

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Cerda v Jacob* [2020] QCATA 57

PARTIES: **JUAN PABLO LARRAIN CERDA**
(applicant/appellant)

v

BINNY JACOB
(respondent)

APPLICATION NO/S: APL217-18

ORIGINATING APPLICATION NO/S: BDL284-16

MATTER TYPE: Appeals

DELIVERED ON: 22 April 2020

HEARING DATE: 25 June 2019

HEARD AT: Brisbane

DECISION OF: Senior Member Brown
Member Olding

ORDERS:

- 1. Leave to appeal is granted.**
- 2. The appeal is allowed.**
- 3. The decision of the Tribunal dated 5 August 2018 is set aside to the extent of the amount of damages payable by Juan Pablo Larrain Cerda to Binny Jacob.**
- 4. Juan Pablo Larrain Cerda must pay to Binny Jacob \$6,750.00 within 28 days of the date of this decision.**
- 5. Juan Pablo Larrain Cerda must pay Binny Jacob's costs of proceeding BDL284-16 fixed in the amount of \$750.70 within 28 days of the date of this decision.**
- 6. The counter application is dismissed.**

CATCHWORDS: APPEALS AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where error asserted in the decision below to order costs of remediation and completion of building works – where contract was not dated – where contract was void and of no effect - where error of law found in proceeding on the basis that the contract was valid and enforceable –

where learned member allowed costs of rectification not in the original scope of works – where error of mixed law and fact found – where appeal allowed

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – GENERALLY – where contract did not comply with the requirements of the Queensland Building and Construction Commission Act 1991 (Qld) – consequences of non-compliance – where contract of no effect

TORTS – NEGLIGENCE – DUTY OF CARE – STANDARD OF CARE, SCOPE OF DUTY AND SUBSEQUENT BREACH – DAMAGES AND CAUSATION – GENERALLY – where breach of duty by builder in undertaking building work – assessment of damages

Civil Liability Act 2003 (Qld), s 4(1), s 11, sch 2

Domestic Building Contracts Act 2000 (Qld)

Queensland Building and Construction Commission Act 1991 (Qld), sch 1B, s 3(1)(a), s 4, s 5(1)(a), s 13(2), s 13(5), s 14(1), s 14(2), s 14(10), s 22, s 44, sch 2

Queensland Building and Construction Commission and Other Legislation Amendment Act 2014 (Qld)

Queensland Building and Construction Commission Regulation 2018 (Qld), reg 45

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142(1), s 142(3)(b), s 147(1), s 147(2), s 147(3)

Bellgrove v Eldridge (1954) 90 CLR 613

Cachia v Grech [2009] NSWCA 232

Ericson v Queensland Building Services Authority [2013] QCA 391

Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388

Harrison and Anor v Meehan [2016] QCATA 197

Jacob v Cerda [2018] QCAT 255

Kirkby & Anor v Cooté & Ors [2006] QCA 61

Kyogle Shire Council v Francis (1988) 13 NSWLR 396

Lyons v Jandon Constructions (A Firm) (1998) WASC 224

McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577

Pohlmann v Harrison (1993) 12 Aust Cons LR 80

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

Re Australian Federation of Construction Contractors;

Ex parte Billing (1986) 68 ALR 416

Robinson v Harman (1848) 1 Ex 850

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

REASONS FOR DECISION

- [1] Mr Cerda undertook building work for Ms Jacob. Ms Jacob claimed that the work was defective and incomplete. She commenced proceedings in the tribunal. Mr Cerda made a counter application. On 5 August 2018 the tribunal ordered Mr Cerda to pay Ms Jacob \$15,665.70. Mr Cerda's counter application was dismissed ('the decision').¹
- [2] Mr Cerda has appealed the decision.

Appeals – the statutory framework

- [3] An appeal to the appeal tribunal on a question of law is as of right.² An appeal on a question of fact or mixed law and fact may only be made with the leave of the appeal tribunal.³
- [4] If an appeal involves a question of fact, or a question of mixed law and fact, and leave to appeal is granted, the appeal must be decided by way of rehearing with or without the hearing of additional evidence.⁴ In deciding the appeal, the appeal tribunal may confirm or amend the decision, set aside the decision and substitute its own decision or remit the matter for reconsideration.⁵
- [5] The relevant principles to be applied in determining whether to grant leave to appeal are: is there a reasonably arguable case of error in the primary decision?;⁶ is there a reasonable prospect that the applicant will obtain substantive relief?;⁷ is leave necessary to correct a substantial injustice to the applicant caused by some error?;⁸ is there a question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to the public advantage?⁹
- [6] If an appeal involves a question of law, unless the determination of the error of law decides the matter in its entirety in the appellant's favour, the proceeding must be returned to the tribunal for reconsideration.¹⁰

The decision

¹ *Jacob v Cerda* [2018] QCAT 255.

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'), s 142(1).

³ *Ibid*, s 142(3)(b).

⁴ *Ibid*, ss 147(1), (2).

⁵ *Ibid*, s 147(3).

⁶ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁷ *Cachia v Grech* [2009] NSWCA 232, [13].

⁸ *Ibid*.

⁹ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578, 580.

¹⁰ *Ericson v Queensland Building Services Authority* [2013] QCA 391.

[7] The learned member found:

- (a) Mr Cerda constructed a series of block retaining walls at the front and rear of Ms Jacob's home, as well as a set of external block stairs from the footpath up to the front entrance of the house.¹¹
- (b) The agreement to perform the building works was signed on 12 July 2016.¹²
- (c) Mr Cerda constructed the walls and stairs in a less than workmanlike manner.¹³
- (d) Mr Cerda made a number of fundamental setting-out errors in constructing the retaining walls and stairs at the front of the property as a result of failing to work outwards from the centre of the property.¹⁴
- (e) Mr Cerda failed to clarify with Ms Jacob whether the stairs were to align with the front door of the residence.¹⁵
- (f) As a result of being bowed and out of alignment the walls were required to be demolished.¹⁶
- (g) Mr Cerda did not seek to sufficiently confirm Ms Jacob's requirements in having the tops of the walls at the front of the property built to the same level, despite the fact of the block sloping across its frontage.¹⁷
- (h) Mr Cerda under quoted for the building works.¹⁸
- (i) In breach of the contract between the parties, Mr Cerda did not deliver the agreed scope of works.¹⁹
- (j) It would be cheaper to complete the job with pavers, rather than by means of either exposed aggregate or coloured concrete, as originally contemplated prior to Mr Cerda ceasing to perform the contract.²⁰
- (k) The remediation and completion works, and the costs associated therewith, were reasonable and necessary.²¹

What do the parties say?

Mr Cerda

[8] Mr Cerda's grounds of appeal raise questions of fact and are essentially limited to complaints about the factual findings made by the learned member including:

- (a) Finding that the stairs and walls were not constructed according to Ms Jacob's instructions and that Ms Jacob was 'happy with the aesthetics'.

¹¹ *Jacob v Cerda* [2018] QCAT 255, [2].

¹² *Ibid*, [7].

¹³ *Ibid*, [32].

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid*, [33].

¹⁹ *Ibid*.

²⁰ *Ibid*, [34].

²¹ *Ibid*.

- (b) Finding that the walls and stairs had been demolished and rebuilt when there was no evidence of this.
- (c) Finding that Mr Cerda had not confirmed Ms Jacob's instructions before undertaking the building work when he had in fact done so.
- (d) Failing to address Ms Jacob's refusal to permit Mr Cerda access to the site.
- (e) Finding that Mr Cerda had under quoted for the job.
- (f) In assessing damages, the learned member included the costs of work that Mr Cerda was not contractually obliged to undertake.
- (g) The learned member should have assessed the costs of rectification in the amount of \$6,750.00.
- (h) The learned member failed to find that Ms Jacob had not mitigated her loss.

[9] At the appeal hearing, Mr Cerda was taken through the learned member's reasons and asked to identify any further asserted errors. The additional matters raised by Mr Cerda were:

- (a) Accepting the evidence of Ms Jacob's engineer, Mr Pugh, when his evidence at the hearing differed from the opinion expressed in his written report.
- (b) Failing to place weight upon the evidence from the manufacturer of the blocks used in the construction of the wall that no footing was required.

Ms Jacob

[10] Ms Jacob says:

- (a) The learned member was entitled to rely upon the evidence of Mr Pugh.
- (b) Mr Cerda was never denied access to the property.
- (c) The rectification works undertaken were the only reasonable option available to Ms Jacob.

Further submissions

[11] The parties were directed to file further submissions addressing whether the building contract complied with s 13 of Schedule 1B of the *Queensland Building and Construction Commission Act 1991 (Qld)* ('QBCC Act') and, if it did not, the consequences of such non-compliance. Both parties filed further submissions.

[12] Mr Cerda said that the contract did not comply with the relevant statutory requirements and as such is unenforceable. Ms Jacob said that the evidence supported a finding that the contract did comply with the requirements of the Act.

Did the contract comply with the requirements of the *Queensland Building and Construction Commission Act 1991 (Qld)*?

[13] We will address firstly the issue of whether the contract between the parties complied with the requirements of the QBCC Act. For the reasons that follow, we find that the contract was void and of no effect.

- [14] The QBCC Act sets out the requirements for domestic building contracts. A domestic building contract includes a contract to carry out domestic building work.²² Domestic building work is defined.²³ A regulated contract includes a domestic building contract for which the contract price is more than the regulated amount.²⁴ Regulated contracts may be level 1 or level 2 contracts depending on the contract price however the difference between level 1 and level 2 contracts is not material for present purposes.
- [15] Regardless of whether a contract is a level 1 or a level 2 regulated contract, the contract must be in a written form, dated and signed by or on behalf of each of the parties to it.²⁵ A contract only has effect if it complies with these requirements.²⁶
- [16] The failure by a building contractor to comply with a requirement under the QBCC Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable unless the contrary intention appears in the Act.²⁷ Section 13(5) and section 14(10) of Schedule 1B of the Act are expressed in clear and unequivocal words. A contract that is not in writing, signed by the parties and dated is of no effect. A contract that has no effect is void and cannot be enforced. We consider that these provisions evidence a contrary intention to the general rule that failure to comply with a requirement under the QBCC Act in relation to a domestic building contract does not make the contract void and unenforceable.
- [17] It cannot be doubted that the contract between Mr Cerda and Ms Jacob was in writing and signed by each of them. The member found accordingly. The written contract comprises:
- (a) a two page quote on the letterhead of Mr Cerda's business, JPL Landscaping Design and Construction;
 - (b) a two page document attached to the quote comprising, on one page, a list of 14 items, the second page being a plan of the works to be undertaken.
- [18] The learned member referred to the documents in (b) above as "extra" conditions'.²⁸ It is not contentious that the four pages to which we have referred comprised the contract between the parties.
- [19] During the hearing the learned member observed to the parties that the contract was not dated.²⁹
- [20] In addition to the four pages to which we have referred there was also before the learned member an additional document which we will call 'the payment schedule'. The payment schedule, presented in table form, provides columns for 'date', 'amount', 'paid as', 'received (signature by Pablo)' and 'status'. In respect of what is identified as 'Payment #1' the details of the date, amount, form of payment and status is type written. The date of the first payment is recorded as 12 July 2017. This accords with the evidence before the learned member as to when the contract was

²² *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act'), sch 1B, s 3(1)(a).

²³ *Ibid*, sch 1B, s 4.

²⁴ *Ibid*, sch 1B, s 5(1)(a).

²⁵ *Ibid*, sch 1B, s 13(2), s 14(2).

²⁶ *Ibid*, sch 1B, s 13(5), s 14(10).

²⁷ *Ibid*, sch 1B, s 44.

²⁸ *Jacob v Cerda* [2018] QCAT 255, [5].

²⁹ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), T1-5 line 14.

signed. In the 'received' column are the initials of (presumably) Mr Cerda. The details of the second and third stage payments are hand written and initialled, again (presumably) by Mr Cerda. The details of the fourth and fifth stage payments are not complete which is consistent with the evidence of the parties in relation to the cessation of the works.

- [21] It seems to us reasonably clear that the payment schedule did not form part of the contract. Firstly, neither party gave evidence that it did in fact form part of the contract. Secondly, the two page quote contains a payment schedule listing five payment instalments including the amounts of each instalment and when the payments were due by reference to various stages of the building works. Thirdly, the details contained in the quote accord with the payment schedule, insofar as it was completed by the parties. To this extent, if indeed it formed part of the contract, the payment schedule was an unnecessary and unexplained duplication of the progress payment schedule contained in the two page quote. Fourthly the payment schedule did not refer to the details of the works to be completed for each payment stage. These details were recorded on the document at the time of payment. Fifthly it is clear that the payment schedule was intended to be a document to which information was added over time in order to record the payments of the instalments referred to in the quote.
- [22] There is no date on the quote nor on the attached two pages comprising the additional contractual conditions and the plan of the works.
- [23] The contract price was \$20,500.00. The contract was therefore a level 2 regulated contract.³⁰ The contract was not dated and therefore did not comply with the requirements of s 14(2) of Schedule 1B of the QBCC Act.
- [24] In our view the s 13(5) and s 14(10) of Schedule 1B are clear on their face. A regulated contract that is not in writing, signed by the parties and dated is of no effect, with the consequence that the contract is void and unenforceable by either party. These minimum mandatory requirements are neither difficult for builders and building owners to comply with nor onerous in circumstances where persons contract for the performance of domestic building work. If parties contract for the performance of domestic building work without complying with these requirements they do so at their own peril and without the protections afforded by a contract or the statutory warranties implied into such contracts.
- [25] We make the following observations regarding the relevant extrinsic material. The extrinsic material confirms our view as to the ordinary meaning of the provisions.³¹
- [26] Schedule 1B of the QBCC Act is essentially an incorporation of the now repealed *Domestic Building Contracts Act 2000 (Qld)* ('DBC Act'). As originally enacted, the DBC Act provided that a regulated contract only had effect if it was signed by the building contractor and the building owner. The Bill incorporating the DBC Act into the QBCC Act originally provided that a level 1 or level 2 regulated contract had effect only if the contract complied with s 13 and s 14 (respectively).³² These requirements were extensive, and extended far beyond the necessity for the contract

³⁰ QBCC Act, sch 1B, s 7; *Queensland Building and Construction Commission Regulation 2018 (Qld)*, reg 45.

³¹ *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416.

³² *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014 (Qld)*.

to be in writing, signed and dated. In the original Bill, the contract was required to contain, among other things, the contract price or the method for calculating it, including the building contractor's reasonable estimate; a provision stating the date for practical completion or how the date was to be determined; and a 'conspicuous' notice advising the building owner of the right the owner may have to withdraw from the contract under the Act.

- [27] Between the introduction of the Bill and its enactment, the requirements for a regulated contract to have effect underwent considerable revision. The Explanatory Notes to the Bill are illuminating in this regard. Under the heading 'Achievement of the objectives' it is stated:

The Government proposes to adopt a number of the Committee's recommendations contained in the Committee Report either in full or in part. This includes the following:

...

... It is proposed to amend proposed new sub-sections 13(5) and 14(11), QBCC Act, to provide that the contract has effect only if it complies with sections 13(2) and 14(2) from Schedule 1B, and to provide that contracts are not deemed invalid for failure to comply with all requirements of sections 13 and 14.³³

- [28] The Transport, Housing and Local Government Committee in its report stated:

The Committee agrees that the consequence (that the contract is deemed invalid) of non-compliance with any of the requirements of proposed new section 13 (for level 1 contracts) and proposed new section 14 (for level 2 contracts) is disproportionate, especially considering that in both the case of level 1 contracts and level 2 contracts, additional requirements may be prescribed in regulation.

The Committee notes the Department's advice that consideration will be given to removing these clauses from the Bill and supports their removal.³⁴

- [29] The Committee recommended:

... that the Minister remove proposed new 13(5) and 14(11) from Schedule 1B to provide that contracts are not deemed invalid for failure to comply with all requirements of those respective sections.³⁵

- [30] The relevant legislative history makes clear that the parliament clearly turned its mind to the minimum requirements for a valid and enforceable regulated contract and the extent to which non-compliance with the Act would result in a regulated contract being of no effect, and thus void. The legislative history also makes clear that the parliament intended a regulated contract would have effect unless it failed to meet the most basic of requirements: that it be in writing, that it be signed and that it be dated.

³³ Explanatory Notes, Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014 (Qld) 2.

³⁴ Transport, Housing and Local Government Committee, Parliament of Queensland, *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* (2014) 23 [3.1.11].

³⁵ Ibid.

- [31] The contract between the parties was not dated. It failed to comply with s 14(10) of Schedule 1B of the Act and was therefore of no effect. The contract was void and unenforceable by either party.

The consequences of the contract not complying with the requirements of the QBCC Act

- [32] The learned member proceeded on the basis that the contract was valid and enforceable and determined the rights of the parties accordingly. In so doing the member erred in law and in fact. The parties' rights fell for determination not under the contract, but in accordance with the *Civil Liability Act 2003* (Qld) and the relevant principles relating to breach of duty and restitution. We will address the consequences of that error later in these reasons.

Consideration of the grounds of appeal

- [33] In the course of the appeal hearing, Mr Cerda was taken through the reasons of the learned member in an attempt to clarify his grounds of appeal.

- [34] In addition to the identified grounds of appeal, Mr Cerda's submissions may be summarised as follows:

- (a) The learned member erred in accepting the evidence of Ms Jacob's engineer, Mr Pugh,³⁶
- (b) The learned member erred in accepting the evidence of the builder who undertook the rectification work, Mr Etherton, as to the extent of the demolition and reinstatement work;³⁷
- (c) Mr Cerda was not afforded procedural fairness. This ground comprises two aspects: firstly, that Mr Cerda was not given the opportunity to inspect the works after Mr Etherton had completed the works and secondly, he was denied an adjournment that would have enabled him to undertake an inspection.

- [35] The grounds of appeal identified by Mr Cerda at the appeal hearing depart to some extent from those grounds set out in the application for leave to appeal or appeal.³⁸ Given the difficulty faced by self represented parties in articulating coherent appeal grounds in matters such as this, we will approach the determination of the appeal by reference to the grounds set out in Mr Cerda's application for leave to appeal or appeal and the submissions made at the appeal hearing.

The evidence of Mr Pugh

- [36] Notwithstanding what we have said regarding the opportunity provided to Mr Cerda to clarify his grounds of appeal at the appeal hearing, the grounds remain somewhat opaque.

- [37] Mr Cerda says that the evidence of the engineer, Mr Pugh, was contradictory and therefore unreliable and the learned member should not have placed any weight on it.

³⁶ *Jacob v Cerda* [2018] QCAT 255, [20]–[25].

³⁷ *Ibid*, [28]–[29].

³⁸ Application for leave to appeal or appeal filed 29 August 2018.

- [38] Mr Pugh attended the site and inspected the works. In his report Mr Pugh expressed a number of opinions about the building works undertaken by Mr Cerda. Mr Cerda's complaints are confined to what he says were inconsistencies in Mr Pugh's evidence about footings for the retaining walls at the rear of Ms Jacob's property. These inconsistencies were such, says Mr Cerda, that Mr Pugh's evidence should not have been accepted.
- [39] Central to Mr Cerda's submission is his contention that Mr Pugh, in his written report, stated that there were no footings present beneath the retaining walls and that his evidence at the hearing was to the contrary. The difficulty we face is in apprehending whether Mr Cerda's arguments relate to all or only some of the retaining walls. It is therefore necessary to say a few things about the layout of Ms Jacob's property to contextualise Mr Cerda's submissions.
- [40] At the front of Ms Jacob's property were two tiered retaining walls located on either side of the central steps leading to the front door of the house. There was also a single tier retaining wall at the rear of the property. The concrete block used in the construction of the front walls was different to that used in the construction of the rear wall.
- [41] Mr Pugh is an engineer. He inspected the property and prepared a report. In relation to the retaining walls at the front of the property, Mr Pugh expressed the view that the lower tiers had footings however he expressed some concerns about the size and reinforcement of the footings.³⁹ Mr Pugh stated that the upper tiers also had footings although some blocks were unsupported in sections.⁴⁰
- [42] In his report, Mr Pugh stated that the type of block wall system used to construct the rear retaining wall was typically placed upon a concrete levelling pad or footing, then dry stacked to height.⁴¹ Mr Pugh stated that the footing on the left side of the rear retaining wall was not visible while the footing on the right side was wide and misshapen. Mr Pugh stated that the wall as constructed was of poor quality and lacking in a number of identified areas.⁴²
- [43] Mr Pugh gave evidence at the hearing that the rear retaining wall had a concrete footing⁴³ and that the footing of the left side of the wall was not reinforced.⁴⁴ Mr Pugh said that, if Mr Cerda's evidence as to the construction of the footings was accepted, the footings for the right side of the wall were adequate.⁴⁵
- [44] In relation to the front walls Mr Pugh gave evidence that the presence of the higher, upper tier retaining wall placed a surcharge on the lower tier retaining wall such that the design of the walls should have been engineered;⁴⁶ both the lower and upper tier walls required footings;⁴⁷ the walls had an inadequate footing;⁴⁸ Mr Pugh was shown photographs which Mr Cerda submitted evidenced the adequacy of the footings he

³⁹ Structural Inspection Report by Thomas Pugh dated 15 September 2016, 5.

⁴⁰ Ibid.

⁴¹ Ibid, 8.

⁴² Ibid, 9.

⁴³ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-30.

⁴⁴ Ibid, 1-31.

⁴⁵ Ibid, 1-39.

⁴⁶ Ibid, 1-32-1-33.

⁴⁷ Ibid, 1-33.

⁴⁸ Ibid, 1-34, 1-35.

constructed. Mr Pugh's opinion remained unaltered.⁴⁹ Mr Pugh's opinion was that the objective evidence was inconsistent with the construction of the footings as asserted by Mr Cerda.⁵⁰

[45] Contrary to Mr Cerda's assertion, Mr Pugh did not state in his report that there were no footings present in the front retaining walls or the rear retaining wall. There were no inconsistencies between Mr Pugh's report and his oral evidence at the hearing.

[46] It was open to the learned member to accept and rely upon the evidence of Mr Pugh. There was no error by the learned member.

The evidence of Mr Etherton

[47] Mr Cerda says that the learned member should not have accepted the evidence of Mr Etherton that rectification works were undertaken in respect of the front retaining walls. Mr Cerda says that the photographic evidence before the learned member was that no such rectification works were carried out.

[48] There were a number of photographs in evidence before the learned member. The difficulty we face is that Mr Cerda is not specific about just what photographic evidence he relies upon.

[49] A written statement by Mr Etherton was filed in the proceedings below. Mr Etherton gave evidence at the hearing about the works undertaken by Mr Cerda and the rectification works carried out.⁵¹ Mr Etherton had provided a written quote to Ms Jacob to undertake the works to the front and rear retaining walls. The quote also included the construction of a front and a rear courtyard. The total amount of the quote was \$14,910.00.⁵² Mr Etherton's evidence was that he carried out the works in accordance with the quote. Mr Etherton said that the works undertaken by Mr Cerda were 'not good quality workmanship'.⁵³

[50] Mr Etherton's evidence was that he constructed two additional retaining walls in front of the rear retaining wall. Mr Etherton was unsure whether this work was included in the original scope of works.⁵⁴

[51] It was open to the learned member to accept Mr Etherton's evidence that he carried out the rectification works set out in his written quote despite Mr Cerda's assertions below, and in this appeal, that photographs of the wall evidenced to the contrary. As we have observed, Mr Cerda does not draw our attention to any specific photograph. Having said this, we have viewed the photographs in evidence before the learned member and do not find Mr Cerda's arguments compelling. It is not possible from simply viewing those photographs to form any view at all regarding Mr Cerda's submissions.

[52] This ground of appeal is not made out.

Assessment of damages

⁴⁹ Ibid, 1-35-1-38.

⁵⁰ Ibid, 1-40.

⁵¹ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-44-1-45.

⁵² Statement of Binny Jacob filed 20 February 2017, 22.

⁵³ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-45.

⁵⁴ Ibid, 1-46.

- [53] Mr Cerda makes numerous submissions about what he says were errors by the learned member in assessing Ms Jacob’s entitlement to damages. Mr Cerda raises a range of issues in relation to the scope of the work undertaken by Mr Etherton, including whether the work was necessary and whether the works related to the original scope of works under the contract.
- [54] We have found that the learned member erred in determining the rights of the parties in accordance with the contract when it was void and of no effect. It is however necessary to address the grounds of appeal relating to the assessment of damages by the learned member as they are relevant in the disposition of the appeal.
- [55] The task of assessing damages for breach of contract is different to assessing damages for negligence.
- [56] In circumstances where a builder is in breach of a contract, the owner’s entitlement to damages is the cost of bringing the works into conformity with the bargain struck between the parties.⁵⁵ The measure of damages is the difference between the contract price of the work contracted for and the cost of making the work conform to the contract plus appropriate consequential damages.⁵⁶ The undertaking of the work necessary to achieve conformity must however be reasonable.⁵⁷
- [57] In an action in negligence, the claimant is entitled to damages to put the claimant into the position which the claimant would have enjoyed but for the commission of the negligent act.⁵⁸ The measure of damages is the cost of the work necessary to remedy the defects.⁵⁹ In *Kirkby v Coote* (*‘Kirkby’*)⁶⁰ it was stated:

[46] In *Bellgrove v Eldridge*, the High Court affirmed the following statement of principle:

“The measure of the damages recoverable by the building owner for the breach of a building contract is ... the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract.”

[47] One may pause here to observe that this is a case where the building owner claims in negligence rather than breach of contract, but neither party suggested that a different approach should be adopted to the measure of damages where the negligent breach of duty has produced a result which falls short of the result which reasonable skill and diligence would have produced.

[48] The High Court, having referred to authority for the proposition cited above, went on to say:

“In none of these cases is anything more done than that work which is required to achieve conformity and the cost of the work, whether it be necessary to replace only a small part, or a substantial part, or, indeed, the whole of the building is, subject to the qualification which we have already mentioned and to which we shall refer, together with any appropriate consequential damages, the extent of the building owner’s loss.

⁵⁵ *Robinson v Harman* (1848) 1 Ex 850.

⁵⁶ *Bellgrove v Eldridge* (1954) 90 CLR 613.

⁵⁷ *Ibid* 616.

⁵⁸ See *Kyogle Shire Council v Francis* (1988) 13 NSWLR 396.

⁵⁹ *Lyons v Jandon Constructions (A Firm)* (1998) WASC 224.

⁶⁰ *Kirkby & Anor v Coote & Ors* [2006] QCA 61.

The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.

...

As to what remedial work is both ‘necessary’ and ‘reasonable’ in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. That work, in such circumstances, is obviously reasonable and in our opinion, may be undertaken at the expense of the builder.”

- [58] At the hearing Ms Jacob claimed \$9,410.00 being the cost of rectifying the defective work, \$15,434.00 being the cost of completing incomplete work and costs of \$925.00.⁶¹ These were the same amounts set out by Ms Jacob in her originating application.⁶² The learned member referred to Ms Jacob’s claim as consisting of the costs of rectification work of \$14,910.00 and engineering report and filing fees totalling \$755.70.⁶³ The discrepancy in the figures can be explained by the fact that between the filing of the originating application and the hearing, Ms Jacob had engaged Mr Etherton to carry out the further works thus crystalizing the actual cost of rectification and completion works.
- [59] Although he made no specific finding regarding the scope of works, it is implicit in the learned member’s reasons that he accepted the scope of works to be undertaken by Mr Cerda was in accordance with the quote and attached documents to which we have referred.
- [60] What is clear from the agreement between the parties is that certain areas of the garden would be covered in aggregate concrete. The quote refers to this area as being approximately 100 square metres.
- [61] Mr Etherton’s evidence was that, rather than laying aggregate concrete, it was cheaper for him to lay pavers.⁶⁴ Ms Jacob was agreeable with this course. It was open to the learned member to accept Mr Etherton’s evidence in this regard. Mr Cerda says that the area to be landscaped was under 100 metres square and that the learned member erred in accepting Mr Etherton’s evidence that the area was 165 metres square. In his statement of evidence Mr Etherton stated that he measured the total area to be landscaped and arrived at the measurement of 165 metres square. Mr Cerda did not directly challenge Mr Etherton’s evidence at the hearing. It was open to the learned member to accept Mr Etherton’s evidence regarding the total area to be paved.
- [62] Other matters complained of by Mr Cerda – that the only changes to the front steps were the heights of the steps, that the steps did not need to be replaced, that Mr Cerda had laid the crusher dust – are all matters upon which the learned member preferred the evidence of Mr Etherton. As we have observed, it was open to the learned member to prefer the evidence of Mr Etherton.

⁶¹ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-10.

⁶² Application for domestic building disputes filed 3 November 2016.

⁶³ *Jacob v Cerda* [2018] QCAT 255, [11].

⁶⁴ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-48.

- [63] Mr Cerda says that the learned member erred in allowing the cost of the construction of additional retaining walls at the rear of the property. Mr Cerda says that this work undertaken by Mr Etherton was not within the original scope of works. It is clear from the plan of the landscaping works attached to the contract that a garden bed was to be constructed at the base of the rear retaining wall, 600 millimetres wide and ‘as high as almost 2 blocks ...’. Mr Cerda says that the plan referred to the garden edge as being timber. Mr Etherton gave evidence that he constructed two smaller retaining walls in front of the rear retaining wall behind which were garden beds.
- [64] Mr Etherton’s evidence was that the labour cost of the construction of the back retaining walls and garden was \$1,910.00.⁶⁵ Mr Etherton’s evidence at the hearing was that the works were minor and required half a day’s work.⁶⁶
- [65] The original scope of works provided for the construction of a garden bed between the rear retaining wall and the paved area, from 1 metre to 1.5 metres wide, and 15 metres long. Mr Cerda says that the contract required sleepers to be laid. The plans refer to a timber garden edge. Ms Jacob’s evidence was that she personally undertook the installation of the timber garden edge, claiming \$441.60 for the cost of materials.⁶⁷ The work undertaken by Ms Jacob related to the construction of the garden bed and edging in accordance with the scope of works. This was, in our view, quite different to the work undertaken by Mr Etherton in constructing the additional retaining walls at the rear of the property. In circumstances where Ms Jacob’s own evidence was that she completed the construction of the timber edging, the learned member erred in finding that the retaining walls were within the scope of works and in allowing the cost of construction of the walls by Mr Etherton.

Failure to afford procedural fairness

- [66] Mr Cerda says that he was not permitted the opportunity to inspect Ms Jacob’s property. Mr Cerda says that he requested an adjournment to permit an inspection which was refused.
- [67] This ground of appeal is not made out. From a reading of the transcript of the hearing below, it is clear Mr Cerda did not at any stage apply for an adjournment. Nor did Mr Cerda make an application prior to the hearing for an order permitting him to access the property. In her submissions at the appeal hearing Ms Jacob said that Mr Cerda did not ask to inspect the property.
- [68] We are not satisfied that there was a failure to afford procedural fairness. This ground of appeal is not made out.

Disposition of the appeal

- [69] We have identified errors of law and errors of mixed law and fact by the learned member.
- [70] Where an appeal is on a question of fact or mixed law and fact, the appeal must be decided by way of rehearing.⁶⁸ The appeal tribunal may confirm or amend the

⁶⁵ Statement of Peter Etherton filed 22 June 2017.

⁶⁶ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-47.

⁶⁷ Statement of Binny Jacob filed 22 June 2017.

⁶⁸ QCAT Act, s 147(2).

decision, set aside the decision and substitute its own decision, or set aside the decision and return the matter for reconsideration.⁶⁹

[71] It is, in our view, preferable to proceed to rehear the matter. In conducting the rehearing we adopt the principles enunciated in *Harrison and Anor v Meehan*:

[20] ... Appeals by way of rehearing involve a new determination of the rights and liabilities of the parties, rather than a mere correction of the errors in the determination of the Tribunal below.

[21] An appeal by way of rehearing under s 147 of the QCAT Act is not a rehearing de novo. The Appeal Tribunal must make its own determination on the material before the Tribunal below (supplemented, if necessary by additional evidence if permitted under s 147(2)) with due respect for the findings of fact of the primary Tribunal, and due consideration of the advantages enjoyed by it.

[22] In rehearing the matter we have adopted the learned member's primary findings of fact other than where those findings have been challenged in these appeals or where there is some doubt as to the findings made. We have otherwise formed our own views on the evidence consistently with the principles applicable in appeals by way of rehearing on the record of proceedings before a primary tribunal.⁷⁰

[72] We are satisfied that the dispute is a domestic building dispute.⁷¹ The work undertaken by Mr Cerda was reviewable domestic work, Mr Cerda was a building contractor and Ms Jacob was a building owner. We are satisfied that the Tribunal has jurisdiction to hear and decide the dispute.

[73] We have determined that the contract entered into between the parties did not satisfy the requirements of the QBCC Act and as such was of no effect. Accordingly, Ms Jacob's claim against Mr Cerda is confined to one in negligence for breach of duty.

[74] The *Civil Liability Act 2003* (Qld) ('CLA') applies to any civil claim for damages for harm.⁷² 'Claim' is defined in the CLA and means, inter alia, a claim for damages based on a liability for damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty.⁷³ 'Harm' is defined as including damage to property and economic loss.⁷⁴ 'Duty' includes a duty of care in tort.⁷⁵ 'Duty of care' means a duty to take reasonable care or to exercise reasonable skill (or both).⁷⁶

[75] By s 11 of the CLA a decision that a breach of duty caused particular harm comprises the following elements:

⁶⁹ Ibid, s 147(3).

⁷⁰ [2016] QCATA 197, [20]-[22] (footnotes omitted).

⁷¹ QBCC Act, sch 2 – 'domestic building dispute' includes: a claim or dispute arising between a building owner and a building contractor relating to the performance of reviewable domestic work; a claim or dispute in negligence, nuisance or trespass related to the performance of reviewable domestic work.

⁷² *Civil Liability Act 2003* (Qld), s 4(1).

⁷³ Ibid, sch 2.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

- (a) The breach of duty was a necessary condition of the occurrence of the harm (factual causation); and
- (b) It is appropriate for the scope of liability of the person in breach to extend to the harm so caused (scope of liability).

[76] Had the contract complied with the QBCC Act certain warranties would have been implied including that the building works would be carried out in an appropriate and skilful way and with reasonable care and skill.⁷⁷ The duty of care owed by Mr Cerda to Ms Jacob in undertaking the building works was co-extensive with the implied contractual terms. Accordingly, and consistently with the CLA, the duties owed by Mr Cerda to Ms Jacob can be expressed in the same terms as the warranties implied by operation of the QBCC Act, that is, to take reasonable care and exercise reasonable skill in undertaking the building works.

[77] We do not propose to traverse in detail the entirety of the evidence below nor, in rehearing the matter, are we required to do so. We adopt the learned member's primary findings of fact other than where those findings have been challenged or where there is doubt about the findings. We have otherwise formed our own views on the evidence and as set out earlier in these reasons.

[78] As we have found Mr Cerda owed to Ms Jacob a duty to take reasonable care and exercise reasonable skill in undertaking the building works. Whether a want of reasonable care and reasonable skill is demonstrated in a particular case will turn on the facts. In this case, we are required to consider whether Mr Cerda exercised reasonable care and skill in undertaking the building works which in turn requires a consideration of the standard of the work actually performed.

[79] We are satisfied, on the evidence of Mr Pugh, Mr Etherton and Ms Jacob, and for the reasons expressed by the learned member, that the works performed by Mr Cerda were not carried out in an appropriate and skilful way and with reasonable care and skill. We accept the evidence of Mr Pugh that the front retaining walls and stairs and the rear retaining wall were not constructed by Mr Cerda in an appropriate and skilful way and with reasonable care and skill and that Mr Cerda thereby breached the duty of care he owed to Ms Jacob.

[80] As was held in *Kirkby*⁷⁸ the correct approach to assessing damages where negligent building work has been performed is in accordance with *Bellgrove v Eldridge*.⁷⁹ The principle espoused in *Bellgrove* is that the measure of damage is the cost of the work which is required to achieve conformity with the works the subject of agreement between the parties, subject to the qualification that the work must be necessary and reasonable. Where, as here, there is no enforceable contract between the parties, the measure of damages is the cost of bringing the works into conformity with what would have been the result had the works been carried out in an appropriate and skilful way subject to the remedial work being necessary and reasonable.

[81] Keane JA (as he then was) stated in *Kirkby*:

[59] As the High Court emphasised in the passage from *Bellgrove v Eldridge* ... because the respondents' damages are assessed "once and for all", the law must be astute to ensure that the measure of damages accurately reflects the

⁷⁷ QBCC Act, sch 1B, s 22.

⁷⁸ *Kirkby & Anor v Coote & Ors* [2006] QCA 61.

⁷⁹ (1954) 90 CLR 613.

restoration of the respondents to the position they would have been in had the appellants not failed in their duty. The respondents should recover the amount of damages necessary to enable them to own a house free of risk so far as its stability was concerned.⁸⁰

- [82] Neither party purported to terminate the ‘contract’. The evidence was that Mr Cerda left the job site and did not return. In *Kirkby*⁸¹ the building work was complete. Here, the building work was incomplete and the works undertaken by Mr Etherton involved both rectification work and completion work. Mr Cerda’s evidence was that, when he left the site, the only work remaining was the laying of the concrete aggregate,⁸² the cutting of blocks on the front retaining wall and the laying of pavers on the top of the stairs.⁸³ Mr Cerda stated that the works would have taken approximately one and a half days to complete.⁸⁴
- [83] As we have observed earlier in these reasons, the evidence of Mr Etherton was that he was a bricklayer and that it was cheaper for him to pave rather than concrete those areas identified in the scope of works. The evidence of Mr Etherton was that the cost of labour associated with paving around the house and ramp was \$6,250.00. Mr Etherton’s evidence was that the cost of the pavers was ‘about \$4,000’.⁸⁵
- [84] Ms Jacob is entitled to recover the cost of bringing the works into conformity with what would have been the result had Mr Cerda carried out the works with reasonable skill and diligence. This does not in our view extend in the circumstances of this case to the cost of completing incomplete work.
- [85] Ms Jacob paid Mr Cerda \$15,500.00 of the total agreed price of \$20,500.00 leaving a balance of \$5,000.00 unpaid. There is no doubt that some of the works remained incomplete at the time Mr Cerda left the site. The evidence in relation to the cost of rectification work was limited to Mr Etherton’s labour costs. We allow the costs associated with the rectification works to the front retaining walls and the stairs on the basis that such works were both reasonable and necessary. These costs total \$6,750.00. The costs associated with the paving around the house totalling \$6,250.00 are not allowed for the reasons we have set out. These were completion works rather than rectification works. The costs associated with the back retaining wall and garden works are not allowed. Aside the issue of whether the cost of such works would be recoverable, these items were not within the original scope of works and thus were not works Mr Cerda was required to carry out.
- [86] Ms Jacob led no evidence that the value of the work performed by Mr Cerda was less than the amount she had paid him nor was any restitutionary relief sought by Ms Jacob.
- [87] We turn now to Mr Cerda’s counter application.⁸⁶ In his evidence below, Mr Cerda said that Ms Jacob owed him \$2,250.00 for variations. The variations related to extra concrete blocks and work required in respect of a water pipe.⁸⁷ Mr Cerda’s counter application sought recovery of \$2,250.00 for these variation works. Before the

⁸⁰ *Kirkby & Anor v Coote & Ors* [2006] QCA 61, [59].

⁸¹ *Kirkby & Anor v Coote & Ors* [2006] QCA 61.

⁸² Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-19.

⁸³ *Ibid*, 1-20.

⁸⁴ *Ibid*, 1-21.

⁸⁵ *Ibid*, 1-53.

⁸⁶ Counter-application filed 3 January 2017.

⁸⁷ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-18-1-19.

tribunal below was an undated invoice rendered by Mr Cerda for \$2,250.00 in respect of the following works and charges:

- (a) Digging up ground to adjust storm water pipe;
- (b) Clean up pebbles on the side of the property and top of the existing retaining wall;
- (c) Variation in quantity of blocks in retaining walls front and rear yards;
- (d) Labour costs for readjusting the front retaining wall after construction due to client's change of mind.⁸⁸

[88] Ms Jacob's evidence at the hearing below was that she did not agree to the variation.⁸⁹

[89] The transcript of the hearing reveals that the learned member told the parties that he would read the many text messages passing between the parties that were in evidence. The learned member stated:

I will have to read all of the text messages myself and form a view about them. All right. I'm not going to descend into text messages now. There are too many of them.⁹⁰

[90] In the reasons, the learned member found that the text messages were confusing and of little practical assistance.⁹¹

[91] Ultimately the learned member dismissed Mr Cerda's counter application finding that Ms Jacob was not required to pay any further sums to Ms Jacob. The reasons do not reveal why the counter application was dismissed. Specifically, there were no findings about the variation claimed by Mr Cerda.

[92] For the reasons that follow we are not satisfied that Mr Cerda is entitled to recover any amount for the claimed variation works. We have found that the contract between the parties was of no effect. Accordingly, the only basis upon which Mr Cerda may claim for the cost of the variation works is on a quantum meruit basis. The basis for a claim in quantum meruit is the execution of work for which there is no enforceable contract and acceptance of the work by the party for whom it is performed.⁹²

[93] The onus was upon Mr Cerda to establish to the required standard that he was entitled to recover an amount for the variation works. Mr Cerda's evidence was that during the course of the works the presence of the underground water pipe was discovered which was 'under a couple of inches of dirt.'⁹³ Mr Cerda says that Ms Jacob instructed him to undertake the works necessary to place the water pipe sufficiently deeply to enable the laying of concrete or pavers over the top of the pipe.⁹⁴ Ms Jacob's evidence was that the presence of the downpipe was discussed before the parties signed the contract.⁹⁵ She said that she told Mr Cerda if the pipe

⁸⁸ Invoice 000320 attached to Statement of Juan Pablo Lorrain Cerda filed 27 October 2017.

⁸⁹ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-24.

⁹⁰ *Ibid*, 1-25.

⁹¹ *Jacob v Cerda* [2018] QCAT 255, [19].

⁹² *Pohlmann v Harrison* (1993) 12 Aust Cons LR 80.

⁹³ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-19.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*, 1-24.

was only a piece of rubbish he was to remove it. Although her evidence on the point was somewhat unclear, Ms Jacob said she told Mr Cerda if the pipe was not rubbish that could be removed, a timber ‘deck’ was to be built above it and painted to merge with the surrounds. Ms Jacob said that this was Mr Cerda’s suggestion.⁹⁶ Ms Jacob’s evidence was that she was ultimately happy with the work undertaken by Mr Cerda in relation to the water pipe.⁹⁷

- [94] There is no evidence that any discussion took place between the parties about the cost of the variation works associated with the water pipe or that there would in fact be an additional cost to Ms Jacob.
- [95] On balance we accept the evidence of Ms Jacob that the issue regarding the storm water pipe was discussed prior to the parties entering into the contract and that any works to be undertaken in relation to the pipe were within Mr Cerda’s contemplation at that time. In the circumstances it would not be unjust for Ms Jacob to retain the benefit of the storm water pipe works without making any further payment for it. In any event, Mr Cerda led no evidence about the value of the works undertaken and there is no basis to enable us to undertake an assessment of a quantum meruit claim in respect of the variation works relating to the water pipe.
- [96] The balance of Mr Cerda’s counter application relates to a claim for the costs of ‘variation in quantity of blocks’ and labour costs associated with ‘readjusting the front retaining wall’. Mr Cerda’s evidence was that the variation included an amount for ‘extra blocks from the front yard’ although this was not further explained.⁹⁸ There was no evidence led by Mr Cerda regarding the value of these works. Ms Jacob’s evidence was that any variation in the quantity of blocks was the result of Mr Cerda’s failure to undertake the works in an appropriate and skilful manner. It is not possible for us to discern from the evidence just what Mr Cerda’s counter application in this regard relates to. Even if we could, there is no evidence that would enable us to undertake an assessment of the value of this part of the counterclaim on a quantum meruit basis.
- [97] It follows that Mr Cerda’s counter application must be dismissed.
- [98] Turning to the issue of the costs of the proceedings below, the learned member allowed the recovery by Ms Jacob of the costs associated with retaining Mr Pugh to provide his report, and the filing fees on the original application. These costs totalled \$750.70. Neither party has sought leave to appeal the costs order. Accordingly, the order remains undisturbed.
- [99] The effect of the orders we make will be to set aside the decision below insofar as it relates to the payment of damages by Mr Cerda to Ms Jacob. In lieu of the damages assessed by the learned member in the amount of \$14,915.00, Mr Cerda must pay to Ms Jacob \$6,750.00. Mr Cerda must pay to Ms Jacob her costs of the proceedings below in the amount of \$750.70. The total amount therefore payable by Mr Cerda to Ms Jacob is \$7,500.70.

Conclusion

- [100] We make the following orders:

⁹⁶ Transcript of Proceedings, *Jacob v Cerda* [2018] QCAT 255 (13 October 2017), 1-58.

⁹⁷ *Ibid*, 1-60.

⁹⁸ *Ibid*, 1-19.

- (a) Leave to appeal is granted.
- (b) The appeal is allowed.
- (c) The decision of the Tribunal dated 5 August 2018 is set aside to the extent of the amount of damages payable by Juan Pablo Larrain Cerda to Binny Jacob.
- (d) Juan Pablo Larrain Cerda must pay to Binny Jacob \$6,750.00 within 28 days of the date of this decision.
- (e) Juan Pablo Larrain Cerda must pay Binny Jacob's costs of proceeding BDL284-16 fixed in the amount of \$750.70 within 28 days of the date of this decision.
- (f) The counter application is dismissed.