2018 S.C. BW. No. 478511

SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Kift v. Ziegler*, 2020 NSSM 9

BETWEEN:

THOMAS BRUCE KIFT

Claimant

-and-

JUERGEN ZIEGLER

Defendant

DECISION AND ORDER

Place of Hearing:	Bridgewater, Nova Scotia
Dates of Hearing:	August 26th, 27th and 28th, 2019; and October 9th, 10th, 11th and 16th, 2019
Dates of Written Submissions:	December 6th, 2019 (Defendant) January 31st, 2020 (Claimant)
Appearances:	**For the Claimant:** Thomas Kift, in Person **For the Defendant:** Matthew Conrad and John M. Dillon, Q.C. (on record)
Adjudicator:	**Gavin Giles, Q.C., Chief Adjudicator**
Date of Decision:	April 14th, 2020

Gavin Giles, Q.C., Chief Adjudicator:

INTRODUCTION:

[1] This matter is a construction claim.

[2] The Claimant commenced his Claim on July 23rd, 2018.

[3] The Defendant filed a Defence and Counter-Claim on September 13th, 2018

[4] The Claimant seeks damages for what he has alleged as shoddy or otherwise negligent construction, by the Defendant, of his new residential dwelling house.

[5] The Defendant has denied the alleged shoddy or negligent construction of the Claimant's new house. The Defendant has alleged that he has not been paid in full. He seeks the balance of what he contends was the contract price to which he says that he and the Claimant agreed. The Defendant also seeks payment for a host of "extras" which he has alleged he has completed to the Claimant's additional order.

[6] The Claimant's new house was constructed at Bridgewater, Nova Scotia on a sub-divided lot of land that he had purchased from the Town of Bridgewater. The Defendant was by all accounts an experienced home builder who had – at least until his dealings with the Claimant – an excellent reputation for quality and craftsmanship, generally on time, and generally on budget.

[7] The Claimant has alleged that quality and craftsmanship, on time, and on budget, were not his experiences with the Defendant. Perhaps not to be out-done, the Defendant has alleged that he had never before attempted to build a house for an owner such as the Claimant; implying at least, that he would never want to have such an experience again.

[8] The Claimant was self-represented, more about which I will set out below.

[9] The Defendant was originally self-represented but later retained Kevin A. MacDonald to represent him. On Mr. MacDonald's temporary departure from legal practice, the Defendant has been represented by John Dillon, Q.C. (on record) and by Matthew Conrad (appearing).

[10] The Claimant's claim was originally scheduled for hearing on October 18th, 2018. Since its original scheduling, the hearing was delayed several times. Precisely why and when has been addressed a number of times. Re-stating those details now is neither necessary nor helpful.

[11] The hearing of the matter finally commenced on August 26th, 2019. It was heard over seven days; the hearing concluding only on October 16th, 2019.

[12] I then sought, and the Claimant and the Defendant were anxious to file, written submission to sum up on their respective cases. The last of these written submission was filed on January 31st, 2020.

[13] My objective was to enter these Reasons for Decision not later than March 31st, 2020. World events intervened. These Reasons for Decision are late. They are beyond the period stipulated in Section 29(1) of the *Small Claims Court Act*. The period stipulated is "directory and not mandatory". With all apologies intended and implied, the law is clear that I maintain jurisdiction notwithstanding that these Reasons for Decision are entered late.

WAS THIS A SMALL CLAIM:

(a) Informal and Inexpensive Adjudication

[14] These proceedings regrettably represented anything but a "small claim". When the Claimant commenced his Claim on July 23rd, 2018, he checked off the box indicating that his Claim could be heard in "under two hours".

[15] Beyond the seven days of hearing actually required, there were 70 multi-page exhibits comprising many hundreds of pages of materials: notes, e-mail and text messages, numerous photographs, technical brochures covering installed and other systems, damages assessments, reconciliations of claims, just to name a few.

[16] Many of these materials were clearly intended as evidence; but oftentimes without the evidentiary requirement of proof.

[17] The seven days of hearings and the consideration of the numerous exhibits were followed by almost 200 pages of written submissions (including additional evidence (the Claimant) and authorities (the Defendant). No such approach can respectfully accord in any manner with the intent and purpose of this Court as set out pursuant to the provisions of Section 2 of the *Small Claims Court Act*: "…informal and inexpensive adjudication in accordance with the principles of law and natural justice."

[18] Additionally, some of the case presentations were weak. Not in any sense that they lacked conviction. More in the sense that the Claimant and especially the Defendant did not appear to regard the complexity of the cases as deserving the sort of preparatory attention they would have received if proceeding in the Supreme Court of Nova Scotia.

[19] In the case of the Claimant, he likely knew no different. In the case of the Defendant, he was likely constrained by budgetary concerns. Either way, much of the matter proceeded much as partly-cooked spaghetti flung against a wall: how much might stick and how much might fall to the floor.

(b) Pre-Hearing Requirements

[20] All of this effort was of course preceded by a veritable plethora of pre-hearing submission, conferences, telephone conferences and even hearings, some of which resulted in interlocutory written decisions, orders and directions.

[21] In that regard, the Claimant more than once indicated that he was not prepared to yield any quarter or extend to the Defendant any of the types of professional courtesies which are common amongst opposing litigation counsel. Even when Mr. MacDonald had to quickly remove himself from the matter for reasons appertaining to his health, the Claimant aggressively opposed the motion by Mr. Dillon, Q.C. to adjourn the matter. The Claimant's position in sum and substance was that the lack of availability of the Defendant's chosen counsel was, effectively, the Defendant's tough luck. I confess that this approach by the Claimant caused me to consider his propriety and his reasonability.

[22] Nice though it might be, this Court was never intended nor structured to undertake and conduct litigation on these bases. To that end, and despite the significant efforts made by the Court to accommodate the Claims and Counter-Claims herein, there is sure to be the sense, by the Claimant, or by the Defendant, or by both, that the Court has simply failed them. Whether that be simply the natural result of the procedural attempt to pound a round peg into a square hole will have to be for others to assess.

[23] One thing is certain that cases of this nature and magnitude generally proceed with carefully-drawn pleadings, a comprehensive disclosure of relevant documents, examinations for discovery of at least key witnesses and oftentimes pre-hearing agreements on how evidence will be called and documents or other exhibits proved.

(c) Jurisdiction

[24] Though I can – and do – sympathize with the Claimant's overarching desire to achieve a measure of recompense from the Defendant for what the Claimant saw and assessed as shoddy or otherwise negligent construction of his new house, and to represent himself in that

pursuit, I fear that he frequently lost sight of the extent and purposes, and the limitations, of this Court. In making that observation, I do not suggest in the least that the Claimant's claims were not within the Court's statutory jurisdiction. Even despite is practical and procedural limitations, the Court's jurisdiction is really quite broad.

[25] The Claimant's fundamental contention is that his contract with the Defendant had been breached, that his reasonable contractual expectations had not been delivered, and that he had suffered damages as a result. He then limited his claims for these damages so as to remain within the Court's $25,000 monetary jurisdiction. Accordingly, and subject only to the procedural limitations set out below, the Claimant's claims are all within the Court's specific jurisdiction as set out pursuant to the provisions of Section 9(a) of the *Small Claims Court Ac*t.

[26] Of course missing from that analysis is that this Court was never intended for, and is not procedurally equipped or staffed for, the purposes of multi-day hearings involving numerous documents. For hearings of the type these proceedings required – extended day-time sessions – the Court is not even staffed other than by the Adjudicator.

[27] There is no official logging of either *viva voce* testimony or the documents tendered into evidence. There is no verbatim record of the testimony to which the Adjudicator can later refer. In fact, the only form of physical record of the proceedings is limited to the Adjudicator's own notes and her or his ability to keep those notes whilst at the same time observing and actively listening to the witnesses for the purposes, amongst other things, of the assessments of their respective credibilities.

[28] The Claimant's chosen methods for the presentation of his case were also fraught with difficulty. He clearly knew what he wanted to do but he adopted approaches which were not consistent with accepted legal practice: such as not infrequently filing, with the Court, and with me as the Adjudicator, voluminous sets of various documents, all of which were intended as evidence, usually without comment or identification, and which thus required entry in the normal fashion.

[29] These limitations and case presentation methods also plagued the Court's decision-making process; in that a complex yet rudimentary record was required to be culled for its import within a very compressed time frame (of 60 days); and a time frame which has already been exceeded.

[30] The Defendant's Counter-Claim, though somewhat more straightforward than the Claimant's Claim, can be aptly described in somewhat the same manner as the Claimant's Claim has been described. The Defendant seeks the payment of some $21,000 which he contends as remaining outstanding on his contract with the Claimant and on the Claimant's various orders for additional work.

THE EVIDENCE GENERALLY:

(a) The Claimant's Approach

[31] Though bright, knowledgeable, clearly experienced and organized, and exceptionally articulate, the Claimant frequently conflated fact, opinion, expertise, and some wishful thinking, in his efforts to persuade me. The Claimant also frequently relied on hearsay evidence of the type and kind which could not always be assessed from the perspectives of accuracy.

[32] In fact, much of the Claimant's evidence on points of significance at least to him, was the product of "Google" or other such and similar searches or of equipment manufacturers' one-line promotional pieces and operating manuals which were at times inconsistent with each other and which offered the Defendant virtually no opportunity for challenge.

[33] Mr. Conrad, on behalf of the Defendant, frequently felt himself constrained to rise in the course of the hearing to express his reservations as to the veracity, and as such, the admissibility of some of the evidence led by the Claimant. In response, the Claimant quite rightly referred to or at least implied the Court's relaxation of the "normal" evidentiary rules. I refer in that regard to the provisions of Section 28(1)(a)(b) of the *Small Claims Court Act*.

[34] With obvious respect to the Claimant, those provisions are permissive but not mandatory with respect to the admissibility of evidence before this Court. In that regard, the caution expressed by Adjudicator Slone in *Marineau v. Mader's Roofing & Masonry Limited*, 2019 NSSM 20 (citing his own decision in *Sparks v. Benteau*, 2008 NSSM 3, at Paragraph 9) is instructive:

> The Small Claims Court does have a more lenient standard for the admission of evidence, including hearsay, than do the higher courts, but when it comes to deciding crucial facts the only evidence that will suffice is sworn testimony by a live witness who can then be cross-examined. This is at least as true if not more so when it comes to expert evidence.

> To give an example here, Mr. Benteau sought to have the Court accept a "To Whom It May Concern" letter from a likely very qualified individual who was purporting to offer an expert opinion as to why paint was peeling on the Claimant's home. While such a letter might be accepted on a non-contentious point, the question of why the paint peeled is potentially central to the case, because the Claimant needs to prove that it was the result of faulty workmanship. It would be fundamentally unfair to the Claimant to admit such evidence and allow it to prove the contentious point, when he had no advance notice that it would be offered, and did not have the author of the letter present to cross-examine. The right to cross-examine has been a cornerstone of our system of justice for centuries, and while many self-represented litigants exercise this right sparingly, it is still a vital right. Having the witness in Court also would allow the Adjudicator to ask pointed questions that might help decide the issue.

[35] This approach to the receipt of and reliance on hearsay evidence is entirely consistent with the approach taken by the Supreme Court of Nova Scotia in matters taken on appeal from this Court to that one.

[36] Accordingly, there will be instances outlined below where I have found myself to have had little choice but to reject some of the Claimant's hearsay evidence or at the very least afford that evidence very little weight. Two examples will serve at this point in my reasons: alleged heating loss over time from the alleged negligent insulation surrounding the house's slab-on-grade foundation; and alleged exposure to increased costs of electrical power over time because of the operating specifications of the heat pump unit actually selected and installed by the Defendant in the Claimant's new house.

[37] As regards both installations, the Claimant's case theory is that he is entitled to damages based on the contention that negligently installed foundation insulation – as alleged – will marginally rob his new house of the heating and cooling efficiencies it would otherwise have had; and that the house's heat pump actually selected and installed by the Defendants will work less efficiently than either of the two alternative units specified.

[38] Without being in any manner critical of framing claims on those bases, I respectfully see them as being amenable only to the most highly technical forms of expert assessment and critique. That type of evidence was missing in these proceedings; with the result that the Claimant often failed to persuade me as to the merits of several of his claims.

[39] Though I fully appreciate the Claimant's absolute right to frame and present his case as he saw fit, he would – as at least implied above – have benefitted from some counsel advice

and direction. The fact that he did not have it – nor appeared interested in obtaining it – was certainly a limiting factor in his prosecution of his claims. That is not to say that the Court is in any manner reluctant to hear self-represented parties; only to observe that the more complex the matter, the less likely it can be adequately presented by the non-legally-trained person.

[40] Additionally, the Claimant not infrequently engaged in exceptionally comprehensive evidentiary development over matters which were not contextually significant, nor which even if successfully argued could have resulted in much by way of damages assessment.

(b) Special Damages and General Damages

[41] Additionally, the Claimant failed to fully comprehend the distinction(s) between special and general damages and the limitations on the latter which are set out pursuant to the provisions of Section 11 of the *Small Claims Court Act*.

[42] Though not overtly intending to fault the Claimant in any way – many lawyers also fail to understand that distinction, at least within the confines of this Court's jurisdiction – there were times at which the Claimant led his case in such a manner as served to ignore the $100 jurisdictional limit on the award of general damages. Correspondingly, some claims which may have been the subject of a special damages award were presented by the Claimant in such manners as to have been self limiting.

[43] A key example, as alluded to above, was the Claimant's electrical power waste claim. Based on percentage efficiency variables, as set out in various on-line or other technical manuals, and then extrapolated into the future on the basis of present day electrical power rates, it all seemed intuitive enough to the Claimant when it was in fact anything but.

[44] Consistent with a general theme not infrequently expressed by the Supreme Court of Nova Scotia that Adjudicators of this Court ought to generally aid and assist self-represented parties so as to ensure that they are not unnecessarily and unfairly trapped by their lacking legal knowledge, there were times in the course of the hearing at which I cautioned the Claimant as to possible better manners within which to present his Claim. These were always difficult cautions as, and as recognized more than once by Mr. Conrad, it is not the Court's role to attempt to regulate – other than for legal and procedural reasons – how any given party's case is presented.

[45] The Claimant, to his credit, was generally receptive to the types and forms of caution referenced above. That being said, and not being legally trained, the Claimant still at several times failed to concentrate his evidence and related arguments at the precise claims which he was advancing. This approach resulted in a number of instances at which the Claimant simply led insufficient – or otherwise non-compelling – evidence in support of his many claims. Strange in that regard was that the Claimant's efforts with respect to small and even dubious claims was oftentimes significant.

[46] None of these statements are intended, nor should they be so construed, as any form of indictment or consequential dismissal of any aspect of the Claimant's claims. Any such result can only come about as a result of the analysis set out below. That being said, there were many – at least some – aspects of the Claimant's claims which were doubtlessly compromised by his presentation of them and by his selection of this Court as his convenient forum. Unquestionably in that regard, the more appropriate, and better, forum for the resolution of the Claimant's claims would have been the Supreme Court of Nova Scotia with its wide variety of helpful pre-hearing procedures, even pursuant only to *Civil Procedure Rule* 57.

BACKGROUND FACTS AND RELATED COMMENTS:

[47] Surprisingly, there was much about the matter's salience on which the Claimant and the Defendant were in general agreement. There was more about their dealings, however, on which they did not agree at all.

(a) The Agreement

[48] The Claimant and the Defendant entered into a written agreement for the construction of the former's new house on July 17th, 2017. Styled as "CONSTRUCTION AGREEMENT BETWEEN Ziegler Homes and Construction Ltd. and Tom Kift" (the Claimant commenced his claim as against Juergen Ziegler, personally, and not as against the corporate entity which was in fact responsible for the Claimant's new house), the agreement was hardly the paradigm of comprehension and clarity which such a project might have better commanded.

[49] Clear from the evidence is that the Claimant sought the Defendant out. The Claimant had built two previous houses but had used another contractor for them.

[50] The Claimant's selection of the Defendant was made, at least in part, on the basis of some not insignificant due diligence. The Claimant "checked out" the Defendant's references,

he discussed the Defendant's work with other of the Defendant's customers, and he verified the Defendant's reputation with the Better Business Bureau.

[51] It would have appeared at first blush that the confidence the Claimant had reposed in the Defendant was not misplaced. The Defendant is a qualified Mechanical Engineer. He had been constructing houses since 1995. His market was Bridgewater, Lunenburg County and the South Shore. By the time he started dealing with the Claimant in the latter part of 2015 (it took the Claimant and the Defendant almost one-and-a-half years to conclude a general house design and related features) he had built over 140 houses.

[52] Couched only in terms which were very general, the agreement made reference to "plans provided by Tom Kift" and to various forms of installations and features which were ill-defined.

[53] Many of the installations and features referred to in the agreement were only generic. Some measurements were only stated as approximations. Almost all installations failed to refer to a specific supplier or manufacturer, or to an expected level of quality and expected longevity or serviceability. Even the house's heat pump, ultimately a significant bone of contention as between the Claimant and the Defendant – and in the hearing – was only ever specified as to manufacturer. Crucial details such as capacity, output and expected heating and cooling ranges were not specified.

[54] None of that is meant to deny, of course, that certain terms and conditions are implied in every building contract. "Materials must be a proper quality, the work must be performed in a good effort and workmanlike manner, the materials and work, when completed, must be fit for their intended purposes, and the work must be completed without undue delay." References establishing those implied terms and conditions include *Flynn v. Halifax Regional Municipality*, 2005 NSCA 81, *Markland Associated Ltd. v. Lohnes* (1973), 11 N.S.R. (2d) 181, and *Girroir v. Cameron* (1999), 176 N.S.R. (2d) 275.

(b) Schedule and Completion

[55] Though the Claimant was exceptionally clear in his evidence and related presentation before the Court as to his expectations surrounding the alacrity and timeliness with which the Defendant would build the Claimant's new house, the agreement did not contain any such provisions. There was in fact no mention in the agreement of an expected start date. The

agreement did not set out an expected finish or occupancy date. There was no suggestion of any form of construction schedule, or milestones, or of the number of days over which construction was expected to be on-going.

[56] The agreement likewise made no provisions for strikes, lock-outs, the availability of building materials, or *force majeure*.

[57] Not surprisingly, the Claimant and the Defendant have differing views regarding the intent and purpose of the agreement; the Claimant contending that the agreement gave him the reasonable expectation that his new house would be ready for occupancy within a few months; and the Defendant taking the position that he did the best he could – in sometimes challenging circumstances – and delivered the Claimant's house ahead, if not well ahead, of any common or reasonable construction schedule.

(c) Early Frictions

[58] Regrettably, frictions started to develop as between the Claimant and the Defendant even before construction of the former's new house commenced. Also regrettably, it appears that the initial friction never abated. If anything, it only served to get worse as time went on.

[59] Reference was made above to the Claimant's purchase of the lot for his new house from the Town of Bridgewater. That purchase was the subject of terms and conditions; set out in an Agreement of Purchase and Sale the Claimant completed with the Town of Bridgewater on June 20th, 2017.

[60] The terms and conditions might be best described as rough earthen works and related rough grubbing and grading so as to assist in the amelioration of some drainage issues the lot presented and so as to roughly ready the lot new house construction. By making that comment, I am not suggesting that the terms and conditions required the Town of Bridgewater to present the lot to the Claimant level and compacted and ready for strip footings and a slab-on-grade foundation. That may have been the Claimant's expectation or perception of what he was purchasing from the Town of Bridgewater, but it does not appear from the limited related information adduced in these proceedings, that any such or similar thing is what the Town of Bridgewater agreed to provide.

[61] The terms and conditions relevant to these proceedings were those set out in Clauses 5 (v)-(vi) of the Agreement of Purchase and Sale. Those terms and conditions generally required

the Town of Bridgewater to remove some sort of drainage pipe from the lot the Claimant was purchasing and infilling the adjacent lot "to lessen chances of flooding" of the Claimant's lot. Clause 5(vii) of the Agreement of Purchase and Sale also permitted the Claimant an out – and full and complete walk-away – should the work required of the Town of Bridgewater not be completed.

[62] The Town of Bridgewater was suggested by the Claimant to have coincidentally contracted with the Defendant to fulfill these terms and conditions on its behalf. The Defendant did not recall doing that work, suggesting in his testimony that it was done by "Millman" or "Mailman". There being no indication that the Claimant ever attempted to avoid the Agreement of Purchase and Sale on the basis that the Town of Bridgwater had not undertaken its required site work, it would appear that the Claimant was not in any way opposed to or dissatisfied over the manner in which that site work had been completed, by either the Defendant or by Millman/Mailman.

[63] I condition that conclusion with "it would appear", in that evidence surfaced in these proceedings to suggest that there are in fact allegations by the Claimant, only somewhat related to these proceedings, that the Town of Bridgewater had either not undertaken the required site work or had at least not undertaken with the effect the Claimant had intended.

[64] In short, the Claimant continues to complain of flooding – or near flooding – issues at his property. He lays the responsibility for these variously: initially at the feet of the Defendant and certainly at the feet of the Town of Bridgewater. By the time he filed his closing submission, the Claimant had resiled from any earlier position that his construction had been negatively affected by any kind of accumulation of precipitation

[65] Notwithstanding the agreement's silence with respect to any kind of construction schedule, it does seem that what the Claimant and the Defendant both had in mind was an early start. "Early" was not any type of term of art, in that it was interpreted by the Claimant as immediate and by the Defendant only as timely or as a priority.

[66] The initial hang-up as between the Claimant and the Defendant as regards the commencement of construction appears to have arisen over the closing of the sale of the house in which the Claimant was then living. According to the Defendant, he was not of the view that he could commence with his construction of the Claimant's new house until the existing house

had in fact sold. The Claimant was not of that view and took the position that he never indicated to the Defendant that the commencement of construction was so circumscribed.

[67] All of that being said, there were no terms or conditions which governed the Defendant's commencement of construction one way or the other. There were comments back and forth. They are not capable of any synthesis; much less capable of persuading me that they were in any way a binding foundational provision to which the Defendant had to attorn.

[68] According to the Defendant, the Claimant began to demand, in the fall of 2017, that his new house be ready for occupancy by Christmas in that same year. Though the term "the fall" was not defined by the Defendant with any specificity, I took it to mean sometime around Labour Day of that year. By that time, the Defendant was hardly “out of the ground”.

[69] The Defendant's testimony as regards this alleged demand by the Claimant was not well fleshed out. For example, the Defendant was not asked about the status to which the construction had arrived by the time the Claimant started to make these demands. Nor was the Defendant asked how much construction remained to be completed at that time. Nor was the Defendant asked when, all things considered and feared being fair, the optimum occupation date for the Claimant's new house would have been at the time he started to make his alleged demands. Nor was the Defendant asked if he ever regarded himself as being pushed by the Claimant such that at least some normal aspects of good construction practice could have been missed.

[70] The Defendant did testify that as soon as a Christmas occupancy was raised by the Claimant, he was told only that the same could not in any way be guaranteed. But what is clear from the Defendant's evidence is that he did rush in order to meet the Defendant's expressed wish for a Christmas, 2017 occupancy. And the Claimant’s pressure in that regard was relentless.

[71] Apropos my comment above, though it was not specifically stated that corners were cut, things were left undone or were not completed as well as they could have been, those possibilities are inferences which I nevertheless draw from the evidence. To whatever extent they can be attributed by the Claimant to the Defendant is not so important; deficiencies in the course of construction which have to be remedied post substantial completion, or in the cases of

the new house builds, post-occupation, are not uncommon. In many respects, it is strange, and perhaps something of a testament to the Defendant, that there were not more deficiencies.

[72] Somewhat interestingly, in order to be able to occupy his new house for Christmas of 2017, the Claimant was required to procure only a Temporary Occupancy Permit from the Town of Bridgewater. According to the Town's own evidence, such an approach to occupation is not common.

(d) The Defendant

[73] The undercurrent, more about which will be set out below, was that the Claimant was exceptionally difficult to deal with. He was demanding. He was relentless. His habits were to frequently attend both his new house and the Town of Bridgewater to proffer observations or make requests for the Town's action with respect to his new house.

[74] The Town's own evidence with respect to this aspect of the Claimant's behavior was measured. Building Inspector, Graham Hopkins, described his relationship with the Claimant as "not the best". By that, Mr. Hopkins expanded to suggest that the Claimant's interventions with the Town with respect to the manner in which his new house was being constructed by the Defendant became so frequent that the Claimant was instructed to no longer attend at the Town's offices without having first made an appointment.

[75] Mr. Hopkins went on in cross-examination to suggest that when it came to an owner's interventions with the Town of Bridgewater with respect to the construction of a new house, the Claimant "set the record by far". Mr. Hopkins also testified in cross-examination that the main theme of his interventions with the Town of Bridgewater were that his new house was not being built correctly and that he wanted the Town to do something about it. All Mr. Hopkins could – and did – offer in response was that the Defendant appeared from the regulatory inspections of the construction of the Claimant's new house to be meeting or exceeding all requirements. Mr. Hopkins was quick to point out in re-examination that was not the Town of Bridgewater's responsibility to inspect the construction of the Claimant's new house for consistency with the agreement, only with respect to new construction regulatory requirements.

[76] In similar evidence led from Glendon Silver, whose company had built the Claimant's two previous houses, the Claimant was described variously as "involved", "demanding", "difficult" and "a little difficult". Mr. Silver did not know why his company was not selected to

build the Claimant's house which was built by the Defendant. His company provided the Claimant with a quotation and he assumed that the Claimant had found it excessive.

[77] Some of the Defendant's personal characteristics have been outlined above. Additionally, he is confident and self-assured. He does not come across as either arrogant or imperious. But he came across during the course of these proceedings as a person who enjoys being correct and who does not appreciate challenges to his personal assessments of his correctness.

(e) Progress

[78] There was, of course, the Defendant's correspondence of June 12th, 2018 to the Claimant's then legal counsel. In that correspondence, the Defendant wrote, in part:

> We entered into a contract with Tom Carol Kift [sic] 17 July 2017, to begin a new home build which they were wanting finished as quickly as possible. We were unable to begin the build until 12 Aug 2017 as we had to wait for the closing of their old home that they had sold. We made them a priority; the footing permit was issued 10 Aug 2017 and we began to build on 12 August 2017. We received a Conditional Occupancy Permit and they were able to begin to move in on 22 Dec 2017. The build time for this home was 4 months and 10 days, a very efficient time frame for a new build.

[79] Strangely, especially given the attention afforded building time frames in these proceedings, there was no independent evidence led by either the Clamant or the Defendant about how long the construction of the Claimant's new house should have taken. Implicit was that anything longer than four months was excessive in the Claimant's estimation. The Defendant testified only generally that most of his houses take six months from start to occupancy.

[80] Whilst any such assessment might be dependent on the length of the Chancellor's foot, there being big houses and small houses, simple houses and complex houses, ordinary houses and luxurious houses, houses with many amenities and houses with few amenities, it does not seem to me that commencement to occupation in barely four months is not such a period of time as to reasonably attract my attention. I note, though only in passing, that my own house was built in eight months, and that many thought that that was pretty efficient.

[81] That being said, the Claimant was at all times free to insert a time schedule into his agreement with the Defendant. He could have inserted early completion bonus clauses and later completion penalty clauses. The Defendant would have been at liberty to accept or reject any such approach. But no such approach was attempted by the Claimant. I am not persuaded that the timing of the Defendant's delivery of the Claimant's house to occupation was in any way deficient.

[82] Not lost on me are various pieces of the Claimant's evidence and submissions with respect to all of what was going on at the time of the commencement of construction. Even with the closing of the sale of the Claimant's then house being on August 2nd, 2017, and not August 12th, 2017, the distinctions are without apparent differences. There were the earthworks required as referred to above. There was a grubbing, leveling and in-filling of the Claimant's property before it could accept strip footings for the slab-on-grade foundation of the Claimant's new house. Who did precisely what and when is not germane to the overall execution of the Defendant's agreement with the Claimant. Differences in recollection and what photographs describe what individual construction-related activities are little beyond irrelevant.

[83] More to the point, none of those differences are such as to cause me to call into question either the Defendant's recollection abilities or his credibility. He was a busy general construction contractor at the time. He had more than one project on the go. Keeping balls in the air is at least perceptively difficult. If the Defendant's individual recollections were out a day here or a day there, the result does not feed into my analysis of the main substance of the Claimant's various contentions with respect to breaches of his agreement and negligent construction of his new house.

[84] Also not lost on me were the Claimant's expressed concerns over Defendant's ability to read a plan, or rendering, and to deliver a finished product accordingly. Without reproducing the general invective with which the Claimant started to describe the Defendant's construction endeavors early on, I refer only to the fact that it appears generally from the evidence that there were several iterations of what precisely the Claimant was asking the Defendant to build and that ad hoc changes to construction documents – such as they were – were relatively common.

[85] It seemed – and seems – strange to me that the Claimant and the Defendant were able to sufficiently describe the necessary quantity of construction so that they could agree on July

17th, 2017, on a contract price; yet almost a month later still find themselves challenged on what precisely was to be constructed.

[86] Generally speaking, construction – even of a new house – commences with a completed set of architectural, engineering, mechanical and electrical drawings. That way, the contractor can know exactly what she or he is expected to build and in what order. That did not appear to be the case as between the Claimant on the Defendant. In fact, much more of the quantification of the Claimant's precise construction was left to definition along the way.

[87] That much undoubtedly produced headaches for the Claimant; and it just as likely produced headaches for the Defendant. Either way, and in all events, it appears from the evidence that the Claimant and the Defendant were off on the wrong foot, one with the other, very early on. That could not have assisted the complexity of construction process to have unfolded as smoothly as it might have.

[88] The overall result was numerous frictions as between the Claimant and the Defendant throughout virtually all of the constructing of the former's new house. Just as the Claimant regarded the Defendant as "incompetent, greedy, or both", the Defendant regarded the Claimant as "meddlesome" and "troublesome". I did not objectively see any evidence of the former. I regrettable saw at least some evidence of the latter.

[89] And just as the Claimant appeared to feel throughout most of the construction of his new house that he had to "project manage", the Defendant regarded the Claimant as in the way, interfering unnecessarily and adopting positions on progress which were inconsistent with agreed-upon approaches and with each other.

[90] Mr. Conrad was careful to take the Defendant through his testimony regarding the Claimant's actions whilst construction of the Claimant's new house was on-going. The Defendant testified that the Claimant was on-site virtually daily, if not several times a day. The Defendant testified that the Claimant was constantly photographing all aspects of construction, was consistently taking measurements and was continuously checking on such details as level and plumb installations.

[91] The Defendant described these actions by the Claimant as unnatural in the Defendant's experience. In that regard, the Defendant testified that owners generally come on site at specific milestones, but are not present in his experience to supervise, control and verify the

various aspects of construction. Instead, it is more common for owners to present their lists of construction deficiencies at or near completion so that they can be rectified; either to spec or to the owner's expectations.

[92] Although perhaps more editorial than anything, it is a small wonder – at least – that the Claimant and the Defendant managed any form of end housing product at all. That being said, of the numerous photographs tendered into evidence before me, many of them are of the Claimant's new house in its finished, or largely finished, state.

[93] To me, at least, those photographs reveal an attractive and modern house, of reasonably ample size and proportions, which offers a pleasing form of elevations and so-called "curb appeal". Interesting in that regard, is that the Claimant did not – perhaps because he could not – tender any evidence that his new house was worth less in the manner in which it had been constructed by the Defendant, than if it had been constructed as the Claimant has alleged it should have been.

[94] Though that discrete issue is not in sum and substance the basis for the Claimant's various "categories" of claim, it does, in my respectful view at least, speak to the Claimant's overall discretion in mounting the various categories of claim he has.

[95] In many, if not most, respects of the Claimant's presentations, I found it difficult to glean what, precisely, his losses had been, and how, if at all, he could be fairly compensated for them. In that regard, I use the term "fairly" in its broadest sense: not only what might be fair for the Claimant, but fair in the context of all things considered.

THE CLAIMANT'S CLAIMS – FACTS, ISSUES AND COMMENTS:

(a) Off On The Wrong Foot

[96] Issues as between the Claimant and the Defendant began from the get-go.

[97] The Claimant's initial concerns related to the work which the Town of Bridgewater had undertaken on the lot next door to the Claimant's lot; and the work required to his own lot to bring it to the Clauses 5 (v)-(vi) (infilling and drainage pipe/system removal) standards as set out pursuant to the terms and conditions of his Agreement of Purchase and Sale with the Town.

[98] The Claimant and the Defendant were not of the same mind regarding that work. The Claimant wanted it done – by the Defendant – but to the account of the Town of Bridgewater (something to which the Town agreed). The Defendant insisted that doing the work was not in the Claimant's interests as it could expose his lot – and therefor his house – to the risk of flooding. According to the Defendant, the Claimant was implacable on this point.

[99] In the evidence led before me, the drainage system and the pipe which the Town of Bridgewater had installed on the lot it ultimately sold to the Claimant, were described variously. There was testimony about a pipe, about a five foot concrete chamber, and about both.

[100] How these installations had been conceived, when and by whom was not in evidence. Similarly, how they were intended to work – and how they actually worked, if they worked at all – was not in evidence. The influence, which I drew, was that the installations were originally intended by the Town of Bridgewater to protect the property to the Claimant's right, when looking at his new house from the street. What those installations were connected to, if connected to anything at all, was also not in evidence.

[101] According to the Defendant, he did not want to remove these installations. He did not see them as affecting the Claimant's intended construction in any way. They were either too far removed from the Claimant's intended construction, or were too far down, to create any impediments. Moreover, the Defendant saw these installations as perhaps being of assistance to the Claimant in that they could lead water away from his property and out into the street.

[102] The Claimant was nevertheless consistent that these installations be removed. In fact, when the Defendant left the pipe in place and only covered it up, the Claimant was annoyed.
[103] Even that caused the Claimant to feel as though he was being "ripped off", to use the vernacular.

[104] The Defendant's thinking was that simply being buried, the pipe would not have any effect on anything, whilst removing it could mean some minor trespass – or at least damage – to the neighboring property.

[105] The Defendant described his discussions with the Claimant over this issue as "endless". In the end, the Defendant only met the Claimant part way, in the removal of the concrete chamber. Despite any current questions about how the Claimant's property now drains when

heavy precipitation accumulates, there was no evidence led before me about the performance or the removal of the concrete chamber one way or the other. Just as there was no evidence led before me about what effect, if any, the Defendant's decision to leave the subject pipe in place might have.

[106] For all of the time and effort spent in the course of the hearing on this issue, it seemed to me to be largely irrelevant. To the extent the Defendant's dealings with it constituted a breach of contract, the Claimant has suffered no discernible damages. To the extent that the Defendant's treatment of it was negligent, the same result, from the perspective of the Claimant, prevails. And though it might well be the case that the Claimant has a legitimate concern over the manner in which certain levels of precipitation at certain times of the year (when the soil is frozen, as an example) rise such to threaten his property and his house, there was no persuasive evidence (subject to what I will set out below) that those threats can be reasonably attributed to anything which the Defendant did or failed to do. In fairness to the Claimant, that was not an attribution he attempted in any event.

[107] In making that statement, nothing herein is to be seen as to in any manner impugning the Town of Bridgewater in its dealings with the Claimant's lot prior to or as a result of the sale of its lot to him. It is simply not within the purview of these proceedings – or this decision – for any determinations to be made as regards anything the Town of Bridgewater did or failed to do with respect to whatever concerns the Claimant might have as regards precipitation accumulation or run-off within the proximity of his house.

(b) Shallow Footings

[108] Though perhaps notably absent from the Defendant's comprehensive closing written submissions, much of the evidence led before me related to starting elevation for the construction of the Claimant's new house. The starting position in that regard is the July 17th, 2017 agreement as between the Claimant from the Defendant wherein, under the heading "Site Preparation", there was a requirement for the Defendant to "raise foundation 1 foot above existing ground".

[109] Once again, this term and condition of the agreement is so uncertain as to leave it wide open to interpretation. And though the Claimant has insisted on an interpretation of the starting

elevation of his new house relative to that of the house next door (to the right), the Defendant insisted in the course of his testimony that he did precisely what he was instructed to do, by the Claimant, and by the agreement" which was to install the foundation for the Claimant's new house one foot above the existing lot surface.

[110] To the extent that it falls to me to attempt to understand or define the confusion, it appears to lie in the following. In the Claimant's interpretation, one foot above the existing ground meant that the lot would be in-filled, that the footings would be placed on top of that in-fill and that the slab-on-grade foundation would be installed on top of the footings. All of that would equate to an increase in base elevation for the Claimant's new house of some 22 inches to 26 inches.

[111] The Defendant readily conceded that if that had in fact been the Claimant's requirement, it should have been spelled out differently and the required work could have been undertaken at either an increased lump-sum contract price or by way of an extra charge.

[112] In fulfilling what he thought was his obligations pursuant to the terms and conditions of the agreement, and the Claimant's requests, the Defendant testified that the Claimant's lot was first "grubbed off", meaning that it was stripped of vegetation and related imperfections down to solid ground. It was then in-filled with imported fill from another site and re-graded to its original level or elevation prior to the grubbing. It was then topped with six inches of rock (which I took to be rock surge), three inches of rigid foam insulation and a four inch reinforced concrete slab. According to the Defendant, that meant an overall increase in elevation by 13 inches and not just the required one foot.

[113] Tyler Meisner testified on behalf of the Defendant. He had worked for the Defendant for approximately three years. The Claimant's new house was one of Mr. Meisner's principal responsibilities. Mr. Meisner was on site for the construction of the Claimant's new house all but daily.

[114] Mr. Meisner did not recall doing any work on the Claimant's lot for the Town of Bridgewater. He did not dig out the concrete chamber referred to nor did he dig up the pipe referred to.

[115] Mr. Meisner recalled the grubbing of the Claimant's lot. He denied removing any soil from the site. He testified that new fill, including rock fill, was brought in, levelled and compacted. Mr. Meisner testified that his responsibilities included the footings for the foundation of the Claimant's new house.

[116] Mr. Meisner was very critical of the lot the Claimant had selected for his new house. He testified that the "property was a mess". He described it as "like a pool". He was clear on his direct examination that the Claimant's lot was "not an ideal spot to build a house".

[117] On cross-examination, Mr. Meisner clarified that when the work started on the Claimant's lot, "the property was pretty wet". He described "the whole back yard" as wet, "something like a swamp". He described the adjacent property as having been "built up".

[118] Also to be recalled the Defendant did not undertake this aspect of the works in any kind of a vacuum. Not only were they subject to the agreement as between the Defendant and the Claimant, they were subject to a grading design, a shallow footing design, an inspection by the Defendant's design engineer and an inspection by a Town of Bridgewater building inspector. Though some questions arose in the course of the evidence led before me about just how these inspections were carried out, and with what effect, it seems to me, and I find, that if the Defendant's installation of the foundation for the Claimant's new house was so deficient, in terms of elevation, some note of it would have been made by someone, somewhere.

[119] Additionally, we know from the Claimant's own testimony and submissions, that by the time of this installation, he had become so distrustful of the Defendant that he was inspecting his own construction closely, sometimes several times a day. He would have seen, and noted, any concerns he had with the starting elevation of the construction of his new house once his slab-on-grade foundation had been poured. There are, however, no notes nor memoranda to that effect. And there is no indication that such concerns the Claimant may have had were brought to the Defendant's attention in real time.

(b) More Progress

[120] Notwithstanding this rocky commencement of the construction of the Claimant's new house, things proceeded relatively uneventfully over the ensuing five or six months. That is not to say that they were not issues; there were.

[121] The Claimant raised legitimate concerns with respect to footing and foundation insulation, the heat pump selected and installed by the Claimant (neither a Daikin nor a York), the installation of the blown-in attic insulation, the care taken by the Defendant and his forces with some ancillary concrete slab pours, the front porch, the rear patio and the garden shed floor, some minor aspects of the house's mechanical systems and some deficiencies with respect to the house's interior finishes.

[122] The discussions as between the Claimant and the Defendant regarding these issues appear to have ensued respectfully. There were concerns and frustrations to be sure. Concerns by the Claimant and frustrations experienced by the Defendant. But the two appeared able to discuss differences without recriminations. Such mindsets regrettably did not endure.

[123] The more important of the issues, primarily the insulation and the heat pump, were the subject of on-going discussion as between the Claimant and the Defendant. The remainder, however, were largely left by the Claimant to be dealt with by way of deficiency listing and rectification, once occupancy had taken place.

[124] There were also, over this period, some requests by the Claimant for extra items. These were relatively small in number and did not come at significant expense. The one exception to that may have been the roof-over area of the house's rear patio. That extra installation required fairly significant work.

[125] There was of course a time when the relationship as between the Claimant and the Defendant broke down completely. Though more about that will be set out below, it was replete with a variety of recriminations, invective and other intemperate language. Though it might well have been the Claimant who "threw the first punch" in that final round, it was quite likely the case that both the Claimant and the Defendant had had enough of each other and became content to leave their respective dealings to others to sort.

[126] That specific reconciliation is a difficult one. The Claimant moved into his new house well over two years ago. It has also been more than two years since the Claimant and the Defendant decided that they could no longer work together.

(c) The Claims

[127] In perhaps an act of collective fiscal irrationality, both the Claimant and the Defendant have repaired to this Court in the effort to prove their respective rights and entitlements. But the within reasons for decision, institutionally, have been more than two years in the making, one is left to wonder about whether a better process, and a cooler-headed approach, may have been more amenable. Such an analysis is not of course within my jurisdiction to make.

[128] For reasons not clear in the evidence led before me, the Claimant's selected house design required the Defendant to install a shallow footing for the slab-on-grade foundation of the new house. "Shallow footing" means just that: the footing does not extend as deeply into the soil as would ordinarily be the case.

[129] The reasons for the employment of shallow foundation are multiple. They can relate to the presence of rock, the excavation of which would be difficult, time-consuming and expensive. They can relate to the nature of the ambient weather conditions of the region in which the footings are being installed: the less likely the onset of frost or frozen ground conditions, the less necessary a deep footing to the common frost line. They can also relate to the type of soil in which they are being installed. Finally, a shallow footing can be a significant cost-saving to an owner in that it employs considerably less concrete to be installed.

(i) Foundation Insulation

[130] The thing about shallow footings installed in areas in which frost is common is that they have to be insulated very carefully. As such, engineered shallow footing designs frequently include specific criteria for insulation.

[131] In the case of the Claimant's shallow footing, it was installed by the Defendant using "ICF" or insulating foam concrete forming blocks. But that form of insulation was not in-and-of-itself sufficient. What was required instead, or in addition, was a perimeter footing insulation which extended outward from the footing’s exterior by some to two to four feet depending on precisely where that insulation was installed. Along footing walls, an extension of two feet was generally considered sufficient. At corners, however, the optimum insulation requirement was more like a four foot extension. These were lateral outward rigid foam insulation extensions, essentially placed on top of level ground and then back-filled.

[132] Exhibit 2, Photo 1(h), apparently taken on August 22nd, 2017, is a good representative depiction of the form of insulation to which I refer. The same Exhibit, Photos 3 and 6(a) depict the insulation's back-filling after installation.

[133] Additionally, the thickness of the insulation is an important consideration. In that regard, Mr. Forbes' footing perimeter insulation plan required an insulation thickness of two-and-a-half inches. In all respects, this was not what the Defendant delivered and the Claimant was rightly concerned.

[134] The Defendant, to his (its) credit, acknowledged the deficient insulation installation early on. The deficiency stemmed back to a supply issue and to workers apparently asleep at the switch when the subject insulation was delivered by the supplier.

[135] For reasons not well developed in the evidence before me, the two and four foot panels of rigid foam insulation were not available from the Defendant's supplier in the two-and-a-half inch thickness. What was delivered instead was installation at both the three inch thickness and the one-and-one-half inch thickness.

[136] It appears that what was installed by the Defendant's workers was whatever was delivered to the Claimant's site by the Defendant's supplier. There were thus a number of areas surrounding the Claimant's exterior shallow footing walls where the lateral installation extending outwards was not sufficiently thick. There were also areas, especially in the foundation corners, where the installation was not extended out far enough so as to meet the requirements clearly set out in Mr. Forbes' plan.

[137] For whatever reason, no one picked up on this deficiency until noted by the Claimant himself. He was understandably annoyed. Heating and cooling efficiency were construction attributes of importance to him. He had made that known to the Defendant.

[138] Again to the Defendant's credit, he made immediate amends to the extent that he could. In those areas where accessibility was still possible, the deficient installation was uncovered and additional installation was placed on top of it. Regrettably, however, not all of the affected areas surrounding the Claimant's shallow footing exterior walls were accessible. By the time the deficiency had been noted, the Claimant's driveway had been poured and a number of ancillary

concrete slabs had been poured. Apart from their breakage and removal, re-insulation and replacement, deficiency rectification in these areas was not possible.

[139] For whatever reason, the Claimant did not demand the breakage and removal, the re-insulation and the re-pouring of the concrete slabs in the areas thus affected. Instead, he chose, through a variety of creative means, to persuade me as to the reduction of efficiency, the related increase in the cost of the heating and cooling of his house, and the accumulation, over a period of years, of special damages accordingly.

[140] For reasons which will be developed more specifically below, the Claimant's approach is fraught with difficulty; not for the least reason of which is the quality of evidence which he adduced. I have thus been left to wonder about whether the sum and substance of the relief available to the Claimant in this regard is limited to a general damages award.

(ii) Attic Insulation

[141] The Claimant was also greatly concerned about the quantity of blown-in fiberglass insulation which the Defendant installed in the attic of his new house. The agreement was clear that the attic insulation was to be R60, blown fiber.

[142] It appeared from the totality of the related evidence that the installation of the attic of the Claimant's new house was problematic. The house being a bungalow without a basement foundation, much of its electrical wiring and HVAC ducting had to be run through its attic. That made insulating the attic difficult; first because of the quantity of insulation which had to be placed not only above the upper side of the house's ceilings but because of the installation which had to be piled even higher in areas, in particular, where HVAC ducting – some of it ten inches in diameter – had been installed.

[143] The Claimant tendered into evidence numerous attic photographs showing what he testified to as insufficient quantities of blown-in insulation. These photographs were variable in depiction: some showed only a little bit of blown-in installation, some showed significant blown-in installation, some showed significant blown-in installation in some part of the house's attic but it was not depicted as having been placed consistently.

[144] As part of his analysis, the Claimant took to counting the bags of installation delivered to his site to be later blown-in two the attic of his new house. According to the Claimant's arithmetic, the Defendant started with 83 bags of insulation, took 48 of them away, brought 15 back and therefore installed only 50 bags. The Claimant described these 50 bags as "well short of what is required by the chart on the insulation bag for an attic of 1960 +/- square feet". The Claimant also testified that "that's why we had to add more".

[145] Once again, the time and effort taken by the Claimant in the course of the hearing to address the alleged insufficient attic insulation issue was of questionable worth. The Defendant was always of the view that sufficient, perhaps even more than sufficient, attic insulation had been delivered to the Claimant's site and blown into the house's attic. The Defendant testified that because of the Claimant's "constant nagging" in this respect, he returned to the house in January, 2018 with even more bags of blown-in installation and ensured that they were installed too.

[146] Mr. Meisner also testified to the insulation of the attic. That was one of his responsibilities. He denied that any bags of insulation intended for the Claimant's house were taken away; though he agreed they may have been removed from the Claimant's garage because they were in the way, he insisted that they were only ever stored on-site and that they were all installed.

[147] The Defendant also testified to the use to which the insulation delivered to the Claimant's site was all installed. The Defendant testified that he was not aware of any bags of insulation delivered to the Claimant's site which were not in fact blown in to the house's attic.

[148] The Defendant testified to the additional 15 bags of blown-in insulation he added to the house's attic in January, 2017. He testified that the R60 rating required the installation of 22 inches of insulation in depth. The Defendant stood in the witness box to demonstrate that the depth of the insulation ultimately installed in the house's attic was up to his hips. According to him, that meant that there was easily 22 inches of insulation in the attic even where it had been installed above a 10 inch HVAC duct.

[149] The Claimant still appears to dispute that he received what he bargained for as regards the attic insulation installed in his new house.

(iii) HVAC

[150] The Claimant has taken significant issue over the manner in which the Defendant designed, procured and then installed (or had installed) the HVAC systems in the Claimant's new house. I make reference to "systems", as there are two of them: the heat recovery/air exchange system and the heating and cooling system which is "fired" by a heat pump.

[151] Given the apparent importance of the design and installation of these two systems to the Claimant, it was surprising that they were not better specified as part and parcel of the agreement. In that regard, the agreement is limited to the following terms and conditions: “air exchanger unit in Mechanical Room which supplies air venting to every room in the house" and "heating - Daikin or York heat pump with forced air system".

[152] Generally ignoring the agreement, the Claimant testified to a discussion he had with the Defendant when standing in one of the Defendant's "show homes" which showed heat recovery venting in every room. The Claimant testified that he told the Defendant that that “was what he wanted”. According to the Claimant, the Defendant told him "that's the way I build them".

[153] In the hearing, the Defendant testified that the Claimant was partially correct in testifying to the "show home" representations regarding ventilation. The Defendant set out the qualification, however, that the "show home" had been fitted with in-floor heating, that he did in fact design and install heat recovery ventilation for each room in the houses which he constructed with in-floor heat. He added that such a "dual" form of ventilation was not required in houses which were heated and cooled by way of a heat pump. The Defendant's general testimony in that regard was that the heat pump provided ventilation to each room even if not being either heated or cooled.

[154] In sum and substance, the Claimant's complaint is that he was seeking overall efficiency in his new house and would have never agreed to two operational systems for heat recovery ventilation purposes for each room. In other words, the Claimant testified that what he had in mind were two independent systems: one which would supply heat recovery ventilation to each room in his new house; and one which independently of that first system would heat and cool each room in his new house, when required.

[155] It is clear that the Claimant's expectations and the Defendant's delivery thereof were lost in the translation. It is not difficult to know why that was. It is similarly not difficult to know why the heat recovery air exchange and the heating and cooling systems in the Claimant's new house have become such an issue to him. I understand the efficiency argument. What I do not understand is why many specifications on which the Claimant was purportedly or apparently relying were not better stated.

[156] Though I appreciate the Claimant's position that he regarded the Defendant as opportunistic and ready to take advantage, that is not a finding I will make. As regards the discrete issue of the heat recovery ventilation and what was allegedly said by the Defendant to the Claimant at the former's show home, I do not know when that was, how far along the Claimant and the Defendant then were as regards the Claimant's new house and whether either the Claimant or the Defendant knew at the time how in fact the Claimant's new house would be heated.

[157] In addition to the above, there is also the Claimant's concern about how he received an LG heat pump and neither a Daikin nor a York. The testimony on this issue, and not just from the Claimant, was inconsistent, confusing and prolix.

[158] It appears from all of the evidence adduced before me on this point that the Defendant had a preferred HVAC sub-contractor to which the Defendant let all of his required work. The specific HVAC sub-contractor was Len's Plumbing and Heating.

[159] It also appears from the evidence led before me that there was a time when Len's Plumbing and Heating might well have been a York heat pump dealer. By the time of the actual installation in the Claimant's new house, however, Len's Plumbing and Heating had ceased being a York dealer. York was still available, though not conveniently. It was on this and other bases that determinations were eventually made, effectively by the Claimant himself, that his new house would receive an LG heat pump.

[160] Upon earlier investigation, the Claimant learned that York heat pumps were available from a distributor in Halifax. The closest dealer, however, was in Digby. There were concerns all round about dealing with the York distributor in Halifax and York dealer in Digby. Those

concerns included not only issues of additional cost, but issues with respect to service should service be required.

[161] In fairness to the Defendant, many of the issues arising out of the heat pump selection for the Claimant's new house were undertaken by the Claimant, himself. He was the one who had most of the salient dealings with Len's Plumbing and Heating. He was the one who did the ancillary investigations.

[162] The sum and substance of the Claimant's complaint about the actual selection of the heat pump installed in his new house was difficult to glean – from both his testimony, other related evidence and his closing submissions.

[163] As regards those closing submissions, the Claimant wrote: "[w]ould we have gone ahead with the York HP, had we known that Digby was the only option? We would have had electric backup for the HP, a propane fireplace and electric space heaters, so, who knows. We were never given the choice."

[164] Against this backdrop, it is at least strange that the Claimant, in real time, having demonstrated his alacrity in the heat pump installation after taking possession of his new house, would not have engaged in the same level of inquiry when it could have made a difference. To be recalled is that this was not a case of an owner expecting a new house and leaving it to a contractor to deliver it; this was a case of an owner being intimately involved with the contractor, in fact taking over many of the contractor's normal responsibilities, in order to consistently inquire, assess, designate and regulate at least some of the installations his new house was receiving.

[165] Once the Claimant took possession of his new house, a process more about which will be set out below, he conducted further investigations into his LG heat pump and other aspects of the heat recovery ventilation system which had been installed in his new house. His conclusions were that what he received from the Defendants, as regards both systems, was marginally less efficient than what he had expected. But even the extrapolation of marginal inefficiency, according to the Claimant left him open, over say 20 years, to slightly higher annual electric power rates.

[166] Again for reasons which will be developed more specifically below, the Claimant's approach with respect to a special damages claim linked to alleged increases in power rates is also fraught with difficulty; not for the least reason of which is the persuasiveness of evidence which he adduced. I have thus been left to wonder about whether the sum and substance of the relief available to the Claimant in this regard is also limited to a general damages award.

[167] Nils LeBlanc testified. He was the designer of the systems installed in the Claimant's new house for heat recovery ventilation and for heating and cooling. He described how the systems worked together to provide heating and cooling and neither heated nor cooled ventilation to each of the rooms in the house.

[168] Though he was on contract to the Defendant, Mr. LeBlanc felt as though he was being directed by the Claimant on what to do and why to do it. Some of Mr. LeBlanc's recommendations to the Claimant were rebuffed by him. One such recommendation related to the size of the heat recovery ventilation unit the Claimant wanted installed. Mr. LeBlanc indicated that it was too small, that it would be required to work too hard, and would not be as efficient as intended. Mr. LeBlanc told the Claimant that the size unit he wanted installed – a 150 instead of a 170 – was for a house smaller than that which the Claimant was building.

[169] Mr. LeBlanc described the Claimant as "huffy". He testified that the Claimant was constantly after him to change his design and layout. He testified that some of what the Claimant wanted – the location and proximity to each other of individual heated/cooled air vents and related returns, for example – were not good construction practice. Things got so bad as between Mr. LeBlanc and the Claimant that the former told the Defendant that he did not want to work on the project any more.

[170] Mr. LeBlanc testified that in the end, the Claimant's new house received two operating HVAC systems: one which heated and cooled the house's incoming air and one which merely circulated the house's incoming air when it was being neither heated nor cooled. In that regard, Mr. LeBlanc described how the systems did different things but were connected and interrelated. Mr. LeBlanc testified that he does not "do" two totally and completely separate systems for houses such as the one the Claimant was building. Such bifurcated systems are too expensive and offer no advantages in that type of construction.

(iv) The Defendant On-Site

[171] The Claimant, at many times in his testimony, and in the related evidence he submitted, was extremely critical of the Defendant for not being available on-site virtually every day the construction of the Claimant's new house was taking place. Despite extensive explanations and heated responses to questions put to him on cross-examination, the Claimant never really explained the benefit that he says would have flowed to his new house construction project had the Defendant actually been on-site to the extent the Claimant testified should have been the case.

[172] The Claimant led into evidence a partial print-out of the Defendant's website. The particular page included the following comment, which the Claimant highlighted: "[h]e has been building distinctive homes in the South Shore of Nova Scotia for over 20 years. He believes in being personally involved in your building project from start to finish. His team is a reflection of his high standards of meticulous workmanship and as a team they are committed to delivering innovative designs and impeccable quality."

[173] The Claimant has apparently construed this informational/promotional piece as a commitment by the Defendant to be personally involved in every project in which he is engaged "from beginning to end", as the Claimant testified. Quite apart from the practical impossibility of any such commitment, even if the Defendant was only engaged in one project at a time, the Claimant knew the Defendant to be engaged in various projects at any given time, including various projects over the time frames over which the Claimant's new house was being constructed.

[174] Though unfortunate and regrettable, the Defendant, during the timeframe throughout which the Claimant's new house was being constructed was also dealing with an aging mother, who suffered from dementia, and who lived on another continent. In order to provide for her care, in a manner which many, at least some, would contend as common in similar circumstances, the Defendant found himself at one point during the course of his construction of the Claimant's new house to be required effectively at his mother's side.

[175] Additionally, there was a period, over Christmas/New Year of 2017/2018, when the Defendant was on vacation with his family.

[176] The Claimant took some umbrage at both periods of absence engaged in by the Defendant. According to the Claimant, at least by implication, personal involvement in a new house construction project, meant just that; no departures for the needs of aging parents, and no vacations.

[177] Troubling though such a position is, especially given the vigor with which it was asserted in the course of the hearing before me, it denies many obvious truths about human existence, regardless of occupational and other endeavors. In reality, people get sick, people get injured, people are called away from their occupational projects, people go on vacation, and people die.

[178] Holding such departures against the Defendant is the Claimant's right. As noted above, he is entitled to put forward his case in his chosen manner, as long as the chosen manner is ethical, consistent with the law and in good taste. None of that, however, means compelling. And I frankly take the position that the Claimant's complaints about the Defendant's actual on-site attendance were not compelling.

[179] In that regard, the Defendant testified that he normally has between three and five residential housing construction projects on the go at any given time. Each one is undertaken by a qualified and ably led crew which can, and does, work independently from other of the Defendant’s crews.

[180] The Defendant also testified that he can be absent from any one of his sites for between two and five days at a time. He also testified that with respect to the more than 140 houses he has built since 1995, his foreman and construction supervisors have always been able to communicate with him, and even when he is not physically present at any of his given sites, he knows what is going on and is available to respond to all developing eventualities.

[181] The description of the cause for his concerns regarding the Defendant's absences arises in the Claimant’s closing submissions. He has submitted that when the Defendant was not present on-site, it was the Claimant, himself, who had to take on the relevant superintending and related directional duties.

[182] The Claimant has testified to a number of things which went wrong and which combined to erode the value of the Defendant's delivery to him. The implication is that those things, or at

least some of them, would not or may not have happened had the Defendant being fully present on-site.

(v) The Claimant As Supervisor

[183] Additionally, the Claimant has made a claim, set out in the Pinnacle report of July 23rd, 2018, that he is entitled to $6,000 (15 days at $400 per day) as "reimbursement for [the Claimant's] absence from duties".

[184] Apparently not considered by the Claimant, or by the author(s) of the Pinnacle report, is that his new home construction could have been left completely to the Defendant with an appropriate deficiency list being drawn up and agreed at the time of substantial completion. Such an approach would certainly have been consistent with the norm; and such an approach may well have obviated the need for the extensiveness and minute analyses which these proceedings have entailed.

[185] Also apparently not considered by the Claimant, or by the author(s) of the Pinnacle report, is that $400 per day, as contended by the Claimant, does not appear to relate to anything objective. Perhaps it is what the Claimant earned whilst he was working. Perhaps it is what the Claimant's – or Pinnacle's – research disclosed about what a residential construction foreperson or supervisor earns. Perhaps it was a figure picked out of the air in an effort to intimidate the Defendant and confound the Court. I cannot be sure; though I can be sure that without proof of necessity and actual value, I cannot make an award of damages other than, perhaps, those which are general in nature.

[186] I make the same comment as regards the contention in the Pinnacle report that the Claimant is entitled to the sum of $3,250 for his attendance on-site "ensuring contract compliance". According to the Pinnacle report, this sum was calculated on the basis of 65 hours worked by the Claimant, at the rate of $50 per hour.

[187] There was no evidence led before me as to any of these hours. There was no suggestion in the Pinnacle report of any hours reconciliation its author(s) had even seen, much less verified. There was likewise no suggestion in the Pinnacle report that its applied rate of $50 per hour was referable to any standard, let alone any standard which was objectively established.

[188] The inference I have drawn from the Pinnacle report is that its author(s) may have been prepared to put to paper whatever claims the Claimant instructed. If so, that is a dangerous role for a specialized opinion witness to take; and a role which calls to question the related reporting.

[189] None of this is to say that I have found the Claimant's claims lacking in overall merit. To the contrary, there were some deficiencies in the execution of the construction of the Claimant's new house. Exactly what they were and how they can be dealt with as a matter of law, is another question.

(vi) Concrete Work

[190] I am particularly concerned about the quality of some of the Defendant's concrete work on behalf of the Claimant. Much was developed in the course of the hearing before me about the quality of the concrete pours and finishing. Out of level, slumped and spalled, cracked, dimpled and discolored, were just some of the complaints which the Claimant articulated with respect to the Defendant's concrete pours.

[191] In that regard, it appeared objectively from the evidence led before me that some of the Defendant's concrete pours were undertaken in sub-par conditions: cold and rain. And at least in two instances, fresh, or at least relatively fresh concrete was permitted exposure to the elements without having been covered for the curing process to take place.

[192] Though the Defendant testified to common problems with respect to concrete, such as shrinking and cracking, he did not have any ready, or compelling, explanations about why so much of the Claimant's concrete turned out so poorly.

[193] To his credit, the Claimant appears not to have considered the complete re-do of the Defendant's concrete pours and all of the attendant mess and re-construction which such an approach would entail. What the Claimant has instead contended, is that some of the Defendant's concrete pours have to be repaired or coated in some manner(s) so as to give them a visual appearance which is consistent with the overall pleasing visual appearance of the Claimant's new house, all as referred to above.

DECISION:

(a) General Comments

[194] Parsing the testimony, and the other evidence, led before me in the course of the hearing would be neither easy nor would it serve a legitimate justiciable purpose. It is clear that the Claimant, with obvious respect, has made these proceedings the main, if not the only, highlight of his life for the better part of two years.

[195] The Claimant has assembled countless documents, prepared extensive notes, testified both from close notes and extemporaneously on a wide variety pf issues, and has chosen to raise every possible claim, regardless of its magnitude and its potential ability to found any real damages in his favor, in a manner which I find was whatever effort he could muster to discredit the Defendant and to call the quality, or lack thereof, of the Defendant's efforts on his behalf into question.

[196] What is beyond question, as noted above, is that the Claimant and the Defendant never saw eye-to-eye on the subject construction project, and eventually got to the point that neither wanted to have anything to do with the other.

[197] The primary point of departure in that regard was being exceptionally bad language used by the Claimant, in the direction of the Defendant, in a series of text messages which began on or about May 14th, 2018. The Claimant's choice of nomenclature, which needs not, and will not, be repeated here, was hardly fair, or helpful. But it did mark the end of the commercial relationship the Claimant and the Defendant had had. By words and deeds thereafter, the Claimant was girding for war.

[198] In order to bring a sense of consistency and finality to these proceedings, I will refer to the Pinnacle report and, though only more tangentially, to the report of September 10th, 2018, prepared by Meisner & Zwicker Construction Limited. It is these two reports which present the sum and substance of the Claimant's actual claims for damages. Attempts to deal with the other matters which the Claimant has raised, some of which have been described generally above, will not be productive.

(b) Insulation

(i) Foundation

[199] The $6,000 which the Pinnacle report attributes to the excavation of the entire perimeter of the Claimant's house for the purposes of the installation of new rigid foam insulation is denied. Not only is there no credible evidence to underpin any contention that the insulation of the Claimant's house will lead to any additional costs over the ensuing years, the Claimant, himself, testified that he was not seeking the same.

[200] Though I am attuned to the concept of "the measure of loss", I will not allow suspect claims, rooted in faulty analysis, when they have not been demonstrated to produce damages which the Claimant has demonstrably sustained.

(ii) Attic

[201] I will similarly not allow the Claimant's claim of $1,500 to permit him to add additional attic insulation in the house to meet the R60 specification. No such requirement or necessity has been proved.

(c) Landscaping

[202] I will similarly not allow the Claimant's claim for $6,900 for "landscaping as per contract". Simply put, this sum has not been charged by the Defendant to the Claimant.

(d) Flooring

[203] I will similarly not allow the Claimant's claim for $500 to remove and re-install vinyl flooring "in effected [sic] areas". According to the Defendant' testimony, which I accept, this was one item which would have been addressed as a deficiency through the re-attendance of the Defendant's flooring sub-contractor.

[204] As does all claimants, the Claimant in these proceedings has a legal obligation to mitigate his losses. By failing to follow standard construction practice, he cannot obtain a benefit which he would not have otherwise to obtain.

(e) HVAC

[205] Similarly, I will not allow the Claimant's $800 claim for heat recovery ventilation duct amendments. The Claimant has not proved that operationally, there is anything faulty with respect to any part of his HVAC systems as installed by the Defendant. I make the same comment with respect to the Claimant's claim for $1,200 to install additional air intake vents in all of the rooms of his house.

(f) Claims For Site Attendance and Supervision

[206] Similarly denied are the Claimant's claims in the sums of $400, $3,250 and $6,000 for his work on-site. As noted above, there was no adequate proof led by the Claimant that any such on-site presence was required, was consistent with an owner's reasonable expectations in similar circumstances, added measurably, if at all, to the efficiency of the construction process involving his new house, or was anything which the Defendant ever indicated he was prepared to consider.

(g) Concrete Repairs/Re-Surfacing

[207] More troublesome from the principled damages assessment perspective are numbers 2, 15, 24 and 31 in the Cost Estimations provided by way of the Pinnacle report. All of these items relate to the application of various surfacing media designed and intended to make good, at least in part, on the Defendant's defective concrete pours already referred to above.

[208] One of those, though not mentioned specifically in the Pinnacle report, related to the Defendant's pouring of the concrete floor of the Claimant's garden shed. Referred to in the Meisner & Zwicker Construction Limited report, the Defendant’s pour produced a “moonscape” appearance in that specific floor. Apparently, and once again, the Defendant had failed to ensure the protection of that concrete pour once it had been placed and finished. The Claimant has not made a specific claim for this.

[209] Grappling with cost estimations against a backdrop of a principled approach to the award of special damages is always difficult. Special damages are, by their very nature, supposed to be based on clear monetary assessments of the damages which the claiming party has sustained. See below.

[210] In Pinnacle's approach, the various concrete deficiencies of which the Claimant complains can prospectively be dealt with through sealing and the application of epoxies, sealing and the application of a "rubberized surface", repairing cracks and resurfacing, and repairing cracks and applying epoxy paint. Clearly these means and methods are variable. Not clear is that they are intentionally variable or, more specifically, that they are said by Pinnacle to apply because of discrete differences in the quantities of concrete deficiencies which have been addressed. The difference is, of course, not insignificant.

[211] In *Gould v. Edmonds Landscaping & Construction Services Ltd.* (1999), 182 NSR (2d) 79, the Supreme Court of Nova Scotia was in the invidious position of attempting to address a series of special damages claims arising out of a variety of transactions, some of which were found to have been legitimate and some of which were found to have been suspect. In reflecting some frustration that the trial evidence was not as clear as it might have been on the discrete issues of special damages being claimed, Nunn, J. (as he then was) held that:

> The total is a hypothetical one. There is no precise way to determine what was excessive other that the items I referred to and even those could only be determined from the exhibits with considerable difficulty. It would be equally wrong for me to apply some other hypothetical standard to determine some amount as excessive. To my mind, the only effective way to deal with damages is by an award of general damages… .

[212] In these proceedings, there is also no precise way to determine just how the Pinnacle's report estimates the reasonable allowances for the damages incurred by the Claimant because of the Defendant's defective concrete pours as alleged. Just as there is no way by which this Court can make anything like some form of composite general damage award to address the special damages which the Claimant has clearly sustained.

[213] In arriving at these conclusions, I am not ignoring the Defendant's position – and related evidence – that there is nothing "structurally" wrong with the subject concrete. I am similarly not ignoring the distinction as between fibre mesh as a poured concrete strengthening additive and steel wire mesh over which placed concrete is poured. Or the explanation by the Defendant as to why the latter was used on the Claimant's new house but not the former, despite the related terms and conditions of the agreement.

[214] I appreciate fully, on the totality of the evidence, that the two concrete placement methods offer similar finished concrete strengthening properties. And I am not ignoring the

Defendant's evidence that the deficiencies in his concrete pours at the Claimant's new house are mainly shrinkage as opposed to settlement in nature.

[215] None of that denudes, in my respectful view, that the overall appearance of the Defendant's concrete pours at the Claimant's new house range from the unattractive to God-awful. All of them are certainly a far cry from the overall architectural attractiveness and "curb appeal" which the Claimant's new house offers even the most casual of observers.

[216] The Court's role, fundamentally, is to attempt to do justice as between the parties to any given claim. That objective will of course be difficult to attain in certain types of claims wherein general damages are limited to no more than $100.

[217] The question of the demarcation as between general and special damages has vexed courts, judges, adjudicators and legal commentators for a long time. In *Beairsto v. Roper Aluminum Products Inc.*, (1994) 32 N.S.R. (2d) 321, the Supreme Court of Nova Scotia (per: Scanlan, J., as he then was) put the conundrum as follows:

> The terms general and special damages are, at best, ambiguous. *MacGregor On Damages*, 15th edition, London, Sweet and Maxwell Ltd., 1988, discusses the definition of special and general damages. He notes at page 19 that the terms are used in a variety of different meanings, and that if these meanings are not kept separate the indiscriminate use of the terms spells confusion. The author then goes on to discuss the four meanings of general and special damages. I am satisfied after reviewing *MacGregor On Damages* that there is no clear delineation between the definition of special or general damages. The terms are interchangeable, depending on whether you are dealing with torts or contract. The meaning of the terms may vary depending whether a matter is at the pleading or proof stage of a proceeding.

[218] At issue in *Beairsto* was a wrongful dismissal case. It was nevertheless rooted in a breach of contract, as are these proceedings.

[219] In distinguishing special damages from general damages in *Beairsto*, Scanlan, J, held that:

> In relation to the matter of proof of damages for wrongful dismissal, the Small Claims Adjudicator noted that the factors being considered in determining the appropriate length of notice to which a dismissed employee is entitled. These factors were set out in *Squires v. Ayerst, McKenna and Harrison Inc*. As in any action for breach of contract, there are a number of factors to be considered in determining a proper damage award. The Small Claims Court is

> called upon routinely to make judgmental decisions. This would include cases where the Court is required to determine liability or make a determination as to the degree of contributory negligence in the motor vehicle accident. These determinations are often required where special damages are claimed. There is nothing in the Small Claims Court Act which prohibits the adjudicator from making judgmental decisions. *Squires v. Ayerst* notes numerous factors to be considered in determining an appropriate length of notice. There is nothing in the factors as set out in *Squires v. Ayerst* which would assist the Respondent and it's argument that claim for wrongful dismissal is claim for general damages as opposed to special damages. *Squires v. Ayerst* provides guidance as to the factors to be considered in making the final determination as to quantum. I refer to the comments of O'Hearn, C.C.J., in *Forbes Chev Olds v. Singer*, 1985, 65 N.S.R. (2d), 159, p.162. Judge O'Hearn refers to Halsbury's Laws of England, fourth edition, vol. 12, p.416, S.S. 1113. He notes:
>
> > In current usage, 'special damage' or 'special damages' relate to post pecuniary loss calculable at the date of trial, whilst 'general damage' or 'general damages' relates to all other items of damage whether pecuniary or non‑pecuniary. The terms 'special damage' and 'general damage' are used in corresponding senses.(sic) thus, in a personal injuries claim, 'special damage' refers to past expenses and loss of earnings, whilst 'general damage' will include anticipated future loss as well as damages for pain and suffering and loss of amenity.

[220] Given the above analysis, there must be seen as some sort of a hybrid approach to those damages which are calculable at the time of trial, and those damages which can only be projected into the future.

[221] In terms of the Claimant's claims arising out of his deficiently placed and finished concrete, those claims are much more towards the former end of the spectrum than they are the latter. The work has been done. It has not been done correctly. The cost of correcting the work is estimated. It needs no more than a judgmental decision on my part to determine what the appropriate measure of damages should be.

[222] In short, what I am being called upon by the Claimant to do, or what I am at least doing, is no different than the exercise through which I would go in attempting to determine, on the basis of all of the evidence led before me in a wrongful dismissal case, what a plaintiff's notice period should be; and how a plaintiff’s entitlement to special damages should be calculated thereon.

[223] It is on this basis that I award special damages to the Claimant, with respect to concrete repairs, sealing and coating on the basis of numbers 15 and 24 of the Pinnacle Cost Estimations, of $6,500. I have reviewed, as closely as I can, the photographs underpinning the Pinnacle Cost Estimates 2 and 31. I simply do not see them, and so find, as representing deficiencies in terms of pouring and placement which are other than natural shrinkage cracking for which no form of damages is warranted.

(h) Mitigation (The Defendant's Dismissal)

[224] In Wise, Howard M., "*Manual of Construction Law*", Thomson Reuters, Volume 1, up-dated to March 13th, 2020, the learned author posits the following at Section 3.6(d), Page 3-50.1:

> Where there are deficiencies in the construction work, in absence of fundamental breach, the contractor is entitled to a reasonable opportunity to rectify the work.

[225] Referred to is the Decision of the Ontario Superior Court of Justice in *C. S. Bachly Builders Ltd. v. Lajlo* (2008), 25 C.L.R. (3d) 76. At issue in the case was an extensive fire damage restoration contract throughout the execution of which there appeared to have been a continuing falling-out as between the owner and her contractor.

[226] As found in Paragraph 29 of the Decision, the construction contract as between the owner and the contractor was terminated effectively when the latter was told "'that they are going in another direction' and that 'basically they were frustrated'."

[227] According to the contractor, he recognized that there were deficiencies in some of the works for which he was responsible. It appeared more generally that most of those works had been undertaken for the contractor by his sub-contractors. Roofing was a particular concern. According to the Decision, some of the roofing was not to standard and did not meet design criteria.

[228] The contractor's normal approach to the rectification of construction different deficiencies was described in the Decision, At Paragraph 40 as follows:

> Scott Bachly testified that his company has dealt with thousands of claims and an aspect of maintaining corporate reputation has been

> attention to any customer complaints. The witness, and S. Whittick, informed the court that when a complaint is received it is documented, an inspection in made and, if the grievance is legitimate, the relevant sub-trade is given a scheduled opportunity to remedy the deficiency, failing which another sub-trade would correct the item with the charge against the original sub-trade and no charge to the insured, the insurer or Bachly.

[229] In these proceedings, it is clear that there were consistent frictions as between the Claimant and the Defendant almost from the construction project's get-go. That being said, there was no precise evidence adduced before me which indicated that the Defendant was not attentive to the Claimant's complaints or was not attuned to the necessity to make good on various construction deficiencies.

[230] In fact, when one reviews the record of the text communications as between the Claimant and the Defendant in detail, one sees a tendency on behalf of the latter to offer to make himself available, usually on short notice, to attend at the Claimant's site to view and address whatever issues the Claimant had identified. That was particularly so in May, 2018, the time when things reached the boiling point with the Claimant. Though it might well have been that by that time the Defendant's responses "were too little, too late", that is not a perspective which the applicable law generally supports.

[231] It is thus that I reject the Claimant's deficiency claims which he did not permit the Defendant to attempt to rectify. In that regard, I address the defective concrete issues differently.

[232] There was also the issue of the confusing accounting. What had commenced as a lump-sum construction project with a relatively defined quantity of work morphed into more of a cost-plus approach, as the Claimant added or extended more and more features. Many of these were very small in nature. Others, like the extension of the roof over the rear patio of the house, were quite significant.

[233] It was thus that not only did the Claimant seek attention to what he viewed as his construction deficiencies, the Defendant also sought to be paid a sum which he regarded as outstanding and past due. His relatively benign request in that regard, set out in a May 14th, 2018 text message, invited a wrath which was not justified, in my view. It was that seminal reaction on the part of the Claimant which set the parties in motion towards these proceedings.

Though it will be up to them to determine “if it was all worth it”, I have reluctantly but determinedly decided that it was probably not.

[234] In addressing the legal principles applicable to the circumstances, the Court, in *Bachly*, held as follows, commencing at the Paragraph 84:

> ‘Mere bad or defective work will not, in general, entitle an owner to terminate a contract’: I. Goldsmith, *Canadian Building Contracts* (4th ed.), p. 6-4 (passage approved in Argiris (c.o.b. as *Atlas Painting*) v. *Calexico Holdings Inc*., [1998] O.J. No. 6291 (Gen. Div.) at para. 12; 568694 Ont. Ltd. v. Davis, [1994] O.J. No. 1030 (Gen. Div.) at para. 5).
>
> For the defendant, the roof repair deficiencies became a convenient coincidence with her plan to pursue a cash settlement through the vehicle of NFA permitting, in her view, her act of taking the work out of the hands of the contractor.
>
> While the state of the roof repairs by Bachly amounted to a breach of contract on its part, “breach of contract is a long way from repudiation of contract”: *Argiris*, at para. 10. The condition of the roof work in this case was not so bad or defective as to deny the defendant the substance of the benefits of the contract and did not amount in substance to a failure or refusal to carry out the contract work and thus amount to repudiation. It is the defendant who failed to fulfil her contractual obligations and thus repudiated the contract. Without justifiable cause, Ms. Lajlo denied the defendant access to the work site and the opportunity for Bachly’s performance to the completion of the contract.
>
> Although the defendant may be entitled to a set-off for that roof work which was defective, in the absence of a fundamental breach by Bachly, she was obliged in mitigation of her damages to provide the plaintiff a reasonable opportunity to correct its own work. An expert’s report would have been unnecessary. I am satisfied, on the evidence I accept, that Mr. Whittick offered to rectify the deficiencies but that the defendant and her agent, Hanson of NFA, denied that opportunity. In these circumstances, the defendant is not entitled to damages based on her own costs of correction: see *Obad* (c.o.b. *Rockwood Drywall*) v. *Ontario Housing Corp*., [1981] O.J. No. 282 (H.C.J.) at para. 48 per Blair J. (as he then was); *568694 Ont. Ltd*., at para. 31; *Argiris*, at para. 22.

[235] Though there are factual differences between the case cited above and those in the instant proceedings, the principles remain the same. Building a house, building anything, is frustrating. The Claimant knew that, he had done it on two occasions before. He was known to his prior builder, and soon enough to the Defendant, as a person who possessed some exacting standards. From his perspective, he was paying good money, and he wanted that to which he regarded himself as entitled. There is nothing wrong with that. In his experience of over more

than 140 house constructions, the Defendant would have experienced it too, no doubt countless times before.

[236] Where the Claimant's exacting standards got away from him, however, were in his pushy and overbearing attitudes. His house in sum and substance was presented to him in only a few days over four months. That, in-and-of-itself, had to be viewed as something of a record – the Defendant's evidence, which I accept as accurate, being that the build-out of such a house would ordinarily take a minimum of six months.

[237] Whether the Claimant appreciates it or not, there is a reason for the old adage "haste makes waste"; and it was not reasonable, and I so find, for the Claimant to insist on consistently pushing his project forward simply to suit his own objectives as to occupation which, all things considered on the totality of the evidence led before me, were not reasonable.

[238] Then, to compound the difficulty which he, at least in part, created, the Claimant then permitted his ire to get the better of common sense, and legal principle, and he terminated his relationship with the Defendant without permitting him the opportunity to re-enter the site to repair the smaller details which the Pinnacle report has listed as deficiencies in its Cost Estimations.

[239] Accordingly, the Claimant's claims for the Pinnacle reports Cost Estimations numbered 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 19, 20, 21, 22, 23, 25, 27, 28, 29, and 30, are denied.

(i) Credits Due to the Claimant

[240] In terms of credits, the evidence adduced before me was all over the place. Not only were the Claimant and the Defendant distinct as between themselves with respect to those credits, their own descriptions were oftentimes inconsistent.

[241] Accordingly, the best I can do, all things considered, is allow the Claimant the credits listed in the Pinnacle report Cost Estimations numbered 33, 34 and 35. I have considered carefully the Pinnacle report Cost Estimations number 37 but cannot find sufficient evidence in the substantial hearing record I created to justify it. The house does have a front porch. It is rather nicely depicted in Photograph 25 of Exhibit 2. Its roofed over area appears to be supported by two columns. There has been no indication from the inspection authorities that it is not to *Code*.

[242] Accordingly, in total, the Defendant is liable, subject to my consideration of his Counter-Claim, to pay to the Claimant the sum of $8,778. As some of these credits have already been removed by the Defendant from his reconciliation of his Counter-Claim, I will ensure to the best I can, as set out below, that there is no double counting.

(j) The Counter-Claim

[243] The Defendant presented an early reconciliation of his Counter-Claim. I refer to Exhibit 4, the second and third pages of Tab 9.

[244] That reconciliation shows the initial contract price of $296,429.95 as its starting point. That is the same figure which appears in the hand writing on the agreement, net of a $756.70 charge for a so-called "light tube".

[245] From there, the Defendant's reconciliation notes the agreed-upon payments by the Claimant of $14,821.49 (July 19th, 2017), $59,285.99 (August 30th, 2017), $74,107.48 (September 25th, 2017), $74,107.48 (November 10th, 2017), $20,000 (February 12th, 2018), $20,000 (March 12th, 2018) and $250 (also March 12th, 2018); for a net alleged due to the Defendant at that time of $33,857.51.

[246] From there, the Defendant made two deductions: the $6,900 allowance which had been included in his contract price for landscaping and an additional $15,000, described by the Defendant as "taking off for kitchen cabinets". That left a net alleged due to the Defendant at that time of $11,957.51.

[247] To that net alleged due total, the Defendant then added $5,925.27. This confusing figure was made up of a list of extra charges, plus HST, less an unspecified $800 credit, plus a $200 power charge. This produced a new net alleged owing to the Defendant at the time of $17,882.78. Though I am not ignoring the Defendant's claim for interest, I will deal with that claim more succinctly below.

[248] By the time of the Defendant’s closing submissions, his Counter-Claim had morphed somewhat. Additionally, there has been no attempt by the Claimant and the Defendant to

"marry" their respective figures even subject to their disputes regarding each of them. That task is thus left crudely to me.

[249] The Defendant's extra charges of $5,925.27 as set out above became $10,516.37 in his closing submissions. The explanation is not clear; nor does it follow from the preceding paragraphs in which different quantities of work are set out. The one significant item accounting perhaps for much of the difference, does not account for all of it.

[250] My overarching goal, and duty, is to do justice as between the Claimant and the Defendant as best I can. In that regard, all I can really rely on is their evidence as they present it and the law as I understand it to be. Failures in either aspect will produce a sub-par result; something not in either party's interest.

[251] It as such seems to me that when a defendant presents a counter-claim with two differing sets of figures without much in the way of explanation, the only way that I can do justice as between the affected parties is to adopt the position most in favour of the other party. Such an approach would appear to be particularly apposite these proceedings wherein there were not only two, but three reconciliations of Counter-Claim presented by the Defendant. I refer in that regard to Exhibit 70 wherein the Defendant's extra charges are set out at $9,819.26.

[252] I refer again to the Defendant's extra costs reconciliation at Exhibit 4, the second and third pages of Tab 9. I will use that reconciliation as my starting point, net of HST.

[253] The Defendant claims from the Claimant an additional $5,674.15. I will add to that, nominally, the $3,200 the Defendant charged the Claimant for the added roofed-in area over the house's back patio, for a total extra charges claim of $8,874.15. To that, I will add back in $1,974 of the damages nominally ordered payable to the Claimant – those items already having been removed from by the Defendant, for a new total extra charges claim of $10,848.15. From that, I will deduct 25% of the extra cost of driveway concrete and 25% of the $3,200 the Defendant charged the Claimant for the added roofed-in area over the house's back patio ($1,125) for an adjusted extra charges allowance of $9,723.15. The quality of those additions from the Claimant's perspective was objectively sub-par. Full allowances for those extra charges would have been unfair.

[254] That brings me to the following concluding summary.

[255] The starting point is, as it was, the initial agreed lump-sum price of $296,429.95 (by all accounts inclusive of HST). To that is added extra charges as objectively determined plus HST ($10,885.52) for a total of $307,315.47. From that is deducted the total payments reflected above ($262,322.44) for a new total of $44,993.03. From that is deducted the credits agreed by the Defendant ($27,700) for a new total of $17,233.03 due and owing by the Claimant to the Defendant, subject to set-off.

(k) Findings

[256] My principal finding is that the Defendant owes the Claimant $8,778 and the Claimant owes the Defendant $17,233.03. It only stands to reason that the former should be set-off against the latter. The Claimant shall pay to the Defendant $8,455.03. General damages, for which no specific submissions were made are disallowed.

[257] The Claimant has not addressed interest, perhaps assuming, in error, that interest cannot be ordered in addition to claims allowed in a sums of $25,000, the Court's maximum monetary jurisdiction. The Defendant has claimed interest. He does not say how.

[258] At a per diem rate of $2.32, the Defendant seeks annual interest of $846.80 on a balance of $16,923.88. That is an interest rate of 5% annually.

[259] There is no contractual interest rate. There is no agreement on interest. Five percent annually is high.

[260] Accordingly, I ask the Claimant and the Defendant to provide me with their written submissions on interest, its availability to them and at what rate. The written submission should be filed with me directly no later than April 29th, 2020. They should be no more than five pages each.

[261] The Claimant and the Defendant have both sought costs. The results of these proceedings have been mixed. Generally in such circumstances, costs are not ordered.

[262] Accordingly, I ask the Claimant and the Defendant to provide me with their written submissions on costs. The written submission should be filed with me directly no later than April 29th, 2020. They should be no more than five pages each.

[263] My Order follows.

DATED at Halifax, Nova Scotia, on April 14th, 2020.

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

O R D E R

AND WHEREAS evidence in support of and contrary to the within Claim was heard on August 26th, 27th and 28th, 2019; and on October 9th, 10th, 11th and 16th, 2019;

AND WHEREAS at the conclusion of the hearing of the evidence in support of and contrary to the within Claim, the Court directed that it would receive written closing submissions, from the Defendant by December 6th, 2019 and from the Claimant by January 31st, 2020;

AND WHEREAS the Court was pleased to render its reasons for decision in writing on April 14th, 2020, in which both the Claimants Claim and the Defendant's Counter-Claim were allowed in part;

IT IS ORDERED:

(1) Both the Claimants Claim and the Defendant's Counter-Claim are allowed in part.

(2) The Claimant's Claim is allowed as against the Defendant in the sum of $8,778 and the Defendant's Counter-Claim is allowed as against the Claimant in the sum $17,233.03.

(3) The Claimant's Claim shall be set off as against the Defendant's Counter-Claim such that the Claimant shall pay to the Defendant the sum of $8,455.03.

(4) This Court shall retain jurisdiction to address such issues of Interest and Costs as the Claimant or the Defendant, or both, may have; such issues to be addressed as directed in the written reasons for decision above.

(5) The rest and remainder of the Claimant's Claim and the Defendant's Counter-Claim are dismissed.

DATED at Halifax, Nova Scotia, on April 14th, 2020.

Gavin Giles, Q.C.,

Chief Adjudicator,
Small Claims Court of Nova Scotia