IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Southland Developments Ltd. v. MacGillivary, 2014 NSSM 7

Claim No: SCK 334535; SCK335735

BETWEEN:

Name Southland Developments Limited **Claimants**

Name Angus Roderick MacGillivary. Terri Dean and Maritime Snow Removal **Defendants**

Editorial Notice

Phone numbers and addresses have been removed from this electronic version of the judgment.

R. Michael MacKenzie appeared on behalf of the Claimant/Defendants by Counterclaim, Garth and Rebecca Hancock and Southland Developments Limited.

Brian F. Bailey appeared on behalf of the Defendants/Claimants by Counterclaim, Angus Roderick MacGillivary, Terri Dean and Maritime Snow Removal.

DECISION

This matter originally began as a claim in trespass by Garth and Rebecca Hancock and their business, Southland Developments Limited, against the Defendant, Angus Roderick MacGillivary. Mr. MacGillivray filed a defence and counterclaim against the Hancocks and their company for alleged improvements to the property owned by the Claimants as well as snow removal. Mr. MacGillivary along with his common law partner, Terri Dean and Maritime Snow Removal, filed a separate action seeking the same relief as in Mr. MacGillivary's counterclaim. Garth Hancock and Rebecca Hancock are the shareholders and directors of Southland Developments Limited. Title to the Hancocks' rental properties are in the name of Southland

Developments Limited. Accordingly, I find on the facts that Garth and Rebecca Hancock were acting in their capacities with the corporate Claimant. I order their claims dismissed without costs, and the sole Claimant is Southland Developments Limited. For the purposes of clarity, Mr. MacGillivary, Terri Dean and Maritime Snow Removal shall be referred to as the Defendants. I shall deal with their respective interests at the conclusion of this decision. This decision and order addresses the Claims, Defences and Counterclaims in both actions.

Facts

Southland Developments Limited has title to the property located at 999 King Street, Windsor, Nova Scotia ("the Southland property"). It includes a six-unit apartment building. The primary shareholders and directors of that company are Garth and Rebecca Hancock. The Defendant, Angus Roderick MacGillivary owns the abutting property, 975 King Street, Windsor, Nova Scotia ("the MacGillivary property"). That property is shown on a plan currently in evidence and marked as Exhibit #1. Following the site visit, it is clear the building nearest the Southland property is Mr. MacGillivary's rental property, while the other building is used by him as his home. The driveway on the plan separates the two residences on the MacGillivary property. The dispute arises as the result of the digging of a ditch which runs roughly along and in the direction of the boundary between the Hancock and MacGillivary properties. Most of the ditch appears to be on MacGillivary's side, at least prior to its excavation by Mr. MacGillivary.

The evidence concerning the excavation differs greatly depending upon who is testifying. While both parties agree that Mr. MacGillivary excavated the ditch, the manner and purpose and any evidence alleging consent by Mr. Hancock varies widely. There is also a counterclaim for snow removal services performed by Mr. MacGillivary for the Hancocks, whose basis in fact and law is equally in dispute. Mr. Hancock submits that the snow-plowing was informal, namely for a few cases of beer. Mr. MacGillivary claims that was not the agreement and he intended to be paid in cash all along. I shall review in detail the evidence tendered by both parties. This case, like many that hinge on credibility is living proof of the old adage, "there are two sides to every story".

It is important to note that I have read all of the exhibits and considered the testimony of both parties in rendering this decision, even if they may not all be referenced in these reasons.

It is equally worth mentioning that in spite of the clearly adversarial positions adopted by the parties, they were both respectful to the Court and, for the most part, each other and their counsel while giving evidence. I attribute a great deal of this to both parties' counsel. In addition to providing very thorough submissions of their evidence, both Mr. MacKenzie and Mr. Bailey exhibited remarkable professionalism and a clear respect for each other.

Issues

The issues are fairly straightforward:

- Is the Defendant, Angus MacGillivary liable in trespass to either Southland Developments Limited Limited or the Hancocks?

- Are the Claimants liable to the Defendants for the impact of water flow to the MacGillivary property?

- Are the Claimants liable to the Defendants for snow removal? Specifically, was there an enforceable contract or a claim in *quantum meruit*?

The Evidence

Donald John Beatty

Mr. Beatty has been the Director of Public Works for the Town of Windsor since 1992. He was presented with several plans and photographs of the properties. He indicated that the property line and arrows in the photograph show the flow of some of the feeder creeks to the marsh in the Windsor area.

Specifically, water flows north and west toward a culvert on Tremaine Crescent. The water flow crosses underneath Tremaine Crescent towards the creek along the subdivision. At his last inspection five or six years before the hearing date, he observed a swale between the Hancock and the MacGillivary properties.

On cross-examination, he acknowledged that surface water flows out to Tremaine Crescent. He testified that the property was not cleared off when he inspected it as it appears in the photographs. He identified the Southland property on the right side of the photo and the MacGillivary property on the left. He indicated that surface water typically runs from footing drains or sump pumps. He indicated that sewage drains are different than surface water. He was not aware of any sewage or petroleum in the drain. If there were, the parties would have a problem and likewise, one would have a problem if petroleum were found in the drain. If there is a problem with outflow (I presume he meant the flow of surface water) it would be between two neighbours to work out. If it were found to be sewage, following a building inspection and environmental inspection, the solution would be to reroute the water flow to the sewage system or correct it.

He testified that there is no sewage system on Tremaine Crescent. There is no expectation on residents with respect to the treatment of ground or surface water other than to keep it clear. The town becomes involved if it is plugged and the water flows onto the street. Further, landowners in Windsor are not expected to have a sump pump in place. A pump is usually used when there is seepage into the basement. In that case, surface water from the basement is typical and indeed, common. He indicated that it is not possible for drainage to King Street due to the higher elevation. There is no other option for drainage other than towards Tremaine Crescent.

Richard Aubrey Bosworth

Mr. Bosworth is a resident of Windsor and Mr. Hancock's uncle, his sister's son. He testified to having plowed snow for Mr. Hancock a few times when he needed it done "in a pinch". Otherwise, he is not in the business of plowing snow. He testified that in November 2008, he was on the Southland property twice as his regular contractor broke an axle on his truck. His involvement ceased in late November once Hancock made other arrangements. He described the driveway on the Southland property as straightforward to go in and out. The driveway is quite long and approximately 12 feet wide. He had never met Mr. MacGillivary prior to this hearing.

Carl Wilcox

Mr. Wilcox testified to being hired by Mr. Hancock to plow snow on his properties on King Street and Gray Street in Windsor. He is no relation to Mr. Hancock. He acknowledged plowing properties a couple of times in 2007 and 2008. He was paid $50 a plow for doing two locations on the same date. His equipment consists of a half ton truck with a plow on the front. He testified that his truck broke in 2008, namely his axle and that ended his plowing for an unspecified time. Once the plow was fixed he plowed for one other client but never again for Mr. Hancock. He estimates having plowed six times that winter for one other client. It was not a busy winter. He testified that the property has a high drainage point.

In cross-examination, he testified that he knows Angus MacGillivary. He borrowed brackets from Mr. MacGillivary in 2007/2008 and 2008/2009 but otherwise, he does not know what he has for equipment. He has not plowed since 2009.

Garth William Harry Hancock

Mr. Hancock is a shareholder, officer and director of the Claimant, Southland Developments Limited, along with his wife, Rebecca, who is also a shareholder and director. He identified on several exhibits the area where Mr. MacGillivary encroached upon his property. On the ground, the digging runs from a width of 2 ½ feet to a narrow point of 1.4 feet.

Southland Developments Limited bought the property in 2004. The property has two buildings a two unit building in the front portion and a six unit building in the rear. He intended to use them as income properties. He testified that when he bought the property there was a swale on it. It is his understanding that a swale is a shallow impression in the ground, while a ditch has no height requirement. He felt that the swale on the property did not work or drain properly.

He testified that the flow of the water occurs as described in Exhibit 9, noting that he added the arrows for illustration purposes. The flow on the properties follows the lay of the land. He testified that he made no alterations to the property. There is a pipe on the property shown in the photographs. The pipe originates at the back foundation wall and is meant to lead groundwater which enters the property out of the drain through a sump pump. The rest of the flow is from

gravity. The groundwater flows from the foundation. He testified that a sanitary sewer is not connected to the water flow. Further, it is not a septic system as the property is serviced by the Town.

In January 2010, he spoke with tenants at the property following a routine follow-up visit. He was advised by them that there was digging taking place on the property and greenery has been dug away. Mr. Hancock visited the property the following day and observed what he described on the stand as a "complete mess". Prior to the digging, the property was cut and had a swale. Now it had a 90° angle drop with a depth of anywhere from 3 to 4 feet. Previously there was no drop, only the swale. He testified that the MacGillivary property previously sloped toward a ditch on his property. The ditch also contains water at the bottom. One picture which was taken in 2004, shows plants and a full tree which are no longer there.

He referred to several of the photographs showing a wooden fence which was present when he bought the property. He described a "tangled garden" to which he added, but many of the shrubs in it were not planted by him originally. He testified to having a lilac tree. However, he believes MacGillivary pushed the machine through the bushes and then cut them down. Once it was cut, the tree was found 18 feet beyond the edge of the property. A survey was conducted and the corner marker was moved two and a half feet closer to the MacGillivary property.

He reviewed the photos tendered as Exhibit 14. He testified that the snowy part on the lawn is his property and the tree is near where the pipe comes out. The photo depicts where soil was added after Mr. MacGillivary had dug as none of it was present when he purchased the property. Prior to MacGillivary's work, the water was not present continuously but the swale was typically shallow and dry. Photograph #13 shows shrubbery that had been present before the digging while photo 16 shows a temporary fence installed for safety reasons.

Exhibits 15 and 16 are several photographs which depict the water running off the property to the ditch. In all, the evidence showed the water runs into the drainage system out of the ditch at the base of MacGillivary's property.

He compared Exhibit 25 to the view now and found it was different. The greenery is showing as behind the shed on the property. He indicated there were no discussions with MacGillivary respecting any consent to the work and he would not have consented to it in any event.

Through his counsel, the Claimants tendered into evidence several quotes for remedial work which they submit will restore the property to a safe condition. I have addressed the quantum and application later in this decision in assessing damages.

With respect to the counterclaim for snowplowing, he testified to needing the services of a snowplow in late 2008. Mr. Wilcox's truck had broken down and he had asked Richard Bosworth to help him on a temporary basis. He was initially recommended to a Mr. Daniels. He later approached Angus MacGillivary for a recommendation and he suggested Andy Frank. Mr.

Frank quoted $80 plus HST to plow. He then asked Mr. MacGillivary whether he would be interested in plowing. The arrangement was for a dozen beer for each plowing on each property. In other words if both the King Street and Gray Street properties were done, it would cost two dozen beer which Mr. Hancock would deliver to him. That arrangement continued until the digging began in March 2009. MacGillivary was given beer each time

When he commenced the claim, he received an invoice for $5543.22. He denies owing that much money as all of the work was paid by beer. He takes issue with the 2008/09 quote as he recalls having little plowing and not that much activity. Mr. and Mrs. Hancock do a lot of the snow work themselves because he likes to do that kind of work. MacGillivary was not hired until December and there was no plowing in December. He compared the invoices for three plows from December 31/January 1. He tendered into evidence printouts from the Weather Network which show trace amounts of snow on December 31 and 10.3 mm on January 1

He testified that MacGillivary uses a backhoe for plowing and not a half ton truck. He described his relationship with MacGillivary up to that point as cordial

On cross examination, He denied being interested in selling his property. Mr. Bailey presented him a letter dated January 20, 2010 which he wrote and mailed asking specifically about buying the property. There is no mention of digging. Angus MacGillivary took it upon himself to excavate to reroute the water. When put to him, he denied asking MacGillivary to re-route the water prior to the digging or that he would help with the cost of moving the ditch. He described that comment as "absolute nonsense". He testified that the volume of water increased once the ditch was dug. He began living on the property January - February 2012.

He acknowledged receiving a written recommendation for a fence and a retaining wall for safety. One quote by Mr. Dell was given verbally over the phone. He has submitted notes at the base of an e-mail showing a breakdown of the quote from Dell.

He identified the tangled garden in the photograph and acknowledged several of the shrubs as weeds. He acknowledged the basement where the pipe was running out. He referred to photographs 7 and 8 which show a pipe with a pink coloured substance on the ground. He denies noticing an odour, especially of sewage. He confirmed that no repairs were performed since 2008.

He testified that he did not receive any invoices from MacGillivary until March 3rd. He denied emphatically that he ever received them. He testified that he met with MacGillivary from time to time. He described a meeting in the fall of 2009 where MacGillivary was present before any plowing was undertaken. At the time, MacGillivary was welding a plow blade. He did not recall the specific date the swale was excavated but believed it may have been after January 20 as he visited the property following the tenant's call on Friday, January 22.

Rebecca Jayne Hancock

Mrs. Hancock said little in evidence other than stating that she agreed with her husband's evidence. She would not have given permission for the ditch constructed by MacGillivary.

Trevor John Douglas Levy

Mr. Levy is 27 and resides at 54 Campbell Lane in Windsor. He is a friend of Angus MacGillivary. In the fall of 2009, he recalls an incident where he was working in Mr. MacGillivary's garage. Mr. Hancock approached them and asked Mr. McGillivray about redirecting water to Tremaine Crescent and overheard Hancock offer to pay him for his time. He does not recall the specific day or date, but that it was an afternoon. Mr. MacGillivary was dressed casually. The conversation lasted approximately 10 to 15 minutes. Levy was standing at the back of the garage while Hancock and McGillivray were in the front. He described the garage as being wide i.e. 2-3 cars could fit sideways in it. The nature of the work involved redirecting the water from the pipe. He heard a couple of minutes of the conversation which he described as cordial. He did not notice any odour that day, however, he had noticed previously a "sewage smell" on hot days mostly from sitting water. He could not really describe the smell.

On cross-examination, he confirmed that he was not sure what the smell was only that it was a "marshy sewage" smell. He acknowledged that it is not uncommon to see or smell marsh in Windsor. He described the type of work they were doing as wiring or winch work and a brake job on an ATV. He could not say how they decided to reroute the pipe only that there was a problem with the pipe. The pipe is not redirected yet. Hancock did not mention anything about excavation or removing of plants. He described receiving gifts or getting paid by Mr. MacGillivary on occasion. This appears to be more of an arrangement between friends, rather than an employer-employee relationship, and I do so find.

David Edwin Giles

David Giles resides at 10 Paxton Drive in Dartmouth. He is 55 years old and works as a toolmaker at Halifax Shipyards. He has known MacGillivary for over 25 years and has a friendly relationship with him. He had not met Mr. Hancock before the day of the hearing. He had been to the property on many occasions before January 2010. On one visit he smelled an odour outside of MacGillivary's garage. They followed the runoff and swale and located a piece of pipe from where the odour seemed to emanate. He described it as a swampy, stagnant smell originating from a pool around the end of the pipe. He identified the pipe in the exhibits which was identified by the other witnesses. He described the smell as a "dishwasher smell".

Under cross examination he accessed the property on the King Street side and walked to the pipe. The ditch ran parallel to Angus's driveway. He described the time as sometime between April and May.

Ryan Jeffrey Bezanson

Ryan Bezanson has been a tenant of Mr. MacGillivary's since October 2012. He was present when photos were taken (Exhibit 3, photo 7 and 8). He testified to smelling a strong petroleum smell coming from the pipe, like furnace oil and could feel slickness in the water.

Under cross examination, he indicated that he did not observe anything from the pipe. He thought the pink substance in the photo was located over the pipe and not below. However, he would not agree that it did not come from the pipe. He described the flow as trickling not rushing and does not know where the discoloration occurred. He first noticed the discoloration when MacGillivary brought him to look at it.

He has no specialized expertise as an engineer or other environmental field expertise. Mr. MacGillivary simply wanted another set of eyes. Mr. Bezanson made no efforts or suggestion to report the problem.

Angus MacGillivary

Angus MacGillivary testified that he knows Mr. Hancock and his business as they are next door to him. He confirmed he performed snow removal for Mr. Hancock. He performs the services using a Ford 4-wheel drive backhoe. Through his counsel, he tendered into evidence a copy of an Environment Canada weather report for the Halifax station. He reviewed the snow dates and plowing records which show snowfall for that month. Unfortunately, like the Weather Network excerpt, the records are not specific to Windsor. It indicates snowfall for the following dates: November 21 (10 cm), Nov 22 (27 cm), February 3 (19.4 cm). His plowing records are shown as having plowed on November 21, November 24, February 1 and 2, 3, 4, 17 and 23rd. He also plowed on February 18, 19 and 22 to make it clearer and neat. When he plowed, he sanded at the same time. The arrangement was for $94 per parking lot. He testified that he has not been paid thereby prompting this claim.

His counsel reviewed the photographs contained in Exhibit 3. He identified the parking lots which he plowed. In photographs 7 and 8, he identified the pink substance around the pipe referenced in the evidence thus far. The picture was taken in late winter or early spring. He indicated that the substance felt like furnace oil. He observed several animals covered in oil. He noticed it had splashed on the snow. He confirmed the common boundary was on the south line. The pipe runs from the 300' row house. He noticed a sewer smell from the outflow. He identified the photographs in the exhibit book and identified the property line and the rope line where he dug.

He testified that there had been issues with the water backing up along the common boundary due to the presence of thorn bushes and weeds. He owned his property for 23 or 24 years and for eighteen of those years had no problem with water flow. He attributed this to the pipe and ditch. The property was sold to Mr. Hancock's company in 2004 and he noticed a significant change in the volume and intensity of water flow. It contained laundry water and at times, blue lint and soap. He noticed a sewage smell. He told Mr. Hancock about the problem and he "brushed it off". At the time, he and Mr. Hancock had a cordial relationship.

He testified to having a conversation about the soapy water from the pipe along the common boundary. He and Mr. Hancock discussed fixing the problem, specifically, to re-route the ditch to Tremaine Crescent. He described several incidents where he claims the conversations took place, both in his garage and when Mr. Hancock was in his garden. He reviewed the remaining photographs showing various views of the property. He indicated that the water flows over the pipe and gurgles as it cannot contain the flow of the water. Photographs 31-35 show where there was stillwater on the property. The photographs show several areas where he dug. He testified that he worked with an excavator on April 15, 2010 to tidy up what work needed to be done. He described the work as moving the scoop back and forth to level it. In total the job took about 3-4 hours. The ditch area consisted mostly of weeds and thorn bushes.

He described a subsequent visit from Mr. Hancock where he indicated he approved of the work indicating it "looked good". Following that, the parties discussed the purchase of the MacGillivary property at one point, MacGillivary offered to accept $103,000 and he would forgive the bills for the snow removal and the cost of the ditch. He did not send a bill for the ditch. He indicated that their cordial relationship ended once MacGillivary wanted money for the plowing.

When asked specifically by Mr. Bailey, he did not recall ever hearing Mr. Hancock state that he could not dig the ditch without permission. Further, he does not recall a tangled garden along the property.

He received the letter written by Mr. Hancock expressing a desire to purchase the property. That took place within a week of getting the call respecting the work done on the property. In his view, it is necessary to have a pump to move water along a 300 foot pipe.

Under cross examination by Mr. MacKenzie, he indicated that he did not recall specific comments by Mr. Hancock that he was upset with the ditch. He recalled two conversations respecting remedial work including dredging. He recalled thinking specifically about what needed to be done. They did not discuss any other remedial action besides a ditch.

He discussed rerouting the water in the back. He did not discuss a contract or a bill to be submitted. Trevor Levy was present but he discussed rerouting the water and not the pipe. There was no discussion concerning the redirection of the pipe. When he took the picture of the pipe, there was no indication of the pipe pouring out and splashing.

With respect to the snow plowing, he testified distinctly recalling plowing on February 1st and 2nd. He waited to plow on several occasions.

Mr. MacKenzie noted that there was no reference to a contract for dredging in his defence. He spoke with a representative of NS Power who attended to stabilize the power pole on the property.

In rebuttal evidence, Mr. Hancock testified that he was advised by the tenant that a contractor was present to stabilize the power pole. He was not present to see the work being done.

On July 10, 2013, a site visit was conducted to place the evidence in context. As described by the witnesses, the ditch is approximately 3 – 4 feet deep in most places. It is well past the survey marker into both parties' properties. It has grown in with grass and various weeds. The Southland property contains scrub bushes located near the rental building on the MacGillivary property, occupied by Ryan Bezanson. There was water in the ditch which I estimate at 6-8 inches deep but only near Bezanson's residence, which faces King Street and located uphill from the pipe. The pipe was not flowing when I visited. I did not notice any discoloration or any substances, debris or discoloration around the pipe. There were no discernible odours, whether from petroleum products, a dishwasher or laundry. There was no lint in the grass. The grass in the ditch was very high and had clearly not been cut that season. The grass and ground on the properties were wet probably due to rain the previous day. The weather was cloudy. The ground near the property occupied by Mr. Bezanson was more level and even than appeared in the photographs. It is clear that area adjacent the ditch had been improved.

The Law - Trepass

The tort of trespass to land has been variously described through the texts and cases. The following is from J.S. Williams, *Limitation of Actions in Canada* (2nd, 1980), where the learned author states at p. 62:

"The act of intentionally or negligently entering or remaining on, or directly causing physical matter to come into contact with land in the possession of another is a trespass... In such actions the accrual of the cause of action occurs when the act of trespass is committed. Each distinct act of trespass is viewed as giving rise to a fresh cause of action. Practically each day marks the accrual of a fresh cause of action. A succession of such acts may amount to what is called a 'continuing trespass'."

This passage was cited with approval by the Nova Scotia Court of Appeal in *Williams v. Musgrave* (2000) NSCA 24 per Cromwell, JA (as he then was). Of note from this passage, there must only be an unlawful entry by one person on the land of another. The action can be either deliberate or negligent and no damage needs to have occurred, as a result.

The entry must be unlawful, meaning without invitation or other colour of right, such as prescriptive remedies. As noted in this decision, the Small Claims Court has no jurisdiction to find and enforce prescriptive rights and indeed, neither party has raised them.

There are several defences to trespass to land, but only two have been raised by the Defendant, the defence of legal authority or permission to enter the premises and a defence of necessity.

For the following reasons, I find the tort of trespass has been established on the evidence and, further, neither defence has been established.

Findings

In reviewing the evidence, I find without hesitation that the ditch was dug by MacGillivary. I am unable to make an order as to the location of the lines, but I am satisfied based on the photographs, a physical view of the property and the witnesses' testimony, that the ditch now extends past the boundary line and encroaches well into the Southland Developments property.

In assessing the evidence presented, I am not satisfied that the defence of necessity has been established. In looking at the evidence of the various witnesses, they have each testified to observing water in the ditch and some noticed a smell:

- Garth Hancock – Mr. Hancock testified to water flowing from a pipe at his back foundation wall running to the swale. The water is pumped by a sump pump.

- Trevor Levy – Mr. Levy testified to noticing a marshy, sewage smell on hot days from sitting water. He also testified that it is common to smell marsh in Windsor. He did not notice any odour on the day of the meeting where Hancock and MacGillivary discussed re-routing the water.

- David Giles – He described a swampy, stagnant smell originating from the pool around the pipe; he compared it to a dishwasher smell.

- Ryan Bezanson – Mr. Bezanson testified to a strong petroleum smell coming from the pipe in October 2012. He testified to seeing a pink substance above the pipe and was adamant under cross examination that it was not below.

- Angus MacGillivary testified to seeing a pink substance and noticing a petroleum substance on the ground and petroleum soaked animals. He did not provide details of what animals were soaked with oil.

I find based on the evidence that the water flowing from the pipe typically had a swampy stagnant smell, consistent with the marshy climate described in evidence by the Town Engineer, Donald Beatty. This is also consistent with the odour one would expect from still water on the Southland property. I find the evidence of Mr. MacGillivary and Mr. Bezanson to be inconsistent with the photographs and the other testimony. Given that their observations of a pink substance occurred long after the commencement of the claim and the commencement of the excavation, I find on the balance of probabilities that this was a contrivance on their part

I also find it difficult to accept that the ditch was dug by MacGillivary to address an accumulation of water. If it were necessary to address the overflow, I expected to see efforts taken to encourage the free flow of water from the drainage system on the King Street side of the properties through to Tremaine Crescent. On the day of the site visit, the grass was long and the water pooled uphill from the pipe. I found no evidence of petroleum, sewage or other substance

flowing from the pipe. I reject the defence of necessity. The only issue remaining is the question of whether Mr. Hancock consented to Mr. MacGillivary's digging the ditch.

In order to establish consent, one must look at all of the circumstances. There is evidence that discussions took place concerning the flow of the water between Hancock and MacGillivary. However, I do not find this evidence is sufficient to establish on the balance of probabilities that Mr. Hancock had finally agreed to Mr. MacGillivray digging the ditch. I accept Mr. Bailey's submission that Mr. Hancock's communication was equivocal and his actions unclear. For example, under cross-examination, Mr. Hancock emphatically denied ever expressing an interest in purchasing Mc.Gillivary's property. However, Mr. Bailey tendered into evidence a letter where did indeed make an offer to purchase the property. Nevertheless, I do not find there was ever a direction given by Hancock for MacGillivary to begin the work.

Secondly, I do not believe that Mr. MacGillivary would do this work gratuitously. Indeed, the snow plowing had been conducted in 2008-2009 for which he claims to be owed in excess of $5500. It would not make any sense that he would agree to perform more work when he expected to be paid from a previous job. Consequently, the only way he could establish consent was if the evidence could prove a contract was created. Thus, the usual elements of a contract must be present, namely, offer, acceptance, consideration and an intention to create legal relations. I find none of those elements were present. The evidence is not sufficient to establish an offer, an acceptance or any details of consideration, both in terms of the work to be performed or its cost. There is nothing in evidence which would lead one to believe that an agreement existed at all. Mr. MacGillivary undertook this work on his own accord without direct or tacit direction or concurrence from the Claimant.

I find MacGillivary liable in trespass to Southland Developments Limited. The Claimant is entitled to damages.

Damages – Trespass

The Small Claims Court is a creature of provincial statute and, therefore, limited to those remedies prescribed by the *Small Claims Court Act*. Specifically, the Court is limited to the following:

- A monetary limit of $25,000 arising from a contract or tort inclusive of general damages but exclusive of interest; (s. 9(a)).

- General damages not to exceed $100; (s. 11).

- In addition, the Small Claims Court may order pre-judgement interest and costs as prescribed by regulation under the *Act*.

A typical trespass action in the Supreme Court of Nova Scotia involves an application for certificate of title and/or a declaration of prescriptive rights such as an easement or adverse possession. However, the *Small Claims Court Act* specifically excludes from the Court's jurisdiction, a claim "for the recovery of land or an estate or interest therein" (s. 10(a)).

The Small Claims Court is not a "section 96 Court", meaning its members are not appointed by the Parliament of Canada pursuant to s. 96 of the *Constitution Act, 1867*. As a result, it lacks the power of the Supreme Court of Nova Scotia to grant injunctive relief and other prerogative remedies sometimes ordered in trespass cases.

Assessment

The law respecting the assessment of damages in trespass cases is succinctly stated by Justice Nathanson in *Saulnier v. Bain* (2006) NSSC 27:

"[51] The fundamental principle for fixing the measure of damages for loss of property is *restitutio in integrum*. This principle attempts to place the injured party in the same position as before the tortious conduct which caused the loss: **Livingston** v. **Rawyards Coal Co.** (1880), 5 App. Cas. 25 (H.L.), at p. 39.
[52] Thus, the plaintiff is entitled to full restitution for his loss. While the depreciation in selling value of the land will generally be an adequate measure of the damage to the land, in the present case no evidence was presented as to the value of the land or the amount of diminution of the value which may have resulted from the cutting and removal of trees. In the absence of such evidence, the Court has no choice but to look at the value of the trees which were cut and removed.
[53] Counsel have cited a number of cases on this point. **Union Bank of Canada** v. **Rideau Lumber Co.** (19?2), 1 O.W.R. 764 (C.A.);**Collicutt Lumber** v. **Dorey**(1980), 42 N.S.R. (2d) 204 (T.D.); **MacAleese** v. **Hiltz and Mills** (1987), 83 N.B.R. (2d) 292 (C.A.); **Patterson** v. **Municipal Contracting Ltd.** (1989), 98 N.S.R. (2d) 259 (T.D.); **Thee**v. **Martin** (1998), 41 C.C.L.T. (2d) 86 (B.C.S.C.); **Phillips Estate** v. **Nobel et al.** (1995), 170 N.B.R. (2d) 161 (T.D.); **Bawa** v. **Noton** (1996), 74 B.C.A.C. 154 (B.C.C.A.); and **Shewish** v. **MacMillan Bloedel Ltd.**(1990), 74 D.L.R. (4^{th}) 345 (B.C.C.A.).
[54] These authorities reveal that the measure of damages depends upon the nature of the trespass.
[55] There appear to be two rules for determining the measure of damages: a mild rule, where the trespass has been inadvertent or under a *bona fide* belief in title or by mere mistake; and a severe rule, to be applied where the trespass has been willful or fraudulent. Under the mild rule, the measure of damages is the value of the trees less the amount which the defendants by their labour have added to that value. Under the severe rule, the measure of damages is the value of the trees cut down, without deduction for the labour and expense of cutting, that is, the value at the time and place the trees were severed from the land.

[56] At one time, trespass caused by negligence was lumped in with and treated the same as willful trespass, attracting the severe measure of damages. Now, the degree of negligence must be examined. The severe measure of damages will be applied only where the negligence bears the mark of culpability and want of *bona fides*."

I favour the evidence of Hancock over that of MacGillivary, as it is more consistent with the evidence tendered. While Mr. Hancock was equivocal in his dealings with Mr. MacGillivary, I found Mr. MacGillivary exaggerated the truth. I find that he and Mr. Bezanson contrived the discovery of pink substances around the pipe. As I have already found, there was neither a contract, consent nor necessity. When visiting the site, it was clear that MacGillivary's property had been improved. I find Mr. MacGillivary took the steps on his own accord, without regard to the Claimant's interest. In my view, the "severe rule" applies.

The severe rule provides the Court with discretion to award an amount greater than the diminution in value caused by the trespass. However, the Claimant is not entitled to damages which would put it in a better position than prior to the trespass. I shall apply this principle in considering an award for special damages.

Special Damages

As noted above, the intent of an award of damages in trespass is to put the Claimant in the same position as it would have been in before the trespass occurred. The Nova Scotia Supreme Court stated the following in *Patterson v. Municipal Contracting* (1989), 98 N.S.R. (2d) 259 (T.D.), where Justice Tidman stated the following:

> "The overriding consideration in trespass cases is that the Plaintiff should as nearly as possible be placed in the same position as before the trespass and generally this is considered done if the Plaintiff is paid the amount of the diminution of the value of the property caused by the trespass. *However, there are cases where it is reasonable in order to fairly compensate the Plaintiff to make an award based on a consideration of the cost of reinstatement or replacement even though such an award may exceed the diminution of the value of the property caused by the trespass.* (emphasis mine)
>
> I believe it is clear from the more recent tort cases, and I subscribe to the same view, that in determining the quantum of damages for trespass each case must be decided on the basis of what is reasonable on the particular facts being considered."

There was no evidence presented by either party as to the diminution in the value of the property owned by Southland Developments property as a result of the trespass. The evidence established that the property is diminished, but only to the extent along the ditch where it is unsafe due to the height of the bank/depth of the ditch and where it is found to be precarious. In my opinion, this justifies the award of an amount required to make it suitable once again.

State of the Property

The Claimant tendered into evidence the following reports to illustrate damage to the property.

Strum Environmental Report

Mr. Hancock received a report from R. Bruce MacNeil, P.Eng., dated September 7, 2010. Mr. MacNeil stated that he reviewed the property and noted a "very steep cut essentially on the property line. The cut slope is up to approximately 0.9m. It is also understood that there is a runoff toward the property line area, and that water occasionally ponds in the area."

Mr. McNeil recommended the following:

1. From a safety perspective, a fence is recommended because of the abrupt change in grade.

2. From a construction and long term stability perspective, we recommend a slope of 3 horizontal to 1 vertical (3H: 1V) with proper erosion and sedimentation control measures. This can be achieved by placing fill to create a slope down from the existing top of the excavation. At the bottom of the new 3H: 1V slope, a grass lined swale/ditch can be constructed for drainage. This slope and swale/ditch repair would provide protection from loss of land on your property due to collapse or erosion of the slope. A gravel-lined slope could also be considered. Also, a retaining wall would be another option.
3. An outlet for the runoff water should be considered to prevent ponding of water. Connecting the low area along the property line to nearby ditches appears to be a solution. The grass lined or gravel lined swale noted in item 2 would promote drainage."

AP Reid Insurance

Mr. Hancock presented a letter from Eric Bourque of AP Reid Insurance in Dartmouth, Nova Scotia. Mr. Bourque made the following recommendation: "Permanent fencing is required to be erected between the neighbouring property; to help reduce the liability exposure created as a result of the excavation undertaken by your neighbour."

Neither author of these reports testified in court. However, as a result of the evidence tendered and the corroboration of the evidence as a result of the site visit, I am satisfied that certain of these recommendations are required in order to reinstate the Southland property to a condition prior to the occurrence of the trespass.

I find that the pipe which drains into the ditch has been in place for over 50 years. Further, I accept the evidence of Mr. Beatty that it is not possible to redirect the drainage of the properties due to the floodplain in Windsor. Accordingly, Mr. Hancock's only solution is to stabilize the existing area around the property where the bank has been constructed.

The claimant has submitted two quotes for repairs:

- O'Neill's Property Services – The contractor recommends a retaining wall along 100 feet of the bank which is set in 9 to 12 inches of class A compact stone at the base. They recommend wall blocks with clear stone and a drain pipe between the wall and the bank. This is followed by backfilling with clear stone and replanting of existing bushes. The total quote inclusive of tax is $8838.90.

- Josh Dill – Mr. Dill quotes a total cost of $25,202. His recommendations include a quote to construct a fence for $4750 plus HST. The fence would be 100' long by 6' high. The remaining quote is for backfilling and levelling his property plus the construction of a retaining wall. The quote was provided in August, 2010 with most figures provides verbally over the phone to Mr. Hancock.

Repairs – Findings

As a result of my findings, I am prepared to award the following repair costs. For reasons noted below, I have rejected a substantial amount of the claim as I find it will put the property in a superior position to how it existed prior to the damage. Furthermore, but for the wooden fence, any other improvements are "recommended" or "suggested", rather than required.

- *Wooden fence* – The Strum Environmental report and the AP Reid Insurance report are unambiguous in the need for a proper fence. Mr. Dill estimates a replacement fence of $4750 plus HST for a total of $5462. In addition, he quotes $115 for the removal of the temporary fence. I find these recommendations to be reasonable.

- *Drainage* - I find some drainage work is required but not to the extent indicated in the above quotes. The work suggested would improve the property to a state which is superior to that which existed prior to the trespass. The retaining wall is noted by Mr. MacNeil in the Strum report as an option. No evidence was called to establish that this is mandatory. I disallow any claim for a retaining wall. I refer to the O'Neill's Property Service quote of $8838.90. As indicated, I find this to be excessive. Mr. Hancock is entitled to some compensation to assist in the leveling or lessening of the pitch of the ditch. In the absence of an acceptable quote, I am left to set an arbitrary amount. I set this figure at $3000.

- *Shrubbery/Tangled Garden* - I have looked at the photographs provided by the Claimant in support of his compensation for shrubbery and greenery removed by Mr. MacGillivary. These bushes appear to be wild shrubs found commonly in Nova Scotia. No value was provided for the lilac tree. The actual loss in this case appears to be nominal, despite his significant disappointment. I do not allow any compensation for this heading.

Mr. Bailey submitted that to award compensation for such losses is in essence an award of general damages. However, as noted, I have taken into account actual pecuniary loss experienced by the Claimant.

General Damages

It is clear from Mr. Hancock's evidence that he was greatly inconvenienced and distressed by Mr. McGillivary's actions on his property. However, I am unable to award any amount greater amount than provided in the *Small Claims Court Act*. Thus, regardless of whether the Claimant could substantiate a higher claim for general damages, or even for punitive damages, this Court is limited to an award of $100.

Mitigation

It is trite law, that a plaintiff in a civil action is required to mitigate his or her losses. A plaintiff cannot sit on his hands and allow losses to accumulate over the passage of time. Furthermore, the Claimant has attempted to prove the property is in a precarious state, yet it has made no improvements over the three-year period between the date of trespass and the site visit.

Mr. MacKenzie submits that Mr. Hancock was unable to perform any of the necessary remedial efforts because he was not able to enter his neighbor's property. This may well have been. However, it was also possible to attempt some remediation immediately. While the relationship between both men has made any such cooperation virtually impossible, I am not satisfied that Mr. Hancock could not have done more. Accordingly, I am reducing the award under this heading by 10%.

Calculation of Damages

In summary, I allow the following items of damages:

Wooden fence:	$5462.00
Remove old fence	$ 115.00
Stability/Grading	$3000.00
Special Damages	$8577.00
General damages	$ 100.00
(Less 10%)	($ 867.70)
Total Claim	$7809.30

Counterclaim

The Defendant has filed a counterclaim for snow removal and damages to repair his property from water flowing from the Claimant's pipe. I shall deal with each item separately.

Snow Removal – Mr. Hancock submits that Mr. MacGillivary agreed to perform snow removal services for beer. I find the evidence is not sufficient to establish such an agreement. While the Court will not concern itself with the adequacy of consideration between two persons of business, the party proving a bargain such as this has the onus of establishing its existence. There is no question there was a contract for snow removal but I find a price has not been fixed. I am left to look at all of the circumstances. If I am wrong in finding a contract existed, Mr. MacGillivary and/or Maritime Snow Removal is entitled to compensation under the head of *quantum meruit*.

I am not satisfied that MacGillivary's claim for the number of snowfalls is either accurate or appropriate. He claims to have plowed and/or sanded a total of 18 times for Mr. Hancock in the winter of 2008-2009. I reviewed the report from Environment Canada tendered into evidence through his solicitor. It shows snowfall at the Halifax Stanfield International Airport. I find that the number is not consistent with when plowing may have been required. Specifically, I am not satisfied that it was necessary to plow on the following dates: November 25, January 7, February 1, February 2 (either time), February 17, and March 1. In total, I would reduce the amount of plows required to 10.

There have been several figures given in evidence as to what is an appropriate rate of pay for snow removal. Mr. MacGillivary seeks $5543.22, based on an estimate of $94 per parking lot per day, which includes $198 for the King Street property as there are two buildings. Carl Wilcox testified he was paid $50 for doing the Southland Developments properties on the same date. Mr. Hancock testified that he sought to retain the services of Mr. Andy Frank for $80 per day for his lots. Based on these figures, I find the estimate of $94 per lot excessive. In the absence of proof of an agreement, I use an average of the Wilcox and Frank quotes of $65 per day for the lots. This would be required on 10 days that winter for a total of $650.

Damage to Property – Mr. McGillivary has filed a claim for damage caused by the water pumped into the swale on his property. As previously indicated, I am unable to find on a balance of probabilities that any damage was caused to the Defendant's property as a result of the drain pipe. The pipe has been in existence for fifty years. There was no evidence that I accepted of any petroleum, excessive water flow or other substance flowing from the Claimant's property. I am also unable to find any damage caused by the water flow. I reject this aspect of the counterclaim.

Conclusion

In conclusion, I find that the Claimant, Southland Developments Limited has proven its claim in trespass. The Defendant, Angus MacGillivary is liable to the Claimant for $7809.30.

The counterclaim is allowed in part. The Defendant has proven their counterclaim against Southland Developments Limited in the amount of $650.

It was not clear to me from the evidence if Mr. MacGillivary was working for himself, or Maritime Snow Removal. I have assumed throughout that either he owns this business, either alone or in partnership with Ms. Dean. I order the claim and counterclaim be set off against each other. If it is necessary to order payment by MacGillivary to Maritime Snow Removal, I shall hear from counsel on that issue.

The Claimant was successful in establishing liability, although not to the extent of the damages it had originally sought. The Defendant was only modestly successful in its counterclaim. Rather than ordering a set-off of costs, I fix the amount of costs to be awarded to the Claimant at $75, which are its costs net of any costs on the counterclaim. Given the passage of time between the commencement of the action and its eventual hearing, I find this is not an appropriate case to award prejudgment interest.

Total Judgment.

The Claimant, Southland Developments Limited shall have judgment against the Defendant Angus MacGillivary as follows:

Total Claim:	$7809.30
Costs:	$ 75.00
(Counterclaim)	($650.00)
Total Judgment	**$7244.30**

An order shall issue accordingly.

Dated at Halifax, NS,
on February 5, 2014;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)