IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Brown v. Magliaro and Bridge Paving Ltd.*, 2023 NSSM 95

Date: 20231224
Claim: No. 526297
Registry: Sydney

Between:

Shawn William Brown

Claimant

v.

Peter Magliaro and Bridge Paving Ltd.

Defendants

Adjudicator:	Raffi A. Balmanoukian, Adjudicator
Heard:	December 21, 2023 by Teams videoconference
Counsel:	Shawn William Brown, for himself, Claimant Stephen Jamael, at prehearing, for the Defendant

By the Court:

[1] When ducks come to the puddles in your driveway, there's a problem.

[2] In summer 2021, the Claimant wanted his driveway paved. Peter Magliaro provided a quote of $4600 plus tax ($5,290) under the name of Bridge Paving Ltd. He offered or agreed to do the job for $4600 cash (which the Claimant confirmed was a "pay me cash, save the tax" type of arrangement, to which I shall return), and there is a notation on the sales order of "4600 cash" to that end.

[3] By all accounts, complete with photographic evidence (including the ducks!) it was a botched job; at least some of the asphalt was spread by hand. Within days, the Claimant was texting Mr. Magliaro complaining of a "bunch of puddles" in the driveway. In addition to aesthetics, there is a safety issue from standing water, snow, and ice. It brings to mind the comments of Lord Denning in *Miller v. Jackson*, [1977] 3 All E.R. 338 that "the animals did not mind the cricket." Perhaps the ducks enjoy the puddles. The humans don't. And they didn't pave the driveway for the ducks' benefit.

[4] Repeated assurances from the Defendants that they would make things right turned out to be a complete canard.

[5] The text message evidence, over a period of almost two years, establishes to my complete satisfaction that a slew of promises to remediate, including a text from Mr. Magliaro that the Claimant had "no need to get worried, I never fucked anyone. I'm not in this business to fuck anyone." went unconsummated.

[6] By July 2023 – almost two years later - the Defendant(s) had attended on the site (in the Claimant's absence), ostensibly to "re cap" the driveway. They removed a 4' x 16' strip of asphalt at the end of the driveway (leaving an approximate 4" dip and a pyramid of asphalt chunks) and texted that "decided to just refund you your money back," leaving a cheque for the $4600. This was cashed.

[7] The Claimant has had to fill the resultant trench with gravel; the driveway remains unsatisfactory. He sues for $5,000 and presents estimates of $8,417.71 and $9,430 to do a proper job. His evidence is that the old driveway is not capable of being re-capped and will have to be removed, a proper layer of gravel laid (which apparently was not done before), and resurfaced.

[8] The Defendants, though counsel, filed a defence and, again through counsel, appeared at the scheduling / case management pre-hearing. Neither they nor counsel appeared at the substantive hearing, although I verified that counsel had

received (and accepted) the Teams link. Counsel had not apprised me of his discharge, or of his seeking to withdraw, or that the scope of his retainer did not include representation at the hearing. After a short interval to allow for attendance, I affirmed and heard the Claimant. At the conclusion, I indicated I would allow a short period of time prior to my rendering a decision to allow the Defendants to come forward with any exigent circumstances that might explain the absence, such as communications failure or equipment that went afoul. They have not done so.

[9] The evidence of the subpar work is clear – indeed, the "refund instead of repair" effectively bears this out[1]. The real questions in this case are the quantum of damages, and who is liable for it.

[10] The measure of damages in contract is the position the Claimant would be in, had the contract been performed. In this instance, he would have a proper 2.25 year old driveway; his estimate was that it should last about 15-20 years with normal wear and tear (meaning that it would be now between 11.25% and 15% through its effective life). While not the best evidence, it is consistent with common sense and with at least one other driveway the Claimant had had at a prior residence. The photographic evidence shows a pleasant and well-kept house on

[1] I add that this refund was a unilateral act by the Defendants. There was no agreement to settle the dispute on this basis, nor were the funds provided on the condition that, if accepted, it would be the end of the matter. There is no issue of settlement or estoppel in this case.

mature grounds, and I accept that the driveway would be due for replacement around that timeframe in keeping with the general quality and "curb appeal" of the yard and surroundings.

[11] As it is, the Claimant is in a worse position than had nothing been done, as the current driveway now has to be removed (except for the trench that the Defendants, for whatever reason, created. Whether they started and then abandoned the job, or did it as a way of flipping the bird to the Claimant, was not clear either way; but this, too, made matters worse for the Claimant yet again).

[12] Had the contract been performed, the Claimant would have spent $4600 (cash) and now have a driveway that would not be new, but which would have significant remaining economic life.

[13] Instead, he will need to spend somewhere between $8,417.71 and $9,430, and upon so doing will have a new driveway. I am satisfied that the lower figure is appropriate as there is nothing to distinguish the higher one as being superior (in fact, the higher estimate measures the square footage to be covered as 1,252 square feet; the lower estimate is for 1,273 square feet).

[14] To this, I must deduct the $4600 that the Claimant would have spent in any event, had the Defendants done the job properly, and which he now has back in

hand. I also must apply an element of betterment. In *Byrne Architects Inc. v. A.J. Hustins Enterprises Ltd.* 2003 NSCA 21, Hamilton, JA, quoting the trial Justice with approval, defined betterment this way:

> [98] When dealing with how the betterment of the upper parking deck should be taken into account in awarding damages the trial judge stated:
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> > [146] The award must also reflect the fact that, notwithstanding that the membrane-joint system failed, the plaintiff installed an entirely new system with an anticipated lifespan of 20 years. That is, his position was improved or bettered. The authors of *Damages for Breach of Contract*, *supra* describe the situation at 2-3(c)(i):
> >
> > > The issue of betterment arises in situations where the court adopts the "cost of performance" test and awards the cost of carrying out the repairs or, in the extreme, awards an amount sufficient to rebuild a defective structure. As a result of the repair of (sic)replacement of the damaged product or building, the plaintiff will receive a new product or building which will have a greater value than that which existed prior to the damage being sustained. The court, therefore, must decide whether to factor the "betterment" into the calculation of damages and reduce the damage award accordingly.
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> > > For example, a plaintiff employing the use of a machine in the manufacturing business may anticipate the machine's life expectancy to be twenty-five years. If, as a result of a breach of contract (or tort), the plaintiff is required to replace that machine after twelve and one-half years, he or she will then be possessed of a new machine that has a life expectancy of twenty-five years, double the life expectancy of the machine in the plaintiff's possession at the time of the breach. In another example, a roof on a commercial building is expected to have a lifespan of ten years. After four years, as a result of negligent construction, that roof must be replaced. The new roof, when installed, will have a new life span of ten years. As a result, the plaintiff will have received a "betterment" consisting of a new roof which will last an additional four years.
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> > [147] They continue at 2-3(c)(ii):
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> > > In the example provided earlier, it can readily be seen that unless betterment is taken into account, the plaintiff will end up with a new roof or rotor, all at the defendants' expense. This would conflict with he basic

> principle of contract and tort law that the plaintiff is entitled to the recovery only of his or her losses. The authors proceed to (sic) describe the two stage method used in Ontario as introduced in *North York (City) v. Kent Chemical Industries Inc.* (1985) 33 C.C.L.T. 184 (Ont. H.C.) to calculate the amount of betterment by which a replacement award will be reduced. I have found no authority that suggests such a method has been adopted in Nova Scotia. The approach used in this province is well illustrated by the case of *Dartmouth (City) v. Acres Consulting et al.* (1995), 1995 CanLII 4551 (NS SC), 138 N.S.R. (2d) 81 (S.C.).
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> [99] The principle rule for measuring damages is to effect a *restitutio in integrum* so far as the damage is concerned. **Cheshire, C.G.** ***Law of Contract*** , 11th ed., (London: Butterworths, 1986), at p.588. Hustins is to be placed in the position that he would have been in had the contract not been breached; no better, no worse. The trial judge applied this rule when he adjusted certain amounts of damages by 25%, to take into account the longer time Hustins would have the use of the waterproofing system because of its replacement, and in doing so he made no reversible error.

[15] I accept that a "proper" driveway would, at the 2.25 year mark, now be somewhere around 1/8th (12.5%) through its life. I am also cognizant that at the end of the life of a proper driveway, there would still be the cost of breaking up and removing the asphalt, and this should be amortized in the same way.

[16] This yields the following:

Current cost: $8,417.71

Less 1/8th for betterment: ($1,052.21)

Less refund to Claimant: ($4,600.00)

Net: $2,765.50

[17] The remaining question is whether the individual defendant, the corporate defendant, or both are responsible for this amount.

[18] Ordinarily, this is a straight-forward analysis. Usually, when a company is engaged, it is clear that the labour and materials are provided by the corporate entity, and the contract is with the corporate entity. It is common, especially in this Court, for the individual owner to be sued either in an attempt to "pierce the corporate veil" or through a layperson's erroneously equating the legal personality of corporation and principal as being one and the same. They are not.

[19] Here, I have no idea of how (if at all) Mr. Magliaro accounted with or to his company for the $4600 cash payment. There is some small possibility that he caused his company to provide a cash discount and that the $4600 is "tax-in." That would be inconsistent with the usual "cash on the dash" experience, especially when the abatement is precisely the amount of the HST. But it's not impossible. I note the "sales order" does not contain an HST number which would be required for a corporate sale.

[20] It's also possible that Mr. Magliaro took the contract for himself, and "subbed" the physical work to the persons and equipment of the corporate defendant.

[21] Finally, it's possible (and frankly most likely) that he just pocketed the cash for his own benefit and used corporate equipment, materials, and labour.

[22] In any scenario, it's clear that the work done by (or through) the company was deficient, which is adequate to establish corporate liability either in contract or in tort (ie negligence)[2]. Although I have my suspicions regarding what happened to the cash, suspicions they alone are. For current purposes, it is adequate to say that Mr. Magliaro was its recipient in at least first instance, and the sales order's lack of an HST number suggests to me that he, not the corporation, was the ultimate payee. What he did with it after that is an issue to be resolved among him, his company, and the CRA. For contract purposes, I find that Mr. Magliaro was at least **A** party, if not **THE** party, to the contract with the Claimant. He is liable accordingly.

[23] In saying this, I in no way condone "off the books" transactions – if that is what happened here – either by payor or payee. I don't know who instigated that conversation. Indeed I have only my strong suspicions of the destiny of the funds, and those suspicions do not form part of my analysis. My function here is to

[2] In negligence, the measure of damages would be to put the Claimant in the position he would have been, had the tort not occurred. In this case, he would have spent $4,600 and had a proper driveway that is now 2.25 years old. The damages are what it would take to provide him with such a driveway, which takes us to the same analysis as for contractual damages: the cost of putting in that driveway now, less the $4600 he paid and less a betterment component, to yield the same $2,765.50. As cited in *Byrne Architects, supra*, the betterment credit in contract and in tort are the same.

adjudicate a construction dispute, and to determine who is responsible and in what amount. But the Court does not live under a rock. It can take notice of the prevalence of the "underground economy" and express its disapproval when there is some indication that one party or another seeks to duck the Tax Man.

[24] There was no period in which the driveway performed its intended function, to the standard sought. In fact, I was told that Mr. Brown's spouse could not even use the driveway for a period, as her car would "bottom out." I award prejudgment interest on $7,365.50[3] from September 2021 (when the work was completed) to July 2023 (when the $4600 was refunded). 22 months at 4% is $540.14. I further award interest on $2,765.50 from July 2023 to the date of release of this decision ($46.09). The rate and calculation is simple interest at 4% pursuant to Regulation 16 of the *Small Claims Court Forms and Procedures Regulations*, NS. Reg. 17/93 as amended. That totals $586.23.

[25] I appreciate that there is potential double recovery in the interest component as the estimates are the cost of remediation in 2023 as opposed to when the job was botched in 2021 (and as such the estimates are presumably higher); however, this is offset by the fact I have counted betterment from 2023 rather than had a new and

[3] The $8,417.71 less betterment. I use the net amount as although the driveway was deficient from day one, it was not repaired on day 1 and the estimates I have in hand are from 2023, not 2021.

defective 2021 driveway been replaced in 2021, when no betterment would have been applied. In my mind, in the absence of evidence to the contrary, these act to offset each other.

[26] I allow the costs of filing ($199.35) and of service ($138.00 as stated by Mr. Brown under affirmation).

[27] The total judgment against the defendants, jointly and severally, is thus

Debt: $2,765.50

Interest: $586.23

Costs: $337.35

Total: $3,689.08

Raffi A. Balmanoukian, Small Claims Court Adjudicator