Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Keith v M & M Building Pty Ltd; M & M Building Pty Ltd v Keith [2016] NSWCATCD 43**
Hearing dates:	30, 31 March 2016
Decision date:	06 May 2016
Jurisdiction:	Consumer and Commercial Division
Before:	Jeffery Smith, Senior Member
Decision:	1 The application in respect of Shaun Mowbray and Malcolm Blair is dismissed as being withdrawn pursuant to the provisions of the Civil and Administrative Tribunal Act 2013, s 55(1)(a). 2 The builder, M & M Building Pty Ltd shall pay to the homeowners Duncan Keith and Emma Keith, jointly, the sum of $421,960.69 immediately. 3 The builder, M & M Building Pty Ltd shall forthwith provide to the homeowners Duncan Keith and Emma Keith all receipts for white goods purchased on behalf of the homeowners. 4 If the parties are unable to agree on the issue of costs any party seeking a costs order must file and serve a short written submission on that issue only, within 21 days of the date of these orders. The submission shall include a short written submission on whether the Tribunal should make an order dispensing with a hearing on the issue of costs pursuant to the provisions of the Civil and Administrative Tribunal Act 2013 s 50. 5 The other party shall within 21 days of receipt of that submission file and serve a short written submission in reply. The submission shall also include a short written submission on whether the Tribunal should make an order dispensing with a hearing on the issue of costs pursuant to the provisions of the Civil and Administrative Tribunal Act 2013 s 50. 6 The applications are otherwise dismissed.
Catchwords:	Termination of building contract at common law

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Home Building Act 1989
Cases Cited:	Galafassi v Kelly [2014] NSWCA 190, Shevill v Builders Licencing Board [1982] 149 CLR 620, Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd [1989] 166 CLR 623, Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] 233 CLR 115 and Foran v Wight [1989] 168 CLR 385, Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] 157 CLR 17, Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] 236 CLR 272, Bellgrove v Eldridge [1954] 90 CLR 613, Hadley v Baxendale [1854] 156 ER 145
Category:	Principal judgment
Parties:	Duncan Keith and Emma Keith, (homeowners- applicants) M & B Building Pty Ltd, (builder - respondent)
Representation:	Counsel: Mr d'Arville for the homeowners -applicants Solicitors: Mr Snelgrove for the builder - respondent)
File Number(s):	HB 15/31711 and HB 15/66010
Publication restriction:	Nil

REASONS FOR DECISION

INTRODUCTION

1 Application HB 15/31711 was filed in the Tribunal by the homeowners on 4 May 2015. The application initially sought orders for work to be done to the approximate value of $200,000 together with orders for relief of payment of a sum allegedly owed to the builder. In addition to M & M Building Pty Ltd, the application also named Shaun Mowbray and Malcolm Blair as respondents. On 7 December 2015 the application was amended, on request of the homeowners and by order of the Tribunal, to seek orders for payment to the homeowners in the sum of $500,000.

2 Although losses of some $630,000 had allegedly been suffered by the homeowners, their claim was limited to $500,000. In opening submissions on the first day of hearing the application was further amended to seek orders for $489,198.78 plus $1,740 for storage costs. In addition the homeowners sought orders for provision to them of receipts for various whitegoods purchased by the builder on their behalf.

3 Application HB 15/66010 was filed by the builder on 10 December 2015. The builder's application was accompanied by Points of Claim in which the builder sought orders for payment to the builder of $13,516 allegedly outstanding under the contract *including*

interest on the outstanding payments. In the builder's Points of Claim the allegedly unpaid tax invoices were listed and together amounted to $20,116. No explanation was given as to why the sum claimed was only $13,516 nor of how much of that sum was made up of interest arising under the terms of the contract. In addition the builder sought orders for unspecified amounts arising from allegedly wrongful termination of the contract by the homeowners.

4 By consent of the parties and without any issue relating to costs being raised the names of Shaun Mowbray and Malcolm Blair were removed, by order of the Tribunal, as respondents on application HB 15/31711.

5 The issue of how and in what circumstances the contract had terminated was hotly contested by the parties. The significance of that issue related to whether the homeowners' claim in respect of the allegedly incomplete work could be maintained. The builder's claim for damages arising from wrongful termination of the contract by the homeowners was never clearly articulated or pressed.

6 Both applications proceeded together and the evidence in one was taken as evidence in both.

JURISDICTION

7 There was no dispute that the Tribunal has jurisdiction to hear and determine both applications pursuant to the provisions of the *Home Building Act 1989* s 48K and the *Civil and Administrative Tribunal Act 2013* Part 3.

HOMEOWNERS' CASE

8 The homeowners' submissions were to the following relevant effect.

9 The homeowners engaged the builder to carry out substantial renovation and extension of their home at Seaforth, New South Wales. The parties entered into a standard form, fixed price, Master Builders BC4 contract on 3 July 2014. That contract referred to plans and specifications prepared by the George Group of architects which in turn referred to structural drawings prepared by Civil and Structural Engineering Design Services Pty Ltd.

10 The contract sum was $287,409.57 and the proposed commencement date for work was 7 July 2014 with a 90 day completion period. Work did not commence until around 21 July 2014 and under the terms of the contract was due for completion by 4 November 2014. By February 2015 there was a considerable part of the work that was not completed and the homeowners sought the assistance of the Office of Fair Trading.

11 A Rectification Order was made under the provisions of the Home Building Act 1989 s 48E for the work to be completed in accordance with the contract by 7 June 2015. However, the builder did not complete the work in accordance with the Rectification Order and has abandoned the contract.

12 By email dated 29 April 2015 the homeowners had given notice to the builder of a dispute pursuant to cl 26 of the contract and had issued a notice of default pursuant to

cl 28(a)(ii) of the contract. As the builder failed to remedy the breach the owners had, by letter dated 10 August 2015, terminated the contract.

13 A letter from the builder to the homeowners dated 25 May 2015 purporting to terminate the contract for non-payment was of no force or effect because the homeowners at that time had paid the builder more than was due under the contract.

14 The contract itself required the work to be carried out in a "*proper and workmanlike manner*" and "*in accordance with the plans and specifications set out in the contract"* (cl 1(b)) and cl 1(c)(i) required the work to comply with the BCA and all other relevant codes, standards and specifications required by law and the conditions of any relevant development consent.

15 The work had not been carried out in accordance with the contract or the development certificate in regard to compliance with the structural drawings prepared by Civil and Structural Engineering Design Services Pty Ltd and there were extensive defects and incomplete works as set out in the expert evidence relied on by the homeowners.

16 Further, the contract (cl 1(b)(iv) required that the works be carried out "*with due diligence*" and *"within the time stipulated in the contract*". The work was not completed by 4 November 2014 as required under the contract and as at the date of termination of the contract remained substantially incomplete.

17 As a result of the above sequence of events the homeowners were entitled to be compensated for the cost of rectifying work found to be defective and also for the cost to complete any incomplete work.

18 The homeowners relied on the following evidence:

(a) Affidavits of Emma Keith dated 24 August 2015 and 7 February 2016,

(b) Affidavits of Duncan Keith dated 24 August 2015 and 7 February 2016,

(c) Report of Geoff Keighran (engineer) dated 31 July 2015,

(d) Report of Stuart Bayliss (coatings) dated 10 July 2015,

(e) Report of David Hall (building) dated 6 August 2015,

(f) Report of David Madden (quantity surveyor) dated 14 August 2015,

(g) Joint report of Messrs Keighran and Stubbs dated 29 January 2016,

(h) Joint report of Dr Bayliss and Mr Todhunter dated 27 January 2016,

(i) Joint report of Messrs Hall and Matley,

(j) Joint report of Messrs Madden and Matley dated 18 March 2016.

19 In addition the homeowners and all of their expert witnesses gave evidence on affirmation and were cross examined on their evidence.

20 A number of documents were filed as an agreed bundle, including a Scott schedule.

BUILDER'S CASE

21 The builder's submissions were to the following relevant effect.

22 In regard to the homeowners' claim to have terminated the contract pursuant to cl 28(a)

of the contract, that purported termination was invalid and not in accordance with the provisions of the contract. The homeowners had, by their attempted termination, evinced an intention to be no longer bound by the terms of the contract which amounted to a repudiated of contract by the homeowners. The builder accepted that repudiation and validly terminated the contract. The homeowners' claim for the cost of completion must therefore fail.

23 In regard to the Rectification Order issued on the builder, it was submitted that the Order was subject to the condition that the homeowners pay progress payments as they fall due. The homeowners failed to make progress payments and, in breach of the contract, commenced these proceedings prior to the expiry of the time specified in the Rectification Order for completion of the work.

24 On enquiry by the Tribunal the builder's representative made clear that the cross claim for payment for variations was made pursuant to the terms of the contract. That is, there was no claim made by the builder for payment of the variations on a *quantum meruit* basis.

25 The builder's submission was that the structural engineering works had been conducted in accordance with the engineering plans provided by R E Proud and Associates Pty Ltd, civil and structural engineers. That firm, it was submitted, had been engaged with the knowledge and consent of the homeowners in the expectation that the originally designed timber and brick on concrete pier foundations would be changed to a steel underfloor framework to effect savings for the homeowners.

26 The builder contested the extent, the proposed method of rectification and the cost of rectification and completion of works and relied on the following evidence.

(a) Affidavit of Stewart Malcolm Blair with annexures SMB1, SMB4 and SMB5 dated 21 July 2015,

(b) Statement of Stewart Malcolm Blair dated 23 November 2105,

(c) Statement of Shaun Mowbray dated 23 November 2015,

(d) Report of David Stubbs (engineer) dated 23 November 2015,

(e) Report of Alan Todhunter (coatings) dated 23 November 2015,

(f) Report of Geoffrey Matley (building) dated 24 November 2015,

(g) Joint report of Messrs Keighran and Stubbs dated 29 January 2016,

(h) Joint report of Dr Bayliss and Mr Todhunter dated 27 January 2016,

(i) Joint report of Messrs Hall and Matley,

(j) Joint report of Messrs Madden and Matley dated 18 March 2016.

27 In addition to Mr Mowbray and Mr Blair, each of the expert witnesses relied on by the builder gave evidence on affirmation and was cross examined on their evidence.

28 The parties also filed a number of documents as an agreed bundle including a Scott schedule.

DID THE CONTRACT CALL FOR CONSTRUCTION IN ACCORDANCE WITH ENGINEERING DETAILS PROVIDED BY PROUD & ASSOCIATES?

29 There is no dispute that the parties entered into a standard form fixed price “BC4” contract on 3 July 2014. The contract sum was $287,409.57. There is no dispute that the specifications of the George Group Architects were adopted in the contract.

30 The builder maintained that the engineering plans provided by Civil and Structural Engineering Design Services Pty Ltd did not form part of the contract. Mr Mowbray’s position was that in discussions held prior to preparation of the contract it was agreed to engage R E Proud & Associates Pty Ltd to prepare a steel sub-floor framework to reduce costs. Mr Mowbray was not an impressive witness. During the course of cross examination it became apparent that alleged conversations and documents that Mr Mowbray considered relevant had not been mentioned in his statements or filed with his documents. Mr Mowbray, under cross examination, acknowledged that he had not previously suggested any conversation had been held with the owners’ architects with a view to engineering design changes. The decision to change the design, it was claimed by Mr Mowbray, was embodied in the quotation dated 3 July 2014 which made some reference to provision of steel members.

31 The homeowners denied that they gave approval for the change to steel sub-floor framework but acknowledged that a preliminary discussion on that issue did take place. No payment was made by the homeowners to the engineers who were engaged directly by the builder. Mrs Keith, under cross examination, did however acknowledge that she had seen the subject steel arrive on site and that she did not raise the issue with the builder.

32 The contract itself, at Schedule 3, refers to the quotation and adopts the George Group specifications and plans. The George Group specifications, at “Appendix 2: Schedule of documents”, refers to Civil and Structural for the engineering plans and certification. There is no mention in the contract and there is no written variation to the contract to which I was referred that corroborated the builder’s submission that the parties had agreed to change the engineering plans and certification from Civil and Structural to Proud & Associates.

33 I am therefore satisfied that the contract required the builder to construct the works in accordance with the plans provided by Civil and Structural Engineering Design Services Pty Ltd. The builder, without proper authority varied the contract to the construction method set out in the engineering plans provided by R E Proud and Associates Pty Ltd.

34 However, as the homeowners acknowledge that there had been some preliminary discussion of the potential to vary the engineering plans and because the homeowners had seen the steel arrive on site and be installed and because they raised no objection with the builder, I am satisfied the homeowners acquiesced in the change. The homeowners’ acquiescence is further supported by the agreement made at the time of the discussions with the inspector from the Office of Fair Trading to accept the certification provided by Proud & Associates on the basis that the builder would pay their fee.

HOW AND IN WHAT CIRCUMSTANCES DID THE CONTRACT TERMINATE?

35 Both parties claim to have validly terminated the contract.

36 The builder's argument on this issue is not clear. Mr Mowbray claims that the homeowners took possession of the site on or about 28 October 2014. It was not denied by the homeowners that they had moved in and occupied part of the premises on 7 or 8 November 2014. Mr Mowbray agreed under cross examination that the homeowners had taken possession with the knowledge and consent of the builder. In those circumstances the taking of possession by the homeowners cannot amount to a repudiation of contract and indeed the builder does not rely on that fact as a repudiation of the contract.

37 The builder's position is that work on the site was formally suspended pursuant to "Article 20(c)" by letter dated 25 May 2015, due to the homeowners' alleged failure to make payment on invoices.

38 Further, the builder claims that the homeowners' purported termination of the contract, for reasons discussed below, was invalid. The builder's position was that it was the purported termination of contract by the owners, at a time when the works were validly suspended by the builder, which amounted to a repudiation of contract by the owners which was accepted by the builder.

39 There are a number of difficulties with this argument.

40 Firstly, it is clause 21 of the contract that deals with the builder's rights to suspend work for non-payment. Clause or "Article" 20(c) places an obligation on the owner to pay a progress claim by the builder within a timeframe. It does not give rise to any right for the builder to suspend works. Hence the notice of suspension dated 25 May 2015 was not validly issued under the terms of the contract.

41 Secondly, the notice of suspension relied on by the builder refers to invoice EDK021 of 10 December 2014 in the sum of $6,600 as being outstanding but attaches a schedule indicating that a number of other invoices amounting in all to $20,739.25 remain unpaid. Even if the notice of suspension were validly issued pursuant to clause 21 of the contract, it would not be possible for the homeowner to know, by reference to that notice, how much they must pay to have the suspension of works lifted.

42 It is also noted that a copy of the invoice in question EDK021, or any of the other invoices referred to in the attachments to the letter of suspension, were not in evidence.

43 Mrs Keith gave evidence that the invoice of 10 December 2014 was for a sum of $6,600 for supply of windows. The windows had not been provided and a substantial part of their cost had already been paid by the homeowners. The homeowners therefore considered that further payment was not due at that time. Mr Mowbray's evidence was that there had been a delay in ordering and delivery of the windows due to a cash flow problem being experienced by the builder.

44 On the evidence the builder has not established the owners were in breach of their payment obligations under clause 20 and I am therefore not satisfied that the builder

was entitled to issue a notice of suspension under clause 21 of the contract. I am also satisfied that the notice that was issued by letter of 25 May 2015 purporting to be a notice of suspension of works referred to an incorrect clause of the contract, was not issued in accordance with the contract and was therefore of no force or effect.

45 The builder alleges that the homeowners, by issuing an invalid notice of termination of the contract on 10 August 2015 repudiated the contract. The actions of the homeowners indicated their intention to be no longer bound by the terms of the contract. The builder, it was submitted, was entitled to accept the repudiation and to treat the contract as being terminated. The difficulty with the builder's argument on this point is that termination for breach is not automatic. The innocent party is entitled to insist on performance or to terminate. If the decision is to determine the contract then it must be communicated to the other party in unequivocal terms.

46 No evidence was given of the builder having accepted the repudiation and terminating the contract. Mr Mowbray under cross examination acknowledged that the builder remained on site beyond February 2015 and believed it was still working at the time of the first notice of hearing issued by NCAT which was on 12 May 2015. Without at this stage making a determination on the issue of the validity of the homeowners' notice of termination I am not satisfied that there is any evidence that the builder accepted the alleged repudiation and terminated the contract.

47 The builder has therefore not established that it validly terminated the contract at any time.

48 The homeowners claimed to have issued a notice of dispute pursuant to clause 26 of the contract and a notice of default pursuant to clause 28(a)(ii) of the contract. These notices were said to have been given by email sent by the homeowners to the builder on 29 April 2015.

49 The homeowners claimed to have then terminated the contract pursuant to clause 28(a) by letter to the builder dated 10 August 2015 as the builder had failed to remedy the notice of default for more than 25 days.

50 Mrs Keith agreed under cross examination that there had been no attempt by the parties to meet within 10 days of the notice of dispute as required by clause 26 of the contract and that she was therefore not entitled to terminate the contract pursuant to clause 28. Mrs Keith further agreed that the details of the alleged default of the builder were not set out in the notice of default as required under clause 27 and that as a result the notice of termination could not, pursuant to clause 27, be considered a valid notice.

51 Despite Mrs Keith's agreement that there had been no meeting of the parties as required by clause 26 of the contract I am satisfied that the meeting between the parties and the inspector from the Office of Fair Trading and the agreement made at that meeting effectively satisfied that requirement of clause 26. However the default notice, as acknowledged by the homeowner, did not set out any detail at all of the alleged failings of the builder and accordingly, pursuant to clause 27 of the contract the notice of termination issued under clause 28 was not valid.

52 For these reasons I am satisfied that the homeowners did not validly terminated the contract in accordance with the terms of the contract.

53 During the course of the hearing I asked the parties whether, at some stage, it would be necessary for me to turn my mind to the issue of whether the contract may have been terminated at common law.

54 Written submissions on behalf of the homeowners on that issue were made to the following effect.

55 Where a party to a contract is either unwilling or unable to perform its contractual obligations, that is, it has evinced an intention to no longer be bound by the contract or that it intends to fulfil the contract in a manner substantially inconsistent with its obligations may give rise to the right for the other party to terminate the contract. Reliance was placed on the decisions of *Galafassi v Kelly* [2014] NSWCA 190, *Shevill v Builders Licencing Board* [1982] 149 CLR 620, *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] 166 CLR 623, *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] 233 CLR 115 and *Foran v Wight* [1989] 168 CLR 385.

56 The matters demonstrating the builder's refusal or inability to perform its obligations under the contract were said to be:

(1) Between August 2014 and February 2015 the builder carried out works without a building licence contrary to the provisions of the Home Building Act 1989 s 12 and 13. After February 2015 the builder could only carry out building work not requiring statutory insurance (that is, for a price of less than $20,000). It was therefore unlawful under the provisions of the Home Building Act for the builder to do any further work,

(2) By August 2015 when the contract was terminated the builder had over-run the date by which completion was required under the contract by some nine months,

(3) The builder carried out the works in accordance with engineering drawings not approved by the homeowners,

(4) A significant part of the incomplete work was delivery and installation of the kitchen and windows. This failure was due to the cash-flow problems being experienced by the builder,

(5) The continuing failure of the builder to rectify the defects complained of by the homeowners was a continuing breach of clauses 1(b) and 1(c) of the contract.

57 The homeowners' position was that the notice of termination issued by them in August 2015, although issued pursuant to the contract, was sufficient to terminate the contract at common law as it was not necessary for that notice to explicitly refer to common law termination. Reliance for that proposition was placed on the decision in *Kennedy v Collings Construction Company Pty Ltd* [1989] 7 BCL 25 where it was said by Giles J that:

> "Although in framing the notice given thereby the letter uses the language of clause 13, that language was apt to express the acceptance of the recited repudiation, and in my view in the light of recital (g) and the claim for damages, can and should be read as such acceptance whereby the contract was brought to an end."

58 The builder's submission on the issue of common law termination of the contract was to

the following effect.

59 Clause 26 of the contract provides that where the parties did not meet in accordance with the clause:

> "a party is not entitled to terminate the contract whether pursuant to clause 28 or 29 or otherwise"

60 This provision of the contract, it was submitted, precluded the homeowners from terminating at common law. Reliance in this regard was placed on the decision in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] 157 CLR 17.

Determination of the issue

61 The above mentioned reliance on the principles enunciated by the High Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* to preclude reliance on common law termination of the contract was, I am satisfied, misplaced. That was a case dealing with re-entry by a landlord to a Torrens title property subject to an unregistered lease. The discussion of the Court was principally concerned with the recovery of damages in a case of common law repudiation in distinction to termination under the contract. However, the Court confirmed its view that a party to a contract may rely on the common law principles for termination for fundamental breach despite a contractual provision precluding termination under the contract.

62 Without attempting to clarify the Court's decision on the issue, the rationale is that if one party to a contract is in fundamental breach of that contract and evinces an intention to no longer be bound by the contract there would be an inconsistency to then allow that party to rely on a contractual term that precluded the innocent party from its common law remedy. That is sufficient to dispose of the builder's argument on that point, however I make the following additional observations.

63 I am satisfied, as already mentioned above, that the parties did in any event meet with a view to resolving their differences. That meeting was in the presence of the Inspector from the Office of Fair Trading and to the extent necessary that meeting satisfied the requirement of clause 26 to hold a meeting.

64 Turning to the facts. There was no dispute that the contract called for a 90 day construction period which, based on commencement of work on 21 July 2014 required the builder to complete the works by 4 November 2014.

65 The builder claimed that there had been a delay in completion of the works due to a number of variations requested by the owners. However the quotes for variations provided by the builder made no mention of an extension of time being necessary to complete the works.

66 Mr Mowbray, under cross examination, claimed that a request for an extension of time was made on a specific "extension of time document" and sent to the homeowners by email and by post. No copies of such documents were in evidence. There was no evidence of the builder having notified the owners in writing of any cause for delay or any stated extension of time for completion, as required by clause 11 of the contract

other than the claim for an extension based on the builder's need to obtain legal advice. I am not satisfied there is any entitlement under the contract to an extension for that purpose.

67 Mr Mowbray also agreed under cross examination that by May 2015 when the builder purported to suspend the works, there was already a delay of some six and a half months in completion of a contract with a 90 day construction period. He also agreed that the delay was largely due to a cash flow problem experienced by the builder which precluded the builder making arrangements for delivery of materials (specifically the windows).

68 This delay in completion of the work was very substantial and continued through the period in which the works were to be completed under the Rectification Order (that is, by 7 June 2015).

69 The contract itself at clause 1(b)(iv) required that the work "*be done with due diligence and within the time stipulated in the contract*". There is no question that the builder was in breach of the obligation imposed by clause 1(b)(iv).

70 The question is whether the failure of the builder to complete the work within the stipulated time, that is by 4 November 2014, and with due diligence amounted to a substantial breach or repudiation of the contract. The answer to that question is a matter of the extent and degree of the delay. If a delay in completion is relatively short then such a breach may fall short of repudiation. In this case the delay was more than twice the initial construction period and even when the contract was eventually terminated some nine months after the contracted completion date, the work remained substantially incomplete. The homeowners had persistently requested the builder to complete the work and to provide a schedule for doing so and the inspector from the Office of Fair Trading had ordered the builder to do so.

71 I am satisfied in these circumstances that the builder's failure to do the work with due diligence and within the time stipulated amounted to a fundamental breach of contract and was in fact a repudiation of the contract by the builder.

72 The homeowners were entitled to accept the repudiation and terminate the contract in unequivocal terms or to ignore the repudiation and allow the contract to run. They chose to terminate the contract and did so by letter dated 10 August 2015.

73 I am satisfied that letter, although not terminating the contract validly pursuant to the terms of the contract was sufficient to advise the builder unequivocally that the homeowners terminated the contract for reason of the failure of the builder to proceed with the works with due diligence.

74 I am satisfied therefore that the homeowners, by letter to the builder dated 10 August 2015, validly terminated the contract at common law.

CONSEQUENCES OF THE FINDINGS ON TERMINATION

75 As it was the homeowners who validly terminated the contract they are entitled to be

compensated in damages not only for the cost of rectification of those items of work shown to be defective and for other losses arising from the builder's repudiation but also for the cost of having the works completed by others.

76 Of course, the builder is entitled to a set-off of any amount shown to be owing to the builder under the contract as at the date of termination and any interest on such sum owing by reason of the terms of the contract. The builder is also entitled to a credit of any sum allowed for in the contract that remains unspent.

IS THE WORK DEFECTIVE AND/OR INCOMPLETE?

77 The homeowners' written opening submissions provided a useful summary of the allegedly incomplete and defective work in dispute. They comprise:

(a) Underfloor framework

(b) Roof construction

(c) Wall construction

(d) Decking

(e) Original garage floor slab

(f) Other items including chimney, sewer/drainage works

(g) Some work was agreed as being defective or incomplete but the experts disagreed on the remediation methods and cost. Those items include brickwork, main bathroom, stairs, kitchen and laundry.

78 The homeowners' submission was that they were entitled to rely on the principles set out by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] 236 CLR 272. That is, the homeowners were entitled to have their extension built in accordance with the Civil and Structural Engineering Design drawings referred to in the contract and should not be forced to accept the work based on the R E Proud & Associates drawings.

79 Further, pursuant to the principles set down by the High Court in *Bellgrove v Eldridge* [1954] 90 CLR 613 the correct measure of damages includes the cost of demolition and reconstruction of the defective works.

THE EXPERT EVIDENCE

80 During the taking of concurrent evidence the Tribunal had the opportunity to observe the various experts. Whilst all were well qualified and provided their evidence in accordance with the Tribunal's code of conduct for expert witnesses I am satisfied that where Mr Hall and Mr Mately were in disagreement I prefer the evidence of Mr Hall.

81 The reason is simply that Mr Hall was very clear in his explanation of his reasons for holding particular opinions and his explanation of the necessary remedial work. Mr Mately's opinion on the other hand was compromised by claimed lack of adequate instruction and assumed engineering or other certification which was not forthcoming. Further, Mr Mately's report relied to a significant extent on his opinion on legal issues.

THE SCOTT SCHEDULE

Item 1, original garage floor slab

82 The engineers jointly inspected the garage floor slab and determined that there is some cracking of the concrete over-lay. There was no agreement that the cracking was only 1mm, but the homeowners' expert did agree that it was less than 5mm. The homeowners' expert was of the opinion that the over-lay is a structural element of the floor and that the engineer ought to have investigated the adequacy of the old slab. The builder's expert assumed that had been done but there was no evidence from Mr Proud as to the structural adequacy of the underlying slab.

83 The builder was building on what was previously a garage floor. Its obligation under the Home Building Act s 18B(c) and under clause 1(b) of the contract was that the work would comply with any law. It is true that the owner was obliged under clause 2(g) of the contract to provide any necessary approvals but, if not provided, the builder was entitled to suspend works. Hence, the argument by the builder's expert that the owners were responsible for obtaining approval from Sydney Water and certificates of adequacy for the pre-existing slab does not entitle the builder to go ahead and build non-complying works.

84 I am satisfied that the structural adequacy of the old-garage floor has not been established and that up-grading that area to habitable space by over-laying the concrete slab requires engineering certification. I am satisfied the burden is upon the builder to establish that the structure, as built, meets all engineering standards for structural adequacy which has not been done. Rectification will be required.

85 The evidence of the homeowners' expert was that the cost to replace this area would be $69,882.78, whilst the builder's expert accepted that the rectification cost was $44,463.03 on an "if found" basis. However the builder's expert did not include the cost of timber floors, windows and tiling in his cost estimate.

86 I therefore accept Mr Madden's costing as the most accurate measure of the remedial cost and allow the sum of $69,882.78.

Item 2, floor framework

87 The homeowners' submission was that the steel framework was built contrary to the requirements of the drawings prepared by Civil and Structural Engineering Design and should be demolished for that reason. However, for reasons provided above I am satisfied that although this work was done contrary to the contractual requirements the homeowners acquiesced in the change to steel.

88 The engineers both agreed that the steel framework was generally completed in accordance with the design provided by R E Proud & Associates.

89 However, despite the change from timber frame to steel frame there was no change to the fact that the George Group specifications remained part of the contractual documents. Those specifications required that all exposed steel "is to be fully hot dip

galvanised".

90 It was not disputed by the experts that the steel supplied was not galvanised and that it was rusting.

91 I accept the opinion of Dr Bayliss (coatings expert) that AS4100 is the appropriate standard to apply to the steel despite the opinion of Mr Todhunter to the contrary. The fact of the matter is that the work was never completed by the builder, it was left exposed to the elements and is showing signs of serious deterioration which requires correction. Mr Todhunter sought to maintain his position despite the fact that it was demonstrated that parts of the steel were in contact with the ground and clearly exposed to any moisture from that source.

92 I am also satisfied that the opinion of Dr Bayliss that demolition will be required should be accepted. *In situ* rectification as suggested by Mr Todhunter will provide the homeowners with steel framework that requires regular maintenance every 10 to 15 years rather than being maintenance free for 50 years they could reasonably expect had the hot dip galvanising been provided.

93 I therefore accept the costing proposed by Mr Madden of $48,316.29 as the more accurate measure of the remediation costs. Mr Matley's estimates did not include the cost of demolition. Similarly his figure for rectification of the acknowledged sagging insulation did not provide for demolition and replacement. Therefore Mr Madden's estimate of $1,429.67 for that item is allowed.

94 In addition the sum of $7,827.40 is allowed for the replacement of the concrete piers for which there was no engineering certification.

Item 3, wall framework and bracing

95 The homeowners' experts (engineer and builder) both gave evidence that the walls were inadequately braced. Despite the builder's expert (Mr Matley's) opinion that engineering certification could demonstrate that adequate bracing was in place, that certification was not in evidence. I accept that the walls were not adequately braced.

96 Under cross examination Mr Hall described the scope of the necessary remedial work and gave clear reasons for the need to remove the cladding and correct the bracing. That is, the scope of the work described as being necessary by Mr Hall was both understandable and under cross examination was not disputed by Mr Mately. I allow the sum of $55,652.38 as estimated by Mr Madden on the basis of the scope suggested by Mr Hall as the more accurate measure of rectification of the bracing.

97 Mr Hall gave evidence of the scope of proposed installation of windows and doors with which Mr Mately agreed. The cost of installation, based on Mr Hall's proposed scope and prepared by Mr Madden was $49,779.16. I allow that sum together with the sum of $4,390.45 to correct the supporting of the attic flooring for which engineering certification was not provided.

Item 4, roof construction

98 Although the homeowners' building expert was of the opinion that there was some minor roof spread (as evidenced from the bellying of the guttering) the building experts acknowledged that the issue was an engineering one.

99 The engineers agreed that the roof had been constructed in accordance with the drawings provided by R E Proud & Associates. I am not persuaded by the homeowner's engineer whose opinion was that the roof was *theoretically* structurally inadequate and requires demolition. There is insufficient evidence to conclude that the roof is structurally inadequate.

100 The contract itself (and the warranties provided under the Home Building Act provides that all materials will be new unless otherwise stated in the contract. It is not disputed that second-hand tiles were provided by the builder.

101 Mrs Keith, under cross examination, agreed that she had requested the builder to source and supply second-hand tiles to match the existing tiles. I am therefore not satisfied the homeowners have made a case for replacement of the second-hand tiles used.

102 I accept that the missing guttering, box gutter, downpipe and flashings are incomplete work. Mr Mately agreed under cross examination that should those items be determined as incomplete work the cost of providing them is $7,643.08. I allow that sum.

103 In regard to the metal roofing it was Mr Hall's opinion that there was no insulation provided. Mr Mately's response was that he had been told by the builder that the insulation was provided. There was no evidence from the builder to support that proposition and I therefore accept Mr Hall's opinion that it was not provided. I allow the sum of $13,569.72 for that item.

Item 5, the decking

104 The parties' building experts both agreed that the method of affixing the decking was defective and had caused significant damage to the decking timbers. The parties' experts also agreed on the appropriate method of rectification being replacement of the timbers and fixing by screwing rather than nails.

105 I allow the sum of $13,180.37 as suggested by Mr Madden as the most accurate costing of the remedial work.

Item 6, sewer gully and drainage

106 Again Mr Hall's opinion is called into question by Mr Mately on the basis that he has been advised by the builder that Sydney Water has inspected and certified all external drainage. However, no evidence was provided to support those assertions. Mr Mowbray did not provide evidence on that issue and the certificate from Sydney Water is not in evidence.

107 I accept Mr Hall's opinion in relation to the drainage. I accept that rectification is required and allow the sum of $7,353.49.

Item 7, brickwork

108 The parties agree that there are defects in the brickwork. The sum allowed by Mr Madden allows for correction of some work and replacement of some damaged bricks. I allow the sum of $1,615.77 based on that scope.

Item 8, the chimney

109 The essence of Mr Hall's concern about the chimney was that it had been constructed without adequate structural support. The QPanel provided is, in Mr Hall's expert opinion, not structural and requires adequate framework for support.

110 Mr Mately did not provide any opinion on that issue or the other issues raised by Mr Hall in relation to the chimney. He relied on the builder's instruction that the QPanels are structurally sound but Mr Mowbray's opinion is not provided elsewhere and would, in any event, not be that of an independent expert.

111 I am satisfied on the only expert evidence on this point that the chimney has been constructed without proper structural support and will require remediation in the manner suggested by Mr Hall. I allow the sum claimed being $8,019.36.

Item 9, main bathroom

112 There is no dispute between the experts that the work relating to the main bathroom remains incomplete. The difference in costing is minor. I allow the sum claimed being $16,611.38.

Item 11, the stairs

113 Mr Hall's evidence was that there are significant defects in the stairs as constructed. His concern relates to the material used for construction of the supporting structure, the evidence of screws penetrating the structure and the variation in height of the risers of the finished stairs.

114 Mr Mately's evidence is that the underside of the stairs is incomplete, the material used is satisfactory and the risers are within tolerance.

115 For the reasons already provided and also because of the supporting photographic evidence provided by Mr Hall, I accept the homeowners' evidence that the stairs as built are not compliant with the BCA and will require demolition and reconstruction at a cost of $21,182.82.

Item 12, kitchen, laundry and other incomplete work

116 There is no dispute by the parties' experts that the work remains incomplete. Mr Madden's opinion of the cost to complete is $58,332.26 whilst Mr Mately costing is $75,761.76.

117 As Mr Madden's costings have generally been accepted on other items, I allow the lower sum of $58,332.26.

Storage costs

118 In addition to the amounts set out in the Scott schedule the homeowners sought compensation in the sum of $1,740 in regard to the cost of storage of furniture for the period November 2014 to November 2015.

119 Neither of the parties' representatives adequately addressed this issue in their final submissions. The only evidence on this point consisted of an attachment to Mrs Keith's statement EK-1 (p 435). I am unaware of any evidence provided by the homeowners to support the sum claimed such as an accurate description of the goods stored, the reason for claiming for the period from November 2014 for one year, what steps if any that may have been taken to return the goods to the homeowners' residence. Further I am unaware of any conversation or agreement by the parties that may influence the homeowners' rights in light of the decision of *Hadley v Baxendale* [1854] 156 ER 145.

120 No amount is allowed for that item.

Whitegoods receipts

121 Mr Mowbray, under cross examination, confirmed that he had receipts for whitegoods purchased on behalf of the applicants and agreed to supply those receipts. An order is made in that regard.

The Bellgrove argument

122 For reasons already provided I am not satisfied that the homeowners are entitled to the cost of demolition and reconstruction based on the builder having built to the R E Proud drawings rather than the Civil and Structural Engineering Design drawings. Hence the general issue of the correct measure of damage based on the principles from *Bellgrove v Eldridge* do not arise.

123 However, in relation to some of the damages claimed and allowed (above, items 1, 2, 5 and 11) the need for demolition and reconstruction has been accepted. To the extent that has been necessary I am satisfied that, applying the rule of *Bellgrove v Eldridge* it is not only necessary to demolish and reconstruct in order to achieve contract compliance but that it is also a reasonable (and indeed the only) method to adopt in order to achieve the necessary contractual compliance.

Overpayments by homeowners

124 It is more convenient to deal with this issue below in considering the builder's cross claim.

THE BUILDER'S CLAIM

125 The builder's cross claim, as mentioned earlier, was for payment of $13,516 allegedly outstanding under the contract *including* interest plus unspecified damages relating to the allegedly wrongful termination of the contract by the homeowners.

126 The claim for damages arising from wrongful termination of the contract by the

homeowners falls away in light of the above decision that the homeowners validly terminated the contract at common law on 10 August 2015.

127 As mentioned already the builder's representative advised, when questioned at the hearing, that no claim was made by the builder based on a *quantum meruit.* Hence the builder's claim must be limited to a claim for variations made pursuant to the contract and in accordance with the Home Building Act plus any sum outstanding under the contract and any interest payable on that sum pursuant to the terms of the contract.

128 The builder's submission was that the sum of $13,516 was owed for unpaid tax invoices, a fact submitted by the builder to have been known to the homeowners at the time of filing their application. It was noted that both homeowners acknowledged that the tax invoice in the sum of $6,600 dated 10 December 2014 remained *unpaid* although the builder's written submission incorrectly stated that the sum was agreed as being *outstanding*.

129 Mr Blair, it was submitted, under cross examination gave evidence that $20,822.10 was owed under the contract.

130 Further, reliance was placed on the report of Mr Mately, appendix F, which set out a table of variations.

131 The homeowners agreed that a variation in the sum of $3,023.32 should be added to the contract sum. That figure is based on a review by Mr Hall of the claimed variations and a determination of whether they were agreed, whether the work was done and whether the work formed part of the contracted works or not.

132 Mr Mately, when giving concurrent evidence acknowledged that some of the variations for which payment was sought formed work that was included under the contract and some of the work for which a variation was claimed had not been performed at all.

133 I am not satisfied that the evidence from either Mr Mately or from Mr Hall is sufficient to determine the issue of variations. In a sense it is inappropriate for a building expert to give opinion on the issue in any event because it necessarily calls for a legal opinion on whether or not the variation was agreed in accordance with the contract and the Home Building Act.

134 Clause 14(c) of the contract provides that variations agreed to by the builder are to be put in writing and signed by the owner and the builder. That is also a requirement of the Home Building Act 1989 s 6(1)(b) and s 7(2). I have not been taken in the evidence to any variation that complies with those provisions.

135 The Home Building Act 1989 s 10 provides that a person who enters into a contract to which the requirements of s 7 apply that is not in writing is not entitled to enforce any remedy in respect of a breach by the other party. Thus, a builder cannot enforce payment by the owner *under the contract* for work done pursuant to an agreed variation that does not comply with s 7.

136 In some circumstances the builder may pursue a claim in *quantum meruit* for such work but that has no relevance in this application.

137 Thus, on the evidence the builder is not entitled as a result of the operation of the Home Building Act s 10 to pursue any claim for any of the variations. However, as the homeowners have conceded the sum of $3,023.32 I am satisfied that sum should be added to the contract price.

138 There is no logic to the builder's claim for payment of $13,516. The builder alleges that it is owed that sum for unpaid tax invoices, however provides little if any evidence to support that assertion bearing in mind that the subject tax invoices were not in evidence. Mr Blair claimed that the sum owing is in fact $20,822.10. If that is the case why was that sum not claimed by the builder?

139 The fact that a tax invoice for $6,600 has been sent to the homeowners and remains unpaid (which was acknowledged by the homeowners) does not necessarily mean that the sum is owed.

140 The correct method of determining whether any amount remains owing under the contract is simply to add to, or subtract from, the contract sum any variations made in accordance with the contract and deduct that figure from the payments actually made.

141 The total contract sum ($287,409.57) plus the allowed variation ($3,023.32) amounts to $290,432.89.

142 The question then is whether the homeowners have paid that amount or not.

143 It was the homeowners' evidence that the total sum of $327,607.20 had been paid to the builder. Mr Mowbray's evidence was that a slightly lower sum had been paid. As already mentioned and for reasons already given Mr Mowbray was not an impressive witness. To the extent of the slight difference I accept the evidence of Mrs Keith as the more accurate.

144 Deducting the sum of $290,432.89 from the sum of $327,607.20 it is evident that the homeowners have paid the builder $37,174.31 more than the contract sum as adjusted. Hence I am not satisfied that there is any further sum due to the builder pursuant to the contract and I am also satisfied that the homeowners are entitled to a refund of the overpayment of $37,174.31.

CONCLUSION

145 The total amount found to be owed by the builder to the homeowners for costs to complete and for rectification of defects is, as set out above, $384,786.38.

146 To that sum must be added the sum of $37,174.31 being the repayment of the over-payment.

147 The builder's cross claim has been entirely unsuccessful.

148 The net result is that the builder is to pay the homeowners the sum of $421,960.69. Orders are made accordingly.

COSTS

149 If the parties are unable to agree on the issue of costs, directions have been made

above to facilitate a hearing or a decision “on the papers” on that issue.

Jeffery Smith

Senior Member

Civil and Administrative Tribunal of New South Wales

6 May 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 06 July 2016