

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP802/2016

### CATCHWORDS

Domestic building, bricklayer sub-contractor's contribution to sum paid by builder in settlement of proceeding brought by owners, brickwork acknowledged to be defective, proportion brickwork represents to total claim for defects by owners, bricklayer's degree of responsibility for losses consequential to the defects sought by the owners, bricklayer's degree of responsibility for termination of the contract between the owners and the builder, claim for costs of builder's expert, claim for reimbursement of hearing fee.

#### APPLICANTS

Mr Antonio Antonangeli (Struck out order 25 January 2018) , Mrs Beverly Joy Antonangeli (Struck out order 25 January 2018)

#### FIRST RESPONDENT

Ellandee Holdings Pty Ltd (ACN: 096 001 946)

#### SECOND AND THIRD RESPONDENTS

Mr Steven Kirkham (Struck out order 25 January 2018), Mrs Teresa Kirkham (Struck out order 25 January 2018)

#### JOINED PARTY

Burton Brickwork Services Pty Ltd (ACN 148 093 074)

#### WHERE HELD

Melbourne

#### BEFORE

Senior Member M. Lothian

#### HEARING TYPE

Hearing

#### DATE OF HEARING

25 July 2018

#### DATE OF ORDER

22 August 2018

#### CITATION

Ellandee Holdings Pty Ltd v Burton Brickwork Services Pty Ltd (Building and Property) [2018] VCAT 1280

### ORDERS

- 1 The Joined Party must pay the First Respondent \$53,732.
- 2 The Joined Party must pay the First Respondent \$1,000 for costs.
- 3 The Joined Party must reimburse the First Respondent half the hearing fee of 25 July 2018, being \$252.90.

4 All payments must be made forthwith.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the First Respondent	Mr S. Kirkham, director and Ms T. Kirkham, manager
For the Joined Party	Mr A. Burton, director

## REASONS

- 1 The parties relevant to this decision are the first respondent-Builder and the joined party-Bricklayer.
- 2 The question is how much the Bricklayer should pay the Builder as contribution to the amount the Builder agreed to pay the applicant-Owners for alleged breaches of contract, which included alleged building defects.
- 3 The Builder seeks \$151,154.00 plus a hearing fee. The parties agree that the Builder entered Terms of Settlement ('ToS') with the Owners to pay them \$140,000.00. The Builder also seeks the cost to it of its experts' fees, being \$5,280.00 for the first report, \$4,620.00 for the second report and \$1,254.00 for a re-visit. The Builder's expert was Mr Ken Ryan.
- 4 While acknowledging that the brickwork was defective, the Bricklayer submitted that it should only have to pay the cost to it of performing any necessary brickwork, as it asserted that it was always willing to undertake repairs.
- 5 The answer is not easy to determine. I have not heard evidence about any defects other than the brickwork defects, so do not know what the reasonable proportion would be of the total sum the Builder agreed to pay. I do not know whether demolition of all brickwork, including the garage, was necessary. I do not know to what extent the Owners would have been successful in their claim for consequential losses such as accommodation.
- 6 I adopt the assumption that if the proceeding had been heard, the Owners would have been awarded a total of \$140,000.00 for their total claim plus any costs and interest. I also adopt the assumption that they would have been equally proportionately successful for each item they claimed (unless I have stated otherwise below).
- 7 Mr and Mrs Kirkham gave evidence for the Builder and Mr Burton gave evidence for the Bricklayer. Mr Ken Ryan gave evidence by telephone.

## BACKGROUND

- 8 According to both the Owners' Points of Claim and the Builder's Points of Defence and Counterclaim, the Builder entered a contract with the Owners on 8 April 2015.

### **Owners' claim against the Builder**

- 9 In the Owners' Points of Claim of 22 July 2016, they sought \$387,292, or alternatively \$189,338.85. In addition to these alternative claims they sought interest pursuant to statute, costs and reimbursement of fees paid to the Tribunal.
- 10 The details of the Owners' claim against the Builder are discussed towards the end of these reasons.

### **The Builder's counterclaim**

- 11 Evidence was not given concerning the Builder's counterclaim against the Owners and it is not taken into account, except to the extent that Schedule 2 of the Owners' Points of Claim took into account the amount that the Owners claimed would have been payable under the contract if the work was defect-free and finished on time. It appears to have included a sum for variations.

### **Builder's claim against the bricklayer**

- 12 In its Points of Claim against the Bricklayer of 20 December 2016, the Builder referred to the Owners' allegation that the contract between the Owners and Builder had been breached by matters that included alleged masonry defects.
- 13 At paragraph 12 the Builder alleged that the Owners were claiming:
- ...loss and damage or liquidated sums arising from the Alleged Masonry Defects materially caused or contributed to, as follows:
    - (a) The direct cost of rectifying the Alleged Masonry Defects in the sum of \$60,247.50
    - ...
    - (b) Loss and damage arising from the Owners' termination of the Contract on 21 June 2016 in the sum of \$387,292.00:

#### **Particulars**

The said allegation is contained in paragraphs 25(a) and (b), 26(a) and (b) and 27 (a) and (b) of the [Owners'] Points of Claim. Each of those allegations relies, at least in part, on the fact of the Defective Masonry Works. ...

- (c) Loss and damage or restitution<sup>1</sup> in the sum of \$189,338.85, in respect of amounts paid by the [Owners] for the Lock-Up and the Fixing stages when those stages were not complete on account of, [among other things] the Alleged Masonry Defects; and
- ...
- (d) Loss and damage arising from misleading and deceptive conduct<sup>2</sup> in contravention of s 18 of the *Australian Consumer Law (Victoria)* the falsity of which representations the Alleged Masonry Defects materially caused or contributed to.

...

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<sup>1</sup> I do not take this sum into account having regard to *Imerva Corporation Pty Ltd v Kuna* (Building and Property) [2015] VCAT 2058

<sup>2</sup> There is no further sum claimed for this alleged contravention.

## The Bricklayer's response

- 14 The Bricklayer was legally represented at the directions hearing where it was joined to the proceeding but was not legally represented when it filed "Brief Points of Defence" dated 13 February 2017. After restating its concern about being joined it added:
3. That said, our defence is simple. We have never denied nor neglected our duties to fix the outlined issues within the report. [Report not identified].
  4. We have always stated and showed willingness to rectify problems as outlined in the report, but have been prevent[ed from] doing any works by [the Builder].
- 15 There were no further pleadings between the Builder and Bricklayer after the Builder and Owner settled.

## BRICKWORK

### Was it defective?

- 16 The Builder and Bricklayer agree that the brickwork was defective. The most serious defect was under-strength mortar for which Mr Burton acknowledged responsibility on behalf of the Bricklayer. However, the brickwork was also out of plumb, not sufficiently straight, not sufficiently level and had voids in the mortar.

### What rectification was necessary?

#### VBA report

- 17 An inspection was carried out by Mr Piccinin of the Victorian Building Authority on 17 February 2016 in the presence of Mr Antonangeli, one of the Owners, and Mr and Mrs Kirkham of the Builder. A report was issued dated 31 May 2016.
- 18 The VBA report concerned 13 items, of which 9 related to the brickwork. I do not include the observations and discussion, but the items were as follows:

Item #	Item in dispute	Is builder's work defective?	Is building work recommended?	What work?
4	Master Bedroom – 12 bricks with vertical lines on surface	Not determined	Not determined	Not determined
5	Theatre room – brick sill [has] minimal fall	No	No	No
6	Front entrance –	Yes	Yes	Rectify...

	perpends have excessive width			
6a	Garage entrance – perpends have excessive width	Yes	No	Nil
7	Brick mortar – strength not to Australian Standards	Not determined	Not determined	Not determined
8	Brick mortar – Voids throughout	Incomplete	Yes	Rectify brick mortar voids ...
9	Theatre room & living room – brick sill projections	No	No	Nil
10	Lintels – bricks overhang the lintels	No	No	Nil
11	Weep holes & damp proof course – located slightly above the floor level of the house	Incomplete	Yes	Provide an adjacent finished ground level that complies with AS4773 - 2010

- 19 Overall the impression given by the report was that there was no particularly serious issue concerning the brickwork. The important item was number 7 where it was noted in the observations and discussion that the Owners had arranged for testing for compliance with requirements and they were awaiting laboratory results.
- 20 I accept Mrs Kirkham’s evidence that there was no mention at the VBA inspection that all brickwork needed to be demolished. However, given that the NATA report had not yet been received, the strengths of mortar was an issue at that point. I also accept her evidence that she, her husband and Mr Burton met at their office in early February to discuss the brickwork. Another report was obtained by them concerning the strength of mortar and it confirmed the conclusions drawn by the Owners’ mortar analyst, Sharp and Howells.
- 21 Mrs Kirkham gave evidence which I do not accept that the Builder did not receive reports from the Owners concerning the inadequacy of the

brickwork until 22 July 2016. These reports were clearly annexed to the Notice of Intention to Terminate of 20 May 2016.

### Kukulka opinions

- 22 Mr Kukulka inspected the site on 24 December 2015 for the Owners and made his preliminary building report of 18 January 2016. He reported on a number of matters including various aspects of the brickwork. Concerning mortar strength, he said:

The mortar appears to be under strength. The surface of the mortar can be eroded in places with the finger. At the time of the inspection the owner advised that a preliminary on-site mortar test indicated that mortar did not comply with the requirements of the Building Code of Australia. The owner also advised that a full-scale laboratory test was being carried out...

- 23 The preliminary report listed defects but did not make recommendations as to the work to be undertaken.

- 24 In his report identifying external defects of 6 May 2016, Mr Kukulka said at page 9:

The most significant issue relates to the brickwork. When the brickwork is view[ed] from a normal viewing position its overall appearance seems reasonable. A closer examination however indicates that [it] has numerous defects some of which are readily apparent (e.g. wide perpend, sections of wall out of plumb etc) but many other defects are not so evident but they include the following:

There followed a list of 13 defects, commencing with under-strength mortar. He concluded:

Some of the defects noted above are, when considered individually, minor and could be ignored. However, given the nature and extent of the defects in the brickwork, it is my opinion that the brickwork should be demolished and rebuilt. [Emphasis added]

### Steer opinion

- 25 Mr Steer of Checkmate Consulting reported for the Owners on 2 July 2016. His report concerning the brickwork commenced at page 5:

Inspection of the exterior raises many concerns in relation to the external brickwork. The quality of the brickwork in general is reasonable, however there are sections of brickwork that do not comply with AS3700-2011 ...

- 26 Mr Steer discussed a number of specific faults, then concluded:

Given the findings of Sharp and Howells ... and the variety and extent of defects within the external brickwork, it is unreasonable to expect partial demolition and reconstruction of sections of the brickwork that do not comply with ... AS3700, and then rake out and repoint the

other sections in which mortar is non-compliant. ... It is therefore recommended the entire brickwork be demolished and rebuilt ...

### Sharp and Howells Pty Ltd – Chemical Laboratories

- 27 On 15 January 2016 Sharp and Howells reported to the Owners. Their report included criticism of the appearance – numerous clay blowouts, erosion of joints, cracked and faulty bricks, variable mortar colour and numerous holes and voids. More importantly, the mortar failed the composition test, with a result of 1 cement, 1.2 lime and 15 sand, when it should have been stronger. It also failed all on-site scratch tests.

### Ryan opinion

- 28 The Bricklayer chose not to obtain its own expert evidence. Mr Burton for the Bricklayer said he had no issue with Mr Ryan's report, which was obtained by the Builder, although at the hearing he attributed some blame to the Builder for the brick courses being out of level and plumb.
- 29 For reasons that I find hard to understand, Mr Ryan's report of 29 June 2016 appeared to dispute many of the items in the Kukulka report, but then concluded at paragraph 52:

The garage brick does not require demolition and the mortar can be rectified simply by raking out the required depth and repoint. This is standard industry practice. Demolition is not required. However, other areas will require rebuilding as the walls on each face of the dwelling cannot be treated separately.

- 30 I find that Mr Ryan's report did not say unequivocally that all other areas of brickwork needed to be demolished and rebuilt.

### Conclusion about rectification

- 31 By the date of the hearing before me it was clear that the Builder and Bricklayer agreed that all the brick work (with the possible exception of the garage) needed to be demolished and rebuilt. I am also satisfied that any defects in the brickwork were the responsibility of the Bricklayer alone. However, it is by no means clear what orders the Tribunal would have made had the Owners' claim been heard and determined by a Tribunal member.

### **THE END OF THE BUILDING CONTRACT**

- 32 Mr and Mrs Kirkham attribute blame for the end of the building contract to the Bricklayer at a time when some steps had been taken to comply with the Notice of Intention to Terminate. Both they and Mr Burton seem to have assumed that if rectification and completion could have been undertaken by the Builder, the overall cost would have been less than settling with the Owners for money.
- 33 Further, the Notice of Intention to Terminate sent by the Owners to the Builder discussed below included the statement that if the Owners engaged

a new builder, they would suffer very substantial loss and damage “very likely to amount to hundreds of thousands of dollars”.

- 34 A question is, was the Bricklayer substantially responsible for the contract coming to an end? If it was, then its contribution to the consequential losses will be greater than if it was not.
- 35 The tone of correspondence between the Owners and the Builder was, at times, pugnacious and unlikely to encourage the other party to cooperate. I note that there is no evidence that the Bricklayer contributed to that tone or the underlying behaviour.

### **Notice of Intention to Terminate**

- 36 The Owners sent the Builder a letter dated 20 May 2016 headed Notice of Intention to Terminate. The notice alleged that the Builder was in substantial breach of the contract and the main defect referred to concerned the brickwork.
- 37 At paragraphs 3 of the letter the Owners said:

You are in “substantial breach” of the Contract in that:

- (a) in breach of clause 10.1 of the Contract you have failed to “carry out the Works in a proper and workmanlike manner and in accordance with the Plans and Specifications set out in the Contract”...
- (b) in breach of clause 10.1 of the Contract you have failed to “carry out the Works in accordance with all laws and legal requirements”... and/or
- (c) in breach of clause 10.1 of the Contract you have failed to “carry out the Works with reasonable care and skill” ...

#### **Particulars**

We refer to: the enclosed expert report of Kulkulka Consultants Pty Ltd (including, in particular, the references therein to defective brickwork and defective mortar); the enclosed expert report of Checkmate Consulting Pty Ltd dated 10 May 2016 (including, in particular, the references therein to defective brickwork and defective mortar); the enclosed NATA Test Report dated 15 January 2016; the enclosed Feature Survey of JR Edwards Land Surveyors dated 18 March 2016 and the letter dated 22 March 2016; Schedule 1 to this letter concerning internal defects.

4. Further or alternatively, you have “refuse[d] or persistently neglect[ed] to remove or remedy defective work or improper Materials, so that by refusal or persistent neglect the Works are adversely affected”.
- ...
5. Further or alternatively, you have claimed payment for the Fixing Stage when that payment is not due. In doing so you have committed a

“substantial breach” of the Contract and/or you have “refuse[d] or persistently neglect[ed] to comply with the Contract”.

#### Particulars

In terms of the Fixing Stage payment not being due:

...

- (ii) ... The presence of such defects means that, on any reasonable view, the Fixing Stage has not been completed.
- (iii) Further or alternatively, the reports listed in paragraph 3 above make it clear that all brickwork and mortar must be demolished and re-built. Once that occurs, the Works will necessarily regress to a stage prior to the completion of the Lock up Stage, which means that the Works are well short of the Fixing Stage...

...

6. Further or alternatively:

- (a) you have “unreasonably suspend[ed] the carrying out of the Works”, and/or
- (b) in “substantial breach” of the Contract you purported to suspend the Works when you had no right to do so under clause 16.1 of the Contract or otherwise.

38 The letter went on to describe a purported suspension by the Builder on 24 December 2015 for alleged late payment by the Owners. I note by that date the Owners suspected that the mortar was understrength but did not yet have the results from the NATA test undertaken by Sharp and Howells, and there was no evidence before me that the Builder was aware of that allegation by 24 December 2015.

39 Paragraph 7 stated that the Builder was in substantial breach for failing to complete construction within the 170 days allowed, stating that the Owners’ position was that Builder was more than 200 days late.

40 The letter then went on to describe the proposed remedial action. Paragraph 9 required the Builder to remedy the defects within 14 calendar days, failing which the Owners intended to terminate the contract. The letter continued:

10. For the avoidance of doubt, we note that in order for you to remedy the breaches referred to... The remedial action which you must take within 14 days includes (but is not limited to):

- (a) Demolishing and re-building all brickwork and mortar as recommended within the expert reports listed at paragraph 3 above;
- (b) Immediately returning to the site;
- (c) As soon as you return to the site, immediately progressing:
  - (i) the demolition and re-build of all brickwork and mortar;

(ii) the rectification of the other defects referred to within the expert reports listed at paragraph 3 above;

(iii) the Works as a whole.

(d) A complete cessation of any request for payment for the Fixing Stage while the Works are in the current state.

11. If and when you decide to demolish and re-build all brickwork and mortar we suggest that you write to us and notify us of that decision.

#### **Written response**

12. If you wish to communicate your position in relation to any of the matters referred to above, then you should do so in writing and by no later than 4 PM on Friday, 3 June 2016.

41 I interpret the letter to mean that the Owners intended to bring the dispute to a head but were doing so in good faith. Every indication is that they were attempting to have the Builder complete the works. I also note that the brickwork was not the only item in dispute and the schedule to the letter included the summary:

In relation to the internal inspection, the major things were the floor being out of level in bedroom 1, the walls not being plumb and inadequate flashing to the bath & trough.

42 On the other hand, there was at least a chance that the Owners had repudiated the contract by failing to pay the fixing stage payment at a point where they might not have had evidence that the mortar was defective.

#### **Builder's letter of 27 May 2016**

43 On 27 May 2016 the Builder sent the Owners a letter in response to the Notice of Intention to Terminate.

44 By the letter, the Builder lifted the suspension notice of 24 December 2015 although it asserted that the Owners were still in breach of the contract. The Builder also maintained that the Fixing stage claim remain due and payable.

45 There had, apparently, been a dispute about whether the Owners had demonstrated capacity to pay the contract sum. This was again raised in the letter of 27 May 2016 and given as a reason why the Owners were in breach of the contract.

46 The Builder said that the "contract completion date has been automatically extended by 149 days plus 28 consequential days". No explanation of that extension was given.

47 The Builder said it was necessary to investigate the 65 page Kulkulka report, the 8 page Checkmate Consulting report and the JR Edwards Land Surveyors Report, all of which had been received on 20 May 2016. The builder said it had engaged "Ken" [Mr Ryan] who would be attending site within seven days.

48 Of the brickwork, the Builder said:

Obviously it would be totally unreasonable to pull down and rebuild all brickwork within 14 days. Your report shows not all brickwork needs to be rebuilt and until we have had the reasonable opportunity to get expert advice on the issues raised in [your] 65 page expert reports we are unable to respond to your report and matters raised there.

Furthermore, notwithstanding the foregoing were refer to your default as aforesaid and advise we are now progressing the works at your property.

### **Builder's letter of 3 June 2016**

49 On 3 June 2016 the Builder wrote to the Owners again to say that matters raised in Schedule 1 to the Notice of Intention to Terminate had been rectified or were within tolerances. Of brickwork the Builder said:

7. Our bricklayer has attended the site to start remedy works. The brick supplier has the brick you selected as currently unavailable as they are currently being manufactured. Upon Boral providing us with a delivery date we will commence removal and replacement of the bricks.

8. It is totally unreasonable to expect the brickwork could be replaced within 14 days when the brick is unavailable. Please refer to clause 15.1 of The New Homes Building Contract dated 8 April 2015.

Builder's entitlement to extension of time the general "unavailability of any Materials necessary to carry out the works".

9. We the Builder hereby claim an initial (14) (Fourteen) delay days as a result of the total requirement of bricks not being available for delivery.

10. Upon receiving all the required bricks we will be relaying the brickwork.

11. To be clear, if you rely on the Default notice and terminate the contract we would regard this as repudiation and an unwillingness on your part to be bound by the contract.

50 I remark that the suggestion in paragraph 8 of the letter that a builder might be entitled to an extension of time in circumstances where its own default has necessitated the work is wrong at law and unlikely to engender confidence in any recipient of such a letter.

### **Owners' letter of 8 June 2016**

51 On 8 June 2016 the Owners wrote back to the Builder requiring, among other things, substantiation of the unavailability of bricks, complaining of alleged ambiguity in the Builder's letter of 3 June 2016 about the extent of work to be undertaken and stating at paragraph 6:

We refer to and repeat paragraphs 9 and 10 of the Notice of Intention, which set out the remedial steps that you should have taken already

and which you must now carry out as a matter of extreme urgency. The remedial action which you must immediately take includes (but is not limited to):

- (a) Demolishing and re-building all brickwork and mortar as recommended within the expert reports listed at paragraph 3 of the Notice of Intention;
- (b) Immediately progressing:
  - (i) the demolition and re-build of all brickwork and mortar;
  - (ii) the rectification of all of the other defects referred to within the expert reports listed at paragraph 3 of the Notice of Intention;
  - (iii) the Works as a whole.

52 I note that the Owners' letter suggested bricks could be sourced from another supplier. It seems unlikely that a reasonable match to existing bricks could be obtained from a different supplier when even bricks from the same supplier but a different batch are sometimes a poor match.

#### **Builder's letter of 10 June 2016**

53 The Builder's letter to the Owners of 10 June 2016 could have gone a long way to remedying the difficult relationship between those parties, but did not. The Builder reported that Mr Ryan had attended site on 1 June 2016. It follows from the evidence given by Mr and Mrs Kirkham and Mr Burton that the Builder knew, by the date of this letter, that all, or almost all, of the brickwork had to be demolished. Instead of saying so, unequivocally, the Builder said towards the end of paragraph 4:

We immediately sent [Mr Ryan] numerous emails of Contract documents and relevant correspondence, several telephone conversations also occurred during this time. We have contacted Mr Ken Ryan today and he has no idea where you get your information from, as it is clearly incorrect.

...

- 5. ... We have told [Mr Ryan] we need the report as soon as possible and he advised us we are entitled to a fair and reasonable amount of time to obtain this report so we can respond.
- 6. There is no point pulling down brickwork now when the bricks are not on-site to replace them and we have not had a fair and reasonable amount of time to respond in detail.

Boral have told us the bricks are being manufactured and we will have them delivered when they are available. At this stage they come out of the kiln on approximately July 20, 2016, to be graded and allocated and the orders filled.

...

We have requested a letter from Boral that shows the bricks are being manufactured and we have followed up several times. We will forward you a copy of the letter from Boral as soon as it comes to hand.

### **The Notice of Termination**

54 On 21 June 2016 the Owners sent the Builder a Notice of Termination. The Owners referred to their earlier request that the Builder provide “written and unambiguous assurance that... you intend to demolish and rebuild all brickwork and mortar as recommended within the expert reports listed at paragraph 3 of the Notice of Intention”.

55 The Notice of Termination said at paragraph 6:

You have failed to provide the written assurance in question (either in Your Second Letter or otherwise).

### **Decisions about brickwork rectification**

56 Mrs Kirkham conceded that not all the \$140,000 was referable to brickwork, but submitted that if there had not been a dispute about the brickwork, the rest of the dispute would have been capable of solution, and in particular, the work sought by the Owners in the Notice of Intention to Terminate could have been completed within the time allowed.

57 In note that the brickwork was less than half the value of the work to be rectified, even after the Builder had allegedly “fixed” defects. I also note that in his supplementary report of 7 July 2016, Mr Kukulka said at paragraph 9.1 on page 4:

The builder has carried out some rectification works internally and externally, but most of the rectification works have not been properly completed.

58 I accept Mr Kirkham’s evidence that his first knowledge of the mortar failure was when Mr Burton telephoned him in early 2016 to say that he had been telephoned by Mr Antonangeli, one of the Owners. I also accept his evidence that at that time he did not believe complete demolition and rebuilding of the brickwork was warranted.

59 Mr Kirkham’s evidence is supported by Mr Burton’s. He said that Mr Antonangeli telephoned him near Christmas 2015 to ask if Mr Burton was aware that there were brick defects. Mr Burton said he contacted Mr Kirkham who was dismissive of Mr Antonangeli’s concerns.

60 Mr Burton said that he asked Mr Kirkham around the end of March 2016 what was happening, and also said he would be prepared to go back to site and fix the brickwork. Mr Burton said he was then contacted by Mrs Kirkham who said that the Builder had seen a lawyer who said the issue was serious and the Bricklayer needed to return to site. Mr Burton said he was on holidays at the time which he cut short to enable him to return to site.

- 61 Mr Burton said “I was to fix the sills and the wall which was out of plumb at the front bedroom and also next to the front door”. Mr Burton gave evidence that the limited scope of works was at the order of Mrs Kirkham. He also gave evidence that he was never asked to demolish and rebuild all bricks.
- 62 Mr Burton gave evidence that part of the reason the bricks were out of level was because the concrete on which they sat was out of level. I accept Mr Ryan’s evidence that it is the bricklayer’s responsibility to check levels and ensure that the bricks are level regardless of the concrete footing.
- 63 Mrs Kirkham gave evidence that the Builder “fixed the minor defects” but on 1 June 2016 Mr Ryan said it would be necessary to demolish all the brickwork when he met them on site. Mr Ryan confirmed that evidence.
- 64 I accept Mr Burton’s evidence that after he stopped work on site on 1 June 2016 at the recommendation of Mr Ryan, he was not asked to do any further work and knew nothing more until informed that the contract had been terminated by the Owners.
- 65 Mr Burton gave evidence that the Bricklayer was willing to lay bricks to the extent that was required by the Builder. His evidence was that the Bricklayer would lay the bricks at its own expense if the Builder supplied the bricks and the materials for the mortar.
- 66 The usual result of such an error is that the party in breach would be liable for the whole cost incurred by reason of its error. If the error necessitates demolition, and obtaining new bricks and materials in addition to relaying, in normal circumstances the person in the position of the Bricklayer would bear the whole expense because, in accordance with *Robinson v Harmon* (1848) 1 Ex Rep 850, that is what is necessary to restore the other party to the position they would have occupied if the subcontract had not been breached.
- 67 I prefer Mr Burton’s evidence that he was only asked by the builder to undertake a limited scope. I note the inconsistency of Mrs Kirkham’s evidence that bricks could be delivered on 20 June 2016 and the information to the Owners in the Builder’s letter of 10 June 2016 that the bricks would “come out of the kiln” on 20 July 2016.
- 68 Mrs Kirkham gave evidence that she asked Mr Burton to demolish all bricks with the exception of the garage she said that the builder had ordered them from Boral, but they were on a “backorder”. She said that the next available date for the bricks to be delivered with 20 June 2016 and she asked Mr Burton to come back to site to lay the replacement bricks. Mrs Kirkham said that Mr Burton and his crew were working on the other side of town and there was a point where he stopped taking her telephone calls. She said that the Builder therefore couldn’t rectify the brickwork therefore Owners terminated the contract.

- 69 There is no evidence that while works by the Builder and the Bricklayer were in contemplation, the Builder sought to be reimbursed for the cost of the bricks by the Bricklayer, or that the Bricklayer refused to lay the bricks unless they were supplied by the Builder. There is therefore no evidence that the Bricklayer's view that it should only relay the bricks, had any impact on the work the Bricklayer was willing to do to rectify the brick defects.
- 70 On balance I find that the Builder decided what brickwork was to be rectified and did not ask the Bricklayer to rebuild all the brickwork.

### **Conclusion regarding Bricklayer's responsibility for building contract termination**

- 71 Although the failure of the brickwork was an important consideration in the Owners' reasons for termination, I am not satisfied that the Bricklayer was substantially responsible for the ultimate termination, which I attributed to unreasonable behaviour between the Builder and the Owners, particularly by the Builder.
- 72 Mrs Kirkham attributed responsibility to the Bricklayer because she said that the brickwork could not possibly be rectified within 14 days. I accept her evidence about the necessary time to rectify, but I do not accept that the Builder took all reasonable steps to give itself necessary time to rectify as it failed to unequivocally state that all bricks would be demolished and rebuilt or even to suggest to the Owners that all bricks other than the garage would be rebuilt.
- 73 In consequence, the Bricklayer's share of responsibility for the Builder's cost of settling with the Owners is not increased to reflect responsibility for termination of the contract.
- 74 The Bricklayer submitted that it should only be liable for the cost to it of undertaking repairs. However, the Bricklayer's defects were substantial and a major aspect of the dispute between the Owners and Builder. The proper measure of the Bricklayer's contribution is the proportion of the amount that the Builder paid that represents the defective brickwork.

### **DETAILS OF THE OWNERS' CLAIM AGAINST THE BUILDER**

#### Schedule 1

- 75 The Owners updated the schedules to their Points of Claim by documents dated 11 August 2016. Paragraph 17 of the Points of Claim, which referred to Schedule 1, pleaded that the works were not carried out in a proper and workmanlike manner, certain materials were not good and suitable for the purpose for which they were used, the works were not in accordance with all laws and legal requirements and the Builder did not carry out the works with reasonable skill and care.

76 Schedule 1 is “Particulars of the Building Company’s breaches and defective work ...” and lists 15 items. Their total is \$123,829.60, before application of a 10% contingency, preliminaries of \$15,280.15, overhead and profit on \$123,829.60 plus preliminaries, which gave a grand total of \$187,450.38.

77 Of the 15 items, only item 1 clearly related to related to brickwork:

1	Brickwork and mortar (all of which needed to be demolished and rebuilt)	\$60,247.50
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78 Item 13 was “Walls in garage not plumb”, but this refers to plaster walls. Item 14 was “External face of garage wall not waterproofed”, which is costed at \$350. It refers to the neighbour’s garden using the bottom of the wall as a retaining wall. I am not satisfied that this was a responsibility of the Bricklayer, to the extent that anything more than complete replacement of brickwork would have been necessary.

79 The brickwork represents 48.65% of the total alleged defects claimed by the Owners, and it is noted that these figures were given after the alleged rectification of various items by the Builder. Applying the same proportion to the grand total gives a sum for brickwork of \$91,194.61.

80 The Bricklayer’s contribution will be further adjusted, taking into account that the Owners and Builder settled for substantially less than the Owners’ total claim.

Schedule 2

81 Schedule 2 is “Loss and damage in respect of ... a new builder taking over and completing the works ...”.

82 Paragraph 29 of the Points of Claim pleaded that by reason of the Builder’s breaches referred to in paragraph 17 to 24 and the termination referred to in paragraphs 25 to 28, the Owners had suffered loss and damage of at least \$387,292, as described in Schedule 2.

83 Paragraphs 17 and 18 referred to Schedule 1 and paragraph 19 referred to them as substantial breaches and persistent failures. In general terms:

- Paragraph 20 refers to the Builder’s failure to complete;
- Paragraph 21 refers to the Builder’s claim for fixing stage when it was not entitled to it – largely (as described in paragraph 32) for brickwork and mortar defects, plus suspension when, the Owners alleged, the Builder was not entitled to do so.
- Paragraph 22 refers to the Builder’s failure to complete within the construction period.
- Paragraph 23 refers to service of a Notice of Intention to Terminate on 20 May 2016.

- Paragraph 24 refers to the Builder's alleged failure to rectify.
- Paragraphs 25 and 26 refer to termination, allegedly in accordance with the contract provisions.
- Paragraph 27 refers to the Owners' alleged additional right to terminate for the Builder's repudiation.
- Paragraph 28 refers to the right the Owners had to terminate under s 41 of the *Domestic Building Contracts Act 1995* (DBC Act) because the construction period had already been exceeded the period allowed by more than 1.5 times.

- 84 Item 1 of Schedule 2 is inconsistent with Schedule 1, because it attributes "at least \$300,000" to the cost of completion and rectification. The amount sought is \$249,710, being \$300,000 less the amount that the Owners claimed would have been payable under the contract if it had been completed on time and defect-free.
- 85 Schedule 2 ends by referring to the opinion expressed in the Checkmate Consulting Pty Ltd report dated 8 August 2016. This report included 34 items, totalling \$205,707.54 before contingency, overhead and profit. The brickwork remained \$60,247.50, or 30.26% of the total.
- 86 There is no way of telling which report, both obtained for the Owners, would have been relied upon, or which would have been preferred by a hypothetical Tribunal Member in deciding between Owners and Builder. I adopt the median between the two reports, of 48.65% and 30.26% being 39.46%.
- 87 I also adopt as the sum for item 1, the median between \$187,450.38 and \$272,562.49 (the grand total allowed in the Checkmate Schedule), being \$230,006.43. On that basis, item 1 would have been \$230,006.43 - \$50,290 unpaid under the contract = \$179,716.43.

#### Schedule 2 – the consequential losses

- 88 I consider the remaining items in Schedule 2, and allow 39.46% of each item, unless it is clear that it was irrecoverable, in whole or in part or irrelevant to brickwork, or to loss and damage as a result of brickwork.

#### Item 2

- 89 This item is for \$15,750 for alternative accommodation arising from the Builder's delays. I am satisfied that the brickwork would have contributed to the delays and allow 39.46%, being \$6,214.95.

#### Item 3

- 90 This item was \$1,770 for storage costs from 27 March 2016 to the date when the Owners would be able to move into their new home in late November 2016. As the contract did not end until 21 June 2016, it is unlikely that the Owners could receive damages in the nature of delay costs

in addition to agreed damages until the contract was terminated. I treat a reasonable sum for storage as 60%, or \$1,062. Of that, I allow 39.46% being \$419.07.

Item 4

91 This item is \$3,000 for removalists costs “due to the Owners being unable to move into their new home in late 2015”. It does not appear to be a claim for two moves rather than one, and therefore would have been unlikely to be successful. I do not take this sum into account.

Item 5

92 This item was for \$400 for the locksmith, immediately after termination. As I found above that I am not satisfied that the Bricklayer was substantially responsible for the termination of the contract, I am not satisfied that the Bricklayer should contribute to this item.

Item 6

93 This item was \$3,500 for site clean-up immediately after termination. As I found above that I am not satisfied that the Bricklayer was substantially responsible for the termination of the contract, I am not satisfied that the Bricklayer should contribute to this item.

Item 7

94 This item was \$7,720 for site security costs immediately after termination. As I found above that I am not satisfied that the Bricklayer was substantially responsible for the termination of the contract, I am not satisfied that the Bricklayer should contribute to this item.

Item 8

95 This item was \$667 for insurance costs immediately after termination. As I found above that I am not satisfied that the Bricklayer was substantially responsible for the termination of the contract, I am not satisfied that the Bricklayer should contribute to this item.

Item 9

96 This item was \$800 for “emergency and unscheduled power disconnection”, which I am not satisfied is relevant to the brickwork.

Item 10

97 This item is \$975 for building permit costs. I am not satisfied that this is relevant to the brickwork.

Item 11

98 This item is “At least \$48,000” for “Miscellaneous costs for consultants and advisers during early 2016 ... including [building, engineering and scientific consultants].”

99 It is noted that the Owners did not commence proceedings until late June 2016, so this is in addition to any amount the Owners might have been able to claim for costs of this proceeding. \$48,000 is a surprising amount, given the value of the contract and the remaining amount in dispute. I treat half of that sum, \$24,000, as a reasonable sum, and allow 39.46% as at least some of these matters concerned brickwork. The total allowed is \$9,470.40.

Item 12

100 This item is \$45,000 for tiling. I am not satisfied that this is relevant to the brickwork.

Item 13

101 This is \$10,000 for “General damages for ... stress, inconvenience, loss of use of the Property and loss of enjoyment of the Property”. Such items are frequently claimed but only very rarely awarded. I treat this claim as one that would be unsuccessful.

Totals

102 I treat the consequential and other claims that had a reasonable chance of success as:

#	Item	Builder's amount	Brick-layer's contribution
2	Alternative accommodation	\$15,750	\$6,214.95
3	Storage	\$1,062	\$419.07
4	Removalist	0	0
5	Locksmith	\$400	0
6	Site clean	\$3,500	0
7	Security costs	\$7,720	0
8	Insurance	\$667	0
9	Emergency power	\$800	0
10	Building permit	\$975	0
11	Consultants etc	\$24,000	\$9,470.40
12	Tiling	\$45,000	0
13	Stress, inconvenience etc	0	0
	<b>Totals</b>	<b>\$99,874.00</b>	<b>\$16,104.42</b>

103 Again, these amounts are further adjusted as the Owners received less than the whole amount they claimed.

### **Conclusion regarding Owners' claim against the Builder, including the Bricklayer's share**

Schedule	Total for Builder	Amount recoverable from Bricklayer if total paid to Owners
Schedule 1	\$179,716	\$91,194.61
Schedule 2	\$99,847	\$16,104.42
Total	\$279,563	\$107,299.03

104 The proportion that the Bricklayer would have had to pay if nearly the whole sum claimed by the Owners had been awarded to them was 38.38%.

### **OWNERS' COSTS AND INTEREST**

105 I make no further adjustments to allow for the amount the Owners might have recovered for costs and interest. No evidence was given of the costs incurred by the Owners, nor of their contribution, if any, to the settlement sum.<sup>3</sup> I am satisfied that the Bricklayer should bear its proportion of any such sum and I treat them as being the same proportion of the total of \$140,000 as the other items.

### **ADJUSTMENT TO TAKE INTO ACCOUNT THE SETTLEMENT SUM**

106 I find that the Bricklayer must pay 38.38% of the sum of \$140,000 paid by the Builder to the Owners, being \$53,732.

### **COSTS**

#### **The Builder's claim for Mr Ryan's fees**

107 Although Mr Ryan's reports might have been necessary to convince the Builder that it was necessary to demolish all the brickwork with the exception of the garage, neither Mr nor Mrs Kirkham have given evidence to say that any report was necessary to convince the Bricklayer to do some or all of the work.

108 I am not satisfied that Mr Ryan's reports are relevant to the dispute between the Builder and the Bricklayer. They were primarily for the Builder's defence against the Owners.

109 However, Mr Ryan's telephone evidence was valuable to me in reaching my decision concerning various aspects of the bricklaying. Mr Ryan could not have given that evidence without considering the reports of the other experts and visiting the site. I attributed \$1,000 of Mr Ryan's services to the

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<sup>3</sup> Nor could it be, having regard to s 85 of the VCAT Act which commences: "Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the Tribunal ..."

value to the dispute between the Builder and Bricklayer. The Bricklayer must pay the Builder \$1,000.00 for costs.

### **HEARING FEES**

110 Having regard to s115B of the *Victorian Civil and Administrative Tribunal Act 1998* I consider the Builder has been substantially successful in its claim for reimbursement by the Bricklayer, although not to the degree it sought. I find it is reasonable that the Bricklayer reimburse the Builder half the cost of the hearing fee for 25 July 2018 of \$505.80, being \$252.90.

**SENIOR MEMBER M. LOTHIAN**