VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP993/2018

CATCHWORDS

DOMESTIC BUILDING Builder sued by subsequent owner pursuant to section 9 *Domestic Building Contracts Act* 1995–driveway found to be constructed contrary to the requirements of the building contract–of driveway found to have exceeded applicable Australian Standard 2890.1:2004–builder found to be liable to subsequent owner for breach of the implied warranties given to the owner and to subsequent owners–assessment of damages in respect of this defect, and other found defects.

Whether the subsequent owner was or ought to have been aware of claimed defects when purchasing the property; *Bonarrigo v DSF Pty Ltd trading as LaRosa Tiling Company* (Domestic Building) [2012] VCAT 1404; *Allianz v Waterbrook* [2009] NSWCA 224; *Beamish v Rosvoll* [2006] VCAT 440 considered.

DAMAGES–Damages awarded for severe physical inconvenience.

APPLICANT	Gavin Brown
RESPONDENT	S & B Weerasinghe Pty Ltd (ACN: 103 986 287) trading as SYD Homes
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	20-21 March 2019, 29 April 2019
DATE OF ORDER	30 August 2019
CITATION	Brown v S & B Weerasinghe Pty Ltd (Building and Property) [2019] VCAT 1329

ORDERS

1. The respondent S & B Weerasinghe Pty Ltd (ACN: 103 986 287) trading as SYD Homes must pay $64,442 to the applicant Gavin Brown.
2. Costs reserved.
3. Any application for costs must be filed and served by **17 September 2019**. Any responding material must be filed and served within 14 days of any such costs application being filed and served. In the event of there being an application for costs, the Tribunal will make its order on the papers, unless there is good cause for requiring the parties also to make oral submissions.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr G Brown in person
For Respondent	Mr N J Phillpott of Counsel

REASONS

Background

1 The applicant Mr Brown and his partner Ms Walton have lived at an address at Tipperary Circuit, Pakenham since January 2016.

2 Mr Brown purchased the property from a Mr and Ms Skinner for $330,000. He signed the contract on 31 October 2015, and the Skinners signed on 7 November 2015. Settlement took place on 11 January 2016.

3 The Skinners had previously engaged the respondent ("**S&B**") to construct the dwelling on the property under a building contract dated 1 October 2009 (the "**contract**"). An occupancy permit was issued on 26 November 2010.

4 Section 8 of the *Domestic Building Contracts Act 1985* (the "**Act**") sets out a number of mandatory warranties applicable to works carried out under a domestic building contract. Amongst other things, the warranties given by the builder are:

(a) that the work will be carried out by the builder in a proper and workmanlike manner, and in accordance with the plans and specifications set out in the contract;

(b) that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of the warranty, the *Building Act 1993* and the regulations made under that Act; and

(c) that the work will be carried out with reasonable care and skill.

5 Section 9 of the Act provides, in effect, that an owner for the time being of the building or land in respect of which the domestic building work was carried out under a domestic building contract may take proceedings for a breach of any of the warranties listed in section 8 of the Act, as if that person was a party to the domestic building contract.

6 Mr Brown, as an owner subsequent to the Skinners, alleges in the proceeding that S&B breached the above implied warranties, by defectively undertaking certain works at the property under the building contract.

7 By Points of Claim filed 11 October 2018, Mr Brown put his claimed loss and damage at $107,075 plus damages for severe physical inconvenience.

The hearing

8 At the hearing, evidence was given by Mr Brown and Ms Walton. Dr Andrew Barrowclough, a civil and structural engineer was called as an expert by Mr Brown.

9 Mr Matthew Osborne, registered building practitioner and carpenter and joiner with 32 years' experience in the residential construction industry was called as an expert by S&B.

The driveway claim

Evidence of the driveway not being suitable for use

10 Ms Walton has a Suzuki *Grand Vitara* 4x4 car. Mr Brown has a Holden *Rodeo* utility vehicle. Mr Brown gave evidence that although the *Vitara* can access the garage, the wheels of his *Rodeo* start spinning about three-quarters of the way up the driveway.

11 Mr Brown gave evidence that a few months after he and Ms Walton occupied the property, he reverse-parked his *Rodeo* at the top of the drive, and that the following morning he found that it had skidded down the drive, and across the road.

12 Mr Brown stated that he has not parked his *Rodeo* in the garage since then, and instead uses the garage largely as a storeroom for furniture and other personal items.

13 Mr Brown also gave evidence that when one of his friends visiting his property, required urgent hospitalisation, staff from emergency services informed him that they were unwilling to carry his friend on a stretcher down the driveway, for safety reasons.

14 He also gave evidence that the transition zone between the footpath and the driveway is insufficient, as the towbar of his *Rodeo* scrapes the pavement when ascending. A 2.4 tonne trailer attached to Mr Brown's digger also twice came off its towbar in the transition zone.

Requirements of relevant Australian Standard

15 *Australian Standard* 2890.1:2004, 2.6.2 *Gradients* states:

> The maximum gradient of domestic driveways shall be 1:4 (25%). The maximum gradient of the associated access driveway across a property line or building alignment shall be 1:20 (5%)…
>
> Grade changes across a footpath and within the property shall be designed and checked in accordance with Appendix C to ensure that vehicles will not scrape their undersides when negotiating them. Transitions may be required (see clause 2.5.3(d)). Checks may be required along one or both edges of a driveway as well as along the centreline if there are changes in the cross slope at or near a grade change.
>
> NOTE: It is recognised that limiting domestic driveway grades to 25 per cent maximum may not be practicable in some particularly hilly residential locations. The services of a professionally qualified person with appropriate experience may be required to make a judgement as to whether a particular grade line design is safe and environmentally sustainable.

16 The maximum gradient specified for a driveway is therefore a 1 metre rise in every 4 metres of horizontal distance (such a gradient being commonly referred to as "1:4").

The driveway as designed.

17 Plan 2 of 5 No 09:85 Revision A (the "**Site Plan**"), being one of the plans forming part of the contract, shows the position of the dwelling relative to the boundaries of the site, and the site's contours.

18 The direction notation appearing on the Site Plan is incorrect. For example, the garage faces approximately east, not approximately west as indicated in the direction notation endorsed on the Plan. For ease of reference, I will use the directions shown in the direction notation on the Site Plan, notwithstanding this error.

19 The Finished Floor Level ("**FFL**") of the garage slab is indicated in the Site Plan as 44.83 metres. The level of the edge of the footpath, towards the west, where the drive intersects with the footpath is recorded in the Plan as 43.20 metres at the northerly intersection, and 43.35 metres at the southerly intersection.

20 Taking the level of the footpath to be about 43.20 metres at the driveway intersection, the FFL of the garage, as designed, is calculated by Dr Barrowclough, the expert called by Mr Brown, to be 1.63 metres above the level of the footpath. I find this to be the case.

21 The horizontal setback of the western edge of the garage from the edge of the footpath is noted in the Site Plan as 7.275 metres.

22 This means that, as designed, the gradient of the driveway is less steep than 1:4 upmost gradient allowed by AS 2890.1, and is closer to 1:4.4.

23 The designed gradient of 1:4.4, relative to the maximum gradient of 1:4 allowed by AS 2890.1 is shown in Diagram A below for illustrative purposes.

The driveway as constructed

24 The horizontal setback of the western edge of the garage from the edge of the footpath is marked in the Site Plan as 7.320 metres. Dr Barrowclough is of the view that although not in accordance with the 7.275 metres setback stipulated in the Site Plan, is within acceptable tolerance of the Plan's requirements.

25 He has calculated, however, that the height of the garage is 2.05 metres above the level of the footpath, not 1.63 metres above the level of the footpath, as designed.

26 He concludes that this has resulted in a driveway gradient of 1:3.57, as also shown in Diagram A below.

27 S&B's expert Mr Osborne's calculations of the height of the garage above the footpath are broadly similar to Dr Barrowclough's: Mr Osborne calculates that the height of the garage is approximately 1.95 metres above the level of the footpath. He arrived at this calculation by taking the height of one side of the driveway (where it meets the garage) of 2.043 metres,

taking a further height of the other side of the driveway (where it meets the garage) of 1.872, and averaging the two heights thus obtained.

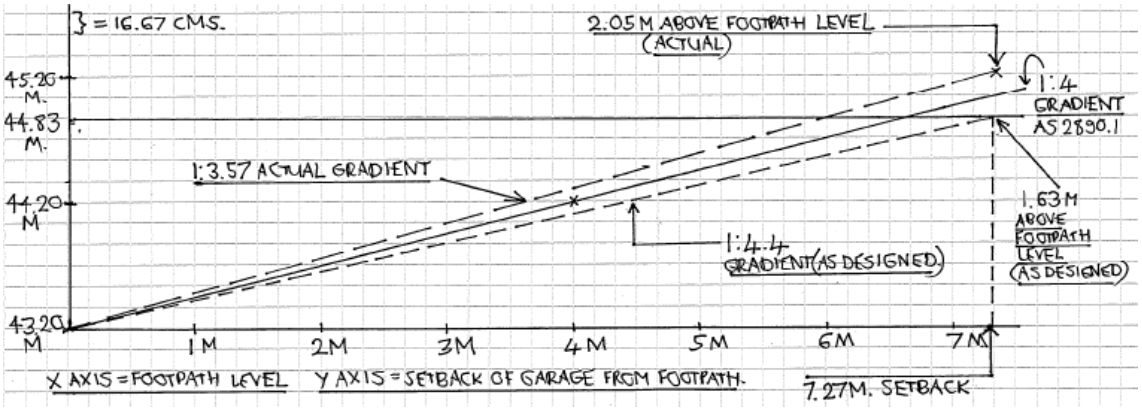

Diagram A

Experts Agree that the construction of the driveway does not meet AS 2890.1

28 The respective experts engaged by the parties both conclude that the driveway exceeds the required guidelines of 1:4, and is therefore defective.

29 Further, Mr Osborne, called by the builder, has also concluded that there are ineffective "transition" zones.

30 I also find, in particular, that the gradient of the driveway does not meet the requirements of the contract, and is therefore defective work by S&B, rendering S&B in breach of the implied warranties to which I have referred.

Was Mr Brown aware of the defective driveway at the date of purchase, such that he has incurred no loss?

31 Previous decisions of the Tribunal demonstrate that where an owner brings a claim against the previous owner's builder in respect of defects existing at the date of purchase, it is one thing to prove a breach of one of the implied warranties; it is quite another to establish that loss or damage results from the breach. In such cases, it is reasonable to presume that the subsequent owner made an allowance for known or patent defects in the dwelling when negotiating the purchase price. As such, the purchaser has no "loss" in respect of the known defects.[1]

32 A subsequent owner may lead evidence that he or she did not, in calculating the purchase price, take account of known or patent defects. In such a case, however, any loss will still be found not to have been occasioned by a breach of one of the implied warranties, but by the purchaser's decision to pay more for the property than what it was worth. Justice Ipp in *Allianz v Waterbrook*[2] considered the position of a successor in title who sought indemnity under a warranty insurance policy for breach, by a builder, of

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1 See *Bonarrigo v DSF Pty Ltd trading as LaRosa Tiling Company (Domestic Building)* [2012] VCAT 1404 at[33]-[40].

2 [2009] NSWCA 224.

statutory warranties (similar to the warranties in section 8 of the Act). The successor had acquired the property with knowledge of existing defects.

33 His Honour referred to case examples of plaintiffs who were unable to recover damages for breach of warranty or breach of contract in circumstances where their own intervening acts or omissions were found to have been the cause of their loss. His Honour stated:

> In my opinion, applying the same reasoning, a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects. In those circumstances, the builder's breach of statutory warranty could not be said to have diminished the successor's assets, nor increased its liabilities. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.[3]

34 His Honour noted that his above observation was:

> …predicated on the "full knowledge" of the defects as being not only knowledge of the existence of the defects but also knowledge of their significance. A party may know of the existence of the defects (because they are patent), but may not appreciate-even acting reasonably-that major expenditure would be required to remedy them.[4]

35 S&B relies on these principles for its primary submission that Mr Brown knew about the steepness of the driveway, and that he took it into account in the purchase price paid by him, and therefore Mr Brown has suffered no loss.

36 The correspondence between the parties is instructive in this respect.

37 On 8 December 2016 Mr Brown complained by email to Mr Weerasinghe of S&B:

> After seeking advice regarding the driveway which is at a 22 degree angle (20 is the maximum allowed) the driveway has not been built with good workmanship, care and skill as required, the driveway is dangerous and if a vehicle is parked on it, it slides down the driveway unless the vehicle wheels are [chocked].

38 Mr Weerasinghe replied by email dated 8 December 2016:

> I told [your vendor] before I did this driveway there are issues, and it is going to be steep. Because the land was on a high elevation, at that stage he agreed and I did the job.
>
> Subsequently he decided to sell the house, before you purchased this house you saw the condition of this driveway, if you were not happy at that stage, you did not have to purchase this house, now I can't do anything about this driveway any more, the previous owner was happy

[3] Ibid at [110].
[4] Ibid at [111].

> he was driving up & down, if you had raised this question before purchasing this house we would have told you we can't do anything about it.

39 By email dated 13 December 2016, Mr Brown wrote to Mr Weerasinghe:

> I have spoken to the Victorian Building Authority and have discussed the problem with them, I read your email to them and it's clear that you have stated you know it was outside the legal building requirements, however you built it anyway. That in itself is illegal. The building authority would like us to come to a resolution, if we can not, I have been advised to fill out their complaint form to get them involved.

40 By email dated 1 May 2017, Mr Brown again raised the question of the driveway with Mr Weerasinghe:

> …In a previous email sent from you, you have advised that you discussed the driveway was too steep with the client the house was built for, therefore admitting that you were aware at the time of building the property that was unsafe…

41 Mr Weerasinghe replied by email dated 16 May 2017:

> …Regards to this driveway, I am unable to do anything regarding this matter, this house was built by me for a client which I explained to him before building this driveway, he [accepted] it as he had a 4 wheel drive & he did not want to spend any extra money, then this house was sold to you…the sales rep [Mr Tangri] explained to you about the steepness of the driveway, and due to this, this was sold $20,000 less than the market value. If you have forgotten all this you can call the sales rep; he will tell you what he spoke at that time to put the price down.

42 There is also a statement, apparently signed by Mr Skinner, dated 10 September 2018 to the effect that the property was sold for $20,000 less than his asking price, but with no further detail of why this may have been the case.

43 Mr Brown gave clear evidence that he purchased the property for $330,000. The property had been previously advertised for a price that was "negotiable over $330,000".

44 Mr Brown said that following his inspection of the property on about 30 October 2015 he made an offer of $325,000 on the property, that that offer was rejected by the Skinners and that he made a further offer of $330,000. He contended that the further offer made by him was accepted.

45 Mr Skinner was not called to give evidence, and I discount his written statement.

46 I find that there is no credible evidence that refutes Mr Brown's contention that he did not obtain a discount on the asking price for the property on account of the steepness of the driveway. I therefore dismiss the

submission on behalf of S&B that Mr Brown paid less for the property on account of his alleged knowledge of the steepness of the driveway.

47 I also mention. in passing. that a reasonable conclusion that may be drawn from the correspondence between Mr Brown and S&B, although I make no finding in this respect, is that S&B may have been aware that the gradient of the driveway did not meet the requirements of the contract, and that it sought a waiver of some sort from the Skinners in regard to the breach.

Has the owner incurred no loss as a result of the defect, because he ought to have been aware of the defect?

48 It is also not always necessary that the successor in title have actual knowledge of an existing defect before it can be said that there is no loss arising from any found breach of a statutory warranty. I agree with Deputy President Aird's comments in *Beamish v Rosvoll*[5] when, in considering whether damages should be awarded to a purchaser of a home which had building defects, she commented:

> Where I am satisfied that a defect was latent, or where it could not have been reasonably observable on inspection prior to purchase I will allow what I find to be the reasonable cost of rectification of the defect…Where I find that a defect was reasonably observable to Mrs Beamish at the time of purchase, whether or not she actually noticed the defect, no allowance will be made[6]

49 S&B submits that at the time of the owner's inspection of the property, the defective driveway was patent and readily observable, and that it must therefore be presumed that it was taken into account when agreeing on the purchase price for the property. Whether or not Mr Brown noticed the defect, S&B submits in line with *Beamish* and other decisions to which I have referred, is not relevant.

50 Whether or not a purchaser of a property should be taken to have been aware of a defect in the construction of the dwelling or associated works must depend, in my view, on the extent to which the defect departed from what a reasonable person in the position of the buyer would have regarded as an appropriate standard of construction. Assessments of this type, particularly where the defect is claimed to have been one which a purchaser should have largely observed with his or her senses other than sight alone, will invariably come down to a question of degree.

51 I am also not persuaded from the evidence of Mr Brown's and Ms Walton's pre-purchase inspections of the property, which I find were on about 18 October 2015 and about 30 October 2015 (when Mr Brown went back to sign the contract), that they should have then recognised that the driveway was too steep or "unusually steep".

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5 [2006] VCAT 440.

6 *Beamish v Rosvoll* (Domestic Building List) [2006] VCAT 440, 17 March 2006 at [19]; see also *DeLutis v Housing Guarantee Fund Ltd* (Domestic Building List) D214/2003 at [24]-[27].

52 Diagram A above assists in this respect. It demonstrates the small extent to which the actual gradient of the driveway of 1:3.57 was greater than the 1:4 maximum gradient required by the relevant Australian Standard.

53 I am of the view that the Australian Standard of a 1:4 gradient prescribes a maximum gradient that many in the community would regard as "steep". The argument that Mr Brown should have appreciated that the driveway was marginally above this gradient, as shown in Diagram A, cannot be sustained.

54 I also do not accept that the test is whether the owner should have realised that the actual gradient is higher than a gradient of 1:1.5. This is the lesser gradient which Mr Osborne, the expert called by S&B, suggests is the gradient commonly recommended by Councils, such as will generally avoid the need for transition zones.

Has the owner failed to establish that the cause of his loss was a breach by the builder of one of the warranties implied by section 8?

55 The owner's expert Dr Barrowclough contends that an approximate 400mm lowering of the FFL of the garage floor is now required, from his found FFL height of 2.05 metres to achieve the design height above the footpath of 1.63 metres. It follows, he considers, that an excavation below the garage of about 500mm is required.

56 S&B's expert Mr Osborne also largely agreed with this proposition.[7]

57 In his report dated 13 February 2019, Mr Osborne also expresses his opinion that:

> 1.5 The gradient of the driveway is defective work as a result of the builder not constructing the garage floor at the height nominated in the architectural drawings...

58 Notwithstanding this candid observation by its own expert Mr Osborne, S&B contends that there is insufficient evidence of the FFL of the garage floor, so as to enable the conclusion to be drawn that the FFL of the garage floor is not in accordance with the approved plans.

59 In order to try to make good this point, in his cross-examination of the owner's expert Dr Barrowclough, Mr Philpott put that Dr Barrowclough's measurement of the garage FFL being 2.050 metres higher than the level of the adjacent footpath was:

(a) reached without the services of a land surveyor;

(b) based upon an assumption that the level of the footpath was 43.20 metres as referred to in the Site Plan; and

(c) based upon an assumption that the levels of 43.20 metres and 43.35 metres recorded in the Site Plan at 2009 had not changed during the

[7] Mr Osborne's stated the reference in paragraph 1.11 of his report to 200mm only was in error, and should be a reference to 400mm.

subsequent 9 year period, and that he should have re-established a common datum point.

60 I am not satisfied that the substantial 400mm difference between the design height of the garage above the footpath of 1.63 metres and the found actual height of the garage above the footpath of 2.05 metres is vitiated by these alleged failings.

61 Although he was not called to give evidence, I also note that measurements also taken by Mr Anton Molnar of *Jim's Building Inspections* record a difference in elevation between the eastern footpath boundary and the garage slab of 2.083 metres.

62 I also reject the submission that the assumed level of the footpath was based on an assumption that the Plan correctly recorded the footpath levels in any event, and therefore the design height is compromised.

63 I rely on the fact that S&B's own expert is satisfied that the actual height of the garage is 1.95 metres above the footpath.

64 In summary, I reject S&B's submission that was made in cross-examination to the effect that there was no supporting material for Dr Barrowclough's reported measurement of 2.050 metres.

65 S&B also contended that it is open to conclude that it was never possible for a driveway to be constructed to a gradient that complied with 1:4, and that Dr Barrowclough failed to demonstrate that it could be. I reject this further contention. I find that by adopting the measurements in the Site Plan, and as shown by diagram A above, the reduction proposed by Dr Barrowclough will ensure that the gradient of the driveway that will be achieved by a 400mm lowering of the garage FFL will be to achieve the driveway designed gradient of 1:4.4. Such a gradient would be in accordance with the applicable Australian Standard.

Damages referrable to defective driveway

66 I am therefore satisfied on all the evidence that Mr Brown has established not only that the driveway is defective, but that the cause of its being defective is the level of the garage being too high. I find on the evidence that if the level of the garage is lowered by 400mm, the driveway will be reduced to a gradient less than 1:4, and will thereby become serviceable.

67 I find that the construction of the garage at too high a level constituted a breach of the implied warranties given to them by S&B to which I have referred.

68 Given Mr Brown's evidence of the effect of the driveway's gradient on their use of the driveway, I find that it is reasonable and necessary for them to recover damages referrable to the reasonable cost of lowering the garage floor.

Cost of lowering the garage floor

69 Dr Barrowclough is of the view that the garage floor is a concrete raft slab on ground, with edge and internal beams. He relies for this conclusion on the engineering drawing Sheet 1 of 1 prepared by KCE Consulting Engineers Pty Ltd dated 1/09.

70 His proposal, in summary, is to:

- underpin the external edge beam, so as not to compromise the stability of the external masonry wall of the garage. This will be achieved by first propping the external wall, and then pouring a concrete pier below the edge beam, in such a way that the beam (which will become a strip footing, once the slab is cut) is founded on the concrete pier;
- cut the garage section of the slab at the insides of the respective beams and dispose of existing floor;
- excavate to about 500mm below the current FFL, and pour a new section of slab, tie it in to the sections of the concrete pier now located below the edge beam (now acting as a strip footing).

71 Dr Barrowclough's estimated costs of this scope of work are as follows:

Preliminaries and removals: Remove and dispose of existing paving along external garage wall	$2,000
Remove and dispose of existing driveway	$10,000
Re-design fees: Engineer's design for new garage slab structure, including temporary works and SWMS	$6,000
Temporary works Propping the external masonry walls	$4,000
Underpinning Underpinning the edge beam around the garage external wall, such that it becomes a viable strip footing	$7,000
Slab removal and excavation Removal and disposal of garage slab, excavation	$5,000
Slab repour	$25,000
Connect new slab to concrete underpinned pier	$3,000
Repour new driveway	$15,000
SUB-TOTAL (including profit and overheads)	**$75,000**

72 Mr Osborne, the building consultant engaged by S&B, considers that the garage slab is an infill slab. An infill slab is a slab laid on the ground between two walls. He partly relies on the architectural plan 5 of 5 of Kostic & Associates Pty Ltd dated September 2009 for his conclusion. As such, he considers that it can be broken up and removed, a 400 metre excavation below the existing floor level of the garage can then be undertaken and a new infill slab then laid.

73 It follows that Mr Osborne does not see the need for new structural design, temporary propping an underpinning of the type recommended by Dr Barrowclough.

74 Mr Osborne's rectification calculations are as follows:

Description	**Rate**	**Quantity**	**Unit**	**Rate**	**$**
Cut infill slab and driveway into sections and remove	L				2,080.00
Hire of demolition saw	P				112.00
Bin hire	P				1,200.00
Excavate garage floor and regrade driveway	P				600.00
Disposal of excavated soil	P				600.00
Pump hire half day	P				800.00
Pour new infill slab, pour new driveway, form step up in the pathway leading to the front door	LM				5,550.00
Repaint garage	LM				1,360.00
				SUB-TOTAL	12,302.00
				Contingencies 10%	1,230.00
					$13,532.00
				Margin 30%	4,059.00
					$17,591.00
				GST 10%	1,759.00
				TOTAL	**$19,350.00**

75 I am satisfied from the evidence, particularly the engineering drawing 1 of 1 that the garage floor is a concrete raft slab on ground, with edge and internal beams. I find that the recommended rectification proposal of Dr Barrowclough is therefore appropriate in the circumstances.

76 I am not however satisfied that the amount of $25,000 estimated by Dr Barrowclough for the cost of the slab repour is reasonable, particularly having regard to the fact that he has already allowed $3,000 for the necessary connections of the repoured slab into the new concrete pier. I adopt Mr Osborne's calculations of $75 per square metre for this item. I calculate from architectural plan 3 of 5 that the garage area is approximately 33 square metres. A total new slab pour cost of $2,475 is achieved. To this I add $247.50 being 10% for contingencies, $816.75 for builder's margin of 30%. To the total arrived at I add $353.93 for GST at 10%. The total sum arrived at is $3,893.18.

77 I am also not satisfied that the cost of removing and disposing of the existing driveway will be $10,000 as contended by Dr Barrowclough. I instead adopt Mr Osborne's calculation that 32 hours will be required to perform this work at $65.00 per hour. A total removal and disposal cost of $2,080 is achieved. To this I add $208 being 10% for contingencies, $686.40 for builder's margin of 30%. To the total arrived at I add $297.44 for GST at 10%. The total sum arrived at is $3,271.84**.**

78 I am also not satisfied that the reasonable cost of pouring of a new driveway will be $15,000 being an unparticularised figure proposed by Dr Barrowclough. I instead adopt Mr Osborne's calculations of $5,550 for this item. To this I add $555 being 10% for contingencies, $1,831.50 for builder's margin of 30%. To the total arrived at I add $793.65 for GST at 10%. The total sum arrived at is $8,730.15.

79 In summary, I award $42,894 damages for this part of the claim, made up as follows:

Preliminaries and removals: Remove and dispose of existing paving along external garage wall	$2,000
Remove and dispose of existing driveway	**$3,271**
Re-design fees: Engineer's design for new garage slab structure, including temporary works and SWMS	$6,000
Temporary works Propping the external masonry walls	$4,000
Underpinning Underpinning the edge beam around the garage external wall, such that it becomes a viable strip	

footing	$7,000
Slab removal and excavation Removal and disposal of garage slab, excavation	$5,000
Slab repour	**$3,893**
Connect new slab to concrete underpinned pier	$3,000
Repour new driveway	**$8,730**
SUB-TOTAL (including profit and overheads)	**$42,894**

Further works required as a result of lowering the level of the garage

80 In consequence of the lowering of the garage slab, Mr Brown claims that the patio at the rear of the garage (and presently level with the garage FFL) will need also to be lowered by 400mm. This in turn would result in the existing retaining wall running west to east at the rear of the property being in excess of 1.2 metres high, therefore requiring an engineer designed new retaining wall.

81 I find that these further works are reasonable and necessary as a direct consequence of the need to lower the FFL of the garage slab. In particular, I note that it is reasonable for Mr Brown to have the expectation that the patio is level with the level of the lowered garage so as to allow rear access for his trailer, and generally to simplify access from the rear of the property to the garage. I therefore reject S&B's submission that Mr Brown should be compensated with one or two steps to a total height of 400mm from the new garage floor to the rear patio area. I accept Mr Brown's contention that steps of this nature would also interfere with the normal use of the garage.

82 I find that it will also be necessary, as a consequence of lowering the patio area by 400mm, to replace the retaining wall running east-west along the southern boundary, which will then be in excess of 1.2 metres in height. I find from the evidence that a retaining wall above 1 metre in height requires a building permit.

83 Dr Barrowclough's estimated costs of these further works are as follows:

Lower the patio (total area 10m x 4m) by 400mm and construct steps to back door.	$6,000
Remove existing retaining wall	$2,000
Engineering design of new retaining wall, and construction thereof	$4,000
TOTAL	**$12,000**

84 There being no satisfactory evidence from S&B as to the alternative cost of these works, I find that Mr Brown is entitled to this amount.

85 In addition, Mr Brown claims $3,500 for a new garage door, by reference to a quotation dated 4 October 2018 from Australian Garage Door Parts. I also allow this item.

Weepholes claim

86 Mr Brown submits that the damp proof course and associated weepholes to the atmosphere are not at the required height above the external finished ground level.

87 I find that the height of a damp proof course for domestic brick veneer construction must not be less than 75mm above finished paved or concrete areas[8], and that weepholes in certain locations are less than this height from the finished concrete areas. The work is therefore defective.

88 Mr Osborne costs the necessary rectification works at $2,689 including contingencies, margin and GST. S&B concedes this amount for the work as specified by Mr Osborne.[9] I find this amount to be the damages to which Mr Brown is entitled in respect of this defect.

Leak to living room claim

89 Mr Brown makes a claim for the cost of properly patching a hole in the plaster ceiling of his front sitting room, and re-painting of the ceiling and ceilings of other living areas.

90 On 8 December 2016, Mr Brown emailed Mr Weerasinghe of S&B, complaining that a leak had occurred in the roof of the front sitting room, and that it had caused a hole to occur in the ceiling plaster in the front sitting room below. Mr Weerasinghe responded by email dated 8 December 2016 to the effect that Mr Brown should engage a handyman to fix the hole, and send the bill to S&B. Mr Brown subsequently informed Mr Weerasinghe that he was reluctant to do so.

91 I heard evidence from Mr Whitney of Tip Top Roofing, who stated that he attended the property in about May 2017 at the request of S&B to repair a leak, and that he observed that the flashing had moved a little on the gable. Mr Jones and Ms Walton gave evidence that there were no further leaks after Mr Whitney attended to repair the flashing.

92 Mr Brown gave evidence that when he inspected the dwelling, he noticed a patch in the ceiling, and that Mr Brown thought it was a poor patching job. Mr Brown gave evidence that the agent then informed him that the owner had "put a barbell through the ceiling" during an exercise session. Mr Brown said that he mentally noted the poor patching job as an item of rectification to which he would need to attend if he purchased the property.

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8 AS3700 Masonry Structures

9 Buildspect report pages 5-7 (Item 2) and 25 (Item 2).

93 Mr Brown now claims $860 for the repair of the damaged ceiling[10] and $1,200 for consequential repainting of 4 rooms plus a section of the hall,[11] necessary to achieve uniformity throughout.

94 Mr Osborne's estimate of rectification and painting costs is broadly similar.

95 I consider that however it may have been caused, the defective patching work to the ceiling was apparent to Mr Brown at the time of purchase. In accordance with the well-established legal principles to which I have referred, Mr Brown must be assumed to have taken rectification cost into account when agreeing to the purchase price of the property, and therefore that no damages are recoverable by Mr Brown in respect of this item.

Brick overhang claim

96 Mr Brown submits that the single skin non-structural brickwork overhangs the base supporting slab at the rear of the dwelling in excess of the maximum allowable tolerance of 15mm.[12]

97 I find that the bricks here overhang the slab by up to 27mm, and are therefore defective.

98 Mr Osborne costs the necessary rectification works at $1,258 including contingencies, margin and GST. S&B concedes this amount for the work as specified by Mr Osborne.[13] I find this amount to be the damages to which Mr Brown is entitled in respect of this defect.

Overflow relief grate ("ORG") claim

99 I find that ORGs are required to be a minimum depth of 150mm below the height of the lowest fixture connected to the ORG and a minimum height of 75mm above the surrounding external finished ground level.[14]

100 S&B's expert Mr Osborne submits that the relevant standard states that the minimum height is not required to be 75mm where the ORG is located in a path or paved area.

101 If the position of the ORG is defective, as contended by Mr Brown, I am of the view that the defect will be rectified when the patio at the rear of the garage is lowered, and I therefore award no damages in respect of this item.

Gas pipe claim

102 I find that gas pipe installations of the type at Mr Brown's property are required to be installed in a way that makes them not susceptible to damage.[15]

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10 See quotation of Quinton Hannett dated 15 January 2018.
11 See undated quotation of D&D Painting Services.
12 Guide to Standards and Tolerances 3.04.
13 Buildspect report page 8 (item 4) and 26 (item 4).
14 See AS3500.2 Plumbing and Drainage.
15 AS5601 Gas Installations 4.10.2.

103 S&B concedes that the gas pipework at the property is unprotected, and that therefore the work is defective.

104 Mr Osborne costs the necessary rectification works at **$101** including contingencies, margin and GST.[16] I find this amount to be the damages to which Mr Brown is entitled.

Damages for severe physical inconvenience

105 Generally, damages for disappointment and distress are not recoverable in an action for breach of contract, however an award of damages might be made to a building owner in respect of severe physical inconvenience suffered as a direct result of the builder's breach of contract.[17]

106 I find that Mr Brown has not since January 2016 been able to use the driveway or his garage for their intended purposes. I also find that he has been unable to carry out his intention of developing the patio area by building a pergola, because he always anticipated that the level of the patio area would need to be lowered. He has also been unable to landscape his front and rear outdoor areas, for fear that any landscaping will need to be re-done once defects are rectified by changing the levels. I find that these matters amount to severe physical inconvenience as comprehended by the authorities.

83. Damages in respect of severe physical inconvenience are typically modest, and I award $2,000 damages under this head of claim.

84. I make the accompanying orders.

AT Kincaid
Member

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16 Buildspect report page 9 (item 6) and 26 (Item 6).

17 *Burke v Lunn* [1976] VR 268 at 285; *Clarke v Shire of Gisborne* [1984] VR 971 *Boncristiano v Lohmann* [1998] 4 VR 82.