



- [4] The Plaintiffs allege that Mr. Topple misrepresented his prior building experience to them in order to induce them to sign the contract with him.
- [5] The Defendants ceased construction at the property in June 2018. Significant work remained incomplete and had to be completed by the Plaintiffs at additional cost. The Plaintiffs had to retain the services of third parties, including engineers, architects and contractors to complete the house and repair the deficiencies.
- [6] The Plaintiffs claim that the value of the work completed by the Defendants was substantially less than the payments made by the Plaintiffs, and that the Defendants redirected their funds to other projects, in particular, the construction of a project by the other Defendant, Town Brewery, in which Mr. Topple was an investor.
- [7] The Plaintiff and the Defendant Town Brewery settled their dispute before the trial began, and Mr. Topple and Future Perfect Construction Inc. (Future Perfect) were the only remaining Defendants when the trial began.
- [8] The Plaintiffs claim \$564,809, which was the cost to them of completing the construction of their home after the contract was abandoned by Mr. Topple. They also seek punitive damages, damages for lost income and damages for unjust enrichment in relation to the diversion of funds from their construction project to Mr. Topple's investment in Town Brewery. The total damages they seek is \$1,329,966.
- [9] Mr. Topple argues that the Plaintiffs contracted with the corporation Future Perfect and that at no time was he acting in his personal capacity.
- [10] The Defendants argue that after the contract was signed, the Plaintiffs made significant changes to the design of the house, and this was the cause of the delays and increased costs. In June 2018, the Plaintiffs refused to make further payments that were due to be paid and the Plaintiffs refused to permit the Defendants on the construction site, thereby preventing the Defendants from completing the contract. Any minor deficiencies would have been corrected if the Defendants had been allowed to complete the contract.
- [11] Mr. Topple denies misappropriating any funds from the Drews' construction project. It is standard practice in the construction industry to manage cash flow across multiple projects.
- [12] Mr. Topple and Future Perfect have counterclaimed for \$250,000, the difference between the original contract price and the amount paid by the Plaintiffs.

### **Facts**

- [13] This case proceeded by way of trial. The only witnesses were the Plaintiffs, Adam and Evelyn Drew, and the Defendant, Aaron Topple. No expert witnesses were called by either side.
- [14] Adam and Evelyn Drew (the Drews) owned a property in Pickering, Ontario. There was a small house on the property, and they wanted to build a larger home behind it. The Drews

retained a designer, Karen Miller, to prepare a design of the house they wanted. Karen Miller is not an architect or an engineer. The Drews took these drawings to Mr. Topple as the basis for their discussions.

- [15] Mr. Topple told the Drews that he was a custom home builder with 20 years experience. He claimed to have built 10 custom homes during that time.
- [16] Based on that representation, the Drews hired Mr. Topple to build their home.
- [17] They signed a contract on September 18, 2017. The contract is between Adam and Evelyn Drew, as the “Owner” or “Customer” and Future Perfect Construction, as the “Contractor”. Aaron Topple signed for Future Perfect Construction, which is not identified as a corporation anywhere in the contract. Mr. Drew testified that he understood it to be Mr. Topple’s business name, which Mr. Topple operated as a sole proprietor.
- [18] The first paragraph of the contract states:

This contract outlines the work that the Contractor agrees to perform and the fees the customer agrees to pay. Which will conform to the house plans (drawings) which are hereby attached and initialed by the Customer and Contractor and made part of the contract. Note: the drawings will be edited reviewed and approved by services and professionals supplied by the Contractor, such as architects and engineers, but this will not change estimates and pricing of this agreement and are subject to customers approval.

- [19] There follows a list setting out the “Scope” of the agreement, a detailed inventory of what is included under each heading, and the costs associated with each step in the construction. For example, the list includes “Foundation and Concrete” not to exceed \$100,000, “Framing, Steel and Structure”, not to exceed \$150,000, “Insulation” not to exceed \$50,000, and various other steps in the construction of the house.
- [20] Significantly, the first heading under “Scope” states:

**Architecture/Engineered approved drawings – will not exceed \$1,200.**

- Contractor will have all drawings reviewed and approved as needed by their preferred architect(s) or engineer(s). Drawings will be shared with the Customer (including CAD files).

- [21] Another heading under “Scope” is “Finish Cathedral Ceiling will not exceed \$6,000”. The contract includes a computer-generated image of what the cathedral ceiling is to look like when the house is constructed and states: “finishing to align with photo”. The construction of the cathedral ceiling became a significant catalyst leading to the falling out between the Drews and Mr. Topple.
- [22] I will return to other headings under “Scope” later in these Reasons.

- [23] Future Perfect “guaranteed quality craftsmanship with a 5+ year warranty”.
- [24] The original agreed price was \$541,200.
- [25] The contract does not include a building schedule or completion date, although Mr. Topple estimated that the project would take 5 months in an email to Mr. Drew the week before the contract was signed.
- [26] Mr. Drew also provided a copy of a schedule issued by Mr. Topple in September 2017, which Mr. Drew claims was part of the contract, although it is not referenced in the contract. This schedule provided for completion within 7 months.
- [27] Based on this schedule, the Drews entered into a contract with the City of Pickering on November 9, 2017 to complete the construction of the new house and demolish the existing house no later than 18 months from the date that the building permit for the new house was issued. The demolition of the existing house was not, however, part of the agreement with Mr. Topple.
- [28] In an email dated September 10, 2017, and entitled “Executive Summary”, Mr. Topple stated that all work would be performed by employees of Future Perfect and that Future Perfect did not use subcontractors, although this assurance was not made part of the contract.
- [29] Mr. Topple advised Mr. Drew in an email dated September 17, 2017 that he only took on one project at a time.
- [30] The Drews paid Mr. Topple a \$20,000 deposit when they signed the contract on September 18, 2017, a further \$25,000 on September 22, 2017, and a further \$122,311 on October 6, 2017. No work was done on the job site until late October, 2017.
- [31] In late November the project seemed to be moving slowly. The foundation wall had not yet been poured, which Mr. Topple blamed on the unavailability of subcontractors. In order to speed things up, the contract was amended on January 19, 2018. The amendment changed the foundation from concrete to customer supplied Insulated Concrete Forms (ICF), which reduced the price of the foundation from \$100,000 to \$85,000. Due to the use of ICF foundation, the contractor did not have to frame or spray foam the exterior walls of the lower level, and this reduced the maximum cost of “Framing – Steel and Structure” from \$150,000 to \$141,153. The Plumbing section, which was \$30,000 in the original contract, was removed entirely and made the responsibility of the customer. As a result, the total contract price was reduced from \$541,200 to \$487,353. The ICF blocks were supplied by the Drews at an additional cost to them of \$35,000.
- [32] On January 18, 2018, Mr. Topple emailed Mr. Drew to advise that the “walk through date” for the house would be June 4, 2018.
- [33] The Plaintiffs became concerned with the quality and pace of the work as construction progressed. For example, the Drews allege that the contractor did not provide frost

protection during the winter months as required by the contract, which resulted in the water line to the existing house freezing and the family being without water for 24 hours.

- [34] The Drews retained an inspector to inspect the house in January and June 2018.
- [35] Both reports were filed as exhibits in the trial, although the author of the reports was not called to testify, and so the conclusions and opinions in the reports cannot be admitted as expert evidence. Mr. Drew used the reports as a guide to his own evidence. The report includes numerous photographs which Mr. Drew relied on to describe and corroborate his own observations. To the extent that the photographs in the reports were used to assist Mr. Drew in his testimony, they are admissible.
- [36] The photos in the June 2018 Report show numerous deficiencies which are apparent to anyone looking at the photographs. For example, the fascia detail were not installed level at the front roof, and the window of the 2<sup>nd</sup> floor office was installed off center under the gable. The plan clearly provides for a window that is centered under the gable.
- [37] The OSB (oriented strand board) at the front entrance is not secured, there are protruding nails in the framing lumber and floor sheathing and some of the framing wood is not properly connected because it is too short. The waterproof membrane on the outside foundation is not sealed or overlapped correctly and is damaged in places. There are places where the foundation is bowed outward. Indicating a weakened structure. Sections of the Tyvek home wrap are incomplete, missing or not sealed. The contract provided for an upgraded ¾ inch subfloor, but only a 5/8 inch subfloor was installed. The contract provided for 12 inch oc (on center) floor joists where tile was to be installed, but 16 inch oc floor joists were installed.
- [38] The contract called for a 10 inch gravel base under the concrete slab in the lower level and garage, but this was not done. The back fill gravel depth appears to be less than 6 inches at various points in the foundation.
- [39] The contractor was supposed to have “all drawings reviewed and approved as needed by their preferred architect(s) or engineer(s)”. Future Perfect did not retain an architect or an engineer to review the drawings that had been prepared by Karen Miller, the Drews’ designer. Instead, they retained a building designer named Kevin Washington to review the drawings.
- [40] There is no dispute that Mr. Washington is a qualified home designer with a BCIN (Building Code Identification Number).
- [41] A building designer is not, however, the same thing as an architect or engineer.
- [42] An Architect means the holder of a licence, a certificate of practice or a temporary licence under the *Architects Act*, R.S.O. 1990, c. A.26. Certain plans under the *Ontario Building Code*, O. Reg. 332/12 can only be designed or reviewed by an architect or engineer.

- [43] A designer is a broader class of persons that include architects. A designer can provide design and architectural drawings for any space up to 600 square metres and listed in Part 9 of the *Ontario Building Code*.
- [44] The role of designers is defined under s. 1.1(2) of the *Building Code Act, 1992*, S.O. 1992, c. 23 and states:
- (a) if the designer's designs are to be submitted in support of an application for a permit under this Act, to provide designs which are in accordance with this Act and the building code and to provide documentation that is sufficiently detailed to permit the design to be assessed for compliance with this Act and the building code and to allow a builder to carry out the work in accordance with the design, this Act and the building code;
  - (b) to perform the role described in clause (a) in respect of only those matters for which the designer has the qualifications, if any, required by this Act and the building code; and
  - (c) if the building code requires that all or part of the design or construction of a building be under general review, to perform the general review in respect of only those matters for which the designer has the qualifications, if any, required by this Act and the building code.
- [45] Whether Mr. Hamilton was qualified to review and approve the drawings prepared by Karen Miller is not the issue. The contract specifically called for an architect or engineer to review the drawings, and that did not happen.
- [46] Another significant deficiency was the location of the roof trusses in the dining room. The photographs of the dining room show that the roof trusses were built across the cathedral window rather than conforming to the angle of the gable peak in the roof. This is an obvious construction flaw – the roof trusses should be built at the same angle as the gable roof so that they do not obstruct the window. It is clear from the photograph of the cathedral ceiling included in the contract that the roof trusses were supposed to follow the angle of the ceiling and not obstruct the window. As built, the finishing of the cathedral ceiling did not “align with photo” as required by the contract.
- [47] When the Drews raised this concern with Mr. Topple in June 2018, Mr. Topple took the position that the roof trusses had been built in accordance with Karen Miller's design, and that if the Drews wanted the roof trusses fixed, they would have to agree to a change order at a cost of an additional \$21,248.
- [48] The Drews refused to pay extra to fix something that, in their view, was an error made by Mr. Topple.
- [49] In June 2018, Mr. Drew prepared a slide presentation for Mr. Topple, outlining his ongoing concerns, a detailed line by line summary of the deficiencies identified by the home

inspection, and his proposal for fixing the deficiencies and moving forward. The parties were unable to resolve their differences. Mr. Topple refused to fix the roof trusses unless the Drews agreed to a change order and to pay an additional \$21,248. The Drews refused to advance any more funds until the deficiencies, including the roof trusses in the dining room, were fixed. As a result, Mr. Topple and Future Perfect stopped working on the site in June 2018, and the Drews had to find other contractors to finish their home.

## Analysis

### Personal Liability of Aaron Topple

- [50] Mr. Topple was initially in business as a sole proprietor using the business name “Future Perfect Construction”. He registered the business name “Future Perfect Construction” as a sole proprietor on March 9, 2014. This registration did not expire until March 9, 2019. Mr. Topple incorporated Future Perfect on May 31, 2017, a few months before the contract with the Drews was signed. He is the sole shareholder and executive officer of the corporation. The corporate name was Future Perfect Construction Inc.
- [51] The first draft of the contract was prepared by Mr. Topple.
- [52] Both the September 18, 2017 contract and the January 19, 2018 amendment refer to “Future Perfect Construction” as the contractor, and both are signed by Mr. Topple on behalf of “Future Perfect Construction”. Neither document identifies “Future Perfect Construction” as a corporation.
- [53] Mr. Drew was told by Mr. Topple to make all cheques payable to “Future Perfect Construction”. None of the payment cheques identify Future Perfect as a corporation. Mr. Drew testified that he thought that he was dealing with a sole proprietorship when he signed the contracts because there was no indication that Future Perfect was incorporated.
- [54] Mr. Topple submits that Mr. Drew was always dealing with a corporation, Future Perfect Construction Inc. When Mr. Topple signed the contract, he was signing for the corporation. He pointed to several emails between Mr. Topple and Mr. Drew from September 1 and 3, 2017 (thus pre-dating the contract) which refer to him as “Aaron Topple, President, Future Perfect Construction Inc.”
- [55] It is a basic principle of corporate law that a shareholder, even a sole shareholder, is a separate legal entity and is not personally liable for contracts entered into by the corporation. Shareholders, as such, have limited liability. In the absence of a personal guarantee given by a shareholder, a shareholder in his capacity as such is not liable for any act or liability of a corporation because the corporation is a separate legal entity: *Koubi v. Hascalovici*, 2016 ONCA 867, at paras. 8 and 9. The threshold for “piercing the corporate veil” is usually very high.

- [56] Mr. Drew submits that Mr. Topple entered the contract in his personal capacity as the sole proprietor of Future Perfect Construction. Mr. Drew testified that he was never made aware that Future Perfect Construction was a corporation. It was not referred to as a corporation on the contracts signed by Mr. Topple or on any of the cheques Mr. Drew wrote to make payments to Mr. Topple. Mr. Drew believed that Future Perfect Construction was just a business name.
- [57] Section 10(1) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (“the OBCA”) and s. 2 of the *Business Names Act*, R.S.O. 1990, c. B.17 (“the BNA”) set out the rules that corporations must follow with respect to their names. Section 10(1) of the OBCA reads:
- 10 (1) The word “Limited”, “Limitée”, “Incorporated”, “Incorporée” or “Corporation” or the corresponding abbreviations “Ltd.”, “Ltée”, “Inc.” or “Corp.” shall be part, in addition to any use in a figurative or descriptive sense, of the name of every corporation, but a corporation may be legally designated by either the full or the abbreviated form.
- [58] The words “Limited”, “Incorporated”, and “Corporation” are referred to as “status identifiers.”
- [59] Section 10(5) of the OBCA requires that a corporation’s name shall be set out in all contracts, invoices, orders and the like issued on its behalf. The Act does not, however, provide for automatic personal liability if the corporation fails to do so: *Watfield International Enterprises Inc. v. 655293 Ontario Ltd.*, 1995 CanLII 7414 (ON SC), at para. 12; *Truster v. Tri-Lux Fine Homes Ltd.*, 1998 CanLII 3497, at para. 21.
- [60] A defendant may be liable in their personal capacity when they fail to make the plaintiff aware that they are dealing with a corporation. The failure to use status identifiers is one example of how a defendant can fail to make corporate status clear, which can lead to a conclusion that the defendant should be personally liable: *G. R. Sibbick Limited v. The Estate of Kenneth Raymond Rattie by its Estate Trustee Tyler Rattie and 2035673 Ontario Inc.*, 2016 ONSC 2344, at paras. 17 and 18; *Chandaria v. Stewart*, 2011 ONSC 2486, at para. 7.
- [61] The law in this regard was summarized by the Court of Appeal in *Truster v. Tri-Lux Fine Homes Ltd.*, at para. 21:

[Section] 10 (5) of the *Business Corporations Act* does not create automatic personal liability if it is not complied with. It is evident that the trial judge was aware of this. He also recognized a principle arising from the case law that persons wishing to benefit from the protection of the corporate veil should not hold themselves out to the public without qualification. They should identify the name of the company with which they are associated in a reasonable manner or risk being found personally liable if the circumstances warrant it: see cases such as *Watfield*

*International Enterprises Inc. v. 655293 Ontario Ltd.* (1995), 1995 CanLII 7414 (ON SC), 21 B.L.R. (2d) 158 (Ont. Ct. (Gen. Div.)) and *Pennelly Ltd. v. 449483 Ontario Ltd.* (1986), 20 C.L.R. 145 (Ont. H.C.J.). This principle properly flows from the fact that incorporation provides corporate officers and shareholders the legal protection thought to be necessary for modern business relations; however, if one expects to benefit from this protection, then others must, at a minimum, be informed in a reasonable manner that they are dealing with a corporation and not an individual. In the last analysis, persons who set up after the fact that they contracted solely on behalf of another bear the onus of establishing that the party with whom they were dealing was aware of the capacity in which they acted: *Clow Darling Ltd. v. 1013983 Ontario Inc.*, [1997] O.J. No. 3655 (Gen. Div.); *Nord Ovest Spa v. Gruppo Giorgio Ltd.*, [1994] O.J. No. 1657 (Gen. Div.).

- [62] The onus is on the defendant to establish that the plaintiff was aware at the time of contracting that the plaintiff was dealing with a limited company. See: *Pennelly Ltd. v. 449483 Ontario Ltd.*, [1986] O.J. No. 2672, at para. 31; *Watfield*, at para. 17; *Dhillon v. Stewart*, 2018 ONSC 4004, at para. 14; *Frittelli International S.P.A. v. Bhatti (Columbia Furniture)*, 2006 CanLII 60338, at para. 1; *Bercell Integrated Technologies Ltd. v. Chartrand*, 2013 ONSC 6539, at para. 9.
- [63] In my view, the Plaintiffs have proven that they believed that they were contracting with Mr. Topple personally, and that Future Perfect Construction was a registered business name for Mr. Topple's business. The contracts were prepared by Mr. Topple, and nothing in the contracts identified Future Perfect Construction as a corporation. The Drews were asked to make their cheques payable to Future Perfect Construction, not Future Perfect Construction Inc.
- [64] The Defendants have failed to establish that the Plaintiffs were aware that they were dealing with a limited company.
- [65] Accordingly, I conclude that Mr. Topple is personally liable for any damages resulting from the breach of contract.

### **Breach of Contract**

- [66] It is not unusual for construction jobs to fall behind schedule. In this case, the schedule was an estimate and not part of the contract.
- [67] It is not unusual for minor deficiencies to be identified as the construction project proceeds, and the builder must be given a chance to correct any deficiencies. Minor deficiencies do not necessarily constitute a breach of contract.
- [68] This case follows the familiar template identified by MacLeod J. in *Cornelis Grey Construction Inc. v. Folz*, 2018 ONSC 647, at para. 12:

As is often the case when construction contracts terminate in acrimony, the court was presented with two narratives. In one narrative, the homeowners were impossible to please, interfered with the management of the project, had unreasonable expectations, did not want to pay for extra work and refused to make payments that were due. In the other narrative, the contractor overpromised and under delivered. The quality of workmanship was shoddy, the project was improperly managed, significant structural errors were made in the work. There were cost overruns, delays and general incompetence. The parties each accused the other of dishonesty and the homeowners believe they were misled from the outset about the ability of the contractor to deliver what was promised.

- [69] The threshold question in a case such as this is to determine which party breached the contract. It is one thing if the homeowners were in breach so that the contractor was justified in abandoning the job. It is another if the contractor improperly abandoned a partly finished project: *Cornelis Grey Construction*, at para. 11.
- [70] The breach of contract in this case turns on the roof trusses in the dining room that blocked the cathedral window.
- [71] Neither Karen Miller (the Drew's designer) nor Kevin Hamilton (Mr. Topple's designer) were called to testify. As such, I am left to decide this issue on the basis of the computer-generated photo of the cathedral ceiling in the September 18, 2017 contract.
- [72] As indicated above, the roof trusses blocking the cathedral window appear to be an obvious construction flaw and are inconsistent with the photograph of the cathedral ceiling in the contract. This error was the contractor's fault and should have been corrected by the contractor at no additional cost to the owner. This error had to be fixed before construction continued. Mr. Topple took the position that he was not responsible for this error and refused to fix the roof trusses unless the Drews agreed to a change order and pay an additional \$21,248. This was a breach of the September 18, 2017 contract. The Drews were within their rights to refuse to pay extra to have this construction error fixed, and Mr. Topple was in breach of the contract by failing to fix the trusses and complete the construction after June 2018.
- [73] The Drew's allegations of pre-contract misrepresentation are, in this case, irrelevant. It may well be that Mr. Topple exaggerated his prior home-building experience. He was, for example, unable to identify the location of the ten houses he claimed to have previously built. In any event, it was Mr. Topple and Future Perfect who breached the contract, and the Plaintiffs are entitled to damages. The damages are the same whether there was pre-contract misrepresentation or not.

### **Damages**

- [74] As a result of this breach, Mr. Topple is liable for the damages. Damages include the cost of completion of the work that was within the scope of the contract but not completed and

the cost of repairing the work that was deficient. The damages are equal to the costs to complete the construction and repair the deficiencies to the extent that those costs exceed the balance of the original contract price.

- [75] Damages for breach of contract are assessed on the basis that damages should place a plaintiff in the same position as if the contract had been performed, provided that they arise naturally from the breach or are in the reasonable contemplation of the parties: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 27; *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 36.
- [76] “The court must be persuaded that the expenses incurred by the homeowners were reasonable and necessary to complete the contract and rectify the damage.”: *Cornelis Grey Construction*, at para. 15.
- [77] The Drews testified that the costs to complete the parts of the house within the scope of the contract were \$497,474, which includes the costs of correcting the deficiencies identified in the inspection report.
- [78] In addition to these costs, the Drews estimated that there are approximately \$96,972 costs remaining to complete the house.
- [79] In addition, the Drews estimate that their family’s personal labour to complete unfinished components of the house over a 17 month period from July 2018 to November 2019, at 45 – 75 hours per week and \$30 per hour was \$133,200.
- [80] These three amounts added together equal \$727,646.
- [81] Up to June 2018, the Drews had paid Mr. Topple a total of \$303,662 of the total (amended) contract price of \$487,353. Had Topple completed the project the Drews would have paid him an additional \$183,691, which must be deducted from any amounts paid to other contractors after Mr. Topple stopped work in June 2018.
- [82] This results in a total claim of \$543,955 in damages for additional construction costs to complete the scope of work in the contract.
- [83] The many hundreds of receipts and invoices to support these payments were introduced through the evidence of the Plaintiff Evelyn Drew. Many of the invoices do provide sufficient information to identify the service or goods provided.
- [84] Although Ms. Drew testified that the receipts and invoices related only to work within the scope of the contract and she could confirm that each of the payments were made, she did not know what individual receipts or invoices were for. She testified that she was given the invoices by Mr. Drew, and she paid them. She did not understand what the items on the receipts referred to, although they are categorized in the Scott Schedule.
- [85] For example, there are numerous Visa receipts for purchases made from Canadian Tire, Lowes, Rona and Home Depot. Ms. Drew was not sure what they were for, and it was

possible that they related to items such as plumbing fixtures, deck supplies and other items that were not within the scope of the contract. These receipts total \$29,058.60. Given Ms. Drew's inability to confirm the purpose of the purchases reflected in the receipts, I will deduct this amount from the total damages.

- [86] There are a few inconsistencies in the Plaintiffs' "Scott Schedule", which was prepared by Adam Drew and relied on by the Plaintiffs to calculate damages.
- [87] For example, the contract provided that the contractor was responsible for excavating the area for the septic tank and bed, but the owner was responsible for purchasing and installing the septic tank. The Drews have included an invoice for \$25,000 from Durham Septic Tank Service to supply and install the septic tank and to back fill the excavated area. The Scott Schedule includes a cost of \$7,000 for "excavation only - Total cost was \$25,000", but it is not clear where this \$7,000 figure came from. The amounts paid by the Drews to Durham Septic Tank all appear to have been paid in October/November 2017, before there was any breach of contract by Mr. Topple. Accordingly, I will deduct this claim for \$7,000 from the total.
- [88] The Scott Schedule includes a charge of \$12,028 for Ontario ICF Blocks dating from December 5, 2017. Under the amended contract of January 19, 2018, the customer was responsible for the supply of ICF blocks. It is not clear why this charge appears in the Scott Schedule. Accordingly, I will deduct this \$12,028 from the total.
- [89] The Scott Schedule includes invoices for approximately \$21,000 from Pearly Gates Homes for framing work done in July and August 2018. This amount includes \$2,458 in HST, which should not be included.
- [90] The Scott Schedule also includes additional invoices for \$9,816 for framing from Just Us Contractors Inc. in November 2018 and February 2019 to, *inter alia*, fix framing deficiencies. Ms. Drew did not know what framing deficiencies were being fixed in November 2018 or February 2019, and whether these were deficiencies caused by Future Perfect or deficiencies in the work of Pearly Gates Homes. Accordingly, I will deduct \$9,816 from this category.
- [91] The Defendant also challenges some of the estimates obtained to complete certain features. For example, one invoice includes the cost of building a 50-foot retaining wall (\$14,633), but the original plan called for only a 24 foot retaining wall.
- [92] Most problematic is the Plaintiffs' claim for \$133,200 for "personal labour", which included the labour of Mr. and Mrs. Drew and their three children, who were 21, 17 and 12 years old at the relevant time. At the claimed price of \$30.00 per hour, this equals a total of 4,433 hours of work. Ms. Drew was not entirely certain what work was done by the family but indicated that she believed it included framing, parging, drywalling and installation of baseboard. They also hired contractors to perform this same work and have included that cost in their Scott Schedule. No time sheets were kept by the family members. The baseboards were not within the scope of the contract. Ms. Drew testified that some of

the framing and parging work was done by Adam Drew while she held the ladder. It is not clear what the three children did.

[93] In my view, this evidence is not sufficient to support the claim for personal labour, and I would not allow any amount for that.

[94] Based on the evidence provided, I have concluded that the following claims for completion of unfinished work and repairing deficiencies should be included in the damages awarded:

- 1) Portable Toilets: \$3,027.00
- 2) Frost Protection: \$3,627.00
- 3) Engineering/Inspections: \$5,796.00
- 4) Grading and Foundation: \$51,177.00
- 5) Framing/Steel/Structure: \$93,120.00
- 6) Insulation: \$36,277.00
- 7) Electrical: \$49,865.00
- 8) HVAC: \$18,958.00
- 9) Soffit/Facia/Eavestrough: \$15,000
- 10) Mason: This category is related to the supply and installation of stone for the exterior of the home, The original contract price was “\$50,000 – fee subject to change depending on type of stone Customer choses”. The Plaintiffs claim \$141,653 for the exterior finishes, the bulk of which (approximately \$90,000) is comprised of 3100 square feet of Permacon Lafitt Stone and 1900 square feet of Permacon Black Brick. I did not receive any evidence as to the relative cost of this type of stone. Given that the final price for stone in the contract was subject to change depending on the type of stone chosen, I will not allow more than the original contract price for this category: \$50,000.
- 11) Drywall: \$42,200.
- 12) Natural Gas/Fireplace Installation: \$5,289
- 13) Deduction for unidentified Canadian Tire, Lowes, Rona and Home Depot Visa receipts: \$29,058.

**Total:** \$345,278.

[95] The Plaintiffs filed a number of estimates that they say relate to work within the scope of contract that is yet to be completed. This includes the 50 ft retaining wall referenced above.

Again, in the absence of expert evidence it is sometimes difficult to assess whether all the work is within the scope of the contract. For example, the work includes an estimate for \$33,764 for basement waterproofing, which is not clearly within the scope of the original contract. While there is some evidence of water damage in the Drews' basement, there was no expert evidence to suggest that this water damage was caused by any deficiency in the construction.

[96] Based on my reading of the contract, I will allow for the following amounts for future work:

- 1) Walk-out patio: \$3,909
- 2) Cathedral Ceiling: \$7,300
- 3) Retaining Wall: \$6,000
- 4) Additional insulation: \$14,700

**Total:** \$31,909

[97] Thus, the total damages for the cost of completion minus the cost of the balance of the original contract price equals \$193,496 (\$345,278 + \$31,909 - \$183,691).

[98] The Drews have also claimed damages for lost income, general damages, and punitive damages. I will deal with each of these in turn.

### **Lost Income**

[99] Mr. Drew testified that in 2019 he lost his job due to stress and work he had done on the home, and was out of work for 2 years between 2019 and 2021. He claims lost income in the amount of \$200,000.

[100] I would not grant any damages under this head of damages for several reasons. Firstly, a claim for lost income is not pled in the Statement of Claim. It is crucial that the pleadings give notice to the defendant of the case they have to meet: *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, at para. 42.

[101] Second, I am not persuaded that the loss of Mr. Drew's job in 2019 was directly related to or caused by the breach of contract in 2018. It was unclear whether Mr. Drew was dismissed or took a voluntary leave of absence. No documents relating to his employment termination were filed as evidence.

[102] Third, I am not persuaded that Mr. Drew leaving his job was a reasonably foreseeable consequence of the breach of the construction contract. The test is objective, and "the inquiry is whether, as a general matter and objectively viewed" lost income "is a type of loss that foreseeably and naturally arises 'according to the usual course of things' from the breach", in this case, of a home construction contract: *Saramia Crescent*, at para. 39.

Objectively viewed, a home construction contract does not contemplate that the plaintiff will lose his job if there are construction delays, deficiencies or even if construction is abandoned. These damages are too remote and not compensable for the breach of contract that was alleged. This type of loss could not have been within the contemplation of the parties when the contract was executed: *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, at paras. 138 – 139, 141.

[103] Finally, no evidence was filed to support the amount claimed. Mr. Drew did not, for example, file his tax returns to show how much income he made in the years preceding the breach of contract, or how much he earned in the 2 years between 2019 and 2021 when he was unemployed.

### **General Damages**

[104] The Plaintiffs claim general damages for emotional distress and pain caused by the breach of contract. In this regard I adopt the analysis of MacLeod J. in *Cornelis Grey Construction Inc.*, at para. 75:

The homeowners have asked for general damages for aggravation and mental distress. Damages for mental distress, hurt feelings, annoyance and disappointment are not recognized in Canadian contract law unless the parties have specifically contracted for peace of mind or it is a contract in which mental distress was specifically contemplated by the parties as a likely consequence of the breach of the contract. Contracts for home repair and renovation are not “peace of mind” contracts, and even if the homeowners could make an argument that mental distress was contemplated by the parties, any distress would have needed to be proven to be of such an extent that compensation is warranted. *Turczinski Estate v. Dupont Heating & Air Conditioning Ltd.* (2004), 2004 CanLII 35549 (ON CA), 191 O.A.C. 350 (C.A.), at paras. 26-30; *Mellor v. Kiddle Karpentry*, 2010 ONSC 4318, at paras. 36-38.

[105] See also: *Fidler*, at para. 45:

In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit.

[106] Accordingly, I decline to award any damages for emotional distress.

### **Punitive Damages**

- [107] The Plaintiffs seek an award of \$100,000 for punitive damages for Mr. Topple’s “deception, misappropriation of funds, ongoing fraudulent misrepresentation of his identity and false and misleading marketing about his company.”
- [108] Punitive damages are an extraordinary remedy. The Supreme Court has held that they should receive “the most careful consideration” and their award “should be most cautiously exercised”. Further, “conduct meriting punitive damages awards must be ‘harsh, vindictive, reprehensible and malicious’, as well as ‘extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment’”: *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para. 68.
- [109] In *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, the Court of Appeal stated, at para. 59:

Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant’s conduct has been “malicious, oppressive and high-handed” and “represents a marked departure from the ordinary standards of decent behaviour”, see *Whiten*, at para. 36.

- [110] As indicated at paras. 66 - 68 above, the allegations in this case were not unusual or exceptional. While the Defendants did breach the contract, the Plaintiffs have not proven that the case “represents a marked departure from the ordinary standards of decent behaviour”.
- [111] Moreover, punitive damages are awarded only where compensatory damages are insufficient to deter the conduct at issue. In my view, the measure of damages for breach of contract, combined with the imposition of personal liability on Mr. Topple, is sufficient to deter the conduct at issue. This is not an appropriate case for punitive damages in addition to the damages for breach of contract.

### **Conclusion**

- [112] Judgment is granted in favour of the Plaintiffs in the amount of \$193,496, payable by both Defendants on a joint and severable basis.
- [113] The Defendants’ counterclaim is dismissed.

### **Costs**

- [114] While the Drews were self-represented at trial, they did have legal representation for much of the litigation process. They claim full indemnity cost of \$97,845. Putting aside the question of whether costs should be awarded on a full, substantial or partial indemnity basis, the costs claimed appear to relate both to the action against Mr. Topple and Future Perfect, and to the action against Town Brewery, which was settled. The Plaintiffs are not entitled to costs in relation to the Town Brewery litigation or settlement, although I understand that it may be difficult to untangle certain aspects of the two cases. Other

aspects of the claim, such as the time spent settling the claim with Town Brewery, are clearly severable.

- [115] The Drews have advanced their legal costs as “damages”, which is not how legal costs are calculated, see Rule 57.01 of the *Rules of Civil Procedure* and *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA), at para. 26:

The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates... Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

- [116] Accordingly, the parties are requested to make costs submissions in accordance with the principles set out in Rule 57.01. These costs should not include any amounts related exclusively to the litigation against Town Brewery.

- [117] The Plaintiffs shall serve and file their costs submissions, not to exceed 3 pages plus costs outline and any offers to settle, within 20 days from the release of this decision. The Defendants may serve and file their responding submissions on the same terms within a further 20 days.

---

Justice R.E. Charney

**Released:** January 16, 2025

**CITATION:** Drew v. Topple, 2025 ONSC 367

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ADAM DREW and EVELYN DREW

Plaintiffs

**– and –**

AARON TOPPLE o/a “FUTURE PERFECT  
CONSTRUCTION”, FUTURE PERFECT  
CONSTRUCTION INC., and TOWN BREWERY INC.

Defendants

---

**REASONS FOR DECISION**

---

Justice R.E. Charney

**Released:** January 16, 2025