IN THE DISTRICT COURT
HELD AT AUCKLAND

NP No 3852/97

BETWEEN AUCKLAND PROPERTY RESTORATION LIMITED

Plaintiff

AND LORETTA DELWYN BLACKFORD

Defendant

Date of Hearing: 5, 6, 7 October 1998

Date of Judgment: 25 November 1998

Counsel: Mr Burnes for Plaintiff
Mr Ring for Defendant

RESERVED JUDGMENT OF JUDGE JEREMY DOOGUE

Solicitors:
McElroys Solicitors DX CP20526, for Plaintiff
Robert Burnes & Associates DX CP26007, for Defendant

This matter has been heard over the last three days. There has been a substantial expenditure of time effort, and no doubt money, on a claim which amounts to some $15,000. I consider that it is regrettable that the parties were not able to settle the matter but, that being so, a decision must now be made on the claim.

In this case I have had the assistance of high quality submissions from competent counsel. They have traversed both matters of fact and law. In the end, the key to resolving matters is making certain findings of fact. I will set those out shortly.

BACKGROUND

The defendant was the owner of a property at St Heliers. In August of 1996 she engaged the plaintiff to carry out certain maintenance and building operations on the property. Those were concerned with dealing with water leaks into the house property. Mrs Blackford who has retired bought the property in July 1996. She found that after rain there were extensive leaks of rain water into the property. This involved accumulations of water on windowsills and water overflowing the sill and wetting the carpets. The areas in which this happened were both on the ground floor and the first floor. The flooding seemed to be in window areas. All of the windows leaked except those which were protected by a canvas overhang. She was recommended to retain the services of a Michael Wesseldine, a consulting engineer who operates a property advisory company. Mr Wesseldine recommended that the defendant obtain the services of one of a number of persons he recommended, one of which was the plaintiff. The defendant met with Mr Edkins a director of the plaintiff company. Just what was agreed upon was a matter of great dispute at the hearing. I will come back

to make findings of fact on what the parties agreed to further below. Mr Edkins' firm quoted to carry out work on the property. Essentially this work was to mitigate the effects of the ingress of water onto the property.

Notwithstanding the expenditure of substantial sums of money Mrs Blackford claims there were still problems with the flooding. She says that in October of 1996 she listed the property for sale. At about that time she found that water was trickling into the property. There were more problems with the worst of the occurrences being on the 1st of December 1996 which was a day when the defendant had an open home scheduled. On this occasion, she says, water had pooled on the tiles and all of the windows which had been the subject of modifications by the plaintiff company were awash in their sills and in at least one place the water had pooled to such an extent that it overflowed the sill and was wetting the new carpet.

The defendant has declined to pay the various accounts of the plaintiff. The plaintiff has accordingly issued proceedings.

FINDINGS OF FACT AS TO WHAT WAS AGREED UPON

The plaintiff provided the defendant with a quotation dated 26 August 1996. The terms of the quotation were as follows (so far as relevant)

> *"Re: 1/211 St Heliers Bay Rd.*
>
> *As discussed on site we are pleased to provide a weatherproofing Quotation for various areas as set out below.*
>
> *Water penetration through the sills of timber windows, associated with the main bedroom north elevation, rear west bedroom (2) windows, rear bedroom east, one large bedroom, lounge area (2) small individual windows and one large window.*

To seal window sill areas we have allowed to remove the bottom pane of glass
Cut the standards and remove the timber sill
Build in a waterproof tray sealing on to foundation footings, and forming an upstand on the interior
Replace the existing timber sills etc.
Reduce the size of the glass and reinstate the glass and glazing system to a water-tight finish
On completion, paint and touch up to make good.

On the lounge there are two louvre panels above the individual windows:

We have allowed to overlay these with a weatherproof cover and paint to match existing.
Our price allows for providing scaffold to gain access to the exterior of these sills areas.
Our quotation does not allow for any breakage of glass and replacement of rotten timber. These two items will be extra to contract.
Total price as set out above: *$7,886.00 Excl. G.S.T. . . .*

On the rooftop area, the junction between the tiles and the gable end walls, on both the north elevation and the west elevation, it is allowing water to penetrate into the cavity brick.

We have allowed a separate price to gain access, waterblast clean this detail And apply a flexible acrylic bandage, colour matched to the adjoining surfaces to be as unattrusive as possible.

Total Price: *$321.00 Excl. G.S.T."*

The defendant says that the contract that was entered into included not just the terms of the quote. It was partly oral and partly written. In paragraph 2.1 of the statement of defence and counterclaim the defendant alleges that the contract provided

". . . in consideration for a total payment of $11,733.75, the plaintiff agreed to carry out work to weatherproof/waterproof/achieve a watertight finish for specified windows on the property:

Particulars

Sections 1 & 3 of the plaintiff's written quotation number 6979v dated 26 August 1996;

Section A of the plaintiff's written quotation number 7072v dated 12 September 1996.

("the contract").

The plaintiff says that the contract was not as extensive as that asserted by the defendant and that the plaintiff at no stage agreed to waterproof or achieve a watertight finish for the windows.

The two protagonists who gave evidence concerning these matters were the defendant and Mr Edkins the director of the plaintiff.

Mr Edkins said that Mrs Blackford was concerned about leaks in the property. He said, and I find, that there were two ways of attacking the problem. The first method was entirely eliminating the ingress of water into the building. This entailed the removal of all the existing wood and joinery around the various windows and replacing it with aluminium joinery. The second method was to carry out a less substantial or radical alteration. This method involved putting waterproof tray ceilings into the windows. To do this the sills would have to be removed, the glass would have to be removed, the new sill tray installed and the window reassembled. This would accomplish the making of watertight of existing windows around the glazed area and would as well provide a system for draining water away from the windows if any did get inside from sources other than the glazing and the new window sills.

Mr Edkins said that he explained that there were two different approaches that could be followed. He says that he explained that the replacement by the existing joinery with aluminium joinery would be a very expensive method. His evidence was that the

defendant when informed of these alternatives elected to choose the less expensive one and that his quote dated 26 August 1996 and a second quote dated 12 September 1996 were accepted by her on this footing.

Mrs Blackford denies that the two methods were discussed.

I resolve this conflict by saying that I accept the evidence of Mr Edkins on this issue. This is partly as a result of my assessing the witnesses following my observation by them in the witness box. It also partly rests on the assessment of whether it is more or less likely in the circumstances that the account of one or the other is more inherently believable.

Mr Edkins seemed to me to be a reliable witness. There was one area of his evidence which I regarded as not being particularly satisfactory (that was concerned with an issue about the louvres in the house) but over all I consider that he was reliable in his recollection, that he had a clear understanding of what was discussed between the parties and that he has accurately reproduced that in his evidence.

As to Mrs Blackford I took the converse view concerning her evidence in his area. I did consider that it was very reliable. This does not reflect in any way on her honesty. In my view her evidence was vague about the technical arrangements that she was agreeing to. At one point she conceded that she didn't have much idea about just how the proposal which had been made by Mr Edkins would work. I consider that that has affected her ability, first to understand what was proposed and then later to give me an account of it in evidence.

So far as matters of probabilities are concerned, it seems that Mr Edkins ought to be believed when he says that there were two alternatives. If there were two alternatives, the one more expensive than the other, it seems to me natural that he would have put both of these to the defendant in order for her to make a choice. It further seems probable to me that he would want to communicate to her that the entire elimination of ingress of water in to the house would be a major undertaking which would be difficult and expensive to achieve. At the same time he would no doubt want to make sure that the client understood that the alternative method while cheaper would not provide such a comprehensive answer to the water problems. I further accept his evidence that he communicated to the defendant the essence of the method that would be chosen if she decided on the less comprehensive attack on the problem and that he informed her that the essence of this method was that while water from various sources might still get in to the house it would be contained and led away to the exterior by means of draining the sills.

My conclusions of fact are, I believe, reinforced by the fact that Mrs Blackford implicitly confirmed that she was told that there would be an ingress of water in to the building. At paragraph 3.3 of her brief of evidence in giving her account of what Mr Edkins said to her she said the following:

> *"He mentioned an APR employee, Jim Hockenhull who had developed a process of inserting a plastic tray under the windowsill. If the water ran in, it would run out again."*

Mr Ring submitted to me that notwithstanding that statement, the defendant was left with the impression that even if water did come in it would not be visible and that the

mechanism that Mr Edkins had in view would lead it away without it becoming visible.

The important thing though is to notice that it was still possible that water was going to get in to the house. That tells against Mrs Blackwood's contention through her counsel that she was of the understanding that the house would be sealed up to a state of complete weatherproofness if the work was carried out. The fact that she agreed that she was told that water could be drained out by means of trays, supports Mr Edkins' evidence. I find that her assertion that the water would not be visible was not a conclusion based upon anything that Mr Edkins said to her. She may herself have reached such a conclusion but Mr Edkins is not, as I view the evidence, responsible for her reaching that view. Nor is her assertion in these proceedings that she had a clear view about the water being contained in some closed system which would mean that it would be invisible, easy to reconcile with the passage from her evidence which I earlier quoted which indicated she didn't have much idea about what was going to be done in the course of the work.

In my conclusion, the terms of the contract were those set out in the quotations of 26 August 1996 and the supplementary quotation dated 12 September 1996.

BREACH OF CONTRACT

I find that the plaintiff essentially carried out the work that it was required to carry out. I conclude however that the system was not completely effective. I accept the defendant's evidence about the subsequent pooling of water which occurred notwithstanding the very substantial work which was carried out by Mr Edkins' firm.

I do not have a clear idea as to why the system implemented by the plaintiff did not work. Counsel in the course of their submissions made reference to the retention of quadrant beads in the new assemblies. In my view it is possible that retaining those beads deprived the system of some of its effectiveness but I cannot express a final conclusion on the matter. What is important to note though is that the plaintiff did not simply undertake to use its best endeavours to provide a solution. It rather assumed an absolute obligation to prevent the type of problem that was again experienced in the house. My findings are that the further ingress of water was not attributable to defects in the re-sealing of the various window assemblies which was carried out by the plaintiff once it had inserted the new drainage sills. Rather, the source of water was from some other point (it may for instance have entered the wall at a point higher up above the window assembly). But the system failed to successfully handle the water which meant that there was a substantial defect in the construction carried out by the plaintiff.

As well, I find that the treatment of the louvres, which was part of the responsibilities of the plaintiff, was not carried out properly. What was done to those louvres did not meet the standard required by the implied provision of the contract (as I find it to be) to complete the work to a proper workmanlike standard.

In the defendant's statement of defence it was said that the defendant derived no benefit from the work and that the plaintiff's consideration for the contract wholly failed. Neither of those contentions can be sustained.

The position at law as I understand it is as follows. Where there has been substantial performance the contractor is entitled to the stipulated price subject only to a cross-action or counterclaim for the omissions or defects in execution: *Hoenig v Isaacs* [1952] 2 All ER 176. There has been substantial performance of the contract in this case but there have been breaches of it. What the consequences of that are, I consider next.

COUNTERCLAIM

The defendant has pleaded a number of bases of counterclaim. First of all she pleads that the plaintiff made misrepresentations to the effect that it would weatherproof, waterproof and achieve a watertight finish for specified windows in the property and that it warranted weatherproof surfaces treated by it. I have already made findings of fact which dispose of the allegation that there were such misrepresentations. There were no additional misrepresentations which expanded the responsibilities assumed by the plaintiff beyond the terms of the written quotations which were provided. I do not accept that the quotations communicate (whether by representation or by amounting to an agreement to contract in those terms) either that the house would be weatherproof, waterproof or watertight. The interpretation of the contract against the background of the explanations given by Mr Edkins made it clear that what was proposed was a system which while not excluding water from the premises amounted to an effective way of dealing with that water by storing it and then diverting it to the exterior of the building.

The second cause of action in the counterclaim is based upon alleged breaches of Section 28 of the Consumer Guarantees Act 1993 and says that the plaintiff failed to

carry out the work with reasonable skill and care. In my view this allegation is sustainable but only to the extent that the system devised by the plaintiff and constructed by it was not completely successful in coping with water which found its way in to the building.

The next cause of action pleaded is breach of guarantee of fitness for purpose in terms of Section 29 of the Consumer Guarantees Act 1993. Again I find there has been a breach of that implied guarantee but the breach is a more limited one than that pleaded by the defendant. Such breach as there was amounted to a breach of the requirement that the system should cope effectively with water which found its way in to the building.

The fourth cause of action pleaded is breach of the Fair Trading Act 1986. It consists in a claim that the plaintiff made the same misrepresentations as I have considered earlier namely that the plaintiff

> *"would weatherproof, waterproof, and achieve a watertight finish for specified windows in the property;*
>
> *Warranted weatherproof surfaces treated by it."*

As I see it this particular claim does not add anything to the breaches that I have already found to be established, which consist of breaches of implied terms of the contract.

The fifth cause of action in counterclaim is breach of the contractual warranty or term. This is co-extensive with the breaches of contract which I have already found proved.

DISALLOWED ITEMS IN CLAIM BY PLAINTIFF

Before I deal with the matter of damages for breach of contract, I will consider the items which the defendant says should be deducted from the value of the Plaintiff's claim for the reason that it was not entitled to claim for them under its contract. She says such items were not authorised or were overcharged. I now deal with each of these.

The first was that she was invoiced for a machine which was purchased by the plaintiff in order to carry out the work. This was necessary because the plaintiff said the type of profiles it was working with were now obsolete. Current machines would not do the job. The plaintiff said therefore it had to purchase the machine. There was no express agreement by the parties that the defendant should pay for this machine. It is not in my view a matter in respect of which I can imply a term that the defendant would agree to pay for this machine. That part of the claim is therefore disallowed.

The second item is cleaning the garage floor and paths. Again I am unable to agree that this was a matter that the defendant impliedly agreed to pay for. I disallow it.

As to item 3, the item was refitting the dishwasher and in my view it was not authorised by the defendant either.

So far as item 4 is concerned, that was expressly commissioned by the defendant and in my view she must pay for it.

DAMAGES

The starting point is that the usual measure of damages for breaches of contract in building cases is the cost of bringing the construction up to the warranted contractual standard. In this case such a measure of loss is of no assistance because the defendant has now sold the property. In that case the observations of Megarry V-C in *Tito v Waddell* (No.2) [1977] 3 All ER 129 at 316:

> *"Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages."*

This passage was commented on by Lord Jauncey in his speech in *Ruxley Electronics & Construction Ltd v Forsyth* [1995] 3 All ER 269 at 275 in the following terms:

> *"Megarry V-C was, as I understand it, there saying that it would be unreasonable to treat as a loss the cost of carrying out work which would never in fact be done."*

Quite apart from anything else there is no evidence of what the cost of carrying out remedial work would be and indeed there is no claim for reimbursement in those terms. No doubt for these reasons, the defendant abandoned the claim for what counsel termed "special damages" in the course of the trial.

The defendant is seeking is general damages for stress and upset and the like. I consider that an award of general damages is justified. This was to be the defendant's home. Ingress of water into the property had already caused damage to floor coverings and the like. It would have been obvious to the plaintiff that recurrences of

this kind would be highly stressful and that a failure by them to carry out work which would in a substantial and effective way minimise the effects of such ingress of water would cause considerable anxiety to the defendant. In those circumstances their failure to properly carry out their contract could be forseen to cause exactly the sort of problem that the defendant complains of. She said that she was constantly anxious as a result of the failure to fix the problem. I think this has to be recognised by a modest award of general damages. Nor should the damages be seen as compensating the plaintiff for personal difficulties that were attributable not to the work but to her unquestioned ill-health at the time when these events occurred – a state of health which was not in any way due to the actions or inactions of the plaintiff. Dealing with matters in the round it seems to me that a fair award under this heading would be $1,000 for general damages.

JUDGMENT

The Plaintiff will have judgment for the following amount:

Amount of claim	12,910.68
Deduct Ryobi	-244.13
Deduct clean garage floor	-213.60
Deduct refitting dishwasher (estimate)	-70.00
	12,382.95
Plus gst	1,547.86
	13,930.81

The defendant will have judgment for the sum of $1,000.00

COSTS

Costs and disbursements will be as fixed by the Registrar in this case. In the event of disagreement the parties can refer back to me. I reserve leave to either party to apply for further directions or orders as may be necessary to implement the judgment that I have given.

(J.P. Doogue)
District Court Judge