

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Brooks and Brooks v Sawdy* [2020] QCAT 79

PARTIES: **CHRISTINE BROOKS**  
**BRADFORD BROOKS**  
(applicant)

v

**MICHAEL SAWDY**  
(respondent)

APPLICATION NO/S: BDL305-18

MATTER TYPE: Building matters

DELIVERED ON: 20 March 2020

HEARING DATE: 15 November 2019

HEARD AT: Caloundra

DECISION OF: Member Fitzpatrick

ORDERS:

- 1. The respondent Michael Sawdy pay to the applicants Christine and Bradford Brooks the sum of \$2,332.00 within 28 days of the date of this decision.**
- 2. The counter-application of the respondent Michael Sawdy is dismissed.**
- 3. The applicants Christine Brooks and Bradford Brooks file and serve any submissions in relation to costs by 4pm 1 April 2020.**
- 4. The respondent Michael Sawdy file and serve any submissions in reply in relation to costs by 4 pm 15 April 2020.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – DAMAGES where parties entered into a binding contract because of *Electronic Transactions (Queensland) Act 2001* – entire contract – implied term as to completion within a reasonable time - defective work – termination for breach – no recovery of final instalment by painting contractor – calculation of damages for homeowner.

*Electronic Transactions (Queensland) Act 2001* section 14(2).

*Queensland Civil and Administrative Tribunal Act 2009* (Qld) sections 100, 105 and Rule 86.

*Queensland Building and Construction Commission Act 1991* (Qld) Schedule 1B, sections 13(2), 29, 33, 42, 77.

*Amann Aviation Pty Ltd v Commonwealth* (1990) 174 CLR 64

*Brittania Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335

*Cascol Constructions Pty Ltd v Blanchard & Anor* [2013] QCAT 270

*Cassidy v Engwirda Construction Co (No2)* [1968] Qd R 159

*Champtaloup v Thomas* [1976] 2 NSWLR 264

*Gold Coast Oil Co Pty Ltd v Lee Properties Pty Ltd* (1984) 1 BCL 63

*Cook's Construction P/L v SFS 007.298.633 P/L* (formerly trading as *Stork Food Systems Australasia P/L* [2009] QCA 75.

*Kennedy v Collings Construction Co Pty Ltd* (1989) 7 BCL 25

*Ownit Homes Pty Ltd v Batchelor* [1983] 2 Qd R 124

*Rocci & Anor v Diploma Construction Pty Ltd* [2004] WASC 18

*Sargent v ASL Developments Ltd* (1974) 131 CLR 634

*Stilk v Myrick* (1809) 2 Camp 317

*Tan Hung Nguyen v Luxury Design Homes Pty Ltd* [2004] NSWCA 178

#### APPEARANCES & REPRESENTATION:

Applicant: Ms J Gesell, Solicitor of Neilson Stanton & Parkinson

Respondent: Mrs A Sawdy, representative

#### REASONS FOR DECISION

- [1] The applicants Mr and Mrs Brooks are owners of a Queenslander style timber house in Gympie.
- [2] The respondent Mr Sawdy is a painting contractor who undertook painting work on the Gympie house. Mr Sawdy trades as All Angles Painting and Roof Restoration.
- [3] Mr and Mrs Brooks complain that the painting work is defective and incomplete. They seek damages from Mr Sawdy in the sum of \$7,382.20 and recovery of all money paid to Mr Sawdy in an amount of \$11,407.20 totalling \$18,789.40. The Brooks seek an order relieving them of any liability to pay any further sum to Mr Sawdy. The Brooks also seek an order for payment of their costs of the proceedings.

- [4] Mr Sawdy has filed a response and counter-application. Mr Sawdy asserts that the work is complete apart from “touch ups” and says that he has been denied access to complete the work. He seeks the sum of \$4,000.00 being the final payment for work performed pursuant to the contract.
- [5] The proceeding first commenced as an application for a minor civil dispute, but was later transferred to the building list in this Tribunal. The parties participated in the Queensland Building and Construction Commission dispute resolution process, whereupon this Tribunal has jurisdiction to decide the dispute between the parties.<sup>1</sup>

**Material relied upon at the hearing**

- [6] The applicants rely upon:
- (a) Application for minor civil dispute filed 18 October 2018;
  - (b) Statement of Bradford Brooks dated 4 June 2019 together with attachments (Exhibit 1);
  - (c) Statement of Bradford Brooks dated 6 August 2018 together with attachments (Exhibit 2);
  - (d) Statement of Christine Brooks dated 4 June 2018 together with attachments (Exhibit 3);
  - (e) Statement of Christine Brooks dated 6 August 2018 together with attachments (Exhibit 4);
  - (f) Statement of George Englert dated 31 May 2019 together with report dated 15 May 2019 (Exhibit 7).
- [7] The respondent and counter-applicant relies upon:
- (a) Response and Counter-application filed 15 April 2019;
  - (b) Statement of Michael Sawdy dated 24 July 2019 (Exhibit 5);
  - (c) Statement of Michael Sawdy in response to the statement of George Englert, undated (Exhibit 6).
- [8] I have referred to all the evidence relied upon by the parties along with the evidence given at the hearing by Mr Brooks, Mr Sawdy and Mr Englert.

**The contract**

- [9] The contract is a domestic building contract, being a level 1 regulated contract for the performance of domestic building work as defined in Schedule 1B of the *Queensland Building and Construction Commission Act 1991* (Qld) (the QBCC Act).<sup>2</sup>
- [10] The QBCC Act sets out a number of requirements for a level 1 regulated contract. Importantly the contract only has effect if it complies with section 13(2) of the QBCC Act. That is, the contract must be in a written form, dated and signed by or on behalf of each of the parties to it.

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<sup>1</sup> Section 77 *Queensland Building and Construction Commission Act 1991* (Qld)

<sup>2</sup> Reprint from 10 November 2017 to 1 March 2018.

- [11] I find that the contract is in written form comprising the quotation sent by email to Mrs Brooks on 3 October 2017 and the Facebook message of 30 November 2017 from Mrs Brooks postponing an earlier agreement for interior painting work and requesting external work be performed in accordance with the quotation. That was agreed to by Mr Sawdy by Facebook message on 30 November 2017. The date of the contract is 30 November 2017. The contract is not signed by handwritten signature. However the *Electronic Transactions (Queensland) Act 2001* provides that a transaction is not invalid under a State law merely because it took place wholly or partly by one or more electronic communications.
- [12] I find that the notation ‘Michael Sawdy’ on the quotation sent by email to Mrs Brooks on 3 October 2017 and the notation ‘Christine’ on the Facebook message of 30 November 2017 accepting the quotation to perform external painting work, satisfies section 14 of the *Electronic Transactions (Queensland) Act 2001*. Pursuant to section 14 if, under a State law, a person’s signature is required, the requirement is taken to have been met for an electronic communication if:
- (a) a method is used to identify the person and to indicate the person’s intention in relation to the information communicated; and
  - (b) the method used was as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; and
  - (c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in (a).
- [13] Section 14(2) provides that reference to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.
- [14] Because of the operation of the *Electronic Transactions (Queensland) Act 2001*, I find that the parties have entered into a binding contract under the QBCC Act.
- [15] It is apparent from the evidence of Mr and Mrs Brooks, that they each considered themselves to be a party to the contract. I find that Mrs Brooks entered into the contract on her own behalf and as agent for Mr Brooks.
- [16] The contract does not contain some of the information required by section 13(3) of the QBCC Act, such as a date for practical completion or notice of a right the owner may have to withdraw from the contract. However, because of section 44 of the QBCC Act those deficiencies will not affect the enforceability of the contract or the rights of the parties under the contract.
- [17] The terms of the contract are set out in the quote.
- [18] The quote provides for:
- painting of the full exterior,
  - cleaning of all surfaces,
  - gap, fill, sand and prime where needed; and
  - application of two coats of Wattyl Solarguard semi-gloss to all exterior surfaces.
- [19] The quote sets out a requirement for:

- 30% book in deposit to be made before work begins
- 30% progress payment mid-way through the job
- Final payment made on the day of completion

The price is said to include labour, materials and equipment.

- [20] The price for exterior painting is said to be \$15,407.20. The quote notes that Mr Sawdy is not GST registered.
- [21] There is no express time frame for completion of the work. Work commenced on 18 December 2017. On 9 January 2018 Mrs Brooks enquired of Mr Sawdy if it would be possible to complete the work by 30 January 2018. Mr Sawdy expressed confidence that would be possible. I do not consider this exchange to constitute a term of the contract absent consideration for a promise to complete by 30 January 2018 as opposed to completion within a reasonable time.<sup>3</sup> I find that it is an implied term of the contract that the work will be completed in a reasonable time.<sup>4</sup>
- [22] Paint colour is not referred to in the written contract. It was discussed upon commencement of the work and has been the cause of some disagreement, but not ultimately a disagreement which relates to any relief sought by the parties.

#### *Implied Warranties*

- [23] By section 19 of the QBCC Act certain warranties are implied into the contract. Relevant to the facts of this case are the following warranties:
- (a) Section 22: The building contractor warrants the subject work will be carried out – in an appropriate and skilful way and with reasonable care and skill.
  - (b) Section 25: The building contractor warrants the subject work will be carried out with reasonable diligence.
- [24] By section 29 of the QBCC Act an owner may start proceedings for breach of a statutory warranty, relevantly, within 12 months of the date on which work under the contract ceased. Proceedings have been started within time. The last work appears to have been performed on 22 June 2018. Proceedings were commenced in this Tribunal on 18 October 2018.
- [25] Section 29(6) provides that in proceedings for breach of a statutory warranty, it is a defence for the defendant to prove that, relevantly, the defendant was not reasonably given access to rectify the deficiencies of which the plaintiff complains.

#### **Payments under the contract**

##### *Payments made to Mr Sawdy*

- [26] The Brooks made the following payments to Mr Sawdy:
- (a) 4 October 2017 - deposit - \$4,300.00
  - (b) 21 December 2017 – progress payment - \$4,622.16

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<sup>3</sup> *Stilk v Myrick* (1809) 2 Camp 317.

<sup>4</sup> *Gold Coast Oil Co Pty Ltd v Lee Properties Pty Ltd* (1984) 1 BCL 63 at 66.

- (c) 26 June 2018 – partial payment of final invoice dated 21 June 2018 - \$2,485.04.

[27] The remaining unpaid contract price is \$4,000.00.

*QBCC Act requirements*

[28] By section 33 of Schedule 1B the QBCC Act a building contractor must not receive a deposit under the contract of more than 10% of the contract price. That provision has been breached and exposes Mr Sawdy to a civil penalty. No relief is sought by the Brooks in this regard.

[29] Another civil penalty provision is section 34 of Schedule 1B of the QBCC Act. A building contractor must not claim an amount under the contract, other than a deposit, unless the amount –

- (a) is directly related to the progress of carrying out the subject work at the building site; and
- (b) is proportionate to the value of the subject work that relates to the claim, or less than that value.

[30] The Brooks maintain no claim for relief in this regard.

*Requirement for Contractor's licence*

[31] As a person preparing surfaces and applying paint, Mr Sawdy is required to hold a painting and decorating licence. A QBCC licence search history reveals that Mr Sawdy's licence was active from 2 June 2017 until 2 March 2018 when it was suspended for non-payment of the annual licence fee. The licence was cancelled on 5 June 2018 for non-payment of the annual licence fee, but restored on the same day. It remained active until 4 March 2019 when it was again suspended.

[32] Mr Sawdy was unlicensed from 2 March 2018 until 5 June 2018 which fell within the time frame when work was performed under the contract.

[33] By section 42 of the QBCC Act<sup>5</sup> a person must not carry out, or undertake to carry out, building work unless the person holds a contractor's licence of the appropriate class under the Act. By section 42(3) a person who carries out building work in contravention of section 42 is not entitled to any monetary or other consideration for doing so. By section 42(4) an unlicensed person is not stopped from claiming reasonable remuneration for carrying out building work, but only if the amount claimed –

- (a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and
- (b) does not include allowance for any of the following –
  - (i) the supply of the person's own labour;
  - (ii) the making of a profit by the person for carrying out the building work;
  - (iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and

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<sup>5</sup> Current as at 1 March 2018 to

- (c) is not more than any amount agreed to, or purportedly agreed to, as the price for carrying out the building work; and
- (d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit.

### **Work done under the contract**

#### *Defective and incomplete work*

- [34] Mrs Brooks attached a report from the QBCC to her statement, exhibit 3, in the proceedings. A QBCC Inspector, Mr Hutson inspected the property on 7 August 2018 and provided a report dated 9 August 2018.
- [35] The QBCC found that a number of matters would be considered either defective or incomplete. The report also notes a number of matters the subject of complaint which would not be defective works. The QBCC concluded that it would not be reasonable to direct the contractor to rectify the complaint items.
- [36] Mr Sawdy alleges that all contract works have been completed apart from rectification work, however, he has been excluded from the site and has therefore been unable to complete the job.
- [37] Mr Sawdy agreed that there is defective and incomplete work which requires rectification. He agreed that the defective work is described in the expert report of Mr Englert, dated 15 May 2019.<sup>6</sup>
- [38] Mr Englert gave evidence that there is a minimum of 13 days' work required for one man to rectify the work referred to in his report. On the basis of Mr Englert's experience as a painter and Mr Sawdy's agreement with his conclusions, I accept the contents of Mr Englert's report and his oral evidence.
- [39] I find that the work performed by Mr Sawdy was defective and incomplete as described in Mr Englert's report and that it will take 13 days for one man to attend to rectification.
- [40] The following are the items of defective or incomplete work relevant to various parts of the house more particularly described in the report with accompanying photographs:
  - most walls contain bare patches which have not been sanded or painted;
  - insufficient paint applied over patching
  - edges of soffit battens not painted;
  - inconsistent finish to windows;
  - filling material not painted
  - paint over-run on underside of windows, window sill
  - peeling paint painted over
  - stump and ant caps not painted

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<sup>6</sup> Exhibit 7 in the proceedings.

- misses to weatherboards, lack of coverage
- frame to louvres not fully painted
- grind mark to face of board requires filling and painting one area
- section of wall and end stop to bottom rear requires painting as specified
- gutter around downpipe - colour should be black not white;
- poor preparation to window frame, peeling paint in recess
- bottom edge of bottom weather board not prepared or repainted
- poor adhesion bottom of infill between door frame requires sanding before repainting
- infill between door frame lacks cover requires final coat
- coating to door sill peeling
- window to kitchen original colour – to be repainted
- peeling paint wall painted over
- coating blistered high level fascia above awning
- variation in colour weatherboards
- bottom edge of weather boards to be cleaned and paint lower boards
- coating peeling from frame to bedroom window
- boards under bay window to bedroom to be completely repainted
- coating peeling - downpipe at entry

**Is Mr Sawdy in breach of contract?**

[41] The solicitor for the Brooks made the following allegations of breach of contract against Mr Sawdy in her final submissions:

- (a) defective work;
- (b) failure to complete the job within a reasonable time;
- (c) refusal to return to complete work unless further payment was made;
- (d) not being licensed for a two month period (although it is unclear if he was working at the house at that time);
- (e) he was not ready willing and able to complete;
- (f) abandonment of the contract after the final invoice was delivered, because he refused to return.

[42] When asked if the Brooks had terminated the contract, their solicitor denied this had occurred. Mr Brooks evidence was that he did not know if the contract had been terminated.

[43] Relevant communication between the parties is set out in the parties' affidavits.

*Unreasonable delay*

- [44] Work commenced on 18 December 2017. Progress of the work was delayed by significant periods of wet weather, Mr Sawdy taking indoor jobs during wet weather which delayed return to site, illness, Mr Sawdy losing his driver's licence and needing to be driven to site as well as car break downs. The Brooks requested Mr Sawdy not attend the house for various reasons, including pest control, guests, not wanting their son exposed to Mr Sawdy before surgery he was to undertake.
- [45] There is evidence of the Brooks expressing a willingness to work around Mr Sawdy's commitments, if he could only make it a couple of times a week.
- [46] Based on Mr Sawdy's affidavit it appears his last attendance to perform work was on 24 May 2018. His off-sider Andrew's last attendance was on 22 June 2018.
- [47] On 21 June 2018 a final invoice was submitted in an amount of \$6,485.00 under cover of a letter suggesting work was at an end. Mr Sawdy said:

...I hope you are happy with the end result. I appreciate your business and also your patience while our lives turned a bit crazy over the last few months, for which I am terribly sorry. If I can be of any assistance in the future, please don't hesitate to contact me.

- [48] Later that evening on 21 June 2018 Mrs Brooks wrote expressing surprise that Mr Sawdy was not returning and complaining about defective and incomplete work. Mrs Brooks demanded that the house be completed to Australian Standards. She said that if Mr Sawdy could not do this another contractor would be engaged to complete the work and the cost would be taken from monies outstanding. A demand was also made for return of a downpipe taken from the property by Mr Sawdy.
- [49] Mr Sawdy responded that he would rectify any work Mrs Brooks was unhappy with. He said:

...I do need to ask though if you will at least pay something. If not our tenancy is at severe risk and Andrew can also not feed his family or pay his rent. I have no available funds to cover this right now. I would appreciate it if we could come to an agreement on this. Thank you.

- [50] Andrew returned to site to commence "touch ups" on 22 June 2018.
- [51] On 26 June 2018 the Brooks made partial payment of the invoiced sum in an amount of \$2,485.04.
- [52] The date is not clear from attachment "H" to exhibit 3, but it appears that on 26 June 2018 Mr Sawdy thanked Mrs Brooks for the payment and said:

...When we expect any further instalments? We are happy to return and complete the minor touch-ups required however they are not valued at \$4000 which is still remaining. We are happy for you to hold back \$1000 until they are completed. We believe that to be more than fair.

...There are only a few touch ups. Other than that it's complete.

I'm happy for you to hold back \$1000 until those touch-ups are done. If I'd seen them before I left they would have been done. I apologize for that. My bad. And I'm happy to take responsibility for those touch-ups

- [53] On 17 July 2018 the Brooks lodged a complaint with the QBCC. On 19 July the QBCC advised Mr Sawdy not to make contact with the Brooks until an Early

Dispute Resolution conference. That conference took place on 7 August 2018 but despite offers between the parties the matter did not resolve.

- [54] On 8 August Mrs Sawdy and Mr Brooks agreed that a further \$2,000.00 would be paid and Mr Sawdy would complete touch-ups within a reasonable time frame.
- [55] On 9 August 2018 the Brooks said that they would make no payment until everything was completed in full. On 10 August 2018 the Brooks proposed paying the balance sum into their solicitor's trust account pending completion. That was rejected.
- [56] I am not satisfied on the evidence that there was unreasonable delay up to the date of delivery of the final invoice on 21 June 2018, nor during the period the QBCC was investigating and attempting to resolve the dispute and whilst the parties were attempting to resolve their dispute. The Brooks were still speaking at that latest time about completion in a 'reasonable time frame'. At no time was time made of the essence in relation to the contract by delivery of a notice to complete. I do not consider that Mr Sawdy is in breach of the statutory warranty that the work will be carried out with reasonable diligence or in breach of the implied term that the work would be completed in a reasonable timeframe.

*Abandonment of contract*

- [57] I do not accept that Mr Sawdy abandoned the contract after delivery of his final invoice. The parties remained in continual communication with Mr Sawdy repeating his willingness to complete, albeit on his terms.

*Unable to complete*

- [58] Mr Sawdy agreed in cross-examination that he could not trade whilst he did not have a licence between 2 March 2018 and 5 June 2018. Apart from this fact, it was put to Mr Sawdy in cross examination that he could not complete the job because he did not have the financial capacity to do so. That was denied. Evidence was given of a loan taken out by the Sawdys and Mr Sawdy's ability to borrow from his mother. It was put that he could not finish the job because he had lost his driver's licence. That was denied on the basis that Mr Sawdy employed an offsider who could drive. He agreed that person was let go in March 2018 and another employee, Andrew, was employed about two weeks later. He said that there was a wet weather period in the interim.
- [59] I accept Mr Sawdy's evidence on these issues. I do not consider that he was unable to complete the job, however the matters put to Mr Sawdy were issues which resulted in delay to completion of the job. I have earlier found that despite delays there was no unreasonable delay which would amount to breach of Mr Sawdy's contractual obligation to complete the job within a reasonable time in all the circumstances.

*No licence*

- [60] It is clear that Mr Sawdy was unlicensed for a period of three months during the course of the contract works. Mr Sawdy was in breach of contract during that period, in that he could not lawfully carry out work under the contract during that period. However Mr Sawdy regained his licence during the course of the contract. The question of what remedy may be available to the Brooks for the breach of contract is vexed on the evidence before me.

*Defective work*

- [61] I have found that the work performed by Mr Sawdy was defective and incomplete. That does not amount to a breach of contract unless Mr Sawdy is given a reasonable opportunity to rectify the defects<sup>7</sup>but he repudiates the contract by refusing to do so.<sup>8</sup>
- [62] The correspondence between the parties reveals that the Brooks were prepared to allow Mr Sawdy to return to site to undertake rectification and to complete the job. They simply refused to pay the sum demanded by Mr Sawdy before he would do so.
- [63] The question arises as to whether Mr Sawdy was entitled to demand payment of some or all of the final payment before he returned to rectify and complete the work. If he was not entitled to do so his conduct may amount to a wrongful repudiation of the contract entitling the Brooks to terminate the contract or to seek damages for breach from Mr Sawdy. By extension Mr Sawdy may also have breached the contract with respect to the defective and incomplete work.

Demand for payment before completion

- [64] A final invoice was delivered on 21 June 2018 seeking payment of the final part of the contract sum. Mr Sawdy thereafter continued to demand some of that amount, with a small adjustment for what he estimated to be the value of the rectification and completion work.
- [65] On 16 August 2018 Mr Sawdy wrote to the Brooks maintaining that the work is practically complete and has been performed to industry standards. It was said that while there are minor touch ups, this does not affect practical completion. Mr Sawdy stressed that he is ready willing and able to return to undertake these minor touch-ups. Mr Sawdy referred to significant painting work done at his own cost over and above the original scope of works, including extensive colour consultation, additional coats of paint due to client changes and repainting the entire western side of the house with an extra two coats. A demand was made for \$3,000.00 with the balance of \$1,000 to be withheld until the minor touch-ups are finalised. It was said the amount withheld exceeds the cost of rectification. That demand was repeated on 13 September 2018.
- [66] I note that there was no agreed variation to the contract as a result of extra painting. Mr Sawdy's evidence is that he was prepared to absorb the cost of extra paint as a gesture of good will.
- [67] The contract between the parties is an entire contract. That is, Mr Sawdy has contracted to do an entire job for a specific sum. The character of the contract is not changed by the agreement to make progress payments during the course of the work.<sup>9</sup>However the legal effect of an entire contract is that a contractor such as Mr Sawdy is not entitled to final payment if he has not fully completed painting of the Brooks' house.<sup>10</sup>
- [68] Mr Sawdy argues in effect that the contract is substantially complete. The Courts have sometimes been prepared to allow recovery of the contract price where a party has substantially performed a contract. To establish substantial performance any

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<sup>7</sup> *Brittania Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335.

<sup>8</sup> *Cassidy v Engwirra Construction Co (No2)* [1968] Qd R 159.

<sup>9</sup> *Ownit Homes Pty Ltd v Batchelor* [1983] 2 Qd R 124 at 134-135

<sup>10</sup> *Rocci & Anor v Diploma Construction Pty Ltd* [2004] WASC 18 at [13].

defects must be of a minor nature. I am unable to find that rectification and completion work which will take 13 days to complete is minor. Later in this decision I make a finding that the cost of rectification and completion is \$5,720.00 inclusive of GST. That will be discussed more fully later in the decision. However, at this stage I note that the cost of rectification and completion is approximately one third of the value of the contract price. That is not consistent with only minor work remaining to be performed.

[69] Apart from this consideration, I find that the contract in question is a true entire contract such that completion of the job is a condition precedent to payment of the contract price.

[70] For these reasons I find that Mr Sawdy has repudiated the contract by refusing to rectify and complete unless he is paid either the balance contract sum in accordance with the final invoice or some portion of that sum as claimed in his later demands. Mr Sawdy's obligation was to entirely complete the job before payment. He refused to do so, except on his own terms as to payment.<sup>11</sup>

[71] The consequence is that the defective and incomplete work is a breach of contract entitling the Brooks to a remedy. Further Mr Sawdy's repudiatory conduct is a breach of contract entitling the Brooks to a remedy.

#### **Are the Brooks in breach of contract?**

[72] It has been said against the Brooks that they are in breach of the contract by refusing Mr Sawdy the opportunity to attend the site and complete the job. I find that the Brooks have not refused Mr Sawdy access. In fact they have continually required him to complete the job, until matters were brought to a head by correspondence from the Brooks' solicitors.

#### **Termination of the contract**

[73] On 11 September 2018 the solicitors for Mr and Mrs Brooks wrote to Mr Sawdy stating:

- \$2,162.88 more than required under the agreement had been paid;
- Mr Sawdy was refusing to complete work until a further \$3000.00 was paid and this is a breach of contract and extortion;
- no further money will be paid while work remains outstanding;
- he is in breach of contract for failure to complete the works in a timely way and failing to undertake the works to an appropriate standard; and
- their clients believe the minor touch ups proposed will be inadequate or unlikely to be completed to an acceptable standard.

[74] The letter is written on an open basis and concludes:

Due to your breach of the Contract, our clients demand repayment of the total amount paid to you of \$11,407.20...Should you not make payment within the required time frame, our clients have instructed us they will be making an application for recovery of the amount already paid to you and for any

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<sup>11</sup> *Kennedy v Collings Construction Co Pty Ltd* (1989) 7 BCL 25 at 39.

additional amount payable over and above your initial quote to rectify the defective works you have carried out.

[75] By letter dated 5 October 2018 the solicitor for the Brooks advised Mr Sawdy:

..Your continued demands to additional funds to which you are not entitled are refused. The terms of our agreement with our clients was quite clear, that the final amount was payable only after the completion of the work.

As it is apparent that you have no intention of adhering to the terms of the contract you entered into with our client we demand that you repay the amount of \$11,407.20 within 7 days of the date of this letter.

...This is the last time we will offer you the opportunity to finalise the matter in this way. Should you choose not to repay the money to our client within the 7 days proceedings will be commence in the Queensland Civil and Administrative Tribunal without any further notice to you.

For your consideration we enclose the two quotes that our clients have obtained from qualified painters who are prepared to undertake the job of finishing the painting works and rectifying the defects you have caused...

[76] Proceedings were then commenced.

[77] Despite the assertion by the Brooks' solicitor that the contract has not been terminated, the correspondence of 11 September 2018 and 5 October 2018 expressly provides that because Mr Sawdy will not perform the contract the Brooks require repayment of all moneys expended by them under the contract.

[78] Mr Brooks gave evidence that he did not want Mr Sawdy to return to the site because he is no longer comfortable with Mr Sawdy and he considers his work to have been incompetent.

[79] I find that the Brooks have terminated the contract with Mr Sawdy because they have treated the contract as at an end. That was communicated by the letter of 5 October 2018 and the commencement of proceedings which gave no credit for work performed and sought recovery of all money paid to Mr Sawdy in the sum of \$11,407.20 together with a further sum of \$7,382.80, amongst other claims. The Brooks conduct and solicitors' letters are in no way consistent with affirmation of the contract.<sup>12</sup>

[80] I find that the contract was terminated by the 5 October 2018 letter and subsequent commencement of proceedings in this Tribunal.<sup>13</sup>

[81] On the basis of the reasoning set out above I find that Mr Sawdy's breach of contract in refusing to complete the work unless paid a significant portion of the balance contract sum justified termination of the contract.

#### **Effect of termination of the contract on Mr Sawdy's claim**

[82] The effect of termination of the contract before full completion of the job is that Mr Sawdy is denied an entitlement to recovery of the final instalment. The rules as to entire contracts apply to the last instalment, or to any balance due if work is brought

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<sup>12</sup> *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 655-6 and 646.

<sup>13</sup> *Champtaloup v Thomas* [1976] 2 NSWLR 264, 274-5 which discussed the nature of an election, including that conduct will be viewed objectively and an election could be found even where there is no subjective intention to elect.

to an end before the instalment is completely earned. It has been said that the entire contract principle is necessary to prevent a contractor such as Mr Sawdy being entitled to partial payment despite his own breach.<sup>14</sup>

- [83] For this reason, Mr Sawdy's claim for the sum of \$4,000.00 as the balance contract price is denied.

**Effect of termination of the contract on the Brooks' claim**

- [84] The Brooks are entitled to sue for damages for breach of contract. They are entitled to recover an amount which will put them in the same position, so far as money can do so, as if the contract had been fulfilled. It will be necessary for the Brooks to give credit for what they would have had to pay had the contract been properly performed. That is they may only recover net loss sustained.<sup>15</sup>
- [85] Effectively Mr Sawdy has a right of set-off, not a counter-claim for the balance contract sum of \$4,000.00.
- [86] The cost to the Brooks in rectifying and completing the work is not clear on the evidence.
- [87] The Brooks rely on a quote from JCP Industries, dated 4 September 2018 to perform the relevant work. The quote is for labour of 336 hours at \$55.00 per hour in an amount of \$18,480 and for materials in an amount of \$800.00.
- [88] No-one from JCP Industries was called to give evidence. Mr Sawdy challenged the quoted value of the work. As the evidence of JCP Industries could not be tested I do not accept that the quote given by JCP Industries is reliable evidence of the cost of rectification and completion.
- [89] Mr Englert's evidence is that there is 13 days' work to perform for completion. That is 104 hours based on an 8 hour day. Given Mr Englert's experience as a painter I accept his time estimate.
- [90] Mr Englert did not give any evidence as to an average hourly rate. Mr Sawdy suggested \$30 per hour was an average rate. His own rate is \$45-\$50 per hour exclusive of GST. The JCP Industries rate is \$55.00 per hour inclusive of GST.
- [91] Given Mr Sawdy's rate is equivalent to the rate quoted by JCP Industries I will adopt \$55.00 per hour inclusive of GST as a reasonable rate for calculation of the cost of rectification and completion.
- [92] I find that the cost of rectification and completion is an amount of \$5,720.00 inclusive of GST being 104 hours work at \$55.00 per hour.
- [93] Accordingly the Brooks net loss is \$5720.00 less \$4,000.00 being an amount of \$1,720.00.
- [94] The Brooks have not established a basis for recovery of the full amount paid to Mr Sawdy for work performed by him. The period during which Mr Sawdy was

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<sup>14</sup> *Tan Hung Nguyen v Luxury Design Homes Pty Ltd* [2004] NSWCA 178 at [22].

<sup>15</sup> *Amann Aviation Pty Ltd v Commonwealth* (1990) 174 CLR 64.

unlicensed may be a basis for recovery of money paid to Mr Sawdy relevant to that period pursuant to s42(3) of the QBCC Act.<sup>16</sup>

- [95] I do not consider that payments made to Mr Sawdy relevant to periods during the term of the contract when he was licensed are recoverable by the Brooks.<sup>17</sup>
- [96] The evidence reveals that no payment was made to Mr Sawdy during the time he was unlicensed. It is not possible on the evidence to say whether the payment made on 21 December 2017 or the later payment made on 26 June 2018 was a payment in recompense for work performed during the unlicensed period. If any part of the payments made did cover work performed during that period, the Brooks would be entitled to recover that part of the payments made. It is not possible on the evidence to determine that part. The added complexity is that if such a claim had been fully particularised, Mr Sawdy would have been entitled to claim under section 42(4) a set off for reasonable remuneration for supply of materials and labour (other than his own), for carrying out the work during that period. There is no such claim from Mr Sawdy.
- [97] Because Mr Sawdy was licensed for all but three months of the contract term, the Brooks could not recover the whole of the moneys paid by them to Mr Sawdy, under s42(3) of the QBCC Act. I am unable to carry out any sensible calculation related to part only of the moneys paid to Mr Sawdy, because of a lack of evidence. Accordingly, I reject the Brooks claim for recovery of all the moneys paid to Mr Sawdy.
- [98] The final aspect of the Brooks' claim relates to a downpipe removed from the site by Mr Sawdy and not returned as at the date of the hearing. Mr Sawdy does not deny removing the downpipe, although he intended to replace it.
- [99] The Brooks filed a quote from Roy Groom Plumber & Drainer dated 27 September 2018 giving two prices for the supply of labour and materials to replace the downpipe. The first price is \$612.00 for a galvanised downpipe and parts and the second price is \$310.00 for a pvc downpipe and fittings. Mr Sawdy did not challenge either price. The downpipe which was removed was a metal downpipe. In replacing like with like I find that Mr Sawdy should pay to the Brooks the sum of \$612.00.

#### **Total amount payable by Mr Sawdy to the Brooks**

- [100] Mr Sawdy is liable to pay to the Brooks \$1,720 for damages for defective and incomplete work and \$612.00 for the cost of replacing the missing drainpipe, in a total amount of \$2,332.00.

#### **Costs**

- [101] The Brooks seek an order for costs of the proceedings under s105 of the QCAT Act and Rule 86 of the QCAT Rules, on the basis that they made offers of settlement in their letters dated 11 September 2018 and 5 October 2018, which were rejected. Plainly the terms of the offers set out in those letters were less favourable to Mr Sawdy than the ultimate result. Accordingly there is no entitlement to costs on this basis.

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<sup>16</sup> *Cook's Construction P/L v SFS 007.298.633 P/L (formerly trading as Stork Food Systems Australasia P/L* [2009] QCA 75 at [58].

<sup>17</sup> *Cascol Constructions Pty Ltd v Blanchard & Anor* [2013] QCAT 270 at [43]

[102] The Tribunal's discretion to award costs in a building dispute is a broader and more general discretion than the one conferred by the QCAT Act.<sup>18</sup>I have made no decision on the issue at this time.

[103] The applicants' solicitor asked for the opportunity to make submissions in relation to costs in the event that the applicants were successful. I will make orders in relation to delivery of submissions as to whether Mr Sawdy should be ordered to pay the applicants costs of the proceedings. The applicants should state the amount of costs sought and provide a breakdown as to how the costs are calculated by reference to the Magistrates Court scale of costs.

**Orders**

[104] I order that:

- (a) Michael Sawdy pay to Christine and Bradford Brooks the sum of \$2,332.00 within 28 days of the date of this decision.
- (b) The counter-application of Michael Sawdy is dismissed.

[105] I order that the applicants file and serve any submissions in relation to costs by 4pm 1 April 2020 and that the respondent file and serve any submissions in reply by 4pm 15 April 2020.

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<sup>18</sup> Section 77(3)(h) of the *Queensland Building and Construction Commission Act 1991* (Qld).