VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP69/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic Building Contracts Act 1995 – s.40(4) -stage payments - nature of - agreement to vary - special definition of base stage – payable on completion of slabs/footings - whether ambiguous – s.132 - whether agreement contracting out of the Act - meaning of "footings" in contract documents - whether footings completed - slabs constructed too high - whether satisfactory completion of base stage - whether substantial breach - slabs accepted as constructed and planning permit amended - claim only in damages - cost of amending permit allowed – variation disallowed - no evidence of increased cost – termination - notice alleging distinct breaches - one breach not proven - notice nonetheless valid as to proven breach - whether party terminating ready and willing to perform

APPLICANT	Sightway Construction Pty Ltd (ACN: 165 522 136)
RESPONDENTS	Mr Kosala Jayasinghe, Mrs Jeanne Jayasinghe
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	6 February 2018. Submissions received by 18 March 2018.
DATE OF ORDER	3 May 2018
CITATION	Sightway Construction Pty Ltd v Jayasinghe (Building and Property) [2018] VCAT 676

ORDERS

1. Order the Respondents to pay to the Applicant the sum of $88,364.70.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Ms J. Johnston, Solicitor
For the Respondents	Mr R. Hapgood, Solicitor

REASONS

Background

1. The Respondents ("the Owners") are the owners of land ("the Site") in Main Road, Lower Plenty. The Applicant ("the Builder") is a building contractor and its director, Mr Bandara, is a registered builder.

2. On or about 15 February 2014 the Builder and the Owners entered into an agreement ("the Contract") for the Builder to construct three two-storey units on the Site pursuant to plans supplied by the Owners, for the sum of $687,000.00. In addition, by a separate agreement, the Builder was to demolish the existing house on the Site for the further sum of $18,000.00, inclusive of GST.

3. The Site slopes quite steeply from the southern boundary, where it abuts Main Road, down to the northern boundary at the rear. Survey levels on the drawings indicate a fall of approximately 6 metres. As well as the existing house on the Site there was a large tree which had to be removed by the Builder.

4. On the date the Contract was signed, the Builder sent to the Owners an invoice in the sum of $18,000.00 inclusive of GST for the demolition of the house and site clearance work. It also sent to the Owners a further invoice in the sum of $34,350.00, being the deposit of 5% of the Contract price due to be paid under the Contract. Both invoices were paid by the Owners. The deposit was paid on 23 March 2014.

5. The house was not demolished until 22 May 2014. The reason for this delay is unclear, although services had to be disconnected. The Builder did not pay the demolition contractor until November that year, even though it had received payment for the demolition from the Owners in March.

Commencement of work

6. The building permit for the construction of the units was issued by the relevant building surveyor on 9 September 2014. According to Mr Bandara, the delay was due to an insufficiency of the documents provided by the Owners which he said caused a delay of 16 weeks. Mr Bandara said that he was only given town planning drawings but the Contract specifications that he signed described the full set of architectural drawings. On this issue I prefer the evidence of Mr Jayasinghe.

7. Mr Jayasinghe said that he was told by the building surveyor that the delay was because Mr Bandara had not paid him. He said that the Owners subsequently paid the building surveyor after the Contract was terminated. It appears that the Builder paid $2,409.80 on 26 August 2015, being half of the building surveyor's fees, and that the Owners have paid the balance.

8. Mr Bandara said that there was then a further delay of approximately eight weeks in regard to protection work notices to neighbours and delays in

obtaining responses. Mr Jayasinghe denied that, saying that he collected the signatures from the neighbours himself.

9. Mr Bandara said in his witness statement that there was a further delay because the Owners did not pay the deposit but it is acknowledged that the Owners paid it promptly in March 2014 as soon as their finance was approved.

Construction difficulties

10. Work commenced on 28 May 2014 with a site cut and levelling. There was considerable delay in the site works which has not been explained in the evidence.

11. Because of the slope in the land, the three units were to be built at different levels. According to the original design upon which the Contract was based, the bottom unit, Unit 3, part of Units 1 and 2 and the garages for all three units were to be constructed on raft slabs and the rest of Units 1 and 2 were to be built on stumps. This caused some difficulty in regard to Unit 3 because the ground levels were such that, in order to achieve the required floor level for Unit 3, substantial fill was required to be placed and compacted. The design for Unit 3 was subsequently amended by the engineer to strip footings and stumps for the unit itself and the garage of Unit 3 was changed to an infill slab.

12. The Builder proceeded with the construction of the footings, pads and slabs according to the amended drawings. A dispute then arose as to whether base stage had been reached. The Builder claimed the base stage payment and a substantial variation and purported to suspend work when these were not paid.

13. On 30 June 2015 the Owners' solicitors served a notice on the Builder alleging various breaches and expressing an intention to terminate the Contract if they were not remedied within 10 days. This was followed on 14 July by a letter from the Owners purporting to terminate the Contract.

14. The Builder's solicitors then also purported to terminate the Contract. The Owners then took charge the Site and after a considerable lapse of time they engaged another builder to complete the units.

This proceeding

15. This proceeding was commenced by the Builder on 28 January 2016 claiming damages of $236,049.82 for breach of contract.

16. The Owners defended the proceeding, denying that they were in breach and claiming damages from the Builder for breach of contract.

The hearing

17. The matter came before me for hearing on the first occasion on 15 May 2017 with five days allocated. After hearing some submissions and visiting

the site with the parties, I adjourned the matter part heard until 17 October 2017 with a further four days allocated.

18. The matter was then further delayed and finally came on for hearing before me on 6 February 2018. Again, Miss Johnston represented the Builder Mr Atwood represented the Owners.

19. For the Builder, I heard evidence from Mr Bandara, from the concreter, Mr Kirci, and from the Builder's expert, Mr Mamone. For the Owners I heard from Mr Jayasinghe, from the Owners' expert Mr Beck, from an engineer, Dr Thiru and from a quantity surveyor, Mr Silvapulle.

The lay witnesses

20. Because some of the evidence of Mr Bandara is inconsistent with the documents I have some doubts about its reliability. In regard to the benchings of the slab of Unit 3, I thought that his evidence was inconsistent with what I could see in the photographs.

21. The terms of his limited registration required him to use registered tradesmen and the concreting contractor that he used, Mr Kirci, was not registered at the time the work was carried out. No plumbing certificate has been produced for the underground plumbing.

22. I found the evidence of Mr Jayasinghe to be consistent with the documents tendered and, where there is conflict, I prefer his evidence to that of Mr Bandara.

The variation in regard to Unit 3

23. Mr Bandara said that, on 6 February 2015, after slab and footing excavations had been carried out, the building surveyor came on site and, in regard to Unit 3, "refused the design and required the slab and footing to be redesigned".

24. The Builder contends that Dr Thiru's design for Unit 3 was defective. That is denied by Dr Thiru and there is no contrary engineering evidence. The building surveyor was not called to give evidence. It seems that he was called to the site to carry out a footings inspection and that what the Builder had done in regard to Unit 3 was not passed. However nothing turns on that.

25. As stated above, according to the original plans, Unit 3 was to be constructed on a slab on ground with a floor level that would require considerable benching to raise the ground level sufficiently to support the slab at the designed level. Nevertheless, by entering into the Contract, that is what the Builder agreed to do and it was required to construct Unit 3 in that way.

26. It is clear that, in the course of site works, the Builder and Mr Kirci had difficulty with the preparation for the slab-on-ground for Unit 3. Mr Bandara said that, after speaking to the building surveyor, he called the design engineer, Dr Thiru, to the Site in order to persuade him that the design would not work. On 7 February 2015, which was the day following

the building surveyor's visit, Dr Thiru inspected the site and provided a report.

27. In his report, which is dated 9 April 2015, Dr Thiru says that he found that the preparation for the benching for Units 1 and 2 was in accordance with the intent of the engineering drawings, and suggested some modifications "to ensure constructability". However, he said that the preparation for Unit 3 was not acceptable due to:

    (a) substantial collapsing of the soil in the benching for the slab and the ground;

    (b) the poor quality of the materials that he said were derived, mainly from topsoil excavated from the Site and used as a fill material to raise the ground level to the required bench level, being the underside of the slab;

    (c) the soil taken from the Site appeared to have been dumped on top of the natural ground in an uncontrolled matter without proper compaction as specified in the engineering drawings; and

    (d) there was inadequate subgrade preparation to construct a proper slab on the ground floor.

28. He concluded that, given those site conditions, especially the collapsing of trenches, the material and subgrade preparation, it would be better to construct the ground floor of Unit 3 as a timber floor on strip footings with piers. He also noted that, depending upon the final finished ground levels, retaining walls might be required.

29. Mr Bandara at first denied that the soil in the benching for Unit 3 was uncompacted. Mr Kirci, who was the contractor who did the site works, gave a different account. He said that the soil depicted within the footprint of Unit 3 was not benched and intended to stay in the positions shown in the photographs but rather, was intended to be removed. He said that he told Mr Bandara that it would not work as a support for the slab.

30. Moreover, he said that he did not prepare for the slab on Unit 3 because he thought that the design would not work. He said that the soil to support the slab of the Unit 3 would be too deep and to place and compact it would be too expensive. He said he got the fill from the Site. Thereafter, the design was changed to strip footings. This evidence seems to be inconsistent with how I understood Mr Bandara's initial evidence.

31. During the hearing Mr Bandara said that the inspection by the building surveyor was of the footings and they had not yet removed the topsoil from the site and that it was there because they had nowhere else to put it.

32. The notion that the heaps of soil shown in the photographs were only temporary and were intended to be removed does not sit easily with the evidence that imported soil was brought onto site, or with Mr Kirci's evidence that he compacted it in 200 mm layers although in fairness to him,

he gave evidence through an interpreter and he might have been talking about the preparation for the garage slabs for Units 1 and 2.

33. Moreover, the soil photographed by Dr Thiru appears to be levelled at the top with trenches in between the benches.

34. If these heaps of soil were intended for the purpose of supporting the Unit 3 slab, they look to me to be loose and I can also see what appears to be grass underneath the benching. These photographs support the observations of Dr Thiru and his opinion that the soil has not been properly prepared and compacted. It appears to be acknowledged now by the Builder that what is shown in the photographs was not intended to be preparation of the benches to support the slab, although that was not how I initially understood Mr Bandara's's evidence.

35. On 12 February 2015 Dr Thiru sent amended engineering drawings to the Builder. The main change was to Unit 3 but changes were made to the other two units as well. Dr Thiru said that it was then up to the Builder which design he followed. There was no formal written variation prepared by either party but the Builder proceeded with the amended design and I find that was what the parties intended would occur.

The consequences of the change

36. On 14 March 2015 Mr Bandara sent the following email to the Owners:

> "Finally, with al the hard work it has come to a stage where we can complete the slab within next 2 to 3 days. As you understand lots of man-hours and expenses have already been incurred and the progress of the project also delayed by at least 6-8 weeks due to the planning/and engineering drawing issues.
>
> The new design requires more concreting work. It could be more than 40 to 50% of the original engineering plans. I am not able to bear the additional cost and need your help. Since you were closely involved last few months you are well aware of the extra work and cost. Hence, please consider reimbursing the additional cost of concreting to ensure smooth progress of the project.
>
> following item will incres the cost,
>
> 1. footing depth and width went more than 3 time or find natural ground level.
> 2. changed drawings lead to higher usage of metal/re enforcement according to new drawings.
> 3. according to site condition find large underground abandon septic tank need to fill with concrete.
> 4. concrete pup guys refusing do the job without traffic management plan and foot path occupation permit otherwise we were planning to pour today.
> 5. removal of large amount of soil according new drawings. (unit 3 area).

I also will send you the Yarra Valley water water connection contribution fees bill for payment." (sic.)

37. There is no evidence of any written response to this email but Mr Bandara said that, on that day the Owners came to the Site and told him to carry out the works as required by the relevant building surveyor. Mr Jayasinghe said that he had no recollection of visiting the Site on that day, which he noted was a working day, and no recollection of giving such an instruction. He said that the Owners were entirely reliant on the experts to make such decisions. I am satisfied that the Builder was required to construct Unit 3 in accordance with the revised plans instead of the original Contract drawings.

38. On 17 February, the Owners' designer, Mr Athauda, sent an email to the Builder and the Owners in the following terms:

> "Now, I look at this job as problem site and situation totally unexpected: there is a abandoned septic tank in the middle of the proposed driveway near Unit 2, soil condition in such never seen before, the survey plan conditions didn't match in some areas.
>
> I understand that expenditure accumulating but can't help unforeseen situation. I hope by the time the housing market will gain some high grounds. If you want to sell this is not the best time because of exposing all ground issues. I think we need to finish this stage and be positive.
>
> I have attached some of the site photos for your information."(sic.)

Conclusion as to the change

39. I am satisfied that, at the time of Dr Thiru's inspection, the benching for Unit 3, if that is what it was, had not been properly constructed by the Builder. I am also satisfied that the reason for the change in design was to address the difficulty in constructing Unit 3 on a slab-on-ground. It seems clear that the ground was of a nature that construction was very difficult and that this had not been anticipated by the engineer when the slab was designed or by the parties when the Contract was entered into.

40. Notwithstanding the obvious difficulties with the site, the expert evidence does not establish that Unit 3 could not have been constructed as it had been designed. I think Mr Hapgood is probably correct in saying that the change in design for Unit 3 was to assist the Builder to construct the unit on difficult ground but it was nonetheless a variation to the scope of works and was at least partially due to the poor soil conditions.

41. On 25 March 2015 Mr Jayasinghe sent an email to Mr Bandara complaining that the concrete had still not been poured and reminding him that it was more than 13 months since the Contract was signed and the Builder had not shown any progress with the project.

42. Mr Kirci said that he carried out the site works in accordance with the engineering drawings and that when the building surveyor came to the site to inspect the preparation he passed it.

43. In April 2015 the slabs and footings were poured for Units 1 and 2 and strip footings and footings for the piers were poured for Unit 3.

The base stage claim

44. On 16 April 2015 the Builder sent an email to the Owners attaching an invoice for the base stage of $68,700.00 and an invoice for a further amount of $22,280.00, which was claimed to be a variation, for:

    (a) extra concrete for the variation in Contract drawing: $12,727.27 plus GST

    (b) steel variation $3,345.46 plus GST

    (c) soil removal and site cut according to the new drawing $4,181.80 plus GST

45. Mr Jayasinghe said that he asked Mr Bandara to reduce this second invoice and it was subsequently revised downwards to the amount of $14,000.00, inclusive of GST, for the additional concrete. However since this lesser amount was not paid the claim is maintained by the Builder for the original amount of $22,280.00.

46. In an email dated 21 April 2015, Mr Jayasinghe told Mr Bandara that the base stage footings had not been completed in various respects and that the invoice for the base stage would be paid when the work was completed.

47. On that same day, the bank informed Mr Jayasinghe that it would not pay the variation claimed by the Builder of $22,280 because it was "outside the building Contract".

48. Mr Jayasinghe appears to have then changed his mind about paying the base stage claim because, on 29 April 2015, he sent the invoice for the base stage to the bank requesting the bank to pay it. He said that he was told by the bank that it would need the base stage to be certified by the relevant building surveyor. He said that he sent Mr Bandara an email to that effect the following day but no such certificate was ever produced.

49. Then, on 1 May 2015 Mr Jayasinghe sent an email to the bank asking it not to make the progress payment, saying that it was on advice from the Owners' lawyers.

50. In a letter dated 12 May 2015 addressed "To whom it may concern", the relevant building surveyor stated that the base and slab steel inspection were approved for the three dwellings and the associated garages. Mr Jayasinghe said in cross-examination that the bank told him that this was not good enough and that they needed a certificate of compliance pursuant to Regulation 1506 of the *Building Interim Regulations* 2017.

51. Also on 12 May 2015, the building surveyor sent an email to the Owners alleging that the fee for the building permit had not been paid by the Builder. When this email was put to Mr Bandara he said that he had an account with the building surveyor and that he had paid half of the amount

due. That is established but it was for the builder to pay the whole of the fee.

52. Mr Jayasinghe said that he then obtained advice from the architectural designer of the project, Mr Athauda, who told him that the base stage had not been reached. He also obtained an assessment by Mr Silvapulle of the value of the Builder's work but the Owners did not pay the sum that he assessed to the Builder.

Notice of suspension

53. By letter dated 18 May 2015 the Builder's solicitors served a notice of suspension of works on the ground of non-payment of the invoices for the base stage progress claim of $62,454.55 and also the variation claim of $22,280.00.

54. The Builder's right to suspend work is contained in Clause 35 of the Contract which provides as follows:

> "The builder may suspend the building works if the owner:
>
> - does not make a progress payment that is due within 7 days after it becomes due; or
> - is in breach of this Contract."

55. The issue is whether the base stage payment was due.

Was base stage achieved?

56. If the base stage was achieved by the Builder it was entitled to claim the base stage payment and suspend work when its claim was not paid.

57. In this regard is s.40 of the *Domestic Building Contracts Act 1995* ("the Act") provides as follows:

> " 'base stage' means—
>
> (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;
>
> (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;
>
> (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;
>
> (d) in the case of a home with a concrete floor, the stage when the floor is completed;
>
> (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;"

58. By subsection (2), where the contract is to build to all stages, the percentage of the Contract price permitted to be charged by the Builder for the base stage, according to this definition, is 10%.

59. By subsection (4), it is open to the parties to a domestic building contract to agree upon some other means of allocating the contract price provided they do so in accordance with the regulations.

60. In the present case, the Contract provided that the base stage payments of 10% of the Contract price was payable upon "completion of slab/footing" and the attachment required by Regulation 12 of the *Domestic Building Contracts Regulations 2007* has been signed by the Owners.

61. The Builder defended the narrower definition of "base stage" in the Contract because of the demands of the Site. Certainly, it is a site that would require substantial site works in terms of cutting, filling and difficulty in the construction of the required slabs and foundations. The steep slope of the land would also have presented problems and that was acknowledged in the expert evidence. In any case, the definition was agreed upon in the required manner and so the Owners are bound by it.

62. Mr Hapgood suggested that limiting the definition of base stage works in this way was an attempt to contract out of the Act, which is prohibited by s.132. I do not accept that submission. The Act itself permits the parties to change the payment regime that is found in s.40 by following the prescribed procedure and so doing that cannot amount to contracting out of the Act.

63. Mr Hapgood submitted that there was nothing in the Contract to assist in determining what was required for the base stage, apart from the words "slab/footing". He said that reference to the plans shows a number of requirements, which he referred to as "deliverables". He said that these were as follows:

    <u>Unit 1</u>

    (a) a slab on the ground for the garage, laundry and entry to the correct level;

    (b) strip footings for the living and kitchen area;

    (c) 12 stumps and stump pads for the living and kitchen area; and

    (d) base level brickwork for the living and kitchen area.

    <u>Unit 2</u>

    (a) a slab on ground for the garage, laundry and entry to the correct level;

    (b) strip footings for the living and kitchen area;

    (c) eight stumps and stump pads for living kitchen area; and

    (d) base level brickwork living and kitchen area.

Unit 3

(a) a slab on ground for the garage, laundry and entry to the correct level; and

(b) a slab on ground for living and kitchen area to the correct level.

64. The drawings that he refers to, which are the amended drawings, show:

(a) that the slabs for the garage, laundry and entry for each of Units 1 and 2 are raft slabs integrated with the strip footings systems and the garage slab for Unit 3 is shown as an infill slab;

(b) strip footings for Units 1 and 2;

(c) pads for Units 1 and 2, which are to support concrete stumps which in turn are to support treated pine beams;

(d) the stumps for Units 1 and 2;

(e) footings to support integrated brick piers in Unit 3;

(f) base level brickwork to support the floor beams;

65. There is no doubt that all of these had to be provided by the Builder at some stage of the construction. However the question is, not what might normally be regarded as "base stage" in a building project, either pursuant to s.40 or in normal parlance, but rather, what is the meaning of "slab/footing "in the present Contract?

66. The parties went to the trouble of stipulating a different schedule of payments from that to be found in s.40 and so it is clear that a different meaning was intended from the normal meaning of base stage. I do not think that I should go beyond the words that are used in the Contract unless required to do so in order to resolve any ambiguity and I find none.

67. Mr Hapgood referred to the following passage from my decision in *Imerva Corporation Pty Ltd v. Kuna* [2015] VCAT 2058 (at para 35):

> "…where there is a written Contract that appears on its face to contain the entire agreement between the parties and contains no ambiguity then (apart from evidence as to surrounding circumstances) it is not generally permissible to lead parol evidence to add to, vary or subtract from the terms of that document (see *Codelfa Constructions v. State Rail Authority of New South Wales* [1982] HCA 24 per Mason J.). The Contract is to be construed objectively without regard to the subjective intentions of the parties…."

68. Mr Hapgood submitted that there was ambiguity as to the meaning of "slab/footings". I do not accept that submission. Both "slab" and "footing" are commonly used building terms and what is a "slab" or what is a "footing" in the present case for the purpose of the Contract can be proven by expert evidence. The existence or otherwise of any ambiguity is again, a matter for expert evidence. There is no expert evidence that the terms are ambiguous.

69. Consequently, I think that once the Builder had completed the slabs and footings it would be entitled to claim the amount specified for base stage. Whether the slabs and footings were all completed by the Builder is a matter of expert evidence.

70. Mr Mamone inspected the site on 3 June 2015. In his report, he noted that, in Units 1 and 2, the concrete footings were poured and the concrete floors in the slab portion of each building and the concrete floor slab to the garage of each building were also poured. In Unit 3, the concrete footings for the unit were poured.

71. Mr Beck inspected the site on 23 April 2016. He said that he observed that the concrete slabs for Units 1 and 2 had been poured and that the footing designed for Unit 3 had been amended from a concrete slab on ground to strip footings with a suspended floor. He said that the strip footings had been poured for both the dwelling and garage and concrete pads had been installed for the brick piers to support the sub-floor.

72. Mr Beck said that it is common industry knowledge that base stage for a building contract is fulfilled when either a concrete slab-on-ground has been constructed or, in the case of suspended floors, when the footings and the supporting base brickwork are installed and he explained why that was so.

73. He referred to what was written in the Contract and agreed that, in those terms, the base stage had been achieved by the Builder. However he expressed concerns about honeycombing at the edges of the reinforced slabs and exposed steel reinforcement, which he described as being badly corroded, and recommended that the slabs be inspected by a structural engineer.

Incorrect slab levels

74. It is argued on behalf of the Owners that one reason base stage was not reached was that the slabs that were poured for the garage, laundry and entry for each of Units 1 and 2 were not at the correct levels. A report by a surveyor, Mr Efremoglou, dated 23 July 2015 has been tendered to the effect that the slab level of the Unit 1 garage, which was provided on the endorsed drawings to be RL68.64 was, as constructed, RL68.77 and the garage of Unit 1, which was required on the drawings to be RL68.49, was, as constructed, RL 68.63. For Unit 2, although the endorsed drawings provided for the slab level to be RL66.61 it was found to be, as constructed, RL66.50 and although the garage of Unit 2 was required to be RL66.35 was, as constructed, RL66.48. The differences in height therefore vary between 110 and 140 mm from the levels as designed. There is no contrary survey evidence and so I accept that this is the case.

75. An error in construction will not necessarily prevent a particular stage of construction from being reached for the purpose of entitling a builder to a progress payment.

76. The point was considered by the Court of Appeal in *Cardona v. Brown* [2012] VSCA 174. In a judgment with which the other two members of the court concurred, Tate JA said (at para 74):

> "74 It is necessary for there to be 'effective and satisfactory completion of the required stage ... [as] a condition of any instalment payment' (*Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159) …. trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion, …."

77. There is no evidence in the present case that any of the additional heights was "borne of impracticalities".

78. Mr Jayasinghe said in cross-examination that the increased floor levels required an amendment to the town planning permit which cost the Owners $5,000.00. The invoice in that sum from the designer, dated 1 December 2016' has been produced. It states:

> "Application and liaise with council to obtain amendment to existing town planning permit due to increased FFL of concrete slabs 181 Main Road Lower Plenty."

The expression "FFL" is a common abbreviation for the term "finished floor level".

79. It is a breach of Contract to construct a slab at the wrong height and if the slab were removed and reconstructed at the correct height, and if it were reasonable to do that, the position would be the same as if it had not been constructed at all. However in the present case the construction has proceeded on the slabs as poured by the Builder and so I think that the non-compliance with levels in the plans is trivial in terms of determining the stage of construction that was reached. Mr Mamone said that the difference in slab levels had no significant consequence to the overall project.

80. However the Owners are entitled to damages for breach of contract for the loss arising from the non-compliance, which is $5,000.00.

Exposed reinforcement

81. Mr Beck described the exposed reinforcement as being badly corroded. It was certainly rusty when I saw it but Mr Mamone said that it was only surface rust. I prefer Mr Mamone's opinion. I think it is unlikely to have been any more than surface rust at the time the base stage was claimed or at the time the Contract was terminated.

Concrete honeycombing

82. Although honeycombing of the concrete is mentioned in Mr Beck's report, it was not suggested by Dr Thiru that the concrete was structurally unsound or that any honeycombing had any structural significance. Mr Mamone said

that he did not see any reinforcing steel exposed through the edges of any of the concrete slabs during the course of his inspections. He described the extent of honeycombing as minimal and of no concern and said that the current builder had not performed any repair work to the slab edges.

Damaged drainpipes

83. Photograph No. 7 in Mr Beck's second report shows one of the pipes that is protruding through a slab that is broken at the top. Questions were raised by Mr Beck as to the state of the underground drainage installed by the Builder and he suggested a CCTV camera inspection. Notwithstanding these misgivings, there is no evidence of any deficiency in this regard.

Base stage for Unit 3 as amended

84. It was further submitted that, for there to be completion of the base stage for Unit 3 in accordance with the amended design, it was necessary for the base brickwork and stumps to be constructed. As stated above, that would normally be the case but, although the scope of works was varied by agreement to Dr Thiru's new design, the term of the Contract concerning payment was not.

The garage slab for Unit 3

85. Mr Hapgood pointed out that the Contractual requirement for "completion of slab/footing" was not met because the garage slab for Unit 3 had not been constructed. That slab is shown on the amended plans to be an infill slab and the walls of the garage are shown as strip footings. "Base stage" relates to parts of the structure that are to support the building and an infill slab is not designed to support any other part of the structure. I therefore do not believe that it falls within the description "slab" in the phrase "completion of slab/footing".

The concrete pads for Units 1 and 2

86. According to both the original Contract drawings and the amended engineering drawings, the floor joists for the ground floor of each of Units 1 and 2 were to be supported on concrete stumps supported by concrete pads, described on the drawings as:

> "450 x 300 (MIN) DEEP PAD FTG"

87. No concrete pads were poured by the Builder in order to support these concrete stumps. The term "FTG" is not defined anywhere in the engineering drawings. However a note on pages S1, S2 and S3 refers to pad footings to be founded at a depth of 100 mm into the undisturbed natural silty clay soil, and so one would suspect that it means "footing".

88. Although in his second report Mr Mamone said, at paragraph 2.2.3.5, that "base stage" within the meaning of the Contract had been achieved, he said earlier in that report, as to both Units 1 and 2, that he considered that the concrete pads that were required to support the concrete stumps should be included within the base stage according to the Contract, although he did

not specifically call them "footings". In his report, in calculating the Builder's entitlement, he deducted the amount of $3,630.00 from the base stage payment on account of the fact that these concrete pads had not been poured. However in his oral evidence during the hearing, he changed his opinion and removed this credit from his calculations.

89. Mr Hapgood submitted that, since these pads had not been poured by the Builder, the base stage was incomplete. That is consistent with Mr Mamone's comments in his second report but inconsistent with his final evidence and with the evidence of Mr Beck, who said that the footings and slabs had been constructed by the Builder.

90. In the engineering drawings, on page S1 relating to Unit 1 and also S2, relating to Unit 2, the pads for the concrete stumps do not appear in the FOOTING SCHEDULE. They are set out in the MEMBER SCHEDULE which suggests that, for engineering purposes, they were to be regarded as "members" rather than "footings". Further, on page A3 of the architectural drawings, the notation relating to the strip footings is:

> "FOR FOOTING AND OTHER DETAILS REF ENG"

whereas the note relating to the concrete stumps and pads is:

> "FOR STUMP AND OTHER DETAILS REF ENG"

91. For Unit 3, the revised design required the ground floor bearers to be supported on engaged brick piers which were to be supported in turn by pad footings. Those footings have been poured. I note that on page S3, the pads for these engaged brick piers do not appear in the MEMBER SCHEDULE and a design for them, which includes steel reinforcement, is found on page S5A.

92. It seems to me that the pads that are to support the concrete stumps are not footings within the meaning of the Contract documents, whereas the more elaborate pads that support the integrated brick piers are.

93. Mr Hapgood submitted that the Unit 3 pad footings were incorrect and in some instances missing but that has not been established.

Conclusion as to the slab stage

94. Under the special definition agreed to by the parties, the Builder was entitled to payment for the base stage upon "completion of slab/footing". I find on the evidence that the slabs and footing were completed by the Builder.

95. Mr Hapgood submitted that, based upon Mr Silvapulles's assessment, the whole of the amount provided in the Contract for the base stage should not be allowed but rather, only the value of the work as assessed by Mr Silvapulle. I do not accept that submission.

96. A stage payment in a building Contract is a specific sum of money that becomes payable when the progress of the work has reached a particular stage, regardless of the actual value of the work done to reach that stage.

97. In the case of *Shao v. A G Advanced Construction Pty Ltd* [2017] VCAT 903 I said (at paras. 208-9):

> "208. A building Contract will generally not have assigned a separate price to the specific items of work for which a builder is entitled to be paid. It will simply have specified a price of the whole of the work.
>
> "209. The Contract in this case provided that payment of the Contract price was to be made in instalments relating to particular stages of construction as those stages were reached. For the reasons already referred to, the Builder's entitlement to claim instalments was limited to the stages set out in s.40 of the Act. This payment regime is intended to regulate how the Contract price is to be paid. The instalments set out in the section do not purport to be equivalent to the actual value of the work done at each stage. The relationship between the proportion of the Contract price a builder is allowed to claim when a particular stage of construction is reached and the amount of work that is actually done with respect to that stage is approximate only. There are some building contracts where claims for payment are made by a builder for the value of work done since the last claim made, but this is not such a contract.

98. That is still my view. Since the Contract specified that, upon work reaching base stage, the Builder would be entitled to be paid $68,700.00, it is entitled to an order for that amount.

Failure to construct the drainage retention system

99. Mr Beck said that, although stormwater retention pits are generally installed at the time when the storm water from the dwellings is connected to the legal point of discharge, because of the difficulties of access on this site, the drainage retention system at the bottom of the slope should have been constructed before the base stage of Unit 3. Mr Mamone agreed but pointed out that the scheduling of work was a matter for the Builder and I think that is correct.

The claim for the variation

100. The Builder claims that the change to the design of Unit 3 resulted in considerable extra cost.

101. In his email 14 March, complaining about the change, he said that the work required by the new design for Unit 3 could cost "more than 40 to 50% of the original engineering plans" but did not offer any specific calculation at the time. He specifically complained about the footing depth and width, additional reinforcement required and the removal of a large amount of soil piled up at the site of Unit 3.

102. It seems to me that although the width of some footings had been increased, the depth of the footings for Unit 3 has been considerably reduced. Moreover, although the large amount of soil piled up at the footprint side of Unit 3 had to be removed, the position adopted by the Builder at the trial was that it had only been placed there on a temporary basis in any event so this is not a cost arising from the change.

103. No formal variation was sent by the Builder to the Owners. Instead, the Builder sent an invoice for:

(a) extra concrete		$12,727.27
(b) extra steel		$ 3,345.46
(c) soil removal and site cut		$ 4,181.80
		$20,254.53
	GST	$ 2,025.47
	Total	$22,280.00

104. Mr Hapgood said that, because the Builder had not complied with the requirements of sections 37 or 38 of the Act or Clause 23 of the Contract, the Builder was not entitled to claim anything for the alleged variation.

105. Miss Johnston argued that I had a discretion to allow the variation under s.38(6)(b) of the Act. Before considering those statutory and contractual provisions I should first look at the evidence in support of the variation that is claimed.

106. In regard to the claim for additional concrete and reinforcement, Mr Bandara provided the following figures in the witness box:

Extra concrete: 85 m³ and $165 per cubic metre	$14,025.00
Extra steel	$ 7,025.45
Soil removal and site cut charged by concreter	$ 4,600.00

These add up to more than the amount claimed and they include the additional concrete used to fill the disused septic tank as well as blinding concrete.

107. Mr Bandara said that he had originally obtained a quote from Mr Kirci for the base stage work which allowed for a quantity of 53 m³ of concrete but when the work was completed, it was found that an extra 85 m³ was used. He seeks to claim the difference. These figures are supported by the invoice that he received from Mr Kirci.

108. It was acknowledged that the change in design incorporated some additional steel work throughout the project, a thickening of the slabs for Units 1 and 2, a widening of some of the footings and the widening of some of the beams. However any claim by the Builder for a variation can only be justified by establishing that there has been an additional cost arising from these changes and the change in the design of Unit 3. If the Builder had

simply underestimated the cost of carrying out the base stage according to the original design, that is not a mistake that it can pass on to the Owners.

109. In this regard, the quantity surveyor, Mr Silvapulle said that he calculated that the volume of concrete required for the base stage was over 100 m^3. He compared what it should have cost to complete the base stage for all three units according to the original design with what it should have cost to complete it according to the revised design. He concluded that the revised design, up to slabs and footings and excluding base brickwork, was $21,024.00 less costly to construct than the original design. That is in terms of base cost, without a builder's margin.

110. Mr Mamone questioned this assessment because Mr Silvapulle said in his report that his costings were not to be used for tendering purposes. I do not believe that that is a relevant consideration. Mr Mamone also said that there were a large number of exclusions from the quantities produced by Mr Silvapulle that would affect the quantum of the construction costs and he gave some examples. Even taking these into account, since they affect both the costing of the original design as well as the costing of the amended design, I cannot see how they would have any bearing on the question whether following the amended design resulted in increased cost to the Builder. However they are relevant considerations in regard to Mr Silvapulle's assessment of the value of the work that the Builder has done.

111. On the state of the evidence I am not satisfied that the Builder has proven that the variation to the plans resulted in any additional cost and so to that extent the claim for a variation is not established.

112. The variation also included the cost of filling an abandoned septic tank with concrete and for money wasted because the concrete pump contractors refused to work without a traffic management plan, causing a load of concrete to be dumped and the pour scheduled for that day to be abandoned. It appears from Mr Kirci's evidence that 6 m^3 were used to fill the disused septic tank and two truckloads of concrete were turned away because of the absence of a traffic management plan.

113. Any loss occasioned by attempting to pour concrete without a traffic management plan is due to the Builder's own action and is not something that can be claimed from the Owners. The septic tank is another matter.

The septic tank

114. The disused septic tank is shown in the photographs to be a large hole lined with bricks in the area adjacent to Unit 2 where the driveway was to be constructed. It was not disputed that that had to be dealt with. Indeed, in his report, Dr Thiru stated that it required sealing.

115. Mr Hapgood submitted that no variation was recoverable by the Builder because there was an unconditional promise by the Builder to carry out the building work and no warranty was given by the Owners as to the condition

of the site. He referred to the following passage from my decision in *Imerva* (above) at para 64:

> "Mr Stuckey submitted that where there was an unconditional promise to perform works and no warranty was given by the Owners about the conditions, the Builder is not entitled to recover the cost of unforeseen obstacles. He relied upon the case of *Re an arbitration between Carr and the Shire of Wodonga* [1925] VLR 238. As a matter of legal principle that is correct."

116. In the present case there was no unconditional promise by the Builder to carry out any scope of works that would have required it to fill this disused septic tank with concrete.

117. I am satisfied that the Builder was requested to seal the septic tank and that it was not within its scope of works. It was done while the concreter was on-site and is unlikely to have caused any delay. The cost would not have added more than 2% to the original Contract price. In those circumstances, the Builder was entitled to carry out the work pursuant to s.38(2) of the Act.

118. There was no agreed price for the work. Mr Kirci said that to fill the septic tank with concrete cost $1,000.00 and that it would have cost more to fill it with anything else. There does not appear to be any other assessment of the cost. Mr Silvapulle said that he could not recall having allowed for it. The sum of $1,000.00 will be allowed.

The overspill

119. There has been considerable overspill of concrete on the edges of the footing excavations. The reason for this seems to have been the nature of the soil in which the excavations were carried out which appears to have crumbled. Mr Beck said that the overspill has occurred due to a lack of supervision during the pour. Mr Silvapulle suggested that formwork or shuttering could have been used to contain the concrete.

120. The extent to which the resulting wastage of concrete has contributed to the additional quantity of concrete claimed by the Builder is unknown.

121. Mr Beck said that the additional concrete would need to be removed but did not assess the cost of doing so. It was suggested by the Owners that they had been quoted $80,000.00 to break and remove the wrongly poured concrete. None of the overspill had been removed by the current builder by the time of the hearing.

122. Mr Mamone said that jack-hammering of overflowed concrete will only be required around parts of Units 1 and 2. He assessed an amount of $2,286.90 being the cost of removing this amount of overspill.

Non-removal of the tree

123. The Owners paid the Builder to demolish the existing house and clear the site. Although the house was demolished the large tree on the Site was not removed Mr Bandara said that the Owners had demanded that he pay the

contractor, even though the tree had not been removed. Payment of the contractor was a matter for the Builder. The Owners had paid the Builder for the tree to be removed and it was not. Consequently, they have had to pay $2,530.00 to have it removed and they are entitled to recover that sum from the Builder.

Termination

124. I find that the Builder was entitled to serve a notice suspending work on 18 May 2015 because the base stage claim had not been paid.

125. On 30 June the Owners' solicitors served upon the Builder a notice purporting to be pursuant to Clause 43 of the Contract, alleging that the Builder was in substantial breach of the Contract by:

    (a) suspending work;

    (b) removing amenities from the site and evincing an intention not to return to the site;

    (c) issuing a claim for the base stage payment when the base stage had not been reached;

    (d) allowing the site security fence to fall and remain down:

    (e) failing to use a licensed concreter at the base stage as required by his licence.

    The notice said that unless the Builder remedied the alleged breaches within 10 days after receipt of the notice, the Owners intended to end the Contract.

126. Clause 43 of the Contract says (where relevant):

> "43.0 If the Builder breaches (including repudiates) this Contract, nothing in this Clause prejudices the rights of the Owner to recover damages or exercise any other right or remedy.
>
> 43.1 The Builder is in substantial breach of this Contract if the Builder:
>
> - suspends the carrying out of the Building Works otherwise than in accordance with Clause 35;
> - is otherwise in substantial breach of this Contract
>
> 43.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder of a written notice to remedy the breach:
>
> - specifying the substantial breach;
> - requiring the substantial breach to be remedied within 10 days after the notice is received by the Builder; and
> - stating that if the substantial breach is not remedied as required, the Owner intends to end the Contract.
>
> 43.3 If the Builder does not remedy the substantial breach stated in the notice to remedy that breach within 10 days of receiving

that notice the Owner may end this Contract by giving a further written notice to that effect.

43.4 The Owner is not entitled to end this Contract under this Clause when the Owner is in substantial breach of this contract."

127. By letter dated 6 July 2005 the Builder's solicitors disputed the right of the Owners to serve a notice under Clause 43. On 14 July 2015 the Owners' solicitors purported to determine the Contract pursuant to Clause 43.2 due to non-compliance by the Builder with the first notice.

128. I am satisfied that, at the time these notices were served on behalf of the Owners, the Owners were in substantial breach of the Contract in not having paid the base stage and so it was not open to them to determine the Contract. In any case, the principal ground of the notice, suspending work without due cause, has not been made out.

Termination by the builder

129. By a letter dated 20 December 2015, the Builder's solicitors sent to the Owners a notice of intention to terminate the Contract, purportedly pursuant to Clause 42, on the ground that the Owners were in substantial breach by failing to pay the base stage claim of $68,700.00 and failing to pay the claim for the variation of $22,280.00.

130. Clause 42 of the Contract says (where relevant):

"42.0 If the Owner breaches (including repudiates) this Contract, nothing in this Clause prejudices the rights of the Builder to recover damages or exercise any other right or remedy.

42.1 The Owner is in substantial breach of this Contract if the Owner:

- does not pay a progress payment as required by Clause 30

42.2 If the Owner is in substantial breach of this Contract the Builder may give the owner of a written notice to remedy the breach:

- specifying the substantial breach;
- requiring the substantial breach to be remedied within 10 days after the notice is received by the Owner; and
- stating that if the substantial breach is not remedied as required, the Builder intends to end the Contract.

42.3 If the Owner does not remedy the substantial breach stated in the notice to remedy that breach within 10 days of receiving that notice the Builder may end this Contract by giving a further written notice to that effect.

42.4 The Builder is not entitled to end this Contract under this Clause when the Builder is in substantial breach of this contract."

131. The notice said that if the Owners remained in breach of a period of 10 days after the date of service of notice the Builder intended to bring the Contract to end. In the alternative, the notice alleged that the breaches were a repudiation of the Contract and that unless they were remedied within 10 days, the Builder would accept the repudiation of the Contract and bring it to an end.

132. On 8 January 2016 the Builder's solicitors served a further notice purporting to determine the Contract.

133. In regard to the Builder's notice, I find that the failure to pay the base stage was a substantial breach but the failure to pay for the claimed variation was not.

A conjunctive notice?

134. Mr Hapgood submitted that the Builder's notice was a conjunctive notice and that unless both breaches alleged were established, it was defective.

135. He referred me to the tribunal's decision in *Fasham Johnson v. Ware* [2003] VCAT 883 in which a notice of breach set out in very general terms a number of breaches connected by the conjunction "and" and it was held that the breach alleged was all of the breaches together and not any of them separately. Consequently, if any one or more of the grounds was not established then the breach, being all the breaches collectively, was not established.

136. What the Tribunal found in that case was that the notice of breach which was served under the Contract alleged only one composite breach comprising all the matters that were alleged in it.

137. That is not the case here. There are distinct breaches alleged that is, a failure to make the base stage payments and a failure to pay an invoice rendered for an alleged variation. The notice is valid to the extent that either of those allegations is made out.

Was the Builder in substantial breach?

138. A contractual right to terminate for breach cannot be exercised by a terminating party that is not itself ready and willing to perform the contract. However not every breach will disentitle a party from ending the contract. The position may be summarised as follows:

> "The law does not require absolute readiness and willingness to perform the contract in every detail. A party need only be ready and willing to perform the contract in substance. A party who is in breach may nevertheless have the right to terminate, so long as the breach is not repudiatory, or of an essential term, or such as to deprive the other party of the substantial benefit of the contract. Inability or unwillingness to perform an inessential term does not preclude termination for breach by the other party".

(Cheshire & Fifoot: *Law of Contract* 9th Australian edition para 21.26 and the cases there cited).

139. Mr Hapgood submitted that the Builder was in substantial breach and so, both at common law and by Clause 42.4 of the Contract, it was not entitled to determine the Contract.

140. In the case of *Ilija Stojanovski v. Australian Dream Homes Pty Ltd* [2015] VSC 404 Dixon J considered the meaning of substantial breach in the context of a building dispute. In *Imerva* (at para 243), I summarised the learned Judge's conclusions as follows:

    (a) Whether the Builder was in substantial breach of the Contract is to be evaluated at the time the notice was sent;

    (b) The term 'substantial' may have various shades of meaning. Having regard to the context, it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal';

    (c) Although a substantial breach is one that is more than ephemeral or de minimis in its character, the concept and purpose of evaluating, and limiting, the kind of breach that enlivens an owner's right to serve a default notice is given context by reference to the terms of the Contract as a whole. It is unhelpful to paraphrase the qualifying condition introduced by the word 'substantial' by using the phrase 'only really important breaches' because that is not the language;

    (d) Whether a breach is a substantial breach is a question of fact and the answer to the legal question: "What was intended by 'substantial'?" is that the nature and the consequences of the breach must satisfy that description and, in the present context, be ample or considerable or important;

    (e) The proper approach is to first identify the term or terms breached, and then evaluate the breach by considering its nature and consequences;

    (f) The time specified in the notice to remedy the breach is that set out in the Contract, even though rectification might take longer, although the time allowed might be relevant to the question whether termination was reasonable in the circumstances. "

141. Of the breaches alleged by the Owners in the present case, those established are:

    (a) constructing the slabs of Units 1 and 2 too high;

    (b) overspill of concrete in the footings;

    (c) failing to use a "licensed" concreter for the base stage construction work as required by Mr Bandara's registration;

142. Neither of the first two of these can be considered a substantial breach of Contract in the required sense. As to the third, concreting is not a licensed trade and registration is voluntary. A requirement to use a registered

tradesman would be a disciplinary matter for Mr Bandara but since the construction has proceeded on the base stage work done by the unregistered concreter it does not appear that it has had any practical consequence. If the failure to use a registered concreter was a breach of the Contract, I am not able to find that that is a substantial breach.

143. As a consequence, was entitled to terminate the Contract and I find that the Contract was duly terminated by the Builder.

The consequences of termination

144. Clause 42.5 of the Contract provides that, if the Builder brings the Contract to an end under that Clause, it is entitled to the Contract price and other amounts payable by the Owners under the Contract, less the cost of the Builder performing the remainder of the building works. It is also entitled to reasonable compensation for any other loss caused by the breach.

145. The Builder's primary claim is as follows:

Progress and variation payment outstanding	$ 90,980.00
less allowance for concrete overspill	$ 1,280.00
	$ 89,700.00
plus interest (14.5% from 23/4/2015)	$ 39,576.30
20% profit on outstanding works of $674,930.00	$134,986.00
	$264,262.30
less deposit paid	$ 34,350.00
Loss and damage	$229,912.30

146. As to these:

(a) The breach giving rise to the termination was the failure to make the base stage payment but that is a monetary claim and not a claim for damages. The claim for the variation has failed, leaving just the claim for the base stage payment of $68,700.00.

(b) The credit for $1,280.00 for concrete overspill is appropriate.

(c) By Clause 31 and paragraph 9 of Schedule one of the Contract, the Builder is entitled to interest at 14.5% on the amount of the base stage payment. From 23 April 2015 until the date of this order is 3 years and so the interest to be allowed will be $29,884.50.

147. However the major part of the claim has not been proven. The Contract does not entitle the Builder to simply claim its profit margin on the remaining work. It is entitled under Clause 42.5 to the balance of the Contract price, less the cost of the Builder of performing the remainder of the building works. Quite obviously, if the cost to the Builder of carrying out the remaining work is equal to or exceeds the balance of the Contract price, it can recover nothing under this heading.

148. There is no evidence as to what it would have cost the Builder to complete the work. I cannot assume that if the Builder had completed the Contract it would have made a profit of 20% of the unpaid balance. When one looks at the Builder's past performance, just to do the site works, slabs and footings, the Builder has paid far more than it has been able to recover from the Owners. The vast majority of the construction cost was still to come.

149. On the alternate claim of a quantum meruit, it is not sufficient for the Builder to simply prove what it has spent. It must prove the reasonable value of its work. The only expert evidence that I have of the value of the work carried out by the Builder is that of Mr Silvapulle, who said that it was $79,003.05. When the deposit is deducted, the balance is less than the base stage claim to which the Builder is entitled, even if one adds back in the amounts that Mr Mamone suggested.

150. In addition:

    (a) the claim with respect to the septic tank will be allowed in favour of the Builder in the sum of $1,000.00;

    (b) the Owners are entitled to an award of damages for defective workmanship under the Contract of $1,280.00 for concrete overspill.

    (c) the Owners are entitled to an order for the cost of removing the tree, which is $2,530.00;

    (d) the Contract required the Builder to obtain the building permit. It paid only half the fee, leaving the Owners to pay the rest. The Owners are entitled to an order for the payment of the other half of the fee, which was $2,409.80;

    (e) the Owners are entitled to an order for the cost of amending the planning permit due to the increased levels of the concrete slabs, which is $5,000.00.

Conclusion

151. There will be an order that the Owners pay to the Builder $88,364.70, calculated as follows:

Base stage claim	$68,700.00	
Interest	$29,884.50	
Septic tank	$ 1,000.00	$99,584.50
less		
Tree removal	$ 2,530.00	
Concrete overspill	$ 1,280.00	
Building permit fee	$ 2,409.80	
Excessive slab	$ 5,000.00	$11,219.80
		$88,364.70

152 Costs will be reserved.

SENIOR MEMBER R. WALKER