VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP420/2018

CATCHWORDS

Australian Consumer Law and Fair Trading Act 2012: respondent contractor entered into contract with the applicant owner for laying of paving; defects found to exist in works; respondent returned to rectify defects but was allegedly prevented from doing so; issues of repudiation of contract and impact of repudiation on assessment of damages.

APPLICANT	Maria Tambassis
RESPONDENT	Andrew Gribbin t/as Inner Melbourne Landscapes
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	6 August 2018 and 13 December 2018
DATE OF ORDER	24 April 2019
CITATION	Tambassis v Andrew Gribbin t/as Inner Melbourne Landscapes (Building and Property) [2019] VCAT 540

ORDERS

1. I declare that the applicant is entitled to an award of $20,800 on her claim.

2. I also declare that the respondent is entitled to an award of $12,124 on his counterclaim.

3. The entitlement of the respondent to an award of $12,124 is to be set off against his obligation to pay to the applicant the sum of $20,800, with the result that the respondent must pay to the applicant the net sum $8,676.

4. Costs are reserved. Any application for costs by either party must be made within 60 days.

5. The issue of whether any party is to reimburse to another party any fee under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is also reserved. Any application for fees is to be made within 60 days.

6. Leave is reserved to the applicant to apply for interest. Any application for interest is to be made within 60 days.

7. **The Principal Registrar is directed to refer any application for costs, fees or interest to Member Edquist who will make further orders regarding the disposition of any such application.**

Member C Edquist

APPEARANCES:

For Applicant	Mr N. Jones, of Counsel
For Respondents	Mr N. J. Philpott, of Counsel

REASONS

Introduction

1. The applicant, Mrs Maria Tambassis, owns a house in Stonehaven Avenue, Malvern East. In late 2016 she and her husband elected to re-do the driveway and upgrade some landscaping in the front garden. To this end she accepted a quotation from the respondent, Andrew Gribbin, who trades as Inner Melbourne Landscapes. The work got underway in January 2017, and was completed by the middle of February. Shortly after Mr Gribbin left the site, Mrs Tambassis, became concerned about the quality of some of the work. Her concerns grew, and on 17 March 2017 there was a critical meeting onsite attended by herself and her representatives on the one hand, and Mr Gribbin's father Alan Gribbin on the other. Following this meeting, Mr Gribbin left the site without having undertaken any rectification work or even investigated issues with the paving. From this point it was inevitable the parties would end up in litigation.

2. Mrs Tambassis initiated the domestic building work dispute process referred to in Division 2 of the *Domestic Building Contracts Act 1995*. There was an unsuccessful conciliation conference conducted by Domestic Building Dispute Resolution Victoria on 4 December 2017.

3. Mrs Tambassis then issued this proceeding seeking substantial damages for breach of contract and negligence. The claim, as ultimately articulated exceeded $50,000. Mr Gribbin has filed a counterclaim seeking payment of the balance of the contract sum, which the parties agree is $12,124.

4. The dispute is principally concerned with the alleged failure of three types of pavers laid under the contract. The pavers in dispute are bluestone pavers laid in the driveway, bluestone drop face pavers laid where old garden bed cappings had been removed, and edging pavers. There is a separate dispute about the failure of a paved area, constructed for the purpose of bin storage, to drain.

THE PLEADINGS

5. Both parties have been legally represented throughout the dispute, and the Tribunal has enjoyed the benefit of pleadings. Mrs Tambassis, in her points of claim, contends that the contract was made between the parties which was constituted by an undated quotation, and terms which were implied in order to give business efficacy to the contract. The implied terms were not specified. However, it was also asserted that the contract was for the performance of domestic building works and accordingly the contract was subject to the warranties implied by s 8 of the *Domestic Building Contracts Act*. Breach of these warranties was asserted, but no particulars were given. It was merely stated that Mrs Tambassis, relied upon a report prepared by Buildcheck dated 5 May 2017. An alternative claim was made for breach of

duty of care. Mrs Tambassis initially put her claim for loss and damage at $26,600, and also claimed interest and costs. At the hearing she adjusted the claim to a claim for reimbursement of the amount paid, namely $19,900, plus damages for breach of contract. According to her expert's report, the claim was suggested to be as high as $50,773, without allowing for compensation for inconvenience.

6. Mr Gribbin filed points of defence, of which the salient points were:

   (a) the contract was based on a quotation provided to Mrs Tambassis on 23 September 2016;

   (b) there were a number of conversations between September 2016 in February 2017 which gave rise to oral terms;

   (c) terms were also implied to give business efficacy to the contract;

   (d) the initial contract was $29,800 (inclusive of GST) but was increased by a further sum of $2,324 (inclusive of GST) for variations;

   (e) there were terms of the contract that Mrs Tambassis would:

      (i) provide him with unhindered site access to allow the works to be carried out until completion;

      (ii) not obstruct or hinder his ability to complete the works; and

      (iii) provide him with a reasonable opportunity to rectify defects in the works if and when they arose;

   (f) he did not admit the contract was subject to the *Domestic Building Contracts Act*;

   (g) the contract was repudiated in about 17 March 2017 when Mrs Tambassis refused to allow his agent, Mr Alan Gribbin, to continue the works;

   (h) alternatively, Mrs Tambassis was in breach of the contract by refusing to allow him to complete the works;

   (i) he admits owing a duty to exercise reasonable care and skill in carrying out the works but says:

      (i) he does not admit that Mrs Tambassis would be exposed to financial loss if he did not perform the works with due care and skill; and

      (ii) his responsibility to perform the works with due care and skill came to an end by reason of the repudiation by Mrs Tambassis;

   (j) as to damages, he says:

(i) Mrs Tambassis's methodology for assessing losses is flawed and that the amount sought would place her in a superior position than if the contract had been completed;

(ii) Mrs Tambassis failed to mitigate her losses in that she had unreasonably refused to allow him to complete the work and/or rectify any defects and;

(iii) he could have rectified the defects identified in the Buildcheck report at no cost to Mrs Tambassis had she not repudiated the contract;

(k) he is entitled to set off the balance of the contract sum of $12,124 (calculated on the basis that Mrs Tambassis had paid him $19,990).

7. In points of counterclaim filed simultaneously with the points of defence, Mr Gribbin claimed the balance of the contract sum of $12,124, plus costs.

THE HEARING

8. The proceeding initially came on for hearing before me on 6 August 2018. Mrs Tambassis was represented by Mr N Jones of Counsel, and Mr Gribbin was represented by Mr N J Phillpott of Counsel. Mrs Tambassis gave evidence, and called as an expert witness Mr Clinton Eldridge of Buildcheck. The proceeding was adjourned part heard and the hearing resumed on 13 December 2018. The applicant was allowed to re-open her case for the purpose of calling Mr Tambassis. Andrew Gribbin and Alan Gribbin then gave evidence. Final submissions were made orally.

THE ISSUES

9. From the pleadings, it might have been thought that the issues to be determined were:

(a) the identification of the defects in the works;

(b) whether the contract was a major domestic building contract for the purposes of the *Domestic Building Contracts Act*, and therefore subject to the warranties implied into the contract by s8 of that Act, or whether the works were subject to or guarantees implied by the *Australian Consumer Law*.

(c) the terms of the contract, and in particular whether Mrs Tambassis would provide Mr Gribbin with a reasonable opportunity to rectify any defects in the works;

(d) whether the contract had been repudiated, and if so, by which party;

(e) the assessment of damages;

(f) whether money was due for Mr Gribbin to Mrs Tambassis or vice versa.

A CASE OF TOTAL FAILURE OF CONSIDERATION?

10. In these circumstances, it was somewhat surprising that Mrs Tambassis's case was opened on the basis that there had been total failure of consideration. It was submitted by Mr Jones that, on the basis of the Buildcheck report, all the works performed by Mr Gribbin had to be taken up and the pavers re-laid. On this basis it was contended that Mrs Tambassis could not be made to pay for works which had no value, and so she was entitled to a refund of all monies she had paid. She was entitled also to the cost of demolition. In financial terms, Mrs Tambassis was seeking the return of the $19,900 as well as cost of re-doing the work.

11. Mrs Tambassis's expert, Mr Clinton Eldridge of Buildcheck, had initially inspected Mr Gribbin's work at the site on 22 March 2017 and again on 18 April 2017, and had prepared a report dated 5 May 2017. This report recorded Mr Eldridge's observations about the state of the pavers. In a second or "addendum" report prepared in August 2018, Mr Eldridge estimated that 70% of the pavers could be reused. He opined the applicants may be entitled to rectification costs totalling $30,783.40 comprising the cost of removing and storing pavers for reuse, the cost of re-installing pavers, the cost of cleaning pavers, increased construction costs and an allowance for contingency.

12. Mr Philpott responded by acknowledging that Mr Gribbin conceded partial rectification of his work was required. However, the proposition that there had been a total failure of consideration was not sustainable. Mr Philpott referred to *Baltic Shipping Co v Dillon*[1]. In this case a passenger on a cruise vessel suffered injury when the vessel sank ten days into a fourteen day cruise. In her action against the shipowner for damages for breach of contract, she was awarded damages which included the refunding of the whole fare and compensation for disappointment and distress. Mr Philpott submitted that the case was relevant to the present one as in *Baltic Shipping* it was held by the High Court that the passenger was not entitled to a refund of the fare because there had not been a total failure of consideration.

13. I accept Mr Philpott's submission on this point. I refer to the following passage in the judgment of Mason CJ at [13]:

> When… an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract-breaker of its obligations under the contract and the contract-breaker renders an incomplete performance, in general, the innocent party cannot recover unless there has been a total failure of consideration….If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract, there will not be a total failure of consideration.

[1] (1993) 176 CLR 344

14. It is also relevant that the High Court was of the opinion that, if the passenger had had a right to recover the fare, she would not have been entitled to full damages for breach of contract as well. Accordingly, Mrs Tambassis's claim for both restitution of the contract sum she has paid as well as damages for breach of contract was misconceived.

15. I now turn to the issues raised by the pleadings.

THE BIN AREA CLAIM

16. Apart from the failure of the three separate types of paper, there was a claim in relation to a slab placed in the area at the back of the driveway where it was intended bins would be stored (**"the bin area"**). This claim can be briefly dealt with.

17. The creation of the bin area slab of 1.5 m² was not in the original quote. It was a variation negotiated afterwards. It was part of the variation works costed at $2,324 (inclusive of GST) according to Mr Gribbin's amended quotation.

18. Mr Eldridge noted in his first report at [2.5 on page 25] that water was pooling in the bin area, which had been graded to the boundary fence. The depth of pooling was around 2 to 3 mm. He referred at section [2.6], to the Stone and Concrete Paving Installation-Landscaping Victoria guide which recommended that paving should have a fall of a minimum of 1% to assist with drainage and prevent water pooling. He expressed the opinion at section [2.7] that the grading and subsequent water ponding in the bin area was a defect that required rectification. He said the bin area should have been graded to the driveway.

19. Mrs Tambassis, in her evidence in chief, noted that it was her expert's opinion that the slab had been graded to the boundary. She understood that water flowing off her property into a neighbour's property would offend section 16 of the *Water Act.* For this reason the base of the fence had been grouted. Now the area filled up like a lake and did not drain.

20. Mr Eldridge was cross-examined about the issue and asked whether he thought it would be appropriate for the area to drain towards the house. He confirmed that it ought to drain to the driveway, rather than to the fence or the house. On this basis he considered the landscape design to be defective.

21. Mr Eldridge said that in order to address the grading problem it would be necessary to "pop" the pavers that have been laid over the slab and regrade the sub- surface before relaying them. Under cross-examination, he said that would take 2 men one day to do this work, and that $120 worth of screed would be required. He did not provide an estimate of the cost of a day's labour by 1 person, let alone 2.

22. It was contended on behalf of Mr Gribbin that the bin area was not defective. No pricing was given for the cost of rectification.

Finding as to liability regarding the bin area

23. It is well known that paving adjacent to a house must be graded away from the house so that water does not flow into the foundations. At the same time, paving should not be graded so that water runs off directly into a neighbour's property, as this might potentially cause an unreasonable flow of water and accordingly generate liability under the *Water Act 1989*. On this basis, Mr Eldridge may have been right in suggesting that the bin area paving ought to have been graded toward the driveway. However, this was not the only solution. A drain could have been created under the bin area.

24. As the bin area does not drain onto the driveway, or into a drain, water pools there. Having regard to the depth of the pool being only two or 3 mm, there is a question as to whether this is a defect. I am prepared to accept that it is. However, there was a question as to whether the defect arises by reason of any breach of contract on behalf of Mr Gribbin.

25. If the bin area had been planned from the outset, it would presumably have been reasonably straightforward to put in a drain, alternatively construct it so that it drained onto the driveway. However, as the bin area was an afterthought, the drainage options appear to have been limited, as the driveway had been planned, if not created, already.

26. It seems likely that the problem the bin area has arisen because Mrs Tambassis did not think thoroughly through what she wanted before she commissioned Mr Gribbin. In particular, no thought appears to have been given to a site drainage plan.

27. Mr Gribbin's contract was for the performance of works. It was not a design and construct contract. He is not, in my view, to be held responsible for the lack of an overall site drainage plan. The resulting drainage issue is accordingly not, in the contractual sense, Mr Gribbin's responsibility.

28. I accordingly find against Mrs Tambassis in respect of this particular complaint.

THE SIZE OF THE PAVERS

29. Mr Eldridge commented [at page 8] in his first report that the bluestone pavers installed around the lawn area measured 600 x 200x 20 mm rather than the specified 600 x 200 x 30 mm. He said "This change in dimensions is aesthetic, and has not contributed to the debonding of the paving stones."

30. Mr Eldridge also noted that the bullnose pavers installed measured 800 x 400 mm rather than the 500 x 350 mm paver specified. Again, he opined that the change in dimensions was aesthetic and did not contribute to the defects complained of.

31. Finally, Mr Eldridge noted that that the driveway pavers were 800 x 400 x 20 mm rather than 30 mm thick as specified. Although he said that a guide published by Landscape Victoria recommended that a paver over 600mm should be at least 30 mm thick in order to resist warping, he indicated the

installed paver was a common paver sold and the reduced thickness "may not have contributed to defects".

32. No complaint about pavers size was pressed at the hearing, and no decision by me is necessary about this potential defect.

33. I now turn to address the defects in the pavers which were the subject of the major portion of the hearing.

WAS THE CONTRACT A MAJOR DOMESTIC BUILDING CONTRACT?

34. In Mrs Tambassis's pleading it was contended that the contract involved domestic building work "as that term is meant and understood in sections 3 and 54 of the *Domestic Building Contracts Act 1995*".

35. Mr Phillpott, behalf of Mr Gribbin, pointed out that to constitute domestic building contract work, work such as landscaping, paving or a driveway had to be either part of the work involved in the erection or construction of a home, under s 5(1)(a)(i) of the *Domestic Building Contracts Act,* or had to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home under s 5(1)(c). As neither of these circumstances applied, the *Domestic Building Contracts Act* did not apply.

36. I accept Mr Phillpott's argument, and find that the contract is not governed by the *Domestic Building Contracts Act*.

THE APPLICATION OF THE AUSTRALIAN CONSUMER LAW

37. Mr Phillpott also submitted that the standing of the contract under the *Domestic Building Contracts Act 1995* was irrelevant to the outcome of the case, because the contract was clearly a contract for the supply of services to a consumer in trade or commerce and was accordingly subject to the guarantee implied by s 60 of the *Australian Consumer Law* ("the ACL") that the services would be rendered with due care and skill. In this way Mr Gribbin could be held to account in respect of defects in the works.

38. I accept this submission. By way of completeness, I note that the ACL forms part of the law of this State under s 8 of the *Australian Consumer Law and Fair Trading Act 2012*, and that the Tribunal has jurisdiction to deal with *consumer and trader disputes* relating to the supply of goods or services, such as the present dispute, under s 182 of that Act.

THE RELEVANT TERMS OF THE CONTRACT

The scope of works

39. Mrs Tambassis did not identify the date of the initial quotation in her points of claim, but at the hearing confirmed that an undated quotation on Mr Gribbin's Inner Melbourne Landscapes letterhead for the carrying out of paving work at her property for $29,800 inclusive of GST was the original contract document.

40. Mr Gribbin put into evidence a tax invoice dated 23 February 2017 which confirmed the initial scope of works, and also confirmed that the scope of works had been increased by a requirement to core 8 holes for light fittings in the pavers and the slab, run 100 m of lighting cable and fit off garden lights, repair a broken irrigation pipe, supply a 12v transformer and a 24v transformer, glue back 4 fallen pieces of sandstone wall and a loose step paver, and pour a 1.5 m² slab in the bin area.

41. The contract price stated in the tax invoice of 23 February 2017 was increased by $2,324 from the original price. This was not disputed.

42. Under cross-examination, Mrs Tambassis agreed that of the original scope of works, a specified border of sawn bluestone pavers had been deleted from the contract.

43. On the other side of the ledger, Mr Philpott extracted a concession from Mrs Tambassis that she had asked Mr Gribbin to fill in at least one expansion joint because it was unsightly. However, this variation was not in issue and requires no further discussion.

The contractor's obligation and entitlement to undertake rectification works

44. Mr Philpott submitted that the term relied on by Mr Gribbin, to the effect that he could return to the site and repair defects, was implied as a matter of law. This was not disputed by Mrs Tambassis. Her evidence was that she expected Mr Gribbin to return to the site to rectify the defects she complained about. I find that there was an implied term that Mr Gribbin was both obligated and entitled to return to site to rectify defects in his work.

45. This finding is critical, because it is relevant to Mr Gribbin's contention that Mrs Tambassis repudiated the contract.

THE PERFORMANCE OF THE WORKS

46. Mrs Tambassis gave evidence that Mr Gribbin started work on 19 or 21 January 2017, and finished about 5 weeks later, that is to say in mid February. She said that Mr Gribbin did a "terrible job". In particular, she said that the bluestone pavers placed in the driveway sounded drummy when she tested them by tapping. They moved when they were driven on. She later explained that because of movement, the grout between pavers has come out, and tiles are chipped. Furthermore, tiles placed around the garden bed had been tested by her, and almost every one of them came up.

47. When pressed, she conceded that she had not counted how many pavers were moving, and did not know how many had been laid. She accordingly could not calculate the failure rate in percentage terms.

FIRST PAYMENT

48. Mr Gribbin had required to be paid half the contract sum of $29,800 before starting work. On this basis, he was paid $14,900.

49. Mrs Tambassis did not pay the balance of the contract sum promptly after the works were completed.

50. On 23 February 2017 Mr Gribbin his updated tax invoice which set out the original scope of works and the additional works that had been performed. costed at $2,324 inclusive of GST. At the hearing Mrs Tambassis agreed that she had received the amended invoice on 27 February 2017.

51. Given that (according to the amended invoice) only $14,700 inclusive of GST was outstanding against the original quotation, the total amount said to be payable was $17,024.

SETTING UP THE SITE MEETING ON 17 MARCH 2017/ FURTHER PAYMENT

52. Mrs Tambassis expressed a concern that the way silicon had been used to fill gaps look very unprofessional. This is evidenced by a text is sent on 17 February 2017. She asked Mr Gribbin to fix the problem. Interestingly, in this text Mrs Tambassis also acknowledged that Mr Gribbin had "done a great job with the tiling so far".

53. By 28 February 2017 it was clear that there was an issue with some pavers. On this date Mrs Tambassis sent a text message to Mr Gribbin asking for a meeting on site.

54. At this point, Mrs Tambassis said that she asked her husband to take over communications with Mr Gribbin. When her husband called Mr Gribbin, Mr Gribbin demanded payment of another $5,000. In good faith they paid that sum. This brought the total amount paid to $19,900, and reduced the sum payable to $12,124.

THE SITE MEETING ON 17 MARCH 2017

Mrs Tambassis's evidence

55. Mrs Tambassis gave evidence about the events on site on 17 March 2017. The first point made was that Andrew Gribbin did not attend, but was represented by his father Alan Gribbin. In her evidence in chief she said that she came out of the house and showed him the tiles, and Mr Gribbin tapped the tiles. She also said that her brother was present, and she quoted her brother as saying "Mate, you've done a shit job". When Alan Gribbin suggested that the tiles should be re-glued, she said that this was not how they should be fixed.

56. Importantly, in my view, while she denied that she or her husband had been abusive to Alan Gribbin, she acknowledged that her brother had probably told him to "F-off".

57. Under cross-examination, Mrs Tambassis changed her narrative slightly. She said that when Mr Alan Gribbin arrived he was met by her husband George Tambassis. Her brother was not there initially. She acknowledged that Alan Gribbin had proposed removing a driveway tile and checking it. When she was asked whether her husband had agreed to this course, she said that he had not.

58. Her brother then turned up. When asked about why her brother had come to the site, she said that she had asked him to be there. She agreed that she had not warned Andrew Gribbin that her brother had been invited.

59. She agreed that her brother had then taken over the conversation. When she was asked whether her brother had been abusive, she conceded that her brother had used words like "you useless piece of shit" and other words beginning with "F" and "C". However, she said the abuse came from both sides.

Mr Tambassis's evidence

60. On the first day the hearing Mr Tambassis was not called. However, when the hearing resumed on December 2018, an application to call him was made, and was granted. The salient points of his evidence-in-chief regarding the meeting on 17 March were these:

    (a) he was surprised to meet Alan Gribbin, as he was expecting Andrew Gribbin;

    (b) he discussed with Alan Gribbin the work performed by Andrew Gribbin, and suggested the whole job had to be done again;

    (c) he agreed that Alan Gribbin had discussed with him the repair of seven capping tiles, and that he had asserted that they had not been laid properly and that he knew they were delaminated because they were drummy and were moving;

    (d) Alan Gribbin said that he would get his tools and lift a tile in the driveway;

    (e) he (Mr Tambassis) asked what the point of lifting one tile would be, as he was concerned that fixing some tiles would not fix the problem, but he reluctantly agreed to this course;

    (f) when he agreed to allow Mr Gribbin to lift a tile in the driveway, his wife was not present, as she was inside the house;

    (g) he did not agree with Mr Gribbin that only some tiles should be rectified;

    (h) his brother-in-law George Athansiadis then arrived and swore at Mr Gribbin;

    (i) Mr Gribbin dropped his tools, then cooled down and collected his tools and walked away, saying "I can't work like this";

(j) he did not ask Mr Gribbin to leave, and he left of his own free will;

(k) he agreed that the brother-in-law's language was "inappropriate', and he apologised for it.

61 Under cross-examination Mr Tambassis denied that Mr Gribbin had agreed to re-install the seven de-laminated capping tiles. However, he agreed that Mr Gribbin had said he would check out the mortar under a driveway paver. Mr Tambassis then made some relevant concessions. The first was that he had it in mind that the whole job would have to be redone. The second was that there were only seven failed capping tiles. The third was that there was only one loose driveway paver at this point, and the driveway was not generally lifting. In respect of the altercation with his brother-in-law, he agreed that Mr Alan Gribbin's language had been "polite" but added that he had been polite too. However, he denied that Mr Gribbin had left the site because of the altercation, and confirmed his evidence in chief that Mr Gribbin had left of his own free will.

Mr Alan Gribbin's evidence

62. Mr Alan Gribbin gave evidence immediately after Mr Tambassis on the second day the hearing. He had previously prepared a written statement, and adopted this statement at the hearing. The salient points in his statement are as follows.

(a) When he got to the site at 8 a.m. he discussed with Mr George Tambassis the issue of seven capping units that had become de-laminated.

(b) He discussed also the removal of a driveway paving unit that was delaminated as he intended to inspect the mortar beneath the paver to ascertain if a full mortar laying base had been used, rather than dollops of mortar.

(c) He indicated that he was aware that Mrs Tambassis had previously requested removal of expansion joints because of her dislike of the "finish" and colour. As these were subjective judgements, and apparently not based on standard building practice, it might be inferred that Mr Gribbin and his son Andrew had a legitimate concern that the complaint about drumming might not be rationally based.

(d) He and Mr Tambassis "resolved that he would re -set/install the seven delaminated bluestone capping units and then grind out [the] mortar grout joint of [the] driveway bluestone paver and inspect the laying base". The stated purpose was to ascertain whether it was drumming due to the laying base or due to expansion issues.

(e) Mrs Tambassis was continually interjecting and ultimately was asked by her husband to go inside, but she refused.

(f) At this point Mrs Tambassis's brother, also named George, arrived. Within a minute or two he had taken over the conversation and was abusing the work performed by Andrew Gribbin.

(g) Mr Gribbin said that he responded by indicating he wouldn't be talking about the issue as it had been resolved what was to be done.

(h) Mrs Tambassis's brother continued using "extremely profane abuse towards Andrew" and when he was rebuked about this he started to abuse Alan Gribbin.

(i) Alan Gribbin confirmed that he was called "a useless piece of shit" and was abused with words beginning with "C" and "F" repeatedly. In these respects, his narrative echoes that of Mrs Tambassis. His account of the situation, however, differed from that of Mrs Tambassis because she had suggested that the foul language was going both ways. Mr Gribbin's account suggests he used more measured language, advising the brother that his ability to resolve conflict was "abysmal" and that he was an uneducated fool and should go away.

(j) The meeting concluded when he thanked George Tambassis for his goodwill, and announced that he was "out of here", saying that it was not possible for him to work in this environment.

(k) After returning home, he visited Caulfield Police Station but was informed that the abuse was not a police issue as there was no physical violence.

63. Mr Gribbin was cross-examined. Relevantly, he confirmed that he was forced off the site verbally by Mrs Tambassis and her brother.

64. When he was asked about why he had not sought to go back to the site, he answered that he was not going to go back because of the personal abuse. He could not work under those conditions. He said that only a fool would go back to such an abusive situation.

65. When asked about the tiles, Alan Gribbin confirmed that there were seven capping tiles which could be lifted, but no pavers in the driveway could be. He confirmed that he was there to investigate the situation, but was interrupted by Mrs Tambassis and her brother George. He agreed that, because he didn't have time to inspect, he couldn't know how many pavers had de-laminated.

66. When pressed as to whether he and Mr Tambassis had agreed that he would re-install the seven capping tiles and grind out the grout of a paver in the

driveway, he confirmed that this was the case. He rebutted the suggestion that George Tambassis had not agreed to that course.

Discussion

67. It is clear that Andrew Gribbin attempted to discharge his responsibility to return to the site to rectify defects in his original work by sending his father Alan Gribbin in his place to the site meeting arranged through Mr Tambassis. Mr Gribbin deposed that he asked his father to attend because of the tension in his interactions with Mrs Tambassis. I accept this, as it is clear that Mr Tambassis had an identical view, which was demonstrated by her action in asking her husband to take over communications with Mr Gribbin.

68. One of the issues to be resolved is what was agreed between Alan Gribbin and George Tambassis. Mr Gribbin is adamant that he agreed to reinstall seven capping tiles which had delaminated. Mr Tambassis disputes this. Also, there was initially tension between Mr Gribbin's evidence and that of Mr Tambassis on what was to be done about the driveway. Mr Gribbin's clear evidence was that he insisted on removing the grout around one paver and lifting it to check the state of the mortar underneath before committing to any course of action. Ultimately, Mr Tambassis conceded that he agreed that one paver was to be tested first. This presumably occurred when his wife was in the house, because she disputed that he had made any such agreement.

69. The question arises as to whether Mr Alan Gribbin's insistence on checking a single paver in the driveway, before committing to any rectification of the driveway, amounts to a repudiation of the contract.

DID MR GRIBBIN REPUDIATE THE CONTRACT?

70. In addressing this issue, it is important to bear in mind the extent of Andrew Gribbin's responsibilities under his contract. The relevant implied term was that he was to rectify defects. I consider it clear that this obligation must be limited to genuine defects, that is to say works not complying with the contract, rather than issues which are defects only in the mind of Mrs Tambassis, or her brother, or Mr Tambassis.

71. This point is of particular significance in circumstances where only 7 capping tiles had actually lifted at the time of the site inspection, and no pavers in the driveway had failed to the point where they could be lifted.

72. In my view, Alan Gribbin was entitled to determine, on behalf of his son Andrew, the extent to which the driveway needed to be uplifted and re-laid before commencing work on it.

73. It is clear that Mr Tambassis accepted that this was appropriate, as he agreed to the investigation of a single driveway paver being undertaken.

74. It follows that Mrs Tambassis had no absolute entitlement, at the meeting on site on 17 March 2017, to insist either personally or through her brother

that the whole job was to be redone. That entitlement had not been established by investigation.

DID MRS TAMBASSIS REPUDIATE THE CONTRACT?

75. This leads us to another question, which is whether Mrs Tambassis, by her actions and those of her brother, repudiated the contract by effectively preventing Mr Gribbin from carrying out any testing of the driveway.

76. After all the evidence had come out, the position was clear. Alan Gribbin had come to the site in order to carry out necessary rectification work. To this end he was entitled to carry out reasonable investigations. Mrs Tambassis and Mr Tambassis had initially wanted him to agree to re-do all the work, but he declined to do this, although he did agree to reinstall seven failed capping tiles. Mr Gribbin and Mr Tambassis had then reached agreement that he was to test a single paver in the driveway before doing rectification work on the driveway. Then Mrs Tambassis's brother George Athansiadis arrived and took over the discussions on behalf of Mrs Tambassis. He refused to allow Mr Gribbin to test one driveway paver and insisted that all the pavers be taken up and re-laid.

77. Mr Athansiadis expressed himself forcefully and abusively. Although Mrs Tambassis suggested that foul language was exchanged between him and Mr Gribbin, the evidence of Mr Gribbin was that he used moderate language. Mr Tambassis supported Mr Gribbin on this point, suggesting his language was polite.

78. Having regard to the nature of the language employed by Mr Athansiadis against Mr Gribbin, which is referred to above, I consider it that it was perfectly reasonable for Mr Gribbin to have formed the view that he could not be expected to work in such circumstances, and to have left the site.

79. Accordingly, although I acknowledge that Mr Gribbin was not manhandled off the site, I find that he was entitled to withdraw from the site and was effectively forced to do so by Mrs Tambassis and her brother. The pattern of behaviour indulged in by Mrs Tambassis, and her brother constituted a direct, clear and ultimately successful strategy to prevent Alan Griffin from testing the drive on behalf of Anderw Gribbin. I consider that this action by Mrs Tambassis and her agent (her brother) amounted to repudiatory conduct as it prevented Mr Alan Gribbin from performing his son's obligations under the contract.

80. The declaration by Mrs Tambassis that all the tiling had to be taken up and re-laid, reinforced by the words of her brother, was also repudiatory in circumstances where investigation had not taken place to determine the extent of failure of the pavers. Mrs Tambassis had not obtained an expert's report at this stage, and was merely relying on her own judgement, and that of her husband and of her brother.

WAS MRS TAMBASSIS'S REPUDIATORY CONDUCT ACCEPTED?

81. It was pleaded by Mr Gribbin in his points of defence, and also submitted on his behalf at the hearing, that Mrs Tambassis's repudiation of the contract was accepted when Alan Gribbin left the site. I accept this contention. In doing so, I note that from the meeting on site on 17 March 2017 the parties conducted themselves on the basis that the contract had been brought to an end. Specifically, Mrs Tambassis made no attempt to get Andrew Gribbin back, and Mr Gribbin made no attempt to return to the site.

LEGAL CONSEQUENCE OF MRS TAMBASSIS'S BREACH OF CONTRACT

82. Mr Andrew Gribbin is entitled to be restored to the same position he would have been in had he been allowed to fully perform his contract. Accordingly, the financial adjustment between the parties must proceed on the basis that Mr Gribbin is entitled to be paid the balance of the contract sum not paid to him. It was agreed that the balance of the contract sum due to be paid, allowing for variations, was $12,124.

83. Against this, Mrs Tambassis is entitled to a credit in respect of the cost of rectifying defects. It is accordingly necessary to examine:

    (a) the extent of the defective paving; and

    (b) the cost of rectification.

WHAT IS EXTENT OF THE DEFECTS IN THE PAVING?

The evidence of Mr Eldridge

84. Mr Clinton Eldridge took the stand on the afternoon of the first day of the hearing. He adopted two reports he had prepared. The first, dated 5 May 2017, had been prepared after an inspection on 18 April 2017. The purpose of this inspection was to test that the mortar base had been laid in accordance with the quote, and to test if the bluestone pavers laid in the driveway had sufficient bonding with the mortar base. The second was in the nature of an addendum, and was dated 18 August 2018. It had been prepared at the request of Mrs Tambassis's lawyers in order to address the issue of whether existing pavers could be re-used, to review the quantification of loss and damage, and to comment on an offer received from Mr Gribbin dated 23 May 2018.

85. The key findings in Mr Eldridge's first report regarding the paving appeared at page 5 where he stated that the defects was the bonding of the pavers to the driveway, footpath, garden edging and garden wall capping.

86. In his executive summary, at page 6, Mr Eldridge noted that the planter wall capping pavers had de-bonded from the mortar mix and become loose; the garden edging stones had become drummy and loose; the bluestone pavers in the driveway were drummy and loose, causing spalling of grout between tiles; and walkway pavers were drummy and loose. He opined that this delamination could have occurred because of:

(a) incorrect mixing of bedding mortar; or

(b) incorrect/insufficient bonding agent between waterbed and paper; or

(c) pavers being installed above temperatures of 30°.

87. At page 10 of his first report, Mr Eldridge opined that the fact the pavers had de-bonded "is a fundamental defect irrespective of cause."

How many tiles had lifted?

88. At the hearing, in examination in chief, Mr Eldridge was taken to the observations recorded at page 10 of his first report to the effect that around 30% of the capping pavers (which he referred to as "stones") on garden walls, 20% of the edging pavers and 40% of the paving tiles (in the driveway) were loose. He explained that insufficient bonding of the pavers had been demonstrated because they could be lifted easily, using two fingers. When he was asked why 100% of the pavers had to be replaced, he responded that each area of paving required replacement because of the wide spread and non-localised nature of the failure. He added that the 40% of an area of paving was loose, it was a reasonable assumption that all pavers would require to be replaced.

89. In cross-examination, Mr Eldridge was taken again to the estimated failure rates set out in executive summary in his first report. He was asked about the tests he had carried out. As to capping tiles, it was evident 7 had lifted. He indicated he tapped 50% of all the tiles. These were the bases, apparently, on which he concluded that 30% of the capping tiles had lifted. It is to be noted that this was similar to the failure rate of 1 in 3 reported by the owners after they had checked the bonding of the capping stones, according to section [1.3] of his first report.

90. Mr Eldridge, under cross-examination, indicated that two tiles in the garden bed had lifted. It was apparently from this observation, together with tapping 50% of those tiles, that he had arrived at the stated failure rate of 20%.

91. In respect of the driveway, he relied firstly on observations of spalling in the grout lines. When questioned about this, he said that some of the pavers were affected. When he was asked how many pavers he had lifted, he conceded that there was only one. On the basis of these observations, and tapping 50% of the driveway pavers, he concluded that 40% had become loose, particularly where the pavers were subject to vehicular traffic.

92. Mr Eldridge was asked in cross examination about his recommendation to pull up all the paving in the driveway. It was put to him that the Landscaping Victoria Guide, to which he had referred to in his first report, indicated that if a paver was to fail, it would fail within the initial curing period of 5-12 hours. In these circumstances he was asked why he thought all the pavers should be replaced. His answer was that the Australian

Standard relating to ceramic tiles- AS 3958.1-2007- suggested that if 20% of tiles in a sample were drummy, then over the long-term the tiles would all fail.

93. Mr Eldridge was asked at about his reliance on AS 3958.1-2007. The context was that in his first report [at page 17] he had referred to Part 5.4.3 of this Australian Standard, which provides:

> In some installations, small hollow sounding areas may be found. Although they do indicate incomplete bond are not necessarily indicative of imminent failure; however, cases where more than 20% of the tile (sic) sound hollow when tapped ("drummy") would have to be considered suspect over the long term.

94. Under cross-examination, Mr Eldridge agreed that AS 3958 was applicable to ceramic tiles, and accordingly was not directly applicable. However, he argued that it was "a similar guide" and of relevance to bluestone pavers, given "the similarities between thin cut bluestone and ceramic tiles" that "are both adhered to their substrate and grouted with a rigid grout with expansion joints.".

95 I am of the view that the reference to AS 3958 is not of direct assistance to the applicant's case simply for the reason that it was developed with a different subject matter in mind, namely ceramic tiles. Ceramic tiles are by their nature smaller and lighter than bluestone pavers. They are typically, but not universally, applied indoors. They are often applied for decorative or waterproofing purposes (or both), but unless they are laid on the floor they are not usually weight-bearing.

96 However, it is instructive to note the proviso set out in Part 5.4.3 of AS 3958.1 where it is declared:

> Needless to say, this ratio of 20% would need to be varied depending on:
>
> (a) Whether the tile is fixed to the floor or the wall; and
>
> (b) The anticipated form and amount of traffic.

This proviso suggests that the fact that the bluestone pavers in the driveway were to be subject to daily vehicular traffic would be a relevant factor.

97 On one view, on a literal assessment of Mr Eldridge's evidence, only 20% sounded drummy. This is because he tapped only half of all the tiles and only 40% of those were drummy. On this basis, the ratio identified by AS3958.1 as the threshold for a determination that all the tiles are liable to fail in due course was only just reached. However, such an assessment overlooks the likelihood that if 40% of all the tiles were found by Mr Eldridge to be drummy, then a significant number of the untested tiles would have proved to be drummy if they had been tested too.

98. However, I have a concern about the accuracy of Mr Eldridge's conclusion that 40% of the driveway pavers had de-bonded and become loose. I say this because, under cross-examination, he was not definitive about the number of tiles he had tested. When he was asked directly how many tiles

he had tapped, he could not say, adding that it have to work it out. He then indicated he didn't want to undertake the calculation. It was only when he was pressed by Mr Philpott to do so that he came up with the proposition that he had tapped 50% of the tiles. In the circumstances I cannot be satisfied that he in fact tested 50% of the tiles. That was merely an estimate. It follows that the contention that 40% of 50% of all the driveway pavers were defective was itself merely an estimate.

99. Having regard to Mr Eldridge's uncertainty on this issue, and his other evidence that only some of the driveway pavers were showing stress in their grouting, and that he lifted only one paver, I am not prepared to proceed on the assumption that he has established, on the balance of probabilities, a failure rate in the driveway pavers of at least 20%. I therefore concluded that even if I was prepared to accept that AS3958.1 had relevance to bluestone pavers as distinct from ceramic tiles, I do not think it has been demonstrated that the threshold failure rate of 20% had been established by Mr Eldridge. Accordingly, I find that there was no basis for Mr Eldridge to rely on AS3958.1 to justify the conclusion that all the driveway pavers need to be removed.

The evidence of Mr Tambassis about the state of the tiles

100. When he gave evidence Mr Tambassis tendered a note he had recently made regarding the state of the pavers. Objection was taken by Mr Philpott when this note was tendered, on two bases. First of all, it was contended, in giving evidence of his observations, Mr Tambassis appeared to be giving expert evidence, when he was not qualified to do so. I rejected this submission as Mr Tambassis was clearly giving evidence as a lay witness of his observations. Secondly, it was contended that Mr Tambassis was seeking to extend the evidence as to the state of the pavers, precisely because Mrs Tambassis had been unable to give precise evidence regarding the state of the tiles, and Mr Eldridge had not been asked to prepare a supplementary report regarding the state of the tiles just prior to the hearing.

101 Having regard to the matter in which the application to call Mr Tambassis was made after the applicant's evidence had otherwise closed, I must consider whether it would be a denial of natural justice to the respondent if I was to have regard to that evidence. I say that because of the manner in which notice was given to the to the respondent regarding the intention to call Mr Tambassis. This notice was given in a letter dated 6 December 2018 from Mrs Tambassis's solicitors which, omitting formal or irrelevant parts, read as follows:

> I confirm that my client will invite the Member to inspect the site, whether on the next hearing date of 13 December 2018 or subsequently unaccompanied by and in the presence of the parties.
>
> Moreover, my client intends to call evidence from George Tambassis with respect to allegations made by your client regarding an alleged discussion between George Tambassis and your client's father. It is envisaged that

George Tambassis's evidence will be limited to that subject matter and at the hearing duration will not be materially affected as a result.

102 When Mr Philpott, on the half of the respondent, objected to Mr Tambassis giving evidence as to the state of the pavers, Mr Jones responded that his application to call Mr Tambassis at the opening of the day's hearing had not been qualified in any way. I do not accept that submission. The application to call Mr Tambassis made by Mr Jones was clearly coloured by written notice given to the respondent and copied to the Tribunal to which I have just referred.

103 In the circumstances, I consider that the respondent was ambushed by Mr Tambassis's evidence about the state of the pavers.

104 However, by the time any objection was taken, the evidence had been given. Moreover, as the day progressed, both sides referred to it. In the circumstances, is not appropriate that I should retrospectively exclude or discount Mr Tambassis's evidence about the state of the tiles entirely.

105 Relevantly, Mr Tambassis's evidence was that at a total of 215 tiles laid, 84 had lifted or displayed significant movement. Mr Philpott in his final submissions referred to that figure as demonstrating that only 40% of the tiles had failed i.e. the 60% per cent were satisfactory. (My calculation is that 61% were satisfactory).

106 Mr Tambassis also said that 55 of the 89 capping tiles had failed, and that 100% of the pavers were drummy.

107 In his final submissions, Mr Jones did not place great weight on Mr Tambassis's figures. He said the applicant relied on Mr Eldridge's report as justifying the view that all the pavers required removal and replacement.

Significance to Mr Gribbin's case the lack of expert evidence

108 Mr Gribbin came to the hearing without any expert evidence. Accordingly, he was not in a position to contest the expert evidence of either Mr Eldridge, or the lay evidence of Mr Tambassis.

109 Mr Jones attached significance to the fact that Mr Gribbin had not called an expert, even though one had attended at the site on his behalf. (Mrs Tambassis had given evidence that someone from a firm called Buildpect had attended at the site by arrangement through her solicitors). Mr Jones submitted that the Tribunal should draw an inference under *Jones v Dunkel*[2] that any evidence which that expert might have given would not have been of assistance to Mr Gribbin's case because she or he was not called. I am not prepared to draw such an inference on the basis that Mr Gribbin was not questioned about whether he had sent an expert to the site and why that expert had not been called. There may have been an explanation.

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[2] [1959] 101 CLR 298; [1959] HCA 8

110 I did not have the benefit of any expert evidence from Mr Gribbin's corner. In the absence of any expert evidence to rebut that of Mr Eldridge, his respective assessments of the rates of failure of the pavers, namely 30% of the capping pavers, 20% of the edging stones and 40% of the driveway pavers, should be accepted unless they are demonstrated to be questionable on the basis of Mr Eldridge's own evidence.

111 On the basis of Mr Eldridge's evidence, I have no basis to query the assessment the 30% of the capping pavers had failed, or that 20% of the edging stones had failed. I am wary, for the reasons expressed above [at paragraph 95] of the assessment that 40% of the tested driveway pavers had failed, and on that basis I am not prepared to apply the 20% threshold established by AS3958.1 as justification for replacement of 100% of the driveway pavers.

112 However, as Mr Philpott did not ignore the evidence of failure rates given by Mr Tambassis , I should not ignore it either. As noted, Mr Tambassis said he had established that that 55 out of 89 capping tiles had lifted. This failure rate of 62% was much higher than the 30% estimated by Mr Eldridge. I also highlight Mr Tambassis's evidence that 100% of the pavers were now drummy. This evidence was not contradicted, and I have no reason to reject it.

113 It is clear that there had been a significant deterioration in the state of the tiles since they were last inspected by Mr Eldridge in April 2017. At this time Mr Eldridge's estimated 40% of the pavers overall had de-laminated. Even if I am sceptical about this estimate for the reason given,[3] it seems to me that if 100% of the pavers are now drummy, as I accept, then the likelihood is that if not all the tiles will fail in due course, at least a significant majority will.

114 Accordingly, I find that the appropriate method of rectification is lifting and replacing all the tiles. Piecemeal rectification from time to time of failed tiles over an indefinite period is not appropriate.

THE COST OF RECTIFICATION AS ASSESSED BY MR ELDRIDGE

The first estimate

115 Mr Eldridge stated in the summary of his first report that rectification included:

(a) complete removal of bluestone pavers;

(b) re-laying bluestone pavers with an at adhesive bonding agent; and

(c) the creation of control joints every 10 m².

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[3] See paragraph 98 above.

116 In the concluding section of his first report Mr Eldridge had estimated that the cost of repairing the pavers at $26,600. He had reached this assessment by starting with the original contract price of $29,800 (inclusive of GST).

117 I am not concerned about Mr Eldridge's premise that it is appropriate to start with the original contract price, because Mr Andrew Gribbin gave evidence that it was a reasonable price.

118 From the original contract price Mr Eldridge had apparently subtracted $3,200, which I understand to represent a credit for the cost of the pavers reduced by his estimate of the cost of cleaning the pavers. The resulting figure was to cover "demolition of the existing work", re-screeding to the appropriate level, and re-installing the existing pavers with an adhesive to stop the tiles de-bonding.

119 Mr Eldridge was cross-examined about this calculation of rectification costs. He had used a rate of $40 a square metre for cleaning the pavers. When he was asked where he had obtained that figure, he indicated that he probably got it on-line.

The second estimate

120 It is clear from the preamble contained in the addendum report that Mr Eldridge was expressly asked by Mrs Tambassis's solicitor to review his opinion that the pavers could be reused. The reason for this request was because the Tambassis had obtained a quotation which indicated that there was no guarantee that they would be able to salvage any of the existing bluestone.

121 Mr Eldridge in his addendum report moved away from the assumption that the existing pavers could be reused. By way of explanation, he acknowledged under cross-examination that this assumption was "flawed". However, he clearly did not agree that all of the existing bluestone would have to be discarded. In the summary section of his second report (at page 6) he opined:

> As some of the bluestone is loose enough to be lifted by fingers, we are of the opinion that a fair amount may be re-claimed and reused. We recommend a contingency amount for new stone (to replace any damaged) and re-cutting of perhaps 30%...

122 On the basis that 70% of the pavers could be reused, he allowed a contingency of $2,450 to replace 30% of the existing pavers. He acknowledged that it would be difficult to match the old pavers.

123 Mr Eldridge was then taken to his new detailed costing in the addendum report. He had calculated the total cost of replacing the pavers at $30,783.40. This total comprised:

(a) The contingency, just referred to, of $2,450 in respect of the replacement of existing pavers;

(b) $5,750 for the cost of removing and storing pavers for re-use;

(c) $18,000 for the cost of reinstalling pavers to previously paved areas;

(d) $3,600, being his estimate of the cost of cleaning the pavers; and

(e) an increase in the cost of construction work of $983.40, calculated on the basis of 3.3% inflation.

124 I am not convinced by Mr Eldridge's evidence that a reasonable cost to repair the pavers is $30,783.40. I say this for several reasons. Firstly, when asked about the sum of $5,750 estimated as the cost of removing and storing pavers for reuse, he could not break the figure down. I am, accordingly, not a position to assess whether the fee is inflated.

125 Secondly, when he was pressed to justify the figure of $18,000 for the cost of reinstalling pavers to previously paved areas, Mr Eldridge said he derived the figure by subtracting from the original contract price of $29,800 the cost of removing and storing pavers ($5,750) and the contingency figure to cover the replacement of 30% of the pavers ($2,450), to produce a net figure of $21,600. From that figure he had deducted $3,600, which was his estimate of the cost of cleaning the pavers.

126 Putting aside the obvious point that in his new costing Mr Eldridge had allowed for the replacement of 30% of the pavers, the costing does not appear to be consistent with the costing put forward in his first report.

127 Moreover, I do not understand the relevance of deducting from the original contract price the cost of removing and storing pavers, acquiring replacement pavers and cleaning pavers. I consider the relevant deduction to be made is the cost of initially acquiring all the pavers used. This would leave a figure representing the cost of initially preparing the site, laying the pavers, then grouting, acid washing and sealing them.

128 It is clear that Mr Eldridge had not directly tested the market to ascertain an appropriate cost to repair. He conceded that he had not put his scope of works out to tender.

129 Furthermore, Mr Eldridge acknowledged that he had not referred to the well-known Rawlinsons cost guide. He said that he did not think it reflected "real pricing".

130 A quotation prepared by Adam Richard Landscaping was shown to Mr Eldridge. He said he had not previously seen this quotation. He did not comment on it.

131 Mr Eldridge was then shown a quotation from Herrod Landscapes, who had quoted $22,143 for laying pavers to a driveway area on a 20 mm mortar bed after preparing the site. Mr Eldridge considered this price "a bit low". Presumably he said this because he had in mind Mr Gribbin's original contract price.

THE EVIDENCE OF MR ANDREW GRIBBIN REGARDING RECTIFICATION COSTS

132 At the hearing Mr Gribbin was shown the photos tendered by Mrs Tambassis illustrating issues with the pavers. After this, he was asked to explain how he would have rectified the problems shown. His stated solution in respect of the edging tiles was to remove, re-grout and relay them. With respect to the capping tiles on the retaining wall, they were to be removed, cleaned and re-adhered.

133 Mr Gribbin considered that the driveway pavers required different treatment because the failed ones had to be identified. Mr Gribbin was specifically asked whether he would redo the whole of the driveway. He answered "definitely no". An inspection was necessary. He said any defective paver could easily be recognised because it would move. Any particular paver could be tested by using a trowel to try to lift it. He suggested that if after 18 months a paver did not move, it must have adhered.

134 Mr Gribbin was asked how long it would take him to undertake the rectification works he had indicated. He said that he had three people available, and they would take three days to do the work. The first day would be involved with lifting, re-aligning and re-laying the tiles. The second day would be involved with re-grouting, and on the third day the job would be finished off. The total hours involved for each person would be 8+8+2 = 18. The charge for his three person team would be $150 per hour, and so the total cost would be 18 x $150, or $2,700. He did not indicate whether this figure was GST inclusive. I assume that it was not, and on this basis understand his evidence to be that the cost of labour would have come to $2,970.

135 When asked about materials, Mr Gribbin agreed that the quantities required would depend on the number of pavers to be re-adhered. He assumed that a drum of adhesive would be required and that two saw blades would be worn out removing grout. More grout would be required. He conceded that $3,000 approximately plus GST would be required, that is to say about $3,300.

136 When Mr Gribbin's estimate of the cost of labour is added to the cost of materials, the total is about $6,270.

137 A question arises concerning Mr Gribbin's evidence. Although I accept that the hourly rate for his three-person team would be $150 per hour plus GST, a total of $165 per hour, I cannot be satisfied that only three days' work would be required in circumstances where he had deposed that the driveway pavers would have to be tested to see how many had to be replaced. The labour and materials required would be directly related to the number of pavers which had to be rectified.

THE PARTIES' SUBMISSIONS ON THE COST OF RECTIFICATION

138 Mr Jones in his final submissions said that Mr Gribbin's estimate of just over $3,000 to rectify the pavers was "a false estimate" made without justification on "no evidentiary basis". I accept this particular submission.

139 Mr Jones contended that weight should be given to Mr Eldridge's estimate. I reject this submission on the basis of the concerns I have already expressed about Mr Eldridge's estimate.

140 Mr Philpott contended that if the Tribunal found against Mr Gribbin on the issue of repudiation, and proceeded to assess the cost of rectification on the basis that a third party would do the work, then reliance should be placed on the quotations provided by Adam Richards Landscaping alternatively Herrod Landscapes. On the other hand, if I found for Mr Gribbin on repudiation, then the cost of rectification of the pavers was to be assessed by reference to what it would have cost Mr Gribbin to do the work, rather than a third party. Even so, the "evidence of the market" was useful.

141 I have found for Mr Gribbin on the issue of repudiation. I accept Mr Philpott's submission that in these circumstances the cost of rectification is to be assessed by reference to what it would have cost Mr Gribbin, rather than a third party, because Mr Gribbin is entitled to be put back into the same position that he would have been, had he been allowed to perform his contract. On this basis, he is entitled to be paid the balance of the contract sum, but allowance must be made for the cost to him of completing the contract work including rectifying defective work.

142 The question then becomes: what would it have cost Mr Gribbin to replace all of the pavers?

143 Because Mr Gribbin agreed under cross-examination that his original contract price was reasonable, I am prepared to proceed on the basis that the starting point in calculating the cost of rectification to Mr Gribbin is that price, namely $29,800 inclusive of GST.

144 An issue arises as to whether the entire cost of acquiring new pavers is to be deducted from this sum. As noted above, Mr Eldridge had initially assumed that all the pavers could be reused, but he reviewed this assumption in his second report and proceeded on the basis that only 70% of the pavers could be used.

145 Mr Gribbin gave evidence that the pavers he had used could be reused.

146 The argument put forward by Mr Eldridge on the half of Mrs Tambassis against the reuse of all the existing pavers was that a number of them were chipped. This may well be the case, as the driveway pavers have apparently been driven on repeatedly in all the months since movement in them was detected. However, in my view, this is not a matter for which Mr Gribbin is to be held responsible because he should have been allowed to test the driveway pavers in March 2017 (through his father) and undertake appropriate rectification works at that point. By failing to allow Mr Gribbin

to do this, Mrs Tambassis has failed to mitigate her loss. I accordingly proceed on the basis that all of the pavers are to be reused.

147 I must make a finding as to the value to Mr Gribbin of re-using the original pavers because, in order to determine what the original cost of laying the pavers was by reference to the original contract price, it is appropriate to deduct from the original contract price the estimated cost of the pavers.

148 In this connection I confirm that Mr Eldridge, in his second report, had allowed for a contingency of $2,450 to replace 30% of the pavers. This contingency was not challenged by Mr Gribbin and I accordingly accept it. On this basis, 100% percent of the pavers are to be valued at $8,167, which I round down to $8,000. To do otherwise would be to suggest that great mathematical precision is being applied, which is not the case.

149 When $8,000 is deducted from the original contract price, the resulting figure is $21,800.

150 This figure must have covered the entire process of laying pavers initially, which included site preparation, and cutting the tiles. The fact that the original pavers have been cut as required should not be overlooked because reusing the pavers would save not only in terms of acquisition of materials, but also in terms of time because new pavers not have to be sized.

151 Mr Gribbin deposed "it took a long time to cut the tiles". Regrettably, he was not more specific. Accordingly, he has given me very little material to work with in assessing what credit ought to be allowed to him in the rectification process for the fact that he has already sized the tiles. All I can discern from Mr Gribbin's evidence is that sizing the tiles "took a long time". On the other hand, I can see from the photographs put into evidence that not all the tiles had to cut. Doing the best I can on the evidence before me, I allow to Mr Gribbin 20% of the initial contract price as the relevant credit for having already cut the tiles. I assessed the credit accordingly as $5,960 which I round to $6,000.

152 When this credit of $6,000 is set off against the adjusted cost of rectification established [in paragraph 149 above] of $21,800, the further adjusted assessment for rectification costs comes to $15,800.

153 Mr Eldridge said that in order to rectify the paving, the pavers have to be lifted and then cleaned. I accept this.

154 Mr Eldridge assessed the cost of cleaning $3,600 at the rate of $40 per square metre. This figure was attacked by Mr Gribbin on the basis that it was not derived from testing the market, but from a search on the Internet. However, Mr Gribbin gave no contrary evidence as to what the cost of cleaning the pavers would be on a m² basis. The figure of $40 per m² it does not seem to me to be unreasonable, as the pavers will have to be lifted before they are cleaned, and I will allow this rate for lifting *and* cleaning the pavers.

155 I note that Mr Eldridge assessed at $3,600 the cost of cleaning 70% of the pavers. If all the pavers are to be cleaned, the cost would be $5,143. I accept this figure in principle as the cost of lifting and cleaning all the pavers, but round it down to $5,000.

156 Addition of this figure to the adjusted assessment for rectification previously established of $15,800 [at paragraph 152 above] increases the cost of rectification to $20,800.

157 I acknowledge again that Mr Eldridge had allowed $5,750 for removing and storing the pavers for re-use, but confirm that I reject the figure as he could not break it down and justify it. I add that I suspect to allow any part of it would create a degree of double counting between this figure and the allowance already made for lifting and cleaning the pavers. I accordingly make no further adjustment to the rectification costs.

158 The upshot is I find that the cost to Mr Gribbin of having to rectify all the pavers is assessed at $20,800. This is the sum to be awarded to Mrs Tambassis on her claim.

The counterclaim

159 For the reasons explained, I am satisfied that Mr Gribbin is entitled to an award on his counterclaim of $12,124. This sum is to be set off against the amount due to Mrs Tambassis of $20,800. Mr Gribbin's net liability Mrs Tambassis accordingly is $8,676. I will make an order for payment of that sum from Mr Gribbin to Mrs Tambassis.

Costs

160 I will reserve costs. Any application for costs by the parties to be made within 60 days.

Reimbursement of fees

161 The issue of whether one party or to reimburse any fee to another party under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is also reserved. Any application for fees is to be made within 60 days.

Interest

162 Leave is reserved to Mrs Tambassis to apply for interest. Any application for interest is to be made within 60 days.

Member C Edquist