

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1368//2017

### CATCHWORDS

*Domestic Building Contracts Act 1995*- claim for defective workmanship and incomplete work; evidence; general damages; whether rectification of brickwork requires demolition and rebuild or rendering; claim for liquidated damages; set off.

<b>APPLICANT</b>	Sherridon Pty Ltd (ACN: 127 439 132)
<b>RESPONDENTS</b>	Nesrin Bayraktar, Vedat Bayraktar
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member F Marks
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	3, 4, 5, 6 and 7 September and 15 November 2018 Closing submissions filed on 13 December 2018
<b>DATE OF ORDER</b>	16 May 2019
<b>CITATION</b>	Sherridon Pty Ltd v Bayraktar (Building and Property) [2019] VCAT 1863

### ORDERS

- 1 The applicant must pay the respondents \$71,054.
- 2 The applicant must reimburse the respondents the filing fee of \$467.80 and the daily hearing fees of \$1,239.25.
- 3 Costs reserved.

### MEMBER F MARKS

**APPEARANCES:**

For the Applicant

Mr J. Silver of counsel

For the Respondents

Mr R. Fink of counsel: 3 to 7 September 2018

Mrs Bayraktar: 15 November 2018

## REASONS

### INTRODUCTION

- 1 The respondents and cross claimants (**Owners**) own a residential property in Greenvale (**Site**). On 11 November 2015 the Owners entered into a domestic building contract with the applicant and cross respondent (**Builder**) for the construction of a two-storey brick home on the Site (**Contract**). The Contract price was \$419,619.30
- 2 The building works commenced in February 2016 and an occupancy permit was issued on 17 March 2017. The Owners have paid \$20,000 towards the final invoice but have refused to pay the balance.

### THE BUILDER'S CLAIM AND OWNERS' COUNTERCLAIM

- 3 In October 2017 the Builder issued this proceeding against the Owners claiming a balance owed on its final invoice of \$20,731.93. A short time later in October 2017 the Owners issued proceeding no BP1379/2017 against the Builder, claiming damages for alleged incomplete and defective building work.
- 4 On 5 December 2017 the Tribunal made orders in this proceeding and related proceeding BP1379/2017 that the proceedings be listed together, that this proceeding be the master file and proceeding BP1379/2017, be treated as a counterclaim.
- 5 On 26 March 2018 the Tribunal made orders in this proceeding for the filing of pleadings, documents and witness statements for both the claim and counterclaim. The Tribunal also made orders in proceeding BP 1379/2017 that the orders in this proceeding govern that proceeding.
- 6 By orders dated 13 April 2018 in this proceeding, the Tribunal gave the Builder leave to withdraw its application against the Owners and made orders that the proceeding remain listed for hearing of the Owners' counterclaim only.
- 7 The Owners filed amended points of counterclaim dated 14 May 2018. They claim damages of \$129,479 and interest.
- 8 The Builder filed points of defence to the amended counterclaim dated 4 June 2018. It admits that some of the building work is defective. It denies most of the Owners' claims and disputes the damages claimed. It originally said it was owed \$19,531.93 being the balance of its final invoice, plus interest. It now claims that it is owed \$20,731.93. It says that monies owed to it should be set off against any damages awarded to the Owners.

### THE HEARING

#### Lay evidence

- 9 The Tribunal ordered that the parties' lay evidence be given in the form of witness statements. Mr and Mrs Bayraktar filed witness statements in support

of their counterclaim. During the hearing I gave Mrs Bayraktar and Mr Huseyin Saglam, the Builder's building manager leave to file witness statements of any alleged agreement reached by the parties in relation to the Builder's failure to do the plumbing rough in for the water tank.

- 10 Mr Pasquale Garofalo, a director of the Builder, filed a witness statement in support of the Builder's original claim for payment of the balance of its final invoice. As the Builder's claim has been withdrawn, Mr Garofalo's witness statement has been received into evidence in support of the Builder's defence to the Owners' counterclaim.
- 11 Mr Garofalo did not file a witness statement in defence to the Owners' counterclaim. At the hearing the Builder sought to give oral evidence in response to Mrs Bayraktar's 46 page witness statement. Not at any stage prior to the final hearing did the Builder file evidence in support of its defence or apply for an extension of time to file witness statements.
- 12 I allowed Mr Garofalo to give evidence at the hearing which was limited to a response to the Owners' claim that the Builder agreed to changes to the Contract which were not included in the Contract.
- 13 At the start of the hearing the Builder filed written submissions objecting to the Owners' lay evidence, including most of Mrs Bayraktar's 46 page witness statement. It submitted that her witness statement included expert opinion which she was not qualified to give, detailed the history of the claim which was not relevant to the issues in question and dealt with issues which went beyond the Owners' amended points of counterclaim.
- 14 The Tribunal is not bound by the rules of evidence except to the extent it adopts those rules [s 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act)]. The Tribunal may inform itself on any matter as it sees fit [s98(1)(c)].
- 15 Having reviewed the witness statements, I have given no weight to Mrs Bayraktar's witness statements in so far as she purports to give expert opinion which she is not qualified to give and to assumptions she has made. I have given weight to her evidence in so far as it is relevant to the issues in question, including her claim of alleged agreements said to be made with the Builder.
- 16 The Builder also objected to Mr Bayraktar's witness statement because it was not translated into English by a professional interpreter and Mr Bayraktar required an interpreter to assist him at the hearing. It also submitted that most of the statement dealt with matters that were not relevant to the issues in question and included hearsay evidence, much of which was given as direct evidence by Mrs Bayraktar.
- 17 I did not receive Mr Bayraktar's witness statement into evidence because it was produced in English and not translated from Turkish to English by a professional accredited translator. Further, a good deal of his witness statement was not relevant to the issues in question and was a repeat of direct

evidence given by Mrs Bayraktar of events where Mr Bayraktar was not present.

- 18 The Tribunal book was just under 1000 pages. Mrs Bayraktar's witness statement referred to hundreds of pages in the Tribunal book. I directed the parties to cross reference the pages in the Tribunal book to the paragraphs in their witness statements.

### **Expert evidence**

- 19 Mr Branko Mladicheck of A Plus Building Advice Pty Ltd and Mr Craig Millar of Millar Projects, gave expert evidence and filed reports for the Owners. Mr Robert Simpson of Building Check Pty Ltd gave expert evidence for the Builder and filed a report. The expert witnesses gave evidence concurrently. I visited the Site with the parties and their experts during the hearing and again with the parties' representatives after the parties filed closing submissions.

### **WHAT HAPPENED?**

- 20 The relevant timing of events was that:
- a On 11 November 2015 the Owners entered into the Contract with the Builder for the construction of their home.
  - b On 4 February 2016 a building permit was issued.
  - c On 24 February 2016 building works started.
  - d The parties agreed to variations to the Contract in 2016.
  - e The building works continued in 2016 and 2017.
  - f The Owners engaged independent building consultants to prepare reports on the building work during construction and consequently the Builder rectified a number of items of defective building work during construction.
  - g The Owners continued to raise concerns about the exterior brickwork.
  - h In about September 2016 the Builder rendered the front of the Owners' home. It also arranged for a Nawcaw colour finish to be applied to the exterior north and south sides and the rear of their home.
  - i On 17 March 2017 an occupancy permit was issued, and the Builder sent the Owners a final stage invoice for \$41,961.93.
  - j On 29 March 2017 the Builder sent the Owners a second final stage invoice for \$40,731.93 noting a variation credit of \$1,230.
  - k On 13 April 2017 the Owners paid the Builder \$20,000 towards the final invoice and took possession of their home.

## THE ISSUES

- 21 The principal issues are:
- a Whether the building work is defective and/or incomplete.
  - b If yes, the amount of damages payable.
  - c Whether the Owners are entitled to liquidated damages for delay.
  - d Whether the Owners are entitled to adjustments to the Contract price.
  - e Whether the Builder is entitled to a set off.

## THE DEFECTS

- 22 Of the defects which the Owners originally identified:
- a some have been rectified by the Builder;
  - b some have been abandoned by the Owners;
  - c some are agreed both as to the existence of the defect and the cost of rectification; and
  - d the remainder are in dispute.
- 23 Of the incomplete work which the Owners originally identified:
- a some have been completed by the Builder;
  - b some have been abandoned by the Owners;
  - c some are agreed both as to the existence of the incomplete work and the cost of completion; and
  - d the remainder are in dispute.
- 24 Some items were agreed and the issue between the parties related only to the damages to be assessed. As to other items, the defects and/or incomplete work were disputed.
- 25 Damages are assessed on the basis of what it would cost to put the innocent parties in the position they would have been in if the contract had been complied with, subject always to that being a reasonable course to adopt in circumstances [*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; *Bellgrove v Eldridge* (1954) 90 CLR 613].

## AGREED CREDITS

- 26 In their amended points of counterclaim the Owners claim the following credits which have been agreed by the Builder.

Item	Amount Agreed
Credit for the supply of black tiles by the Owners to be laid in the pantry	\$116

Credit for 4 fly screens included in the Contract price that were unnecessary	\$232
<b>Total agreed credits</b>	<b>\$348</b>

## **CREDITS NOT AGREED**

### **Credit claimed for “Yarra Water” supply charges**

- 27 The Owners claim in their amended points of counterclaim that they are entitled to a credit of \$247 for Yarra Water charges. They say they were not under any contractual obligation to pay for water use while the Builder was in possession of the property.
- 28 In its points of defence, the Builder denies that it was obliged to pay for water charges. It says special condition 5 in Schedule 4 states that the Builder does not agree to pay for the consumption of water, power or gas during the construction process.
- 29 Mrs Bayraktar said on the day she signed the Contract at the Builder’s head office Mr Geoff Stewart told her the Builder would cover the cost of electricity and water used during the build. Mrs Bayraktar said in paying \$20,000 towards the Builder’s final invoice dated 17 March 2017, she deducted amongst other costs, an amount for the water services she paid during construction. She did not state the actual amount deducted nor provide the relevant invoices from Yarra Water.
- 30 Even if I were to accept Mrs Bayraktar’s evidence about the oral agreement, the Owners have not proved their claim for a refund of the water charges as they have not provided evidence of the amount paid to Yarra Water during construction. I therefore dismiss this claim.

### **Credit claimed for amendment to architectural drawings**

- 31 The Owners claim a refund of \$3,000, included in the Contract price, for amendments to architectural drawings. The Builder says it made changes to the original plans to accommodate regulations and town planning requirements to meet the Owners’ requirements.
- 32 The Contract price was \$419,619.30. The Contract included a sales tender document which lists the cost of the Owners’ home plus promotions and variations. The variations include structural alterations of \$39,143.30 which include an administration/drafting fee of \$3,000 for redrafting the plans due to relocation of wet areas and major structural design changes [Item 3.1]. Each of the changes are listed and included in the Contract.
- 33 Mrs Bayraktar did not address the changes to the plans listed in item 3.1 but said that the plans did not allow for plumbing for a gas heater that she wanted to install in the alcove. She said the area had not been designed as required and she agreed during construction to the alcove being extended. She now

considers it to be too big and bulky. No expert evidence was given about this item and Mrs Bayraktar's evidence does not support the Owners' claim.

- 34 The Contract clearly allowed the Builder to charge for amendments to the plans. The change is reflected in Item 3.1. The Owners signed the Contract aware of this cost. The fact that the Builder may not have provided an alcove that met the Owners' wishes does not remove the Owners' obligation to pay for changes to the plans as set out in Item 3.1. I am not satisfied that the Owners have made out this claim.

#### **AGREED ITEMS**

- 35 The parties agreed that the following items were defective or incomplete. They agreed on the estimated rectification and completion costs which included a Builder's margin of 30% and GST. The item numbers refer to the item numbers in the Scott Schedule.

<b>Scott Schedule</b>	<b>Agreed Item</b>	<b>Agreed Amount</b>
Item 6	Acid cleaning damaged window and sliding door components	\$186.00
Item 9	No articulation joint to south-east corner	\$372.00
Item 12	Varnish not cleaned off balustrade	\$700.00
Items 15 and 16	Cracked exposed aggregate paving	Nil as agreed that this is not a defect
Item 17	Leaking balcony	\$4,734.00
Item 19	Tiling defects	\$1,038.00
Item 20	Faults in 2 joinery doors	\$963.00
Items 21 and 22	Bath stand and spout in bathroom not selected by the Owners and other faults with bathroom	\$2,250.00
Items 24 and 25	Scratches to 4 windows	\$830.00
Items 26 and 27	Missing data box and installation of phone lines	\$450.00
Items 28 and 29	Inadequate painting	\$1,536.00
Item 30	Bowed walls and cornices and faults with nails and sanded joints	\$2,405.00
	<b>TOTAL</b>	<b>\$15,464</b>



## ITEMS IN DISPUTE

### **Crack in brickwork above left-hand front window [item 10]**

- 36 In his report Mr Mladicheck stated that the Builder did not provide an effective articulation joint to the front elevation which resulted in cracking to the brickwork and render. He assessed the installation cost at \$1,545.
- 37 However, at the hearing Mr Mladicheck conceded that the articulation joint was not missing and that he should have identified this item as a crack in the brickwork above the left-hand window on the first storey. He said he did not measure the crack but estimated it to be about 3 mm wide or at least more than 1 mm.
- 38 Mr Simpson said he did not observe the crack on his inspection. He said the photo in his report [TB 415] did not show a crack, let alone a crack of 3 mm. Mr Mladicheck agreed that he could not see the crack in Mr Simpson's photo but said that he had seen the crack during his inspection.
- 39 Mr Simpson examined Mrs Bayraktar's photo [TB 504] which he said showed a hairline crack of less than 1 mm caused by thermal variation being the expansion and contraction of the steel lintel. He said a crack of less than 1 mm was not a defect under the Guide to Standards and Tolerances 2015 (**Guide**). I accept Mr Simpson's evidence.
- 40 I prefer the evidence of Mr Simpson. I am not persuaded by Mr Mladicheck's evidence that he could recollect the exact size of the crack during his inspection 8 months ago. Even if I were to accept his evidence Mr Mladicheck did not provide an assessment of the costs to repair the crack. I am not satisfied as to this item.

### **Failure to properly install ceiling insulation [item 11]**

- 41 Mr Mladicheck said the ceiling insulation was not fitted tightly and had gaps which compromised the energy efficiency of the home. He assessed a cost of \$2,574 to reinstall the insulation and recertify the installation.
- 42 Mr Mladicheck did not go into the ceiling cavity to inspect the insulation but stood on a ladder at the top of the manhole. He said he used his Bullard thermal imaging camera to delineate white areas which indicated warmth and black areas which indicated cold. He said his photos of the screen shots showed gaps in the insulation. He later admitted that a white cold spot may in fact reflect steel taking the heat away and not represent a lack of insulation.
- 43 The Builder objected to Mr Mladicheck's evidence of his findings from the thermal imaging camera because, amongst other things, he did not provide a test protocol. Having heard the evidence, I have placed no weight on Mr Mladicheck's photos of the screen shots from the thermal imaging camera. I found his evidence to be confusing and his thermal imaging testing not to be substantiated by technical protocols.

- 44 Mr Simpson said he went into the ceiling cavity and walked around and found no evidence of missing or defective roof insulation. He said his photos showed the ceiling to be well insulated. He agreed there were a few gaps where lights had been fitted but said that the Building Code of Australia (**Code**) did not require insulation around down lights or electrical installations. I accept Mr Simpson's evidence.
- 45 I prefer the evidence of Mr Simpson to Mr Mladicheck. Mr Simpson went into the ceiling cavity and inspected the insulation. Mr Mladicheck did not. Even if I were to accept Mr Mladicheck's evidence, I am not persuaded that the Owners would be entitled to damages of \$2,574 for a complete refitting and re-certifying of the ceiling insulation. On Mr Mladicheck's own evidence, there was no basis for a complete refit and recertification. I am not satisfied as to this item.

#### **No downpipe installed to rear roof [item 13]**

- 46 Mr Mladicheck said the plans showed a downpipe attached to the rear roof which was not installed. He said its exclusion was a breach of the implied warranties in the *Domestic Building Contracts Act 1995*.
- 47 Mr Simpson said the downpipes had been installed at each side of the rear upper roof and were less than 12m apart. He said paragraph 5.5.8 of A.S.3500.5 did not allow for placing a downpipe and spreader at the location specified in the plan.
- 48 Mr Mladicheck agreed with Mr Simpson as to the location of the downpipes but said they were to continue to the gutter. Mr Simpson disagreed and said stormwater drains of less than 10m may be put into a spreader but if the distance between the downpipes was greater than 10m they were required to go to a legal point of discharge.
- 49 I prefer Mr Simpson's opinion to Mr Mladicheck's. I accept Mr Simpson's evidence that it was necessary for the building to comply with the relevant Australian Standard, rather than with plans which did not comply with that standard. I am not satisfied as to the item.

#### **Eave trim separation at rear corners of upper roof [Item 14]**

- 50 Mr Mladicheck said the eave trim separation at the rear corners of the upper roof was a latent defect because the Builder did not allow for brickwork expansion and growth. He said the plans did not provide expansion joints where required.
- 51 Mr Simpson said this was a defect but that it had been dealt with in item 9 which had been agreed by the experts. Mr Mladicheck said that this item was another example of the same issue set out in item 9. The experts agreed that if this item were to be treated separately then they assessed a cost of \$1,545.
- 52 Having heard the evidence I find that this is a separate item and not part of item 9. I will therefore allow the amount of \$1,545.

### **Broken stormwater pipe at rear of garage [item 17 A]**

- 53 Mr Mladicheck identified a broken stormwater pipe at the rear of the garage. Mr Simpson agreed that this was a defect. Mr Mladicheck assessed a cost of \$737. Mr Simpson assessed a cost of \$200.
- 54 In Mr Mladicheck's opinion rectification work comprised the plumber digging around the pipe with a garden spade, cutting the stormwater pipe inserting a join and replacing the pipe. He allowed 4 hours for labour but agreed that a plumber would be on-site already.
- 55 Mr Simpson said the rectification work comprised putting a sleeve over the broken pipe. He allowed \$20 per sleeve with a maximum allowance of \$200. In his opinion the work would take less than one hour to complete.
- 56 I observed the broken pipe on Site. I accept Mr Simpson's view that the rectification work is straight forward and would take less than an hour. I prefer Mr Simpson's assessment of costs and will allow \$200.

### **Render and brickwork cracking to front elevation [item 18]**

- 57 Mr Mladicheck said there was cracking to the render and brickwork at the front elevation caused by the Builder not installing an articulation joint as required by the plans. Mr Mladicheck assessed a cost of \$1,609 to install.
- 58 Mr Simpson said this item was a repeat of item 10. Having preferred Mr Simpson's opinion in relation to item 10, I am not satisfied as to this item.

### **Kitchen window - leak [item 20 (no 23)]**

- 59 Mr Mladicheck said when he inspected the kitchen window he saw a stain on the window and concluded the window was leaking. He said he did not find the source of the leak and assessed the cost of identifying the source of the leak at \$687.
- 60 At the hearing Mr Mladicheck admitted that when he inspected the Owners' house in December 2017 and later in September 2018, with the parties, their experts, lawyers and the Tribunal, he could not detect any swelling of the MDF but observed cracking.
- 61 Mr Simpson said when he first inspected the kitchen window and later, when he attended the inspection with the Tribunal, he did not detect a leak or moisture. He said on the view he used his moisture meter to measure any water content and the moisture meter did not indicate water and/or swelling. In his opinion there was no defect.
- 62 During the hearing, when Mrs Bayraktar filed her annotated witness statement which cross-referenced the documents in the Tribunal book, she filed further photos. She said her photos taken in 2017 showed a water leak. One photo shows water on the exterior of the window. The other shows some drops of water on the internal reveal.

63 Having heard the expert's evidence, I prefer Mr Simpson's evidence. As neither expert observed any evidence of moisture or water leaking during the view, I am not satisfied as to this item.

**Cooktop with faulty controls [item 20 (no 24)]**

64 Mr Mladicheck's report states that the controls on the cooktop have fallen into a hole resulting in the flame not lighting or staying alight. He has assessed a cost of \$1,330 to replace the cooktop which he says has defective controls.

65 Mr Mladicheck suggested that the cut out of the granite kitchen bench was in the wrong location but said he had no direct evidence to confirm his opinion. In cross examination he admitted that he did not know who had caused the problem but that in his opinion the Builder was responsible because it installed the cooktop.

66 Mr Simpson said he recognised that the control panel of the cooktop was sinking but considered the unit to be installed correctly. He said there appeared to be something wrong with the unit which he considered to be a manufacturer's warranty issue. He said there was no evidence of defective workmanship.

67 The Owners relied on a report from a person called Clintion, the manufacturer's (Kleenmaid) agent. Mrs Bayraktar said the agent sent her the following report after his inspection which stated:

Inspected cooktop for not staying lit. Found the opening for the cooktop too big and not supporting the base of the cooktop. Positioned cooktop on very edges of the opening and tested the operation which tested okay.

Case issue: INSTALLATION ERROR NOT WARRANTY

68 I accept the manufacturer's report and find that the cook top was not faulty.

69 The Builder submitted that I should not accept Mrs Bayraktar's evidence on the basis of the rule in *Jones v Dunkel*. It said the Owners were required to call the manufacturer's agent to give evidence. It submitted that if called the evidence would not have assisted the Owners' claim. I reject the Builder's submission as the principle in *Jones v Dunkel* is not relevant here. I find that the agent's report supports the Owners' claim that the cooktop is not faulty.

70 Mr Mladicheck's evidence does not prove that the Builder is liable. Further if it were liable, Mr Mladicheck has assessed the cost of replacing the cooktop when there is no evidence to suggest that the cook top needs to be replaced. Mr Mladicheck has not provided evidence of the cost of re-installing the cooktop correctly, so I do not award any damages for this item.

### **Blown range hood [item 20 (no 25)]**

- 71 Mr Mladicheck said the motor in the range hood has blown. He assessed the cost of a new range hood at \$2,832 on the basis that parts for the range hood could not be found.
- 72 Mr Simpson said when he inspected the Owners' house there was no evidence of water marks or other indications that there was water entry causing a fault to the blown motors. He said the fan from the range hood exited by way of outlets through the rear wall with a louvre turned downward to deflect water away. Mr Simpson said if it could be shown that water was entering the ducting for the range hood, a cover could be fitted over the outlet for protection.
- 73 Mr Simpson did not dispute the fact that water had gone into the motors. He said the leakage could be caused by wind driven rain. He said if water was entering the duct, which appeared to be the case, then he would put a cowl over the vent on the outside wall.
- 74 Mr Mladicheck did not consider that a cowl would fix the problem. However he did not explain how the leak could be fixed nor provide any costings for the rectification work.
- 75 The Owners relied on an email dated 11 March 2018 from the agents of the manufacturers of the range hood to them. [TB392]. The email stated that the agents inspected the range hood following a request from the Owners in October 2017. They found the motors had shorted. They observed rust on both motors. For rust to form on the motors, they suspected there was moisture or water getting into the range hood due to a water leak. They replaced both motors and tested the range hood.
- 76 The email stated that the agents returned again in February 2018 as the Owners advised that the range hood had stopped working. On inspection they found both motors to have blown again and to be rusty. In their experience they had never seen a range hood blow both motors twice, in as many months, without some external factor causing damage.
- 77 I accept the opinion of the manufacturer's agents that there was some external factor causing the damage and that the damage was not caused by the unit. I find that the Owners have established that there were other indications of water entry.
- 78 I find there to be no basis for Mr Mladicheck's opinion that the range hood should be replaced. I prefer Mr Simpson's view that a cowl should be installed, and the motors replaced. I will allow Mr Simpson's figure of \$350.

### **Scratched kitchen sink [item 20 (no 26)]**

- 79 Mr Mladicheck said the kitchen sink was scratched and should be replaced. He has assessed the cost of a replacement sink at \$679.25.
- 80 He said the Owners directed him to this item and he could not say whether this scratch was present at the time of installation or occurred at a later time.

In his opinion the scratch could be caused by anything. Accepting Mr Mladicheck's evidence, I am not satisfied that the Owners have proved that the Builder scratched the sink or supplied a sink that was scratched and so I am not satisfied as to the item.

**Failure to do the plumbing rough in for the water tank [item 23]**

- 81 The parties agreed that the Builder did not do the plumbing rough in for a rain water tank. The Builder says the Owners agreed to a variation credit of \$1,230 which they were given in the final invoice dated 29 March 2017. The Owners deny reaching an agreement with the Builder.
- 82 Mr Saglam admitted that the plumbing rough in was overlooked by the Builder's sub-contractor. He said he understood the Builder's sub-contractor suggested moving the water tank to under the big window on the same wall. He said the Builder discussed this issue with Mrs Bayraktar and agreed to do the necessary rough in plumbing work for the relocated water tank but that she did not agree to the Builder's offer.
- 83 Mr Saglam said Mrs Bayraktar requested a credit of \$1,230 to be done by way of a variation to the Contract and the Builder prepared the variation. He said Daniel Messiano, the site supervisor and Alan Broadly, the construction manager, relayed Mrs Bayraktar's instructions to him.
- 84 Mrs Bayraktar disputed Mr Saglam's evidence. She said the Builder refused to do the rough in for the water tank in its original location and wanted to relocate the water tank to under the big window. She said she did not agree to the relocation because the water tank would be unsightly if moved to under the big window.
- 85 Mrs Bayraktar said she asked for a variation which included a refund of the \$1,230 paid plus the cost of having the water tank properly fitted into its original location. She denied agreeing to only a credit of \$1,230 as compensation.
- 86 By email dated 23 March 2017 sent at 6.15pm [TB 506], Alan Broadley confirmed his discussions with Mrs Bayraktar on that day. His email stated that the tank would be relocated under the stairwell window. The email stated that he fully understood Mrs Bayraktar's concerns and that it was her choice as to whether she would like the Builder to do the rough in work for the relocated tank. Mr Broadley also stated in his email that, if she wished, the Builder would agree to refund the amount she paid for the rough in.
- 87 On the same day at 8.19pm Mrs Bayraktar sent Mr Broadley an email [TB 505]. The email stated she had done some research with plumbers in relation to having this work done to an existing double storey home. She was told that it was not an easy process, or cost, as stated by the Builder. Her email continued:
- "...therefore, ask to be refunded, plus the cost of having it properly fitted in the future to a completed home.... It is only fair that we get back a fair amount reimbursed."

- 88 I accept Mrs Bayraktar's evidence that she did not reach an agreement with the Builder about compensation arising from the Builder failing to do the plumbing rough in for the water tank. I prefer Mrs Bayraktar's evidence to Mr Saglam's evidence. Mr Saglam conceded that he was not directly involved in the discussions between the Builder and Mrs Bayraktar about the proposed resolution of this issue. On the other hand, Mrs Bayraktar gave direct evidence of her discussions with Mr Broadley and set out the Owners' position in her email to Mr Broadley dated 23 March 2017.
- 89 In cross examination Mr Saglam said he spoke to Mrs Bayraktar about once a week however he agreed that from about December 2016, all communication between the Builder and Mrs Bayraktar was by email as requested by Mrs Bayraktar. He stated he would not have approved the variation unless Mrs Bayraktar told him she wanted the deduction made. However, in cross examination he was unable to recall when he had spoken to her.
- 90 The emails between Mr Broadley, the Builder's construction manager and Mrs Bayraktar, contradict Mr Saglam's evidence. It is clear from the emails that the parties did not reach an agreement on compensation. Further, the post Contract variation document prepared by the Builder dated 28 March 2017, on which Mr Saglam relied, was not signed by the Owners.
- 91 I find that the parties did not reach an agreement about the compensation to be paid to the Owners arising from the Builder not doing the plumbing rough in for the water tanks. Mr Mladicheck and Mr Simpson have agreed on \$9,213 as being the costs assessed of doing the plumbing rough in for the water tank in the location shown in the plans. I will allow \$9,213.

### **Failure to supply bevelled edge skirtings [Item 33]**

- 92 Mr Mladicheck said skirtings and architraves selected by the Owners as part of a \$14,000 upgrade were a rectangular shape, but that the Builder installed bevelled edge skirtings and architraves. Mr Mladicheck did not express an opinion on this item but assessed the cost of replacing the skirtings and architraves at \$5,778.
- 93 Mr Simpson said the Builder was not liable for this item. He observed on his inspection that the skirting boards and architraves were bevelled edge as listed in version 1 of the Project specifications dated 8 October 2010. The specifications are actually dated 28 October 2015. Mr Simpson agreed with Mr Mladicheck's costing.
- 94 The Contract includes a document headed internal selection schedule dated 28 October 2015. It is initialled by Mrs Bayraktar. Next to each item appears one of the following words: "STANDARD", "INCLUSION" or "UPGRADE". The internal selection schedule lists bevelled edge skirtings and architraves as standard [TB 237]. It reads:

ARCHITRAVE: HUME. ... SINGLE BEVELLED 67 X 18 MM DIAMETER MDF, STANDARD  
SKIRTING: HUME: SINGLE BEVELLED 67 X 18 MM DIAMETER MDF, STANDARD

- 95 The Contract also includes a document headed “Gallerie Variation” dated 28 October 2015 which sets out the changes to the Owners’ selections. It is initialled by Mrs Bayraktar. Skirtings and architraves are not included in the list.
- 96 The Contract also includes a document headed “essentials inclusions” dated 11 November 2015. It has been initialled by Mrs Bayraktar. It lists various internal features. The mouldings are listed as including square edge skirtings and architraves. The Owners say this document supports their claim that the Builder was required to supply square edge skirtings and architraves but made a mistake and supplied bevelled edge mouldings.
- 97 Mrs Bayraktar gave evidence that the Owners upgraded their home from a standard Claremont 37 design to the “essentials package” which included square edge skirtings and architraves which she said were not supplied. She said during construction the Builder agreed to compensate her for the mistake by concreting or providing decking free of charge and then failed to honour its agreement.
- 98 In cross examination Mrs Bayraktar agreed that she chose bevelled edge architraves and skirtings because she did not know, or understand, the meaning of the word bevelled. I accept her evidence.
- 99 Having reviewed all the relevant documents and the oral evidence, I am not satisfied that the Contract required the Builder to provide square edge skirtings and architraves. Although Mrs Bayraktar initialled the essentials inclusions, I find that internal selection schedule and the Gallerie Variation documents clearly set out the items that the Owners had selected and on which they signed off. Both Mrs Bayraktar, in cross examination and Mr Bayraktar, when cross examining Mr Garofalo, conceded this fact.
- 100 Here, the fact that the essential inclusions document included a reference to square edge skirtings and architraves is not to the point. In my opinion the essentials inclusions document must be read in the context of the internal selection schedule and the Gallerie Variations.
- 101 The items chosen by the Owners were listed in the internal selection schedule. Any changes the Owners made to their selection were listed in the Gallerie Variation and appeared as an upgrade. Both documents were initialled and signed by Mrs Bayraktar on the same day. The fact that the essential inclusions documents was included in the Contract documents does not alter this fact.
- 102 It is not to the point that Mrs Bayraktar did not know or understand the term bevelled edge. If that were the case, she should have sought clarification from the Builder before making her selection. I am not satisfied that the Owners have made out their claim to this item.



### **Laundry tap located in unserviceable position**

- 103 The Owners claim that the laundry tap required for the washing machine, is in an unserviceable position and should be moved to a position that can be easily accessed.
- 104 Mr Mladicheck considered the tap to be in a difficult position to access and assessed the cost of \$265 to move the pipes. Mr Simpson conceded that the tap was in an awkward position but said it could be reached. He agreed with Mr Mladicheck's costing.
- 105 On my inspection I was shown the location of the laundry tap. I observed it to be in a very awkward position which is difficult to access. I will allow \$265.

### **BRICKWORK [items 1 to 5, 7 and 8]**

#### **Mr Mladicheck's report**

- 106 Mr Mladicheck's report stated that the following items of brickwork were defective. He recommended the demolition and reconstruction of brickwork to the side elevations and the rear elevation. He assessed the cost to be \$60,847.

<b>Scott Schedule</b>	<b>Alleged defective work</b>
Item 1	Bricks supplied are a darker shade than sample from which the Owners made their selection
Item 2	Bricks have not been supplied from the same batch for uniformity of colour and tone
Item 3	Bricks have not been mixed, randomised and blended for uniform appearance
Item 4	There is visible and pronounced tone transition from lower storey to upper storey brickwork
Item 5	Brickwork has been severely damaged by acid cleaning insofar that tooled iron joints are unrecognisable
Item 7	Bricks have not been culled for damage or cracking and significant amount of bricks have defective appearance
Item 8	There is significant brickwork crack on the right side against tall window

- 107 Mr Mladicheck considered the Owners to be entitled to a standard of brickwork not less than that of the display home. In his opinion the brickwork was of a lesser standard than that of the display home. The Builder objected to Mr Mladicheck's evidence comparing the brickwork in the display home

to the brickwork of the Owners' home as it submitted this did not form part of the Owners' claim.

- 108 I agree with the Builder's objection of Mr Mladicheck's evidence. I find that that this claim was not included in the Owners' amended points of counterclaim and does not form part of the Owners' claim.

### **Mr Simpson's report**

- 109 Mr Simpson agreed there was a variation in the colour of the bricks and that the bricks were darker than the sample selected by the Owners. He said the variation in colour was minor and the bricks had darkened because of water absorption. He did not consider either of these items to be defective.
- 110 Mr Simpson agreed there was a tonal variation between the upper and lower stories. He said the colour variation would not have been evident until the whole wall was completed and there was no evidence to suggest that the Builder or bricklayer was at fault. He did not consider this item to be defective. He said part 3.05 of the Guide stated that a perfect colour match may not be possible and that differences may diminish over time. Part 3.05 of the Guide deals with repair work and not with new masonry work.
- 111 It is not disputed that the Builder carried out repair work on the brickwork during construction. Mr Simpson did not make it clear whether his opinion related to the original brickwork or the repairs to the brickwork.
- 112 Mr Simpson agreed that several bricks had minor chips and hairline cracks. He said there were minor imperfections and hairline cracking in some bricks which arose from the manufacturing process and were not a defect under part 3.10 of the Guide. He said that the bricks were not defective unless there was a complete fracture of the unit.
- 113 Mr Simpson agreed that too much acid had been applied to the mortar, in at least one area where the mortar was depressed, which did not comply with part 3.09 of the Guide and required repair. He said any voids or holes in the mortar should be repaired and the colour of the mortar should be matched as closely as possible.
- 114 Mr Simpson agreed that there was a crack through the horizontal mortar course at the top right-hand side of the tall window on the south side of the house, in line with the damp proof course. He considered this to be associated with shrinkage with the crack limited to several bricks. He said that this was a category 2 defect under part 3.02 of the Guide and required repointing.
- 115 Mr Simpson assessed costs to rectify items 5 and 8 at \$551.80.

### **Mr Millar's report**

- 116 Mr Millar is a registered commercial Builder with 15 years' experience as a Builder. He prepared a report which attached photos of the exterior brickwork.

- 117 The Builder originally objected to Mr Millar's report because it did not comply with the VCAT practice note 2 which deals with expert evidence. However, in written closing submissions, the Builder submitted that Mr Millar was a competent and reliable witness in his area of expertise.
- 118 At the hearing Counsel for the Owners took Mr Millar through the VCAT practice note and asked him questions about his qualifications and expertise. I am satisfied that Mr Millar has the necessary qualifications and experience to give an expert opinion on the brickwork.
- 119 Mr Millar said he was asked to inspect the exterior brickwork and masonry and was given the architectural and structural drawings. After his inspection he asked Reese Thompson, a domestic and commercial bricklayer, to inspect the building and verbally report to him. He was asked to give his opinion on the brickwork, including the architectural/visual appearance. On inspecting the Owners' house, he considered it to be structurally sound.
- 120 Mr Millar said the bulk of the defective brickwork was located on the south wall of the Owners' house [Elevation D of the plans at TB 245]. He also observed defects in other areas of brickwork around the house.
- 121 Mr Millar said the brickwork was of very poor quality and the workmanship was unacceptable. He said the finish was poor and visually unappealing due to acid etching. He said there was a colour variation in multiple areas.
- 122 In cross-examination Mr Millar agreed that the largest crack was less than 5 mm but said the masonry was cracked at multiple locations. He identified a crack running vertically through six courses of brick at the midpoint of the south wall. He said the cracking and separation of the mortar from the bricks, was visually evident across the wall.
- 123 At the hearing he said the mortar thickness was inconsistent and the bed thickness ranged from 25 mm to 5 mm across the wall. He said there was shrinkage in the mortar in various areas, which in his opinion was due to the incorrect ratio of the sand and cement mix. He said he touched the mortar and found it to be brittle because in his opinion there was not enough cement in the mix. He said this resulted in the adhesion to the block work being inconsistent and not allowing the bricks to stay together.
- 124 In cross examination he conceded that he had not carried out any chemical tests or formally analysed the composition of the mortar mixture. However, he said he had visually inspected the mortar and, in his opinion based on his industry experience, there was a problem with the composition of the mortar. Mr Simpson said he did not find there to be a problem with the mortar.
- 125 Mr Millar said excessive pressure cleaning had blown away mortar beds as some mortar beds were flush, and some were raked excessively. He said the excessive raking of the bricks allowed water to enter the mortar and for further deterioration to occur.
- 126 In cross examination he reiterated that he had observed multiple cracks in the mortar across the building. Some cracks required repointing and others

needed to be monitored. He said he made a note of several areas where there were mortar issues but did not make a note in relation to every area. He said brick walls were continuous and complete structures and needed to be viewed as a whole.

- 127 In Mr Millar's opinion the brickwork was defective for a number of reasons. The visual appearance of the bricks, the variation in the mortar beds, the deterioration of the mortar and variance in colour, the cracking and issue of mortar having fallen out across the face of the brickwork on the south wall. He agreed localised repair work was necessary.
- 128 Mr Millar assessed most of the defective brickwork to be on the south wall although he said the brickwork and mortar was defective, albeit to a lesser extent on the north wall and the rear wall of the Owners' house. In his opinion about 50% of the south wall (side wall), 10% of the east wall (back wall); and 20% of the north wall (side wall), required rectification.

### **Conclusion**

- 129 During the hearing, I attended the Owners' property to view the interior and exterior of the Owners' house. The Owners, the Builder, their counsel and the experts attended the view. I observed numerous stickers which the Owners had placed on the exterior walls to mark areas of alleged defective brickwork.
- 130 At the end of the hearing I directed the Owners to remove all of the stickers from the exterior walls, so I could view the exterior walls without interruption. On 9 April 2019 I attended the Owners' property and viewed the exterior brickwork without the stickers. Mr Saglam and Mrs Bayraktar attended the view.
- 131 Having had an opportunity to view the exterior brickwork and having heard the evidence of the experts about the brickwork I prefer the evidence of Mr Millar to Mr Simpson's evidence.
- 132 I accept Mr Millar's evidence that the exterior brickwork is visually unattractive and unappealing. I accept his evidence that there are cracks in the mortar and that the thickness of the mortar beds and perpend varies considerably over the brickwork. In particular, over the south wall, and to a lesser extent, over the north side wall and rear wall.
- 133 I accept Mr Millar's evidence that the acid pressure cleaning has blown away mortar beds and that some beds are flush, and others raked excessively. In so far as Mr Mladicheck agreed with Mr Millar's assessment and conclusions, I prefer his evidence to Mr Simpson's.
- 134 I reject Mr Simpson's evidence that the only areas of defective brickwork are items 5 and 8 of the Scott Schedule which comprised one area of mortar damaged by acid cleaning, and another area where there was a crack through the horizontal mortar course at the top right-hand side of the tall window on the south wall. Mr Simpson was shown evidence of a number of areas where

there was a difference in the thickness of the mortar beds, cracks in the mortar and/or bricks. In each case he referred to part 3 of Guide and dealt with each item of brickwork separately.

- 135 In my opinion what Mr Simpson did not do was assess the brickwork as a whole, as Mr Millar and Mr Mladicheck have done. I accept the evidence of Mr Millar and Mr Mladicheck that the exterior walls must be viewed as a whole and that each defect cannot be viewed in isolation.
- 136 Having accepted Mr Millar's evidence, I find that the brickwork is architecturally and cosmetically unappealing when the exterior walls are viewed as a whole, in particular the south wall. I find that the mortar width is uneven and the mortar is damaged by severe acid cleaning. I also find that there is a significant difference in tone between the colour of the lower storey and the upper storey.
- 137 I find that the Owners have made out this claim for defective brickwork.

#### **Cost of rectification of brickwork**

- 138 Mr Millar's report assessed costs between \$55,200 and \$61,800 to demolish and rebrick two sides and the rear of the Owners' house. Mr Mladicheck's report assessed a cost of \$60,847 to demolish and rebuild the brickwork.
- 139 Mr Millar assessed a cost of \$15,840 plus project management costs of \$2,400, to render the defective brickwork. Mr Mladicheck did not assess a cost for rendering.
- 140 Mr Simpson's report assessed a cost of \$551.80 to repair the mortar [allowance for items 5 and 8 of the Scott Schedule]. He did not consider there was any need to demolish and rebuild the brickwork. Nor did he consider that there was any requirement to render the Owners' house.
- 141 Although Mr Simpson said that neither option was required, at the hearing he agreed with Mr Mladicheck's assessment of \$60,847 to demolish and re-brick. At the hearing the experts agreed a cost of \$24,796 for rendering the exterior of the Owners' house.
- 142 Mr Millar said in so far as deterioration of the mortar was concerned, the need to demolish and re-brick was only necessary if the mortar was failing throughout the exterior of the house. He said that more cracks would need to appear before it reached a stage where it could not be repaired, for it to be necessary to demolish all of the brickwork.
- 143 The experts spent a great deal of time giving evidence about different methods and products which could be used to render the side walls and back wall of the Owners' house. Mr Millar said render was a satisfactory option if the repair work was done correctly. He said render provided a more high-end finish and a more striking street appeal and a consistent colour and tone. However, he agreed render provided a major visual change. Mr Simpson suggested an alternative method of render which removed the need for a separate repair cost. Mr Millar agreed that this was an option.

## Findings

- 144 I accept Mr Mladicheck's assessment of costs of \$60,847, which was agreed by Mr Simpson, to demolish and re-brick the south, north and rear walls of the Owners' house.
- 145 It is not disputed that issues arose with the brickwork during construction. Nor is it disputed that the Builder rendered the front of the Owners' house and arranged for a Nawcaw colour product to be applied to the mortar on the side walls and rear of the Owners' house as a way of addressing the complaints.
- 146 The walls have been patched and the patches have not rectified the problem. The visual appearance of the bricks and mortar is poor. I have accepted Mr Millar's evidence that over 50% of the south wall needs to be replaced and rebuilt and the north wall and rear wall need to be repaired. I am not convinced that an attempt to rectify parts of each of the walls will result in a better finish.
- 147 Damages must be assessed on the basis of what it would cost to put the Owners in the position they would have been in if the Contract had been complied with, subject always to that being a reasonable course to adopt in the circumstances.
- 148 The Contract provides for the construction of a house with face brickwork and not render. The Owners did not contract for a patchy appearance. The Builder has tried to repair the brickwork and has not succeeded. It is not to the point that the experts agreed that rendering was a satisfactory alternative to demolishing and rebuilding the brickwork.
- 149 Nor is it to the point that the Owners agreed to the front of their home being rendered during construction. They did so because the Builder suggested that this was a satisfactory way of dealing with the problems with the brickwork at the time.
- 150 The Builder submitted that demolishing and re-building the brickwork would be unreasonable in that it would secure the Owners an uncovenanted profit. I reject this submission. In *Tabcorp*, the High Court explained the qualification of "unreasonableness" established in *Bellgrove*. It established that this qualification is only to apply in fairly exceptional circumstances where the innocent party is merely using a technical breach to secure the uncovenanted profit [*Radford v De Froberville* [1977] 1WLR 1262 per Oliver J].
- 151 In my opinion, that is not the case here. In this case I find that the remedial work by demolition and reconstruction is entirely reasonable given the fact that I have accepted that Mr Millar and Mr Mladicheck have found the greater part of the brickwork to be defective and the fact that the brickwork must be viewed as a whole. Here, I am not satisfied that the suggested repair work will remedy the defective brickwork. I have also found that the Contract

provided for the construction of a home with face brickwork. I will therefore allow the amount of \$60,847.

### PRELIMINARY COSTS WHICH ARE AGREED

152 The following preliminary costs are agreed both as to the items and the amount:

<b>Scott schedule</b>	<b>Item</b>	<b>Agreed Amount</b>
Item 6	Building permit	Nil as experts agreed no building permit is required
Item 7	Home Owners warranty insurance	\$1,500
Item 10	Protect existing dwelling surfaces	\$744
<b>TOTAL</b>		<b>\$2,244</b>

### PRELIMINARY COSTS IN DISPUTE

#### Procurement [item 2]

153 Mr Mladicheck assessed procurement costs at \$8,237. Mr Simpson considered these costs to be excessive. In addition to the figures for individual items, the Owners claim an additional margin of 43% comprising a Builder's margin of 30% plus GST of 10%. There was no dispute as to the margin to be allowed to the rectifying Builder, which was agreed at 30%.

154 Mr Simpson considered this margin allocated to procurement to be a double up. I accept Mr Simpson's evidence and find that Mr Mladicheck's estimate of the costs of procurement includes a double up of the margin and is excessive.

155 In his report Mr Mladicheck allocated 28 hours to preparing plans, tendering, reviewing tenders, obtaining a building permit and signing up the Builder chosen to do the rectification work. Mr Simpson said the time required would be far less than the amount claimed. He considered it would take no more than an hour to go through the tender and check that the statement of work meets the specifications. He considered items 1 and 2 to be excessive and items 3 and 5 not to be required.

156 I found Mr Mladicheck's evidence to be confusing and inconsistent. First, he said the brickwork was not structural. Later he said it was structural because it was tied to the frame. He then said a building permit was required but later agreed with Mr Simpson that neither a demolition or building permit were

required because the work was not structural, and the Builder rectifying the defects, was replacing like with like.

- 157 Mr Mladicheck allocated 4 hours for a supervisor. In cross examination he did not agree a competent builder could do the work without a supervisor. Mr Simpson said there was no requirement for a supervisor and said \$500 was a reasonable assessment of procurement costs. Given the extent of the work I prefer Mr Simpson's evidence and allow \$500 for procurement costs.

#### **Contract works insurance [item 8]**

- 158 Mr Mladicheck assessed the Contract works insurance at \$1,788. His explanation for his costing was not plausible. Mr Simpson said a builder would have insurance already which would be included in the costings. He said the insurance was a one-off annual payment and was not referable to a particular building Contract.

- 159 I prefer Mr Simpson's evidence and am not satisfied as to this item.

#### **Preliminaries [item 9]**

- 160 Mr Mladicheck allocated \$3,003 to preliminaries. His report stated the need for the Site to have a storage shed, a workers' shed, a builder's toilet and security fencing. Mr Simpson said these preliminaries were not necessary for the rectification works. He considered that there was no requirement for a shed or a builder's toilet and that the back was secure. At the hearing Mr Mladicheck agreed that the backyard was secure. Given the extent of work I prefer Mr Simpson's evidence and am not satisfied as to this item.

#### **THE CLAIM FOR DELAY**

- 161 The Owners claim damages of \$2,678.57 for delay. They say:
- a The building works commenced on 24 February 2016.
  - b The building works should have been completed by 27 January 2017.
  - c They took possession on 13 April 2017.
  - d They are entitled to 75 days at \$250 per week.
- 162 The Builder submits in its closing submission (which is different to its opening submission) that the Owners are entitled to damages of \$1,250 for delay. It says:
- a The building works commenced on 7 March 2016 being the commencement date defined in clause 16 of Schedule 4 – Special conditions (completing base stage - end of stage 1) and not the day building works commenced.
  - b The building period was 340 days.
  - c Completion date was 17 March 2017 when the Builder sent its final invoice with the occupancy certificate.



- d Construction period was 374 days (35 days over).
- e Damages for delay should not be extended to handover as it was open to the Owners to take possession at an earlier time.

## **Time**

163 The Contract provided for delay costs to be paid to the Owners. There is a tension between the standard definition of Commencement in the Contract and the definition of Commencement in Clause 16 of Schedule 4. I find that the parties have agreed to the commencement date being the date of the end of the base stage, namely 7 March 2016. The definition in the special condition supersedes the standard definition.

164 There was no dispute that the building period was 340 days [item 1 of schedule 1]. Clause 40 of the Contract provides that if the building works have not reached completion by the end of the building period the owner is entitled to agreed damages of \$250 per week [item 9 of schedule 1] for each week after the end of the Building Period to and including the earlier of:

- the date the building works reach completion;
- the date the Contract is ended; and
- the day the owner takes possession of the land or any part of the land.

165 The Owners are entitled to delay costs for each week after the end of the Building Period up to and including 13 April 2017, the day they took possession of the property. I reject the Builder's submission that the date of completion was the day the Builder sent its first final invoice. This date is not relevant to calculating delay damages under clause 40 of the Contract. Nor is it relevant that the Owners continued to dispute matters with the Builder.

166 I find that the Commencement date was 7 March 2016. I find that the Building works were to reach completion on 10 February 2017, 340 days after 7 March 2016. I find that the Owners are entitled to delay damages of \$250 for 8 weeks amounting to \$2,040.

## **DEFECTS AND INCOMPLETE WORKS NOT IN EXPERTS' REPORTS**

167 In addition to the alleged defective and incomplete works referred to in the expert reports, the Owners claim the Builder has breached the Contract by carrying out 24 additional items of defective work and/or incomplete work or the supply of items not agreed [see paragraph 19 of the amended points of counterclaim]. As there was no expert evidence given about these items, I have not taken them into account.

## **CONCLUSION**

168 The Owners' claim is established in the sum of \$93,016 comprised of:

- a \$348 for agreed credits.
- b \$15,464 for agreed items of defective or incomplete work.

- c \$72,420 allowed for rectification costs of defects and incomplete work:
  - i. Item 14 \$1,545
  - ii. Item 17A \$200
  - iii. Item 20(25) \$350
  - iv. Item 23 \$9,213
  - v. Item 1 to 5, 7 and 8 Brickwork \$60,847
  - vi. Laundry tap \$265
- d \$2,244 for agreed preliminary costs.
- e \$500 allowed for further preliminary costs.
- f \$2,040 for delay costs.

### SET OFF

- 169 The Builder has issued 2 invoices, each of which is stated to be a final invoice. I find that the invoice dated 17 March 2017 for \$41,961.93 is the final invoice. I find that the second final invoice dated 29 March 2017 was incorrect as it listed a variation credit of \$1,230 which I have found was never agreed to by the Owners. The Owners have paid \$20,000 towards the final invoice.
- 170 I find that the Builder is entitled to the balance of the final invoice dated 17 March 2017 being \$21,961.93.
- 171 The Builder claims interest on the balance of the amount said to be outstanding under the Contract and not paid in full by the Owners. The work with respect to which the final claim was made was, in any case, defective, and the cost of rectification exceeded the amount the Builder claimed. The Owners were entitled to set off their claim for defective work against the Builder's final claim, so that nothing was due on the final claim upon which interest could be calculated.
- 172 Similarly, a claim for interest under section 53 of the *Domestic Building Contracts Act 1995* would fail because it would not be "fair" to order interest in these circumstances.
- 173 The amount of \$21,961.93 will be set off and there will be an order that the Builder must pay the Owners the amount of \$71,054.
- 174 Costs will be reserved.

### MEMBER F MARKS