

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1238/2015

CATCHWORDS

Domestic building, alleged defects and incomplete work, costing, Regulation 1507 certificate, variations, time extensions because of variations, termination of the contract, notification to the Municipal Building Surveyor, notification to the VBA.

APPLICANTS	Craig Kenneth Burleigh, Heather Burleigh
RESPONDENT	EWB South Morang Pty Ltd (ACN: 152 501 392)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATES OF HEARING	16 and 17 June 2016 in Melbourne. On site in Doreen on the morning of 5 September 2016 and in Melbourne afternoon. The afternoon of 19 October 2016 in Melbourne.
DATE OF ORDER	19 December 2016
CITATION	Burleigh v EWB South Morang Pty Ltd (Building and Property) [2016] VCAT 2113

ORDERS

- 1 The respondent must pay the applicants \$62,488.22 forthwith.
- 2 Interest and costs are reserved with liberty to apply.
- 3 Under s104 of the *Victorian Civil and Administrative Tribunal Act 1998* the applicant must pay Mr Basile \$750 for his attendance in answer to the summons issued by the Tribunal.
- 4 **I direct the Principal Registrar to:**
 - (a) **send a copy of these orders and reasons to the Municipal Building Surveyor, City of Whittlesea, 25 Ferres Boulevard, South Morang, Victoria 3752;**
 - (b) **draw his attention to paragraphs 59 to 86 of the Reasons; and**
 - (c) **provide the street address of the applicants' property.**

- 5 I direct the Principal Registrar to send a copy of these orders and Reasons to Mr Basile, C/- Altmann Associates, Office 4, 114 Evans Street, Sunbury, Victoria 3429.**
- 6 I direct the Principal Registrar to refer the file to the Victorian Building Authority under Clause 12 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* concerning the conduct of the relevant builder, engineer and Relevant Building Surveyor with respect to the brickwork defects described in paragraphs 58 to 85 of the Reasons.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Mr and Mrs Burleigh in person
For Respondent	Mr G Stanbrook, director

REASONS

- 1 The applicant-Owners, Craig and Heather Burleigh, own a home in Doreen. It was built for them under a contract with the respondent Builder, EWH South Morang Pty Ltd.
- 2 According to the Owners the contract was dated 19 March 2014, completion was to be in 300 days (which the Owners now calculate to be 15 April 2015), the contract price was \$241,432.30 and \$217,289.07 has been paid. If the Owners are correct, there would be \$24,143.23 still to pay if the work had been completed in accordance with the contract and on time.
- 3 The Owners claim that at the time the contract ended there were defects in the works to the value of \$98,624, incomplete or unsupplied items to the value of \$12,537 and that they are entitled to liquidated damages for delay of \$5,400; a total of \$116,561.
- 4 The Builder counterclaims for \$29,010.70, being the completion stage under the contract, which it agrees is \$24,143.23, plus variations. The Builder submits that all variations were agreed, and, with the exception of Variation 4 for soil removal, all were signed.
- 5 The Owners appeared for themselves and Mr Stanbrook, director of the Builder, appeared for it. The Owners filed a preliminary report of Mr Jeffrey Beck dated 9 November 2015. Mr James Campbell's report of 28 April 2016 was filed by the Builder. These experts gave evidence concurrently on 16 June 2016.
- 6 At the end of the second day of hearing, 17 June 2016, both parties were given the opportunity to file further expert reports concerning engineering aspects of the Owners' claim. The Owners filed a report of Ogin Dawood of Ogin Dawood Structural & Civil Engineering, with a confirming report by Ross Dahal of Fusion Engineering Services, although I note that the Dawood report appears to do no more than attach the Dahal report.
- 7 The Dawood report appears to be in accordance with PNVCAT 2, Expert Evidence. The Dahal report does not contain or attach the statements necessary to make it compliant. No answering engineering report was filed by the Builder, but because of the importance of a Regulation 1507¹ certificate, and the need for a further evidence from the experts, the hearing was adjourned to a final half day hearing on 19 October 2016, and Mr Basile, the author of the Regulation 1507 certificate, was summoned to attend.
- 8 On 19 October 2016, in addition to the parties, Mr Basile attended in answer to the summons to witness. The Owners' experts, Mr Dahal and Mr Beck also attended. Mr Campbell did not.

¹ This is a regulation under the *Building Act 1993* that provides a certificate prepared by a class of people including engineers allows the RBS to rely on the adequacy of the design.

- 9 At the commencement of the hearing on 16 June 2016 Mr Burleigh stated that the home is now complete and has an occupancy permit. The completion work was mainly undertaken by external contractors, although the Owners undertook some work themselves.

TIME

- 10 I discuss time under the contract first, because it is an important element in determining which party breached the contract.
- 11 The contract date was 19 March 2014 with an allowance of 300 calendar days to complete the works.
- 12 Both Mr Burleigh and Mr Stanbrook gave evidence that, before adjustment of the contract period, the date for completion was to be 15 April 2015. Both parties agree that the Owners took possession on 24 September 2015.
- 13 The Owners claim \$5400 for late completion. I note that under item 9 of Schedule 1 to the contract, the Owners were entitled to agreed damages of \$150 a week for late completion of the work.

Time extension claims - variations

- 14 Mr Stanbrook said that there were five signed variations which entitled the Builder to 35 days of time extensions.
- 15 As discussed below, four of the five variations were signed by the Owners. It appears that the Builder has a standard formula for variations where every variation includes the words “This variation will add 7 days to the Contract Time.”
- 16 I find it difficult to accept that this is a genuine estimate of the delay caused by every variation, particularly where variations 2 and 3 were respectively “Delete Alfresco Concrete” and “Delete Concrete to Porch”. It is hard to imagine how these variations could have delayed the project at all.
- 17 Section 37 of the *Domestic Building Contracts Act 1995* (“DBC Act”) governs variation sought by the builder. Section 38 governs variation sought by the owner. In both sections there is a requirement that the builder give notice to the owner that:
- ... if the variation will result in any delays, states the builders reasonable estimate as to how long those delays will be;² [underlining added]
- 18 Although the Owners signed the four variations and in normal circumstances should be bound by documents they sign, I do not accept that variations 2 and 3 were reasonable estimates. Accordingly, I allow time extensions for variations 1 and 5 only, totalling 14 days.

² S37(1)(d) and s38(3)(a)(ii) respectively

Time extension claim of 20 August 2015

19 The Builder's Exhibit R3 was a "Notification of extension of time". It was dated 20 August 2015 and purported to be made under clause 34.1 of the contract. The period of time claimed was from 26 May 2015 and ongoing and the reason given was:

[The Builder is] issuing a extension of time notice from 26 May until the certificate of occupancy has been issued. The relevant building surveyor has stopped communicating with us and has only been communicating with yourselves. [The Builder has] put in a complaint to the VBA to try to resolve this so the CFO³ can be released. [sic]

20 The Builder gave no evidence about how the Owners are alleged to have prevented him from completing the works and obtaining an Occupancy Permit. Further, a notice given almost 3 months after the alleged delay period is said to have commenced is less than convincing.

21 As discussed below, I accept Mr Burleigh's evidence that the RBS told him that the Builder had never obtained a frame certificate and issued a building notice to stop further work until the frame was complete and certified. I attribute the delay in obtaining the Occupancy Permit to that cause.

22 I do not allow this extension of time.

Conclusion regarding time

23 I therefore find that the date by which the Builder should have completed the home was by 29 April 2015, being 14 days after 15 April 2015. At the date the Owners took possession, completion was 20 weeks and 1 day late. The agreed damages under the contract are \$150 a week which I calculate is \$3,021.43, which I allow.

END OF THE CONTRACT

24 As found in the previous paragraph, the job was significantly delayed when the Owners took possession, and the delay was caused by the Builder.

25 Mr Burleigh gave evidence that the building process was long and frustrating. He said that there were a number of occasions when completion of a stage of work was promised, and amounts were paid by the Owners but then the Builder would not perform. He said that before the frame was clad in bricks the Sisalation (reflective foil insulation) had started to rip.

26 Mr Stanbrook said in evidence that he booked the RBS to undertake an inspection for the Occupancy Permit on 21 May 2015 and the permit was issued on 24 September 2015. Later in his evidence, Mr Stanbrook said that the RBS came to site with an engineer on about 20 August 2015 to inspect and the Occupancy Permit was issued after that.

³ Presumably "certificate of occupancy" which was the previous description of an Occupancy Permit.

- 27 I accept Mr Burleigh's evidence that the Owners paid as and when requested until the last demand.
- 28 I accept Mr Burleigh's evidence that he sent Mr Stanley an email on 9 June 2015 in which he said, omitting the formal parts:

Hi Greg,

I have been out on site twice today and no-one is on site, as discussed via text last week.

This is now at a critical point and I'll be seeking legal advice.

This notice is to Homes North have all work completed in the next 10 working days as of today 9 June 2015.

If not completed I will be giving you notice to cancel the contract with Homes North as you are in breach of contract and I will provide evidence with the issue of notice.

I will be contracting a new builder to finish work not completed by Homes North and deducting all cost associated in finishing work, if costs are above what is required to complete the build it will be invoiced to Homes North. To be paid within 10 working days after completion.

Regards

Craig Burleigh.

- 29 Mr Burleigh said that Mr Stanbrook telephoned on 26 June 2015 to say that there would be a final inspection of the internal work. At that inspection the parties noticed that the main bathroom basin was scratched and there were no carpets and no appliances.
- 30 Mr Burleigh reported that Mrs Burleigh had been told there were "complications with the RBS". I accept Mr Burleigh's evidence that he spoke to the RBS and was told that there had not been a frame inspection and yet the house was nearing completion. He said this was when the building notice was issued and an engineering report (the Regulation 1507 certificate) was obtained to get the notice lifted. I accept Mr Burleigh's evidence that when the building notice was issued he had to engage directly with the RBS.
- 31 Mr Stanbrook said that he arranged for the Regulation 1507 certificate, he gave it to the Owners and they provided it to the RBS.
- 32 This Regulation 1507 certificate, which is dated 11 August 2015, is discussed in greater detail later.
- 33 Mr Burleigh said he was concerned about the Builder's performance, but also concerned that if the contract was ended it would be difficult to find another builder to complete. Mr Burleigh gave evidence that the Builder was demanding payment of the lock-up stage before the house had reached that stage and that around that time the garage was vandalized. Mr Burleigh said he concluded that the Builder had chosen not to undertake the works in

a timely and competent manner or in accordance with the display home that they had seen before they chose the Builder.

- 34 Mr Burleigh said that during the Builder's possession of the property the hot water service and ducted heating units were stolen and next day the back door was kicked in.
- 35 Mr Burleigh said that he and Mrs Burleigh drew the conclusion that Mr Stanbrook was avoiding their telephone calls. He said this was particularly frustrating when work did not seem to be progressing and the site did not seem to be adequately secured.
- 36 Mr Stanbrook said that if he did not answer his telephone then the instructions were to ring Sonia from his office and that he was not avoiding Mr Burleigh. Nevertheless, regardless of Mr Stanbrook's intentions, I find Mr and Mrs Burleigh's concerns about the difficulty in reaching Mr Stanbrook was reasonable. I also find, that if Mr Stanbrook was not trying to avoid telephone calls from Mr Burleigh, he did not communicate that adequately.
- 37 According to Mr Stanbrook, by September 2015 the RBS was apparently not communicating with the Builder and Mr Stanbrook sent a text to Mr Burleigh to say it was not the Builder's responsibility to obtain the occupancy permit.
- 38 I accept Mrs Burleigh's evidence that Mr Stanbrook told the Owners that the delay was the fault of the RBS. I also accept her evidence that after the Owners started proceedings in the Tribunal on 18 September 2015, Mr Daryl Gansburg, the RBS, said he would issue the Occupancy Permit once the "forms had been filled out".
- 39 Mr Burleigh said that he contacted the RBS to obtain the occupancy permit. He was told by the RBS that the occupancy permit had not previously been provided because the Builder had not paid the RBS. I note this is not evidence of whether the Builder had paid the RBS, but it is evidence of one reason for the Owners' understanding of why the occupancy permit was delayed.
- 40 Mr Burleigh said that on 24 September 2015 the Owners moved in. I accept his evidence that the Owners have never refused access to the Builder. He said that there was a mediation where the Owners thought the dispute had been resolved and the Builder was on site after that date.
- 41 Mr Burleigh said he believed the date by which the work should have been finished and the occupancy permit issued was 15 April 2015 but that the Owners did not have possession of the property until 24 September 2015.
- 42 Mr Stanbrook's evidence was that the Owners "broke in" and took possession and in consequence he sent a breach of contract notice. He said he did not tell the Owners to deal directly with the RBS, but that the certificates for the registered trades, such as electrician and plumber, which

are necessary for an occupancy permit to be issued were sent by his office to the Owners with his approval.

- 43 Mr Stanbrook sent the Owners an email on 3 October 2015 which commenced:

I'm putting you on notice that you are in Substantial Breach of the HIA Building contract between yourselves and EWH South Morang Pty Ltd and the final invoice needs to be paid by the 7 day, due date 8/10/2015.

- 44 These words were followed by a paste-in of clauses 38 and 42 of the building contract. Clause 38 obliges the Builder to hand over possession of the land together with keys and certificates when the Owner pays the final claim.

- 45 Clause 38.1 deals with the owner taking possession before payment of the final claimant without the builder's prior written consent. It entitles the builder to elect to:

- (a) treat the owner's action as repudiation and accept the repudiation;
- (b) give the owner a notice to remedy the breach or
- (c) accept the owner's action as a variation to omit work not already completed.

- 46 Clause 42 deals with breaches by the owner. Apart from demanding payment, the Builder made no election under clause 38.1.

- 47 Mr Burleigh's evidence was that he did not breach the contract by taking possession and he and his family did not break in. I accept his evidence and that of Mrs Burleigh, that the home had been left unlocked with broken doors and door locks, and the works appeared to be abandoned.

- 48 When Mr Stanbrook challenged Mr Burleigh and said "the locks weren't damaged, you broke in." Mrs Burleigh replied "you were in Mildura". Mr Stanbrook replied that he "owns a house around the corner", but I note that he also carries on business of supplying and installing carpet in the Mildura area. I prefer the evidence of Mr and Mrs Burleigh to that of Mr Stanbrook on this point.

- 49 I accept Mr Burleigh's evidence that the Builder had seemingly abandoned the works and, in any event, left the home unprotected.

- 50 I find that the Builder breached the contract by abandoning the works and that the Owners mitigated their loss by moving in and protecting the home.

ALLEGED DEFECTS

- 51 As stated above, the Owners claim \$98,624 for alleged defects and a further \$12,537 for incomplete or unsupplied items. The Builder's expert, Mr Campbell, estimates the cost to rectify and complete at \$15,648.43.

Hourly rates

- 52 Part of the difference in costing between Mr Beck and Mr Campbell is in the hourly rates allowed for trades and labour. Mr Campbell said that his rates are based on Rawlinsons Construction Cost Guide 2016. He said that there has been a downturn in construction costs over the last 12 months and that Rawlinsons is appropriate because of the relatively simple nature of the work costed.
- 53 Mr Beck's evidence was that he applied rates based on those actually charged by builders with a substantial practice in rectification and completion such as Longbow, Master Menders and Johns Lyng.
- 54 Their hourly rates are as follows:

Trade	Mr Beck	Mr Campbell
Labourers and cleaners	\$55	\$55
General trades	\$65	\$58.50
Bricklayer	\$65	\$58.50
Carpenter	\$65	\$55
Joiner	\$65	\$59
Glazier	\$65	\$57.50
Painter	\$65	\$57.50
Licensed and specialist trades		
Plumber	\$85	\$75
Electrician	\$85	\$64.50
Mechanical services	\$85	\$61.25

- 55 I prefer Mr Beck's rates because rectifying builders are notoriously hard to locate and expensive. I am also not satisfied that this is a simple job.

Allowances

- 56 Another difference in costing is that Mr Beck allows a 20% overhead and 10% profit, whereas Mr Campbell allows 10% for preliminaries and 10% for overhead and profit. I prefer Mr Beck's allowance, as rectification work is usually the most expensive work undertaken, but allow a single bundle of combined margins at 30% to which 10% GST is then added. The preliminaries allowed by Mr Beck relate to specific items such as builder's warranty insurance and crange. I discuss these items at the end of alleged defects.
- 57 Where I accept Mr Beck's allowance, I adjust the sums to take into account my use of a single 30% margin rather than 20% compounded by 10%, by dividing by 132 and multiplying by 130. Where I accept Mr Campbell's

calculations I adjust the hourly rates to be in accordance with Mr Beck's calculations.

Numbering

58 The following alleged defects are numbered in accordance with the Owners' Points of Claim, which reflect the numbering in Mr Beck's report, up to item 16.

Item 1. Structural defects - \$47,619

59 This is the most expensive aspect of the Owners' claim, and is also the greatest contributor to the preliminaries. Mr Stanbrook said he believed that concerns about the brickwork had been addressed and dealt with by the RBS.

60 Mr Beck identified matters of concern, although he commenced this section of his report:

There are several structural issues with the construction of the building that require inspection by a Structural Engineer.

61 Mr Beck identified:

- Bricks laid on edge on the strip footings, rather than flat;
- Brick piers apparently constructed after construction that may not have been constructed in a proper manner, particularly with respect to possible inadequacy of bed joints;
- Engaged piers apparently constructed after completion of the building. Photograph 7 in Mr Beck's report indicates that at least one of the piers might not be tied to the original brick work. It also appears to be too short to support the bearer above it, and a block of wood has been installed, and
- Damp proof course in north garage wall constructed above the finished floor level.

He also noted bounce in the entry hallway, which he found is consistent with inadequate support of the sub-floor in that area.

62 I note that the course of bricks laid on edge does not include the garage walls.

Bricks laid on edge

63 To give this issue context, the site slopes substantially, mainly from west to east. The subframe bricks on the east side are more than a meter high.

64 Mr Beck's opinion was:

If these items are found defective by an engineer, rectification of these items will require complete removal of affected brickwork and further support or 'lifting and packing' of the structural members of the sub-floor.

- 65 Mr Beck's costs are based on this methodology.
- 66 Mr Dahal expressed his concern that the way the first course of base bricks has been laid is neither "deemed to satisfy" under the Australian Building Code, nor an engineered solution.
- 67 Mr Dahal reported that the first course of base bricks are structural as they support not just the wall but also the house frame and therefore the roof. As well as being laid on edge, they have been laid dry, with no mortar between them and possibly below them. My inspection on site was inconclusive as to whether there is mortar below. There is certainly none between the bricks. Mr Dahal reported that they are three-core bricks, which have not been grouted.
- 68 Mr Dahal stated at paragraph 3.3 of his report:
- These edge faced bricks are not just external brick veneer, [they] are supporting engaged brick piers at sub-floor which subsequently supporting floor bearer, floor joists, ground floor wall and roof loads. In other words, loads from the roof has been transferred to the bedding bricks. [sic]
- 69 Mr Stanbrook asked Mr Dahal whether he had seen any distress. Mr Dahal referred him to the plans at Appendix B to his report. I note that the items under "distress index" are not items of distress, but rather, items of poor workmanship. Building distress is damage which occurs as a result of poor workmanship as well as due to other causes.
- 70 Mr Dahal's recommendation for rectification of the base bricks is at 4.1.1 and 4.1.2 of his report. At paragraph 4.1.1 he suggests attempting to rectify "by removing 3-number of edge faced brick in one meter centers" [sic] failing which demolition and rebuilding the brick work would be necessary.
- 71 I accept Mr Beck's opinion that, if rectification is necessary, only demolition and rebuilding of the brickwork is sufficient; Mr Dahal's possible solution of staged replacement is not.

Regulation 1507 certificate

- 72 Mr Campbell noted that Mr Basile, structural engineer, provided a Regulation 1507 certificate to the RBS. Mr Stanbrook said he arranged for the certificate when the Owners told him that it was necessary because they had been served with a building notice by the RBS.
- 73 The Regulation 1507 certificate related to an inspection on 3 August 2015 and was dated 11 August 2015. Somewhat surprisingly, the covering letter is dated "3rd August 2015", is addressed to an unnamed RBS, and the relevant parts are as follows:

Re Dwelling construction at ..., Doreen.

Subject: Brickwork

As requested by the Builder of the above new brick veneer dwelling on strip footings, Mr Greg Stanbrook of Homes North, an inspection was carried out on 2nd August 2015 to assess the structural integrity of the bottom course of bricks which have been laid transverse on edge.

My assessment is that considering that the brickwork is non-load bearing, the brick wall which has been constructed with the bottom course of bricks laid transverse on edge over strip footings is structurally sound and will not impact on the service life of the brick veneer wall. [Underlining added]

74 Mr Basile confirmed that the letter and certificate were his and said that he was aware that the part of the brick structure beneath the timber frame is load-bearing. He said the only unusual aspect of the wall was that the bricks were laid on edge and transversely. He said he believed that there was mortar beneath them and acknowledged that there was no mortar between them.

75 In the course of his cross-examination of Mr Basile, Mr Burleigh said:

Mr Basile told me that the brickwork was inadequate when I contacted him to see if I could use him as an expert. I believe it was after the first hearing in June.

Mr Basile replied:

Yes, I agree. I was only asked to look at the base course – I think that is structurally sound.

I am very concerned that an occupancy permit appears to have been issued in circumstances where the engineer, upon whose certificate the RBS has relied, does not consider the brickwork is adequate other than the base course.

76 I drew Mr Basile's attention to photographs in both the Beck and Dahal reports concerning the articulation joints. He agreed that some were insufficient and of no particular use although he said he did not know whether they did any harm. He emphasised again that Mr Stanbrook asked him to look at the base course only.

No apparent damage

77 I noted on site that there was no sign of any damage to the brick structure, but I consider that this observation of itself is not evidence that this somewhat unusually built structure will be adequate for the expected life of the building.

Brick piers

78 Mr Beck and Mr Dahal both expressed concern that the brick piers that should give stability to the single skin sub-floor walls and support the frame are not actually "engaged".

- 79 Mr Campbell remarked during concurrent evidence that photographs 7 and 8 of Mr Beck's report show a piece of timber about 200 mm high which sits between the top of an engaged pier and the bottom of a beam, presumably to support the beam. He said that it "should not be there". He also remarked that there should be tie downs fastened over the beams to connect them to the engaged piers and that these are not apparent.
- 80 Mr Campbell said that an appropriate allowance would be about \$1,000 for an engineer to check the adequacy of the piers and about \$110 to fix the tie downs and remove the temporary propping. Mr Beck agreed with Mr Campbell's allowance provided an engineer were to say that the engaged piers are adequate.
- 81 Mr Stanbrook said that he thought the block on top of the engaged pier was "not structural" and could be removed without any harm being done. Mr Beck said that this could be correct because there are two beams either laminated together or side-by-side, and the beam closest to the point of view from which the photographs were taken could be supported by the beam against the brick wall. However a close examination of photographs 7 and 8 in Mr Beck's report show that the block of wood is directly beneath the beam closest to the wall.
- 82 Mr Burleigh said that the floor joist had bowed by more than 10 mm and that Mr Stanbrook could have had the block of wood removed at any stage during construction. He said its presence was a matter frequently discussed between himself and Mr Stanbrook.
- 83 I asked Mr Basile whether he thought the piers were engaged. He said he had a "feeling that they are not". He said it was not what he was asked to inspect but that one would expect to see the ends of bricks placed laterally in engaged piers and he did not notice any.

Conclusion regarding walls and brick piers

- 84 I accept Mr Dahal's evidence that the method of construction of the base course of the brick walls is not in accordance with the Australian Building Code and neither is it an engineered solution. I note the Builder did not provide any evidence to the contrary. I am not satisfied that the Regulation 1507 certificate provided by Mr Basile relates to the totality of the brick work as he said that he was asked to restrict his opinion to the base course of the brickwork. I note that the articulation joints are inadequate in a number of places and that there is no evidence that the "engaged piers" are actually engaged.
- 85 Mr Campbell did not allow anything for rectification of "structural defects". In the absence of evidence from the Builder as to cost of reconstruction of the brick walls, I allow the Owners the amount calculated by Mr Beck, adjusted in accordance with paragraph 57 to be \$46,897.50.

Notifying the Municipal Building Surveyor and the VBA

86 The seriousness of this alleged defect cannot be overstated. Because of the potential danger to any subsequent owner of the home or a visitor to the home, I will direct the Principal Registrar to send a copy of these orders and reasons to the Municipal Building Surveyor, City of Whittlesea, and to refer the file to the Victorian Building Authority.

Damp proof course

87 Mr Beck alleged that the damp proof course in the garage is above the finished floor level.

88 I am not satisfied that the garage wall is defective and note that the Owners have painted a layer of waterproofing on the external north wall to enable earth to be laid against the wall. There is no allowance for this item.

Floor bounce

89 Mr Beck reported that Mr Burleigh told him there was bounce in the hallway floor.

90 Mr Dahal said at paragraph 3.5 of his report:

We are of the opinion that the bouncing floor was experienced by the owner mainly due to lack of proper support to the floor framing (missing brick Pier and engaged brick peer – which were constructed at a later stage – ...), timber post to support floor bearer ... bigger spacing of the brick Pier as compared to the engineering documentation provided ... and poor floor framing connection ... As advised to his office, the engaged brick piers and new brick piers were constructed after completion of the framing and roofing. [He went on to express concern about the brick piers].

91 Mr Campbell said during concurrent evidence that he did not notice significant bounce when he inspected the home and he noted that the Owners had installed a timber prop which might have ameliorated the bounce. He said he was instructed by the Builder that it had installed another temporary prop which was removed when an engaged brick pier was installed.

92 My own observations were that there was a little bounce in the hallway but that it was not excessive, however I note that a prop is still in place. I accept Mr Beck's evidence that it is necessary to remove the prop and replace it with something other than timber and allow \$2,500 for this item in accordance with Mr Beck's evidence.

93 In consequence of the orders concerning the brickwork, items 2, 4, 5 and 6 claimed by the Owners are not compensated individually as they will be rectified when the bricks are rebuilt.

Item 2. Subfloor ventilation - \$3,861

94 Rectification of this item will be undertaken when the walls are rebuilt.

Item 3. Subfloor ground levels - \$1,544

- 95 Mr Stanbrook said that there was nothing wrong with the subfloor grading but it appeared very uneven.
- 96 Mr Beck and Mr Campbell agree that the sub-floor ground levels need re-grading. The allowances before margins are \$1,080 by Mr Beck and \$628 by Mr Campbell. As Mr Beck said, the only substantial difference between them was Mr Beck allowed installation of an agricultural drain. Mr Campbell acknowledged the need for an agricultural drain, but was instructed by the Builder that this would have been done by the Builder with the site clean had the Owners not taken possession.
- 97 At the site inspection there was a little mud for a short distance inside the east wall, which is the lowest side of the subfloor. Mr Stanbrook pointed to a leaking waste pipe which he undertook to repair.
- 98 As I have found that the Builder abandoned the contract, the Owners are entitled to Mr Beck's estimate, adjusted in accordance with paragraph 57 to \$1,521.

Item 4. Unsealed penetrations in external walls - \$272

- 99 Rectification of this item will be undertaken when the walls are rebuilt.

Item 5. Articulation joints - \$729

- 100 Rectification of this item will be undertaken when the walls are rebuilt.

Item 6. Man hole to sub floor - \$365

- 101 Rectification of this item will be undertaken when the walls are rebuilt.

Item 7. Rear external steps from laundry and privacy screen - \$6,256

Rear steps

- 102 There are timber steps from the laundry to the ground. The experts agree that the steps each rise 160mm with the exception of the top riser, which is 175mm. They agree that this is a defect that must be rectified. Mr Campbell's opinion is that the structure can be reset, without the need for new materials, in 2 hours at a labour cost of \$110. Mr Beck's view is that the cost of demolishing the existing steps and installing new steps is \$3,250 before margin. He gave no break-down of labour and materials in his report, but in concurrent evidence with Mr Campbell, said that he thought the time required would be 4 hours.
- 103 I prefer Mr Campbell's evidence concerning the steps, but allow 3 hours, at \$65 per hour for the carpenter. The allowance is:

3 hours labour	\$195.00
Margin 30%	<u>\$ 58.50</u>
	\$253.50

Plus GST	<u>\$ 25.35</u>
	\$278.85

Privacy screen

104 The experts agree that the privacy screen at the stair landing is a piece of bracing board which is not fit for purpose. Mr Stanbrook’s evidence is that the temporary screen was installed because of a change of mind by the RBS. I note that the screen appears as a hand-written change to sheet 4 of the architectural drawings, but was also shown on the “fixed price quotation” which was Owners’ Exhibit A5 as:

Provide [timber] external Stairs (and appropriate screening if necessary) to laundry \$1100.

105 Mr Beck costs replacement of the screen at \$1,250, but he does not say what it is to be built of. Neither does he give a break-down between labour and materials.

106 I prefer Mr Campbell’s costings for a treated pine screen, which I find is appropriate given the allowance, but I allow 4 hours labour at \$65 per hour, to which I apply Mr Beck’s margins:

Labour and materials	\$4100.00
Margins- 30%	<u>\$123.00</u>
	\$533.00
Plus GST	<u>\$ 53.30</u>
	\$586.30

Item 8. Storm water - \$1,022

107 Mr Burleigh said he undertook a small amount of work for this item, and is not seeking recompense for it. In any event, I am not satisfied that the Builder’s work was defective. I accept Mr Stanbrook’s evidence that the storm water was constructed in accordance with plumbing regulations.

108 I make no allowance for this item.

Item 9. Painted concrete driveway - \$7,272

109 Both experts agree that that the driveway has been painted. Mr Beck said that the “concrete color was to be announced” but this does not appear in the specification. The fixed price quotation of 1 March 2014 includes “Provide one color concrete paving min 40m². See paving plan showing separate driveway to the side and path to the front”. The painting selection does not include any mention of a colour for the concrete. I therefore conclude that the concrete as laid was to be coloured, not painted.

110 At the on-site inspection I noted that the paint was flaking from the plain concrete driveway and it looked patchy. I find that painted concrete is not

an adequate substitute for the coloured concrete the Builder was obliged to provide.

111 Mr Campbell's evidence is that if removal and replacement of the concrete is necessary, removal can be done at \$35.80/m² and replacement at \$68.00/m². Before the addition of allowances, Mr Campbell's figure is \$3,736.80. Mr Beck allows 16 hours at \$65/hour for a contractor to remove 30m² of concrete, and \$115/m² to lay colored concrete; a total of \$5,199.76.

112 I prefer Mr Campbell's figures, with Mr Beck's margins.

113 Mr Campbell's allowance	\$3,736.80
Margins 30%	<u>\$1,121.04</u>
	\$4,857.84
Plus GST	<u>\$485.78</u>
	\$5,343.62

114 The Building must allow the Owners \$5,343.62 for this item.

Item 10. External Sliding doors - \$1,316

115 At the hearing on 5 September 2016 the parties agreed that the concrete pads that had been specified outside both sliding doors were deleted by agreed variation and that the treatment of those areas became a matter for the Owners. There is no allowance for steps or landings adjacent to the sliding doors.

Item 11. Mains gas line - \$122

116 Both experts agree that the mains gas pipe, which is plastic, needs to be protected from ultra violet light. However Mr Stanbrook gave evidence that the gas line was connected by the Owners' plumber after they took possession. The Owners did not disagree. I am not satisfied that this defect was attributable to the Builder, and make no allowance for it.

Item 12. Painting - \$8,044

117 Mr Beck reported that plaster joins and patched areas can be seen from a normal viewing position and that the painter has failed to seal the tops and bottoms of doors to wet areas. He concluded that the plastering and painting requires some sanding and a further coat in some locations, particularly to frame and doors.

118 At the hearing Mr Beck said the amount allowed includes painting for item 13 and painting the eaves after re-bricking.

119 Mr Campbell said he was instructed by the Builder that the work was incomplete, although he acknowledged "a number of issues with the finish of plasterboard and painting". Mr Campbell allowed \$2,949.98 which includes \$212, before application of margins, for preliminaries. His allowance was for the painter only and he allowed nothing for a plasterer.

- 120 At the on-site inspection I saw that the painting is a little uneven with some dribbles. Problematic areas include the entry to the TV room, the main bathroom beside the shower and the en-suite beside the vanity.
- 121 On the whole I prefer Mr Campbell's evidence regarding this item. However, rebricking is necessary, therefore the eaves will need to be repainted. I allow \$4,000 which I find is for painting defects and the consequence of making good the brick defects rather than incomplete paintwork. For the reasons given under item 13 below, there is no allowance for make-good paintwork after plaster rectification in the entry hall.

Item 13. Entry hall not straight - \$393

- 122 Mr Beck reported that the east elevation partition wall to the front entrance is beyond the relevant tolerance for straightness. The tolerances included in the 2007 *Guide to Standards and Tolerances* are that the wall should not be out of plumb or out of level by more than 4 mm over a distance of 2 m.
- 123 Mr Campbell said access to the area was unavailable because of furniture. I viewed the wall and did not see anything to satisfy me that the wall is beyond tolerances. I make no allowance for this item.

Item 14. Window privacy - \$3,518

- 124 Both Mr Beck and Mr Campbell reported that the bedrooms on the east side of the house had been painted to afford privacy to the neighbouring property. Paint was not apparent when I attended the site. Mr Campbell also reported that privacy film had been installed inside the windows, which Mr Beck agreed was the correct method of installation.
- 125 Mr Stanbrook said that the contract only called for privacy screening on one bedroom window and that it had been provided to other windows and that this amounted to a variation. I prefer Mrs Burleigh's evidence that sheet 2 of 9 of the plans shows a handwritten notation highlighted in yellow which requires all the windows on the east side to be obscured.
- 126 Mr Burleigh complained that the privacy film had been unevenly applied to the inside of the windows, had bubbles in it and was coming off. At the site inspection I noted that the privacy film was indeed bubbled and seemed to be detaching at top corners.
- 127 I am satisfied that the film on each of the windows on the east side needs to be replaced and in the absence of better evidence I allow \$100.

Item 15. Ducted heating - \$438

- 128 Mr Beck identified that there was one less register than designed, but the parties agree that its designed location is beneath a kitchen dresser, and it can be cut in if needed. I make no allowance for this item.

Item 16. Damaged vanity basin in main bathroom - \$829

- 129 Over a length of approximately 50mm there are a few fine nicks in the edge of the basin. Mr Stanbrook attempted to polish them out at the site inspection of 5 September 2016. He improved the appearance of the basin by removing some glue or similar product, but the nicks remain. He gave evidence that the problem could be fixed by a firm called “Bath Magic” for about \$100.
- 130 I am aware of such a firm that undertakes chip repair, but there is no evidence before me as to the price, given substantial travel time to the Owners’ home from many commercial locations.
- 131 I accept the evidence of Mr Beck and Mr Campbell in concurrent evidence that the basin can be replaced by a similar one for \$225. I allow \$225.

Preliminaries - \$15,024

- 132 As mentioned above, the allowance for preliminaries depends on the extent of work to be undertaken. As I have determined that the Owners are entitled to demolition and rebuilding of the brickwork, the preliminaries are substantial. Items include certification by a structural engineer, liability and contractors insurance, warranty insurance, temporary fencing, scaffolding for masonry works, allowance for safety and protection items, and allowance to terminate and re-establish services such as electricity. The year
- 133 I accept Mr Beck’s evidence about the nature and cost of preliminaries, subject only to the adjustment for margins in accordance with paragraph 57. I note that Mr Beck calculates the preliminaries according to the necessary items such as insurance and fencing, not as a percentage of the cost of the works.
- 134 The Builder must therefore allow the Owners \$14,796 for preliminaries.

Summary of defective works:

- 135 The Builder must allow the Owners, for defective works:

Brickwork	\$46,897.50
Remove and replace prop	\$2,500.00
Subfloor levels and drainage	\$1,521.00
Rear external steps	\$278.85
Privacy screen	\$586.30
Painted concrete driveway	\$5,343.62
Painting	\$4,000.00
Window privacy	\$100.00
Damaged vanity basin	\$225.00

Laminated flooring ⁴	\$150.00
Preliminaries	<u>\$14,796.00</u>
Total	\$76,398.27

ALLEGEDLY INCOMPLETE ITEMS

The Owners continued numbering as follows:

17.1 Hot water unit (removed from site) - \$2,750

136 The parties agree that the Builder was in control of the site at the time the hot water unit and the gas ducted heating unit were stolen. Somewhat surprisingly, Mr Stanbrook said that the Builder did not claim on its general insurance for this theft.

137 Mr Burleigh gave evidence that the Owners paid \$2,750 for the replacement hot water unit, and his evidence is supported by a receipt from Jaroco Investments Pty Ltd trading as Hot Water Professionals of 28 September 2015. I accept Mrs Burleigh's evidence that the item acquired was the same as the item called for in the specifications and that the thief who removed the hot water system also removed the solar tank and booster.

138 Mr Stanbrook gave evidence that the cost of the hot water unit which had been fitted to the home and was then stolen was \$840, but the Builder provided no supporting documentary evidence.

139 I allow the Owners \$2,750 for this item.

17.2 Range hood - \$659

140 Mr Burleigh gave evidence that the cost of the range hood was \$659, but it was not the originally specified Blanco WGG90X with curved glass, because Mr Burleigh said that this range hood was no longer available.

141 Mr Stanbrook gave evidence that the price for the range hood in accordance with his orders to the supplier, Bourne Bathrooms & Kitchen Centre, was \$455 plus GST (\$490.50), not \$659. This order was presented as Builders Exhibit R6 . It is less than conclusive evidence in circumstances where there is no indication that the supplier would supply for this price and the boxes for "authorisation" and "acceptance" have not been signed and dated.

142 In the absence of evidence about the comparability of the range hood which was acquired by the Owners from Harvey Norman on 25 September 2015 and the original specified, I allow the median point between the two prices being \$574.75. In making this allowance, I note that owners who are buying for themselves are unable to claim the trade discounts that builders can claim.

143 The Owners stated that the range hood had not been vented, but they did not provide a quotation for the cost to vent and no allowance is made for that.

⁴ See item 19.1 below.

17.3 Oven - \$3,850

- 144 Mr Burleigh gave evidence that the cost of the oven was \$3,850. Mr Stanbrook gave evidence that the price for the oven in accordance with his order to the supplier was \$1,920 plus GST, not \$3,850. The same considerations apply as for the previous item concerning the range hood.
- 145 Although I am satisfied that the Owners paid \$3,850 for their oven, I note the advice to Mrs Burleigh from Monaco Corp that the recommended price of the oven that was specified was \$3,499.
- 146 The Builder must allow the Owners \$3,499 for this item.

17.4 Dishwasher - \$878

- 147 The Owners claimed for a dishwasher and Mr Burleigh gave evidence that its cost was \$878. Mr Stanbrook said that the contract did not call for a dishwasher. Having regard to sheet 6 of 9 of the plans provided by the Builder, I note that View D of the kitchen plan shows the elevation which includes “DW Space”. View B, by way of comparison, shows a stove and range hood in place and “Ref Space” which is clearly for the refrigerator. View D also includes “M/W Space”, which is clearly a space for the microwave.
- 148 Mr Burleigh’s evidence was that the dishwasher was shown on page 43 of the original colour selection made after the deposit was paid, but before the contract was signed. I am not satisfied that the colour selection formed part of the contract. He also gave evidence that he read the contract, plans and specifications thoroughly.
- 149 It is somewhat surprising that a contract for a home of this nature would not include a dishwasher, but the drawings do not include it and neither do specifications. The only items under “White goods” are the oven and range hood.
- 150 I am not satisfied that the dishwasher was an item the Owners were entitled to receive under the contract and I make no allowance for it.

17.5 Gas ducted heating (Removed from site) - \$1,200

- 151 Mr Burleigh gave evidence that the cost of the gas ducted heating unit supplied and installed by the Owners was \$1,200. He said it had been stolen from site before they took possession and this had been reported to the Police.
- 152 Mr Stanbrook did not dispute the cost of the gas ducted heating unit.
- 153 I allow the Owners \$1,200 for this item.

17.6 Termite protection not done - \$1,200

- 154 Mr Burleigh said that termite protection had not been undertaken. Mr Burleigh said that as he is involved in termite protection professionally, he

insisted that it be included in the contract but did not notice that it was not in the specifications.

- 155 I accept Mr Stanbrook's evidence that termite protection is not required in this geographic area and was not called for under the contract.
- 156 I note Mr Burleigh's evidence that a pest controller attended site but that Mr Burleigh refused to allow him to undertake the job because Mr Burleigh was unsure of his accreditation to use the particular system.
- 157 I find that either termite protection was not a contractual term or Mr Burleigh prevented the Builder from undertaking termite protection. There is no allowance for this item.

17.7 Site clean - \$500

- 158 Mr Burleigh gave evidence that he undertook the site clean. He said that \$500 was the amount allowed for this item in the contract. Mr Stanbrook's evidence was that he undertook a site clean and that rubbish remaining on site was left by the fencing contractors who were engaged by the Owners. He said that some bricks were left on site but that was done in accordance with the request of Mr Burleigh.
- 159 Mr Burleigh acknowledged that he asked for bricks to remain, but he sought sound bricks, not broken ones. The Owners relied on a number of photographs which are Exhibit A6. I am not satisfied that the relatively small amount of debris left on site was because of any failure of the Builder.
- 160 Nevertheless, there was still some work to be undertaken after the Builder abandoned the job which would necessitate further removal of rubbish. In the absence of better evidence I allow \$100 for this item.

17.8 Plumbing installation including sundries - \$1,500

- 161 Mr Burleigh gave evidence that the cost of installation of plumbing items including the hot water system was \$1,500. The Owners did not have documentary evidence of the cost to them of plumbing installation, although, if undertaken as it was required to be, by a registered plumber, there would have been significant cost. It is also noted that the plumbing installation includes the dishwasher.
- 162 In the absence of better evidence, I allow \$1,000 for this item.

Summary of incomplete works:

- 163 I allow the Owners, for incomplete works:

Hot water unit	\$2,750.00
Range hood	\$574.75
Oven	\$3,499.00
Gas ducted heating unit	\$1,200.00

Site clean	\$100.00
Plumbing installation and sundries	<u>\$1,000.00</u>
Total	\$9,123.75

“MONTH MAINTENANCE ITEMS”

164 The Owners’ Points of Claim included two items that were not costed:

19.1 Laminated flooring poorly installed with visual signs of installation faults

165 There is a slight rise between two adjacent boards near the kitchen, and the cover strap between the hall and kitchen is approximately 40mm wide and 15mm high. Mr Burleigh expressed concern that when he visited site during flooring installation, it appeared to be being laid by an inexperienced person. Mr Stanbrook’s evidence was that it was laid by his son, who is a carpenter, and he assisted. He said there were no defects when they left site.

166 Although I find that the floor is generally acceptable, the cover strap is not. In the absence of better evidence I allow \$150 for a carpenter to overcome the problem of the cover strap. The allowance is higher than it otherwise might have been, because I have no way of knowing what is beneath the cover strap and how it can be properly rectified.

19.2 Carpet poorly installed with carpet lifting at entry points to all rooms and lumps

167 The carpet has not been laid so that it is taut. It is quite loose at most door openings and there is a decided wrinkle across the master bedroom. I find Mr Stanbrook’s evidence that “something must have been dragged across the carpet” unconvincing as more than one area of carpet appears loose.

168 I invited the Owners to provide a cost for rectification, such as re-stretching, but they failed to do so. I make no allowance for this item.

COUNTERCLAIM

Completion stage payment

169 The parties agree that if the work had been finished in a tradesmanlike manner and on time, the completion stage payment of \$24,143.23 would be due to the Builder. However, the parties do not agree about the variations.

Variations

170 I accept the Builder’s evidence that there were five variations, all of which were agreed and signed with the exception of variation 4. They are as follows, and as described on the Builder’s final tax invoice No 0001822, which is exhibit R1:

a	Variation 1 Upgrade to Floor heating	\$540.00
b	Variation 2 Delete Concrete Alfresco	-\$430.00

c	Variation 3 Delete Porch Concrete	-\$118.00
d	Variation 4 Remove soil	\$2,152.98
e	Variation 5 Upgrade carpet	<u>\$1920.00</u>
		\$4064.98
	Plus GST	<u>\$ 406.50</u>
		\$4471.48

171 Mr Burleigh agreed with Mr Stanbrook's evidence that all variations were agreed except 4, and said that he disagreed with the volume of soil that had to be removed. Mr Stanbrook said the contract allowed for 90m³ but 150m³ was removed.

172 Mr Burleigh said that he understood if more than 90 m³ of soil had to be removed he would be consulted and given an opportunity to measure. He said he was happy to pay a reasonable sum for the variation but the Builder seemed to be trying to charge him for the cost of moving the excavator to site as well which he does not believe was reasonable.

173 Variations 1, 2, 3 and 5 were signed for the Owners as can be seen from exhibit R1. Variation 4 was not signed and carries the note "this was agreed to by phone before removal".

174 I prefer Mr Burleigh's evidence that there was no agreed variation 4 and I make no allowance for it. The net total of variations is therefore:

Variation #1	+\$540
Variation #2	-\$430
Variation #3	-\$118
Variation #5	<u>+\$1920</u>
To the Builder	\$1912

RECONCILIATION

175 The amount the Builder must allow the Owners is:

Defects	\$76,398.27
Incomplete work	\$9,123.75
Agreed damages	<u>\$3,021.43</u>
Total	\$88,543.45

Less the amounts due to the Builder under the contract:

Completion stage	\$24,143.23
Variations	<u>\$1,912.00</u>
	\$26,055.23

176 The Builder must pay the Owners:

\$88,543.45

- \$26,055.23

\$62,488.22

INTEREST AND COSTS

177 Interest and costs are reserved with liberty to apply. The parties' attention is drawn to the fact that interest is rarely awarded on amounts which are yet to be spent and section 109 of the VCAT Act commences with the assumption that parties bear their own costs.

SENIOR MEMBER M. LOTHIAN