

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D686/2005

CATCHWORDS

Domestic Building, cost of repairs, glazing, *Guide to Standards and Tolerances*: guidance but not prescriptive, timber floor – considerations of whether to rectify or replace.

APPLICANT	Ashjam Pty Ltd T/as Rodian Homes
RESPONDENT	Paul Carroll
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	28 – 30 August and 2 – 5 October 2006
DATE OF ORDER	20 December 2006
CITATION	Ashjam Pty Ltd v Paul Carroll (Domestic Building) [2006] VCAT 2612

ORDER

- 1 The Applicant must pay the Respondent \$24,604.52.
- 2 Interest under statute and costs are reserved and there is leave to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr P Lithgow of Counsel

Witnesses:

Mr Hogben, sole director of the Applicant

Mr Atchison of Buildcheck Pty Ltd

Mr Ian Valentine of College Floors

For Respondent

Mr J Forrest of Counsel

Witnesses:

Mr Carroll

Mr Sherrard of Alan Nicholas & Associates

Mr Hay of JB & PF Consulting Services

Mr Ian Anderson of Hurtob Homes Pty Ltd

Mr Anthony Gladman of CRL Pty Ltd

REASONS

- 1 The proceeding concerns a contract to construct two dwellings at 68 Kananook Avenue, Seaford for the agreed contract price of \$324,002.25. The Applicant-Builder claims that it has undertaken the work under the contract, and some extra work, and that the sum of \$27,548.53 plus interest remains unpaid. Unit 1 has been sold and the Respondent-Owner's counter-claim concerns alleged defects in the Owner's home, Unit 2. The contract was dated 7 April 2004 and the Owner took possession in or about 7 April 2005.
- 2 The contract documents were the standard-form HIA contract of 2002, an eight page specification, four pages of plans and three sheets of engineer's designs prepared by E.Struct. Mr Hogben of the Builder agreed under cross-examination that the four pages of plans prepared by Harvan for the Owner are the contract plans referred to, even though the set tendered by the Builder as A1 are neither stamped by the relevant authority nor signed by the parties. The landscape plan which appears as pages 1 and 2 of the Owner's Tribunal Book is not included in the list of contract documents on page 1 of the particulars of contract, however it is referred to on page 1 of the "Other Inclusions" to specification in a hand-written note and initialled "RH". Answers to questions put to Mr Hogben during cross-examination indicated that he believed landscaping had been part of the obligations of the Builder until a \$5,000.00 credit was given by the Builder to the Owner. The question of whether such a credit had been given was never fully canvassed by either party.
- 3 The Builder submitted that there was a contract term that the Owner would pay interest of 20% per annum on any outstanding sums from the date they fell due until payment, and that should the Owner take possession of the building works without the Builder's consent, the Owner would be obliged to make the final payment immediately. The Builder submitted that the Owner took possession on 7 April 2005 without the Builder's consent and has failed to make payment.

THE BUILDER'S CLAIM

- 4 The Builder's claim for \$27,548.53 is either damages, the balance of the contract price or quantum meruit, plus interest. It is noted that the Builder did not argue its claim based on quantum meruit. The interest claim, as described in the Points of Claim is for *either*^{*} of 20% from 7 April 2005 to the date of filing the proceedings on 15 September 2005, or in the alternative, interest pursuant to s58 of the *Supreme Court Act 1986* and/or the *Penalty Interest Rates Act 1958*, plus costs.

* Emphasis added

THE OWNER'S COUNTER-CLAIM

5 The Owner's Counter-Claim, is for work allegedly not carried out in accordance with all laws, defective work and poor materials. At paragraph 15, item (i)(iv) of the particulars, the Owner concurs that the balance under the contract sum is \$27,548.53 which the Owner acknowledges is to be taken into account in determining the nett sum claimed by the Owner. The Owner alleges this sum is derived by deducting from the agreed contract sum \$4,851.70 which he claims has been credited, and \$291,602.02 which he states has been paid.

6 The nett sum claimed by the Owner in his Particulars of Loss and Damage is \$52,235.02, being:

i	Rectification works	\$60,940.00
ii	Accommodation for 3 months	\$10,350.00
iii	Furniture removal	\$ 1,000.00
iv	Storage costs	\$ 1,773.00
v	Locksmith	\$ 433.25
vi	Garage remote control	\$ 212.30
vii	Letterboxes	\$ 250.00
viii	Broom	\$ 25.00
ix	Cost of rectification quote	\$ 300.00
x	Liquidated damages	<u>\$ 4,500.00</u>
		\$79,783.55
	Less monies in hand	<u>\$27,548.53</u>
		\$52,235.02

7 In his witness statement the Owner also claimed \$60.00 for heating bills for the time while his heating was being run by the Builder to dry out the concrete slab after the first floor was taken up and \$30.00 for a rubbish bin.

8 The Owner alleges he was entitled to and did properly terminate the contract. It is found that the Owner properly terminated the contract by notice of default of 21 March 2005 and notice of determination of 4 April 2005. The Builder submitted that the Owner was in breach of contract for failure to pay the final claim, which was dated 1 March 2005 but it is accepted that at that date the Builder had not provided the Occupancy Permit to the Owner which, clause 36.1 of the contract required it to provide to the Owner before the demand for final payment.

VARIATIONS

9 Under cross-examination Mr Hogben of the Builder admitted that the variations were not in writing. With few exceptions, they are required to be

in accordance with clause 23 of the contract and sections 37 and 38 of the *Domestic Building Contracts Act 1995*. However as there is no contest between the parties as to the amount outstanding under the contract, no further examination of this issue is required.

ALLEGED DEFECTS

- 10 There is consideration of both whether items complained of are defective or incomplete and also the amount for which the Owner should be compensated for each defective item. As stated by the learned authors of the fourth edition of *Brooking on Building Contracts**:

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

- 11 This rule is subject to the qualification in *Belgrove v Eldridge* (1954) 90 CLR 613. In discussing the usual rule that the owner of a building is entitled to the cost of having the building conform to the contract, Dixon CJ, Webb and Taylor JJ said that consideration must be given to whether the works contemplated are both necessary and reasonable.
- 12 In considering the sum which it is fair and reasonable for the Builder to pay or allow for each item found to be defective, I have aimed to find the sum that a prudent builder would quote to prudent owners who intend to pay for the works themselves. With this purpose in mind the Hurtop quote is useful, because Mr Anderson said Hurtop is willing to do the work. The accepted wisdom, which is always open to challenge, is that many builders refuse to undertake repair work at all, and those who do load the cost when compared with renovation work where there has been no dispute.
- 13 However not every quotation will be taken seriously, because a builder quoting for an owner could quote high in the knowledge that it is unlikely that the job will be theirs once the case is concluded. Further, the Hurtop quote suffers from brevity – each item is quoted separately, but the elements of the items are not broken down. Finally, each item is a round number and many are substantially more than the amounts allowed by both Mr Atchison, who gave evidence for the Builder, and Mr Sherrard, who gave evidence for the Owner.
- 14 The following items are numbered in accordance with the numbering system of Mr Alan Sherrard.

Item 1 Concrete slab to garage

- 15 In accordance with the opinion of Mr Sherrard this item is to be monitored only and there is no allowance for it in this proceeding.

* D J Cremean, B A Schnookal and MH Whitten, Lexis Nexis Butterworths, 2004, page 186

Item 2 Masonry 1 – control joints

- 16 Mr Sherrard reported that articulation joints were required but not installed to the west wall, between the lounge window and the kitchen window; to the south wall to the right of the garage window, to the east (garage) wall at the mid-point and to the right of the living room window. He estimated the cost to install them now at \$590.00. The Hurtob quotation is \$500.00. Mr Atchison agreed that articulation joints were not installed, but said the soil conditions are stable, and in accordance with s3.3.1.8(a) of the Building Code of Australia no rectification work is necessary.
- 17 It is noted that the elevations which appear on sheet three of four of the drawings by Harvan Design, articulation joints appear in the positions described by Mr Sherrard. Regardless of whether they are now necessary for the stability of the building, the Owner was entitled to a building with articulation joints in accordance with the contract. In accordance with the Hurtob quotation, the Builder must allow the Owner \$500.00 for this item.

Item 3 Masonry 2 – left of front door and east wall of garage.

Left of front door

- 18 Mr Sherrard asserted that the nib-angled wall to the left of the front door is out of plumb, the perpend is out of plumb and vary in width, mortar repairs are unsightly and detaching and infill caulking is unsightly. The on-site inspection confirmed his view. Mr Sherrard said the cost to rectify this area is \$290.00. The Hurtob quote was for \$2,500.00 for this item and the repair of two pillars in the garage. Mr Atchison agreed that the bricks to the left of the front door need to be broken out and re-laid, which I find is the reasonable method to rectify this fault.

East wall of garage

- 19 Mr Sherrard said that the east wall of the garage is also out of plumb and that although some repair work has been done to masonry piers, there is minor movement which indicates insufficient installation of masonry ties. He recommended partial demolition and re-building plus rectification to the front entry at a cost of \$3,844.50. However at the hearing he revised his opinion to allow for full demolition of the wall and re-building at the cost of \$6,792.00.
- 20 Mr Atchison said that it would be sufficient to relay upper sections of the brick walls and piers, tying the piers to the walls. His estimate for this work is \$898.00. The Hurtob quotation for this section of the work was for the piers alone. It is accepted that more work than this is necessary.
- 21 Mr Sherrard's first opinion is accepted. The Owner is entitled to the cost of partial demolition and relaying of the wall.
- 22 The Builder must allow the Owner \$3,844.50 for this item in total.

Item 4 Masonry Weepholes

- 23 Mr Sherrard submitted that the weep holes varied in height, but in his report of 18 August 2006, acknowledged the work had been rectified. The Hurtob quote was for \$400.00.
- 24 It was noted at the on-site inspection that an apparent weep-hole to the left of the front door appeared to be a saw-cut into a perpend which did not penetrate all the way to the cavity between the masonry skin and the timber frame of the Owner's home. At the hearing Mr Anderson of Hurtob revised his estimate for rectification of one weep-hole and subsequent make-good to render to \$175.00, which is accepted. The Builder must allow the Owner \$175.00 for this item.

Item 5 Paving/Masonry Weepholes

- 25 Mr Sherrard asserted that paving to the rear of the garage partially blocks weep holes, and should be lowered at a cost of \$1,007.00. The Hurtob quotation was "this item is not required" but in examination in chief Mr Anderson said the cost for the work would be \$1,800.00.
- 26 Mr Atchison stated that the paving abuts the bottom of the weep holes and the weep holes are correctly placed one brick below the interior floor level, so no work is necessary. At the on-site inspection it was apparent that the paving is a little higher - approximately 1 cm – than the bottom of the weep holes, which raises the concern that water might run into them rather than weep out.
- 27 Mr Sherrard's evidence is accepted. The Builder must allow the Owner \$1,007.00 for this item.

Item 6 Eave lining

- 28 Mr Sherrard reported that the eave linings do not run parallel to the masonry courses, indicating that the masonry is out of level.
- 29 Mr Atchison recommended minor rectification at a cost of \$763.00, with which Mr Sherrard agreed. The Hurtob quotation was for \$900.00 however the agreed sum is preferred in circumstances where the discrepancy is difficult to see. The Builder must allow the Owner \$763.00 for this item.

Item 7 Driveway and Paving

Colour

- 30 The driveway and paving are coloured concrete, with saw cuts and control joints. Mr Sherrard asserted that the saw cuts varied from 10 to 15mm, cracking was noted and that the concrete been painted black when the Owner required it to be charcoal. Mr Sherrard recommended reapplication of colour at a cost of \$1,100.00.

- 31 Mr Atchison did not comment in his report on the saw cuts and alleged cracks, but said that the driveway colour is charcoal, in accordance with the colour manufacturer's chart.
- 32 It is accepted that the colour specified was charcoal, but that the colour of the concrete matched the colour chart provided which was Builder's exhibit A2, and was indistinguishable from black. Were this the only matter complained of regarding the driveway no allowance would have been made.

Ponding

- 33 The Owner also complained of ponding in the driveway. On site Mr Atchison agreed approximately 3 m² of concrete to the north of the drainage pit in the driveway allows ponding and needs to be taken up and re-laid. Mr Hogben made the same admission under cross-examination. The Builder must compensate the Owner for removal and re-laying an area of approximately 3 m² and for re-coating the driveway in accordance with the revised opinion of Mr Atchison given during examination in chief with which Mr Sherrard agreed, as to method and amount. The Builder must allow the Owner \$1,749.00 for this item.

Item 8 Glazing

- 34 Mr Sherrard asserted the mirrors to bathroom and en suite have damaged edges. Mr Atchison said the silicon seal around the mirrors is untidy. Mr Atchison's opinion was confirmed at the on-site inspection, and Mr Hogben's evidence is accepted that the mirrors had been replaced after the reports were written.
- 35 The sub-items were:
- The glass splash back in the kitchen has excessive silicon: - silicon is missing on the right, and Mr Atchison agreed with Mr Sherrard;
 - Windows to the lounge east wall are scratched: - Mr Atchison said the alleged scratches could not be seen at 1.5m from the glass, and the on-site inspection confirmed Mr Atchison's opinion. At the on-site inspection the experts remarked that the lintel to the northern-most window facing east had not been painted, however it is noted that it is taken into account in item 20.
 - The study window has marks from painting. Mr Atchison's opinion that no marks could be seen from a distance of 1.5 meters is accepted, and it is accepted that, in accordance with the Building Commission *Guide to Standards and Tolerances*, if a fault in glazing is not visible from a distance of 1.5 meters, it is not an aesthetic defect. I emphasise that the *Guide* is not prescriptive. As Deputy President Aird said in *Gombac Group Pty Ltd v Vero Insurance Ltd* [2004] VCAT 2540, which was endorsed by the Supreme Court in *Gombac Group Pty Ltd v Vero Insurance Ltd* [2005] VSC 442:

Although these are clearly intended as Guidelines only, they do provide some assistance in determining the liability of the builder.

There is no allowance for these marks.

- 36 Mr Sherrard's allowance for this item is \$358.00 and the Hurtob quotation item is \$500.00. Mr Atchison recommended cleaning and resealing the mirrors and splash back at the cost of \$121.00, which is accepted. The Builder must allow the Owner \$121.00

Item 9 Timber floors

- 37 In or about April 2005 there was a flood beneath the timber floor apparently caused by failure of the Builder's plumber to properly connect the outlet to the spa bath. The first symptom of the problem was substantial cupping of the floor, followed by the buckling and breaking of some boards. The floor was replaced by the Builder at its own expense in July 2005. This work was to be undertaken in accordance with the report provided by Mr Atchison dated 31 May 2005. He recommended tests including "observe and test for moisture content of the concrete slab" and the rectification to be undertaken was:

- Remove furniture;
- Provide appropriate protection to benches, walls etc:
- Cut up the existing floor:
- Apply a waterproofing membrane to the slab once the moisture content has been reduced;
- Reapply and refinish a new floor.

- 38 Mr Sherrard has recommended removal and replacement of the new tongue and groove floor to the kitchen, lounge and living room because there is cupping, this has created a 3 mm gap under the kitchen bench, sanding and polishing imperfections are visible, the floor has "variations of approx 5mm", and the floor boards "are excessively veined and split". He estimated the cost of removal and reinstallation of the kitchen and floor plus make good at \$23,238.60.

- 39 Mr Atchison acknowledged there has been a flood which caused the floor to be re-laid, and that there is cupping and a poor finish to the new floor. Mr Atchison agreed under cross-examination that the Builder's failure to undertake a moisture test was poor building practice. Mr Atchison suggested that re-sanding and re-polishing of the floors will suffice and that veins etc. are to be found as a normal feature of the timbers used. I accept Mr Atchison's evidence that the floors are not excessively veined. I also note that the specification called for "Tas Oak polished floor boards" and the experts agree that the replacement floor was Blackbutt. Had I been convinced that the floor could remain in place, an amount might have been allowed because the Owner did not get what he bargained for, however in this instance, the only issue concerning the floor is cupping.

- 40 Mr Atchison's estimate was \$3,102.00 to repair the floor, or \$17,271.00 if it is found that the floor must be taken up again and replaced. This part of the Hurtob quotation, including removal and replacement of joinery, is \$22,725.00.

Method of rectifying the floor

- 41 It is accepted that the method of rectification of the first floor provided by Mr Atchison was not faithfully followed. It was admitted by Mr Hogben under cross-examination that there was no moisture test. I also accept that not all the battens were replaced. In particular, I note the evidence of the Owner that he visited the site during the repair works and observed that not all the battens had been taken up, and that battens he saw were water damaged.
- 42 The question is whether the new floor can be rectified or whether the Owner is entitled to the cost of having it replaced again. The floor as it is does not require urgent work. There is wide-spread cupping of approximately 2 mm high, which is not dangerous, but is clearly defective in appearance, and the Builder acknowledges that it is defective. It is accepted that the Owner is entitled to a flat floor. The Owner submitted that the work necessary to provide a flat surface ready for re-polishing is likely to cause the floor to fail or at least to substantially shorten the life of the floor if further polishing is undertaken in future. Mr Atchison said that if the 18mm floor is reduced to 16mm it is unlikely to shorten its life-expectancy, which should be in the region of 30 to 40 years.
- 43 Mr Hogben was imprecise about the work done and could not provide documentary evidence to support the contention that all the battens were replaced. He agreed with Mr Hay's opinion that approximately 230 lineal meters of battens would be required and the Builder did not provide proof that more than approximately 10.8 lineal meters of new battens were purchased when the floor was re-laid. Mr Hogben neither undertook the work nor personally supervised it, although he did visit the site while the work was underway. Mr Hogben did not say that he had seen the floor with all the battens removed. He did say that he assumed his sub-contractors would "do the right thing".
- 44 It was not submitted to me that "Cut up the existing floor" could mean remove only the floorboards and leave the battens in place and I find the plain meaning is that floorboards and battens were to be removed and replaced. Further, Mr Hogben admitted that the moisture barrier was not installed over the whole floor, but just between the battens.
- 45 Mr Valentine, who was called on behalf of the Builder, has extensive experience in carpet and floor coverings in general, but less in wooden floors. In his report of 18 May 2006 there was a statement that "new timber battens were installed" which I find is inaccurate. As found above, it is accepted that some new timber battens were installed but that the whole floor was not re-battened, therefore Mr Valentine's opinion is founded in

part on an incorrect assumption. He corrected this assumption in evidence at the hearing, but his assertion that “once the polish is off the floor the battens will dry out” seemed more hopeful than reliable.

- 46 Mr Valentine took moisture readings on 12 May 2006 which were substantially lower than those taken by Mr Hay in December 2005. There was one reading of 11% (13% when corrected for this species of timber) and the others were 10% (12% corrected). His opinion was that the Equilibrium Moisture Content (EMC) should be approximately 10% corrected. He concluded that:

It is appropriate to indicate that whilst not yet able to be described as being sufficiently dry for a successful installation of timber strip flooring to occur, the circumstance of the substantial decrease in the moisture content of the timber strip flooring indicates the source of moisture has almost dissipated.

- 47 Mr Valentine suggested that “to allow the moisture to dissipate faster” the impervious coating should be sanded off in line with the grain of the boards, the boards allowed to dry further, be tested to determine whether they have reached EMC, sanded flat diagonal to the grain, fine sanded with the grain and then re-coated. His evidence regarding the time it would take for the floorboards to dry out completely or even whether it would work at all is unconvincing.
- 48 Equally unconvincing is his unsupported assertion that as the floor dries out the height of the longitudinal edges of the boards will decrease “slightly” and that “level and fine sanding will rarely require the thickness of the boards to be reduced by more than 1 mm”. Mr Valentine gave evidence about how the impervious coating could be sanded off the boards following the cupped profile of the boards. The sanding drum he suggested could be used was brought to the hearing and the sanding belt. There was a little “give” in the two when placed together, but only very little.
- 49 The evidence of Mr Sherrard is preferred that the impervious coating could not be completely removed at this stage without sanding the floor flat or nearly flat, even if undertaken by a skilled and careful operator. It therefore follows that most of the lip on each board would be lost, and if Mr Valentine’s view regarding shrinking during further drying were accurate, the boards could then be at least slightly indented at the edges. Further, Mr Sherrard’s evidence is accepted that once deformed, the boards are unlikely to flatten of their own accord, and drying is likely to leave gaps between the boards.
- 50 Mr Sherrard’s evidence is also accepted that the thinner the tongue and groove boards are, the narrower should be the spacing of battens which support them. Were sanding to be permitted, the resulting thinner boards would then be attached to battens spaced too widely for their thickness.
- 51 Mr Gladman provided a witness statement for the Owner, and the Builder elected not to cross examine him. It therefore follows that the Builder has

admitted the accuracy of Mr Gladman's evidence, which was that in April 2006, tests of the air space above three areas of concrete were too humid, which indicated that at that date the concrete slab was still unacceptably wet. Mr Sherrard's evidence is accepted that there is no certainty as to how long it would take for both the concrete slab and the over-lying boards to dry out if left in place and the polished surface merely removed.

- 52 Mr Hay gave evidence for the Owner that if the existing floorboards are sanded flat, then fine sanded for the application of polish, having already been sanded before they were polished initially, the top sections of the grooves which are approximately 6 mm thick on a new board, could be reduced in size to "the extent splitting along the top section of the groove is highly likely". He said that particularly if a heavy item, like a refrigerator, were moved across the hypothetically repaired floor, there would be a real chance of some of the boards splitting along the groove. Mr Hay's evidence is accepted.
- 53 In accordance with the rule in *Belgrove v Eldridge* I am satisfied that there is a real risk that the floor will fail and therefore find that replacement of the floor is necessary and reasonable. The Owner is therefore entitled to receive the reasonable cost of replacing the floor, which includes removing and replacing the joinery.

Cost of replacing the floor

- 54 I accept the Hurtob quotation as reasonable for this item. The Builder must allow the Owner \$22,725.00.

Item 10 Floor and wall tiling

- 55 Mr Sherrard reported poor grouting and cleaning, and the use of tiles cut short. He recommended replacement of floor tiles "cut short" to laundry/garage and bathroom at \$440.00, in addition to Mr Atchison's recommendation for cleaning silicon below.
- 56 Mr Atchison's view was that this item called for cleaning off excessive sealant, at a cost of \$120.00, plus grinding out cracked grout, re-sealing internal corners with flexible sealant and sealing the grout line between the two flooring systems (tiles over concrete and tiles over wood) with flexible sealant. This part of the Hurtob quotation was \$1,000.00, which appears to include removal and re-seating of the spa bath. The only reference to removal and reseating the bath is found in the Hurtob quotation, and as it is not an item in the Owner's claim otherwise, it is not allowed.
- 57 At the site inspection my attention was directed to a band of small feature tiles and particularly to the way they were finished behind the bathroom door. The size of the tiles meant that they were a little short of the larger tiles below them at the architrave to the door, but I find the result was not defective. My attention was also directed to an excessively wide grout joint in the laundry, which I find is defective.

58 Mr Sherrard's evidence is accepted that it is necessary to replace floor tiles cut short in the laundry and bathroom at a cost of \$440.00 and clean excess silicone at a cost of \$120.00. The Builder must allow the Owner \$560.00 for this item.

Item 11 Down Pipes and Guttering

59 Mr Sherrard alleged the down-pipes have not been installed in accordance with the plan, with which Mr Atchison agreed, but remarked that the down-pipe called for on the drawings would be on the neighbouring property. It is noted that on the site plan, which is sheet one of four provided by Harvan Design, the down-pipe in question appears on the Owner's property, on the eastern end of the south wall to the garage.

60 Mr Hogben admitted under cross-examination that the contract drawings called for the down-pipe, but the guttering sub-contractor said that a down-pipe was not required in that position. He admitted further that the Builder was obliged to carry out the work in accordance with the contract, and he agreed that he did not obtain the consent of the Owner to omit the down-pipe.

61 In answer to my question, Mr Hogben said that the cost to install the down-pipe at the time of construction would have been approximately \$150.00 and to install it now, with the consequent need to cut and make good concrete paving, would be approximately \$500.00.

62 Mr Atchison remarked that with the guttering installed on the fascia which is directly attached to brick-work without eaves, installation of an over-flow pop is necessary to prevent flooding back into the ceiling space during intense down-pours.

63 Mr Sherrard alleged the guttering to the south east holds water. Mr Atchison recommended adjusting the guttering at the cost of \$352.00. The Hurtob quotation to adjust the spouting fall was \$450.00 however it is accepted that the fall has since been rectified. I find it is not necessary to install the down-pipe but the Owner is entitled to a credit for the amount not spent by the Builder for this item. In accordance with Mr Atchison's estimate, the Builder must allow the Owner \$352.00 for this item.

Item 12 Lattice to fence

64 Mr Sherrard asserted that the Builder was obliged to install lattice to the fence as shown on the Planning permit, and recommended a credit of \$340.00.

65 It has been found that the landscape plan was part of the contract, and that plan indicates lattice to fences. However the specification referred only to "751m HALF SHARE STD HEIGHT 1650mm" and in accordance with clause 16 of the contract, where there is an inconsistency between plans and specification, the specification takes precedence. It is accepted that the

relevant fences are at least 1650mm high and possibly 1900mm high. There is no allowance for this item.

Item 13 Shower

- 66 Mr Sherrard stated that one shower trombone has been installed with a washer and the other without, and that they should match. The Hurtob quotation is for \$700.00 which is to remove tiles behind the shower trombone, replace and refit. This work is out of all proportion to the defect complained of.
- 67 Mr Atchison recommended the shower without a washer should have it installed and estimated the cost at \$180.00, with which Mr Sherrard agreed. The Builder must allow the Owners \$180.00 for this item.

Item 14 Toilet Suites

- 68 Mr Sherrard said the toilets as installed are less expensive than those specified, and recommended a credit of \$200.00.
- 69 Mr Atchison reported the Builder's assertion that the toilets installed are more expensive than those specified. The Owner has not pressed this item and there is no allowance for it.

Item 15 Skirting, architraves and window reveals

- 70 Mr Sherrard reported various carpentry and painting defects, and recommended a credit of \$600.00.
- 71 Mr Atchison agreed that carpentry and skirting should be rectified. He estimated the cost at \$489.00. The Hurtob quotation is \$970.00. Mr Sherrard's estimate is preferred. The Builder must allow the Owners \$600.00 for this item.

Item 16 Plasterboard installation

- 72 Mr Sherrard reported some areas of plaster had not been properly finished prior to painting.
- 73 Mr Atchison agreed that two areas of plasterboard required further preparation and repainting. His estimate is \$431.00, with which Mr Sherrard agrees. The Hurtob quotation was for \$1,500.00, but given the description of the task and the lack of detail from Hurtob, there is insufficient basis for the extra sum. In particular, Mr Atchison's evidence is accepted that a good painter will match the wall and it is unnecessary to repaint more than one wall. The Builder must allow the Owner \$431.00 for this item.

Item 17 Garden and Paving

- 74 Mr Sherrard reported that render had been spilled on garden plants and paving and it and building debris had not been removed.

75 Mr Atchison agreed that clean up was required and estimated the price at \$188.00, with which Mr Sherrard agreed. The clean-up has since been undertaken by the Owner. The Builder must allow the Owner \$188.00 for this item.

Item 18 Stormwater drainage and paving

76 Mr Sherrard asserted that the paving was not sloped to enable water to drain into the pit at the rear south east and estimated cost of rectification at \$630.00. Hurtob quoted \$2,500.00.

77 Mr Atchison said that water sprayed in this area ran to the pit or to the edge of the paving, but the Owner's installation of a retaining wall makes it impossible for the water to disperse into lawn or garden. The Owner has failed to prove that this area fails to drain adequately and no amount is allowed.

Item 19 Front fence piers and letter boxes

78 Mr Sherrard said the front fence, piers and letter boxes were not installed by the Builder and that the reasonable cost to do so is \$480.00. Under cross-examination he agreed that the Owner had told him the cost of this item was \$480.00, but that if it was done for \$250.00 this is a reasonable amount.

79 Mr Atchison reported that the contract is unclear about whether the Builder was obliged to install letter boxes, but if he was, the reasonable cost is \$226.00. As found above, the Builder was obliged to provide landscaping which included letter boxes. The Owner's evidence is accepted that the letter boxes have been constructed at a cost of \$250.00. The Builder must allow the Owner \$250.00 for this item.

Item 20 Other Items

80 There was a list of other items in Mr Atchison's report for which he allowed \$731.00 and with which Mr Sherrard agreed. The Hurtob quotation for a similar but not identical list is \$3,150.00. The items allowed in accordance with Mr Atchison's list are:

- Clean up or replace kickboards
- Apply lacquer to garage sill
- Adjust sliding door to dining room
- Refit carpet to bedroom 2
- Replace cracked tile in en suite shower recess
- Adjust cistern button
- Paint lintel to window
- Adjust doors to vanities
- Clean and polish window frames.

In addition it was noted at the site inspection that there is substantial cracking to the hob supporting the shower base. Mr Sherrard's estimate to repair this item of \$130 is accepted. The Builder must allow the owner \$861.00 for this item.

Item 21 Slab moisture test

- 81 It was submitted for the Builder that if the floor were removed, one moisture test would be sufficient. Although this may be so, if the first test fails one or more subsequent tests must be undertaken. It is found reasonable to allow for two future moisture tests at a cost of \$500.00 each. The Builder must allow the Owner \$1,000.00 for this item.

Registration/Insurance

- 82 The Owner has claimed \$2,800.00 for this item in accordance with the quotation of Hurtob. It is clear that for the size of the contract the Owner must enter in order to have the repair work undertaken, both are necessary. Hurtob quotation figures have been accepted for the majority of the value allowed, it is accepted that Hurtob makes a separate allowance for this item and the amount is accepted as reasonable. The Builder must allow the Owner \$2,800.00 for this item.

ACCOMMODATION

- 83 In the summary provided by Mr Forrest for the Owner of 5 October 2006, he claims \$7,245.00 being nine weeks by seven days by \$115.00 per day for future accommodation while future repairs are undertaken. Mr Hogben admitted under cross-examination that the amount charged by Quest Apartments is \$115 per night and he was unable to give evidence of a reasonable alternative.
- 84 Mr Atchison agreed under cross-examination with Mr Hay's opinion that the floor needs to be left open to allow the slab to dry out completely for a period of eight or nine weeks.
- 85 The Owner's evidence is accepted that when he was absent from his home for the first replacement of the floor he stayed with his friend for ten weeks and paid her \$80.00 per week. He also admitted under cross-examination that the cost of living at home would be comparable. There is no allowance for this period.
- 86 It is reasonable that the Owner should have independent accommodation commensurate with his accommodation at home for nine weeks. The Builder must allow the Owner \$7,245.00 for this item.

FURNITURE REMOVAL AND STORAGE COSTS

- 87 The Owner said in his witness statement that he has incurred storage costs during the ten weeks he was absent from his property for the first floor rectification of \$560.00. The Builder must allow him this sum. He has also obtained a quotation for \$1,213.00 for packing, removal and delivery for

the next occasion on which he will be absent from his home, which is accepted as reasonable, and it is found reasonable that the Owner's possessions should be removed and stored while the Owner is absent from his home. The Builder must allow the Owner \$1,773.00 for this item.

KEYS AND GARAGE REMOTE CONTROLS

88 The Owner said in his witness statement that when his solicitors wrote to the Builder on 4 April 2005 enclosing the notice of termination, they requested the keys and garage remote controls for both units. His evidence is accepted that they were not provided by the Builder, that it was not reasonable for the Builder to refuse to provide them and that the costs incurred were \$433.25 for the locksmith and \$212.30 for the garage remote controls. The Builder must allow the Owner a total of \$645.55 for this item.

BIN

89 The Owner claimed \$30.00 as the cost of a rubbish bin used by the Builder to mix mortar. The Owner's witness statement said that the bin was removed from site, but then said in examination in chief "the bin is wrecked – I can't use it inside". It is noted that Mr Hogben admitted the bin was damaged. The Builder must allow the Owner \$20.00 for this item.

BROOM

90 The Builder conceded the cost of a broom to the Owner. The Builder must allow the Owner \$25.00 for this item.

RECTIFICATION QUOTE

91 This item appears to be an amount paid to Hurtob to obtain the rectification quote. It is in the nature of costs and is not taken into account in this decision but is reserved to be dealt with upon any application for costs.

LIQUIDATED DAMAGES

92 The Owner claimed liquidated damages at \$250.00 per week from 1 December 2004 to 4 April 2005, a period of 18 weeks, being \$4,500.00 which the Builder admitted on the second day of the hearing.

HEATING COSTS

93 The Owner claimed \$60.00 as the cost of the Builder running his central heating after the first floor was taken up. He said in evidence in chief that he visited his home one evening, found the heating running and turned it off. This appears to have been done without consultation with the Builder and is, to say the least, surprising if the Builder's aim in running the heating was to dry out the slab. The Owner provided no documentary evidence to support his claim and gave no indication of how he reached the figure. No amount is allowed.

THE RELATIONSHIP BETWEEN THE PARTIES

- 94 Evidence was given that the relationship between the Owner and Mr Hogben was acrimonious even before the floor damage became apparent. The Owner gave evidence that he was intimidated by Mr Hogben and some of his employees on an occasion when he visited the Builder's office. His evidence of believing that he heard insulting words as he left the office is accepted. His evidence that he was intimidated is not accepted, as he said in evidence in chief that after he departed the office, he returned three times to ask what had been said. Mr Hogben said under cross-examination that the Owner ripped off his own shirt and invited Mr Hogben to step outside. Mr Hogben's evidence is accepted.
- 95 This evidence is mentioned because it emphasises how unfortunate it is if antipathy between the parties causes or exacerbates a dispute or stands in the way of a sensible, commercial settlement.

SUMMARY OF ENTITLEMENTS

- 96 Amounts due to the Owner:

Defects:

Item 2 – Masonry 1	\$500.00
Item 3 – Masonry 2	\$3844.50
Item 4 – weephole near front door	\$175.00
Item 5 – Paving/weepholes	\$1,007.00
Item 6 – Eave lining	\$763.00
Item 7 – Driveway	\$1,749.00
Item 8 – Glazing	\$121.00
Item 9 – Timber floors	\$22,725.00
Item 10 – Tiling	\$560.00
Item 11 – Downpipe credit	\$352.00
Item 13 – Shower washer	\$180.00
Item 15 – Skirtings etc	\$600.00
Item 16 – Plasterboard	\$431.00
Item 17 – Garden and paving	\$188.00
Item 19 – Letter boxes	\$250.00
Item 20 – Other items	\$861.00
Item 21 – Moisture tests	\$1,000.00
Registration and insurance	\$2,800.00
Accommodation	\$7,245.00

Furniture removal and storage	\$1,773.00
Keys and garage remote controls	\$645.55
Bin	\$20.00
Broom	\$25.00
Liquidated damages	<u>\$4,500.00</u>
Total	\$52,315.05
Less amount due to the Builder under the contract	<u>\$27,548.55</u>
Nett amount due to Owner	<u>\$24,766.50</u>

INTEREST

97 As the nett sum in this proceeding is payable to the Owner and the contract was properly terminated, the Builder is not entitled to interest under the contract. The question of interest is otherwise reserved and there is leave to apply.

COSTS

98 The question of costs is reserved and there is leave to apply.

SENIOR MEMBER M. LOTHIAN