PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No.: 69608

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

CASTLEWOOD BUILDING SERVICES LIMITED

Plaintiff

- and -

CRAIG GARSON

Defendant

David Coles, Esq., Solicitor for the Plaintiff and Defendant by Cross-claim.
W. Brian Smith, Esq., Solicitor for the Defendant and Plaintiff by Cross-claim.

1992, January 8th, Palmeter, C.J.C.C.: This proceeding arises by way of the provisions of the **Mechanics' Lien Act**, R.S.N.S. 1989 Chap. 277. The Plaintiff and Defendant by Cross-claim, hereinafter called "Castlewood", has claimed against the Defendant and Plaintiff by Cross-claim, hereinafter called "Garson", for the supply of labour and materials for the renovations of a property owned by Garson located at 785 Young Avenue, Halifax, Nova Scotia.

Garson, on the other hand, has cross-claimed against Castlewood for alleged damages suffered by him as a result of inferior work done by Castlewood, deficiencies not corrected,

work not being done, and for economic loss suffered by Garson by failure of Castlewood to complete the project as promised, or within a reasonable period of time.

The basic facts are not really in dispute. Garson contacted Castlewood through its owner, one Don Longard, in or about the month of September 1989, in regard to having work done on the property. As a result two proposals were made by Castlewood, one for the majority of the work dated October 12th, 1989 (Exh. #2, Tab 7), and an additional proposal for a rear fire exit dated October 26th, 1989 (Exh. #2, Tab 9). Both these proposals were accepted by Garson. A City of Halifax Building Permit (Exh. #2, Tab 5) was issued on October 5th, 1989. Work commenced on the project in late October and the last work was done on or about January 17th, 1990.

Some discussion regarding time of completion was held between the parties prior to the proposals being made and accepted, but it is clear from the evidence that no formal completion date was set forth in the proposals. During the progress of the work Garson did, from time to time, point out deficiencies or faults in the work to Castlewood, not often to Mr. Longard but usually to one of the workmen employed by Castlewood.

On the 19th of January 1990, Garson met with Mr. Longard at the property and went over a large list of deficiencies and faulty workmanship. Apparently, at this time, Longard admitted deficiencies and indicated he would put his best men on the job. Garson indicated that he would think over the matter and would be in touch with him.

Evidence indicates that Garson telephoned Mr. Longard on January 20th, 1990 and advised him that Castlewood's forces were no longer required on the project and to pick up their tools. By letter dated January 21st, 1990 (Exh. #2, Tab 33) Garson terminated the services of Castlewood.

I have determined that the issues in this matter are as follows:

1. What is the proper amount of Plaintiff's claim?

2. Was Garson entitled to terminate the contract with Castlewood because of:
   (a) unreasonable delay in performing the work, or
   (b) faulty workmanship, or

(c) both delay and faulty workmanship.

3. If Garson was entitled to terminate the contract, what is the measure of his damages?

I will deal with each of these issues on a individual basis.

1. Plaintiff's Claim:

Castlewood claims the sum of $43,593.00 and Garson agrees that this amount would be the correct balance of the finished product, plus agreed upon extras. There is no dispute about this amount.

Evidence indicates that there were three items in the contract not not done and these are itemized in Exhibit #13. There has to be an allowance for this work not done. The cost of performing this work was in the amount of $1,100.00, which sum I accept. I find, therefore, that the amount of $1,100.00 should be deducted from the Plaintiff's claim which would make a net claim of $42,493.00.

2. Termination:

I have canvassed the law in regard to termination of a building contract by the owner in two recent cases, namely, **J. L. MacLean v. Gary Winters and Claire Winters**, 92 N.S.R.

(2d), 214 and **Sharon Monett and Gary Monett v. All Seasons Siding and Carpentry Ltd.**, 1990, C.BW. No. 7578 (County Court District #2) unreported.

In **Monett** I stated at p. 7:

> "Suffice it to say, that an owner can terminate a building contract where there has been a substantial breach of the contract by the builder which amounts to repudiation of the contract by the builder. (See: **Goldsmith on Canadian Building Contracts** 4th Ed. p. 6-3. **Goldsmith**, supra, at p. 6-4 states:
>
> > 'An owner is entitled to terminate a contract if it is clear that either before the commencement of the work, or during the course of it, the contractor is not in substance able or willing to perform the work. Frequently building contracts contain an express clause entitling the owner to take the work out of the contractor's hands, and forfeit the contract in certain circumstances. Sometimes the certificate of the architect or engineer, certifying the contactor's [sic] inability or unwillingness to complete, is required as a condition precedent to such right. An order exercising such a right or forfeiture must comply strictly with the terms of the contract, or he may himself breach the contract by preventing the contractor from completing. Mere bad or defective work will not, in general, entitle an owner to terminate a contract, but the contractor's work may be so bad or so defective as to amount, in substance, to a failure or refusal to carry out the contract work, and thus amount to repudiation.'"

Accordingly, Garson could only terminate the contract if there was a substantial breach of the contract by Castlewood, which amounted to repudiation of the contract by Castlewood.

(a) **Allegations of Unreasonable Delay:**

There was no completion date set forth in the formal contract. Both parties testified that there were discussions about the length of time it might take to complete the work. Mr. Longard testified that Castlewood had a chart indicating eight to nine weeks for the project. Garson, on the other hand, testified that there was a graph showing six to eight weeks, with eight weeks being the outside maximum.

Garson further testified that he wanted to rent the new units by January 1st, 1990 and that Castlewood was to be out by Christmas of 1989, and that Castlewood was aware of this. I am not satisfied, on a balance of probabilities, that there was any oral agreement between the parties that the work would be completed prior to January 1st, 1990.

In my opinion, where a completion date is not set out in the contract, a contractor must complete his work within a reasonable amount of time. **Hudson's Building and Engineering Contracts** 10 Ed. at p. 609 states:

> "...that, as a matter of business efficiency, there must be an implied term in building and engineering contracts that the contractor will proceed with reasonable diligence and expedition."

Goldsmith on Canadian Building Contracts at p. 5 - 13 indicates that an owner is entitled to have his work completed within a reasonable time if no specific time is provided for.

The implied provision of completion within a reasonable time to be implied in a building contract was considered with approval in the case of **Pilcher v. Alcan Design Homes Limited** (1976), 13 N.S.R. (2d) 546. At p. 562 Jones, J. adopted the following proposition from **Keating's Law and Practice of Building Contracts**:

> "If no time is specified for completion of the contract a reasonable time for completion will be implied. What is a reasonable time is a question of fact. If no time is specified but words are used such as 'as soon as possible' or 'within a reasonable time', it is a question of construction to determine the time for completion."

In the case before me the Defendant must establish by the civil burden of proof, that is by a preponderance of evidence, that Castlewood caused unreasonable delay such as to enable Garson to treat the contract at an end or claim damages.

With deference to submissions by counsel for Garson, the evidence adduced does not satisfy me on a balance of probabilities that there was any unreasonable delay on the

part of Castlewood. I accept that there were some minor delays caused by other subcontractors and there were some changes and extras to the work requested by Garson which could have caused some minor delays, but on the whole the evidence satisfies me that Castlewood proceeded with reasonable expedience in light of all the circumstances.

I also find that Garson did not continually press Castlewood to proceed with greater speed and the evidence leads me to believe that Garson was not worried about the speed of the work during the time in question. He was more worried about other matters which I will consider later in this decision.

I, accordingly, find that there was not any unusual delay on the part of Castlewood such as to cause a substantial breach of the contract and allow Garson to claim damages therefore. The economic claim of Garson is based on the apartment units not being available for rental as of January 1st, 1990. I disallow such a claim.

(b) Faulty Workmanship

I accept the evidence of Garson that he expected first class workmanship on the project and that this was communicated to Castlewood through its agent Longard. The

property was in a prime residential area of Halifax and the apartment units to be constructed would be prime units. I find that Castlewood promised excellent workmanship on the project, being aware of what was expected.

Goldsmith on Canadian Building Contracts, 4th ed. at p. 6 - 4 states:

> "An owner is entitled to terminate a contract if it is clear that either before the commencement of the work, or during the course of it, the contractor is not in substance able or willing to perform the work. Frequently building contracts contain an express clause entitling the owner to take the work out of the contractor's hands, and forfeit the contract in certain circumstances. Sometimes the certificate of the architect or engineer, certifying the contactor's (sic) inability of unwillingness to complete, is required as a condition precedent to such right. An order exercising such a right of forfeiture must comply strictly with the terms of the contract, or he may himself breach the contract by preventing the contractor from completing. Mere bad or defective work will not, in general, entitle an owner to terminate a contract, but the contractor's work may be so bad or so defective as to amount, in substance, to a failure or refusal to carry out the contract work, and thus amount to repudiation."

In my opinion, if a breach by a contractor is not serious enough as to amount to repudiation, the owner's only remedy is for damages and he cannot invoke termination.

As indicated by **Goldsmith**, mere bad or defective work will not, in general, entitle an owner to terminate. In this case, was the work of Castlewood so bad and so defective as to technically amount to repudiation? There is also the distinction to be made between what could normally be called deficiencies in a building contract and serious negligent workmanship. Normally, where deficiencies occur, a contractor must be given a reasonable time to correct the same if he agrees to do so. In the case before me the contract was really at an end other than for correction of deficiencies and the alleged serious negligent workmanship.

Evidence adduced before me indicates that most of the faulty workmanship complained of was more than mere deficiencies. In my opinion the work was more than mere bad or defective, it was negligent. Even if I accept that the Plaintiff agreed to come back and correct all of the work complained of, I am not convinced that it had the forces necessary to do the proper work and repair. I find that, in substance, Castlewood was not able to perform the work based on the evidence before me.

There was some question raised as to whether Garson acted precipitously terminating the contract as he did and not allowing Castlewood to have attempted to complete. It certainly would have been preferable to have had more in writing from Garson to Castlewood, itemizing his complaints during

the course of the construction, but I accept the evidence that Garson did make continuous complaints to Castlewood's forces on the job and that Castlewood was aware that Garson was not happy with the workmanship. In my opinion Garson had no alternative, under the circumstances, to act as he did.

3. Measure of Damages:

Once a breach of the contract has been proven and repudiation by Castlewood established, Garson is entitled to recover from Castlewood the cost of completing and repairing the project. At p. 585 of **Pilcher**, supra, Jones J. states as follows:

> "In those cases where, in breach of contract, the work has been left incomplete, whether by abandonment, termination, or otherwise, or containing defects, the direct measure of damage will be the difference between the reasonable cost to the employer of repairing the defects or completing the work, together with any sums paid by or due from him under the contract, and the sums which would have been payable by him under the contract if it had been properly carried out. (Where the former does not exceed the latter, only nominal damages would be recoverable, and where the sums due under the contract have been paid in full, as where a contractor has completed and defects or omissions are discovered at some time after final payment, the direct measure is, of course, the reasonable cost of repair simpliciter.) Such damages are clearly recoverable within the first branch of the rule in Hadley v. Baxendale, supra, as likely to arise in the usual course of things from the breach."

In **McGregor on Damages** 15th Ed. it states at paragraph 1086, p. 673:

> "The normal measure of damages is the cost to the owner of completing the building in a reasonable manner less the contract price, and possibly, in addition, the value of the use of the premises lost by reason of the delay. This measure of cost of completion less contract price is laid down by the Court of Appeal in **Mertens v. Home Freeholds Co.**, which must be regarded perforce as the leading case since it proves to be the only one dealing with this issue."

Goldsmith, supra, at p. 6 - 8 and 6 - 9 states:

> "If the breach consists merely of defective work, the damages will usually be the reasonable costs of remedying the defects, which may include the costs of an engineer to investigate the deficiencies; and damages may also be awarded for inconvenience, loss of enjoyment and indirect costs which could have been prevented. An owner is entitled only to have such defects remedied to such extent as to conform to the requirements of the contract, but not to require additional work or work of a higher quality; but he is entitled to have any defects remedied as soon as they are brought to the attention of the contractor. An owner who alleges that the work performed, or the materials supplied, are defective must provide proper evidence on the basis of which his damages can be assessed."

Exhibit #13 basically quantifies the Defendant's cross-claim in this matter and includes not only cost of repair but an economic loss claim as well. As I have already determined that there was not unreasonable delay caused by Castlewood, the claims for rental income due to delay and due to decreased rents will not be allowed, as well as the claim for newspaper advertising.

I will deal with all of the other items on Exhibit #13 leaving the claim relating to Inkpen Constractors Limited to the last.

1. **MacWilliams Engineering** - I will allow this claim in the amount of $999.70 because I find it was necessary for Garson to obtain professional advice as it related to the considerable moisture in the dwelling during construction. Also this company corroborated the poor quality of the work as suspected by Garson.

2. **Metro Renovations and Repairs** - I will allow this claim in the amount of $2,918.00 as being the amount actually expended by Garson on part of the repairs.

3. **Wayne Dingle Painting** - This claim is allowed in the amount of $400.00. This was actually expended by Garson to correct deficiencies.

4. **Metro Electric** - I will allow this claim in the amount of $700.00.

5. **Byrne Architects** - This claim is allowed in the amount of $1,262.24. Because of the state of the work it was necessary for Garson to retain an expert to determine the extent of the problems.

6. **David Heiland** - This claim in the amount of $108.00 for cleanup of garbage is allowed.

7. **R. F. Walsh Plumbing and Heating Limited** - This claim of $79.84 for removal of gyprock in the kitchen sink is allowed.

8. **Inkpen Contractors Limited** - This estimate (Exh. #2 Tab 53) is listed in the total sum of $31,622.82 which includes G.S.T. This claim also relates to work proposed to be done relative to the alleged failure of Castlewood to install insulation in the roof area according to the plans and the National Building Code. It is my intention to deal with roof insulation as a separate matter, however, there are certain items in the Inkpen estimate which can easily be quantified and are required as a result of the negligent workmanship or non-completion by Castlewood.

(a) **Bathroom door.** This work was faulty and cannot be corrected. I accept that a new door has to be installed. This claim is in the amount of $1,262.00. Castlewood states that the door can be repaired at a cost of $200.00. I do not accept that repairs can be made. I will allow the estimate in the amount of $1,262.00.

(b) **Plastic laminate in kitchen.** This work was negligently done. Castlewood says that repairs could be made to the amount of $300.00. I accept that this work has to be completely redone. I will allow this estimate in the amount of $1,146.00.

(c) **Hardwood top.** I will allow this estimate in the amount of $127.15.

(d) **Back fire escape.** The evidence given and the pictures adduced as exhibits convince me that the work was improperly done and is not acceptable. There are

three estimates for this claim, namely, molding in the amount of $497.40, repair of concrete footings, of which I accept estimate for option #2 in the amount of $120.14, and replacing pavement in the amount of $275.00. I will allow these three estimates.

(e) **Work in rooms unrelated to insulation.** Evidence indicates other work has to be done due to the negligent workmanship of Castlewood. It is extremely difficult to quantify the value of this work based on the estimate of Inkpen but I would allow the amount of $480.00 for this work, together with an amount of $500.00 for taping and painting.

(f) **Basement kitchen floor.** This work was negligently done and needs to be repaired. I will allow this estimate in the amount of $1,495.00. Castlewood agrees that this estimate is fair if the work has to be redone.

(g) **Repair of window over door.** I will allow this estimate in the amount of $87.00.

(h) **Wainscoating repair.** I accept that this damage was caused by Castlewood. I will allow this estimate in the amount of $156.00.

(i) **Repair base, tighten look.** Castlewood agrees that this cost estimate would be acceptable to repair this work. I will allow the sum of $360.00.

Accordingly, the total amount allowable on the Inkpen estimate exclusive of insulating would be the amount of $6,961.15, including G.S.T. of $455.40. I decline to award anything for repair or replacement of doors to the eves or for sliding door repairs because Garson has not convinced me, on the balance of probabilities, that these items are the responsibility of Castlewood.

The last matter to be determined is the matter of the roof insulation. Garson has convinced me, on the balance of probabilities, that Castlewood did not install the insulation according to the architect's plans or according to the National Building Code. I accept that no tru-vent was used as specified for the roof insulation and that the roof was not properly ventilated.

There was some conflicting evidence between the experts for Garson and for Castlewood as to whether this improper installation and ventilation would, in fact, cause damage to the roof and, accordingly, would have to be redone. I have difficulty in making this determination because I was impressed with the evidence of both Mr. Byrne and Mr. Grimby.

The question which I have to determine is whether there was a breach of the contract by Castlewood in this regard. I have no hesitation in finding that there was a breach, Castlewood did not do what was required and expected by Garson relative to the roof insulation and ventilation.

In dealing with the Inkpen estimate (Exh. #2 Tab 53) it would appear that Inkpen estimates the sum of $24,661.77, including G.S.T., to tear out the existing work and replace all the insulation and vent the same according to the plans and the National Building Code. In my opinion, and on the basis of the evidence presented, this sum is excessive and Garson has not convinced me, on the balance of probabilities, that this is the reasonable cost which would be incurred if the whole work had to be replaced.

I have great difficulty in quantifying this claim and, accordingly, I have determined to allow the claim based on an award of general damages for the breach of contract relating to the roof insulation and ventilation. I will award Garson the amount of $14,000.00 as general damages in this regard.

Accordingly, I will allow Garson on his cross-claim the sum of $13,428.87 in special damages and $14,000.00 in regard to general damages, for a total of $27,428.87. He will have his costs under Tariff "A" Scale 3 based on an amount of $30,000.00 together with all proper disbursements. He will also be entitled to pre-judgment interest on the sum of $27,428.87 at the rate of 10% per annum from the 11th day of April 1990 to the date hereof.

Castlewood, on the other hand, will recover from Garson the sum of $42,493.00 together with costs which I hereby fix in the sum of $2,325.00, together with all proper disbursements together with pre-judgment interest at the rate of 10% per annum on the sum of $15,064.13, from the 2nd day of March 1990 to the date hereof, less all amounts awarded to Garson in the preceeding paragraph hereof.

A Judge of the County Court
of District Number One