VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1026/2011

CATCHWORDS

Domestic Building – cost plus contract - Owner taking over aspects of work – delay – responsibility for – party wall in Class two building – sound transmission – ordinary brick ties used – wall of continuous construction – no special ties specified – no breach by Builder – *Wrongs Act* 1958 Part IVAA – claim against builder for breach of building contract not an apportionable claim

APPLICANTS	Mr Peter Hyndman, Mrs Margaret Hyndman
RESPONDENT	Hurtob Homes Pty Ltd (ACN 005 064 746)
FIRST JOINED PARTY	Unitex Granular Marble Pty Ltd (ACN: 005 99 561)
SECOND JOINED PARTY	Senad Ibrahimovic t/as Sena The Handyman
THIRD JOINED PARTY	Tiling Creations Pty Ltd (ACN: 109 736 245)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	2-6 December 2013; 30-31 January 2014
DATE OF ORDER	4 April 2014
CITATION	Hyndman v Hurtob Homes Pty Ltd (Domestic Building) [2014] VCAT 380

ORDER

1. Order the Respondent to pay to the Second Applicant $67,173.12.
2. The Second Applicants' claims against the First and Second Joined Parties are dismissed.
3. Order the Second Applicant to pay to the Respondent $10,780.68.
4. The Respondent's claim against the First Joined Party is dismissed.
5. Order the Second Joined Party to pay to the Respondent $54,694.72.

6. Liberty to the Applicants to apply upon notice to the Third Joined Party for further orders in relation to their claim against the Third Joined Party.

7. Costs reserved

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr. B. Reid of Counsel
For the Respondent	Mr A. Beck-Godoy of Counsel
For the First Joined Party	Mr C. Gilligan of Counsel
For the Second Joined Party	In person
For the Third Joined Party	No appearance

REASONS

Background

1 The Applicant Mrs Hyndman and the estate of her late husband, Peter Hyndman, ("the Owners") are the Owners of two adjoining and attached units at Arden Court in East Kew ("the Units").

2 The Respondent is and was at all material times carrying on business as a Builder. Its director, Mr Hunter is and was at all material times a registered Builder.

3 On or about 22 December 2009 the Owners and the Builder entered into a cost- plus contract for the construction of the Units with an estimated price of $980,000 inclusive of GST ("the Contract").

4 The Units were to be constructed in accordance with plans prepared by Mr Hyndman who was an architectural draughtsman, a building consultant and a former builder. The Owners intended that, upon completion, they would live in Unit 2 and rent out Unit 1 in order to derive an income.

5 With his knowledge and expertise Mr Hyndman would have been well capable of carrying out the construction himself except that he was suffering from very poor health. He approached Mr Hunter on several occasions requesting that he undertake the construction on a cost-plus basis and Mr Hunter eventually agreed to do so.

The construction

6 Despite the Contract, the contracting and supervision of some aspects of the construction were undertaken by Mr Hyndman himself. These included the roof, the lift and the demolition of the existing house. In addition, a number of suppliers were paid directly by the Owners. Additionally, because of Mr Hyndman's contacts within the building industry and his belief that he as owed favours by various people it was agreed that he would be consulted about the trades to be used and had the right to suggest subcontractors.

7 There was a dispute at the hearing as to whether the bricklaying and the tiling were undertaken by the Builder or by the Owners through their own contractors. The significance of that was first, whether the Builder was entitled to a margin on that work and secondly, whether responsibility for any defects lay with the Builder or the Owners.

Time

8 The Contract provided for a construction period of 340 days from the commencement date, which was 23 December 2009.

9 The Owners were concerned to have the Units completed by 17 December 2010 because, on the following day, their children were coming to visit. Because of Mr Hyndman's ill health it was expected to be his last Christmas and they wanted to spend it in the Unit they were to occupy, which was Unit 2.

10 The Owners moved into Unit 2 on 17 December 2010 but Unit 1 was still not completed.

The dispute

11 Complaints were then made about sound transfer through the party wall between the Units and, following the receipt of some expert opinion, further work was done by the Builder to rectify the problem.

12 By this stage the relationship between the parties had deteriorated and the correspondence and conversations became acrimonious. The work on Unit 2 appears to have proceeded erratically, some of it being due to the Builder and some due to the Owners. The certificate of occupancy for Unit 2 was not issued until 30 September 2011. A major area of dispute is, whose fault that was.

13 In December 2011 this proceeding was issued by the Owners claiming:

(a) damages for defective work, quantified at $249,377.45;

(b) overpayments said to have been $38,383.74; and

(c) damages for late completion, claimed to be $70,171.43.

14 The two largest defects alleged related to the rendering of the Units and the internal floor tiling. On the application of the Respondent the three joined parties were added as parties. The First Joined Party ("Unitex") was the supplier of most of the materials used in the cladding and rendering. The

Second Joined Party ("the Renderer") was the renderer who provided the labour and materials to clad and render the Units and the Third Joined Party ("the Tiler") was the tiling company that carried out the floor tiling complained of.

15 Before the proceeding could be heard, Mr Hyndman died. I am told that there has been no grant of probate of any will nor any grant of administration of his estate.

Hearing

16 By Mr Reid's opening, the Owners claimed $368,089.84 damages for defective work, the return of the sum of $38,383.74 said to have been overcharged by the Builder and $52,800 damages for delay, calculated at loss of rental of Unit 1 for 44 weeks at $1,200 per week.

17 The matter came before me for hearing on 2 December 2013 with five days allocated. Mr B. Reid of Counsel appeared for the Owners, Mr Beck-Godoy of Counsel appeared for the Builder, Mr C. Gilligan of Counsel appeared for Unitex and the Renderer appeared in person. The Tiler did not appear but its Director, Mr Anthony Spiteri, gave evidence on behalf of the Owners.

18 The Builder has counterclaimed for an amount of $77,104.01 which is said to be the balance owed for the work and materials supplied plus the Builder's 15% margin.

19 I raised with Mr Reid the difficulty caused by the death of Mr Hyndman and the lack of any legal personal representative of the estate. He said that Mrs Hyndman was conducting the proceeding as a joint contracting party. None of the other parties present took any point as to a want of parties and so the matter proceeded.

20 The five days allocated proved to be insufficient and the matter was adjourned to 30 January 2014 with two further days allocated.

Witnesses

21 For the Owners I heard evidence from:

(a) Mrs Hyndman, as to the events that occurred of which she was aware;

(b) Mr Murrihy, a surveyor who gave evidence about the levels of the tiling on the floors;

(c) an estate agent, Mr David Gillham, who gave evidence as to the rental value of Unit 1;

(d) Mr Anthony Spiteri, a director of the Tiler, who gave evidence as to the Tiler's engagement to carry out the work.

(e) Mr Hegarty, a building consultant: and

(f) Mr Unkles, an acoustic expert whose report was tendered.

(g) Dr Smith, as to the health of Mr Hyndman.

22 For the Builder I heard evidence from:

(a) its Director. Mr Hunter, who gave evidence as to the principal matters;

(b) a carpenter, Mr Ellis, who gave evidence as to certain variations Mr Hyndman made to the plans;

(c) a labourer, Mr Demelzen. who also worked on the site and gave evidence as to changes made to the balcony;

(d) Mr Campbell, a building consultant; and

(e) Mr Antonopoulos, an acoustic engineer.

23 For Unitex I heard evidence from:

(a) its director. Mr Concannon, who gave evidence of the materials supplied to the Renderer and about how the work ought to have been done; and

(b) Mr Lorich, a building consultant.

24. The Renderer gave evidence on his own behalf. He also produced an expert report from a Mr Mladichek but I was informed that Mr Mladichek was not available to give evidence after the first day of the hearing. I have nonetheless read and considered Mr Mladichek's report.

25. The missing witness was, of course, Mr Hyndman. He was the author of the Owners' side of an extensive and, at times, acrimonious correspondence passing between the Owners and the Builder.

Defects

26. Most of the hearing time was occupied in dealing with the Owner's allegations of defective work. Mr Hegarty prepared three reports and Mr Campbell for the Builder produced one. Mr Lorich reported on the cladding and rendering but not on the other matters. A report was tendered by the Renderer from Mr Mladichek but he was not called. There were also reports about the acoustics of the party wall but the acoustic evidence was uncontroversial.

27. Mr Beck-Godoy submitted that Mr Hegarty, who had known Mr Hyndman professionally for many years, was not a disinterested witness. He described him as an admitted personal friend and close associate of the Owners for over 30 years. That was not quite the evidence. Mr Hegarty had known Mr Hyndman for 30 years and they had socialized but he had only met Mrs Hyndman once and he had not seen Mr Hyndman for three years when he received instructions for this proceeding.

28. Mr Beck-Godoy said that Mr Hegarty used "unmeasured language" in his reports to criticize Mr Campbell and that he gave the impression that he was advancing the Owners' interests rather than impartially assisting the Tribunal.

29. I think there is some validity in this criticism. Mr Hegarty's first report does express opinions on legal and contractual matters which are outside his function. He refers throughout his report to rectification of "poor workmanship" and "very poor workmanship" in contexts where it appears gratuitous. After referring to photographs he had seen of the render and a letter from Unitex he said in his report: "…it follows that the application of the applied finish was applied in a could not care a less attitude…" which is not only emotive but proved to be quite unwarranted on the evidence.

30. In his report of 17 October 2013 he ventures into arguments as to liability, supported by accounts of what he has been told. That is the role of an advocate rather than an expert. He criticized Mr Campbell for using Rawlinson's guide although that is commonly used in hearings in this list, as is Cordell's guide, which Mr Hegarty also criticized. He did this in a way that was very disparaging of Mr Campbell. For example, he said that Mr Campbell "generally uses a made up rate, which I assume he found in Cordells". It is possible for him to say that Cordell's rates are inappropriate, if that is his opinion, and say why without being disrespectful of the other expert.

31. I thought Mr Campbell gave more detached evidence but he did not assist me on the biggest item, which was the rendering. On that item I was more assisted by Mr Lorich. Mr Mladicheck's report consisted largely of annotated photographs of the render that he had taken but he did not do any destructive testing nor express any opinion on rectification.

Rendering

32. The external render for all walls above the level of the base brickwork was to be 75mm polystyrene foam rendered over. The specification required, in Item P:

> "External cladding: 75mm foam complete with acrylic topcoat and waterproof finish membrane. Complete system to be installed strictly in accordance with the manufacturer's recommendation."

33. The architectural plan, No. 2 of 5, provides that it is to be "75mm thick foam Easyclad with 3-5mm acrylic coating and finishing membrane coating".

34. Both the specifications and the drawings were prepared by Mr Hyndman.

35. The Builder engaged the Renderer to supply and install the foam and external mouldings and render them. Instead of using the Easyclad system the Renderer used materials supplied by Unitex.

36. According to the evidence of Mr Concannon the Unitex system has a number of components, all of which have to be used in accordance with the recommendations of Unitex in order for it to attract the warranty that that company gives to those using its materials.

37. After hearing the evidence of the Renderer as to the method of construction used, Mr Concannon said that he had departed from the Unitex system in several respects.

38. First, he did not glue the polystyrene panels together at the edges as required. Secondly, he did not use a sufficient build-up of the base coat of the render to the required thickness and thirdly, the mouldings that he used were manufactured by another company.

39. In addition, it appears that the Renderer stuck the mouldings to the cladding of the Units using an adhesive recommended to him by the staff at Bunnings, a well known hardware retailer.

40. After the Owners took possession of Unit 2, Mr Hyndman noticed that the render had a spotted appearance on very cold mornings. He took photographs, which were tendered, showing spots over the walls.

41. According to the expert evidence, this spotting is due to the transference of the warmer temperature from inside the house to the external skin of the foam cladding. The transfer occurs because the screws used to hold the foam panels to the frame conduct the heat to the outside. The difference in temperature dissipates over the plastic washer between the head of the screw and the outer face of the foam panel that it secures. The result is a moisture spot clearly visible from outside equivalent to the shape of the plastic washer. The appearance is unsightly but disappears as soon as to the external air heats sufficiently. It only appears on a very few cold mornings. At most times of the year the effect would not occur.

42. Mr Hegarty drew my attention to paragraph 5.02 of the *Guide to Standards and Tolerances* 2007, which provides:

> "Staining, folds, splits, dents, open joints between panels, cracking and other distortions in wall cladding are defects if they are visible from a normal viewing position at ground level or an upper floor level."

It does not seem to me that this paragraph describes what has occurred in regard to this heat transference.

43. Mr Hegarty said in his first report that the coatings applied to the walls were far too thin or had insufficient base in the mixture to conceal the fixings from view under all conditions. That accords with the evidence of Mr Concannon. Mr Hegarty pointed out that the contract requirement was for 3-5mm applied acrylic and finishing membrane to be applied and that certain delaminated pieces that he had observed were nowhere near that thickness.

44. In his next report Mr Hegarty reported on delamination of the architrave mouldings including the quoin mouldings at the corners and the shrinkage of some sill mouldings on one side of the house. He said that the Renderer had used a "conglomeration of various suppliers' products" and had installed them in an untradesmanlike manner. In addition to the thinness of

the render he said that the aluminium window frames had not been masked and the mouldings had not been properly installed as a result of which a number of them were delaminated from the walls.

45. In regard to a join in one sill moulding which had opened to a gap of 7mm, he said that a full length moulding should have been used, although I note the Renderer's evidence that a longer piece was not available. He said some of the joints were cut and finished in an amateurish way and some mouldings had been cut too short. He also said that no expansion joints had been installed in the wall cladding system

46. Mr Campbell said that the scenario whereby the position of the fixings of the foam become apparent on cold mornings is a rare one but did not deal with the specific allegations as to defects in Mr Hegarty's report. He said that in the absence of any visual confirmation or written evidence he could make no further comment. As to costing he said that would depend upon the recommendations of the manufacturer.

47. Mr Mladichek said in his report that he considered the rendering to be above average. He acknowledged "…a small number of workmanship defects…" but said that since these were apparent to the Builder and the Owners at the time of handover, they were "…estopped from claiming defects". It is not for an expert to express an opinion about legal matters.

48. Mr Mladichek said that his testing was that the thickness of the render exceeded 3mm. He said that the spotting was a consequence of the physical properties of the cladding and rendering system used and that responsibility for the selection of the building elements was with Mr Hyndman as the designer. He said that increasing the thickness would make no difference.

49. Mr Lorich said that the surface coating over the foam board substrate was very thin and he considered it to be approximately 2mm to a maximum of 3mm in most areas. He also said that the render had no finishing trim to the bottom edge of the foam boards which left them exposed to future deterioration. He agreed with Mr Hegarty that there was a lack of wall expansion in contractual control joints to the internal corners and around window and door openings. He said there appeared to be a paint finish applied over the rendered surface which was to act as a membrane.

50. Mr Lorich concluded by saying that the Renderer may have used as little material as possible in the cladding and the application of the moulding product for a system from an unknown manufacturer. He suggested that this might be due to the cost of the Unitex products which, he said, are regarded within the cladding industry as being of superior quality.

51. He agreed that the "spotting" issue was a thermal bridging effect with heat from the inside of the house diffusing onto the metal fixing screws but he said that this only occurred if the plastic washers were too close to the surface. He said that if the render had been of the required thickness it would not have occurred. He said that the Unitex materials had not been

applied in accordance with their documented requirements and that it was a fault of the application of the render not the materials supplied by Unitex.

52. The Renderer said that he used Unitex materials except for the mouldings and that he followed advice given to him from time to time by an employee from Unitex. That person was not called to give evidence.

53. He acknowledged not having glued the polystyrene panels together which Mr Concannon had said was required. He said that although the baseboard system had required a 5mm build-up of render as a basecoat this could not be achieved in practice. He said that following the fixing of the polystyrene foam boards he then applied the first coat of polymer render, then mesh, then the second coat of polymer render, then the baseboard render 1mm thick followed by the dry texture which is 2mm thick followed by 2 coats of paint which is the sealer over the other materials. On this basis, he said that he achieved a thickness of 5mm.

54. He referred to a photograph of a sample of render taken by Mr Hegarty and said that he measured the thickness of the render at that location at being 5.2mm. Mr Hegarty did not dispute that, but said that that was not the thickness of most of the render.

55. The Renderer said that he did put expansion joints in the external cladding but acknowledged that these had been rendered over or painted over. He said that the sill moulding was joined in the middle because the mouldings came in 3m lengths and the sill was longer than that.

56. Mr Hegarty said that he measured the thickness of the render at being less than 3mm on the side of Unit 2. Mr Lorich said that he took two samples to form his opinion that the render was too thin but was unable to recall precisely where he took them from.

57. The Renderer identified the supplier of the mouldings as a company called Auscuf and Mr Campbell said that that was a reputable company.

58. The Renderer said that Unitex had changed their plastic washers for a smaller white washer and suggested that the problem with the spotting might be due to the older washers that he had used.

59. Mr Concannon denied that the washers had been changed for any reason to do with performance but was instead related to Unitex having taken over another company. There was no expert evidence to support the Renderer's suggestion that the earlier washers were deficient.

60. The Renderer had tendered some product information sheets of the adhesive that he had used, suggesting that it was suitable for external application, despite the misgivings expressed by Mr Lorich in his evidence. Notwithstanding that, the mouldings have delaminated in several places, raising questions as to the suitability of the adhesive or the manner in which it was applied.

61. The Renderer said that he used finishing trim to the bottom edge of the foam boards and I find that he did.

62. The preponderance of the expert evidence is that the render is defective and that the two Units require additional render and the replacement of the external mouldings.

63. I do not accept that it is necessary to remove what is there. I accept Mr Lorich's opinion that it requires further coats of render in order to build it up to the required thickness.

64. Mr Hegarty costed the replacement of the render at $54,694.72. A major component in this costing was the erection and subsequent dismantling of a scaffolding for both Units. The Renderer said that he did the job with a mobile scaffold at considerably less expense, but the weight of expert evidence was that a perimeter scaffold is required. That was the view of Mr Hegarty.

65. Mr Campbell raised the possibility of using a scissor lift but I preferred Mr Hegarty's and Mr Lorich's opinion that the whole job will have to be scaffolded. Mr Campbell queried why all of the mouldings would have to be removed since only some have delaminated. I prefer Mr Hegarty's opinion that in view of the extent of movement between the mouldings that have already failed and the substrate the conclusion can be drawn that they are not properly fixed and that all of them should be replaced.

66. Accordingly, the amount of $54,694.72 assessed by Mr Hegarty will be allowed.

Finished floor levels

67. The ground floors of both Units are tiled and the finished floor levels are irregular.

68. Mr Hegarty referred to paragraph 2.08 of the *Guide to Standards and Tolerances* 2007 which provides that new floors are defective if, within the first 24 months, they differ in level by more than 10mm in any room or area or more than 4mm in any 2 metre length. The overall deviation of floor level to the entire building footprint is not to exceed 20mm.

69. Mr Campbell said that the appropriate tolerance to apply is that set out in paragraph 2.07 of the Guide, which provides that finished floor levels and/or reduced levels are defective where they depart from the documented finish level by more than 40mm.

70. There was some debate about this but I think that the two clauses are directed to different things. The complaint in the present case is about the levelness of the floor and in that respect Clause 2.08 is the appropriate measure. The evidence of Mr Murrihy demonstrates numerous instances in which the floor levels of both Units exceed the specified tolerance and these are set out in Mr Hegarty's report.

71. At the on-site inspection I did not consider that the floors were unsightly in any respect, apart from some very minor lipping. A golf ball placed on the floor will roll to the low points confirming that the floor is out of level and the legs of furniture needed to be packed in places. Otherwise the difference in levels is not visually apparent. Since the degree to which the floors are out of level exceeds the tolerance set out in the Guide and since there is no reasons to discount what the Guide says in this particular case, I find that the floors are defective. The real issue is, who is responsible?

72. Mr Hyndman was a building expert of considerable experience as well as having been a Builder on his own account. The tiles were laid by Mr Spiteri. He was sent to the site by Mr Hunter but was paid directly Mr Hyndman.

73. According to Mr Spiteri, he was engaged by the Builder and sent to the site and told that the tiles would be supplied directly by the Owners and that they would be paying him directly. He quoted a price per square metre to Mr Hunter and also told him that he believed that some of the floors were not level. From that I conclude that he had already been out to the site and had a look at it.

74. In paragraph 4 of his witness statement he said that he refused to tile the floors in the lounge dining and kitchen area because they were so out of level. However from his evidence it became apparent that his refusal related entirely to Unit 1. He had already tiled the floors in Unit 2. Mr Hunter hired a machine to level the floor and according to Mr Spiteri, he was then told by Mr Hunter that the floor was ready to receive the tiles.

75. Mr Spiteri said that, although he could see that they were still out of level, he proceeded to tile them, even though he had formed the view that the grinding had not fixed the floor problems.

76. He made a general statement in paragraph 8 of his witness statement that Mr Hunter "at all times was the person directing me to perform the tiling works" but he does not suggest that Mr Hunter was there when he was working and he gives no details of what he claims Mr Hunter said to him. He said that his company, Tiling Creations, was moribund but not in liquidation.

77. Mr Hunter said that it was Mr Hyndman who directed the Tiler, that Mr Spiteri had raised concerns about the levels of the concrete floor slabs which the Builder rectified. He said that he believed at the time that Mr Hyndman was then happy with the floors because he then instructed the Tiler to lay the tiles. Mr Hunter said in paragraph 30 of his witness statement:

> "If he had told me he was not happy, then I would have arranged for self levelling compound to easily fix the problems, but Peter was supervising this aspect of the work, as with other aspects of the work".

78. Generally, it is not for an Owner to say whether or not he is happy that the floor is in a condition to receive tiles. It is for the Builder to carry out the scope of works required by the contract in a proper and workmanlike manner and this would involve doing whatever had to be done in order to ensure that the finished floor level did not exceed the required tolerances.

79. However, in the present case Mr Hyndman was a building expert and took charge of this aspect of the work himself. He was able to observe the floors and gave directions to Mr Spiteri.

80. In a letter that he wrote to Mr Hunter dated 2 February 2011 Mr Hyndman said:

> "With respect to the tiler, you gave me his phone number and you told me to ring him. I met him on site and I negotiated his rates and gave him his set out instructions. Thereafter, I gave him day to day instructions."

81. In a further letter to Mr Hunter dated 6 March 2011 Mr Hyndman said:

> "The timing was a "debacle" as you put it. The tiler, recommended by you did only part of the job, was supervised by us, paid by us and on several occasions until finally, he refused to continue working due to the unfairness of the floors. It took at least a week to get you to grind them back to somewhere near level and another 3 days to clean up the disgusting mess of slurry you left on the window and door frames plus the glass and other abutting finishes."

82. On his copy of this email, Mr Hunter has written: "Wrong". However it is clear that Mr Spiteri went to the site at the request of Mr Hunter and was then directed by Mr Hyndman who then refused to pay any margin on this work to the Builder. I think it likely that it was Mr Hyndman who supervised this part of the work.

83. Mr Spiteri said that Mr Hyndman gave him his set out instructions and which tiles were to go where but that he gave him no other instructions. He nonetheless supervised the work and must have been satisfied with the way it was being done or he would have directed Mr Spiteri to do it in another way.

84. Mr Hunter observed in paragraph 15 of his reply witness statement that, if the Tiler had laid the tiles on a screed prior to tiling the minor problems would have been alleviated.

85. Mr Campbell referred me to paragraph 11.04 of the *Guide to Standards and Tolerances* which states:

> "11.04 Floor and wall tiles where the Owner supplies and lays the tiles.
>
> The Owner is responsible for checking the adequacy of the substrate before laying the tiles. Any failure of tiles, adhesive or grout, where the Owners supplies and lays the tiles, is the responsibility of the Owner."

86. Mr Campbell suggested that Mr Hyndman had acknowledged that he alone instructed and supervised the floor tiler.

87. Mr Campbell also referred me to Australian Standard AS3958.1 *Ceramic Tiles Part 1*, Section 4 which, he says states:

> "As the preparation of the background is normally carried out by others, the Tiler should not proceed unless he considers that the preparatory work is satisfactory."

88. It seems to me that the problem has arisen by adhering the tiles directly to the concrete slab without first ensuring that the slab was true and level. Certainly, it is the Builder's responsibility to lay a slab that is relatively level but a building expert of Mr Hyndman's knowledge and experience would have been aware that if the tiles were adhered directly to the slab the finished floor level would reflect any want in the levelness of the slab. Since I am satisfied that he supervised the tiler the decision not to use a screed was his and so I do not think that liability of the Builder for this claim is proven.

Articulation joints to brick walls

89. Mr Hegarty refers to the requirement of Clause 3.3.1.8 of the *Building Code of Australia* that vertical articulation joints must be provided in straight continuous walls of unreinforced masonry at no more than 6 metre centres. He said that in the present case, the Building Surveyor had required them to be spaced at 5 metre intervals. He said no articulation joints have been provided in the basement brickwork of the party walls.

90. Mr Hegarty refers in his report to photographs that he was told the Owners had which confirm that no articulation joints have been provided in the base brickwork walls in the cellar. No such photographs have been tendered but I could see no articulation joints in the base brickwork at the inspection unless they were concealed behind the nib walls.

91. Since the site was low lying and on a flood plain, the two Units were required to be constructed upon very high base brickwork because of the danger of flooding, There is a single continuous suspended concrete slab poured on "Bondeck" integrated formwork under the Units extending right across the base brickwork from the external side of one unit to the external side of the other, resting also on the base brickwork of the party wall. Above this suspended Bondeck slab, the party wall is constructed from bricks but the rest of the cladding is timber frame clad in rendered foam. The effect of the Bondeck slab is to isolate the party wall above it from the party wall that forms part of the base brickwork. The Bondeck would also give the wall lateral support. Nevertheless I can see nothing in the Code which exempts the base brickwork from the requirement to incorporate articulation joints.

92. Apart from the base brickwork, the only brickwork walls where articulation joints would be required would be the party wall and the garage wall. There are none in the garage walls.

93. The engineering plans specify that articulation joints are to be provided as shown in the architectural plans. The architectural plans, drawn by Mr Hyndman, specify articulation joints in the party wall, which Mr Hunter says were installed, and one articulation joint at the rear of the garage which, it is acknowledged, exists, but none are shown in the base brickwork

94. Mr Campbell said that because of the internal linings it is not possible to say whether the articulation joints required to be placed in the party wall were provided or not. He said that the foundation and site plans show no specified articulation joints in the supporting base brickwork supporting the structural floor slab upon which the two Units are supported. He said that there no evidence of any structural movement, cracking or failing of the masonry walls nor any concerns raised.

95. There is no evidence to contradict Mr Hunter's evidence that the articulation joints required to be installed in the party wall above the Bondeck slab have in fact been installed. Mr Hyndman was regularly on site and in view of his interest in the construction and his undoubted expertise must have noticed if articulation joints had not been included. I am not satisfied that it has been established that there are no articulation joints in the party wall. However the Code required them in the base brickwork and also in the two garage walls, which are 6.5 metres long.

96. Mr Campbell said that he did not consider that the articulation joints were necessary but that if they were, Mr Hegarty's costing of $7,404.54 is fair and reasonable. However that costing includes the party wall and I have no costing for just installing them in the base brickwork and the garage. Looking at Mr Hegarty's costings and the apparent proportion of that relating to the party wall to be deducted I will allow $2,500.

Damp proof course

97. Mr Hegarty said that there was no damp proof course in the base brickwork and to install it now will cost $11,356.25. It was not suggested that there was no damp proof course for the Units themselves.

98. Because the land is on a flood plain, Melbourne Water stipulated that the area under each Unit was not to be used for storage. However since taking possession the Owners have excavated under the Bondeck slabs and poured concrete slabs to create a cellar under each Unit. Some minor efflorescence was visible on some parts of the cellar walls, which are base brickwork. The Owners have since painted the walls.

99. Mr Hegarty suggested that the cause of the efflorescence was rising damp. Mr Campbell said that there was no evidence of rising damp but that water was back tracking in from the balconies. At the onsite inspection I noted that there was no drip line at the outer edge of the balcony above and the

water appeared to be tracking along the underside of the Bondeck. I accept Mr Campbell's evidence in that regard. Mr Campbell pointed out that the Owners had paved the area under the Bondeck and that might have an influence on any dampness in the walls but that suggestion was not explored. In a notation to a photograph in the Tribunal Book at page 644 Mr Hyndman blamed the efflorescence of the west wall of Unit 1 on water shedding from the slab above. On the following page he made a similar comment regarding efflorescence on the face of the party wall. Other efflorescence he attributed to rising damp (see page 604)

100. Both paving and painting were post-construction. Notwithstanding this work, the areas in question were not constructed by the Builder or required by the plans to be habitable rooms. Mr Campbell said that the walls in question are structural support walls and that they do not form part of the habitable building. I think that is correct.

101. The requirement of the Code is to have a damp proof course not less than the specified distance above the ground. The complaint here appears to be that they are an excessive height above the ground, due to the height of the base brickwork. It was not suggested that there was any requirement in the plans to install a second damp proof course closer to the ground in order to prevent efflorescence in the base brickwork. In any case, it was not demonstrated to me at the inspection that there was rising damp in the base brickwork.

102. The Builder was required to construct the Units in a proper and workmanlike manner but Mr Hunter said that there was a damp proof material added to the mortar in the base brickwork. I do not find any breach by the Builder in this regard.

The balconies

103. Mr Hegarty said that the rear balconies had insufficient fall allowing water to pond. I accept his opinion that this was undesirable and needed to be rectified. He said that this required the tiles to be removed, the concrete scabbled and the tiles re-laid on a screed to allow a sufficient fall. The balconies have since been retiled by the Owners at a cost of $4,543.00 which they now claim from the Builder.

104. According to the evidence of Mr Hunter and Mr Ellis which is also supported by amended drawings, the Builder was directed by Mr Hyndman to lower the sill of the sliding door leading onto the balcony just before the concrete was poured. The effect of this was to reduce the height of the step down to the balcony at the doorway from 150mm to 70mm. This reduced the amount of fall that could be achieved, because the concrete could not be laid below the steel supporting the outside edge of the balcony.

105. Mr Hunter said that after Mr Spiteri left the site another tiler came and laid two thirds of the balcony in Unit 1 but could not complete it because of the

balustrade. The Owners completed that balcony and also the balcony of Unit 2.

106. In his report of 17 October 2013 Mr Hegarty acknowledges that the balconies have since been tiled "in an effort to mitigate loss" and in order "to allow occupation of the premises" but still suggests that further rectification is required "…to achieve a tradesmanlike finish so that water will drain freely … ' from the balconies. He does not suggest that water is still ponding on the balconies. According to Mr Campbell's report, at the time of his inspection, both balconies were draining to the balcony edge.

107. I am satisfied that there was a lack of fall initially present. The Builder blames that on the lowering of the doorway but the rectifying tiler has managed to achieve a sufficient fall. I therefore find the claim for the cost of rectification the Owners incurred established. However I am not satisfied that the problem is still present and, consequently, I am not satisfied that the scope of works costed by Mr Hegarty are required.

Northern section of the party wall

108. Mr Hegarty says that there are cracks in the external party wall and concludes: "It appears the Builder has failed to install brick reinforcement during the laying of the bricks". He does not say that the plans required reinforced masonry for this brickwork, or that there was any other requirement to install such reinforcement, nor does he identify what it should be, that is, brick ties or some other type of reinforcement.

109. Mr Campbell said that he observed minor cracking of between 1 to 1.5mm and that accords with what I was shown on site. Mr Campbell said that he was unable to attribute that to a lack of brick reinforcement and said that it was consistent with normal building settlement and movement. Although he said that cracks of less than 1mm were within tolerance he acknowledged that the cracks greater than that would require patching which he costed.

110. On this issue I prefer Mr Campbell's evidence because it accords with my own observation. As to the rectification cost, since it is only a cosmetic repair and since I am allowing for the re-rendering of the two Units, there is none.

111. The other issue raised by Mr Hegarty in regard to this wall was the finish at the top of the wall which is noticeably out of level. I accept his opinion in this regard but unfortunately, I have no separate rectification cost for it. The substrate will need to be levelled before the wall is re-rendered. That should not be a significant cost because the whole building will already be scaffolded and there will be trades on site for the other work that I have allowed. In the absence of any other evidence I will allow $500.

Excessive noise transfer through the party wall

112. After moving in to Unit 2, the Owners complained about the transfer of noise from Unit 1 through the party wall.

113. The plans had required the installation of insulation wool in the gap between the two leaves of brickwork. This would need to be put in progressively as the wall was constructed. Mr Hunter believed that it could not be put in because it would get wet from the rain during installation and would then not dry out. He said that Mr Hyndman was aware that the wool had not been installed.

114. After the Owners' complaints the Builder filled the gap between the two leaves of brickwork with styrene but that did not solve the problem. The Owners obtained a report from a Mr Unkles of Audiometric & Acoustic Services, acoustic engineers, who inspected the Units on 3 April 2011.

115. Mr Unkles said that standard wire ties linking the two leaves should not have been used and that resilient ties should have been used instead. He also said that the styrene in the cavity had poor sound insulating properties. He recommended that the plaster on one side of the party wall be removed, that it be re-fixed on specially mounted furring channels and that the gap between the plaster and the wall be filled with a specified insulating material. This was subsequently done by the Builder.

116. The Builder did not construct the wall as required by the plans in that it omitted the wool in the cavity. However according to the expert evidence this would have made no difference. The problem with sound transmission was due to the use of standard brick ties instead of the resilient ties recommended by Mr Unkles. The use of standard ties made the wall a continuous construction. Mr Reid submitted that this was defective work of the Builder. He said that an experienced builder should have know what brick ties to use. However it can also be said that a designer and building consultant of Mr Hyndman's experience should have known what brick ties to specify, yet no special brick ties were specified. It is the job of the designer to design to an owner's requirements and it is then the contractual obligation of the Builder to build what is designed.

117. Mr Unkles pointed out that the Building Code of Australia does not specify the degree of impact isolation but it does specify for the building to be of discontinuous construction. In the present case, the concrete floor between the two Units is continuous but that is what was designed. The wall is also continuous because standard brick ties were used.

118. Mr Hegarty considered that, notwithstanding the extensive work that has already been done, further work is necessary because of noise that he could hear. On this issue Mr Hegarty has ventured outside his level of expertise. He is certainly well qualified to cost rectification work but the scope of work necessary to achieve an acceptable acoustical outcome needs to be determined by an acoustic engineer.

119. Mr Campbell said that the Builder's opinion was that the noise transfer was through the concrete slab, which was continuous under both Units. He said that if that was correct then it would be a design problem. However he

declined to venture an opinion, suggesting that Mr Unkles be consulted about the matter.

120. Since no special ties were specified I find no breach by the Builder in using standard ties.

Garage floors

121. The complaint was that water ponded on the garage floors. Work has been done by the Builder on the garage in Unit 1 which has eliminated the ponding problem but left the floor with a patchy appearance. The garage floor in Unit 2 does not appear to be ponding. Mr Hunter said that all that it required was someone in there with a scraper but Mr Campbell acknowledged that the slab surface contained "debris and minor staining".

122. The garages are susceptible to water entry because they are partly open at the rear with a ramp up the ground level, allowing water to enter. I think that is a design issue. Mr Hegarty said in his first report: "It seems to me that the Builder was not au fait with the requirements of the owner in relation to the ramp required and the 50mm gradient to the garage car entry". He does not explain what he means by that but he says that the floors were not poured to the detailed plan prepared by the owner. In order to increase the gradient and provide a better appearance he said that the floors will need to be scabbled and a granolithic finish applied at a cost of $8,771.00. Mr Campbell said that all that is necessary to improve the appearance is to apply a coating at a cost of $4,935.40.

The Builder's claim for apportionment

123. By its Further Amended Points of Defence the Builder pleads that the claims brought against it by the Owners are apportionable claims within the meaning of s. 24E of the *Wrongs Act* 1958, which defines "apportionable claim" as meaning "a claim to which this Part applies".

124. Section 24F of the *Wrongs Act* 1958 provides:

> "(1) This Part applies to—
>
> (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
>
> (b) a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria).
>
> (2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.
>
> (3) A provision of this Part that gives protection from civil liability does not limit or otherwise affect any protection from liability given by any other provision of this Act or by another Act or law".

125. Liability for apportionable claims is limited according to the provisions of s.24 AI as follows:

> " (1) In any proceeding involving an apportionable claim—
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
>
> (b) judgment must not be given against the defendant for more than that amount in relation to that claim.
>
> (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
>
> (a) liability for the apportionable claim is to be determined in accordance with this Part; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
>
> (3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up."

126. The term "concurrent wrongdoer" is defined in s.24AH(1) as follows:

> "(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim."

127. To avail itself of the protection given by the section the Builder must show that the claim brought against it is an apportionable claim. I am not satisfied that the Owners' claim against the Builder based upon the Contract is an apportionable claim within the meaning of s.24E.

128. The Owners' claim against the Builder for breach of the Contract does not depend upon establishing any want of care. In *Commonwealth Bank of Australia v Witherow* [2006] VSCA 45 the Court of Appeal made the obvious point that the claim brought against the defendant must arise from a failure to take reasonable care. The learned President said (at para 11):

> "The Bank sues on a guarantee. It seeks, in effect, specific performance of the contract of guarantee. No question of failure to take reasonable care arises in that claim, or could possibly arise".

129. In the present case, the Builder has assumed a contractual obligation to build the Units in accordance with the Contract. If the works do not conform with the Contract it is no answer for the Builder to say that it was not negligent. Contractual liability is strict. The liability of a builder to an

owner does not arise from any failure to take reasonable care. It arises from a failure to perform the contract. Of course there may be cases where a party contracts to exercise reasonable care. In such a case, if he failed to do so and was sued for breach of contract on that account then that would be an apportionable claim because it would arise from a failure to take reasonable care, even though the duty of care arose in contract.

130. The Owners have pleaded as their primary claim:

    (a) the contractual obligation;

    (b) the extent to which it was not fulfilled; and

    (c) the resultant damage.

    No question of any failure to take reasonable care arises for that claim.

131. They have then gone on to plead a duty of care and a breach of that duty and damages. That is an apportionable claim because it arises from a failure to take reasonable care. However, since I have found their primary claim established it is unnecessary to consider whether their secondary claim in negligence is established and whether it is appropriate to apportion that claim with the claims made against the Joined Parties.

The Builder's counterclaim

132. The Builder's counterclaim of $77,104.01 is calculated as follows:

Cost of work performed	$614,357.42
Plus 15% margin	$ 92,153.61
Plus GST	$ 70,651.00
Plus additional costs	$ 46,238.35
Total	$823,400.38
Less paid	$746,296.37
Balance claimed	$ 77,104.01

133. The work claimed for is listed in an annexure to the Further Amended Points of Defence and Counterclaim. Mr Reid added these figures to $602,547.63 and when I added them up I arrived at the same figure. There is an agreement between the parties that there was an overcharge of $5,000. Putting to one side the additional coasts, that would alter the figures as follows:

Cost of work performed	$602,547.63
Less agreed overcharge	($5,000.00)
Plus 15% margin	$ 89,632.14
Plus GST	$ 68,717.98
Total	$755,897.75

Less paid	$746,296.37
Balance due to the Builder	$ 9,601.38

134. This calculation assumes that GST is payable upon the 15% margin. However Mr Reid submitted that it is not payable.

GST on the Builder's margin

135. Evidence was given by Mr Hunter about the negotiations prior to the Contract. He said that, initially, he wanted more than 15% as the margin but finally agreed to accept that figure.

136. Mr Reid referred me to Schedule 3 of the Contract where it is stated that progress payments are to be "Cost + 15% upon receipt of invoices". He submitted that should be interpreted as meaning the Builder was to simply add its 15% to the GST inclusive invoices.

137. I do not accept that submission. Schedule 3 relates to how progress payments are to be made. The more relevant schedule is Schedule 4 which describes the cost of the Building Works. After describing labour and other services it provides in paragraph (l) that the cost of the building work includes "…any GST payable upon any of the above amounts or on the supply of the Building Works to the Owner." The Builder's services were a supply of the building works and GST was payable.

138. Quite apart from that, the 15% claimed was the Builder's charge for its services. It was a taxable supply and it was also contemplated by the parties that it was part of the cost of construction. There is no reason to treat it differently from the other costs.

139. I have no doubt that the agreement the parties intended to enter into was that the 15% margin would not include GST. Such an arrangement would have been quite uneconomical. I am not persuaded that I should interpret the contract this way.

Additional costs

140. The following additional costs are claimed and they are disputed.

Work cover premiums

141. The Builder claims $2,214.36 for Work Cover premiums for its employees. In support of that claim 15 copies of the same page of an invoice dated 27 August 2011 is produced for an insurance premium of $8,324.92. The claim seems to be that a premium was payable by the Builder on the invoices of its employees equivalent to 1.8127% of the amount paid.

142. Who these people are and why work cover is payable with respect to them and why these amounts were not previously claimed is not explained. I have examined the Invoices the claims are said to relate to but there is nothing to indicate which of the persons named are employees with respect to whom Work Cover premiums would be payable. For Invoice 1311 I attempted calculations based upon various assumptions as to who these people might

be but I could not arrive at the figure claimed. Although I think work cover premiums may well be part of the cost of supplying the labour I am not satisfied that this part of the claim is proved.

Margin on sub-contractors paid directly by the Owners

143. The Builder claims a margin of $7,036.70 (including GST) on the money paid to the bricklayers and the Tiler. As to the Tiler, Mr Hyndman rejected that claim and asserted that he paid and supervised the Tiler. I have already found that it was Mr Hyndman who supervised and instructed the Tiler and also paid it for its work. It seems to me that this aspect of the work was taken out of the Contract by agreement.

144. It is asserted in Mr Hunter's own evidence that had he, Mr Hunter, been supervising the work he would have laid the tiles differently.

145. As to the brick layers there were two invoices ("Exhibit D" and "Exhibit J"). Each was sent to the Owners by the Builder with the suggestion that they might like to save some money by paying the bricklayer directly. The Owners paid both invoices. I accept Mr Reid's submission that the only meaning to be given to the communication in each case was that the saving would be in not having to pay the margin.

146. The Builder's reason for doing this is not apparent. The parties might have been on friendly terms at the time or it might not have been convenient or practical for the Builder to make the payment to the bricklayer itself in the first instance. The letter in each case amounted to an offer which was accepted by the Owners making the payment. The consideration moving from the Owners in each case was the making of a payment at a time and to a person to they were not otherwise obliged to. The margin is not now recoverable.

The Builder's claim for GST on their contractor's invoices

147. The Builder claims that it has omitted to claim GST on some of its contractors' invoices, totalling $5,002.20. The amount claimed is apparently detailed in a letter from the Builder to the Owners dated 18 February 2011, although only the first and last pages of that letter were included in the Tribunal Book and the missing page was not produced.

148. Mr Reid submitted that because the invoices from the individual tradesmen did not specify that they were GST inclusive I must infer that the GST is included in the invoice. On that basis, he said that I should infer that there is GST already included and so it was not open to the Builder to charge GST again on the amount of the invoice. He referred me to the decision in *ACCC v. Signature Security Pty Ltd* [2003] FCA 3 but that case related to misleading pricing. The argument requires me to assume that GST has been collected by the tradesmen concerned. The regime for collection of GST was explained to me by Mr Reid and it appears that where a business has a turnover of less than $75,000 per year it is not required to be registered for GST.

149. I think the provision of the services of these tradesmen to the Owners by the Builder, together with the margin of the Builder for its own work and supervision, amounts to a taxable supply upon which GST is payable. The Builder will have to charge it and remit it to the tax office. It does not seem to me that it would have been open to the Builder to claim an input credit on GST in regard to any one of the invoices referred to. I ought not to assume that GST has already been included in the invoice from the subcontractor in the absence of some indication that that has occurred. The invoices are informal in nature and do not by their appearance suggest that they were issued by a tradesmen who is registered for GST.

150. However the only amounts about which evidence has been given are those set out in the two pages of the letter that are on the Tribunal file. They amount to $1,179.30, not the $5,002.20 claimed.

Short payment of Invoice 1478 (Stage 20)

151. This invoice was for $21,281.80, yet only $20,000 was paid. It was for four items, the first three of which are already included in the total of $602,547.63. The last of the four items is expressed to be the Builder's margin on those items, although it is a little less than 15% of the three items before it. There is no explanation for that. The charges, the Builder's margin and the payment are all taken into account in the above calculation. There is no further adjustment to make.

The claim for the party wall and miscellaneous works

152. The Builder claims for the work that it did in addressing the Owners' concerns in regard to the sound transmission through the party wall. It also claims for "miscellaneous works". The invoices claimed are set out in Part B of the appendix to the Counterclaim. In some instances it is possible to conclude from the description what the invoice relates to but in others it is not.

153. As to the party wall the Builder acknowledges that it did not build it as designed, in that the insulation material specified was omitted, but that would have not made any difference to the acoustic properties of the wall. It did not use brick ties appropriate to achieve sound attenuation between the two Units but none were specified and the Builder cannot be expected to be an acoustic engineer.

154. Mr Hunter said that he did not charge the Owners for the work relating to the party wall because it could not be charged until responsibility for it had been established. He nonetheless said that the work was done at the Owners' request. It is clear from the correspondence between the parties in the Tribunal Book that, at the time this work was done, Mr Hyndman was insistent that the fault lay entirely with the Builder and he required the Builder to rectify it at the Builder's cost.

155. The rectification work was done without any agreement by the Owners that they would pay for it and it was not done pursuant to any request in

circumstances where the law would imply an obligation to pay a reasonable price. Mr Hyndman demanded that the Builder fix it at its own cost and it did so. In a letter from the Builder to Mr Hyndman dated 14 June 2011 Mr Hunter said:

> "We accept no responsibility for cost over-runs as the Contract entered into is on a cost plus basis and the majority of the repair work has been borne by our company, despite the fact that in our opinion a fair proportion of the problems have been caused by discrepancies in the plans provided by you."

156. In the same letter he asserts that it was design problem but nonetheless says in relation to the painting which formed part of the rectification work:

> "…there is not, nor has there been any costs incurred by you in this matter.":

157. I think the Builder did this work with the intention that it be done at its own expense and not with the expectation of any payment by the Owners. There was no variation of the Contract to include this additional work, nor was there any agreement by the Owners to pay for it. When Mr Hyndman insisted that the work be rectified at the Builder's cost the Builder could have refused to do so or made it clear that, if it did the work it would be seeking payment. Instead it went ahead and complied with the demand. That does not give rise to any entitlement to payment (see *Halsbury: Laws of England* 4th Ed. Vol.9 para 697). It seems to me that the Builder now wishes to claim this expenditure because of the claims made against it by the Owners. However there is no legal or equitable basis for such a claim.

158. As to the rest of the items claimed, there is insufficient evidence to show what it was for and why it was not already charged for. It appears to be rectification work.

159. I am not satisfied that this part of the counterclaim is established.

Contractors all risk insurance

160. The claim for an "All risk" insurance premium is supported by an invoice from an insurer for a period from13 July 2011 to 13 July 2013. The full premium is $10,112.01 and there is an annotation on it in Mrs Hunter's handwriting to the effect that the cost of the premium relating to Arden Street was $991.00.

161. The calculation annexed to Mr Hunter's witness statement states that the premium is based upon turnover and taking the value of the job for the Owners against their overall turnover, the cost to the Owners was $3,743.60.

162. Mrs Hunter, who did these calculations was not called to explain them or to explain why, if this sum is really owed, it was not claimed earlier. Mr Hunter could not verify the accuracy of the calculations. There was also no evidence as to the factual matters upon which the calculation appears to have been based. In an email dated 28 March 2011, Mr Hunter informed the

Owners that the Builder had not charged them for, amongst other things, WorkCare costs for its staff or Contractor's All Risk Insurance.

The Owners' claim for damages for delay

163. Mr Reid submitted, correctly I think, that the fact that the symbol "0" appears in that part of the Contract relating to liquidated damages simply means that the parties have not agreed upon a figure for liquidated damages and that therefore it is open to the Owners to prove the amount of any actual loss they have suffered by reason of the delay of the Builder. I accept that submission.

164. The Contract provided that the time for completion was 340 days from the commencement date.

165. The problem with this claim is that the remaining work to complete Unit 1 was shared by the Builder and the Owners and each blamed the other for the delay. It is apparent that there was great activity to have Unit 2 ready for occupation by the Owners by the date they moved in. Christmas followed shortly thereafter and then the complaints about sound transmission through the wall. There as then confusion as to who was to do what and lines of communication broke down from time to time. Both sides then expressed concerns about delay and each blamed the other.

166. The Builder complains that the Owners refused to allow the Builder's cabinetmaker or painter to be engaged and eventually engaged their own contractors. Mr Hunter said that his Cabinet Maker could have started in July 2010 and his painter would have started in September. He said that whereas his own painter was "ready to go", the Owners' painter was still carrying out work in late 2011.

167. Mr Hunter also complained that the windows the Owners had selected were not in accordance with the plans and not compliant because they were single glazed and not "Comfort Plus" as required. He said that he could not certify that the energy requirements were met.

168. The Builder complained about some mistakes in the plans and changes made by Mr Hyndman. Apart from the set down for the windows on the back balconies it appears that the architectural plans did not match the engineering drawings in regard to the staircases, which Mr Hyndman blamed on the engineer. Down pipes and a box gutter also had to be added.

169. Mr Reid said that I should ignore any time before 17 December 2010, which is when the Owners took possession. He said that nothing much happened between then and the 4 January and that thereafter the critical path was blocked by the deficiencies in the party wall and the Builder's rectification work. Certainly the work done on the party wall on its own would have prevented the completion of the work.

170. Mr Reid did not join issue with Mr Beck-Godoy in regard to the apparent inactivity of Mr Hyndman to order the water tank and the concreting which had to be done before the certificate of occupancy could be issued.

However he said that although the painting was still progressing well into 2011, this was not relevant because work could not proceed in any event because of the party wall. However that argument operates both ways. The Builder could equally say that any delay on its part was not causative of any loss to the Owners because they had delayed in the work that they were to do.

171. I suggested to Mr Reid that the evidence was that the Builder's cabinetmaker and painter could both have started well within 2010 and that had the Owners been content for the Builder to use its own tradesmen the works might have been much more advanced by the end of 2010. Mr Reid said that, nonetheless, it was the party wall that drove the delay. He acknowledged if I did not find that the deficiency in the party wall was due to the Builder's breach, the delay damages could not be claimed.

172. I think that both parties contributed to the delay and I do not think that I ought to attribute the loss that the Owners now claim to the Builder.

Conclusion

173. The following claims by the Owners for rectification costs are established:

(a)	the render:	$54,694.72
(b)	articulation joints:	$ 2,500.00
(c)	the balconies:	$ 4,543.00
(d)	the northern end of the party wall:	$ 500.00
(e)	garage floors:	$ 4,935.40
Total:		$67,173.12

174. The following claims by the Builder are established:

(a)	Balance due to the Builder:	$ 9,601.38
(b)	Claim for GST:	$ 1,179.30
Total:		$10,780.68

Orders to be made

175. The First Applicant is deceased and the proceeding is being continued only by the Second Applicant. In her Amended Points of Claim dated 12 August 2012 the primary claim is made against the Respondent. Claims are also made against the Joined Parties but only in the event that I should find that the primary claim against the Respondent relating to their work or materials is an apportionable claim. Since I have found that the claims are not apportionable I no orders against them are sought.

176. The following orders will be made:

(a) There will be an order on the Claim that the Respondent pay to the Second Applicant $67,173.12.

(b) The Second Applicants' claims against the Joined Parties are dismissed.

(c) There will be an order on the Counterclaim that the Second Applicant pay to the Respondent $10,780.68.

(d) The Respondent's claim against the First Joined Party will be dismissed.

(e) There will be an order on the Respondent's claim against the Second Joined Party that he pay to it the Respondent $54,694.72.

177. Since it is unclear whether the Applicant seeks an order against the Third Joined Party I will reserve liberty to the Applicant to apply upon notice to the Third Joined Party for any such order. Costs will be reserved

SENIOR MEMBER R. WALKER