

Claim No: 286976

Date: 20081003

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
**Cite as: Symes v. K.B. Clarke Restoration, 2008 NSSM 87**

**BETWEEN:**

Name Jason Symes, c/o Kelly Patrick Shannon, Burnside Law Office Claimant 1

Name Barbara Symes, c/o Kelly Patrick Shannon, Burnside Law Office Claimant 2

Name 2123125 Ontario Limited, c.o.b. as K.B. Clarke Restoration Defendant 1

Name Priority Environmental Services Limited Defendant 2

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on July 2, 2009.

**DECISION**

**BACKGROUND**

- (1) The Claimants, Jason and Barbara Symes, have filed a Notice of Claim against the Defendants, 2123125 Ontario Limited c.o.b. as K.B. Clarke Restoration (K.B. Clarke) and Priority Environmental Services Ltd. (Priority).
- (2) The amount claimed is \$25,000.00 plus interest and costs. The claim is framed both in negligence and breach of contract as against K.B. Clarke and in negligence against Priority. The claim arose after the Claimants had retained K.B. Clarke for purposes of remedial work on their property at 2178 Lawrencetown Road, Lawrencetown, Nova Scotia, following a furnace oil leak. The remedial work involved removing and replacing portions of the

foundation and basement floor, which necessitated moving the Claimants' patio deck and returning it to its original location. Priority was retained primarily to remove the impacted soil and to restore the basement to its original condition.

- (3) The Claimants' position is that following the remedial work by K.B. Clarke and Priority, they experienced water problems in their basement and that this was as a result of the Defendants not performing the work properly.
- (4) The Claimants abandon any amount exceeding the monetary jurisdiction of this Court.
- (5) The Defendants deny liability.

### **REMEDIAL WORK**

- (6) The Claimants experienced an oil spill at their residence at 2178 Lawrencetown Road on or about April 20, 2004. They signed a Work Authorization Form retaining K.B. Clarke to perform necessary emergency work. The Work Authorization Form constitutes a written contract between the parties. It was signed on April 22, 2004. Paragraph 2 of the contract provides that the total cost of work is to be in accordance with estimates prepared by K.B. Clarke and approved by the insurance adjuster. Paragraph 3 provides that any supplemental work not on the original estimates or hidden damages must be approved by the adjuster. The contract contains "General Conditions" and "Specific Conditions" on the reverse side.
- (7) In or about the month of July 2004, Priority's services were engaged after it was discovered that the oil from the spill had impacted the soil and entered the water table beneath the foundation floor.
- (8) K.B. Clarke remained involved through their Project Manager, Ed Bowdridge (Bowdridge), in a supervisory capacity once the oil had been cleaned up from the interior of the basement.
- (9) Gardiner Budden (Budden) is the owner and director of Priority. He testified that shortly after their work began in July 2004, there was a meeting onsite between himself, Bowdridge, and a representative from Strum Environmental, who were the engineers retained to assist in the oil clean up (primarily in testing the soil). At that meeting, the scope of the remedial work was reviewed.

- (10) Priority was not retained by Symes. They took their instructions directly from the insurance adjuster. The insurer was responsible for resolving any issues concerning scope of coverage.
- (11) In this case, the scope of the work did not involve the landscaping of the property.
- (12) When Priority arrived on site, a portion of the concrete basement floor had already been removed. They began the work of removing the soil and having it tested by Strum.
- (13) Priority found an existing drainage system involving a sump pump in the basement tied to a line which ran approximately one hundred feet (100') to a crock in the backyard. This drainage system was used to discharge subfloor water. The sump pump had discharged some oil into the crock necessitating additional remedial work, namely, minor excavation around the crock, removing the crock with an excavator, removing the contaminated soil around the crock, and putting the crock back together.
- (14) Priority installed a new sump pit in the basement and a second pump after water had leaked into the basement prior to the new floor being poured. Priority was aware that the Claimants were going to be renovating their basement, including a new addition where Ms. Symes was going to have a hairdresser business.
- (15) Lateral pumps were added and connected to the sump pit to enhance water flow to the sump pump. The new sump pit was tied into the existing line running to the crock.
- (16) During their work, Priority kept the soil on site and used what they could for backfill. Additional soil was required.
- (17) The existing drainage system around the foundation was clay drain tile, which was common for a home of that age. The clay drain tile is a red four inch (4") pipe of various lengths butted together.
- (18) Budden observed that the clay drain tile was silted up badly.
- (19) Once the remedial work had been completed, Priority was instructed to backfill, and they put drainage stone along the side of the footing. More stone was applied than usual. The drainage stone was purchased from a quality controlled pit. The foundation was tarred and damp proofed.

- (20) Since the existing drain tile was clogged, Budden put new drain tile on top of the footing. His intention was to use the drain tile as a type of backup system.
- (21) Budden felt that the existing sump pump discharging the subfloor water was a satisfactory drainage system and he did not find any discharge point for the water around the clay drain tile.
- (22) A new drywell was constructed as a release point for the drainage tile. The drywell was approximately fifteen feet (15') from the foundation (also referred to in evidence as a surge pit).
- (23) Priority's work was completed in late November or early December 2004.

### **LEAKING**

- (24) In or about the month of May 2006, the Claimant, Jason Symes (Symes), reported a water problem to Bowdridge who convened a meeting onsite between Symes, Bowdridge, and Budden. At that time, Budden pointed out to Symes that his neighbor was discharging his roof water directly onto Symes' property in a low spot along the foundation and the water had begun to pool in this area. The area in question was along the foundation near where Symes had installed a new porch/entrance following the remedial work.
- (25) Budden suggested to Symes that he address the drainage problem with the neighbor and, secondly, create a positive drain away from the house in that area.
- (26) Budden arranged to deliver a load of soil to Symes to be used for this purpose.
- (27) During that summer, Symes undertook some remedial work of his own. He tied the downspouts into another four inch pipe running away from the foundation. He dug down as far as the existing pipe that was there and tied into the system. He performed the work with the assistance of friends and family. This work involved digging a trench, into which the pipe was laid and tying the new pipe into the existing drainage system.
- (28) Despite these repairs, further water problems arose subsequently.

- (29) The Claimants consulted with legal counsel and in September 2006, retained P.P. Griggs (Griggs), Engineer, who prepared a written report (the first Griggs report) dated September 22, 2006. Griggs was not called by either party to give evidence in this proceeding, however, his reports were submitted into evidence by agreement. The first Griggs report was followed by a site meeting in early November 2006 between Symes, his legal counsel, Griggs, Budden, and representatives of K.B. Clarke.
- (30) Following this meeting, Griggs authored a further report (the second Griggs report) dated November 10, 2006. In the second report, Griggs stated:

“The fact that an under slab drainage system, including a new sump pit complete with pump, was installed prior to the replacement of that portion of the basement slab that was removed in order to excavate the oil contaminated soil and that no water seems to be flowing over the edge of your old sump pit, as reported by yourself, indicates that proper precautions were undertaken by Priority to control the water with-in the perimeter of your foundation.

The fact that the exterior perimeter drainage tile is above the top of the footing has nothing to do with your basement leaking problem except that this drainage tile should control the water within the boundaries of the excavation site that was back filled with clear stone. This drainage tile should be positively drained and from the description of the soils encountered during the excavation process (boulders mixed with clay) we question whether this is the case.

Our recommendation would be to extend the perimeter drainage tile to the back of the property in a manner similar to what your neighbors on each side of you have done or into the concrete crock.”

- (31) Further meetings were arranged on site. Chris Geddes (Geddes), Vice President and General Manager of K.B. Clarke, attended a meeting on May 16, 2007. Symes reported to Geddes that the water had come in through the footing between the porch and the rec-room/shop which caused drywall damage, damage to pine boards on the wall, and laminate flooring in the rec-room and some minor damage in the shop. There was also evidence of slight leaking on the driveway side near the chimney. Symes did not report any problems with the functioning of the sump pump or pit beyond the pump having burnt out on several occasions.

- (32) At that meeting, it was brought to Symes' attention that there were no rain gutters on the porch he had installed allowing the water to run off to the area in question where the water was entering the home.
- (33) At subsequent meetings, it was indicated that Symes had not addressed the water problem with the neighbor or the issue of creating a positive grade away from the home in this area or the lack of downspouts on the porch.
- (34) Budden arranged to go to the site and excavate in the area where it was believed the water was entering the home. This excavation disclosed a large crack in the foundation. He suggested to Symes that he address the issue of the clogged drain tile as well. Symes hired someone to seal the crack in the foundation.
- (35) After the two Griggs reports, the site meetings, and two reports prepared for the Claimant by Chris Foran (Foran), of Servant Dunbrack McKenzie & MacDonald, the first dated March 19, 2007, (the first Foran report) and the second dated June 4, 2007, (the second Foran report), Symes also undertook the installation of a french drain to direct water away from the foundation and towards the rear of the property. Foran testified that a trench thirty to fifty feet (30-50') would have been sufficient as stone was only required to that distance, however, Symes went back approximately one hundred feet (100'). This work followed Foran's recommendations concerning a means to divert water away from the foundation. He exposed the foundation around three sides of the house and put footing drains at the basement elevation. He drained everything to a trench leading to the crock. He backfilled with rock and rough graded landscape. He stated that there was a significant release of water from the foundation but this was not personally observed by Foran.
- (36) After all of the repairs undertaken by Symes, he has reported no further incidents of water leakage.

### **BURDEN OF PROOF**

- (37) The Claimant must establish liability for breach of contract or negligence on a balance of probabilities.

### **LIABILITY OF PRIORITY**

**Scope of Work Priority Retained to Do**

- (38) When assessing possible liability of Priority, it must be assessed in the context of the scope of the work that Priority was retained to do.
- (39) It was common ground and admitted by all parties, including Symes, that Priority was retained by the insurer and took its instructions directly from them. Therefore, its liability and the extent of damages if liability is established are limited to scope of the work as defined by the insurance contract or any damages caused by that work.
- (40) It was Priority's obligation to place the Claimant back into the same position as it was prior to the oil spill.

**Implied Term**

- (41) It was common ground and admitted by all parties, including Priority, that there was a duty of care upon Priority such that Priority was required to carry out its work in a workmanlike manner and in accordance with the National Building Code with all other applicable statutory requirements to be followed.

**Location of Drain Tile Above the Footing and Construction of Drywell**

- (42) A major thrust to the Claimants' case is that when Priority replaced the portions of the foundation that had been removed to do the remedial work, the new drainage tile was placed above the footings.
- (43) While there is some difference of opinion and different observations concerning how far above the footings the new drainage tile was placed, it is common ground and admitted by Priority that the drainage tile was in fact placed above the footings anywhere from a few inches to as much as a foot.
- (44) In the second Foran report, Foran states:

“The footing drains were not properly installed and there was not enough care taken with regards to providing a point of discharge for your footing drains and downspouts.”

- (45) Foran stated that he observed the drainage tile nine to twelve inches (9-12") above the footing in photographs shown to him by Symes during a site visit, although he admitted in cross-examination that photographs can be deceptive, depending upon the angle of observation and so forth. He stated, as well, that he had never seen this type of thing before.
- (46) In his opinion, as the footing drain was above the level of the basement floor, the water created pressure on the floor before it could be relieved.
- (47) Foran explained that since a foundation is a like a boat in the water, the purpose of the drainage tile is to keep water off the floor so, normally, the footing drain is placed at or below the level of the floor.
- (48) In his opinion, it was better to catch the surface water before it got to the house and to drain it away from the house.
- (49) The Defendants retained an expert, Kevin Bezanson (Bezanson), who prepared a report dated May 23, 2008, (the Bezanson report).
- (50) Bezanson also addressed this issue, however, it was Bezanson's opinion that the fact that the drainage tile was placed above the footings was not that important. The home contained an adequate drainage system such that the water would go to the sump and be pumped to the crock. He stated that the water level at the drywell which was used as a discharge point for the new drainage tile was at the same level as the water at the foundation. In his opinion, if water was coming from the perimeter of the foundation wall adjacent to the work done, then the only way for the water to get into the basement was through cracks in the foundation unless the water table was higher than the floor elevation.
- (51) Bezanson described it as similar to placing a pipe in the ocean. The water table level under the floor, around the foundation, and at the surge pit would be the same.
- (52) It was common ground throughout this proceeding that the property had a very high potential of water problems as the water table was just beneath the basement floor at the time that the remedial work was being done.



- (53) Part of Foran's contention was that it was possible (in his evidence, he described it as a "best guess" as he did not do a drainage study) that there was a flat or negative surface grading around the dwelling.
- (54) He explains his conclusion at page 2 of the first Foran report.
- (55) I conclude from the Foran report and from his evidence, however, that his statements concerning flat or negative surface grading around the dwelling and/or a negative grade from the drywell back towards the foundation are not based on any kind of reliable evidence or findings that he reached on his own. He did visit the site, and he did examine photographs shown to him by Symes, but his reports are coached with many reservations and specifically elude to the fact that there was no "thorough site investigation, including a drainage pattern study of your area, foundation inspection, and investigation of the infrastructure that was installed during the renovation..." In cross-examination, he admitted that he did not actually see where the pipes connected to the drywell at the point of discharge. He did not mention any evidence of cracks in the foundation in his evidence, although he stated that Symes told him that he had observed one at one point. He stated that he was "not asked to look for cracks". He stated that some of the photographs could possibly show flat areas where the drain tile was running to the drywell or perhaps a slight slope. He was not certain if, prior to the oil spill, the clay drain tile was connected to the drywell or crock. He admitted on cross-examination that the only system in place prior to the oil spill was clogged drain tile with no apparent system to drain water entering it. When asked if the drainage system that he proposed to construct was something that did not exist prior to the oil spill, his answer was that he "assumed" that the water was pumped somewhere but he had no specific knowledge where since he saw that there was a sump pump there. He admitted that he had no information or knowledge concerning the means of draining water away from the clay drain tile prior to the oil spill. He admitted that he was likely proposing a new drainage system.
- (56) Foran's second visit to the site was only after Symes had undertaken substantial renovations pertaining to the installation of the french drain.
- (57) In the Bezanson report, it is stated as follows:
- "Regarding SDMM's comment related to not providing a point of discharge for the footing drains, there is no mention of the sump that was installed by PESL. It appears that Griggs was not aware of the sump when he provided his first letter and then upon learning of its

existence modified his comments. This may be the case with SDMM as they may not have been aware of the sump as well. The photographs show that a drywell was installed near the corner on the dwelling. This drywell could also provide some storage for flow from the foundation drain depending on the water table elevation. In my opinion, the sump and gravel would provide the necessary drainage system.”

- (58) Bezanson hypothesized that perhaps Foran was not aware of the existing drainage system when he made his reports.
- (59) Bezanson is correct when he states that Griggs was not made aware of the existing drainage system prior to the preparation of the first Griggs report and Griggs in fact mentions this himself in the second Griggs report. Similarly, it is clear from the evidence that Symes did not advise Foran of the existing drainage system in a timely fashion. In his evidence, Foran stated that he was aware of the underslab drainage system and that a new sump pump had been installed and pipework, however, he stated he did not mention it in either of his reports since it was not described to him as a drainage system. He stated, as well, that he only became aware of the extent of the drainage system after he had provided his second report and confirmed that when he wrote his first report, he knew nothing about the underslab drainage system except that there was a sump pump and before he wrote the second report, he knew there was something going to the sump pump but not the extent of it.
- (60) When asked on cross-examination that if the sump pump was working, whether the existing drainage system would deal with the water issues on the floor, his answer was that it could possibly do so, but he was not sure whether the system was adequate and that his report did not deal with that issue. He was not sure of the size of the pump, the capacity of the pump, and simply did not address those issues.
- (61) In his direct evidence, Symes downplayed the role of the existing drainage system yet, in cross-examination, he admitted that the system cleared water from under the concrete slab back to the crock. He also admitted in cross-examination that there had been some previous water issues where water backed up as a result of a tap on one occasion and well pump on another occasion. While his theory is that the water problems he experienced were due to the improper placement of the drainage tile, the evidence is that Priority only went part way along the back of the house and only partly up the driveway side and did not replace the drainage tile along the rest of the driveway or along the front of the house. The chimney is located closer to the middle of the driveway and not in the area where the work was performed by Priority.

- (62) There is also not enough evidence before the Court to prove that the old clay drainage tile was hooked up to a discharge point prior to the oil spill.
- (63) I accept Budden's evidence that the new drainage tile had been installed to provide a path for the water rising up from the water table on the exterior of the foundation as described in the second Griggs report. As Budden stated, the installation of the new drywell might not help, but it wasn't going to hurt the situation.
- (64) There is insufficient evidence before the Court concerning the entry point of the discharge line into the drywell nor is there sufficient evidence from which it could be concluded on a balance of probabilities that there was negative drainage from the drywell towards the foundation.
- (65) In summary, the lack of independent evidence of negative drainage from the drywell back towards the foundation, the fact that Foran did not undertake a drainage study, foundation inspection or investigation of the drainage system originally on the premises as modified by Priority, and insufficient evidence of the actual slope or grade or in fact where the pipe running from the drainage tile was connected to the drywell, combined with the fact that Bezanson's report contains conclusions based upon a knowledge of the existing drainage system and his commonsense explanation of the water table level and how the drainage system would work, lead to the conclusion that the Claimant has not proven on a balance of probabilities that Priority was negligent in the placement of the drainage tile above the footings and/or construction of the drywell.

### **Improper Use of Backfill**

- (66) Symes stated that Priority improperly used backfill when completing their work.
- (67) I do accept Budden's evidence that, to the extent possible, in situ material was used and that some replacement soil was necessary due to the oil spill.
- (68) I also accept Budden's evidence that all material was purchased from a qualified and regulated supplier.
- (69) In the first Foran report, it is stated, "There is also the possibility that there is an increase in ground water infiltration around your foundation as the result of disturbing the original soils on the upgrade side of the dwelling."

- (70) In his evidence, Foran recognized that it was not always possible to use in situ material, especially where some of it may have been damaged by the oil spill.
- (71) In his evidence, Symes confirmed that clear stone was used by Budden.
- (72) In conclusion, while it is possible that there may have been some disturbance of the original soils during Priority's work, there is insufficient evidence to conclude that Priority was negligent in its method of construction or that improper material was used.

### **Downspouts / Improper Drainage / Cracks in Foundation**

- (73) There was evidence that the neighbor's downspouts were directing water onto Symes' property and this issue was brought to Symes' attention after he experienced leaks and after he had done some remedial work on his own in 2006.
- (74) There was also evidence that there were no downspouts on the porch which had been built by Symes. Further, it was brought to Symes' attention that there appeared to be a negative grade in the area of the house adjacent to where the porch was built and where the actual leakage had occurred.
- (75) The work done by Priority extended up to the area of the porch but not beyond it, and I find that the cracks in the foundation were in fact in an area beyond the scope of the work performed by Priority.
- (76) In cross-examination, Foran stated that he had no evidence of who might be responsible for the poor grading around parts of the foundation. He didn't know if Symes had done work around the property prior to his first visit to the property.
- (77) In the first Foran report, he states "rain leader downspouts have been piped underground to outfall in a drywell." He stated that his assumption was that this had been done by K.B. Clarke. In fact, this was done by Symes.
- (78) Foran also stated that on his second visit to the property, he was shown a number of photographs showing the piping for the downspouts, and he stated that he understood that this was part of the original construction to the drywell.

- (79) The work done by Symes in 2006 related in part to the problem of the drainage of water from the neighbor's property onto his property which was unrelated to the work which had been performed by Priority and in fact on the other side of the property.
- (80) In his first report, Foran reaches certain conclusions, however, those are premised on an assumption on his part that either there was a flat or negative surface grading around the dwelling. Foran also concluded that the original soils were disturbed on the upgrade side of the dwelling, however, he agreed in cross-examination that this was necessary to some extent because of the spoilage of the soil by the oil spill. He also states that there was a negative grade from the drywell to the house but, again, this is an assumption on his part not supported by any solid evidence.
- (81) Foran also stated in his evidence that he did not mention in his report any evidence of cracks in the foundation, although he was aware of them as Symes had told him that he had observed one at one point. Foran could not recall if Symes had mentioned the issue of the cracks in the foundation before the second Foran report was prepared. He stated that he was not asked to look for cracks.
- (82) Placing the drain tile above the footings would only create a problem if the water table rose to the point beyond where the drain tile was located. There would have to be a crack in the foundation in order for the water to enter the home. The only crack that is known to exist is the one found on the other side of the home which was in a part of the foundation beyond the scope of the work performed by K.B. Clarke and Priority.
- (83) In summary, there is insufficient evidence to find negligence on the part of Priority with respect to the issue of placement of downspouts, improper drainage or cracks in the foundation.

### **Sump Pump / Sump Pit Issues**

- (84) The preponderance of evidence is that the existing drainage system as modified by Priority worked adequately as at no time was there any evidence of the sump pit backing up with water other than the statement by Symes that the pump was working overtime and that he went through a couple of pumps. Foran stated in evidence that the fact that the pump was working overtime and Symes went through a couple of pumps reinforced his "gut feeling" that there was a lot of water not being released.

- (85) Symes did not, however, produce any independent evidence of pump replacement beyond his statement such as a purchase slip or invoice.
- (86) According to Budden, when he attended on the premises on one occasion and Symes told him that the pump had burned out, he looked at the pump and he stated it was the same pump that he had purchased. Budden stated that he had purchased the best pump that he could have and that the sump pit met all the requirements.
- (87) In the absence of independent evidence, I accept Budden's evidence on this point.
- (88) Also, surprisingly, the Claimants did not provide any photographic evidence of the water damage in their basement. Barbara Symes did not testify at all in this proceeding. I assume that the Claimants have put forth their best evidence. In the first Foran report, Foran refers to "localized flooding" in the basement. I conclude the actual water damage to the Claimants' premises was minimal.
- (89) At the November 2006 meeting, I accept that Symes told Budden that the sump had burned out on more than one occasion, however, Budden reinforced at that time that Symes would have water issues in the basement if the sump was not working and that the pump had to work at all times. There was also a discussion at the same meeting whether water had come up through the sump hole, and Symes advised Budden that it had not, however, from the expert evidence, I conclude that it would likely do so if the pump failed.
- (90) I accept Bezanson's evidence that hydrostatic pressure would push the water through the sump pump hole yet there is no evidence of any water leaking through the sump pump hole other than the times when the pump may have burnt out, therefore, I conclude from this that the sump pump system worked at all times. Even if the sump pump had burned out, there is no evidence that this was as a result of negligence on the part of Priority.
- (91) I find that Symes has not proven on a balance of probabilities any negligence on behalf of Priority with respect to sump pump or sump pit issues.

### **National Building Code Violation**

- (92) Symes alleges that Priority breached the National Building Code by not placing the new drainage tile at or below the level of the footings.

- (93) Foran indicated that he was not particularly familiar with the National Building Code requirements and did not address this issue in his reports. Bezanson, on the other hand, provided a detailed summary as follows:

**“Foundation Drains**

With respect to the foundation drains, Clause 9.14.2.1 of the National Building Code of Canada (NBCC) specifies two alternatives. The first alternative is using drainage tile and second is using a layer of gravel or crushed rock to provide a path for ground water to flow. For new construction the drainage tile alternative is most often used as the entire foundation is accessible. In this case PESL had to replace only the portion of drain tile that was contaminated even though the remainder of existing drain tile was blocked with silt. The contaminated area of limited to the side of the house adjacent to the driveway and extended about one quarter of the way along the two adjacent sides. PESL did not excavate around the entire perimeter of the structure. The preferred method to remediate the blocked drainage tile would be to replace the drainage tile around the house, as indicated in PESL’s November 17, 2006 letter however this would be considered betterment and the cost of this work would have to be carried by the owner. To maintain the work within the scope of the contaminated area, PESL replaced that portion of tile that was removed as part of the remedial work, with new crushed rock and drain tile. The crushed rock met the NBCC drainage requirements (second alternative) while the new drainage tile was installed as a secondary drainage path. This drainage tile was placed higher up the foundation wall than normal because it would not have been effective to put it in the recommended position as then it would be tying into the existing system that was already blocked. In my opinion this was appropriate under the given circumstances.

The crushed stone provided a drainage path for ground water to reach the new sump that PESL installed in the basement entrance that replaced the existing sump that was originally located in the basement. The new sump was connected to the existing closed line that ran to the existing manhole crock that was located at the back of the property. Griggs’ letter of November 10, 2006 also confirms that the position of the new drain tile placed by PESL in the remediated area had nothing to do with the water problems in the basement.”

- (94) There is no evidence that the stone used by Priority was defective or deficient in any manner.
- (95) The Building Code establishes a duty of care in this case. Code provision 9.14.2.1 establishes two alternatives, only one of which requires that the drain tile be at the bottom of the footing. Budden used the second alternative in this case.
- (96) I accept Bezanson's conclusion that it was beyond the scope of the remedial work for Priority to replace the drainage tile around the entire perimeter of the home. I also accept Budden's evidence, which is uncontradicted, that the clay drainage tile was clogged. I also accept that the manner in which the new drainage tile was installed was appropriate in the circumstances of this case.
- (97) I also accept Bezanson's conclusion that the existing drainage system provided a path for the water to reach the sump pump drainage system. This conclusion is supported in part by the second Griggs report.
- (98) While there is some suggestion in the first Griggs' report that the work done was not in accordance with the National Building Code, it is common ground that Griggs was not aware of the existing underslab drainage system at the time that his report was prepared.
- (99) While the location of the drainage tile was unusual and one that was normally reserved for cases of new construction, I agree with Bezanson's conclusions that it was an appropriate method in the circumstances of this case.
- (100) Foran was placed by Symes in a position of recommending a type of drainage system before he was provided with details of the existing drainage system.
- (101) The second Foran report was not prepared until the new drainage work was at least commenced by Symes as he states as follows, "I offer this letter as record of my visit to your property... to review the new construction..."
- (102) In conclusion, there is insufficient evidence to support the claim by Symes that Priority violated the provisions of the National Building Code.

## **Summary**



(103) For these reasons, the claim is dismissed as against the Defendant, Priority.

**LIABILITY OF K.B. CLARKE**

(104) K.B. Clarke and Symes entered into a contractual arrangement. It is common ground that there is an implied term that the work was to be done in a reasonable and workmanlike manner.

(105) Possible liability of K.B. Clarke must be assessed in light of the scope of insurance work which they were retained to do.

(106) The essential terms of the work in this case was the removal of oil as the possibility existed that it might leak onto the neighbor's property.

(107) I accept Geddes' evidence as the most reliable evidence concerning the source of the leakage reported by Symes, that is to say, it occurred primarily in the area adjacent to the porch built by Symes, which was beyond the area excavated during the remedial work and along with slight leaking around the chimney on the driveway side.

(108) I conclude on the balance of evidence that the leakage in the area near the porch was as a result of a crack in the foundation near the area of negative grading as identified by Budden and pointed out to Symes.

(109) This was localized leaking and not general flooding.

(110) There is no reliable evidence that the sump pump system had ever failed to operate properly.

(111) As the only reliable evidence is that the water source of the leakage was from the exterior to the interior and since K.B. Clarke was only involved in the interior work, there is no

evidence, therefore, that their work was performed in other than a reasonable and workmanlike manner or that they were negligent in any way.

(112) For these reasons, the claim is dismissed as against the Defendant, K.B. Clarke.

**SUMMARY**

(113) The Claim is dismissed as against both Defendants, K.B. Clarke and Priority, for the reasons stated above.

Dated at Dartmouth, Nova Scotia,  
on October 3, 2008.

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Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant(s)
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