VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP 126/2018

CATCHWORDS

Domestic building work – renovation of dwelling house in order to rent out – defective and incomplete work – claim for loses due to delay – delay while dispute with Domestic Building Dispute Victoria not reasonably foreseeable – *Hadley v Baxendale* (1854) 9 Ex 341 – failure to mitigate loss – *Australian Dream Homes Pty Ltd v Stojanovski (No 2)* [2016] VCAT 2194 – report of assessor admitted in evidence pursuant to section 48T of the *Domestic Building Contracts Act* 1995

APPLICANT	Hamish McDougall
RESPONDENT	Rock-Solid Renos Pty Ltd (ACN 149 777 720)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	1 June 2018
DATE OF ORDER	19 June 2018
CITATION	McDougall v Rock-Solid Renos Pty Ltd (Building and Property) [2018] VCAT 933

Order

1. The respondent must pay to the applicant the sum of $2200.60.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr H. McDougall in person
For the Respondent	Mr K.J. Georges in person

REASONS

Background

1. The applicant Owner inherited a property in Sandringham. It needed some repairs and maintenance work before being rented out, and the managing real estate agent introduced the Owner to the respondent Builder. The Builder operates as a company which provides building maintenance services, particularly to property managers.

2. The parties exchanged emails and messages prior to meeting on site to discuss the works required. This led to the Builder providing a written quote No. 187 dated 7 March 2017 ("the Quote"). As a result of the Owner accepting the Quote, the parties entered into a contract ("the Contract").

3. The Quote listed the works that would be carried out, for the price of $5303 plus GST, and noted that the shower and leadlight replacement would be at an extra cost. Both parties agreed that the Contract was then varied to include further items in addition to the scope of work set out in the Quote.

4. The Builder carried out either all, or the majority, of the works (the parties disagreed about this) and the Owner paid him $8500. On 20 April 2017 they met on site together with the managing real estate agent. The Owner says that there were still works outstanding as well as defective works, and required the Builder to complete and rectify these. The Builder on the other hand says that all the works in the Contract had been completed and there were only minor works to be done, which were extra to the Contract. The Builder refused to carry out any further work until he was paid what he said was owing under the Contract.

5. No further works have been done since that date, and the Owner ultimately commenced this proceeding. He seeks the following items:

    a. Repayment of monies paid to the Builder for defective work - $8500

    b. Costs incurred for repairs of Builder's incomplete and defective work - $7334.60[1]

    c. Loss of rental income from 16 April 2017 to 1 January 2018 - $30,686

    d. VCAT filing fee - $467.80.

[1] The amount claimed in the Points of Claim (PoC) was $7659.60 but during the hearing the Owner reduced this amount by withdrawing his claims for towel rail, toilet roll holder and duplication of bathroom window latch claim

The hearing

6. The Owner's claim came before me for hearing on 1 June 2018. The Builder alleged that he was owed monies for the works carried out, but I was unable to hear that claim because no counterclaim had been lodged. Directions had been made on 27 March 2018 giving the Builder the opportunity to lodge a counterclaim. Although the Builder did not attend the directions hearing, its directors acknowledged that they had received a copy of the orders made but had not acted on them. Despite this, they were keen to proceed with defending the Owner's claim on this day. The Owner was also keen to proceed, even though no formal points of defence had been filed by the Builder.

7. The Owner represented himself at the hearing and the Builder was represented by its directors Mr and Mrs Georges. The Owner relied on an assessment report ("the Report") prepared by a technical assessor appointed by Domestic Building Dispute Resolution Victoria ("DBDRV")[2], Mr Nick Kukulka ("the assessor"). This report is admissible in evidence in proceedings in this Tribunal pursuant to section 48T of the *Domestic Building Contracts Act* 1995 ("the DBC Act").

8. The owner also relied on a number of quotations and invoices provided by the other contractors he had engaged to carry out the rectification and completion works, together with copies of his bank statements to confirm they were paid. The other contractors' documents were:

   - quote from Craig Machell dated 4 October 2017
   - quote from Australian Electrical & Data Solutions Pty Ltd dated 15 November 2017
   - quote from Australian Electrical & Data Solutions Pty Ltd dated 10 October 2017
   - invoice from Australian Electrical & Data Solutions Pty Ltd dated 18 October 2017
   - quote from Senad Piljevic re porch tiling no. 25/52016
   - quote from Adadaz Glass Artists Pty Ltd dated 8 November 2017
   - quote from O'Brien Glass Industries Ltd dated 9 November 2017.

9. The Owner had prepared his application and supporting documentation with a high level of organisation and detail. The evidence he gave during the hearing was less impressive, as he was sometimes unable to identify or

[2] section 48O of the DBC Act

recall which items he was claiming, or details of the item. For example, when I questioned whether the bathroom window latch had been claimed in two places, he found it very difficult to understand the overlap in his own documents, or locate the items in the Report. The evidence of Mr Georges was not completely reliable either, as he tended to make generalised statements, rather than give considered responses to questions. For example, he said there was a new building code which does not require silicon to be applied to the inside face of a shower screen. When I challenged him to specify which code, he said that it was actually just an updated practice, as told to him by his tiling contacts.

10. Accordingly in making my decision, I will prefer the evidence contained in contemporaneous documents or given by independent witnesses. When it is a choice between the Owner and Mr Georges I will decide on the balance of probabilities; that is, which version of events is more likely than the other.

Repayment of monies paid to the Builder $8500

11. I explained to the Owner during the hearing that he was not entitled to recover both the monies he had paid to the Builder and also the cost he had paid to other builders to complete and rectify the works. That would amount to "double dipping", as he would end up with the benefit of the works having paid no money. The Owner chose to claim the rectification and completion costs instead of a refund.

The cost to rectify and complete the works

12. This claim incorporates twelve separate items which the Owner says the Builder failed to carry out at all or failed to carry out free of defects.

13. The law implies certain guarantees and warranties into the Contract which the Builder must comply with, namely:

    a. as the Builder was supplying to the Owner as a consumer, services in trade or commerce, the Owner was entitled to the benefit of a guarantee under s 60 of *The Australian Consumer Law* that the services supplied by the Builder would be rendered with due care and skill; and

    b. further, as the Builder was, under the Contract, to perform work within the meaning of 'domestic building work' as defined in the DBC Act, the Owner was entitled to the benefit of the implied warranties regarding the work set out in section 8 of that Act, including the warranties created by s.8(a) and (d) that the work would be carried out in a proper and workmanlike manner and with reasonable care and skill.

14. A failure to complete work required under the Contract, or completing it defectively, is a failure to carry out the work with due care and skill, or in a proper and workmanlike manner, or with reasonable care and skill.

15. I will now consider each of the items claimed in turn:

Item 1 - grout defectively done in bathroom 2 - $225

16. The Quote includes "Grout x 1 bathroom shower area/caulk where needed". The Report identifies that although grouting has been done in areas, it was done defectively. The Owner had this work redone by a rectifying builder at the cost of $225[3].

17. The Builder says that he did the work as best as he could, considering the age of the house and the degeneration of the existing tiles.

18. In the absence of any other evidence, I accept the findings of the assessor in the Report that this item is a defect. The age of the house and the condition of the existing tiles would have been obvious to the assessor when he formed his opinion. I will allow the amount claimed as being a reasonable amount to rectify this defect.

Item 2 – various items in Bathroom 1 - $685

19. The Quote includes "Demo[lish] shower recess only/screen wall tiles/supply install new shower base/screen/tile walls". This claim was for four items in the bathroom 1 works:

    a. Shower taps faultily installed and had to be reinstalled $150

    b. Silicone missing to all bathroom shower walls and veneer $125

    c. bathroom window latch defective $100

    d. LED wall lights on each side of mirror not replaced $310

2a) shower taps - $150

20. In respect of the shower taps, the Owner said that they were loose and wobbly and he had to engage another builder to replace them, at a cost of $150[4]. This was done before the Report. The Builder says he was never notified that these taps were defectively installed. He was present when they were installed and he says it was done appropriately.

21. In the absence of any independent evidence, I must decide this item based on the evidence given by each of the witnesses. I note especially that the taps were identified as being incomplete in a text message sent by the

[3] quote from Craig Machell
[4] quote from Craig Machell

Owner to the Builder on 20 April 2018, after the inspection with the real estate agent. I accept that it is more likely than not that the taps were loose and had to be redone. I will allow $150 as the reasonable cost.

2b) silicon all bathroom shower walls and veneer - $125

22. The Owner says there are two areas in the bathroom where silicone is missing. These are between the tiles and plasterboard wall and between the inside of the shower screen and the tiled wall. The Report has considered both items and has assessed that the first issue is not a defect, but the second is. The cost claimed is for both areas.

23. The Builder says that current good building practice does not require silicone to be applied on the inside join of a shower screen and tiled wall. However I prefer the evidence of the assessor over the Builder, since the assessor is independent and is applying "the building regulations in force at the time the work was carried out and good building practice" (at page 4 of his Report, underlining added).

24. I will allow the sum of $100 for this item. The claim of $125 was for both areas of silicone. The Builder said that the cost of doing the shower screen junction alone would be about $85 labour plus $15 materials.

2c) repair bathroom window latch - $100

25. This item was originally claimed as part of the bathroom repairs, but it is also claimed at item 13 below. I will consider it there.

2d) Replace LED wall light on each side mirror – $310

26. This item was not specifically mentioned in the Quote. There were existing light fittings in the bathroom on either side of the mirror, but they had no globes and were missing shades. The Owner says that there was a separate agreement made with the Builder that the Owner would buy new light fittings and the Builder would install these, and the Builder did so. He said this agreement was recorded in text messages, but could not show me any text messages expressly noting such an agreement.

27. The Builder said that there was a discussion about trying new globes and that the Builder offered to engage an electrician for the Owner if the Owner wanted the fittings changed. He denies having changed the fittings.

28. I note that the Report states that the fittings inspected appear to be second-hand (at page 13). The Owner strongly disputed this. The Report also notes that globes and covers were missing.

29. My view is that the Report confirms the evidence I heard from both parties about the state of the lights before the Builder allegedly carried out any work. I find that the Builder has not replaced the light fittings, nor was

there any agreement to vary the Contract to include this in the Builder's works. In reaching this view, I note that the Owner was not able to produce the text messages he said showed the variation. Further, an electrician would have been required to carry out this work and in the absence of any charges being rendered by an electrician, or by the Builder to the Owner, I find it more likely than not that the lights were not replaced. In any event, if they had been replaced, it would have been at an extra cost to the Owner, which he has not paid. Accordingly, the Builder is not liable for this item.

Item 3 - leak underneath kitchen sink - $49

30. The Quote required the Builder to "remove and replace kitchen sink". The parties agree that the Builder did this work and also installed a new mixer tap for the sink as part of extra works for which he was paid.

31. The Report has identified a leak under the sink (at page 25). The Builder disputed whether the leak was coming from the tap or the sink and said that in any event it was not leaking when the works were completed in April 2017. The Owner said that he had had to put a bucket under the sink to catch the leak and that it was not obvious initially because nobody was living in the house using the water.

32. I accept the opinion in the Report that the plumbing works were altered and should not leak. Whether the leak is from the tap connection or the sink drain, both of these were connected to the Builder's works. Accordingly I find the Builder liable for this rectification cost. The Owner has paid another builder $49 for this item[5], which I will allow.

Item 4 – front porch tiling - $831.60

33. The Quote required the Builder to "remove broken tiles front steps repair crack re-tile match or as close to". Instead of re-tiling, the Builder has removed a row of tiles and replaced them with concrete. The Report (at page 32) records as follows:

> "I inspected the front porch and noted that the second last role of tiles had been removed and in its place a base type mixture had been provided.
>
> I noted that there were nine loose whole tiles stacked up on the front porch area… The tiles that had been removed could have been replaced back into position.
>
> It would be normal practice for repairs to a tiled surface to be consistent or blend in with the surrounding surface, however in this particular case, the repair work was completely different from the adjoining tiles.

[5] tax invoice Australian Electrical & Data Solutions

> As the repairs to the porch tiles are not consistent with the adjoining tiles, a defect is noted."

34. The Builder says that the Owner agreed to the method he used. He said that the slab underneath the tiles had split apart and one side had sunk, which was the reason the tiles had cracked. He said that he told the Owner that the only way to fix this would be to apply a grout in the slab crack and then redo all the tiles. He said that the Owner thought this too expensive and instructed him to proceed with just the row of concrete.

35. The Owner disputed this and said that all the work had been done before the Builder told him that the slab had cracked. He was not given the choice as to the scope of works undertaken. He has since had the row of tiles re-laid by another builder, at a cost of $831.60[6].

36. I find that the description of the works set out in the Quote is clear. The Builder was required to remove the broken tiles and re-tile. If the Builder thought that the scope of work was not appropriate, he should not have agreed to do it in the Quote. The fact that both the assessor and another builder agreed that the scope of works in the Quote was possible, adds weight to my conclusion. I will allow the sum of $831.60.

Item 5 - access hole missing in back gate – $75

37. The Builder was required by the Quote to remove and replace the back gate. He did so. However he did not cut an access hole into the gate for a hand to be able to reach through and open the latch. The Builder says that he asked the Owner whether he wanted such a hole and that the Owner declined, on grounds of security. He said that there was no lock on the back door which is why security was important.

38. The Owner denies that such a conversation ever occurred. He says that he engaged another builder to cut the hole at a cost of $75[7].

39. The Report notes that it would be normal practice for an access hole to be provided and as this has not occurred, a defect is noted.

40. I find it more likely than not that the Builder simply forgot to cut the hole. I do not accept that he asked the Owner and was told not to install it. I note particularly that one of the reasons given by the Builder was that the backdoor lock was not working. However, as will be discussed below, the Builder was required to replace the backdoor lock as part of its works. That is inconsistent with the reason given for not cutting the access hole.

[6] quote from Senad Piljevic
[7] quote from Craig Machell

41. I will allow the claim, but in the amount of $20, not the $75 claimed. On perusing the quote from Mr Machell, I see that he has quoted only $20 for this work.

Item 6 – remove replace backdoor lock - $650

42. This item is listed in the Quote. The Owner says that it was not done. The Builder initially said in evidence that this was not part of its scope of work. Having reviewed the Quote, he then said that he did repair the lock. I do not accept that the lock was repaired, given that the Builder could not recall that it was part of its scope of works.

43. However I do not allow the claimed amount of $650. The Owner says that this is the amount paid by him to another builder and relies on the quote of Craig Machell at page 4. However the item listed by Mr Machell is "living room: remove/replace backdoor room - $650". The Owner has made a separate claim for the replacement of the back door at item 11 below. In that claim he also relies on this quote by Mr Machell and also claims $650. I find that this item 6 is a duplicate of the amount claimed at item 11.

Item 7 – grind back door rails rear – $350

44. The Quote provides for this item. The Owner says that the balustrade to the outside rear stairs was rusting and unsafe. The Builder was required to grind off the rust so that it could be made safe and then painted by others. He carried out part of this work but it was not completed.

45. The Report (at page 28 -29) says:

> "I noted that sections of the railings had been sanded back but this work had not been completed.
>
> It would be normal practice for all of the rust to be removed from a metal structure before it is repaired and repainted.
>
> In this particular case, I noted that the rust was so significant and had caused so much damage to the metal balustrades that replacement of the balustrades may have been another alternative method of repair.
>
> As the work is incomplete, a defect is noted."

46. The Owner claims the amount of $350 which is the amount quoted by another builder[8] for "Backdoor: paint door rails - $350".

47. The Builder says that he was not required to carry out any painting under the Quote. Further, he said that he did as much grinding back as was possible but the balustrade was coming apart as he was working so that he could not complete all areas. He recommended to the Owner that he replace the balustrade.

[8] quote from Craig Machell

48. Having viewed the photographs, and noting the opinion of the assessor that the rust was so significant and had caused so much damage that replacement would have been an option, I accept the evidence of the Builder that he has complied with its obligations under the Contract. Further, I note that the quote to complete the work by the other builder was for painting the rails, not further sanding or grinding. Painting was not part of the Builder's scope of works and so I do not allow this item on that basis.

Item 8 – repair and adjust the study door window – $100

49. The Owner said that this item was one of the first discussed with the Builder, well before the Quote was offered. The Owner was told by his painter that the study window required urgent attention before it could be painted and the Builder was sent text messages and photographs showing what was required.

50. The Builder said that when it came to start the work, he realised that the window was rotten and the hinges were broken, and so he did nothing, as this was beyond what he thought he had agreed to do. He said he did not offer any credit for this item because he carried out other work at no charge instead.

51. The Report (at page 23) notes that the sash window was not able to operate satisfactorily as the mechanism was damaged and had not been repaired, but makes no finding as to whether this is a defect, because it is a contractual question.

52. I find that the Builder was required to complete this work under the Contract and did not do so. The wording of the Quote is clear and was provided by the Builder after having been given detailed information about the work required for the study window.

53. The Owner says that he has paid another builder $100[9] to fix this window. Having perused the quote of Mr Machell, it appears Mr Machell quoted $150 for this item. However I accept the Owner's evidence that he paid $100 and will allow that amount.

Item 9 – replace kitchen door lead lighting - $1474

54. The Owner says that the Builder was asked to remove and replace the leadlight glazing in the kitchen door as two glass panels had been broken. The Report (at page 26) notes the broken panels, but the assessor says he is unable to determine who is responsible. The Owner has had the glass replaced by another contractor at a cost of $1474[10].

[9] quote from Australian Electrical & Data Solutions
[10] quote from Adadaz Glass Artists

55. The Builder says that while the Quote listed the replacement of leadlight glass, the cost of doing so was not part of the quoted Contract price. The Quote expressly states "labour/materials does not include shower and lead windows". An estimate for the lead windows was given of between $800 and $1400. The Builder did not carry out this work and he made no charge for this item.

56. I accept the Builder's interpretation of the Contract. It is clear from the wording of the Quote that if the Builder had carried out the leadlight replacement, it would have been at an extra cost to the Owner. He did not carry out the work at all, nor has he charged the Owner, and is therefore not liable for any amounts that the Owner has paid to another contractor.

Item 10 –latch in living room, bathroom 2 window handle defective installation - $145

57. The Owner relies on the item in the Quote which states "supply install locks/latch bedroom windows/bathroom" and says that there are two issues of defective work:

    a. the window latch in the back room is loose and in the wrong location, per the Report (at page 30) which notes a defect; and

    b. the bathroom 2 window handle has been installed incorrectly per the Report (at page 18) which notes a defect.

58. The Builder says that the Quote required him to carry out works in the bedroom and bathroom only and the back room is actually a living room and is not included in its scope of works. In respect of the bathroom window, he says that he copied the pre-existing latch system and the result was the best that could be achieved given the type of lock and type of window.

59. The Owner responded by saying that the Quote was meant to include all windows, not just the bedroom and bathroom. Further, the new builder was able to install the bathroom latch correctly and the assessor's opinion was also that it could be installed correctly.

60. I accept that the latch to bathroom 2 was installed incorrectly or defectively by the Builder and I will allow the amount of $75, as charged by the rectifying builder[11]. I do not allow the claim for the back room window as I do not accept this was part of the scope of works in the Contract. The Quote is the record of the agreement between the parties in respect of the scope of works required for this item and it does not include the back room.

[11] quote from Craig Machell

Item 11 – remove replace door back room – $650

61. The Quote records that the Builder was required to "remove [and] replace" the back door. He did not do so and so the Owner carried out this work. He paid the rectifying builder $650 to replace the door[12].

62. The Builder says that when he inspected the property, there was no door present. When asked why he included the word "remove" the door in the Quote, he said that he had not inspected the property carefully when he prepared the quote and so had not realised there was no door there.

63. In my view, that does not provide a defence to the claim. The cost of $650 is for the replacement door, not the removal of the old door. So it makes no difference whether an old door was there or not. The Quote clearly states that the Builder was to replace the door. I will allow this amount as the reasonable cost of replacing the door.

Item 12 – repairs to ceiling plaster in study – $2200

64. The Builder's evidence was that there was an area of water damage to the ceiling in the study, approximately 30cm x 50cm, plus cornice. The Owner asked the Builder to cut out and replace this area, separate to the works specified in the Quote. The Builder initially quoted to repair all the plaster in the room for approximately $2700, but the Owner decided that was too expensive for a rental property. The Builder then offered to do a small repair for around $350-$400 and the Owner agreed. I was shown text messages confirming these discussions. The Builder's plasterer then carried out this work and the Builder charged the Owner as an extra in its invoice of 29 April 2017.

65. The Owner's position is that patching works were carried out, but they were carried out defectively and had to be redone by the new builder. He claims $2200 being the amount charged by the new builder for "study paint room and bog up hole or plaster"[13].

66. This was not an item considered by the assessor. In the absence of any evidence that the work done by the Builder was done defectively, I do not accept this item. Further, I note that the work done by the rectifying builder is far more extensive than that done by the Builder in any event. Even if I were to determine that the plaster patching was not done satisfactorily, I have no way of determining what would be the reasonable cost of repair. The amount of $2200 is not broken down in any way and I cannot tell how much is for painting and how much is for plastering, nor how much is relative to the small area undertaken by the Builder's plasterer.

[12] quote from Craig Machell
[13] quote from Australian Electrical & Data Solutions

Summary of Findings regarding defective and incomplete works

67. As a result of my findings above, I allow the following amounts:

Item 1	Grout	$225
Item 2a	Shower taps	$150
Item 2b	Silicon	$100
Item 3	Sink leak	$49
Item 4	Front porch	$831.60
Item 5	Access hole	$20
Item 8	Study window	$100
Item 10	Bathroom window latch	$75
Item 11	Back door	$650
Total for defective and incomplete work		$2200.60

Claim for loss of rent $30,686

68. The Owner alleges that he was unable to rent out the property until the works were completed, and that the loss of 8 months of rental income has caused him "significant financial loss, stress, anxiety and depression"[14]. He said he had a tenant ready to move in on 16 April 2017 and produced a copy of a rental agreement to that effect. He said that he had to cancel that agreement because the house was not completed until 19 November 2017. He then advertised the property for rental and rental income commenced on 1 January 2018. He claims rent from 16 April 2017 to 1 January 2018, being 37.2 weeks at $823/week.

69. The Builder denies liability for any of the delays. There are two relevant time periods to be considered: first, the period he was on site in April 2017 and second, the delays after April 2017.

70. In respect of the first period, the Builder agreed that he had originally estimated that he would complete the works within 2 to 3 weeks of starting, as he said in his text message of 27 February 2017. He said that that estimate was preliminary only, and was based on the original discussions about the scope, well before the Quote was issued. Then after he had

[14] PoC paragraph 21

started on site, the Owner asked for extra works, which extended the time required.

71. I accept that the estimate of 2 to 3 weeks was not a term of the contract, as it was an estimate only, and that extra works were asked for and carried out by the Builder, which took extra time. The evidence of this is the fact that the Builder charged the Owner $930 for extra items, which the Owner paid. As a result, I find that the Builder is not liable for any delay prior to 21 April, when he ceased work.

72. In respect of the second period of delay, between 21 April 2017 and 1 January 2018, it is necessary to set out the reasons for the delays. The parties fell into dispute towards the end of April 2017. On 28 April, the Owner lodged a referral with DBDRV, as he was required to do pursuant to Part 4 of the DBC Act.

73. DBDRV accepted the referral[15] and in accordance with its functions under the DBC Act, it:

    a. arranged for an assessment of the building works and obtained the written assessment report[16];

    b. held a conciliation conference[17], at which the matter did not resolve[18];

    c. issued a "certificate of conciliation – not resolved" dated 6 October 2017[19].

74. The Owner said that he did not think that he could engage another builder to complete the outstanding works while the matter was before DBDRV, because he was told that the aim of the conciliation was to have the Builder complete the works. Once the certificate of conciliation was issued he engaged other contractors to complete the works, and the house was ready to be rented by mid November 2017 and rental income commenced on 1 January 2018.

75. The question then is whether the Builder ought be liable for the delay between late April and late December 2017. As was held by Member Edquist in *Milani Pty Ltd v Australia Nice Flooring Warehouse Pty Ltd*[20]:

> "The basic rules as to the recovery of damages in a case of breach of contract were laid down more than 150 years ago in the seminal case

[15] pursuant to section 45C of the DBC Act
[16] pursuant to section 48B of the DBC Act
[17] pursuant to section 46 DBC Act
[18] the Builder advised that he was overseas and so did not attend the conciliation conference
[19] pursuant to section 46D DBC Act
[20] [2015] VCAT 1757 at [119]

of *Hadley v Baxendale*[21]. The relevant passage in the famous judgment of Baron Alderson reads as follows:

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'"

76. I consider that the Owner's claims for damages incurred due to the inability to rent the property while waiting for the DBDRV process to be concluded is not damage which reasonably might be said to have been in the contemplation of both parties as likely to arise in the event of a breach of the Contract. Accordingly the Builder is not liable to compensate the Owner for the loss of rent.

77. If I am wrong about that, I am not satisfied that the Owner took steps to mitigate his loss in any event. It seems to me that the loss of rent is the result of him deciding not to carry out the repairs in a timely way, rather than of any failure by the Builder.

78. In *Australian Dream Homes Pty Ltd v Stojanovski (No 2)*[22] Senior Member Riegler considered the question of mitigation of damages in connection with a domestic building dispute. He said (at paragraph 90):

> "In *Tuncel v Renown Plate Co Pty Ltd*[23] the Full Court of the Supreme Court of Victoria considered the question of mitigation in the context of a tortious claim for damages resulting from an injury suffered in an industrial accident. The Court stated:
>
> > 'The three rules are these:-
> >
> > (1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.
> >
> > (2) the second rule is the corollary of the first and is that where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong he can recover for loss incurred in so doing; this is so even although the resulting damage is in the event greater than it would have been had the mitigating steps

[21] (1854) 9 Ex 341
[22] [2016] VCAT 2194
[23] [1976] VR 501 at 503

not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

(3) the third rule is that where the plaintiff does take steps to mitigate the loss to him consequent upon the defendant's wrong and the steps are successful, the defendant is entitled to the benefit accruing from the plaintiff's action and is liable only for the loss is lessened; this is so even although the plaintiff would not have been debarred under the first rule form [sic] recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by the first rule. Put shortly, the plaintiff cannot recover for avoided loss.'

The principle of mitigation is equally applicable to actions in contract. Although I accept that the threshold that the Owners must cross is not particularly high, I consider that it was incumbent upon them to act expeditiously in securing another builder to repair and complete the Works, following termination of the Contract."

79. I respectfully agree with this statement of principle. Damages for loss of rent should be limited to what they would have been had the Owner acted promptly to rectify the defects. I appreciate that he thought he was acting appropriately by waiting until after the DBDRV process had concluded, but I do not accept that the Builder should be liable for that misplaced belief.

80. Accordingly the claim for loss of rent is not allowed.

Summary of findings regarding damages

81. The Owner is entitled to damages in respect of the rectification and completion of the work assessed in the sum of $2200.60.

Finding regarding reimbursement of filing fee

82. Having regard to section 115B of the *Victorian Civil and Administrative Tribunal Act* 1998 and being satisfied that the applicant has not substantially succeeded in his claim, the Tribunal orders that the application for the reimbursement of the filing fee he paid is dismissed.

Orders

83. The orders I will make to give effect to these findings are as follows:

(1) The respondent must pay to the applicant the sum of $2200.60.

SENIOR MEMBER S. KIRTON