

CITATION: 1593095 Ontario Ltd. (Northwood Window and Door Centre) v. McCann, 2024
 ONSC 0163
COURT FILE NO.: CV-20-0053
DATE: 2024-01-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
 1593095 Ontario Ltd. o/a Northwood) Bradley Jackson, for the Plaintiff
 Window and Door Centre)
 Plaintiff)
 – and –)
)
 Peter Michael McCann and Jane Ann)
 McCann) Joseph Kennedy, for the Defendants
 Defendants)
 -and-)
)
 Peter Michael McCann and Jane Ann) Joseph Kennedy, for the Defendants
 McCann)
 Plaintiffs by Counterclaim)
)
 1593095 Ontario Ltd. o/a Northwood)
 Window and Door Centre and Andrew) Bradley Jackson, for the Defendants to the
 Walton) Counterclaim
 Defendants to the Counterclaim)
) **HEARD:** May 8, 9, 10, 11, 12, 15, 16 and
) August 17, 2023

2024 ONSC 163 (CanLII)

REASONS FOR JUDGMENT

S.K. STOTHART J.

Contents

Overview 3
 The issues 3
 The position of the parties 4
 The position of NWDC and Andrew Walton 4
 The position of the McCanns 4
 The evidence at trial 5
 The terms of the house and garage contracts 6
 Issues that arose during the project 6

The large window in the great room	7
Master bedroom garden doors	12
Storm doors in the kitchen and laundry	13
The double front door	13
Kitchen windows	14
Kitchen door.....	15
Truscene screens	15
The sills for the 400 series windows.....	17
Garage windows.....	17
The garage man door	17
The hardware for the windows	18
<i>What remained to be done after July 7, 2020?</i>	19
<i>Requests for payment</i>	20
Request for payment in December 2017.....	20
Request for payment in April 2019.....	22
Request for payment in June and July 2020	22
Further communications after July 9, 2020	24
<i>The amount of the lien</i>	26
<i>Final demand for payment</i>	26
Analysis.....	27
<i>The evidence at trial</i>	27
<i>The terms of the contract</i>	27
Scope of work under the contract	28
The terms of payment	28
Was the house contract substantially completed by July 2020?	30
Was the garage contract substantially completed by July 2020?.....	37
Conclusion	37
<i>Who, if anyone, breached the terms of the contract?</i>	37
When an owner breaches the contract	37
When a contractor breaches the contract	37
Was NWDC entitled to demand payment in July 2020?	38
<i>Is NWDC entitled to quantum meriut?</i>	39
<i>Is the Lien enforceable?</i>	40

<i>Was there a negligent misrepresentation?</i>	41
<i>Was NWDC negligent in their performance of the contracts?</i>	41
Duty of care.....	42
The standard of care.....	42
Causation.....	42
Expert evidence.....	42
<i>Should Andrew Walton be held personally responsible for damages incurred?</i>	44
Conclusion	49
Costs.....	51

Overview

[1] In 2016, Peter and Jane McCann (the “McCanns”) decided to move from their home in Mississauga, Ontario to live full time at their cottage located at 137 Rockview Road, Callander, Ontario. In furtherance of this objective, they undertook a large renovation project to convert the cottage into a permanent home and decided to construct a new detached garage.

[2] The McCanns hired 1593095 Ontario Ltd. which operates as Northwood Window and Door Centre (“NWDC”) to supply and install all new windows and doors for their home and the new detached garage.

[3] The work to the home and garage commenced in September 2017 and was expected to take two to four weeks. A number of issues arose, and work continued until July 2020 when the relationship between the parties broke down over payment.

[4] On July 29, 2020, NWDC sent a final e-mail requesting payment. When payment was not provided NWDC registered a lien on the property in order to secure the remaining amounts owing on the two contracts. On September 29, 2020, the lien was perfected, and this action was commenced.

[5] The McCanns have defended the action and have brought a counterclaim against NWDC and one of its owners, Andrew Walton, alleging breach of contract, negligence and negligent misrepresentation. The McCanns seek damages they say they incurred as a result of the actions of the NWDC and Andrew Walton.

The issues

[6] The issues for this court to determine are:

- a. Whether the terms of the contracts for windows and doors were breached, and if so, by whom;
- b. If the McCanns breached the terms of the contracts, is NWDC entitled to payment on a *quantum meruit* basis, and if so, what should that amount be;

- c. If NWDC breached the terms of the contract, are the McCanns entitled to damages, and if so, what should that amount be;
- d. Is the construction lien registered against the McCann property null and void because the amount and dates noted were incorrect;
- e. Did NWDC and/or Andrew Walton negligently misrepresent what he and his company were capable of providing;
- f. Was the work performed by the NWDC done so in a negligent manner;
- g. If there were negligent misrepresentations and/or work performed negligently, what damages, if any, flow from those torts; and
- h. Should the court “pierce the corporate veil” of 1593095 Ontario Ltd. and find one of the owners, Andrew Walton, personally liable for damages suffered by the defendants.

The position of the parties

The position of NWDC and Andrew Walton

[7] NWDC takes the position that it completed or substantially completed the work required for the home and garage and as such it fulfilled its obligations pursuant to both contracts.

[8] NWDC submits that the McCanns failed to provide payment in accordance with the terms of the contract upon demand. It says this non-payment was a fundamental breach of the contract and entitled NWDC to abandon the contract and claim a lien for damages for the unpaid accounts.

[9] NWDC acknowledges that there are inaccuracies in the registered lien, however it submits that these inaccuracies are minor and do not render the lien void.

[10] NWDC and Andrew Walton take the position that Andrew did not make any negligent misrepresentations to the McCanns. Further, the work performed at the McCann home and garage was not negligent. As such, no damages are owing.

[11] NWDC and Andrew Walton take the position that even if the McCanns establish negligent misrepresentation and/or negligence in the performance of their work, the McCanns have not provided evidence of damages suffered or evidence of any mitigation of those damages.

[12] Finally, Andrew Walton submits that there is no basis to pierce the corporate veil of NWDC such that he would be personally liable for any damages suffered by the McCanns.

The position of the McCanns

[13] The McCanns take the position that NWDC breached the terms of the contracts by demanding payment when it was not due and then abandoning the project.

[14] The McCanns submit that the construction lien placed on their property is null and void because it misstates the amount owing under the contract and incorrectly states the last date of supply.

[15] The McCanns submit that Andrew Walton and NWDC negligently misrepresented their ability to carry out the terms of the contract and that they were negligent in the work they carried out.

[16] The McCanns submit that both Andrew Walton and NWDC should be held liable for the damages they suffered due a breach of contract, negligent misrepresentation and negligent work performed. They submit that Andrew Walton should be held personally liable because he is the owner of the company and is the person who misrepresented the type of work that could be performed and oversaw the work completed.

The evidence at trial

[17] Andrew Walton (“Andrew”) and his wife own and run NWDC. Andrew has been involved in the window and door installation business part time since 1997 and full time since 2004. He has experience as an installer and then later in sales and service. His wife does the bookkeeping and accounting. NWDC also employs several staff which include a project manager, a sales associate and installers.

[18] Andrew and the McCanns met in 2016 when the McCanns inquired about windows and doors for their home. They met several times at the company showroom and at the McCann residence and the McCanns viewed a number of product samples. Andrew attended at the McCanns home and took various photographs and measurements. The parties discussed various options and NWDC provided several estimates over the ensuing months.

[19] According to Jane McCann (“Jane”), during this process she told Andrew that they had two non-negotiable conditions: (1) the windows had to be wood; and (2) the screens had to be tight fitting. Jane had had a bad experience where bats came through a screen window.

[20] Jane testified that she told Andrew about the torrential rain, the winds and snow blowing at their lakefront property. The weather could get rough, and they wanted to ensure the windows were durable and the screens were tight fitting.

[21] On June 18, 2017, NWDC issued a sales order for the replacement and installation of windows and doors that had been selected by the McCanns. Andrew testified that the McCanns approved the sales order, provided a deposit, and authorized work to proceed. As a result, work began on the house in September 2017.

[22] While work was going on at the house, the McCanns requested an estimate for windows and doors for a new detached garage that was being constructed on their property. On September 28, 2017, NWDC provided the McCanns with a sales order that set out the items purchased and work to be performed. According to Andrew, the McCanns authorized work to proceed on the garage.

The terms of the house and garage contracts

[23] The parties agree that the house sales order dated June 18, 2017 (exhibit 8) and the garage sales order dated September 28, 2017 (exhibit 9) are the two contracts in dispute in these proceedings. There were a few minor changes to the sales orders.

[24] Both sales orders provide the following terms and conditions, which the parties agree form part of the contracts:

50% Non-refundable Deposit required upon time of order.
2% Discount if paid by cash/cheque or debit.
2% Discount if paid in full at time of order.
Balance due when the job is completed. If there are any after sales service items, customer may hold back 10% until completed.
Estimates are valid for 30 days.
Building Permits are the responsibility of the customer – Cost of permit not included in pricing.
For Installation: Customers are responsible to remove blinds and window treatments prior to installation. We require a safe space to work, this involves clear paths, drop sheets and work boots that will need to be used inside your home. Installation timelines are given as a guideline and may take longer due to issues outside of our control. In the event of an incorrect measure or order Northwood will reorder the product at their cost. Customers are not subject to additional compensation based on reorder. By giving us a deposit, you acknowledge that you accept the custom product and service terms listed. Any changes made after the deposit has been placed may incur (*sic*) additional costs, specifically related to colour, hardware, function and design changes.

[25] Jane testified that she reviewed the terms and conditions. She understood the reference to “after sales service items” to mean something like if a doorknob had a glitch or a window did not open smoothly. She did not believe it meant anything major.

Issues that arose during the project

[26] Work commenced at the McCann residence in September 2017. By December 2017, all of the windows and doors had been installed, however the McCanns had concerns about some of the products that had been installed and the quality of some of the work. The most significant concern arose shortly after the installation of a large custom window in the great room. Within days of its installation, the McCanns noticed that the window appeared to be leaking because there was water observed at the bottom of the window, at the base of the steel posts.

[27] The project did not complete by the end of 2017. What remained to be done was the installation of trim around the windows in the great room, the installation of window hardware for some of the windows, the replacement of the front door and the replacement of a door that led

from the kitchen to the back deck. In addition, NWDC continued to work on addressing the source of the water that was appearing at the base of the steel posts in the large great room window.

[28] NWDC continued to perform work through 2018, 2019 and 2020. There were gaps in time where work could not continue because the McCanns were out of the country during the winter months.

The large window in the great room

[29] As part of the house contract, a large window in the great room was to be replaced. This window is approximately 13 feet high and 12 feet wide and is made up of 9 windows, consisting of 6 fixed windows, 2 quarter round windows at the top of each side, and a half-moon window on very top. The windows are connected together to create one large window. The window faces out over the lake.

[30] The original large window was reinforced with three vertical steel beams and two horizontal beams. As part of the contract, the McCanns asked that NWDC work with the existing vertical steel beams. The work was to include reinforcing the two horizontal joints, removing the drywall return around the window, installing a sill with an apron on the bottom, custom casings to match other casings, using PVC brickmould to match the colour and texture of the windows, and installing primed pine jamb extended frames. All of this is set out in the house contract (exhibit 8).

[31] Andrew testified that the original plan for the large window in the great room was that they would mull the windows (connect them together) on site. This was reflected in the original invoice. Andrew testified that the McCanns wanted a brickmould and the only way to install brickmould is on a giant table, which NWDC did not have. As such the large window was mulled by the manufacturer (Ostaco). NWDC ordered the glass loose, which meant that the window was assembled but the windows were not glazed into the frame. Andrew testified that they borrowed a flat bed, built a custom rack, drove to Ostaco, picked up the window, and then delivered it the next day to the McCanns in one piece.

[32] Andrew testified that when they installed the new large great room window, they removed most of couplers, re-mulled and then re-caulked the windows. Andrew testified that he dammed every joint and sealed the inside of the coupler to the window. Andrew testified that the window was later inspected by Ostaco, who reported no problems to him.

[33] During cross-examination, Andrew agreed that during the installation, the installers cut the original steel posts. This is depicted in a photograph produced trial (exhibit 95). Andrew agreed that this was contrary to the instructions he provided to the installers. The original steels posts were re-welded together when the new large great room window was installed. When asked if he had concerns about the posts being re-welded, Andrew testified that he did not have any concerns.

[34] During cross-examination, Andrew agreed that the original sales order indicated that the large window would be mulled on site. At trial, in support of his testimony, Andrew produced a shipping manifest that indicated that the window was shipped in one piece. Andrew agreed that

the shipping manifest had an incorrect date of September 14, 2022. He could not comment on this error, as the shipping manifest was created by Ostaco.

[35] Andrew testified that he was told by one of his installers, Jason, that when the new large window was being installed in the great room, the installers noted water damage on the sill plate and a new sill plate had to be installed before the windows could be installed. According to Andrew, it is not unusual to see some moisture on a sill and to replace it.

[36] Andrew testified that the window originally had a drywall return at the base of the window. He agreed that normally if a window leaks you will see damage to the drywall in the form of bubbling or leaks. Andrew testified that drywall can be installed above the sill in a way that the drywall does not contact the sill. In that situation, if water is leaking, it can leak along a post to an air space between the sill and the drywall.

[37] Andrew testified that he told Jane about the water damage to the windowsill when he asked for payment for the water damage they found when they replaced the garden doors in the master bedroom.

[38] Adam Walton (“Adam”) testified at trial about the installation of the large great room window. Adam is Andrew’s brother and works at NWDC as their operations manager.

[39] Adam testified that he assisted with taking out the old great room window and putting in the new one. According to Adam, when they took out the old window there was mold and rot on the old wooden sill in the area of the steel posts. As a result, they replaced the sill. According to Adam it took about 15-20 minutes to install the new sill. He identified the new sill which is depicted in a photograph entered as exhibit 78 at trial which shows red tuck tape covering the sill, and two shims under the window.

[40] Adam testified that they did not show the damage to the McCanns, and he could not recall if they told them about it. They did not take photos of the rot before replacing the sill.

[41] Andrew testified that within about a week of installation Jason phoned him and told him that there was a minor leak at one of the posts. Andrew told Jason to keep this information under his hat as he wanted to ensure they had all the information and did not want to alert the owners that there was leaking. Andrew testified that his first thought was that the leak could be from the movement of the windows during transport and thought it might be coming from the couplers (these are what join the windows together).

[42] Jane testified that in October 2017, one of the workers brought to her attention that there was a leak in the large great room window. She took photos of the water accumulating at the base of the window and sent them to Andrew. Several photographs depicting water pooling at the base of the vertical steel beams were introduced as exhibits at trial.

[43] Andrew testified that on November 1, 2017, he went to the McCann house and examined the large great room window. He inspected the couplers, took the foam off the steel posts, replaced the foam, caulked around the area, put the couplers back on, and caulked again. As he did this, he took photographs that were entered as exhibits at trial. One of the photographs depicts one of the

posts and there is dirt and rust at the bottom. According to Andrew, this told him that water had run down the post, which is why he caulked, coupled, and then caulked again. This work took the better part of a day. He did not charge for this service.

[44] Andrew testified that during this inspection he saw no issues with the installation or the caulking. The only thing he saw, when he pulled the couplers off, was some evidence of moisture on the horizontal couplers and on the bottom of the post where water had penetrated the foam.

[45] After Andrew's inspection, water continued to accumulate at the bottom of the posts.

[46] In the spring of 2018, Jane sprayed the windows with a hose to see if she could identify the source of the leak. Jane testified that while the windows did not leak, the hose she was using did not have much pressure and the water could not reach the top of the window.

[47] Andrew testified that when the water issue continued, he contacted Ostaco and asked them to send a technician out to inspect the window. A representative from Ostaco inspected the window sometime around May 2018. It is agreed that Ostaco did not find a problem with window or its installation at that time.

[48] Jane testified that the Ostaco technician removed everything, cleaned it, reinstalled it. At the time they could not see anything other than a little moisture. She showed the technician the dampness at the bottom of both steel posts.

[49] In August 2018, Jane wrote to Andrew requesting an update from Ostaco from their inspection. Andrew advised her that Ostaco believed the water was coming in from the steel posts.

[50] In September 2018, Andrew conducted further testing on the area around the window to see if the water was coming in from the brick exterior. They sealed off the windows and pressure washed the exposed brick area surrounding the window. When they got to the right radius, they noticed that the post started to leak. Andrew testified that he was happy because this confirmed to him that their work was solid and that it was an outside factor causing the leak. He hoped that they could get paid and end the job.

[51] In October 2018, the McCanns reached out to Martial Gerolami ("Martial") for assistance in identifying where the water was coming from. Martial is a masonry carpenter and operates a business called Brolga Construction. Martial suggested to Andrew that they install a foam backer rod at the top half round. Andrew did not agree with this suggestion and responded that perhaps the water issue could be addressed by waterproofing the soffit or sealing the brick.

[52] October 4, 2018, Andrew suggested to the McCanns that he could do another water test where he would put plastic over the soffit and fascia and the windows, and water test to see if the water was coming mainly from the brick. The only issue was finding a way to secure the plastic to the brick.

[53] October 29, 2018, Andrew wrote to the McCanns and agreed that the water appeared to be coming from somewhere on the exterior of the house and stated that he thought it most likely had something to do with the brick.

[54] On April 3, 2019, Andrew wrote to the McCanns again and suggested that once the weather was warmer, they could do the second water test and asked what time would work for them.

[55] On April 10, 2019, the McCanns responded and advised Andrew that they did not think a further water test was warranted. They advised that they had thought about it, and it was apparent to them that the water was caused by the window or the installation. In their view, this was because the original window never leaked, no water damage repair was required when the window was removed and there were no problems with the brick or soffit.

[56] On April 18, 2019, Andrew responded stating that although he could not see where the water was coming in, he was open to the fact that it could be from the window itself or the installation and that the only way to figure that out would be to remove the glass, pull the window out, inspect the hole and have product to solve the issue. Andrew went on to state that he was still trying to figure out if the water was coming through somewhere else other than the window and find a solution. He noted that during the earlier water test, where the window was not getting any water, there was still a leak.

[57] On or around July 4, 2019, the McCanns asked Andrew to pull the red tuck tape so that they could have Martial inspect the installation. On July 10, 2019, Andrew attended and removed the red tuck tape and inspected the window again. He pulled out the foam at the top of the window and there was no evidence of water on the foam or on the wood jam attached to the window. Andrew re-foamed and re-taped the windows at no cost and assisted Martial with some measurements.

[58] Following this visit, Andrew suggested two options. The first was to deglaze the window, remove it, install a foam backer rod behind the brick and foamboard which would fill the gap, install layers, reinstall window, reinstall the glass, re-caulk it and re-foam it. Andrew stated that he would do this as a good will gesture. The second option was to leave the window in place, remove the outside brick that surrounded the window, install house wrap and drip caps, finish the brick exterior, and then re-caulk the window. The brick work would be done by Martial and would be at an additional cost to the McCanns. These two options were set out in an e-mail from Andrew to the McCanns on July 13, 2019, with Andrew recommending option two.

[59] On August 2, 2019, the McCanns acknowledged the two options and advised that after some consideration they decided to proceed with the second option and would hire Martial at an additional cost to them. Martial was not able to do the work in 2019, and so it was scheduled for 2020.

[60] Between June 17 and July 1, 2020, the brick outside the large great room window was removed by Martial. Andrew testified that when the brick was removed, they discovered that there was no sheathing behind the brick. Sheathing gives a wall structure and support. Sheathing is not part of window and door installation.

[61] Andrew testified that they installed new sheathing and replaced the foam board. They taped the window to the sheathing and then taped up higher than where the post was. They then wrapped the entire window in Dupont flash tape and then used flex wrap over that. They purchased a blue skin, which is an expensive breathable membrane house wrap that sticks to plywood. They overlapped this over the pre-existing flashing tape. They then installed a drip cap and foamed any gaps. Andrew described this process as “over kill”. Martial installed new stone and another contractor installed a new soffit. Photographs of this work were introduced as exhibits at trial.

[62] Andrew testified that while he was completing this work, he observed rust at the top of the left and right steel posts and water damage in an area above the window. He took photographs of the water damage, and they were entered as exhibits at trial.

[63] Despite the work completed in July 2020, water continued to pool at the bottom the steel beams. According to the McCanns, the water continues to pool in this location to date.

[64] Andrew testified that he believes the water is due to circumstances not related to the installation or product used.

[65] The McCanns testified that they did not hire an independent contractor or an engineer to independently inspect the large great room window. Although they received a warranty for this window, they chose not to pursue the warranty because it would have involved more expense and according to Peter McCann it would be pointless because Ostaco took the position that there was nothing wrong with the window.

[66] The McCanns testified that there was no prior water damage to the pre-existing great room window. They provided photographs that show the drywall return around the old window which show no damage to the drywall return at the bottom of the old window. Jane testified that she did not believe that they had to provide any evidence about why the window leaked at trial and that that should be up to NWDC to explain the leak.

[67] The McCanns called Harold Wallace (“Harold”) and Martial Gerolami as witnesses at trial.

[68] Harold is Jane McCann’s brother. He testified that he was present on the day the large window in the great room was installed and stood about 8-9 feet away from the window, watching the removal and installation, which took about an hour. He watched the entire process and only left for about 3 minutes to get a coffee. During this time, he did not see any rot on the sill or where the window sat. He did see the installers sweeping or vacuuming in the area of the sill. He did not observe the installers replace the sill or place red tuck tape on it nor did he see them shim the windows.

[69] Martial works as a masonry contractor and operates his own masonry company. He testified that he went to the McCann’s home at their request on October 1, 2018 to assist them with the great room window. He did not personally observe any leaking but did see photographs showing water on the sill. Martial suggested that they install a backer rod which is used to fill in caulking joints on the outside of a building. Any water that would hit the brick would hit the backer rod, and then run down, avoiding a leak.

[70] Martial has never been employed as a window installer and was not qualified to provide expert evidence at trial. He did provide evidence with respect to the stone that he installed outside the great room window in 2020. Martial agreed that when they conducted this work, they discovered that there was no sheathing behind the brick surrounding the large great room window. He testified that while this may have passed building codes when the house was built, it would no longer pass building codes. Once the work was completed in 2020, the outside wall was in compliance with existing building codes.

[71] Martial testified that he did not observe any mold or rot during this work. He could not recall if he observed any wet or discolored insulation in the area above the great room window. When he was shown the photographs taken by Andrew of this area, he testified that it was hard to give a definitive answer on what was depicted in the photograph.

Master bedroom garden doors

[72] As part of the contract, NWDC was to replace the master bedroom garden doors and the two tall windows on either side.

[73] Andrew testified that when they began work on the master bedroom garden doors, they noticed water damage and the door had to be reframed. When they requested payment, the McCanns refused to pay for the work, stating that they had already paid enough for the windows.

[74] Andrew testified that after they installed the new windows and garden doors, the McCanns advised that they did not like the way they looked. He went in, looked at the trim, and suggested that they move the garden doors up so that the top trim would look like one continuous piece. According to Andrew, the McCanns agreed and NWDC completed this work to the satisfaction of the McCanns.

[75] Jane testified that when the master bedroom garden doors arrived, they were too short. The windows on either side of the garden doors were higher than the garden doors. Andrew suggested that they move the door up and they could put one piece of architrave along the top to make it look like one piece. She agreed to this modification. Jane testified at trial that the garden doors now leak and are a tripping hazard.

[76] Peter McCann testified that the sill of the new garden doors is over 4 inches from the floor and produced photographs of the new garden doors which were entered as exhibit 96 at trial. In cross-examination, Peter agreed that they did not raise the issue of the height of these doors with NWDC when they listed outstanding deficiencies in December 2017. Peter also agreed that he had not measured how far off the floor the old sill had sat.

[77] Photographs of the old garden doors and side windows were entered as exhibit 6 at trial. In these photos, the garden doors appear to be several inches above the floor.

Storm doors in the kitchen and laundry

[78] Jane testified that when the storm doors for the laundry and kitchen arrived, they were about an inch too short on the top. They decided to cancel this part of the order and NWDC was to issue them a credit for these doors.

[79] Andrew acknowledged that the McCanns did not approve of the storm doors, and as such they were removed from the contract and a credit was applied to the account.

The double front door

[80] The McCanns originally had one front door, with two side windows. They decided to replace this door with two double doors, so that they could move furniture in and out of the home.

[81] Jane testified that after the two front doors were installed, she went outside and noticed that there was a gap between the door and the house. When she raised this with Andrew, he blamed it on the brick moulding and said that the old front door had the same gap.

[82] Jane testified that the glass in the front door was also uneven and there was a scratch at the base of the door. On December 18, 2017, the McCanns advised NWDC by e-mail that the door was too short, there was a blemish in the paint, the mullion was damaged, one window was crooked and there were several scratches. They requested a new door unit to be installed in May 2018.

[83] Andrew testified that when the door was first installed it was too short by 3/8 to 3/4 of an inch. He agreed that he should have cut back the drywall to see the header when he measured the door. According to Andrew, the issue could have been addressed by filling the space on top of the door. This would be a cosmetic fix. The McCanns did not agree with this suggestion and NWDC agreed to order a new, larger door, with new glass inserts and new hardware, at their own cost.

[84] On May 3, 2018, Andrew sent an e-mail to the McCanns indicating that he wished to clear up a point with respect to the sizing of the door. In his e-mail, he explained that the door that was ordered was the correct height based on the rough stud opening. He went on to explain that the original door was 82.25 inches tall, and they ordered a door that was 82 inches tall to allow for foam, shimming and squaring the door. Any issues with the height could be addressed with the brickmould. On May 8, 2019, Jane responded thanking Andrew for the explanation.

[85] On August 22, 2018, NWDC installed two new front doors. Following installation, the McCanns noticed that the sill and entry door had scratches. On August 22, they wrote to Andrew advising him of the scratches and that they had been advised by the installers that neither could be repaired, as such the door was not acceptable for installation. The McCanns requested, and NWDC agreed, that the door be returned and replaced with a new door.

[86] On April 18, 2019, Andrew advised the McCanns that the new door was in, and it was in perfect condition, with no visible scratches or damage. Andrew advised the McCanns that since the last order, the manufacturer had upgraded the hardware for the inswing door. As such, the McCanns would need to approve the new hardware before installation.

[87] On June 26, 2019, the McCanns wrote to Andrew, thanking him for explaining the hardware options and for ordering three new samples. The McCanns agreed to the hardware chosen and looked forward to having it installed on the new front door unit.

[88] In September 2019 NWDC was ready to install the new front door. On September 11, 2019, Andrew advised the McCanns that their regular installer had a medical issue and that they were going to send another installer. The McCanns objected and wanted the regular installer to install the door. The McCanns advised that the door would have to be installed the following year by the installer of their choice, as they were now leaving the country.

[89] On July 6, 2020, the new front door was installed. Andrew testified that Peter McCann inspected the door and approved it. The only issue raised by the McCanns at that time was a small scratch on the door hardware and Andrew believed he had a replacement for this. Andrew testified that there was one piece of caning that was off in the window, but it was well within specification. Andrew testified that the McCanns were happy with the door.

[90] Jane testified at trial that the new door that was installed in July had crooked glass, the door handle was in the wrong finish and had a scratch on it. She testified that the door handle was in a matte finish, and they had ordered a painted finish.

Kitchen windows

[91] As part of the contract, a kitchen window above the sink was to be replaced. As part of the order, the McCanns requested that NWDC keep and use the existing marble sill for this window.

[92] Andrew testified that they installed the window above the sink, installed the trim around the window and installed the hardware. When they did this, the McCanns did not like the way it looked, and they did not like that the hardware stuck out from the trim by about $\frac{3}{4}$ of an inch. As a result, NWDC ripped out the trim and installed a deeper trim and reinstalled the hardware.

[93] Jane testified that the kitchen window above the sink was measured incorrectly and that the trim installed was the wrong size. The installer had to guess at the depth of the trim because they did not have the hardware for the window. When the hardware arrived and was installed it hung over the trim and looked terrible.

[94] Jane testified that Andrew told her that they would install a wider trim. She agreed with this suggestion. Eventually a wider trim was installed with black hardware. According to Jane, Andrew told her that the hardware for this window could not sit on the granite sill in the same way the hardware sat on the sill of the other Anderson windows.

[95] Jane testified that the kitchen window now squeaks, and she believes it is because it was measured and installed incorrectly. In cross-examination, Jane agreed that she did not list the kitchen window as a deficiency prior to trial.

Kitchen door

[96] The McCanns wanted to replace the door that leads from their kitchen to their back deck. They ordered an Entry Guard door which was installed in 2017.

[97] The parties agree that this door leaked. According to Andrew, the door faced the lake and could not handle the extreme weather. He tried to address the leak using weather stripping, but it did not completely eliminate the issue. On September 24, 2018, Andrew reached out to Entry Guard asking that they send a technician because the door still leaked when there was a storm.

[98] Andrew testified that he spoke to a representative from Entry Guard doors about installing a high-performance door which was a heavier, weather-stripped door. Entry Guard committed to covering the cost of the high-performance door and NWDC advised that they would install it.

[99] In 2018/2019, the manufacturer was not manufacturing these types of doors and it was agreed that the door would be installed when it became available. I received no evidence with respect to whether this door is now available.

[100] The McCanns continue to have the original door purchased and installed by NWDC and it still leaks.

Truscene screens

[101] The McCanns wanted tight fighting screens for their windows. As part of the house contract, they ordered Truscene screens, which are upgraded screens that have a finer mesh. Jane testified that she told Andrew that tight fighting screens were very important to her.

[102] The parties disagree about whether samples of Truscene screens were at the NWDC showroom when the McCanns chose to purchase them. The McCanns testified that no samples were available, and that Andrew could not show them photographs of what they looked like. According to Andrew, there were Truscene screens in the showroom at the time he dealt with the McCanns, and he produced a photograph of the showroom in 2013 which shows windows with the screens on them.

[103] It is agreed that when the Truscene screens arrived some of them were bowed. In addition, the screens did not fit as tightly as the McCanns desired because they only had one knife latch that attaches to the windows. Jane testified that had she known the Truscene windows only had one knife latch, they would have never purchased them.

[104] Andrew testified that the screens that were bowed were either straightened or replaced. With respect to the issue of the fit of the screen, he suggested solutions that included installing another latch or using weather stripping. He also offered to refund the cost of the Truscene screens and replace them with Anderson standard screens, which was declined by the McCanns.

[105] On May 8, 2018, Jane reached out to Andrew about the screens given the weather was starting to improve. On May 8, 2018, Andrew advised in an e-mail that they had been able to flatten the affected screens and had re-ordered two screens that could not be flattened. He then

referred to a prior conversation where he recommended that any minor gaps could be fixed with weatherstripping behind the frame. Jane responded the same day advising that she could not recall having a conversation about weather stripping but did recall discussing suggestions for a quick fix that she had dismissed. It was her view that the screens were a manufacturer issue and that they should fit perfectly.

[106] In September 2018, a representative from the screen manufacturer, John Peacock (“Peacock”), attended the McCann residence and produced a report with suggested fixes. He suggested that knife/wing latches be added to the screens.

[107] Jane testified that she was present when Peacock inspected the screens. Jane and Andrew continued to correspond with the manufacturer in 2018 and 2019.

[108] On April 18, 2019, Andrew wrote to the McCanns and advised them that he had been back and forth with the manufacturer and if he could not get the answer they wanted, he would refund the cost of the screens and still try to find a solution to tighten the screens in the openings.

[109] In June 2019, Jane communicated directly with a representative from the manufacturer, Amber Johnson (“Johnson”) about her concerns about the screens and various options to address them.

[110] In July 2019, in correspondence with Johnson, Jane suggested adding six knife/wing blades to the screens. Johnson advised that they could not install that many knife/wing blades and suggested adding Velcro or weatherstripping. On July 30, 2019, Johnson suggested adding four wing blades, two at the top and two at the bottom, and then adding weather stripping.

[111] On August 6, 2019, Jane wrote to Johnson advising that they wanted Peacock, not Andrew, to be assigned to the job and wanted written assurances that the manufacturer would proceed on their instructions. On that same date, Johnson wrote back confirming that the manufacturer would supply new screens with the 4 knife/wing blades and that Peacock would go out and install new grommets on the screens to accept the wing blades.

[112] On August 13, 2019, Jane wrote to Johnson confirming that the manufacturer would manufacture fourteen new screens using Peacock’s measurements, that it would install four wing blades to these screens, that it would provide Peacock with the required materials, and that Peacock was to install the new knife latches/grommets in each screen.

[113] On October 13, 2020, Peacock wrote to Andrew asking that he let him know when he had the new screens in his possession so that he could attend and install the screens at the McCann residence.

[114] On October 13, 2020, Andrew wrote back advising that he had not received the screens yet but would advise when he received them. Andrew went on to state “Currently I am having issues with them that have stopped us from working further on this job/project. I will let you know when that situation is resolved. Once everything is resolved then we can do the screens”.

The sills for the 400 series windows

[115] As part of the original contact, the McCanns requested unfinished pine for the sills for the 400 series Anderson windows. This is what is itemized in the house contract.

[116] Despite this, NWDC ordered prime/paint grade pine for the sills. Andrew testified that he thought that the McCanns were going to paint the sills and prime/paint grade pine would save them time. When the McCanns pointed out that this was not what they had ordered, Andrew acknowledged the error, and ordered and installed unfinished pine sills to the satisfaction of the McCanns.

Garage windows

[117] As part of the garage contract, NWDC agreed to install windows and doors in the new detached garage. When the windows arrived, they did not fit the framed openings.

[118] Jane testified that they had drawings prepared for their new garage and they told the individual preparing the drawings that they wanted to re-use the blinds from the dining room and the bonus room for the garage windows. When the drawings were ready, they gave them to Andrew. The drawings provided for windows that were 72 inches by 72 inches.

[119] Andrew testified that the McCanns told him that they wanted windows where they could re-use blinds that were previously inside the house. This would require windows that were 73.5 by 72 inches. Andrew noted this size of window in the sales order which was provided to the McCanns. Andrew was not sure if the McCanns showed the sales order to the person framing the garage.

[120] Andrew acknowledged that the McCanns gave him rough drawings for the garage, which provided for a 72 x 72-inch window. Andrew testified that he assumed that this was a typo, and he ordered the windows that were set out in the sales order that had been approved by the McCanns.

[121] When the windows arrived, they did not fit the opening. Andrew suggested that they could re-frame the size of the opening to fit the windows. The framer, Harold Shank, did not agree to this suggestion. As a result, NWDC ordered new windows to fit the openings and the issue was resolved.

[122] Peter McCann testified and agreed that he and his wife were managing the renovation project and he was handling the trades and subtrades. Peter agreed that he did not provide the window and door sales order (which had the size of the windows they ordered) to the framer for the garage prior to the garage being built.

The garage man door

[123] As part of the garage project, NWDC was to install two “man doors” in the garage. Jane testified that the man doors provided by NWDC did not really fit the depth of the opening in the garage. They wanted the doors to be deeper so that they could insulate them at a later date. She testified that the doors also came with the wrong brickmould, and glass insert. They wanted the

man doors to match the three doors they had in their house. She brought this to NWDC attention, and the doors were changed.

[124] Andrew testified that the McCanns advised that they did not like the trim on the garage man door because it was thinner than the other doors. Andrew testified that normally you would just change the frame. Instead, NWDC ordered brand new doors at their own cost, which was four times the cost of simply changing the frame. Andrew testified that this was not due to any error on his part.

[125] Andrew testified that the McCanns also advised him that one of the man doors leaked. As a result, they installed more foam and caulking and addressed this issue.

The hardware for the windows

[126] The initial sales order for the house project provided for traditional white folding hardware for the Anderson 400 series windows. Andrew testified that as part of the sales process he offered to upgrade the hardware and install it at no extra cost. The McCanns advised that they wanted to see the hardware in their home after all the screens were installed. NWDC ordered samples of the hardware and arranged for a few pieces of temporary hardware to be provided so that the McCanns could open their windows until they chose the hardware they wanted.

[127] On May 15, 2018, Jane wrote and advised that she required the temporary hardware as they were having some painting done and they were considering an upgrade to the permanent hardware as previously discussed with Andrew. Jane advised that they would prefer that the permanent hardware be installed at a later date once all the windows and screens were done so that she could see what it looked like. On May 16, 2018, Andrew wrote back and advised that he no longer had the temporary hardware and suggested that the McCanns use the current hardware as the temporary hardware. There was some back and forth between Jane and Andrew about the hardware that had been left at the home and they realized that the installer had taken the temp hardware with him when he left.

[128] On May 23, 2018, Andrew offered to bring the temp hardware back. Jane responded that she did not think that the temp hardware would help the painter and wanted to know when the black temp hardware was ordered. On May 24, 2018, Andrew responded that he had the hardware and would send it the next day. The next day, Jane wrote to Andrew and told him that the brown hardware did not fit, and she would be returning it. Jane indicated that she had two latching/locking handles which would help until the black temp hardware arrived.

[129] On August 30, 2019, the McCanns sent an e-mail asking about the black hardware. On September 13, 2019, Andrew advised that he would be ordering the black contemporary hardware for all of the Anderson windows.

[130] On November 13, 2019, Andrew wrote to the McCanns and offered to attend and install the window hardware during the following two weeks. On December 4, 2019, Andrew wrote again offering to attend and install the window hardware the following week or in the new year. The McCanns replied that they wanted the hardware installed when the trim on the kitchen window

was done and indicated that this would have to be in 2020, because they would be away until April, 2020.

[131] In June 2020, Andrew wrote to the McCanns asking if they could install the front door, the kitchen trim and the black hardware on July 6, 2020.

[132] The evidence is unclear about why the window hardware was not installed at the same time the door was installed and the kitchen trim was completed.

[133] On July 17, 2020, Jane wrote to Andrew asking when they would be returning to install the hardware. Andrew responded the same day and advised that while he was prepared to drop the hardware off at their house, they would not install it until payment was made.

[134] It does not appear that the hardware was ever requested or dropped off.

What remained to be done after July 7, 2020?

[135] Andrew testified that by July 7, 2020, the job was complete, and any items left to be addressed were after sales service items. He testified that those items were:

- a. Provide the upgraded black hardware for the Anderson series windows;
- b. Fix garage door hardware (this would be a simple service call);
- c. Install the trim in the great room. The trim had been purchased however the McCanns did not want them to install it. While Andrew understood why the large great room window could not be trimmed, he felt the side windows could have been trimmed, but the McCanns refused; and
- d. They were still waiting for a replacement upgraded high performance kitchen door from the manufacturer.

[136] Andrew testified that the large window in the great room had been tested and there was no issue with the product or installation. As such, he considered this to be completed.

[137] During cross-examination, Andrew was taken to his examination for discovery where he agreed that the project had not been completed by July because there were still deficiencies to be addressed. At trial, Andrew testified that he was not sure why he testified this way during discovery, because the job had been completed, subject to some after sales service items that remained to be addressed.

[138] Jane testified that the following items remain outstanding after July 7, 2020:

- a. The large great room windows continued to leak and needed to be fixed;
- b. The garage door handles needed to be repaired;
- c. The trim in the great room needed to be installed;
- d. The kitchen door needed to be replaced with a door that did not leak;

- e. The hardware for seven windows needed to be installed;
- f. The trim installed at the kitchen windows was too light and did not match the window wood;
- g. The door handle for the double front door was the wrong finish and needed to be replaced;
- h. The screens still remained an issue; and
- i. They did not receive the warranties for the remaining windows.

[139] In addition to these items, Jane testified that since these proceedings commenced the following issues have arisen:

- a. The kitchen window now squeaks when the wind blows;
- b. The garden doors in the bedroom now leak;
- c. The two side windows in the great room now leak;
- d. The window in the family room now leaks;
- e. The trim around the laundry room door is loose and the glass is crooked;
- f. The glass in the front door is crooked; and
- g. The sill of the garden doors is unsafe because it is too high.

Requests for payment

[140] The parties agreed that during the course of the project, the McCanns paid:

- a. \$45,000 on June 20, 2017, which was the 50% down payment on the house;
- b. \$4,199.78 on December 21, 2017, which was the 50% down payment towards the garage; and
- c. \$16,981.76 on December 21, 2017, to be applied towards the house project.

Request for payment in December 2017

[141] Andrew testified that by December 2017, the project was going slower than expected. They felt this was a big job and they wanted to keep their client happy. When the McCanns had a concern or question, they took the time to discuss and address the issue. However, each time they had to do this, it cost the company time and money. Eventually the project took so long that NWDC had to start paying their installer hourly instead of by the piece, which increased their labour costs considerably.

[142] On December 5, 2017, Andrew had a conversation with the McCanns at their home. According to Andrew, he proposed that NWDC be paid for the work that the McCanns were happy with. He did not request further payment with respect to the large great room window and the two

great room side windows because the McCanns asked them not to put the trim on those windows until the large great room window was addressed.

[143] Jane testified that in December 2017, Andrew came to the home to re-measure the garage windows. During this visit he told her that he would like payment on the things that were completed. She responded that the balance due was only upon completion. Andrew told her that if she did not give him some money, it would come to a stalemate. Jane testified that she felt threatened by this interaction and told Andrew to send them a list of what he thought they should pay, and they would review it.

[144] Peter McCann testified that he overheard Andrew and Jane talking about an additional payment during this December visit. He heard Andrew say that if he did not receive payment that there would be trouble or a problem. He felt it was threatening and stood up and went over to Andrew and Jane. Jane told Andrew to send them what amount he wanted and that they would discuss it.

[145] On December 6, 2017, Andrew sent a spreadsheet to the McCanns setting out the payment he wished to receive for work completed on the house. The total he requested as \$24,331.01, which excluded the cost of the great room large window, the trim in the great room and the front door. In his e-mail, Andrew wrote "Please see attached spreadsheet. Let me know what you think."

[146] On December 13, 2017, the McCanns responded by e-mail and advised that they felt that the project was substantially incomplete. They felt that what needed to be completed was well beyond after sales service items. They provided their own spreadsheet which indicated that they would hold back 100% of the payment for the great room large window, the great room side windows, the garage door (which they said now leaked) and the front door. In addition, they would hold back 10% on all remaining items. Based on this calculation, the McCanns agreed to pay \$16,981.76 for the work that had been completed to date.

[147] Peter McCann testified that the spreadsheet they prepared did not mean that they accepted that the work was substantially completed on the items they proposed to hold 10% back. He described the use of 10% as a way to show how they reached the amount they were willing to pay. Peter testified that they only agreed to make a further payment in December because they felt threatened, and they wanted the job to be completed.

[148] On December 19, 2017, the McCanns sent a list of items by e-mail they considered to be incomplete. They were:

- a. The front door (acknowledging a new one had been ordered);
- b. The garage man door leaked;
- c. The master bedroom screen did not lock and door handles needed to be adjusted;
- d. The master bath window needed grout;
- e. Anderson 500 windows – nail holes needed to be filled, missing temporary hardware and none of the screens fit (acknowledging that Walton had 15 screens at the office he was trying to fix);

- f. Door windows and hardware needed a walk through and possible adjusting;
- g. Window and door glass inserts needed to be cleaned;
- h. Great room large window leaked and needed to be fixed;
- i. Great room window and side windows needed trim;
- j. Garage door glass inserts to be ordered; and
- k. Minor incidents – glue to be removed from sill in kitchen, green foam on kitchen man door, flue to be removed from master bedroom door, master bedroom French door screen to be adjusted and caulking to be removed from outside of Anderson French door.

[149] On December 20, 2017, Andrew acknowledged receiving the list. He responded that the front door had been measured correctly in terms of the rough stud opening, that he had ordered the custom glass for the front door and that they had agreed on a colour matched caulking for the bathroom window because grout would eventually crack. Andrew ended the e-mail with “Otherwise, everything you have here is the same as what is on my list”.

Request for payment in April 2019

[150] On April 18, 2019, Andrew wrote to the McCanns attaching the statement for the balance owing on the windows and doors for the garage. He ended his e-mail with “I assume everything with them is kosher?”.

[151] I have not received any evidence that the McCanns responded to this request for payment.

Request for payment in June and July 2020

[152] On June 27, 2020, Andrew wrote confirming the July 6 date for the installation of the front door, kitchen window trim and hardware. In the e-mail he wrote “What is your proposed payment schedule regarding the following: Garage windows and doors – balance still owing – no issues; Living Room window – once the leak is resolved can we do a percentage of owing and the balance once the trim work is completed; Front door- once completed?; Balance of 400 series windows – once the trim work is done and screens are resolved. We also need to install a new door in the kitchen once it comes in (upgraded to the NHP door which is just rolling out now – was supposed to roll out last year”).

[153] Jane wrote back confirming the date and asked Andrew to check the front door to ensure it was in a flawless and perfect condition prior to installation.

[154] On June 29, 2020, Andrew wrote back “Will do, I will give it a cleaning and double check. You didn’t answer my question regarding payment schedule. I would like to get on the same page before Monday. I think it would be fair to pay for the garage, let me know your schedule on the front window (time you wish to wait before doing the trim and percentage of payment once that is established) and the front door when completed. Please let me know”.

[155] On June 30, 2020, Jane wrote back asking about caulking the window and painting the Angle Iron. She then wrote “We can sit down and discuss financial matters while Jean installs the new double doors”.

[156] On June 30, 2020, Andrew wrote back “For the financial matters – I am not looking for payment right this second, or even Monday, I would simply like to know what your plan and requirements are so we are on the same page. I would like that prior to doing the front door so I know where we stand”.

[157] On July 6, 2020 the front door was installed and on July 7, the trim was finished around the eating room and kitchen room doors.

[158] On July 8, 2020, Andrew sent an e-mail to the McCanns stating “As per our conversation yesterday, you and Peter were going to discuss the payment plan and get back to me. Please let me know today what your plan is. As it stands now: garage completed, balance outstanding; front windows completed as far as I am allowed to take it, percentage of payment is required; front door completed, hardware was re-ordered at your request, otherwise completed; great window it is your call when we start doing the trim. For the rest of the hardware, once you get back to me, I will come out and finish it off.”

[159] On July 9, 2020, the McCanns responded, “We are surprised that your demand for a payment plan on a project that began in 2017 with absolutely no resolve to the outstanding issues in 2017, 2019, 2019 & 2020 until June 17, 2020.” The e-mail went on to state “Your demand for payment would appear to be an attempt to extort yet another payment from us prior to completing the project which began in 2017. Is this how you and your company treat all your clients”.

[160] In the July 9, 2020 e-mail, the McCanns went on to list what they considered outstanding. With respect to the garage, they advised that they had sent an e-mail in 2019 about an issue that had not been addressed, once that was completed, they would consider the job complete and settle the account. With respect to the house, they noted the great room window still leaked, the front door had only just been installed and the front door hardware was not acceptable to them.

[161] The McCanns stated that since making a good will payment in December, no major outstanding issues were resolved in the two and a half years following, which left them extremely disappointed and regretful for giving the additional funds. They went on to state “As past behaviour is an indicator of future behaviour, making another payment would clearly delay this project further and has proven not to be in our best interest. Please confirm your intent to complete this project. We are concerned your recent request is signaling you are not prepared to meet your commitments to your customer”.

[162] On July 9, 2020, Andrew wrote back stating, “This is not extortion. I am following up and honouring our terms and conditions” and attached the McCanns’ spreadsheet from December, 2017 and noting that it negated their deposit by holding back 100% payment on various items, including the side windows in the great room that had been completed, other than the trim.

[163] Andrew went on to set out the following:

- a. The great room side rooms were completed, other than trim. A payment of 85% would be fair;
- b. He had proven that the great room large window did not leak and had completed extensive work protecting the window at a cost of over \$2000 to himself. A payment of 80% should at least be paid;
- c. He was ready to do the trim, but the McCanns refused to let them;
- d. The front door was 100% done. The McCanns had approved the hardware ahead of time and then decided they did not like it. He offered to replace it, but this did not mean that they should hold back 100% of the price;
- e. He thought they had addressed the house garage door leaking, if not they would address it;
- f. He is not aware of any issue with the garage windows and doors the necessitated a 50% holdback;
- g. He had offered a full refund on the Truscene screens;
- h. Anderson hardware had been purchased and provided at no charge out of goodwill; and
- i. The rot in the master bedroom had been fixed at no charge.

[164] Andrew wrote that the comments about not doing anything were offensive. He went on to state “This is not extortion, please pay for the completed items- pay up to the completion rates on the other items and I will happily finish the trim, continue addressing issue with service and honour all warranties”.

Further communications after July 9, 2020

[165] Despite the e-mails about payment, on July 10, 2020, Jane wrote to Andrew advising that another window leak had just happened. Andrew responded that he would reach out to Ostaco and indicated that it was highly unlikely that the leak was coming through the window.

[166] On July 10, 2020, Andrew reached out to Martial asking if he had any theories about the cause of the water.

[167] On July 14, 2020, Andrew reached out to Ostaco about the great room window and asked if they could send a tech out to source the leak. Ostaco responded suggesting that they conduct a water test around the window and then on the window.

[168] On July 14, 2020, Andrew reached out to Jean Larocque, an architect, asking if he had any suggestions about the water issue.

[169] On July 17, 2020, Jane wrote to Andrew asking when he would be back to install the new kitchen hardware and advised that they were unable to open their kitchen windows. Andrew

responded the same day stating “As I said previously there are items that are complete that you do not want to pay for. I don’t know where to go from here. If you would like to pay for the items that are completed as requested (minus the 10% holdback as per Northwoods terms and conditions), I will be happy to come back next week. If you maintain your stance that you are not releasing any payments towards work completed, then I can drop off the hardware on your front porch but I am done doing anymore work until we can come to an agreement on this”.

[170] On July 19, 2020, Jane wrote “Andrew, if we understand you correctly, you will not do any further work on our project until we make the payments you have requested. We have asked you, in two e-mails, for a copy of Northwood’s terms and conditions that requires early payment prior to job completion. We do not understand why you are not forwarding this to us. When can we expect to receive this document”.

[171] On July 21, 2023, Jane wrote to Andrew asking if the new kitchen door was in production. On July 23, 2020, Andrew wrote back and advised that it was not in mass production yet and sent a link for the door.

[172] On July 24, 2020, Jane wrote to Andrew stating that it had now been two weeks since they had advised him of the new leaks. She requested the name and all correspondence that Andrew had had with an architect on this issue. She also requested that Andrew forward all of his communications with Ostaco, along with his contact details including the name/title of the Ostaco manager he had been dealing with.

[173] On July 27, 2020, Andrew wrote back attaching a screen shot of his conversation with Ostaco. Andrew advised that he had sent a request to Ostaco that they do a water test/diagnostic to help source the issue. Andrew further advised that he spoke to Jean Larocque from LEA architects, who suggested that the soffit should have been solid/sealed and made other suggestions. Andrew stated that the architect had not attended the site, nor had he financially compensated his firm to get a written opinion.

[174] On July 29, 2020, Walton sent a final e-mail requesting for payment, writing:

We feel that the job has been substantially completed and is now into after sales service as per our terms and conditions.

We request the following payment to be completed:

Invoice 3615 – Garage.

Balance Owing \$4,199.78

minus 10% for outstanding service (please notify what that is) = \$3359.82

Invoice 3168 – House

Balancing owing is \$31,861.79

Minus 10% on Andersen windows \$3771.43

Minus 50% (original deposit) on Great Room window \$7440.63

Minus 10% on Eating Man Door \$277.08

= \$20372.47

TOTAL: \$23732.47

If we do not receive this by Wednesday August 5, 2020 then we will be forced to seek all legal remedies available to us.

I hope we can avoid further conflict by coming up with a reasonable resolution to this issue.

[175] Andrew agreed in cross-examination that the McCanns never refused to pay the invoice, they simply never paid the amount requested and ignored the request.

[176] Andrew agreed that the McCanns never refused entry to their property to complete the remaining work. Andrew testified that had the McCanns paid the \$24,000 he would have kept working.

[177] Jane testified that they would have let NWDC continue to work in the home and fix the remaining issues. They were just not prepared to pay any more money. She described their entire experience with NWDC as a “nightmare”.

The amount of the lien

[178] On August 14, 2020, pursuant to the *Construction Act*, NWDC registered a claim for lien in the amount of \$36,081.57 for work performed between September 12, 2017 and July 7, 2020.

[179] At trial Andrew agreed that the amount registered failed to account for the credit note that had been issued for the two storm doors in the kitchen and laundry room in the amount of \$1,209.33 in 2017. Andrew testified that this was an accounting error and was a simple oversight.

[180] When the lien was issued it noted the time within which lien claimant supplied services or materials was between September 12, 2017 and July 7, 2020. At trial, Andrew agreed that end date should have been July 9, 2020 and that he did not notice that the date was incorrect when he reviewed the lien.

Final demand for payment

[181] On August 19, 2020, a lawyer for NWDC wrote to the McCanns providing notice of the lien. In addition, the lawyer wrote “At this time we demand full payment of the Account, in the amount of \$36,061.57. If the Account is paid, in full, within fifteen (15) calendar days our client will forego any interest payable on the Account and we shall register a discharge of the Lien at no cost to you. Should you fail or refuse to pay the Account at proposed herein, we shall enforce payment of the Account through an action issued in the Superior Court of Justice, seeking damages in addition to pre-judgement interest, and our client’s legal costs on a substantial indemnity basis”.

[182] This action was commenced on September 28, 2020.

Analysis

The evidence at trial

[183] Much of the evidence at trial was not in dispute. Variations in the evidence tended to be due to differing points of view and opinions about various issues.

[184] I found Andrew Walton to be a credible and reliable witness. His evidence was detailed and supported by extensive correspondence and photographs taken throughout the project. He was able to explain and describe the installation of the windows and doors in a straightforward manner. He conceded many of the challenges that they faced with the product they received and appeared to understand and sympathize with the McCanns' frustration.

[185] Andrew agreed that he was responsible for changing the sales order with respect to the unfinished pine for the sills. While his explanation for why he changed the order made sense, he agreed that he should not have made this change without prior authorization from the McCanns. His evidence was otherwise unchallenged in cross-examination.

[186] With respect to Andrew's evidence at trial that in his view the work was complete, I do not find that his answer during discovery to the suggestion that the job was not complete because there were remaining deficiencies, to be a material inconsistency. Andrew's evidence at trial was that as of July 7, 2020, there were still things that he had agreed to do that had not been done. The issue in this trial was whether those things were substantial or minor in nature. Overall, I accept Andrew's evidence at trial, subject to a few minor areas which I will describe in more detail below.

[187] I found Jane McCann and Peter McCann to be credible and reliable witnesses. They also provided detailed evidence that was supported by the extensive correspondence and photographs tendered at trial. They both provided extensive evidence about their frustrations throughout the project and the reasons behind their decisions as the project progressed. I found they were not seriously challenged in cross-examination. Overall, I accept the evidence of Jane and Peter McCann, subject to a few areas which I will describe in more detail below.

The terms of the contract

[188] The first issue that must be addressed is who, if anyone, breached the terms of the contracts between the parties. NWDC says the McCanns breached the contracts by not paying for the work that had been completed upon request and in accordance with the terms of the contract. NWDC submits they were prepared to complete the after sales service items once they received payment.

[189] The McCanns say NWDC breached the contracts by insisting on payment before it was due under the contract and then walking away and not completing the project. They say they were prepared to have NWDC complete the work, they just weren't prepared to make any further payments until the job was complete.

[190] Each party bears the onus of proving their position. *Adam Rowe v. Fred Hageman's Holdings Limited et al*, 2021 ONSC 5291 at para. 62.

Scope of work under the contract

[191] The scope of work and materials to be provided is set out in the house sales order (exhibit 8) and the garage sales order (exhibit 9).

[192] With respect to the house sales order, the windows and doors are described by product and by measurement. Some windows were to have traditional white folding hardware, however Andrew agreed verbally to upgrade the hardware. Some windows were to have Truscene screens and others were to have fiberglass screens. There are notes about re-using existing structures for some of the windows and about installation.

[193] With respect to the newly built detached garage, the garage sales order provides for the purchase and installation of two windows and two doors. The contract describes the windows and doors by product and measurement.

The terms of payment

[194] The terms of payment in this case were set out in the sales order and were brief. The total price for the house project was \$95,314.12. The total price for the garage project was \$8,399.56.

[195] With respect to the issue of payment, the terms simply state that a 50% deposit was due upon time of the order and “Balance due when the job is completed. If there are any after sales service items, customer may hold back 10% until completed”.

[196] The terms of payment as set out in the contract are extremely brief. There are no specific terms setting out what constitutes the job being “complete” such that the balance of the contract becomes due. NWDC submits that payment became due when the job was substantially complete. The McCanns submit that payment became due when the entire job was completed to their satisfaction.

[197] The differing positions taken by the parties require me to interpret the terms of the sales orders and determine when payment was due and in what form.

[198] The leading decision on contractual interpretation is *Sattva Capital Corp v. Creston Moly Corp*, [2014] S.C.C. No. 33. The Supreme Court encouraged courts to take a common-sense approach and highlighted the importance of determining the parties’ intent by considering the words of the contract in light of the factual matrix. *Sattva Capital Corp. v. Creston Moly Corp.* at para. 50.

[199] The court further held that the factual matrix “should consist only of objective evidence of the background facts at the time of the execution of the contract [...], that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting” *Sattva Capital Corp. v. Creston Moly Corp* at para. 58.

[200] The Ontario Court of Appeal summarized the principles applicable to interpretation of a commercial contract in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para. 65, as follows:

- a. determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
- b. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- c. read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
- d. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[201] With respect to the last point, the court must look at the result from the perspective of both parties, not simply one. What may seem a fair result to one party could seem absurd to the other. *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, 1998 CanLII 4427 (ONCA), at para. 27.

[202] I find that a common-sense interpretation of the terms of payment in this case, when considering the intent of the parties, the wording used, the surrounding circumstances and sound commercial principles, is that the parties agreed that the balance owing would be paid once the entire job was substantially complete.

[203] I do not accept that the terms of payments provided for full payment only when all issues related to the project were resolved to the satisfaction of the McCanns. In my view it makes no sense to include a 10% holdback in payment if the parties intend that full payment would only be provided when the job was fully completed, to the full satisfaction of the customer, with no further issues to be addressed. The 10% hold back addresses the "after sales issues" that come up after the product is installed.

[204] Further, it does not make sound commercial sense for a contract to provide that full payment would only be required once everything had been completed to the satisfaction of the homeowner. This introduces a subjective aspect to the contract making it potentially unenforceable if the homeowner is never fully satisfied with the way the work has been completed. It would bind the contractor to an endless obligation to return and repair issues without having received full payment for the work performed.

[205] I find that “after sales service items” would include making adjustments, replacing product, addressing imperfections such as scratches or crooked glass, or re-caulking.

[206] I find that “after sales service items” would not include serious or substantial non-performance or known and concealed departures from the requirements of the contract.

Was the house contract substantially completed by July 2020?

[207] Having considered the evidence called at trial, I am satisfied, on a balance of probabilities, that by either July 6 or 7, 2020, the house contract had been substantially completed. I make this finding based on the following.

[208] By July 7, 2020, all of the windows and doors as set out in the sales orders had been provided and installed. What remained to be installed was the upgraded hardware for some of the windows, the modified Truscene screens, and the trim for the windows in the great room. Further, NWDC had committed to replacing the kitchen door with an upgraded door once one became available.

[209] With respect to the hardware for the windows, the evidence establishes, and I accept, that NWDC reached out several times in 2018, 2019, and 2020 and offered to install the hardware. The McCanns declined those opportunities because they did not want the hardware installed until the issue with the screens had been resolved to their satisfaction. The evidence before me is that the value of the missing hardware is \$129.27 (H.S.T. included).

[210] With respect to the trim in the great room, the evidence establishes, and I accept, that NWDC was in a position to install the trim as early as December 2017. Issues with respect to the large window in the great room delayed installing the trim on that window. It is understandable that the McCanns would want to delay installing the trim on this window, given the water issues. However, with respect to the remaining rooms in the great room, NWDC offered to install the trim, but their offer was declined by the McCanns. The evidence before me is that the value of the missing trim is \$892.87.

[211] With respect to the Truscene screens, the evidence establishes, and I accept that the product ordered was delivered. The screens that were bowed have been straightened and replacements ordered for those that could not be straightened. The manufacturer has agreed to customize the screens to the satisfaction of the McCanns. The last e-mail produced at trial on this issue indicates that the replacement screens have not yet been received by NWDC. I will comment further on this issue below.

[212] With respect to the kitchen door, NWDC had obtained a commitment from the manufacturer that they would provide an upgraded door, at no further expense and NWDC agreed to install it.

[213] The McCanns point to many other issues that they say rendered the contract incomplete. Based on the totality of evidence led at trial, I make the following findings of fact with respect to the remaining issues related to the house.

A - The large great room window

[214] The McCanns submit that the large window in the great room was a substantial deficiency, either with respect to the product or the installation, and as such the house contract was not complete.

[215] My findings of fact with respect to the new large great room window must be based on the evidentiary record before me.

[216] I have received no evidence from any window expert who examined the windows. Further, I have received no expert opinion evidence that would suggest that the water pooling at the base of the steel beams is due to the windows or the way the windows were installed.

[217] I accept the evidence of the McCanns that there was no water damage to the drywall returns just underneath the large great room windows prior to the windows being replaced. However, I have also received evidence, which I accept, that there may be a gap between the drywall return and the windowsill which sits somewhere below the drywall return, and water can travel down and pool on the windowsill without necessarily damaging the drywall return.

[218] In submissions, NWDC submitted that the photographs taken after the new window was installed show the windowsill, covered in red tuck tape, sitting below a wooden jam that is underneath the window. They say this supports their position that the steel beam continued below the drywall return. The McCanns submitted that the older photographs show the steel beam ending just above the drywall return. I am not an expert in the area of vertical steel beams. In my view, I am unable to make a finding on this issue by simply looking at the photographs. I note that in the older photographs, the vertical steel beam is covered with a white casing, and it is impossible to determine where it ends. On all of the evidence, I find it more likely that the steel beam continued down towards the windowsill, which was below the drywall return. However, I find that I do not need to resolve this issue for the purposes of my ultimate findings.

[219] There was conflicting evidence led at trial about whether there was water damage observed on the wooden windowsill of the large great room window at the time of removal and installation, I found both Adam Walton and Harold Wallace to be credible witnesses on this issue. They both testified in a forthright and clear manner, and I was satisfied that they were both providing their sincere recollection of the events.

[220] With respect to Adam Walton, I accept that the windowsill was replaced prior to the new window being installed. Photographs tendered at trial show what appears to be a new windowsill, wrapped in red tuck tape, with shims in between the sill and the window. The house estimate provided for a “sill with apron on bottom”.

[221] With respect to Harold Wallace, I accept that he did not observe any rot under the windows, however I note that he was standing a considerable distance away. He also saw the installers sweeping and vacuuming in the area of the windowsill, which is equally consistent with a new windowsill being installed. I also note that he has no recollection of observing the application of the red tuck tape, which was clearly applied by the installers at some point because it appears in the photographs tendered at trial.

[222] Andrew’s evidence at trial about what Jason told him about the observed rot was clearly hearsay and I do not rely on it.

[223] There is no reference to rot being found under the great room window in the correspondence between Andrew and the McCanns. While Andrew was able to recall a conversation about the water damage under the garden doors in the bedroom, his evidence regarding any conversations with the McCanns about water damage under the great room window lacked detail.

[224] I accept Jane’s evidence that this issue was never reported to her. Her evidence is supported by her e-mail to Andrew dated April 10, 2019, where she noted that the original window never leaked, there was no water damage to the drywall returns, and there was no water damage repair required when the window was removed. Had there been water damage observed when the window was removed, I would have expected Andrew to correct Jane’s assertions in this e-mail and would have expected Andrew to refer to this during the many e-mails about the large great room window.

[225] On the totality of the evidence, I am unable to reconcile the equally credible evidence about whether there was or was not water damage observed under the old great room window when it was removed. When I consider Jane’s evidence and her direct reference to the lack of damage under the window when it was removed when speaking with Andrew and his lack of correction, while I am satisfied that a new windowsill was installed, I am not satisfied that there was rot observed.

[226] While I appreciate that the McCanns believe that the simple fact that there was no water damage on the drywall returns before the windows were installed, and there is now water pooling at the posts after the windows were installed, should be enough for this court to be satisfied that the windows or their installation was deficient, in my view the issue is not that simple.

[227] There is evidence that there were issues with water coming into the house, specifically the back of the house. The garden doors in the master bedroom had evidence of prior water damage. The area above the great room windows had evidence of prior water damage.

[228] It was suggested in closing submissions that the water may be coming in through the steel beams because they were cut and then re-welded together. I have received no evidence upon which I could reach any conclusion about this possibility.

[229] With respect to the large great room window, on the totality of evidence called at trial, I make the following findings of fact:

- a. On or about October 10, 2017, NWDC installed the large great room window;
- b. Within a week of installation, an installer advised Andrew that there was a minor leak at one of the posts;
- c. On or about October 27, 2017, the McCanns noticed water pooling at the base of the steel beams;
- d. On or about October 31, 2017, Kevin Healy from Ostaco inspected the window, found no issues and authorized NWDC to service it;
- e. On November 1, 2017, Andrew inspected the windows. At that time, he saw no issue with the windows or the installation. He re-sealed/re-caulked the windows. I accept Andrew's evidence that he observed no issue with the windows or installation at this time;
- f. Andrew testified that he did not have any concerns that the steel beams had been cut and re-connected during the installation of the large great room window;
- g. In 2018, Jane tested the windows by spraying water on them with a hose. She was not able to reach the top of the windows with the water during this test. The windows did not leak during this test;
- h. In May 2018, a technician from Ostaco examined the windows and found no issue. This was communicated to Jane in August 2018;
- i. In September 2018, Andrew conducted a water test where he covered the window and sprayed the surrounding brick with water. During this test, water was observed at the base of the steel beams. Andrew concluded that this confirmed that the water was coming in from somewhere other than the windows;
- j. No one has observed water coming through or dripping down the windows. No one has observed water coming in through the sides of the window. The water has always been observed at the base of the steel beams;
- k. There was evidence of prior water damage around the bedroom garden doors, which also face out towards the lake. This required NWDC to reframe those doors;
- l. In June/July 2020, extensive waterproofing was installed around the windows, sheathing was installed, and new stone was installed. Despite this, water continued to pool around the steel posts; and
- m. At the time of the waterproofing and stone installation, there was evidence of prior water damage in an area above the windows. Photographs depicting this damage were filed at trial.

[230] In my view, the steps taken by NWDC to investigate and address the water pooling at the base of steel beams was extensive and reasonable. They came back and inspected the windows and the installation several times. They had a technician from the manufacturer come back and inspect the windows and installation. They conducted a water test, which suggested that water was coming in from somewhere other than the windows and running down the steel beam. They worked collaboratively with Martial Gerolami to try to find the source of the water. They came back and installed extensive waterproofing all around the window, at significant cost and for which they requested no payment.

[231] When I consider the evidence in its totality, I find that it is unlikely that the water, which occasionally pools at the base of the steel beams in the new large great room window, is the result of a deficiency in the new window or a deficiency in the way it was installed.

[232] As such, I find that the large great room window was not a substantial deficiency, such that the contract had not been substantially completed by July, 2020.

B - The Truscene screens

[233] With respect to the issue of the Truscene screens, I was presented with conflicting evidence regarding whether the McCanns had the opportunity to view the product prior to purchasing it. Whether the product was in the showroom or not, I am satisfied that the McCanns did not see it. I accept that had they observed that the screens only had one latch, they would likely have been dissatisfied with the product.

[234] I do not accept the evidence of Jane that the McCanns specifically asked to see the screens, or photos of them, and were denied this opportunity by NWDC. Given the totality of evidence, including the number of consultations that took place leading up to the final sales order and while the project was underway, it makes no sense that NWDC would not permit the McCanns to look at the screens if they were in their showroom, or would have not ordered a sample for them to look at if they were not in the showroom. I accept that NWDC took great pains to explain products to the McCanns and to satisfy any of their concerns when they arose.

[235] There is no evidence that the McCanns made any inquiries about the latching system for the Truscene screens during their many consultations with NWDC. Neither Jane nor Peter testified about making these inquiries. There is nothing noted in the estimates about the screens having to have several latches or that they had to be tight fitting. The only specification noted in the sales order with respect to the screens was that the McCanns wanted the black screen tabs removed prior to installation for cosmetic reasons.

[236] I find that the McCanns received the Truscene screens that they ordered. When they arrived, the McCanns did not like the way they fit and did not agree with the suggestions made to address any gaps, such as using Velcro or weatherstripping to close any gaps.

[237] I find that NWDC made reasonable efforts to attempt to address the McCanns concerns. Andrew took the screens back to his shop and flattened them. If he was unable to flatten a screen, he ordered a new one. Andrew reached out to the manufacturer about options that would make the

screens tighter fitting. A technician from the manufacturer (Peacock) came out personally to the McCann home to try to find a way to modify the screens to make them more tight fitting.

[238] By 2019, Jane was working directly with the manufacturer who agreed to modify the screens by installing additional latches to the screens. In August 2019, Jane directed the manufacturer to have Peacock modify the screens and indicated she did not want Andrew involved in the process.

[239] I find that any further issues with respect to customizing the screens to address the McCanns' standards is not a deficiency in the product or with the installation, such that it impacted whether the job was complete.

C - The kitchen window

[240] The kitchen window was installed using the existing marble sill. This was at the request of the McCanns. I accept the evidence of Andrew, that the window was sized properly, and that it was ordered a bit smaller to accommodate the installation process.

[241] I find that the cosmetic issues that arose with respect to the placement of the hardware was because the McCanns wished to keep and use the existing marble sill. There was no issue with placing the hardware on the other windowsills. I find that this cosmetic issue was adequately addressed by NWDC installing wider trim in July 2020. I do not find the size of the trim to be a deficiency.

[242] With respect to the McCann's claim that this window now squeaks, I have received no evidence that this is attributable to the product or the installation. It could be something that could be fixed with a service call and further caulking. I have received no evidence as to any steps taken by the McCanns to diagnose or address this issue. As such, I am not satisfied that this is a deficiency.

D - The bedroom garden doors

[243] I am not satisfied that there is a deficiency with respect to the bedroom garden doors. Andrew testified that the doors ordered were the same size as the prior doors. The decision to later raise the garden doors was made in consultation with the McCanns and was done for cosmetic purposes to make the trim along the top look nicer.

[244] With respect to the concern about the garden doors being a tripping hazard, I have received no expert evidence that the doors are in fact at tripping hazard such that they are a deficiency. When I look at the photos of the garden doors before and after, I note that they appear to have always been raised several inches up off the floor.

[245] With respect to the issue of the garden doors now leaking, this was raised for the first time in the course of this litigation. I have no evidence that this is a deficiency. In my view, it is more likely that this is an issue that could be addressed by way of a service call.

E - The double front door

[246] NWDC installed the replacement double front door in July 2020. I accept the evidence of Andrew that the door was inspected and approved by Peter McCann.

[247] With respect to the door hardware, I am satisfied that the McCanns chose the hardware that was installed in July after being shown several samples. This is reflected in the e-mail correspondence dated June 26, 2019 where Jane thanks Andrew for showing them samples and confirms their choice. Ultimately when the hardware was installed, the McCanns did not like the finish. I find that this is a cosmetic issue, and not a deficiency.

F - Kitchen door leading to the deck

[248] NWDC supplied and installed the door that was ordered by the McCanns. I have received no evidence that the door was defective or installed incorrectly. Rather, when it arrived, it was discovered that the door could not handle the weather conditions as it faces out towards the lake.

[249] The parties agree that the door leaks. NWDC attempted to resolve the leak but was unable to do so. NWDC then reached out to the manufacturer and determined that a new high performing door was in development. NWDC committed to replacing the door purchased in the contract with a high-performance door once it became available at no extra cost.

[250] This is not an issue of a deficient product or deficient installation by the contractor such that payment should have been withheld. Rather, it is a situation where the item purchased turned out to be incompatible with the owner's needs. Ordinarily this would be addressed by simply returning the door and issuing a refund.

[251] The replacement of purchased door with a higher performing door does not form part of the original contract. At most, the McCanns are entitled to a refund on the door that was installed.

G - Issues arising after July 9, 2020

[252] The McCanns testified that other issues have arisen since July 7, 2020 and the commencement of these proceedings.

[253] The McCanns state that the glass in the front double doors is crooked. I accept the evidence of Andrew that the glass falls within specification. The evidence was that Peter McCann inspected the door when it was installed and was happy with it. No complaint was made about the glass until these proceedings were commenced. I have received no evidence that the glass does not fall within specification. I am satisfied it does not amount to a defect.

[254] The McCanns state that the great room side windows, the eating room window, and the garden doors in the master bedroom now leak. I did not receive any details with respect to these leaks, other than a simple statement that they leak. I do not know the cause of the leak or if it is due to a deficiency. I note that the garden doors in the master bedroom leaked before they were replaced, and I am not certain if this the same issue or a new issue.

[255] The McCanns state that the trim around the glass insert is loose in the laundry room door. I have received no specific evidence that describes this issue, when it arose, or if it amounts to a deficiency. It may be that this could be addressed by way of a service call.

Was the garage contract substantially completed by July 2020?

[256] By July 2020, all of the windows and doors had been installed. The only remaining issue was the need to have a door handle adjusted. I accept the uncontradicted evidence of Andrew that this would have been addressed by way of a quick service call. The value of this service call is \$84.75 (H.S.T. included).

Conclusion

[257] For the reasons set out above, I am satisfied that both the house and garage contracts were substantially completed by July 7, 2020.

Who, if anyone, breached the terms of the contract?

When an owner breaches the contract

[258] An owner may be found to have breached a contract where they cease to make required payments under the contract, cancel the contract, or through some act without cause make it impossible for the contractor to complete its work. *D&M Steel v. 51 Construction Ltd.*, 2018 ONSC 2171 at para. 49.

[259] When this happens, the contractor is entitled to abandon the work and may then elect to recover damages for breach of contract or *quantum meruit* for the value of the work performed before the repudiation. Any deficiencies in the work are accounted for as reductions in the value of the work done, but no account is taken of the owner's cost to complete. *D&M Steel v. 51 Construction Ltd.*, at para. 50. *Komorowski v. Van Weel*, [1993] O.J. No. 555 (Ont.Gen.Div.) at para. 61.

[260] Mere bad or defective work or insignificant non-compliance will not, in general, entitle and owner to terminate a contract. The owner has an obligation to pay for the work and then, if there is defective work or non-completion, the owner may bring a claim against the contractor. This claim will generally be for the cost of completing non-completed work and remedying any defects. *D&M Steel v. 51 Construction Ltd.*, at para. 51.

When a contractor breaches the contract

[261] A contractor may be found to have breached a contract where they abandon a contract, repudiate the contract, fundamentally breach the contract or perform the contract in such a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work. In these circumstances an owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligation to pay on a *quantum meruit* or for work already performed. *D&M Steel v. 51 Construction Ltd.*, at para. 53.

[262] If a contractor demands payment before it is due under the contract or refuses to proceed unless paid, this may be conduct that evidences an intention to no longer be bound by the terms of the contract, amounting to a fundamental breach or repudiation of the contract. *D&M Steel v. 51 Construction Ltd.*, at para. 54.

[263] A contractor will not be required to show perfection in carrying out its obligations to be entitled to payment. Where a contractor's mistakes amount to a serious or substantial non-performance or known and concealed departures from the requirements of plans or specifications, a court may reject a claim for *quantum meruit*. *Komorowski v. Van Weel*, 1993 CanLII 8470 (Ont.Ct.Gen.Div.) at p. 27; 463; *Summers v. Harrower*, 2005 CanLII 50261(Ont.S.C.J.) at para. 15.

[264] Where there have been defects in the contractor's work, but not enough to amount to a fundamental breach, the contractor should be permitted to remedy the defects. The failure by an owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim as a result of a failure to mitigate. *D&M Steel v. 51 Construction Ltd.*, at para. 52.

Was NWDC entitled to demand payment in July 2020?

[265] Having reached the conclusion that both the house and garage contracts were substantially complete, subject to a few after sales service items, I find that as of July 7, 2020, NWDC was entitled to payment of the balance of the funds owing, subject to a 10% holdback, as set out in the terms of the contract.

[266] On July 29, 2020, Andrew sent a final e-mail requesting payment for the house and garage. With respect to the garage, he requested payment, less a 10% holdback for outstanding service. With respect to the house, he requested payment less a 50% hold back on the large great room, less 10% on the Anderson windows, and less 10% on the eating man door. I find that this demand was a reasonable attempt to resolve the issues between the parties. The total amount demanded was actually less than NWDC would be entitled to under the terms of the contract, which provided for a 10% holdback on the total price.

[267] I am satisfied that the McCanns were not prepared to make any further payment on the contract in July 2020. A reasonable interpretation of the McCanns' responding e-mail on July 9, 2020 was that they were refusing to pay and took strong objection NWDC's request for payment. It is undisputed that the McCanns made no further payments following the July 29, 2020 demand and the August 19, 2020 demand. The evidence of Jane at trial was that were not prepared to make any further payments because they did not believe the job was complete.

[268] I find that the failure to pay the amounts due and owing amounted to a fundamental breach of contract and amounted to a repudiation of the contract by the McCanns, which entitled NWDC to walk away from the project and elect to either recover damages or recover *quantum meruit* for the work performed.

[269] Even if there had been bad or defective work (which I find there was not), the existence of bad or defective work will not, in general, entitle an owner to terminate a contract. An owner has an obligation to pay for the work and then, if there is defective work or non-completion, the owner may bring a claim against the contractor. In this case, if the McCanns were not satisfied with the work completed by NWDC, they were required to pay for the work completed, and then bring a claim for the cost of remedying any defects in the window. *D&M Steel v. 51 Construction*, at para. 51.

Is NWDC entitled to quantum meruit?

[270] NWDC seeks to be paid for the products provided and the work completed on a *quantum meruit* basis. *Landmark II Inc. v. 1535709 Ontario Ltd.* 2011 ONCA 567 at para. 13.

[271] Recovery on *quantum meruit* is limited to the price agreed under the contract in cases where there has been substantial compliance with the terms of the contract. There can be no recovery on *quantum meruit* where the plaintiff has abandoned the contract before substantial completion. *Kaplun v. Mihhailenko*, 2005 CarswellOnt 1945 (ONSC)

[272] The total amount invoiced for product and services for the house project was \$93,843.55. It is agreed that the McCanns provided a deposit and a part payment, totaling \$61,981.76. It is also agreed that NWDC issued a credit in the amount of \$1,209.33 to reflect the fact that two storm doors had been returned. This leaves an outstanding balance of \$30,652.46.

[273] NWDC agrees that there should be a reduction for items invoiced, but not completed. These were:

- a. Trim that was to be installed in the great room - \$892.87;
- b. A refund for the kitchen door that was installed but was insufficient for the weather conditions - \$2,166.34; and
- c. Window hardware for eleven windows - \$129.27.

[274] I find these deductions to be reasonable and the amounts were not challenged by the McCanns at trial. This leaves a total amount owing for product and work completed on the house in the amount of \$27,463.98.

[275] The total amount invoiced for the detached garage product was \$8,399.56. It is agreed that the McCanns provided a deposit in the amount of \$4,199.78. NWDC agrees that there should be a reduction to reflect a service call to adjust the door handle in the amount of \$84.75. I find this deduction to be reasonable. This leaves the total amount owing for product and work completed on the garage in the amount of \$4,115.03.

[276] The McCanns have the evidentiary onus of proving further deficiencies. Simply stating that the work was performed improperly does not meet this evidentiary threshold. *Reid v. Xiao*, 2021 ONSC 7468 at para. 140.

[277] I have received no evidence on behalf of the McCanns that would identify any other deficiencies, other than their own opinions about the quality of the work. Even if deficiencies were identified, I have not received any evidence as to how much it would cost to address them. As such, I am not satisfied that any other amounts should be deducted from the amount owing for work completed and product supplied.

Is the Lien enforceable?

[278] Section 87.1 of the *Construction Act*, R.S.O. 1990, c.C.30, provides that any contract entered into before July 1, 2018, shall be governed by the *Construction Act* and its regulations as they read on June 29, 2018. As such, in this case I have applied the provisions of the *Construction Act* that existed on June 29, 2018 and all references to specific provisions refer to the prior version of the *Construction Act*.

[279] Section 35(1) of the *Construction Act* provides that any person who preserves or gives written notice of a lien for an amount that the person knows or ought to know has been willfully exaggerated is liable to any person who suffers damage as a result. Section 35(2) provides that the court may reduce the lien by the exaggerated portion if the person was acting in good faith.

[280] Section 6, of the *Construction Act*, provides that no certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with s. 32(2), 33(1) or 34(5), unless the court is of the opinion that a person has been prejudiced as a result, and then only to the extent of the prejudice suffered. This provision has been interpreted in a manner that allows a court to refuse to find a claim to be invalid because of minor or technical irregularities. *Gillies Lumber Inc. v. Kubassek Holdings Ltd.*, 1999 CarswellOnt 2160 (Ont.C.A.) at para. 55.

[281] NWDC acknowledged at the beginning of the trial, in opening submissions, that the amount originally claimed in its lien was incorrect because it failed to account for the credit processed for the two storm doors in the kitchen and laundry. The amount of the lien should have been reduced by \$1,209.33. Andrew testified that the amount claimed in the registered lien was the result of either an accounting error or an oversight.

[282] I accept that the increased amount registered in the lien was the result of an accounting error or an oversight. The credit issued for the kitchen and laundry storm doors took place early on in the project. I have received no evidence that the defendants suffered prejudice as a result of the amount claimed. Further, the McCanns could have brought a motion to discharge or reduce the lien on the basis that they were registered in an exaggerated amount.

[283] With respect to the last day of service/supply, I find that this date is a bit confusing. Based on the evidence at trial this may have been on July 6, 7 or 9, 2020. NWDC agrees in these proceedings that it should have been July 9, 2020.

[284] I find that whether the last day of supply was July 6, 7 or 9 is of no practical consequence. The lien was properly registered within 45 days of either of these days and the lien was perfected within 90 days of any of these dates. As such, I find that the McCanns are not prejudiced by this slight inaccuracy.

[285] I find that the lien is not void for these irregularities.

Was there a negligent misrepresentation?

[286] A negligent misrepresentation is a representation made carelessly, not knowingly, that is untrue, inaccurate or misleading.

[287] There are six general requirements for a claim of negligent misrepresentation. The plaintiff must prove, on a balance of probabilities that: (1) the defendant owed them a duty of care based on a special relationship; (2) the defendant made a false representation of fact; (3) the defendant knew that the statement was false or was reckless as to its truth; (4) the defendant made the representation with the intention that it would be relied upon by the plaintiff; (5) the plaintiff reasonably relied on the statement; and (6) the plaintiff's reliance resulted in damages. *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110; *Krawchuk v. Scherbak*, 2011 ONCA 352; *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918 at para. 60; *Mariani v. Lemstra*, 2004 ONCA at para. 12.

[288] I am satisfied that NWDC owed the McCanns a duty of care. However, I am not satisfied that any representation made to them by Andrew was false or misleading.

[289] The only evidence I have received in this trial is that NWDC is a supplier and installer of building materials including windows and doors. Andrew has worked in the windows and doors business starting part time in 1997 and full time since 2004. At the time he dealt with the McCanns in 2016, he had been involved in the business of windows and doors full time for about 12 years.

[290] Pursuant to two contracts, NWDC installed all of the windows and doors set out in the approved sales orders. Following installation, NWDC continued to address the concerns raised by the McCanns about the product provided and attempted to address those concerns.

[291] The McCanns submit that Andrew should have told them that he had never installed a window similar in size and shape to the large great room window. I do not find this to be a negligent misrepresentation. The large great room window was a custom window and quite unique. It is not surprising that Andrew or NWDC would not have installed that type of window in the past. I find that nothing said, or unsaid, by NWDC in this case amounted to, or would have left the McCanns with, an untrue, inaccurate or misleading impression of their abilities.

[292] As such, I find that the McCanns have not proven negligent misrepresentation.

Was NWDC negligent in their performance of the contracts?

[293] To be successful in a negligence action, the plaintiff must establish the following on a balance of probabilities:

- a. The defendants owed the plaintiffs a duty of care;
- b. The defendants breached that standard of care;
- c. The defendants' conduct was the cause of the plaintiffs' injury or loss;

- d. As a result of the breach, the plaintiffs suffered an injury or loss; and
- e. The loss was reasonably foreseeable for the defendants.

Duty of care

[294] I am satisfied that NWDC owed the McCanns a duty of care in the provision and installation of windows and doors in accordance with the contracts.

The standard of care

[295] A tortfeasor must exercise the standard of care that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case. This involves an examination of the known or foreseeable harm, the gravity of the harm and the burden or cost which would be incurred to prevent the injury. In addition, the court may consider external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards. *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) at para. 28.

Causation

[296] If the plaintiff establishes a breach of the standard of care, he/she must go on and establish, on a balance of probabilities, that the defendant's actions caused a loss and/or injury and that the loss and/or injury would not have occurred "but for" the fault of the defendant or if that test is inappropriate, that the defendant's breach contributed to the loss and/or injury in a material way, although there may have been other causes. *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.) at paras. 13-19.

Expert evidence

[297] Although not required, expert evidence can assist in establishing the standard of care expected of a defendant. *Krawchuk v. Scherback*, 2011 ONA 352 at para. 130, *Zink v. Adrian* (2005), 37 B.C.L.R. (4th) 389 (B.C.C.A.) at para. 43.

[298] The court may not require expert evidence where the court is faced with "non-technical" matters or those which an ordinary person may be expected to have knowledge; or where the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard. *Krawchuk v. Scherback*, at paras. 133-135. *Larizza v. Royal Bank of Canada*, 2018 ONCA 632 at para. 37.

[299] The installation of windows and doors is not a "non-technical" matter or one which an ordinary person may be expected to have knowledge or experience. I certainly do not have any knowledge or experience with installing windows or doors.

[300] The McCanns submit that the work completed by NWDC was littered with errors and negligence. They provide as examples:

- a. Invoices had incorrect dates and incorrect amounts;
- b. Windows and doors were not measured properly;
- c. The steel posts were cut and then repaired; and
- d. The large great room window leaked.

[301] The only evidence I have received with respect to errors related to dates on invoices is that when some of the invoices were printed out an incorrect date was inserted. This had something to do with the NWDC computer system and the accounting processes related to year-end. There was an incorrect date on a Ostaco invoice, but that had nothing to do with NWDC. I have not received any evidence with respect to incorrect amounts noted in invoices. I do not find these issues rise to the level of negligence.

[302] With respect to improper measurements, I received evidence that the front door was not measured correctly the first time. Andrew candidly agreed that he should have pulled back the drywall around the door when he measured it. He provided an explanation, and photographs, which explain how he originally measured the door using the rough opening. It was only when the door was removed, that you could see that there was a space between the opening for old door and the house. This was addressed by re-measuring and ordering a new door to the satisfaction of the McCanns. Andrew explained all of this to the McCanns in an e-mail. An error in measurement is not necessarily negligence. I do not find that this mistake in the circumstances as explained amounted to negligence.

[303] Jane testified that there were other improper measurements, specifically the windows in the garage, the kitchen window and the bedroom garden doors.

[304] With respect to the garage window, this was not an incorrect measurement, this was a failure to communicate between the McCanns, NWDC and the person preparing the drawings for the garage. With respect to the window in the kitchen, I am satisfied that the window was measured correctly and had to be smaller in order to permit a retrofit. Finally, I am not satisfied on the evidence that the bedroom garden doors were mis-measured.

[305] With respect to the steel posts being cut, the only evidence before me is that the installers appeared to have done this on their own accord. The error was corrected shortly after, likely the very same day when the windows were installed. Andrew did not have any concerns about re-welding the beams back together. A mistake does not always amount to negligence. In this case, I find that the fact that the beams were cut in error does not reach the level of negligence.

[306] With respect to the large window in the great room, I have already made a finding of fact that the water which pools at the bottom of the steel beams is not likely attributed to the installation of the window. I have received no evidence that this window was installed negligently.

[307] The McCanns submit that I should draw a negative inference from the fact that Andrew conceded that the water pooling at the bottom of the steel beams could be from the windows or the installation. When I read all of the e-mail communications about the windows, it is clear that the issue progressed from a suspicion that the water might be coming from the windows; testing which demonstrated that it might not be coming from the windows; a belief that the water might be coming from the brick; steps taken to replace the brick and water-proof the windows; and then a belief that the water was coming in somewhere near the roof, at the top of the windows.

[308] The April 18, 2019 e-mail that the McCanns point to must be read in its entirety and contextually. In that e-mail, Andrew was responding to the McCanns' April 10 e-mail where they decline his offer to conduct a further water test on the windows. On April 18 Andrew writes back "Regarding the living room window – Although I cannot see where the water is coming from, I am open to the fact that it could be a result of the window itself or the installation. The only way to figure this out is to remove the glass and pull the window out and inspect the hole and have products to solve the issue". He goes on to state "With that in mind I am still trying to figure out a solution for if the water is coming through somewhere other than the window – how do we stop it from happening. I cannot ignore the result of the water test where the window was clearly not getting any water yet still travelled down the posts to leak at the base of the window".

[309] Contextually, this e-mail occurs when the only testing that has taken place appears to indicate that the water is not coming through the window. Despite this, Andrew is keeping an open mind and committing to continue to investigate the issue. NWDC goes on to install extensive waterproofing around the window at its own cost in 2020. I do not find that the April 2019 e-mail was an admission that the windows leaked due to their installation. Nor do I find I can draw an adverse inference from the e-mail.

[310] Having heard and considered the evidence at trial, I am not satisfied that the actions of NWDC fell short of the standard of care expected of a reasonably competent window and door supplier and installer. As such, the McCanns have not established that NWDC was negligent in its services and in performance of the contracts.

Should Andrew Walton be held personally responsible for damages incurred?

[311] Piercing or lifting the corporate veil is an equitable exception to certain statutory rules. Those rules provide that a corporation is a separate legal person, and a shareholder is not liable for any act, default, obligation or liability of the corporation. *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont.Gen.Div.) affirmed [1997] O.J. No. 3754 (Ont.C.A.).

[312] In *FNF Enterprises Inc. v. Wag and Train Inc.*, 2023 ONCA at paras.17-21, the Ontario Court of Appeal summarized the principles surrounding when a corporate veil may be pierced as follows:

- a. Piercing or lifting the corporate veil is an equitable exception to certain statutory rules. Those rules provide that a corporation is a separate legal person (with the consequence that its property,

rights, and obligations are its own, not those of the individuals through whom it acts) and that a shareholder is not liable for any act, default, obligation, or liability of the corporation: OBCA, ss. 15, 92.2.

- b. The test for piercing the corporate veil in Ontario is that set out in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.). That case set out a two-part test, at pp. 433-34, as follows "courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct." See also *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, at paras. 36, 65-71.
- c. The *Transamerica* test is consistent with the principle reflected in the various business corporation statutes in Canada that corporate separateness is the rule. Where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct, the law recognizes an exception to this rule.
- d. The first element of the *Transamerica* test requires not just ownership or control of a corporation, but complete domination or abuse of the corporate form. The second element requires fraudulent or improper conduct, and contemplates that it is that conduct that has given rise to the liabilities the plaintiff seeks to enforce. Where those two elements are present, the corporate veil will be lifted to prevent the person who engaged in that conduct from asserting that the liabilities the fraudulent or improper conduct gave rise to are those of the corporation only.
- e. In *642947 Ontario Ltd. v. Fleischer*, (2001), 56 O.R. (3d) 417 (C.A.), at para. 68, this court expanded on the meaning of "fraudulent or improper conduct" as follows "Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done".

[313] On the totality of evidence called at this trial, I am not satisfied that Andrew Walton operates NWDC in order facilitate fraudulent or improper conduct. There is no evidence that would support such a conclusion. The only evidence I have is that NWDC is operated as a construction business that provides and installs windows and doors. It employes several employees and has been involved in the business for many years.

[314] With respect to the expanded meaning of “fraudulent or improper conduct” as set out in *642947 Ontario Ltd. v. Fleischer*, at para. 68, I find that there is no evidence upon which I could conclude that Andrew Walton, as one of the owners, expressly directed a wrongful thing to be done.

[315] Even if I were to find that NWDC breached the terms of the contracts or performed work in a negligent manner (which I have not), I am not satisfied that it would be appropriate to exercise my discretion and pierce the corporate veil in the circumstances of this case. With respect to the alleged breach of contract, it is, at its highest, a disagreement between Andrew and the McCanns about when payment was due. With respect to the allegations of negligence, there is no evidence that Andrew directed any of the installers to perform negligent or fraudulent work.

Damages

[316] I have found that NWDC did not breach the terms of the contracts. I have also found that NWDC was not negligent in its work and that Andrew did not negligently misrepresent any facts to the McCanns in relation to the house and garage contracts. Despite these findings, I will go on to assess the issue of damages in the event that I am incorrect on these issues.

[317] An owner who alleges that work performed or the materials supplied are deficient, must provide proper evidence on the basis of which their damages can be assessed. *TMS Lighting Ltd. v. K.J.S. Transport Inc.*, 2014 ONCA 1 at paras 61 and 65; *Linzell v. MacLead* (1972) 2 Nfld.&PEIR 286 (P.E.I.C.A.) at 304-307. *Summers v. Harrower*, [2005] O.J. No. 5770 at para. 20.

[318] A trial judge is obliged to do his or her best to assess the damages suffered by a plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of a plaintiff’s loss uncertain or impossible. Where the absence of evidence makes it impossible to assess damages, the plaintiff is entitled to nominal damages at best. *TMS Lighting Ltd. v. KJS Transport Inc.* at para. 61.

[319] Damages may be claimed for breach of contract and in tort. The measure of damages in tort is what it would take to put the innocent party in the position had the negligent misrepresentation and/or negligence had not been made. The measure of damages in contract is to put the innocent party in the position it would have been had the contract been performed as agreed. This can often lead to the same result. You cannot obtain double recovery by stacking tort damages on top of contractual damages. *Cornelis Grey Construction Inc. v. Folz*, 2018 ONSC 647 at para. 26.

[320] The objective of contractual damages is to put the innocent party homeowners into the position they would have been in had the contract been fulfilled. It is not to put them into a better position or to effectively provide them with materials and labour free of charge. The court must be persuaded that the expenses incurred (or to be incurred) are reasonable and necessary to complete the contract and rectify the damage. The damages claimed by the homeowners must be recoverable at law and must flow unavoidably from the breach of contract. *Cornelis Grey Construction Inc. v. Folz*, at para. 15.

[321] A breach of contract by a contractor is not *carte blanche* for the homeowners to make extravagant claims amounting to a complete refund of what was paid for the work. The homeowners must act reasonably and prudently and must mitigate their losses if possible. *Cornelis Grey Construction Inc. v. Folz*, at para. 65; *Interborough Electric Inc. v. 724352 Ontario Ltd.*, 2015 ONSC 5591.

[322] The McCanns seek the following as damages for breach of contract, negligence and negligent misrepresentation:

- a. A full refund of all funds paid to NWDC;
- b. To be relieved from having to pay anything further to NWDC;
- c. Reimbursement for the cost of the stonework completed by Martial Gerolami in July 2020; and
- d. The cost of removing and replacing all of the windows and doors in their house and the detached garage.

[323] The evidence provided with respect to damages is contained in a damages brief, which was filed as exhibit 97 at trial. It consists of the following:

- a. An estimate from Pella Windows and Doors for the complete removal of all windows and doors and replacement with Pella product;
- b. Invoices representing the cost of having the brick surrounding the great room window taken out and replaced with stone by Martial Gerolami (Brolga) in July 2020;
- c. The cost of removing and re-installing the soffit/fascia by Hubert Shank (Maintenance Plus) in July 2020; and
- d. An estimate provided by Rona for the cost of having new siding installed which would be required if all of the windows and doors are replaced. These materials are all contained in the McCanns' damages brief which was filed as exhibit 97 at trial.

[324] With respect to the estimate provided by Pella Windows and Doors, this estimate sets out the cost of replacing every window and door in the house and garage. The evidence at trial does not support such a drastic response.

[325] What the McCanns would be entitled to, had they established a breach of contract, negligent misrepresentation, and/or negligence, would be to be placed in the position had the breach/tort not occurred. This would involve replacing and/or repairing any product that was deficient or installed deficiently. I have received no evidence that every window and door in the McCann home must be replaced or repaired. Further, I have received no evidence of how much that would cost, if needed.

[326] The estimate provided by Pella Windows and Doors was challenged by NWDC. Andrew testified that the windows and doors selected as part of the Pella Windows and Doors estimate were an upgrade from the windows and doors selected and installed by NWDC. The plaintiffs did

not call any evidence to contradict this evidence. Even if the McCanns could establish that every single window and door installed by NWDC was deficient and had to be replaced (which they have not) they are not entitled to replace these items with upgraded materials.

[327] In this case, the McCanns have taken no steps to rectify the alleged deficiencies, including the most significant alleged deficiency which is the large great room window.

[328] With respect to the large great room window, the McCanns have not pursued a warranty claim with the window manufacturer, despite having the warranty for this window. They have not pursued a home insurance claim for water damage.

[329] With respect to the Truscene screens, the McCanns do not appear to have continued their discussions with the manufacturer or sought out their assistance with having John Peacock customize and install the Truscene screens. The evidence at trial was that Jane was communicating directly with the manufacturer and had obtained their agreement to customize the windows at no cost, and to have Peacock complete the modifications. I have received no evidence that the McCanns have hired anyone to install the screens.

[330] With respect to the remaining issues, I have received no evidence that the McCanns have hired anyone to fix issues such as adjusting the garage door handle or addressing any leaks.

[331] Where a contractor breaches the terms of a contract, there is an obligation by the homeowner to take steps to mitigate their damages. The evidence led at this trial is that the McCanns have taken no steps towards mitigation.

[332] With respect to the McCanns' submission that they should be refunded for all amounts they have paid NWDC, I have received no legal authority that would support such a claim. As indicated above, in contract, homeowners are entitled to be placed in the same position they would have been had the contract been fulfilled. This entitles them to the cost of completing the contract, not to a refund.

[333] With respect to the McCann's submission that they should be compensated for the work completed by Martial Gerolami (Brolga) and Hubert Shank (for the soffit/fascia) in July 2020, the evidence is that when the brick was removed from the outer wall, they discovered that there was no sheathing behind the brick. Sheathing was provided to ensure the outer wall met building codes. I find that there was some aspect of "betterment" in this process, as the McCanns now have a wall that is structurally supported and have new stone installed on the outside of their home. I have not received evidence from either party on how I would quantify that betterment.

[334] A trial judge is obliged to do his or her best to assess the damages suffered by a plaintiff on the available evidence even where difficulties in the quantification of damages render a precise mathematical calculation of a plaintiff's loss uncertain or impossible. This requires some evidence upon which a trial judge can make a reasoned and supported assessment of damages.

[335] This is not a case where it would be difficult for the McCanns to obtain evidence that would quantify their damages. They would simply need to lead evidence from another window installer or manufacturer about the cost that would be incurred in having the alleged deficiencies addressed.

[336] The best I can do, in terms of assessing damages is to make the following estimates, based on the evidence provided by NWDC and the estimates for the house and garage.

- a. Cost of fixing the garage door handle - \$84.75;
- b. A refund for the door in the kitchen which was insufficient for the weather conditions - \$2,166.34;
- c. Cost of window hardware - \$129.27;
- d. Recaulk the leaking/squeaking windows - \$50;
- e. Cost of new trim around the kitchen window - \$50;
- f. Cost of front door hardware - \$100;
- g. Truscene screens - \$0 (Anderson has agreed to customize at no cost);
- h. Cost of replacing the garden doors in the bedroom - \$5,103.10 (refund);
- i. Cost of replacing the large great room window - \$13,169.26 (refund);
- j. Cost of trim in the great room - \$200;
- k. Portion of cost incurred to replace brick/soffit - \$6,000 (½ of the total cost); and
- l. Labour - \$5,000 (5 days of work to install replacement doors and window, re-caulk windows, install hardware, repair hardware and install trim)

[337] Based on these amounts, had I found a breach of contract on the part of NWDC, and/or negligent misrepresentation, and/or negligence, I would have set damages at \$32,052.72.

Conclusion

[338] In conclusion, I am satisfied that the plaintiff NWDC has established on a balance of probabilities that the defendants, Jane and Peter McCann, fundamentally breached the terms of the house and garage contracts and repudiated them when they failed to pay amounts that were properly due and owing. I am also satisfied that as a result of this breach, the plaintiff NWDC is entitled to *quantum meruit*.

[339] As such, NWDC shall have judgement as against the defendants, Jane and Peter McCann, on the basis of *quantum meruit*, in the amount of **\$31,579.01**. This amount reflects \$27,463.98 for the house contract and \$4,115.03 for the garage contract.

[340] I have calculated this amount as follows:

House contract:

Invoiced amount	\$93,843.55
Less amount paid	(\$61,981.76)
Less credit for two storm doors	(\$1,209.33)
Less cost of remaining trim for great room	(\$892.87)
Less cost of window hardware	(\$129.27)
Less cost of kitchen door	(\$2,166.34)
Balance owing:	\$27,463.98

Garage contract:

Invoiced amount	\$8,399.56
Less amount paid	(\$4,199.78)
Less service call to fix door handle	(\$84.75)
Balancing owing:	\$4,115.03

[341] I find that the plaintiff, NWDC, is entitled to pre and post interest on this judgement in accordance with the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

[342] I also declare that NWDC is entitled to a lien on the estate and interests of the McCanns in the lands and premises bearing PIN 52221-0429, municipally known as 137 Rockview Road, Callander, Ontario, in the amount of \$31,579.01.

[343] I also order that in default of payment of the judgment owed, the estate and interests of Peter McCann and Jane McCann in the 137 Rockview Road, Callander, Ontario, may be sold and the proceeds applied in and towards payment of the plaintiff's claim, costs and interest, pursuant to the *Construction Act*, R.S.O. 1990, Ch. C.30 as amended.

[344] I am not satisfied that the counterclaim plaintiffs, Jane and Peter McCann, have established on a balance of probabilities, that the defendants NWDC and Andrew McCann breach the terms of the house and garage contracts. Further, I am not satisfied on a balance of probabilities that the defendants NWDC and Andrew Walton committed the torts of negligent misrepresentation or negligence as against the Jane and Peter McCann. As such, the counterclaim is dismissed.

Costs

[345] The plaintiff, NWDC, has been successful in these proceedings.

[346] If the parties cannot agree on the issue of costs, then costs submissions should be made in writing.

[347] NWDC shall serve their written submissions within 30 days of the release of this decision. McCanns shall serve and file their responding written submission within 30 days of being served with NWDC's submission. NWDC may file reply-submissions, if so desired, within 15 days of being served with the McCann's submissions.

[348] The written submission of NWDC and McCanns shall not be more than 5 pages, excluding any offers to settle or case lines. Reply submission shall not be more than 2 pages.

[349] In the absence of receiving written submissions as directed above, the parties shall be deemed to have agreed on costs.

The Honourable Madam Justice S.K. Stothart

Released: January 10, 2024

CITATION: 1593095 Ontario Ltd. (Northwood Window and Door Centre) v. McCann, 2024
ONSC 0163
COURT FILE NO.: CV-20-0053
DATE: 2024-01-10

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1593095 Ontario Ltd. o/a Northwood Window and Door
Centre
Plaintiff

– and –

Peter Michael McCann and Jane Ann McCann
Defendants

-and-

Peter Michael McCann and Jane Ann McCann
Plaintiffs by Counterclaim

1593095 Ontario Ltd. o/a Northwood
Window and Door Centre and Andrew Walton
Defendants to the Counterclaim

REASONS FOR JUDGMENT

S.K. Stothart, J.

Released: January 10, 2024