

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D59/2011

**CATCHWORDS**

Domestic Building Contract, brickwork colour, breach of warranty, measure of damages

<b>APPLICANTS</b>	Jessie Magaporo, Denise Magaporo
<b>RESPONDENT</b>	Ashford Homes Pty Ltd (ACN 009 217 976)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member M. Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	24 January 2012
<b>DATE OF ORDER</b>	3 February 2012
<b>CITATION</b>	Magaporo v Ashford Homes Pty Ltd (Domestic Building) [2012] VCAT 130

**ORDER**

The Respondent must pay the Applicants \$9,317.

**MEMBER M. FARRELLY**

**APPEARANCES:**

For the Applicants	Mr J. Magaporo and Ms D. Magaporo
For the Respondent	Mr G. Bechara

## REASONS

- 1 The applicants are the owners of a home constructed by the respondent builder at Pakenham, Victoria (“the Property”). The applicants seek damages from the respondent in respect of alleged defective works – variance in colour of brickwork – in the amount of \$46,585.

## BACKGROUND

- 2 The applicants entered into a new home building contract with the respondent on 16 May 2008. On 13 June 2008, by which date works had not yet commenced, the applicants and the respondent completed and signed a document headed “Ashford Homes Schedule” which set out the various colour choices and finishes in respect of the works. That document identified the selected bricks for the Property as being “*Boral Jarrah*”. To assist them in selecting the bricks the applicants had, prior to 13 June 2008, perused a Boral brochure (“the Boral brochure”) and attended the respondent’s office in Camberwell, Victoria to view samples of brickwork. The *Jarrah* bricks selected were pictured in the Boral brochure as being red and blue/grey, with red being the predominant colour.
- 3 On 28 November 2008 when, although the works were incomplete, the brickwork had been carried out the owners sent an email to the respondent briefly raising concerns in relation to various works including the brickwork.
- 4 A few weeks later the applicants met on site with the respondent’s then construction manager, whose full name the applicants cannot remember but whom they refer to as “Raman” (“the December 2008 meeting”). The applicants say that during this meeting they raised their concern that the bricks varied in colour from predominantly red to predominantly blue/grey. The applicants believed that the respondent had supplied two different types of brick – the predominantly red coloured bricks being the correct *Jarrah* bricks and the predominantly blue/grey coloured bricks being some other variety, possibly *Ironbark* as depicted in the Boral brochure.
- 5 The applicants say that at the December 2008 meeting “Raman” agreed that the brickwork to the central section of the southern facing wall included “*wrong bricks*” in that the upper half of the wall was comprised of predominantly red bricks which stood out in comparison to the lower half of the wall which was comprised of predominantly blue/grey bricks. The applicants say that Raman advised that the respondent “*can fix that*”. When asked by the applicants how such fix would be done Mr Raman gave no explanation but simply confirmed that “*we can fix that*”.
- 6 Approximately one month after the December 2008 meeting the applicants again attended the site to meet representatives of the respondent to discuss various issues including the colour of the brickwork. Present at this meeting was Mr Blanko Mladichek, a building consultant engaged by the

applicants. The respondent's representatives included a Mr Glenn Smith and a man whom the owners knew as "John". It was at this meeting that the applicants noticed that the upper portion of the central section of the south facing wall had been treated with a coloured stain or paint apparently in an attempt to add a grey/blue tinge to match the colour of the lower section of the brickwork. The applicants say they had not authorised or agreed to such works.

- 7 Mrs Denise Magaporo says that approximately one month after this meeting Mr Smith telephoned her with an offer of compensation in the sum of \$1,000 to settle the brickwork colour issue. About one week later Mrs Magaporo telephoned Mr Smith to advise that the applicants did not accept the offer.
- 8 The applicants took possession of their completed home on 22 June 2009. At handover, the applicants paid all monies owing to the builder pursuant to the contract but did so reserving their right to pursue the builder for damages arising as a result of alleged defective works.
- 9 In March 2010 the applicants contacted the Building Commission to obtain an inspection report in respect of various of their concerns as to the building works, including the variance in colour of the brickwork. The inspector appointed by the Building Commission, Mr Stephen Scimonello, inspected the Property on 16 April 2010 in the presence of the applicants and the respondent's representative Mr Corey Robertson. In early May 2010 the applicants received Mr Scimonello's Inspection Report dated 28 April 2010. In item 37 Mr Scimonello opines that the variance in colour did not constitute a building defect as the bricks "*are within the Boral colour quality specification and are Jarrah.*" Further, Mr Scimonello considered that stain mark splashes on areas of the fascia and the spouting ought to be removed by the builder (item 38). The applicants say that the stain mark splashes were a by product of the application of stain to areas of the brickwork.

## THE PROCEEDING

- 10 The applicants commenced the proceeding by application filed in the Tribunal on 28 January 2011. Initially they sought damages in respect of a variety of alleged defective building works. At the commencement of the hearing on 24 January 2012 the applicants confirmed that all matters in dispute, save for the brickwork colour issue, had been resolved. In the afternoon the hearing continued on site at the property to allow for a view of the brickwork ("the View").
- 11 Each of the applicants gave evidence in person. The applicants also sought to rely on expert evidence set out in Mr Blanko Mladichek's reports, in particular his most recent updated report dated 13 December 2011 ("Mr Mladickeck's report").

- 12 Mr George Bechara, construction manager for the respondent, gave evidence for the respondent and referred to the following documentation submitted to the tribunal by the respondent on 6 December 2011:
- the respondent's letter to the Tribunal dated 6 December 2011;
  - a one page document being an excerpt from *Section 1.3 Brick Masonry Construction* from a *Boral Bricks & Pavers Technical Manual* ("the Boral Manual excerpt");
  - a one page excerpt from a *Nawkaw – Masonry Re-colouring Specialists* pamphlet;
  - a copy of a letter dated 5 December 2011 from a Mr Con Papakostas, Residential Sales Manager Boral Bricks Pty Ltd to the respondent ("the Boral letter").

### THE VIEW

- 13 The brickwork at the north face (the front of the Property) appeared uniform and consistent in colour with no noticeable defect. The applicants' complaint in respect of this section of the brickwork was that the overall colour of the brickwork, though uniform, was predominantly blue/grey rather than the predominantly red colour they expected of "Jarrah" bricks.
- 14 The applicants had a similar complaint in relation to the east face brickwork (including the garage wall). Additionally, they pointed out various randomly placed bricks of a predominantly red colour (the correct Jarrah bricks according to the applicants) which produced what they considered to be an aesthetically unpleasing result. Mr Bechara considered the brickwork to be "normal" with the random predominantly red coloured bricks presenting an intended aesthetic appearance for bricks that are expected to have colour variances. I am not persuaded the variance in colour between the bricks is abnormal and find that overall the wall was uniform in appearance.
- 15 The south facing wall has a middle section of brickwork bordered at the eastern end by glass doors and a window at the western end. It is this middle section (referred to in paragraphs 5 and 6 above) which the applicants say was coated with a stain or paint in an unauthorised attempt by the respondent to match the colour of the upper portion of bricks to the lower portion. The wall provides a backdrop to the rear entertaining area. The stained bricks have a noticeably different appearance to the surrounding bricks in the same wall face. The stained brickwork area gives a "patchwork" appearance to the wall as a whole.
- 16 The west face is what might be called the "blind" side of the house. The gap between the west wall and the boundary fence is about 1 meter wide and the neighbouring property brick wall sits against that fence. As a result there exists only a narrow viewing corridor for the length of the west face. Mid way along the wall is the laundry door. As the applicants pointed out, the

brickwork south of the laundry door has a predominantly blue/grey appearance whereas the brickwork north of the laundry door progressively becomes predominantly red as one approaches the northernmost end. As pointed out by Mr Bechara, the colour variance within this wall is not readily noticeable when viewing the wall as a whole from either end of the viewing corridor. It is only noticeable when one walks the length of the wall.

- 17 The applicants pointed out that, when viewing the north west corner of the Property from the street or footpath at the front of the Property, there is an apparent difference in colour between the north face (which is predominantly blue/grey) and the small viewable section of the West face (which is predominantly red).

### **ARE THE BRICKS JARRAH?**

- 18 The applicants gave evidence as to their own belief that the colour variation in the bricks indicated that the respondent supplied 2 different types of brick, one being the specified *Jarrah* and the other being some other type possibly *Ironbark*. They also submitted “Raman’s” comments at the December 2008 meeting coupled with the respondent’s subsequent attempt to rectify the southern face of brickwork by application of a coloured stain added to their belief.

- 19 The applicants also rely on Mr Mladicheck’s report in which he states at page 2:

*“Brickwork has unacceptable variance in colour. Brickwork selected by the owners was Jarrah, but finished brickwork appears to be a patchy blend of Jarrah and Ironbark (Ironbark has significantly more grey/blue content).”*

- 20 Mr Bechara for the respondent gave evidence that Boral, having inspected the brickwork, confirmed the bricks to be *Jarrah*. He referred to the Boral letter which makes reference to an inspection by Mr Papakostas (from Boral) and Mr Corey Robinson on 19 April 2011 and states in part:

*“...fired products made from natural clay materials can consequently vary slightly in colour range and texture.....During our inspection the owner suggested that we delivered the wrong product, at a later stage I confirmed with Corey that the product delivered is first quality Jarrah batch 64”.*

- 21 Mr Bechara also referred to the Boral Manual excerpt which states:

*“Raw materials for brick making are from natural sources and these vary in colour within any one deposit. Brick makers blend materials to moderate the colour variation but it still occurs. Colour variation may be caused by different conditions across the kiln. No matter how well made, bricks delivered to site will have some degree of colour variation.”*

- 22 I prefer the Respondent's evidence. As both Mr Bechara and the applicants noted during the View, large sections of the brickwork, notably the whole east face, included bricks varying in colour from predominantly grey / blue to predominantly red. As I have noted previously the east face, despite the variance in brick colour, appeared to me have an overall uniform appearance. It may be that the respondent's tradesmen were mindful, when laying bricks to the east face, to blend the bricks to achieve a blended, uniform appearance. Yet a similar blended, uniform appearance was not achieved to the south face. On balance it seems to me that the uniform appearance of the east face reflects the random colour variance in one batch of bricks more than it reflects a concerted attempt to blend two different types of brick.
- 23 I find that the bricks supplied were *Jarrah* bricks as specified in the contract.

### **Is the brickwork defective?**

- 24 The Boral Manual excerpt states in part:

*Poorly blended bricks may show unwanted patches, streaks and bands of colour in the finished masonry. To avoid this:*

- *All bricks required for the project, or as many packs as will fit, should be delivered at one time and stored on site; and*
- *Bricks should be drawn from at least four packs simultaneously, working down from the corners of each pack.*

- 25 Mr Mladicheck in his report makes the following comment:

*"In my opinion, face brickwork is comprehensively defective because it does not meet functionality of uniform and pleasing appearance. Builder has failed to control quality of bricks, site blending and workmanship. An attempt to paint brickwork to attenuate variation in colour is in my opinion unacceptable.*

- 26 The building contract, at clause 11, sets out various warranties in relation to the building works, including the mandatory warranties contained in section 8 of the *Domestic Building Contracts Act 1995*. The warranties require, amongst other things, that the building works be carried out *in a proper and workmanlike manner and with reasonable care and skill* (the warranties").
- 27 In my view the brickwork to the central section of the south face does not meet the standard required by the warranties. I accept the evidence of the applicants that the respondent acknowledged the unsatisfactory appearance of this section of brickwork – the upper half being predominantly red coloured bricks and the lower half bricks being predominantly blue/grey coloured bricks – and attempted to rectify the appearance of the brickwork by applying a stain to the upper half of the wall without authorisation from the applicants. The result is aesthetically unpleasing "patchy" brickwork.

- 28 I am satisfied the brickwork to the north face and the east face at the Property is acceptable. Whilst the colour of these sections of brickwork may not be exactly what the applicants were expecting, I find that the bricks are *Jarrah* as specified in the building contract. I also accept the respondent's evidence that any colour variation within these brick faces is "normal" and within the range of an intended aesthetic appearance for such bricks.
- 29 In relation to the west face brickwork I find that the colour variance within this wall is not readily noticeable when viewing the wall as a whole from either end of the viewing corridor.
- 30 However I am satisfied that when viewing the north west corner of the Property from the street or footpath, there is a noticeable difference in colour between the north face (which is predominantly blue/grey) and the viewable section of the west face (the predominantly red northern end of the west face). The viewable section of the west face is a small area of a few square meters. In my view that colour variation, as it is, amounts to a breach of the warranties.

## DAMAGES

- 31 I am satisfied that there are two sections of the brickwork which constitute a breach of the warranties. Accordingly I consider the applicants are entitled to damages for breach of contract. The measure of such damage is as described by Park B in *Robinson v Harmon*<sup>1</sup>:

*.. The rule of common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*

- 32 In my view it is appropriate that the sum of damages in this case be a sum sufficient to enable the applicants to rectify the offending areas of brickwork to achieve a uniform appearance. Those areas are the small northernmost section of the west face which is viewable from the street and the rear south face. As noted above, the south face provides a backdrop to the rear entertaining area. I am satisfied that rectification works to achieve an acceptable uniform finish to this face may well necessitate works to the wall as a whole rather than the middle section alone.
- 33 Whilst the respondent presented some evidence that masonry colouring specialists, such as Nawkaw, offer solutions to alter the colour of brickwork without the need to replace brickwork, no further evidence was provided as to the cost of any such works or indeed the quality of outcome of such works.
- 34 The applicants produced in evidence a quotation dated 12 December 2012 from Co-Design Constructions to replace all of the exterior brickwork at the

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<sup>1</sup> (1848) ALL ER 383 at 385

Property for a sum of \$46,585. No other evidence was presented as to costs of any rectification works.

- 35 In my estimation the areas of brickwork requiring rectification constitute approximately 20% of the total exterior brickwork. I consider it appropriate that damages be the sum calculated as 20% of the Co-Design quoted sum. Accordingly I assess the sum of damages to be paid by the respondent to the applicants as \$9,317.

**MEMBER M. FARRELLY**