EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2015-044-000575
[2016] NZDC 21842

BETWEEN	WIDESPAN BUILDINGS AUCKLAND NORTH LIMITED Plaintiff
AND	HARLEY JAMES ARDEN Defendant

Hearing: 4 and 5 October 2016

Appearances: Mr M Taylor for the Plaintiff
Mr A Stuart for the Defendant

Judgment: 9 November 2016

DECISION OF JUDGE G M HARRISON

The issue

[1] The issue in this case is whether the defendant (Mr Arden) was entitled to cancel his contract with the plaintiff (Widespan) pursuant to s 7(4)(b)(ii) of the Contractual Remedies Act 1979, for breach of a term of that contract which substantially increased the burden of the cancelling party under the contract.

Preliminary

[2] Mr Arden and his partner, Carol Crossman (Ms Crossman), jointly own a property located at 29 Lawson Drive, Tutukaka.

[3] Initially they approached Mr Peter Visini (Mr Visini) the director of Widespan to provide a kitset shed for erection on the property either by Mr Arden and Ms Crossman themselves, or by a construction team provided by Widespan.

[4] There were various quotations and changes which ultimately led to an agreement for the construction by Widespan of a dwelling of 160 square metres.

[5] Mr Arden acknowledged that he accepted a quotation from Widespan of 7 September 2014 for a total of $75,473.25.

[6] Mr Visini produced a construction agreement which he said Mr Arden signed on the bonnet of Mr Visini's car when they met at Matakana. Mr Arden denies ever signing this contract. Fortunately, I do not have to decide in fact whether he did sign it because clearly the quote of 7 September was accepted, but I must say that I find it hard to accept that an experienced businessman, which Mr Visini clearly is, would proceed with the supply and construction of the building without first obtaining a signed contract. The effect of Mr Arden's denial is that the signature on the contract purporting to be his was forged, of which there is no evidence whatsoever, but as stated it is unnecessary for me to make any specific finding in that regard.

[7] A building consent was issued on 23 September 2014 following which Mr Arden constructed the concrete floor and pier footings.

[8] The kitset building was delivered to the site and construction commenced about 15 October 2014.

[9] The quote provided that the cladding for the walls was to be Colorsteel Metclad 850. This is a trapezoid profile cladding. When it arrived on site Mr Arden advised that he wanted a corrugated profile rather than trapezoid. Mr Visini said that he offered to change the cladding to corrugated but Mr Arden instructed him to proceed to install the Metclad as per the specification.

[10] On or about 21 November 2014 Mr Arden called Mr Visini to advise that he was not happy with some of the work and asked that work stop. They agreed to meet on site which eventually occurred on 8 December 2014.

[11] At the meeting Mr Arden explained that he was not happy with the window flashings in particular, and also that a bottom plate had not been installed which was

necessary for the attachment of vermin protection flashing. There were also issues with the construction of the steel framing, which appeared to be out of square because work on interior walls and fixtures required adjustment.

[12] It was agreed at the meeting by Mr Visini that the window flashings were not up to standard and that he would replace them and that he would also replace the cladding, at no cost to Mr Arden. It was agreed that the new cladding would have a corrugated profile as originally desired by Mr Arden.

[13] Following the meeting Mr Arden forwarded an email to Mr Visini indicating that his offer to replace the cladding and flashings was agreeable, but that he was awaiting a report from the Whangarei District Council, and also two quotes from separate qualified builders to do the work.

[14] On 15 December 2014 the Council provided a letter headed "Report on cladding" from the Senior Building Controls Officer of the Council, which noted 11 items of non-compliance, nine of which related to the flashings and cladding. The other two items being, that the framing of the building appeared to be out of plumb and outside tolerances noted in the Building Code, and that flashing for the eaves was also required.

[15] There was no further contact between the parties until 22 January 2015, when Mr Arden and Ms Crossman wrote by email to Widespan cancelling the contract. It is clear from that letter that they received legal advice before compiling it.

[16] The letter said in part:

> Unfortunately the work and materials you have supplied do not meet these contractual requirements and they are seriously deficient in their compliance with the building standards such that the work to date requires major remedial work to qualify for a Code of Compliance Certificate. We have provided to you a copy of the letter from the Whangarei District Council dated 15 December 2014 listing the various defects. In addition to the issues listed in that letter there are numerous other less serious deficiencies in the workmanship. The combined defects are so extensive as to comprise a complete failure on your part to comply with your contractual obligations. … Given the extent of the defects in your work, and our belief that you are incapable of remedying those defects, we have had legal advice that we are entitled to cancel the contract and we give you notice that we now do so.

Was there a valid right of cancellation?

[17] The Contractual Remedies Act 1979 specifies the circumstances in which a contract may be cancelled. As relevant, s 7 of the Act provides:

> (3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if—
>
> …
>
> (b) a term in the contract is broken by another party to that contract; or
>
> …
>
> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) applies, a party may exercise the right to cancel if, and only if,—
>
> (b) the effect of the … breach is …
>
> (i) substantially to reduce the benefit of the contract to the cancelling party; or
>
> (ii) substantially to increase the burden of the cancelling party under the contract; or …

[18] In the course of the hearing, I invited counsel to consider the relevance of the Consumer Guarantees Act 1993 to the issues. Both counsel referred to this statute, but it seems it has no influence different from the Contractual Remedies Act. In *Law of Contract in New Zealand* 5th Edn; Burrows, Finn Todd, at p717 the following is stated:

> Cancellation under the (Consumer Guarantees) Act substantially mirrors cancellation under the Contractual Remedies Act 1979. The rules about making the cancellation known to the other party are much the same, as are the rules defining the *effects* of cancellation, but with one important exception: the consumer is to be entitled to a refund of money paid unless a court or tribunal orders otherwise.

The authors go on (at p 178) to say:

> In *Jackson v McClintock,* for example, the plaintiff bought a partially completed house which was to be completed by the builder/seller. The agreement to complete the house could rightly be considered to be a contract of services governed by the Consumer Guarantees Act. But in this case, the purchaser elected, after a substantial breach by the other, to cancel the whole contract (that is, to sell and build) in its entirety. It was held he could do so and obtain relief under the Contractual Remedies Act.

That being so it seems appropriate to consider the rights and liabilities of the parties pursuant to the Contractual Remedies Act only.

[19] I am mindful of the decisions of the courts of circumstances in which cancellation is justified. In *Law of Contract in New Zealand* (op cit) at p 692(xii) the following is stated:

> Building contracts can raise difficult issues in this regard. If defects and failures to comply with the contract become apparent as work proceeds, cancellation will seldom be justified at that stage. A stipulation to build in accordance with a contractual standard is only broken if the work is not in accordance with the contract at completion. There will only be a breach during construction if the defects are such that they cannot be rectified, or if the builder has declared that he or she will not rectify them. Even then the defects would of course need to be substantial to justify cancellation.

[20] This proposition is confirmed in the Court of Appeal decisions of *Oxborough v North Harbour Builders Limited* [2002] 1 NZLR 145; and *Yu v T&P Developments Limited* [2003] 1 NZLR 363.

[21] The issue then is whether the admitted breach of contract and all other circumstances are sufficiently substantial to justify cancellation of the contract.

[22] The approach to be adopted in deciding that question was dealt with by Burrows et al at p 693. They said:

> In *Sharplin v Henderson* [1990] 2 NZLR 134, the Court of Appeal accepted counsel's proposition that s 7(4)(b)(iii) of the Contractual Remedies Act requires an assessment taking into account both subjective and objective factors.
>
> All this demonstrates that what is ultimately involved in the application of s 7(4)(b) is a question of degree: can it be said that the breach and its effects have had a "substantial effect on the contract? It is not feasible to lay down detailed rules on such a matter, and in marginal cases it may well be that different minds will reach different conclusions".

[23] In this case Mr Taylor for Widespan submits that the purported cancellation was invalid because Widespan had not breached an essential term of the contract and that in any event it was at all times ready, willing and able to carry out repair work necessary to fulfil its contractual obligations.

[24] On the other hand, Mr Stuart relies upon provisions of the Building Act 2004 and the definition of "substantial breach" in that statute as being of assistance in determining what is "substantial" for the purposes of cancellation under the Contractual Remedies Act. He submitted as follows:

> Taking this meaning it is submitted that the building the plaintiff constructed failed substantially to meet the expectations of the defendant under the contract and any reasonable person, having knowledge of the nature and extent of the plaintiff's breach, would not have entered into the building contract with the plaintiff (i.e. would not have engaged the plaintiff to undertake the work knowing of the extent of the defects that emerged).

[25] It must also be remembered that as at the meeting of 8 December, the work was substantially complete which removes this case from those where purported cancellations were made when the work had not been completed.

[26] Mr Arden raised a further concern, and that was the absence of a licensed building practitioner to supervise the work. Section 84 of the Building Act 2004 requires that simple residential building work must be carried out or supervised by a licensed building practitioner. Mr Visini held a design licence only. He said that Widespan engaged a Mr Bruce Weir, a licensed building practitioner, to install the windows and flashings, and to supervise the work. Although Mr Arden was not at the site each day, he never met this man.

[27] The person Mr Arden had some contact with was a Mr Boden Young who appeared to be the builder on site, and whose business card described him as a licensed building practitioner. However, after the work was stopped, Mr Arden's evidence was that he was told by Mr Young that he was not licensed, and only held himself out as such. Neither Messrs Weir nor Young were called to give evidence.

[28] I have reached the conclusion that, in all of the circumstances of this case, Mr Arden and Ms Crossman were entitled to cancel the contract for a substantial breach of its terms by Widespan resulting in a substantial increase in their burden under the contract in having to bear the cost of replacing the cladding and flashing.

[29] I am satisfied that they would not have entered into the contract with Widespan if they had known, before doing so, that such a major amount of the

construction work would have to be completely redone. It is not as if there were minor problems with the flashings or only some of them that could be repaired relatively easily. All of the flashings had to be replaced with the consequent advisability of replacing the cladding at the same time. Mr Arden and Ms Crossman were in receipt of advice from the District Council at the time of their cancellation of the contract that in 11 respects the work undertaken by Widespan would not qualify for the issue of a Code Compliance Certificate.

[30] In those circumstances I am satisfied that they were justified in declining the offer of Widespan to redo the work in question when they could not be sure, based on their experience to that point in time, that any remedial work undertaken would reach the necessary standard, and also because of the uncertainty that a properly licensed building practitioner would supervise the work.

Consequences of cancellation

[31] The contract price was $75,473.25. Widespan acknowledges that two items of work were not completed, being an internal wall for which the contractor allowed $1,065.54, and the garage door for which $2,360 had been allowed. They total $3,425.54 which, when deducted from the contract price, leaves a balance of $72,047.71. Mr Arden has paid $32,679.90, leaving a balance payable of $39,367.81.

[32] From this figure must be deducted the cost of the remedial work.

[33] This amounted to $25,335.42 made up as follows:

Removal and replacement of cladding, flashings	$14,513.00
Removal and replacement of fittings so that cladding could be fitted	$ 1,527.06
Reinstallation of califont after removal of cladding	$ 562.01
Builders to assist with recladding	$ 4,531.00
Removal and replacement of electrical fittings	$ 2,050.45

[34] That leaves a balance payable under the contract of $14,032.39.

Betterment

[35] Widespan claims that it could have replaced the flashings and cladding for approximately $7,800 and that the actual cost incurred by the plaintiff in doing that work is excessive and amounts to betterment.

[36] The obligation of a claimant following a breach of a duty owed to him is to act reasonably in the adoption of remedial measures.

[37] In *Banko de Portugal v Waterlow and Sons Limited* [1932] AC 452, Lord McMillan at p 506 said:

> I confess I am not disposed to regard with much sympathy the criticism which Messrs Waterlow have directed at the bank's actions. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

[38] It may be that an employer's refusal to allow the contractor to remedy defective work may amount to a failure to mitigate with the result that the employer can recover no more than it would have cost the contractor to do the work. However, in *Gul Bottlers (PVT) Limited v Nichols PLC* [2014] EWHC 2173, it was held that it was reasonable to reject an offer from a defendant whose behaviour has been such as to cause a complete lack of trust.

[39] In the circumstances of this case, with the work on the flashings in particular having been carried out poorly, and the lack of a licensed building practitioner supervising the work, I am of the view that it was reasonable for Mr Arden to reject Widespan's offer to remediate the work.

[40] As far as betterment is concerned, there was no evidence from Widespan that Mr Arden would benefit from an increase in value of the property by reason of the remedial work. Even if there was such evidence, that would not justify any reduction in the amount claimed. In *Chitty on Contracts* 32nd Edn, para 26-097, it is stated:

> Damages will not be reduced where reasonable steps taken by the claimant by way of mitigation result in a notional betterment of his position, unless the betterment will result in an immediate saving to the claimant to give him an advantage that is readily realisable. Thus, where a breach of contract caused the destruction of a building, and the owners acted reasonably both in deciding to rebuild and in choosing the plan for the new building, it was held that the defendants were not entitled to a reduction in damages (which consisted in the actual cost of rebuilding) on account of the "betterment" enjoyed by the claimants in having a new building in place of the old one – the claimants had no effective choice; …

[41] Consequently that defence to the claim for the replacement costs is dismissed.

Further counter claims – the roof

[42] The claim in this regard concentrated essentially on the degree to which the iron roofing sheets overhang the gutter. Evidence on this aspect of the counter claim was given by Mr Graham Moor on behalf of Mr Arden and by Mr Alan Light on behalf of Widespan. There seemed to be no problem with the flashing overlap at the ridge of the roof, and as far as the gutter overhand was concerned apart from a 2-3 metre section on the northwest corner where the overhang reduces to around 25 mm, the evidence was that a 50 mm overhang was the optimal. However, an underflashing has been installed to alleviate concerns with the overhang, and relevantly both experts agreed that the roof is apparently fit for the purpose and is currently performing its primary functions. There is no evidence of any failure of the roof and, in particular, of any water entering the building envelope.

[43] There was also a claim raised in respect of swarf, which are small filings or even dust that can be produced from drilling or cutting, which need to be removed from the roof or otherwise they rust, which can lead to damage of the roofing iron. Widespan resists this claim on the basis that they were directed not to return to the

site before they had an opportunity to remove any swarf associated with their activities and, in any event, it was conceded that it could have been produced by the aerial installer or by the chimney installation, and there was no proof of any damage to the roof area that would support a claim, particularly one for the replacement of the roof. That part of the counter claim is dismissed.

The concrete floor

[44] There was a claim for alleged damage to this floor which was laid by Mr Arden. As I understood it he is a concreting contractor and he wished to polish the floor to a high standard as an example of his work.

[45] In the course of construction, bracing of the framing was required. Apparently such bracing is often fixed externally to the building but, according to Mr Visini, could not be done in this case because drains had been constructed by Mr Arden outside the building platform.

[46] The bracing was therefore secured by three bolts screwed into the concrete floor. As I understood it, these bolts have been removed and could be filled with an appropriate material which would then permit the floor to be polished as desired.

[47] In any event there is no reference in the accepted quote to this plan for the concrete floor, and nor could I discern from the evidence any contractual commitment from Widespan not to insert the bolts in the manner described.

[48] For that reason the claim in respect of the floor is also dismissed.

The final claims

[49] I have already taken into account the credits passed by Widespan for the garage door and the internal wall. That leaves remaining a claim for the cost to install an internal door and to install the washroom entry. Mr Stuart referred only briefly to them in paragraph 68 of his closing submission where he noted that the cost of the internal door was paid to Buildspec Builders which I understand to be the contractor that carried out the remedial work, but I have been unable to ascertain on

the brief evidence given on this issue whether it was a contractual item, or an addition to the work undertaken by Buildspec. Also, the washroom entry is stated to have been unable to be constructed because of a steel beam, but whether or not that was improperly installed is far from clear.

[50] Mr Taylor did not address these two items in his closing submissions. I note that the statement of defence to the second amended statement of claim merely denies the allegations at paragraph 34 of the counter claim which is where respective claims are made for these two items.

[51] The evidence is not sufficiently clear to enable me to make findings on these relatively minor items and so the claims made in respect of them are dismissed.

Damages for distress and inconvenience

[52] Mr Arden claims $30,000 by way of general damages for distress, inconvenience and financial difficulties.

[53] Widespan opposes the claim on the basis that this is not a case where general damages are appropriate. Reference is made to the decision in *Pier v Imation Holdings Limited* (HC Auckland, CIV-2005-404-503, 5 December 2006, Rodney Hansen J). I simply note that that decision was severely criticised in "Damages for Emotional Distress", Leigh Miller, [2008] NZLJ 78.

[54] Surprisingly, neither counsel referred to the Court of Appeal decision in *Mouat v Clark-Boyce* [1992] 2 NZLR 559. Richardson J at p 573 said:

> By way of example there are numerous recent cases in which moderate awards have been made in respect of discomfort and inconvenience and associated anxiety and distress sustained by plaintiffs where damage to buildings has occurred due to carelessness on the part of local body building inspectors …

[55] The learned Judge went on to refer to those authorities and then said:

> I can see no objection in principle or in terms of public policy to the award of such damages so long as the kinds of harm suffered were reasonably

> foreseeable consequences of the particular breaches of duty and were caused by those breaches of duty.

[56] This case was followed in *Heslop v Cousins* [2007] 3 NZLR 679. At [303] Chisholm J said:

> First, I do not accept that the claim for general damages should be rejected on the basis that the Moir agreement was effectively a business transaction. While I accept that there is a reluctance to award damages for stress and anxiety in a business context because, as Cooke P observed in *Mouat v Clark-Boyce* at p 569 "stress is an ordinary incidence of commercial or professional life", I do not accept that the sale of the Heslops' home falls into that category. In my view the stress and anxiety that arose from Mr Cousins' breaches could not be regarded as an ordinary incidence of this type of transaction. In any event, there is no hard and fast rule, and general damages have been awarded in a commercial context. …

Reference to relevant decisions was then made.

[57] Applying those principles to this case, I do not regard the contractual arrangement between the parties as a purely commercial transaction. Widespan was engaged to build a home for Mr Arden and his family. They were then living in a caravan on the site and did so for four-five months while construction was in progress. They have between them five children who resided with them from time to time during this period. Ms Crossman became quiet ill and it seems that the stress of the shortcomings of Widespan and the need to replace the flashings and cladding, delaying occupation of the house, may have led to that. That meant that Mr Arden had to care for her from time to time, which meant he could not attend to his concrete contracting business, with stressful consequences for him. I note that Ms Crossman is not a plaintiff and therefore no award may be made in respect of distress, anxiety and inconvenience suffered by her, but I apprehend that those effects suffered by Mr Arden both personally and because of the effect on Ms Crossman can be taken into account. Mr Arden also catalogues in his evidence numerous attendances required on his part to support the continuation of the construction work when those matters should have been attended to by Widespan's employees. This constant demand on his time had a negative effect on his business in being unable at times to honour attendance commitments or to complete work on time.

[58] The case authorities are to the effect that "stress damages be kept within moderate limits" – Cooke P (p 569 of the *Mouat* case). Mr Arden claims $30,000. I think that is too high. In all the circumstances of this case I am of the view that an award is justified and, in my view, the sum of $15,000 is an appropriate amount and is awarded accordingly.

Conclusion

[59] There will consequently be judgment for Mr Arden for the balance of $967.61 remaining, after deducting the amount payable under the contract of $39,367.81 from the two items allowed on the counterclaim which total $40,335.42, in accordance with r 11.19.

[60] In view of the success of both parties and the modest difference between the amounts payable by both parties, costs should lie where they fall, pursuant to my discretion to reach that conclusion pursuant to r 14.15.

G M Harrison
District Court Judge