Claim No. 350247

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Norman Bushell House Moving v. Carlson*, 2012 NSSM 26

BETWEEN:

NORMAN BUSHELL HOUSE MOVING

CLAIMANT

-and-

LAURIE (PLANTE) CARLSON and RONALD CARLSON

DEFENDANTS

REASONS FOR DECISION

BEFORE

Ralph W. Ripley - Adjudicator

Hearings *held at Sydney, Nova Scotia, on:*

1. *October 18, 2011*
2. *November 16 and 23, 2011*
3. *January 26, 2012*
4. *March 7, 21, and 26, 2012*

Decision *rendered on April 11, 2012*

APPEARANCES

Claimant - Self Represented
Defendants - Douglas McKinley

The Claimant, Norman Bushell Sr (doing business under the name "Norman Bushell House Moving") is in the business of lifting houses, constructing foundations and putting the houses back on to the newly constructed foundations. The Defendants own a property in Gabarus which prior to 2010 did not rest on a foundation. For many years Ms. Plante, was interested in having a foundation constructed under the home. The evidence does not appear to be in dispute, that on 3 different occasions, Ms. Plante approached Mr. Bushell about doing work in lifting her home, and constructing a foundation under the home, and then replacing the home back onto the foundation. The evidence of both Parties was that the first occasion was in either 2004 or 2005. The second occasion was in 2007, and the third occasion in 2010. Ms. Plante decided to not proceed with the work on the first two occasions she received Proposals from the Claimant.

The discussions in the instant case with respect to the Claimant doing work were for the most part, carried on by the Defendant, Plante. It was agreed and confirmed in the evidence by both Ms.Plante and Mr. Carlson that the Defendant, Carlson, was equally liable for any amount awarded and equally entitled to any claim on the counterclaim allowed.

Both Defendants own the property in question in Gabarus, and the property was one as a result, that would be either equally bettered or equally affected by the work undertaken with the Claimant. They also both testified that Ms. Plante had Mr. Carlson's authority to negotiate with Mr. Bushell on his behalf.

The Claimant sued the Defendants.

The claim was commenced by the Claimant on June 10, 2011. No Defence was filed within the time prescribed and an Order was issued by Adjudicator, Dominic Goduto, in the amount of $22,760.00 plus costs of $182.94, on August 22, 2011, as a result of the Defendants failing to file a Defence with respect to this claim. An Order was later issued by Adjudicator, Dominic Goduto, on September 19, 2011, setting aside the earlier Order that was issued. The matter was then set down for a hearing on October 18, 2011. This matter has then encompassed one entire sitting of the Court in its normal night time sittings and 5 ½ day sittings. Eighty-Nine Exhibits (photographs, invoices, blocks of wood, pieces of "house wrap" etc) were tendered were entered.

On the night of October 18, 2011, when the hearing was to commence, counsel appeared for the Defendants and provided the Claimant (as well as the Court), with an Amended Defence and Counterclaim, which stated that the nature of the claim was:

> *breach of contract; negligent; breach of the Sale of Goods Act*

Elsewhere, it stated that the amount that was counterclaimed for was:

> *$19,270.93, plus costs, plus further damages yet to be determined*

As I noted above, the matter was scheduled to begin on that night, and the Claimant chose to proceed. The Claimant however, at that time, had no further details with respect to the matters that were the subject of the counterclaim, other then that which he received that night (October 18, 2011).

I advised the Claimant at that time as a result, that I certainly understood that in dealing with the counterclaim, that to a great extent, he would be learning about the nature of the claim as the matter proceeded, and as a result, I would allow him the opportunity at the close of the Defendants' case, to re-testify with respect to the matter of the counterclaim, and in particular, about matters that arose or he was not aware of at the time he testified. The Defendant availed himself of that opportunity.

ORIGINAL CONTRACT

Mr. Bushell testified that he provided a "proposal" to do the house lift and foundation to Ms. Plante on the 3 occasions on which she approached him as noted above. He testified that on the 3rd occasion in 2010, he provided a proposal to be "signed off", indicating acceptance by Ms. Plante, but that it was not returned by Ms. Plante.

Ms. Plante and Mr. Bushell both testified and I accept that other then on the matter of price, the written proposal that was provided in 2010, was identical to the written proposal provided in 2007, which is exhibit 2. Notably that was tendered by the Defendants and even the copy introduced was not "signed off" by the Parties.

That proposal notes under the specification / estimate of the work that it was:

> *too [sic] raise house & install foundation with lift dig + backfill footing 6 " by 8 " with 2 drops for a 4' wall on front of house 4' wall to be app 36' top of wall to be framed with 2 ' by 6' rest of foundation to be 7' 8" grade 6" gravel floor 3" concrete floor tar + foundation coating weeping tile and gravel 4-36"-24" windows all footing steel reinforced.*

The Parties agree that the price that was agreed upon to undertake the work noted in exhibit 2, when Ms. Plante decided to undertake the work in 2010, was $38,000.00 plus $5,700.00 in HST, for a total of $43,700.00. It is also undisputed that the Defendants made an advance payment to Mr. Bushell of $20,000.00, which would leave remaining the amount of $23,700.00.

Those aspects of the case appear to be without contest.

The Defendants have put forward an argument based upon the case of ***Floors Plus v. Homeland Builders Inc***, 2009 NSSM 62, which is a decision of the Small Claims Court by Adjudicator, Giles. The Defendant's counsel submits that in that case, the Adjudicator found that the work was so shoddy that there was a determination that nothing was awarded on the claim because in essence, there was no benefit from the work done. I do not find that case is applicable in the instant case.

Ms Plante wanted a foundation under her house. Putting a foundation under an existing house by raising the home, excavating the ground for the foundation, putting the forms in for the foundation, pouring the foundation, and replacing the home, is not an easy task. There is a great potential for liability in any raising of a home. She substantially has what she bargained for. The case of ***Floors Plus v. Homeland Builders Inc***, I find is not applicable in the instant case. I find as a result that the Claimant has a valid claim on the Contract entered into to provide service to raise the Defendants' house and provide a foundation thereunder.

The dispute however, centers on the Claimant's claim for extra work done, and the Defendants' claim for deficiencies in the work. I turn to those issues as follows.

EXTRAS

Mr. Bushell testified that in essence, the scope of his work was to lift the house, dig a hole for a foundation, build the foundation, including the basement floor, and to put the house back down on the newly created foundation. To a great extent, that is what is called for in exhibit 2. It does **not** call for the extent or scope of work that is called for in what I can best describe as the Defendants' claim of what was included in the scope of work and which the Defendants claim Bushell verbally stated would be included in the price of the Proposal.

Mr. Bushell, when questioned, in particular, by the Adjudicator, candidly admitted that he did not do what would normally be referred to in the trade as a "change order" or other documents to verify the charge for extras at the time he was requested to do the work.

Certainly there was a large amount of work that does not appear to fall within the scope of what was contained in the proposal, including reshaping the Defendants' yard, burning old debris, installing patio doors, foundation, putting in a second water line under the floor, and shaping the lot.

Mr. Bushell indicates that the claim for extra work amounts to $4,400.00, with an additional

$660.00 of HST on that amount.

In Mr. Bushell's words, during the course of the work when items arose that were not within the scope of work, he would advise Ms. Plante that she would be charged extra. It does not appear however, that there was ever any discussion of how much would be charged for each of these extras before they were done.

When asked about the failure to have a change order done or other documentation done, Mr. Bushell's response was that he had been in business for 40 years, and this was the 3rd time he found himself in court. Though understandable, following the practice of having "extras" documented between the Parties would have made determining these issues much easier and certainly can assist in resolving such matters, as it relates to billing for extras. The question becomes is it fatal to the Claimant's claim for extras.

The work called for in this case, is not like a large scale construction site with a comprehensive construction contract governing the relationship of the parties, including items such as change orders. In fact, in cases with such, such has not been fatal to claims for extras.

In the case of ***Fraser Brace v. Centennial Property et al*** (1980), 41, NSR (2d) 375 (SCTD), the late Justice Morrison reviewed a clause relating to "extras" similar to that contained in the instant case. He stated a page 375 of the decision that:

> *In my opinion, a course of conduct was adopted by the parties that made it unnecessary to obtain the written authorization to proceed with essential changes in the work. This constituted a waiver on the part of Centennial as to the provision of Article 25 of the contract which make it a condition precedent for payment of extras that a written order signed by Centennial be obtained. A promise to pay must be implied on the part of Centennial for extras which were ordered verbally although subsequent written authorization was not given and also as well for work which was essential to the projects completion even though verbal authorization had not been given. It would be most unjust to allow Centennial to use Article 25 as an escape clause when it not only verbally authorized most of these change orders but stood by for the others and allowed them to be done by Fraser-Brace which changes were necessary to complete the structures and make them fit for occupancy.*

Furthermore, Judge McLellan in the case of ***JR Jones v. Gossen*** (1980), 40 NSR (2d) 292 Cty. Ct. spoke of the effect of a similar clause at page 292 of that decision where he states that:

> *I accept the Plaintiff's evidence that there were many items which were discussed between the parties as the work progressed which can properly be designated as extras to the contract. During the discussions, pro and con, respecting these items, the parties drifted into a more or less casual relationship which, I am satisfied, effectively resulted in a waiver of writing to which the Defendants would otherwise be required to affix their signatures before the Plaintiff would be entitled to recover the item as an extra.*

Judge Simon MacDonald made a similar finding on the unreported decision of The ***First Acoostook Corporation v. The Municipality of the County of Cape Breton et al*** (unreported S SN No. 04490, Aug 16, 1988). Judge MacDonald states and page 13 of that decision that:

> *I am more than satisfied and find as a fact that Mr. Roy as agent for the Defendant by his words and actions during the term of the contract, when considered in total, waived on the part of the Defendant the clause dealing with the written change orders being a condition precedent for the payment of the "extras".*
>
> *I am also satisfied and I find the "extras" were actually performed and done and were requirements that the parties had agreed to after discussing same. I am more than satisfied on the evidence from the Plaintiff's witnesses which were done as a result of conversations between the parties for the benefit of the Defendant.*
>
> *I also feel it would be unjust and unfair to me, after hearing the evidence and accepting the fact that Mr. Roy knew that these improvements were being done, yet let them go on to allow the Defendant to gain the benefit of same without being responsible for their payment.*

I find as a result, in cases involving actual written construction contracts and parties with a great deal more sophistication than the parties in the instant case, the failure to have "change orders" has not been fatal to claims for extras. If the failure to provide change orders for extras was not fatal to such claim, in those cases, I find that it is not in and of itself fatal to the Claimant's claim for extras in the instant case as well

I find as a result that the failure to document changes to the scope of work and/or changes

is not necessarily fatal to the claim for extras in this case. It however must be determined as to whether the work claimed were extras and thus recoverable as such, or within the scope of work in the original contract and thus paid for thereunder. At the conclusion of the hearing after evidence was completed Defendant's counsel and Mr. Bushell jointly submitted Exhibit 89 which is a breakdown of Mr. Bushell's claim for extras. It would have been helpful to have received that in evidence during the hearing. Nevertheless as both Parties have agreed to submit it to me, it is a helpful guide on dealing with the claim for extras **if** I award any claims for extras and in particular it is helpful is assessing the apportionment of the various claims for extras.

There were a number of instances during the Trial that the Defendants when questioned would stake out a position and on cross examination from Mr. Bushell or questioning from the adjudicator and the problems or contradictions with that position was pointed out, would disavow that position. There were several instances when that occurred, it is only one measure of credibility but it was certainly influential in assessing credibility. There were a number of occasions when Ms. Plante, and for that matter, Mr. Carlson, would give evidence, and then when a contradiction in their evidence was pointed out, would "backtrack" from their earlier testimony. It happened with both of them on many occasions. It certainly causes me a great deal of concern with respect to their credibility. I found that they both had a propensity to "gild the lily" as it related to issues to which they testified.

Mr. Bushell could be characterized as a "rough and ready" individual. He is certainly a direct individual. Some might also characterize him as an abrasive individual. Abrasive and rough however, do not necessarily equate with un-credible. I found Mr. Bushell to be a forthright and direct individual in his testimony. Where there were failings in his work, or items that had to be repaired, he "took it on the chin" in his testimony. Mr. Bushell did not, to my estimation, have the occasions , in which when testifying that he was caught in contradictions and backtrack in his evidence to the extent that the Defendants did.

In instances where a finding of credibility is necessary on issues I prefer the evidence of Mr. Bushell. I do so as it relates to the issue of extras and what were extras. However there are some instances in which I find that which was claimed as an extra should have been included within the scope of the Contract and I discuss that below. As it relates to one extra item I find that the amount billed is excessive and without documentation that the amount billed for that work was agreed to in advance by the Parties I have reduced that amount. However with that one exception I found the amounts billed for extras to be extremely reasonable.

A review of the invoice that the Defendants submitted from Pashendale Golf Club (exhibit

72) and the testimony of Harvey Elsworth, as well as the testimony of Barry Morrison (which respectively deals with the matter of costs of doing landscaping work and carpentry work), illustrates that the Claimant's charges for extras are reasonable. That evidence puts into context that for the most part the work billed by the Claimant as extras was done at a very reasonable cost. In one instance the work done by the Claimant has provided the Defendants with approximately 15 extra feet of yard on one side of their home.

Because neither Defendant has provided evidence with respect to how much would be an appropriate figure for those extras or cross examined Mr. Bushell on that issue, I am left with the unenviable task of attempting to determine an appropriate amount of extras after determining what amount should be reduced for items that I have determined are not appropriately claimed as extras. In doing so, I have as my only guide Exhibit 89 which was jointly submitted, my comparison of that to other work of a similar nature for which the Defendants received bills (ie - Pashendale and Morrison) and common sense.

I find that there were items of work that were done by the Claimant that were properly characterized as extras. I find however, that in looking at the claim for extras, that it lists a total amount of $4,400.00, but that there are some items that should not be properly characterized as extras, namely:

1. Bill center stringer under house 4" x 10" -.

2. Similarly, the Bill for installing 5 windows. The contract as contained in the proposal, contained a provision for 4 windows which would involve installing 4.

Of the claim for extras, I find thatthe item build center stringer is not a valid claim for an extra. I find that if Mr. Bushell has properly inspected the home before agreeing to the lift, he would have been able to determine that it would be necessary to build a center stringer in order to lift the home. I reduce the claim for extras by that amount as noted in Exhibit 89 ($150.00).

Similarly, I do not find that item install 5 windows as being an appropriate item for an extra. The contact referred to installing 4 windows (Exhibit 2), as 4 windows were called for, and 5 were installed. I reduce the claim for extras by an additional $400.00 to reflect a pro rated amount for the 4 windows that were called upon to be installed in the Proposal.

I am also mindful that was simply installation of windows and not supply of windows, which will be discussed in the counterclaim below.

With respect to the Claim for an extra for burning the tree roots and rotten wood claim, Mr. Bushell has billed for 2 men at 20 hours at $25.00 per hour for that item. I find that is excessive. I do find however, that the Defendants did get the benefit of having that work done (in fact part of their counterclaim is that the yard is not cleaned up enough). I also found it was not covered in the original scope of work. I have reduced this extra by $600.00.

As a result of the above, I award Mr. Bushell for extras, the amount of $3,250.00 plus HST in the amount of $487.50.

FINDING ON CLAIM

The parties agree that a figure of $6,000.00 should be apportioned to the Defendants for jewelry that Mr. Bushell and his son had taken out “in trade”.

Before set off or counterclaim award as a result on the Claimant’s action, I award him $21,610.00 as follows:

$43,700.00	main contract - inclusive of HST
$3,250.00	extras
$487.50	HST on extras
[$20,000.00]	credit - deposit
[$6,000.00]	credit - jewelry

$21,437.50

COUNTERCLAIM

At the outset of the hearing and cross examination, the Defendants put forward exhibit 1, which they put forward as the nature of their claim. That however, was an evolving matter through the course of the hearing. As noted above in submissions Defendants’ counsel submitted that the Claim was $31,317.32 but for jurisdictional purposes his clients submitted a Counter Claim for $25,000.00 within the Jurisdiction of the Small Claims Court .

The Claimant claims that he should have been notified of any deficiencies and allowed the

opportunity to rectify same in accordance with normal practice. I accept that is normal practice, I however find that the Claimant filed his claim with this Court within days after his discussions with Ms. Plante and Mr. Carlson. Many of these deficiencies had not been identified at that time. In fact the Inspection report noted below was done four days after the Claim was commenced, I find that in effect thwarted any opportunity for discussion of the Claimant rectifying the alleged deficiencies. I do not find that as a result is fatal to The Defendants' Counter Claim.

A good starting point for discussion of some of the counterclaim relates back to exhibit 34, which is a building inspection report completed by the CBRM Fire Services / Inspection and Bylaw Division, dated June 14, 2011. Those listed as deficiencies on June 14, 2011 (after the Claimant had left the job), the following:

1. Beam does not sit in beam pocket on foundation wall. Supported by wedges and pocket at an end, etc.

2. 4x4 fence post used to support structure on top of foundation wall.

3. Structure not tied to foundation required to be anchored to foundation wall.

4. Patio door requires proper header above door.

With respect to items 1, 2 and 3 above (irrespective of the evidence which appears clear that what the inspectors say as a 4" x. 4" fence post were actually 6" x 6"), to paraphrase Mr. Bushell on questioning from the Adjudicator, "If the inspector says it has to be done, then it should be done." I found as a result, that those items that had to be rectified. I find that rectifying item 1 above is the a valid claim by the Defendants. I find for the reasons below that Items 2 and 3 (which are intertwined) would, if done by Mr. Bushell have been properly billed as an extra, as the work I find was not in the original scope of work and did not have to be removed and redone (unlike the Patio Door discussed below) but simply required further work to be done. I find if it had to be done by Mr. Bushell it would have been an extra to the Contract and billed to the Defendants as Mr. Morrison has done. I thus award no amount to the Claimants for this aspect of their Claim.

On the Fourth item with respect to the patio doors, the Claimant having raised in its claim, the item as an extra for installing of the patio door, and having charged for same, then it is an appropriate that if there is a deficiency in that regard, it should also be allowed. The Claimant only charged $100.00 for doing this work. However in doing so, the Claimant bears responsibility for it being done appropriately. I find that the installation of a Pre Engineered Header was the appropriate manner to rectify that problem (whether that is still not up to "Code" or otherwise that manner of rectification was accepted by the Municipal Inspector). If as the Claimant contends he had concerns about placing that door in that space when asked to do so by the Defendants he could have simply declined to do the work for the Defendants.

Barry Morrison was called by the Defendants with respect to their counterclaim. I found Mr. Morrison to be a very creditable witness. He was called as he did some of the repairs, including those deficiencies that were listed in the inspection report.

He however, did work in addition to that which was covered in the deficiency, at the behest of the Defendants some of which appear not to have been necessitated by what I would find as a deficiency in the Claimant's work. In particular, I do not find that there was anything untoward in the Claimant's workmanship with respect to the Defendants' claim that the fact that "used" plywood was used as an interior surface or for that matter, that it was not caulked (given that was subject to having insulation on the interior, tyvek and siding, presumably on the exterior).

Some of Barry Morrison's work included replacing the 2 x 10 sill that was rotten. I find that would not have been included in Mr. Bushell's work, and if done by him, would have been an extra to the contract. That would be substantial work to be undertaken.

Mr. Morrison also did work in and around the rim joists which are shown in photographs 50 (a, b and c). He also did calking in the gaps between the interior plywood. I do not find that was included or part of the scope of work agreed to by Mr. Bushell or a deficiency in his work.

Mr. Morrison also installed "hurricane strips" to tie together the 6 x 6 blocks used at the top of the concrete foundation was part of the extra work of Mr. Bushell. If Mr. Bushell had been called upon to install the "hurricane strips" that would have simply been an extra cost that he could bill as an extra to the contract, and the Defendants would have been billed for that amount (as they did and were for the installation of the 6 x 6 blocks themselves).

Interestingly enough, on an issue of credibility, the Defendants, in particular Ms. Plante,

testified that by April 2011 (she indicated that she was aware of that day as she went to Toronto in April), that the tyvek, that Mr. Bushell had placed on the home, was in shreds. Mr. Carlson gave similar testimony. Mr. Bushell vehemently denied that. Mr. Bushell (in testifying under cross examination) and Ms. Plante (in rebuttal) agreed that any of the wrap placed by Mr. Morrison had "Castle" on it as opposed to that of Mr. Bushell in which you can clearly see the "tyvek". I reviewed the photographs. Interestingly enough, photographs 19 and 25 were noted to have been taken after this dispute arose (one can see from the photograph and the grass growing and dandelions growing, that it had to be taken after the winter in which the work was done). It shows tyvek perfectly intact. It does not have "Castle" on it which suggests that it was that which was installed by Mr. Bushell. That suggests Ms. Plante's evidence re the Tyvek being in "tatters" before she went to Ontario in April, 2011 is wrong. The Defendants' counsel in submissions indicated that the addressing of this issue is important in assessing credibility. I agree. My assessment of credibility on this isssue based upon review of the photographs tendered by the Defendants leads me again to prefer the evidence of Mr. Bushell to that of Ms. Plante. Photograph 28 (b) shows tyvek that would have been replaced by Mr. Morrison. The fact that house warp was replaced does not suggest it was deficient. The house wrap (tyvek) appears to be something that is placed on a house before siding or other covering is placed on the home. It is not meant to be left on a home for as long as it has without further outside covering. It is the Defendants who have not yet finished the exterior of the home and left the house warp exposed.

I have no breakdown of the work done by Mr. Morrison as it relates to the various work done by him. It has been difficult to determine what amount of Mr. Morrison's bill relates to the items that were covered and legitimately deficiencies and those that I have found that are not. His bill was in the amount of $4,087.50 (exhibit 41). During submissions I advised the Parties that without guidance I would have difficulty in apportioning the Bill of Mr. Morrison to that which was in rectifying deficiencies in the Claimant's work and that which was not. I asked for input from the Parties and found little of guidance. Hearing his evidence and what was involved .I find that of Mr. Morrison's bill of $4,087.00, that $2,500.00 would be related to rectifying deficiencies. I would characterize that work that related to rectifying what I have found as deficiencies (which would not otherwise have resulted in an extra charge from the Claimant) and have allowed that in the amount of $2,500.00. Mr. Morrison did not charge HST on the original bill and I award none on that I find as noted above that

Mr. Morrison's bill for "Proposed" work estimated to be $4,500.00 relates to that work which I do not find as necessary to rectify work of the Claimant. That claim is not allowed.
the estimate that he provided of $4,500.00 for proposed work is not related to rectifying work necessitated by deficiencies in the work by Mr. Bushell

With respect to the materials purchased by the Defendants, that were undertaken in Mr. Morrison's work, I allow the bill for the engineered beam which is in the amount of $468.61 (exhibit 77) as well as from Central of $162.63 (exhibit 76), the bill from Cameron Building Supplies (exhibit 71), for the chipboard only, which is $17.94. I find that the remaining items do not relate to the deficiencies or work that was necessitated by deficiencies of the Claimant (the caulking ($188.65), the tyvek roll ($39.00), the caulking gun ($9.89). As the proposal called for 4 windows and only one was supplied by the Claimant I also allow the claim for the additional 3 windows which equates with $576.84 ($769,12 x 3/4).

Similarly I find that the invoice from Central Supplies (exhibit 75) does not relate to items that I have found to be deficiencies. I find that the Claim for the materials used for the 6" x 6" block is not allowed as that was an extra to the contract which provided the Defendants greater height in the basement and if the Claimant had not used that material on hand he would have to obtain it elsewhere and bill it as an extra to the Defendants.

I find that the bill from Landry's is allowed in part in the amount of $137.50 (plus HST) relating to the cost of exposing the footers for inspection (see exhibit 65).

The Defendants, Plaintiffs by Counterclaim, have claimed for damage caused by an alleged failure of their septic system. Mr. Bushell claims that he did not cause the damage to the septic system. As with all matters, in a case of this sort, the burden of proof lies on the party making such claim (the Defendants/Plaintiffs by Counterclaim).

I find that the Defendants/Plaintiffs by Counterclaim failed to meet that burden. In particular, I would find on a balance of probabilities that the Defendants have not proven that the problems complained of were the result of actions of Mr. Bushell. The Defendants/Plaintiffs by Counterclaim called as a witness, William MacCormick. Like Mr. Morrison, I found William MacCormick a particularly credible witness. He did not embellish. He was not evasive, and he gave direct answers when provided with direct questions. William MacCormick had indicated that he had been involved in the installation of septic systems for over 20 years. He testified that septic systems, according to the recommendations of the Department of Environment, have a recommended life of 20-25 years but as he indicated have guarantees substantially less than that time.

Mr. Carlson testified that when he bought the home, that the was told that the septic system was good for 50 years. I put no weight on that testimony whatsoever. I take it as simply another example of Mr. Carlson "gilding the lily". I much prefer the evidence of William MacCormick who was called on behalf of the Defendants and indicated that the septic systems have a life of 20-25 years. The Defendants had lived in the home for 17 years, and it was 6 years old at the time they bought it. They testified the septic system had never been replaced, it was at least 23 years old. The septic system was certainly within the time frame when it would be normally expected to be replaced.

William MacCormick testified that he could not find where the septic field was located. When Ms. Plante was asked by her own counsel with respect to where the septic field was when referred to exhibit 81 and in particular the plan with septic attached thereto, made a sweeping motion with her hand in a semi circular fashion where the septic tank is located to an area to the West, which when she did it (on two occasions when questioned by her counsel), clearly encroaching on to the land of the adjoining property owner (shown on the plan) and as PID 15350275 Lands of Jennifer Chisholm. When I pointed that out to Ms. Plante, she then changed her testimony with respect to where she said that the old septic disposal field was. This was again one of the many examples of Ms. Plante's testimony changing when contradictions were pointed out. There may not have been a proper septic field on the property, many qualified people testified in the hearing (MacCormick and Landry for the Defendants),and none could pinpoint its location.

The Defendants at the outset of the hearing contended that Mr. Bushell parked one of his large excavators on the septic tank and that is what caused the problem. Given the evidence of Mr. McCormack, that does not appear to have been an explanation as to how the problem with the septic system would have been caused.

Exhibits 81 and 82 show how close the septic system is to the home itself. The excavator in question as described by Mr. Bushell has an arm on it that is so long that it would not allow the excavator itself (upon which most of the weight would be located), to get that close to the house. That fact is borne out by a review of exhibit 38, where one can see the arm of the excavator. I do not find that the septic tank or system was damaged by the Claimant driving over or parking on the tank with his equipment.

Mr. Bushell candidly testified that on one occasion, when excavating, he had struck the edge of the septic tank with the bucket of his equipment. He indicated that he had repaired same. He described the damage as generally round and 6" to 8 " in diameter. He testified he properly repaired that hole. Ms. Plante, testified that it was more of a wedge shape at the top of the tank on one end. That directly contradicts the evidence of Mr. Bushell. Mr. McCormack was questioned on cross-examination with respect to the repair work that was done. He testified that there was no problem with the repair and that it has been properly sealed. His description of the area repaired conforms with the evidence of Mr. Bushell. Mr. MacCormick did not describe any damage (whether repaired or otherwise) in a manner such as that described by Ms. Plante.

As it relates to where damage was on the septic tank itself, I find based upon the testimony of William MacCormick, who was called by the Defendants, that whatever damage Mr. Bushell caused when he struck the septic tank with the bucket of his equipment had been properly repaired. Mr. McCormack testified that he found that the seals (or gaskets) between the cover and the tank itself, had failed. He testified that there was no way of knowing what may have caused that. He postulated a number of possibilities. There are a number of ways in which as a result that could have occurred.

The problem for the Defendants' on their counterclaim on this issue is that Mr. MacCormick claimed that the problem related to a failure of the seals/gaskets between the tank and its cover. He described a number of various ways in which that could be caused. I do not find on a balance of probabilities that the actions of Mr. Bushell have been shown to be that cause, given the evidence of Mr. MacCormick there are other plausible means by which that could have occurred.

Mr. MacCormick was also shown photographs of material in a pipe in the septic system (Photograph 24), which when questioned on Cross Examination he indicated suggests the problem with the system had been in existence for at least several months. Given the Defendants' evidence of how little the system was used after the work carried out by the Claimant began, that also suggests to me that any failure of the system necessitating the completion of a whole new system as was installed by Mr. MacCormick was not a result of the Claimant's work.

More importantly, I do not find that the Defendants/Plaintiffs by Counterclaim have proven on a balance of probabilities that the damage they claim for installation of a new were related to any acts of Mr. Bushell.

Ms. Plante and to a lesser extent, Mr. Carlson, claimed damages due to nuisance or inconvenience with respect to the claimed inability of Ms. Plante to reoccupy her home. For the most part however, from June 2011 onward, Ms. Plante's remaining away from the home related to the problems with septic system. For the reasons noted above, I have found that alleged failure was not caused by the Claimant consequently that delay was not a occasioned by Mr. Bushell. Those damages as a result are not allowed.

The Defendants claim that there were damages due to delay in getting the building permit that they state occasioned delay from January to June, 2011. Neither party has pointed to me, any governing case law or statutory authority with respect to upon whom the burden to make such an application rests. However, it is clear that no one sought a permit, whether a building permit or a renovation permit.

Mr. Bushell testified that he advised Ms. Plante to apply for a "renovation permit" as it has a $35.00 fee and the inspection criteria are less stringent. Ms. Plante testified that nothing was told to her with respect to applying for a building permit. It is clear that the work was done without a permit. It is clear that the work was almost at conclusion before the stop work order which was issued on January 6, 2011, was issued.

It appears that one of the issues with respect to the completion of the work was that the building inspector needed to inspect the "footings" and that they had been covered over. Once frost set in (as it did between January 6, 2011 and when the building permit was issued on January 17, 2011), the ground could not be opened up to allow the inspector to review the footings until the frost came out of the ground. That occasioned a delay until the ground could be opened for that purpose.

The application for the building and development permit for the CBRM is available online, and there are three places in which contact information is required. They are:

1. Applicant
2. Owner
3. Contractor

Of those, the contact information for the applicant is required, as is the information for the owner. The information for the contractor is not noted as being required.

S. 2.4 of the *Municipal Building By-Law* states:

> ***INSPECTIONS***
>
> *2.4 The authority having jurisdiction shall be notified and given an opportunity to inspect:*
>
> *(a) the footings prior to placement of the foundation;*
>
> *(b) the foundation before backfilling, and before a superstructure is place d on a foundation;*
>
> *(c) basement floor slap insulation;*
>
> *(d) the framing, roof, underground and rough plumbing, heating, ventilation*
> *insulation before interior wall coverings are installed, and*
>
> *(e) before occupancy.*

It would be difficult to envisage how Mr. Bushell a Contractor with 40 years of experience would not be aware of the necessity of such provisions which would entail inspections and by necessity, the application for a permit.

I find Mr. Bushell knew or ought to have known that the Footers had to be inspected and that a Permit whether Renovation or Building Permit as a result was required. Mr. Bushell unlike the Defendants would be more familiar with those necessities To begin that work at that time of year when there was a risk that frost would set in and to cover the Footers was negligent. Irrespective of who may have been responsible for the Cost of obtaining the Permit Mr. Bushell could and in my view should have (a) insisted that the Permit be in Place before he began the work and (b) should have insured that he did not undertake the work unless it could have been completed within a time that would allow the Footers to be inspected and the Inspection as a result completed in a timely fashion after the work commenced.

If a Building Permit had been obtained and an inspection of the Footers occurred before they were covered and/or was undertaken before frost set in and the Footers could be uncovered Ms. Plante would have been in her home in January, 2011. I do not find that she has shown a quantified claim for special damages over that time period January - June, 2011. She lived with Mr. Carlson in his/their apartment in Glace Bay.

I find as a result, that there was a delay occasion by the failure to obtain a building permit

and that whether or not, Mr. Bushell, advised the Defendant, Plante, to obtain such a permit (which I find there were discussions in that regard), in undertaking the work without such a permit so late in the year, where the window of opportunity of completing the work before the frost set in was so small, that Mr. Bushell was negligent in undertaking the work without ensuring a permit was in place. I find however, that this claim is a claim for nuisance or inconvenience and that a claim for special damages has not been proven to my satisfaction for the period of delay from January - June, 2011. I do find however that a Claim for General Damages for such inconvenience is well founded. The jurisdiction of the Small Claims Court, however is limited on awards of General Damages by s. 10(e) of the ***Small Claims Court Act***, to general damages of $100.00 or less. I award the Defendants $100.00.

I find the damages allowed on the Counter Claim as follows:

Bill from Landrys' (opening footers for inspection) $137.50 plus HST	$ 158.25
Portion Bill (Exhibit 71) $17.94 plus H.S.T.	$ 20.63
Windows (supplied one contract called for 4 $769,12 x 3/4)	$ 576.84
Engineered Beam (Exhibit 77)	$ 468.61
Morrison Bill (portion see above)	$ 2,500.00
General Damages (Inconvenience)	$ 100.00
TOTAL	$3,824.33

Setting off the amount due on the counterclaim against the amount awarded on the claim results in an amount due to the Claimant in the amount of $17,613.17. Both Parties have incurred filing fees and both have been successful in their claims. I find that one offsets the other and as a result decline to award that as costs of filing the claims to either Party. I decline to Order the Costs of Service incurred by the Defendant and claimed in the amount of $50.00. That was incurred in serving a Defence alone and not the Amended Defence and Counterclaim. The counterclaim upon which the Defendants were successful was brought to Court and provided to the Court and the Claimant on October 18, 2011 as Amended Defence and counterclaim. There was no Cost on serving that amended Document which was the Counterclaim. As it is that Claim upon which the Defendants were successful I decline to award as disbursements the $50.00 fee for serving the Defence.

RALPH W. RIPLEY
ADJUDICATOR