VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP153/2018

CATCHWORDS

Domestic building work – contract terminated by owners based on builder's failure to complete within the contract period or at all – substantial breach of the contract – builder relied on difficulties with the site and bad weather to explain the delays – calculation of loss and damage – whether the builder's attempt to exclude the cost of obtaining the building permit is valid under section 24 of the *Domestic Building Contracts Act* 1995 – liability of director of building company.

FIRST APPLICANT	Jing Wei Cao
SECOND APPLICANT	Zin Zhang
FIRST RESPONDENT	Al Bahjeh Pty Ltd ACN 084 143 019 t/as Ultimate Creative Designers
SECOND RESPONDENT	Jamal Nahas
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	29 and 30 January 2019
DATE OF ORDER	29 March 2019
CITATION	Cao v Al Bahjeh Pty Ltd (Building and Property) [2019] VCAT 367

ORDERS

1. The first respondent must pay the applicants $244,259.25.
2. The claim against the second respondent is dismissed.
3. There is liberty to apply on the question of interest and costs and reimbursement of fees. I direct the principal registrar to list any application for hearing before Senior Member Kirton for one hour.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr M. Hoyne of Counsel
For the Respondents	Mr J. Nahas, director

REASONS

BACKGROUND

1. The applicants own a very steep block of land in Berwick. When they decided to build a house on it, it was obvious that significant site cuts and very tall retaining walls would be needed. The owners knew Mr Nahas as they occupy neighbouring business premises. Coincidently, Mr Nahas' wife also owns the block of land next to the subject land. It was unsurprising then that Mr Nahas and the owners should discuss the building of their new home while at work.

2. Mr Nahas assisted the owners with the initial design stage by introducing them to a building designer, an engineer and a building surveyor. Then, on 18 September 2015, the owners and the first respondent (the builder) entered into a standard form HIA building contract.

3. The building contract allowed for a construction period of 540 days (the Building Period). This period included an allowance of 60 days for inclement weather, 124 days for weekends, public holidays, rostered days off, and a further 21 days for "other days that are reasonable having regard to the nature of the building work".

4. The excavation works commenced on or about 20 November 2015. No claims for extension of time were made by the builder under the contract. The due date for completion was therefore 13 May 2017. However, by that date, the building works had not even reached the completion of base stage. The owners' evidence was that work was only carried out sporadically throughout 2016 and the parties agree that works effectively ceased from about February 2017[1].

5. The builder provided various reasons why the works were delayed, which came down to two factors according to Mr Nahas' evidence and submissions made during the hearing. First, that he was unprepared for the difficulties with the site and second, progress was affected by bad weather. The builder abandoned the allegation made in the Points of Defence that it had suspended the works in February 2017 due to the owners failing to provide evidence of capacity to pay. Instead, Mr Nahas was quite clear that the builder had never suspended works.

6. In early 2017, the owners and the builder each engaged solicitors, who attempted to renegotiate a completion date, including corresponding with each other, engaging the Victorian Building Authority, and making an application to Domestic Building Dispute Resolution Victoria.

7. These attempts proved fruitless, and on 4 September 2017 the owners served a notice of intention to terminate the building contract, in accordance

[1] paragraphs 13 of the Points of Claim and Points of Defence

with clause 43 of the contract. They alleged that the builder's failure to complete the building works within the building period constituted a substantial breach for the purpose of clause 43. Further, it was alleged that the builder's conduct as detailed in that letter otherwise amounted to a repudiation of the contract. The notice stated that if the building works were not completed by 14 September 2017, the owners intended to terminate the building contract.

8. The builder failed to remedy the substantial breach and by letter dated 15 September 2017, the owners terminated the contract.

9. They then engaged a new builder, UDCON1 Pty Ltd, to complete the works. Their claim in this proceeding is for the remedy set out at clause 44 of the contract, being the difference between the contract price due to the builder, and the price to be paid to UDCON1 Pty Ltd, being $249,769. They make a further claim against Mr Nahas personally, alleging that he was negligent in his role as the registered building practitioner.

10. For the reasons set out below, I find that the builder was in substantial breach of the building contract by reason of the delay, the owners were entitled to and did terminate the contract pursuant to clause 43, and they are entitled to the difference in price between the original contract and the new contract, as set out at clause 44. However, I do not accept that Mr Nahas has a personal liability to the owners and I dismiss the claim against him.

THE HEARING

11. The applicants were represented at the hearing by Mr M. Hoyne of Counsel. The respondents were represented by Mr J. Nahas, with the assistance of his daughters, Ms D. Nahas, Ms Y. Nahas and Ms A. Nahas.

12. The hearing occupied 1½ days, during which I heard evidence from Mr Cao (the first applicant) and from Mr Nahas on behalf of both respondents. Each party provided written submissions and authorities at the conclusion of the hearing and I gave the respondents the opportunity to provide any further written submissions within seven days, as they were not legally represented. They did not do so.

13. I commend the legal representatives of the applicants for the efficient way they conducted the hearing. The Tribunal book was one folder of relevant documents. The factual issues in dispute in the claim were refined to involve only questions of delay. As a result, there was no need for expert witnesses to be called, nor for a site visit. I also note the valuable assistance given to the respondents by Mr Nahas' daughters.

THE ISSUES IN DISPUTE

14. The owners' claim, simply put, is that the works were delayed for so long a period that this constituted a substantial breach of the contract. It is

unarguable that the builder failed to complete the building works within the Building Period allowed by the contract, and was not even close to being able to do so. In its points of defence, the builder said that the delay was caused by factors outside its control, namely the owners' failure to provide evidence of capacity to pay, the steepness of the site and bad weather. The issue for me to decide is whether these are allowable excuses.

Did the owners fail to provide evidence of capacity to pay?

15. As stated above, the builder originally pleaded that it had suspended the works because the owners had failed to provide evidence of capacity to pay. However this defence was abandoned by the builder during the hearing, as Mr Nahas' evidence was that the works were never actually suspended. This concession was appropriately made, in my view, in light of the following uncontroversial matters:

    a. clause 35 of the building contract which provides that the builder may suspend the building works if the owner is in breach of the contract by giving a notice in writing. The builder conceded that no such notice had been given;

    b. the contemporaneous correspondence sent by the builder's solicitors identifying that the delays were due to latent conditions and excessive wet weather in 2016, and that the works had cost the builder considerable amounts of money, but with no mention of requiring evidence of capacity to pay;

    c. the first time that evidence of capacity to pay was raised by the builder's solicitors was 31 July 2017, more than two months after the works should have been completed;

    d. the responses from the owners' solicitors on 29 August and 8 September 2017 disputing this allegation;

    e. the comment by the builder's solicitors on 11 September 2017 that if the owners provided evidence of the ANZ loan account this would "end their queries" in this regard, together with the response from the owners' solicitors which provided that information. In their letter of 13 September 2017, the builder's solicitors acknowledged that sufficient evidence had been provided.

Can the builder rely on the site difficulties to delay completion?

16. Ms Nahas suggested to Mr Cao during her questioning of him that Mr Nahas had undercharged significantly in estimating the contract price. She explained this by saying this was the first site her father had worked on with such geographical difficulties. She also suggested that Mr Cao was aware that the site cuts required were not like usual site cuts, and there were large boulders which required more machinery to be removed. Ms Nahas

submitted that her father had contributed his own money towards the project, and was funding the extra time, machinery and concrete required by the site difficulties.

17. Mr Cao disputed that the builder had underestimated the contract price, as he said he had given an initial estimate of about $700,000, whereas the final contract price was $860,000. He said that in any event, the contract price is the contract price and whether it was underquoted or not, is not the owners' fault.

18. Mr Cao also said that he has in fact paid the builder more than required under the contract, and so the submission that Mr Nahas was funding the job from his own money is unsustainable. As the result of an agreement reached between the parties on 21 December 2015, the owners paid an extra $129,000 by instalments, between 21 December 2015 and 15 January 2016. This payment was not required by the payment schedule agreed in the contract.

19. The parties' evidence differed about certain aspects of the agreement, but nothing material turns on the differing versions of events. The parties agreed that they had a meeting on 21 December 2015 to discuss an alternative payment arrangement. At that point in time, excavations had commenced. The parties both say that they agreed to defer payment of $50,000 of the contract price until after completion of the works and that $129,000 would be paid immediately. The owners also say that there was an agreement to reduce the original contract price from $860,000 to $840,000. However, in their calculation of loss and damage, the owners have used the original contract price of $860,000. Accordingly, there is no practical difference between the parties about the agreement.

20. As a result of the payment of $129,000 made by the owners in December 2015 and January 2016, they have in fact paid the builder more than required under the contract. As mentioned above, as at that time excavation of the site had commenced. The deposit was due and paid but the next progress payment, being base stage, was not due. On that basis, I do not accept that the builder was funding the project from Mr Nahas' own money, as alleged by the builder.

21. As for whether the builder had significantly underestimated the cost of the project, that may be correct. However, once the builder offered to build the house at that price, and that offer was accepted by the owners, the builder is contractually liable to honour that price, unless variations could be validly claimed in accordance with the terms of the contract.

22. In any event, Mr Nahas said that he had not asked for extra money from the owners. His solicitors wrote to the owners' solicitors on 16 May 2017 discussing the cost of the foundation works carried out and said "We would be pleased if your client can consider those invoices noting that the

foundation works on this particular property including earthworks and retaining walls has been significant." It was put to Mr Nahas that his solicitors were asking if the owners would consider making an extra payment. Mr Nahas denied that, saying "All of the email is right but it doesn't say I want more money from the owners. I say it is costing money but we are trying to make it happen for him".

23. Based on the matters discussed above, I do not accept that the fact that the site was more difficult and more costly than the builder had allowed for is a sufficient ground for the builder to fail to complete the works within the time allowed by the contract.

Did bad weather cause the delay?

24. The time allowed in the building contract of 540 days includes 60 days for "inclement weather and the effects of inclement weather" (Schedule 1 clause 1).

25. At paragraph 16 of the points of defence, the respondents say there was a total of 72 days when the carrying out of the works was delayed by inclement weather or by water at the site resulting from inclement weather. They attach a schedule listing the specific dates affected by inclement weather. The effect of this pleading is that the respondents claim an additional 12 days over and above the number of days allowed in the contract.

26. The owners dispute that there were 72 days of inclement weather, but in any event, submit that even if the additional 12 days were accepted, the completion date for the works would only be extended to June 2017.

27. As the works had not even reached base stage by the date of termination in September 2017, it is clear that the inclement weather alleged by the builder is not the reason for the failure to complete the works within the building period.

28. Mr Nahas submitted that the pleading in the points of defence was wrong, and had been prepared by his solicitors without his instructions. I do not accept that evidence, but even if it were true, Mr Nahas was not able to provide any evidence to establish a sufficient number of rain days to explain why no work was carried out through much of 2016 and most of 2017.

29. His evidence was that excavation commenced in November 2015 and was finished in approximately the end of March or April 2016. The plumbing rough in was performed in July. He said the delay between April and July was due to bad weather, ordering materials and working on other jobs. The plumbing rough in was finished by the end of July. He started constructing the first slab one week later and that area of concreting was finished by

August or September. He then prepared for a retaining wall which was installed in November, and "worked on this site and other sites" up until the end of 2016. From February 2017 very little work occurred on the owners' property. The scaffold was raised from the first to the second floor in March or April 2017 to prepare for the second slab. Apart from that, Mr Nahas said he would visit the site "every now and then to check the fences and safety".

30. He gave evidence that there was heavy rain in September or August 2016 and that the days before and after the heavy rain also affected the progress of the works. He said that when he saw a weather forecast for rain, he would not carry out any work preparing the site for excavation in the days leading up to the rain. After it had rained, the site was inaccessible because of mud making it slippery. He said he was very concerned to provide a safe workplace for his labourers. Instead, he would work on other projects he had running.

31. That evidence does not support the respondents' contention that the works were incomplete as at September 2017 due to rain.

Conclusion

32. For the reasons set out above, I find that the builder was in substantial breach of the building contract by reason of the delay, the owners were entitled to and did terminate the contract pursuant to clause 43, and they are entitled to damages calculated in accordance with clause 44 of the contract.

LOSS AND DAMAGE

33. Clause 44 provides as follows:

> 44.0 If the Owner brings this Contract to an end under Clause 43, then the Owner's obligations to make further payment to the Builder is suspended for a reasonable time to enable the Owner to find out the reasonable cost of completing the Building Works and fixing any defects.
>
> 44.1 The Owner is entitled to deduct that reasonable cost calculated under Clause 44.0 from the total of the unpaid balance of the Contract Price and other amounts payable by the Owner under this Contract if this Contract had not been terminated and if the deduction produces:
>
> - a negative balance – the Builder must pay the difference within 7 Days of demand…

34. To paraphrase the agreed procedure for assessing loss and damage contained at clause 44.1 of the building contract, and the widely accepted principles set out in decision such as *Belgrove v Eldridge* and *De Cesare v*

Deluxe Motors Pty Ltd[2], the owners are entitled to the difference between the amount that it is now going to cost them to build their house and the amount it would have cost them to complete their house if the first respondent had complied with its contractual obligations.

Original Building Contract Price

35. The original building contract price was $860,000. There were a number of variations to the price agreed during the project. The owners conceded that the following variations totalling $5400 were due to the builder in addition to the contract price:

    a) Upgrade to timber floor - $3000

    b) Extra 12 m² concrete base - $2400

36. There was a third variation claimed by the builder during the project for $12,000 for a change in the retaining wall from timber to concrete. The owners have paid this amount, however they now allege that the claim was not validly made and so they should receive the benefit of a refund.

37. Mr Cao's evidence was that the rear retaining wall was designed in timber. He said that he told Mr Nahas that he would prefer it to be built from concrete, which the builder did for an extra cost of $12,000. Mr Cao paid this amount to the builder on 23 May 2016. The builder did not follow the procedures required by clause 23 of the building contract, in that it did not require the request to be made in writing and signed. However, I am satisfied that the value of the variation was less than 2% of the contract price and I was not provided with any evidence that the variation had required an amendment to any permit. Accordingly, in accordance with section 38 of the *Domestic Building Contracts Act* 1995 ("the DBCA") and clause 23.1 of the contract, I accept that the builder was entitled to carry out and be paid for this work as a variation.

38. The varied contract price was therefore $877,400, being $860,000 plus $3000 plus $2400 plus $12,000.

Payments made to the builder

39. It was not in dispute that the owners have paid the builder a total of $214,400, being the following payments:

a)	13/9/15	Timber floor variation	$3000
b)	29/9/15	Deposit	$43,000
c)	21/12/15 -	Payment made in advance of the progress payment schedule, pursuant to the	$129,000

[2] (1954) 90 CLR 61 and (1996) 67 SASR 28 at 30-31; 38-39

	15/1/16	agreement made on 21/12/15	
d)	23/5/16	Change to retaining wall at rear from timber to concrete	$12,000
e)	29/9/16	Additional money for completion of the concrete first floor base paid at the respondents' request	$10,000
f)	26/10/16	Extra 12 m² concrete base	$2400
g)		Architectural drawings	$5000
h)		Engineering drawings	$4500
i)		Building permit	$5500

40. The balance of the original contract price the owners have in hand is therefore $663,000, being $877,400 less $214,400.

Other payments made

41. I note here for completion that the owners concede that the cost of the boundary realignment and the water connection was their responsibility under the contract. The builder originally paid these sums ($1000 and $550 respectively), but the owners have already reimbursed it. I therefore do not factor in these items to either the contract price or the amounts paid.

New building contract price

42. Mr Doyle of UDCON1 Pty Ltd gave evidence that his estimated price to complete the building works, in accordance with the original plans and specifications, and the variations agreed between the builder and the owners, will be $896,305. I accept his evidence, as it was not seriously challenged.

43. The difference between the amount that it is now going to cost the owners to build their house and the amount it would have cost them to complete the house if the first respondent had complied with its contractual obligations is $233,305, being the difference between $896,305 and $663,000.

Re-establishment survey

44. Due to the delay in the completion of the works, a landslip on the boundary with the adjoining property and the need to obtain a new building permit (the original building permit expired in November 2017), the owners were required to obtain a re-establishment survey of the land, at a cost of $990. I will allow this amount as a reasonably foreseeable head of loss and damage.

Refund of building permit fee

45. The owners also seek a refund of the amount they paid to the builder for the building permit. Although the contract provides that the issuing of the building permit is to be at the owners' cost (Schedule 1, clause 1 and the List of Standard Inclusions incorporated by Schedule 5), they rely on section 24 of the DBCA which provides as follows:

> **24. Builder may exclude certain items from contract price**
>
> (1) This section applies if a builder wishes to exclude from the contract price the amount any third person is to receive in relation to the work to be carried out under a domestic building contract…
>
> (b) for the issue of planning or building permits.
>
> (2) The builder may exclude any such amount by stating in the contract immediately after the contract price first appears in the contract-
>
> (a) that the cost of the work or thing to which the amount relates is not included in the contract price; and
>
> (b) a reasonable estimate of how much the amount is likely to be.

46. In the present case, the builder failed to provide any estimate at all of how much the building permit fee was likely to be. Accordingly, the owners submit, it is not entitled to exclude that amount from the contract price.

47. This section was considered by Deputy President Macnamara (as he then was) in *Brown v Cardona & Ors*[3], where he concluded:

> … I believe that the word 'only' should be implied in the first line of subsection (2) because to do otherwise would render the section entirely pointless.…

48. Although the result is contrary perhaps to the parties' original intentions, I am bound by the wording of the DBCA and respectfully agree with the interpretation given by then Deputy President Macnamara. The result is that the builder in the present case is <u>only</u> entitled to exclude the cost of the building permit if it had immediately after the exclusion, provided a reasonable estimate of the cost of the permit. It did not do so. As the owners have paid the builder for the cost of the building permit, they are entitled to a refund of this payment of $5500.

Liquidated damages

49. By clause 40 and schedule 1 clause 9 of the building contract the parties agreed that liquidated damages of $250 per week would be payable by the builder in the event of late completion of the building work.

[3] [2009] VCAT 910 at [102] – [105]

50. The due date for completion under the contract was 13 May 2017. The contract was terminated on 15 September 2017. This is a period of 17.857 weeks. The amount of liquidated damages therefore is $4464.25. I will allow this amount.

SUMMARY OF AMOUNTS DUE BY FIRST RESPONDENT

Item	Amount
Difference between cost to complete and balance of original contract	$233,305.00
Re-establishment survey	$990.00
Refund of building permit fees	$5,500.00
Liquidated damages	$4,464.25
Total	**$244,259.25**

LIABILITY OF SECOND RESPONDENT

The pleaded claim against the director

51. The owners also allege that the second respondent is personally liable to them for their loss and damage, on the ground that as the registered building practitioner who carried out the works, he owed them a duty of care, which he breached. They allege in the Points of Claim that:

> **Duty of Care**
>
> 8. The second respondent was the registered builder who carried out, or was responsible for the carrying out of the Building Works under the Contract.
> 9. By reason of the matters set out above, each of the respondents owed the applicants a common law duty to take the level of care one would expect of a reasonably competent building practitioner in the carrying out of the Building Works.
>
> …
>
> **Negligence**
>
> 25. Further or alternatively:
>
> a. in failing to undertake the Building Works in a timely manner; and
>
> b. by reason of the defects;
>
> each of the respondents failed to undertake the Building Works to a standard one could reasonably expect of a reasonably competent building practitioner and thereby breached their duty of care to the applicants…

52. The facts they rely on include that almost two years after the contract had been entered into, the works had not even reached base stage. Mr Nahas has

never alleged that he was let down by otherwise reputable third-party contractors or that he did all he reasonably could to complete the works in a timely manner. They submit that the only explanation for the delays is that Mr Nahas was negligent in the way he managed the project. This was not simply a case of a company not complying with contractual terms. Rather, no competent builder acting reasonably could, or would, have allowed the project to operate in this way.

53. Mr Hoyne provided a number of authorities in support of this claim. Surprisingly, he did not provide any authority as to whether or when an individual registered building practitioner may owe a duty of care to an owner to prevent purely economic loss. This is a contentious question, particularly when the parties have chosen to formalise the terms of their relationship by entering into a contract, and where the individual being sued is not the person liable under the contract. In *Perre v Apand*[4] McHugh J listed five features considered by his Honour to be "relevant in determining whether a duty exists in all cases of liability for pure economic loss". They are:

    a. reasonable foreseeability of loss;

    b. whether there would be indeterminacy of liability;

    c. the preservation of the autonomy of the individual in legitimately protecting or pursuing his or her social or business interests;

    d. vulnerability to risk; and

    e. the defendant's knowledge of the risk and its magnitude.

54. I was not addressed on any of these factors. As a result, I am unable to conclude that the second respondent is a primary tortfeasor.

Does the director have a secondary liability?

55. The applicants provided a number of authorities which discuss whether a director may be personally liable as a secondary tortfeasor for the torts committed by their company. Accordingly, although this cause of action is not specifically alluded to in the pleadings, I have considered the authorities provided to me, together with others obtained through my own research.

56. As has been regularly noted[5], the test to be applied before a director of a corporation is exposed to a liability in tort by reason of his involvement in

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[4] [1999] HCA 36 at [105]-[137]. His Honour subsequently adopted the same principles in his consideration of the facts in *Woolcock Street Developments v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16 at [74]-[88].

[5] For example: *Pioneer Electronics Australia Pty Ltd v Lee* [2000] FCA 1926; (2001) 108 FCR 216, at p.233; *AMI Australia v Bade Medical Institute* 262 ALR 458 at [99] – [101]

the conduct of a corporation remains uncertain. The issue is summarised in *Halsbury's Laws of Australia*[6] as follows (omitting references, emphasis added):

> "… A person, such as a director, may be liable concurrently with the corporation as a joint tortfeasor. However, the circumstances in which this liability may be imposed are uncertain. Several different tests have been applied. On one view, a person should be liable if they have personally directed or procured the corporation to commit the tort. Provided there was a sufficient personal involvement in the relevant act or omission, a person may be liable under this test even if they were acting as the corporation at the time, or were otherwise discharging their usual obligations to it. However, directors will not be liable merely because they were in control of the corporation when it committed the tort. On another view, a person should only be liable as a joint tortfeasor if they behaved wilfully or recklessly in relation to the commission of the tort so as to make the tort their own. Under this more restrictive test, a person is not liable for merely acting as the corporation or otherwise carrying out their normal functions for it. Underpinning this test is the concern that joint tortfeasor liability should not be allowed to unreasonably undermine the protection of the concept of limited liability for members of small corporations or discourage enterprise by exposing directors of corporations of all sizes to potentially onerous liabilities. A third view is that the person must have been so personally involved in the commission of the tort that it is just that they should be rendered liable.
>
> The nature and extent of participation in a tortious act or omission by a corporation which will render a person liable as a joint tortfeasor is a question of fact which must be decided by the circumstances of each case."

57. The principal authority relied on by the applicants is the Victorian decision of Redlich J in *Johnson Matthey (Aust) Pty Ltd v Dascorp Pty Ltd & Ors*[7]. In his very lengthy judgement, His Honour exhaustively examined the authorities concerning primary and secondary liability in tort of directors of companies. He commenced his discussion of secondary liability, by saying:

> "Where the primary tortfeasor is a corporation, questions as to the liability of its directors for the tort attract principles which impose personal liability on directors which are dependent on the degree of their involvement. The liability of a director is probably a form of accessorial or civil secondary liability." [8]

58. He further said:

> "Both in Australia and in England a director is in no different position to an agent, who whilst binding their principal may also be liable for their tortious acts. The defendant's submission that [the directors] cannot be held liable

[6] James Hambrook, LexisNexis Australia, *Halsbury's Laws of Australia*, at [120-3165]
[7] (2003-2004) 9 VR 171
[8] Ibid [106]

for their conduct as directors because their acts are those of those of the corporation, expressed in such absolute terms, must be rejected. This does not mean that directors become personally liable merely because they are directors. Unless they procure or direct the tortious conduct the law does not impose upon them liability for the acts of other agents or employees, whether they are directors of large corporations or what is described as 'one man' companies." [9]

59. His Honour concluded after analysing numerous authorities that there appears to be at least two tests that could be applied in a negligence context when assessing a director's liability by reason of his involvement in the conduct of a corporation. A distinction may be drawn depending on whether there is a contract in place between the victim and the corporation:

    a. If the victim has "played no role in the selection of the tortfeasor who inflicts the harm", then the relevant test is whether the director procured or directed the commission of the tortious act.

    b. However, where there is a contract in place between the victim and the company, i.e. where "the victim has dealt with a company and has chosen to accept the risks associated with the company's limited liability and torts", then the courts will be more likely to require the victim to show that the director has assumed liability for the company's acts, when procuring or directing them, i.e. that "the director knew or was indifferent as to whether the acts were unlawful or likely to cause loss or damage"[10].

60. Mr Hoyne helpfully conceded that in the present case, as the parties have entered into a contractual relationship, it is the second test that would be applicable. That is, I must be satisfied that the second respondent had assumed liability for the company's acts by engaging in "the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it"[11].

61. The requirement to establish that a director has assumed responsibility for the negligence of a corporation is consistent with the approach taken by the Tribunal in similar cases. In *Korfiatis v Tremaine Developments Pty Ltd*[12] a claim was brought against a building company (Tremaine) and its director (Ktori), alleging that the work was done defectively and the construction was never completed. It was argued that Ktori, as the director of the company and the registered building practitioner, directed or procured Tremaine to carry out the works negligently, and physically performed

[9] Ibid [198]
[10] Ibid [199] – [200]
[11] The so-called Mentmore test: *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 as referred to in *AMI v Bade,* op. cit., at [101]
[12] [2008] VCAT 403

some of the works himself, and so had a personal liability as a joint or several tortfeasor.

62. Senior Member Walker cited with approval the passage by Redlich J in *Johnson Matthey* summarised above, in relation to the distinction to be drawn between those who by choice enter into contractual arrangements and those who have had no dealings with the company. He examined many of the authorities on this issue and concluded (omitting citations):

> "46. In the case as articulated, reliance is placed upon the degree of personal involvement and control Ktori had over aspects of the work. Even if all that is established on the evidence, in the light of the authorities referred to, I do not think that this amounts to an assumption of responsibility in the required sense. What Ktori is said to have done would suggest nothing more than his acting as an employee and director of Tremaine. It is not suggested that he had any independent arrangement or agreement with any of the Applicants or undertook any personal responsibility directly to them. His actions did not extend beyond the contractual obligations that Tremaine assumed by entering into the building contract. This is not sufficient to show an assumption by Ktori of any duty of care to the Applicants or to any of them.
>
> …
>
> 48. The direct and procure test used in *Johnson Matthey* might have application in a building context in some fact situations; where, for example, the director intentionally sabotaged the work or procured or caused a breach of the contract otherwise than while acting bona fide within the scope of his authority. However it is not of assistance where all that is alleged is that the company was negligent ...[13]

63. In *Korfiatis*, Senior Member Walker examined some of the Tribunal's decisions on this issue. I will not repeat them here. Since *Korfiatis*, decisions including the following have been made:

64. The County Court in *Rednual Holdings Pty Ltd & Anor v Loule Pty Ltd & Ors*[14] considered an application to join the director of a builder and said as follows (omitting citations):

> "49. I received written submissions about the decision of the Victorian and Civil Administrative Tribunal in *Korfiatis v Tremaine Developments Pty Ltd* on the issue of whether a director of a builder owed a duty of care to the client of the builder. While it appears that in that case, the claim against the director was exclusively put on a basis that his directorship created a duty of care, there is no suggestion in that decision that the director of a builder owes a duty of care to builder's client, merely by being a director.

[13] Ibid [46] – [48]
[14] [2013] VCC 328 per Ginnane J at [49] – [50]

50. I do not consider the cause of action pleaded against [the director] is arguable. There was no contractual relationship between [the director] and the plaintiffs. Therefore, any possible legal liability would need to be based on a duty of care owed by him to the plaintiffs. No facts were pleaded which might give rise to such a duty of care: see generally *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*."

65. In *Germano v Brenner Homes and Anor*[15] Senior Member Riegler (as he then was) considered an application to join the director. He concluded as follows (omitting citations):

"27. I have considered the authorities referred to me by both [Counsel for the applicant and the respondent]. In my view, those authorities distil the following principles, insofar as the personal liability of a director of a building company is concerned:

(a) A director of a building company may be personally liable if that director procured or directed the tortious act in circumstances where the director knew or was indifferent as to whether the acts were or were likely to cause loss and damage to the proprietor: *Johnston Matthey (Aust) Ltd* v *Dascorp*.

(b) A director of a building company may be personally liable along with the company when he has procured or directed the building company to commit the tort. However, before a director can be held personally liable there must be an element of deliberateness or recklessness and knowledge or means of knowledge that the act or conduct is likely to be tortious: *Root Quality Pty Ltd v Root Control Technologies Pty Ltd*.

(c) There must be some act or behaviour of the director that is more than merely carrying out his company duties, even if it results in a breach of contract or a failure by the company to fulfil its obligations: *Lawley v Terrace Designs Pty Ltd*."

66. In the present case, the applicants submit that the following conduct by Mr Nahas is sufficient to mean he was doing more than merely carrying out his company duties and has assumed some personal liability:

a. It was within Mr Nahas' power and capability to address the difficulties with the site. He could have employed more people to help him.

b. The delays with this job were caused because Mr Nahas spent more time dealing with his other projects than this one.

c. Mr Nahas was recklessly indifferent to the company's obligations under the building contract and/or to what a reasonable building practitioner would do in similar circumstances.

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[15] [2010] VCAT 2081 at [27]

d. His own evidence was that he was not “one of those builders who sits in the office”. He controlled everything on site and was almost always present when any subcontractors were working.

67. Mr Hoyne submitted that the present case can be distinguished from *Korfiatis* as in that case, the director’s role was to direct or allow others to complete the work. He says that Mr Nahas’ role was a step more personal, in that he was the person arranging and scheduling the work to make sure it was completed on time. This means that he owed a duty of care to the owners to make sure the work was carried out. As he has failed to do this, he is personally liable to them.

68. I do not accept this submission. Adopting the various authorities referred to above, as summarised by now Deputy President Riegler, I am not satisfied that the elements of ‘deliberateness or recklessness’ and ‘knowledge or means of knowledge that the act or conduct is likely to be tortious’ are made out. I am not satisfied that there is any act or behaviour of Mr Nahas that is more than merely carrying out his company duties, even though that resulted in a breach of contract.

69. In my view, Mr Nahas’ role is similar to Ktori’s:

> “What Ktori is said to have done would suggest nothing more than his acting as an employee and director of Tremaine. It is not suggested that he had any independent arrangement or agreement with any of the Applicants or undertook any personal responsibility directly to them. His actions did not extend beyond the contractual obligations that Tremaine assumed by entering into the building contract. This is not sufficient to show an assumption by Ktori of any duty of care to the Applicants or to any of them.”

70. Accordingly, the claim against the second respondent is dismissed.

ORDERS

71. The following orders will be made:

    1. The first respondent must pay the applicants $244,259.25.

    2. The claim against the second respondent is dismissed.

    3. There is liberty to apply on the question of interest and costs and reimbursement of fees. I direct the principal registrar to list any application for hearing before Senior Member Kirton for one hour.

SENIOR MEMBER S. KIRTON