Briefing in Domestic Building Disputes – Practical Observations from an Overworked Barrister

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Author's Note (17 April 2025): This paper was originally published on 19 April 2017, and aspects of the paper may not reflect the law of today. An updated version of this paper will be produced in due course.

1. At one stage or another of their career, solicitors in general practice will take on a matter to which the *Domestic Building Contracts Act* 1995 ('**the DBCA**') applies,[1] in which a modest to substantial amount is in dispute. Some of those will be in the thousands, others in the hundreds of thousands.

2. The parties initiating the dispute – often a building owner or subcontractor – are not impecunious, but do feel the financial strain, some expecting a quick jump to the end of the story, in which the appearance happens within the week, the matter heard by a quick reading of the contact on the bench, and, because there is only one possible determination that could be made (from the client' perspective), that determination made (from their perspective): in their favour.

3. The parties defending – such as a builder – are often (pardon the pun) defensive of their conduct, finding the whole process an inconvenience, due to the unreasonable behaviour of the agitating party, who in their experience is doomed to fail and is behaving in a completely unreasonable fashion.

4. A belief often shared between the parties (even parties who have been involved in disputes before) is that the matter is as simple as deciding who is right, and who is wrong, and in practice, the hearing will be decided by lay evidence.

5. That, as you will appreciate, is completely wrong.

[1] The scope of the DBCA is outlined primarily in sections 5, 6, and 54.

6. While holding a Masters in Construction Law is no prerequisite to solicitors in general practice taking them on, it must be appreciated that a 'domestic building dispute' (a technical term) is not a simple contractual fight. It is important that practitioners provide their client, at the first consultation, with a realistic idea of what the dispute will entail.

7. Many practitioners have the wisdom to involve a barrister early on in the process, in the expectation that the matter will proceed to a hearing (which the barrister will handle), but also because of our expertise (or at least experience). That is good practice, but comes with a caveat.

8. In many construction briefs, I find that I am both an educator and an advocate, in that I am also giving much guidance to my instructor on what needs to be in my brief. There is nothing wrong with that, and I prefer that the questions be asked.

9. What a domestic building brief cannot be is a "mystery bag challenge" – my favourite segment in my favourite daytime TV program, *Ready, Steady, Cook!*[2] – in which a celebrity chef (or barrister) must come up with a new and appetising dish from a selection of random ingredients in their shopping bag, and in 20 minutes or less.

10. Unlike the contestants on *Ready, Steady, Cook!*, I don't do mystery bags. If the ingredients I need are not in the bag (or brief), I send my instructor back to the market, with clear directions on what I need.

11. The idea of this practice paper is to ensure my instructor only makes one trip to the market, by providing some basic guidance which will assist anyone wanting to instruct barristers in this field. I deal with several topics, all of which are matters you should ideally consider before sending the brief:
    (a) Jurisdiction;
    (b) Framing the allegations;
    (c) Finding and instructing experts (and when);
    (d) Who to sue and the limits of recovery; and

[2] While writing this piece, I discovered the show was cancelled in 2013

(e) Quantifying loss.

12. A basic appreciation of these issues is fundamental to providing construction law services to a level of minimum competence.

(a) <u>Jurisdiction</u>

13. Mostly for the better, ***domestic building disputes*** are mainly heard (as section 57 of the DBCA puts it) in the Victorian Civil and Administrative Tribunal ('**the VCAT**'), which has 'chief responsibility' for them. That arrangement has existed since 1995, when the Kennett Government established the former Domestic Building Tribunal.

14. This 'chief responsibility' is not the same as 'exclusive' jurisdiction, contrary to what some might suggest.

15. The DBCA itself applies broadly to all ***domestic building work***, as defined in section 5 (with exclusions in section 6). At risk of oversimplification, the phrase brings most works associated with a 'home,'[3] existing or proposed, within the scope of the DBCA.

16. The perhaps elementary proposition that a 'home' includes multiple homes should not be forgotten.[4] This means that multi-unit developments, while not using the same standard form Master Builders or Housing Industry Association contracts, are still subject to the same regime.

17. Section 54 broadly defines what is a domestic building dispute–

> (1) A ***domestic building dispute*** is a dispute or claim arising—
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> (a) between a building owner and—
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> (i) a builder; or
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> (ii) a building practitioner (as defined in the Building Act 1993); or
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> (iii) a sub-contractor; or
>
> (iv) an architect—
>
> in relation to a domestic building contract or the carrying out of domestic

[3] As defined in section 3.
[4] *Burbank Australia Pty Ltd v Owners Corporation* [2015] VSC 160, [30] (McDonald J)

building work; or

(b) between a builder and—

(i) another builder; or

(ii) a building practitioner (as defined in the **Building Act 1993**); or

(iii) a sub-contractor; or

(iv) an insurer—

in relation to a domestic building contract or the carrying out of domestic building work; or

(c) between a building owner or a builder and—

(i) an architect; or

(ii) a building practitioner registered under the **Building Act 1993** as an engineer or draftsperson—

in relation to any design work carried out by the architect or building practitioner in respect of domestic building work; or

(d) between a lot owner or an owners corporation and an initial owner (within the meaning of section 68 of the **Owners Corporations Act 2006**) of land in a plan of subdivision in relation to an obligation imposed on the initial owner under section 68(2) of the **Owners Corporations Act 2006**.

(2) For the purposes of subsection (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.

(3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

18. This is a broad categorisation that sees VCAT considered 'the most appropriate' forum for domestic building disputes. It means the ordinary advice I give, when asked where to file, is that a claim should be filed in VCAT.

19. But there are some exceptions.

20. **First**, a claim can be brought in the courts, and may continue there unless a party, before any evidence is heard, applies for a stay so that the action can instead be brought before the VCAT (a stay the Court must grant).[5]

21. A court cannot stay an action of its own motion.

22. In some scenarios, the scale of the dispute, and the character of the parties, can make a court the more appropriate venue. For example, if the dispute is between a developer and a large head contractor/building company in a major residential development – giving the dispute a more 'commercial' character – the parties may prefer that their dispute is dealt with in the courts, with more formality.

23. From a costs perspective, parties may want to avoid the prospect that VCAT will take an unfavourable position under section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998, which sets a default position of parties bearing their own costs of an action.[6]

24. While most members sitting in VCAT's Building and Property List seem to consider it 'fair' to award costs in such actions – because running them attracts significant costs, especially the expert evidence[7] – and make orders without too great a level of argument, others before whom I have appeared take the 'no costs' mantra more seriously.

25. It is good practice to explain these matters to a client before filing an action, which I shall discuss later in this piece.

26. **Second**, while unmet payment claims can relate to domestic building works,[8] VCAT is not considered a 'court of competent jurisdiction' under security of payment laws,

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[5] *Domestic Building Contracts Act* 1995, sub-s 57(2)
[6] While VCAT is referred to by some (including members of the Tribunal itself) as a 'no costs jurisdiction,' that term appears nowhere in the Act, and I would submit its use is misleading.
[7] In *Stellar Constructions Pty Ltd v Ferguson (Domestic Building)* [2014] VCAT 503, Farrely M noted that it was 'fair' to award costs '*having regard to the nature and complexity of the proceeding*.'
[8] But note *Building and Construction Industry (Security of Payment) Act* 2002, sub-s 7(2)

such as the *Building and Construction Industry Security of Payment Act* 2002.[9] Those actions must be commenced in the courts.

27. It should be mentioned that security of payment laws do not affect any rights the parties may have to commence civil proceedings for breach of contract, including in the VCAT (at least where adjudication has not occurred).[10]

28. **Third** – and this is an issue of interpretation that has not been decided – VCAT has limited jurisdiction to hear third party claims for contribution or indemnity (more often used where an insurance contract exists).

29. While the Tribunal has power to join a party, where if 'for any other reason it is desirable that the person be joined as a party,'[11] I lead the proposition that VCAT has limited jurisdiction (in this respect) for several reasons:
    (a) while a contribution or indemnity can be claimed in the courts through utilising the 'third party procedure,'[12] there is no equivalent procedure in the *Victorian Civil and Administrative Tribunal Act* 1998;
    (b) the statutory basis – remembering that VCAT has no inherent jurisdiction) for contribution or indemnity is Part IV of the *Wrongs Act* 1958. But Part IV does not apply to VCAT, because it does not define 'court' to include a tribunal. While Part IVAA ('Proportionate Liability') includes a specific definition of ***court*** (incorporating 'tribunal'); Part IV has no equivalent;
    (c) the DBCA itself makes clear in section 54 that a ***domestic building dispute*** is between two parties, no more;
    (d) the Tribunal is intended to provide a 'low-cost' and efficient means of resolving disputes.[13] If a domestic building contract is bilateral – a builder responsible for a project entirely – then that reflects the parties' intention that disputes should not be held up through the involvement of subcontractors (liable to the builder) as possible contributors.

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[9] See *Domaine Homes v RIA Building* [2005] VCC 111 with reference to the *Building and Construction Industry (Security of Payment) Act* 2002, sub-s 16(2)(a)
[10] *Building and Construction Industry (Security of Payment) Act* 2002 s 47
[11] *Victorian Civil and Administrative Tribunal Act* 1998 sub-s 60(1)(c)
[12] *Supreme Court (General Civil Procedure) Rules* 2015 r 11.02
[13] See discussion in *Independent Cement & Lime v VCAT* [2000] VSC 355 at [1] (Bryne J)

30. I do note that VCAT has established the category of a 'joined party' for third parties that are not neatly an applicant or respondent (under section 60 of the VCAT Act).[14] An argument put to me (from the bench) is that section 54 of the DBCA is sufficiently general that VCAT can add a 'joined party', for the purposes of another party seeking indemnity or contribution. However, neither section 54 nor section 53 – providing the Tribunal '*may make any order it considers fair to resolve a domestic building dispute*' – address the issues dealt with above. There is no mention of third parties in the DBCA either.

31. This is not to suggest that VCAT cannot do indirectly what it cannot do directly, through the filing of a separate proceeding against a subcontractor, and then one party making application to have the two proceedings heard together.[15]

32. This would require a defendant to make more specific allegations against the third party, than if issuing proceedings through a third party notice (in which an annexed statement of claim can effectively 'piggy-back' of that against the defendant, meaning less specific allegations against the third party could be made).

33. A practitioner should not pursue such a route where, even if the Tribunal is perfectly comfortable doing so, recourse may lie to the Supreme Court for error of law (which will lead to costs consequences). In that instance, it would be open to file elsewhere, or seek orders striking out a matter and filing in a more appropriate forum (namely, one where the relief sought can actually be granted).[16]

34. But unless there is good reason to contend VCAT might not have jurisdiction, filing elsewhere should be avoided.

(b) <u>Framing the allegations</u>

35. While VCAT is not a 'court of pleadings,' that rule does not prevail in the Building and Property List.[17] Pleadings in the List, as anywhere else, must articulate the client's claim such that the other parties are on notice of what is alleged against them.

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[14] Such as *L U Simon Builders Pty Ltd v Lubeca Systems Australia* [2002] VCAT 10.
[15] *Victorian Civil and Administrative Tribunal Act* 1998 sub-s 82(1)(b)
[16] *Victorian Civil and Administrative Tribunal Act* 1998 s 77
[17] See VCAT Building and Property List – Practice Note 1 (August 2014), paragraphs [8]-[12]

36. Not all pleadings need be authored after consulting an expert, particularly when you are acting for a trade, and simply plead that you have completed certain works, and are entitled to payment under the contract.

37. Indeed, the facilities of VCAT are not reserved to those who have gone out to obtain expert evidence. Some parties see filing in the Tribunal as a way of breaking deadlock, facilitating discussion between them, and providing an opportunity to settle. However, that is not a view with which practitioners should inculcate their clients with, as it effectively means we add no value to the process.

38. It is not impossible to prepare a Points of Claim without an expert report. It is logical, for instance, that if a house of mason (brick or stone) collapses in high winds, that it was constructed negligently (or rather, in breach of a contract). That is because homes must be constructed according to certain standards (such as the National Construction Code), which include resistance to wind shear, to eliminate the possibility of collapse.

39. Such a pleading is prefaced on the assumption – often reflected in Particulars to the effect that '*The applicant will provide further expert evidence closer to trial*' – that the evidence to be obtained will substantiate the cause of action. In any event, it will not stop the opposing party pleading a defence, for example, that the builder relied on geotechnical data from the owner, but the information was flawed.

40. Such a pleading may, in any event, be a wasted endeavour, as VCAT often orders parties to file amended pleadings, to more accurately reflect what is asked for.

41. But returning to the main issue.

42. What are the features of a good pleading in a domestic building dispute?

43. My approach to the task is minimalist, in that I only plead what I need to plead. That means identifying the following features.

44. **First**, identifying *what is the contract*. That includes, for instance, the contract itself (often standard form), plans and specifications, as well as any variations (although if the dispute does not relate to them, a mention is enough).

45. It is also worth pleading that a contract is a 'domestic building contract' according to the DBCA (not all contracts in 'domestic building disputes' are),[18] as that will allow for the statutory warranties in section 8 to be relied upon.
46. A pleading should, in other words, identify each 'source' of the contract.

47. **Second**, identify *only* the *material terms* of the contract.

48. A fault in many pleadings I come across – and this is perhaps because of hesitance to unwittingly close off any routes to relief – is that they reproduce *ad verbatim* the written terms of the contract, and then in one foul swoop point the finger at this re-statement and say 'breach.'

49. You do not have to plead the entire contract (which will doubtless be in evidence), only the terms on which you rely. To do otherwise makes the pleading a less practical aid than it otherwise can be.

50. **Third**, identify *the facts that constitute the breach of contract*, and *tie those facts to the terms (or statutory provisions) which they breach* (which might be multiple).

51. **Fourth**, establish the *loss and damage*, and tie it to the alleged breaches.

52. While a specific figure is not necessary at the outset, you should be able to identify the 'heads of damage,' that is, the items from which the loss flows. Our measure of damage is expectation loss, that is, what will be required to put the client in the position he or she would have been in, were the contract been performed.

53. **Fifth**, consider the necessity of including any alternative causes of action.

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[18] *Domestic Building Contracts Act* 1995 s 3 states that '***domestic building contract*** means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor'

54. Some practitioners include a claim for misleading and deceptive conduct in their pleadings, usually so that they can 'catch' officers of the builder,[19] or to ensure there is an alternative if the contract is somehow not valid.

55. The action stated is usually to the effect that: the individual represented that the builder would meet certain standards (such as the implied warranties), but the builder did not, and the individual had no reasonable basis to make the representation.

56. In my view, such a cause of action reflects a misunderstanding of causation, and will be seen by the Tribunal as creative (which undermines the credibility of the practitioner advancing it).

57. Unless there is no valid contract, the only thing the individual can be said to have done is led the complainant to enter a contract (although no doubt after the complainant had made his or her own inquiries), under which they subsequent suffered loss and damage. It is a significant allegation to suggest the individual spoke misleadingly, let alone that their conduct was the actual cause of the loss.

58. Likewise, unless there is a serious question as to whether a valid contract exists, it is probably not necessary to plead an action in unjust enrichment seeking restitution.

(c) <u>Finding and instructing experts (and when)</u>

59. Understand the following: you cannot get up in front of a Court or Tribunal, and conclude along the lines of:

> "*Well your Sir, the contract said completion by 31 December 1999, it wasn't completed until 30 June 2000, and my client knows from her best friend whose mum is a real estate agent that she could have earned $400.00 per month in rent for those six months.*"[20]

Or along the lines of:

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[19] As discussed in *Houghton v Arms* (2006) 225 CLR 553, an individual cannot hide behind the corporate veil where they personally engaged in the conduct.

[20] In one VCAT matter I was briefed in, the solicitor for the other side proposed to lead such lay evidence (I am perhaps exaggerating). I should say that those situations are not normally possible, where one or both sides are represented, as most VCAT members recognise when expert evidence is needed (in that instance, from a property valuer).

> "*Your Honour, the Court has seen the plans, through the evidence of my client, and can be comfortably satisfied on the balance of probabilities that the dwelling as constructed does not conform, and damages for expectation loss are appropriate*."

Your client cannot give that evidence, and no lawyer (barrister or solicitor) should be getting up to make a case like it.

60. Finding an expert is usually the stage I get brought in. That is perhaps not necessary, but more than prudent.

61. I say that because there are two steps in the process which I find seem to be overlooked, or at least are not identified as steps in themselves. The first is **identify the required expertise**, and the second, **instruct the expert**.

62. The need to call experts is embodied in the 'opinion rule' of evidence, that:[21]

> *Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.*

However, an exception is made if '*a person has specialised knowledge based on the person's training, study or experience*,' and their evidence reflects that knowledge.[22] While the rules of evidence do not apply in VCAT,[23] that does not mean evidence given otherwise will have any particular weight.

63. Expert evidence is needed

> whenever the subject-matter of inquiry is such **that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance**, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.[24]

64. A client with professional qualifications is not enough.

65. The importance of finding the right expert is illustrated by an example.

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[21] *Evidence Act* 2008 s 76
[22] *Evidence Act* 2008 sub-s 79(1)
[23] *Victorian Civil and Administrative Tribunal Act* 1998 sub-s 98(b)
[24] See *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon J), referring to J. W. Smith.

Example: The jewellery store expert

66. A barrister was briefed in a dispute about the fitout (or 'joinery') of a jewellery store, located in a large suburban shopping centre. While her client, a joinery subcontractor, had not retained an expert, the counterclaiming builder had.

67. In short, the builder had not paid what he/she owed the subcontractor, but pointed to certain (and rather obvious) defects, and suggested that, because of this, the joiner should give a 'discount' to a value the builder had estimated.

68. The joiner disputed that all were his/her responsibility, and like many in the field, asserted that he/she could have repaired them if identified during the works, but that the opportunity was not provided (a common argument, but not usually provided for in the subcontracts)

69. Before the proceedings commenced, no third parties were called in. Likewise, no rectification works had happened.

70. Jewellery store fitouts are bespoke in their own peculiar manner. That, as the barrister learned that week (she had two briefs about jewellery store fit-outs), is because many brands require specific cabinets to display particular brands of rings, watches, and so forth, which are insisted on and provided by the brand. That is not so different from the common "dream home."

71. The matter came on for compulsory conference, a type of mediation where a VCAT member presides (as opposed to an external mediator). The expert did not attend, as is commonplace.

72. While few opportunities exist in building disputes to (legitimately) surprise an opponent, badly prepared expert reports often provide fair game; the builder, it might be added, had filed the report late, together with an out-of-time counterclaim, so the barrister felt surprise was fair (or at least fairer) game.

73. Without quoting the report itself, the expert made statements to the following effect:

Consultant's Experience

I am a building consultant with expertise in building problems.

My report concerns the construction standard of a commercial fitout. I believe my experience and expertise makes me an expert in this area.

My Instructions

The Builder gave me verbal instructions to provide an opinion on if the rectification quote from the new subcontractor is reasonable.

74. In fairness to that expert, a proper statement of his/her qualifications were contained later on in the report. The report also contained an extract of the quote concerned, itemising the defects to be replaced, but was not otherwise provided.

75. Despite the barrister not having her own expert report, she made short work of her opponents, by demonstrating their expert paid "lip service" (as I have heard the Tribunal describe it) to the Practice Note, for example:
    (a) the expert had not made clear what expertise, if any, he/she had in jewellery store or equivalent fitouts;
    (b) the expert referred to another person's opinion – the alternate builder, who was not named, aside from his/her company – whose expertise was not identified;
    (c) the expert had not been instructed, according to the report, to inspect the shop and identify any defects, but only to provide an opinion on what someone else had identified;
    (d) the 'verbal' instructions of the builder were not specified in any great detail. That would include, for example, the factual summary which the expert was (obviously) given by the builder, as otherwise he/she would not have known what the quote was prepared against;
    (e) continuing on point (d), the report did not identify the 'facts, matters, and all assumptions' upon which it proceeded (as required by the expert report), only stating that it was 'assumed' information provided by the builder was accurate;
    (f) the expert accepted suggests that rectification could only occur 'after hours' in coordination with the shopping centre, and accepted items in the quote such as 'security,' without details of inquiries made to verify those statements;
    (g) the expert had not, in the event, given their own opinion of what rectification would entail, instead merely judging the steps someone else was proposing.

76. After those arguments were made in opening, the Tribunal sided with the subcontractor and his/her barrister, which saw the expert report effectively discounted in the subsequent negotiations.

77. So I am told.

78. What we see in this story is that, not only did the builder (or rather, their lawyers) not identify what expertise was required, their expert was not given clear instructions. Despite the possible quality of the expert as a witness, the document he/she produced was useless.

79. Which brings us to a point of good practice: if you can avoid it, **do not get the client to arrange the expert**.

80. If the client first comes to you with one, that is fine, and chances are it might even fit the bill. But if not, it is the lawyer's job to make those arrangements. It is incredibly frustrating, having had a high-level discussion with my instructor about experts –

including what we need from them – to find out that they have simply told the client to go find one and instruct him.

81. Getting an expert is not simply a matter of accepting what the client has complained of, and getting in an expert to hear what the client told you (already), and then to prepare a report. It involves your consideration of those complaints, deciding on what facts are relevant, how the expertise might verify those complaints, but also any discussion points you might want addressed.

82. That is another reason I do not like clients who instruct experts directly. A client may insist on a specific 'expert' based on a pre-existing relationship (for instance, a former business partnership, or simply a belief by the client that the expert will 'go in to bat for them'). In such circumstances, not only may the evidence be unreliable (and fatal to their case), it will have costs consequences.[25]

83. But just because the expert is the expert, and is impartial/independent (a trite proposition that a few still forget), it does not mean they cannot be instructed on what their report must address as a matter of form; for example, when I have drawn a brief to expert, I might ask them to state an opinion in response to certain questions, prompted by the factual background.

84. The rules concerning expert reports and evidence are found in 'VCAT Practice Note 2 (PNVCAT 2, 1 October 14) – Expert Evidence.'

85. But how do you decide on the required expertise?

86. This is an easier task than might first appear.

87. The experts who most commonly appear in domestic building disputes are so-called '**building consultants**.' I say 'so-called' because 'building consulting' is not a distinct professional qualification.

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[25] As occurred for the expert in *Antczak v Tara Roach Pty Ltd (Building and Property) (Amended)* [2016] VCAT 879, with a costs ruling in *Antczak v Tara Roach Pty Ltd (Building and Property)* [2016] VCAT 1859

88. The term covers different construction professionals – architects, engineers, registered builders (who hold formal 'construction' qualifications)[26] – who do the same thing, namely, use their academic and practical construction knowledge to assess whether a building complies with certain requirements, such as plans, industry standards, as well as insurance requirements

89. Some consultants remain active in construction, or work concurrently as registered building surveyors under the *Building Act* 1993 (which requires certain, mandatory inspections).

90. The role of a building consultant, in domestic building disputes, is to assess a structure against the contract (including the plans and specifications) on which it is based, and advise as to what extent it complies with it. Where works are non-compliant, they can state an opinion as to what the cause was, and propose a course of rectification.

91. A consultant's report should contain a list of these items, and advise what they do not comply with (ie. the plans, or the National Construction Codes).

92. Where a more specific defect is identified – for example, the client says that a retaining wall does not comply with a design – it may be prudent to retain a more specific expert who can go into more detail on why something does not comply, such as a structural engineer for a defective retaining wall, or an electrical engineer for a faulty lift unit.

93. It is preferable to use someone who practises as a consultant, rather than just anyone with relevant qualifications (who can meet the criteria of 'expert'), because they will likely have given expert evidence before, and understand what that entails.

94. Most building consultants, however, cannot accurately cost any rectification works proposed (although some do). That is the job of a **quantity surveyor**, the professional who cost construction projects. Chances are, if a loan has been taken

[26] A person can only be registered as a builder in Victoria if they a qualification as defined in schedule 7 to the *Building Regulations* 2006. The more complicated the works, the more qualified a professional must be.

out to fund a project (particularly if we are talking a multiunit development), a quantity surveyor has already been involved to verify the cost for the lender.

95. The Australian Institute of Quantity Surveyors explain:[27]

> *Quantity surveyors get their name from the Bill of Quantities, a document which itemises the quantities of materials and labour in a construction project. This is measured from design drawings, to be used by the contractors for tendering and for progress payments, for variations and changes and ultimately for statistics, taxation and valuation.*

96. Any of these experts can be easily found by looking up the professional association to which they belong, for example, the Australian Society of Building Consultants, or the Australian Institute of Quantity Surveyors.

97. As a footnote, it is quite permissible to ask an expert to author a supplementary report, in reply to another party's report itself responding to theirs.

(d) Who to sue and the limits of recovery

98. The ease of domestic building disputes, when acting for the owner, is that there is only one defendant: the builder.

99. The builder contracted to deliver the project, and if they did not, and no matter how many of their subcontractors let them down, the owner always pursues the builder.

100. That 'simple' scenario, however, is not limited to scenarios where the owner themselves contracted with the builder.

101. I earlier mentioned section 8 of the DBCA, which implies into all domestic building contracts the following warranties:

(a) the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

(b) all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;

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[27] See http://www.aiqs.com.au/imis/AIQS_Website/About/What_is_a_QS_/AIQS_Website/About/What_is_a_QS_.aspx

(c) the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act* 1993 and the regulations made under that Act;

(d) the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

(e) if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

102. While the original domestic building contract is between the first owners and the builder, the warranties in section 8, through section 9, 'run with the building,' meaning that subsequent owners can still pursue the original builder, up to ten years following the issue of a certificate of occupancy, or of final inspection.[28] The limitation period in building, it should be recalled, is not from the time a defect is discovered, but from that of completion.

103. In other words, an exception to the doctrine of privity exists in building.

104. This is significant in multi-unit developments, such as multi-storey buildings or housing estates, where the developers have retained a separate building company, but may also give specific warranties as vendor in the contract of sale.[29] In that scenario, the developer and the builder may be jointly and severally liable, depending on the terms of the contract of sale.

105. So long as a valid domestic building contract exists, there is no reason for an owner to pursue other parties, such as subcontractors. It is not difficult to argue that a duty of care exists between owners and subcontractors, but from a causal perspective, an

[28] *Building Act* 1993 s 134
[29] Consider *Domestic Building Contracts Act* 1995 sub-s 3(4)

owner is arguing that they have suffered pure economic loss, against which they are expected to protect themselves through contract.[30]

106. This also means that a builder cannot argue that, because a subcontractor owed the owner a duty of care, the builder should have their liability reduced proportionality under the Part IVAA of the *Wrongs Act* 1958.

107. Note, however, that in *Bryan v Maloney* (1995) 182 CLR 609, the High Court held that a builder is to compensate a subsequent owner for pure economic loss.

108. The situation is different where owner-builders are concerned, because of their direct contractual relationships with the contractors. An expert should be retained before commencing proceedings there, to determine which contractors were responsible, so that they are included in the claim. This ensures all those who are liable, under the proportionate liability regime in the *Wrongs Act*, are ordered to pay their proportion.

(e) <u>Quantifying loss</u>

109. The quantification of loss is not a job for the lawyers. As mentioned, that is for a quantity surveyor (although in less complicated scenarios, multiple trade quotes may be sufficient, such as quotes from bricklayers to demolish and reconstruct a brick wall).

110. However, what is considered 'loss' – what the client can recover – is something where we have a role to play.

111. In contract disputes, the measure of loss is that required to place a party in the position in which they would have been, had the contract been performed.[31] In building, that can mean as little as removing light fittings and putting in the correct ones (with plaster touch-ups in the process), to a full demolition and re-build where the foundations are not deep enough to transfer the building load to the ground below.

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[30] *Perre v Apand* (1999) 198 CLR 180; *Caltex Oil (Aust) Pty Ltd v The Dredge* (1976) 136 CLR 529
[31] *Robinson v Harman* (1848) 154 ER 363, 365 (Parke B)

112. Although it remains contentious, the law in the building and construction context is that a simple 'technical' breach of a building contract is not enough, if what is built fulfils the exact same function. A court will not award damages where the technical breach leads only to an 'uncovenanted profit.'[32]

113. It is not a question of money alone.

114. In *Tabcorp v Bowen Investments* (2009) 236 CLR 272, the High Court of Australia rejected the so-called theory of 'efficient breach,' which is that – where a party has not provided what they were contracted to – they need only pay the difference-in-value (between what should have been provided, and what was instead provided), instead of the cost of fulfilling the contract.

115. The tenant, in breach of its lease agreement, had demolished a Cherrywood foyer, and reconstructed it as a modern and functional foyer (in breach of a provision that the premises were required to be preserved without alteration). The tenant argued the correct measure of damage was the difference-in-value, before and after the alterations (an 'efficient breach'), which the Court rejected.

116. The landlord was not to be compensated for the net loss, but rather, the amount to restore the Cherrywood foyer. The Court was not interested in whether or not the landlord actually intended to do so.

117. For context, in *Tabcorp*, the difference-in-value between the foyers was just under $35,000.00, while the expectation loss was $1,380,000.00 (which was awarded).

118. It must also be 'reasonable' (and necessary) to fulfil the contractual expectation. The High Court explained this in *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618 (Dixon CJ, Taylor and Webb JJ):

> No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks.

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[32] *Radford v De Froberville* [1978] 1 All ER 33, 42 (Oliver J)

119. This principle was distorted in the United Kingdom, when the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 decided that it was not reasonable for an owner, whose pool was constructed to a depth of 6 foot (1.8m), instead of 7.5 foot (2.3m), to reconstruct it, and indicated that in those circumstances, the correct measure is diminution-in-value.

120. I say 'distorted' because in *Tabcorp*, the High Court of Australia described the decision as inconsistent with the principles upon which it was said to be prefaced.[33] In other words, the principle is sound, but its application to the swimming pool – and there is a clear safety difference when half a metre in depth is absent – is misconceived.

121. What is reasonable, then, is a question of fact in each individual case.

122. In some instances, the VCAT has taken the harsh approach in *Ruxley*, such as an incorrect roof pitch, despite the steep roof having been an important aesthetic feature of a dwelling (that is, a roof is not just a roof).[34] In contrast, if we are dealing with a structural issue (such as a retaining wall), non-compliance with the contractual designs – where the element is structurally sound, and effectively 'fits the bill' – insisting on compliance with the contractual designs may not be reasonable.

123. The rules of causation and intervening acts should not be forgotten. If, for example, a builder was responsible for water damage to window frames, but did not install them before termination, he is not also responsible for the cost of removing them and putting in new windows. [35]

124. These are issues to be considered, not only when drawing pleadings, but also when advising the client on what can actually be recovered.

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[33] *Tabcorp v Bowen Investments* (2009) 236 CLR 272, 289 (The Court)
[34] For example, see *Harmonious Blend Building Corporation v Ibraham* (Building and Property) [2014] VCAT 1084, [165]-[180]
[35] For example, see Ibid. [188]-[194]