CITATION: *Secombe & Secombe v Julie Grace T/as Sunscape Gardening* [2003] NTMC 030

PARTIES:	MOSTYN SECOMBE & FIONA SECOMBE v JULIE GRACE T/AS SUNSCAPE GARDENING
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20108317
DELIVERED ON:	20 June 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	27 August 2002
DECISION OF:	Mr Wallace

CATCHWORDS:

Contract – "contractual negligence" – implication of terms – damage not reasonably foreseeable

REPRESENTATION:

Counsel:

Plaintiff:	Mr F Davis
Defendant:	Davis Norman

Solicitors:

Plaintiff:	Mr D De Silva
Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 030
Number of paragraphs:	42

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20108317

[2003] NTMC 030

BETWEEN:

MOSTYN SECOMBE & FIONA SECOMBE
Plaintiffs

AND:

JULIE GRACE T/AS SUNSCAPE GARDENING
Defendant

REASONS FOR DECISION

(Delivered 20 June 2003)

Mr R J WALLACE SM:

1. This is a claim principally in contract - there is half hearted suggestion of an alternative basis of claim in tort – brought in the Local Court. The Particulars of Claim read :

> "PARTICULARS OF CLAIM
>
> 1. At all material times the Plaintiff were the owners of the land and improvements at 20 Majestic Drive, Durack. (hereafter referred to a Plaintiffs property).
>
> 2. The Defendant conducts business to design and undertake landscape and design work.
>
> 3. The Defendant in person offered in writing to perform landscape work at the Plaintiff's property (hereafter referred to as the offer).
>
> 4. The Plaintiff's accepted the Defendant's offer.
>
> 5. There was an express and or implied warranty in the agreement that:

(i) The Defendant was qualified to perform the landscape work,

(ii) That any material supplied by the Defendant were suitable.

(iii) That the Defendant would ensure that any work performed by her or her servants or agents would provide for proper damage and proper kerbing.[Should read "drainage"]

6. The Defendant herself or by the servants or agents failed to properly prepare the ground surface, provide a proper drainage system or grade the soil surface to allow water flow.

7. In consequence the Defendant breached her duty of case to the Plaintiff's and the Plaintiff refer to and repeat paragraph 5 and 6. As a consequence thereof the Plaintiff will be required to have the Defendant's work redone by a qualified tradesperson at considerable costs.

8. In breach of the agreement between the parties the Defendant has failed to rectify the faulty works.

AND THE PLAINTIFFS

(i) Damages
(ii) Interest
(iii) Costs

2. Liability was denied in the Defence. At a case management inquiry on 6 August 2002, I ordered that Mr Davis, counsel for the Plaintiffs, inform the Defendant on or before 20.08.02 whether the claim was for the sum of money:

1. Less than $ 5000

2. Between $ 5000 and $ 10,000 or,

3. More than $10,000.

3. The Defendant did not appear on that occasion. I was concerned that the matter might property belong in the Small Claims Jurisdiction : it had the look of a claim for liquidated damages Mr Davis did write a letter to the Defendant's solicitors, specifying that:

"My client's claim is:

a) Cost rectifying faulty work:

(i) TERRA FIRMA PLUMBING $2568.50

(ii) WILSON LANDSCAPING $4015.00

b) Repayment from Defendant;

(i) Charge for faulty design work, total amount or part thereof $490.00

(ii) Charge to undertake work wholly faulty or part thereof. $8721.90

c) General Damages.

4. These particulars, as can be seen, did not really address my concern.

(i) EVIDENCE

5. The Plaintiffs, were all at relevant times the owners of a residential property at 20 Majestic Drive Durack. The house on that property had been a display home before they purchased it in June 2000. The house is situated on a corner block. The claim arises from landscaping works carried out by the Defendant Ms Grace, on the two street frontages of the block. Before those works were carried out the frontages had lawns planted on them. A photograph, Ex 6.2 shows about half of the relevant area as it was before Ms Grace got to work. The lawn appears to incline slightly all the way down to the kerb and gutter on the streets. There is no footpath.

6. The only witness called in the case for the plaintiff was Mr Mostyn Secombe. In the ordinary course of events it would have been expected that his wife, Ms Fiona Secombe, would also have given evidence. In the event, the Secombes had moved to New South Wales since the matter arose, and could not both return for the hearing. No-one seems to have thought of arranging for video conferencing in order to take her evidence – or his, for that matter. As it happened, I do not think the plaintiff's case suffered much

by her absence. Both counsel, Mr Davis for the Plaintiffs, and Mr De Silva for the Defendant, took fewer objections to hearsay evidence than might ordinarily have been expected (sensibly so, in my view); almost as if the case were in the Small Claims jurisdiction (as it arguably should have been).

7. Mr Secombe's evidence was that there had never been any surface drainage problem with his front yard in its original grassed state. I accept that evidence (I thought that he both he and Ms Grace, the principal witness in her case, were entirely honest witnesses). Sometime in 2000 he and his wife decided they wanted a rather more striking look to their house frontage. They rang around various landscapers, including Ms Grace, who was not previously known to them. Ms Grace got the work; first, because she, unlike others, was willing to invest time in drawing up a plan, and secondly of course, because the Secombes found the plan attractive.

8. The plan became Ex 1. Ms Grace submitted a quote, Ex 2 dated 23.02.01.

> "ATTENTION: MOSTON SECOMBE
>
> Regarding quote for landscaping to 20 Majestic Drive, as per drafted plan.
> Price $7,929.00 + GST
> Includes clearing off existing unwanted plants and grass.
> Paving.
> Continuous kerbing
> Plants and fertiliser
> Mulch
> Mosaic tiles
> Supply, spread and compaction of road base gravel to form foundations for river gravel.
> As requested appropriate river stones will be sourced from interstate and are not included in the costing of this quote.
>
> Thankyou for the opportunity to quote."

9. Ms Grace had previously invoiced the Secombes, for her drafting work on the plan, on 05.02.02, in the sum of $ 450 + $ 45 GST. Her quote for the works was rather more than the $ 6,000 budget the Secombes has told her

that they had in mind. There was some discussion as to how Ms Grace might do the work more cheaply – the only really flexible point would have had her supplying smaller, less expensive specimens of the plants on the plan or by substituting cheaper species - but in the end the Secombes accepted the original quote and, around the end of February, authorised her to go ahead. Ms Grace finished the job after about four days work, in mid or late March 2001. Mr Secombe paid on completion.

10. The wet season concerned was a heavy one, with near record amounts of rain, and a near record number of rainy days. It is surprising, then, that the works were completed without any interruption by the weather, and that some days passed after the completion before the first significant rain occurred. This rain exposed the drainage problems. The house's roof was guttered, and the flow from the gutters led safely away. No underground water pipes were fractured. All the water concerned seems to have fallen from the skies into the ground between the house and the streets.

11. Photographs Ex 6.1, 6.3, 6.4, and 6.5 depict the completed work in the fine weather. Photos Ex 6.6, 6.7 and 6.8 depict areas of work on a rainy day. The gravelled areas and garden beds are completely covered by water deep enough to overflow, in places, concrete edging which must be 8 or 10 cm high. This flooding is what this action is about. The Secombes, to judge from, the way Mr Secombe gave his evidence, were appalled by the sight, and who could blame them. Their shock soon turned to anger, which they directed, naturally enough, at Ms Grace. Relations between the parties curdled very fast. Consequently, Ms Grace was given only a short limited opportunity to inspect the site, investigate the cause and come up with suggestions to mitigate the problem. Mr Secombe chose to look elsewhere.

12. Within a week or so Mr Secombe had called in others to look at and suggest remedies for the problem. An early suggestion, from someone at a firm called Terra Firma Plumbing (NT) Pty Ltd. , was that the expanses of water

might be dammed in the place by the concrete edging : if so cutting slots in the edging would allow the water to escape. Slots were cut, but this did not remedy the situation much, as can be seen again from the photos Ex 6.6, 6.7 and 6.8, which were taken after that: the cut slots are visible in all three photos, most clearly in the middle foreground of Ex 6.7. Mr Secombe also contacted a Mr Alan Maurice Grove, an engineer from the Land Development Division of the NT Dept of Infrastructure Planning and Environment (as it now is). Mr Grove went to the site at least twice. His qualifications and report depends to a degree on hearsay material form another unnamed putative expert. "the soil scientist". Mr Grove wrote:

> "I unfortunately have not kept a record of when I first inspected the property but it was approximately mid March 2001. I further visited the property on *5* April 2001 meeting Mr. Secombe on site.
>
> The soil scientist did not make a written report but only a verbal report to me to the effect that be had dug some holes and that the soil approx 300mm below the surface was of a very fine silty nature unlikely to be free draining, He reported smelling water in one of the holes indicating stagnation due to lack of oxygen.
> Mr Secombe first rang me, in my capacity of Director responsible for the control of the subdivision development being carried out by a private developer. His initial concern was that the developer had developed his block with inappropriate soils or that an unacceptable high water table was causing his plants to die.
> There was no water table problem and the soils, whilst fine and non porous. were not dissimilar to other Darwin properties. The presence of such soils do require some considerations when draining the garden.
> I was not consulted as a landscape expert nor do I have such credentials. My inspection, coupled with the soil scientists report, led me to the conclusion that the previously well drained lawn had been replaced by a new landscaped garden that had caused disruption to the previous free draining nature of the area, creating surface water barriers and retention conditions along with planting holes excavated into the fine grained, non-draining soils below the surface."

13. That report is all the expert evidence there is in the case. Otherwise I am left to rely upon evidence of Mr Secombe, an intelligent, observant and articulate man, of Ms Grace, an intelligent and articulate woman with, obviously, an amount of experience in landscaping work (at page 47 of the

transcript she said she had been operating her business for approximately 8 years, and I assume she would have had some relevant experience before starting that up), and the brief evidence of Jason Karl Roennfeldt, Ms Grace's husband, who worked on the Secombe project and was with her when she inspected the flooded outcome. Mr Roennfeldt, also seemed to be intelligent, observant and articulate. None of them has advanced a complete explanation for the flooding. All of them have considered sensible hypotheses: their observations have more or less refuted all these hypotheses. In the end, the case for the Plaintiff, whether framed in contract or tort, can be fairly summarised as res ipsa loquitur. The defence is that there was no occasion reasonably to foresee the rem.

(ii) THE SCOPE OF THE WORKS

14. The works carried out by Ms Grace did not involve any deep changes to the earth. In relation to the pre-existing grass her evidence was (p 48 examination in chief)

> "...we removed the lawn.
> Did you adjust levels at all? --- No, there was no – we didn't adjust levels at all, all we did was scrape off the grass, that was it."

15. This item was further developed in cross examination by Mr Davis, (into which I intruded) From p 63:

> "When you came in, whether it was a man on a machine that you hired, the existing garden was ripped up and moved around, was it not?---Well I wouldn't say it was ripped up and moved around, we scraped off the grass. -
>
> When you scraped the grass off, what was left---Bare ground, because we just took off the depth of the grass which is about that deep, so then we had bare dirt underneath.
>
> What went on top of the bare ground, did you just leave bare ground?---Well part of it was the gravelled area, so we put the roadbase on that and compacted it down to keep it nice and flat. And the garden beds didn't have soil added to them because it would have made the quote even dearer than what it was for the Secombes as it was.

> HIS WORSHIP: Ms Grace, the gravel base once laid, wouldn't that have been at much the same level as the ground under the lawn had been or a little higher or a little lower or what?---Well I suppose if you take off that much and then put that much back, it's pretty much same same.
>
> So you've taken off rather less than an inch of dirt of the lawn and then put in a very similar thickness (inaudible)?---Yes, we've just taken off the ground - yes, scraped off the grass and then we've put a layer of roadbase over the top, yes.
>
> Whereas the area where the plants were, the garden beds, would have been somewhat lower than they were before?---Before the mulch being put on, yes, just only by the depth of grass though.
>
> MR DAVIS: But it's still an alteration in the level; would you concede that?---No, not of the actual levels, like we didn't change the levels. The levels, the gradient of the front yard is still the same, all we did was take the top inch of cover off. We didn't change the levels.
>
> If you alter the natural surface which was the grass and the soil, right, if you remove the grass and scrape it, then you will alter which way water flows?---No, thats incorrect. We didn't change the slope of the grade, the gradient of the ground was still exactly the same, it was just an inch less, an inch taken off the top"

16. I accept that evidence (which was corroborated by Roennfeldt on p 69). The works created a large circular paved area on the corner, and two gravelled zig – zag paths on the street frontages, with garden beds on both sides of the gravelled areas. It is hard to believe that the gravel, however compacted, would be less permeable by water than its predecessor lawn had been. The paved circle, on the other hand, may well have been less permeable. However no witness suggests that the flooding owes anything in particular to runoff from the paved circle. It occurred to me that the machine – bobcat or backhoe – used to scrape the lawn might have compressed the soil and compromised its water absorption, but there is no support for this idea in the evidence. In any event the evidence establishes on the balance of probabilities that the subsoil was always virtually impermeable. I am not informed as to the depth of the topsoil, apart from the "30mm" mentioned by the soil scientist – and that is not exactly given as measure of the topsoil. .

17. As to the chance of a high water table being implicated (as Mr Secombe may have suggested to Mr Grove), or springs (as Ms Grace was to hypothesise) the rebuttal of such theories arises from all the evidence concerning the digging of holes during the completion of the works.

18. Ms Grace's evidence as to these was (p48) :

> "And of course you had to dig holes to put the plants into?---Mm mm.
>
> What did you see in the holes that you dug, if anything?--There was myself and many other people that worked on the job with me and no one seen any watering the bottom of any holes whilst we were doing the job. Had we have come across water whilst we were doing the holes, we would have thought 'well what's going on here, there's something - you know, there's water there, we can't do this', but during the course of doing the job there was no water present with any of the holes dug, some of which were about 0.8 of a metre deep and there was no sign of water or considerable dampness with that."

19. Mr Roennfeldt said (p69):

> "Not at any time was there any water present when the holes were being drilled or any other time when I was there".

20. Having been called in on or about 1 April to view the flooding, Ms Grace saw: (p48) :

> "One section of the landscape had – did have water sitting in the holes, the rest of it was okay, there was just one section of it that seemed to be suffering from water logging. There was about an inch below ground level in the holes. I look at – investigated one of the holes by reaching my arm into it as far as I could and there didn't seem to be any end –any bottom to the hole, which was a bit concerning because we thought 'well this water must be coming from underneath'. It was also on a spot which had been gravelled, the three of us knelt down on the ground and had a close look and you could actually see water bubbling up from the ground, which all of us agreed like that's what we saw was the bubbling up of water beneath the gravel."

This and her other observations led her to speculate (p 49):

> "MR DE SILVA: Did you have any views as to where the water that you saw was coming from? ---Well it was a bit of a mystery and we were a bit baffled by it, but it would seem to us that the water was coming up from the ground from perhaps the area being a bit of a spring, as the water was coming up out of the ground, and only one section of it being affected by the water and not the whole lot of it. If it was run-off, then the whole lot would have been flooded at once, not just one section."

Mr Secombe remembers that, or a related hypothesis He said (at p 18) :

> "She did come over once with Jason and we had conversations which were along the lines that she believed that Delfin had built the house on the swamp and that was to blame for the seeping of the water. Jason then dug a very large hole at the bottom part of the verge which is the lowest point, but after he'd done that it was bone dry, so that theory was sort of not there. And not long after that we got a pool put in the back yard as well and when the big hole was dug for that, that was also dry, so there was no water seepage at all."

21. I accept that evidence as I accept Ms Grace's and Mr Roennfeldt's evidence as to the dry state of soil when the holes were dug or drilled. When one remembers that all this evidence relates to March in a very wet Wet season I consider that all the hypotheses which entail a flow of water through the subsoil are quite exploded. Had there been any subsoil flow, or upwelling of the water table, the holes would have filled up with water almost as soon as they were dug.

22. The totality of that evidence leads me to conclude that the subsoil was, in the words attributed by Mr Grove to "the soil scientist" unlikely to be free-draining. I conclude that there never was a time when significant amounts of rainwater percolated deeply into the soil. At all times prior to the carrying out of the works, water must have run off the surface or through the top soil to the street. It follows that the proximate cause of the flooding must be that the works interrupted this flow, to some degree, and perhaps that they laid bare its occurrence, previously masked by the lawn. I am unable to make such sense of the observations by Ms Grace and Mr Roennfeldt of water

"bubbling up". It might possibly be explained as a reaction to the observers' weight on an adjacent part of the gravel.

(iii) The extent of actual foresight

23. The evidence from Mr Secombe and Ms Grace establishes to my satisfaction that no party gave a thought to the question of surface drainage before the flooding concerned. There was no occasion for Ms Grace to think there might be a problem with subsoil drainage – the Secombe's block was not at the bottom of a hill, for example. Mr Secombe had never particularly noticed water running off into the street. He had no occasion to raise the matter of run-off with her. The quote, as Ms Grace said in her evidence more than once, was for landscaping and surface works – not drainage: see, for example p53. Sure enough, there is no mention of drainage works in Ex 2 or in Ex 1. Had there been, no doubt the quote would have been correspondingly more expensive. There is equally no doubt the performance of the contract has led to damage to the plaintiff's that was not within the actual contemplation of either party.

THE LAW

24. The case appears to be one of what is sometimes referred to as "contractual negligence" (see for example Lindgren J in *N G I C A v Kenny & Good* (1996) 140 ALR 313 at 372-3). Such cases raise questions more familiar from tort that contract, of causation and remoteness of damage. The relevant law derives from the statement of Alderson B in *Hadley v Baxendale.* (1854) 9 Ex 341 at 354 (156 ER 145 at 151) laying down the basic rule, or rules:

> "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably considered either arising naturally ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

25. In order to succeed in the claim the plaintiffs must establish a breach of contract by the defendant. It seems that this question is the location of the central difficulty in deciding what has been a difficult case. The defendant's performance of express terms of the contract, and of the more obvious implied terms, was exemplary. On the evidence before me it is not in dispute that she performed the works according to the plans, expeditiously, in a workmanlike manner, using the prescribed or otherwise appropriate materials. Hence her being paid straight away by the plaintiffs. (I leave out of the account hence complaints about the health and size of some trees and shrubs provided by and planted by the defendant, which is a separate issue).

26. In order to establish a breach of contract, the plaintiffs must establish the existence of an implied term, some sort of warranty from the defendant to the plaintiffs that no drainage problems would arise from the works. If a term to that effect may properly be found to be implied as part of the contract between the paries, then the rest of my task would be familiar if not straightforward. As Scarman L J put it in *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co. Ltd* [1975] QB 791at p 807:

> "The court's task... is to decide what loss to the plaintiff it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind a breach when they made their contract."

27. A general statement of the circumstances in which a term can be implied was made by Lord Simon in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 @ p 283;

> "... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

28. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, Deane J noted (at p 121) that that statement had been accepted by the High Court of Australia in a number of cases. Deane J went on to note that Lord Simon, and the High Court in those cases, were dealing with instances of formal contracts seemingly complete on their faces and said that:

> "...care should be taken to avoid an over-rigid application of the cumulative criteria which they specify to a case such as the present where the contract is oral or partly oral and where the parties have never attempted to reduce it to complete written form. In particular, I do not think that a rigid approach to the requirement "that it must be necessary to give business efficacy to the contract" should be adopted in the case of an informal and obviously not detailed oral contract where the term which it is sought to imply is one which satisfies the requirement of being "so obvious that it goes without saying" in that if it had been raised both parties would "testily" have replied "of course": cf. the *BP Refinery Case* (6). As a general rule, however, the "so obvious that it goes without saying" requirement must be satisfied even in the case of an informal oral contract before the courts will imply a term which cannot be implied from some actual statement, from previous dealings between the parties or from established mercantile practice"

29. In the present case had the drainage question been raised, the evidence compels me to the view that the parties, and in particular the Defendant, would not have replied "of course" if asked to warrant her works free of risk of drainage problems. In her evidence on p 64 she said, during cross-examination by Mr Davis:

> "And as I understand your evidence, as a proposition, when you did the landscaping, you say that the question of drainage isn't your. responsibility?—-l didn't quote to do subsoil drainage, I quoted to fulfil the design, doing the kerbing, the plants, the mulching as per quote which I fulfilled. There was no subsoil drainage as part of my contract.
>
> And is it your position that because it wasn't a part of your contract, you just didn't take it into account?---If people want subsoil drainage, then you do that, and then you do the landscaping. Like every landscaping job you do, you don't just go and put subsoil

drainage in every time you do a landscaping job. It's not standard procedure to do that every time you do someone's front yard."

30. Had there been a concern for drainage, she would have quoted for a job providing it. [In that case, the Secombes being beyond their proposed budget already, the job would probably not have been done.]

31. Likewise it seems to me that the plaintiffs, and Mr Secombe in particular would not have said "of course", had Ms Grace told them (as, had she been asked, I think it highly likely she would have) that, although she could not see no likelihood of a drainage problem, one never knows and would they therefore either (a) add drainage to the job description, and pay for it, or (b) accept the risk or (c) retain an expert for advice. I have no doubt as I have said, that the Secombes would not have accepted (a). They might have taken the risk in (b): I have no way of knowing. They might have got an expert opinion, but I doubt it.

32. I am satisfied that the drainage problem was entirely unforeseen by the Secombes, who were familiar with the block, and by Ms Grace, who was familiar with the usual effects of works of the kind carried carried out on land and soils similar to the plaintiff's block. I am not satisfied that the drainage problem was "reasonably foreseeable" except in the sense that those words have come to be given in the law of torts, where it sometimes seems that anything that ever happened was, in hindsight, reasonably foreseeable. And even by that relaxed standard of reasonable foresight, in a case like this one, where the evidence does not permit me to decide what was the cause of the flooding, what it was that went wrong, it would seem to be stretching things to conclude that unknown though it may be, it was reasonably foreseeable. In the final analysis the plaintiffs bear the onus of proof, and I cannot find that they have discharged that onus. It is possible that Mr Secombe's abrupt severance of relations with Ms Grace, and his rapid recourse to third parties like Terra Firma Plumbing prevented Ms Grace, and himself, from getting to the bottom of the problem. However that

may be. I cannot, on the evidence before me, conclude that it would be just and equitable to imply a term to the effect that the defendant assume the entire risk of unforeseen problems with the works. I conclude that the plaintiffs have not established that the Defendant is liable for the costs spent of remedying the problem.

33. In case I am wrong about that, I turn to the question of those costs. On the evidence before me I am satisfied that the whole of the amount paid by the Plaintiffs to Terra Firma Plumbing to install drainage was reasonably spent to remedy the drainage problem. That amount was $2,565.50. The amounts paid out to Wilson & Co. Landscaping - $ 4,015.00 – are not so clearly reasonably spent to that end. The items which go to make up that amount are detailed to some extent in Ex P5, a quote from Wilson & Co. Landscaping. Mr Secombes uncontradicted evidence was that accepted was that he accepted that the quote, had the work done and paid for it – see p21 of the transcript. P5 reads in substance :

> "Dear Fiona
>
> The quoted price for the rectification of the landscaping of your front yard is as follows:
>
> 1) to remove dead and dying plants and then supply and install new plants: $ 1200
>
> 2) to remove and replace woodchip mulch and then supply and install new mulch: $ 450
>
> 3) to supply and spread approx. 10 cubic metres of good quality garden bed soil: $700
>
> 4) to supply and spread 10mm walkway pebbles at a 30mm depth: $900
>
> 5) to spread a 15mm topdressing on bare patches in footpath verge grass: $ 250
>
> 6) to clean up site of previous rubbish and to make good new areas of restoration: $ 150

Sub total	$3650
10%GST	$365
Total	$4015”

34. As to item 1, the “dead and dying plants”, I am satisfied on the evidence as a whole that the Plaintiffs ended up, after Wilson and Co’s work, with a greater number of plants than Ms Grace’s plan had specified, and some of them more costly than originally specified. However, I am also satisfied that Ms Grace acknowledged an obligation – an implied term – to replace the plants that did die. Indeed, of the original suite, the calatheas had all perished quickly from over exposure to the sun, and Ms Grace had replaced them with hardier substitutes. Had there been no drainage problem, I have no doubt that Ms Grace would have continued to replace, for a while, plants that died more slowly. I am satisfied by Mr Secombe’s evidence that further plants did die, and that others were doing poorly. I have no reason to accept his opinion that they “drowned” – an opinion which Ms Grace rejects also, and here her experience carries the day. It seems to me likely enough that about half of the $1200 can be ascribed to restorative works replacing plants which died because they were unsuited to the conditions of sun and soil, or perished upon transplantation. The other half represents an improvement to the garden which is no responsibility of Ms Grace’s.

35. As to item 2, the mulch, I accept the evidence of Ms Grace that the price of the mulch she had installed in the first place was about $ 100. I draw on judicial knowledge to conclude that the side effects of drainage works: trench digging, soil everywhere; would be to spoil that mulch, and necessitate its removal and replacement. The evidence does not really permit me to establish the labour cost of removal and replacement. The evidence does permit me to conclude that the replacement mulch was probably of higher quality (and price) than the stuff Ms Grace had used, another bonus for the Secombes. Doing the best I can, with that item I am satisfied as to two thirds of it being necessary.

36. As for item 3, the topsoil – none was supplied in the original job and I have not been given any reason why its supply by Wilson & Co. would be purely remedial. (It might have been, but if so, that fact is not proved.).

37. In respect of item 4, the pebbles, these items again represent an improvement on the quality (and price) of the materials supplied by Ms Grace. As in the case of the soil, it is not proved to be in any way her responsibility.

38. Item 5, the topdressing, does not arise from Ms Grace's works, nor from any problem with those works, but from another cause entirely.

39. Item 6, the rubbish clean up, seems to me on the evidence, to be recoverable. Ms Grace denies leaving any substantial amount of rubbish, and that may be right, but if her concrete offcuts are added to whatever mess the plumbers left (the cost of the plumbers' exertions being, in this hypothesis, recoverable by the Secombes from Ms Grace) the total seems credible.

40. Therefore, of the Wilson & CO. Landscaping quote, I would allow the plaintiffs to recover from the defendants :

1.	plants	$ 600
2.	mulch	$ 300
6.	rubbish	$ 150
		$ 1050
GST		$ 105
TOTAL		**$ 1155**

41. Accordingly, if the defendant is liable to pay damages to the plaintiffs, the total amount would be $ 3723.50.

42. Even if the plaintiffs had succeeded in every item of their claim the damages in the matter could not have exceeded $ 8,721.90. This matter ought to have been heard in the Small Claims Jurisdiction. I will hear the parties as to costs.

Dated this 20th day of June 2003.

_____

R J WALLACE
STIPENDIARY MAGISTRATE