**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** MacMaster v. Maritime Pools Ltd., 2006 NSSC 366

**Date:** 20061130
**Docket No:** S.A.T. 252128
**Registry:** Antigonish

**Between:**

John Fraser MacMaster, of Cross Roads, Ohio, RR # 1 Antigonish, in the County of Antigonish, Province of Nova Scotia

Plaintiff

v.

Maritime Pools Limited, a body corporate, 1072955 Nova Scotia Limited, a body corporate, George Grant Holdings Incorporated, a body corporate, and George Gardner Grant, carrying on business as Maritime Pools

Defendant

**Judge:** The Honourable Justice Donald M. Hall.

**Heard:** October 2, 2006, in Antigonish, Nova Scotia

**Counsel:** Thomas William Gorman, counsel for the plaintiff

Daniel J. MacIsaac, counsel for the defendants

**By the Court**:

[1] This is an action for breach of contract and negligence with respect to the installation of a swimming pool. The issues are whether the defendants were in breach of the contract to supply and install a swimming pool for the plaintiff or were negligent in failing to provide drainage for the pool. There is also the issue as to whether an exclusionary clause in the contract would excuse or exempt the defendants from any liability. Finally there is the issue as to whether the action is barred under the terms of the **Statute of Limitations**.

[2] Under date of September 11, 1989, the defendant, Maritime Pools Limited, entered into a written contract to supply and install a liner type pool on the plaintiff's residential property at Ohio, Antigonish County. At that time the plaintiff was a self employed construction worker.

[3] All of the corporate bodies named as defendants in the Statement of Claim were owned at the relevant times by the defendant, George Gardner Grant. Mr. Grant resides in Guysborough County and from 1963 to 1999 was engaged in the business of supplying and installing pools. He had been supplying and installing pools in Northern Nova Scotia since 1968.

[4] The contract provided that the defendant, Maritime Pools Limited, would supply and install the liner type pool as well as certain accessories for the sum of $14,708.00, which was paid by the plaintiff in accordance with the terms of the contract. The contract contained among others the following clauses:

> Seller does no electrical wiring or grounding. Machine grade only. Additional charge only for Jack Hammering, high water table or extra fill. Buyer to furnish building permit, water supply and is responsible for drainage adjacent to the pool.

On the first page of the document it is stated:

> **BUYER AGREES TO ADDITIONAL TERMS ON THE REVERSE SIDE OF THIS CONTRACT:**

The relevant additional terms appearing on the reverse side are the following:

> The following items shall be supplied by and/or shall be the sole responsibility of the Buyer, and the Seller shall have no responsibility for: grading, fill, change of grade, landslide, settling of land or landscaping; concrete work, sidewalks, fences, lawns, shrubbery, driveways or patios; electrical wiring or grounding; draining around the pool area; and building permits, zoning and zoning changes. The Seller shall have no responsibility whatever for misuse, abuse, fire, action of the elements, act of god, high water tables or rising water tables, or surface or subsurface draining around pool. Buyer shall grade the area around the pool so that surface and subsurface water and draining shall pitch and flow away from the pool; construct any necessary or desirable retaining walls; keep the pool filled with water at all times; and shall comply fully with the instruction manual.

[5] The contract was signed by the plaintiff and by Mr. Grant, on behalf of Maritime Pools Limited. The defendant did not provide the perimeter walk way around the pool.

[6] Before excavating for the pool the plaintiff and Mr. Grant viewed the location where the plaintiff wanted the pool installed. Mr. Grant agreed that the location was suitable. There is an issue as to what discussion took place as to whether the top of the pool should be level with or ten to twelve inches above the existing grade. That matter will be dealt with in greater detail later in these reasons.

[7] The pool installation was completed in the fall of 1989. The plaintiff did not use it until spring of the following year. At that time he noticed that the liner was pulling away from the side walls, however, when the weather warmed up it appeared that the liner would for the most part go back in place but it did leave a wrinkle in the area where it had separated from the wall. Apparently it became worse each following year, that is, the wrinkle became more pronounced. It

appeared, however, that no problems were encountered during the summers of 1990 and 1991.

[8] The plaintiff did not use the pool much during the 1995 season.

[9] The pool had been losing water beginning in 1992 and the problem became progressively worse until the spring of 1999 when the plaintiff had the liner replaced by a Stellarton firm, Poolman Enterprises Limited. At that time the pool was excavated and a drain installed around the perimeter at the bottom of the pool. As well the pool was back filled with new aggregate and the side walkways replaced. The total cost of these repairs and additions was $14,500.00.

[10] According to the plaintiff there has been no problem with the pool since that time insofar as the liner pulling away from the side walls and leaking. It is noted, however, in one of the photographs in Exhibit 2 taken in 2002, that the liner had pulled away at one point.

[11] The plaintiff contends that the defendant was both in breach of the contract and negligent in the initial installation of the pool in failing to provide a drainage

system and by backfilling with unsatisfactory aggregate material. He further maintains that the limitation period did not start running until the cause of the problem, that is the alleged improper drainage, was discovered in 1999. Thus the action was commenced well within the limitation period. He says, accordingly, the defendant should reimburse him for all his expense in repairing the pool including the cost of the new pool liner and installation of the drainage system.

[12] The defendant maintains that the problem with the pool developed as a result of the plaintiff's insistence that the pool be installed in such a manner that the top of the pool would be level with the existing grade, rather than ten to twelve inches higher as recommended by the defendant. Had that been done the defendant says that there would have been no need for a sophisticated drainage system as the water would have naturally run away from the pool. This would have avoided the problem of surface water running over the top of the pool which caused the liner to pull away.

[13] The drainage issue received the bulk of the parties attention in the proceeding and appears to be the determining issue.

[14] Mr. Eric Jordan, the expert in geotechnology, called by the plaintiff, in his written report, Exhibit 2, set out his opinion as to why the problem occurred with respect to the plaintiff's pool as follows:

> The liner came away from the side of the pool because of greater water pressure on the outside of the pool liner.
>
> Water pressure is related to the depth of water; the deeper the water the greater the pressure.
>
> The vinyl liner is normally held in place against the side of the pool by the pressure of the water inside the pool liner. This happens when the water is deeper and the pressure is greater on the inside of the pool liner than it is on the outside.
>
> However, at Mr. MacMaster's pool there was greater water pressure on the outside of the pool liner because the water was deeper there than on the inside
>
> The water was deeper on the outside of the pool liner mainly because the runoff from the ground surface at the rear of the pool filled the space outside the pool to a higher level than the water inside. The difference in water depth need only be fractions to a few inches to cause the liner to move away from the side of the pool.
>
> The space outside the liner which fills with water is comprised of the small voids in the soil that is placed outside against the back of the pool. The water pressure in small voids would be the same as in larger voids at the same depth in the soil.
>
> The amount of water available to fill the voids in the soil outside the pool would depend on the amount of rain and runoff during a given period. The greater the amount of rain and runoff, the greater the depth of water in the voids and the more certain the liner will move away from the side of the pool.

> It was possible to fill the space with water outside the pool, behind the panels, to a greater depth than inside because the surface runoff was trapped there. The water was trapped because there was no drainage system outside to remove the water. The water could not drain away quickly enough through the natural soil because it was a poorly drained soil.

[15] Mr. Jordan also expressed the opinion, based on information received from workmen on site during the replacement installation, that the pool had been previously backfilled with aggregate material of a clayey, silty nature and not sufficiently porous to provide adequate drainage. He also expressed the opinion that the drainage should have included a " French drain", that is, tile laid around the perimeter at the base of the pool leading away to a lower level of grade so that the water would run away from the pool.

[16] In his testimony the defendant, George Gardner Grant, stated that when he installed a pool it was always ten to twelve inches above the grade surrounding the pool, but when the landscaping was completed and graded, it would look to be level to the naked eye. He said that when he informed the plaintiff of this he became quite irate and said that if he wanted an above ground pool he would have ordered one, that he wanted it flat. Mr. Grant said that he told the plaintiff that there could be a problem with drainage resulting from the grade, but the plaintiff

insisted that he knew all about drainage, that he was a construction man. He said that he thought it would be okay because he understood that the plaintiff was going to landscape and change the grade around the pool.

[17] The plaintiff denies that such a conversation took place. He testified that Mr. Grant never mentioned anything about drainage and the need for it.

[18] It seems to me that this is the nub of the issue. Mr. Grant testified that he began installing pools in Ontario in 1963 and has been installing them in Northern Nova Scotia since 1968 and has installed a number of pools, "in the high hundreds". He apparently has had no complaints with respect to any of the other pools that he installed insofar as drainage is concerned. Mr. Grant referred to the installation manual provided by the pool supplier, Methat Sales Limited, Exhibit 5, and which he essentially followed in installing pools. Under the heading "Site" in the fifth paragraph, the manual states:

> The pool should always be located on fairly high ground. This is necessary to provide adequate natural drainage. Poorly drained sites which allow surface water to accumulate around the pool walls and in the backfill are the major cause of structural failure. Setting the pool elevation a foot or so higher will often eliminate the need for special drainage systems, costly backfill materials, or additional structural members. Less excavation is required, working conditions in the hole are drier, and excess dirt will not have to be removed from the site.

> Skilful grading and landscaping eliminate or conceal abrupt changes in grade. A pool installation may well appear to be flush with the original grade after careful grading, when, in fact, it is a foot or more above the original elevation. Since the raised, graded area around the pool must be approximately level, and since the pool itself must be perfectly level, a reasonably level construction site will be the most suitable and the least expensive. Because the base of the pool must rest on undisturbed earth, the land cannot fall away faster than the height of the pool sidewall in the distance of the pool length or width.

[19] Although I found both the plaintiff and Mr. Grant to be credible witnesses, as to this issue I am satisfied that the testimony of Mr. Grant is more reliable. He was well aware of the importance of the drainage factor and it is only reasonable and likely that the issue would have been raised with his customer as he stated. Undoubtedly, the plaintiff's rather "irate" and "confrontational" reaction caused the incident to be indelibly imprinted on his mind. On the other hand, the plaintiff did not recognize the crucial importance of drainage and thought no more about it. That being the case, it seems to me that the plaintiff in insisting that the pool be placed in the manner that he did was the author of his own misfortune. In reaching this conclusion I carefully considered and weighed the evidence of the expert Mr. Jordan, and do not disparage his opinion. I am satisfied, however, that if the plaintiff had followed Mr. Grant's proposal as to the elevation of the pool, the drainage problem would not have arisen.

[20] An ancillary issue is with respect to the aggregate material that was used for backfilling the pool. It is noted that the manual says that a pool should be backfilled with sand. Mr. Jordan said that he would recommend using “pea gravel”.

[21] Mr. Grant said that he used “pit run” gravel from a local gravel pit. According to him the material consisted of sand and gravel, thirty percent of which would pass a one inch screen, except for the few top inches where he used shale, that the material was porous and would not hold water.

[22] Mr. Jordan’s opinion that the pool had been backfilled with unsuitable material was based on information and opinions that he had received from workmen who re-excavated the pool and installed the drainage system in 1999. Although an expert is permitted to testify as to the information obtained from third parties for the purpose of formulating and substantiating his or her opinion, it is hearsay and not admissible as proof of the facts alleged, which must be proved by other first hand evidence.

[23] Accordingly, the only admissible evidence before the court in this respect is that of Mr. Grant. From his description of the material used, I am satisfied that it was adequate and suitable for backfilling. I find that it was not the cause of the problems that the plaintiff had with his pool.

[24] It is noted that the plaintiff had no problem with the pool during the first two years of operation and that he did not begin encountering problems until the 1992 season when leakage in the liner was noted.

[25] The plaintiff acknowledged that he had “nicked” the liner in the course of removing the pool ladder on one occasion. The liner was patched and there was no further trouble from that source. Other leaks were subsequently discovered under the pool stairs and around the skimmer, but there was no evidence presented to show that the leaks occurred as a result of defective materials or workmanship on the part of the defendants in the installation of the pool.

[26] From the foregoing, it will be seen that I am of the opinion that the plaintiff’s misfortune in regard to his pool was not caused by a breach of contract

or negligence on the part of the defendants. Accordingly, the plaintiff's action is dismissed on that ground alone.

[27] In view of this conclusion it is not necessary for me to consider the other defences respecting the exemption clauses and the limitation period raised by the defendants.

[28] If I were obliged to assess damages, I would fix them at $7,250.00, being approximately one half of the cost of the initial pool, which coincidentally is approximately equal to the major repair job done in 1999. I arrive at this figure taking into account the fact that the plaintiff had the use of the pool installed by the defendants for approximately ten years albeit not totally satisfactory during all of that time. As well, with the repairs and the replacement of certain parts of the pool, he had a virtually new pool as of 1999. In addition he has the benefit of a complete drainage system which was not bargained for in the contract of the defendants.

[29] All of this has resulted in a substantial improvement. That combined with the depreciation factor leads me to the conclusion that the stated figure would have been appropriate if damages were to be awarded.

[30] For the reasons stated, however, the plaintiff's action is dismissed. The defendants may have their costs to be taxed as one bill under tariff A, scale 3 of the 1989 Tariffs on an amount involved of $15,000.00. I understand that opinion is somewhat divided as to whether the new tariffs which came into force September 29, 2004, should apply to actions commenced prior to that. I believe that the weight of the authorities is in the negative, but in any event, I choose to exercise my discretion and direct that costs are to be taxed under the tariffs that came into force January 1, 1989.

Donald M. Hall, J.