Cite as: Whittaker v. Crowell, 1992 NSCO 32

PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX C.H. No.: 73702

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

AUDREY WHITTAKER AND ZELMA WHITTAKER

Plaintiffs

- and -

LESTER GERALD CROWELL

Defendant

Darlene Jamieson-Fraser, Counsel for the Plaintiffs.
Robert W. Newman, Counsel for the Defendant.

1992, June 1st, Bateman, J.C.C.:- Audrey and Zelma Whittaker are the owners of a home located at 9 Crystal Court, Lower Sackville, County of Halifax, Province of Nova Scotia. Lester Crowell, who sold the home to the Whittakers, is the builder.

The Whittakers are claiming from Mr. Crowell the cost of remedial work performed to forestall erosion of the slope on the back portion of their property.

The principle issue is the interpretation of clause 1(h)(6) of the Agreement of Purchase and Sale, which read:

> "...In the event that landscaping on hill area in back of property should erode within the first nine months of 1989, said problem to be rectified by contractor at no cost to the purchasers."

The evidence is that the hill did erode well within the nine month period and that Mr. Crowell attended to the problem by placing new sods on the eroded area and constructing a rock wall at the foot of the hill.

The erosion continued, however, after the nine month period and Mr. Crowell denied any further responsibility.

The Whittakers, through their own physical labour and with the efforts of a landscape company rectified the problem at considerable expense.

While the doctrine of merger was discussed in the legal briefs both parties accept that it was a common intention that Mr. Crowell's obligation under Clause 1(h)(6) of the Agreement of Purchase and Sale would survive closing.

Mr. Crowell says his obligation under the clause was limited to replacing the sod if the original grass washed out. He specifically denies that he was responsible to rectify any drainage problem or other cause of erosion. He says, in the alternative, that the erosion occuring after his replacement was due to the Whittakers' failure to properly care for the sods. Thus, he says, the sods didn't take root and slipped down the hill. His efforts, he submits, were adequate but for the failure of the Whittakers to take care.

While other issues have been raised, such as oral guarantees provided by Mr. Crowell prior to the offer to purchase, the matter can be resolved on the wording of Clause 1(h)(6). The soil stability expert, David Hubble, has identified the cause of the soil and sod erosion on the hill to be inadequate drainage. His evidence is uncontradicted. Tony Ubdegrove, the landscaper who did the remedial work, testified that the ground was so wet that the sods composted and turned into moss with the sod roots rotting. He indicates that the soil was wet to a depth of about 5 feet. Again, this evidence is uncontradicted and corroborated by the evidence of the Whittakers as to the extent of water in their back yard. It refutes Mr. Crowell's assertion that the cause of the subsequent

sod failure was winter-kill or improper care of the sods. Given the extent of the water problem on the hill the sods could not have taken root.

In interpreting Clause 1(h)(6) I must first determine if the words are ambiguous. I do not find the words to be ambiguous. Under principles of strict interpretation the inquiry ends at that point. There is some authority, however, for the proposition that the strict rule generally precluding the admissibility of parol evidence has been somewhat relaxed. The issue turns upon the extent of "ambiguity" necessary before parol evidence can be admitted, where the contract is totally in writing. Certain, more recent, cases stand for the proposition that parol evidence is admissible in all cases of doubtful meaning.

In **Imperial Oil Limited** v. **Nova Scotia Light and Power Co.** (1977), 21 N.S.R. (2d) 321 (N.S.S.C.A.D.) (upheld on Appeal to S.C.C.) at page 5, Coffin J.A. states:

> "While it is true that parol evidence is not admissible to vary or modify the terms of the contract, it is admissible... when, as here, there is disagreement between the parties as to what the words 'production' and 'manufacture' mean... in other words, such Parol evidence is admissible to explain

> the contract or to assist in establishing the facts which the parties had in their minds at the time the contract was made, when, as here, they are not in agreement as to the scope and meaning of paragraph 9."

In this instance both parties seek to introduce evidence of their meeting leading up to the signing of the Agreement of Purchase and Sale.

Mr. Crowell advises that the Whittakers only expressed concern regarding the hill behind the house was that the sod would not grow due to the grade of the hill. The Whittakers, as well as both Real Estate Agents involved, have testified that the Whittakers frankly expressed concern about drainage and erosion problems on the back hill. I accept the evidence of the Whittakers where it conflicts with that of Mr. Crowell. I am satisfied that the Whittakers made it very clear to Mr. Crowell that they were concerned about any type of problem in relation to the back hill and that their concern principally surrounded drainage from the hill.

When Mr. Crowell did attempt to rectify the initial erosion problem he not only replaced the sods but constructed a rock wall at the foot of the hill. This is inconsistent with his assertion that he believed his only obligation was to replace sods.

Mr. Crowell's obligation under the Agreement was to "rectify the problem" if the "landscaping should erode". The clause did not limit him to replacing dead sod. I am satisfied that the only reasonable interpretation that can be attributed to the clause is that put forward by the Whittakers and includes the obligation on Mr. Crowell to correct the source of any erosion problem, whether drainage or other.

I am further satisfied that his efforts in the spring of 1989 fell far short of adequate to rectify the problem. The test is not whether his work was sufficient from his point of view but whether it fixed the erosion problem. It did not. Mr. Crowell asserts that the erosion in 1989 was limited to the middle portion of the hill and that the remedial work ultimately conducted was more extensive than necessary. In this regard I accept the evidence of the Whittakers and Mr. Hubble that by placing the new sods on the property in the spring of 1989, without dealing with the drainage problem, Mr. Crowell caused the water to divert to the left and right sides of the hill which resulted in erosion in those areas.

Mr. Crowell suggests that the drainage on the property must have been adequate or the Municipality would not have

issued building permits. I do not accept that representation. There was no evidence before me as to the extent of drainage requirements by the Municipality, nor was the Municipality joined by Mr. Crowell as a third party.

I am further satisfied that the subsequent steps taken by the Whittakers to rectify the problem were reasonable and not more extensive than necessary. The work done was consistent with the expert's report. They selected the least expensive landscaper and contributed hundreds of hours personally for which they are not claiming. Accordingly, the Whittakers shall have judgment against Mr. Crowell for an amount comprised of the following sums:

Green Tree Landscaping Limited	$14,750.00
Payzant Building Products Limited	$ 258.14
Wallace Lively Macdonald - Survey	$ 173.34
Terra Nova Landscaping Limited	$ 233.00
	$15,414.48

In addition I award pre-judgment interest from October 31st to May 31st at the rate of 5 percent simple interest per annum, which results in interest of $449.59.

The Plaintiffs shall have their costs of the action, including disbursements, based upon Scale 3 of Tariff A, rounding the amount involved to $16,000.00. This results in costs prorated at $2,325.00. The Plaintiffs' disbursements shall be proved by Affidavit and shall include an entitlement to costs of the expert's report and attendance.

Nancy Barkman

A Judge of the County Court
of District Number One