SUPREME COURT OF NOVA SCOTIA

Citation: Pavestone Creations Ltd. v. Kuentzel, 2013 NSSC 199

Date: 20130626
Docket: Hfx. No. 336708
Registry: Halifax

Between:

Pavestone Creations Limited

Plaintiff/
Defendant by Counterclaim

v.

Michael Danny Kuentzel

Defendant/
Plaintiff by Counterclaim

Judge:	The Honourable Justice Arthur LeBlanc
Heard:	October 29, 30 and 31, 2012; November 1, 2012; December 3 and 4, 2012; and January 14, 2013, in Halifax, Nova Scotia
Counsel:	Philip Whitehead and Laura Spurway, for the plaintiff/defendant by counterclaim James MacNeil and Tracy Smith, for the defendant/plaintiff by counterclaim

By the Court:

Introduction

[1] This case involves a dispute between the parties concerning a contract to build a house. The plaintiff contractor seeks damages arising from work done on the site before the relationship broke down. The defendant denies that the plaintiff is entitled to damages, and counterclaims for alleged deficiencies in the work that was completed by the defendant, and for remedial work he says was required after the plaintiff left the site.

Negotiating the construction contract

[2] The defendant and plaintiff by counterclaim, Mr. Kuentzel approached the plaintiff, Pavestone Creations Ltd. (Pavestone) about building a home. At the time, Mr. and Mrs. Kuentzel were living in another home they owned. Mr. Kuentzel testified that he had bought the property in 2009. Mr. Kuentzel testified that due to an injury arising from a motor vehicle accident, his wife, Johanna Kuentzel, required a house without stairs. They intended to build a single-story house.

[3] Pavestone is a general contracting company. Matt Abel, Pavestone's owner and operator, prepared an estimate, as well as a set of computer drawings, which were dated September 20, 2009. According to Mr. Abel, the initial estimate, with a full basement, was between $430,000.00 and $450,000.00. The estimate was reduced after a change in the size of the basement. Mr. Abel said this resulted in a basement area of 660 square feet, while the main floor would be 1951 square feet. The design included step footings, due to the elevation of the land.

[4] The parties agreed to a construction proposal prepared by Pavestone, dated October 19, 2009 (the contract). The contract indicated a build time for the house of "approximately 4 months," adding that "with weather conditions it may vary the time line." Mr. Kuentzel agreed at trial that he was aware that the timing was weather-dependent. The scope of work called for a "single story home with a 3 car garage and a 22' x 30' walkout finished basement." The contract specified that Pavestone, would "complete all excavation for the foundation and reuse the removed material for landscaping on the property" and would "apply crusher run to existing driveway." The stated total price, including HST, was $337,102.13.

[5] The payment schedule provided as follows:

> 10% Down
>
> Then the use of third party appraisal to produce draws. Pavestone Creation's [*sic*] to pay for appraisal fee's [*sic*]

No appraiser was ever appointed for the purpose of the draws.

[6] Mr. Kuentzel did not sign the proposal, but he did not dispute that he agreed to it. He took the contract to the Mortgage Centre and obtained a builder's mortgage from a bank.

Beginning work and the down-payment

[7] Mr. Abel said he spread some rock on the property before receiving the down-payment, but did not speak to any sub-trades. Pavestone retained a structural engineer, Brian Maillet, to provide detailed engineering plans, which was done in October or November, before the down-payment was received. Mr. Kuentzel paid for the plans, although this cost was included in the proposal. Mr. Maillet's invoice, dated November 12, 2009, was in the amount of $3,164.00.

[8] The contract required that ten per cent of the contract price be paid as a down-payment. Accordingly, the plaintiff paid $33,000.00 in late November 2009.

According to Mr. Kuentzel, the nature of the draws was discussed when he provided the down-payment. However, he did not show Mr. Abel any documents establishing the timing of draws at this time. He did not give Mr. Abel a copy of the mortgage. He said, Mr. Abel did not ask for it. Mr. Abel testified that once he received the down-payment, there was no discussion of when the next advance would be required.

Progress in the winter and spring of 2009-2010

[9] Between October 2009 and February 2010, the only work done was grubbing and laying crushed rock. Pavestone also obtained permits from the Department of the Environment (for septic approval) on 18 December, 2009, and from Halifax Regional Municipality (the construction permit) on 21 January, 2010. The work began in earnest in February 2010, when Carlton Construction, a subcontractor, excavated the area for the foundation. Mr. Abel testified that Carlton's personnel informed him that water began to appear during excavation, although he said they did not tell him how much water had appeared. Mr. Abel attributed the accumulation of water to a snowstorm. He said he had not anticipated water on the site in February, but that there was an early thaw. He testified that he arrived at the site on a Monday, after Carlton had finished excavating for the footings and removed its equipment, and found the excavation full of water, which Pavestone attempted to pump. According to Mr. Abel, a gas pump was insufficient to remove the water, and trenching became necessary. Mr. Kuentzel claims the trenches were not properly constructed.

[10] The court qualified Ray Leclair to give opinion evidence on water accumulation and compacting for footings in residential and commercial construction. In a report dated January 10, 2012, Mr. Leclair commented on the accumulation of water during the winter that led Mr. Abel to construct a trench system in an attempt to drain it off:

> [T]here is a substantial drop in the terrain between the road and the front of the house which, based on the natural topography of the lot directed water toward the area where the footings and foundation were to be built. One of the earliest issues Mr. Abel and I discussed was his efforts to divert the natural flow of ground water and surface water runoff from nearby storm drains. I observed the steps taken by him to divert water away from the construction site and believe that the steps were reasonable in the circumstances. Matt created trenching and created a series of settling ponds to allow for sentiment [sic] control and on each visit the system was functioning properly. The water can't simply be diverted away due to the proximity to the lake and the likely hood [sic] of runoff entering the lake and contamination from sediment particles. In my opinion the effort taken by Matt is industry standard and absolutely necessary. The cost associated would not be unreasonable…

[11] In his own report dated February 14, 2012, Thomas Wagner responded to Mr. Leclair's opinion about water accumulation. He stated that the steps described in Mr. Leclair's report seemed to be "in good judgment." However, he continued:

> Mr. and Mrs. Kuentzel have informed me these steps were taken only after they had insisted that a trench be dug to divert the water. Prior to this a pump was used to drain the water from the hole. A very minimal charge would be associated with this procedure, I would approximate $300-500. I do not know what charges were associated with this problem… My only disagreement on this matter is with respect to the costs associated with this problem and the procedure he used at the time…

Mr. Wagner went on to describe his own view of how serious water accumulation in a hole dug for a footing should be managed:

> There are two ways to remove surface water or rain water. Either divert it in the form of a ditch or pump it out. If the land will not provide suitable slope for the water to be diverted or is simply too costly, a pump is used. In my professional opinion, a simple drainage ditch (that would have been used for the perimeter drain of the home at a later date) would have easily alleviated the water problem. If there was a concern of water contamination of the lake which is used for the public water supply, a simple application could have been made to the Department of Environment. Unless a contaminate was found in the dig itself, I find it hard to believe they would deny the request simply because no matter what method was used it would still end up in the lake. It would be considered ground water. A holding pond to filter the water prior to entering the lake may be a suitable deterrent of contaminates. I would also like to point out that there was a substantial slope for a drainage ditch…

[12] Mr. Wagner's criticism of the steps taken by Pavestone is not extreme. He concedes that they appear to have been taken in good judgment. There was evidence that Mr. Leclair and Mr. Abel had worked together before and were on friendly terms. For this reason, Mr. Kuenztel says Mr. Leclair's evidence should receive less weight. I have taken note of this in assessing the evidence, but I am not convinced that Mr. Leclair's evidence is thereby tainted to any degree. I am satisfied that the measures Pavestone took to deal with water accumulation were reasonable.

[13] Mr. Abel also said that during March and April he brought in and spread extra gravel due to alterations to the driveway requested by Mr. Kuentzel. He estimated the cost at $1,000.00.

The discovery of bedrock

[14] In April 2010 Pavestone discovered bedrock under the foundation area. Mr. Abel attempted to break the rock with a small excavator and rock breaker, to no avail. Mr. Abel testified that he discussed the situation with Mr. Kuentzel. He estimated that breaking the rock would cost between $40,000.00 and $60,000.00. He said smaller rock-breaking equipment would cost between $150.00 and $180.00 per hour, while larger equipment would be more than $300.00 per hour. Because the construction was under restrictions due to being in a watershed, he said, blasting was not an option. Mr. Abel also testified that he and Mr. Maillet discussed the possibility of changing the location of the house on the lot, but concluded that there was no better location, and that a change would require changes to the step footers. The result of the decision not to break the bedrock was that the house would be elevated by eight feet. In order to raise the house, Pavestone brought in structural fill, which took several weeks, due to road restrictions permitting only smaller loads.

[15] Pavestone did not have the footings inspected during construction. Mr. Abel confirmed in his evidence that Mr. Maillet was not informed before Pavestone poured the concrete. Pavestone maintains, however, that the engineer was informed of, and agreed to, the method of building the footings. He said he took photographs of the work, and that Mr. Maillet approved of the method used. Mr. Maillet visited the site to check on progress on June 22, 2010. After looking over the site, he wrote to Mr. Abel, stating that the footings were in place, that no walls had yet been poured other than parts of three interior basement walls and "a bit of the exterior walls where they abut the basement." He raised several issues, including that fact that he "could not see any reinforcing steel protruding from the concrete," where there should have been steel visible. Further, Mr. Maillet found that the interior basement walls had been poured to a height of about three feet, leaving a "continuous cold joint running around it." Worse, he wrote, "without the vertical reinforcing being continuous from the top of the footing to the top of the wall, there is now a 'hinge' in the wall at the cold joint location. This will prevent the wall from resisting the bending caused by the lateral earth pressure. This wall will be unsafe when finished. Something will have to be done to rectify this situation."

The requested payment and termination of Pavestone

[16] Mr. Kuentzel testified that near the end of May, Mr. Abel he asked for a draw under the contract. Mr. Kuentzel said he told Mr. Abel that he would receive a further draw at the roof tight stage, in accordance with the mortgage arrangements. He did, however, request an early draw from the bank, but was refused. He asked the bank for a letter confirming the draw timing to Mr. Abel. According to the letter, dated June 16, 2010, the mortgage funds would be "disbursed via 3 draws at the following approximate percentage of completion: 30-35% (Building lock up), 60-65% (Drywall), 100% completion-occupancy permit must be issued." Mr. Abel testified that he could not proceed without a guarantee of payment, and the bank financing arrangements did not allow for this at that stage. Mr. Abel pulled Pavestone's people and equipment off the site.

[17] Mr. Kuentzel agreed that Mr. Abel had not seen any documents respecting the timing of draws before the bank's letter. Mr. Abel denied that he knew these details. It is worth noting as well that Mr. Kuentzel actually requested an advance from the bank at the time of Mr. Abel's request. I am satisfied on all the evidence

that Mr. Abel was not familiar with the specifics of the timing of draws under the mortgage before he saw the bank's letter.

[18] The Kuentzels wrote to Pavestone on July 3, 2010. They stated:

> This is a notice of termination of your services.
>
> As promised in your proposal it was indicated that build time would be approximately 4 months with weather conditions pending. The weather has been more than adequate for building. It is now July 3/2010 and we don't even have a full foundation. You were given a 10% deposit, In the amount of 33,000.00. At the time you were told the next draw would be at the roof tight stage as our financial institution has indicated on our Mortgage. As you should know you must provide us with Permits and Receipts, We also want the receipts and all papers from the engineer that was paid at our expense, that amount was given by cheque in the amount of 3164.00 in Nov.

[19] In all the circumstances, I conclude that it was the Kuentzels' letter that triggered the final termination of the contractual relationship. Mr. Abel's evidence was that he did not intend to leave the site permanently. That is not to say that he was entitled to payment as he requested, but I conclude that neither party regarded the relationship as having been terminated until Mr. Kuentzel delivered the termination letter to Mr. Abel – an event which by his own account surprised and upset Mr. Abel.

[20] Pavestone sent an invoice for $39,415.50, dated July 22, 2010. The invoice indicates that the contract was "voided due to customers [*sic*] failure to pay first draw." The invoice includes line items relating to septic system work, excavation, importing structural rock and fill, foundation concrete, insulating concrete forms (ICF), rebar for the footings, and labor relating to compacting rock. Certain items on the invoice did not correspond to inclusions in the contract. After taking into account sales tax and deducting the $33,000.00 down-payment, the invoice totalled $39,415.50.

[21] The Kuentzels did not pay the invoice. Mr. Kuentzel maintains that Pavestone never provided adequate invoices and receipts for the work performed, although he and his wife requested receipts in an e-mail on July 26.

Pavestone replaced by Houses to Homes

[22] In July 2010 Mr. Kuentzel hired another contractor to finish the work. Thomas Wagner, owner of Houses to Homes Construction, visited the site and provided an estimate to complete the project. After having new plans prepared, Mr. Wagner began putting up concrete walls. He testified that he had assumed that

the footings had been inspected and passed by the HRM building inspector. As it turned out, however, a footing inspection report dated August 9, 2010, required a geotechnical report before the footings could be passed. A second footing inspection report, dated September 2, 2010, gave a partial pass, pending a further geotechnical report and reinspection for footings that were not yet cast.

[23] After visiting the site again on August 31, 2010, the engineer, Bryan Maillet wrote to Mr. Wagner that "[a]t original sections 1 or 2, the new dowels have been placed and are fine. These walls were designed to be backfilled on each side." He went on to raise concerns about the placement of dowels in other sections. Mr. Maillet noted that it was his understanding that the basement was being expanded:

> While on site Russell explained that there is to be several new areas of basements. In at least one location, one of the basement walls will, in fact, become an interior wall and will be brought upwards as a stud wall. This means that new basement walls will be constructed elsewhere.
>
> I have not seen any revised foundation plans, so I know nothing of any revised layouts. I understand that the basement areas are not greater than eight feet in height and now fall under NBC, part 9. This means that you do not need an engineer for the remaining walls. In order to avoid future confusion and/or misunderstanding, I wish to clarify that I accept responsibility only for the portions of the foundation walls that I designed and indicated on the original drawings.

[24] In a second letter, on September 7, Mr. Maillet wrote that all the footings and walls in the original drawings had been structurally acceptable, as were the

walls that were modified by dowelling in place of keyways. He also commented on the state of other aspects of the design.

[25] As required by the footing inspection reports, Houses to Homes had a geotechnical inspection done by Maritime Testing in early September 2010, for the purposes of assessing the conditions of the lot and the adequacy of the foundation subsoils. The site inspection included a test pit evaluation of the subsurface founding conditions on September 3 and a geotechnical inspection, conducted during reconstruction of fill in the garage area on September 7.

[26] Mr. Wagner testified that the major issue facing him was that rockfill was falling away from beneath the footings in certain areas due to insufficient compaction. This was mainly a problem at the rear left area of the structure. On September 15, 2010, Scott Simms of Maritime Testing reported to Mr. Wagner that most of the footings had been cast (though not in the garage area) and parts of the wall and floor were constructed. Mr. Simms reported a “moderate depth of fill (i.e. 3 to 3.5 feet) … beneath footings over select areas of the structure.” The imported fill consisted of “a clean well graded rockfill.” From observing test pits, Mr. Simms concluded that the fill had been “placed on undisturbed native till and

included a buffer to accommodate splay of bearing. The fill was observed to be in loose condition; reportedly compaction of the materials had not been carried out.

[27] Along the rear at the left side, test pitting resulted in significant sloughing of the loose rockfill from beneath the footing area." Mr. Simms went on to state:

> Generally, poor compaction of the imported fill has been encountered, however, in light of the anticipated light loading and good quality of the rockfill utilized (i.e. clean well graded angular rockfill), we are of the opinion that significant settlement would not be expected. Some cracking should be anticipated. Subject to the extent of cracking following completion of building construction, repairs can be carried out if necessary…
>
> On the basis of subsurface investigation and site observations, and work supervised by MTL, we are of the opinion that the foundation subsoils are suitable for support of the structure with only minor settlement/cracking anticipated. Conditions are consistent with continued construction of the dwelling. If any cracks develop that warrant a repair, repair work should be postponed until completion of construction, when the majority of building loads are applied.

[28] On September 16, 2010, Mr. Wagner wrote to Mr. Kuentzel, informing him that in his view, the decision to infill under two bedrooms had resulted in the loss of about 528 square feet of livable space. He added that the infill had not been compacted, and therefore it had been necessary to remove and restructure the back corner facing the lake in order to meet engineering standards. He continued:

> The remainder of that section of wall was cast in place by my company with the understanding that this section had been compacted and approved, this was not the case. However, under the direction of the engineer the rest of this section will

> remain, but under substandard conditions. The customer will expect some settling and cracking. To counteract this condition I took it upon myself to install a flexible rubber membrane to prevent water penetration. Structurally the foundation meets minimal engineering standards. A customer should only expect high standards of construction.

[29] Mr. Wagner went on to comment on other aspects of the structure. He stated that the previous contractor had poured the concrete wall opposite the basement walk-out to a height of three feet, rather than eight feet, resulting in a horizontal cold joint at the three-foot level which would have been avoided by using a continuous eight-foot pour. In addition, Mr. Wagner wrote, it had been necessary to remove and rebuild due to inadequate compacting and the footings being built at a grade that made it "almost impossible to backfill."

[30] Mr. Wagner testified that the issues with the footings in the rear left of the building were dealt with by removing the footings in that area, digging to native soil, and building new footings. He also removed footings on the right side of the foundation and rebuilt them four feet deeper, which he said was necessary because the height was insufficient to maintain a four-foot frost wall, as it was not possible to backfill. At the greater depth, he encountered native soil, so that there was no need for further engineering or geotechnical reports.

[31] Mr. Leclair offered an expert opinion on the compaction for the footings, in response to the suggestion that the soil was not properly compacted under one of the footings. He indicated that he had not been directed to examine the soil compaction when he was on the site, but added that there were "no soil compacting issues which were so noticeable as to draw my attention," nor had Mr. Maillet's reports suggested to him that there was a problem with soil compaction "under or around the foundation or footings." He believed that "any minor issues with the settling of the soil could be effectively addressed at the time the foundation was backfilled." Mr. Leclair also suggested that the rain could have affected the compaction, which I do not accept. I accept Mr. Simms's opinion that rain would not affect properly compacted fill.

[32] Mr. Wagner replied to Mr. Leclair's opinion respecting the compacting of footings. After observing that the Maritime Testing report was prepared after the work was done, he said:

> When a footing is placed on non native soil and infill is required it is required that the infill be compacted to meet the National Building Code Requirements. When this is necessary outsourcing of a structural engineer and Geo Technical Engineer is used to determine the compaction rate of the soil based on the current situation. I do this to ensure the structural integrity of the soil. This is very common in commercial construction. The cost is minimal compared to a failed inspection report. Building inspectors require such a report when footings are cast on non-native soil. Mr. LeClair's comment on visual inspection would not be of any relevance whether or not he approved or disapproved of the soil conditions. This

> is very evident on the HRM footing inspection that states the footing [sic] are approved based on approval of geo-tech report. None was provided when I started the project.
>
> To clarify and to justify any of the above statements as a contractor I have to abide by a set of rules known as the National Building Code of Canada. None of the actions taken where [sic] derived from my opinion but by the qualified professionals in the field. The building inspector wanted a pass by the Geo-Tech, until that happened I could not proceed. The inspector also wanted an engineer approval on the far left hand corner of the foundation which I provided. When a footing is installed it must be on non disturbed soil or compacted soil that meets National Building Code standards. I do not hold certification to verify the standard was met nor does Mr. LeClair that I am aware of.

[33] Mr. Simms wrote to Mr. Wagner on March 22, 2012, in order to provide further details of the inspection and assessment work done in September 2010, with specific emphasis on the geotechnical condition of the site. He observed that the fill had been loose under parts of the structure:

> It is accepted geotechnical practice that structural fill placed beneath building foundations be well compacted. This was not the observed condition of the fill at the site. The fill was sufficiently loose beneath footing bearing areas at the rear left of the structure, such that the fill fell away from beneath the footing, although the edge of the test pit was approximately 2 to 3 feet away from the footing. In this area of footing undermining, it was the opinion of Maritime testing that the foundation be either underpinned (i.e. transfer loading from the footing to the level of competent stratum), remove this section of foundation and lower the footings to competent soils, or remove this section of foundation and reconstruct the structural fill followed by foundation reconstruction. We understand that lowering of footings to the undisturbed glacial soils (i.e. competent stratum) at the site was carried out.
>
> In the area of the garage, much of the loose site rockfill was subexcavated in thin lifts and compacted with several passes of a diesel plate tamper. Maritime Testing personnel provided on-site inspection during this remedial work to confirm that the materials were well compacted. At this location footings were removed, reportedly due to founding levels not consistent with providing suitable soil cover for frost protection.

[34] Further to his geotechnical inspection report of September 15, 2010, and his geotechnical conditions report of March 22, 2012, Mr. Simms provided an expert's report dated May 11, 2012. He was qualified to give expert opinion evidence on compaction. He noted that the purpose of the excavation and investigation of the four test pits in September 2010 was "to determine the depth, type, quality, and condition of fills placed and to evaluate the underlying native undisturbed soils subsoils at test locations." The specific areas of concern were "the back left corner and a portion of the garage." Mr. Simms concluded that removal and reconstruction of all the foundations and slabs was not required, but that "satisfactory performance of the structure could be achieved by reconstructing select areas identified by the test pit investigation as loose and of sufficient thickness that could lead to major structural damage to the structure."

[35] In inspecting the fill "below founding levels (i.e. bottom of footing levels)," Mr. Simms found that the fill increased in depth from the front to the rear, consistent with the natural downward grade of the property. The fill from the test pits consisted of "imported well-graded (i.e. particle sizes well distributed from large to small diameters) clean angular rockfill … consistent with a high quality

blasted and/or crushed quarry material…" Under the fill, he reported, were "undisturbed glacial soils," which he described as "a competent bearing stratum for placement of residential footings or engineered fill." He observed that "a suitable buffer of rockfill had been placed beyond the perimeter footing areas to accommodate the splay of bearing (i.e. transfer load from the footings through the fill to the underlying native undisturbed soils)." Mr. Simms observed that the fill was "of a loose relative density, consistent with the reported information that the fill had not been compacted with vibratory compaction equipment." There was "significant sloughing of the test pit sidewalls in the area of the rear left corner of the structure during excavation, including partial undermining of the foundation," indicating that "the fill was in a loose condition."

[36] Mr. Simms summarized his views with the opinion that the imported rockfill was generally poorly compacted, but that "in light of the anticipated light loading (i.e. single storey residential structure) and good quality of the rockfill utilized (i.e. clean well graded angular rockfill)," he did not believe that "settlement that could cause major structural damage" would be expected in most areas. He believed that some cracking in the structure was likely, however. In addition, in the rear left corner of the structure, where the fill was deepest and loose fill was observed, Mr.

Simms was strongly of the opinion that "there was high risk of major structural damage to the structure if remedial work was not undertaken to improve foundation support." Around the garage, he recommended "reconstruction of the fill … due to the observed poorly compacted fill and partially due to the fact that the foundations had been removed, and thus convenient and economical to do so."

[37] I am satisfied, on the basis of all the evidence, including that of Mr. Simms (which I prefer to Mr. Wagner's on this issue) that the infilling was inadequate and required remedial work in the area of the rear left of the house and the area of the garage.

[38] The Houses to Homes invoice, dated September 24, 2010, included charges of $400.00 for the services of Maritime Testing, $2,750.00 for repair of the back corner, and $400.00 for recompaction. These are amounts said to arise from the alleged deficiencies of Pavestone's work. Mr. Wagner testified that the total bill for the work done by Houses to Homes was higher than the original contract amount. In addition to remedying the alleged deficiencies, the heating system was upgraded and the living space was expanded.

Findings of fact

[39] Based on the evidence presented, I wish to identify certain findings of fact of particular significance:

1. On October 19, 2009, Pavestone and Mr. Kuentzel entered into a contract for the construction of a house on the Kuentzel property, at a price of $337,102.13, to be completed within approximately four months, weather permitting;

2. Pavestone, and its principal Matt Abel, had no significant experience in constructing private homes;

3. Mr. Kuentzel provided a down-payment of ten per cent ($33,000.00), as required by the contract, by the end of November 2009;

4. Mr. Kuentzel stipulated that a single-level walk-in design was required for the house, due to Mrs. Kuentzel's physical limitations;

5. In November 2009 Mr. Kuentzel paid for engineered plans provided by a structural engineer, Brian Maillet, in the amount of $3,164.00.

6. Pavestone obtained septic approval on December 18, 2009, and a building permit on January 21, 2010. Construction commenced in February 2010;

7. Pavestone's subcontractor, Carlton Construction, completed the foundation excavation in mid- or late February;

8. Due to groundwater and significant rainfall, Pavestone took reasonable steps to remove water from the site by digging trenches;

9. Due to soil conditions and the cost of rock-breaking as advised by Mr. Abel, Mr. Kuentzel agreed to the importation of rock in order to raise the level of the house by eight feet, and making it necessary to add steps to access the house and the garage;

10. Pavestone failed to properly compact the infill before construction of the footings, resulting in the need to remove portions of the footings;

11. Pavestone did not unduly delay the construction of the footings and foundation;

12. Pavestone brought aggregate onto the site without an agreement on the cost with Mr. Kuentzel;

13. The contract specified that payment draws would depend on third-party appraisal, whose fees were to be paid by Pavestone. Pavestone did not nominate an independent appraiser. Otherwise, the contract did not specify when payments were due;

14. In May 2010 Mr. Abel asked Mr. Kuentzel for further payment. Mr. Kuentzel attempted to obtain early funds from the bank, but was refused. The mortgage terms did not permit a further payment until the construction was 30 to 35 per cent complete;

15. Pavestone had not previously been informed of these conditions for draws under the mortgage;

16. As a result of not receiving a payment on demand, Pavestone withdrew its personnel and equipment from the site in June 2010;

17. On 3 July 2010 the Kuentzels sent a letter in which they informed Pavestone that its services were terminated;

18. After the breakdown of the contract with Pavestone, Mr. Kuentzel retained a replacement contracting company, Houses to Homes, which subsequently performed reasonably in finishing the project;

19. Mr. Leclair's opinion respecting the improperly compacted infill in portions of the foundation is rejected in favour of the opinion of Scott Simms.

These findings, along with the evidence generally, will be the basis for the findings of law.

Issues

[40] The issues are (1) whether Mr. Kuentzel breached the contract by failing to

pay a draw in accordance with the contract; (2) whether Pavestone provided work and materials for which it was not paid, entitling it to damages; (3) whether Pavestone breached the contract by failing to complete the work in accordance with the applicable requirements of time and quality; and (4) whether Pavestone's lien claim was a slander on title.

Pavestone's claim for unpaid work and materials

Breach of contract and quantum meruit

[41] Mr. Kuentzel stated that the bank's schedule for draws was discussed with Mr. Abel at the time of the contract. Mr. Abel denied this. Pavestone submits that the contract entitled it to progress draws from time to time with the support of a third party appraisal, without any restriction on the number or timing of the draws. Pavestone's position is that Mr. Abel was not informed when the contract was signed that there would be no draw until the roof-tight stage. Rather, Mr. Abel said he understood that progress draws would be on his request. The plaintiff maintains that the draw schedule, which was only produced when Mr. Abel requested a draw, amounted to an attempt to amend to the contract, to which Pavestone did not agree. As such, Pavestone says, it was a breach of contract for Mr. Kuentzel to

refuse payment when Mr. Abel requested a draw at the footings stage. By this argument, Pavestone was entitled to treat the contract as terminated for breach of warranty.

[42] In addition to claiming that Mr. Abel was informed of the draw schedule, Mr. Kuentzel says the contract was ambiguous, and that the ambiguity should be interpreted against the drafter. It is not disputed that Mr. Abel prepared the contract. In any event, Pavestone never arranged an appraisal as it was obliged to do under the contract. Mr. Abel testified that he did not arrange this. Pavestone says the defendant did not request an appraisal. Mr. Kuentzel's position is that no draw was due when Mr. Abel made the request. As such, he submits, nothing should turn on Mr. Abel's knowledge (or lack thereof) about the timing of draws under the mortgage, since it was never shown that a draw was actually due.

[43] Pavestone says it was not a termination of the contract for Mr. Abel to remove his equipment and to stop work; he was, he says, awaiting payment of a draw as requested. According to Pavestone, it was the defendant's termination letter which actually ended the contract. Alternatively, Pavestone seeks recovery through *quantum meruit*. As an alternative to the contractual claim, Pavestone

claims compensation for work and materials provided to Mr. Kuentzel on the basis of *quantum meruit*. Pavestone failed to plead *quantum meruit* in the statement of claim, and counsel requested an amendment in submissions at trial. While *quantum meruit* was not pleaded, it was referenced in both parties' pre-trial briefs. The defendant went as far as to state that "Pavestone is entitled to compensation on a *quantum meruit* basis for the value of the work it had performed to date," while denying that Pavestone is actually entitled to compensation on the facts. At trial, counsel for Pavestone requested an amendment to plead *quantum meruit*. There seems to be ample basis on which to allow such an amendment to the statement of claim. It is clear that the defendant is not prejudiced by the amendment.

[44] The basis for recovery is disputable. Mr. Kuentzel submits, in essence, that Pavestone repudiated the contract and should be denied recovery on that basis. It is true that Mr. Abel removed Pavestone's personnel and equipment from the site when Mr. Kuentzel did not provide further payment. I am not convinced, however, that either party regarded this as a breakdown of the contract at that point. I have found that Mr. Abel was not aware of the specific timing of the draws under the mortgage. Nor did the contract (provided, of course, by Pavestone) specify a

schedule. Mr. Abel's own evidence was that he did not intend to end the contract when Pavestone left the site. Further, the Kuentzels were very clear that the intention of their subsequent letter was to terminate Pavestone's services. In these circumstances, I am not prepared to find that Pavestone repudiated the contract. The parties share the responsibility for the termination of the contract. In any event, it would also be open to Pavestone to seek recovery by way of *quantum meruit*.

Construction contracts and quantum meruit

[45] It is well established that "[c]ertain terms are implied in every building contract: materials must be of proper quality, the work must be performed in a good 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…": *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81, at para 34, citing 2003 NSSC 253 (varied on other grounds). In the *Manual of Construction Law* (Toronto: Carswell, looseleaf), Howard M. Wise comments, at §3.5(b)(ii), that courts will imply a term in a construction contract that the work contracted for will be completed in accordance with a certain standard. What the comparative

standard is will depend on the nature of the work and the parties' expectations and may include the industry standard, a regulatory body's standards, or other acceptable standards.

[46] Another term which has been implied in construction contracts is that the contractor's work be completed in a proper and workmanlike manner. What constitutes a "proper and workmanlike manner" will seemingly depend upon the particular facts of each case.

[47] A similar phrase that is often used as an implied term in a construction contract is that the work must be of quality or suitable workmanship. If the workmanship is not of the quality that an owner could reasonably expect, the contract is in breach.

[48] There is authority to the effect that in determining the appropriate standard, the court should consider "all the circumstances of the contract including the degree of skill expressly or impliedly professed by the contractor": Donald Keating, *Building Contracts*, 4th edn. (1978), at 37, cited in *Stavely Community Centre v. L.&D. Masonry Enterprises Ltd.* (1983), 45 A.R. 375, [1983] A.J. No.

813 (Alta. Q.B.), at para. 14.

[49] The requirements of *quantum meruit* as it pertains to construction contracts were reviewed in *Magnum Contracting Ltd. v. DLG Contracting Ltd.*, [2004] N.J. No. 432 (Nfld. Prov. Ct. (Sm. Cl. Div.)), where Hyslop Prov. Ct. J. said:

> 13 In *The Law of Contract* (4th ed.) G.H. Treitel, the following may be found at p. 704:
>
> > "A party can claim a "quantum meruit" for work done or goods delivered under a contract which does not expressly provide how much he is to be paid. This will be the case where the whole agreement is implied from conduct, or where it is simply silent as to the rate of payment. The first question in such cases is whether the plaintiff was intended to have any legal right to be paid at all. If he was intended to have such a right, the court will award a reasonable sum."
>
> 14 The question of the doctrine of quantum meruit is yet another example of the flexibility of the common law. Of course the Courts of Equity were fused in the 19th century with the Common Law courts to mitigate what was seen as inflexibility and harshness associated with strict application of precedent and strict construction of the rules relating to pleadings. This doctrine arises out of contract law but falls into the area sometimes referred to as "quasi-contract." The doctrine is explained in Cheshire and Fifoot's *Law of Contract* (9th ed.) at 657 ff. At p. 657 the following may be found:
>
> > "The common law has long provided a convenient remedy when the plaintiff seeks, not a precise sum alleged to be due to him, but a reasonable remuneration for services rendered. He is then said to sue on a quantum meruit."

[50] Mr. Kuentzel says Pavestone breached the contract, entitling him to damages for the cost of remediating deficiencies, as well as damages for the

allegedly reduced property value arising from Pavestone's breach. He also claims damages on account of delay. Mr. Kuentzel claims that Mr. Abel held himself out as having more experience in homebuilding than he actually had, and that Pavestone should be held to the standard of a professional contractor. He says Pavestone's work fell below the standard of the skill and care of a qualified contractor. He says Pavestone failed to obtain necessary permits and approvals. He points to various specific deficiencies, including the reduction of usable space in the basement due to infilling; the improper compaction of the infill; the cold joint; and that alleged improper grading on the rear left and the garage. He also says the footings were constructed in an "unnecessarily laborious and costly" way, and that unnecessary work and expense arose from the trenching to remove water and from Pavestone's advice to elevate the house rather than breaking the bedrock.

The specifics of the claim

[51] The starting point of Pavestone's claim is the invoice that was sent to the defendant and his wife, dated July 22, 2010. As noted earlier, the invoice was in the amount of $39,415.50. It included the following items and amounts:

Septic/setback	$1,650.00
First excavation before thaw	$4,500.00
Excavator with breaker charge	$2,400.00
Imported structural rock (driveway and foundation built up due to lot conditions)	$16,500.00
Imported Fill	$1,600.00
Concrete for Foundation (6 pours)	$14,500.00
ICF Durablock forms	$4,500.00
15mm Rebar (footings and icf wall)	$2,400.00
Excavation for drainage trench and Placing earthy materials	$6,500.00
General labour (compaction of rock)	$10,800.00

[52] The claim as advanced at trial is somewhat different. Pavestone provided a revised list of services and expenses, which was further revised at trial.

[53] Mr. Kuentzel claims that Pavestone's claim for the value of the work it completed is excessive, and the evidence does not support the amount claimed. He says the $33,000.00 he paid at the time of the contract exceeded the costs of labour

and materials for the work Pavestone did. I believe that a reasonable assessment of the amounts sought must be based on the original contract and the invoice. I am satisfied that Pavestone should recover limited amounts on the basis of the contract for services and materials provided. These amounts will reflect the limited extent of the contractually-required work that was actually completed. Certain other items that were completed with Mr. Kuentzel's agreement, even where they represented departures from the terms of the contract, will be allowed on the basis of *quantum meruit* for work actually done and materials actually provided. I have considered the deficiencies alleged by Mr. Kuentzel in the process of determining appropriate amounts of recovery.

Trenching

[54] Mr. Kuentzel says Pavestone failed to use proper skill and judgment in leaving the foundation trenches open to the elements between February and May 2010, resulting in unnecessary costs in pumping the trenches out. Pavestone says the water accumulation was unforeseen and was not contemplated in the contract, and that the measures it took to remove the water – first pumping, then trenching – were reasonable and accorded with industry standards, as supported by the reports

of Mr. Leclair and Mr. Wagner. As noted earlier, I agree that Pavestone's methods were reasonable and did not fall below industry standard. I would allow the claim respecting the trenching work on the basis of *quantum meruit* in the amount of $2000.00.

Raising the property

[55] As to Mr. Kuentzel's claim that Pavestone should have excavated the bedrock rather than elevating the house, Pavestone says the steps taken to deal with an unforeseen bedrock issue were reasonable and were done in consultation with Mr. Kuentzel and with Bryan Maillet; in Pavestone's view it is very difficult to determine how easily rock will break prior to testing the area. The evidence does not convince me that Pavestone failed to meet an applicable standard in advising Mr. Kuentzel that building up the property was preferable to breaking the bedrock.

Foundation and footings

[56] Mr. Kuentzel says the failure of the first HRM footing inspection was due to Pavestone's failure to have an inspection by a geotechnical engineer before

pouring the footings. Pavestone also did not inform Mr. Maillet, the structural engineer, before the footings were poured. On inspection, Scott Simms, the geotechnical engineer, found that areas of foundation were loose and that major structural damage was possible. I have found that Pavestone did not sufficiently compact the fill in certain areas. This resulted in fill falling away under the footings, undermining their structure. Remedial work was therefore required, particularly on the rear left corner of the house.

[57] In response to Kuentzel's claim that it proceeded without necessary inspections, Pavestone agrees that Mr. Maillet was not notified before the concrete was poured for the footings. However, Mr. Maillet did subsequently receive a description of how the work was done, including photographs, and he visited the site on June 22, 2010, and found that the footings met or exceeded the necessary standards. Pavestone further submits that additional inspection and approval would have been required on account of changes to the design after Houses to Homes took over the project.

[58] In addition to the amounts for labour (discussed below), In respect of the foundation I would allow Pavestone to recover under the contract the following

amounts: $3,750.00 for clearing, $16,700.00 for footer materials, and $675.00 for foundation material (ten percent of $6750.00, to reflect the extent of work actually done). The following amounts are recoverable on the basis of *quantum meruit*: $10,469.00 on account of the gateway rock invoice, $1130.00 for imported fill, and $1600.00 for rock breaking.

Insulating concrete forms

[59] Mr. Kuentzel maintains that he never agreed to pay for insulating concrete forms (ICF), and that Mr. Abel stated that Pavestone would install ICF at no charge, since he intended to use the house as a show house to demonstrate Pavestone's use of ICF. He maintains that Pavestone has, in fact, used photographs from the house, including the ICF, as advertising on its website. Mr. Abel's evidence was that he understood that HRM planned to require ICF and that he would not have installed ICF had he known that Pavestone was not going to be paid for the project. It appears clear that ICF was not part of the contract and that no claim can be sustained for it.

Use of Pavestone's tools

[60] In addition to the materials claim, Pavestone claims $7,345.00 for use of its own tools, namely a skidsteer, an excavator, and a dump trailer. Counsel for Mr. Kuentzel submitted that this amount fell within the "overall costs" in the contract. I agree; I do not see a basis in the contract for a separate claim for the use of Pavestone's own tools.

Labour costs

[61] Pavestone further claims labour costs of $23,346.01, comprised of $12,223.21 for 373 hours of work allegedly done by three Pavestone employees at $29.00 per hour, and $11,122.80 for 248 hours of work allegedly done by Mr. Abel at $39.00 per hour. There was no further breakdown of labour costs provided, such as time sheets, which Mr. Abel testified he could not locate. Counsel stated that the best evidence was Mr. Abel's testimony, in which he described the work being done, and the photographs taken during the work.

[62] The contract specified labour costs for building the footings ($6,300.00) and the foundation ($8,000.00). On the basis of the work actually done during the life of the contract, I would allow recovery of $6,300.00 for labour on the footings and $800.00 for labour on the foundation. I would also allow $2,000.00 for labour on account of rock compaction.

Profits and overhead

[63] In addition to materials, tools, and labour, Pavestone claims "profit margin and overhead costs" in the original amount of $19,066.63, with a discount of $6,700.20, leaving a profit claim of $12,366.43. Mr. Kuentzel says Pavestone completed only a small part of the project, and says that any claim of this kind would be minimal. While Pavestone apparently discounted $6,700.20 from its profits, Mr. Kuentzel says this is not sufficient, given the early stage at which the contract broke down.

[64] On the basis of *quantum meruit* I would allow recovery for job site supervision of $2000.00, and for provision of a portable rest room of $200.00. With respect to planning, I would allow an amount of $3,370.00.

Delay

[65] Mr. Kuentzel also complains of delay in Pavestone's work. This was one of the issues referred to in the termination letter. According to the *Manual of Construction Law*, at §3.5(b)(iii), where a construction contract contains a date for full or substantial completion,

> [f]ailure to complete by the stipulated date, due to actions which are the responsibility of the contractor, will be a breach of the contract by the contractor. Where the contract contains no specified date for the completion of the contractor's work, the courts may infer that the contract contains an implied term that the work be completed within a reasonable period of time.
>
> What is reasonable in any given situation will depend on the nature of the work being undertaken and the conditions under which work is being performed…

[66] Mr. Kuentzel says it was a term of the contract that Pavestone would construct the house within four months, depending on weather. The contract was concluded in October 2009, but, he says, no significant work was done until February 2010, and by June 2010 all Pavestone had done was to build the footings and part of the foundation. He says this delay was unreasonable in the circumstances.

[67] Pavestone's position is that the parties knew when they made the contract and when Mr. Kuentzel provided the deposit that "build time" would commence when the ground was broken. The deposit was only provided around the end of November 2009. Construction could not begin until the necessary permits were obtained, a process which began with obtaining septic approval, which arrived on December 18, about three weeks after the deposit was received. Pavestone applied for the construction permit on January 7, 2010, and it was approved on January 21. Excavation began in February. Pavestone agrees that there were delays caused by an early thaw, water accumulation and the bedrock, but says these were unexpected delays that were dealt with in a timely and reasonable manner. Further, the contract addressed the possibility of unforeseen weather-related delays.

[68] I am not satisfied that Pavestone caused undue delay in the project. I note that it was not any alleged delay that caused the breakdown of the contract, but rather Pavestone's request for further payment.

[69] Mr. Kuentzel also says that Pavestone is in no position to claim that the delay was in part attributable to a shortage of funds. The contract provided for a ten per cent down-payment, and the use of third-party appraisers (at Pavestone's

expense) to produce draws. The first bank draw was due when the construction was 30 to 35 per cent complete, at the stage of "lock-up." Mr. Kuentzel says Pavestone never brought the project to that level of progress. I agree that Pavestone had not met the prerequisites for further payment and cannot attribute any delay to Mr. Kuentzel's failure to pay.

The counterclaim

[70] Mr. Kuentzel says Pavestone's failure to perform the work to the required standard, and the resulting breach of the contract, entitles him to damages for foreseeable losses resulting from Pavestone's breach. He cites the "ordinary rule" for damages for breach of contract in a building case as described by Anglin J. in *Cunningham v. Insinger*, [1924] S.C.R. 8 at 16-17, that "the measure of damages for breach by a defendant of a contract to perform work on the plaintiff's land is the actual pecuniary loss sustained by the plaintiff as a result of such breach, i.e., the difference between what would have been the value of the premises had the work contracted for been done and their value with it unperformed."

[71] Mr. Kuentzel says it is impossible to restore him to the position he would

have been in but for the breach – that is, the same position as if the contract had been performed. Where the actual loss resulting from the breach is difficult to estimate, the court must "do its best to estimate the loss," in accordance with the principle originally derived from *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267: see the *Manual of Construction Law* at §3.6(c)(i). He cites *Garrett v. Quality Engineered Homes Ltd.* (2006), 50 C.L.R. (3d) 129, [2006] O.J. No. 588 (Ont. Sup. Ct. J.). In that case, the house was not placed on the proper location on the lot. This resulted in a loss of important view lines. The plaintiff had taken reasonable measures to raise the issue during construction. The total property value was $456,000.00. The trial judge assessed the value of the view at fifty percent of the property value ($228,000.00), and assessed the damages at ten percent of that figure ($22,800.00)(paras. 27-34). On this basis, Mr. Kuentzel says the value of his house being built level with the ground amounted to five per cent of the property value. Based on the contract figure of $337,102.13, this would result in damages of $16,855.11.

[72] Mr. Kuentzel also says it was important to him and his wife – who he says has trouble walking up hills – to have a house without steps and with a level garage, as called for by the contract. There was evidence from Mr. Abel that he

was aware that Mrs. Kuentzel had problems with stairs. That being said, Mrs. Kuentzel did not testify, and in the absence of such direct evidence I am not willing to find that the altered design – to which Mr. Kuentzel agreed – justifies damages on that account.

[73] It has been said that general damages are ordered in building contract cases "only in the most egregious cases": *Force Construction Ltd. v. Campbell*, 2008 NSSC 149, at para. 124, affirmed at 2009 NSCA 20. Pavestone denies that Kuentzel is entitled to general damages.

[74] Mr. Kuentzel's counterclaim, as framed at trial, advances a claim based on Mr. Wagner's description of the deficiencies in the work done by Pavestone. The relevant amounts set out in Mr. Wagner's invoice relate in particular to the remedial work that was required on the read left corner of the house, arising from the inadequate compaction of fill. They comprise $400.00 for the services of Maritime Testing, $400.00 for recompaction in the garage area, and $2750.00 for repair of the back corner. Based on my findings respecting the issues with that portion of Pavestone's work, I allow the counterclaim in the amount of $2750.00.

Slander on title

[75] Mr. Kuentzel alleges that the claim of lien advanced by Pavestone was a slander on title. The elements of slander on title were set out in *MacLean v. Morash*, 2003 NSSC 219, [2003] N.S.J. No. 426, at para. 20: "Slander of the title requires that the following elements be proved: (1) that the defendant published words in disparagement of the plaintiff's property, (2) that such words were false, (3) that such words were published with actual malice, (4) that the plaintiff sustained special damage as a result."

[76] According to Kuentzel, the registration of lien amounts to a publication that affects the property owner's interest in the property, in accordance with section 8 of the *Builders' Lien Act*, R.S.N.S. 1989, c. 277. He says the allegation that $39,415.50 was owing to Pavestone was false in view of the evidence at trial.

[77] The element of malice requires the defendant to act "from some improper purpose, with the intention of causing injury to the plaintiff, in other words, out of spite or ill-will": *Maclean* at para. 23, citing G.H.L. Fridman, *The Law of Torts in Canada*, 2d edn. (Toronto: Carswell, 2002) at 827. Mr. Kuentzel argues that the

magnitude of the discrepancy between the amount of the lien ($39,415.50) and the actual value of the work is evidence of malice. He also says the delay was evidence of malice, arising from his refusal to pay Pavestone additional funds. Mr. Kuentzel claims damages arising from the loan he took out to pay money into court to vacate the lien. He says the loan of $20,000.00 had incurred interest of $2,060.25 by April 18, 2012.

[78] Pavestone denies any malice and takes the position that the lien was filed solely for the purpose of receiving compensation for work and materials related to the project. Pavestone also says that even if one part of the foundation area was improperly compacted, the resulting cost was $3550.00 plus tax invoiced by Maritime testing on September 24, 2010. This amount, it is submitted, would not affect the overall validity of the lien.

[79] Mr. Kuentzel has not established an entitlement to damages on account of slander of title. I do not accept that it is reasonable to infer malice from the mere act of filing the lien.

[80] There is also a suggestion that the claim for lien was filed out of time. I

have found that the contract only terminated when the Kuentzels wrote to terminate Pavestone's services on July 3. The lien claim was entered on August 6. This is within the 60-day period set out in the *Builders Lien Act*, R.S.N.S. 1989, c. 277, s. 24.

Conclusion

[81] Pavestone is entitled to recover damages on the basis of contract or *quantum meruit* in the amounts set out above. For convenience, I will summarize them here:

Trenching	$2,000.00
Foundation and footings:	
Clearing	$3,750.00
Materials (footings)	$16,700.00
Materials (foundation)	$675.00
Gateway rock	$10,469.00
Imported fill	$1,130.00
Rock breaking	$1,600.00
Labour (footings)	$6,300.00
Labour (foundation)	$800.00
Labour (compaction)	$2,000.00
Supervision	$2,000.00
Portable rest room	$200.00
Planning	$3370.00
Total	$50,994.00

[82] From the total of $50,994.00, it is necessary to deduct the amount of the down-payment ($33,000.00) and the amount allowed on the counterclaim ($2750.00). The result is a total of damages due to the plaintiff of $15, 244.00.

[83] If the parties are unable to agree on pre-judgment interest, I will hear them on that issue.

[84] The parties may provide submissions on costs by August 30, 2013.

LeBlanc, J.