EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WAITAKERE

CIV-2014-090-001182
CIV-2014-090-000649
[2016] NZDC 19921

BETWEEN	FIONA TUGAGA Plaintiff
AND	WESTEND PAINTERS LIMITED First Defendant
AND	LEE TERRENCE DONALD Second Defendant

Hearing:	30 and 31 August 2016, 1 September 2016 and 13 and 14 September 2016
Appearances:	Mr CJC McLean and Ms Gould for the Plaintiff Miss SJR Neville for the Defendants
Judgment:	27 October 2016

DECISION OF JUDGE G M HARRISON

The contract

[1] The plaintiff, Ms Fiona Tugaga (Ms Tugaga), owns a two-storey wooden villa situated at 2 Kohu Road, Titirangi, Auckland.

[2] The residence was occupied by Shirley Anne Sharp (Ms Sharp) who is Ms Tugaga's sister in law. The house required redecoration.

[3] Through mutual acquaintances Ms Sharp contacted Westend Painters Limited (Westend) and one of its directors, Mr Lee Donald (Mr Donald), to undertake the work, the company having a good reputation for redecorating other similar houses.

[4] The house was in a state of disrepair, with considerable work required to be done to the roof, to the structure itself and by the painters. In particular, rotting or

otherwise unsuitable timber had to be replaced before Westend could paint it in conjunction with the other painting work required to the entire building. Significant cleaning, sanding and other preparation was required.

[5] There were discussions between Ms Sharp and Mr Donald as to the type of paint to be used, the necessity for scaffolding and other matters. Ms Sharp alleges that she was advised by Mr Donald that the work would be undertaken by three qualified and experienced painters and would be completed within a period of eight weeks. Mr Donald denies any representation by him to that effect, let alone that there was any term in the subsequent contract to that effect.

[6] On 15 August 2013 Mr Donald forwarded a written quotation to Ms Sharp for the cleaning, preparation and painting of the house for a sum of $46,704 excluding GST. This did not include the cost of scaffolding, nor the paint itself, which were additional items.

[7] The cost of the paint was estimated at $3,576 plus GST. Mr Donald obtained a quote from Summit Scaffolding for $5,278 plus GST plus a weekly hire figure of $718 plus GST.

[8] The quote included a warranty that the paint manufacturer (in this case, Wattyl) would provide a 15 year guarantee on Solargard exterior paint, such guarantee to be subject to the paint manufacturer's specifications and warranties.

[9] On 4 September 2013 Ms Sharp signed a document headed "Credit Account Application" which, it is common ground, accepted the terms of the quote.

[10] There is some confusion over the correct plaintiff. At all material times Mr Donald's contact was only with Ms Sharp. He says at no time was he aware of Ms Tugaga's existence or that she was the owner of the property. At one point, at Ms Sharp's behest, invoices from Westend were addressed to The Angel Trust, which was apparently a private trust which had advanced funds to Ms Tugaga to undertake the work.

[11] The defendants denied any knowledge of Ms Tugaga and maintained that the contractual relationship was entered into between them and Ms Sharp, on the basis that she had been acting for an undisclosed principal.

[12] Only a day or so prior to the commencement of this hearing a deed of assignment was completed by Ms Sharp in favour of Ms Tugaga in respect of the rights and obligations of the former in the contract. Ms Sharp is an undischarged bankrupt. She is not entitled to commence Court proceedings in her own right anyway, without the approval of the Official Assignee. In the end, the defendants did not press the issue and I am content to proceed on the basis that the assignment is effective, and Ms Tugaga is the proper plaintiff and the party contracting with the defendants.

Commencement of the work

[13] On or about 8 September 2013 the painting work commenced with the cleaning of the house. Westend had three workers at the site from time to time. Mr Donald, a Mr Edghill and an Italian known as Tarek. There was some criticism of his experience and expertise in using spray painting equipment although, in the end, no particular fault could be attributed to his work. Mr Edghill explained how he preferred to brush paint but that Mr Donald preferred spraying, possibly because it was quicker.

[14] Work progressed with invoices being forwarded to The Angel Trust by Westend from time to time.

[15] By mid-November Ms Sharp, in emails, was beginning to challenge the invoices and hourly rates charged. She also queried numerous aspects of the work where perhaps more sanding or filling was required. Some co-ordination was required between the work of the builders, which, when complete would be followed by the painters.

[16] For instance, in an email of 2 December 2013 to Mr Donald, Ms Sharp says:

> Hi Lee
>
> I still don't feel comfortable about paying any more money until problems are sorted out and the job is finished. There are a lot of things around the house that need more attention. I feel more attention was needed when the prep work was done and attention to detail but I'm hoping this can all be sorted out.
>
> I see the window man has been back and fixed some windows, that's a help but he has broken one of the new ones he put in. Also where are we up to with the scaffolding, is the painting finished up there? Shall I check it now, I need to print those sheets out and start filling them in. Thank you. Shirley Anne.

[17] The "sheets" referred to was a document entitled "job completion form" sent to Ms Sharp by Mr Donald the previous day. In an email, he said in part:

> I've attached a job completion form I have customers fill out, so that there isn't back and forth with getting touch ups completed. If you could complete for me so I know what areas you need doing. Thanks.

[18] On 3 December Mr Donald emails Ms Sharp as follows:

> Hi Shirley Anne
>
> So now you are saying that I have to wait until August when the builders start back up? I do not think that is fair at all; the roof was a different pricing from the rest of house – this is finished:

[19] On 9 December Mr Donald emails Ms Sharp as follows:

> Hi Shirley Anne
>
> Re the phone call on Friday, paintwork is on hold until builders work is completed – the completion of windows; however waiting four months for this completion is not workable for me as we would like to get the job completed (as you would too), I would recommend discussing with Alex (the builder) to arrange to have someone else come in to complete the work; also for this reason you would like to have the scaffolding to be pulled – if this is correct are you then happy with the work there? If not, then assess to rectify areas, scaffolding will be required;
>
> If you could please confirm that this is what you want. Thanks.

[20] Matters came to a head with an email from Ms Sharp to Mr Donald of 10 December 2013. She wrote in part:

> Hi Lee
>
> The conversation we had on Monday was horrible. I will not be communicating with you any further in this manner. The communication

> level has obviously completely broken down, I will not taking part in this continually arguing.

[21] She went on to refer to her preference to retain Alex the builder and his team. As for the scaffolding she implied this was not needed further because the builders had their own scaffolding although they had been using the scaffolding supplied by Westend and that, in the future, the painters could use the builders scaffolding. She expressed some concern at further work needed where the scaffolding was then located and then said:

> Because these area need to be redone this will be at Westend Painters' expense including the scaffolding.
>
> I am working on the job completion forms and will return them to you as soon as possible.
>
> Thank you, Shirley Anne

[22] On 11 December Mr Paul Donald, Mr Lee Donald's brother and a director of Westend, emailed Ms Sharp as follows:

> Hi Shirley Anne
>
> It is Paul here, I am going to take over your job to completion. I am just working through with Lee in regards to what work is still to be completed. Please send all correspondence to me going forward. I will contact you in the next few days so we can arrange to go through what work needs to be completed. As per your request please see attached form for completion (Word doc).
>
> Thank you.
>
> Paul Donald.

At this stage the job completion form had not been completed, Ms Sharp having requested a further copy of it in "Word" form.

[23] It seems that Ms Sharp discussed the unfinished work with Mr Paul Donald on 17 December, and on 11 January Mr Paul Donald responded to the effect that a representative from the Master Painters was available to attend the property that week to prepare a report, and was it acceptable for him to attend. On 13 January Ms Sharp replied to the effect that she had already obtained a report from a Mr David Neill but said that if he wished to have another report done, the attendance

of the person preparing it should be arranged through her. Mr Paul Donald requested a copy of the Neill report but it was not supplied.

[24] On 21 January Mr Paul Donald forwarded an invoice for the scaffolding which had been taken down at various times, for $8,210.05 inclusive of GST. This recorded an earlier payment made by Ms Sharp to Mr Lee Donald in cash of $4,500. The invoice also noted 21 days hire for scaffolding at the back of the house for which there was no charge and seven days labour and hire for scaffolding on the roof to access the chimney in respect of which there was also no charge.

[25] On 24 January Ms Sharp emailed Mr Paul Donald as follows:

> As you know we are not happy with the job and are seeking legal advice. Thank you.

[26] Further invoices followed from him seeking payment which was not forthcoming, which led to Westend commencing proceedings in the Disputes Tribunal in February 2014. Even then, Westend was prepared to complete the work, but when Westend would not withdraw its claim in the Disputes Tribunal Ms Sharp cancelled the contract and obtained quotes from other painters to undertake a complete repaint of the house.

[27] Ms Tugaga then commenced this claim.

[28] At this time the only evidence held by the plaintiff and/or Ms Sharp regarding workmanship was the report of Mr Neill dated 20 December 2013 in which he said:

> As the painting contract has not yet obtained practical or sectional completion, I am not in a position to comment on the acceptability or otherwise of the standard of workmanship of the exterior painting of 2 Kohu Road, Titirangi.

[29] One further matter requires comment, and that was a meeting held on site between Mr Paul Donald, Ms Sharp, Ms Tugaga and a Mr Kerridge. It is alleged that at that meeting Mr Paul Donald agreed that the entire job needed to be redone, which he denies. No cause of action is advanced on any such agreement, and the meeting appears to be consistent with the effort of Westend to identify Ms Sharp's

areas of concern and address them. The job completion form was never filled out and returned by her, apparently on the advice of Mr Neill.

The pleadings

[30] Ms Tugaga claims that Westend is in breach of contract by failing to undertake the work in a proper and workmanlike manner and provide a 15 year warranty from Wattyl. She alleges further that Westend was negligent in failing to perform its services with reasonable care and skill and that there were breaches of the Fair Trading Act through representations that three experienced and qualified painters would carry out the work over a period of eight weeks, and that a 15 year warranty would be issued by Wattyl.

[31] The claims against Mr Lee Donald personally are that he was negligent in the performance of the painting services and that he failed adequately to perform or instruct others to exercise reasonable care and skill in performing the painting services.

[32] It is also alleged that similar statements to those alleged against Westend were made by him in breach of the requirements of the Fair Trading Act.

[33] For its part Westend denies any breach of contract or that the alleged misrepresentations were made. Mr Donald makes similar denials.

[34] There are affirmative defences which it is unnecessary to detail.

[35] Westend counter claims for the scaffolding cost of $8,210.05.

Did Ms Tugaga cancel the contract and was it justified?

> In New Zealand cancellation of the great majority of contracts is governed by the Contractual Remedies Act 1979. … It covers contracts made on after 1 April 1980, and replaces the old common law on the subject.
>
> A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule previously established by a long line of authorities and now contained in s 7 of the 1979

> Act is that the right of a party to cancel the contract arises only in two types of case.
>
> The first is where the party in default has repudiated the contract before performance is due or before it has been fully performed.
>
> The second is where the party in default has committed what may be called a substantial breach. A breach is of this nature if, having regard to the contract as a whole, the promise that has been violated has been agreed to be essential to the innocent party, or the breach which has been committed has major consequences.
>
> Burrows, Finn and Todd, Law of Contract in New Zealand, 5th Edn, 18.2.

[36] In the course of submissions I invited counsel to give consideration to the Consumer Guarantees Act 1993. I am of the view that that Act applies to the parties in this case in that Ms Tugaga is a consumer and Westend is in trade supplying services. However, the determination of their respective rights and liabilities will be no different regardless of which statute is applied. Again, Burrows et al at 18.4.2(b) state:

> Again, in respect of services, the consumer may rely on either the Contractual Remedies Act or the Consumer Guarantees Act except insofar as there is inconsistency. In fact, the provisions about cancellation are almost identical in the two Acts, except that under the Consumer Guarantees Act a cancelling consumer of services is automatically entitled to a refund of any money paid, whereas under the Contractual Remedies Act that is not so. That inconsistency means the Consumer Guarantees Act provision will prevail in that instance.

[37] The second class of case in which a party is entitled to treat himself or herself as discharged from further liability is where the other contracting party without expressly or implicitly repudiating his or her obligations, commits what may be described as a substantial breach of the contract. Of what nature, then, must a breach be before it is to be called "substantial?" There are two alternative tests that may provide the answer. The Court may find the decisive element either in the importance that the parties have attached to the term which has been broken or in the seriousness of the consequences that have in fact resulted from the breach.

[38] Section 7(3) and (4) of the Contractual Remedies Act 1979 codifies this twofold test. As relevant, the subsections provide:

(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; …

(4) Where subsection … (3)(b) … applies, a party may exercise the right to cancel if, and only if,—

…

(b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) substantially to reduce the benefit of the contract to the cancelling party; or …

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[39] What is perplexing in this case is the actual basis on which Ms Sharp purported to cancel the contract. At a time when she was discussing with Mr Paul Donald her concerns about the work that had so far been undertaken, and in respect of which she never supplied the list requested, she states, in response to a request for payment of the scaffolding invoice, in her email of 24 January 2014:

> Hi Paul
>
> As you know we are not happy with the job and are seeking legal advice. Thank you.

[40] That is a clear statement of a possible cancellation of the contract. No reason for non-payment of the scaffolding invoice is given.

[41] In reply to an email from Mr Paul Donald of 21 January 2014 enclosing the scaffolding invoice, which he followed up with a further email of 30 January 2014, Ms Sharp responds on 2 February as follows:

> I did reply to your email on 24 January, (this appears to be a mistaken reference to Mr Donald's email of 21 January) I have never seen these prices or the quote you sent through, I have not signed it, I did not agree to this. Shirley Anne Sharp.

[42] Ms Sharp does not refer to this email in her evidence in chief. In cross-examination she was asked:

Q. And then document 5 is the document before, this is the quote from Summit Scaffolding for the scaffolding work?

A. Yes.

Q. And you agree that you were provided with a copy of this on or about 15 August as well?

A. I think so. Yes, yes.

[43] That answer of course contradicts Ms Sharp's statement in her email of 2 February that she had never seen the prices or the quote which Mr Paul Donald had again sent to her on 21 January. A part-payment in cash of $4,500 had previously been made towards the cost of the scaffolding, and all I can discern from Ms Sharp's evidence in reply to that of Mr Lee Donald is that she was of the view that the scaffolding should only have been used by the painters and not other contractors on site despite that being to her benefit, and should have been removed at the end of the painting works, but of course the painting was never able to be completed.

[44] Even as late as 20 March Ms Sharp emails Mr Paul Donald and says:

> Hi Paul, I contacted the court and the hearing has not yet been cancelled, can you please see to this as I would really like to move forward with the list and getting this job sorted out. Thank you Shirley ann.

[45] I can therefore discern no valid basis for the refusal to pay for the scaffolding, particularly when no charge was made for periods of its use and in the absence of any evidence from the plaintiff that any part of the charge for the scaffolding was unreasonable, or unjustified. I conclude, therefore, that the refusal to pay for the scaffolding did not justify cancellation of the contract.

[46] The other ground on which Ms Tugaga claims cancellation was justified was the poor standard of work. Ms Sharp claims that before she signed the contract Mr Donald told her that the work would be undertaken by three experienced painters, and would be finished in eight weeks. Mr Donald denies making these statements at least to the extent that they might achieve the status of contractual conditions. There was no mention of either in the contract document, and on the authority of the decision in *Newmans Tours Ltd v Ranier Investments* [1992] NZLR

68, the parol evidence rule would preclude either statement, if made, from becoming a term of the contract.

[47] Fisher J (at p 81 l35) expressed the rule as –

> parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument.

He said further (at p 81 l44) –

> If the written document appears on its face to be a comprehensive record of an agreement, that in itself will be strong evidence that it was intended to be exhaustive.

[48] It follows that I do not accept that either alleged statement became a term of the contract, and in my view there was no need for the 'three experienced painters' to be so because of the 15 year Wattyl warranty, and with such a warranty the experience of the painters who carried out the work would be irrelevant. I also do not accept that Mr Donald undertook to complete the work in eight weeks. If that had been agreed Ms Sharp would not have suggested that the painting work be deferred for four months until the builders returned, as detailed in the emails referred to in [18] and [19].

[49] What has to be appreciated is that the work was not complete.

[50] Mr David Neill, the expert called by Ms Tugaga, agreed that the only area of painting fully completed was the top balcony area at the northern end of the house, which he described as being up to standard. But none of the other areas had been completed as confirmed by the schedule to Mr Neill's evidence.

[51] I note, too, that Mr Ryan McKenzie who, at the material time, was a sales representative for Wattyl Paints, inspected the property four times while the painting works were being undertaken by Westend. He expressed the opinion that the job was going well and that the works were being undertaken in line with good trade practice.

[52] He was asked to inspect the property by Ms Sharp and said he could not see any problem with the painting job. He said:

> I attended on the property and inspected the areas that Shirley Anne Sharp complained about, not all the work in these areas had been completed or even finished at this stage. I did notice some brush marks but no more than was reasonable considering the previous condition of the areas.

[53] A significant amount of evidence was given by other experts as to various aspects of the job and, in particular, the film thickness of the paint that had been applied. Mr Grant McCauley, an expert called by Westend, concluded his evidence as follows:

> 38. The overall painting was good with all preparation and paint application (where completed) undertaken to a good tradesman like standard. As no work has been done for two years and there was no evidence of paint failure in any form, the only issues that were evident were cracking, which is out of the painter's control, and bubbling to roof paint, which is not the responsibility of the painting contractor as this is an existing failure which is impossible to predict.
>
> 39. It is my opinion that if the painting contractor was left to complete it the unfinished works would likewise have been completed to a good standard.

[54] At pp 691, 692 Burrows et al give examples from a number of cases to illustrate whether a right to cancel a contract or not, pursuant to s 7(4)(b) of the Contractual Remedies Act, exists.

[55] Notably, at (xii) p 692 they state the following:

> 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. Even then the defects would of course need to be substantial to justify cancellation.

[56] I pause to note that in this case Westend at no stage declared that it would not rectify any identified defects, and expert opinion was that the work that had been completed was to an acceptable standard.

[57] In *Oxborough v North Harbour Builders Limited* [2002] 1 NZLR 145, the Court of Appeal determined a matter not dissimilar from the present where the building owner asserted a right to cancel because the builder was in breach of the terms of the building contract and had repudiated it.

[58] The Court said:

> [20] The Judge held in relation to para (a) of s 7(4) Contractual Remedies Act, dealing with the essentiality issue, that the builder had not broken any stipulation in the contract. He did so primarily because the work had not yet been completed, and the builder, if given the opportunity, would have taken all necessary steps to complete to the contractual standard. … It is contractually artificial to view the obligations to carry out and complete the work as discrete and self-contained. The dominant purpose of the contract was to obtain completion according to its terms. No issue of breach or repudiation on account of delay was raised. A stipulation was relevantly broken only if at completion the work was not in accordance with the contract, or if the builder wrongly refused to remedy some appropriately established defective work, and thus could not be said to have completed it in terms of the contract. Neither of these situations existed.
>
> [21] The absence of breach also defeated the Oxboroughs' right to cancel on the basis of paragraph (b), (of s 7 Contractual Remedies Act) which involves the question of sustainability.

[59] The Court concluded:

> [26] We therefore hold that, leaving aside the question of affirmation, the Judge was correct in deciding that the Oxboroughs had no right to cancel for breach. While there may have been elements of breach, in total they simply did not qualify for cancellation.

[60] This decision was followed by the Court of Appeal in *Yu v T & P Developments Limited* [2003] 1 NZLR 363. This again involved a purported cancellation by the owner of a property in the course of work and before it was completed. After referring to the *Oxborough* decision and another unreported decision of the Court of Appeal, the Court said:

> [56] Those decisions emphasise that a stipulation as to completion in accordance with a contractual standard is only broken if the work is not in accordance with the contract "at completion", or if the work during construction is such that it cannot be made to conform with what the contract requires. If any defects can be remedied before completion, the builder will be in breach only where he has made it clear he does not intend to rectify.

[61] The Court also said:

> [62] Although the Judge (in the High Court) acknowledged that the list of deficiencies was not short, she made the point that all could be remedied, in the most part for relatively small sums. It is to be noted that even in respect of the defects for which she held T & P responsible, the list contains some 14 items the Judge regarded as properly to be characterised as completion work.

[62] The Court went on to hold that the purported cancellation of the contract was invalid, essentially because the work had not been completed and the contractor had given no indication that he did not intend to rectify.

[63] Based on that authority, I am of the view that Ms Tugaga, or Ms Sharp on her behalf, had no right to cancel the contract. The work had not been completed, and Westend had given no indication of not being prepared to complete it. Indeed, it was at pains to do so, persisting in the requests that Ms Sharp provide a list of items she wished to have attended to. There has been no breach of contract by Westend justifying cancellation of the contract and, consequently, the claim that Westend did so breach the contract is dismissed.

Conclusion

[64] That effectively resolves the litigation. The claim against Mr Lee Donald cannot succeed because he made no representation outside the terms of the contract which misled the plaintiff and/or Ms Sharp into entering into the contract. I refer to the decision of *Trevor Ivory v Anderson* [1992] NZLR 517. The headnote recorded the observations of Cooke P as follows:

> Where damage to property or other economic loss is the basis of a claim it may be possible to sheet home personal responsibility for an intentional tort such as deceit or knowing conversion, and the individual defendant who is placed in a fiduciary position towards the plaintiff will be personally liable for the breach of that duty.

[65] No such allegation is made in this case. The second observation is:

> In relation to an obligation to give careful and skilful advice, the owner of a one person company might assume personal responsibility. Something special was required to justify putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction in terms.

[66] I see nothing in the pre-contractual advice of Lee Donald that might amount to an assumption of personal liability. The contract provided that a 15 year Wattyl warranty would be available to the plaintiff, and if the work had been completed, it seems from the evidence of Mr McKenzie that the warranty would have been available.

[67] The claims of negligence amount to no more than allegations that Westend was in breach of its contractual duty to complete the work in a proper and workmanlike manner, but it was not given that opportunity by the unwarranted purported cancellation.

[68] It is consequently unnecessary to consider the other affirmative defences raised against the claim.

[69] As far as the counter claim for the cost of scaffolding is concerned, I am satisfied it has been proved and there will consequently be judgment on the counter claim in favour of Westend against Ms Tugaga in the sum of $8,210.05.

[70] I see no reason why costs should not follow the event calculated on a 2B basis and invite the parties to agree, reserving however leave for memoranda to be filed should that prove to be necessary.

G M Harrison
District Court Judge