

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D133/2010

CATCHWORDS

Terms of contract, pre-existing damage - whether subsequent contractor liable for pre-existing damage.

APPLICANT	Tony Lombardi t/as Tony Lombardi Building Services
RESPONDENT	Graham Kenneth McDonald t/as Graham McDonald Bricklaying
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	7 May 2010
DATE OF ORDER	3 June 2010
CITATION	Lombardi trading as Tony Lombardi Building Services v McDonald trading as Graham McDonald Bricklaying (Domestic Building) [2010] VCAT 972

ORDER

1. The Respondent is to pay the Applicant \$1,828.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

- For the Applicant: Mr Lombardi in person.
For the Respondent Mr McDonald in person.

REASONS

- 1 The Applicant claims \$10,000 against the Respondent in relation to bricklaying work undertaken by the Respondent on two properties constructed by the Applicant in Sunshine West. The claim made by the applicant comprises several elements as follows:

Rectification of defective brickwork in relation to Lot 39:	\$8,000
Rectification of defective brickwork in relation to Lot 40:	\$2,000
Cost of additional bricks:	\$1,160
Bricks left over:	\$580
Additional sand and cement	\$150
Bin hire:	\$1,208
- 2 The applicant says that he abandons so much of his claim as exceeds \$10,000.

THE EVIDENCE

- 3 The Applicant, Mr Lombardi, was the builder of two residential adjoining dwellings located in West Sunshine. Construction of the dwellings commenced in September 2008. At that time, Mr Lombardi had engaged bricklayers to commence the brickwork. Those bricklayers constructed the base brickwork, garage façades and eastern wall of both garages. The brickwork was then left to allow Mr Lombardi to construct the timber frame and roof. The brickwork around the garage was left toothed for later connection.
- 4 Following the completion of the frame, Mr Lombardi was unable to secure the services of the original bricklayers and consequently contracted with the Respondent, Mr McDonald, to complete the brickwork on both dwellings for a price of \$5,000.
- 5 Mr Lombardi stated that he first met Mr McDonald on 9 November 2008 at the building site to go over the job.
- 6 Mr Lombardi said that Mr McDonald told him at that meeting that the existing brick gauges were not of a standard gauge that he ordinarily used. According to Mr Lombardi, Mr McDonald had said that over a 3 metre height, the brick course would be out by 20 mm.
- 7 Mr Lombardi said that he told Mr McDonald that he should commence laying the new brickwork from each end of the garages, being the front of the two dwellings. He said that commencing the new brickwork from the existing brickwork gave an existing level point. Mr Lombardi said that the purpose of this was to pick up or adjust for the 20 mm out of level brick course over the length of the dwellings. In other words, Mr McDonald was required to humour out the discrepancy over the run of the perimeter brickwork.

- 8 Mr Lombardi gave evidence that Mr McDonald commenced laying the new brickwork from the rear of dwellings with the result that the bed joints did not align when they reached the existing brickwork. Mr Lombardi relied upon a report prepared by Tony Croucher from Buildspect dated 2 April 2009 in order to substantiate his contention that the brickwork undertaken by Mr McDonald was defective. Mr Croucher was not, however, called to give evidence in the proceeding.
- 9 Nevertheless, the observations made by Mr Croucher in his report are summarised as follows:
- a. Brickwork to the northern wall of the garage measured along the bed joint is 12 mm out of level over 1700mm.
 - b. Brickwork to the right hand side or west side of the entry door is out of alignment 30 mm to the brickwork on the west wall of the garage over a distance of approximately 1400mm.
 - c. Bed joints on the right hand side of the doorway have been ‘squeezed’ down to approximately 5mm in thickness from a nominal 10 mm in thickness in an attempt to align the brickwork.
 - d. Perpend and bed joints varied in width.
 - e. Brickwork bed joints at the left side of the entry door do not align at the internal corner between the garage wall and entry.
 - f. A bulge or bow is apparent in the brickwork to the left side of the entry door of approximately 5mm over 700mm or eight courses of brickwork.
 - g. Brickwork bed joints at the entry are out of alignment by approximately 20 mm in an attempt to align the bed joints between the east side of the house and the east side of the garage wall.
- 10 Mr McDonald denied that he commenced laying the brickwork from the rear of the dwellings. He relied upon a report prepared by *Building Advisory and Consultancy Services* dated 12 May 2009 to substantiate his position that the quality of the finished brickwork was largely dictated by the condition of the existing brickwork. The author of that report was Peter Hyndman. Mr Hyndman was called to give evidence in the proceeding. Mr Hyndman adopted what he had set out in his report as his evidence in the proceeding. Mr Hyndman responded to matters raised by Mr Croucher in his report. In essence, Mr Hyndman substantially agreed with the observations made by Mr Croucher in his report as to defective state of the finished brickwork. In particular, Mr Hyndman stated in his report that:

I used a builder’s dumpy level to take levels across the front of the house and down the east wall of the Garage and this confirmed that of the 1st bricklayers work was out of gauge and/or level and confirms the generality of Mr. Croucher’s findings in respect to level deviations. [emphasis added]

- 11 Mr Hyndman was of the opinion, however, that the defects now present were unavoidable because it was practically impossible to harmonise the existing brickwork so that the bed joints could be evened out and aligned. He stated:

If all the existing defects being known before McDonald commenced his part of the work, I am of the view that a reasonable person having a modicum of bricklaying expertise would have known that the discrepancies would eventually show up, as has happened, at some point in the work no matter how skilful the layer.

I am of the further view that if the builder had properly investigated the full extent of the defects in the original work before instructing McDonald to commence and if he was a prudent builder, he would have required the original work to be demolished and reconstructed.

- 12 Mr Lombardi gave evidence that several attempts had been made by Mr McDonald to rectify misaligned brickwork, however, that resulted in brickwork being out of level. Mr Lombardi said that this was because Mr McDonald had only used two panels of brickwork to pick up the difference in the alignment of bed joints.
- 13 Mr Lombardi gave further evidence that similar problems existed with the brickwork on Lot 40 but to a lesser extent. No independent expert evidence was given as to the state of the brickwork on Lot 40 and no reference was made to that dwelling in the report of Mr Croucher or the report of Mr Hyndman.
- 14 Nevertheless, I was shown photographs of the brickwork on both Lot 39 and Lot 40, which generally substantiated the evidence of Mr Lombardi.
- 15 Mr McDonald gave evidence that \$1980 had not been paid by Mr Lombardi in respect of Mr McDonald's last invoice. Mr Lombardi did not dispute that evidence.

LIABILITY

- 16 The central question for determination is whether Mr McDonald is liable for the finished state of the brickwork in circumstances where the expert evidence of Mr Hyndman is that no competent bricklayer could have reasonably aligned the level of the bed joints from one side of the house to the other; given the state of the brickwork performed by the original bricklayers. In other words, the dispute between the parties is not whether the state of the finished brickwork is acceptable but rather, whether Mr McDonald is responsible for the finished state of the brickwork.
- 17 Having considered Mr Hyndman's evidence, it is not entirely clear to me that the brickwork undertaken by the first crew of bricklayers could not have been corrected by Mr McDonald during the course of his work. Mr Lombardi was certainly of the view that the subsequent brickwork could

have corrected deficiencies in the initial brickwork. Mr Lombardi gave evidence that he had been the builder for 30 years and on that basis contended that he had the requisite qualifications to make that statement.

- 18 Ultimately, however, the question may be resolved on another basis. In particular, the evidence of Mr Lombardi was that the parties discussed the state of the pre-existing brickwork before the contract with Mr McDonald was entered into. This evidence is consistent with what Mr Hyndman has stated in his report. In particular, Mr Hyndman states:

Prior to commencement, the Builder instructed Mr McDonald that the East wall of the Garage had been laid some 20mm out of level by the 1st bricklayer and that MacDonald was required to humour out the discrepancy over the run of the perimeter brickwork.

Other defects were subsequently discovered that the Builder had failed to inform Mr. MacDonald about. These defects only became obvious as MacDonald's work progressed and were of such an extent as could not be concealed.

- 19 Mr Hyndman gave very little evidence as to the *other defects*, although he said that some of base brickwork and existing garage wall brickwork was uneven or out of level. Mr Lombardi said that the state of the existing brickwork was known to Mr McDonald because he inspected the project before giving his quotation.
- 20 It seems to me that the agreement between the parties required Mr McDonald to harmonise the differences in the bed joints so that the bed joints would align when the two sides of brickwork met. Although it may have been the case that Mr McDonald was not told about all of the defects in the existing brickwork, he nevertheless had the opportunity to inspect the state of the existing brickwork before entering into the agreement with Mr Lombardi. There is no evidence before me that the agreement between the parties contained a term that relieved Mr McDonald of responsibility to produce an acceptable finish of brickwork, despite the condition of the existing brickwork. In other words, I find that Mr McDonald took on the project "warts and all", with the promise that he would produce an acceptable brickwork finish. Had he believed that the quality of his work would be compromised by the state of the existing brickwork he could have protected himself by insisting on a term that would limit his liability. There is no evidence of the parties ever having discussed such a term.
- 21 Further there is no evidence to suggest that the existing brickwork suffered from latent defects; that is, defects that could not be discovered by careful inspection. Indeed, the further defects referred to by Mr Hyndman were discovered by him, following his inspection of Lot 39.
- 22 Accordingly, it seems to me that the question as to whether or not Mr McDonald could have completed the bricklaying works to an acceptable

standard, given the state of the existing brickwork is, largely, beside the point. I find that the terms of the contract between the parties imposed an obligation on Mr McDonald to complete the brickwork to an acceptable standard, notwithstanding any deficiencies in the existing brickwork. I find that the agreement between the parties was that Mr McDonald would harmonise deficiencies in the existing brickwork so that those deficiencies would be relatively unnoticeable in the finished work.

- 23 I therefore find that Mr McDonald is responsible for the state of the finished brickwork. The next question is what it is the appropriate measure of damage.

DAMAGES

Rendering work

- 24 Mr Lombardi gave evidence that in order to mitigate his loss, he partially rendered the brickwork to cover over deficiencies in that work. Mr Hyndman gave evidence that this was a prudent and reasonable course to adopt, although he disagreed as to the extent of rendering undertaken by Mr Lombardi.
- 25 Mr Lombardi gave evidence that the cost to partially render Lot 39 was \$8,000. He produced an invoice from Con Petrakos dated 2 July 2009, which related to rendering and associated works to substantiate that expense. By contrast, Mr Hyndman expressed the view that only 30 m² of rendering was reasonably required to cover over the defective brickwork on Lot 39. In his report, he identified the relevant areas as:

On the basis that the adjoining Unit is partially rendered without any real detriment to its appearance, I have no doubt that a full render treatment of the Garage walls on the North elevation over the Garage door lintel and side piers, the South wall surrounding the Garage Pedestrian Door up to the adjoining house East wall, the East wall (possibly) and the section of brickwork from the front North West pier to the internal reveal of the front wall beside the Entry door on the West elevation of the Garage would certainly serve to conceal the most obvious defects incorporated in the 1st bricklayer's defective work particularly where it abuts MacDonald's acceptable work.

- 26 He estimated that the rendering would account for a cost of between \$1,000 and \$1,250 plus GST but excluding other margins. However, Mr Hyndman's evidence only related to Lot 39. He said nothing as to how much rendering was reasonably required in respect of Lot 40.
- 27 Mr Lombardi gave further evidence that the cost of rendering Lot 40 was \$2,000. Mr Lombardi did not produce any documentary evidence substantiating the claim for \$2,000; nor did he call any witness to corroborate his own evidence.

- 28 There is a lack of evidence going to the issue of how much rendering is reasonable to make good the defective brickwork. In particular, it is not clear to me why there was any need to apply a 900 mm band of render around the perimeter of Lot 39. There was no render band applied to Lot 40, however, Mr Lombardi gave evidence that its brickwork suffered from the same defects as affected Lot 39 but to a lesser degree.
- 29 Nevertheless, and mindful as I am that under s53 of the *Domestic Building Contracts Act* 1995, I am to make an order which I consider to be fair to resolve the dispute between the parties, I conclude that the amount of rendering undertaken exceeded what was reasonable in order to cover over the defective brickwork. The question then remains what amount of rendering was reasonably necessary and what is the cost of that work.
- 30 During the course of the hearing, Mr Lombardi provided me with a dimensioned ground floor plan of Lot 39. According to that plan, the perimeter length of the west, south and east walls of Lot 39 (excluding the east wall of the garage and window/door openings) measure approximately 30.22 metres. Accordingly, the area of the 900 mm render band around that perimeter is approximately 27.2m^2 . I do not believe that the cost of this render work should be attributed to Mr McDonald because I am not satisfied, on the balance of probabilities that the rectification work reasonably required this work be done. In addition, the cost of rendering the whole of the garage east wall should not be attributed to Mr McDonald because he did not construct that brickwork. I calculate the area of that wall to be approximately 17.7 m^2 , assuming the wall to be 2.8 metres high.
- 31 Accordingly, I find that Mr McDonald is not responsible for approximately 44.9m^2 of rendering that has occurred. This area is calculated as follows:
- a. 900 mm render band: 27.2 m^2
 - b. East wall of garage: 17.7m^2
- 32 Mr Lombardi gave evidence that he was also required to render the brick sills because they were out of level. He produced photographs to substantiate this evidence; however, no expert evidence was adduced to support his evidence. Moreover, there was no mention of any defects in respect of the brick sills in the building inspection report of Mr Croucher. Although I accept, based on the photographs shown to me, that the brick sills may have been out of level, I am unable to say whether they were out of level to such an extent as to constitute a defect. In that respect, there is insufficient evidence before me to make such a finding.
- 33 Given the above, I accept that it was reasonable to render the garage walls on the north elevation over the garage door lintel and side piers, the south wall surrounding the garage pedestrian door up to the adjoining house wall (both externally and internally), the section of brickwork from the front north west garage pier to the internal reveal of the front wall beside the entry door.

- 34 As I have already indicated, Mr Hyndman has estimated that the amount of rendering reasonably required to cover over the defective brickwork is approximately 30 m². He has included the garage east wall in that calculation but has not included rendering the internal garage wall around the pedestrian door on the south side of the garage. In my view, it was reasonable to render that section of brickwork, as its appearance internally is the same as its appearance externally. I estimate that area to be approximately 2 m², based on the dimensions given in the ground floor plan and taking into account the door opening.
- 35 Therefore, if I exclude the east wall of the garage from Mr Hyndman's estimate of 30 m², the amount of rendering left is 12.3 m² (assuming that the area of that garage east wall is 17.7 m²). I then add a further 2 m² for the interior of the garage south wall around the pedestrian door making a total of approximately 14.3 m² of rendering was required for each dwelling in order to cover over the defective brickwork.
- 36 As previously indicated, I estimate that the area of render comprising the 900 mm perimeter band around Lot 39 amounts to approximately 27.2 m². In addition, Mr Hyndman estimated that the area of render work referred to above (including the garage east wall) is approximately 30 m². This does not include rendering the brick sills and the interior of the garage south wall. If I take into consideration that additional rendering, I estimate that approximately 60 m² of render was applied to Lot 39. If 14.3 m² of rendering was required to cover over the defective brickwork undertaken by Mr McDonald, that represents 23.8% of the total rendering undertaken. If the total cost of rendering was \$8,000, the amount of attributed to Mr McDonald is \$1,904. A similar amount can be allocated to Lot 40. That amounts to \$3,808.
- 37 Accordingly, I find that Mr Lombardi's loss attributable to Mr McDonald is \$3,808. From this amount, I deduct the amount outstanding to be paid under the contract between the parties, in the amount of \$1,980 and I find in favour of Mr Lombardi in the amount of \$1,828.

Additional sand, cement and bricks

- 38 Mr Lombardi produced four invoices in relation to sand and cement in the amount of \$196 and bricks in the amount of \$1,342 which he said was required for rectification of the brickwork or alternatively, additional materials requested by Mr McDonald but not utilised.
- 39 Mr Lombardi gave evidence that he had already purchased all of the required materials to undertake the brickwork but that Mr McDonald had advised him that more materials were required. He gave evidence that he ordered additional bricks but that only a small portion of those bricks were utilised leaving a substantial amount of bricks unused. Mr Lombardi claims the cost of the additional bricks and materials from Mr McDonald on two basis:

- a. bricks and sundries purchased but not used; and
 - b. bricks and sundries used to rectify defective brickwork.
- 40 In relation to the oversupply of bricks and sundries claim, Mr Lombardi contends that he acted on the advice of Mr McDonald to purchase the additional bricks and that such advice was erroneous causing him to purchase more bricks than reasonably required.
- 41 Mr McDonald gave evidence that he supplied all sundries and did not use the sand and cement allegedly supplied by Mr Lombardi. He further said that he had no obligation to supply or advise on the number of bricks required.
- 42 I look to the terms of the contract to establish whether there was any contractual obligation on Mr McDonald to estimate how many bricks or other materials should be supplied. Based on the evidence before me, I find that there is no such term in the agreement between the parties. Indeed, it seems that most of the bricks were purchased prior to Mr McDonald first visiting the site. Accordingly, I find that the relationship between the parties did not impose any contractual or other duty upon Mr McDonald to estimate or advise on how many bricks were required. Mr Lombardi retained control over the supply of bricks and sundries irrespective of whether advice was received from Mr McDonald or not.
- 43 I find that Mr McDonald is not liable for any costs thrown away by reason of the oversupply of bricks and associated materials, even in circumstances where Mr Lombardi may have relied upon erroneous advice as to what materials were needed to complete the project.
- 44 As to the cost of bricks and sundries to carry out repairs to brickwork, there is no evidence before me how many bricks were actually used to rectify the panels of brickwork that were demolished and then rebuilt by Mr McDonald in an attempt to rectify the brickwork. Similarly, there is no evidence as to what the cost of those materials may have been. Indeed the evidence before me was that only small section of brickwork was demolished and rebuilt. Given the lack of evidence substantiating this aspect of Lombardi's claim, I am unable to find that Mr Lombardi has discharged the evidentiary burden of proving this aspect of his claim and I disallow this part of his claim.

Bin hire to clear site

- 45 Mr Lombardi also claims for the cost of clearing the site in the amount of \$1,280, which relates to the hire of a bin. Mr Lombardi gave evidence that Mr McDonald left the building site in an unacceptable and messy state. He produced photographs showing the building site following completion of the brickwork by Mr McDonald.
- 46 Mr McDonald disputed this. He said that the photos were taken before his work was completed and did not accurately reflect what the site looked like when he left.

- 47 Mr Lombardi did not produce any documentary evidence to verify the cost of the bin hire. Although the photographs show the site in an untidy condition, it is not clear whether the rubbish depicted in those photographs would have filled an industrial bin, nor is any photograph evidence showing the bin.
- 48 In addition, it is not clear to whether the terms of the contract between the parties required Mr McDonald to leave the site clean or whether that responsibility lay with Mr Lombardi.
- 49 For those reasons, I find that Mr Lombardi has failed to discharge the evidentiary burden of proving this aspect of his claim and I disallow this part of his claim.

Carpenter fee to repair eaves.

- 50 Mr Lombardi gave little or no evidence to prosecute this aspect of his claim. There is nothing mentioned in either of the expert reports filed in the proceeding to indicate damage to the eaves. The carpenter was not called to give evidence as to what work he may have carried out or what he charged. Similarly, no documents were produced to verify that expenditure. Consequently, I find that Mr Lombardi has failed to discharge the evidentiary burden of proving this aspect of his claim and I disallow this part of his claim.

CONCLUSION

- 51 For the reasons given above, I determine that Mr McDonald is liable to Mr Lombardi in the sum of \$1,828 in respect of damages suffered by Mr Lombardi attributable to the acts or omissions on the part of Mr McDonald and I so order.

SENIOR MEMBER E. RIEGLER