VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP405/2016

CATCHWORDS

DOMESTIC BUILDING; dispute about rendering; identification of terms of contract and parallel duty of care; discussion about application of terms implied by operation of the *Fair Trading Act 1999* (Vic); conflict of expert evidence; case dismissed as builder failed to establish breach of contract or breach of duty of care by respondent renderer.

APPLICANT	Noordenne Constructions Pty Ltd ACN 006 347 262
RESPONDENT	Royal Solid Plaster Pty Ltd ACN 085 170 207
FIRST JOINED PARTY	Ruslan and Nataly Kotlyarsky
SECOND JOINED PARTY	Steven Mark Miller
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	Hearing
DATES OF HEARING	16 - 17 March 2017
DATE OF ORDER	24 May 2017
CITATION	Noordenne Constructions Pty Ltd v Royal Solid Plaster Pty Ltd (Building and Property) [2017] VCAT 677

ORDER

1 Under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the VCAT Act") the name of the applicant is amended from Noordene Construction Pty Ltd (ACN 006 347 262) to Noordenne Construction Pty Ltd (ACN 006 347 262).

2 The proceeding is dismissed.

3 Costs and reimbursement of fees under s 115B of the VCAT Act are reserved, with liberty to apply within 60 days. **The principal registrar is directed to list any application for costs and reimbursement of fees for hearing by Member Edquist, with an allowance of half a day.**

C Edquist
Member

APPEARANCES:

For Applicant	Ms S. Kirton of Counsel
For Respondent	Mr J. Gray, Solicitor
For the Joined Parties	No appearance

REASONS

INTRODUCTION

1 Brian van Noordenne is a builder who conducts a substantial business through his company Noordenne Construction Pty Ltd (ACN 006 347 262). Jerry Kizer is a renderer who trades through a company called Royal Solid Plaster Pty Ltd (ACN 085 170 207).

2 In June 2010 Noordenne Construction Pty Ltd ("the builder") entered into a contract ("the contract") with Royal Solid Plaster Pty Ltd ("the renderer") in connection with rendering works at two units in Bealiba Road, Caulfield South, Victoria ("the properties").

3 The rendering works were part of works ("the project") which were being constructed by the builder under a major domestic building contract ("the building contract") made in May 2010 between it and the owners of the properties Ruslan Kotlyarsky and Nataly Kotlyarsky. The works involved the construction of a unit on each of the properties. The project was brought to completion when certificates of occupancy were issued in or around March 2011.

4 After completion of the two units the Kotlyarskys sold one to Steven Mark Miller, but kept the other.

5 Approximately two years after completion of the project one of the owners began to complain about leaks in their unit. By 2015, serious problems with the rendering had become manifest. In particular, at some of the external corners of the units, galvanised metal angles had begun to rust and exfoliate, causing the render to lift and separate.

6 It is common ground between the parties that the render is defective and needs to be rectified, at least to some extent.

7 At the heart of the case is the issue of whether the failure of the galvanised metal angles was caused by the failure of the renderer to properly seal the rendered surface of the units including the corner angles, or whether some other mechanism of failure is at work for which the renderer is not responsible.

8 If the renderer is found to be responsible for the failure of the galvanised metal angles and the consequent damage to the render, there is a secondary issue as to the extent to which the render needs to be replaced, and the cost of the necessary work, which will necessarily involve the use of scaffolding.

9 The builder says that if the renderer does not rectify the defective rendering works, it will have to rectify those defects, and will incur costs estimated by its expert, Mr Ken Ryan, at $60,908. The builder seeks an order that the renderer carry out and complete rectification of the rendering works, or alternatively, pay to the builder **$60,908**.

10 The builder also claims it has already carried out defect rectification at a cost of $4,373.45 inclusive of GST, and is entitled to builder's margin of $801.80 on those works. The builder seeks an order for damages for the cost of those works plus margin, a total of **$5,175.25.**

CONTEXT OF THE PROCEEDING

11 As continuing owners of one unit the Kotlyarskys are entitled to the benefit of the express warranties as to the quality of works contained in clause 11 of the building contract which are mandated by s 8 of the *Domestic Building Contracts Act 1995* ("the s 8 warranties"). As a subsequent owner of the other unit, Mr Miller is also entitled to the benefit of the s 8 warranties by operation of s 9 of the Act. The benefit of the s 8 warranties expires ten years after the date of issue of the occupancy permit for each unit, by operation of s 134 of the *Building Act 1993.* These matters are so obvious they were not expressly mentioned at the hearing, but they form an important part of the background to the dispute.

12 It was because Mr and Mrs Kotlyarsky and Mr Miller have an interest in the outcome of the proceeding that they were, on the Tribunal's own motion, joined as parties on 19 October 2016. However, they have taken no active part in the proceeding, and did not appear at the hearing.

OVERVIEW OF THE TECHNICAL DISPUTE

13 In the builder's submissions, the situation was summarised neatly as follows:

> There is a stark dichotomy in the technical evidence. The Respondent [the renderer] relies on Mr Robin May, who is a materials engineer, with experience in corrosion, but is not an expert in the construction of domestic dwellings. The Applicant [the builder] relies on Mr Ken Ryan, who is a building consultant and a builder, but is not a corrosions expert.[1]

14 The problem with the render is that it has, in certain areas in both units but not universally, been disrupted due to the rusting of corner angles. There is broad agreement as to extent of the damage, and consensus as to its seriousness.

15 There was also broad agreement as to the specific mechanism of failure of the render. Mr May explains the cause of corrosion in his report in these terms:

> The distress of the render coating along the horizontal and vertical edges can be attributed to corrosion of the galvanised steel external corner bead and the associated generation of voluminous corrosion products at the interface between the surface of the corner bead and the render surface coating. The volume of these corrosion products can be 3 to 5 times that of the metal removed and it is this volumetric

[1] Builder's submissions dated 24 March 2017, paragraph 1.

> expansion at the interface which has caused tensile stresses to develop in the coating and lead top failure along the nose of the metal corner bead.[2] (sic)

16 Mr Ryan's observations in his report are consistent with this mechanism.[3] Moreover, he expressly states at [67]:

> The cause of the damage to the dwellings can be directly related to the rusting and expanding metal render angles causing the render to peel away from the external corners which is allowing moisture to enter the building.

17 However, the respective experts have widely differing views as to the cause of the rusting. Mr May contends that the mechanism of failure is that the metal angles have corroded from the inside out as a result of the action of humidity trapped under the render. On the other hand, Mr Ryan considers that the failure of the galvanised metal angles is due to the fact that the renderer had not placed a sufficient amount of sealer over the angles.

EVOLUTION OF THE BUILDER'S CLAIM IN ITS SUCCESSIVE POINTS OF CLAIM

18 The builder filed points of claim initially on 6 April 2016, and then filed amended points of claim on 14 October 2016, 17 February 2017 and 9 March 2017.

19 The builder consistently pleads in the successive iterations of its points of claim that the agreement made between it and the renderer is partly in writing and partly oral and partly to be implied. The builder says the central document is the builder's purchase order. The relevant conversations are said to be between the representatives of the builder and representatives of the renderer between June 2010 and May 2011.

20 The builder also consistently pleads that the renderer breached the agreement when it failed to correctly apply waterproof membrane to all surfaces over the rendering work, failed to use the specified metal angles on edging beneath the render so as to prevent rusting of those metal angles, and failed to use reasonable care and skill when carrying out the works.

21 In the first iteration of the points of claim, the builder claimed that it had incurred costs of $42,061.64 plus GST in carrying out works necessary to rectify the defects, and claimed a gross margin of 20% over and above its actual costs to carry out those works. The margin claimed was $8,412.32.

22 The builder in the second iteration of its claim refined its position, saying that it is likely that more defects in the works will emerge over time in areas that were not yet affected by the defects, and that rectification of the defects therefore requires the removal of all rendering work in the affected areas and the re-rendering of those areas. It is alleged that if the renderer does not carry out the rectification works, and the builder has to rectify on behalf of

[2] Mr May's report dated 29 September 2016 ("May report") section 8, paragraph 4 (page 6).
[3] See Mr Ryan's report dated 7 February 2017 ("Ryan report") at paragraphs 15- 22 inclusive, 29 and 35.

the renderer, the builder will incur those costs. The builder claims for the cost of those future rectification works, together with the cost of the works which have already been completed.

23 The builder maintained this formulation of the claim in the third version of its points of claim, and still relies on it in the final version filed on 9 March 2017.

24 The major change to the builder's pleading effected by the third version of the points of claim was to amend the case regarding the terms to be implied into the agreement. In the first two versions of the points of claim, it had been asserted that terms ought to be implied as a matter of common law. In the new pleading, it was asserted in the alternative that there were warranties implied into the agreement by operation of s 32J and s32JA of the *Fair Trading Act 1999* (Vic) ("the FTA"), which were applicable as the agreement was made prior to 1 January 2011.

25 The final version of the points of claim refined the terms allegedly implied under the FTA by setting out the substance of the statutory warranties.

26 The third version of the points of claim also contained a new, alternative, claim that the renderer owed the builder a common law duty to take reasonable care when providing the works to be carried out under the agreement, including when selecting and applying the corner angles, and applying coats of render, and any membrane to the render. In the final version of its pleading the builder provided particulars of the alleged duty of care.

THE RENDERER'S DEFENCE

27 The renderer filed its first defence, apparently without the assistance of lawyers, on 20 May 2016. The renderer filed an amended defence in November 2016 in response to the amended points of claim dated 14 October 2016. The renderer filed its final amended points of defence on 15 March 2017 in response to the builder's amended points of claim dated 9 March 2017. It is only necessary to consider the final version of the defence.

28 The renderer agrees with the builder that the agreement between them was partly in writing, partly oral, and partly to be implied. However, it denies the agreement contained the documents referred to by the builder, namely the builder's purchase order, and a series of cheques issued by the builder to the renderer, and says instead that the contract included its quotation. The renderer contends that an express term of the contract was to be found within that quotation to the effect that the renderer gave no guarantee regarding products used in the works.

29 The renderer contends that the contract was constituted in part by conversations between Jerry Kizer and Brian van Noordenne confirming when the renderer was to proceed with the works, and that the builder would apply a silicone beading to seal around the windows. The renderer

also refers to a conversation between unspecified individuals to the effect that if there was any defect in the works the renderer would be able to return to fix the defects.

30 The renderer also relies on implied terms said to arise from custom and practice, or the usual practice between the parties, and also (apparently) by operation of the common law.

31 The renderer relies on technical and factual defences regarding the application of the warranties allegedly arising under the *Fair Trading Act* ("FTA").

32 Regarding the substantive allegations of breach, the renderer meets the builder head-on, asserting that:

(a) it installed metal edges as provided by the render manufacturer;

(b) it installed the metal angles in accordance with the manufacturer's specifications;

(c) it properly applied a Wattyl waterproof membrane sealer on to the surface of the final render coat in accordance with the manufacturer's recommendations; and

(d) it was paid in seven instalments after each stage was completed, and inspected by the builder's supervisors, and passed by those supervisors.

33 The renderer also goes on the attack, asserting that:

(a) it was not contracted as to apply silicone seal around the windows;

(b) this was the job of the builder;

(c) silicone seals around the windows were not installed by the builder until an unexplained but extended period between November 2011-February 2015;

(d) it was during this extended period that the metal angles began to rust and cause consequent defects;

(e) the process of sealing around the windows sealed in un-extracted moisture within the render and ensured the metal angles would rust;

(f) the metal angles rusted due to water penetration around the window penetrations where the builder had failed to seal, and water penetration through the waterproof membrane sealer which was not refreshed or reapplied or maintained on a regular and systematic basis by the building owner.

34 The renderer, in the last iteration of its defence, also:

(a) alleges that the builder has failed to mitigate its loss in several respects;

(b) attacks the builder's quantification of future repair work; and

(c) raises a new defence that the builder has sustained no loss because the owners of the properties, who are parties to the proceeding, have made no claim against the builder, and are estopped from making any claim.

DEVELOPMENT OF THE BUILDER'S CASE AT THE HEARING

35 Apart from the evidence of Mr Ryan, the builder relied on an argument that the builder's purchase order, which it insisted was a contract document, required the renderer to apply membrane made by Dulux known as Acrashield 355. Counsel for the builder seized on Mr Kizer's evidence that he had applied membrane manufactured by Wattyl, and asserted that the burden of establishing that this alternative product was the equivalent of the mandated Dulux product lay with the renderer.

36 Counsel for the builder also referred the Tribunal to the list of products which Mr Kizer had told his expert Mr May he used on the project. In particular, it was pointed out that Wattyl GranoMarble texture and Wattyl GranoSkin membrane had been used. In cross-examination a specification for GranoSkin Membrane downloaded from the Internet, was shown to Mr Kizer, and it was put to him that he had not followed that specification.

THE ISSUES

37 The primary issues in this case are whether the renderer, by its acts or omissions, has breached its contract with the builder, or alternatively has breached a duty of care owed to the builder. If no contractual term (including any implied term) or no duty of care has been breached, the builder's claim must fail.

38 Resolution of the primary issue as to whether the renderer has breached any term of the contract involves an investigation of the terms of the contract, including whether it required the renderer to apply Dulux Acrashield 355. This involves an identification of the contract documents, the substance of any conversations forming part of the contract, and any implied terms. It also involves a factual assessment of whether the renderer discharged its contractual responsibilities.

39 Resolution of the primary issue as to whether there has been an actionable breach of duty of care necessitates an enquiries as to:

(a) the existence of any such duty;

(b) breach; and

(c) loss, as the establishment of loss is an essential element of such a claim.

40 Issues of causation arise. For instance, if the renderer's work did not include sealing around the perimeter of the doors and windows, was any failure of the builder to do this work in a timely manner relevant.

41 There may be important issues of quantification to consider. What loss, if any has the builder suffered to date by reason of any breach of the renderer?

What future losses might be incurred by the builder which are claimable from the renderer, and has the builder failed to mitigate its loss in any way?

RENDERER'S DEFENCE THAT BUILDER HAS NO CLAIM AGAINST IT BECAUSE OWNERS HAVE MADE NO CLAIM AGAINST BUILDER

42 As noted, in the amended defence filed on the eve of the hearing the renderer contended that the builder has sustained no lost, and could sustain no loss, with respect to the claims by the owners of the units because those owners have been joined to the proceeding for some months, but have made no claim against the builder, and are estopped from making any such claim. It is not necessary to make any finding about the legal efficacy of this argument because it is not founded on the facts.

43 Mr van Noordenne gave evidence that he had worked on more than one project with Mr and Mrs Kotlyarsky and they were aware that he would accept responsibility for defects. On the project he was responding to complaints made by them through their managing agent.

44 Mr Ken Smith, who had been a long serving employee of the builder prior to his retirement three years ago, had been the construction manager at the project. He deposed that he had made a number of attendances at the property in response to complaints from the owners about leaks. He also said that Mr Rod Hall, another employee of the builder, had attended on a number of occasions.

45 In its last amended points of claim the builder set out a list of attendances at the units to rectify window leaks or render.[4] There were 13 such attendances. In respect of most of these attendances, the builder had charged $240 plus GST for labour, representing three hours work. Typically there was also a charge for a tube of silicone of $10 plus GST, making a total of $275. The total cost to carry out rectification work inclusive of GST was put at $4,373.45. With margin, the total was $5175.25. This constituted one limb of the builder's claim.

46 In these circumstances, it is clear that the builder has been responding to claims made by the respective owners, even though these claims have been made in a low key way and have not been made by letter of demand, by the prosecution of any claim by either of the respective owners as joined parties in this proceeding, or by the institution of any separate proceeding.

47 As this preliminary line of defence fails, it is necessary to address the substantive dispute between the parties which relates to the mechanism of failure of the galvanised metal angles.

[4] Builder's amended points of claim dated 9 March 2017, paragraph 9.2.

FORMATION OF THE CONTRACT AND ITS TERMS

Mr van Noordenne's evidence

48 Mr van Noordenne could not recall when he first used Mr Kizer is a renderer, but deposed that his company had been working with Mr Kizer for a number of years. He said his company tended to use the same subcontractors on every job. He clearly had a high opinion of Mr Kizer's ability as he had engaged him as the renderer when he was constructing his own house.

49 Mr van Noordenne had no particular knowledge of the formation of the contract between his company and the renderer. The builder's practice at the start of a job was to issue a purchase order. When he was handed his company's purchase order No.43008 dated 11 June 2010, which related to the project, he identified it as a typical purchase order. He did not say in his evidence in chief that it had been sent to Mr Kizer. Under cross-examination he confirmed he could not recall giving the purchase order to Mr Kizer.

50 Mr van Noordenne confirmed the purchase order was a one page document, with nothing on the back. When he was asked about the condition that the contractor was "to carry out all accordance with the period trade Contract conditions" he said that that was a reference to the standard HIA subcontract conditions. He could not recall whether a copy have been provided to the renderer. He did not produce a copy of the HIA subcontract conditions, and it was not argued by the builder that they had any bearing on the case.

51 When he was asked whether he could recall any conversations with Mr Kizer about the formation of the contract, he said he could not, and added that it was the role of the supervisor to have discussions with Mr Kizer.

52 Mr van Noordenne had brought with him a file of documents relating to the project. He was asked during cross-examination to look at this file. He could not identify any quotation received from the renderer. He said he was not aware that Mr Kizer produced quotations.

53 Mr van Noordenne agreed that the renderer was not contracted to apply a silicone seal around the windows.

Mr Ken Smith's evidence

54 When the project supervisor Mr Ken Smith gave evidence, he deposed that he had first given Mr Kizer a job 12 or 13 years ago after Mr Kizer approached him in Williamstown. He said that the process of engaging the renderer was that the builder issued a purchase order to Mr Kizer, and he would accept it. Mr Smith emphasised that he would encourage the subcontractor to read it, because the company's rule was that once a purchase order was signed, it was "gospel".

55 Mr Smith said that he would supervise seven or eight jobs for the builder. It was his responsibility to speak to Mr Kizer if any problems arose.

56 When Mr Smith was asked whether he could recall discussions with Mr Kizer this particular job, Mr Smith said that he could not.

57 When he was asked whether he could recall a discussion with Mr Kizer to the effect that Mr Kizer wouldn't be responsible for materials supplied, Mr Smith said he couldn't recall. When he was asked about such a discussion on previous jobs, he also said he could not recall.

58 Mr Smith was asked if he had a discussion about materials, but could not recall. However, under cross-examination, he agreed that the renderer stored materials in the garage.

59 Mr Smith also agreed that a system of progress payment was in place. Mr Kizer would put in a progress claim, Mr Smith would look at the work and approve payment in accordance with the progress made. When he was asked whether he signed off on quality, he said he was not qualified to do so as he was not a qualified renderer. But he added that he would authorise payment if the work looked "right".

Mr Kizer's evidence

60 Mr Kizer said that he worked with the builder over the period 2000 to 2011. He estimated he did about 31 jobs with the builder. The builder was not the only contractor who he worked with. He worked with about 30 contractors.

61 Regarding formation of a new contract, Mr Kizer deposed that the supervisor Ken Smith would usually give him a purchase order. Rates were usually fixed, as they only changed over time, but the purchase order would reflect the quantities on the proposed job.

62 With respect to the project, Mr Kizer did not swear up to the allegation in the defence that his company's contact with the builder was centred on a written quotation. He deposed that he was not sure he sent a quotation.

63 When he was shown the builder's purchase order, his evidence was specific. He deposed that it was issued after he began work. He got it after he had put the polystyrene on. He acknowledged reading the purchase order after he received it, saying that he needed it to get paid.

64 He said that the purchase order referred to Dulux Acrashield 335. This was inaccurate as he was using Wattyl products on his jobs.

65 When he was asked about this, he said that he had used Wattyl products for about 5 years. Initially he had used JPS, but their products had issues, and he began to use Wattyl products for the final two coats.

66 He had an understanding with Mr van Noordenne that he could use whatever products he liked, provided they were good. He regarded Wattyl as an equivalent product to Dulux as the companies were competitors, and were regarded as producing the best products. He confirmed that Mr van

Noordenne was happy with Wattyl, and knew Wattyl was being used by him. Moreover, under cross-examination, he said that Dulux products cost more than Wattly products, and that if he had used Dulux products he would have charged more. The builder did not want to pay for Dulux.

67 He said that he had raised the inaccurate reference to Dulux in the builder's purchase orders with Mr van Noordenne's brother in law, Wayne, who worked in the builder's office, but was told not to worry about the change to Wattyl "if Brian is happy".

68 He deposed that Mr Smith knew that Wattyl products were being used at Bealiba Road as he stored materials in the garage. There were three pallets of render, as about 150 bags were used. There were three or four pallets of polystyrene, and about 80 drums of texture and sealer.

69 Mr Kizer also deposed that he used galvanised angles as they were the industry standard. Mr van Noordenne had made no complaint about this.

70 Mr Kizer produced a tax invoice dated 3 August 2011 he had sent to the builder after the job was completed.[5] No reliance was placed on this.

FINDINGS ABOUT CONTRACT

The builder's purchase order

71 On the basis of Mr Kizer's evidence that he had received the purchase order after he had started work, which was uncontradicted because neither Mr van Noordenne nor Mr Smith could recall any specific details about the formation of the contract, I find that the purchase order was issued after the contract had been formed. Accordingly, I find the contract did not include the purchase order. This being the case, its contents do not constitute contractual terms, and the requirement in the purchase order to use Dulux Acrashield 355 was not a term of the contract.

72 Even if the purchase order is viewed as a record of the terms of a contract that had already been formed , it does not advance the builder's case. The evidence of Mr Kizer was that the materials he was to use on the project were stored in the garage. They included Wattyl membrane and sealer, not Dulux products. I accept Mr Kizer's evidence that Mr Smith was aware of this, and, as the agent of the builder, he agreed to the use of Wattyl products. Accordingly, the purchase order was not even an accurate record of the contents of the contract.

73 For these reasons, to the extent to which the claim is based on an allegation that the renderer used a product other than the specified Dulux rendering product, the builder's claim must fail.

74 By way of completeness, I note that even if I had found that the purchase order was a contractual document, with the result that Dulux Acrashield 355 had been specified, and even if I was satisfied that the onus of

[5] Tendered as Exhibit R2.

satisfying the Tribunal that the Wattyl product was an adequate substitute was the renderer's to discharge, the builder's supplementary argument based on these points would also have failed. In this connection I note that Mr Kizer's evidence to the effect that Wattyl is an equivalent product to Dulux was not contradicted. Accordingly, any claim based on the alleged unsuitability of Wattyl products would have failed.

The renderer's quotation

75 The fact that Mr Kizer did not swear up to the allegation contained in the renderer's defence that his company's contract with the builder was centred on a written quotation necessitates a finding that the quotation was not a contract document. This finding in turn means that the renderer cannot rely on the term expressed in the quotation it had referred to in its amended points of defence to the effect that it did not warrant the products it used.

Course of dealing

76 Each of Mr van Noordenne, Mr Smith and Mr Kizer gave evidence that the renderer had provided rendering services to the builder over many projects over a number of years, and it was not contested by the builder that from this course of dealing an agreement could be identified that at the project the builder and the renderer would share scaffolding.

77 Mr van Noordenne also did not contest the renderer's contention that its scope of work did not include sealing around the windows and doors. On the contrary, he agreed that if this was to be done, it was to be done by the builder, although he disputed that it was necessary.

78 I do not think that the renderer established from the evidence regarding the course of dealing that it did not guarantee the products it used in any way, although Mr Kizer deposed that this was the position. He did not say why this was to be inferred from the parties' previous history of working together.

Oral terms

79 The renderer had referred in its amended defence to a conversation between unspecified individuals to the effect that if there was any defect in the works the renderer would be able to return to fix the defects. No direct evidence was given about this, but Mr van Nordenne gave evidence the renderer was asked back to look at some issues. On the basis of this evidence I find that it was a term of the contract that it was agreed between the parties that if there was any defect in the renderer's work the renderer would be allowed to return to fix the defects.

Terms implied under the common law

80 The renderer contended that the contract contain implied terms (presumably by operation of the common law) to the effect that:

(a) the renderer would perform the works using reasonable care and skill; and

(b) the waterproof membrane sealer would last only until the manufacturer specified the coat required replacement, being 3 to 5 years.

81 The first of these implied terms, is usually found to exist as a matter of law in a contract of the type in question and I find it existed here. However, I can see no basis to justify a finding that the second implied term contended for existed.

Implied terms arising under the FTA

82 The final version of the points of claim set out the substance of the statutory warranties said to apply by operation of 32J and s32JA of the FTA in these terms:

(a) the works would be rendered with due care and skill and would be reasonably fit for the purpose for which they were supplied, namely to achieve compliance with the contract; and

(b) the works would be reasonably fit for the purpose or be of such a nature and quality that they might reasonably be expected to achieve the particular purpose for which they were supplied.

83 The first technical defence pleaded by the renderer was that as the FTA was repealed in about 2012, it no longer applied, and the Tribunal no longer had jurisdiction.

84 The builder in its written submissions addressed this argument by referring to s 14(2) of the *Interpretation of Legislation Act 1984*(Vic) which relevantly provides:

> (2) Where an Act or a provision of an Act—
>
> (a) is repealed or amended; …
>
> the repeal, amendment… of that Act or provision shall not, unless the contrary intention expressly appears—
>
> ...
>
> (d) affect the previous operation of that Act or provision or anything duly done or suffered under that Act or provision;
>
> (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision; …
>
> … or
>
> (g) affect any … legal proceeding or remedy in respect of anything mentioned in paragraphs (e) to (f)—
>
> and any such … legal proceeding or remedy may be instituted, continued or enforced… as if that Act or provision had not been repealed or amended …

85 The builder also calls in aid the following passage from Pearce and Geddes in *Statutory Interpretation in Australia* (7th edition.) at [6.8]:

> Interpretation Acts include provisions having the effect of preserving the position as it existed under the repealed Act. In particular, express words are necessary to take away rights that have accrued or liabilities that have been incurred under a repealed Act. Legal proceedings in relation to any such rights or liabilities may be brought or continued.

86 The builder contends that nowhere in the replacement legislation, the *Australian Consumer Law and Fair Trading Act 2012* ("the ACLFTA") is there any express wording which takes away any rights established before the repeal of the FTA by s 32J or s 32JA.

87 I accept the builder's argument, and find that as the renderer's work was performed before a certificate of occupancy was issued in or around March 2011, and as the FTA was repealed under s 233 of the ACLFTA in or after 2012, the renderer's work is covered by s 32J or s 32JA of the FTA, unless there is some other basis why the FTA does not apply.

88 The second technical argument raised by the renderer is that the goods and services provided are not ordinarily acquired for domestic or household use, and accordingly the FTA does not apply. The answer to this is that the renderer was provided services in connection with the construction of a dwelling, and by definition the services were for domestic use.

89 I accordingly find that s 32J and s 32JA of the FTA do apply.

SUMMARY OF THE RENDER'S OBLIGATIONS UNDER THE CONTRACT

90 The effect of the above findings is that:

(a) the renderer was entitled to apply Wattyl membrane and Wattyl sealer products rather than Dulux products,

(b) the entitlement to use Wattyl products brought with it an obligation to follow Wattyl's specification for the Wattyl products used;

(c) the parties would share scaffolding at the project;

(d) the renderer's scope of work did not include sealing around the windows and doors;

(e) if there was any defect in its works the renderer would be able to return to fix the defect;

(f) the renderer would perform the works using reasonable care and skill;

(g) under s 32J or s 32JA of the FTA:

(i) the works would be rendered with due care and skill and would be reasonably fit for the purpose for which they were supplied, namely to achieve compliance with the agreement; and

(ii) the works would be reasonably fit for the purpose or be of such a nature and quality that they might reasonably be expected to achieve the particular purpose for which they were supplied.

Duty of care

91 In the final iteration of its points of claim the builder articulated the contents of the alleged duty of care as a duty:

> to exercise skill and care so as not to cause the [owners] and the [builder] and/or each of them loss and damage including but not limited to damage to the premises and pure economic loss.[6]

92 As the owners make no claim against the renderer, the duty allegedly owed to the builder, based on the builder's formulation, is limited to a duty:

> to exercise skill and care so as not to cause the builder loss and damage including but not limited to damage to the premises and pure economic loss.

93 The renderer does not dispute the existence of a duty of care in its defence, but says that its content is "that of a reasonably competent renderer acting reasonably," and that it met this standard.

94 The content of the duty of care owed by the renderer to the builder was not debated at the hearing. Approaching the matter from first principles, I do not doubt that the renderer owed the builder a duty of care to perform its work in accordance with the terms of its contract with the builder. However, I doubt whether the duty would be any higher. Accordingly, I will proceed on the basis that the builder's cause will not be advanced by reliance on any duty of care.

THE EVIDENCE REGARDING THE TECHNICAL DISPUTES

Mr Ryan's evidence

95 The builder's expert, Mr Ken Ryan, is a registered building practitioner and registered building inspector. Although Mr Ryan did not profess to be an expert in metal corrosion, no attack was made by the renderer on his qualification as an expert.

96 Mr Ryan inspected one of the units briefly on 21 October 2016 and because of an access issue returned to inspect both units on 16 November 2016. He prepared a report dated 7 February 2017.

The damage

97 When giving evidence at the hearing, Mr Ryan summarised his report. After outlining the extent of the issues with the metal angles and the consequent damage to the render, he commented that the damage was the worst he had seen in 51 years in the building industry. He produced samples taken from different points in the two units which dramatically illustrated the nature

[6] Builder's amended points of claim dated 9 March 2017, paragraph 4B(f).

and the extent of corrosion and exfoliation of the metal angles. He explained that it was the external corners or angles which had failed, not the internal angles. There had also been damage at the corners of the ground floor brickwork, on the letterbox to one unit, and around the windows. However, the walls were in "good condition".

Mr Ryan's theory about the cover of membrane

98 Mr Ryan's view is conveniently summarised in the builder's submissions as follows:

> Mr Ryan's opinion is that the damage was caused by an inadequate coverage of membrane over the render system. He observed areas (mostly of flat walls) which are in good condition (paragraph 65 Ryan report), but the extensive damage particularly on the external corners indicates "the coating on the external angle radius edge would appear to be thin and has allowed moisture to attack the galvanised angles" (paragraph 56).[7]

99 When giving evidence at the hearing Mr Ryan suggested that if a full render system had been applied involving an acrylic base coat, a primer, a coloured texture coat and a painted membrane, water would not be getting in. He suggested that "[t]he external corners had no membrane cover." He said that if proper cover had been provided to the corner angles "[w]e wouldn't be here today."

100 Mr Ryan's oral evidence that inadequate cover had been applied to the external angles is consistent with paragraph 47 of his report, which reads:

> The render application used appears to be consistent with the builders Purchase Order dated 11 June 2010. The Dulux Acrashield membrane painted on thickness or cover appears to be inadequate on the external galvanised render angles. This has contributed to the moisture ingress through the membrane through to the metal render angle allowing oxidation to occur causing the severe rusting is observed in the photographs attached to this report.

101 It is pertinent to highlight that Mr Ryan's opinion here was that it *appeared* that the membrane thickness or cover on the angles was inadequate. The same issue arises in paragraph 34 where he says he observed "that there *appeared* to be very little membrane cover on the render external metal angle in the courtyard". He also relies upon the *appearance* of thinness of the coating on the external angle radius edge at paragraph 56. [My emphasis in each case.]

102 At the hearing, under cross-examination Mr Ryan conceded that he had not tested any angle samples.

103 In these circumstances it is clear that Mr Ryan has based his conclusion on the appearance rather than any scientific testing of the level of cover on the external angles.

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[7] Builder submissions, paragraph 3.

104 It is also relevant to note that Mr Ryan was not provided with a copy of Mr May's report before he made his inspection. In cross-examination, he said that he had received Mr May's report only "yesterday". The upshot is that he was not given the opportunity to consider Mr May's views while he inspected the project.

The use of galvanised angles.

105 In his report, Mr Ryan stated at [39]:

> The building industry used several different types of external angles used for rendering masonry or polystyrene. Render contractors use either, Stainless Steel, Aluminium, Plastic or Galvanised steel. (sic)

106 He went on to say at [41 and [42]

> Whilst the external metal angles have not been professionally tested in a laboratory, there is sufficient evidence to confirm that the external angles used were "Galvanised steel".
>
> Manufacturer's (sic) would generally recommend either stainless steel or aluminium as these external angles do not rust.

He continued at [46] as follows:

> … [T]he contractor has installed an external angle product considered not fit for purpose. This is evident from a visual inspection.

107 In his responses to the questions posed in his brief at [61] he opined:

> It is well accepted in the industry that either stainless steel or aluminium external render angles or beads should be used to prevent the likelihood of rusting. If either of these two products were used, then the external corner angles would not have rusted and caused the damage to the two townhouses as shown in the attached photographs

108 The builder clearly attaches importance to this evidence, because one of the three breaches of the contract alleged in the points of claim is that the renderer failed to use metal angles of "correct specification".[8] Accordingly, it is of some significance that under cross-examination Mr Ryan conceded that:

(a) the industry used galvanised steel angles at the time (of the project);

(b) he had no criticism to make of the renderer for using galvanised angles if they were used as a part of a "system"; and

(c) the galvanised angles should have performed.

Mr May's evidence

109 The renderer's expert, Mr Robin May, holds a Masters degree in corrosion science and engineering and a diploma in metallurgy. Mr May describes himself as a materials engineer and research scientist.

[8] Builder's amended points of claim dated 9 March 2017, paragraph 5.4.2.

110 Mr May posited a different mechanism of failure in his report in which he said:

> Based on the visual examination of the corroded external angles on the building, the corrosion appears to have initiated on the external angle underneath the render finish and not along the nose …of the corner bead. The generation of the voluminous corrosion products under the render has then caused progressive failure of the render along the nose of the corner bead and exposure of the underlying corrosion products.[9]

111 At the hearing, Mr May agreed that there was a systemic problem with the external angles, and he agreed with Mr Ryan's observation that the angles were severely corroded and were exfoliating. He also said that it was the worst he had seen. Like Mr Ryan, he had noted that the problem was principally with the external angles. He agreed that a letterbox and sills were also affected. However, he noted that there was no damage at the external corner beads on the rendered brickwork.

112 Mr May at the hearing, suggested that the problem was not caused by a lack of seal, based on the following reasons:

(a) If there was a seal problem, we would expect the problem with the angles to be similar for both the polystyrene external angles-where it was bad-and in the angles on the brickwork, where it was less severe.

(b) The corrosion on the angles had been underway for a lengthy period, estimated to be at least four years . It had not become manifest until recently. If the corrosion was happening "outside-in," you would expect to see it immediately.

(c) That corrosion is occurring "inside-out" is consistent with the presence of humidity under the render.

(d) If there was a problem with the seal coat, you would not expect to see systemic failure, but failure at separate points along the angle edge. In the present case, we are seeing opening up of the render along the length of the angle.

(e) The extent of the corrosion after perhaps four years rather than 10 years is consistent with continual corrosion.

113 Mr May, in his report, suggested that potential sources of entry of moisture into the wall cavity and the corner angles, other than rainwater penetration through the render coating due to failure to apply a seal, included

(a) moisture ingress past inadequate flashing at the metal deck roof/parapet interface; the parapet capping, and at the windows and doors;

(b) failure to seal around the windows and doors with a bead of silicone;

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[9] May report, section 9, paragraph 1 (page 6).

(c) incomplete coverage and/or inadequate overlap of RFI installed on the framing; and

(d) moisture migration from damp soil into the render interface along the ground level door and window sills.[10]

Mr May's theory

114 Mr May drew certain conclusions from his observations during his inspection. While he was not able to confirm the source of moisture within the render, Mr May contended:

> … the above estimates indicate that the level of corrosion observed on the external angles could only occur if moisture was trapped under the render finish creating a humid environment for an extended period equating to the life of the building. If the problem was related to failure to apply a seal coat to the render and taking into consideration the extended period of dryness associated with the wetting and drying action associated with the climate, the severity of the corrosion on the metal angles over the 6 year period since installation would be markedly lower. [11]

115 This theory of causation led Mr May to point to the builder's failure to promptly apply a silicone seal around the perimeter of the doors and windows as the underlying issue. He observed

> [M]oisture migration under the sealed render finish from water seepage past the flashing or around the perimeter of the installed doors and windows would have the potential to maintain elevated humidity under the render for extended periods. In regard to the latter, it is understood that the builder failed to seal around the perimeter of the doors and windows until some 12 months after the render was finished. This would have created a situation where any moisture ingress through the unsealed gap would have become "locked-in" creating a humid environment under the render along the external angles installed around the windows and doors.[12]

116 Mr May expressed his conclusion in these terms:

> …the corrosion damage is most likely a direct result of exposure to elevated humidity under the render due to moisture ingress around the perimeter of the doors and windows and the subsequent "locking in" of this moisture when the gaps were sealed with silicone some 12 months after the render was installed.[13]

Mr May's evidence regarding the use of galvanised angles

117 Mr May gave detailed evidence about the ability of stainless steel, aluminium and galvanised angles to resist corrosion. He deposed that there were three grades of stainless steel available, two grades of aluminium, and

[10] May report, section 9 paragraph 3 (page 6).
[11] May report, section 9, paragraph 4 (page 6).
[12] May report, section 9, paragraph 5 (page 7).
[13] May report, section 10, (page 7).

also galvanised products. They had different qualities, and the choice made would affect price.

118 Mr May deposed that the attitude of the industry to different products changed over time. At one stage aluminium was popular, and then stainless steel was in vogue.

119 Mr May did not criticise the use of galvanised angles by the renderer either in his report, or in his oral evidence.

The builder's attack on Mr May's evidence regarding the mechanism of failure

120 In its submissions, the builder mounts a sustained attack on Mr May's evidence, asserting that it "consisted of a number of hypotheses all possibilities, which have some attraction as an academic exercise."[14] The builder highlights that Mr May's approach was to identify seven potential sources of moisture entry, and then to discard each of them save for the builder's failure to seal around the windows and doors with a bead of silicone. The builder asserts that the concession made by Mr May in his oral evidence that the excluded mechanisms were still possibilities, means that his contention that the underlying mechanism was the builder's failure to seal around the windows and doors, is merely a theory.

121 Mr May was also attacked for having used the "facts" of the lack of sealing around doors and windows, and the subsequent trapping of moisture, as a starting point of his hypothesis, and then working to his conclusion that the rust occurred from inside out as a means of explaining those facts.[15]

122 I am not convinced by this criticism of Mr May's evidence. The methodology he followed in section 9 of his report-which deals with the cause of corrosion-was to record his observations that the corrosion appears to have initiated on the external angle underneath the render finish and not along the nose of the corner bead. From the severity of the corrosion observed and the thickness of the corrosion products on the external angles Mr May concluded that the corrosion process had been active for a number of years, most probably 4 to 6 years. He then itemised 4 assumptions underlying this estimate, including continuous exposure of the angle to elevated humidity over the whole period, a delay of one year before the galvanised protection would be lost from the corner angle, and a typical corrosion rate of 0.1 to 0.2 mm a year for steel exposed to a relatively benign damp environment. In my view, Mr May has proceeded from a set of observations, then taken into account a number of matters which would appear to be within his area of expertise, and only after that drawn a conclusion about how long the process of corrosion had been underway. It was only because he considered corrosion had been taking place for 4 to 6 years that he considered that the failure of the builder to seal around the

[14] Builder's submissions, paragraph 4.
[15] Builder's submissions, paragraph 6.

windows until 12 months later might be the underlying issue, because it had the potential to maintain elevated humidity under the render for extended periods. In other words he proceeded appropriately from observations and assumptions to a conclusion.

Other criticisms of Mr May's report

123 The builder also attacked Mr May's thesis on the basis of the inconsistencies in the damage to the render observed which would not be expected if the failure of the builder to seal around the windows and doors was in fact the underlying cause of the issue,[16] and on the basis that his suggestions as to water entry were not consistent with the structure of the dwellings.[17]

Evidence relevant to assessing the other criticisms of Mr May's evidence

124 Counsel for the builder specifically recalled Mr van Noordenne to address some of Mr May's evidence. Mr van Noordenne gave some evidence which was relevant to some of the mechanisms of water entry raised by Mr May. For instance, he said that under the entire wall structure there was a plastic strip to stop water climbing through the porous mortar. He also gave evidence regarding the method used to waterproof penetrations made in the structure, and about the construction of the parapet.

125 However, when Mr van Noordenne was referred to paragraph 31 of Mr Ryan's report, in which Mr Ryan had indicated that he did "not inspect the tiled balcony to ascertain whether the moisture stain on the study ceiling was due to the render damage or the tiled balcony," all that he could say was that no issue had been reported to him.

126 The renderer's solicitor also referred Mr van Noordenne to a photograph showing a glass parapet on the balcony. Mr van Noordenne agreed that the glass must be sitting in a channel. When it was suggested that the fixing of the channel must involve penetrations of the adjoining wall, Mr van Noordenne initially disagreed, but ultimately had to concede that he did not know how the channel had been affixed.

127 Mr van Noordenne was also referred to a photograph showing that the courtyard sill-which Mr Ryan had conceded was green with moisture-was not protected by a plastic sheet under the sill, and was only indirectly protected by a plastic sheet under the courtyard slab.

128 Mr van Noordenne also conceded that the postbox which was showing damage was not sitting on a plastic sheet, but on a concrete footing.

129 I also note that Mr van Noordenne did not address cracks which a photograph showed around a galvanised screen bearer which had penetrated a wall.

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[16] Builder's submissions, paragraph 7.
[17] Builder's submissions, paragraphs 8.1-8.11.

130 Finally, I note that Mr Ryan in his report observed at [24 and [25] that:

> …there was visual evidence of moisture ingress and damage to the skirting and lower plaster walls surrounding the courtyard. This is not considered related to the external rendered light weight cladding.
>
> I checked the door head on the laundry door head reveal and the dining room sliding door head reveal which both were considered dry.

131 These comments suggest to me that there was some mechanism of moisture penetration into the dining and laundry areas other than the issue with the external light weight cladding, and specifically, that moisture was coming up from below.

132 For all these reasons I am not satisfied that the builder has thrown such a shadow of doubt over Mr May's suggested sources of moisture entry into the wall cavity and to the corner angles so as to justify discounting his opinions altogether. Notwithstanding the builder's attack on his evidence, I think that Mr May has advanced a credible theory regarding the underlying mechanism for failure of the metal angles.

133 Moreover, the fundamental problem faced by the builder is that its own expert could not provide a theory for the damage which was consistent with the evidence which came out at the hearing.

EVIDENCE RELEVANT TO THE COVER ISSUE

134 In respect of his work history generally, Mr Kizer's evidence was that he had never had a render problem in 15 years. He noted that Mr van Nordenne was "very comfortable" with his work as he worked on Mr van Nordenne's own house.

135 When asked about his performance on the project, Mr Kizer could not think of any errors made. He said his "crew" were very experienced.

136 He explained the rendering process involves 4 layers. After the builder levels the wall, the renderer affixes the polystyrene to the wall using silicone spray foam. The surface is made wet with render, and then mesh is embedded. Another coat of render is added to the mesh. The renderer then waits at least 48 hours before putting on a second coat. Usually there is a break of 3 days, sometimes a week, before the next layer is applied. The third layer is the texture layer. This is applied using a float. The final layer of membrane is rolled on, except around windows, where it is painted on. This membrane is a sealer. It is rolled on once, and then re-rolled when wet, so there are 2 coats.

137 Mr Kizer said that on the project he had waited 2 weeks between the second and third coats.

138 Under cross examination, Mr Kizer said that when treating the corners, sealer is rolled on to both sides, so the corners are covered.

139 Mr Kizer confirmed galvanised corners had been used on the project. He expressly confirmed to me that sealer had been applied to them.

140 Mr Smith had confirmed the renderer's proposition that it was paid progressively as sections of the works were completed, inspected and approved.

141 With respect to the silicone seal issue, Mr van Noordenne agreed under cross examination that silicone beading was not placed around the windows as part of the construction process. It was only placed when leaking was discovered, and even then it was placed around the leaking windows.

142 Mr Kizer emphatically expressed the view that the failure of the builder to place a silicone bead around the windows was relevant when he said:

> "if he had sealed the windows we wouldn't be here today."

DISCUSSION OF TECHNICAL ISSUES

143 Taking into account the matters identified above, I am not satisfied that Mr Ryan has correctly identified the mechanism of failure. He has theorised that the external angles were not covered with membrane, but I accept Mr Kizer's explicit evidence that the angles were covered.

144 The fact that the renderer's work was approved and paid for, after inspection, is supportive of the truth of Mr Kizer's statement that the external angles were covered.

145 I consider that Mr May has identified a set of circumstances which, taken together, support his thesis that the metal angles are corroding from the inside out.

146 It was conceded by Mr van Nordenne that placing a silicone bead around windows and doors was not a contractual responsibility of the renderer. He also conceded that it his workers did not place silicone bead for some months if they did so at all. In these circumstances I find that Mr May's explanation of the failure of the angles is more likely to be correct than Mr Ryan's.

147 For all these reasons I reject the builder's argument that the external angles have failed because they were not adequately covered with membrane. I find there has been no breach of contract, and no breach of any duty of care, on the part of the renderer in this respect.

148 Mr Ryan in his evidence at the hearing conceded that galvanised angles were acceptable in the industry at the time of the project. This evidence is consistent with that of Mr Kizer that he used galvanised angles constantly in the early 2000's, and had had no problems with them until he used them on the project. On this basis, and on the basis also of Mr Ryan's concession that galvanised angles should perform if used in a proper rendering system, I find that the use of galvanised metal angles was not a causal factor in their failure. Furthermore, I find their use did not constitute a breach of any term in the contract nor breach of any duty of care.

THE BUILDER'S SUPPLEMENTARY CLAIMS

149 The builder's first supplementary argument has been dealt with. This was the argument based on the proposition that the contract incorporated the builder's purchase order which in turn required the renderer to apply Dulux Acrashield 355. I have found against the builder above because:

(a) the purchase order was issued after the contract had been formed; and so

(b) its contents did not constitute contractual terms; and accordingly

(c) the use of Dulux Acrashield 355 was not a term of the contract.[18]

150 The second supplementary argument raised by the builder, which emerged during cross examination of Mr Kizer, was founded on Mr Kizer's evidence that he had applied membrane manufactured by Wattyl. In particular, it was highlighted by the builder's Counsel that Mr Kizer had informed Mr May that he had used Wattyl products GranoMarble texture and GranoSkin membrane. Counsel for the builder put to Mr Kizer in cross-examination a specification for GranoSkin membrane which had been downloaded from the Internet, and argued, on the basis of the evidence already given by Mr Kizer, that the specification had not been followed.

151 Under cross-examination Mr Kizer confirmed that he had used GranoSkin membrane on the project. He deposed that when he was treating the corners, he would roll sealer onto both sides, and that he applied 2 coats by roller. The second coat was applied when the first coat was wet.

152 When it was put to him by Counsel for the builder that he had put only one coat on, he was adamant that he had applied the equivalent of 2 coats by roller, because rolling produced a thinner layer than a brush.

153 Counsel for the builder proposed to Mr Kizer that because he was applying a second coat of sealer over the first coat before it was dry, there was only one coat. Mr Kizer again disagreed, stating that he had applied two coats.

154 I find against the builder on this supplementary argument for two reasons. I acknowledge that Counsel for the builder contended that the application of a further coat over a primary coat of sealer, when the primary coat was still wet, would create only one coat. However, the builder produced no evidence that this contention was consistent with how an expert renderer would see the situation. Accordingly, Mr Kizer's evidence that he had, in these circumstances, applied two coats was uncontradicted, and I find that he did apply two coats.

155 Moreover, even if the manufacturer's specification had not been strictly followed because the second coat of GranoSkin membrane had been applied when the first coat was wet, there was no evidence that this would have had any detrimental effect on the performance of the sealer.

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[18] Paragraph 71 above.

CONCLUSION

156 As the builder's primary arguments about the lack of cover and the use of galvanised angles have been rejected, and as I have found against the builder on both its supplementary claims, I dismiss the builder's claim.

157 Any application for costs made under s 109 of the VCAT Act will be reserved together with any application for reimbursement of filing fees and hearing fees made under s 115B of the *Victorian Civil and Administrative Tribunal Act*.

C Edquist
Member