

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP209/2017

### CATCHWORDS

Domestic Building; contract for bricklaying; claim for unpaid works; counterclaim in respect of monies overcharged for bricks laid and for rectification of faulty works; appropriate methodology for counting bricks considered.

**APPLICANT:** Jason's Bricklayer Pty Ltd (ACN 167 194 514)(ABN 36 479 234 273)

**FIRST RESPONDENT:** Fynnan Pty Ltd (ACN 079 169 476)

**SECOND RESPONDENT:** David John Carabott

**WHERE HELD:** Melbourne

**BEFORE:** Member C Edquist

**HEARING TYPE:** Hearing

**DATE OF HEARING:** 3 August and 4 August 2017

**DATE OF RECEIPT OF APPLICANT'S SUBMISSION:** 22 August 2017

**DATE OF RECEIPT OF RESPONDENT'S SUBMISSION:** 31 August 2017

**DATE OF ORDER:** 16 October 2017

**CITATION:** Jason's Bricklayer Pty Ltd v Fynnan Pty Ltd (Building and Property) [2017] VCAT 1623

### ORDERS

- 1 The applicant must pay to the respondents the sum of \$7,376.63.
- 2 The issues of costs, and reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* are reserved. The respondents have liberty to apply in respect of these matters within 60 days.

**Member C Edquist**

**APPEARANCES:**

For Bricklayer : Mr J Liu

For the First Respondent: Mr D Carabott, director

For the Second Respondent: Mr D Carabott, in person

## REASONS

### BACKGROUND

- 1 Mr Jing Liu is a bricklayer who conducts his business through a company styled Jason's Bricklayer Pty Ltd. That company is the applicant ("the bricklayer"). The bricklayer has come to the Tribunal seeking an order for \$24,217.70 in respect of bricklaying carried out for Fynnan Constructions.

### THE RESPONDENTS

- 2 The bricklayer initially named Fynnan Constructions ACN 079 169 476 as sole respondent. A business name search dated 17 February 2017 indicates that Fynnan Constructions is not a company, but is a business name owned by a partnership comprising Fynnan Pty Ltd and David John Carabott. An ASIC search confirms Fynnan Pty Ltd has the ACN 079 169 476. As the bricklayer indicated at the start of the hearing that his intention was to sue the owners of Fynnan Constructions, it was appropriate that the name of the first named respondent should be changed to Fynnan Pty Ltd ACN 079 169 476 and that David John Carabott should be added as second respondent. Neither Fynnan Pty Ltd nor Mr Carabott objected to this course, and the necessary orders were made during the hearing. For convenience, Fynnan Pty Ltd and Mr Carabott will be referred to as "the builders".

### THE HEARING

- 3 The hearing came on before me on 3 August 2015 and continued on 4 August 2015. It concluded at the end of the second day. The bricklayer was represented by Mr Liu. He was the only witness who appeared for the bricklayer, but he submitted statements from three other bricklayers and a builder and all but one of those individuals gave evidence by phone.
- 4 The builders were represented at the hearing by Mr David John Carabott. He gave evidence, as did the project manager Mr Connor Jeffreys.

### THE BRICKLAYER'S CLAIM

- 5 The bricklayer's case is that that Mr Liu worked as a subcontractor for the builders between November 2015 and July 2016. The work was carried out at an address in Chapel Road, Keysborough. Mr Liu's evidence was that he was paid on a monthly basis, but did not receive full payment of the last two tax invoices he rendered. Specifically, he says that of the second last invoice No 213 issued on 14 June 2016, he was paid only \$26,000 out of a total of \$36,718. This left a deficit of \$10,718. He also alleges he was paid nothing out of the final invoice No 216 issued on 11 August 2016 in the sum of \$13,499.70. This explains why the bricklayer's total claim is for \$24,217.70.
- 6 Mr Liu says that he chased payment by telephone and text message, but received no response. He also says that he went to the builders' office in September 2016 to find out what was happening and was told he would not

get paid because there were some defects in his work, but he was not told what the defects were.

## **THE BUILDERS' DEFENCE AND COUNTERCLAIM**

7 The builders filed a document dated 16 May 2017 setting out the basis of their defence and a counterclaim. The document does not appear to have been drafted by lawyer. No criticism of the builders is intended by this remark, which is made only because it has been necessary for me to isolate the allegations which ordinarily would be said to constitute a defence from those which constitute a counterclaim.

### **The defence of faulty workmanship**

8 The allegations which clearly constitute the defence of set-off are that the bricklaying work was below an acceptable standard. The alleged faults in the workmanship included inconsistent mortar joints, excessive mortar joints, incorrect fall on a sill, and brick courses not lining up. Photos were tendered by the builders showing allegedly faulty workmanship. The costs of rectification of defects in the brickwork, carried out by MLS Bricklaying Pty Ltd ("MLS") are evidenced by invoices in the respective sums of \$1,320, \$1,496, \$550 and \$792. A further invoice rendered by MLS, for \$660, is referred to under the discussion of the counterclaim below.

### **The counterclaim**

- 9 The counterclaim includes five elements. The first is that the bricklayer's workers had mixed their cement next to a storm water pit and had then washed out their tools, barrow and mixer into the pit. This had led to the drain from the pit becoming blocked with sand and cement. The builders' client, the developer of the 34 units which were being built at the site, had to engage a third party to clear the pipes using a high pressure pipe cleaning suction truck at a cost of \$970. The developer had charged this to the builders, and they in turn had sought permission from the bricklayer to deduct \$970 from an invoice from the bricklayer. This had not been done prior to the hearing, even though it was alleged that the bricklayer had agreed to this course in June 2016.
- 10 The second limb of the counterclaim is that on 15 September 2016 Mr Liu allegedly attended at the site and started hitting a brick wall with a hammer, causing considerable damage. It is asserted that Mr Liu sent a text and admitted that he had caused the damage. This claim was referred to in the hearing as the "criminal damage" claim. \$660 is claimed for the repair of the criminal damage, which was carried out by MLS.
- 11 The third limb of the counterclaim is directly related to this incident. The site was then at the very final stage of completion, and it was initially alleged that the damage delayed the completion of the project. However, in submissions received after the hearing, the builders withdrew their claim for "liquidated damages", which I take to refer to their claim for delay. This claim accordingly falls away.

- 12 The fourth limb of the counterclaim is for \$1,280, which is a sum the builders claim for attending to administrative tasks associated with the litigation.
- 13 The fifth, and in monetary terms by far the most significant part of the counterclaim, relates to the number of bricks invoiced by the bricklayer. It is alleged that number of bricks allegedly invoiced by the bricklayer was 116,100. It is asserted, on the basis of a report prepared by a quantity surveyor, that only 1,764 m<sup>2</sup> of bricks were laid, and at a rate of 49 bricks per square metre. This equates to 86,436 bricks. It is asserted that this led to \$35,893.44 being overcharged to the builders. The builders agree that a credit for this sum is due to the bricklayer against the \$24,217.70 which has not been paid, and accordingly the net value of the claim for overcharging for bricks is reduced to \$11,675.74.
- 14 The total set off and counterclaim made by the builders is for \$1,320, \$1,496, \$550 and \$792 for defects, plus \$970 for the drain, plus \$660 for the criminal damage, plus \$1,280 for administration costs, plus \$11,675.74 being the net claim for overcharging. The total is \$18,743.74

#### **THE BRICKLAYER'S RESPONSE TO THE BUILDERS' DEFENCE AND COUNTERCLAIM**

- 15 The bricklayer filed points of defence to the counterclaim on 30 June 2017 in which it responded to the builders' claims.
- 16 The bricklayer acknowledges that there were "some defects in the work completed" but says that Mr Liu made a number of offers to come back and rectify the defects without additional charge. Mr Liu further says the builders refused to communicate with him and engaged another tradesperson to carry out the rectification, without notifying him.
- 17 The bricklayer denies the allegation that the builders were overcharged by it for bricks laid. Mr Liu disputes the conclusion reached by the builders' quantity surveyor on the basis that the quantity surveyor's report did not accurately reflect the consumption of bricks used on the site. The primary proposition put is that the methodology used by the quantity surveyor to measure bricks was wrong. A secondary argument was raised at the hearing, which was that the quantity surveyor had underestimated the number of bricks laid by ignoring some elements of the brick work.
- 18 In relation to the criminal damage claim, the bricklayer admits that Mr Liu caused damage to the site, but says that he made a payment of \$1,300 by way of compensation for the criminal damage in accordance with a diversion plan entered into at the Magistrates Court on 20 April 2017.

#### **THE ISSUES**

- 19 From this summary of the claim and counterclaim, and from the submissions made at the hearing, I consider that the issues I must address are as follows:

- (a) In respect of the defects, is the bricklayer absolved of responsibility because Mr Liu offered to come back and rectify the defects without additional charge? This question involves an issue of whether the builders acted reasonably in refusing to allow Mr Liu to come back.
- (b) If the bricklayer must pay for the rectification of defects, what is the reasonable cost of rectification?
- (c) Turning to the counterclaim, the first issue is whether a credit should be allowed to the builders in respect of the \$970 they had to pay or allow to the developer in respect of the blocked drain.
- (d) In relation to the loss arising from the criminal damage to the garage, there appear to be two remaining issues. The first is whether the builder can in this proceeding claim compensation for damages in circumstances where, under a diversion plan entered into in the Magistrate Court, compensation of \$1,300 has already been paid. If the builder can still maintain a claim for compensation for the criminal damage, there is an issue as to what is the reasonable cost of rectifying the damage deliberately caused to the garage. I confirm the third issue, which related to compensation in respect of the delay to completion of the project by the damage to the garage, has been withdrawn.
- (e) Regarding the claimed administrative charges \$1,280, the issues are whether they are damages which flow directly and naturally from the bricklayer's breach of contract, and whether they are reasonable.
- (f) With respect to the key issue of alleged overcharging for bricks laid, the primary question is whether the quantity surveyor used the right methodology.
- (g) If the quantity surveyor has used the correct methodology, then there is a separate issue as to whether he performed his calculations correctly.
- (h) A final issue is whether the builders have accurately quantified the loss flowing from the over estimation of bricks laid.

**Issue 1: Is the bricklayer absolved from responsibility because the bricklayer offered to come back to rectify defects.**

- 20 Mr Liu gave evidence that he first made the offer to return to the site and rectify defects when he went to the office of Fynnan Constructions and confronted Mr Jeffreys about the fact that he was not being paid. The parties agreed that this occurred on or about 5 September 2016, as this is the date that Mr Liu sent a number of texts to Mr Jeffreys regarding defects.
- 21 According to the evidence of Mr Jeffreys, most of the defects had been attended to earlier than September. The builder presented as evidence in support of the cost of rectification a series of invoices from MLS, a company operated by Michael Sheehan. The first MLS invoice, dated 1 August 2016, refers to work on "Thursday 21<sup>st</sup>" which must be a reference

back to Thursday 21 July 2016. A second invoice from MLS was dated 14 August 2016, and refers back to work carried out on Friday, 29 July 2016.

- 22 The fact that MLS had been engaged to carry out rectification work as early as 21 July 2016, gives rise to the issue of whether the bricklayer should have been given an opportunity to carry out rectification work at that point. Mr Liu contended he was entitled to return to fix any defects in his work. For the purposes of argument I am prepared to accept that ordinarily a tradesperson should be given an opportunity to rectify defects in their work.
- 23 In this particular case, two particular matters are relevant to Mr Liu's argument. Firstly, Mr Jeffreys gave evidence that the work performed by the bricklayer's tradesmen was unsatisfactory unless Mr Liu was present. Secondly, Mr Liu deposed that he broke his leg on or about 25 June 2016, and was hospitalised. After this, he spent the whole of July at home with his leg elevated. Clearly, he could not attend site during that period
- 24 In these circumstances, I find it reasonable that the builders did not engage the bricklayer to undertake defects rectification in July 2016.
- 25 This finding covers the MLS first invoice dated 1 August 2016 for \$1,320, and the second MLS invoice dated 14 August 2016 for \$1,496. These are the major invoices.
- 26 A third invoice, rendered on 8 September 2016, was for \$792. This was only days after the confrontation between Mr Liu and Mr Jeffreys outside the builders' office. I do not see how the builders can be criticised for having continued to use MLS to carry out rectification work at this point. I find that the bricklayer had no entitlement to come back on the site to carry out rectification work at this late stage.
- 27 Another MLS invoice, dated 27 September 2016, was for \$660, and related to the dismantling and rectification of the broken "teeth" bricks on the corner of the garage. This was the criminal damage caused by Mr Liu on or about 5 September 2016.
- 28 In my view, the builders could not reasonably have been expected to allow the bricklayer back on the site after that incident, and I find the bricklayer cannot complain that it was denied the opportunity to go back to the site to rectify the corner of the garage.
- 29 The remaining MLS invoice, due on 10 October 2016, was for \$550 and related to dismantling and relaying a garage door and creating an opening for a door. As the evidence was that at this point the relationship between the parties had completely broken down. I find the builders are not to be criticised for using not MLS for this work.
- 30 The upshot is that I find the bricklayer cannot raise as a defence the argument that it should have been allowed back on site to rectify defects.

## **Issue 2: What is the reasonable cost of rectification?**

- 31 As the bricklayer must pay for the rectification of defects, I now turn to the question of the reasonableness of the cost of rectification claimed by the builders.
- 32 The first MLS invoice, dated 1 August 2016, was for \$1,200 plus GST, a total of \$1,320. It covered the work of four bricklayers, described as tradesmen. The “unit price” claimed was \$200 per hour. Mr Liu did not dispute the rate of \$50 per hour for a bricklayer. This was not a surprising concession, as it came out later in his evidence that he himself charged \$50 per hour. However, he queried whether 4 bricklayers were required. When it was confirmed by Mr Carabott that Fynnan Constructions provided the labourers, the invoice was conceded by Mr Liu.
- 33 The next MLS invoice, dated 14 August 2016, covered 3 bricklayers at a unit price of \$170 per hour, and totalled \$1,360 exclusive of GST, or \$1,496 with GST. Mr Jeffreys suggested that the fact that more than \$50 per hour was charged per bricklayer was explained as the principal, Mr Sheehan, would have charged \$70 per hour. This rate, when added to the cost of two standard bricklayers at \$50 per hour, yielded the claimed unit price of \$120 per hour. The invoice was then accepted by Mr Liu.
- 34 The other MLS invoices for rectification tendered were dated 8 September 2016 (\$792 inclusive of GST) and 10 October 2016 (\$550 inclusive of GST). These were accepted at the hearing.
- 35 The upshot is that the MLS invoices, save for the invoice for \$660 relating to the rectification of the criminal damage to the corner bricks in the garage, were all accepted by Mr Liu. The accepted invoices total \$4,158. This figure must be deducted from the sum which is otherwise to be awarded to the brick layer.

## **Issue 3: Drain cleaning**

- 36 Mr Liu confirmed at the hearing that he had agreed to the deduction of \$970 from the bricklayer’s invoices in order to compensate the builder for the payment which had been deducted by the developer. This figure must also be credited to the builders.

## **Issue 4: Recovery by the builders of damages in respect of the criminal damage to the garage**

- 37 As noted above, Mr Liu was charged with criminal damage after he deliberately smashed some corner bricks in the garage. Mr Liu says that he damaged the bricks because they were out of plumb, and he says it was his intention to demolish them and then reinstate them accurately. However, he was charged with criminal damage, which resulted in Mr Liu pleading guilty at the Magistrates Court of Dandenong in April 2017 and being placed on a diversion plan, which required him to pay \$1,300 compensation to Mr Jeffreys. Mr Jeffreys gave evidence that when the \$1,300 was paid to him he paid the money to his employer. I accept this, and accordingly



consider it is appropriate for the payment to be taken into account in assessing the bricklayer's liability to the builders.

- 38 Mr Liu contended that as he had been forced to pay \$1,300 compensation to the builders, the builders had been overcompensated.
- 39 I find the compensation payment of \$1,300 must be deemed to cover at least the MLS invoice for \$660.
- 40 Mr Carabott said that his business had incurred overhead expenses and disruption because of the criminal damage incident. That may well be the case. However, that is not an issue that I have to determine, because the \$1,300 was a figure determined by the Magistrates Court, and it is a sum which has been paid by the bricklayer.
- 41 My finding that the builders have already been compensated in relation to the MLS invoice for \$660 means that no allowance in favour of the builders is to be made in respect of that invoice in the present case.

**Issue 5: The administrative charges of \$1,280.**

- 42 The first issue here is whether they are damages which are recoverable under ordinary principles of contract law as damages that flow directly and naturally from the bricklayer's breach of contract. I consider they are arguably too remote. If the parties had had a conversation at the time the contract was being formed about the imposition of administrative charges by the innocent party on the other party in the event that the other party breached the contract, then such damages might have been recoverable. However, there was no evidence that such a conversation took place.
- 43 Even if administrative charges are conceivably recoverable, no details of what they related to were given. The only information provided was that they covered 16 hours of work at a rate of \$80 per hour. There was no evidence as to who carried out the work, or why a rate of \$80 was reasonable.
- 44 On balance, I am not persuaded that the claim is justified, and I dismiss it.

**Issue 6: Alleged overcharging for bricks laid**

- 45 The quantity surveyor engaged by the builders as their expert was Mr Kevin Jong of Napier & Blakeley. His first report was dated 4 May 2017. He was also called to give evidence at the hearing by telephone.
- 46 I note that Mr Jong's report had not been prepared in accordance with the Tribunal's practice note regarding expert reports, and Mr Jong did not set out a statement of his experience and expertise in his report. However, when he gave evidence by telephone, he deposed that he held a degree in building and property from the University of Melbourne, and had been a quantity surveyor for 12 years.
- 47 Mr Jong in his report dated 4 May 2017 indicated that he had estimated the quality of bricks laid using the construction drawings (revisions C1 & C 2) provided to him in respect of the 34 terraces in the project. From the

drawings he had estimated that 1764 m<sup>2</sup> of bricks were used. He gave specific numbers in respect of a number of walls and elevations.

- 48 From this base of 1764 m<sup>2</sup> of bricks, Mr Jong calculated that, at the rate of 49 bricks per square metre, a total of 86,436 bricks had been used.

#### Mr Liu's evidence

- 49 Mr Liu contested this methodology. His evidence was that the appropriate methodology was to subtract from the total number of bricks ordered and delivered to site the total number of bricks left on site. He deposed that was how he always worked out bricks used. He also said that the builders' supervisor Jarrod had walked around the site every month and counted bricks.
- 50 Furthermore, Mr Liu said it was the "industry standard". When he was challenged in cross examination about that statement, he asserted that he had been in the industry for 12 years.
- 51 In order to support his proposition that the way he counted bricks was the industry standard, Mr Liu tendered statements from a number of individuals.

#### Mr Singh's evidence

- 52 The first of these was Mr Sarabit Singh. His hand written statement was not in the form of a statutory declaration. It stated that he had seen Mr Liu walk around with the site manager Jarrod to count bricks at the project on more than three occasions. He also confirmed that the way "we count" bricks is to deduct bricks left over from the bricks delivered to the site. He said that this is the way bricks are counted "all the time for each single job."
- 53 Mr Singh gave evidence by telephone. Under cross-examination he said that he had seen Jarrod walk around the site more than three times. However, he conceded that he was not able to hear what Jarrod and Mr Liu were talking about.

#### Mr Ren's evidence

- 54 The second witness called about the counting bricks was Mr Hang Ren. He had put in a typed statement, in which he "declared" information, but it was not in the form of a statutory declaration. He said he had been a bricklayer with seven years experience in the industry. With respect to the counting of bricks he declared:

The way I calculate how many bricks should charge to builder is how many bricks delivered on site reduce the amount of full size bricks left on site. This is the way I always do and the same way for all other bricklayers that I know to calculate bricks. We never charge by per square meters because it is only for estimate matter not for actually using amount. (sic)

- 55 Mr Ren gave evidence by telephone. He confirmed his evidence. However, he conceded under cross-examination that when he counted bricks, he

counted broken bricks. He confirmed that he charged for unused broken bricks and wastage.

#### Mr Cong's evidence

- 56 A third bricklayer called by Mr Liu was Mr Yu Gie Cong. He put in a typed declaration which was in exactly the same form as the declaration tendered under the name of Hang Ren. The only difference was that Mr Gong said that he had been a bricklayer for nine years. Mr Gong was unavailable to give evidence by telephone, and accordingly could not give sworn evidence and could not be cross-examined. In circumstances where his statement was identical in form to that prepared in the name of Mr Ren, I discount it.

#### Mr Gavan's Evidence

- 57 Mr Liu tendered a fourth statement, from Mr Anthony Gavan. The statement was not in the form of a statutory declaration. Mr Gavan says he was a builder with 30 years experience in the industry. Relevantly, he stated:

The way in which I calculate how many bricks should be charged per job, to the builder, is simple: How many bricks are delivered onto site, less the amount of (full) size bricks left on site.

This is the way I have paid for brick work for many years, and do and the same way for all other bricklayers that I have worked with in which to calculate bricks/and the job invoice. We have never paid by the square meter, as this measurement is used only for estimated quotes and not for final invoicing. (sic)

- 58 Mr Gavan gave evidence by telephone and confirmed his statement. Under cross-examination he deposed that "I just count the good bricks left and take that off the total delivered".

#### **Discussion regarding methodology**

- 59 Mr Singh and Mr Ren are bricklayers. They gave evidence which I do not doubt was based on their personal experience in the building industry. However, this does not qualify them as experts, and I do not think that they are in a position to give evidence as to the existence of any industry standards regarding the appropriate method for counting bricks.
- 60 The other witness called, Mr Gavan, is a builder. While it may well be that because of his experience as a builder over a lengthy period he might have been expected to have had a better understanding of industry wide practice in the domestic arena, he did not seek to qualify himself as an expert. Although I do not doubt the evidence he gave, it does not justify a finding that there is in the domestic construction industry in Victoria an industry wide practice of counting bricks in the manner contended by Mr Liu.
- 61 Mr Charabott is also a builder. He supports the method of counting bricks adopted by Mr Jong. He also points out that it is not in the interests of a builder to use the methodology relied on by Mr Liu, because a consequence

of using Mr Liu's methodology of deducting from the number of bricks delivered to site the number of full bricks left, is that the builder has to pay for unused broken bricks and other wastage. There is no incentive for the builder to be careful with bricks.

#### **Issue 6: did the quantity surveyor perform his calculations correctly?**

- 62 At the hearing an issue emerged as to whether the quantity surveyor had accurately estimated number of bricks used. It appeared that he may not have accurately assessed how many bricks should have been allowed for in piers incorporated within walls, in stand alone piers, and in double brick walls in the garages. It was for this reason that the bricklayer was given an opportunity, in the orders made at the conclusion of the second day of the hearing on 4 August 2017, to make submissions about those matters. These builders were given the opportunity to file response submissions.
- 63 The bricklayer put in lengthy submissions several days after the date limited for the submission in the Tribunal's Order, and a number of those submissions were not relevant to the specific questions concerning the number of bricks laid. The relevant submissions, in section 2, include the following:
- a) the builders did not question his methodology for counting bricks after he submitted his updated quotation;
  - b) the builders accepted the bricklayer's methodology by paying his invoices without question up until the last two invoices;
  - c) the site manager used to count bricks with Mr Liu, and knew the bricks were being counted for the purposes of invoicing;
  - d) the quantity surveyor's report was not accurate as it based on the design drawings, but not on actual building work carried out;
  - e) calculating bricks per square meter ignores the need to use less than full size bricks in parts of the works.

#### **Discussion of the bricklayer's contentions**

- 64 I am not persuaded by the bricklayer's arguments that the builders did not question his methodology for counting bricks after they accepted his revised quotation, and that the builders accepted the bricklayer's methodology by paying his invoices without question up until the last two invoices.
- 65 I comment that the argument that the method of calculating bricks had been resolved by an amendment to the contract arising from the builder's acceptance of the revised quotation was run very much as a secondary argument at the hearing. It received very little attention. It was not raised in the points of defence (to counterclaim) filed by the bricklayer on 30 June 2017.
- 66 Mr Jeffreys gave evidence on behalf of the builders that the contract between the parties was based on a purchase order dated 24 November

2014. Reference to the purchase order indicates that it quoted a figure of \$1 per brick including sand, cement, lime and waterproofing. Different prices were provided for piers, double piers, sills, brick cuts and insulation. Nothing was said about the method of counting bricks.

67 The bricklayer relies on a document he calls his revised quotation, which came in the form of an email dated 16 February 2016. This included a provision that:

The way we calculate bricks is the amount of bricks ordered minus amount of bricks left over because we are not charge by per meter.  
(Sic)

68 The existence of this provision meant that there was a potential conflict between the method of charging to be applied under the purchase order, and the method of charging which the bricklayer contends was agreed because the builder accepted the revised quotation.

69 The builders' answer to this is that the revised quotation was only "partly accepted". Mr Jeffreys gave evidence that the email was sent when the bricklayer was three months into the job. This statement is supported by the fact that on 16 February 2016, the bricklayer had already sent invoices for December 2015, and January and February 2016.

70 Mr Jeffreys did not dispute the higher rates for the laying of bricks stipulated in the revised quotation, but he said that he had become concerned about the number of bricks being invoiced at an early point. He said that it was agreed with Mr Liu that the dispute would be resolved. He also said that he had noted the stipulation about the method of counting bricks, but did not accept it, although he conceded that he did not put his concern about it in writing.

71 I note that Mr Jeffreys did not expressly dispute the term regarding the manner in which bricks were to be calculated as set out in the revised invoice, but I also note he did not specifically agree to the provision either.

72 From the evidence, it is clear that if the bricklayer's methodology is accepted as the methodology agreed between the parties, the builders will be put at a potentially significant disadvantage, in two ways. Firstly, the bricklayer's methodology does not encourage the bricklayer to be careful with bricks. On the contrary, it encourages wastage.

73 Secondly, the builders' agreement with their client - the developer of the units - was that they were to be paid for bricks laid, calculated and measured on a square metre basis. The upshot is that the builders would, if the bricklayers methodology were to be accepted, run the risk of paying the bricklayer more for bricks laid than they are paid by their own client.

74 Accordingly, I consider that it is inherently unlikely that the builders would have agreed to the methodology proposed by Mr Liu.

75 I do not accept that there was a clear acceptance of the provision in the revised quotation concerning the methodology for counting bricks merely

because some subsequent invoices were paid by the builder. The reason for this is that progress payments are usually treated as payments on account only, and are not necessarily evidence that the work claimed has been accepted without dispute.

- 76 It seems to me inherently unsatisfactory that a pivotal contractual condition, such as method of measuring bricks in a contract for the provision of brickwork for 34 townhouses, should be governed by what is effectively a footnote in an email which was not expressly accepted.
- 77 I turn to the bricklayer's next argument, which is that the site supervisor Mr Jarrod Manning counted bricks with the bricklayer, and that this was consistent with Mr Liu's contention that Mr Manning understood how Mr Liu was invoicing for bricks.
- 78 In circumstances where he had been negotiating about the terms of the contract with Mr Connor, I consider that Mr Liu cannot reasonably have inferred that Mr Manning had authority to bind the builders about the terms of the contract. Accordingly, Mr Manning's understanding cannot have been determinative of the builders' attitude, and therefore cannot have been effective to alter the terms of the contract.
- 79 On the basis that there is no clear evidence that the builders agreed to Mr Liu's methodology, I find that the bricklayer's entitlement is not to be assessed using that methodology.
- 80 As only two methods of counting bricks were under consideration, the appropriate methodology to be used for counting bricks must be that adopted by Mr Jong. I make a finding accordingly.
- 81 As the bricklayer's entitlement is to be determined in accordance with the number of bricks laid, using the quantity surveyor's methodology, the issue becomes: was there any error in the quantity surveyor's initial calculations using that system of counting.

### **The quantity surveyor's second report**

- 82 The builders submitted a new report for Mr Jong dated 25 August 2017. This provided a revised estimate that 1923 square metres of bricks were laid. At 49 bricks per square metre, the estimated total number bricks laid accordingly is 94,227.

### **Comparison of the quantity surveyors 2 reports**

- 83 When preparing his report of 4 May 2017, Mr Jong divided the project up into seven components, each comprising a number of units. For instance, the first component comprised Terraces 1-5. He divided the project up and the same components when he produced his second report. This made it comparatively easy to compare his respective estimates of bricks laid.
- 84 It is clear from comparing the report 25 August 2017 to the report of 4 May 2017 that the quantity surveyor has now taken into account 3 brick piers in 2 components, 2 brick piers in 3 components, and 1 brick pier in 2

components. He has also taken into account an extra 2.5 course of single skin bricks above the garage opening (2.7 m wide) in each component.

- 85 I accordingly accept that the quantity surveyor has appropriately remeasured the bricks. I accept his new estimation that 94,227 bricks were laid. I note that 94,227 bricks is significantly more than the number of bricks initially estimated by Mr Jong in his report on 4 May 2017 which was 86,436 bricks, and that this is likely to have a significant financial impact on the outcome of the case.

**Issue 7: What is the loss flowing to the builders from the bricklayers over estimation of bricks laid?**

- 86 It is to be recalled the builders had asserted that the bricklayers had estimated that 116,100 bricks had been laid, when in fact only 86,436 bricks had been laid. The difference accordingly was 29,664 bricks. The builders said that this resulted in an overcharging of \$35,893.44. On this basis it is clear that the builders were assessing the rate of laying each brick at \$1.21.
- 87 This rate was presumably a blended rate reflecting that in the revised quotation the bricklayer had agreed to accept \$1.10 plus GST per brick on the ground floor, and differing rates for other brickwork including \$25 per metre for sills, \$35 per metre for single brick piers, and \$60 per metre for freestanding piers.
- 88 At the hearing, Mr Liu did not challenge the blended rate of \$1.21 per brick and accordingly I adopt it in order to calculate the refund due to the builders in respect of bricks laid. If \$1.21 is applied to the difference between the bricklayers assessment that 116,100 bricks were laid and the quantity surveyor's revised assessment of 94,227, namely 21,873 bricks, the resulting overcharge is assessed at \$26,466.33.

**SUMMARY AND CONCLUSION**

- 89 I have found above that the builders are entitled to recover \$4,158 in respect of damages for rectification.
- 90 In addition, the builders are entitled to a credit of \$970 in respect of damage to the drain.
- 91 The builders have been compensated by payment of \$1,300 in respect of the criminal damage to the corner bricks of the garage. No adjustment needs to be made in favour of the builders in respect of respect of the MLS invoice for \$660 relating to the rectification of the corner bricks on the garage.
- 92 The claim for \$1,280 in charges has been dismissed.
- 93 The builders are entitled to a credit of \$26,466.33 against the sum charged by the bricklayer for bricks.
- 94 The total amount due to be paid or credited to the builders accordingly is  $(\$4,158 + \$970 + \$26,466.33) = \$31,594.33$ .

- 95 Having regard to the fact that the parties are agreed that \$24,217.70 had been held back by the builders from invoices otherwise due to the bricklayer, the net amount to be paid by the bricklayer to the builders is \$7,376.63. I will make an order to that effect.
- 96 The issues of costs, and reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* are reserved. The builders will have liberty to apply in respect of these matters within 60 days.

**Member C Edquist**