious and has required urgent repair. He also does not deny that his report indicated that the sills were in satisfactory condition, which was (as it turned out) incorrect. He also admitted that it would be prudent practice to examine the condition of the sills.

[11] The Defendant says that there were several factors which caused him to miss this defect in this case. These included:

A. The inspection took place in early February of 2003, during very cold weather and after a significant snowfall that caused the trench to be filled with snow, obscuring his view of the trench and of the buckling

siding, and making it impossible to assess whether there was proper drainage from the trench. He stated that he could not even get his shovel into the trench to remove snow, because it was too narrow.

B. His attention was focussed on a tree close to the foundation which he regarded as an immediate threat, the removal of which he believed to be the most urgent priority.

C. There was limited access to the sill from the inside because much of it was covered by pieces of fibreglass insulation between the joists. The Defendant indicated in his evidence that he does not like to come into contact with fibreglass insulation because it irritates his skin. He did say that he moved a few pieces to gain some access.

D. In those areas where the sill was accessible, it was cold to the touch and frozen solid, such that the softness and water logging could not be detected. In other words, it was not until the sill thawed out that someone could assess how rotten it was.

[12] While this was not a reason for failing to detect the problem *per se*, the Defendant candidly admitted that he found the house to be in such poor condition overall that he was surprised that the Claimant went through with the deal. The inference that I draw is that the Defendant had already pointed out so many deficiencies that he did not bother to look too much deeper. He noted that there were abandoned cars on the property, further reinforcing the view that this was a derelict, neglected place.

[13] The Defendant further stated that his report recommended an annual budget for repairs of 3% of the purchase price, which would have been intended to cover repairs such as this.

[14] In his testimony the Defendant stated that he believed the property would have needed about $80,000 in renovations to bring it up to the average condition of homes in the neighbourhood. This belief was not reflected in the report, which simply focussed on specific items, many but not all of which were unsatisfactory. It seemed clear to me that the Defendant did not believe that the Claimant would go through with the purchase. As things turned out, he was wrong.

[15] While the property was bought in 2003, the full extent of the sill problem was not discovered until 2004 when the Claimant himself was looking more closely in the basement with a view possibly to adding additional insulation. At trial the Defendant did not dispute that what was discovered in 2004 had likely been going on for years, and I am prepared to make the inference that the problem existed fully in 2003.

[16] Upon discovering the problem the Claimant contacted the Defendant and made efforts to involve him in solving the problem. The Defendant gave some technical information about what might need to be done, and even suggested that he could find someone willing to buy the property who was in the business and could do the repairs himself cost effectively. It is sufficient for purposes of this decision to say that the Defendant showed good will and offered some assistance, but in the end there was no resolution of the dispute and the Claimant proceeded in due course to

have the problem repaired at his own expense, intending to sue the Defendant for the cost of repair.

[17] The Claimant also engaged another inspector to give an opinion about the problem. That gentleman, Philip D. DeBay, produced a very useful report and testified at trial. His credentials are impressive and I qualified him as an expert in the area of building deficiencies and practice.

[18] In the concluding section of his report, which was expanded upon in testimony, he states:

> **DISCUSSION**
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> **At the very least, any person in the home or building inspection business should have at least a rudimentary knowledge of building pathology.**
>
> **The proximity of the rock retaining wall, a rock retaining wall's tendency to crack, break and shift from several causes and the installation of concrete up the side of the building and between the building and the rock retaining wall should have raised red flags and set off very loud alarm bells.**
>
> **The foregoing items cause rot, mould, fungus, mildew etc., as well as movement in the building. The National Building Code of Canada requires that exterior grade is maintained 200 mm or 8" below materials affected by moisture. The vinyl is not affected by moisture, but the material that the vinyl is nailed to is very adversely affected by moisture, and with the grade 12" to 16" of poured concrete above the bottom of wood wall, and with the vinyl siding directly above the concrete attached to the wood.**

**Additionally, the observation of the vinyl in the area between the building and the rock retaining wall indicates that the vinyl is being deformed. The most probable cause of this deformation is that the building is settling due to rot.**

**All of the above indicate problems from the exterior. It provides the inspector with a heads up as to what to look for on the interior. Internally, many locations of significant rot and subsequent deterioration were clearly visible and easily accessible.**

**CONCLUSIONS**

**It can only be concluded that some or all of the externally visible items would indicate to any competent inspector that serious structural issues would be found upon further investigation. As well, internally, significant rot is clearly visible in easily accessible areas, has been occurring for a very long period of time, probably ten years or longer. For the above to have been missed by the inspector or for the inspector not to have advised the client, a perspective purchaser of the property, of these potentially serious and expensive to correct problems, is not in keeping with what a reasonable person has the right to expect and can receive.**

[19] While it is ultimately for the Court and not the witness to determine the appropriate standard, below which would be actionable negligence, it is helpful to have the opinion of someone else in the field. I accept Mr. DeBay's evidence to the effect that this defect ought to have been found by a competent inspector, and that his failure to do so fell short of his duty to his client.

[20] Having said that, I wish to add that I was impressed overall with Mr. Rickard's knowledge and credibility. I have no reason to question his competence nor integrity, overall. Everyone makes mistakes, and I find that he did so here. It seems to me that he became convinced that the Claimant would probably not buy the property because of all of the known

problems, and the Defendant simply stopped short of identifying everything that ought to have been identified.

[21] I am mindful of the fact that a two or three hour inspection at a cost of several hundred dollars cannot be expected to diagnose precisely everything that is potentially wrong with a property. For example, there are issues that cannot be explored non-destructively. In such a case, the report should state that a particular condition could not be investigated. To paraphrase a quote from political sources, there are the "known knowns and known unknowns." A prospective purchaser wants to know what is knowable and what is not knowable so that he can make a decision as fully informed as is possible under the circumstances.

[22] Here the inspection report did not qualify the opinions expressed because of any alleged external condition making it difficult or impossible to assess the structure. The Defendant could have stated that snow, cold or lack of access made it impossible to assess certain things properly, in which case the Claimant would have been alerted to the possibility that there were additional defects. In failing to qualify his opinion, I find that the Defendant negligently misrepresented the condition of the sill. I further find as a fact that the Claimant relied on this misrepresentation, to his detriment.

[23] It is clear law that inspection reports are not warranties of the state of a property. They are opinions that go as far as they go.

[24] The law in this area has recently been canvassed at considerable length in the Supreme Court of Nova Scotia decision of Smith A.C.J. in *Gesner v.*

*Ernst* (2007) 254 N.S.R. (2d) 284. She adopts the test used in other provinces:

190 In the case of *Brownjohn v. Ramsay*, [2003] B.C.J. No. 43 (B.C. Prov. Ct.) Stansfield, A.C.J. gave, in my view, a very useful review of the tort of negligent misrepresentation as it relates to home inspectors. He stated at paragraphs 16-24:

> ¶ 16 The point made repeatedly in the PTP contract, and mentioned consistently in the various cases to which I was referred -- but most importantly, which simply accords with common sense -- is that there are limits on what one reasonably can expect from a relatively brief visual inspection undertaken by someone who has no right to interfere with (and by that I mean no right to dismantle, nor to effect any permanent change in) the property which one must remember is not owned by the person requesting the inspection. As well, as a matter of common sense one has to recognize that a service performed for a fee of $240.00 cannot be expected to be exhaustive.
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> ¶ 17 The broad purpose of securing a residential home inspection is to provide to a lay purchaser expert advice about any substantial deficiencies in the property which can be discerned upon a visual inspection, and which are of a type or magnitude that reasonably can be expected to have some bearing upon the purchaser's decision-making regarding whether they wish to purchase the property at all, or whether there is some basis upon which they should negotiate a variation in price. Broadly speaking, it is a risk-assessment tool.
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> ¶ 18 In *Seltzer-Soberano v. Kogut*, [1999] O.J. No. 1871 (Ont. Superior Court of Justice), Justice Wright said (at paragraph 6):
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> The usual house inspection is general in nature and is performed by a visual inspection. A house inspector cannot be held responsible for a problem which is not readily apparent by a reasonable visual inspection. A house inspector would be held to a different standard of responsibility if requested to respond to a specific question, i.e., "we want to know if there is any evidence of termites in this house?" If that specific question was asked of a house inspector, the inspector, unless

expert in that area, would probably tell the proposed purchaser to consult a pest control company.

¶ 19 In *Drever v. Eaton*, unreported, November 14, 2000, Victoria Registry No. 28199 (Provincial Court), my colleague Judge Filmer dealt with a claim against a home inspector, and mentioned in passing:

(The home inspection) was not being used as an assurance of the structural integrity of this building. To do that for $200 would be a fool's errand, in my view.

¶ 20 While I suggest there are obvious limitations to what one can expect from home inspections of the type undertaken in this case, one also needs to be mindful of the responsibility which is taken on by the home inspector. Persons who hold themselves out to the community as professionals prepared to provide advice for a fee -- accountants, lawyers, engineers, architects, physicians, and other professionals immediately come to mind -- must know that in marketing and providing their services, they invite reliance upon their advice and, in doing so, they create a risk that their client will suffer harm if the professional falls short of the standard of care which reasonably may be expected of that category of professional in the particular circumstances, and their advice is wrong.

¶ 21 The home inspector in the context of the average residential home inspection is involved in an inherently risky business. The inspector invites reliance. If prospective home purchasers did not believe they could secure meaningful and reliable advice about the home they are considering purchasing, there would be no reason for them to retain the inspector. The matters about which the inspector is asked to opine -- for example, roofs, foundations, and other basic home systems -- are of interest to the purchaser precisely because they are the aspects of the home which would give rise to the greatest financial exposure were they to be discovered to be defective after completion of the purchase.

¶ 22 .....What is the test in law for "negligence" in the context of home inspections?

¶ 23 Because the core of the service provided by the home inspector is the advice given regarding the condition of the home, claims against home inspectors in superior courts have

> been pleaded and considered by the court in the context of the tort of negligent misrepresentation. The five elements to be proven in that tort, as articulated by the Supreme Court of Canada in *Queen v. Cognos Inc.* (1993) 99 D.L.R. (4th) 626, are well established:
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> 1. there must be a duty of care based on a special relationship between the parties,
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> 2. the representation made by one party to the other must be false, inaccurate or misleading,
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> 3. the representation must be made negligently,
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> 4. the person to whom the representation is made must have reasonably relied on the representation and,
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> 5. the reliance must have been detrimental to that person with the consequence of his suffering damages.
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> ¶ 24 The third requirement that "the representation must be made negligently" one presumes will fall to be determined by application of the test applicable to other types of "professional negligence", namely, that the home inspector failed to meet the standard of care expected of a reasonably prudent home inspector in those circumstances and at that time.

[25] Looking at these five necessary factors, I am satisfied that the case fits all of them.

**1. there must be a duty of care based on a special relationship between the parties**

[26] I believe that the contractual nature of the relationship satisfies this requirement. The problem in other cases is that the maker of the statement may have no expectation that someone other than an intended recipient would rely upon it. An example of this problem might be where

the inspection was obtained and used years later in the context of a subsequent sale.

**2. the representation made by one party to the other must be false, inaccurate or misleading**

[27] I have found that the statement to the effect that the sill was satisfactory was clearly false, inaccurate and misleading.

**3. the representation must be made negligently**

[28] I have found that the Defendant fell short of his standard of care in this instance.

**4. the person to whom the representation is made must have reasonably relied on the representation**

[29] I find that it was reasonable for the Claimant to have relied on the representation, and that he clearly did so.

**5. the reliance must have been detrimental to that person with the consequence of his suffering damages**.

[30] The reliance was detrimental because the Claimant assumed that he had been alerted to all of the urgent issues, and governed himself accordingly. Had he known of the sill problem he could have backed out of the deal or negotiated an abatement.

**Personal liability**

[31] As to whether the Defendant should bear personal responsibility, notwithstanding his use of a corporation, I am of the view that he should, although had the Claimant sued the corporation I would without hesitation have held the corporation liable. The salient point is that there was no evidence to establish that the Claimant understood that he was contracting with a corporation. It was not until the report was presented that he might have noticed the corporate identity.

[32] A similar issue arose in the *Gesner* case cited above:

> 187 In my view, in order to succeed with his argument on this issue, the Defendant Rubarth must establish that he properly informed the Plaintiff that she was dealing with a corporation rather than an individual carrying on business as Cornerstone Inspections. Reference is made to the Ontario Court of Appeal decision in *Truster v. Tri-Lux Fine Homes Ltd.*, [1998] O.J. No. 2001 (Ont. C.A.) where Finlayson, J. A. stated at ¶21:
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> .....persons wishing to benefit from the protection of the corporate veil should not hold themselves out to the public without qualification. They should identify the name of the company with which they are associated in a reasonable manner or risk being held personally liable if the circumstances warrant it: see cases such as *Watfield International Enterprises Inc. v. 655293 Ontario Ltd.* (1995), 21 B.L.R. (2d) 158 (Ont. Ct. (Gen. Div.)) and *Pennelly Ltd. v. 449483 Ontario Ltd.* (1986), 20 C.L.R. 145 (Ont. H.C.J.). This principle properly flows from the fact that incorporation provides corporate officers and shareholders the legal protection thought to be necessary for modern business relations; however, if one expects to benefit from this protection, then others must, at a minimum, be informed in a reasonable manner that they are dealing with a corporation and not an individual. In the last analysis, persons who set up after the fact that they contracted solely on behalf of another bear the onus of establishing that the party with whom they were dealing was aware of the capacity in which they acted: *Clow Darling Ltd. v. 1013983 Ontario Inc*., [1997]

O.J. No. 3655 (Gen. Div.); *Nord Ovest Spa v. Gruppo Giorgio Ltd.*, [1994] O.J. No. 1657 (Gen. Div.).

[33] It is accordingly my finding that the Defendant is personally liable for the negligent misrepresentation.

**Limitations of Liability**

[34] The report contains the following statement:

> **Every attempt is made to reduce the risk of purchasing. The inspection cannot eliminate the risk. R. Rickard Consultants Ltd., Ralph Rickard and employees do not assume liability for any comments on the report, omissions from the report or actions by any party arising from the report.**

[35] The law has always been leery of limitations of liability by professionals who are paid to express professional opinions. Such clauses are enforced, at times reluctantly, so long as it is clear that the clause was brought to the attention of the other contracting party and accepted as a term of the contract, and so long as it is beyond doubt that the clause excludes liability for the claim made. Here there was no evidence that the clause was specifically brought to the attention of the Claimant nor that he accepted it as a term of the engagement. More significantly, however, it is not clear to anyone reading it that it was intended to exclude liability for negligence. As such, I find that the clause is not a defence to the claim.

**Damages**

[36] The Claimant seeks a total of $6,908.63 in damages, consisting of $3,842.88 paid to third parties, as well as $3,065.75 for his own labour. He also seeks $100.00 for general damages plus costs, including the cost of his expert.

[37] The Claimant had the remedial work done in the spring of 2006. He hired a qualified person to perform it, taking two weeks off to act as his helper.

[38] I accept the amount paid for labour and materials to others. The amount that the Claimant seeks for his own time is a little more problematic. He claims $2,900.00 for 80 hours of work, which is based upon a rate of $36.25 per hour. He used this rate because this is what he says he could have earned at his own job instead of using two weeks of his vacation.

[39] The strategy of doing part of the work itself may have been a reasonable one, given the uncertainty that it could ever be recovered from the Defendant. However, in my view the measure is not what the Claimant could have earned doing what he is qualified to do, but is the inherent value of the labour that he supplied. To illustrate the point, if the Claimant were a high-priced lawyer or cardiac surgeon, he could hardly expect to have his time valued by lawyers' or surgeons' effective hourly rates.

[40] Here the Claimant acted as essentially a carpenter's assistant. Had he gone out into the market and hired a handyman or carpenter's apprentice, the going rate would have been considerably less than $36.25 per hour. I believe an appropriate rate for the 80 hours that he put in himself would be $20.00 per hour for a total of $1,600.00.

[41] The Claimant asked for reimbursement of $95.75 for “meals, lunches and coffee breaks” and $70.00 for gas used in his own vehicle. I find that these are reasonably included as costs of the work.

[42] The damages that I am prepared to allow are therefore:

| | |
|---|---|
| Paid for labour and materials | $3,842.88 |
| Value of Claimant’s own labour | $1,600.00 |
| Personal expenses | $165.75 |
| | $5,608.63 |

**General damages**

[43] The general damages claim appears to be based on the fact that the Claimant was very upset when he discovered the rotten sill, and the fact that this persisted for some time. I have no doubt that he did experience a great deal of distress over what he found. The question is whether this should be compensated by an award of general damages.

[44] Given the almost token amount of $100 that is (currently) within the jurisdiction of this court, there is not a great deal of guidance to be had about when it is appropriate to award such damages. General damages are most obviously appropriate when there is a physical or psychological injury resulting from a trauma such as a collision or other mishap. When the wrong committed involves essentially a mistake with financial consequences, and not an intentional act, it would in my view be inappropriate to award general damages simply because the financial loss or prospect of financial loss impacted a particular Claimant more acutely.

Most people are upset when something occurs that costs them money, but that does not mean that general damages should be added, for example, to an award for faulty mechanical work on a car, or when a debt is not repaid in a prompt manner, either of which could be as upsetting as a failure to detect a structural problem in a home inspection.

[45] Another way of saying this is that I do not believe it was a foreseeable consequence that the Claimant would suffer a compensable “personal injury” because of a flaw in an inspection report ended up costing him some money.

**Interest and Costs**

[46] The Claimant has claimed a number of items as costs. Some of them are compensable and some are not.

[47] The Regulations under the *Small Claims Act* set out the following allowable items:

> 15 (1) The adjudicator may award the following costs to the successful party:
>
> (a) filing fee;
>
> (b) transfer fee;
>
> (c) fees incurred in serving the claim or defence/counterclaim;
>
> (d) witness fees;
>
> (e) costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;
>
> (f) reasonable travel expenses where the successful party resides or carries on business outside the county in which the hearing is held;

(g) additional out of pocket expenses approved by the adjudicator.
Clause 15(1)(e) amended: O.I.C. 2000-169, N.S. Reg. 58/2000.

(2) No agent or barrister fees of any kind shall be awarded to either party.
Section 12 renumbered 15: O.I.C. 2000-169, N.S. Reg. 58/2000.

16 An adjudicator may award prejudgment interest at a rate of four percent per annum in the same circumstances in which prejudgment interest may be awarded by the Supreme Court.

[48] The items of costs that I am prepared to allow are these:

| | |
|---|---|
| Issue claim | $85.44 |
| Clerical costs | $64.95 |
| Serve claim | $62.70 |
| Expert fees | $595.00 |
| | $808.09 |

[49] The claimed items that I am not prepared to allow are:

A. witness fees for the lay witness, Russel McNeil ($120.00);

B. Legal research costs ($749.00).

[50] Witness fees are normally allowable at the rate of $35.00 per day to a witness who was served with a subpoena. This practice derives from Tariff D to the rules governing attendance in the Supreme Court of Nova Scotia, which permits *"Attendance money payable to witnesses, excluding parties to the action: (1) Each day of necessary attendance, $35.00."* It is well known within the legal profession that these are token amounts that bear no relationship to the actual value of people's time. There is no legal

basis for witnesses in Small Claims Court to receive more than they do in Supreme Court.

[51] The individual in question was a co-worker of the Claimant who testified to having called the Defendant at the request of the Claimant, posing as a potential customer. The purpose was to demonstrate that the Defendant trumpeted his qualifications. Under the circumstances, I did not find this evidence useful or necessary. I would not allow any fees to this witness.

[52] The costs for legal research consist of 14 hours at the rate of $50.00 per hour, plus HST, said to have been paid to “C. Burgess, LL.B.” I am not aware of who C. Burgess is, although it really does not matter because the regulation is quite clear that money paid as “agent or barristers fees” is not recoverable. That is a policy decision made by the Legislature to promote access to the Small Claims Court without fear of having to pick up the tab for the other party’s legal expenses.

[53] I am prepared to award prejudgment interest on the damages at the rate of 4% from May 15, 2006, which is approximately when the repair work was done.

[54] The Claimant shall accordingly have judgment against the Defendant for the following amounts:

| | |
|---|---|
| Damages | $5,608.63 |
| Interest @ 4% from May 15, 2006 to February 25, 2008 (651 days) | $400.13 |

| | | |
|---|---|---|
| Cost to issue claim | | $85.44 |
| Clerical costs | | $64.95 |
| Cost to serve claim | | $62.70 |
| Expert fees(DeBay) | | $595.00 |
| | **TOTAL** | $6,816.85 |

**Eric K. Slone, Adjudicator**