VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP775/2014

CATCHWORDS

Domestic building – termination of contract – reasonable evidence of capacity to pay contract price - what is reasonable evidence – - whether provided - builder not entitled to terminate contract if he is in substantial breach - whether minor defects or deficiencies in work amount to substantial breach – base stage brickwork must be built to floor level – whether to underside of bearers is floor level

APPLICANT	Peter Kyle
RESPONDENT	Michael Wilson
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATES OF HEARING	6-13 February 2017 Submissions received by 23 March 2017
DATE OF ORDER	27 April 2017
CITATION	Kyle v Wilson (Building and Property) [2017] VCAT 544

ORDER

1. The tribunal finds that the major domestic building contract entered into between the Applicant and the Respondent was lawfully terminated by the Applicant on 20 January 2015.
2. In accordance with the order made on 6 February 2017, the following directions are given in regard to the further conduct of this proceeding:
3. **The proceeding will be fixed for further hearing and determination of the Applicant's claim for an assessment of damages at 10 AM on 14 July 2017 at 55 King Street Melbourne before Senior Member Walker with one day allocated.**
4. Any further witness statement to be relied upon by the Applicant must be filed and served by 15 May 2017.
5. Any further witness statement to be relied upon by the Respondent must be filed and served by 15 June 2017.

6. Costs reserved.
7. Liberty to apply.

SENIOR MEMBER R. WALKER

Appearances:

For the Applicant	Mr R. Rozenberg of Counsel
For the Respondent	Mr R. Squirrell of Counsel

REASONS FOR DECISION

Background

1. The Respondent ("the Owner") is the owner of land in Bena in Gippsland. The Applicant ("the Builder") is a registered builder.

2. By a major domestic building contract dated 13 May 2014, the Builder agreed to construct a house on the land ("the House") for $337,190.00.

3. The construction of the House proceeded from 3 September 2014 until November 2014 by which time the frame had been completed. There was an argument on site on 23 November 2014 and on 10 December 2014, the Builder commenced this proceeding seeking payment of sums that were then claimed to be owed to him by the Owner.

4. By a letter dated 19 January 2015, which was sent on 20 January, the Builder purported to terminate the contract.

The proceeding

5. In his application, which was issued on 12 December 2014, the Builder sought payment of the sum of $50,578.40, which included his claim for the frame stage of construction. The Owner paid for the frame stage shortly afterwards and by Amended Points of Claim the Builder reduced his claim to the sum of $19,419.58, being the cost of windows that he had ordered for the House and interest on the base stage and frame stage claims, both of which he said were paid late.

6. On 23 January 2015 the Owner issued a counterclaim against the Builder, alleging that the Builder had repudiated the contract and seeking unspecified damages.

The hearing

7. The matter came before me for hearing on 6 February 2017 with six days allocated. Mr R Rozenberg of Counsel appeared on behalf of the Builder and Mr R. Squirrell of Counsel appeared on behalf of the Owner.

8. At the commencement of the hearing the Builder sought leave to file a supplementary witness statement and further and better particulars of his claim, dated 6 February 2017. He also sought to further amend his Points of Claim. The application for leave was opposed. Following submissions by counsel I made the following orders and directions:

    (a) Leave to the applicant to file and serve the supplementary witness statement and the further and better particulars dated 6 February 2017.

    (b) The applicant must file and serve his amended Points of Claim by 1:30 PM on 7 February 2017.

    (c) The hearing shall proceed as if the further and better particulars of loss and damage and the further witness statement were not filed and served.

(d) If on the determination of the proceeding as it stands the tribunal determines that the applicant lawfully terminated the contract the proceeding will be adjourned for further hearing and determination of the applicant's claim for an assessment of damages.

(e) The tribunal will make directions for the filing and service of further material at that time.

The hearing then proceeded on that basis.

9. On the second day of the hearing, the foreshadowed further amended Points of Claim were filed and served by the Builder, repeating the claim for $19,419.58 and also claiming in the alternative, damages for loss of profit on the job totalling $72,671.00 and in the alternative, $24,735.00 on a claim for a quantum meruit, that being said to be the fair and reasonable value of his work.

10. At the conclusion of the hearing I gave directions for the filing and service of written submissions. These were all received by 23 March 2017.

Witnesses

11. I heard evidence from the Builder, the Owner, his partner Ms Joyce and a Mr Chapman who was employed directly by the Owner to lay the driveway.

12. Expert engineering evidence was given by Mr Gibney on behalf of the Owner and Mr Jubb on behalf of the Builder. Expert building evidence was given by Mr Mitchell behalf of the Owner and Mr Mowlam on behalf of the Builder.

13. Of the lay witnesses the evidence of the Builder was largely supported by documents. I thought that the Owner tended to exaggerate at times and some of his evidence did not match the documents that were produced. His evidence and that of Ms Joyce also conflicted with the evidence of the Owner's witness, Mr Chapman, who denied that he had told them that the floor level as set out by the Builder was too low. Both the Owner and Ms Joyce said that, at the final meeting on 23 November, the Builder had told them that if they did not pay the frame stage invoice he would leave the frame to rot. I have listened to the recording of the conversation and read the transcript and the Builder did not say that. Ms Joyce also said that a week later the Builder turned up at the site and attempted to take photographs of her. No reason was suggested as to why he would seek to do that although I can imagine that he might have wanted to take pictures of the House.

14. During the course of the hearing I visited the site with the parties and their experts and various things were pointed out to me. It was apparent from the inspection that, following the departure of the Builder from the site, no steps were taken to cover the frame or protect it. It remains exposed to the elements and has deteriorated substantially. It is common ground that the particle board flooring will now have to be replaced and it was questioned whether it would be more economical to repair the frame or demolish and replace it. The Building Surveyor has directed the Owner to show cause why it should not be demolished.

The contract

15. The contract is in the form of the MBAV HC6 contract. It references a number of documents including six sheets of plans prepared by one Wayne Sanders ("the Designer") and a set of specifications.

16. It was put to the Builder in cross-examination that the Owner did not sign the specifications. In cross-examination the Owner first said that he could not recall having signed the specifications but in re-examination he then denied having signed them. Both the contract and the specifications are in evidence and bear the same date that is, 13 May 2014. The Builder said that the Owner signed the specifications on site although his evidence about this appeared to be uncertain.

17. I am not a handwriting expert but the signature and initialling on the building contract which are acknowledged to be that of the Owner look substantially the same as what as what are said to be the signature and initialling by the Owner on the pages of the specifications.

18. The Builder said that, on 1 September 2014 he received seven pages of the contract which were previously missing but not the specifications. The following day, the Builder emailed the Owner telling him that he would need to catch up with him to get the specifications signed. Similar emails were sent the following day. On 4 September the Owner emailed the Builder to say in the second paragraph:

> "The contract is signed, sealed and delivered and there will be no further discussions around the contract, specs or quote. This was done back in the day. I have no desire to be renegotiating something that is already in stone."

19. The Builder said that he replied to this by email but that his reply cannot now be located. Thereafter, there appears to have been no further complaint by the Builder that the specifications needed to be signed.

20. I am satisfied that the Owner signed the specifications although I am unable to find when this occurred. However nothing turns on this point

The respective claims

21. In his application Builder claims that

    (a) the Owner failed to pay for the frame stage when due and failed to provide reasonable evidence that he had the financial capacity to pay the contract price after having been requested to do so. As a result, he determined the contract in accordance with the provisions of the contract;

    (b) the Owner failed to make progress payments on time and so he claims interest pursuant to the contract, being $318.89 with respect to the base stage payment and $266.49 with respect to the frame stage payment; and

    (c) he paid $18,834.20 for windows for the House which he can no longer use because the contract is at an end.

    His claim, according to the application, is the total of these three sums, which is $19,419.58.

22. The Owner claims:

    (a) that the Builder was not entitled to terminate the contract in that the frame stage was not reached and he had provided evidence of his ability to pay the contract price. He said that the purported termination was unlawful and amounted to a repudiation of the contract by the Builder which he said he accepted;

    (b) that he has suffered loss and damage, being the cost that he will incur in completing and rectifying the work himself, which is calculated as follows:

Cost to rectify defective work	$ 7,594.16	
Cost to complete work	$367,488.00	$375,082.16
less balance of the contract price		
Contract price	$337,190.00	
less payments made to the Builder	$105,317.00	$231,873.00
Loss		$143,209.16

    (c) damages for late completion of the work.

The issues

23. The primary issue is termination. That turns on:

    (a) the obligation of the Owner to provide evidence of financial capacity to pay;

    (b) whether the Builder was entitled in the circumstances to require that evidence of financial capacity be provided and whether it was provided;

    (c) since one of the grounds of termination was the non-payment of the frame stage payment, whether that payment was due and whether the notice of default requiring payment was complied with;

    (d) whether the Builder himself was in substantial breach of the contract or whether it was unreasonable for him to determine the contract.

24. Most of the evidence turned on the allegation that the Builder was in substantial breach of the contract. The three substantial breaches alleged are that the Builder:

    (a) set out the House in the incorrect position;

    (b) claimed and received payment for the base and frame stages when those stages were not complete;

    (c) unlawfully suspended works on 23 November 2014.

    I will now consider the first two of these. The third will be dealt with later in these reasons.

The set out

25. At the first visit the Owner showed the Builder a number of stakes in the ground which he said had been placed there by the Designer to indicate where the House would be located. The Builder described these as being wooden stakes but the Owner said they were steel. A wooden stake is shown in photograph 3 of Exhibit 4 but the Owner suggested that the steel stake in that location had been moved. The Owner said that the stakes indicated the positions of the corners of the House and the floor level. He acknowledged that he was not present when the Designer put them in.

26. At the time the Builder was shown the site by the Owner, there was a power pole and electricity box situated near to where it was apparently thought the garage would be constructed. It would seem that, when the garage was built, the electricity box would be relocated onto the garage wall.

27. According to the Builder's evidence, when he set out the hurdles for the construction of the House in the position required by the plans and the planning permit, he found that the stakes had been put in the wrong places and that, according to the contract documents, the House was to be built a few metres to the west.

28. He contacted the Owner and a meeting took place on 3 September 2014. At that meeting the Builder informed the Owner that the positioning of the stakes was wrong but the Owner insisted that it was the Builder's set out that was in the wrong location. The Owner said during evidence that the position of the garage was correct but the other end of the House had been rotated uphill, making it closer to the main road and losing the view that he would have had of the local town from the master bedroom.

29. It appears that the set out was then altered by the Builder, because late in the evening of 3 September, he emailed the Owner to say that he had organised to dig on Monday and asked that the Owner look at the siting of the House before then because he would need a day to change it if the Owner did not like it.

30. At 7:03 AM on the following morning, 4 September, the Owner emailed the Builder stating, amongst other things:

> "The layout needs to come back down the hill at least 3 m, I have no idea why you have laid it out where you have, it is not what we discussed or what is on the plans. Please redress this".

The Builder said that he replied to this email but that he has misplaced his copy of the reply.

31. The Owner said that, after his first visit, the next time he visited the site was several days later, after the footings had been laid, when he formed the view that they did not appear to be in the correct position.

32. I think that is unlikely to be true. He was asked late in the evening of 3 September to check the measurements and he gave a direction by email early on the following morning, referring to the way the Builder had done the set-out. I

think it is likely that he had looked at the set-out in the meantime. When pressed about this in cross examination he agreed that he had driven by the site and made an observation from his car. That was not mentioned in his witness statement and it seems unlikely that he would have driven all the way out to the site for the purpose of observing the set out and then driven past without having a proper look at it. No reason was suggested why he would have done that. Overall, I thought that the Owner's evidence in regard to this issue was confused and not borne out by the emails. I prefer the evidence of the Builder.

33. The Builder said that, on 5 September, he met with the Owner on site, showed him where the external walls and corners of the House were to be and told him that the height of the string lines would be the height of the stumps. He said that the Owner acknowledged that and said that he was looking forward to getting going with the construction. He said that there was no talk then that this was not to be the location of the House. That was a Friday and construction commenced on the following Monday. Mr Squirrell said that there was no evidence of any meeting on 5 September. The meeting appears to be that referred to in paragraph 67 of the Builder's witness statement. The date of 5 September was given in oral evidence by the Builder in re-examination.

34. On 29 September 2014, the Builder submitted an application, purportedly on behalf of the Owner, to the Shire Council to amend the planning permit by re-siting the House to the position that he said was agreed upon and he paid a fee to the Council of $102.00. Mr Squirrell suggested that the Builder must have realised at some point that he had sited the House in the wrong position and that is why he went to the Shire to obtain an amended planning permit. That could only be so if the House had in fact been sited in the wrong position.

35. The Owner said that the application for the permit was done without his knowledge or authority and that the re-siting of the House was never discussed by the Builder. I do not accept that evidence.

36. The Owner's complaint is that the House was rotated down the hill by 5 metres. The Builder agrees that it has been but says that it was done at the direction of the Owner. The Owner said that he insisted that the set-out be moved to what he claimed was the correct position as per the drawings. The Builder said that, at the Owner's request the footprint of the House was rotated down the hill and to the west so that, instead of the corner of the garage being adjacent to the power pole, it was approximately 5 m to the west.

37. This created a problem with respect to the driveway, which had been laid to terminate at what had been intended to be the entrance to the garage, as indicated by the position of the power pole. It is alleged by the Builder that it also had implications for the floor height.

38. I do not understand how the Owner could have formed the opinion that the Builder's set out was wrong, apart from the obvious fact that it was not in the position indicated by the stakes. The Owner had not placed these stakes there himself and the Designer was not called to give evidence to prove that they were in the positions indicated on the plans. There is no evidence that the Owner has

any building expertise or that he took any measurements himself to demonstrate that the Builder's set out was wrong.

39. It is unlikely that the Builder would have deliberately set out the position of the House otherwise than in accordance with the documents. There was nothing to be gained by the Builder setting the House out contrary to the permit or in a position that the Owner had not requested and then having to amend the permit. He did not charge for this work. It is also unlikely to have been a mistake because, at the time of the set-out, the driveway had been laid and it would have been apparent to the Builder that his set-out was not consistent with positions of the driveway and the power pole. He would therefore have been put on enquiry as to whether his measurements were right.

40. Mr Squirrell submitted that, under the rule in *Jones v. Dunkell* (1959) 101 CLR 298, I should infer from the Builder's failure to call his apprentice that the evidence of the apprentice would not have assisted the Builder. According to the Builder, he set out the House with the assistance of his apprentice and no explanation was given for the failure to call him.

41. I do not think that any useful inference can be drawn from the failure to call the apprentice because:

    (a) the rule does not require a party to call evidence that is merely cumulative. It was not disputed that the setup was not in accordance with the Designer's stakes and there were no measurements taken by the Owner to contradict the measurements the Builder said he took.

    (b) there is nothing in the evidence that calls for an explanation or contradiction from the apprentice.

    (See *Cross on Evidence* 4th Australian edition pp. 37 to 38).

42. I find that the Builder's siting of the House, which was based upon measurements and the use of a level, is more likely to be correct than the Owner's opinion of where the House should have been, which does not appear to have been based upon anything other than the location of stakes that were put in the ground by the Designer.

43. Consequently, I am not satisfied that it has been established that the Builder's initial set-out was in the wrong position. I am satisfied that its present position, as constructed, was requested by the Owner.

44. Mr Squirrell is correct in saying that there ought to have been a variation prepared and signed and there was not. In his letter to the Owner of 3 October 2014 the Builder said that this was because he knew from previous experience that it would have been difficult to get the Owner to sign a variation and pay extra and so he carried on with the requested change without a signed variation and bore the extra cost himself. I would have thought that a concern about difficulties with the Owner would have been a very good reason for the Builder to get any changes in writing.

The base stage

45. It was said that the base stage was not reached because the wrong stumps were used, some of the stumps were not 400 mm out of the ground and not all of the base brickwork was complete.

46. By both Clause 1.0 of the contract and section 41 of the *Domestic Building Contracts Act* 1995, "base stage" for a house with a timber floor means when the concrete footings for the floor are poured and the base brickwork is built to floor level. The term "floor level" is not further defined but it must mean at least a level high enough to support the floor structure.

47. Whether or not a particular stage of construction was reached was considered by the Court of Appeal in *Cardona v. Brown* [2012] VSCA 174. In a judgment with which the other two members of the court concurred, Tate JA said (at para 74):

> "74 It is necessary for there to be 'effective and satisfactory completion of the required stage ... [as] a condition of any instalment payment' (*Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159) …. trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion, …."

48. In the present case the construction of the House was to be brick veneer on strip footings with stumps and a timber subfloor. The specifications were silent as to the stumps to be used but the contract plans required concrete stumps 100 mm x 100 mm which were to be 1400 mm into the ground and at least 400 mm out of the ground. Where the stumps exceeded 1500 mm out of the ground, 125 mm x 125 mm cypress stumps were to be used. The veranda, which was to surround the House except for the eastern side, was to be supported by 100 mm x 100 mm cypress stumps. At some stage it was agreed that the veranda construction would be changed so that the external support would be a brick wall instead of stumps.

49. The Builder used cypress stumps 100 mm x 100 mm throughout, instead of concrete stumps, without obtaining any variation of the contract and without consulting the Owner. He said in evidence that he did that for consistency in that he did not think that it would be an issue. He said that no concrete stumps were made of sufficient length to protrude up to 1500 mm above ground level and yet be set 1400 mm into the ground. He said that cypress stumps were sufficient to achieve the same purpose and that they were more expensive than concrete stumps. Moreover, he said that some of the longer stumps needed to be braced and this was easier to do if they were made from cypress instead of concrete. At least one stump was more than 1500 mm ground and yet it was not 125 mm x 125 mm as required but 100 mm x 100 mm. The Builder said that this was because it only exceeded 1500 mm by a very small amount.

50. Some of the stumps at the uphill end were less 400 mm above ground level. The Builder claims that this was because of the relocation of the House which he made at the request of the Owner. The Builder said in evidence that having stumps a minimum of 400 mm above ground was a generic dimension to the found in the National Code of Construction ("the Code"). That is beside the point. It was a requirement of the contract documents.

51. By an email dated 11 September 2014 the Owner asked the Builder for an explanation for the use of cypress stumps other than 100 x 100 mm concrete stumps as per the plan. The Builder replied by email on the same day explaining why cypress posts had been used and the advantage of using cypress rather than concrete. He asked the Owner to let him know if he had any other concerns. The Owner responded thanking the Builder for the clarification and suggesting that he ought to have had a forewarning. The Builder said that the Owner raised no objection on that occasion to the use of cypress stumps.

52. According to the Builder's evidence, the overall height of the House required by the plans was 6400 mm from the ground to the top of the roof ridge line. That is shown in the plans. Indeed, since no floor levels are indicated, that is the only dimension in the plans from which the level of the floor can be calculated.

53. The Builder said that he had to set the level of the stumps in order to achieve that overall height and in doing so, the four stumps at the uphill end of the House were less than 400 mm out of the ground by about 100 mm. He acknowledged that this meant that the floor level was less than it would have been otherwise but he said that before installing the stumps, he showed the Owner what the stump would be with a string line and he agreed to them. The Owner denied this meeting took place but, as stated above, I think it is more likely than not to have occurred.

54. Mr Squirrell pointed out, correctly, that using the larger bearers meant that the ridgeline of the house was lifted 210 mm higher than the 6400 mm dimension that the Builder had used to set his levels. As a consequence, he invited me to find that the Builder had made a mistake on his levels. However it must have been apparent to the Builder at the time of the set-out how high the tops of the stumps would be out of the ground and so I think it is unlikely that a mistake was made. On the balance of probabilities, the setting of the stumps at that height was done deliberately for the reasons the Builder has given.

55. I think the proper reading of the plans is that the 400 mm measurement in regard to the stumps is intended to create a minimum clearance of 400 mm under the bearers rather than set a particular floor level. The levels of the building are established by the overall dimension of 6400 mm to the ridge line from ground level at the lowest point.

56. There is no evidence that the original set out would not have resulted in a ridgeline 6400 mm above ground level if the original bearers had been used. I am satisfied that the Builder set the roof to the correct height and that that is what produced the floor level about which the Owner then complained. To achieve the distance of 400 mm from ground level to the top of the shortest stumps would have required a lowering of the ground level around the stumps at the highest point, although this was never done.

57. On 23 September 2014 there was an on-site meeting between the parties and on the following day the Owner sent an email to the Builder alleging that the floor height was not as per plan and that he was going to employ an independent inspector to check out the subfloor. The Builder replied saying that he had no

objection to an inspector checking his work and he enclosed a copy of the building surveyor's approval of the footing and stump inspection.

58. By two emails of 25 September the Owner said that he did not want cypress stumps and asked to be informed when they had been replaced. Later that day the Builder sent the claim for the base stage together with a letter to the Owner saying that all the stumps were less than 1500 mm out of the ground, that the stumps provided complied with AS1684 and suggesting that a mediator be appointed. Further communications occurred in the course of which the Owner demanded compensation of $4,500.00. He would not detail how this figure was arrived at but said that the dispute needed to be resolved before the bank would allow him to release funds.

59. The parties met on site on 8 October and, after some argument, the Builder proposed a solution whereby the normal 100 mm bearers would be replaced with bearers 400 mm high, in order to raise the floor level by 210 mm. This would also require an amendment to the building permit. The Owner refused to pay the extra cost and it was agreed that the cost would be borne by the Builder.

60. The Builder contacted the Designer to have a detail drawn for the connection of the larger bearers to the stumps. That was done and on 10 October he sent this to the Owner.

61. On 13 October, the Builder sent a "no cost" variation form to the Owner to substitute the higher bearers. The Owner replied that it was not clear how these larger bearers would be affixed and also said that the variation should be a Builder's variation. After some further communication including a threat by the Builder to terminate the contract for non-payment of the base stage, a resolution was achieved on 16 October 2014 when the Owner accepted a Builder's variation that was sent by the Builder on that day.

62. In the course of the earlier email exchange, the Owner had identified the Builder's use of the cypress stumps as being one of the issues in dispute. In an email that was sent at 7.05 AM on 16 October he said that he would prefer that the stumps were ripped out and replaced with the ones that were of the correct size and material as per the original plans. However, after referring in the email to the change in the bearers and to conditions that he specified in regard to the written variation, he said:

> "Once this information is included in your correct Builder's variation and the work complete, then the dispute is over".

63. According to the Builder, he met the Owner later that day and discussed the outstanding issues and negotiated how the Owner wanted the variation drawn up. He said that he then prepared a Builder's variation in the way the This variation seems to address the conditions specified in the Owner's earlier email. It was signed by the Owner and returned on 17 October.

64. Mr Rozenberg submitted that by this variation the stump height complaint was resolved. Certainly the Owner's complaint about the stumps was to do with the floor height and it is clear from the emails that the Owner accepted this variation

as satisfying his complaints about the stump height and the use of cypress stumps. Nonetheless, some of the stumps were still less than 400 mm out of the ground. The building surveyor subsequently directed that a chemical ant barrier be installed in the areas where the stumps were less than 400 mm out of the ground.

65. Mr Jubb said that concretes stumps 100 x 100 mm came with a maximum length of 1800 mm. He also said that the "treated pine" stumps for the job were fit for the purpose and a better choice product to use. He acknowledged in evidence that in fact, the stumps that were used were not treated pine but cypress.

The base brickwork

66. It was submitted that the base stage payment was also not due because the base brickwork had not been completed.

67. Mr Rozenberg relied upon the evidence of Mr Jubb that it is industry standard that base brickwork is completed to the underside of the bearer. There was no contrary expert evidence and it is a sensible interpretation. The base brickwork is to support the structure of a house. The house frame rests upon the base brickwork and the stumps that support it. Any bricks above that cannot sensibly be said to be base brickwork because they do not form the base of the house or support its weight. The brick veneer walls support nothing but their own weight and indeed, are tied into the frame from which they derive additional support.

68. In the present case, the base brickwork was built to the underside of the bearers. That did not change when the level of the floor was raised by the installation of the larger bearers. However because of the increase in height, two extra courses of bricks are required to be laid because the bricks around the veranda are now higher and exceed the dimension of 1400 mm allowed for a single skin brick wall. Two courses of a second skin of bricks will have to be laid on the inside of the veranda walls. Bricks are on-site for the purpose and according to the Builder, they were to be laid when the bricklayer was next on site. In relation to payment, the relevant time to determine whether the work has reached base stage is when the Builder seeks payment for the base stage. The invoice for the base stage was issued by the Builder on 25 September 2014 before the agreement for the larger bearers had been reached. At that time the brickwork was appropriate for the height of the external veranda wall as it was then proposed to be. If the Builder was then entitled to payment for the base stage then a subsequent variation which raises the external wall height further does not remove that entitlement. In any case, the base stage has since been paid.

69. I think that, at the time the base stage claim was made, there was effective and satisfactory completion of the base stage, save for a small amount of excavation around the shorter stumps.

The frame stage

70. Mr Squirrell submitted, correctly, that building is a sequential process and if the base stage has not been reached then it cannot be said that the frame stage has been reached. Authority for that proposition is to be found in *Cardona v. Brown* (above). Since I find that the notice of default was complied with in regard to payment of the frame stage, the only significance of this aspect of the case is, whether by receiving payment for the frame stage the builder was in substantial breach of the contract. I will consider that below.

Subsequent events

71. Following the agreement to substitute the larger bearers, the Builder sought an amendment to the building permit to allow the change. However the building surveyor was not satisfied with the method that had been drawn by the Designer for connecting the bearers to the stumps. The building surveyor also said that he had noticed there was no tie-down detail in the plans for the veranda posts. At the Builder's expense, the building surveyor engaged an engineer who designed a different method for the connection of the bearers and also provided a detail for the tie down of the veranda posts.

72. The Builder sent the engineer's drawing to the Owner on 30 October. The following day the Owner replied with an email that stated that the drawings were "totally unacceptable" to him "for many reasons" which he did not specify. He does not say in the email what was wrong with the engineer's drawings or how he, as a layman, was qualified to comment on their sufficiency. In his witness statement he said that it was because the cleats attaching the bearers to the posts were un-treated pine that would touch the ground when attached to the shortest stumps. That is an understandable and sensible objection. However he continues in the email to say:

> "It would appear that this is yet another botched attempt to cut corners and save money."

73. It is not apparent either from the email or from the surrounding circumstances what the Owner thought the Builder was doing that would have saved him money or "cut corners". It had been agreed that the Builder would bear all the expense of the change.

74. On 31 October the Owner visited the site and said in his witness statement:

> "…I was nothing short of horrified at what was before me. Every other stump was fixed with a pine cleat and those in between was simply nailed. I told the applicant it was not acceptable and was to be ripped out and that he needed to start again. I told him that I was concerned that he was not working on the property with the proper documentation and that I could not understand why he was doing these things."(sic.)

75. That passage from his witness statement would suggest that the Owner considered that he was better qualified to assess the sufficiency of the fixing of the bearers than the engineer who designed the fixing system or the Builder who installed it. The Owner has no building qualification nor any right to direct the

Builder how to carry out the construction. The Builder is required to build in accordance with the contract documents, whether original or as varied by agreement, but it is up to him how he goes about it.

76. More emails followed in which the Owner made various accusations about the Builder. Attached to an email from the Owner dated 2 November was a two page report from a building inspector the Owner had engaged, listing the following three departures from the drawings and making the following recommendations:

    (a) Since cypress stumps had been supplied instead of concrete stumps they would need to be removed and replaced with concrete stumps in accordance with the approved permit & plans or otherwise properly justified.

    (b) Since any stump more than 1500 mm out of the ground was to be 125 mm x 125 mm, the single stump that was1525 mm out of the ground would need to be replaced with a 125 mm x 125 mm post as specified.

    (c) The majority of stumps within the first row from the front wall of bedroom two, the bathroom and bedroom three were between 290 mm and 360 mm out of the ground instead of 400 mm out of the ground as required by the plans. That would need to be rectified to achieve the 400 mm minimum clearances specified.

    In the accompanying email, the Owner accused the Builder of having few morals and attempting to deceive him but he does not comment on the contents of this accompanying report.

77. On 3 November the Builder contacted the building surveyor and requested that he speak to the Owner about his concerns. That afternoon the Owner contacted the Builder to say that he had had a good chat with the building surveyor and a meeting was arranged between the Owner and the Builder on site the following day.

78. At the meeting on 4 November it was agreed that the connections of the bearers to the posts would all be steel. According to the Builder, that agreement was on the basis that the parties would share the cost equally. The Owner denied that and says that the Builder was to pay for it. According to the Builder, the Owner said that he was happy that the floor had been laid and wanted the Builder to continue with the work.

79. Despite the agreement to replace all the cleats with steel, that did not occur. The Builder blamed that on the failure of the Owner to return his calls. He did not say what he wanted to speak to the Owner about but I assume that it was related to the sharing of the cost of replacing all of the cleats with steel.

80. On 9 November the building surveyor issued a work direction to the effect that the cleats connecting the bearers to the stumps that were less than 400 mm above the ground were required to be steel and that a chemical termite barrier was to be installed where the subfloor clearance was less than 400 mm above ground level.

81. On 20 November the Builder sent to the Owner a copy of the amended building permit and plans and informed him that the frame was complete and due to be inspected that day. The inspection took place and the frame stage was certified by the building surveyor on the same day, 20 November. The base stage was paid by the Owner's bank on the following day, 21 November. Two days afterwards, a critical meeting occurred.

The 23 November meeting

82. This meeting appears to have been arranged to inspect the frame which had just been completed but the two topics discussed were the subfloor and the tying down of the veranda. The conversation was recorded by Ms Joyce and the recording and transcriptions are in evidence. The Owner's tone of voice throughout this conversation was quite aggressive and his comments to the Builder were condescending. Most of the conversation had to do with mutual recriminations, with the Owner insisting that the Builder had made numerous mistakes and the Builder insisting that the difficulty with the floor clearance was due to the Owner changing the location of the House.

83. The main argument related to the subfloor, with the Owner alleging that the Builder had agreed to provide metal cleats to all the stumps and the Builder claiming that he only had to provide them to the short stumps and that it had been agreed with the Owner that they would share the cost of installing steel cleats on the others. The Owner denied that. The other argument related to the tie-downs for the veranda which the Owner criticised as being unsightly and not having sufficient tension. It does not appear that any such tie-downs had been shown on the plans so this would appear to have been a variation although nothing was signed and no extra payment was claimed by the Builder for installing them. Moreover, it was acknowledged that the tie-downs installed by the Builder were installed in accordance with the engineer's instruction.

84. It is clear from the recording that the relationship between the parties by this time was distrustful and embittered. On different occasions during the conversation, each of them suggested the possibility of engaging a supervisor to take charge of the construction, with the Owner alleging that the Builder was not capable of completing the work and the Builder saying that he could not please the Owner or work with him.

85. At one stage the Owner also said that he would not pay the Builder for the frame stage until such time as the dispute had been sorted out. Later in the conversation he denied having said that he would not pay for the frame stage but then he said that payment of the frame stage was a matter for the bank.

86. The Builder's concern expressed during the conversation related to whether he was going to be paid for what he had done and for what he had already outlaid for the windows which had been ordered but not yet installed. He said that he had delayed the delivery of the roofing material pending the resolution of the dispute.

87. The Owner suggested on a number of occasions that it was the bank, not the Owner, that paid the Builder and that he had no control and no say over what the bank did. He said that the bank had told him that there was an issue with the build and that they had warned him that they were going to value it. He said that if the bank were to undervalue the build, they were going to say to him that they were going to have to change whatever their agreement had been and the loan valuation.

88. The Builder then said that he thought the Owner needed to touch base with the bank before proceeding further to make sure that they were happy because the frame stage would not be due for payment for another fortnight by which time he would have spent another $40,000 on the job and he was concerned that the Owner would then say to him that the bank was not happy and that he, the Owner, was not paying him. The Owner replied that it was not he who paid the Builder but the bank. The Builder said that he thought that they needed to suspend works until the position with the bank was clarified and the Owner said that if the Builder wanted to suspend work he should do so in writing and give a reason for the suspension. The Builder denied that he had said that he was going to suspend work but said that he could request proof of capacity to pay at any time. The Owner suggested that he should request it. At the conclusion of the meeting the Owner said to the Builder that he did not have the capacity to take money out of the bank until they had approved it

89. That evening the Builder sent an email to the Owner referring to the meeting, noting the concerns that had been expressed, requesting the Owner to submit the frame invoice to the bank, suggesting an on-site meeting to confirm the location of various services and asking the Owner to sign a variation for the proposed additional works. He then went on to say that should all that take place, he would be happy to continue to build the House. He also asked the Owner to check with the bank to confirm that they were happy to continue payments as per the contract and provide a written notice of capacity to pay the contract price.

90. The Builder received an angry response to this email from the Owner which contained some derogatory comments about the Builder and set out a purported summary of the meeting which was inaccurate in a number of respects. The last paragraph of the email is:

> "Your constant harassment and abuse is unacceptable and will not be tolerated. Despite my best attempts to try and resolve this dispute it seems clear that you have no intention of completing this build let alone ending this dispute."

A "without prejudice" letter from the Owner followed but the contents of that letter are not in evidence.

91. On 28 November the Builder's then solicitor, Mr Gray, sent a letter by email to the Owner stating that payment of $50,578.50 for the frame would be due on 5 December 2014 and saying that if payment was not forthcoming by that date work would be suspended. There was a "without prejudice" reply from the Owner following this letter but the contents of that letter are not in evidence.

92. On 1 December 2014 the Owner sent an email to the Builder's window supplier asking him to confirm that the windows had been constructed for the site and were ready to be installed.

93. By a further email to the Owner dated 2 December 2014, the Builder's solicitor, Mr Gray, said (inter alia):

> "My client hereby reaffirms its commitment to the contract and the building project and stands ready willing and able to complete the work, however he requires to be paid in accordance with the contract.
>
> Please confirm you will do so.
>
> The work is not suspended Peter Kyle is busy on other jobs however he is well aware you are refusing to pay the frame stage payment in accordance with the contract terms, that is, you are insisting on a further part stage of work being done being lock-up…"

94. The Owner responded by email stating that both Mr Gray's emails had gone to his junk folder, denying that he had refused to pay for the frame stage and demanding particulars of Mr Gray's position and qualifications.

95. On 8 December the Builder sent a copy of the frame stage invoice together with a list from the building surveyor of inspections that had been made, stating that both the subfloor and the frame had been approved. The Builder said in the email that he would be seeking to terminate the contract and take legal action if the invoice for the frame stage was not paid within 14 days.

96. Also on 8 December, the manager of the Owner's bank sent the following email to both the Builder and the Owner:

> "Hi Peter and Mick,
>
> Please see attached unconditional approval that we have for your home loan."

Attached to this email was a copy of the letter dated 20 July 2014 to the Owner from the bank advising that his loan application has been approved for $472,200. The letter describes it as a building loan.

Notice of breach

97. On 12 December the Builder's present solicitors sent a letter to the Owner by registered mail, the operative part of which is as follows:

> "This notice to remedy the below breaches is given to you pursuant to Clause 22 of the Building Contract and is served for the purpose of advising you that our client intends to terminate the Building Contract if this notice is not complied with.
>
> We are instructed by our client that you have failed, neglected or refused to pay to our client the sum of $50,578.50 pursuant to his tax invoice number 91 rendered to you on 21 November 2014.
>
> Furthermore, you have failed, neglected or refused to provide evidence of your capacity to pay the contract price:

a. in accordance with the provisions of Clause 11.1 of the Building Contract; and/or

b. pursuant to our client's request made on 23 November 2014.

Accordingly, we hereby give you notice pursuant to Clause 22.1 of the Building Contract that you are required to remedy the breaches described above within 14 days after you receive this letter.

Please note that in the event the breaches are not remedied within that time, our client has the right to terminate the Building Contract pursuant to clause 22.3 and furthermore, will be exercising that right." (sic)

98. In response, the Owner's solicitors sent a letter to the effect that the Owner was anxious to have the work completed and would make payment of the sum of $50,578.50 for the frame stage, subject to the Builder confirming in writing:

"1.That he will immediately recommence works and undertake to complete the construction within a reasonable timeframe and as per the contract. Can you provide confirmation of the windows and roofing materials have been ordered and are ready for installation and

2. Provide details of why your client suspended works and walked off site before the expiration period in which to make payment for the frame stage. This will assist our client with future building works."

99. The Builder's solicitors replied by email on 16 December, noting that the Owner had not unconditionally offered to pay the frame stage nor produced evidence of his capacity to pay the contract sum. The letter went on to say that the works were suspended pursuant to Clause 16.2 of the contract, due to non-payment of the frame stage and the Owner's failure to produce evidence of the capacity to pay the contract sum.

100. The Owner's solicitors replied on 17 December saying that they would advise the Owner to make the final payment and enclosing an email dated 1 December from a Miss Edwards at the Owner's bank, in the following terms:

"I can confirm that Michael Wilson has a current loan with NAB, with partial drawdowns still available".

101. The email provided no details of the loan or the total amount of drawdowns that was available. The Builder's solicitors responded the same day saying that it was not sufficient and that, as the Owner had to provide evidence that he had the capacity to pay the contract sum, the actual sum must be specifically stated in the evidence.

102. On 22 December the Builder's solicitors wrote again to the Owner's solicitors confirming that work was suspended and stating that the Builder was willing to proceed with the contract if the outstanding amount plus interest was paid and the Owner produced evidence that he had sufficient funds to pay the contract sum. Various other conditions were also specified.

103. On 29 December the Owner made the frame stage payment of $50,578.50.

104. On 14 January 2015 the Builder's solicitor sent an email to the Owner's solicitor confirming that payment for the frame had been made, pointing out that interest on that sum had not been paid in accordance with the terms of the building contract and that evidence of capacity to pay had not been produced. He said that work remained suspended, that the Builder was now at liberty to terminate the building contract and that he was seeking the Builder's instructions.

105. On that same day, 14 January, the Owner's solicitors wrote to the Builder's solicitors, attaching a further copy of the approval letter dated 20 July 2014 to the Owner from the bank approving the construction loan of $472,200.00. The Builder's solicitors replied the same day, stating:

> "The attached NAB letter is not unequivocal evidence that your client has the capacity to pay the contract sum. In particular and without limitation, it is a conditional letter and your client has not provided evidence that it was fully formalised as per the conditions in the letter or that "as at this day", the loan is available to draw on or that your client has capacity to pay the CS."

106. On 19 January, the Builder's solicitors wrote to the Owner stating (inter-alia):

> "You have failed to comply with the matters in our above letter to you.
>
> Accordingly, in accordance with clause 22.2 of the building contract and without prejudice to any of his rights and remedies, a client hereby terminates the building contract."

107. Also enclosed in that letter was an invoice dated 5 December 2014 addressed to the Builder from the window supplier for $18,834.20. The Builder's solicitor informed the Owner's solicitor that the windows had been ordered and manufactured and the supplier was awaiting instructions for delivery.

Suspension of work

108. Mr Squirrell submitted that I should find that the Builder suspended work following the meeting of 23 November. He submitted that to suspend work otherwise than in accordance with the terms of the contract was a substantial breach by the Builder.

109. During the meeting on 23 November the Builder denied that he intended to suspend work. In the letter to the Owner dated 2 December, the Builder's solicitor Mr Gray, said that the works were not suspended but that the Builder was busy on other jobs.

110. On 5 December the Builder was invoiced for the windows to be installed in the House and it is clear that on 19 January 2015 they were awaiting delivery. Mr Rozenberg invited me to infer that they were ordered after 23 November but the order form shows an order date of 24 September. However the order was not cancelled.

111. The notice of breach was served on the Owner on 12 December but not immediately complied with. On 16 December, after noting that the Owner had not unconditionally offered to pay for the frame stage which, according to the Builder, was due for payment on 5 December, nor produced evidence of his

capacity to pay the contract sum, the Builder's solicitors gave notification pursuant to Clause 16.2 of the contract that works were suspended.

112. The delay between the meeting of 23 November and the formal suspension of works on 16 December is 23 days. During this period the order for the roof was cancelled and no work was carried out by the Builder on the House. From his comments in the transcript of the meeting of 23 November it is reasonable to infer that the Builder was reluctant to spend any more money on the construction until such time as he was satisfied that he was going to be paid. However I do not find that he suspended work within the meaning of Clause 16 of the contract.

113. The Builder has to complete the House within the time specified in the contract but he is not obliged to work on the site continuously.

114. I think it was reasonable in the circumstances for the Builder to seek reasonable evidence of the Owner's capacity to pay but he would not have had grounds to suspend work in accordance with the contract unless that was not provided. The Owner must be given a reasonable opportunity to provide that evidence. In the meantime, I do not think that it was unreasonable in the circumstances for the Builder to cease work. Quite obviously, since work was not suspended in accordance with the contractual provisions, time continued to run during the period of his inactivity and so he would have had to make up the time when he resumed work in order to meet the completion date required by the contract.

115. I do not find that by doing no further work between 23 November and 16 December the Builder has either suspended work or committed a substantial breach of the contract.

Termination

116. The letter of breach dated 12 December 2014 was sent to the Owner by registered post pursuant to Clause 22 of the contract. The letter required the Owner to remedy the alleged breaches within 14 days of receipt of the letter, failing which the Builder intended to terminate the contract.

117. Clause 24.3 of the contract provides that a document served by registered post will be deemed to have been received on the date of actual receipt or two clear business days after the date of posting, whichever is earlier. There was no evidence of the date of actual receipt of the registered post. Mr Rozenberg said that the date of actual receipt was 12 December which was when the Owner received an emailed copy of the letter. However I think actual receipt of a notice given by registered post means the receipt of the registered post not the receipt of a copy of the contents of the registered post which has been received by other means.

118. Mr Squirrell submitted that, since 12 December was a Friday, two clear business days would mean that it was deemed to have been received on the following Wednesday 17 December and that consequently, the Owner had until 31 December in which to comply with the notice before the Builder would be entitled to determine the contract. I accept that submission.

Service of the notice of termination

119. By Clause 22.2 of the contract, if the Owner should fail to remedy the breaches stated in the notice of breach within 14 days of receipt, the Builder may, without prejudice to any of his other rights and remedies, give further written notice by registered post to the Owner, immediately terminating the contract.

120. By letter dated 19 January 2015 the Builder's solicitors referred to the service of the notice of breach on 12 December, stated that the Owner had failed to fully comply with the matters set out in the letter and concluded:

> "Accordingly, in accordance with clause 22.2 of the building contract without prejudice to any of his rights and remedies, our client hereby terminates the building contract."

121. Mr Squirrell suggested that this letter was not sent by registered post as required by Clause 22.2 of the contract. How this letter was sent was not specifically raised in the evidence. In his witness statement, the Builder said that he was advised by his solicitor that the letter terminating the contract was posted to the Owner on 19 January as well as being emailed to the Owner and his solicitor. The Builder was not cross-examined as to the manner of posting.

122. Clause 8 b. of the Builders Amended Points of Claim states:

> "On or about 19 January 2015 the Builder's solicitors wrote to the Owner terminating the agreement pursuant to clause 22.2 of the contract and requiring remedy within 14 days of receipt of 19 January 2015 letter" (sic.)

123. In answer to this allegation, the Owner said in his points of defence:

> "Save that he admits receipt of the demand for the frame stage progress claim and of the notice terminating the agreement, he denies each and every allegation contained in paragraph 8 therein.
>
> PARTICULARS
>
> The Respondent maintains that the Applicant did not achieve base or frame stage, and that the Respondent provided evidence of capacity to pay, details of which are referred to in the particulars subjoined to paragraph 6 herein. The Respondent denies that the Applicant was entitled to terminate the agreement by its notice dated 19 January 2015."(sic.)

124. This tribunal is not a court of pleading but similar documents are used in order to give each party notice of the case that the opposing party has to meet. As a matter of procedural fairness, if the point was to be taken by the Owner that service of the notice of termination was defective, that should have been raised in the points defence and it should also have been put to the Builder in cross-examination so as to give him an opportunity of calling any further evidence that he might have concerning the manner of posting. In the light of what is set out in the documents that stand in place of pleadings and in the absence of any suggestion to the Builder in cross examination that service of the notice of termination was defective is not now open to the Owner to argue that this fact has been insufficiently proven.

125. The sworn evidence of the Builder, albeit hearsay, was that the letter comprising the notice was posted to the Owner on 20 January 2015 and that it was a letter terminating the contract. To have that effect it would need to have been given by registered post. The Owner admitted in his witness statement that he received it, although he did not say how. The allegation in paragraph 8 of the Amended Points of Claim was that the Builder's solicitors wrote to the Owner terminating the agreement pursuant to Clause 22.2 of the contract. Again, if it had that effect it would have to have been given by registered post. Paragraph 8 appears to have been admitted, since it is said that the letter was a notice terminating the agreement. There is no suggestion that it did not have this effect because it was not sent by registered post. In order for it to have been "…pursuant to Clause 22.2…" it would have to have been sent by registered post. In his Points of Defence the Owner does not say that the notice was ineffective to terminate the agreement. Rather, he says that the Builder was not entitled to terminate the agreement. The case was conducted on the dispute as delineated in these documents.

Conjunctive notice

126. Mr Squirrell submitted that the notice of 12 December was a conjunctive notice that is, that the Builder was asserting that there were two breaches and that unless they were both remedied he would terminate the contract.

127. He further submitted that, if the defaulting party has made good one or more of the grounds of breach leaving other grounds extant, then the notice of termination is defective. He referred to an earlier decision of the tribunal in the case of *Fasham Johnson v. Ware* [2003] VCAT 883 in which it was found that a notice of breach that set out in very general terms a number of breaches connected by the conjunction "and", it was held that the breach alleged was all of the breaches together and not any of them separately. Consequently, if any one or more of the grounds was not established then the breach, being all the breaches collectively, was not established.

128. That was a very different case from the present. Here, both breaches are set out in the notice, both were established as having been extant at the time the notice was served and they were both to be remedied. A failure to remedy either meant a failure to comply with the notice.

129. Since the frame stage was paid on 29 December, which was within the 14 day period, that breach was remedied. The issue of termination turns upon whether or not the Owner provided reasonable evidence of his capacity to pay the contract price.

Evidence that the Owner has the financial capacity to pay

130. The obligation to provide evidence of capacity to pay is imposed by Clauses 11.1 11.2 and 11.3 of the contract. They state as follows:

"**11.1 Evidence of capacity to pay the contract price**

The Owner will within fourteen (14) days of the Owner signing the contract, provide written or other reasonable evidence to the Builder that the Owner has the financial capacity to pay the contract price.

11.2 Continuing obligation upon Owner to provide evidence of capacity to pay

The obligation of the Owner to provide evidence of capacity to pay the contract price is a continuing obligation until the Works have reached Completion.

11.3 Builder may request evidence of capacity to pay during the contract

The Builder may at any time until the works have reached completion, request the Owner to provide written or other reasonable evidence of capacity to pay the balance of the contract price or any variation notwithstanding the fact that the Owner has previously provided such evidence to the Builder under the contract, and the Owner will, within fourteen (14) days of any request, provide evidence of such capacity."

131. The Builder having requested it, the Owner was required to provide reasonable evidence to the Builder that he had the financial capacity to pay the balance of the contract price within fourteen days of the request.

132. Evidence of capacity had been provided to the Builder before work commenced. On 28 August 2014 the Owner's bank wrote to the Builder to say:

"**Builder's Advice**

Construction at: Lot 206 Bena-Kongwak Road , Bena VIC 3946

Customer name(s): Michael Wilson

We wish to advise that all required documents have been executed by the customer and NAB has approved finance to assist with the construction of the above-named property relating to:

Builder's contract number:

Contract price/Construction cost: $337,190

If you require any further information please do not hesitate to contact me."

133. I think that notification would have satisfied a reasonable builder that the Owner, at that time, had the financial capacity to pay a contract price of the figure specified namely, $337,190.00. Indeed, following the receipt of this letter the Builder commenced work on the House.

134. However situations might change and the contract provided that the obligation to provide reasonable evidence of capacity to pay continued until the work reached completion.

135. Thereafter, in communications with the Builder, the Owner raised doubts from time to time as to the willingness of the bank to continue to provide the finance. On 25 September 2014 he sent an email to the Builder stating:

"The bank has been informed in regards to my concerns about this build and they will advise accordingly. My expectation is that they will release funds as per the agreed

progress payment but I have no control over this. I have no idea how they will handle the concerns that I have raised but the important part, as far as I am concerned, it is their valuation on the work carried out, which is crucial to me. If they agree with your synopsis of the situation then I am happy."(sic)

136. On 28 September 2014 the Owner wrote to the Builder suggesting that his attempts to resolve his concerns was proving to be an impossible feat and that an amicable resolution was highly improbable. After referring to his complaints about materials and the floor level and suggesting that the plans had not been followed, he concluded the letter by saying:

> "Please be advised that under instructions from the bank no further progress payments will be made until these matters are fully resolved."

137. In a further email on 8 October 2014 from the Owner, the final sentence stated:

> "Regardless, the dispute needs to be resolved before Melbourne would agree to let me release funds".

138. The Owner's evidence was that "Melbourne" meant the bank. A further email from the Owner on the same day stated that no money was be paid until the dispute was resolved.

139. In an email of 19 October, which was after the larger bearers had been agreed upon, the Owner stated to the Builder that the new variation and disputes would undoubtedly be an issue for the bank, but said that if the dispute were "officially resolved", that should satisfy the bank and "once completed" they would release funds as progress payments.

140. In a further email of 12 November the Owner said to the Builder that the bank had expressed concern about the build.

141. The final trigger for the request for evidence of financial capacity appears to have been what was said at the acrimonious meeting that took place between the parties on 23 November 2014. During that meeting the Owner mentioned the bank on a number of occasions and cast doubt upon the willingness of the bank to pay for the work. The following are extracts from the transcript of the recording of the conversation. *(The grammatical errors in the transcription have been preserved and one expletive deleted)*:

Owner:	[*about his conversation with the bank*] Guess what they said? Hang on. What the hell is going on here? Now I haven't got any leeway over the bank Pete, none whatsoever. So if they are saying to me that there is an issue with that build then that is what they are saying …. And obviously they value it on what the finished product is going to look like.
<u>Later</u>	
Owner:	I have not got any control over the bank Pete, have I?
Builder:	Let's say the bank's not concerned.
Owner:	Well they are concerned.

Later

Owner: I won't accept is if the bank turn around and, they have already warned me they are going to do an inspection on it.

Builder: That's great.

Owner: And if they do, and if they say about the house, oh well, sorry, but we've valued it at whatever it's valued at.

Later

Owner: If they decide to undervalue this build it's going to affect me, do you know what I mean? It might affect my to value ratio. Which means I end up paying more for it.

Later

Owner: What they are going to say to me is, right we are going to change whatever it is to do with the loan valuation. Whatever it is, it is going to cost you X amount to sort it out.

Later

Builder: I think you need to liaise with the bank and make sure they are happy with what has happened underneath

Later

Builder: For the next stage [*the frame stage*], and that is not due, because I issued an invoice on Friday, it is not due until Friday fortnight. So for me to go and spend another 20 and another 20 on the roof, I am going to be nearly $100,000 down the tube, now you may say, "No the bank's not happy with all of this, I am not paying you". That is it.

Owner: But it is not me that pays you Pete, it is the bank that pays you so I'm…

Builder: I think that we need to suspend the works until that's clarified. And we get that in writing that you are happy for me to continue to go ahead…

Later on

Builder: You need to have the bank approve before I can continue.

Owner: Everybody has to have the bank approve before money goes out of an account.

Builder: That's what I mean.

Owner: So what has that got to do with building this at the moment?

Builder: Mick, I can request capacity to pay anytime I want and if the bank….

Owner: Well request it

Later

Builder: I have not said I am going to suspend the works, I said this is what I see going forward, this is my proposal, and we have a meeting, we get everything right, and before Karen goes into labour, before you are going to get busy get it all right and then you can leave me to build the house. But you need to get approval that the bank's going to keep paying me.

Owner: Why would not the bank keep paying unless you've f….d something up?

Builder: Because you just said yourself, you brought it to my attention that if the bank takes 20,000 off your value you do not know what is going to happen.

Owner: Well I do not know what is going to happen.

Later

Builder: I did not say I wanted to walk off the build. I said we need to sort it out with the bank, then have a meeting, confirm everything and continue.

Owner: There is nothing to sort out the bank is there, what are you going to sort out the bank? Is it your bank is it?

Builder: You do.

Owner: I am not sorting out anything with the bank, the bank does what bloody hell the bank does.

Later

Owner: No one is disputing the fact that I owe you on it, but I have not got the capacity to take money out of the bank until they have approved it."

142. It seems very strange that an owner would want to put doubt in the mind of his builder concerning the continuing availability of his own finance but that is certainly the import of what the Owner said at that meeting. When the Builder expressed concerns about the implications of his comments the Owner did nothing to allay those concerns.

143. Following the meeting and on the same evening, the Builder sent an email to the Owner in the following terms:

> "Could you please check with the bank that they are happy to continue the payments as per contract agreement and provide a written notice of approval or capacity to pay the contract price".

144. As stated above, the response to that request was an angry email from the Owner which did not address the request made by the Builder. The ultimate response in that regard was through the Owner's solicitors.

145. The statements made by the Owner during the meeting on 23 November sit uneasily with the email correspondence that he had had with the bank shortly beforehand which would suggest that, in fact, the bank had no such concerns.

146. On 9 November the Owner had sent an email to Ms Crawford at the bank in which he referred to the dispute about the stumps and said that the fixing of the bearers needed to be resolved before the frame progress payment was made. He attached a copy of the amended permit, said that he was concerned that the House exceeded its valuation and sought advice from the bank in that regard. The following day he received a return email from Ms Crawford saying that she was ordering an inspection and would advise when it had been completed. The Owner responded, asking whether he should contact the Master Builders Association and Ms Crawford's answer was that that would be up to him.

147. On 17 November Ms Crawford sent an email to the Owner stating:

> "Hi Michael,
>
> The base valuation came back and everything is fine. I have now had a look at the base claim and will arrange for payment, should be paid within couple of days".

The Owner did not provide a copy of this email to the Builder.

148. By an email on 27 November 2014, the Owner informed Ms Crawford that the Builder had requested proof of capacity to pay the contract price and asked her to respond to it. The operative part of her answer was as follows:

> "The only information that I can legally provide your builder is the builder commencement letter.
>
> Any information regarding funding or issues of how the build is being paid for is between the builder and you.
>
> The bank would be breaching privacy laws to provide any funding information to your builder as our contract is with you only.
>
> You could provide the builder with statements, loan approval letter but that is up to you."

149. The Builder's concerns might well have been allayed by simply sending him a copy of this email or the email of 17 November. That was not done.

150. Details of the loan were set out in an email from Miss Crawford to the Owner on 28 August. This not only referred to the amount of the overall loan but also the staged payments to be made to the Builder. Again, this was not sent on to the Builder.

151. Mr Squirrell submitted that, as at 8 December 2014 the Builder knew or ought reasonably to have known that the Owner had a construction loan for the full price of the contract, that the deposit and base staged payments had been made by the bank and that the construction loan was still in place and available for further drawdowns. He said that, in the circumstances, it was known by the Builder that finance was available for the balance of the contract price.

152. I do not accept that submission. Certainly, it was known that the two progress claims had been paid, but the communications from the bank did not establish that any specific sum was available or that the bank would be willing to pay it to the Builder.

153. It was the Owner himself who created doubt about whether payment would be made to the Builder. It was therefore reasonable for the Builder to request that reasonable evidence of capacity to pay the balance of the contract price be provided. The reasonableness of the information that was then provided by the Owner in response to the request must be assessed.

154. The letter dated 20 July 2014 did not add anything to the later letter of 28 August and so sending a copy of it to the Builder's solicitors in January 2015 was not sufficient to show that the Owner then had the capacity to pay the balance of the contract price.

155. The email from the bank dated 1 December 2014 confirmed that the Owner then had "a current loan with NAB, with partial drawdowns still available" and although one might suspect that the loan referred to was the same as the construction loan, the email does not say that, nor does it give any indication of the amount of money that was still available to be drawn down.

156. I think that reasonable evidence of capacity to pay must at least refer to the amount of money that is available and indicate that it is available. Evidence that the Owner has the capacity to pay some unspecified amount of money is not evidence that he has the capacity to pay the balance of the contract price. Further, having suggested that the bank had concerns about the build and might itself decide not to pay, the Owner should have made it clear to the Builder that the bank did not in fact have these concerns.

157. For these reasons I am satisfied that the Owner failed to provide reasonable evidence of his capacity to pay the contract price when requested by the Builder. He had ample evidence at his disposal that he could have shown the Builder but he did not do so. The ground for termination is therefore established.

158. I now turn to whether the Builder was entitled in the circumstances to terminate the contract.

Was the Builder entitled to terminate the contract?

159. Clause 22.3 of the contract provides that the Builder may not terminate the contract unreasonably or vexatiously or if he is in substantial breach of the contract himself.

160. Mr Squirrell submitted that, even if the Owner had failed to provide reasonable evidence of capacity to pay, the Builder was nonetheless not entitled to determine the contract because, at the time of the purported termination, he was himself in substantial breach of contract. He also submitted that it was unreasonable in the circumstances for the Builder to terminate the contract.

Was the Builder in substantial breach?

161. As to the nature of a substantial breach, both counsel referred me to the case of *Ilija Stojanovski v. Australian Dream Homes Pty Ltd* [2015] VSC 404 where Dixon J considered the meaning of substantial breach in the context of a building dispute. In particular, Mr Squirrell urged me to consider the judgment from paragraphs 42 to 58, which are as follows:

“42 The question whether the Builder was in substantial breach of the contract is to be evaluated at the time that the notice was sent. That the party in default might subsequently remedy a substantial breach is self-evident. The language of the contract contemplates the prospect of remediation because the parties have plainly agreed that the right to immediately terminate the contract is dependent upon the opportunity to remedy the breach not having been taken. The opportunity to remedy an existing breach merely by completing the works free of defects by the agreed completion date does not address whether there was a substantial breach at the time when the notice was given. Thus, the prospect that a breach might be remediated after service of a default notice cannot resolve the question of whether the Builder was in substantial breach when the notice was served. In this respect, the tribunal’s reasoning was in error.

43 The tribunal ought to have determined on the evidence whether the Builder was in breach of the contract on 17 April 2012 in the particular respects asserted by the notice and whether such breach was a substantial breach. The task involved identifying the terms of the contract that were breached. Assessing whether the alleged circumstances of breach were substantial involved the proper construction of the phrase ‘substantial breach’ as used in cl 20.1.

44 Although the tribunal did consider the analysis of the phrase ‘substantial breach’ in *Serong v Dependable Developments Pty Ltd* [2009] VCAT 760, the test identified in that case was not applied by the tribunal in determining whether the Owner was entitled to serve the default notice. The tribunal made no finding that the defects particularised in the default notice constituted a substantial breach of the Builder’s obligation under cl 10.1 at the time that the default notice was served.

45 The word ‘substantial’ is protean, which no doubt explains the propensity for the drafters of standard form terms and conditions for building contracts to identify what breaches are to be regarded as substantial. It is not uncommon for building contracts to contain an inclusive definition of ‘substantial breach’….However, the term ‘substantial breach’ is not defined in this contract. Neither party addressed the court as to the proper meaning of ‘substantial breach’.

46 Its meaning in a variety of contexts has been considered by courts.

47 In *Wong v Silkfield Pty Ltd*, [1999] HCA 48, the High Court said that the term ‘substantial’ may have various shades of meaning. Having regard to the context,[6] it may mean ‘large or weighty’ or ‘real or of substance as distinct from ephemeral or nominal’. In that case, the meaning dictated by the statutory context was that ‘substantial’ did not indicate that which is ‘large’ or ‘of special significance’ or would ‘have a major impact on the ... litigation’ but, rather, was directed to issues which were ‘real or of substance’. The court’s reasoning permitted context to determine where on the continuum the intended meaning was to be found.

48 The term ‘substantial’ appears in s 9A of the *Workers Compensation Act* 1987 (NSW), in the context ‘... a worker’s employment is not to be regarded as a substantial contributing factor to a worker’s injury merely because of either or both of the following ...’. The word is employed to evaluate a notion of causation. In *Dayton v Coles Supermarkets Pty Limited* [2001] NSWCA 153 the trial judge found that the

worker's employment constituted a 'rather minor' factor in the aetiology of the worker's injury. Meagher JA opined that:

> "Many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word "substantial". But this word is a plain English word which is understood by anyone who is not a judge. Nor have the endless judicial lucubrations on the word contributed to anyone's understanding of it. And nobody in their senses would regard a cause which could be correctly categorised as very "minor" as "substantial"."

162. The same principles apply when considering whether the conduct of the party terminating the contract is vexatious or unreasonable. Mr Squirrell referred to the following further passages from the judgment of Dixon J in *Stojanovski*:

> "63 The obligation to not terminate unreasonably or vexatiously or when the Owner is in substantial breach governs the Owner's conduct when serving a termination notice under cl 20.2, not the service of a default notice under cl 20.1. The specification of the period in the default notice during which the Builder is required to remedy the substantial breach of the contract is different conduct antecedent to that which the parties have agreed must be exercised reasonably. The parties have not agreed that the obligation not to act unreasonably or vexatiously governs the act of serving a default notice and in particular in determining the time to be allowed for remediation before the power to terminate will be exercised. The exercise of the power to serve a default notice should be discharged in good faith but it is not in issue on this appeal."

and

> "67 That is not to say that the time required for remediation of the alleged defects is not a relevant consideration, but is not the only consideration. Once the inquiry is whether the Owner has acted reasonably, the court must examine not just the default notice and its context but also the response of both the Builder and the Owner after service of the default notice up to the time of service of the termination notice."

163. Mr Rozenberg referred me to what I said in *Imerva Corporation v. Kuna* [2015] VCAT 2058 by way of summary of his Honours comments in *Stojanovski*. Since I have set out the relevant passages from the judgment in full, it is unnecessary to repeat the summary that I made.

The substantial breaches alleged

164. Mr Squirrell submitted that, at the time of the notice of breach and the time of termination, the Builder was in substantial breach of contract due to a number of extant deficiencies in the work. They were as follows.

Stumps

165. Mr Gibney said that the use of 100 mm x 100 mm cypress stumps was structurally acceptable but it was inadequate where the stumps were over 1500 mm high in the north-western corner of the House. He said he measured the highest stump at 1605 mm above the ground, another at 1525 mm and a third at "just over"1500 mm. He also said that where the stumps exceed 1500 mm they are required to be braced. Mr Mitchell agreed.

166. Mr Mowlam said that the use of cypress stumps was satisfactory and in accordance with the Code. He said that the stumps in excess of 1500 mm were in one area and the longest stump that he measured in that area was 1550 mm high. The earlier report obtained by the Owner during construction refers to one stump over 1500 mm which the author of that report measured at 1525mm.

167. There was some suggestion during the on-site inspection that the ground level around the longest stumps had been built up or reduced by removing or adding soil around the base of the stump. Certainly that might explain the different measurements that were taken at different times by different people. There was no evidence that it had been and so it is impossible to make a finding either way. Whether it is one stump for three stumps that exceed the 1500 mm length, the degree by which any stump exceeds 1500 mm is very small. Mr Mowlam referred to it as marginal.

168. Mr Mowlam conducted computations on the stumps in question, taking a 1600 mm maximum height and found that the 100 mm x 100 mm cypress stumps were structurally sound, given the close centres of the stumps, both as to dead and live loads and racking forces. The structural adequacy of the stumps does not appear to be doubted.

169. Mr Jubb said that concrete stumps have a maximum length of 1800 mm whereas the length of the stumps required for the House was between 1800 and 2400 mm. He said that the stumps used (which he incorrectly described in this report as treated pine) were fit for the purpose and a better choice. He suggested in his report that the 400 mm ground clearance around the shorter stumps could be obtained by excavation.

170. The use of cypress stumps instead of concrete and the floor height complaint were dealt with by the signed variation. Consequently, there was no extant breach on account of using cypress stumps at the two critical times, which were the dates of the notice of default and the notice of termination.

171. The failure to use 125 mm x 125 mm dimension cypress stumps was not specifically referred to in the variation but work proceeded on the basis that the stumps as installed was sufficient. Moreover, the amount by which the one, two or three stumps exceeded 1500 mm in length was minimal and the engineering evidence was that, due to the use of the larger bearers no further work was required. If there was an extant breach, it was not a substantial one.

Attachment of cleats to the bearers

172. Metal cleats were installed on the shorter stumps as directed by the relevant building surveyor. There is a dispute as to whether the other timber cleats were to be replaced with metal cleats at the cost of Builder or whether the cost was to be shared between the Owner and the Builder. The cleats as installed were part of the base stage which was approved by the relevant building surveyor.

173. Mr Mitchell said that the timber cleats connecting the bearers to the stumps were not treated against termite attack. This was acknowledged. Mr Mowlam also said that one of the bearers needed blocking or tying to the external brick skin.

174. Mr Jubb agreed that, since the cleats provided a pathway for termites, they made the termite caps on the stumps ineffective. He said that it would be necessary for a chemical spray to be used for the termite protection and that, on his instructions, the Builder had already had "Part A" of the treatment carried out.

175. The cleats connecting the bearers to the stumps were approved by the relevant building surveyor and designed by the engineer that he engaged. I find that, given the use of a chemical termite treatment, they were sufficient.

176. Given that the installation of the larger bearers was an agreed variation and that the manner of fixing the bearers to the stumps was specified by the relevant building surveyor, I do not find that the Builder was in substantial breach of the contract on account of the cleats that were used.

Garage base brickwork

177. Mr Gibney said the base brickwork in the garage was required to act as a retaining wall and at present, the brickwork was single skin with piers which would not have sufficient capacity to resist the soil loads generated by internal soil loads and external soil loads around the perimeter brickwork of the garage.

178. He also questioned the spacing of the integrated brick piers which would need to support the garage floor slab. Mr Jubb said that, because it was an infill slab, the brick piers would carry the weight of the slab and so more piers are required at 900 mm centres.

179. Mr Mowlam calculated that if the internal fill under the garage floor was properly compacted, the existing piers would be sufficient to support the slab. He also said that the intersecting brick walls would provide support to the garage brick walls.

180. There was some discussion about this on-site and it seems that the floor can be supported on these piers. Since the installation of the garage slab was a later stage of construction, I do not find that the walls as constructed amount to a substantial breach on the part of the Builder.

Other base brickwork

181. As stated above, I am satisfied that the base brickwork of the House extends to the underside of the bearers.

182. Mr Mitchell said that the base brickwork was not double where it exceeds 1400 mm above the ground as required by Sheet 4 of 8 of the working drawings. Mr Mowlam acknowledged the requirement but said that the Builder informed him that floor level was raised 300 mm after the base brickwork had been laid and that it was intended to raise the internal skin of brickwork once the bricklayers return to site.

183. Mr Jubb agreed that a brick wall more than 1400 mm high should be double brick below this but he said that that could be completed at any stage. He said that another brick skin needs to be laid on the inside of any single skin wall over 1400 mm high in order to produce the 1400 mm minimum distance to the top of the brick wall.

184. I do not find that there was a substantial breach by the Builder on account of the base brickwork.

Metal tie-downs

185. Mr Gibney said that the metal strapping used to provide localised tie-downs to the veranda posts had been allowed to sit in water for a significant period of time. Mr Mitchell said that they appeared to have been installed in accordance with the engineering drawings but that they were rusty and very weak at the 90° angle where connected to the concrete footing and they should be replaced and protected from the weather. It was also said that they require tensioning and that was demonstrated on the site inspection. Mr Mowlam said it was difficult to know how the strapping had been installed originally but that tensioning them was a simple process.

186. Mr Mowlam agreed with Mr Gibney's concerns about the tie-downs although he said that they appeared to have been installed in accordance with the engineer's instructions. He suggested how they could be re-installed and protected from the weather.

187. Complaints about the tie-downs relate to their condition after having been exposed to the elements for two years. It seems to be acknowledged that they were installed in accordance with the engineer's design.

188. I do not find that there was a substantial breach of contract by the Builder on account of the tie-downs.

Bolting of waler plates

189. Mr Gibney said the timber waler plates supporting the ends of the balcony joists have been fixed into the bed joint mortar or into the very bottom of the brick with no edge distance from the edge of the brick. He said that the bolts do not have oversized washers and are well in excess of the 450 mm centres expected to be used for domestic floor loading and as specified in detail "D" on Sheet 7 of 8 of the working drawings.

190. Mr Mowlam agreed that the Code requires the use of washers but said that they are rarely used in practice. He also agreed that the bolts should have been in the brick rather than the mortar course but he said that, because there was sufficient brickwork above to ensure structural adequacy and since the bolt was working only "in shear", they would be sufficient. He also said that he could not find where the bolts were spaced more than 450 mm apart. He found one instance where a bolt had not been fully installed which he attributed to the fact that the adjacent brickwork over the subfloor access had yet to be installed.

191. Since the use of washers was required by the Code, their absence is a breach but it does not have any practical consequence. Accordingly, I do not find the Builder was in substantial breach of the contract on that account.

Attachment of roof trusses

192. Mr Gibney said the roof trusses had not been installed in accordance with the manufacturer's details but he did not say in what respect. He said that the nail

plates were backing out of the panel joints at the bottom corner of the trusses which appears to be agreed between the experts although it also seemed to be agreed that this was a result of the weathering of the frame after the termination of the contract. Mr Gibney said that the truss tie down required for wind uplift at top plate level has not been carried down to the bottom plate level and the footings but he did not say whether that was required by the Code.

193. Mr Mowlam said that the majority of the jack trusses only require nominal fixing into the bottom chords because the top chords were connected by creeper brackets or were continuous over. He acknowledged that a tie connecting one triple stud to the doorframe was required.

194. Mr Gibney said that there was inadequate support of the two girder trusses in the garage stud wall in that they are currently only supported on a single stud with no nogging. He said the studs were inadequate to support the proposed roof loads. Mr Mowlam agreed but said that the studs in question were only temporary supports pending completion of the brickwork and the installation of the metal lintel above the window opening. I accept that evidence.

195. The criticisms of the frame seem to be fairly minor and most of the items are disputed. To the extent that there are omissions, they seem to be minor and I do not think that they amount to a substantial breach of contract by the Builder.

Stormwater drainage

196. During the course of the work, the Builder constructed a spoon drain uphill of the House to deflect water from the construction area. Although Mr Mowlam described the drainage of the site as good, Mr Gibney said that the stormwater drainage from the garage was discharging against the brick strip footings and will cause footing movement. In particular, he identified the culvert that had been constructed by Mr Chapman before the building work commenced in order to direct water away from the garage. When the garage was moved from the position that was originally intended, the culvert was not extended or reconstructed to suit the new position and it now finishes at the garage entrance. The construction of this culvert was not part of the Builder's scope of works.

197. Mr Gibney identified the north-western corner subfloor as a place where water was ponding and also the eastern side of the garage where the ground slopes towards the garage wall. He did not suggest that there were was any sign of footing movement and none was pointed out on-site. Quite obviously, the subfloor area in the north-west corner would be protected from the rain once construction was completed. Mr Mowlam said that, according to the soil report, the footings were founded in weathered rock and a change in moisture will have little effect on the structure during construction stage.

198. After two years exposure to the weather there was no sign of movement pointed out to me and I could see none. I do not find that the site drainage amounted to a substantial breach of contract by the Builder.

Timber used

199. Mr Gibney said the deck joists in the veranda area do not appear to be treated pine as required. Mr Mowlam said that he found a tag on the timber identifying it as treated pine. A similar tag was found during the on-site hearing. I am satisfied that the timber that was used is treated pine.

Missing half-brick

200. There is a half-brick missing from an integrated pier adjacent to the entry to the subfloor. This appears to have been installed at some stage but it is no longer there and it is acknowledged that it must be replaced.

Substantial breach?

201. Of the reasons that Mr Squirrell has advanced, the only extant deficiencies in the base stage at the time of termination were:

    (a) the clearance of 400 mm the plans required between the underside of the bearers and the ground was not achieved in regard to a number of the short stumps, although according to the evidence, the required clearance could be achieved by some minor excavation around those stumps which would have taken very little time. I do not think that the builder was in substantial breach of the contract in failing to do that excavation before making the claim for the base stage or before terminating the contract.

    (b) a further skin of brickwork, said to be two courses high, needed to be added to the inside of the veranda brick wall in the downhill corner as a consequence of changing to the larger bearers. The necessary bricks were on-site but were not laid. I accept the Builder's evidence that those two courses would have been laid when the bricklayer was next on site. The absence of that brickwork at the time of termination did not mean that at that time Builder was in substantial breach of the contract.

202. Even taking all the criticisms together, I do not find that, at the time his solicitors served the notice of default upon the Owner or the time that he terminated the contract, the Builder was in substantial breach of contract on account of those issues. Accordingly, the Builder was entitled to terminate the contract.

Condition of frame

203. The relevant building surveyor has issued a demolition order requiring the frame to be demolished due to its present weathered condition.

204. Mr Gibney said that the sheet flooring is in poor condition and will require to be pulled up and re-laid. Mr Mitchell said it would not be economical to attempt to repair the frame and that the particle board flooring and the whole frame built upon it should be demolished and replaced. Mr Mowlam generally agreed with Mr Gibney.

205. Mr Jubb said that, despite the extensive exposure to the weather, the roof and wall frames had maintained their line and were fit for the purpose. He said that bracing nails or bolts and any nailing plates that are withdrawing from their

fixing nodes should be replaced and the speed bracing should be replaced or tightened. He said that frame would then need to be covered and then allowed to dry out before any internal linings were fitted.

206. During the joint expert evidence at the hearing concerns were expressed by Mr Gibney as to whether an engineer would be prepared to certify the frame and whether, given the cost of that and the necessary work to rectify the frame, it would be economical to try and salvage it. Neither engineer was willing to assert that it would definitely be approved although no expert said categorically that it not be possible to salvage it.

207. However, the condition of the frame is the result of it being allowed to stand unprotected in the weather for over two years. It does not relate to the termination issue.

Conclusion

208. I am satisfied that the contract was validly terminated by the Builder in accordance with Clause 22.2.

209. In the light of that finding, pursuant to the directions given on 6 February 2017, an order will be made as follows:

    (a) The proceeding will be fixed for further hearing and determination of the applicant's claim for an assessment of damages at 10 AM on 14 July 2017 at 55 King Street Melbourne before Senior Member Walker with one day allocated.

    (b) Any further witness statement to be relied upon by the Builder must be filed and served by 15 May 2017.

    (c) Any further witness statement to be relied upon by the Owner must be filed and served by 15 June 2017.

    (d) Costs reserved.

    (e) Liberty to apply.

SENIOR MEMBER R. WALKER