IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Blackburn v. Gillespie, 2016 NSSM 23

**Claim:** SCAR No. 444201
**Registry:** Annapolis Royal

**Between:**

SHERRI BLACKBURN

CLAIMANT

– and –

MICHAEL GILLESPIE

DEFENDANT

Adjudicator: Andrew S. Nickerson, QC

**Heard:** February 4 and 16, 2016 at Annapolis Royal
with written submissions of counsel completed March 29, 2016

**Decision:** May 17, 2016

**Appearances:** Gregory J Affleck, for the Claimant,
Maggie A. Shackleton, for the Defendant,

FACTS

On April 17, 2014 the parties entered into a written contract whereby the defendant would construct a versa lock retaining wall on the claimant's property. The description of the work to be performed is as follows:

> Installation of a VersaLok retaining wall system
>
> The retaining wall will go the width of the existing lawn (fence to fence) & curve in along with the fence.
>
> The wall will be built in two different levels with a set of stairs through the west side.

> The top of the first level will be built so a garden can be installed & the top level will be sodded.
>
> The wall will be constructed with natural weathered VersaLok, have drainage stone& pipe installed behind the wall. The blocks will be pinned with VersaLok pins and reinforced with geogrid to strengthen the wall.

The price was to be $12,160 plus HST for a total of $13,984. A deposit of $3,500 was paid at the time of signing. The copy before the court was not signed by the claimant but she testified at trial that this was the contract that she agreed to and entered into. Sometime after the work began the claimant paid a further $5,000 making the total advanced to the defendant $8500.

The claimant testified that her understanding of the agreement was that the wall was to go from "fence to fence" and was to be curved at the ends. It was to have stairs "through" the wall and was to be reinforced with "geo-grid".

The work began on June 29 and was completed on July 9. The claimant was not at home most of the time when the work was performed. Shortly after the work commenced the claimant began to have concerns about the way in which the wall was being constructed. She says that she left a note on one of the excavators of the defendant which was at her site raising various concerns. Her concerns related to the fact that the wall did not go "from fence to fence" and did not "wrap around" at the ends. The defendant did attempt to correct the curves at the ends of one wall but the claimant was dissatisfied that this did not include the bottom wall. She also expressed concerns that the lower wall was not high enough, that the soil level between the two walls was not level and that the bottom stairs were not constructed correctly. She says that the stairs were "in front of the wall" and not "through the wall" as agreed. She says that the construction of the stairs was unstable and was not tied in the wall. She says that she spoke to the defendant about these concerns on August 8 and the defendant disagreed that his work was defective in any way or failed to comply with the contract. The claimant states that in that conversation she told the defendant his services were no longer required.

I found the claimant to be a straightforward witness and did not have any concerns about her truthfulness. She admitted that although she is a qualified carpenter she is not familiar with the construction of retaining walls. I find her evidence is only helpful with respect to determining what the contract was and the dealings between her and the defendant.

The defendant sued the claimant in the Small Claims Court for payment of the balance of the monies due. Neither party was represented by counsel in that claim. The claimant in this action filed no counterclaim in the prior action brought by the defendant. The documents relating to that action can be found in Exhibit 1 Tab N. On June 11 2015 Adjudicator Kirby dismissed the claimant's action after a hearing. [Exhibit 1 Tab P] The defendant argues that because of the doctrine of res judicata the action before me is barred.

The claimant was completely dissatisfied with the work performed by the defendant. She engaged the engineering firm of Hiltz and Simone to examine the work and to make recommendations because she wanted to ensure that any repair was done correctly.

The claimant proceeded to hire Kenneth Bowlby to repair the work. Mr. Bowlby reconstructed the wall and steps and his invoice was $16,898.96. She says that Mr. Bowlby had to purchase materials to make the wall higher.

Thomas Rice has been employed by VJ Rice Concrete for over 35 years and has a bachelor's of business Administration. His company is a distributor for the versa lock retaining wall system and he is very familiar with that product. This company has information as to the correct installation and provides advice to customers purchasing this property as to the correct installation. These materials are also readily available online. The materials were not purchased by the defendant from VJ Rice and therefore he did not provide any information or guidance to the defendant. He did sell the additional blocks required by Mr. Bowlby to Mr. Bowlby.

Mr. Bowlby spoke to Mr. Rice about the reconstruction of the wall at the claimant's property. Mr. Rice indicated that he did see concerns with the construction performed by the defendant and recommended to Mr. Bowlby that he engage the services of a professional engineer as to the correct methodology for resolving the problems the wall.

Alexander Dewar has been a professional civil engineer since 1973 and obtained his P. Eng. designation in 1975. He is qualified as a professional engineer in Nova Scotia, Alberta and Ontario. Mr. Dewar has extensive experience with retaining walls, is familiar with soil mechanics and has designed and supervised the construction of retaining walls. He had done no work for the claimants before this occasion and did not know her. He was asked for his opinion by the claimant. On April 21, 2015 he attended this site and observed both walls constructed by the defendant and took several photographs. His observation was that the walls

were leaning forward up to 3 inches or were vertical. He found the stairs to be “wobbly”, “loose” and “shaky”. His report is at Exhibit 1, Tab Q. In cross-examination it was suggested that he had not himself personally been at the site and his report may have been based on the report of one of his employees and the review of photographic evidence. I do not think that this takes away from the reliability of his evidence. The member of his staff who would have attended would also been a professional engineer. I am satisfied that the evidence he gave of the condition of the walls was reliable and I have no difficulty accepting the observations testified to and his evidence as a whole. Even if it were technically hearsay I am permitted to receive and rely on this evidence if I consider it reliable.

In his review of the relevant factors he examined the manufacturer’s recommendations as to the foundation required, the method of stacking and interlocking blocks and the question of using a geo-grid mesh to ensure stability at the higher part of the walls. He testified that geo-grid is a mesh like material with a fairly large mesh of three or 4 inches. Its purpose is to tie the wall into the soil so that the wall and the soil behind it are tied together preventing the pressure of the soil from moving the higher part of the wall forward. He was unable to detect that any geo-grid had been used. He said that typically one could see it from the front of the wall between the layers of blocks because there will be a slight difference in the thickness of the gap between layers of blocks. He could see none in the wall constructed at the claimant’s property. He said that this wall was at least 4 feet and required at least one layer of geo-grid part way up the wall. He said it is a judgment call depending on the nature of the soils whether one would use one or two layers of geo-grid. He said that if he was designing this project he would have utilized two layers.

Mr. Dewar testified that the versa lock blocks are designed to have a three-quarter inch offset on each layer of blocks which would make the wall lean slightly towards the soil side. [This can be seen in Mr. Dewar’s report and in Exhibit 8 Tab E.] He said that this particular wall should have leaned backwards into the soil approximately 6 inches from the base to the top. He also said that the bottom courses should have been essentially buried. He said that the versa lock system is designed so that when the next layer of blocks is placed there is a locking pin that can be dropped into the upper block that locks it to the lower block. If this was installed correctly the wall would have the three-quarter inch setback which the blocks are designed to create.

Mr. Dewar testified that the stairs were not interconnected to the wall contrary to the manufacturer’s recommendations. He also pointed out that the steps were not built into the wall.

His opinion was that both the wall and the steps from a construction and engineering point of view were unsatisfactory, unsafe and needed remediation.

As to the remediation required, Mr. Dewar was definite that there needed to be more soil at the base. He said that possibly the first 2 feet of the wall could be left but geo-grid would definitely need to be installed. He said that he could not be certain about this because one would really need to examine the state of the soils and the foundation after the wall had been partially dismantled to be sure.

Mr. Dewar's account is found at the last page of his report in the amount of $685.40.

I found Mr. Dewar to be a professional and reliable witness. I find that his description of the state of the wall when he examined it is credible and reliable and I place substantial reliance on his evidence.

Kenneth Bowlby has been doing landscaping work for most of his lifetime and has been doing it full time for the past five years. He was engaged by the claimant to correct the deficiencies in the retaining wall and stairs constructed by the defendant. He says that the claimant called him as a result of her unhappiness and pointed out to him that she had engaged an engineer to look at it. He did not speak to Mr. Dewar himself but reviewed his report which was provided by the claimant. Upon examining the structure he found that the wall was leaning forward approximately 3 inches at the 4 foot height. He observed that the stairs were not "pinned right" and blocks could fall off. He was advised by the claimant that the stairs were to be inserted in the wall.

Mr. Bowlby admitted that he had only built four walls using the versa lock system and had taken no training. He confirmed that he consulted with Mr. Thomas Rice and obtained appropriate materials from him.

Mr. Bowlby dismantled the wall and the stairs and as he had determined that they had to be entirely rebuilt. When he dismantled the wall he found that there was a type of geotextile fabric about halfway up the wall extending into the soil. This was not the type of grid he was familiar with as he always used a wire mesh grid himself. He said that this may be acceptable but it was not what he would use. He found that the area between the two walls was not sufficiently level for that area to be usable by the claimant for tables or seating.

I find that in reconstructing the wall he increased the wall height by one row on the top wall and two rows on the bottom wall and widened the structure by approximately 8 feet. He also inset the stairs. He said that he utilized the materials on site to the extent that he could but required geo-grid, additional blocks and 10 loads of fill. He utilized two rolls of geo-grid at a cost of $600 each. He needed approximately $5000 of additional blocks because he could not reuse the tops and required more blocks. He says he used 98% of the existing blocks but needed to replace 85% of the tops because the initial ones were glued down and could not be reused. He needed 10 loads of fill out $150 per load. He needed to construct a roadway or passageway over the claimant's property in order to access the lower wall. The reconstruction was carried out by him on the site with a crew of three members and took approximately 2 ½ weeks.

Upon disassembling the wall he found crushed rock behind the wall. He found that the foundation was insufficient because it was not level and had to be reconstructed. He completed the work by July 17, 2005 and rendered an account in the amount of is $16,898.96 which is at Exhibit 1 Tab V.

Mr. Bowlby acknowledged that Mr. Gillespie is a competitor of his. Despite this I found Mr. Bowlby to be a straightforward witness and to be knowledgeable about the subject matter. I perceived no animosity towards the defendant. I did not find anything in the cross examination that would cause me to question Mr. Bowlby's truthfulness or accuracy. I accept Mr. Bowlby's description of what he saw and what he did as accurate. I am satisfied that he had the knowledge to determine whether the foundation needs to be replaced and on the basis of his evidence I am satisfied that that was required.

The defendant testified. He testified that he had been in the landscape business since 2008 and had built upwards of 50 retaining walls. He took a two-year landscape and horticultural program at KingsTech. He said he had experience with the versa lock system and did not get technical material because he knew how to use this product. He said that the wall was to be 3.5 to 4 feet tall and that the versa lock specs require no more than 10% of the wall to be in the ground. He uses geo-grid and says that it is only required when the wall is greater than 4 feet or if there is more pressure in the soils. He says that he installed geo-grid in each wall.

He referred to the contract between the parties at Exhibit 1 Tab A. He says this was the only written agreement between the parties and notes the wording "set of stairs through the west side". He says that the parties never discussed whether steps were to be in the wall or in front

of it. He said that the claimant told him that she wanted the top level such that she could use her as a seating area.

He says that he only saw the claimant on site two or three times and on those occasions she expressed no complaints to him. He says that he did receive notes from the claimant about her concerns and did speak to her on the telephone the same day. He told her that to make the wall go from fence to fence he would need to get onto the neighbors' property and would have to excavate on the neighbors' property. He spoke to them and they would not give permission. He said that the claimant told him it would be okay if the wall was 1 foot from the old fence line. He said that in the construction which he performed the top wall was curved at the ends and that the lower wall was straight due to getting too close to the neighbors' line.

He says that he did have a telephone conversation with the claimant on August 8 wherein she indicated that she was not happy and told him to stay off of her property. He sent her an invoice for $4984 being the balance of his contract and "extras". He says that he never heard back from her after 4 or 5 phone calls and so he filed the Small Claims Court action for the collection of his account.

The defendant testified that the wall must have been correctly installed because there is a pin which goes down through the upper layer and if incorrectly installed will fall through on these pins are approximately 6 inches long.

Shane Langley has worked for the defendant for approximately three years and says that he has worked on three dozen retaining walls the majority of which were constructed with the versa lock system. He says he was on site at the claimant's property for approximate two weeks. He did not speak with the claimant. He says that in his view the foundation was correctly built. He said that the wall must have been correctly constructed because all of the blocks were pinned and had a three-quarter inch setback. His evidence was that it must have been right because if you put the pin in the wrong spot they simply fall through. He confirmed that geo-grid was used and the reason that the engineer could not see it is that it was laid out 2 inches in from the face. He does not recall how deeply the geo-grid went into the soil but stated that they did use a mesh type geo-grid that would look like "agreed on a piece of paper". I took him to be referring to the look of a graph paper and to be describing the kind of mesh that Mr. Dewar was talking about.

Brendan Skeldon has worked for the defendant for five years. Prior to that, he worked for town of Bridgetown Public Works Department. He has no formal education and landscaping but says he is built 30 or 40 retaining walls and has worked with versa lock blocks. He was on the job at the claimant's property for most days. He said that the base was constructed of 8 inches of class A gravel with 4 inches of crusher dust on top of it, compacted every 2 inches. He says that the blocks were assembled correctly because if they are not stacked correctly the pins will fall through. He says he was involved in installing geo-grid on both walls approximately halfway up. He referred to it as a "textured grid". He also did not speak to the claimant.

While I do not doubt Mr. Langley's or Mr. Skeldon' sincerity I have serious questions about their reliability. I had the distinct impression that their recollection of the events was not specific to the events and more based on their impressions of what "must have been". We know from other evidence that a mesh type grid was not used. I was not satisfied with the explanation of how or why the foundation was correctly installed. It seems logical to me that if the pins were correctly installed we would not be faced with the fact of the wall leaning three or 4 inches forward. I cannot reconcile their evidence with this. I prefer the evidence of Mr. Dewar and Mr. Bowlby.

While I do not find that the defendant was attempting to mislead the court, I do find that his evidence was not as detailed and clear as that of Mr. Bowlby and Mr. Dewar. I also found his descriptions of his dealings with the claimant not to be as precise as the evidence given by the claimant. I also take into account that the defendant is an interested party. Mr. Dewar is clearly an uninterested party. I do not find that Mr. Bowlby's status as a competitor of the defendant played a role in the truthfulness and accuracy of his evidence. Where the evidence of the defendant differs from that of Mr. Bowlby and Mr. Dewar, I prefer evidence of Mr. Bowlby and Mr. Dewar. Where the evidence of the defendant and that of the claimant differ I prefer that of the claimant.

ISSUES

Is the claimant barred from judgment in this action due to the doctrine of res judicata or issue estoppel?

What did the contract between the parties obligate the defendant to provide?

Did the defendant breach the contract?

What damages did the claimant suffer?

Should the damages be reduced on the principle of betterment?

LAW AND ANALYSIS

**Res Judicata**

I will first deal with the question of res judicata and the related doctrines of issue estoppel and abuse of process. I consider that the principles involved in all of these legal doctrines are sufficiently similar that I will deal with them together.

I have no difficulty in finding that the Small Claims Court can apply these doctrines. **Kameka v. Williams, 2009 NSCA 107** is more than ample authority for the proposition. In addition there are many cases where adjudicators in the Small Claims Court have applied this doctrine without appeal.

There are many cases describing and applying the doctrines. I am satisfied that Justice Murphy in **Imperial Oil Limited v Atlantic Oil Workers Union, Local 1 (2004) Carswell, NS 410),** at para. 56 precisely and succinctly captured the principles to be applied when he stated:

> "There are three preconditions to the operation of res judicata:
> (1) There must be a final decision pronounced by a court of competent jurisdiction;
> (2) The parties to the judicial decision or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privy; and
> (3) The same question (cause of action or issue) must have been decided." *[My emphasis]*

I have no difficulty determining that points one and two of Justice Murphy's analysis are fulfilled in this case. The prior decision before adjudicator Kirby was a final decision on the matter before her. The parties are the same and so the second point is satisfied. What causes me difficulty is the third point. Justice Murphy specifically says that the "same question" must be either the same "cause of action" or "issue". I must address the question of whether the defendant in this case suing for the collection of debt constitutes the same cause of action or issue as the matters raised in this matter that I must adjudicate. While many of the facts and relevant evidence will be the same or similar I have difficulty concluding that the matter before me arises from the same cause of action or issue.

Counsel for the defendant has not cited any case where res judicata, issue estoppel or abuse of process was applied because a party failed to raise a counterclaim. I have not been able to find any case containing a judicial pronouncement specifically on this point.

I have considered the judgment of the Supreme Court of Canada in **Angle v. Minister of National Revenue [1975] 2 S.C.R. 248**. Dickson J. states:

> 3 In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [2], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. We are not here concerned with cause of action estoppel as the Minister's present claim that Mrs. Angle is indebted to Transworld in the sum of $34,612.33 is obviously not the cause of action which came before the Exchequer Court in the s. 8(1)(*c*) proceedings. The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [3], at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").
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> Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [4], at p. 935, defined the requirements of issue estoppel as:
>
> > ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies....
>
> Is the question to be decided in these proceedings, namely the indebtedness of Mrs. Angle to Transworld Explorations Limited, the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's case* [5], quoted by Lord Selborne L.J. in *R. v. Hutchings* [6], at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope* [7]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *per* Lord Shaw in *Hoystead v. Commissioner of Taxation* [8]. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.* [9], at p. 301, set forth in these words the nature of the enquiry which must be made:
>
> > ...whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.
>
> *[In the underlining is my emphasis]*

The matter before adjudicator Kirby was whether or not the defendant in this action could succeed in his collection action. Undoubtedly she may well have had to consider whether there were defects in the work although I do not have the benefit of her reasons for judgment. The

case before me is whether the defendant so breached his contract as to be required to pay damages for that breach. I do not consider these to be the same cause of action or issue. It seems to me that I am asked to apply these doctrines in a situation that "must be inferred by argument from the judgment". I find it difficult to hold that the payment of damages for the breach of contract is something that was "fundamental to the decision arrived at" by adjudicator Kirby. I also find it difficult to say that "determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former".

The closest case that I could find where a court had offered an opinion on whether a counterclaim was obliged to be raised is **Moore v. Dewolf 1945 CarswellBC 11, [1945] 1 W.W.R. 505, [1945] 1 D.L.R. 792, 61 B.C.R. 81** where the British Columbia Court of Appeal stated:

> 12 With respect to the plaint it is apparent that in the first action the question of the occupation by DeWolf of one room in Moore's building was directed to one issue, i.e., variation or waiver of the terms of the agreement and was dealt with in that aspect by the trial Judge. What, if any, use and occupation rental DeWolf should be chargeable with for his use and occupation of that room was not in dispute in the original action nor was it part of Moore's defence. True he might have raised that question by way of **counterclaim** but I do not think under the circumstances herein he was obliged to do so.*[My emphasis]*

This implies to me that a litigant is not required to raise all counterclaims that may be made in the original action. This accords with my view that the cause of action for breach of contract by way of counterclaim is not the same as the cause of action of the original claimant for the collection of debt, albeit arising out of the same facts. Adjudicator Kirby cannot be said to have addressed her mind to the issues that arise in the claim before me. All she had to do, at best, is determine that there was sufficient defect to resist the claim for debt. Because I do not have her reasons it is by no means certain that she did dismiss the defendant in this action's claim on the basis of defective workmanship. I assume for the purposes of this decision, that she did address defects to some extent, because it places the defendant in this case with the most favorable position for the purposes of this analysis. I am required to assess the claim of the claimant in this action for breach of contract and specifically assess what damages, if any, flow from that breach. I do not think it can be said these are the same cause of action or issue.

Based on the lack of authority, it seems to me that counsel for the defendant is raising a somewhat novel point. I do not say that critically as it is her duty to put forward all arguments that may be of benefit to her client. As I have indicated, I find it difficult to apply the precedents giving me guidance in the manner which she suggests. In the absence of clear authority that

there is a duty to raise all possible counterclaims, I do not think I am on solid legal grounds to grant her the remedy that she seeks. If such a proposition is to be established it will need to come from a higher authority than me.

The Small Claims Court Act and particularly section 9 states that a person may make a "claim". I consider that **Kameka v. Williams, 2009 NSCA 107** makes it clear that the word "claim" is to be equated to the notion of "cause of action". I consider the matter before adjudicator Kirby in the matter before me to arise from different causes of action despite the fact that the parties are the same and a substantial amount of the evidence would likely be the same. I state this only to emphasize that I see no reason why the principles should be any different in the Small Claims Court merely because that statute uses the word "claim".

Despite the defendant's counsel's able argument, I am unable to accede to the defendant's submissions and conclude that the doctrines of res judicata, issue estoppel or abuse of process do not constitute a defence. I will proceed to analyze the case on its merits.

**The contract**

It is well-established law that I must interpret a written contract primarily by an analysis of the words contained in the written document. Historically extrinsic evidence was not permitted unless I am satisfied that there is an ambiguity that requires the introduction of parole evidence. Counsel for the defendant argues that that this rule has been somewhat softened by the decision of the Supreme Court of Canada in **Sattva v Capital Corp v Creston Moly Corp, 2014 SCC 53**. I have read the case carefully and have concluded that Justice Rothstein directs the lower courts to apply this modification with great caution. He says:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably

> ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

I understand this judgment to sanction the court looking at all the surrounding circumstances but it does not permit the court to "rewrite contract". What I understand from Justice Rothstein's direction is that the goal is to understand the context of the creation of the contract so that the court may understand the common intention of the parties. I do not find anything in the evidence of the parties which would suggest that there is any difficulty with the context of the creation of this agreement. I do not find anything in the circumstances that would lead to a conclusion that language used in the contract was intended to reflect anything other than the plain language used.

I have considered the evidence of Mr. Gillespie but I do not find anything in his evidence that leads me to think that the words used were not reflective of the intention of the parties. I find the contract to be sufficiently clear and unambiguous and I rely on the plain language of its terms.

By the terms of the contract the retaining wall was to extend "the width of the existing lawn (fence to fence) and curve in along with fence". The defendant testified that he could not achieve this because of the difficulty in getting access to the neighbors' properties. Exhibit 1Tabs F and G among other photographs included in the materials before me establish that the upper wall may have extended to the fence line on one end but did not on the other end, and that the lower wall did not extend to the fence line. I do not accept the defendant's evidence that he was not able to achieve the proper result due to the inability to access the neighbors' properties. The photographs at Exhibit 1Tab W satisfy me that Mr. Bowlby was able to achieve this result with those constraints.

The contract also specifically states that the walls will be built "with a set of stairs <u>through</u> the west side". *[my emphasis]* The defendant suggested that the word "through" was ambiguous and that I should accept his evidence that the contract permitted the stairs to be constructed in front of the wall. I do not find the contract language ambiguous and therefore in accordance with the law even taking into account his oral evidence in this regard, I do not deviate from the plain words of the contract. I see no other interpretation for the word "through" than that the stairs were to be in set into the wall. If the stairs had the even partially been inset into the wall I

might have been able to consider this not to be a breach, but in this case as is apparent from Exhibit 1 Tab J, among other photographs the steps were constructed entirely in front of the wall.

I accept the evidence of Mr. Dewar, Mr. Bowlby and the claimant that the steps were unstable and I infer from the evidence that they were unsafe.

The contract states that "the top of the first level will be built so that a garden can be installed". I infer from this that it was the intention of the parties that the area between the walls would be reasonably level. I do not think one can be expected to plant a garden of any nature on a significantly sloping area. I accept the evidence of Mr. Bowlby and the claimant that this was not the case.

I am satisfied that the defendant breached his contract. The measure of damages in breach of contract cases is that the injured party is to be restored to the position that they would have been in had the contract been fulfilled. Damages in contract cases are compensatory meaning that the injured party is not to be placed in a better position but merely to be brought back to the position they would have been in but for the breach.

The contract document does not specify the exact height of the walls. I infer from the submissions of counsel that the parties agree that the wall was to be approximately 4 feet in height. The reconstructed walls were slightly higher. The defendant's counsel suggests that were 60 additional blocks required having a value of $523.80. I am prepared to accept that as a reasonable estimate of the additional materials employed.

I am satisfied that the **Consumer Protection Act RSNS 1989, c 92** applies to this contract. In particular I apply section 26(5) which states the following condition applies:

> (5) There shall be implied in every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skillful and workmanlike manner

I am satisfied that the defendant failed to perform the contract in a skillful and workmanlike manner. I find that the construction was substantially below standard. In my view this is readily apparent from an examination of the photographs of the work which the defendant did and the photographs of the work which was done by Mr. Bowlby. My examination of the various exhibits setting out the manufacturer's instructions and recommendations were not complied with. Most telling is that the walls sloped forward contrary to the design of the blocks and manufacturer's literature, and Mr. Dewar's professional opinion, and thus did not function as retaining walls. If it

had been necessary I would have held this to be a fundamental breach of the contract. I have come to this conclusion on the basis of my analysis of the entire evidence placed before me.

I have to consider how correction and repair could have been achieved. I see no alternative to a complete disassembly and reconstruction, particularly given the forward leaning of the wall to the extent of three inches or more, which raises questions as to its entire construction and as to the foundation. I find that this was necessary and am prepared to award compensation for it. I take into account the fact that materials were reused. As will be seen below, I have allowed for that in giving credit to the defendant for what the Claimant would otherwise have paid. It is to be expected that the cost would increase because correction involved disassembly and then reassembly. I do not find anything in Mr. Bowlby's invoices to be inappropriate or unnecessary.

I am satisfied that for the claimant to be put back in the same position that she would have been had the contract been performed properly the work that Mr. Bowlby did was necessary. The only possible difference is the 60 additional blocks. I do find that that is betterment to the Claimant and I will deduct that from the claim. That brings this head of damages to $16,375.16.

The Claimant now has the structure she contracted for but she did not pay the full price. The contract was for $13,984.00. She paid $8,500.00 leaving a balance of $5,484.00 that she would have paid. I must deduct that amount to place the Claimant in the positon she would have been had the contract been performed. That reduces this head of damages to $10,891.16.

The Supreme Court regularly awards prejudgment interest at the rate of 2.5% and I am prepared to do the same. Interest is awarded at the rate of 2.5% from May 20, 2015 in respect of the Hiltz and Seamone account and from July 17, 2015 in respect of the Bowlby account to May 17, 2016. Subject to Mr. Affleck filing with the court documentary evidence of items 6 through 9, I am prepared to award the following damages and costs:

| | |
|---|---|
| 1 Expert opinion from Hiltz and Seamone. | $685.40 |
| 2 Pre-judgment interest - expert opinion from Hiltz and Seamone | $17.04 |
| 3 Damages for breach of contract | $10,891.16 |
| 4 Pre-judgment interest - damage claim | $226.90 |
| 5 Court filing fee for Notice of Claim. | $199.35 |
| 6 Process Server's fee for personal service of Notice of Claim | $126.70 |
| 7 Process Server's fee for personal service of subpoenas on witnesses | $223.20 |
| 8 Witness fee: Alexander Dewar. | $24.00 |
| 9 Witness fee: Glenn Bowlby. | $18.00 |
| TOTAL | $12,411.75 |

I will refrain from issuing an order until my review of Mr. Affleck's submission and Ms. Shackleton's comments as to items 6 through 9, at which time I reserve the right to modify the intended award of costs in respect of those items.

Although not cited in detail in this decision, I wish to assure counsel that I have read every single case which they submitted and reviewed their submissions thoroughly. I also have examined every single exhibit whether mentioned in his decision or not and found nothing inconsistent with this decision. I thank counsel for their assistance in this matter. The presentation of the case and their written submissions were very helpful.

Andrew S Nickerson Q.C., Adjudicator