

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP553/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building; alleged defects by respondent; non payment of invoice by respondent; set off; respondent in counter claim director of company.

APPLICANT	H.E.Tomkins PTY. LTD
RESPONDENT (APPLICANT IN COUNTERCLAIM)	Jennifer Shaw
RESPONDENT IN COUNTERCLAIM	Harold Tomkins
WHERE HELD	Melbourne
BEFORE	Domenico Calabro` Member
HEARING TYPE	Hearing
DATE OF HEARING	14 & 15 April 2016
DATE OF ORDER	13 May 2016
CITATION	H.E.Tomkins PTY. LTD v Shaw (Building and Property) [2016] VCAT 773

ORDERS

1. The claim against Mr Harold Tomkins (second named respondent to the counterclaim) is dismissed.
2. The Tribunal orders that the respondent Ms Jennifer Shaw must pay the applicant H.E. Tomkins PTY. LTD sum of \$14,778.50.
3. The Tribunal orders the first named respondent in the counterclaim H.E. Tomkins PTY. LTD. must pay the applicant (Ms Shaw) in the counterclaim the sum of \$4351.17 .This amount is to be set off from the amount ordered against Ms Shaw so that the amount the respondent Ms Shaw must pay to the applicant H.E. Tomkins PTY. LTD. is \$10,427.33.
4. Pursuant to section 115 of the *Victorian Civil and Administrative Tribunal Act 1998* I order that the respondent Ms Shaw reimburse \$565.60, being the application fee paid by the applicant H.E. Tomkins PTY. LTD.

5. Costs reserved with Liberty to apply. Any application to be listed for hearing by Member D. Calabro' with a half day allocated.
6. Pursuant to section 115(c) of the *Victorian Civil and Administrative Tribunal Act 1998* I do not make an order for the reimbursement of the application fee paid by Ms Shaw in her counterclaim.

DOMENICO CALABRO`
Member

APPEARANCES:

For the Applicant and
Respondent in counterclaim

Mr Wirth of counsel

For the Respondent and
Applicant in counterclaim

Ms Jennifer Shaw in person

REASONS

BACKGROUND

- 1 This is a claim by H.E.Tomkins PTY. LTD against Ms Jennifer Shaw for payment of \$15,304.10 for work done at 11 Nariana Court Portsea Victoria. This amount comprises \$14,778.50 for work completed and invoiced, \$525.60 application fee and costs to be determined by the Tribunal.
- 2 Ms Shaw lodged a counter claim against H.E.Tomkins PTY. LTD. in the sum of \$38,991.93 approximately and \$525.60 application fee and costs to be determined by the Tribunal. It should be noted that Ms Shaw was unsure of the total of her counterclaim.
- 3 The claim and counterclaim were listed for a one-day mediation on 16 October 2015. The parties did not settle.
- 4 On 29 January 2016 the Tribunal (on the application of Ms Shaw) joined Mr Harold Tomkins (Mr Tomkins) as a Second Respondent by Counterclaim.
- 5 The matter was listed for a two-day hearing at the Tribunal commencing on 14 April 2016.
- 6 Mr Tomkins and H.E.Tomkins PTY. LTD were represented by Mr Wirth of counsel and Ms Shaw represented herself.

THE LAW

- 7 The standard of proof remains the same – Barwick CJ in *Reifek v McElroy* [\[1965\] HCA 46](#); [\(1965\) 112 CLR 517](#) at 521-2 said that:-

“The standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words; it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such proceeding to obtain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.”
- 8 The applicant and the applicant in the counterclaim have the burden of proof and to be successful they must demonstrate that the facts on which they rely to establish that their claims.

APPLICANT'S CLAIM H.E. Tomkins Pty Ltd.

- 9 The applicant's claim is contained in its application, Tribunal books and Mr Tomkins evidence to the Tribunal and is summarised as follows:

The applicant is a company whose sole director is Mr Tomkins. The applicant has had a long working relationship with Ms Shaw, having commenced working for her on a contractual basis in 2011. The company completed a number of works (including sub contracting and supervising) for Ms Shaw during that time.

In 2011 the applicant completed work for Ms Shaw by extending the portico (including paving) to the garage. The work was completed and the invoice was paid. There were no issues with this work.

In 2013 there was movement in the property and work was required to underpin and rebuild the portico including removing and replacing pavers. Ms Shaw made a claim on the Owners Corporation insurance and she sought a quotation from the applicant.

The applicant provided a quotation for the works and Ms Shaw accepted the quotation after the insurance company accepted the claim.

Work to the portico was completed in 2014. The work included underpinning pillars, concreting, remove and replace pavers, painting and rendering. The applicant used subcontractors to do the work and Mr Tomkins arranged for quotations and supervised the work.

Ms Shaw asked Mr Tomkins to return to the property on a number of occasions to clean up and rectify some issues including cleaning and re-corking.

The Fence

- 10 Ms Shaw asked the applicant to construct a fence and to obtain quotations for work to be done in the garage to stop moisture ingress. The applicant obtained quotations for the fence; Ms Shaw approved this and the fence was completed.

Moisture proofing the garage

- 11 The applicant obtained 2 quotations from companies that specialised in water proofing or moisture ingress. One company went into liquidation and the quotation for the other was forwarded to Ms Shaw who approved it. Ms Shaw paid some invoices directly to contractors but mostly the applicant would pay subcontractors and then invoice her for work done (this included labour and material).
- 12 The applicant had previously invoiced Ms Shaw for work and she paid this. When the work was completed a final invoice was sent to Ms Shaw in the sum of \$14778.50. This amount remains outstanding.

RESPONDENT'S CLAIM (Ms Shaw)-APPLICANT IN THE COUNTERCLAIM

13 Ms Shaw's claim is contained in her application, Tribunal book and her evidence to the Tribunal this is summarised as follows:

She claims that the company and Mr Tomkins had completed work in excess of \$120,000 for her from March 2010 to 2014. She claims that the work done in 2014 was sub standard, the pavers were the wrong colour and the work was not completed to all the correct standards and codes and as such she will have to remove the concrete and pavers on the portico and rebuild.

She also claims that the applicant has over charged her on the hourly rate, double charged her for Goods and Services Tax (GST). Other work completed failed including the moisture ingress to the garage. She was required to obtain a retrospective permit for a fence and required to engage a plumber to stop water ingress from the roof despite the applicant having contracted a plumber to do so.

Ms Shaw also claimed that the builder did not supply any certificates of compliance including electrical and plumbing.

MR TOMKINS' EVIDENCE

14 This is summarised as follows:

He told the Tribunal that he was the sole director of H.E.Tomkins PTY. LTD. He was a builder and registered building practitioner and had 40 years experience in building extensions and new homes. Mr Tomkins said that he was contacted by Ms Shaw to complete maintenance work at her unit and the agreement was at costs plus and an hourly rate of \$60 plus GST. When the works were completed an invoice was sent to Ms Shaw who paid the invoices without any issues being raised.

His company originally started work on the portico in October 2011. This was to extend the portico to the garage, remove sleepers and crushed rock and replace with reinforced concrete, as well as new pavers.

In 2011, he obtained 2 quotations from Flagstone and Anston for the pavers. Ms Shaw wanted the work to be completed before Christmas but Anston could not supply pavers until after Christmas.

Ms Shaw approved the quotation from Flagstone for the pavers. The work was completed before Christmas, invoiced and paid. Ms Shaw did not raise any issues with the work.

In 2013 Ms Shaw asked him to provide a quotation for remedial work to the portico as the site had moved. He provided a quotation to her and this was accepted.

THE PORTICO

15 Work commenced in 2013. He sent a quotation for underpinning and for the pavers from Anston. He obtained the quotation from Anston as Ms

Shaw asked him to use these as they were a better colour match. Ms Shaw approved these quotations.

- 16 Mr Tomkins told the Tribunal that he was on site every morning when the pavers were laid. The tiler laid the pavers in nearly the same pattern as they were laid previously.
- 17 He paid the invoice for the underpinning and paving. After the paving was completed he had a discussion with Ms Shaw who was unhappy with the rubbish and building debris left. She was unhappy with the grouting colour. He cleaned up the rubbish and cleaned the mortar off the security door and drive way with acid. He recorked the pavers in the correct colour.
- 18 Mr Tomkins said that Ms Shaw was not happy with the grouting joints not being in line. He said that the pavers were varying in size and it was difficult to get them to line up. He told the Tribunal that he arranged for a renderer to re render the columns at a cost of \$450 because Ms Shaw was not happy with the colour. He did so that he would be paid. He returned to the work site 4 or 5 times because Ms Shaw kept finding problems.
- 19 He said that in all the works done by his company between 2011 and 2013 he was not given any documents, drawings or specifications. In commenting on Mr Florenini's report he said that there is enough fall in the pavers and that water does not pool and when it rains 'it hasn't caused any drama...'.
- 20 He said there was no vertical fascia on the side steps as it was covered by the agapanthus and he had left it the same way as the work done in 2011. On cross-examination by Ms Shaw Mr Tomkins did not recall the conversation about matching the pavers with the colour of pavers produced in the 1990's. He did not recall the conversation that Anston had two different types of Sorrento coloured pavers. He did recall speaking to Anston about Sorrento pavers and that the colour was the same for 8 or 9 years.

The waterproofing

- 21 Mr Tomkins said that he was asked to obtain a quotation for the waterproofing in the garage by Ms Shaw. He said the problem was that a salt was coming through the render in the garage wall at a metre in height on the expansion joint. This was on the right hand side that had a retaining wall.
- 22 He sent the quotation to Ms Shaw who approved the works. He said that the company told him that there was an 80 per cent chance of success, he could not recall if he told Ms Shaw.
- 23 Mr Tomkins told the Tribunal that Ms Shaw asked him to arrange for a plumber to fix a leak on the roof, as water would come down the face of

the garage when it rained. He arranged for New Wave plumbing to complete the work. An invoice was sent and paid by Ms Shaw.

- 24 The issue was not resolved as water kept leaking when it rained. The plumber returned twice to find the leak. He was not able to stop the leak. Mr Tomkins said that all units had the same problem because of problem with the original construction.

The fence

- 25 Mr Tomkins said that he was asked by Ms Shaw to obtain a quotation for a side fence. He arranged a fencer to provide a quotation. He told Ms Shaw that anything over one metre would require a permit. She did not want to obtain a permit and the work was completed, invoiced and paid. He noted that other persons in the Owners Corporation complained about the height of the fence

The certificates

- 26 He told the Tribunal that all certificates were provided to Ms Shaw.

BRANKO MLADICHEK REPORT

- 27 His evidence is contained in his written report and his evidence to the Tribunal that is summarised as follows:

His qualifications are contained in his undated report (date of inspection 15 August 2015).

He told the Tribunal that he inspected the external portico. He observed that there was no defect in the setting out of the pavers but there were uneven grout lines. He also measured the steps and found that while uneven in height they did not exceed the Building Code of Australia (BCA).

He found that there was a slight fall from the house to the outside of the portico and saw that there were no issues of moss or pooling or staining by water. He did not observe any difference in colour of the pavers and stated that usually pavers are not waterproofed. He agreed that it was appropriate to fill in any holes in the side of the portico. It would be possible to add concrete in the holes. He was of the opinion that there was some patching of the rendering but the work was within a reasonable standard but that the finish could have been better.

On cross-examination he agreed that he did not view the garage, as Ms Shaw was not available on the day. He did not view the other 12 units in the owners corporation but did view the unit next door to Ms Shaw's and found that the colour of the pavers were the same.

OSCAR FLORENINI

- 28 His evidence is contained in his written report and his evidence to the Tribunal that is summarised as follows:

His qualifications are contained in his report dated 26 June 2015. He told the Tribunal that he measured the fall in the portico by using a digital level and determined that it was likely to hold water. He felt that there was insufficient

drainage. This could lead to water pooling and a slip hazard if water was brought into the wood floors in the house.

Mr Florenini told the Tribunal that he then measured the steps and there was a difference of 15mm in the risers. He said he could see there was a difference in height in the second step at the bottom and this could lead to a potential fall.

He told the Tribunal that the layout of the pavers was defective aesthetically and there was an unsightly narrow strip of pavers at the front of the portico. He noted some drumming and cracking of pavers as well as the non application of a fascia to the side of the steps.

He noted that the painter did not paint under the house number and the painting did not merge with the previous painted area. He also noted that the render in parts was poorly finished near the corner of the wall and patching was clearly visible.

He inspected the garage and noted that on inspection of the garage wall he could not discern whether there had been any drilling and injecting of chemicals into the bricks as per the quotation he was shown. He tapped the block walls and they sounded hollow.

He was of the opinion that the work failed and that the original problem with moisture was an original structural defect with the original builder of the unit. He stated that the cost of rectification of the portico and other works would be in excess of \$21,000 and it was fair and reasonable to bring the job up to the client's expectations.

On cross-examination Mr Florenini confirmed that he did not check surrounding units to compare colours or the layout of pavers and could not comment on this.

FINDINGS

CLAIM AGAINST MR TOMKINS (second named respondent in the counter claim)

- 29 Ms Shaw claims that throughout the construction she contracted with Mr Tomkins, she always worked personally with Mr Tomkins. She did not contract with H.E.Tomkins PTY. LTD. As such she believes that Mr Tomkins should personally be liable.
- 30 Counsel for the second named respondent in the counter claim provided evidence to the Tribunal in the Tribunal book (exhibit 1 A) that the ASIC search showed that Mr Tomkins is the sole Director and secretary of the company H.E.Tomkins PTY. LTD.
- 31 He submitted that Mr Tomkins was an agent for an undisclosed principle being the company H.E.Tomkins PTY. LTD.
- 32 He also submitted that since the commencements of their contractual relationship in 2010, at all times invoices submitted to Ms Shaw were in

the name of H.E.Tomkins PTY.LTD. And Ms Shaw paid all those invoices (save for the final invoice) to the company. There was no evidence that Mr Tomkins should be personally liable.

- 33 There is no evidence before me that Mr Tomkins resorted to any false or misleading comments or other actions that would ultimately hold him personally liable for any acts in this matter.
- 34 I note that Ms Shaw has always dealt with Mr Tomkins throughout their long association. This is not unusual.
- 35 I accept the evidence before me shows all invoices are from the company H.E.Tomkins PTY. LTD. and Ms Shaw has paid the invoices to that company for the work done including all work done by other contractors.
- 36 The fact that Ms Shaw dealt with Mr Tomkins does not prove that he should be personally liable for any claims by her. He is an agent of the company and all contracting was with the company. I accept the submission by counsel for the applicant that an objective bystander independent of the parties would know that Ms Shaw would be contracting with the company H.E.Tomkins PTY. LTD.
- 37 Ms Shaw has not proven on balance of probabilities that Mr Tomkins is personally liable. I note that in her counterclaim she states that ‘I hired Harold Tomkins of H.E.Tomkins PTY. LTD...’ The contract is with the company H.E.Tomkins PTY. LTD and I dismiss the claim against the second named respondent in the counter claim.

MOISTURE TREATMENT

- 38 With the exception of the evidence relating to damp ingress in the garage, I accept the evidence of Mr Mladichek over that of Mr Florenini for reasons set out later in the decision. Mr Mladichek did not view the garage as Ms Shaw was not present. I accept the evidence that there were alternate dates for Mr Mladichek to view the garage when Ms Shaw was present.
- 39 The evidence from Mr Florenini was that the treatment was only to 600mm when the crack in the garage wall was at 1 meter. He saw no evidence of any drilling of the wall and opined that the wall was constructed of hollow concrete bricks –and his testing consisted of knocking the bricks that still showed there was a hollow sound.
- 40 The evidence from Mr Tomkins was that he was told by the company that there was an 80% probability of success. He did not convey this to the respondent nor did he provide the second page of the document that set out potential difficulties with the product and work. Ms Shaw confirmed this. She gave evidence that she was not told of the potential for the treatment to fail.
- 41 Both experts agreed that the dampness in the garage was a problem with the original construction of the building not as a result of any work done

by the applicant (and the respondent in the counter claim) but by the original builder.

- 42 I accept part of the evidence of Mr Florenini that the work in the garage had failed and that there was continuing ingress of dampness. The only way this could be avoided was to move all soil from the wall and rectify from the outside.
- 43 I do not accept on the balance of probabilities that the company did not actually drill or inject the product into the wall. Mr Florenini did not conduct any tests except for knocking the blocks, which sounded hollow. I am not persuaded, in the absence of more conclusive testing, that Ms Shaw has proven this claim.
- 44 I find that the work completed on the garage has partially failed (in that there is an ingress of moisture where the blocks have been water proofed at an incorrect height of 600mm instead of 1 metre) and that there are continuing problems with the dampness coming through the wall.
- 45 I find here is a partial failure of the product and the work done to the garage wall. The work was completed by a contractor but did not go the height of the crack in the wall at 1 metre. Even if I took into account the disclaimer by the contractor (which I accept was not conveyed to the respondent) – the evidence shows that the work done was only completed to 600 and not 1 metre.
- 46 There is insufficient evidence before me to conclude on balance that there was not an injection of product into the concrete blocks. The respondent in the counter claim did not call any evidence and their expert did not examine the garage (because of access – even though other dates were available).
- 47 Ms Shaw provided evidence in the form of a quotation from Strahan Homes that shows the product previously applied to the walls would have to be scraped off and then reapplied. The cost of this is \$1925.00.
- 48 The difficulty that Ms Shaw has in this matter (in proving her claim for the total cost of the moisture proofing) is that to effectively stop any dampness would be to engage in major works on the outside of the wall. I must conclude of the evidence before me that any work done may fail in the future without extensive and expensive external work. This is a defect in the building at the time of construction.
- 49 The evidence before me is that the work was not done to a level of 1 metre – however there is no evidence for me to conclude that this is the reason for the continuing problem with the dampness continuing. There is no evidence before me to conclude that there has been a total failure of the work done and I dismiss this part of the counter claim seeking full reimbursement of the cost of the work done by Protecon. I allow the sum of \$1925 being the amount to rectify the problem with the moisture

proofing, that is to scrape off the product placed on the wall and reapply to the level of 1 meter.

THE PORTICO AND PAVERS

- 50 The Tribunal has listed all of the claims under their respective headings. This is the largest claim by Ms Shaw. She is seeking that the whole of the portico, concrete and pavers be removed and re-laid. She claims the pavers were not the correct colour; there was no fall in the pavers and water pooled; there were cracks in the grout and the pattern of the pavers were not up to the standard of the house.
- 51 This is the area where both experts differ. Mr Mladichek expert for the respondent in the counter claim opined that the layout of the pavers is not a defect and acceptable. He went on to say that the colour was consistent with the colour of the adjoining unit.
- 52 Mr Florenini opined that the pavers were not laid out correctly and that a professional should have foreseen the consequences of the layout. He said that the respondent in the counter claim should have provided more information to the tiler and the tiler should have properly laid the pavers taking into account the portico. He stated that the only way to cure the defect was to remove and relay the pavers and to relay the concrete.

THE COLOUR

- 53 Ms Shaw gave evidence that the colour should have been the Sorrento colour from Anston pavers but that it had to be a special order. She said that the supplier should have been notified that the Sorrento colour sought ought to have been the colour that was being produced in the 90's not the current Sorrento colour.
- 54 She told the Tribunal that Mr Tomkins should have ordered the correct colour pavers. She provided a letter from Anston confirming the availability of Sorrento pavers being available in a 1990's colour.
- 55 Ms Shaw did not provide any evidence that the owners corporation had objected to the colour or layout of the tiles in that it was inconsistent with that required by them.
- 56 The evidence from Mr Tomkins contradicts Ms Shaw's evidence. He provided written evidence from Anston that there were three colours available including Sorrento. Ms Shaw provided written evidence from Anston that they could provide the colour on special order.
- 57 Ms Tomkins denied any conversation occurred between Ms Shaw and himself that there was a Sorrento colour available on special order. He said prior to the work commencing he provided a quote from Anston to Ms Shaw and she approved it.
- 58 I am not satisfied on the evidence before me that Ms Shaw has proven her claim on the balance of probabilities. Ms Shaw produced a letter from Anston two years after the pavers had been laid. Mr Mladichek gave

evidence that the colour was consistent with that of the adjoining unit. Mr Florenini did not provide any evidence that the colour was inconsistent with other units as he did not examine them.

- 59 I accept the evidence of Mr Mladichek is preferable over that of Mr Florenini as he did not examine any units for consistency of colour. Ms Shaw told the Tribunal that the adjoining unit had replaced the pavers with the incorrect colour. She did not provide any evidence of this. I dismiss this claim.

THE FALL IN THE PORTICO

- 60 Ms Shaw told the Tribunal that when it rained there was pooling on the portico and that she would bring water into the house. Mr Florenini in his evidence stated that there was no fall in the portico and this could lead to water pooling on the portico. This could lead to water being brought into the house with polished floorboards leading to a slip hazard.
- 61 He opined that because of this the whole of the front portico should be removed and rebuilt including the concrete. In his evidence to the Tribunal he reported that he had determined that through his measurement that there was no fall in the portico.
- 62 Mr Mladichek was of the opinion that the portico did have a very slight fall and that he did not observe any evidence of water pooling (staining or moss).
- 63 Both experts did not conduct any other tests such as water placed on the portico. Mr Florenini relied on photographs from Ms Shaw.
- 64 There is no evidence before the Tribunal from either expert that there is a problem with water rising from the concrete. There is no evidence that either expert conducted tests to show whether the concrete was no poured properly or that the concrete did not have appropriate damp protection.
- 65 Ms Shaw has not proven her claim on the balance of probabilities that there is a defect in the portico to such an extent that it required be demolished and replaced. I dismiss her claim.

THE STEPS

- 66 Mr Florenini gave evidence that the steps are of uneven height and this was a defect. He opined that this could cause a fall. Mr Mladichek also gave evidence about the height of the steps. He agreed that not all the steps were of the same height but they were not of such a height deviance that there was a defect and they complied with the BCA. He did not find that there was a fall danger.
- 67 I note that Mr Florenini did not provide any measurements of the steps at the hearing.
- 68 I accept the evidence of Mr Mladichek. He provided more detailed evidence and conducted height tests of the steps. I am not satisfied on

balance of probabilities that the steps while varying in height, they are a fall or trip hazard or that they require replacement.

OTHER DEFECTS IN THE PORTICO

- 69 Both experts agreed that there was some cracking and unevenness in the grouting around the paving in the portico. On the evidence before me including the reports and photographs, it is clear that there is some cracking and unevenness in the grouting in the paving. This is as a result of work done by the tiler.
- 70 I do not accept that on the evidence before me the whole of the portico pavers should be removed and replaced. There is evidence that there is rectification required to replace some cracked tiles, regrout some areas and cover some holes on the side of the steps. There is an entitlement to some compensation for fixing these defects. Given that the relationship between Ms Shaw and the company has deteriorated to such an extent that I will not order the company to return and fix these defects.
- 71 Neither party has provided details as to the cost of fixing the defects save for the total claim for removal and replacement by the applicant Ms Shaw in her counter claim. I find that the defects are not of such a calibre that requires a demolition of the pavers or steps. I allow the sum of \$500 compensation for the defects.

THE PAINTING

- 72 The experts agreed that there was a problem with the painting around the house number. Mr Florenini, on cross examination, agreed that the painter could cut around the house number rather than remove the number.
- 73 I accept the evidence that there is some painting required to rectify this defect and I allow \$100.00 to cut in between the numbers and rectify the painting.

THE RENDERING

- 74 Mr Florenini said that there were two areas where the rendering was deficient. Mr Mladichek agreed that there was unevenness in the rendering but that it was minor and did not require a total re rendering of the product.
- 75 I find that there are two areas where the rendering was deficient and I accept the evidence of the parties that it is in one corner and on the side of the steps. There are no separate amounts available to the Tribunal in regard to this claim. The amounts claimed relate to the whole of the portico removal and replacement of pavers etc. I will allow the sum of \$500 in compensation for the rectification of these defects.

THE FRONT SECURITY SCREEN

- 76 Both experts agreed that there was a discolouring of the powder coated front security screen as a result of poor workmanship and this was because there was no preventative work to protect the door.
- 77 Mr Tomkins gave evidence that he cleaned the door with a dilute acid. When the cement and adhesive was cleaned off with acid the powder coating came off.
- 78 Initially Mr Mladichek stated in his evidence that the defect was minor and that painting the affected area would suffice, but when questioned on whether this was acceptable he stated that if this door was his he would require it to be powder coated whilst agreeing it was fairly minor he would not expect it to be rectified by merely painting the security door. Painting would deteriorate in time.
- 79 I accept the evidence before me. The powder coating on the security door was damaged by the work done by the contractor and exacerbated by Mr Tomkins cleaning. I allow the sum of \$500 in compensation to have the door re powder coated.

THE FENCE

- 80 Ms Shaw claimed that she had contracted Mr Tomkins and asked him to handle all the requirements for erecting a new fence. Mr Tomkins arranged for the contractors to erect the fence and because he did not obtain a permit from the local council she was required to obtain a retrospective permit. She claimed that the respondent in the counter claim should pay these extra costs. She claims that Mr Tomkins referred her to another company (Hoban-Hynes Pty Ltd) to do drawings for the council, they charged her \$1303.50 but did not obtain the permit. She then had to engage R.Hamilton Wilson Assoc Group P/L who completed drawings and obtained the retrospective permit for her.
- 81 Ms Shaw claims a further \$894.28 on top of the money she spent with Hoban-Hynes Pty Ltd. She was advised that the original cost of a permit prior to erecting the fence should have cost her between \$450-500 instead of the \$1369.28 she paid for the fence.
- 82 Mr Tomkins told the Tribunal that he told Ms Shaw that a permit was required for the fence, however she insisted that he commence the work without a permit.
- 83 Again the difficulty for Ms Shaw is that she must prove her claim on the balance of probabilities. She was required to obtain the permit for the fence and did not do so and I find that the applicant is not liable for the added cost of obtaining the permit.
- 84 I dismiss her claim for this sum.

THE GST

- 85 Ms Shaw claimed that the respondent in the counter claim had charged her twice for GST. She provided evidence in the form of invoices from the respondent as set out in her documents in exhibit R1. In particular tab 7, pages 111 to 136 inclusive.
- 86 She stated that external contractors submitted their invoices to the respondent in the counter claim that included GST. The respondent then invoiced her for these amounts together with a further amount for GST again calculated on top of these invoices.
- 87 Counsel for the respondent in the counterclaim submitted that GST was payable on the invoices that his client submitted. Having examined the invoices submitted by Ms Shaw it is clear in some cases that she was charged GST on amounts that already included GST. This is in effect charging twice for GST in invoices where there were charges from other contractors. Ms Shaw is entitled to a refund of the GST she was charged twice for.
- 88 The overpayments of GST are listed below:
- Invoice 00002569: Next Wave Plumbing \$13.00
 - Invoice 00002636: Next Wave Plumbing \$16.95
 - Invoice 00002645: Protecon Vic \$566.50
 - Invoice 0002664: Prowall Plastering \$25.85
- Total GST over paid \$643.30
- 89 I allow the sum of \$643.30 as the sum that Ms Shaw was charged twice for GST based on the evidence of invoices from the respondent in the counter claim and the invoices from the above companies. I dismiss all other claims by Ms Shaw as there is no evidence before me to show that GST was charged twice in the other invoices. Ms Shaw did not provide invoices from other contractors.

THE HOURLY RATE

- 90 Ms Shaw claimed that the hourly rate charged by Mr Tomkins should have been \$50 per hour plus GST and not \$60 per hour plus GST. She bases this on advice given to her by an acquaintance and the assumption that he would also receive a management commission on the labour and materials of 10%. She was of the opinion that he charged a 'charge out' rate not a 'cost rate'. She has been advised that the estimated minimum overcharge was \$10 per hour.

- 91 Mr Tomkins gave evidence that he had managed work for Ms Shaw since 2011. He said that he had always charged \$60 per hour plus GST and there were no issues regarding cost raised by her.
- 92 Counsel for the respondent in the counter claim submitted that his client had submitted his invoices for his work in the past and Ms Shaw did not question the cost and paid the amount and because of this the claim should be dismissed.
- 93 He submitted that there was no evidence before the Tribunal to find that Ms Shaw had been over charged.
- 94 I accept this submission. As stated earlier in this decision it is up to the applicant (in this case the applicant in the counter claim) to prove her claim on the balance of probabilities.
- 95 There is no evidence provided by Ms Shaw that there was anything other than an agreement between herself and the respondent in the counter claim to pay the sum of \$60 per hour plus GST. The respondent in the counterclaim invoiced this amount in the past and apart from the amount outstanding in their claim, Ms Shaw paid these amounts.
- 96 This was the agreement between the Ms Shaw and the respondent in the counter claim and in the absence of any other evidence her claim must fail.

THE ROOF LEAK

- 97 Ms Shaw claims that the respondent in the counter claim arranged for the attendances of plumbers to fix a roof leak. Plumbers came on two occasions to fix the leak. It continued to leak and she had to engage a plumber to stop the leak. She said that the plumber immediately knew what the problem was and was able to fix the problem.
- 98 Mr Tomkins told the Tribunal that he did engage a plumber to fix the roof leak at the request of Ms Shaw.
- 99 Neither expert commented on the roof leak in their report or evidence. Both sides agree that the roof leak was a result of an original building defect.
- 100 I accept the evidence of Ms Shaw that the work by the plumbers contracted by Mr Tomkins was defective and did not stop the roof leaking. I accept that she engaged another plumber who did fix the roof leak. Ms Shaw is entitled to a partial refund of the work done by plumber contracted by Mr Tomkins in the sum of \$98.22 (as set out in Ms Shaw's counter claim) together with the cost of Mr Tomkins labour of \$60 and supervision costs of \$24.65 a total of \$182.87.
- 101 I do not find that the respondent in the counterclaim is liable for the cost of the plumber Mal Cairns. This is the actual cost of fixing the leak that was present as a result of the original building defect and not caused by

Mr Tomkins or the plumber he contracted. This is a cost to be born by Ms Shaw and I dismiss her claim for this amount.

CLAIM FOR DEFAMATION COSTS

102 Ms Shaw claimed \$990.00 for legal fees for an alleged defamation by Mr Tomkins. I do not propose to discuss this in detail. It is clear that Ms Shaw should bring such a claim in another venue not VCAT. The Tribunal does not have jurisdiction to determine these allegations. This claim is dismissed.

REPORT BY ROBERT WILSON OF R.HAMILTON WILSON ASSOCIATES P/L

103 This report does not comply with the Tribunal practice notes for expert reports. It is undated, unsigned and does not contain any details of Mr. Wilson's expertise. It consists of a number of photographs with handwritten notes. Ms Shaw told the Tribunal that Mr Wilson is an acquaintance that provided the hand written report to her.

104 The Tribunal does not accept this report. Mr Wilson was not called by Ms Shaw to give evidence or be cross-examined.

THE CLAIM BY H.E.TOMKINS PTY. LTD.

105 Save for my findings above regarding some of the claims by Ms Shaw, I find that H.E.Tomkins PTY. LTD. conducted the work as requested by Ms Shaw. I find that the company completed and invoiced the work. (See my findings on certain aspects of the work done) and she has not paid the final invoice in the sum of \$14,778.50.

CONCLUSION

106 Having regard to the evidence by the parties, reports and my findings above I make the following orders.

107 The claim against Mr Harold Tomkins (second named respondent to the counterclaim) is dismissed.

108 The Tribunal orders that the respondent Ms Jennifer Shaw must pay the applicant H.E.Tomkins PTY. LTD sum of \$14,778.50.

109 The Tribunal orders the first named respondent in the counterclaim H.E.Tomkins PTY. LTD. must pay the applicant (Ms Shaw) in the counterclaim the sum of \$4351.17 .This amount is to be set off from the amount ordered against Ms Shaw so that the amount the respondent Ms Shaw must pay to the applicant H.E.Tomkins PTY. LTD. is \$10,427.33.

110 Pursuant to section 115 of the *Victorian Civil and Administrative Tribunal Act 1998* I order that the respondent Ms Shaw reimburse \$565.60, being the application fee paid by the applicant H.E.Tomkins PTY. LTD.

- 111 Pursuant to section 115(c) of the *Victorian Civil and Administrative Tribunal Act 1998* I do not make an order for the reimbursement of the application fee paid by Ms Shaw in her counterclaim.
- 112 Costs reserved with Liberty to apply. Any application to be listed for hearing by Member D. Calabro' with a half day allocated.

DOMENICO CALABRO`
Member