IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: First Class Grass Landscaping and Excavation Inc. v. Greenmont Developments Ltd., 2014 NSSM 52

Claim No: SCCH 420646

BETWEEN:

Name	First Class Grass Landscaping and Excavation Inc.	**Claimant**
Address	c/o William M. Leahey Leahey Legal Services Suite 425 – 1741 Brunswick Street Halifax, NS B3J 3X8	
Phone	(902) 492-1787	

Name	Greenmont Developments Limited	**Defendant**
Address	c/o John Di Costanzo Noseworthy Di Costanzo Diab 6470 Chebucto Road Halifax, NS B3L 1L4	
Phone	(902) 444-4747	

William M. Leahey appeared for the Claimant.

John Di Costanzo appeared for the Defendant.

DECISION

This is a claim for breach of contract. The hearing took place over the course of three full nights followed by written submissions. This decision has been filed beyond the sixty days required by the *Small Claims Court Act*. The particular time line has been held to be directory rather than mandatory, as noted most recently by the Supreme Court of Nova Scotia in *Towle v. Samad*, 2013 NSSC 260. Nevertheless, the parties and their counsel have doubtlessly been anticipating this decision. Their patience has been greatly appreciated.

The evidence in this matter has been quite detailed and well presented by two experienced members of the Nova Scotia Bar. In this decision, I have read each exhibit and considered all of the evidence. While there may be certain exhibits not specifically referenced, both parties can be

assured that I have given each exhibit and point raised in *viva voce* evidence due consideration.

The contract was for the supply of labour and materials by the Claimant, First Class Grass Landscaping and Excavation Inc. ("First Class Grass"), to the Defendant, Greenmont Developments Limited ("Greenmont"). The work related to the excavation and servicing of a lot located at 52 Mountain Road, Halifax, Nova Scotia.

The work to be done consisted of excavation, back filling and installation of water and sewer lines in furtherance of the construction of a building which would eventually become two semi-detached dwellings.

Despite frequently contradictory positions, certain facts are not seriously in dispute. Both counsel concede, in their submissions that there was a valid contract and certain work was performed. The issue is the interpretation of the contract and the degree to which the contract was completed.

First Class Grass is a private company owned by Mr. Derek Hale. He operates a second company in conjunction with it known as Ground Control Excavation. Throughout the matter, the parties referred to Ground Control, First Class Grass and Mr. Hale. Yet I find, unless stipulated, they were referring to the Claimant. Mr. Hale was contacted in the spring of 2012 by representatives of Greenmont. Greenmont is a privately owned real estate company, whose primary shareholders are two brothers, Pierre Atie and Charlie Atie. For the purposes of clarity in this decision, I have found it necessary to identify both Messrs. Atie by their first names, "Pierre" and "Charlie".

Mr. Hale prepared a quote for Greenmont dated May 11, 2012. The quote described the various excavation services. The total estimate for the job was $24,239 plus HST. At the foot of the estimate appears the following:

"***Please Note: any use of rock breaker will be considered an extra cost and will be invoiced at an hourly rate, if required and/or requested by homeowner. Price for hydraulic breaker will be billed at rate of $190.00 per hour. Any additional services will require a change order and pricing will be discussed prior to commencement."

Although there is some dispute about the last provision, Greenmont was satisfied with the quote and directed First Class Grass to proceed with the work. First Class Grass was on-site at 52 Mountain Road from May 22, 2012 to September 26, 2012. At that time, a disagreement arose with respect to the total amount to be paid under the invoice. While I shall deal with specific findings further in this decision, it is clear First Class Grass left the job site and Greenmont stopped paying. The Claimant prepared an invoice for $29,355.86 plus $4403.38 HST for a total of $33,759.24. Two payments had been made by Greenmont totaling $15,000.00. The amount of the Claim is $18,759.24, the difference in the amount they claim to be owed.

The Defendant alleges that the Claimant failed to complete the contract and failed to pay its subcontractor, Innovative Drilling Limited, resulting in a Builders' Lien being filed against the

property. In addition, while not specifically pleaded, the Defendant claims a set off which will be set out more fully in these reasons.

Both counsel correctly described this case as turning on the credibility of the witnesses. Consequently, the issue is not whether a contract existed but about the interpretation of the terms of that contract.

The Issues

As the issues are primarily fact-based, they are relatively straightforward to define, although not necessarily to find in fact. They are as follows:

- What was the Agreement, in general?
- What was the agreement with respect to blasting and other excess work required?
- What arrangements were made for the abandonment of the old water lines as described by the Halifax Regional Water Commission?
- What work was actually performed by the Claimant for the Defendant? What was the value of that work?
- What has the Defendant established by way of a set off?

The Evidence

The Claimant's Evidence

Derek Hale

Derek Douglas Hale is the president of First Class Grass. The company is in the business of excavation, landscaping, and snow removal. Mr. Hale has been operating a business known as "First Class Grass" since April 2000, although the business was not incorporated until 2009. From time to time, he contracts in the name of a subsidiary company, Ground Control Excavation.

He attended to 52 Mountain Road to review the property and prepare a quote for the excavation work required by the Defendant. The property was described as having previously had a dwelling on it. Some of the work was to be performed by Ground Control. At the time he delivered the original quote ($24,239 plus HST) to Pierre and Charlie, Mr. Hale advised them that reference to the rock breaker was added as a precaution in case there was unseen rock in the ground. He testified Pierre was on-site and indicated that he was fine with paying extra for blasting but wanted a cap at $5000. First Class Grass was hired and performed work each week, but apparently on an irregular basis, from May 18 to September 25, 2012. Mr. Hale prepared an Excel spreadsheet outlining the work that was done and the cost. On May 22, a float fee was charged to bring the rock breaker to the job site. First Class Grass' workers identified the possibility of granite which could not be broken. Consequently, there are five entries indicating "no charge" for the days when he was unsuccessful at breaking the granite.

Sometime around May 29, Mr. Hale spoke with Pierre indicating he had no success removing the rock. He would not charge them for his time, but Greenmont should hire somebody else who could blast it. He contacted John Hill of Innovative Drilling to provide a quote for the blasting work. Mr. Hill quoted $6000 on June 18. Mr. Hale finished the job and obtained the permits for blasting. He used a Cat model 315 excavator to lay mats required when blasting was being undertaken. These mats are thick covers designed to contain the debris to the site and prevent it from flying around. First Class Grass was on-site between June 19-29.

First Class Grass prepared the site for an engineered pad, i.e. they removed the existing material and filled the hole with 6" of extra material. Rock was then added and compacted before being refilled. He testified that this work was undertaken with the advice of an engineer. The Aties paid the engineer directly on behalf of Greenmont. He testified that at no time did either Pierre or Charlie express any concern with the quality of his work.

Between July 16 and August 7, no work was performed at the site. Greenmont hired Vernon Bellefontaine to prepare the foundation. First Class Grass was waiting for the installation of the foundation footings. He could not do anything until the walls were installed. Mr. Hale testified that Mr. Bellefontaine's group started the work on August 7 and following his attendance at the site between August 16-24, the inspector came in and passed the work. First Class Grass backfilled the foundation from the home and put in the six-inch layer of fill. Mr. Hale indicated that he had to use the bucket for the backfill is the excavator would not fit into the location.

He testified to receiving an invoice from John Hill for "approximately $18,000" inclusive of HST. Mr. Hale found the amount more than was expected. Mr. Hill justified the amount to him indicating there was more rock than expected, due to the presence of solid granite. Mr. Hill completed the blasting work for the hookups and as no funds were received, he registered a lien against the property for approximately $20,000. Mr. Hill, Pierre and Mr. Hale discussed the overcharge and each agreed to pay approximately $6000 plus HST.

Ground Control Landscaping sent an invoice to Greenmont dated September 17, 2012 for $15,000. They sent a final invoice for $29,355 plus HST. He testified that he did not receive $18,759.24.

Mr. Hale testified that his quote dealt solely with the installation from the house and mainlines for water, sewer and storm drainage. There were "two runs" of each line, as the building consisted of two duplexes. He installed the services as instructed.

He met Mr. Bob Gogan at the job site. Mr. Gogan works for the Halifax Water Commission as an inspector and he attended to examine the connections and the grade, which according to Mr. Hale, he found to be satisfactory. In his report, he indicated there was more work to be done. He testified that the abandoned lines from the previous dwelling ought to have been capped off or removed in September 2012. Mr. Hale testified that there were no documents provided to him to show the requirement to change the laterals. According to Mr. Hale, the paper work he was

provided only revealed a requirement for a water meter. The Claimant introduced into evidence (Exhibit 1, Tab 5), a letter from the Halifax Regional Water Commission addressed to Greenmont Developments. The letter directs Greenmont to disconnect any abandoned existing water and sewer laterals at main and to install new 5" DR28 sanitary pipe and new 5' DR 35 storm sewer laterals. In summary, the document provides details on the type of laterals and piping required. Hale claims he did not receive this letter until September, 2012. Meanwhile, the Defendant hired Charles Falkenham to conduct some of the work. Tab 7 includes an invoice showing sewer and water cut off. Mr. Hale testified that he was unaware of any of the work needing to be done or that it was actually completed. He testified telling Pierre that the lines would cost extra as it would require traffic control and work at the water main. He provided a photograph of the location of the lines, although currently, the portion is covered over by the street. Following lengthy discussions between Mr. Gogan, Pierre and others, Mr. Hale discussed doing some of the lateral work, but ultimately declined to do it as he was not going to get paid. He estimated it would have taken an a further two days to complete the work.

Under cross examination Mr. Hale acknowledged that he had been in the excavation business for 11 to 12 years since 2004. He has been working on commercial buildings such as apartments and condominium complexes. He has been averaging approximately 20 units per year for the past five years. Until five years ago, he ran smaller equipment such as "Bobcats" and other related equipment.

With respect to the existing job, he initially met Pierre in Dartmouth and then again at the job site. He and Pierre walked the site. Hale arranged for a backhoe to be present to remove material and dig a test pit. He testified that there was large bedrock exposed poking out through the soil and he knew the job was going to be difficult. Indeed, whenever granite is present, excavation can become very difficult. They discussed various alternatives for the job and Mr. Hale sent the quote on behalf of the Claimant. He reviewed the invoice and testified there would be no charge for rock breaking except July 11. He agreed they had not incurred $5000 worth of rock breaking under his contract. There was one charge on June 29 for rock breaking to allow it to set at the elevation of the concrete slab.

Mr. Hale was cross examined on another entry indicating that four pegs were inputted for the foundation. He was aware that permits were obtained. However, he did not receive a copy until obtained from the Halifax Water Commission. He testified that he only received a permit number from Pierre.

He confirmed that the contract contemplated the work to be "pad ready". In order to put the foundation in, the ground must be pad ready. He did acknowledge there is no reference in the quote to a requirement for the site to be pad ready. The final contract price was a fixed price and not billed as time and material charges.

He referred to Exhibit 4 which was the Excel spreadsheet he prepared itemizing all of the time and disbursements for the work. He acknowledged that the first invoice was sent out on

September 12, 2012, while the second was not sent until July 19, 2013. He testified that his former office administrator was also his former common-law partner. The relationship had ended and he did not know that Greenmont had not been billed in the interim. He testified that the Defendant was aware there were further charges pending and to expect an invoice.

Mr. Hale testified that between May 22-29, 2012, he attempted using the rock breaker to remove the granite but without success. He contacted John Hill at Innovative Drilling and received an initial quote of $6000. Mr. Hale advised Mr. Hill that the bill would be paid by Pierre. When the work was completed, First Class Grass received a bill for $18,000. Mr. Hale presented the invoice to Pierre but it did not get paid at first. Mr. Hill filed a lien on behalf of the company for $20,000. Mr. Hale, John Hill, and Pierre met in August and determined that each of them would absorb one third of the cost of the lien of $19,499.04.

He acknowledges there is nothing in the contract related to blasting. It is his evidence that Pierre agreed to $6000 each for the lien plus the $5000 maximum. Mr. Hill did the footwork for the blasting company.

In redirect evidence, Mr. Hale testified that he believes Pierre contacted Mr. Hill on behalf of Greenmont. When the issue of blasting was discussed, Pierre told him do whatever you need to do to get the project done. Once First Class Grass had finished the work, it filed a lien but it was not perfected, in other words, no lien action was filed or *lis pendens* recorded.

In November 2012, Mr. Hale was in the hospital receiving treatment. He was in hospital for 11 days, even spending time in a wheelchair. His former partner, Ms. Constable, did the leg work to prepare the lien action. He testified that he relied on her to pay the bills and handle any invoices. He received an invoice from Innovative Drilling Limited on October 5, 2012. He believes this to be for the final work to the street. At that time, he was not aware of the lien filed by Mr. Hill.

He testified that to make a property pad ready requires one to distribute the soil at the site and compact it to a level of 6". This allows for footing to be poured onto it and the dwelling subsequently constructed. The process usually involves approximately 2 to 3 inches of material distributed to the desired setting.

He confirmed there were no permits provided to him. He called to get the HRM to get the permit numbers. He found this unusual as permits are usually on-site to show building inspectors or by-law inspectors to examine. Greenmont did not provide them with a copy. He contacted HRM to discover the permits were still registered in the name of C.R. Falkenham Backhoe.

John Hill

Richard John Hill is the president and owner of Innovative Drilling Limited. The company is in the business of performing drilling work and setting explosives on properties. Mr. Hill has been doing this type of work for approximately 40 years.

He testified to working at 52 Mountain Road, Halifax. He provided Mr. Hale with an estimate of $6000 to do the job and he was hired. He was initially advised the quote was not accepted by the owner (Greenmont) but the quote was accepted by the contractor. Hale eventually indicated to him that he was in negotiations with the owner who approved the quote. Somehow, perhaps through the conversation, Mr. Hill learned that the owner of the property was Greenmont or some other company owned by Pierre and Charlie. He had done business with the brothers previously. With that information, he started the process of obtaining the necessary permits, bonding and insurance policies. He estimates it takes approximately 17 to 18 days to do the preparation work after he was contracted.

In performing blasting, it is typical for the "earth contractor" to do the digging and place the mats. The process itself requires seismographic work as well as obtaining permission from the neighbors to do any blasting. He estimated it took approximately 2 to 3 days to clear rock from the site. It was necessary to dig a trench between the house and the curb to blast. When all of blasting the work was completed, the total amount was $17,396.52 plus HST for a total of $20,006.00. This was larger than the initial estimate. The final bill was submitted to Ground Control as he was not aware of any payment arrangements between Mr. Hale and the Atie brothers.

When he was not paid for his services, it became apparent that there was an impasse between the parties as to the amount and the liability therefore. Eventually, the lien was settled on March 15, 2013, with each party paying $6000 plus HST.

On cross examination he confirmed that he was owed nothing further by Greenmont or Ground Control. A contract was signed on the beginning of June and the work began on June 18, 2012 to remove the white granite. The HRM initially required a pre-blast survey. The work itself took two or three days to complete. The drill was moved from the property until the work on the street needed to be done. This took place sometime in late August or early September. They had been on site twice and noticed hard white granite.

The Defendant's Evidence

Pierre Atie

Pierre Atie is one owner of Greenmont Developments Limited, which he described as a development or contracting company. Pierre has been in the construction business for approximately 15 years. He had worked in flooring and renovation when he began purchasing and developing properties. He is now devoted to property development on a full-time basis. Initially he was in business with a different partner in a company known as Sanitha Developments. He is now a shareholder in Greenmont Developments, along with his brother, Charlie. He estimates this company has constructed approximately 34 or 35 homes in its existence. He describes his role as the general manager in that he is in charge of the construction

site and deals with subcontractors. His brother is the real estate agent and handles all of the financial matters for the company.

The company purchased 52 Mountain Road in 2011. It was a vacant lot. He was aware the lot contained huge white granite above and below the ground. He did not do any of the work to the lot itself, but only negotiated a price. In 2012, he contacted various contractors to see about the cost of excavation at 52 Mountain Road. His intention was to develop the property for duplexes. He estimates that it usually takes between 5 to 6 months construct a new property.

The typical first step is to obtain the plans and permits, followed by the excavation and pouring the foundation. There are several contractors that the usually Defendant hires for excavation and foundation work including Falkenham. He knew the job would be a difficult project due to the granite. He left a message for Mr. Bellefontaine, as well as Mr. Hale. He initially contacted Cyril Falkenham, who was issued a permit by the HRM. However, Mr. Falkenham did not do the work. In order to change the name to a different person, it is necessary for the contractor to attend to the HRM and show the insurance coverage. He chose not to use Mr. Falkenham due to the cost. He then sought other quotes without satisfaction. At that point, the Defendant decided to make arrangements with the Claimant.

Pierre testified that when he met with Mr. Hale, he told Hale he "did not want any surprises". He wanted a quote for the removal of the fill, and to ensure that the service was strong enough for a foundation. Any inherent costs would be paid by the Claimant, unless an engineer was required. In that case, GeoTech's costs would be paid by the Defendant. The arrangements were verbal. A quote was delivered by Hale to Pierre at Tim Horton's on Wyse Road in Dartmouth. He took the quote with him and noticed one mistake, the quote was to be all-inclusive with nothing extra to be charged for rock breaking. He testified that Mr. Hale agreed, indicating the estimate would be fixed. No documents were signed or amendments delivered; the work simply began. He did not contact Mr. Falkenham to fix the permit. In his opinion, it was Mr. Hale's responsibility to do that.

He testified that in his opinion, there was nothing else needed to be done. There was no requirement for an engineered pad to be completed by Mr. Hale. The surveyor staked the four posts where the work should begin. However, the expectation was that it would be "pad ready" and the services installed. In his opinion, this means that copper pipe would be run inside the property such that, sewer and storm drains could be connected. It would be tied to the water meter so the foundation could then be poured. With respect to the opening in the street, it was intended to be part of the initial contract, so that he could replace the asphalt at the point where it was necessary to open the road. A contractor is expected to have insurance with the HRM, for if they do not have it then they cannot be hired. It is necessary to have the permit number changed and registered in order for insurance to be in effect. Indeed, in his opinion, the contractor should not begin any of the work unless the permit is in the contractor's proper name. He testified that he was under the impression that there was no need for blasting as Mr. Hale indicated his machine should be able to break it. Unfortunately, there were no results after the passage of

several days in May. He was advised that blasting would be necessary to remove the rock. Pierre agreed to the blasting, however, he testified he was not willing to pay for any additional charges.

He acknowledged having seen the blasting underway and was surprised to learn that it was Mr. Hill's company that was doing the work. He did not meet with Mr. Hill until the meeting took place with Mr. Hale, presumably over the settlement of the lien. He testified that Mr. Hill advised him mats were not on correctly. Mr. Atie did not provide any details in his evidence.

Mr. Di Costanzo asked Pierre if the job was completed. He testified that the pad was one foot below the elevation. In fact, the pad should be higher than the elevation. He testified that you can see this "by eye" on-site. He testified that the elevation was incorrect for lot 52B, resulting in it being unable to sell.

He referred to Exhibit 1, Tab 5, which shows some of the services and lot grading. He illustrated the grading by showing arrows running away from the house on the photograph. The problem was resolved when he hired a contractor to put the retaining wall on the side of the house. A storm line was run to that point. He testified that the engineer proved that, however there is nothing in evidence from the engineer. The footing was less than four feet and he had to place a rigid form instead. He hired a surveyor, Thomson & Conn, to determine the level of the property. Their invoice is contained in evidence. Their plans show various slopes and high and low points on the property. The next invoice was for Mr. Falkenham to remove debris and rock from along the retaining wall. The Defendant seeks to have the contract reduced due to the work not being completed, or on time. He testified the pad was indeed ready in August but was about two months behind at that point. He testified there was a 15 foot drop in a hole in the front that you could not put in a power pole to allow for other services to being installed. He attempted to contact Mr. Hale but there's no way he could leave a message. He testified to discussing a payment for Mr. Hill. Eventually the deal became that he would pay Hale, who would eventually pay Innovative Drilling.

He testified that Mr. Hale started the work to install the services but he needed the Water Commission's approval. Mr. Hale did not finish the excavation or cover the driveway where the pavement on the street. He provided Mr. Hale with the permit number to date. He did not supply the permit.

He testified that in order to get the water disconnected, it is necessary to make arrangements with the Water Commission and obtain permission from the neighbours to perform the blastingHe indicated that 3-4 weeks is a normal amount of time for the work to be completed. The connection of the service is sometimes part of the service provided by Innovative Drilling. Further, First Class Grass did not complete the patch in the road and it was necessary to pay to have the work completed. He paid Mr. Hale $15,000 but was not prepared to pay anything further until the work was completed to his satisfaction. He indicated he only did so as he needed a little help at the time. He only learned of the issue respecting the lines when he was contacted by Cyril Falkenham inquiring why the HRM was calling him about permits. He did not

know where the old line was claiming it is not his job as builder. . He arranged for the sewer and water to be cut off. He was charged $6900 by Mr. Falkenham to do the work.

In cross-examination, he testified that the he delivered all necessary documents to Hale, specifically the plans. He acknowledged that he knew the existing water and sewer needed to be abandoned ahead of time. He did not figure the cost of disconnecting the lines. In his opinion, it is not the responsibility of the Defendant to provide that information. On the question of abandonment of the lines, he acknowledged there was no reference to it in the contract but he still felt it was not his responsibility.

He did not deal with Mr. Hale previously. He discussed the issue of the rock breaker with him explaining there was a "big mistake". He testified that he was shown the rock from above ground. He did not know the lot had granite. It was only at that point there was any reference to blasting. He indicated in cross examination he was not aware of the hardness of the granite. He said he understood that it costs more to excavate granite than just topsoil. He asked other contractors for a fixed price but Cyril Falkenham would only do the service work while others would only provide excavation work. He was told by Hale that the granite was rotten and would be easy to break. He asked for him to remove reference to the rock breaker but nothing was written or signed.

With respect to the elevation, he acknowledged in evidence that the foundation contractor would normally tell him if the excavation was too low. If so, the excavator would be required to level it. He did not completely answer the question put to him by counsel. Further, he did not know if it was necessary to have insurance. He believed John Hill was lying when he said the rock was very hard granite. He does not know where the cost for the permit was charged. He indicated that he deals with professionals and does not need to know details.

He acknowledged that he cannot do any backfill until the foundation is complete. The foundation installer was not ready for 30 days. On August 8, the footings were just poured for the building. He acknowledged the elevation was not correct once the foundation was poured. He went back to fill the foundation.

He testified that the blasting began around the end of June and the foundation was only being poured in August. This was the extent of what was done while he was in Lebanon. He thought it ought to have been completed. He discovered the elevation problem after Mr. Hale left. Mr. Bellefontaine attributed the difficulty to Mr. Hale. He acknowledged that Thomson & Conn were hired and their plans showed the property sloping inward toward the home. He learned Mr. Hale was not on the property as he was sick for some time. The lines were complete and the pavement installed. The surveyors were hired at that point. He testified there were rocks and fill left on the property.

Mr. Atie acknowledged the last of the blasting took place in September. They agreed upon a $6000 price before the blasting took place. He believes Hill was lying with respect to the price

and taking advantage of Mr. Hale. He believes the Claimant would have been entitled to only $24, 239 + HST or $27,874.85. In cross examination, he testified the only item not complete was to replace the metal plate on the road.

He testified that Mr. Hale told him the Water Commission and HRM would not issue a permit until the abandonment issue was addressed. The issue over the abandonment resulted in the Claimant's leaving the job site. Specifically, they disagreed over whether it was included in the price of the job. Mr. Atie refused to pay him and Mr. Hale refused to do any work.

In redirect evidence, he testified that he expected the foundation contractors and excavators to coordinate the construction and the elevations of the property. This was not done.

Charlie Atie

Charbel "Charlie" Atie is the other owner of Greenmont Developments. After graduating from university, he became a licensed real estate agent and has been a broker for the past two years. Before establishing Greenmont, he worked in property acquisition and construction. He renovated his own buildings and then offered them for resale. He also oversees trades for project design and leasing. He has been doing this for approximately twelve years.

He testified the project at 52 Mountain Road began in April 2012. He expected the project to be complete and ready to sell by September 2012. He is of the opinion that the best time to sell property is in the fall or spring while the low season is between December to March.

He began handling the day to day operations of Greenmont in July 2012 while Pierre and his family were visiting Lebanon. He testified that he had been dealing with Derek Hale, although he felt he was not supposed to be as his work was supposed to have been completed. He would check on the site throughout the summer. He observed on several occasions that Hale's equipment was not on-site. He tried to reach Mr. Hale by telephone. Sometimes, he was successful and other times not. When asked why he was not on site, he indicated that Hale "always had a story".

He described delays that were occurring. He had Vernon Bellefontaine and others waiting to work. Hale indicated that he would not be ready until the middle of August. He then indicated it would not be ready until the end of August. He was advised of the elevation issues near the house requiring catch basins. The second time it was examined, he assumed the work was corrected. He acknowledged having paid First Class Grass the sum of $15,000 identifying the invoice and cheques in Exhibit 9. He did not recall receiving the receipt found in Tab 2. He only received a hand written receipt from Mr. Hale's fiancée. He has received nothing from them since.

He identified the Halifax Water Commission letter in Tab 5. The document came at the same time as the building permit. He provided Mr. Hale with the permit number. He subsequently

provided him with the document in July. It was his evidence that Hale advised him he made calls to the HRM to determine what was required. He also identified all of the invoices in Tab 7. He confirmed the elevations as proposed. The invoice for $386.40 was the cost to remove a large rock. He acknowledged receiving the Excel spreadsheet (Exhibit 4) and giving it to Pierre.

In redirect evidence, Charlie confirmed that Pierre expressed his concerns and dissatisfaction to him. He also expressed concerns with the quality of the Claimant's work.

He testified that the work was supposed to have been completed in September but was not completed until December. It was not fully complete until February, 2013. He attempted to sell the property in its unfinished state in September without success. He attempted to sell it when finished but could not and ended up leasing the property. Copies of the executed leases were tendered into evidence.

In cross examination, Charlie testified that he did not actually supervise the work being done. He did not complete any time records or ask for any from Mr. Hale. The work began on the property on May 22 and he had been on the scene about six weeks before he saw him. He spoke with Pierre about the property. He was upset about Hale and the progress the work was taking. He testified the foundation installers attended in mid-August but could not begin the work. He met with Vernon Bellefontaine after the engineered pad was installed. He did not have any records from the foundation contractors. They did not provide him with any details. He acknowledged as well that the property could not be backfilled until the engineered pad was completed. He further acknowledged the previous building was supported by the granite foundation. He indicated the work would have been satisfactory had Mr. Hale been completed in July.

Rebuttal Evidence

Derek Hale

Mr. Leahy recalled Mr. Hale to provide rebuttal evidence.

Mr. Hale acknowledged being told the driveway was one foot lower than it should have been. The remedy suggested, a catch basin, would have been expensive. He testified that he conducts between 75-100 excavations per year. Typically, it is the surveyor who marks where the ground is supposed to go and at what level. When an engineered pad is being constructed, the specifications of the load bearing weight are given. If it is incorrect, you add stones to one side and compact it. At the time the engineered pad was complete, Vernon Bellefontaine indicated it was "okay".

He did not agree that he was to be blamed for the foundation wall being too low. He indicated there was no set rule. If the foundation contractor had wanted it to be higher, it would not have been difficult to rectify. Mr. Bellefontaine indicated he would check it before the Claimant left the site. He denied having received the Water Commission letter in July. He only saw it the first time when he met Bob Gogan at the final inspection. Further, he denies any mistakes with the blasting mats. He has been placing those daily throughout his time in business.

He testified that none of the contractors complained about his work during the blasting. With respect to the blasting quote, he confirmed that the blasting was capped at $5000 above the quoted price. There was no agreement to remove the clause.

With respect to changing his name on the permit, he testified that he is required to attend to the HRM offices and provide them with a copy of First Class Grass' insurance. The HRM indicated they would then change the name on the permit. In the meantime, the Water Commission advised they would turn off the water so he could do the connection. They require an inspection to be performed on 24 hours notice. There was no mention of any requirement to attend to the abandonment.

He knew that Pierre Atie was getting calls regarding the permit. He was not sure why Falkenham was receiving the calls instead of him. He did not take any further steps as he was not getting paid. Pierre had advised him he would not be paid until the Defendant was paid for the blasting service. He testified to drilling an additional hole and ensuring a power mast was installed. He testified that the builders installed a retaining wall.

In cross examination, he testified that he initially worked in the front of the lot. He recalled speaking with Pierre about the pace of the job, namely that Pierre felt it was taking too long. In the contract, he indicated he did not complete the gravel or finish the driveway. He acknowledged he did not require the full permit just the permit number as he was already

bonded. He acknowledged obtaining the permit from the Water Commission and the need to shut off the power.

Matthew Prest

Matthew Paul Prest has been the owner of Prestige Pavement since 1999. He did not work on the property but had an opportunity to view it two weeks prior to the final night of evidence. Based on his evidence, he has experience in the construction and laying of concrete floors. He described the process to raise the elevation by one foot if it is too low. He estimates the cost to be approximately $600-$700. Under cross-examination, he acknowledged that he was not aware the problem had been solved. His opinion was based on the status of the property at that time. I find his evidence of little value and assign it little weight.

The Law

It is a fundamental principle of contract law, to quote Professor G.H.L. Fridman, QC, in *The Law of Contract in Canada (6th ed.)* that:

"Agreement is the basis of any legally enforceable contract. There must be *consensus ad idem*. Without a meeting of the minds of the parties there can be no contract."

While there is no doubt that a contract is in existence, the cases also require a meeting of the minds on the terms themselves. As Fridman states at pp. 15-16:

"Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what…"

"In each instance the courts seek proof of an agreement between the parties involving the necessary exchange of acts and promises, promises and promises or acts and acts."

While not seriously at issue in this case, construction contracts carry an implied term, namely as stated by Gillis J. of the Supreme Court of Nova Scotia – Trial Division (as it then was) where he stated the following in *Stevens & Fiske Construction Ltd. v. Johnson* (1973), 9 N.S.R. (2d) 608 at p. 626:

"It is fundamental, I think, that in the absence of an express term, the Court may imply as a term of every building contract that the contractor undertook to do the work undertaken, with care and skill, or, in a good and workmanlike manner."

Findings

In order to determine the agreement for this contract, it is necessary to review the various facts. In making findings of fact in this matter it is necessary to consider both the reliability and credibility of the evidence. The assessment of credibility involves the weighing of many factors

and has been considered by Justice Gregory Warner of the Supreme Court of Nova Scotia in the case of *Bocaneala v. Liberatore*, 2013 NSSC 372, where he stated the following:

"[31] Fact finding requires the Court to assess both reliability and credibility. Reliability relates primarily to the assessment of a witness's capacity to observe, recall and communicate accurately. Credibility involves the assessment of the believability or truthfulness of evidence.

[32] In *R v Béland*, [1987] 2 SCR 398, at paragraph 20, the Supreme Court recognized the significance of oral evidence in the assessment of credibility since litigation replaced trial by combat as the method for resolving disputes.

[33] To assist in the assessment of credibility courts have approved many tools. I have done so in several decisions, including, in particular, *Re: Novak Estate*, 2008 NSSC 283. Among the tools used are:

> i) a consideration of the motives that witnesses may have to give the evidence as they do;
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> ii) the consistency or inconsistency over time between the witness's different iterations of the facts, and internal inconsistencies within a witness's testimony;
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> iii) the presence of collaborative or supporting evidence;
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> iv) the demeanor or the manner of giving evidence, but with caution; and,
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> v) above all, the court has to assess what appears to make common sense; in that regard, this Court notes the words of Justice O'Halloran of the British Columbia Court of Appeal in *Faryna* v. *Chorny***,** 1951 Carswell BC 133, at paragraphs 9 and 10:
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> If a trial judge's finding of credibility is to depend solely on which person he thinks makes the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. . . . the appearance of telling the truth is but one of the elements. . . . Opportunities for knowledge, powers of observation, judgment, memory, ability to describe clearly what the witness has seen or heard, as well as other factors, combine to produce what is called credibility. . . . The credibility of interested witnesses, that is . . . cannot be gauged solely by the test of whether the personal demeanor of particular witness carried conviction of the truth.

The key passage is this:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (underlining mine)

[34] It is not required that a trier of fact believes or disbelieves a witness's evidence in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and attach different weight to different parts of it."

Each party provides a version of events that is markedly different and at times, wholly contradictory. Thus, it is necessary to consider all of the evidence in its entirety against the backdrop of the factors outlined above. In reviewing the above, it is clear that the assessment of credibility is not based on an "all or nothing" assessment of one witness' view of the salient points. This is not to suggest that the evidence of certain witnesses cannot receive more weight or preference by the trier of fact than the evidence of another witness. Indeed, such weighing

takes place on a regular basis at all levels of court or administrative tribunal. However, believability is but one factor assessed against the backdrop of the remaining evidence.

Before reviewing the evidence and findings on each issue, I must comment on certain key factors. Firstly, I cannot help but notice that the evidence provided by each of the parties, Hale, Pierre and Charlie, involved constant reference to other third parties, such as Bob Gogan at the Halifax Regional Water Commission, Vernon Bellefontaine and Cyril Falkenham. Each apparently made comments which if correct or proven to have been conveyed may have been relevant to the finding of certain facts. However, none of these individuals gave evidence.

I must also state that in making my findings of fact, I have considerable difficulty with the testimony of Pierre Atie. He was prone to provide certain evidence in chief under questioning by Mr. Di Costanzo, yet when cross-examined, he would provide the opposite answer or simply reply, "I don't know". For example, he indicated in his evidence that he knew his property had granite in it, yet on cross examination he said he did not.

Despite this, I was given the impression that he was an intelligent and driven individual, obviously important traits for success in the Aties' business. Yet when it came to issues concerning what was taking place on the project, he purported to be unaware. In his testimony, he indicated that he assumed certain issues were to be left for the contractors to address. In all of the cases before me, it would be the first time I have heard an experienced developer testify to deferring to his contractors to work things out. Other times, he struck me as more interested in providing the management and leadership necessary to successfully complete the project.

I shall review each point below based on the issues listed at the beginning of this decision.

Agreement in General

In order to determine the value of the contract and its terms, it is necessary to review the initial contract together with any modifications. The initial quote was for $24,239 plus HST. The final price was for $33,759.24. The difference between the two values relates to the cost of rock blasting. For the reasons stated below, I have already found that to have been addressed between the three parties.

I find the parties executed a fixed price contract, not one based on time and materials. The original contract was to be for $27,874.85.

The work included several items which are listed further in this decision. Any additional items were subject to, "a change order and pricing will be discussed prior to commencement."

I found there to have been no collateral warranties or other agreements. Mr. Hale was in negotiations with Pierre. Pierre wanted no surprises. Mr. Hale impressed me as an individual who was concerned with substantiating details. If that is the case, one would have expected to

see an e-mail, notes or references in their materials to agreements on such items. There were none. Their conversations did not lead to *consensus ad idem*.

The quote and the description, constituted the entire agreement.

The three questions to be determined are if the contract specifically included blasting, the capping of the abandoned lines and, what part of the contract was actually fulfilled.

Blasting

The initial contract began with the quote found in Tab 1 of Exhibit 1. The quote was silent as to blasting. The contract referred to "rock breaking" with any additional fees requiring a possible change order with written notice, at a rate of $190 per hour. Pierre testified that the limit was initially $24,239.00 plus HST and then a cap at $5000. He did not know about the presence of granite and testified to being told by Hale the granite was rotten. Mr. Hale testified that Pierre told him to do what he had to do to complete the work. Mr. Hill testified that a sum of $6000 was agreed to, however, he charged $20,006 inclusive of HST.

I find as a fact that Pierre knew prior to the agreement being reached that there was granite on-site. I infer this from the fact that topsoil was removed to reveal granite. Further, I accept the evidence of Charlie and Pierre that the previous building had been removed and was supported by granite. He knew it was there. Both parties confirmed that the rock breakers could not handle the granite and thus, blasting was necessary.

I find there was a cap negotiated of $6000 for blasting which would have included placing the mats. There was no mention verbally or in writing of an additional charge for placement.

I find John Hill of Innovative Drilling did indeed quote $6000 yet ended up charging $20,006. It is not clear why that was the case or at least why he did not notify Hale or Atie. Had Derek Hale paid more attention to the Innovative Drilling account, (assuming he was able to), the result may have been different. In order to settle the matter, all three parties mutually agreed to absorb roughly one-third of the cost. Whatever arrangement the parties made for paying a third party for blasting, it was replaced by the settlement reached to discharge the lien placed by Innovative Drilling. I do not agree with the Claimant that this was intended to be an additional cost, otherwise, it would not make sense for him to have commented to John Hill that there was not yet agreement on a capped rate for blasting. This comment leads me to believe that it was not contemplated at all, until the blasting was required. Furthermore, it would not make sense for him to agree to absorb any portion of the Innovative Drilling charges, if he then intended to turn around and charge them to Greenmont. I find the intent of the parties was to settle that issue among them. This portion of the claim ought to be dismissed. Furthermore, there has been nothing in writing or by conduct which suggests the laying of the blasting mats was contemplated either. Thus, I am unwilling to award the Claimant any additional payment for its work placing the blasting mats.

Abandoned Lines

Both parties deny any responsibility for ensuring there were no limitations or conditions on the permits respecting the capping of the abandoned lines. Yet it seems to me that both ought to have taken the initiative to determine such additional requirements. For a contractor, it would be a necessary part of providing its services in a skilful and workmanlike manner. For a property owner, it would be both prudent and necessary to identify any possible issues which may hamper

the construction. Indeed, it is not a stretch to suggest there is an element of good faith expected on the part of the landowner to reveal the presence of such requirements in its knowledge. I do not consider such an obligation relevant in the determination of liability. Both parties had a shared responsibility to determine if the abandoned lines were an issue to the municipality and they did not fulfill it.

I find without hesitation that the capping of the abandoned lines was required for approval of a water permit by the Halifax Water Commission. The question to be determined is if this was part of the contract. The work was discussed in May and a quote was prepared. The quote stated:

"Water, sewer and storm laterals to be installed at time of backfilling."

There was no mention of replacing abandoned lines. There is disagreement as to when Hale became aware of the contents of the letter from the Water Commission contained in Tab 5. Both Pierre and Charlie said he received it in July. Mr. Hale indicated it was not until September at the time of the inspection. I find that neither party discussed abandoned lines while the work was being done or prior to the execution of the agreement. The lines are not referenced in the quote. The quote only deals with installation of the lines. Pierre testified that he wanted "no surprises". If so, it would be reasonable to expect him to insist on that work being included. I do not find the evidence sufficient to establish replacement of the abandoned lines as a term of the contract. I disallow any compensation for that item.

Work Completed and Value of Work Performed

The question remaining is what services were contracted and what was actually performed. I find the property was intended to be "pad ready". The quote of May 12 listed the following items required to be performed by First Class Grass:

- Excavate for foundation and sono tubes for deck.
- Backfilling to be completed upon installation of Big O drainage pipe.
- Water, sewer and storm laterals referenced above.
- All materials necessary for installation of services and traffic control.
- Any required fill to be supplied for final grading.
- Curb and sidewalk to be removed to be disposed of off-site with construction of two gravel driveways.
- Asphalt reinstatement on street.

I have omitted those items to be supplied by the foundation contractor or the owners.

In reviewing the evidence, I am satisfied that for the most part, the work had been completed by First Class Grass or Ground Control. However, there were several issues addressed in the witness' testimony.

Quality - I accept Mr. Hale's evidence that nobody complained about the quality of his work. I accept the evidence of both Pierre and Charlie Atie that the work was completed behind schedule.

The Defendants seek a reduction for the delay in construction. The contract did not provide a completion date. Mr. Hale seriously underestimated the time required to excavate the property as he thought, incorrectly, he could remove the granite with a rock breaker. This added to the delay. I have only heard the opinion of the Aties as to the time the project should have taken. Pierre estimated the Claimant was two months behind schedule. The agreement is silent as to a time limit. There was also delay caused by the argument and controversy arising over how to address the abandoned lines. As noted previously, I find the Defendant at least partly responsible for that. I am asked to consider the difference between the profit made selling the property and leasing it. There was no market evidence tendered as to the amount of lost opportunity. In any event, I find such an exercise to be too speculative. I decline to award anything under this head of damages. If I am wrong and had I been inclined to make an award, I would have limited it to an abatement of $1000 based on the relatively short timeline and the Claimant's previous knowledge of the granite, which he ought to have contemplated would create difficulties and delays in excavation.

With respect to the sloping and drainage, I find the elevation was off and the foundation too low by one foot. That fact was not largely disputed. I find remedial work was necessary in the form of removing rock and creating catch basins.

In my view, this can be addressed by way of a set off for actual expenses proven.

Set Off

I find the Defendant has proven its defence for a set-off against the main contract. Specifically, I allow the following items:

East Coast Paving (asphalt reinstatement on street)	$1495.00
Thomson & Conn (Survey to show layout)	$ 409.11
Falkenham Backhoe (Removing rocks from wall)	$ 386.40
Total Expenditures Allowed	$2290.51

Damages

It is a widely held principle that the object of a damage award for breach of contract is to put the parties in the position had the breach not occurred. In my view, had the contract been completed, the Claimant would have received the initial contract price. However, where the work was not completed, they should provide credit to the Defendant for the cost to complete the work. Thus, I find as follows:

Amount of initial contract	$27,874.85

(Set-Off)	($2290.51)
(Amount Paid to Date)	($15,000.00)
Total	**$10,584.34**

Prejudgment Interest and Costs

The initial claim was for $18,759.24 while the Defendant claimed a larger set-off since it included a claim for $6900 to cap the abandoned lines. In my view, each party has been equally successful and thus, each should bear its own costs. Similarly, I find each party partially responsible for the delay in payment. I disallow any claim for prejudgment interest.

Summary

In summary, the Claimant, First Class Grass Landscaping and Excavation Inc., has successfully proven its claim in part. It shall have judgment against Greenmont Developments Ltd. in the amount of $10,584.34, with each party bearing its own costs.

Order accordingly.

Dated at Halifax, NS,
on September 30, 2014.

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Gregg W. Knudsen, Adjudicator

Original: Court File
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