

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP314/2017

CATCHWORDS

Domestic building work – underpinning and restumping carried out by the respondent – breach of the warranties implied by section 8 *Domestic Building Contracts Act* 1995 – expert evidence – failure to call authors of reports - appropriate method of rectification – damages

FIRST APPLICANT	Ms Carol Jasen
SECOND APPLICANT	Mr Saeje Henshall
RESPONDENT	Supa Reblocking & Underpinning Pty Ltd (ACN: 116 786 326)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	24 May 2018
DATE OF ORDER	28 May 2018
CITATION	Jasen v Supa Reblocking & Underpinning Pty Ltd (Building and Property) [2018] VCAT 813

ORDER

The respondent must pay to the applicants damages in the sum of \$30,244.50.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the First Applicant	Ms C. Jasen in person
For the Second Applicant	Mr S. Henshall in person
For the Respondent	Mr M. Younan in person

REASONS

Background

- 1 It is not unusual for a 100-year-old house to be suffering from sagging foundations, sloping floors and brickwork and plaster cracking. The applicants are the owners of one such house in Northcote¹. It is a semi detached weatherboard Edwardian cottage, set on stumps, with a double brick party wall forming the common boundary connecting the two dwellings.
- 2 The second applicant, Mr Henshall, lives in the house with his wife. In 2010 he decided to renovate. Prior to the renovations being undertaken, the first applicant, Ms Jasen, suggested that they should first have the house restumped and partially underpinned. The “wing wall” (which is the visible area of party wall located at the veranda entrance to the property and is approximately 1.5m wide), had badly cracked and this was the area to be lifted and underpinned.
- 3 On 24 August 2010 they engaged the respondent to carry out the following work:
 - a. to lift and stabilise the wing wall, including installing two underpins; and
 - b. to replace all timber stumps for the entire house, including the front veranda, and level the existing floors; and
 - c. to obtain necessary permits and other associated works.

Findings Regarding Contract

- 4 The contract between the parties ("**the Contract**") is made up of the following documents:
 - a. the respondent's quotation no. 1700 dated 24 August 2010 for the wing wall underpinning; and
 - b. the respondent's quotation no. 3090 dated 24 August 2010 for the re-blocking.
- 5 The cost of the works was \$3200 for the underpinning and \$8350 for the re-blocking.
- 6 The respondent obtained the following building permits from surveyors Nicholson Wright:
 - a. for the underpinning works dated 15 November 2010; and

¹ The first applicant is the legal owner of the property and the second applicant, her son, is the beneficial owner under a constructive trust. They are both “building owners” within the meaning of that word in the *Domestic Building Contracts Act 1995*.

- b. for the re-blocking works, dated 12 November 2010.
- 7 In making the applications for the building permits, the respondent provided the building surveyor with a sketch drawing of the re-blocking works and a two-page engineering design for the underpins.
 - 8 The works were completed in or about December 2010. Mr Henshall paid the respondent a total of \$10,900. The owner of the adjoining property paid the respondent for half of the cost of the underpinning of the wing wall.
 - 9 Mr Henshall gave evidence that the respondent in fact did not complete the underpinning as quoted. He said that when “Warwick” of the respondent had excavated underneath the wing wall, he discovered that it was sitting on a bluestone foundation. He told Mr Henshall that it was not possible to lift the wall as had been quoted, because of this foundation. Instead of lifting the wall, the respondent poured additional concrete next to the existing footing. It is not clear if the underpins were ever installed. Mr Younan for the respondent agreed that the wall was not lifted, but said the reason would have been because of the risk of damaging the adjoining property. However he agreed that he was not on site during the works and is not aware of what “Warwick” actually said or did.
 - 10 The respondent obtained Certificates of Final Inspection from Nicholson Wright on 15 December 2010.

Events subsequent to the works

- 11 In 2011 the renovations commenced. The builder undertaking the renovations ran into difficulties when trying to install French doors on the eastern side of the house. Mr Henshall was told that the newly rebuilt floor was so uneven that it was impossible for the builder to install the new door frame and doors. He contacted the respondent who came back to the property and carried out further work to improve the levels of the floor. The renovations were then completed. The works done included replacing the existing lathe and plaster walls with new plasterboard and new timber stud walls, repainting all new walls and ceilings, installation of new bathroom, kitchen, electrical rewiring, sanding and polishing of timber floors throughout, rebuilding of front veranda.
- 12 On 21 July 2011 the respondent provided a Certificate of 15 Years Guarantee for the re-blocking.
- 13 Over the next few years, the house continued to subside. Ms Jasen had been living overseas and had not observed the gradual deterioration to the property. When she returned in 2015, she was concerned by what she saw. She said that her concerns included:
 - a. the timber house subsiding particularly on the eastern side, causing it to pull away from the party wall,

- b. extensive large cracks have appeared in the new plasterboard walls on the western side of the house, including the length of the hallway, adjacent to the decorative timber fretwork in the hallway, the length of the living room, the passageway leading to the kitchen, the kitchen wall,
 - c. long large diagonal cracks have appeared in the re-rendered plaster wall of the solid brick chimney face in the kitchen,
 - d. the two doors in the lounge room adjacent to the Western Wall failed to close as that always have dropped,
 - e. the house is visibly pulling away from the entire length of the double brick party wall both internally and externally,
 - f. the cracks are worse than the cracks which existed prior to the renovations,
 - g. the Baltic pine timber floors are not horizontal, and
 - h. the floors in the kitchen and living room bounce and squeak when walked upon as the bearers are not sitting on many of the stumps.
- 14 The applicants contacted the respondent to discuss their concerns, but were unable to achieve an acceptable result. They commenced this proceeding in March 2017, seeking orders on grounds that the respondent is in breach of the warranties implied into the Contract by section 8 of the *Domestic Building Contracts Act 1995*², including that:
- a. the works would be carried out in a workmanlike manner and in accordance with any plans and specifications;
 - b. the works would be carried out with reasonable care and skill.
- 15 The respondent's defence to the claim was put on a number of grounds³, which may be summarised as follows:
- a. its works were carried out in a proper and workmanlike manner, and with reasonable care and skill, and in accordance with the Contract, which is evidenced by the fact that the building surveyor, Nicholson Wright, issued Certificates of Final Inspection;
 - b. the defects in the house were not caused by its works, as evidenced by a report prepared by Mr Bruce Cossins on behalf of the Victorian Building Authority;

² Third Amended Points of Claim

³ Third Amended Points of Defence and Points of Defence

- c. if there is excessive cracking and movement in the house, this was caused not by the respondent's works, but by:
 - i. very reactive ground/foundation material in the Northcote area;
 - ii. proximity of a large oak/elm tree located on the eastern boundary;
 - iii. potential high water table or other form of moisture in the soil;
- d. the respondent's 15 year guarantee expressly excludes liability for damage caused by natural ground movements, poor drainage, weather conditions, effects from trees, environmental causes, any other contingency or act of God.

The hearing

- 16 The matter came before the Tribunal for hearing on 24 May 2018. Each of the applicants gave evidence. They had engaged a building consultant, Mr Salvatore Mamone, of Inspect Direct Pty Ltd, who attended the Tribunal to give evidence. Mr Mamone had carried out a number of inspections and provided two reports to the Tribunal⁴. The applicants also tendered two technical reports, one from a structural engineer Mr Richard Drew⁵, and one from a geotechnical engineer, Mr Alex Rodriguez⁶. They were not called to give evidence and I advised the applicants that if their reports were challenged, I would have to assess how much weight to give their opinions. The applicants said that they understood but that it was cost prohibitive to have them attend, particularly when their reports did not add much more than Mr Mamone's evidence.
- 17 The respondent was represented by its director, Mr Michael Younan, and its administration manager, Ms Vanessa Younan, who both gave evidence. The respondent did not call evidence from any expert witnesses, but they sought to rely on a report prepared by Mr Bruce Cossins on behalf of the Victorian Building Authority.
- 18 At the commencement of the hearing I warned the respondent of the risks of proceeding without calling any technical experts as witnesses. I explained that I would read Mr Cossins' report and take it into consideration, but where he disagreed with Mr Mamone, I would have to make a decision on which opinion I preferred, and that I may find it difficult to prefer Mr Cossins' evidence when it was not explained or tested. Despite this warning, the respondent wanted to proceed with the hearing.
- 19 I also raised with the respondent the difficulties I would face in assessing the importance of the Certificates of Final Inspection issued by the building

⁴ reports dated 16 February 2016 and 4 August 2017 and expert witness statement pursuant to PNVCAT2 made 2 March 2018

⁵ report dated 14 March 2018

⁶ report dated 17 April 2018

surveyor when the surveyor was not present to give evidence. Mr Younan insisted that the certificates were a guarantee that all the works his company had done had been carried out correctly. I explained to him that the role of a building surveyor under the *Building Act* 1993 is not to provide a report on the quality of workmanship, instead it is to satisfy his or her statutory obligations under that Act⁷. I also pointed out to him that in its Building Permit documentation, Nicholson Wright expressly exclude themselves from any responsibility for any form of levelling of the existing floor, and for any defects that occur to the building, and for any underpinning work that does not rectify the problem, once the underpinning work has been completed (Building Permit Conditions paragraphs 2, 3, 4). In spite of that advice, the respondent insisted on proceeding with the hearing without calling any witnesses apart from himself.

Evidence about the damage to the house

- 20 Mr Mamone gave evidence and was cross-examined by Mr Younan. He adopted his opinions as set out in his reports, after making one amendment, namely that the references to the Guide To Standards And Tolerances published by the Victorian Building Authority (“Guide”) should be to the 2007 version of the Guide not the 2015 version. He based his opinion on his qualifications as an architect and registered building practitioner, with particular experience in designing and administering building work.
- 21 In respect of the underpinning works his opinion may be summarised as follows:
- a. The wing wall is showing significant cracking, with the largest crack being up to 15 mm in width, with daylight showing through.
 - b. The corbel brickwork at the top of the wall is unstable and on the verge of falling, as the bricks have moved loose.
 - c. The engineering design obtained by the respondent (as attached to the Building Permit) for the underpinning and lifting of the wing wall is disturbing in its lack of detail.
 - d. Mr Younan suggested to him that he could not lift the wing wall for risk of damage to the neighbour’s front doors and instead stabilised the foundation with concrete. Mr Mamone said that as the neighbour was also a party to the underpinning contract, he would have presumed that the neighbour was a party to that risk. Nevertheless, Mr Mamone’s concern was not so much the failure to lift the wall, but the fact that the wall was still sinking and the cracking was worsening.

⁷ See for example: *Lawley v Terrace Designs Pty Ltd* [2006] VCAT 1363 at [243]; *Moorabool v Taitapanui* [2006] VSCA 30; *Jacobi & Ors v Motalli & Anor* [2012] VCAT 659; *Elturan v Unicon Property Group Pty Ltd & Ors* [2013] VCAT 924

- e. Despite the respondent's failure to call Mr Cossins to give evidence, I put the opinions in his report to Mr Mamone. In respect of the wing wall, Mr Cossins says that the existing crack has not increased since the underpinning and that the new cracks are caused by a failure to support the brickwork above the existing crack. He has provided no basis for that assumption and it is contradicted by the evidence of the applicants that the crack has worsened over time. Presumably Mr Cossins was given those instructions, but in circumstances where Mr Younan said he was not on site in 2010 prior to the works being carried out, it is hard to understand who could have given Mr Cossins those instructions.
- f. Mr Mamone's response to Mr Cossins' opinion was that it ignored the new damage to the corbel brickwork, which is a significant sign that the wall is not adequately supported by the new footings.

22 In respect of the re-blocking works, in summary, Mr Mamone's opinion is that:

- a. The greatest cracking in the wall plaster is on the west side of the house, indicating that the timber frame is pulling away from the party wall and the whole house is sinking towards the east.
- b. The floor levels are outside the tolerances allowed by the Guide, being a difference in level of more than 15 mm in any room area or more than 8 mm in any two metre length. His measurements revealed differences in floor levels of up to 28 mm.
- c. It can be assumed that at the time of the renovations being completed in 2011, the house was relatively crack free and the floors were relatively level. The damage has occurred progressively over the five years following.
- d. The damage is the direct result of excessive uncontrolled movements resulting from subsidence of the concrete stumps.
- e. The causes of the subsidence of the concrete stumps are the following:
 - i. a failure by the respondent to take into account the general overall very reactive ground/foundation material within the Northcote area - good workmanship would have ensured that the base pads supporting the stumps were founded at an adequate depth and were of an adequate size;
 - ii. a failure by the respondent to take into account a large oak/elm tree on the eastern boundary - this tree was mature at the time of the works;

- iii. the potential for a high water table this area.
- f. The design documentation produced by the respondent (as attached to the building permit) is disturbingly inadequate for such a job and fails to take into consideration the site and area conditions.
- g. Mr Younan suggested in cross examination that either surface or subsurface moisture, from groundwater or from a leaking pipe, could have caused the stumps to subside. Mr Mamone agreed that was a possibility, but said he saw no evidence of moisture during his inspections. Mr Younan said he was not able to say whether there had been moisture during the installation of the stumps, because he was not on site.
- h. Mr Younan also suggested that the mature trees on the boundary could be affecting the soil. Mr Mamone agreed and said that these trees should have been taken into consideration by the respondent when designing the works, since they were mature at that time.
- i. I then put the opinions expressed by Mr Cossins in his report to Mr Mamone, so best as I could understand them. His response was that it appears that Mr Cossins has assumed that the party wall has moved upwards relative to the rest of the house (for example see item 7 of his report). Mr Mamone's view is that the party wall has stayed stable, and it is the rest of the house that has subsided towards the east wall, pulling the house away from the party wall.
- j. Mr Cossins says at items 9 and 10 of his report that the stumps are generally aligned and erect. Mr Mamone does not disagree, but says that misses the issue; the cause of the movement is that the stumps have subsided, which they can do while remaining aligned and erect. He says the evidence of the subsidence is the gapping that has developed between the bearers and the joists. The bearers are tied to the stumps and move downwards as the stumps sink, while the joists remain attached to the frame of the house.
- k. Mr Mamone was supported in that opinion by evidence from Mr Henshall that they had packers put in to fill the gaps above the stumps, and these worked for about six months to stabilise the floor, but then the stumps continue to subside and the gaps have opened up again.

Findings Regarding Applicable Implied Warranties

- 23 As the respondent was, under the Contract, to perform work within the meaning of *domestic building work* as defined in the *Domestic Building Contracts Act 1995*, the applicant was entitled to the benefit of the implied warranties regarding the work set out in s 8 of that Act, including the

warranty created by subsections 8(a) and (d) that the work would be carried out in a proper and workmanlike manner and with reasonable care and skill.

Findings Regarding Breach

- 24 I accept the opinion of Mr Mamone that the work was not carried out in a proper and workmanlike manner nor with reasonable care and skill. In particular, I rely on his professional opinion that the design of the underpinning and re-blocking was lacking in detail and failed to take into consideration the site conditions. I accept that the damage to the house has occurred over the last five years, since the renovations were completed. I also accept his opinion that it is the stumps that are subsiding that has caused the damage, rather than the party wall moving upwards. Further, I accept that the wing wall has not been stabilised by the underpinning works and has continued to subside.
- 25 As a result of these findings, I accept that the respondent has breached the implied warranties created by the *Domestic Building Contracts Act 1995*.

Findings regarding damages

- 26 The Applicants have suffered loss and damage as a result of the breaches. They seek the following amounts⁸:

a.	Rectification costs	\$25,033
b.	Expert attendance and report costs	\$3561.50
c.	Cost of obtaining copy of building permit, ASIC search, colour photographs	\$443.91
d.	Refund for costs paid for underpinning works not performed	\$3200
e.	Legal costs	\$1650
Total		\$33,888.41

My decision in respect of each of these claims is as follows:

a. Rectification Costs \$25,033

- 27 The rectification costs are a combination of monies already expended and works still to be done. The items claimed are:

i. Temporary packing of stumps and bearers – \$1100

⁸ Amended paragraph 8 of the Third Amended Points of Claim handed up during the hearing

per invoice from Titan Reblocking dated 31 January 2017.

The applicants' evidence was that this work was carried out in January 2017 and resulted in a temporary improvement to the bouncing of the floors.

ii. *To restump the house – \$13,500*

Per quotation from Cornerstone Foundations dated 9 August 2017.

The restumping rectification works proposed are to replace the easternmost row of stumps with stumps to a depth of 1 metre. This is in accordance with the recommendations of Mr Mamone.

iii. *To repair damaged plasterwork on internal walls and ceilings - \$1650*

Per invoice from Quality Value Plastering dated 8 March 2017.

This work has already been completed. The applicants acknowledge that these repairs may have to be redone after the restumping is completed, as further internal damage is likely to occur. However they make no claim for those future costs, as they are unknown at this time. Instead they seek compensation for the costs already incurred as a reasonable measure of their loss.

iv. *To repaint the repaired internal plasterwork - \$1700*

Per invoice from Dennis Mightiest Painter dated 7 March 2017

Similarly to the previous item, these are costs already expended but claimed to be reasonable in circumstances where the future damage consequential on the restumping is unknown.

v. *To remove and relay paths adjacent to the eastern wall of the house - \$3685*

Per quotation from Collegian Paving & Landscaping dated 20 October 2017

These works will be required to allow access for the restumping works.

vi. *To underpin 1.5m of party wing wall - \$2850*

Per quotation from Cornerstone Foundations dated 9 August 2017.

This is in accordance with the recommendation of Mr Mamone. The complete value of the quotation is \$5700, but the applicants claim only half, on the basis that the wing wall is a party wall and the neighbour is responsible for half the cost. I was advised that the neighbour was

invited to bring a claim against the respondent in this proceeding, but declined to do so.

vii. To lift and re-lay 8 decking boards on the front veranda - \$548

Per quotation from CA Building Maintenance dated 1 September 2017

This is required to allow access for the underpinning of the party wall.

- 28 The respondent did not dispute the amount of the quotations or invoices, nor the scope of works proposed. The respondent also did not argue that the scope of works proposed was greater than that which it had originally carried out.
- 29 I accept the evidence of Mr Mamone that the scope of the proposed rectification works is reasonable and appropriate. In the absence of any evidence to the contrary, I also accept that the amounts quoted or charged are reasonable. I note the concessions of the applicants (which are appropriately made) that they are not making any claim for future damage, as they are unable to quantify this at this time; nor are they claiming on behalf of their neighbour. This lends weight to my view that the amounts sought are reasonable.
- 30 Accordingly I will allow \$25,033 for rectification costs.

b. Expert attendance and report costs \$3561.50

31 This claim is made up of the following costs:

- i. *Inspect Direct report on restumping - \$550*
- ii. *Inspect Direct report on underpinning - \$495*
- iii. *Inspect Direct VCAT compliance addendum - \$297*
- iv. *Drew Rudd engineering report - \$495*
- v. *Drew Rudd VCAT compliance addendum - \$742.50*
- vi. *Soil Test geotechnical report - \$385*
- vii. *Attendance of Mr Mamone at hearing - \$597*

32 I accept that it was appropriate for the applicants to engage experts to assist them in proving their claims. I will allow these claims as necessary costs in the proceeding.

c. Cost of obtaining copy of building permit, ASIC search, colour photographs \$443.91

33 These items are not recoverable as costs in the proceeding.

d. Refund for costs paid for underpinning works not performed \$3200

34 I explained to the applicants during the hearing that, in my view, to allow this item would be “double-dipping”, as they cannot recover both the original cost of having the work done and the cost of having it rectified. They agreed with that analysis and do not press this claim.

e. Legal costs \$1650

35 I accept that it was appropriate for the applicants to engage lawyers to assist them in prosecuting their claims. I will allow this item as costs in the proceeding.

f. Lack of Insurance

36 I should also note, for the sake of completeness, that during the hearing, the applicants asserted that the respondent had failed to provide insurance for the works. They were not specific about the type of insurance they alleged, but I understood them to mean the domestic building warranty insurance which is required pursuant to section 137B of the *Building Act* 1993 and the Ministerial Order made thereunder. They do not seek any monetary compensation for this alleged failure. I make no findings about whether such insurance was required in this matter, and note that even if it was, the indemnity provided by the insurance would only apply for a period of 6 years from the completion of the works, and only if the respondent was insolvent. Accordingly there would be no financial loss to the applicants at this time.

Conclusion

37 As a result of my findings above, I find that the respondent is liable to the applicants for the amount of \$30,244.50, calculated as follows, and I will make orders accordingly.

a.	Rectification costs	\$25,033
b.	Expert attendance and report costs	\$3561.50
e.	Legal costs	\$1650
Total		\$30,244.50

SENIOR MEMBER S. KIRTON