Claim No: 300780

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Burke v. Bryan Perrier Contracting, 2012 NSSM 14

BETWEEN:

GREG JOHN BURKE

Claimant

- and -

BRYAN PERRIER c.o.b. as BRYAN PERRIER CONTRACTING
and as OPERATE FOR YOU CONTRACTING

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 8, June 9, October 17 and October 18, 2011

Decision rendered on February 29, 2012

APPEARANCES

For the Claimant	James D. MacNeil, Counsel
For the Defendant	Ian Dunbar, Counsel

BY THE COURT:

Introduction

[1] This is a claim for damages alleging that the Defendant did defective work on the Claimant's property, requiring remedial action and removal of some of the allegedly defective work. The damages claimed are in excess of $25,000.00, reduced to the $25,000.00 which is the jurisdictional limit of the court.

[2] The hearing took place over four evenings. During the first two evenings in June of 2011, there was an additional party present, namely Elmsdale Landscaping Limited, which had supplied topsoil to the Defendant. The Defendant had issued a separate claim against Elmsdale, in what serves as this court's equivalent of a third party procedure. Prior to the resumption of the hearing in October 2011, the Defendant discontinued its claim against Elmsdale on terms that were kept confidential between them.

[3] The question for this court is whether or not the Defendant, Mr. Perrier, should be held legally responsible for - and if so, for how much of - the remedial work that the Claimant, Mr. Burke, did to restore his property after it had been worked on by Mr. Perrier. Perhaps the most serious allegation is that the Defendant's faulty landscaping and driveway construction work led to flooding on part of the property, with consequent loss of trees. It is also claimed that the Defendant damaged a driveway and did faulty work in preparing new areas of the driveway for paving, necessitating a new paving job. It is also alleged that landscaping work he did was defective and had to be redone.

[4] I believe it is necessary in this case, to review the considerable evidence in detail before I make the necessary findings of fact.

The Evidence

[5] The Claimant first called Mr. Gary Good, who is the principal of an asphalt paving company - Eastcoast Asphalt - with extensive experience in both paving and landscaping projects. He has done many driveways including the driveway for the Claimant in this matter. He was hired in 2011 to do the re-paving of the driveway for Mr. Burke, replacing the job that Mr. Burke regarded as having been done improperly by the Defendant. In the course of doing this job he recollected that he had done the original paving back in 2002 or 2003, although he had no specific recollection of the details of that earlier job. He also redid the landscaping job in 2011.

[6] It was part of his job, as quoted, to fill in the swamp on the left side of the driveway (as one faces the home from the road). As the evidence later made clear, this was an area that flooded some time after the Defendant did his landscaping work. For that purpose Mr. Good brought in two tandem roads of rock to fill in the swamp. He also used the old sod that he had dug up in order to be replaced.

[7] His first job was to fill in the swamp. He said that when he took up the sod, as part of his mandate to redo the landscaping, he made an observation that there was little if any topsoil underneath, just clay. He testified that if someone put down sod without putting the proper amount of topsoil under it, the sod would tend to dry up because it is the topsoil that holds water. He made known to the homeowner his view that there was no topsoil.

[8] He testified that for the re-landscaping, he brought in five tandem loads of topsoil to create a proper base for the sod that he was laying. This was a lot more topsoil than he was expecting to use because he did not anticipate how little topsoil would be found under the existing sod. Once all of the work was done with respect to the landscaping and swamp work, he then proceeded to re-pave the driveway. He testified that there was approximately 6,500 square feet of paving to be done, which took approximately one half day.

[9] He testified that the areas of newer asphalt that had to be replaced, which corresponded to the areas done much more recently with the involvement of the Defendant, were in much worse condition; namely rough and bumpy. His observation was that there was not a proper base under these areas with the result that they had settled badly. It was his testimony that having a proper gravel base was more important in the larger scheme of things than the thickness of the asphalt itself. He testified that one needs approximately 6" of compacted gravel to make a proper base for a driveway. His testimony was that the base under the old part of the driveway that he had done himself years ago was still in good condition, but the areas where others, including the Defendant, had created the base were much weaker.

[10] In the area near the garage, which was one of the areas worked on by the Defendant, he observed only two to three inches of class A gravel. As a result the pavement there was rough and partly settled. There were ruts and cracks.

[11] On cross examination he admitted that he did not test the soil that he classified as clay, but that this was just his observation.

[12] He also did an upgrade to the culvert end walls taking out the ones done by the Defendant and putting in larger exposed concrete end walls. The ones that had been done by the Defendant were, he testified, too short as a result of which they had been built up by wood structures. This was necessary to supply some retaining wall capabilities to hold the driveway. He admitted that when he redid the driveway he did not add any drainage because it was his observation that an adequate gravel base was there for drainage purposes.

[13] He testified that he did not do any estimate on recapping the driveway, because he had not been asked, but that it would have been considerably cheaper than completely re-paving it. Had he been asked he would have recommended against recapping and would not have offered any guarantee had he done so.

[14] He also testified as to his observations about the sod that he was removing and replacing. He observed that the sod which had been laid much more recently by the Defendant was a different colour from the other grass, and much of it did not look as healthy as the older grass near the house.

[15] He also testified that when sod is removed it is usual that it will peel away easily from the topsoil. Here it was much more difficult as it was stuck to the clay. His observation was that there was at most about an inch of topsoil, which typically is part of the original sod. A good job would normally consist of about six inches of topsoil, whereas here he observed no more than about one inch. He added that there is nothing wrong with using clay as a subbase, but that there should be topsoil over it.

[16] The next witness to testify was the homeowner himself, the Claimant, Greg Burke. He is a self-employed financial planner who has owned the subject property since 2003. As such the house had been built and the driveway paved sometime before his ownership. He did discover through documents left behind by the prior owner that the paving had been done a couple of years earlier by East Coast Paving, which was the company owned by Mr. Good.

[17] Mr. Burke testified that he knew the Defendant Brian Perrier as a result of having been neighbours with his parents some years earlier. He had known Mr. Perrier since the latter was about 14 years old, although he had not seen him for a number of years when he happened to see him riding an excavator in his neighbourhood and stopped to talk to him. He learned that Mr. Perrier was doing excavation type work on a part time basis. This was in the fall of 2005.

[18] Mr. Burke mentioned to Mr. Perrier that he had been planning to do an extension to his driveway in order to create a place to park his trailer. Mr. Perrier indicated that this was something that he was capable of doing. He also hired Mr. Perrier to create a second area which he called a turnaround, approximately half way down his driveway. He later hired Mr. Perrier to prepare some areas of his landscaping which had not previously been sodded, to extend the grassy area of his property. Part of what he specified to Mr. Perrier was that the grass was to match the existing grass in terms of the type of sod used.

[19] Mr. Burke's evidence was that he hired the Defendant with specific instructions to prepare the areas of the driveway for paving by others.

[20] As will be made clear later, there is a difference in the evidence in that Mr. Perrier insists that he did not expect there to be <u>imminent</u> paving, but rather

eventual paving, which means that he concentrated on creating gravelled areas that could be used as such. He would have anticipated that whoever was doing eventual paving would make sure that the gravel base was proper and sufficiently compacted for a good paving job.

[21] There was a particular sequence to the hiring of Mr. Perrier. It was in the fall of 2005 that the work was done to create the two additional areas of the driveway, but it was not until April of 2006 that there were discussions about extending the landscaping.

[22] According to Mr. Burke, he had discussions with Mr. Perrier about what he was intending to do in terms of landscaping, whereupon Mr. Perrier volunteered that this was also the type of work that he was prepared to do. Mr. Burke said that he was surprised because he did not think that Mr. Perrier had a crew who were capable of working with him. He said that Mr. Perrier indicated that he had a friend who worked with him from time to time, and also that he hired high school students when it came time to lay the sod.

[23] Mr. Burke said that he had two or three quotes from other landscaping companies and that if Mr. Perrier could match the price, he could have the job. Mr. Perrier said that he could do it all for $4,000.00. He also told Mr. Perrier that he wanted to have raised culvert caps at the end of the driveway and a widening of the driveway at the street.

[24] Mr. Burke observed Mr. Perrier doing the work. He noticed that he had a tractor with a bucket in front, as well as a small bobcat that he used from time to time. He noticed that Mr. Perrier did not use any employees but appeared to be doing all the work by himself.

[25] It was at or around the same time that Mr. Burke steered another job to Mr. Perrier, namely a landscaping job at his daughter's property. The work on the daughter's property was at or about the same time that Mr. Perrier was working on Mr. Burke's property, and at times he went back and forth between the two jobs. As will be noted later, there were some problems with the job at the daughter's property, but those matters are not directly before me.

[26] When it came time to lay the sod at Mr. Burke's property, the sod had been delivered and it appeared that there was no one available other than Mr. Perrier to lay it. In the end, Mr. Burke himself ended up doing a lot of the laying of sod, which he insisted had never been within his contemplation.

[27] It was shortly after the landscaping work had been done that the first major problem arose. In the area to the left of the driveway (facing the house) there had been a low-lying, somewhat wet area, which - after a rainy stretch - suddenly became a full-fledged pond as a result of a build up of water to an unprecedented level. When this happened, he immediately called Mr. Perrier who came over and set up a pump to try and divert some of this water to the ditch near the street. According to Mr. Burke, nearly all of the trees which had previously been healthy within this low-lying area, died. It is this area that eventually, as a result of the work by Mr. Good, was filled in and is to be or has already been replanted with new trees.

[28] Apart from the problems with flooding, Mr. Burke became concerned about the problems with the areas of the driveway that had been prepared by Mr. Perrier. In these areas cracks developed which widened over time.

[29] The culverts at the end of the driveway were another issue that Mr. Burke had with the work done by Mr. Perrier. His evidence was that he had instructed Mr. Perrier to obtain culvert caps that extended up about 6 inches above the level of the driveway in order to properly retain the driveway itself. When the time came for the culverts to be installed, it appears that Mr. Perrier had not ordered these custom culverts but was forced to take a shorter type culvert that is part of the concrete companies' standard inventory. Mr. Burke was caught in a difficult situation because he had pavers coming the next day and needed the culvert caps installed immediately. Mr. Perrier indicated that he would have someone build up some wood structures above the caps to create a visually pleasing appearance. It turned out that the individual who helped was Mr. Perrier's brother, who was also known to Mr. Burke, who did the work as a favour to both of them.

[30] Part of the landscaping job was to construct a new flower bed which it appears that Mr. Burke was not happy with. The main problem appears to be quality of soil. In the end Mr. Burke had this flower bed completely taken out and replaced with what he said was proper garden soil.

[31] It should be noted here that as a result of all these complaints about topsoil, after being sued by the Claimant, Mr. Perrier brought a separate claim against the supplier of the topsoil, which was Elmsdale Landscaping. During the long hiatus between the second and third days of the trial, Mr. Perrier made some sort of a settlement with Elmsdale, the details of which were not disclosed to the court.

[32] However, as it was Mr. Perrier who chose where to obtain the topsoil and to charge for it in his invoice (even if only at cost) it would be Mr. Perrier who must take responsibility for the product that he supplied.

[33] Mr. Burke placed in evidence a series of photographs which were of considerable assistance to the court in understanding the lay of the land and the particular problems he was pointing to.

[34] Part of the reason that Mr. Burke ended up having the driveway completely redone was because after Mr. Perrier had done all of his work there were areas of the driveway which were damaged, which Mr. Burke insists were as a result of careless operation of Mr. Perrier's machinery. In particular, Mr. Burke believed that Mr. Perrier drove over the driveway close to the edge where there is no retaining curb, causing cracking at the edge.

[35] In the end, Mr. Burke says that the total cost to him to repair everything that required repairing after Mr. Perrier's work, will come to in excess of $40,000.00. Mr. Burke stated quite pointedly that Mr. Perrier had "ruined" his property.

[36] As for problems with the new lawn, Mr. Burke indicated that he had been very careful to water the new sod so that it had time to take properly. He also testified that he attempted re-seeding as a way to improve the quality of the grass, but this was to no effect.

[37] Mr. Burke conceded that although the paving of the two new areas was done by another contractor, Earl Willis, he did not take any steps to sue Mr. Willis for the problems experienced with the driveway. It was his view that the

problems were not as a result of the laying of the asphalt, but as a result of the improper preparation of the base.

[38] Mr. Burke insisted on cross-examination that he had never expected to be part of the sod laying crew. He believed that Mr. Perrier had access to students who would supply all of the additional manpower required. In the end, he was forced to do some of the sod laying both at his daughter's and at his own property, because these was urgency in both cases to get the sod laid quickly in advance of predicted rain. On one of those occasions Mr. Burke indicated that he was sick in bed, and clearly resented having to get out of his sick bed in order to do this kind of hard physical work.

[39] On cross-examination Mr. Burke clarified that the flooding in the area that he now refers to as the duck pond (also sometimes referred to as the swamp) only occurred after Mr. Perrier had built up certain areas with soil and added the new sod.

[40] On the question of the sods, Mr. Burke insisted that he had instructed Mr. Perrier to match the existing lawn. He testified that he noticed almost immediately that the sods obtained by Mr. Perrier were not thriving and did not appear to be similar to his existing lawn. He was also unhappy with the texture of the lawn in that he did not believe that Mr. Perrier had done a proper job of preparing the land, as a result of which there were too many of what he referred to as moguls. He tried to use a roller afterwards, but this did not fully resolve that issue. He also observed that the new grass put in by Mr. Perrier was more prone to weeds than his existing lawn, which further convinced him that Mr. Perrier had not supplied Kentucky Bluegrass as instructed. In the end, some years after, Mr. Burke insists that his older lawn remains healthy and thriving while, up to the

end, the sod placed by Mr. Perrier was neither healthy nor attractive. He described the grass planted by Mr. Perrier as looking more like hay than grass. The problems with that part of the lawn were greater during dry periods, while during rainy times the grass seemed to do a little better.

[41] The Defendant first called an expert, Archie Frost, who is a civil and structural engineer with extensive credentials testifying as an expert witness in court. I qualified him as an expert over the objections of counsel for the Claimant. His testimony touched on issues mostly concerning the paving and some testimony concerning the issue of flooding.

[42] Mr. Frost testified that the paving which had been done in the two areas worked on by the Defendant, was not well sealed at the area of the join. He detected water coming up through a crack and gave the opinion that there should have been some drainage to prevent such a thing from happening. He observed that water flows generally from a northeast to southwest direction on this property, and that the driveway is right in the path of this water flow. It would be expected that the driveway would slow the natural movement of water, particularly where the surface of the driveway is above the natural grade.

[43] His opinion was that there should have been a provision for drainage allowing for the movement of water from one side to the other, such as by some form of pipe. He examined the area which has been referred to as the pond and gave the opinion, which is mostly common sense, that this has occurred because water is moving into this area faster than it can move out. Assuming that, prior to the work done by Mr. Perrier, there had been little or no water buildup in that area, then his conclusion is that water that had previously flowed under the driveway was now being impeded.

[44] He also gave his opinion on the cracks which occurred on the edges of the driveway. He said that it is typical that driveways will be softer or weaker at the edges. There was a gouge in the driveway that he noticed, which he suggested likely came from some heavy equipment such as the bucket used by Mr. Perrier.

[45] Mr. Frost's conceded that he did no intrusive testing which would have given some additional information, and much of what he testified to was relatively self-evident. Mr. Frost also conceded that he did not pay much attention to the landscaping which is not really within his area of expertise.

[46] The next witness called on behalf of the defence was George Cooper, the president of Elmsdale Landscaping. Because Elmsdale had itself been implicated in the problem, and were threatened with being sued, they took the opportunity to inspect the work and sample the soils that they had supplied.

[47] In October 2009, approximately three and a half years after the soil had been supplied, Mr. Cooper caused samples of the soil to be taken from various locations. These samples were in turn passed over the laboratory at the Nova Scotia Agricultural College for analysis. Without getting into the technical details, it was the opinion of the laboratory, bolstered by the interpretation of an expert, Lise LeBlanc of L.P. Consulting, that the samples taken were reasonable soil mixtures for growing grass.

[48] It should be noted that Ms. LeBlanc’s experience largely is in advising on the quality of soil and what it needs to allow it to do its job of growing plants better. In other words, she was able to say that this soil was doing a reasonable

job and did not need much by way of amendment, but (as was argued by the Claimant) this does not entirely show that it was very good soil.

[49] The larger criticism of this evidence levelled by counsel for the Claimant was the relatively small sample size. On the evidence, it was a fairly small area from which the soil was taken, and there were only three samples taken. I am somewhat in agreement and do not place a lot of weight on this evidence.

[50] The Defendant Brian Perrier testified in his own defence. His evidence differed from that of Mr. Burke in a number of significant ways. I will highlight these as I go through them.

[51] At the time that Mr. Perrier began to discuss working for Mr. Burke, he had been doing a number of small residential jobs over the previous number of years, which he described as including stump removal, driveway construction, concrete pads etc. He had a 3-½ ton mini excavator and a bobcat, and he rented other equipment as needed. He mostly worked on his own but had available to him other individuals who could operate a second machine if the job required one. He rarely if ever used written contracts and mostly did contracts on the basis of verbal agreements with customers. He also rarely if ever quoted fixed prices for any of the jobs, preferring to work on a time and materials basis. (This was the basis of his work for Mr. Burke).

[52] Mr. Perrier testified that he typically made his profit by marking up the material cost and by charging out his labour at rates that allowed him to make a decent income.

[53] He testified that he knew Mr. Burke from his childhood as they had been neighbours long ago. He had been doing some work in the subdivision where Mr. Burke lives, and ran into Mr. Burke by chance. Mr. Burke asked him to come down to his property with a view to possibly using his services to widen the driveway on the left side to create an area where he could park his trailer. His evidence was that he understood that he was creating a gravel area, but not specifically preparing the area for paving. He understood that it might eventually be paved, but expected that if it were to be paved, the paving company would do the final preparation. His approach was to excavate and lay down crusher run, which he believed was the appropriate material for gravel driveways and areas, as well as being the appropriate material for underneath paving.

[54] It was only after he completed that area that Mr. Burke asked him to put down some of his excess material halfway down the driveway to the road, to fill in an area that became known as the turnaround.

[55] In the area up at the top of the driveway where Mr. Burke had wanted to park his truck, the materials that Mr. Perrier used were surge rock covered by 3/4 inch crusher rock. In the area down near the shed, all he did was lay down some gravel as this was left over from the area up at the top. His invoice for this job was paid without complaint or question.

[56] The landscaping job, which was a larger undertaking, came about in the spring of 2006. He was asked to come back and discuss it with Mr. Burke. The first phase of the job involved filling in another area up top next to the garage, extending the driveway. By then he had begun to charge Mr. Burke on what he called a family plan on materials, namely charging them at cost and essentially only making a profit on his own labour.

[57] The next job in sequence of time was the job at Mr. Burke's daughter's house, where he did some stump removal and prepared the ground for the laying of sod. He stated that on that job he had given Mr. Burke the option of hiring some young people to lay the sod when the time came, but was told that Mr. Burke's son in law was going to look after the laying of the sod. The significance of this was that when it turned out that Mr. Burke himself and his son-in-law ended up laying sods, it was not because Mr. Perrier could not have hired a crew, but rather that he was not asked to hire anyone. He did not believe that Mr. Burke was unhappy having to lay sod other than the fact that he was sick at the time and did not really feel like doing it, but understood that it had to be done.

[58] Meanwhile at Mr. Burke's own home, the next phase of the job was to widen the driveway near the road and also to extend the area of lawn to areas where it previously was more natural ground cover. According to Mr. Perrier, Mr. Burke asked him to suggest how this might be done and Mr. Perrier suggested that they bring in some clay fill to raise those areas and then bring in topsoil and sod.

[59] Mr. Perrier did not take any responsibility for having put in the wrong concrete end walls at the culvert. It was his evidence that Mr. Burke appeared to be in a big hurry because of some event that was taking place at his house, and as such he needed the bottom of the driveway finished right away which meant that they had to use the stock concrete end walls that were available. Because these were lower than the ones that might otherwise have been used, Mr. Perrier arranged for his brother to help him build the wooden walls that served as retaining walls for the end of the driveway.

[60] Mr. Perrier defended his supplying of topsoil from Elmsdale Landscaping, which he said had been his sole supplier in the past and which he believed to be a quality supplier. He entirely denies any allegation that he failed to use topsoil. From his perspective, the topsoil delivered was no different from other topsoil that he had used, and there was nothing wrong with it. He admitted that Mr. Burke complained at one point that the topsoil seemed to be clumpy, but Mr. Perrier's evidence was that this happened to be a wet day and topsoil can become clumpy in the rain. After he finished laying out the topsoil, the sod rolls were delivered and he left it to Mr. Burke and his son in law to lay the sod.

[61] The part of the driveway above the culvert, near the street where the driveway was widened, was an area of some controversy. This was eventually paved by another company, and that paving did not do very well within a short period of time. Mr. Burke blamed Mr. Perrier for not having properly prepared the area, in particular for not supplying enough gravel and not sufficiently compacting it. The evidence of Mr. Perrier was that at the point when he was finishing the end of the driveway, he told Mr. Burke that he did not have enough material to complete that area and asked Mr. Burke to make sure that when his paver came they added some additional material to make the paving job suitable. He takes no responsibility for what appears to have been the case, namely that when the pavers came they merely paved over the area without placing any additional Class A material.

[62] In the end Mr. Perrier's invoice for all of the landscaping work and for the work on the culvert, came to some $4,721.91. That invoice was paid in full, and according to Mr. Perrier, Mr. Burke was fully satisfied with the result.

[63] In or about September or October of 2006, being approximately four or five months later, Mr. Perrier was called by Mr. Burke to come back because Mr. Burke was complaining that Mr. Perrier had "ruined his driveway." At that point he was complaining about the cracks in the driveway along the margins. Mr. Perrier admitted that there were cracks but he was not able to ascertain what was causing them. In particular, he was disputing what Mr. Burke seemed to be suggesting, namely that these cracks were caused by excessive buildup of soil for landscaping purposes up to the driveway itself. In other words, Mr. Burke was suggesting that whereas the driveway had been raised slightly above ground level prior to Mr. Perrier doing his work, the adding of additional material along both sides of the driveway was putting pressure on the driveway causing it to crack. (It may be noted that this was not the allegation advanced at the trial.)

[64] According to Mr. Perrier, at this time (September or October of 2006) the driveway was the only issue bothering Mr. Burke. Mr. Burke did not appear to be complaining about the ponding of water near his property, which had been partly dealt with by way of a pump and a drainage trench. It was at this point that the matter became highly conflictual, with Mr. Burke refusing to pay the invoice owing for work at his daughter's property. As I have indicated earlier in these reasons, that matter is not before me and may be the subject of a different claim in this court.

[65] As for the quality of the sod, it was his evidence that he simply requested of Elmsdale that they supply Kentucky Bluegrass, which as far as he knows they did, because that is their standard product.

[66] Mr. Perrier was subjected to considerable cross-examination on his invoices, and answered a number of suggestions that he may have overcharged

for materials supplied, but I am far from convinced that there are any irregularities in this respect. This is not to say that Mr. Perrier's record keeping is exemplary, but it being some five years after the fact, he can surely be excused from not being able to back up every materials charge with an invoice.

[67] As for the allegation that his work caused the flooding on Mr. Burke's property, he cannot understand how anything that he did could have made such a difference. He testified that this was always a wet area and that he did nothing to block its drainage.

[68] As for issues concerning the compaction of crusher run for driveway purposes, Mr. Perrier was adamant that he was not hired to do the final compaction for paving purposes. His evidence was that he constructed these areas as if they were gravel driveways, and anticipated that the paving contractor would make sure that the areas were properly prepared for paving.

[69] Mr. Perrier took the position that he was hired on a time and materials basis to do certain specified work, and that it is unfair to compare what he did with what Mr. Burke is now doing, which is a "Cadillac job."

[70] In summary Mr. Perrier insisted that there was nothing that he did wrong on Mr. Burke's property, and he does not see how he should be held responsible for what has subsequently occurred.

[71] The court heard evidence also from Mr. Perrier's brother, Craig Perrier, who did the work building up the end walls with wooden ties. He also assisted with laying some sods at Mr. Burke's daughter's property, and confirmed that Mr. Burke was complaining somewhat because he was not feeling well. Mr. Perrier

did his work on a gratuitous basis and there is no allegation that he did anything wrong.

Discussion of issues

[72] There are a number of issues, as I see them, broken down by the particular work that the Claimant considers to have been defective. There is a threshold issue in each case, however, which concerns the scope of the work and the standard by which Mr. Perrier is to be judged.

[73] People hired to do skilled or specialized work, and who are put in control of a project, implicitly warrant that they will apply their skills to the task, and if things go wrong that should not have occurred under the watch or control of a reasonably skilled person, that person may be responsible in damages (if there are damages) or may simply be disqualified from being paid for the sub-standard work.

[74] On the other hand, if a property owner hires someone to perform a task (which may involve some skill, or the use of specialized equipment) but not to exercise some greater level of skill or oversight, then the person doing the work may not necessarily being responsible for things that go wrong. It all depends on the scope of responsibility delegated to the person.

[75] The contentious areas of work done (or alleged failures) by Mr. Perrier are:

a. Driveway additions, including two up at the top, the turnaround, and near the culvert. The allegation is failing to place adequate fill under the areas to be paved, which resulted in a failure of the paving.

b. Damaging the driveway, particularly at the edges.

c. The culvert caps: failing to anticipate the need to order custom caps, leaving the Claimant in a position of having to use shorter caps which he eventually replaced.

d. The landscaping, which is further broken down into:

(a) Building up areas with clay and allegedly inadequate topsoil.

(b) The garden bed: using inadequate topsoil.

(c) The supply and installation of sod: failing to ensure that it was Kentucky Bluegrass and consistent with his existing lawn.

(d) Causing his property to flood and creating the so-called swamp, or duck pond, which later had to be filled in and replanted with trees.

[76] For all of this, the Claimant seeks damages for what he regards as poor workmanship and materials, measured by the cost to have the work redone or to remedy the damage created.

Findings of fact on standard of care

[77] I was able to observe the witnesses, and in particular the parties, at close quarters. Each of them was cross-examined by skilled counsel. In the end, I am

left with the strong impression that the Claimant has overstated his case and attempted to place unreasonable expectations on the Defendant. I believe that the Claimant's motives at the outset were likely benign; he was happy to throw a little work the way of his old neighbour's kid. He was also hoping to get work done relatively cheaply. However, his accusation that the Defendant had "ruined [his] property" must count as hyperbole, at best. I do not doubt that some things went wrong, or at least not as hoped for, but blaming the Defendant for all of this is totally out of proportion.

[78] I believe that the Claimant knew he was dealing with someone who had a couple of machines, and likely knew how to operate them, but there is no way that he expected the services of an expert landscaper or paver. He knew that he was hiring someone on a time and materials basis to perform specific tasks which he believed needed to be done.

Driveway construction

[79] The initial work was to create the gravel addition to the driveway up top, and to construct the turnaround halfway up the driveway. I find more credible the Defendant's version of the facts, namely that he was told that the area was likely to be paved eventually. I also accept that the Claimant asked him to construct the turnaround, almost as an afterthought, using left over materials.

[80] I cannot accept the notion that Mr. Perrier was instructed to prepare any of the areas for immediate paving. I accept his evidence that he treated the areas he was creating as gravel driveway, fit to be used (for a time) as such, and that any paving company coming in to lay asphalt at a later date would make the

assessment of whether additional fill was needed and how much, if any, additional compaction.

[81] It just does not seem reasonable to bring in a paving contractor with a mandate to come in and just cover over someone else's gravel preparation, unless the two events are extremely close in time, and unless also the contractor preparing the surface explicitly knows that this is the expectation.

[82] On the facts here, it was clearly Mr. Burke's intention to use the newly constructed driveway areas and turnaround for a period of time - whether weeks or months - before paving them. Even the fact of driving over these areas for a time could affect whether or not they are ready for paving. For example, gravel (no matter how abundant or well compacted) can be eroded and carried away on tires, bit by bit, and may need to be replenished and compacted further. I believe that any competent paver, and particularly one that was warranting its work, would assess whether there was adequate material and, if not, add some. He would also perform further compaction, particularly since he would already be bringing equipment on site to compact the asphalt. The only reason why a paving contractor might not do these things would be because he was instructed to do less, or if he was simply not doing a thorough or competent job.

[83] The Claimant chose not to sue his paving contractor, and did not call him as a witness, so it is difficult for me to draw any clear conclusions about that person's work. However, I do conclude that the Defendant should not be held responsible for any failure of the paving. This includes both of the two areas up at the top, the turnaround, and the top area near the culvert which was being widened. In the case of the latter, I accept that the Defendant told the Claimant that he did not have enough material and that the paving contractor should add

more. If the area was as lacking in fill as both parties suggest (or admit), the blame can only fall on the paving contractor who ought to have ensured that the area was fit for asphalting.

Landscaping

[84] The landscaping work presents several issues. One of the major questions is whether anything the Defendant did, or failed to do, caused the flooding of the swamp or duck pond, and - if so - whether he should be held responsible for it.

[85] It is a fairly easy inference, overall, that something done on the property during the late spring of 2006 led to the eventual water build up. There was clearly a natural grade to the land, and somehow water was draining away from the low-lying area, likely through or under the driveway, with the result that it never flooded. The fact that there were mature trees in there despite being a known wet area confirms that there was some type of equilibrium, and the fact that they quickly died in 2006 demonstrates that the equilibrium was disturbed.

[86] But the further questions for this court are these:

a. What did Mr. Perrier do to create this problem?

b. Ought he to have known that this was a potential consequence?

[87] Looking at the work that Mr. Perrier did, there are certain inferences that I can draw. Somehow, by building up some of the non-landscaped areas, and filling it in with clay and topsoil (whether or not of good quality), the natural

drainage flow was altered and the equilibrium was disrupted. Based on the evidence before me, this is the most likely conclusion. It is also possible, but much less likely, that the construction of one or more of the additions to the driveway (such as the turnaround) disrupted the flow just enough to tip the balance.

[88] Of course, other factors may have been at play, including inordinate amounts of rain and the natural changes over time of underground watercourses.

[89] Even if the landscaping work was the most probable cause, this does not necessarily render the Defendant liable. The work may have been done well, or poorly, as a landscaping job, but to hold the Defendant liable for this unintended consequence would only be justified if the undesirable event (i.e. the damage) had been foreseeable.

[90] In attempting to hold Mr. Perrier liable, the Claimant is implicitly saying that he ought to have foreseen that building up the landscaped areas would disrupt the drainage of the property, to the extent that it appears to have been done, and that trees would die and an unwanted swamp would be created.

[91] It is possible, though not certain, that a larger company that employs landscape designers and civil engineers might have (if asked to quote on the job) assessed the situation from a broader perspective and advised against further landscaping, or recommended specific measures to assist water flow, as part of such a project. However, the Claimant had to have known the limitations of who he was hiring. He was hiring a small operator with a couple of machines, and the Claimant himself was instructing him on what he wanted done. It is totally

unreasonable for the Claimant to expect that the Defendant would have had the type and degree of expertise to foresee the consequences that later occurred.

[92] As unfortunate as it was that the flooding occurred, I do not believe that the Claimant has made out a case of negligence or breach of contract against the Defendant. In negligence, the damages would have to have been foreseeable. In contract, they must have been "within the contemplation of the parties." In some cases, these standards may amount to different things, but in the case at hand they are very close. A freak occurrence such as the flooding was neither foreseeable nor in anyone's contemplation. Where there is no liability on another party, the losses must rest where they fall.

The landscaping itself

[93] The problems identified with this work begin with the question of allegedly inadequate topsoil. What is known for certain is that Mr. Perrier ordered it from Elmsdale, that it was delivered in sufficient quantities, and it was spread relatively uniformly over the areas where it was needed. Several years later, Mr. Good was in a position to peel off the poorly-performing sods and gave the evidence that what he found underneath the one inch of topsoil that is typically part of the sod, was just clay. There is also the evidence from the Agricultural College and the consultant, Ms. LeBlanc, that the three samples tested were reasonably adequate soil mixtures from the point of view of a chemical analysis.

[94] Mr. Burke had also testified that he observed the soil when it was delivered and that it had a clumpy texture, which Mr. Perrier testified was what sometimes happens when it rains.

[95] On this subject, I find the evidence presented by the Claimant to be more compelling than that presented by the Defendant. I have no confidence that the soil samples taken for testing were a properly representative sample. On the evidence there were three samples taken, all from a fairly small area.

[96] I place some reliance on the evidence of the Claimant to the effect that the sod, for the most part, never did very well. It was prone to drying out. The sod did not thrive, despite extra watering and care. Most people would expect that new turf will be lush and, if anything, look healthier than the older turf that it abuts, but here the opposite was the case. The most probable explanation is that the topsoil did not have the necessary organic content to hold water and/or nutrients necessary to grow a healthy lawn.

[97] As for whether or not the turf variety was correct, the evidence was that Mr. Burke wanted Kentucky Bluegrass, which is a common variety and which, on the evidence, was the only thing that Elmsdale sold. I do not know if there are sub-varieties of Kentucky Bluegrass. Clearly the Claimant wanted his new lawn to blend in with his old one, over time, but it would be unreasonable to hold the Defendant liable for being unable to match grass varieties more specifically than he did. Even if the grass varieties were not identical, there is no evidence that the existing grass was Kentucky Bluegrass, except for the say-so of the Claimant, who is not an expert. He asked for Kentucky Bluegrass, and it appears he got it. Had he said: *“match the grass varieties as closely as possible, if necessary have samples of the existing lawn sent away for analysis, and scour the market across Canada for suppliers that carry this precise sub-species”* - then perhaps the Defendant could be said to have assumed the risk that the grass varieties would fail to blend together. But that is not what happened.

[98] I believe the more likely reason that the grasses did not blend were because of their different ages and the different growing conditions, and in particular the soil substrate.

[99] In the result, I would hold the Defendant responsible for having supplied inadequate topsoil with the result that the landscaped areas had to be redone, and the flower bed replaced. I acknowledge that the Defendant passed on the cost of the soil and sod at cost, and that he had no effective way to ensure its quality, but from a contractual point of view, he was the seller and Mr. Burke was the buyer. The Claimant did not have a direct claim against Elmsdale because there was no privity of contract. In law, a seller of goods warrants that it will be of reasonable quality and fit for the purpose intended. However reputable Elmsdale may ordinarily be, it appears that this was a poor batch which did not meet the required standard.

The culvert caps

[100] I am unwilling to hold the Defendant responsible for failing to order and supply the larger, custom culvert caps that Mr. Burke evidently preferred. There is insufficient evidence to the effect that he communicated to Mr. Perrier that the caps would be needed by a certain date. I accept Mr. Perrier's evidence that he was unaware of the urgency, and was taken by surprise when Mr. Burke told him that the work had to be done within the next day or so. I find that Mr. Burke, however reluctantly, accepted that he would receive the shorter caps and that using wood structures to build up their height would be an acceptable substitute.

Other miscellaneous issues

[101] I will touch on the issue of sod laying, even though little may turn on it, because there was so much evidence on the point. Mr. Burke presented himself as someone who was surprised and displeased to be put in the position of having to lay his own sod. Mr. Perrier's evidence was that Mr. Burke was a willing participant, and only expressed displeasure when he happened to be sick at a time when sod needed to be laid. On balance, I believe that Mr. Burke volunteered to participate, perhaps to save money. In his evidence he made a point of impressing on the court that he is very successful in his business and does not need to save a few bucks by laying his own sod. Perhaps that reflects his own assessment, in retrospect, but I believe that Mr. Perrier could have and would have arranged for a crew of some type to do the sod laying, had it been made absolutely clear to him that this was necessary.

[102] I will also make a few comments on the damage to the driveway. I am prepared to accept that Mr. Perrier may have created a few gouges or scrapes with his equipment, which I believe is always a risk when bringing heavy equipment onto a paved driveway. Most people would live with those, or engage in spot patching. It would not justify redoing the whole driveway.

[103] However, I do not find Mr. Perrier to be responsible for the cracking depicted in the photographs, and the very poor joints between the old driveway and newer parts. There is no plausible explanation before me as to how anything Mr. Perrier did, or failed to do, would have caused the cracks. Mr. Burke's initial theory, according to Mr. Perrier, was that the weight of the new clay and topsoil abutting the driveway had caused it to crack. This is entirely illogical. If anything, that soil and clay ought to have acted like a curb. Mr. Frost pointed out that, unless there is a retaining curb, asphalt surfaces are weaker at their edges and prone to cracking. As for the joints, I believe that the

responsibility fell on the paving contractor to ensure that the two areas met and bonded together. Having found that Mr. Perrier was not responsible for inadequate compaction, I also find him not responsible for the joints.

Damages

[104] It is necessary for me to assess damages for the faulty landscaping job which, I have found, was caused by poor topsoil.

[105] It was Mr. Good's company that redid the work, but his invoice is not broken down precisely into its components. He charged a total of $32,200.00 for his work done in May 2011. There is a reference to "landscaping $4,500" on the invoice, but I am unsure of what that means. Mr. Good was not asked the question: what did you charge to remove the sod, add topsoil, and re-sod?"

[106] as such, I must assess damages as best I can using the evidence before me.

[107] Mr. Perrier's invoice dated June 11, 2006 included all of the landscaping work that he did. The total of the invoice (including HST) was $4,721.91. This also included several items which were not landscaping, including $405.00 (plus HST) for the culvert end walls and perhaps a $10.50 piece of sewer pipe. In rough terms, the landscaping work was a $4,250.00 job. This is relatively close to the quotes that Mr. Burke had in hand at the time, which quotes he wanted Mr. Perrier to meet or beat.

[108] Given that the replacement occurred five years later, adding something for inflation, plus considering that there was extra work involved in removing the old

sod (which would not have been a part of the original job), but also deducting something for the fact that the existing clay fill was not replaced, I assess that the cost to have the landscaping replaced was $5,000.00, all inclusive, and I allow the Claimant damages in that amount.

[109] I find no other damages proved. I note in the original claim as filed, that the Claimant sought not only the cost of having work redone, but also a refund of the invoice rendered by Mr. Perrier. This would, in my opinion, amount to double compensation, which I would not allow.

[110] In the result, the Claimant is entitled to judgment for $5,000.00 in damages, plus his proven costs of $259.13. I would also allow prejudgment interest on the damages at the rate of 4% from May 10, 2011 (the date of the Good invoice) to the date of this judgment (295 days), in the amount of $161.64, for total of $5,420.77.

Eric K. Slone, Adjudicator