2006 **SCP 267850**

Cite as: Higgins Construction Ltd. v. Crosby, 2007 NSSM 98

BETWEEN:

HIGGINS CONSTRUCTION LIMITED

CLAIMANT
(DEFENDANT BY COUNTERCLAIM)

-AND-

JOHN CROSBY

DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

DECISION

HEARD: At New Glasgow on November 15, 16, 2006; March 26, 27, 2007

DECISION: June 11, 2007

COUNSEL: Higgins Construction Limited, Self-Represented
Douglas A. Caldwell, Q.C., for the Defendant and Claimant by Counterclaim

1. PLEADINGS:

i) Statement of Claim

The claimant (defendant by counterclaim) Higgins Construction Limited ("hereinafter called "Higgins"), commenced an action in the Small Claims Court of Nova Scotia, on June 26, 2006, in the amount of $25,000.00, representing the costs of extras performed by the claimant at the request of the defendant. Their claim was for special damages as set out in the invoice of $31,204.90. In order to have this matter come within the jurisdiction of the Small Claims Court, they reduced their claim for the purposes of this Hearing to the amount of $25,000 plus interest.

ii) Defence and Counterclaim

The defendant (claimant by counterclaim) John Crosby, (hereinafter referred to as "Crosby"), does not dispute the amount owing to "Higgins" for extras as set out in the final invoice of "Higgins". "Crosby" filed a counterclaim alleging however certain work carried out by "Higgins" was unsatisfactory or deficient and/or not completed, as identified by reports from the Building Inspector and Fire Marshall. "Crosby" claims the costs of rectifying the deficiencies and/or uncompleted work amounts to $49,346.29. "Crosby" claims the defence of set-off pursuant to Rule 14.20 on the value of the deficiencies, reduced to $25,000 to accord with the upper limit of the Small Claims Court.

iii) Defence to Counterclaim

"Higgins" filed a defence to the Counterclaim on September, 2006, acknowledging that they were aware of the Building Code requirements and conditions set out in the Building Permit; however, "Higgins" states some of the items noted in the Building Permit and inspection reports were not within the scope of the contract. "Higgins" further states they informed "Crosby" of the conditions set out in the Building Reports, but "Crosby" opted not to have these conditions met at the time "Higgins" was carrying out work under the contract. "Higgins" also denies the value placed on the deficiencies by "Crosby".

2. EVIDENCE

"Higgins" is a private company having carried on business in the County of Pictou for several years. It's principal owner is Royce Williston, P. Engineer and it was Mr. Williston who gave evidence on behalf of "Higgins" and it was Mr. Williston who at all times dealt with "Crosby", on behalf of Higgins Construction Limited.

Mr. Williston has been involved with the company since 1984. The company does primarily industrial and commercial construction and renovations.

"Crosby" has no prior construction knowledge or experience and is a chartered accountant by profession.

"Crosby" purchased the older building located at 74 Stellarton Road, New Glasgow, in February, 2001. This building was formerly known as the "Copper Kettle." The building remained vacant for a number of years after having been used as a restaurant/lounge. It was "Crosby's" intention to convert the building into office space on the main floor for himself and another tenant and have the lower level (basement) converted and used as rental space at a later date. The basement area contained approximately 1,100 square feet, however, it was not "Crosby's" intention at the time he entered into the building contract with "Higgins" to renovate this area for immediate tenancy.

The building is of a brick exterior with foundation. The interior of the building was in dire disrepair with rotting throughout the roof and floor areas. The walls were covered with wallpaper and there was evidence of mildew and rot. "Crosby" acknowledged that the building was rotting from inside out and that it was in deplorable condition at the time he purchased it.

Prior to purchasing the building, "Crosby" retained the services of Thompson Engineering Consultants Limited to carry out an inspection and provide an opinion on the existing facility with regards to renovation, both main floor and basement. The report of Thompson Engineering Consultants Limited dated April 12, 2001, is set out in Exhibit #1, Tab 1, of the claimant's documents. "Crosby" was relying on Thompson Engineering Consultants Limited and their recommendations with regards to plumbing, HVAC, electrical, and mechanical repairs. That is, he was relying on them, as to how he should heat the building; the plumbing and electrical that

was necessary; and the mechanical work that was required. He stated that he was relying on Thompson Engineering Consultants Limited to give him directions as to what systems to put in the building and he informed Thompson Engineering Consultants Limited the use for which he, "Crosby" wanted to use the building.

"Higgins" and "Crosby" met to discuss the Thompson Engineering Consultants Limited report. On May 17, 2001, "Higgins" submitted a quotation to carry out work on Phase I. Phase II and III were to be quoted on at a later date with the exception of the main floor under Phase III. Phase I, consisted of work on the "building shell" which included a new roof and floor with a stipulated price of $62,700; Phase II, was for the Mechanical and Electrical that was to be sub-contracted out by "Crosby". However, the quotation document contained an overhead charge of $3,344 agreed to by the parties that would be paid to "Higgins" to oversee the scheduling of that work when it was carried out by sub-contractors. The quotation for the Phase I work was accepted by "Crosby" on May 29, 2001, and it is this document that I find forms the basis of the contract between the parties along with it's attached drawings and specifications. The contract documents signed by "Crosby" on May 29th, contains the clause:

> "Contract Terms and Conditions to be as per CCDC Number 2 (1994) stipulated price contract."

The contract document signed by "Crosby" on May 29, 2001, is set out in Exhibit #1, Tab

1, of "Higgin's" documents and under Exhibit #1, Tab 2, of the "Crosby" documents. The contract document was prepared by "Higgins". Two drawings attached to and forming part of the contract, were prepared by "Higgins" and approved by "Crosby". At the time the contract was accepted by "Crosby" on May 29th, no drawings were provided or in place for the mechanical and electrical. The mechanical and electrical, which was Phase II, did not, I find, form part of the contract between the parties dated May 29, 2001, that "Higgins" was to carry out.

On May 29th, "Crosby" asked that all work that was to be done in the basement be deleted. This change is initialed and agreed to by the parties as noted on the contract document. It was "Crosby's" intentions to have this work in the basement done at a future date.

"Crosby" stated that upon receiving from "Higgins" the quotation dated May 17th, he took it to a lawyer to review and then signed it on May 29th as presented. "Crosby" agreed that the drawings for the basement represented the scope of the work for the basement area which "Higgins" would be responsible; when and if, he carried out work in the basement.

It was agreed by the parties that "Higgins" was not responsible for trimming on the exterior of the building. "Crosby" subcontracted the work for painting, flooring, carpets and cupboards, mechanical and electrical on his own and it was "Crosby" who hired these other trades to do their work and paid them for their work.

For Phase II work, "Crosby" had Sheehan's Electric do the electrical, Max Air do the mechanical, and Sandy Bonvie do the duct work for the HVAC. While "Crosby" contracted with these trades directly and paid these sub-contractors directly, the scheduling of their work was supervised by "Higgins" and "Higgins" was paid the sum of $3,344 for that work. "Higgins" stated they had no knowledge or experience regarding the installation or design of the electrical and mechanical systems and I find he did not hold himself out as having any such knowledge or expertise in these areas.

"Higgins" completed the work under the contract plus extras by September or early October, 2001, and "Crosby" took possession of the building and moved into the building to occupy the main floor in late October, 2001.

Building Code:

The owner, "Crosby", contends that "Higgins" did not comply with various Building Codes and those Code violations amount to deficiencies in the "work" that "Higgins" was responsible to carry out under the contract. "Crosby" took the position that he had no knowledge of the Building Code provisions for the mechanical and electrical work and that he was relying on "Higgins" to make sure the Building Code requirements for the installation of the mechanical and electrical were followed. "Crosby" also stated he was not familiar with the CCDC

documents, however, he admitted these documents were given to him by "Higgins".

"Crosby" relies on s. 10.2.3, and 10.2.5 of the stipulated price contract (CCDC) which state:

> 10.2.3 "The *Contractor*" shall give the required notices and comply with the laws, ordinances, rules, regulations, or codes which are or become in force during the performance of the *Work* and which relate to the *Work*, to the preservation of the public health, and to construction safety."

> 10.2.5 "If the *Contractor* fails to notify the *Consultant* in writing; and fails to obtain direction as required in paragraph 1.2.4; and performs work knowing it to be contrary to any laws, ordinances, rules, regulations, or codes; the *Contractor* shall be responsible for and shall correct the violations thereof; and shall bear the costs, expenses, and damages attributable to the failure to comply with the provisions of such laws, ordinances, rules, regulations, or codes."

As well, "Crosby" relies on sections 12.3.2 and 12.3.3 of the CCDC and says "Higgins" breached it's express contractual duty:

> 12.3.2 "The *Contractor* shall be responsible for the proper performance of the *Work* to the extent that the design and *Contract Documents* permit such performance.:

> 12.3.3 "Except for the provisions of paragraph 12.3.6 and subject to paragraph 12.3.2 the *Contractor* shall correct promptly, at the *Contractor*'s expense, defects or deficiencies in the Work which appear prior to and during the warranty periods specified in the *Contract Documents*."

"Crosby" stated on direct examination he was not the consultant on the project and no consultant had been appointed. He stated he had no discussions with "Higgins" regarding permits required for the job and that "Higgins" did not notify him when he requested change orders that those changes were in contravention to the Building Code. There was no evidence before me what change orders, if any, were in contravention of the Building Code. "Higgins" stated he provided "Crosby" with a copy of the letter dated June 26, 2001, attached to the Building Permit bearing the same date and informed "Crosby" these conditions had to be met and that they were outside the scope of "work" he "Higgins" had quoted on that formed the basis of the contract dated May 29, 2001. "Higgins" also stated that he also provided "Crosby" with the building Inspector's Report dated July 18, 2001, and met with "Crosby" to review these items.

I find and accept the evidence of "Higgins" that copies of these two Inspection Reports were provided to "Crosby" in a timely fashion.

Building Inspection Reports and Permits relied on by "Crosby" as deficiencies

1. The Municipal Building Inspector issued his first report on June 26, 2001, (Exhibit #1, Tab 3, p. 50) (Tab 3, page 50, Exhibit #1, of the defendant's Exhibit Book.) The report letter is addressed to John Crosby in c/o Higgins Construction. This letter is attached to the Building

Permit for renovations and repairs to the existing structure. Under Tab 3 is a "Notice Bulletin # 1974" from the Fire Marshall's office stating that the electrical room for the installation of the building's main electrical equipment is for that purpose only and shall not be used for any other purpose. I find that these documents were sent directly to "Higgins". The report letters dated June 26, 2001, sets out the following conditions:

> 1. "The floor area shall meet all requirements of Section 3.8 of the Provincial Building Code Regulations, Barrier free design (main entrance, washroom etc.).
>
> 2. Exits shall be installed in conformance with Section 9.9 of the 1995 National Building Code;
>
> 3. Emergency lighting to be installed as per Article 9.9.11.3 of the 1995 National Building Code;
>
> 4. As per Article 9.10.8.1 of the 1995 National Building Code, the first floor shall be constructed as a fire separation having a minimum fire resistance rating of at least 45 minutes;
>
> 5. Follow inspection schedule on reverse of Building Permit;"

2. The second Building Inspector's Report was issued on July 18, 2001. It sets out the following conditions:

> 1. the "exit enclosure" shall be separated from the remainder of the building by a fire separation having a minimum fire resistance rating of at least 45 minutes. This fire separation shall be continuous from the top of the basement floor slab to the underside of the roof, Article 9.9.4.2 of the 1995 National Building Code.
>
> 2. storage rooms shall be separated from the remainder of the building by a fire separation having a minimum fire resistance rating of at least 45 minutes (Article 9.10.10.6 of the 1995 N.B.C.)

3. service rooms shall be separated by a fire separation having a minimum 45 minute fire resistance rating.

3. A further Building Inspection Report was issued on February 11, 2002, approximately five months after "Crosby" took possession of the building and "Higgins" had completed the work under Phase I. On examination in chief, "Crosby" stated he did not receive the Building Inspection Report dated February 11, 2002, until June, 2002, when he went to the Building Inspector's office in Stellarton to pick up the report. He did not know if this report had been sent to "Higgins". After receiving the report, he contacted "Higgins" and a follow up meeting was arranged between the parties at which time the deficiencies and/or incomplete work set out in the report dated February 11, 2002, was discussed. There was no dispute by the parties this meeting took place in early August, 2002. The deficiencies and/or incomplete work identified in the report dated February 11, 2002 were as follows:

1. As per section 3.8 of the Provincial Building code, the main entrance shall be barrier free in design (the threshold shall not be more than ½" higher than finished exterior grade and beveled to facilitate the passage of wheelchairs).

2. The stairs to basement shall be protected by guards that meet or exceed the requirements of subsection 9.8.8 f the Provincial Building Code.

3. As per Article 9.9.4.2 of the Provincial Building Code, the exit enclosure shall be separated from the remainder of the building by a fire separation having a minimum fire resistance rating of at least 45 minutes.

4. As per Article 9.10.13.5 of the Provincial Building Code, plain glass or Plexiglas is not permitted in doors required to have a minimum fire protection rating (replace with wired glass).

5. As per Article 9.10.8.1 of the Provincial Building Code, the floor assembly shall be constructed as a fire separation having a minimum fire resistance rating of at least 45 minutes.

6. As per Article 9.10.13.13 of the Provincial Building Code, fire dampers shall be installed on ducts that penetrate an assembly required to be a fire separation with a fire resistance rating.

7. As per Article 9.10.10.3 of the Provincial Building Code and requirements of the Office of the Fire Marshall, electrical service entrances 205V and over, or exceeding 250 amps shall be located in a separate room separated by a fire separation having a minimum fire resistance rating of at least one hour.

By June, 2002, "Crosby" had already hired someone else to complete item #1 of the February 11, 2002, report and he agreed this was not part of the scope of "Higgins'" contract.

With regards to items 2, 3, 4, 5, 6, and 7, of the February 11, 2002, Building Inspection Report, "Higgins" position can be stated as follows:

Items 2: (hand rails) and **Item 4** (glass door)-he agreed these were deficiencies and would be corrected.

Item 3: this was not within the scope of his work for Phase I, and "Crosby" did not want this work carried out until he found a tenant for the basement.

Item 5: this was not the scope of his work under Phase I and "Crosby" did not want this work carried out until he found a tenant for the basement.

Item 6: the dampers were not shown on the drawings for the mechanical and HVAC system for duct work and were not within the scope of his work.

Item 7: the mechanical and electrical were not within the cope of his work and "Crosby was not prepared to have the partitions installed in the basement for the various rooms, including the mechanical and electrical rooms, until he found a tenant.

Nothing was done by "Crosby" following the August, 2002, meeting with "Higgins", to address the deficiencies and/or incomplete work as set out in the Building Inspection Report dated February 11, 2002, until June 22, 2004, when "Crosby" requested a report from Burnside Consultants Ltd., and no work was carried out until approximately, March, 2005, when he had work carried out as a result of the recommendations contained in the report of Burnside Consultants Ltd.

"Crosby" retained Burnside Consultants Limited in June, 2004, to prepare a report to address the air conditioning system, reported noise from the system, zone control and Code violations set out in the Building Inspector's Report dated February 11, 2002. It identifies some of the Code violations as noted in the Building Inspector's Report dated February 11, 2002, and also makes recommendations for improving the air conditioning system and for better zone

control of the temperatures for tenants.

In a letter dated March 8, 2005, from "Crosby" to Burnside Consultants Ltd., "Crosby" stated he had a tenant arranged to rent the basement. He decided to now complete the basement area and proceed with the revisions to the air conditioning system that Burnside proposed in 2004. "Crosby" decided to have all the deficiencies, and/or incomplete work identified in the Building Inspector's Report dated February 11, 2002, addressed at the same time that he was having the work to the interior of the basement carried out. As a result, the costs to both were co-mingled. To establish a cost for the alleged deficiencies and a cost for the interior work to the basement, "Crosby" retained the services of Hanscomb Ltd., a quantity surveyor to prepare a report, segregating the costs of each.

When it was pointed out to "Crosby" on cross-examination that the contract documents did not provide for "Higgins" constructing a mechanical and electrical room, "Crosby" acknowledged that "Higgins" had told him that the "electrical room" should be put in the same area where the service had previously been for the building.

With regards to fire dampers being installed on ducts that penetrate an assembly, item #6, referred to in the Inspection Report dated February 11, 2002, "Crosby" agreed that Thompson Engineering provided the drawings that included the duct work to be installed and it was he who hired Thompson's and he who paid Thompson's for their work. When asked on cross-examination if he would agree that everything "Higgins" contracted to do was completed

and partially paid, he stated "yes".

"Higgins" agreed that they controlled the site and were responsible for some of the sub-contractors that they obtained quotes from for the work it was to carry out. Based on the evidence before me, I am satisfied, on a balance of probabilities, that "Crosby" acted as the general contractor and "Higgins" was one of the contractors that "Crosby" entered into an agreement with to do the work set out under Phase I as well as the partitioning on the main floor level, referred to in the contract under Phase III.

Reference by both parties was made to the drawings that had been prepared and submitted by Thompson Engineering. It is clear from a review of the drawings that they do not specify the location of the mechanical and electrical rooms, nor do they specify that the rooms are to be segregated. On reviewing the two drawings that were part of the contract dated May 29, 2001, page 2, shows the floor plan for the basement. I find that this plan does not show the location of the electrical or mechanical rooms. It was this floor plan that was provided to Thompson Engineering who in turn prepared the plans that formed part of the documents set out in Tab 5, of the "Crosby" documents. It was the Thompson Engineering drawings that were provided to the sub-contractors for quotes which were then accepted by "Crosby" and paid for by "Crosby".

"Crosby" was also claiming damages for what is referred to as "ponding" on the roof. This was occurring around a small section on the roof where a drainpipe had been installed by

one of the sub-contractors' (Foscoe) who finished the roof. The pipe was alleged to be higher than the roof resulting in water not draining off. "Higgins" stated that he had viewed the roof and found that the drain was full of leaves and debris which resulted in some "ponding". It was his evidence based on the information he had received, that as long as water evaporates off a roof within 48 hours, it is not considered "ponding" and is not considered to be a deficiency.

"Crosby" was recalled on rebuttal and was asked if he saw the report dated July 18, 2001. He answered that he could not recollect seeing this report. He stated that he never spoke to the Building Inspector until 2002.

3. ISSUES

I) Do the Building Code conditions or violations noted in the Building Inspection Report dated February 11, 2002, amount to deficiencies and/or incomplete work that "Higgins" is liable and do they amount to breach of contract?

II) Do the deficiencies and/or incomplete work referred to in the said reports fall within the scope of "work" "Higgins" was responsible, either under Phase I, II, or III?

4. FINDINGS OF FACT AND LAW

I find there was a binding written contract between the parties and it is dated May 29, 2001. I find the contract incorporates the CCDC Stipulated Price, Terms and Conditions and this document was acknowledged by both parties as forming part of the contract.

In addition, in every contract for work there is also a condition implied by law that the work shall be done in a good and workmanlike manner. See: **Mattinson v. Hewson** (1909), 43 N.S.R. 339 (C.A.) 819. The court can and often has implied work should be done in a good and workmanlike manner. See: **Stevens & Fiske Contractors Ltd. v. Johnson** (1973), 9 N.S.R. (2d) 608, where Gillis J. states at p. 626:

> "It is fundamental, I think, that in the absence of an express term, the court may imply as a term of every building contract that the contractor undertook to do the work undertaken, with care and skill, or, in a good and workmanlike manner."

As well, the CCDC document contains a one-year warranty clause.

> 12.3.1 "The warranty period with regard to the Contract is one year from the date of Substantial Performance of the Work or those periods specified in the Contract Documents for certain portions of the Work or Products."

"Higgins" has admitted items 2 and 4, of the February 11, 2002, Building Inspection Report formed part of the "work" he was to carry out under the written contract dated May 29, 2001, and that the guards (or rails) were not installed on the stairs and plain glass was not permitted in the doors. He stated the glass door they installed was temporary. He agreed it was their responsibility to rectify these two deficiencies and they do not dispute the cost estimate by Hanscomb. Damages will be allowed for these two items totaling $1,680.00.

In my opinion, the major concerns raised in this case can be classified as either deficiencies and/or work not completed and are in regards to:

1. Building Code violations referred to in the Inspection Report dated February 11, 2002, and stated as:

    i) Exit enclosure installed in conformance with Section 9.9.4.2 of the National Building Code.

    ii) First floor constructed as a fire separation having a fire resistance rating of at least 45 minutes;

    iii) Fire dampers installed on ducts that penetrate an assembly require a fire separation;

    iv) The electrical and mechanical services located in separate rooms.

2. Ponding on roof;

3. Revisions to air conditioning units and control of heating system;

The contract document signed on May 29, 2001, provides that the contract terms and conditions are to be as per the CCDC 2(1994) stipulated price contract. Although the entire CCDC document is not attached to the contract, I am satisfied that both parties knew the contract was governed by the CCDC document.

Paragraph 10.2.4 states:

> "The *Contractor* shall not be responsible for verifying that the Construction Documents are in compliance with the applicable laws, ordinances, rules, regulations, or codes relating to the *Work*. If the Contract Documents are in variance therewith, or if, subsequent to the date of bid closing, changes are made to the applicable laws, ordinances, rules, regulations or codes that require modification to the Contract Documents, the *Contractor* shall notify the consultant in writing requiring direction immediately upon such variance or change becoming known. The consultant shall make the changes required to the Contract Documents as provided in GC 6.1-Changes, GC 6.2-Change Order and GC 6.3 Change of Directive."

Under the heading of Definitions, it describes "Work"

9. Work

"The *Work* means the total construction and related services required by the *Contract Documents*."

These clauses set out in the CCDC documents must be interpreted in light of the evidence

before the Court.

It was stated by Richard J. in **Enfield Hardware Limited v. Theodorus (Dick) DeGier and Carolyn DeGier**, 2002 N.S.S.C. 164 (CanL II), in regards to Building Code violations:

> "I want to make one very significant point. The homeowner is entitled to rely on the expertise of the contractor to complete the work in accordance with the terms of the contract. National Building Code violations may be evidence of a deficiency in the contract, which may in fact result in breach of contract, but the reverse is not true. Compliance with the Building Code is not evidence of compliance with the contract. The contract rules the relations between the parties."

Clearly, in this case, the inspection report of July 18, 2001, and the follow up on February 11, 2002, some five months after "Higgins" had completed his work, set out Code violations. The question then becomes who is liable for these Building Code violations, "Higgins" or "others"? Do the deficiencies and/or incomplete work as noted in the Building Inspection Report fall within the definition of "work" as defined in the CCDC document for which "Higgins" was responsible for in carrying out work under Phase I and the limited work under Phase III?

I propose to deal with the Building Code concerns set out in the February 11, 2002, report first and the less serious items separately.

(I) EXIT ENCLOSURES; (II) FIRST FLOOR ASSEMBLY; (III) FIRE DAMPERS; (IV)ELECTRICAL AND MECHANICAL SERVICE ROOMS;

The exit enclosure (I), and the first floor assembly (II), issues are also contained in the letter/report dated June 26, 2001, accompanying the Building Permit. The exit enclosure and the electrical service room entrances are also set out in the Inspection Report dated July 18, 2001.

I accept and find as a fact that "Higgins" did fax a copy of the July 18, 2001, Inspection Report to "Crosby" as well as the letter dated June 26, 2001. I find as a fact "Higgins" reviewed the letter and Inspection Report with "Crosby" and "Higgins" pointed out to "Crosby" the conditions set out therein required compliance. I base my conclusions on "Crosby's" admission that the fax number in which the documents were faxed to him was a fax number that he was receiving documents, and on the evidence of "Higgins" that when he reviewed the July 18, 2001, Inspection Report with "Crosby", "Crosby" stated that he wanted an update on his current financial picture, that is, the work that was completed and the cost to date. This update was in fact prepared by "Higgins" as requested and presented to "Crosby". "Crosby" stated that he could not recollect asking for this document. Where the evidence of "Crosby" differs from "Higgins" in this regard, I accept the evidence of "Higgins". In my view the "Higgins" evidence appears more in consistence with the balance of probabilities than that of "Crosby". I also accept the evidence of "Higgins" that when he discussed these matters with "Crosby", "Crosby" did not want to address them immediately, having stated that he would deal with them when he found a tenant for the basement, which of course turns out to be in 2005. I find that "Higgins" did

contact the owner ("Crosby") to obtain directions and instructions to address the deficiencies and/or incomplete work and "Crosby" told him those matters would be dealt with at a later time.

Paragraph 10.2.5 of the CCDC documents provide that "Where the Contractor fails to notify the consultant…and fails to obtain directions as required in paragraph 10.2.4, the contractor is responsible for and shall correct the violations thereof and bear the costs". In this matter I find there was no consultant. I find, based on all the evidence before, me that "Higgins" did, however, notify the owner, "Crosby", who elected not to correct or comply with the Code violations and/or uncompleted work at that time. "Crosby" informed, I find, "Higgins" the he ("Crosby") would deal with these concerns or deficiencies at some point when he found a tenant for the basement area. "Higgins", I find, attempted to get directions to address these concerns even though he felt they were outside the scope of his work, before he left the site in September, or early October, 2001, upon completion of the work he had contracted for under the contract dated May 29, 2001. I find, based on the evidence before me that "Higgins" did not breach condition 10.2.5 of the CCDC document.

I find that "Higgins" admitted to the two deficiencies referred to earlier in this decision i.e. (hand rails and proper door) and informed "Crosby" the other concerns, or deficiencies set out in the report of February 11, 2002, were not within the scope of his work. "Crosby", I find, did nothing to address the deficiencies and/or incomplete work until at least September, 2004, when he contacted Burnside Consultants Limited for a report on the air conditioning system. He had a plan prepared for revising the electrical and mechanical system and then proceeded to have

the work carried out in early 2005 after he secured a tenant for the basement area. This is not to say that the delay in itself would be a bar to a claim for breach of contract, even where as here, the CCDC document provides a warranty period with regards to the contract of one year from the date of Substantial Performance of the work, although it could, I find, impact on the amount of damages. See: **Levy v. Elmer Lohnes Lumbering Ltd.**, [2004] N.S.J. No. 329.

I find "Crosby" elected and decided while "Higgins" was still willing to carry out the work, not to have the exit enclosure constructed to have it separated from the remainder of the building; and not to have the fire separation installed in the basement to separate that area from the main floor area, until he found a tenant.

It is also my opinion, that the exit enclosure and first floor assembly referred to in the report fell outside the scope of "work" as defined, that "Higgins" had contracted to do, under Phase I and Phase III and extras. They were not so much deficiencies as they were incomplete work.

With respect to the fire dampers, I find this item fell under the mechanical/electrical design of Thompson Engineering. The mechanical and electrical, Phase II, was not the responsibility of "Higgins" with the exception that he was to oversee and arrange for the orderly conduct of that work including scheduling, which he was being paid a flat rate of $3,344, pursuant to the contract. I accept the evidence of "Higgins" that he was requested by "Crosby" to obtain quotes for that work per the Thompson Engineering drawings, present those quotes for

approval to "Crosby", and to then arrange for that work to be carried out. I find that "Higgins" did oversee that work and was paid his commission. "Crosby" was, I find, the General Contractor, for this job and therefore it was he who would look to ensure these sub-contractors carried out their work according to the Code.

I find based on all the evidence that the drawings provided by Thompson Engineering did not form part of the contract documents between "Higgins" and "Crosby", or fall within the scope of "work" "Higgins" was responsible for. The absence of the fire dampers per article 9.10.13.13 did not therefore form part of the work that "Higgins" was responsible for.

With regards to the electrical and mechanical services; the evidence was clear and there was agreement between the parties that the drawings for the electrical and mechanical equipment do not show where the services were to be located and they do not show that they are to be either in separate rooms or in the same room. The design plans and documents prepared by Thompson Engineering simply did not show the mechanical and electrical system in separate rooms. However, it is clear from the Inspection Reports dated July 18, 2001, and February 11, 2002, that the mechanical and electrical rooms should be separated. Thompson Engineering was retained by "Crosby" and the Thompson services were paid for directly by "Crosby", albeit, on the referral of "Higgins".

I find the mechanical and electrical components were not part of the contract, Phase I, that was quoted on by "Higgins". The electrical and mechanical systems and work was Part II which "Crosby" sub-contracted out himself. It was not, in my opinion, part of the "work" which "Higgins" had contracted for and therefore there could be no breach of contract between "Higgins" and "Crosby" for this work. Notwithstanding this work did not fall within the scope of "Higgins"' "work". I find that "Higgins" brought the requirement for the electrical and mechanical system to be in separate rooms to the attention of "Crosby" and "Crosby" took the position he would deal with the matter when he found a tenant.

I find, based on all the evidence before me, that "Higgins" was not in breach of section 12.3.2. and 12.3.3 of the CCDC terms.

Miscellaneous Deficiencies

a) Roof Drain:

"Crosby" also claims for a deficiency in the roof drain. I am not satisfied on the evidence that "Crosby" has proven this claim on a balance of probabilities. I accept the evidence of "Higgins" that when he checked the drain on the top of the roof, it was clogged with leaves and other debris. There was no evidence presented to contradict the evidence of "Higgins" that

"ponding" is not a concern where the water evaporates within 48 hours. I also accepted "Higgins" evidence that if there was in fact a defect in the construction of the drain pipe as it relates to the roof, that would have been a deficiency that should be addressed by Foscoe Roofing Ltd., the people who installed the drain. This could have been carried out at no cost under the original contract. I am also not satisfied that "Crosby" has proven on a balance of probabilities that prolonged "ponding" and unknown conditions of roof deck are in question. I would therefore disallow this portion of the claim.

(b) Mechanical and Electrical Service Room

Based on the evidence before me, I am not satisfied that "Crosby" is entitled to damages arising from the mechanical and electrical remediation, due to service access restrictions caused by construction of a new electrical room, including performance problems with installed equipment causing vibration and noise issues as described in the report of Burnside Consultants Limited dated June 22, 2004. Other than the evidence that a tenant was bothered by some noise caused by the mechanical equipment and "Crosby" wanting more control over the heating of the building, there was no other evidence to substantiate this claim amounting to $10,000 which forms part of the costs set out in the Hanscomb report of $20,805, at page 2.

"Higgins" shall be entitled to it's claim of $25,000 less the deficiencies awarded to "Crosby" in the amount of $1,680.00.

In the result, the claim by "Higgins" for $25,000, shall be allowed and the claim for set off by "Crosby" shall be allowed in the amount of $1,680.00.

Interest:

Interest has been claimed by "Higgins" at a rate of two percent (2%) per month from December 31, 2001, to date of judgment.

While the stipulated price contract refers to interest being charged, it does not refer to the interest rate to be used. This section or space for the interest rate is left blank. Interest is also not referenced in the June, 2001, letter from "Higgins" to "Crosby". No claim for interest was made by "Higgins" until after December 31, 2001. After this date, "Higgins" started monthly reminder invoices of unpaid balance, notes interest will be charged. There is no evidence any prior dealings between the parties whereby "Crosby" has paid interest and there was no evidence that "Crosby" paid interest on any invoice submitted for this job.

I am not satisfied "Higgins" is entitled to interest at the rate of two percent (2%) per month as claimed on the unpaid invoice. However, I accept he is entitled interest on his unpaid

account and I exercise my discretion and I will allow interest at the rate of four percent (4%) per annum for four years. I find there to be no evidence as to why "Higgins" waited until June 26, 2006, to file his claim. Interest will be allowed for four (4) years in the amount of $3,731.20.

An Order will be issued in favour of "Higgins" for special damages in the amount of $23,320.00 plus interest in the amount of $3,731.20 plus costs of $160.00 for the filing fee.

GRANTED THIS day of June, 2007.

ISSUED at Pictou this day of , 2007.

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RAY E. O'BLENIS
Adjudicator